

WASHINGTON STATE BarNews

THE OFFICIAL PUBLICATION OF THE WASHINGTON STATE BAR ASSOCIATION

Mentor, Educator, Trailblazer

An interview with Washington
Supreme Court Justice
G. Helen Whitener / **p. 34**

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Loren Miller Bar Association

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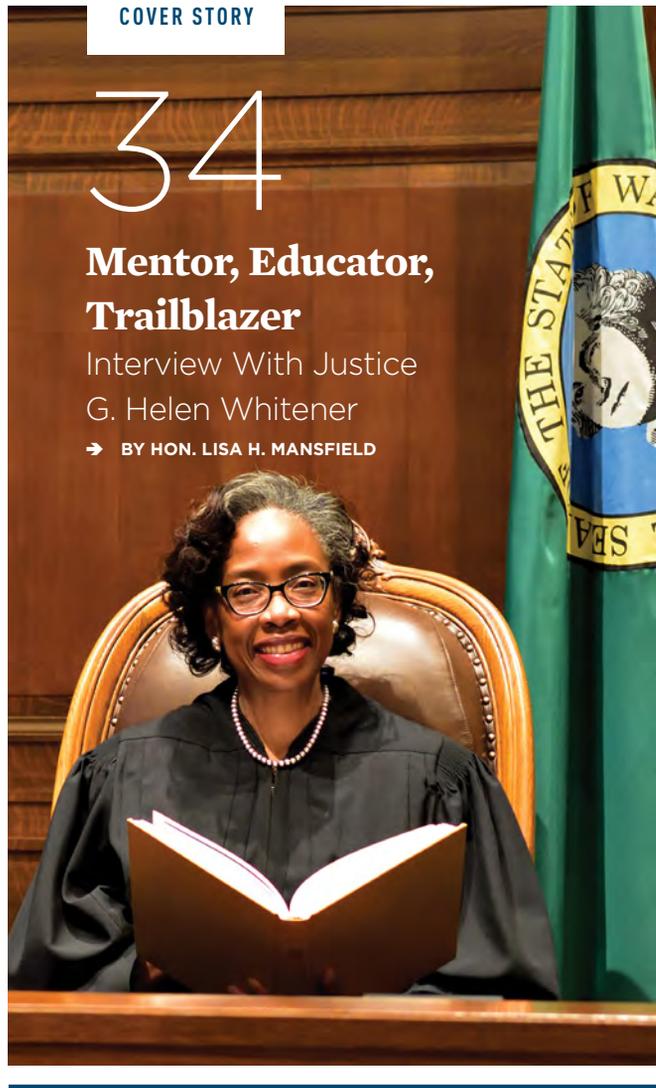


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Blazing a Path

Kirsten Abel is the editor of *Washington State Bar News* and can be reached at kirstena@wsba.org.



ON THE COVER
Photo courtesy of Washington State Supreme Court

In honor of Black History Month, the cover of the February issue of *Bar News* features someone who has made fairly recent history in Washington state. Justice G. Helen Whitener is the first Black woman to serve on the Washington Supreme Court and the first Black LGBT judge in the state.

In an interview with Judge Lisa H. Mansfield, Justice Whitener shared her perspective on her history-making career and her role as a trailblazer in the legal profession. “It’s a lonely place to achieve success if you have done it only for yourself. Support comes from creating that village of mentees and seeing it become a movement founded on the fundamentals of giving back,” Justice Whitener told Judge Mansfield. “... We still have a long way to go. I am humbled and grateful for this opportunity to be on a team blazing a path for the next generation.” Read the full interview on page 34.

Also in this issue: an interview with Justice Sheryl Gordon McCloud, co-chair of the Washington Supreme Court’s Gender and Justice Commission, about the commission’s recently published study entitled “2021: How Gender and Race Affect Justice Now” (page 28); a Q&A with Loren Miller Bar Association President Lionel Greaves IV (page 26); a look at the new Washington Nonprofit Corporation Act (page 42); an ethics column on problems that can arise with common or joint representation (page 20); and more. [BN](#)

In an interview with Judge Lisa H. Mansfield, Justice Whitener shared her perspective on her history-making career and her role as a trailblazer in the legal profession.

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

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Inbox



Pasco and the Rest of Us Are Better Today

I found George Critchlow's story of racism in Pasco in a 1976 jury verdict finding his clients to have been discriminated against but awarding no damages ["The Case That Stuck With Me," November 2021 *Bar News*] to be another white apologist's patronizing mea culpa at the altar of racial equality in its attempt to justify critical race theory as it asserts that vestiges of white supremacy, racism, racial discrimination, and injustice not only remain firmly rooted in our society but "may, in fact, be ascendant." His version of history leaves out much of the story and disserves the young lawyers he says he wants to motivate at the same time it denigrates Pasco's past and the progress it, its sister cities, and our society have made.

After arriving in Pasco in 1978 to be its city attorney, I met Ed and George Critchlow and I admired and liked them both for their legal acumen and their personal affability.

LET US HEAR FROM YOU!

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.

*GR 12.2(c) states that the WSBA is not authorized to "(1) Take positions on issues concerning the politics or social positions of foreign nations; (2) Take positions on political or social issues which do not relate to or affect the practice of law or the administration of justice; or (3) Support or oppose, in an election, candidates for public office." In *Keller v. State Bar of California*, the Court ruled that a bar association may not use mandatory member fees to support political or ideological activities that are not reasonably related to the regulation of the legal profession or improving the quality of legal services.

Some attorneys in the Tri-Cities of Pasco, Richland, and Kennewick asked me why I came to Pasco given its record of discrimination and being the poorest of the three cities. I found these inquiries bemusing and the product of a certain hubris that is reflected in Critchlow's piece as well.

I had grown up in Spokane, and I recalled the all-white Richland and Kennewick basketball teams that came to play against teams in my town as well as the Pasco team that always had more than one Black player, so it had not occurred to me that Pasco would be the candidate for the leader of discrimination in the Tri-Cities. I had grown up in East Spokane where most of its Black community

resided alongside its Japanese Americans, my Italian American brethren, and a generally lower-income mix of various Caucasian ethnicities whose specific identities never occurred to us as we played and scuffled together. Racial discrimination was not unknown to us, but we also knew it to be much more pronounced in the Tri-Cities.

The reasons for this difference could be attributed to any number of things, but one likely reason was not apparent in the history recounted in Critchlow's article. Although racial issues surely existed previously, they became more pronounced when the U.S. government under the Roosevelt and Truman administrations began

the Hanford project that built the plutonium reactors along the Columbia River. The construction and continued operation of these reactors brought a large influx of people to the entire area, including Black people, from many parts of the U.S. The project was located several miles north of Kennewick and adjacent to a small town, Richland, that became a government town. The government did not allow Black people to live in Richland for many years. And, as Critchlow so aptly pointed out, Kennewick's unwritten "Sundown Law" kept Black people from living there.

The trial [Critchlow] described in the article was over before I arrived. The irony is that a lawyer who [I believed to be] a staunch supporter of the two administrations that de jure forbade Black people from living in the government town their administrations owned, Richland, and his lawyer son, both of whom lived and practiced law in Kennewick, a city that de facto forbade Black people to stay in that city after dark, prevailed in a discrimination lawsuit in Pasco, a city across the Columbia River—a lawsuit that could not have been brought in Richland or Kennewick because neither city had the requisite Black plaintiff living in it. At least there was a semblance of justice in Pasco, when there could be none in Kennewick or Richland.

All these cities and all our society have changed and

grown incredibly more tolerant in the intervening years despite Critchlow's attempt to paint a bleak picture of us all. Pasco was the best of the three at the time, and it grew to be the most tolerant the fastest despite the disappointing verdict that could only be had there due to it being better than its sister cities.

Dennis DeFelice
Sacramento, CA

Letters Policy Too Restrictive

If Nancy Whitten was disappointed to find no letters to the editor in the October 2021 issue of *Bar News* ["Inbox," *Bar News*, December/January 2022], we have only to review the *Bar News* letters policy to find out why. This policy states that letters to *Bar News* "must respond to content presented in the magazine."

But what about letters that do not respond to content presented in the magazine? For example, if the state Legislature passes a bill which is not addressed in *Bar News*, the WSBA could refuse to print a letter about the bill, or if the state Supreme Court issues an opinion which is not addressed in *Bar News*, the WSBA could refuse to print a letter about the opinion.

This restrictive clamp-down policy may explain why there are often so few letters appearing in *Bar News*. Letters of great pith and moment can

be denied publication if they do not relate to content already appearing in the magazine.

Although General Rule 12.2 and *Keller v. State Bar of California*, 496 U.S. 1 (1990), may restrict the WSBA as an organization from taking certain political stands, the individual lawyer, representing himself or herself, is still free to write a letter on any political or legal topic.

And who owns *Bar News* anyway? It is owned by the member lawyers of the WSBA. They should be able to submit and have printed a letter on any legal topic that they wish to discuss. Censorship can appear in many forms, in this case, under the guise of a restrictive letters policy.

Patricia M. Michl
Ellensburg

From the Bench, Zoom Hearings Look Good

Zoom and telephone hearings will never adequately replace all types of in-person court hearings, but Chris Van Vechten's criticism of virtual hearings is overly broad [Inbox, "Just Phoning It In," November 2021 *Bar News*]. From my view on the bankruptcy bench, the use of Zoom and telephone hearings can promote access to justice. Physical presence

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Washington State Bar News relies on submissions from WSBA members and members of the public that are of interest to readers. Articles should not have been submitted to any other publications and become the property of the WSBA. Articles typically run 1,000-2,500 words. Citations should be incorporated into the body of the article and be minimal. Please include a brief author's biography, with contact info, at the end of the article. High-resolution graphics and photographs (preferably 1 MB in size) are requested. Authors should provide a high-resolution digital photo of themselves with their submission. Send articles to wabarnews@wsba.org. The editor reserves the right to edit articles as deemed appropriate. The editorial team may work with the writer, and the editor may provide additional proofs to the author for review.

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Inbox

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in a courtroom may be beneficial for certain criminal cases, proceedings involving significant personal injuries, and cases that rest solely on witness credibility, but for many other matters, the remote processes we learned to use during the pandemic improve the justice system.

In my bankruptcy court, where many debtors live over 100 miles from the courthouse and cannot skip a day of work, Zoom or telephone hearings provide people with the opportunity to have their day in court. For example, if a debtor cannot travel to court to dispute a creditor's \$2,000 claim—an amount that may seem insignificant to many Washingtonians—that claim can result in the garnishment of a bread-winner's wages and prevent her from paying rent.

Also, Zoom has been a useful tool in complex commercial cases brought before me where the attorneys and parties are from all over the world. In these cases, where disputes can be resolved as a matter of law, it does not make sense for the attorneys and their clients to pay thousands of dollars for a trip to Spokane for oral arguments that may last only a few hours. By efficiently conducting hearings via Zoom, where appropriate, all parties save money, and we increase the amount of funds available for legitimate claims.

In short, remote hearings can be helpful, efficient, and increase many individuals' access to justice. Let's learn from our pandemic experiences and use Zoom and telephone hearings where appropriate.

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8 Supreme Court Cases to Watch in the 2021-2022 Term

The U.S. Supreme Court's 2021-2022 term is in session and, as usual, there will be some closely watched cases. The Court now sits at a 6-3 conservative supermajority after the confirmation of Justice Amy Coney Barrett in October 2020. The justices will hear a number of notable cases this term, including ones that could have significant outcomes for abortion access and gun rights. Here are eight of the most noteworthy cases the Court [...]

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WA Supreme Court Outlines Contours of Confidentiality Rule

The Washington Supreme Court recently addressed the scope of the confidentiality rule (RPC 1.6) in *In re Cross*. Cross had represented a client in a criminal case arising out of an accident involving an all-terrain vehicle the client was driving. When the criminal case resolved, Cross and the client held a confidential discussion about the possibility of [...]

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NWSidebar's Top 10 Most-Read Blog Posts in 2021

It's hard to believe that 2021 is already over. After a painfully slow 2020 during which the entire world was coming to grips with a (hopefully) once-in-a-lifetime pandemic, things almost began to feel normal this past year, and the weeks and months seemed to fly by. We started going out. We dared to think about things other than the virus. We [...]

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WASHINGTON STATE
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A NOTE FROM THE WSBA EXECUTIVE DIRECTOR

Black History Month: What is Our Pathway Forward?

We all own the work of dismantling systemic racism

Another year begins deeply impacted by COVID-19. This month, as we honor the achievements and contributions of Black Americans, this junction between the pandemic and Black History Month feels particularly important. COVID-19 has harmed Black Americans more than any other group.¹ It has exacerbated and exposed the systemic inequities and injustices that our institutions are built upon. It has proved how too often our institutions are resistant to Black voices and experiences. It has emphasized that unfortunately, there is nothing “historic” about Black racism and it has helped many of us to acknowledge that the “normal” we are waiting to return to has, in many respects, not served Black people well.

So what is our pathway forward? Can we find a “new normal” that better speaks to our values of equity and justice? As we consider this question at the Washington State Bar Association, with a unique focus on the administration of law and integrity of the legal profession, I want to flag several efforts that all of us in the legal profession can support and engage with.

WSBA Demographic Study

The WSBA is kicking off a comprehensive demographic study of the legal profession, following up on a similar study conducted almost a decade ago² that was the basis for the WSBA’s inaugural Diversity Plan. We will be working with an expert consultant to collect and analyze data about our members so we can better promote diversity and equality in the legal profession. Our focus is on understanding how members’ multiple identities may impact their experience in the profession and their legal career. Among other things, we will use the results of the study to inform how the WSBA can better support underrepresented and historically marginalized legal professionals and promote diversity, equity, and inclusion. The results will be available to all members and others in the legal community, including sections, minority bar associations, law schools, and the judiciary. You can expect to receive an invitation to take part in the demographic study before this fall. Please respond. Your participation makes a difference.



Terra Nevitt
WSBA Executive Director

Nevitt can be reached at terran@wsba.org or 206-727-8282.

WSBA Equity and Disparity Work Group

In June 2020, responding to the murders of George Floyd, Breonna Taylor, Tony McDade, Charleena Lyles, Manuel Ellis, and countless others by police officers, the nationwide uprisings addressing virulent racism in the United States, as well as the COVID-19 pandemic and resulting economic devastation, the Board of Governors created an Equity and Disparity Work Group. Its purpose is to propose to the Board of Governors solutions to address the laws, policies, and procedures in place in the legal system that have historically led to disparate and inequitable results that disproportionately harm Black, Indigenous, and people of color. The work group, chaired by Gov. Alec Stephens, has focused its initial efforts on (1) critically examining the language and interpretation of General Rule 12.2, which prohibits the WSBA and its entities from taking positions on political or social issues which do not relate to or affect the practice of law or the administration of justice; and (2) promoting expanded access to courts through the continuation of a hybrid in-person/virtual court system post-pandemic. The work group hopes to bring proposals to the Board of Governors later this year.

Task Force 2.0: Race and Washington’s Criminal Justice System

Expanding our view beyond the WSBA, in 2020, the deans of Washington’s three law schools at the time—Mario L. Barnes (University of Washington), Annette E. Clark (Seattle University), and Jacob H. Rooksby (Gonzaga University)—convened this task force to pick up where a similar task force left off in 2010 and revisit where things stand regarding racial disproportionality in our state’s criminal justice system. Thus far, the task force has issued two reports. The first report—the work of the task force’s Research Working Group—provides an updated and more complete picture of racial disproportionality in Washington’s criminal justice system, including disproportionalities experienced by Indigenous people, which were not examined in the 2011 report. While the data shows some improvement, the persistence and significance of disproportionality is a sobering call to action. “[R]ace and racial bias continue to matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce

disparities in the criminal justice system, and that undermine public confidence in our legal system.”³ The second report, published by the Juvenile Justice Subcommittee, finds that 10 years since the task force first looked at the overrepresentation of youth of color at every stage of the juvenile justice process, little has changed and in some cases, racial disproportionality has worsened. The subcommittee sets forth recommendations “to fundamentally change how systems respond to the needs of young people.”⁴

You can learn more about the task force and follow along with its work at the website of the Seattle University School of Law Korematsu Center.⁵

Washington Supreme Court Symposium

In June 2021, the Supreme Court’s Minority and Justice Commission and its Gender and Justice Commission⁶ joined together to share information about the significant overrepresentation of Black and Indigenous women in the conviction and sentencing of women and girls in Washington state. In a half-day symposium, the distinguished panelists addressed the systems that contribute to racial disproportionality and the collateral consequences of incarceration. In addition, the presenters highlighted the experiences of LGBTQ+ persons in our state’s incarceration facilities. The powerful symposium is available to view on TVW⁷ and the materials are available on the website for the Minority and Justice Commission.⁸

This weekend, I listened to a podcast episode of *Code Switch* on NPR, “They came, they saw, they reckoned?” In a conversation with political scientists Jennifer Chudy and Hakeem Jefferson, the episode explores the impact of the “racial reckoning” that occurred during the summer of 2020, following the murder of George Floyd. The upshot wasn’t encouraging. This has been an incredibly difficult period for all of us. We are isolated and divided, we are worried about our health, we’ve lost loved ones, and our work and school norms have been turned on their head. It seems natural and human, under these conditions, to narrow our focus on the things we can control and the things that impact us daily.

I had this in mind when Denise Diskin and Dana Savage presented a CLE to the Board of Governors at its January meeting, “LGBTQ+ Experiences in the Legal System:

A View from Practitioners and Communities.” In explaining why she wasn’t presenting on terminology, Diskin noted the ever-changing evolution of how communities see and identify themselves and noted (I’m paraphrasing here) that having the specific terminology right is not as important as listening thoughtfully and having empathy. Her statement was simple but powerful and it reminded me of our Washington Supreme Court’s 2020 call to action:

“As we lean in to do this hard and necessary work, may we also remember to support our [B]lack colleagues by lifting their voices. Listening to and acknowledging their experiences will enrich and inform our shared cause of dismantling systemic racism.”⁹

We *all* own the work of dismantling systemic racism. Part of that begins with supporting and amplifying experiences that are not just our own. There is some good work being done in our state, I hope you can find an opportunity to engage with it with thoughtfulness and empathy. Black History Month is a reminder that we have work to do—*every* month, *every* day—because there is nothing historic about Black racism, and we in the legal system have unique skills and access to address systemic injustice. Please take care of yourselves and our broader communities, and let’s work together toward a new, better “normal.” [BN](#)

NOTES

1. www.ncbi.nlm.nih.gov/pmc/articles/PMC7762908/.
2. www.wsba.org/about-wsba/equity-and-inclusion/achieving-inclusion.
3. <https://law.seattleu.edu/centers-and-institutes/korematsu-center/initiatives/task-force-20-x24772>.
4. https://digitalcommons.law.seattleu.edu/korematsu_center/118/.
5. <https://law.seattleu.edu/centers-and-institutes/korematsu-center/initiatives/task-force-20-x24772>.
6. For more on the Gender and Justice Commission, see page 28.
7. <https://tvw.org/video/2021-state-supreme-court-symposium-2021061001/?eventID=2021061001>.
8. www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2.
9. www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.



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Déjà vu All Over Again?* Looking at Your Bar's Structure

As you might know, your Bar Association has several very distinct functions.¹ Some functions are categorized as “regulatory/mandatory” and deal with bar activities such as bar licensure, admissions, trust account and MCLE compliance, ethics violations, and discipline. Other activities of your Bar Association are categorized as “permissive/voluntary,” such as member benefit programs, legislative activity, Bar sections, *Bar News* and other communications activities, and certain Bar committees, work groups, and task forces. Your Bar Association is also responsible for administering and funding certain boards that were created by and answer directly to the Supreme Court.²

These two categories of activities (mandatory and voluntary) plus the administration of the Supreme Court boards are combined under one “unified” (aka “integrated”) entity, namely the Washington State Bar Association,³ and funded chiefly by member license fees.⁴ Mandatory/unified bar associations that lawyers must belong to in order to practice law in a particular state, and similar to the WSBA, exist in approximately 31 states and the District of Columbia.⁵

For many years, lawyers have debated whether they should be compelled to join unified state bars and, for the most part, legal challenges to the unified bar structure have been rebuffed.⁶ Recently, however, a new series of cases in federal courts has called into question whether certain activities of unified bar associations that have both mandatory and voluntary functions violate lawyers' First Amendment rights. In my opinion, the most closely watched of these recent litigation challenges are two cases that arise out of federal courts in Texas and Oklahoma.⁷ As of mid-January, when I penned this column, both of those cases (and, possibly, a third case) have petitions for writs of certiorari pending before the U.S. Supreme Court.⁸ I will not attempt to summarize here the specifics of those cases because a quick internet search by a reader can provide other websites with a fuller description.

As a result of these new cases, back in December 2021 our Washington Supreme Court directed the WSBA Board of Governors to study and make recommendations about the structure of the WSBA by answering three questions:⁹

First, are there changes in the law that require changes to the WSBA?

Second, even if changes are not required, if there was a change, what would the new structure look like?

Third, regardless of any of the answers to the first two questions, are there suggested changes as improvements?



Judge Brian Tollefson (Ret.)

WSBA President

Tollefson is a principal at Black Robe Dispute Resolution Services, PLLC. He can be reached at TollefsonBOG@outlook.com.

*** NOTE**

Thank you, Yogi Berra, for this timeless phrase. See https://en.wikipedia.org/wiki/Yogi_Berra#%22Yogi-isms%22 and https://en.wikipedia.org/wiki/Déjà_Vu_All_Over_Again.

In order to answer these questions, the Supreme Court wants the WSBA to seek “broad input.” While these questions are easy to ask, they are not so easy to answer, especially given the request to seek “broad input.” It is also important to point out that this endeavor asked of your Bar Association is not the first. These or similar questions have been investigated and reported on before, as summarized below.

Bar Structure Studies of 2012-15 and 2018-19

Most recently, in November 2018, the late former Chief Justice Mary Fairhurst of the Washington Supreme Court created a 10-member “Bar Structure Work Group” composed of a variety of stakeholders, including three members of the current WSBA Board of Governors. That work group was created “to review and assess the WSBA’s structure in light of (1) recent case law with First Amendment and antitrust implications; (2) recent reorganizations by other state bar associations and/or groups and their reasoning; and (3) the additional responsibilities of the WSBA due to its administration of Supreme Court appointed boards.” The data assembled and reports that were generated from that effort, which lasted nearly a year, are available on the WSBA website.¹⁰ The whole endeavor took hundreds of hours by this group of volunteers. I am grateful to them for their dedication and perseverance.

Years earlier, in September 2012, another “Governance Task Force” was created and it was directed to “undertake an in-depth review of the governance of the WSBA, including but not limited to the following aspects of WSBA governance: WSBA overall governance, including but not limited to structure of representation; boards and committees, staff, and financial matters; continuity of operations from year to year; interrelationship between staff and governing body; and effective means of reviewing programs and goals.” Its reports, both interim and final, are available on the WSBA website as well.¹¹ While the 2012-15 task force may not have been particularly focused on the constitutional issues related to bar structure, its final reports may have information relevant to the third question the Supreme Court asked the WSBA Board of Governors to answer this year.

MORE ONLINE

Stay updated about the Board's process to evaluate the WSBA's structure—including feedback opportunities and meeting dates—at www.wsba.org.

How Much Time and Money Will All This Cost Our Members?

The forgoing discussion brings me to a corollary topic: How much will this current directive from the Supreme Court cost our members? More accurately stated, how much time, money, and work by the WSBA staff and the Board of Governors will this process entail? The Board of Governors has as one of its most important responsibilities each year the approval of the Bar Association budget of approximately \$21 million. The budget for this fiscal year (October 2021 – September 2022) was already approved back in September 2021, and to my knowledge no money was budgeted for the Dec. 15, 2021, decision by the Board about the manner in which to undertake this possibly costly task. At the January Board of Governors meeting, the Board voted to move ahead with adding eight additional meetings to discuss the Bar's structure. The estimated cost of these additional meetings will vary depending on the ultimate configuration for each meeting.¹²

Questions When Looking at Structure

Since your Bar Association has been asked to undertake a thorough structural review, then it should examine the expenditures of the many boards, committees, councils, task forces, etc. The Board should be looking at every program or requirement now in existence and those that might be proposed in the future following any structural changes and ponder a few simple questions.

A good starting place to examine the WSBA structure is to remember that our Bar Association's mission statement is “to

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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 at www.wsba.org/elections

KEY DATES

Application Submission Deadline		
District Governor	February 15	
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Voting		
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District Governor	March 15	April 1
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For more information, contact Paris Eriksen at parise@wsba.org

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President's Corner

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serve the public and the members of the Bar, to ensure the integrity of the legal profession, and to champion justice." In light of that mission statement, here are a few questions that come to mind:

First, does the current Bar structure with its current programs or requirements serve both the public *and* the members of the Bar? In short, does the Bar Association's existing structure fulfill an essential need of the members and the public? Here are some sub-questions: Are the Bar's current programs and requirements working for the benefit of all WSBA members and all members of the public? Are there programs or requirements that serve only a few Bar members and not much of the public?

Second, how does any program or requirement help our members be better legal professionals, which in turn benefits the public? Several sub-questions here include: Are there programs or requirements that have lost their benefit to the members and the public, and should be eliminated or reduced? Is the program or requirement the best use of the members' license fees? Has there been a cost-benefit analysis of the program or requirement? Is there a more cost-effective method of implementation? Are there programs or requirements that are duplicative of what other public institutions are doing?

Answering the Questions

My four-plus years on the Board of Governors (three as District 6 Governor, one as president-elect, and now as your president) have given me much knowledge and familiarity with how the WSBA is organized and operates. I hope to have the Board answer some or all of these questions during this new structure study because so much of what the WSBA does is dependent on our members' license fees. Accordingly, the Board needs to be deliberate and ensure broad input from the membership as it moves forward while answering the latest "structures" questions from the Supreme Court. [BN](#)

NOTES

1. The full spectrum of WSBA programs and activities, as of 2018, is detailed in a chart found here: www.wsba.org/docs/default-source/legal-community/committees/bar-structure-work-group/spectrum-of-wsba-programs.pdf?sfvrsn=576503f1_3.

2. *E.g.*, the Access to Justice Board and the Practice of Law Board.
3. See the WSBA structure spectrum chart in note 1.
4. The total annual budget for the WSBA is approximately \$21 million and mandatory member license fees are about \$15 million of that total budget amount.
5. Levin, L., "The End of Mandatory State Bars?" 109 *The Georgetown Law Journal Online*, pp 1-20 (2020), *available at* www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/04/Levin_The-End-of-Mandatory-State-Bars.pdf.
6. *Id.* See the discussion on pages 2 & 11-15. Also, Professor Levin's nomenclature regarding bar association classification is slightly different than that used in the chart in note 1.
7. There is a case involving the Oregon State Bar Association too. See *Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021)
8. In *Schell v. Chief Justice and Justices of Oklahoma Supreme Court*, 11 F.4th 1178 (10th Cir.), *petition for cert. docketed* (Nov. 24, 2021), the question presented is: "Are mandatory bar dues that subsidize the political and ideological speech of bar associations subject to 'the same constitutional rule' of exacting First Amendment scrutiny that applies to compulsory union fees under *Janus*?" In *McDonald v. Firth*, 4 F.4th 229 (5th Cir. 2021), *petition for cert. docketed* (Jan. 6, 2022), the question presented is, "Does the First Amendment prohibit a state from compelling attorneys to join and fund a state bar association that engages in extensive political and ideological activities?"
9. The WSBA minutes of the Dec. 14, 2021, meeting state the questions in this manner. However, I carefully listened to the remarks of Chief Justice Steven González at that meeting and he stated the questions this way: First, have any of the "changes in the law" "dictated" a change to the structure of the WSBA? Second, even if there are not any changes that need to be made, if relief were granted in the pending cases referred to above, what would the new structure look like? Third, regardless, are there any changes that the WSBA thinks should be made for the betterment of the Bar in the interests of justice? The remarks made by Chief Justice González can be viewed at: https://m.youtube.com/watch?v=Arb34v8_khA&list=PLh1IoFW23b5hQfFQ-99jU1kEZfH8Kq-34&index=1.
10. See: www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/bar-structure-work-group.
11. See: www.wsba.org/connect-serve/committees-boards-other-groups/governance-TF.
12. The estimated meeting cost-scenarios presented to the Board can be reviewed here: www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-materials-2021---2022/jan-2022/board-of-governors-meeting-late-late-materials-january-13-14-2022.pdf?sfvrsn=330a16f1_4.

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Fiscal Year 2022: New Challenges and Continued Focus

Happy 2022—a new year with fresh possibilities. Personally, I hope that COVID-19 goes from being a pandemic to an endemic in 2022. The last two years have been challenging for all of us and some good news regarding COVID-19 would be a very welcome turn of events. While 2021 had its ups and downs, I am happy that 2021 is in the rearview mirror.

On a personal note, this past holiday season reminded me once again of the importance of health, family, and community—in particular, living each day with gratitude and not taking life for granted. I was able to take about a week off for Christmas, and it highlighted how taking time off once in a while can help to keep priorities straight—and to see what priorities might need to be adjusted. My wish for you is a happy and healthy 2022!

As for the Washington State Bar Association, we are planning for a financially sound year for FY 2022 (the fiscal year runs from October through September). The ongoing intent for this column is to provide maximum transparency and communication about the financial matters of the WSBA, and to that end I would like to provide information regarding our first Budget and Audit Committee retreat and the midyear budget reforecast.

Before diving into these exciting topics, some good news: The certified public accounting firm Clark Number has issued an unmodified “clean” audit opinion for the WSBA’s 2021 fiscal year. This marks multiple consecutive years of unqualified reports, which should give members a high degree of confidence in the Bar’s financial integrity. An unmodified/unqualified opinion means there were no adjustments made, no material weaknesses found, and no management letter issued. The data the WSBA reports on its financial statements is true and accurate. Congratulations to the Bar’s financial team and to the Budget and Audit Committee for their diligence and professionalism!

Budget and Audit Committee Retreat

I would like to thank the WSBA finance team for all of their hard work to put this retreat together and to ensure that it was a wonderful event and a great learning experience for the Budget and Audit Committee members. Here are some of the highlights from FY 21:

- 74 percent of WSBA revenue stems from license fees and related revenue.
- Total revenue is approximately \$24.9 million.

- Salaries and benefits are the largest indirect expense at approximately \$16.3 million.
- Our current office lease expires on Dec. 31, 2026, and the annual rent is \$2.1 million.

One of the most helpful parts of our retreat was to learn to better understand the WSBA monthly financial reports and also learn the nuances between the direct and indirect WSBA expenses. The Budget and Audit Committee was almost unable to contain their excitement given all of the topics and information revealed at our retreat!

Reforecast

We have begun our budget reforecast, which is the process of comparing, midway through the fiscal year, actual revenues and expenses against our initial budget assumptions. This budget reforecast not only helps us to determine how far off we are to our initial budget assumptions, but also allows us to incorporate new and unforeseen expenses. This budget reforecast process assists us to ensure that we course correct as necessary through the fiscal year to come out in the end with right-sized balances and reserves. The reforecast process is designed to maximize efficiencies and to ensure that we are providing the Board of Governors, staff, and the membership with the most accurate, up-to-date financial information.

COVID-19 continues to cause many economic unknowns for the WSBA. Anticipating this uncertainty, we developed the FY 22 budget with some leeway and safeguards. For the FY 22 budget, one of our main assumptions is that 2022 will be more like 2019 than 2021. With the omicron variant, this assumption may prove to be incorrect, but we will have to see how this year plays out.

For the first quarter of FY 22, our actual revenues and expenditures have been fairly close to our assumptions. However, licensing season is the most critical component of our overall forecast, and we will have those actual revenue numbers after the Feb. 1 licensing deadline. Our goal for the reforecast is to present the adjusted midyear budget to the entire Board of Governors at the March meeting. [BN](#)



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.

Have Questions? Please Reach Out

As always, it is an honor to serve as your WSBA treasurer. I take my responsibility to serve our organization and to keep you informed seriously. I encourage you to contact me at any time as to any questions and/or feedback you may have for me for the continued improvement of the WSBA.

Common Problems with Common Representation

Examining conflicts that can arise when representing clients whose interests may not remain aligned

BY MARK J. FUCILE

Common or “joint” representation is a frequent fact of life for many lawyers in a wide variety of areas in civil practice.¹ In the litigation context, for example, a lawyer may take on two defendants in the same case. In business settings, a lawyer may be advising multiple family members. Common representation is generally permitted as long as the respective positions of the jointly represented clients are—and remain—aligned. Even permitted common representations, however, can raise nuanced confidentiality issues. In this column, we’ll look at both conflicts and confidentiality in the common representation context. We’ll then close by surveying the potential consequences to lawyers who don’t carefully structure common representations at the outset and monitor them along the way.



CONFLICTS

Comments 29 through 33 to RPC 1.7, which addresses conflicts among current clients, warrant close review by lawyers contemplating a common representation.² Comment 29 summarizes both the predicate need for the common clients to be aligned and the result if adversity develops among them:

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.³

It is important to stress that “adversity” for conflict purposes means more than simply asserting a claim against another client. Comments 6 and 7 to RPC 1.7 discuss the phrase “directly adverse” and underscore that taking opposing legal positions also meets that definition in both litigation and transactional settings. In *In re Carpenter*,

160 Wn.2d 16, 155 P.3d 937 (2007), for example, a lawyer was disciplined for taking conflicting legal positions for commonly represented defendants in commercial litigation. Similarly, in *In re Botimer*, 166 Wn.2d 759, 214 P.3d 133 (2009), a lawyer was disciplined for taking conflicting legal positions for commonly represented clients in a business advisory context.

As Comment 29 notes, if it is apparent that conflicts exist at the outset of a matter, the lawyer should not take on the common representation.⁴ *Gustafson v. City of Seattle*, 87 Wn. App. 298, 941 P.2d 701 (1997), for example, revolved around the contention that a conflict between a driver and a passenger in an automobile accident case was so apparent from the beginning that the lawyer should not have taken on their common

Under the colorfully named ‘hot potato’ rule, a lawyer cannot ‘fire’ a current client to ‘cure’ a conflict or, in the vernacular of this judicially created rule, drop a client like a ‘hot potato.’

representation.⁵ More often, however, the clients' disparate interests only develop mid-matter. In *Carpenter*, for example, an indemnity agreement that appeared to align two defendants at the outset later came into dispute between them when the indemnitor did not have the financial resources to perform.⁶ In still other instances, the conflict may arise near the end of a case during settlement. *Matter of Lauderdale's Guardianship*, 15 Wn. App. 321, 549 P.2d 42 (1976), for example, involved a conflict that surfaced in attempting to allocate settlement proceeds among jointly represented claimants in a wrongful death case.⁷

Comment 29 to RPC 1.7 notes the difficult result if a conflict develops among the clients in a common representation: “Ordinarily, the lawyer will be forced to withdraw from representing all of the clients[.]” The reason is simple. Conflicts that arise in the same matter are non-waivable under RPC 1.7(b).⁸ Moreover, under the colorfully named “hot potato” rule, a lawyer cannot “fire” a current client to “cure” a conflict or, in the vernacular of this judicially created rule, drop a client like a “hot potato.”⁹

Reflecting these constraints, law firms sometimes structure common representations from the outset so that one (or more) of the commonly represented clients agrees that in the event of a conflict, the client involved will voluntarily become a former client and prospectively waives the resulting former-client conflict. In theory, all former-client conflicts are waivable under RPC 1.9, and Comment 22 to RPC 1.7 permits advance waivers of future conflicts.¹⁰ In practice, however, “outplaced” clients may contend later that they did not understand what they were agreeing to and object to the law firm remaining in the case. In *R.O. by and through S.H. v. Medalist Holdings, Inc.*, 2021 WL 672069 (Wn. App. Feb. 22, 2021) (unpublished), for example, a law firm using this construct was disqualified when a conflict arose and the outplaced client revoked his earlier consent.¹¹ In short, the inherent complexity of this theoretical construct leaves it vulnerable precisely when a law firm tries to rely on it.

In other instances, law firms can avoid conflicts by limiting the scope of the representation under RPC 1.2(c)—which permits limitations as long as they are reasonable under the circumstances and the clients consent. For example, a law firm might represent a manufacturer and a distributor in defending a product liability claim by structuring the representation so that any potential cross-claims are reserved for later resolution in a different proceeding through separate counsel.¹² Similarly, a plaintiffs' firm might structure its representation so that in the event a defendant's assets are insufficient to fully satisfy the commonly represented clients' claims, the firm's representation is limited to assembling the largest possible fund and the clients' competing interests in that

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fund are then allocated through an agreed mechanism using separate counsel.¹³

CONFIDENTIALITY

Comments 30 and 31 to RPC 1.7 focus on the confidentiality aspects of common representation.¹⁴ They emphasize that although privilege protects confidential attorney-client communications from those beyond the common representation, privilege does not apply in the event of later litigation among the commonly represented clients over the matter concerned. Similarly, the comments stress that a lawyer cannot generally withhold information from some of the commonly represented clients that is material to the joint representation.¹⁵ The comments point out that this required sharing of information reflects both the duties of loyalty and communication to all of the clients involved. Although not part of the comments, related evidence law generally holds that one commonly represented client cannot waive privilege for others in a joint representation.¹⁶

Reflecting the sensitivity and the potential complexity of confidentiality issues in this context, Comment 31 advises that “[t]he lawyer should, at the outset of the common representation and as part of the process of obtaining each client’s informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.” Prudent practice suggests that the lawyer use the informed consent process to also warn the clients of the financial costs involved if a conflict develops and they need to obtain separate replacement counsel. Prudent

practice also suggests using the engagement agreement to confirm that, based on reasonably available information, the clients’ positions appear aligned at the outset—which, as discussed earlier, is the foundation on which common representation rests. Although “informed consent” under Comment 31 does not require written confirmation, risk management considerations counsel memorializing both the advisories and the clients’ consent in writing in the event there are any questions later.¹⁷

When common representations unravel, the allegations left in their wake often run along the lines of claims that the lawyer favored one client over the other to the detriment of the ‘disfavored’ client.

CONSEQUENCES

The potential consequences for lawyers who do not carefully structure common representations at the beginning and monitor them closely along the way are many, varied, and difficult. In some of the examples discussed above, the lawyers involved were disciplined. In others, their law firms were disqualified. When common representations unravel, the allegations left in their wake often run along the lines of claims that the lawyer favored one client over the other to the detriment of the “disfavored” client. Such allegations, in turn, lend themselves to being recast as civil damage claims for legal malpractice or breach of fiduciary duty. Still others arise when the lawyer attempts to collect a fee, such as, for example, when the former client in *Gustafson* claimed that

her former lawyer’s attorney lien was unenforceable because he had a conflict from the outset.

These potential risks do not mean that common representations should necessarily be avoided. At the same time, the risks suggest that lawyers should not enter into common representations reflexively but, rather, should carefully evaluate the specific circumstances before proceeding and continue to monitor them as the matter progresses. [BN](#)

NOTES

1. This column focuses on common representation in civil matters. Although multiple client representation in criminal cases is not prohibited outright, the conflicts typically presented—such as plea offers contingent on testifying against co-defendants—effectively make common representation in criminal cases rare. See generally Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering* § 12.19 (rev. 4th ed. 2020) (surveying common representation and associated conflicts in criminal cases).
2. Comment 41 to RPC 1.7 addresses common representation by governmental counsel. *Restatement (Third) of the Law Governing Lawyers* §§ 128-130 (2000) (*Restatement*) also address common representation.
3. Comment 33 notes a related principle that a client in a common representation also retains the right to discharge the lawyer.
4. If it appears from the outset that common representation will not work, a practical option is to have separate law firms represent the clients involved while coordinating their efforts as appropriate.
5. The Court of Appeals in *Gustafson* found that there were insufficient facts in the appellate record on this point and remanded the case to the trial court for further proceedings. 87 Wn. App. at 304-05.
6. See 160 Wn.2d at 19-21.
7. RPC 1.8(g) deals with a separate and much more complex set of issues arising out of common representation: aggregate settlements. Although the term “aggregate settlement” is not defined in the rule, it ordinarily occurs when commonly represented clients are presented with a single settlement offer on an “all or nothing” basis or the offer otherwise links their individual allocations. See generally ABA Formal Op. 06-438 (2006) (addressing ABA Model Rule 1.8(g)). Although aggregate settlements are not prohibited, they typically involve extensive disclosure to the clients involved. *Id.* See also In re Gatti, 333 P.3d 994 (Or. 2014) (discussing Oregon’s version of the aggregate settlement rule and surveying authorities nationally in a case involving

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multiple plaintiffs); American Law Institute, *Principles of Aggregate Litigation* § 3.16 (2010) (identifying the characteristics of aggregate settlements).

8. See, e.g., *In re Celcyte Genetic Corp. Securities Litigation*, 2008 WL 5000156 at *4 (W.D. Wash. Nov. 20, 2008) (unpublished) (disqualifying law firm for non-waivable conflict between clients in the same matter). RPC 1.16(a)(1) states the corollary principle that a lawyer must withdraw if “the representation will result in violation of the Rules of Professional Conduct[.]”
9. See, e.g., *Atlantic Specialty Ins. Co. v. Premera Blue Cross*, 2016 WL 1615430 at *8, *13 (W.D. Wash. Apr. 22, 2016) (unpublished) (applying the “hot potato” rule in disqualifying law firm); see generally *Unified Sewerage Agency of Washington County, Or. v. Jelco, Inc.*, 646 F.2d 1339, 1345 n.4 (9th Cir. 1981) (discussing the analytical underpinnings of the rule).
10. See generally *WSBA Advisory Op. 1950* (2001) (discussing this construct). See also *ABA Formal Op. 05-436* (2005) (addressing advance waivers).
11. Comment 21 to RPC 1.7 addresses revoking consent.
12. See Peter R. Jarvis and Allison Martin Rhodes, *The Ethical Oregon Lawyer* at 10-29 (4th ed. 2015) (discussing structuring representations to avoid conflicts using this example).
13. See generally *Oregon State Bar Formal Op. 2005-158* at 6 (rev. 2015) (discussing this approach); see also *Matter of Lauderdale’s Guardianship*, 15 Wn. App. at 325 (describing this approach before RPC 1.2(c) was adopted).
14. See also *ABA Formal Op. 08-450* (2008) (surveying confidentiality issues when representing multiple clients in the same or related matters).
15. Comment 31 creates a narrow exception when the clients have agreed that the lawyer can maintain some separate confidential information: “In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.” Comment 31 then gives the example of an agreement permitting the lawyer to keep one client’s trade secret information confidential from the other when it will not affect the representation.
16. See generally *U.S. v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012) (surveying case law on this point); see also *Restatement, supra* n.2, § 76, cmt. g and accompanying Reporter’s Note (same).
17. Comment 32 counsels that any limitations on the scope of the representation under RPC 1.2(c) should also be discussed with the clients. Again, prudent risk management suggests confirming these discussions and the clients’ consent to any limitations in writing.

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Folweiler Chiropractic, PS v. Safeco Ins. Co./First National Ins. Co., 2021 WL 4059799 (2021) (claims of PIP service provider barred under Illinois class settlement)

Nau v. Vogel, 2021 WL 4520076 (2021) (affirming dismissal of RESPA claims and trial court CR 11 sanctions)

Griswold v. Fred Meyer Stores, 2021 WL 3619918 (2021) (affirming judgment for premises liability where dolly fell on shopper's foot)

Mancini v. City of Tacoma, 196 Wn.2d 864, 479 P.3d 656 (2021) (holding police may be liable for negligently executing search warrant)

Meyers, et al. v. Ferndale School District, 197 Wn.2d 281, 481 P.3d 1084 (2021) (district responsible for student killed by driver who ran off road striking him during improper off campus walk)

McLaughlin v. Travelers Com. Ins. Co., 196 Wn.2d 631, 476 P.3d 1032 (2020) (court holds bicyclist is pedestrian for PIP coverage)

Bao Xuyen Le v. Molina, 810 Fed. Appx. 550 (9th Cir. 2020) (affirmed rejection of officer qualified immunity in police shooting case)

Schwartz v. King County, 14 Wn. App. 2d 915, 474 P.3d 1092 (2020) (reversed summary judgment in favor of County under rec immunity statute for bike-bollard collision)

Plein v. USAA Cas. Ins. Co.; Sterling Group, 195 Wn.2d 677, 463 P.3d 728 (2020) (RPC 1.9 interpretation)

Surowiecki v. Hat Island Community Ass'n, 14 Wn. App. 2d 718, 472 P.3d 998 (2020) (reversal of trial court refusal to address whether HOA assessments were equitable)

Nelson v. Thurston County, 2020 WL 2838608 (2020) (denying qualified immunity to a police officer who shot a citizen in the back)

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Labor and Employment Law Section

BY TINA AIKEN

Q. What is the most valuable benefit members get from joining your Section that they can't get anywhere else?

The WSBA Labor and Employment Law Section (L&E) is one of the larger sections of the Bar with nearly 1,000 members. It includes members practicing many different aspects of labor and employment law, including lawyers representing private- and public-sector employers, unions, management, and individual employees, as well as law professors, arbitrators, and other neutrals, so members get a well-rounded view on this area of law.

Our Section hosts an annual CLE and three or four mini-CLEs each year. For the annual CLE, we offer interactive panel discussions and speakers from around the state to feature the breadth and

depth of our Section's various perspectives. The mini-CLEs are offered to Section members at low or no cost, making them more accessible to new and young lawyers and lawyers of moderate means. These events keep members informed on cutting-edge developments in labor and employment law, which promotes competency and ethical practice. Like other sections, our Section pivoted from hosting in-person seminars to a virtual education format at the beginning of the pandemic. These virtual

CLEs have been well attended despite not having the in-person draw. The Section also provides a forum for members to exchange ideas about this area of the law.

L&E Section members also get a chance to give back to the legal community. Our Section sponsors a summer grant program for three law students from Washington law schools (one student from each law school—the University of Washington, Seattle University, and Gonzaga University). The program provides a stipend to

Tina Aiken is the chair of the WSBA Labor and Employment Law Section and a senior attorney with Sebris Busto James. Her practice includes advising employers regarding compliance with state, federal, and local employment laws; defending employers when litigation arises; and conducting investigations. Tina received a B.S. in psychology from Washington State University and an M.A. in organizational psychology with an emphasis in human resource management from Columbia University. Before attending law school, Tina worked as a human resources professional. She received her J.D. from Seattle University School of Law.



LEARN MORE >

The Section membership year is Jan. 1 - Dec. 31. For more information and to join the Labor and Employment Law Section, or any other Section, visit www.wsba.org/legal-community/sections/sections.

students working in labor or employment law during the summer in Washington for a government entity, nonprofit, or union. Our Section's portion of the grant is \$5,000 per student, and each school contributes an additional amount toward its student's stipend.

Q. What is a recent Section accomplishment or current project that you are excited about?

Our Section recently hosted its annual CLE in a virtual format for the second year in a row due to COVID-19-related restrictions. For a section that enjoys in-person gatherings, networking opportunities, and interactive panels, pivoting to a virtual format has had its challenges. Despite these challenges, the CLE was a success, primarily due to efforts by the top-notch moderators and presenters. They intentionally made the panels as interactive as possible and selected timely and thought-provoking topics, such as Washington's new Paid Family and Medical Leave law, recent changes to EEO laws, and strategies for conducting trials virtually.

To increase engagement and networking during these times of in-person restrictions, our Section plans to begin hosting monthly virtual meetings on current labor and/or employment law issues in

2022. The meetings will likely be a combination of mini-CLES and shorter informal lunchtime gatherings. The intent is to provide more frequent opportunities for Section members to interact with each other and stay on top of recent developments in this area of the law.

Q. What opportunities does your Section provide for members who are looking for a mentor or for somebody to mentor?

Our Section participates in the WSBA's Open Section Night, where new and young members have the opportunity to network with experienced attorneys who practice labor and/or employment law and learn more about the Section. Our Section has also participated in section outreach events, such as one hosted by Gonzaga University last year, where students and recent graduates had the opportunity to meet and discuss the Section with its representatives.

In the past, our Section coordinated with the University of Washington and Seattle University to provide networking events for law students. The Section and schools planned a lunch event at one of the two Seattle law schools where attorneys and law students had a chance to network and discuss the practice of labor and employment law. Our Section intends to bring back this annual event and expand it to include students from Gonzaga University.

Our Section has a young lawyer liaison, connecting the Section to the new or young lawyer community. In collaboration with the

Section, the young lawyer liaison brings their perspective and connections to building educational programming, events, and other Section activities tailored to new and young lawyers.

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?

The labor and employment bar tends to be a close-knit group of practitioners who enjoy networking and are happy to provide referrals and input on labor and employment issues. Attending the Section's CLEs and upcoming lunchtime meetings is one way to connect with, and learn from, these practitioners. Volunteering with the Section or participating on the Section's Executive Committee also provides opportunities to meet attorneys in this area and grow your practice. The Section is always looking for more ways to connect members and update them on recent labor and employment law developments.

Q. In addition to membership in your Section, what are the best ways to stay up on the developing law in this practice area?

Our Section's CLEs are available to members and nonmembers, attorneys and non-attorneys alike. Attending the annual Pacific Coast Labor & Employment Law Conference and engaging with the King County Bar Association Labor & Employment Law Section are other excellent ways to connect with practitioners and stay on top of current issues

SIDEBAR

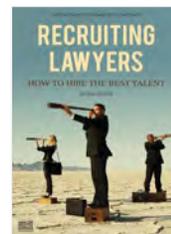
Titles Available From the Lending Library Related to Labor and Employment Law and Other Topics



The Big Book of HR
By Barbara Mitchell
and Cornelia Gamlem



Effectively Staffing Your Law Firm
By Jennifer J. Rose



Recruiting Lawyers: How to Hire the Best Talent
By Susan G. Manch
and Marcia Pennington Shannon



You Raised Us, Now Work With Us: Millennials, Career Success, and Building Strong Workplace Teams
By Lauren Stiller Rikleen

> For more information about the WSBA Lending Library, email lendinglibrary@wsba.org or visit www.wsba.org/library.

in this area of the law. Many minority bar associations offer legal clinics that provide employment advice. Lawyers can participate in those clinics, and non-lawyers can volunteer to help coordinate the clinics to gain exposure

and opportunities in this practice area. Many labor and employment law firms also have podcasts, blogs, or monthly newsletters focused on recent labor and employment law developments. **BN**



MBA SPOTLIGHT

Loren Miller Bar Association

BY LIONEL GREAVES IV

Q. How and when did your Minority Bar Association (MBA) get started?

The Loren Miller Bar Association (LMBA) was started in August 1968 by our 13 founders,¹ Black attorneys who joined together to further the cause of civil rights.

Q. What are some of the core goals and/or purposes of your MBA?

LMBA works to confront institutionalized racism, build a better legal system, provide information on important legal and policy issues, and facilitate both access to and progression within the legal profession for



our members, our community, and by extension all people in Washington.

Q. What need does your MBA fill that is unmet elsewhere?

There are many groups doing great work to assist the Black community, but LMBA is the largest, oldest, and only statewide association of Black attorneys in Washington.

Q. What are a few of the opportunities or benefits that your members receive?

LMBA maintains an active jobs board, provides monthly meetings and newsletters to keep members informed of important community issues, offers opportunities to participate in the judicial evaluation process, and regularly lends the weight of our organization to amicus briefs, service opportunities, or other interests championed by individual members.

Q. Does your MBA offer any mentorship or scholarship opportunities? If so, please describe.

In partnership with the Loren Miller Bar Foundation, LMBA provides access to scholarships for law students studying for the bar exam and for undergraduate students taking the LSAT. We provide informal mentorship matching that can be accessed by contacting us through our website.

Q. What is a recent MBA accomplishment, current project, or event that you are excited about?

LMBA has worked with many other advocates on reforming jury selection to be more inclusive and to combat bias. This work² resulted in GR 37³ in Washington state, and we continued our advocacy in Arizona,⁴ which helped influence that state to eliminate peremptory challenges.⁵

Q. How can WSBA members support the work of your MBA?

WSBA members can sign up for a free account on our website, which allows them to post jobs, increase their visibility and service to the Black community, and more. They can become paying members, which allows them to have a voice in some of our work and helps fund our organization. They can also support our events, like the annual Philip L. Burton Memorial Scholarship Dinner, which will be happening again in May 2022.

Q. Is there anything else you would like WSBA members to know about your MBA?

We are proud of the work of all who came before us in this space and have gratitude for all our allies seeking a more just society. [BN](#)

NOTES

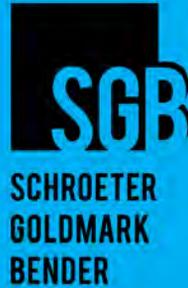
1. www.lmba.net/founders.
2. www.aclu-wa.org/file/103708/download?token=pIDKbJrg.
3. www.courts.wa.gov/court_rules/pdf/GR/GA_GR_37_00_00.pdf.
4. www.azcourts.gov/Rules-Forum/aft/1196/afpg/2.
5. www.vox.com/22648651/arizona-jury-race-batson-kentucky-peremptory-strikes-challenges-thurgood-marshall.

Lionel Greaves IV is the president of LMBA and honored to serve his community alongside LMBA's wonderful Executive Board. He has been a WSBA member since 2009. He and his wife, Lydia, live in Seattle and are the proud parents of a son and daughter.





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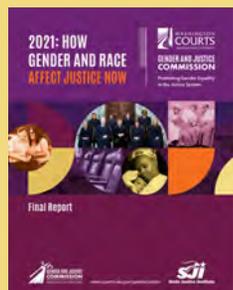


GENDER, JUSTICE, AND THE POWER OF DATA

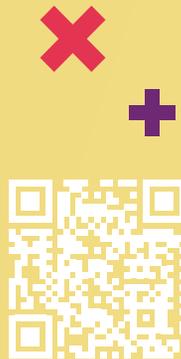
The Washington Supreme Court Gender and Justice Commission’s latest report is an update to a fact-finding study undertaken in 1989

BY HON. LISA H. MANSFIELD

Washington Supreme Court Justice Sheryl Gordon McCloud is co-chair of the court’s Gender and Justice Commission. She spoke with me recently about the Commission’s recently published report, “2021: How Gender and Race Affect Justice Now.”



MORE ONLINE > The full report includes 16 chapters covering various aspects of the justice system. Find it and other resources by scanning the QR code or by visiting www.courts.wa.gov/genderjustice.



Hon. Lisa H. Mansfield [LHM]: How did you come to work on the Washington Supreme Court Gender and Justice Commission?

Justice Sheryl Gordon McCloud [SGM]: My path to this work was indirect. I have a criminal justice background—I was a public defender in the 1980s and then I did appellate work. My main area of interest was not women’s issues—except as they came up in the course of representing people fearing or facing claims that they had violated criminal or regulatory laws.

But when I joined the Supreme Court bench, then-Chief Justice [Barbara] Madsen asked me to be the vice chair of the Gender and Justice Commission that she was leading at that point. I accepted. Ultimately, she turned the reins over to me as chair. Fortunately, I had the good judgment to ask Judge Marilyn Paja, of the Kitsap County District Court, to co-chair with me. Justice Madsen said to me, “In 1989, we published a report on how women were being treated by our courts. It’s going to be 30 years pretty soon. You should probably do a look back on that work and see how we’re doing now.” I agreed—with the understanding that race as well as gender be a focus of the study.

LHM: So this current study stands on the shoulders of the 1989 study.¹ Can you speak to me a bit about those beginnings, and why you felt a need to enlarge the scope of the original study?

SGM: In 1989, there was no Gender and Justice Commission, there was no Minority and Justice Commission, and there was no Interpreter Commission. The Legislature asked the Washington Supreme Court to lead a report on whether gender bias affected our courts. The Supreme Court accepted and created a Gender Bias Task Force. This nonpartisan group was composed of judges, lawyers, academics, elected officials, and non-lawyers who worked in relevant fields. They came from across the state. They delved into the issues that the Legislature asked them to. But if you look at the index of that 1989 report, it’s limited. That reflects constraints of time and

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Gender, Justice, and the Power of Data

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money. But it also reflects the voices that the task force heard at that time.

During that period, the voices they heard were saying things like, “I was raped, but I was on a date, so they wouldn’t take my case seriously.” They heard voices saying, “I was divorced and I got some money, but I’ve got the kids and I can’t support the kids on this.” They also heard voices like, “I got my law degree, I can’t get child care, I can’t make partner, and the judge calls me ‘honey’ every time I walk into court.”

The areas that they studied reflected the voices that they heard. They were what some might call “women’s issues”: domestic violence, rape, divorce and its consequences, and treatment of [women] in the profession. They did a great job. It was the first such study in Washington state and one of the first ones nationally to survey how the courts were doing in such issues. The answers were disappointing, but not surprising: They concluded that gender bias did exist in those areas, and the bias was mainly against women.

I think it’s fair to say that 30 years later when we proposed to do our report, one of the reasons that we spent a ridiculous amount of time scoping out and doing interviews about what topics to cover was that we were trying to hear other voices and see what other areas we should look into. We certainly heard some of the same voices our predecessors heard in 1989. But we also heard other voices:

Judge Lisa H. Mansfield presides over Lakewood Municipal Court, which serves the cities of Lakewood, Steilacoom, and DuPont, and proudly hosts a Veterans Treatment Court. Judge Mansfield is a member of the Remote Jury Trials Work Group and sits on the Community Advisory Board of the University of Washington Tacoma Legal Pathways. Judge Mansfield enjoys writing about the intersection of law and justice and is a frequent contributor to *Bar News*.



We heard people with deep concerns about criminal justice—not just how it affected men, but particularly how it affected Black and other men of color and the effect that had on women in the community. The voices that we heard were saying things like “My partner is in prison and I’m at home alone with the kids. He’s not getting out any time soon. I’ve been holding down three jobs. My health is deteriorating. I can’t keep this up much longer.”

We heard about the drug war, high incarceration, increasing incarceration of women, and the terrible impacts on children. We heard about how when a woman is arrested and put in jail—even for a short time—or put in prison, there’s not always a dad to take care of the kids. Consequently, the number of women who lose their kids (because they are incarcerated) is higher than the number of men who lose their kids. Because if a man is incarcerated, usually mom is at home; or if mom isn’t home, grandma is at home.

While we were aware of the vast

increase in incarceration of Black and Native [American] men over the last 30 years, we learned that the number has slowly decreased over the past decade. However, the rate of incarceration of Black and Native [American] women over the past decade has sharply increased.

These issues are centered in race. So we were hearing the voices of Black, Native [American], and other women of color. We also heard the voices of people in the LGBT community concerned about commercial sexual exploitation and how its worst impacts were on younger women and men, especially gay youth. And we heard voices of immigrants who were saying it was difficult for them to get to the court, even for protection orders, because of the fear of being deported. We heard immigrant women who weren’t concerned about their immigration status, but who had trouble understanding English, expressing the same problems.

We came out of this process with a different understanding of “women’s issues.”

QUICK BIO

Justice Sheryl Gordon McCloud was elected to the Washington Supreme Court in 2012 after a career of helping clients fight for their constitutional and individual rights.



- > She currently serves as co-chair of the Washington Supreme Court Gender and Justice Commission, as a member of the Supreme Court’s Rules Committee, and as the liaison to the Supreme Court’s Pattern Instructions Committee (on which she previously served as a lawyer-member).
- > She is also on the Washington State Bar Association’s Council on Public Defense. She speaks regularly at legal and community events throughout the state on topics ranging from ethics to criminal justice.
- > Before she became a judge, she handled hundreds of cases before the Washington Supreme Court and other appellate courts. She also taught at Seattle University School of Law.
- > She has been honored with several awards over her career including the Washington Association of Criminal Defense Lawyers’ highest award, the William O. Douglas Award, for “extraordinary courage” in the practice of law; the Washington Women Lawyers King County Chapter’s 2015 President’s Award, and the Cardoza Society of Washington State’s 2018 L’Dor V’Dor Award.

LHM: Given the criminal justice lens you applied, I can see how the report really grew from the original 1989 study. How long did the interviewing process take?

SGM: I think we spent a year interviewing lawyers, judges, community activists, people that defense attorneys typically worked with, people that prosecutors typically worked with, and academics on the current problems affecting women.

LHM: You heard a wider array of voices saying troubling things about the disparate impact of race and gender throughout the justice system. What did you think a study would accomplish?

SGM: We really wanted hard facts, scientific data, and a view of what it's like on the ground. How many women are in prison? How many Black women are in prison? Let's disaggregate by race and ethnicity, because if we just talk about the majority of women, who in Washington are white, we are not getting a comprehensive picture of women. We were looking for data so we could provide a detailed report, so that a layperson could read, learn from, and rely on the report for information on each of the 20-some odd topics studied. The better the data, the better the chance that people could name the problem and struggle over solutions.

LHM: Was there a concerted effort to make the report accessible such that a non-lawyer could understand it?

SGM: That was definitely a major consideration in writing the report. That was our goal. I hope we succeeded.

LHM: You did! Not only is it readable, it's impactful. There were times that I had to stop reading and wonder if I read what I read correctly. For instance, I was stunned at the fact that Black, Native [American], and women of color are sentenced at rates two to eight times higher than that of white women.

SGM: I remember reading that. Those numbers came from one of our pilot

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LEARN MORE

5 Pilot Projects Initiated

As part of the 2021 Study, the Commission conducted five projects to fill research and data gaps identified in the course of conducting the 2021 Study. The Commission solicited project ideas from stakeholders. After the Commission vetted and scoped the project proposals submitted by stakeholders, proponents of select proposals were then invited to present their project ideas to the Gender Justice Study Task Force and the Gender Justice Study Advisory Committee.

Workplace Harassment Survey: Washington State Courts, Superior Court Clerks' Offices, and Judicial Branch Agencies

A survey of employees working in Washington courts, Superior Court Clerks' Offices, and Judicial Branch agencies. The survey includes information on workplace sexual harassment; harassment based on gender, race, and sexual orientation; and general workplace bullying and harassment.

Evaluation of Washington State Domestic Violence - Moral Reconciliation Therapy (DV-MRT) Programs Process and Outcomes

An evaluation of the implementation of and effectiveness of DV-MRT, a specific form of treatment for domestic violence offenders that a small number of courts in Washington are offering.

Jury Diversity: A Survey of Washington State Trial Courts

Analysis of Court Demographic Data Collection and Juror Accommodations

A survey of Washington trial courts to identify: 1) demographic data collected on potential jurors at each stage of the jury selection process, 2) barriers to data collection, 3) accommodations made for jurors, and 4) barriers to providing accommodations.

Evaluation Report: On-Site Childcare Programs in County Courthouses & Their Effect on Access to the Justice System

An evaluation of two courthouse childcare programs in Washington state to determine how they are implemented and what role they have in addressing barriers to court access.

Incarceration of Women in Washington State: Multi-Year Analysis of Felony Data

Analyses of Washington State Caseload Forecast Council felony data to identify racial inequities in the incarceration of women.

Source: Washington Supreme Court Gender and Justice Commission



Gender, Justice, and the Power of Data

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research projects. I must have read it five times. I insisted that the data be rechecked.

LHM: That highlights the importance of data.

SGM: You can disagree on why, and you can disagree on remedies, but there it is. That's our situation, and it's a problem.

Data is nonpartisan, and we are a nonpartisan judicial branch organization. We don't write legislation. We wanted to point to the problems and have stakeholders discuss options. If you read through the recommendations, you'll see they are not partisan. They don't contain specific legislative language. What they do is identify problems, present areas for improvement, and offer solutions that other jurisdictions or organizations have considered, or that we actually studied in our pilot projects.

LHM: How did this report incorporate data?

SGM: The report is strongly data based. We have only given conclusions that are based on data in which we have confidence. We have noted where data improvement is needed and we have made concrete recommendations about that. Many of those recommendations—like how to code race and ethnicity more accurately so we don't miscount the entire Latinx segment of our population, like how and why to code LGBT status, and like how to allow for disaggregation by more than one variable, so you can get a snapshot of say Black women rather than just Black [people] or [just] women—are designed to make all data collection more useful. I want people to know that they can depend on this report.

LHM: Besides centering on data, what other concepts would you want a reader to take from the study?

SGM: I want people to know that when you're asking about women's status in the

'The report is strongly data based. We have only given conclusions that are based on data in which we have confidence.'

courts, you really must look at all groups that comprise women. Because if you look at what you think the majority is, you're missing something. For example, you would miss the impact of increasing rates of incarceration of Black women. You would overlook the fact that while there have been tremendous advances in how courts treat violence against many women, we have been failing missing and murdered Indigenous women.

I don't want disaggregation to be just a big word. I want it to reflect the fact that there are people being overlooked if you don't look past findings about the majority of women. Our courts can't afford to overlook anybody.

LHM: As you were putting the pieces of this study together, what type of support did you have?

SGM: We had a fantastic nonpartisan, statewide, active Advisory Committee. It included elected officials from both major parties, rural and urban, judges, lawyers, lawmakers, and academics. We had social science researchers including students, legal researchers including students, and expert judges and lawyers leading each study area.

LHM: Now that the data has been gathered and the study is done, the question arises: "What's next?"

SGM: We conducted five pilot projects to expand the data and test some suggestions for improvements. Briefly, there is an evaluation of the efficacy of DV-MRT (Domestic

Violence - Moral Reconciliation Therapy), an evaluation of courthouse child care, an analysis of data from the Caseload Forecast Council (successor to the Sentencing Guidelines Commission), a study of workplace harassment in the judicial branch, and an analysis of jury summons data.

Some of these projects point a way forward. We now have data showing that low-cost treatment for people convicted of domestic violence crimes, treatment they can actually afford, can work just as well as the high-priced, private offerings. We have data showing that affordable child care helps people get to court—which is especially important for low-income women, including women of color. We have data showing specific steps that taxpayer-funded agencies can take to gather and code data on those who come into contact with the justice system far more accurately. We have data showing the need to address harassment—race, gender, and LGBT-based harassment—in our house, the judicial branch. And we have data showing the need to improve representation of women and people of color on juries.

LHM: Justice Gordon McCloud, thank you for helping to lead this important work of the Washington Supreme Court Gender and Justice Commission and sharing the important data it contains. What is a good starting point to learn more about this work and move it forward?

SGM: Read, share, and discuss the report (or its shorter executive summary). It's called "2021: How Gender and Race Affect Justice Now" and it's located at www.courts.wa.gov/genderjustice (Gender Justice Study Tab). Get more involved: contact us at commissions@courts.wa.gov. And as we study the impact of existing or proposed laws and policies on women, remember that the impact may differ for different subpopulations of women. That's critically important, because the Washington courts serve all women, not just some. **BN**

NOTE

1. The 1989 report can be found at www.courts.wa.gov/committee/pdf/Gender%20and%20Justice%20in%20the%20Courts--Final%20Report,%201989.pdf.



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INTERVIEW WITH JUSTICE G. HELEN WHITENER

MENTOR, EDUCATOR, TRAILBLAZER

Shrugging off society's labels and creating a path for others

BY HON. LISA H. MANSFIELD

I recently sat down with Washington Supreme Court Justice G. Helen Whitener to talk about her extraordinary life and to solicit her perspective on the many justice and equity issues in Washington today.

Hon. Lisa H. Mansfield [LHM]: Your father had a credo taken from Shakespeare's play *Hamlet*: "To thine own self be true." What does that statement mean to you in the context of your life?

Justice G. Helen Whitener [GHW]: When my father said, "To thine own self be true," he wanted us to be our authentic selves. My father was service oriented. He was a teacher and, later, he became a school principal. He instilled in us a sense of

Justice G. Helen Whitener was appointed to the Washington Supreme Court in April 2020 and was elected by the voters to retain her position on the Supreme Court in November 2020.

individualism. By that statement he meant, whatever you do, it's OK to be yourself. That doesn't mean that you will always be liked or accepted, but you will be grounded in your true self.

LHM: You are at the intersection of several identities: being a Black, gay woman; living with a disability; a first-generation immigrant. In our society, a combination of all five intersecting identities does not necessarily add up to a life of success and abundance. In your case, it has. What has been your journey to achieving such abundance?

GHW: Actually, these are society's labels, not mine. I learned quite early, when remembering Daddy's words, "To thine own self be true," that I would not be defined by any of society's labels.

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Interview With Justice G. Helen Whitener

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I see myself as worthy. I know I can do anything I put my mind to, which is what I have done so far, and I have much more to accomplish. With this mindset comes a responsibility, and that responsibility is to use my sense of worth to educate others and encourage their pursuit of their life interests and not be held back by society's labels. It is indeed possible to achieve your goals. You just have to figure out how to go about it because there will be barriers. I liken the barriers to hurdles. In my youth, I participated in track and field; I had to engage a hurdler's mindset. The same is true about my journey: How do I jump this hurdle? If I cannot jump over it and I cannot go around it, I am going to go *through* that hurdle. I will rise to the occasion and finish

Above: Justice Whitener at Puerto de la Mujer (Women's Bridge), Buenos Aires. At left: Justice Whitener dancing with her father, Lennard Pierre.

the race. No hurdle will stop me.

It's not race, it's not gender, or sexual orientation. Those are the labels that are separating us. Remove yourself from those labels. I don't mean lose yourself, but remove yourself from those labels and think of yourself as just like everybody else. Go for it. Just like everybody else, one person has a straight path, the other one experiences some bumps, the third one has hurdles. If our vision is getting everybody to the finish line, then we can find ways to journey through these bumps and hurdles. We make it happen.

LHM: Could you talk about what you mean by identity transcendence?

GHW: Identity transcendence is the process of overcoming society's labels. One's identity interplays with how society sees a person. But as I said, by associating my identity with a label does not mean limiting me, even if labels are used as limiters. Instead, remembering my father's credo, I grew up believing "I am unique." We are all unique. We all have positive attributes, and identity transcendence is the process of honing those attributes to figure out what your contribution will be to this society regardless of the labels.

'My work is not just a reflection of my identity and it is not only to overcome barriers.'

Will you succumb to the labels or will you overcome them? My mindset is to overcome them. In other words, I choose identity transcendence.

Still, the choice is not easy. It's a personal journey, finding and developing one's path to breaking down barriers. But more importantly, once barriers are broken, we cannot allow them to rise up again. We must develop the strength for all that it takes to face down the barriers with wisdom, courage, and integrity. That's where mentoring and giving back to our community plays a big part in my identity. My work is not just a reflection of my identity and it is not only to overcome barriers. My work is founded on the belief that together we will knock down and change the way society perceives barriers. We must find ways to help others understand how those in our community have been subjected to the negativity brought by society's labels.

LHM: Could you discuss the importance of mentorship?

GHW: Mentorship is a beautiful way of giving back to our community. Mentoring is a two-way street. Not only do we reach our younger citizens and provide them with valuable lessons about our own journeys, we also share and learn so much from them about their unique perspective and experience. My mission is to develop opportunities for mentees, and together we can eradicate the hurdles that limit their success.

LHM: It's an impossible task to take on by yourself isn't it?

GHW: It's a lonely place to achieve success if you have done it only for yourself. Support comes from creating that village of mentees and seeing it become a movement founded on the fundamentals of giving back.

When I met Supreme Court Justice Sonia Sotomayor in Seattle, she asked me,

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Interview With Justice G. Helen Whitener

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“How does it feel to be a trailblazer?” I said afterward to my wife, Lynn, “I never thought of myself as a trailblazer. What does this word ‘trailblazer’ truly mean?” My vocabulary did not include it as a descriptor for myself. I realized then that “trailblazer” means you are the first one. You have to build the trail for the next one to follow. So you’re creating this trail and you’re blazing this trail, being the one out front.

It is not easy. You have to work harder and keep proving you are qualified to do the work. So much of society’s misunderstandings are thrown at the trailblazer. But if you are prepared to do the best work possible and create a trustworthy family of colleagues and friends, these are the tenets that serve as your foundation to succeed. I will step around the mines so that you have a safer path to follow. I will take the risks so that we all learn from the experiences. The responsibility is not only immense, it is heavy. Fortunately, in 2021 many more have joined the team of trailblazers in the legal profession. We still have a long way to go. I am humbled and grateful for this opportunity to be on a team blazing a path for the next generation.

LHM: Shifting the focus to our judicial system in Washington state, there has been a lot of work in training the Bar and the judiciary about diversity, equity, and inclusion (DEI) recently. What do you see as working well in this regard and what in your opinion has room for improvement?

GHW: We have made a good number of inroads with representation, and Washington state has done well to place representation at the forefront of the discussion. In recent years, the legal field and the judiciary have become more representative of the people we serve. In 2020, the Washington Supreme Court

became the most diverse state supreme court in the nation. Now in 2022, President Joe Biden is preparing to nominate a Black woman jurist to be the next associate justice of the United States Supreme Court. I am thrilled to be a part of these historic times. As for areas of improvement, we must keep up our work to eradicate racial bias. This is not an easy journey, but the discourse is prevalent in our society, and we have action plans in place in our government and educational institutions. It will take leadership of the highest standards to achieve diversity, equity, and inclusion. As a society, we can and must find the strength in ourselves and in our leaders to support these efforts.

LHM: Isn't it automatic that once you open the door for someone, that person is included at the table?

GHW: You may hire someone from a diverse background, but they may not be included. That person may not feel acknowledged or valued. Many individuals that are "firsts" experience a lack of acknowledgment and value. Our profession must be better. We must be prepared and ready to acknowledge and to value all our colleagues. As judicial officers, we are bound by our oaths to raise public trust and confidence in our judiciary. Diversification is one layer and the next is a deeper understanding of the value that someone brings to the table. This is where the bulk of our work needs focus in order to grasp



Judge Lisa H. Mansfield presides over Lakewood Municipal Court, which serves the cities of Lakewood, Steilacoom, and DuPont, and proudly hosts a Veterans Treatment Court. Judge Mansfield is a member of the Remote Jury Trials Work Group and sits on the Community Advisory Board of the University of Washington Tacoma Legal Pathways. Judge Mansfield enjoys writing about the intersection of law and justice and is a frequent contributor to *Bar News*.

'I would suggest that we get away from thinking of inclusivity in terms of numbers ... Instead, why not determine first how to be inclusive?'

Justice Whitener and her wife, Lynn Rainey, taking in the PRIDE celebration in Tacoma.



the true practice of inclusivity.

There is some backlash with regards to my message. They say, "We allowed you in and we gave you a seat at the table, so we have addressed DEI." In actuality, you have not taken the step to be inclusive, so we're still on the outside. We're not trying to take anything away from anyone. What we're trying to do is have everyone be seen, eliminating the barriers where necessary so the person in the wheelchair can interact on the same level within his or her capability as the person who doesn't need a wheelchair. That's what we're working on. The phrase that John Powell uses is belonging. We're working on belonging.

LHM: I think how people grow up has a large impact on the success of inclusivity. If you have never been exposed to or have never interacted in a meaningful way with those who look different or who have different values from you, then those different folks become the "other." Many people feel uncomfortable and awkward and unsure of themselves dealing with "the other" and it is easier to not deal with them at all.

GHW: That's where we, meaning "the other," have a part to play. I'll give you an example. We've been trained on

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Interview With Justice G. Helen Whitener

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DEI issues for quite some time now in the legal profession and the judiciary. But what's missing from the discussion is the understanding that "the other," meaning the marginalized individual or the underrepresented person, has been having this conversation for years—in my case 400-plus and in your case 400-plus years—a conversation that the non-marginalized individual has not been privy to. So they are new to the conversation. So as familiar as this conversation is to us, if they are finally ready to converse now, we must be flexible to say OK, let me help you with this conversation; let me share because, finally, you're here. It's important to be open to conversations that are trying to address systemic issues and create sustainable solutions, and not to respond, "Let's do a quota system." I am not available for that. I will engage in this new conversation, and I am here for the new gatekeepers because they are in position to make changes. I am not going to redo Dr. King's March [on Washington], I am not redoing that conversation. That experiment failed. I want you to understand something. He had a dream. I am in my mid-50s and that dream has not come to fruition. Why has it failed? Because we dropped the ball. So that conversation about the dream, that's not mine to have. I don't dream. I create goals and I create action plans. Let's take his dream and let's create a plan for solutions, sustainable solutions.

LHM: That brings me to my last question which is how can we do this work side by side if there are those who are unable to work together?

GHW: I never look to others to do what I can do myself. So when I say side by side, if you want to be with me, I don't want you behind me; if you are there, I will pull you

QUICK BIO

Justice G. Helen Whitener was appointed to the Washington Supreme Court in April 2020 and was elected by the voters to retain her position on the Supreme Court in November 2020.



- > Prior to her appointment to Washington's highest court, Justice Whitener served as a Pierce County Superior Court judge. Before becoming a judge, Justice Whitener litigated both civil and criminal cases for 14 years, first as a prosecutor and defense attorney and later as a managing partner of the law firm of Whitener Rainey Writt PS.
- > Justice Whitener has received numerous awards and honors, including the IALGBT Judges 2021 President's Award, the Washington Women Lawyers Chief Justice Mary Fairhurst Passing the Torch Award, the Washington State Bar Association's Charles Z. Smith Excellence in Diversity and Inclusion Award, and many others.
- > She is the first Black woman to serve on the Washington Supreme Court, the fourth immigrant-born Justice, and the first Black LGBT judge in the state of Washington.
- > Justice Whitener was born and raised in the Caribbean island nation of Trinidad and Tobago. She earned her B.A. in business administration and international marketing from Baruch College, New York, and received her J.D. from Seattle University School of Law. Justice Whitener lives in Pierce County with her wife, attorney Lynn Rainey (CSM-US Army Ret).
- > This month, Justice Whitener received the American Bar Association's 2022 Stonewall Award, an honor that "recognizes lawyers who have considerably advanced lesbian, gay bisexual, and transgender individuals in the legal profession successfully championed LGBT legal causes."

up. If you are in front of me, I want you to be able to pull me up. I always say, "Whitener is heading for the finish line." You can join me on the journey. I don't even mind pushing you ahead just as long as we finish.

LHM: But what about those folks that don't want to join and are still at the starting block?

GHW: All we can do is try to educate folks as to why change is necessary and needed, and then we can provide opportunities for change. There are many people who want to share in the work. If you are not on that train, you do not need to climb aboard. We can still touch many hearts and we can touch many minds. We can do it side by side, and we can see and hear each other in a truly thoughtful way. [BN](#)

'You can join me on the journey. I don't even mind pushing you ahead just as long as we finish.'



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FEATURE

What You Need to Know About the New Washington Nonprofit Corporation Act

BY DAVID A. LAWSON AND JUDITH L. ANDREWS

In 2021, the Washington Legislature adopted, and Gov. Jay Inslee signed into law, an all-new Washington Nonprofit Corporation Act (the “New Act”).¹ The New Act, which took effect Jan. 1, 2022, and is codified at Chapter 24.03A RCW, is a total replacement of the current Washington Nonprofit Corporation Act (the “Previous Act”), Chapter 24.03 RCW. Washington lawyers who represent nonprofits will likely want to familiarize themselves with the New Act and ensure that their clients’ governing documents and governance practices are compliant.

The Nonprofit Corporations Committee of the WSBA Business Law Section served as the primary drafter of the New Act. The committee began its work revising the Act in

the fall of 2008, shortly after the Nonprofit Organizations Committee of the American Bar Association released the Model Nonprofit Corporation Act, Third Edition (the “Model Act”). The committee chose to start with the Model Act, rather than trying to fix the Previous Act, in recognition of the age (originally adopted in 1967) and haphazard organization of the Previous Act. All of the committee members serving in 2008 recognized and had experienced the challenging legal questions raised in many of the Previous Act’s provisions. In addition, there was a wish for additional clarity with respect to the treatment of charitable assets held by corporations organized under the Previous Act and the other Washington statutes that bear on the management of such assets.

The committee’s membership included attorneys in private practice who represented nonprofits in Washington, practitioners who taught classes in nonprofit corporations and charitable organizations at Washington law schools, and representatives from the Washington Secretary of State’s office (both the Corporations and Charities Divisions) and the Attorney General’s Office. These government officials generously gave their time, experience, and knowledge to the committee over the nearly 13 years in which the committee worked on the revisions to the Act. In addition, the group frequently included one or more accountants practicing in the nonprofit area, who shared their perspectives, as well as a few committed laypeople who brought their direct experience as volunteers and consultants to nonprofit organizations into the process.

During this dozen-year effort, the committee worked through three complete reviews of what would ultimately become the New Act before completing its work in early 2021.

The committee’s intent was for the New Act to reflect recent developments in nonprofit and corporate law and to improve Washington law in three key areas where the Previous Act created difficulties for nonprofits, lawyers representing them, and regulators.

1. Modernization: The New Act is intended to reflect currently accepted practices in the nonprofit sector without imposing unnecessary burdens. This has impact in multiple areas, but especially in the rules governing electronic communications (RCW 24.03A.015), notices to members and directors (respectively, RCW 24.03A.410 and RCW 24.03A.555), and meeting procedures (e.g., RCW 24.03A.485 and RCW 24.03A.580).

2. Protecting Charitable Assets: The New Act takes a new approach to regulating and protecting charitable assets held by nonprofit corporations. The New Act’s provisions in this area are designed specifically for nonprofit

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What You Need to Know About the New Washington Nonprofit Corporation Act

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corporations, replacing the previous approach of governing charitable assets under trust law whether or not the assets are actually in trust. See RCW 24.03A.155-.165; RCW 24.03A.180-.205; and RCW 24.03A.944-.960).

3. Membership Organizations: The previous law governing membership nonprofits was incomplete and left many unanswered questions about the rights and duties of nonprofit members. The New Act adds a comprehensive set of provisions governing membership in nonprofit organizations. RCW 24.03A.315-.485.

These areas had the committee's primary focus; however, the New Act incorporates changes in many others.

The committee expects that most nonprofits without members will not need to make immediate changes to be in compliance with the New Act. Those nonprofits

may find, though, that the New Act presents opportunities for them to streamline their governance. Membership nonprofits are more likely to need to amend their governing documents to remain in compliance, as the New Act's more comprehensive membership provisions are likely to conflict with some organizations' prior practices. Nonprofit organizations with and without

24.03A.385), an organizational concept that is particularly common in religious organizations. The New Act clarifies that members generally do not have fiduciary duties to the corporation. RCW 24.03A.355. It sets out complete procedures for membership voting by ballot or electronic media, an area that is subject to considerable uncertainty under current law. RCW 24.03A.435-480.

Washington lawyers who represent nonprofits will likely want to familiarize themselves with the New Act and ensure that their clients' governing documents and governance practices are compliant.



David Lawson is an attorney at Davis Wright Tremaine. His practice includes tax advice for tax-exempt organizations; corporate governance; compliance with solicitation and charitable trust rules; and business transactions involving nonprofits and nonprofit healthcare, with a special focus on emerging issues at the intersection of charity and technology. He can be reached at DavidLawson@dwt.com.



Judith Andrews is of counsel at APEX Law Group. Her practice focuses on nonprofit corporation law, tax-exempt organizations, and public finance. In addition, Andrews leads workshops on the formation and maintenance of 501(c)(3) organizations for Communities Rise, and served as an adjunct professor at Seattle University School of Law, having created a nonprofit legal clinic class. She can be reached at judy@apexlg.com.



members may both wish to consult with legal counsel to ensure that they are well prepared for the transition to the New Act.

The following are some of the key improvements and changes in the New Act.

ELECTRONIC NOTICES AND MEETINGS

The Previous Act required members, directors, and officers to opt in affirmatively, in writing, before they may receive any email notices from a nonprofit corporation. RCW 24.03.009. The New Act permits email notices by default, with an opt-out option in case a particular member, director, or officer does not want to receive them. RCW 24.03A.015. The New Act also clarifies that meetings of members, directors, or officers may be held either fully or partly by videoconference or phone, unless the corporation's articles or bylaws expressly prohibit it. RCW 24.03A.485 (members); RCW 24.03A.580.

MEMBERSHIP CORPORATIONS

The New Act includes a comprehensive set of provisions setting out the relationship between a nonprofit corporation and its members, including rules governing members' rights and duties, notices to members, membership meetings, voting by members, and inspection rights. It also expressly provides for delegates of members to carry out some of those members' duties (RCW

BOARD OF DIRECTORS

Section 501(c)(3) organizations classified as public charities under federal tax law are required under the New Act to have at least three directors on their boards. Section 501(c)(3) organizations that are classified as private foundations, or nonprofit corporations that are not Section 501(c)(3) organizations, may continue to have one or two directors. RCW 24.03A.505.

The New Act clarifies that directors of charitable nonprofit corporations have the traditional fiduciary duties of corporate directors, rather than the substantially stricter duties that apply to trustees of a charity formed as a trust—and arguably to nonprofit directors as well, under some interpretations of current law. RCW 24.03A.495. This change should reduce potential liability exposure for directors of charitable corporations and encourage service on boards. Finally, the New Act expressly allows organizations to have youth representation on their boards, subject to several specific conditions. RCW 24.03A.565; RCW 24.03A.635.

SUPERVISION OF CHARITABLE ASSETS

The New Act significantly revises the rules governing how organizations must handle charitable assets, which include all assets held by Section 501(c)(3) organizations. The

rules introduce new procedures for managing assets subject to donor restrictions that are designed for consistency with the Uniform Prudent Management of Institutional Funds Act, Ch. 24.55 RCW. The New Act establishes specific procedures for modifying gift restrictions (RCW 24.03A.190); preventing charitable assets from being distributed improperly (RCW 24.03A.155); handling charitable assets in transactions such as mergers and dissolutions (e.g., RCW 24.03A.715); and reporting certain major changes in a charitable organization's activities or purposes (RCW 24.03A.075). It also clarifies the procedures through which the Attorney General's Office may investigate potential misuse or mishandling of charitable assets. RCW 24.03A.946-.958.

FUNDAMENTAL TRANSACTIONS

The New Act has all-new provisions governing so-called "fundamental transactions"—mergers, dissolutions, dispositions of assets, and other similar transactions. See Chapter 24.03A RCW, Part III. The new provisions are intended to guide nonprofits through the process of a fundamental transaction with more clarity, including especially how to treat charitable assets throughout the process. The New Act also adds new provisions expressly allowing corporations to "redomesticate," or change their state of incorporation, if the other state allows such transactions as well. RCW 24.03A.785 *et seq.* Finally, the New Act will allow corporations to convert from for-profit to nonprofit status, or vice versa, without reincorporating if certain conditions are met and other applicable laws allow the conversion. RCW 24.03A.855 *et seq.*

TRANSITION PROVISIONS

On the effective date of Jan. 1, 2022, all nonprofit corporations currently governed by Chapter 24.03 RCW became automatically subject to the New Act. Other types of nonprofit corporations governed by other chapters of Title 24 RCW, including Chapter 24.06 (mutual and miscellaneous corporations), will continue to be subject to existing law. **BN**

NOTE

1. Senate Bill 5034. <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5034-S.SL.pdf?q=20210719091317>.



Michelle Taft Joins JGKMW Partnership



JGKMW is pleased to welcome Michelle Taft as the firm's newest partner. Michelle's dedication to her clients, strong work ethic, empathy, and competitive spirit make her an effective and successful advocate for her clients. Outside the courtroom, Michelle has spent countless hours volunteering in animal rescue, on the board of a local rowing club, and as a volunteer ski patroller. Michelle's athletic and mountain rescue background and dedication to serving others give her a unique ability to connect with her healthcare clients and advocate on their behalf. JGKMW is excited to welcome Michelle to partnership, and we look forward to her continued commitment to providing our clients with quality legal representation.

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On Board

NEWS FROM THE BOARD OF GOVERNORS & THE WSBA

JAN. 13-14, 2022

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. Upon the request of the Washington Supreme Court, the Board has developed a plan to study the WSBA's integrated-bar structure.

In December, the Chief Justice of the Washington Supreme Court set forth three questions for the WSBA Board of Governors to answer in the coming months:

- Are there changes in federal law that require the WSBA to change its structure as an integrated bar?
- Even if a structural change is not legally required now, do we have a contingency plan to respond if we are forced to change in the near future?
- Regardless of federal law, what is the ideal structure for the state bar?

In response, the Board is firming up details about the process. Between now and the end of August, the Board plans to hold eight meetings to evaluate pending federal litigation regarding integrated bars, consider what an ideal bar structure

looks like, and, perhaps most importantly, to hear from stakeholders. The meeting framework was approved, but at the time of publication, dates were yet to be set; when they are, the WSBA will post them online and send notification to all members. The WSBA will also send notification of opportunities for input.

2 Remembering a Legal Luminary. Following a moment of silence to honor the passing of Justice Mary

Fairhurst (see more on page 48), several governors offered support for the idea of naming an APEX Award in her honor. The Awards Committee will explore the recommendation.

3 LGBTQ Experiences in the Legal System. The Board held a training ("the ethics of inclusion") and conversation with leaders from the QLaw Foundation and QLaw Association about the experiences, perspectives, challenges, and opportunities of being an LGBTQ legal practitioner.

4 RPC Amendment to Create a Financial Assistance Exception.

The Board approved a request from the Committee on Professional Ethics to submit an amendment to Rule of Professional Conduct (RPC) 1.8(e) to the Washington Supreme Court for consideration. Based on the ABA Model Rules of Professional Conduct, the amendment would permit lawyers to pay court costs and expenses of litigation on behalf of indigent clients, and to provide modest gifts for living expenses to indigent clients in limited circumstances.

5 Statement on Public Defense Workloads. The Board supported the Council on Public Defense's statement, to be used as a tool to assist public defenders and administrators in bringing concerns to their funders about workloads exceeding capacity due to the pandemic. The statement is based on a recent survey of private and public defense counsel and states: "Public defenders struggle to represent their clients because of a combination of a surge of newly filed cases, unresolved cases open for longer than average, backlogs of trials, and a push to re-open jury trials has resulted in overwhelming public defenders. Many lawyers have felony caseloads of over 100 open felonies."

MORE ONLINE

The agenda, materials, and video recording from this Board of Governors meeting (held virtually), as well as past meetings, are online here: www.wsba.org/about-wsba/who-we-are/board-of-governors.

 SAVE THE DATE

The next regular meeting is March 10-11 in Lacey. To subscribe to the Board Meeting Notification list, email barleaders@wsba.org.

6 2022 Legislative Priorities and WSBA-Sponsored Bills. The 2022 session of the Washington State Legislature convened Jan. 10 and runs through March 10. The Board Legislative Committee will meet at least weekly throughout the session; its priorities are supporting two Bar-request bills (two bills put forth by the Business Law Section); monitoring and taking appropriate action on legislative proposals related to the practice of law and administration of justice; and supporting legislative proposals approved by the Board under GR 12 constraints.

OTHER BUSINESS

The Board also:

- **Approved** changes to WSBA admissions policies to change the deadline for applicants to request an accommodation prior to the bar exam, to clarify how the admissions policies apply to reinstatement petitions, and to allow Bar staff to delete unsubmitted and incomplete (“abandoned”) applications in the online application portal after six months.
- **Heard** the Access to Justice Board’s annual report, including how the COVID-19 pandemic has highlighted and prioritized the urgency of dismantling unjust systems.
- **Heard** the Practice of Law Board’s annual report, including an update on a request to the Washington Supreme Court to authorize a Legal Regulatory Lab (Sandbox) to determine how to best regulate online legal service providers and alternative legal business models. 



Bracepoint Law, P.S. Welcomes Jonathan H. Keasey

Bracepoint Law, a premier Northwest entertainment law firm, is proud to welcome Jonathan Keasey, WGA screenwriter and attorney.

“When I returned to the Pacific Northwest from Los Angeles, to raise my children, I made it my mission to marry my unique experience as a studio writer and lawyer to elevate, empower and protect the immense talent pool in our region which deserves access and representation at the highest levels of Hollywood and beyond.” Jon Keasey

Jonathan joins a legal team dedicated to serving at the intersection of business, law, and creativity in the Northwest. Bracepoint Law represents filmmakers, recording artists, gamers and game companies, publishers, authors, athletes, media producers, and streaming platforms.

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LAWYER ANNOUNCEMENT



is pleased to announce that

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have joined the firm as **Associates**.

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LAWYER ANNOUNCEMENT



In Remembrance

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

Please email notices to wabarnews@wsba.org.

1997-98 WSBA PRESIDENT

Mary E. Fairhurst

#14784, 12/28/2021

A retired Chief Justice of the Washington Supreme Court, Mary Fairhurst was a legal luminary and ferocious advocate for justice. She served on the state Supreme Court from 2003 to 2020.

Last March, the WSBA honored Justice Fairhurst with a resolution about her distinguished career and impact on the state Bar and legal profession. Among other achievements, it recognized Justice Fairhurst's efforts to expand legal opportunities for women and minorities; to ensure access to justice for all Washingtonians; to always serve and look out for the public welfare; and, not least, to uphold the integrity of the legal profession through thousands of hours volunteered with the WSBA. Those included serving as the WSBA president from 1997-1998—as only the second woman to do so, at that time—as well as on the Board of Governors, Council for Public Education, and many other committees and initiatives.

Justice Fairhurst received the WSBA's APEX Award of Merit in 2011, which is the state Bar's highest honor given for long-

term service to the Bar and the public. "Throughout her career, Justice Fairhurst has worked to enhance opportunities for women and minorities in the profession and to ensure access to justice for low-income individuals and families," her nomination stated. "She worked on the constitutional amendment to increase the rights of crime victims while still honoring the constitutional rights of the accused. She organized the first statewide conferences on domestic violence. She planned and facilitated a youth violence summit and organized and moderated conferences dealing with sex offenders in the community."

Simply, Justice Fairhurst was a force of good for the WSBA and the extended legal community. She was also an unwavering beacon of love and compassion and a friend to all who came into her life.

Justice Fairhurst died surrounded by her family on Dec. 28, 2021, at age 64 after a years'-long battle with cancer.

MORE ONLINE >

When available, information about a celebration of life will be posted to www.wsba.org.

Richard R. Albrecht,
#2513, 12/28/2021

Grosvenor Anschell,
#9756, 9/4/2021

Charles William Bailey,
#5032, 12/10/2021

Stanley H. Barer,
#2775, 12/13/2021

Donald H. Bond,
#3215, 10/1/2021

Gene B. Brandzel,
#395, 10/18/2021

Timothy David Cantu,
#49298, 11/9/2021

Paul James Codd,
#3385, 8/30/2021

Patrick Donlan Coogan,
#3993, 10/26/2021

Tom H. Foulds,
#1960, 11/14/2021

Douglas R. Hartwich,
#1720, 9/29/2021

Donald J. Horowitz,
#7304, 1/14/2022

Harold Karlsvik,
#23026, 9/13/2021

George A. Leone,
#37544, 9/29/2021

Hon. J. Dean Morgan,
#2605, 12/3/2021

Charles Eugene Peery,
#2619, 8/29/2021

Robert Gregg Rodgers,
#13629, 8/31/2021

Suzanne Ellen Sarason,
#11955, 12/4/2021

James "Jim" Sloane,
#2994, 01/21/2021

Hon. David A. Steiner,
#14535, 11/2/2021

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Need to Know

NEWS & INFORMATION OF INTEREST TO WSBA MEMBERS

WSBA NEWS APEX Award Nominations Open

Do you know someone who achieved something amazing for their client, their community, or the legal profession over the past year? The WSBA is accepting nominations through March 15 for the 2022 APEX (Acknowledging Professional Excellence) Awards. Please fill out a nomination form, available at bit.ly/2022ApexNominations, and submit it to barleaders@wsba.org. Direct questions to Michael Kroner at michaelk@wsba.org or 206-727-8289 for more information.

Leaders Wanted

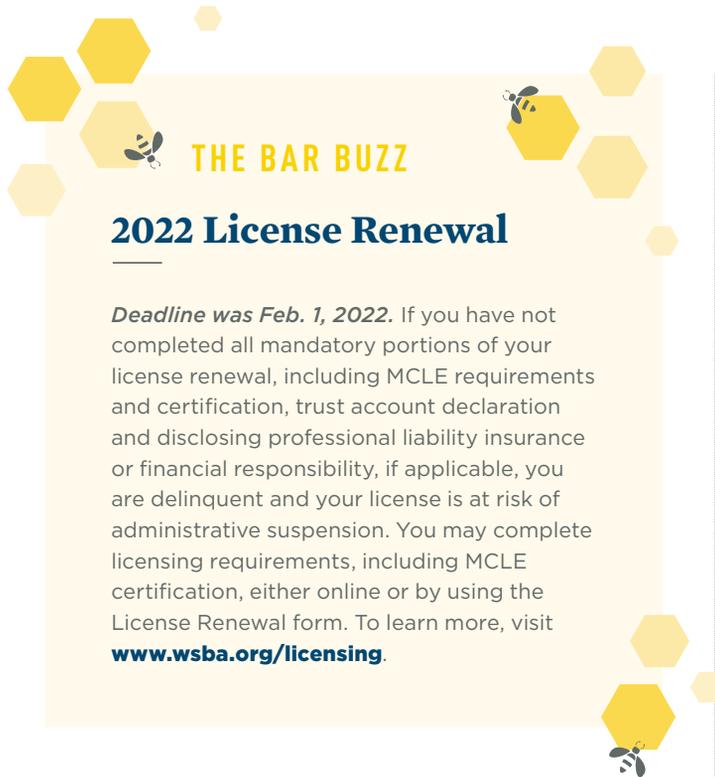
The annual WSBA volunteer application and selection cycle opens March 14. The WSBA, the profession, and the legal community greatly benefit from members like you! Join our dedicated, skilled, and knowledgeable volunteer community! More information at: www.wsba.org/connect-serve/volunteer-opportunities.

WSBA Board Feedback

Send your feedback to boardfeedback@wsba.org. Please note that all WSBA emails are subject to public records requests.

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.



THE BAR BUZZ

2022 License Renewal

Deadline was Feb. 1, 2022. If you have not completed all mandatory portions of your license renewal, including MCLE requirements and certification, trust account declaration and disclosing professional liability insurance or financial responsibility, if applicable, you are delinquent and your license is at risk of administrative suspension. You may complete licensing requirements, including MCLE certification, either online or by using the License Renewal form. To learn more, visit www.wsba.org/licensing.

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..

VOLUNTEER 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/connect-serve/volunteer-opportunities/act-as-custodian, or contact Darlene Neumann: darlene@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.

RESOURCES Bar Exam Proctors Needed

The WSBA is hiring up to 35 proctors to help administer the winter bar exam, Feb. 22-23 in Lynnwood. Proctors are paid a minimum of \$325 for an orientation and two full exam days. If you know anyone who might be interested, please have them contact admissions@wsba.org. (Please note: we typically avoid hiring lawyers or anyone with a close relationship to an applicant as proctors.)

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, microaggressions/bias, and

CONTINUED >



Need to Know

CONTINUED >

COVID-19 NEWS TO KNOW

race. Visit www.wsba.org/about-wsba/equity-and-inclusion/dei-resource-library.

Practice Guides Available

Access two practice guides—"The Law Firm Guide to Document Retention" and "The Law Firm Guide to Disaster Planning and Recovery"—as well as other law firm guides and templates at www.wsba.org/guides.

Work at the WSBA

The Washington State Bar Association currently has the following openings: disciplinary counsel - intake; and member wellness program clinical and outreach lead. To find out more and apply, please visit www.wsba.org/career-center/work-at-the-wsba.

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.

Career Consultation

Get help with your résumé, networking tips, and more—www.wsba.org/for-legal-professionals/member-support/wellness/consultation—or email wellness@wsba.org.

HAVE SOMETHING NEWSWORTHY TO SHARE?

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

Court Emergency Operations & Closures

The Washington Supreme Court has published a COVID-19 response page, which is a compilation of its emergency orders and court modifications: www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.COVID19.

Law Office Reopening Guide

The WSBA Coronavirus Response Task Force compiled recommendations for how to safely reopen a law office in Washington. Find the guide "Reopening Safely: A Guide for Washington State Law Offices," at www.wsba.org/docs/reopen.

Free Consultations and Practice-Management Assistance

The WSBA offers free resources and education on practice management issues. For more information, visit www.wsba.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.

ETHICS 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.

WSBA MEMBER WELLNESS

Telehealth is here!

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

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.

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.

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. 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.

QUICK REFERENCE Feb. 2022 Usury

The usury rate for February 2022 is 12%. The auction yield of the Jan. 3, 2022, auction of the six-month Treasury Bill was 0.223%. The interest rate required by RCW 4.56.110(3)(a) and 4.56.115 for February 2022 is 2.223%. The interest rate required by RCW 4.56.110(3)(b) and 4.56.111 for February 2022 is 5.25%. **BN**



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Former King County Superior Court Judge

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Former King County Superior Court Judge



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LARRY A. JORDAN
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STEVE SCOTT
Former King County Superior Court Judge

LINDA LAU
Former Appellate and Superior Court Judge



BRUCE HELLER
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Notices

DISCIPLINE & OTHER REGULATORY NOTICES

THESE NOTICES OF THE IMPOSITION OF DISCIPLINARY SANCTIONS

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

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

Disbarred

Souphavady Bounlutay (WSBA No. 30552, admitted 2000) of Seattle, was disbarred, effective 11/10/2021, by order of the Washington Supreme Court. Bounlutay's conduct violated the following Rules of Professional Conduct: 1.4 (Communication), 1.7 (Conflict of Interest: Current Clients), 1.15A (Safeguarding Property), 3.1 (Meritorious Claims and Contentions), 3.3 (Candor Toward the Tribunal), 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation).

In relation to her handling of settlement funds for clients in personal injury cases, the hearing officer recommended, and the Supreme Court ordered, that Bounlutay be disbarred following a hearing. Bounlutay was found to have violated the Rules of Professional Conduct by: 1) converting client settlement funds; 2) providing clients with false accountings, by misrepresenting to clients that Respondent had paid their medical liens and money owed to Provider A (Bounlutay's husband, a chiropractor), and by failing to inform clients that she had taken settlement funds designated for third parties; 3) representing Client A and Client B in Provider A's lawsuits against them when there was significant risk that the representation would be limited by Bounlutay's own personal interest, without gaining either client's informed consent, con-

firmed in writing; and 4) filing an answer in the litigation between Client A and Provider A in which Bounlutay falsely denied that Client A had failed to pay Provider A when Client A's case had settled, when Bounlutay knew the denial was false.

Francesca D'Angelo acted as disciplinary counsel. Mark Clayton Choate represented Respondent. Andre M. Penalver was the hearing officer. Diana Marie Dearmin was the settlement hearing officer. The online version of *Washington State Bar News* contains links to the following documents: Hearing Officer's Decision, Disciplinary Board Order Declining Sua Sponte Review and Adopting Hearing Officer's Decision, and Washington Supreme Court Order.

Resigned in Lieu of Discipline

Nathan W. Choi (WSBA No. 41610, admitted 2009) of Honolulu, HI, resigned in lieu of discipline, effective 11/12/2021. Choi agrees that he is aware of the alleged misconduct in disciplinary counsel's Statement of Alleged Misconduct and, rather than defend against the allegations, wishes to permanently resign from membership in the Association. The Statement of Alleged Misconduct reflects the following violations of the Rules of Professional Conduct: 3.3 (Candor Toward the Tribunal), 8.2 (Ju-

dicial and Legal Officials), 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation), 8.4(d) (Prejudicial to the Admin of Justice), 8.4(i) (Moral Turpitude, Corruption or Disregard of Rule of Law), 8.4(j) (Violate a Court Order), 8.4(l) (ELC violation), 8.4(m) (Violate the Code of Judicial Conduct).

Choi's alleged misconduct, as stated in disciplinary counsel's Statement of Alleged Misconduct, related to his candidacy with King County Elections for the office of Court of Appeals Judge in 2017 and for a position on the Washington Supreme Court in 2018, and for actions related to his divorce. Choi's alleged misconduct includes: 1) as a candidate for the Court of Appeals, failing to comply with the applicable filing and disclosure laws and regulations and/or failing to file the reports required by law; 2) failing to respond to written requests for a response to a grievance; 3) as a candidate for the Supreme Court, failing to comply with applicable filing and disclosure laws and regulations, and/or failing to file the reports required by law; 4) completing and filing the Excise Tax Affidavit that falsely stated that the transfer to Choi's girlfriend was exempt from tax because it was to separate community property; 5) transferring real property to Choi's girlfriend for significantly less than its value in order to avoid any judgment entered by the dissolution proceeding's special master and/or any obligation owed to his ex-wife, and/or to avoid payment of excise tax; 6) transferring real property to Choi's girlfriend for significantly less than its value which resulted in Choi's ex-wife filing a lawsuit against him to undo the transaction; 7) filing the declaration of Choi's mother, purportedly signed by her in Honolulu, HI, when the statement was false; 8) filing the dissolution petition which contained false statements; 9) filing the affidavit of service stating that he had personally served Choi's ex-wife's counsel with the notice of bond, when the statement was false; 10) providing and filing financial statements that failed to disclose

a bank account in Hawaii containing over \$128,000; 11) registering vehicles in Oregon using a fake Oregon address to avoid taxes on the vehicles he purchased; 12) willfully disobeying the requirement in the Decree of Dissolution that he hire a CPA to prepare all tax returns from 2009 through 2015; and 13) failing to timely file and pay federal, Hawaii, Washington, and Bellevue taxes.

Debra Slater and Benjamin J. Attanasio acted as disciplinary counsel. Randolph Petgrave III was the hearing officer. Karen A. Clark was the settlement hearing officer. Nathan W. Choi represented himself. The online version of *Washington State Bar News* contains a link to the following document: Resignation Form of Nathan W. Choi ELC 9.3(b)).

Suspended

Kevin L. Johnson (WSBA No. 24784, admitted 1995) of Olympia, was suspended for 12 months, effective 11/23/2021, by order of the Washington Supreme Court. Johnson's conduct violated the following Rules of Professional Conduct: 1.5 (Fees), 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records), 1.16 (Declining or Terminating Representation), 3.1 (Meritorious Claims and Contentions), 3.4 (Fairness to Opposing Party and Counsel).

In relation to his handling of his trust account and a litigation matter, Johnson stipulated to suspension for: 1) failing to deposit Client A's advanced fees into a trust account; 2) removing funds from the trust account for use on behalf of Client A, when Client A had no funds in the trust account and by using another client's funds on behalf of Client A; 3) removing funds from the trust account without giving notice to the client through a billing statement or other document; 4) making cash withdrawals from a trust account; 5) failing to provide a written accounting to a client after remov-

ing funds from a trust account; 6) failing to maintain a check register and client ledgers; 7) failing to reconcile a check register to the bank statements and by failing to reconcile a check register to client ledgers; 8) failing to maintain client funds in a trust account, by disbursing more funds from the trust account than the clients or third persons had on deposit, and by using one client's funds on behalf of another; 9) filing frivolous counterclaims in a litigation matter; and 10) failing to return the property of a former client in the same litigation matter.

Francesca D'Angelo acted as disciplinary counsel. Kurt M. Bulmer represented Respondent. Diana M. Dearmin was the hearing officer. William J. Carlson was the settlement hearing officer. The online version of *Washington State Bar News* contains links to the following documents: Disciplinary Board Order Approving Stipulation, Stipulation to 12 Month Suspension, and Washington Supreme Court Order.

Douglas Holmes Prestrud (WSBA No. 29913, admitted 2000) of Seattle, was suspended for six months, effective 11/11/2021, by order of the Washington Supreme Court. Prestrud's conduct violated the following Rules of Professional Conduct: 1.1 (Competence), 1.3 (Diligence), 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records), 8.4(I) (ELC violation).

In relation to his handling of fees and to his representation of a client in a family law matter, the hearing officer recommend-

ed, and the Supreme Court ordered, that Prestrud be suspended following a default hearing. Prestrud was found to have violated the Rules of Professional Conduct by: 1) failing to deposit fees paid in advance into a trust account; 2) failing to file a motion for reconsideration timely, failing to file the motion electronically, and/or by basing the motion for reconsideration on improper grounds; 3) failing to promptly respond to a request for a response to the grievance, and/or by failing to provide a full and complete response to disciplinary counsel's inquiries and/or subpoena duces tecum for information relevant to a grievance; and 4) failing to maintain a copy of the fee agreement.

Chris Chang and Sachia Stonefeld Powell acted as disciplinary counsel. Douglas Holmes Prestrud represented himself. Randolph O. Petgrave III was the hearing officer. The online version of *Washington State Bar News* contains links to the following documents: Hearing Officer's Decision, Disciplinary Board Order Declining Sua Sponte Review and Adopting Hearing Officer's Decision, and Washington Supreme Court Order.

Reprimanded

Lori S. Haskell (WSBA No. 15779, admitted 1986) of Seattle, was reprimanded, effective 11/08/2021, by order of the chief hearing officer. Haskell'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, Haskell stipulated to a reprimand for: 1) failing to maintain a complete, accurate, and current check register and client ledgers for the trust account; 2) failing to reconcile the trust account; 3) failing to promptly pay or deliver funds that clients

MORE ONLINE

Access further details of the notices by clicking the links in the online version:

www.wabarnews.org

CONTINUED >

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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
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WASHINGTON STATE
BAR ASSOCIATION



Notices

CONTINUED >

and third persons were entitled to receive; 4) retaining Haskell's own funds in the trust account and by failing to hold client property separate from Haskell's own property; 5) disbursing more funds than clients or third persons had on deposit in the trust account and by using one client's funds on behalf of another; and 6) disbursing funds from the trust account before deposits cleared the banking process.

Henry Cruz acted as disciplinary counsel. Kevin M. Bank represented Respondent. The online version of *Washington State Bar News* contains links to the following documents: Order Approving Stipulation to Reprimand, Stipulation to Reprimand, and Notice of Reprimand.

Walter O. Peale III (WSBA No. 7889, admitted 1977) of Shoreline, was reprimanded, effective 10/06/2021, by order of the hearing officer. Peale's conduct violated the following Rules of Professional Conduct: 1.5 (Fees), 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records), 8.4(I) (ELC violation).

In relation to his actions while on disciplinary probation and his handling of his trust account, following a hearing the hearing officer recommended that Peale be reprimanded for: 1) failing to provide trust account records and fee agreements, as required by the terms of a 2017 probation order; 2) failing to fully and completely respond to the Office of Disciplinary Counsel's inquiries in a 2019 grievance and failing to completely and accurately respond to a subpoena duces tecum; 3) failing to maintain accurate, current, and complete trust account records; 4) failing to properly and accurately reconcile his trust account records; and 5) failing to deposit fees paid in advance by clients A, B, and C into his trust account.

Chris Chang and Kathy Jo Blake acted as disciplinary counsel. Kevin M. Bank represented Respondent. James Smith was the hearing officer. William E. Fitzharris Jr. was the settlement hearing officer. The online version of *Washington State Bar News* contains links to the following documents: Hearing Officer's Decision, Order Modifying Hearing Officer's Decision, Disciplinary Board Chair Order Declining Referral of Sua Sponte Review Consideration, and Notice of Reprimand.

Gwyn Elizabeth Staton (WSBA No. 9419, admitted 1979) of Seattle, was reprimanded, effective 8/18/2021, by order of the chief hearing officer. Staton's conduct violated the following Rules of Professional Conduct: 1.7 (Conflict of Interest: Current Clients), 1.8 (Conflict of Interest: Current Clients: Specific Rules).

In relation to her representation of Client A in a property distribution matter and subsequent dispute over debts owed to Staton by Client A, Staton stipulated to a reprimand for: 1) representing Client A while simultaneously representing Client B in connection with a hearing when there was significant risk that one client's representation may be materially limited by the other client's representation, and by continuing to represent Client A when there was significant risk that the representation may be materially limited by Staton's personal interests as Client A's creditor, customer, and having claims against Client A for theft and/or conversion; and 2) engaging in business transactions with Client A, including a promissory note, deed of trust, and subsequent loans to Client A, when the terms were not fair and reasonable and were not fully conveyed in writing, and when Client A did not give informed consent confirmed in writing as to the essential terms of the transactions.

Jonathon Burke and Marsha Matsumoto acted as disciplinary counsel. Anne Seidel represented Respondent. The online version of *Washington State Bar News* contains links to the following documents: Order on Stipulation to Reprimand, Stipulation to Reprimand, and Notice of Reprimand. **BN**

MORE ONLINE

Access further details of the notices by clicking the links in the online version:

www.wabarnews.org 

Thank you for renewing your commitment to 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.

DONATIONS TO THE



Campaign for Equal Justice fund 40+ legal aid programs like TeamChild, Northwest Immigrant Rights Project, Legal Counsel for Youth & Children and Columbia Legal Services. Your donation advances civil justice for youth and families and all who suffer the injustices of poverty and systemic racism.

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(See, e.g.):

- *Ground Zero v. United States Navy*, 860 F.3d 1244 (9th Cir. 2017)
- *Yates v. Fithian*, 2010 WL 3788272 (W.D. Wash. 2010)
- *City of Seattle v. Menotti*, 409 F.3d 1113 (9th Cir. 2005)
- *State v. Letourneau*, 100 Wn. App. 424 (2000)
- *Fordyce v. Seattle*, 55 F.3d 436 (9th Cir. 1995)
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Is pleased to announce

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Lori joined the firm in October. Her 27 years of practice in the complex litigation arena fits well with KVL's philosophy of service and strong advocacy. Prior to joining the firm, Lori was a partner with Heinson & DeDobbelaere.

Lori has handled a large variety of cases including premises liability, sex abuse, business disputes, landlord tenant, wrongful death, dog bites (and other animal related matters), RICO, pesticide overspray, defamation, motor vehicle accidents, mold exposure, asbestos, HOA matters and construction defects. She serves as an arbitrator and is on the panel for the Arbitration Services of Portland. She has handled appeals in the Oregon Court of Appeals, Oregon Supreme Court, 9th Circuit Court of Appeals and the US Supreme Court.

Lori is licensed to practice in state and federal courts in Oregon and Washington.

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SMITH ALLING, PS

Is pleased to announce that

A. Scott Marlow

and

Andrea H. Brewer

have become Shareholders of the firm.

Mr. Marlow practices primarily in the area of family law, and joins us after sixteen years of practice.

Ms. Brewer has been an Associate of the firm for four years, and will practice primarily in the areas of estate planning and administration, litigation, and elder law.

Gabriel Hinman

has become an Associate of the firm.

Mr. Hinman joins us after serving four years as a law clerk to the Court of Appeals (Division II) and the State Supreme Court.

Robert L. Michaels

has retired from the firm after 37 years of practice.

Mr. Michaels has been a Shareholder of the firm since 2000, and has practiced primarily in the areas of estate planning, wills, probate, and elder law. He has been an extraordinary asset to the firm and his clients, and we wish him happiness in retirement.

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Leslie J. Garrison

BAR NUMBER: 18040

I am a family law Collaborative attorney and mediator. I also work part time contracting with the Office of Public Defense. My non-work life is filled with family, hiking, biking, and learning to paddleboard with my dog.

If you could change one thing about the legal system, what would you change?

It would be that attorneys actually help their clients avoid court whenever possible. And when in court, that judges actually hold attorneys accountable for their actions.

How is being a lawyer different from the way you thought it would be?

I didn't expect to meet and work with such a variety of interesting people.

How did you become interested in your practice area?

My dear friend, Laura Weight, introduced me to Collaborative Law while I was still a public defender. Who knows where I would be now if it weren't for her!

What is your best piece of advice for someone who's just entered law school?

I am passing on the advice I was given when I started, since I think it helped keep me motivated to study: "There are too many lawyers, but not enough good ones." **BN**



What did you eat for breakfast this morning? Blueberry pancakes.

What is one thing your colleagues may not know about you? I worked on the U.S. Air Force base in Adana, Turkey.

What is your favorite smell? Cinnamon.

What is your favorite podcast? *The Writer's Almanac*.

What book have you read more than once? *Master and Margarita* by Mikhail Bulgakov.

What is the last thing you watched on television? *Queer Eye*, or was it *Jeopardy*?

What is the best fictional representation (TV, movie, book) of a lawyer? Atticus Finch.

What is your best random fact that you would share with others at a party? I raised three boys without a TV in our house.

What did you think was cool when you were younger that makes you cringe to think about now? Hand-embroidered pockets on my jeans.

Staff illustration

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