TIMES (AND TESTAMENTS) THEY ARE A-CHANGIN’

What you need to know about Washington’s new Uniform Electronic Wills Act / p. 30
"Deep in the human heart; The fire of justice burns."

WILLIAM WALLACE
FINALLY,
LEGAL MALPRACTICE
INSURANCE MADE
EASY.

“With ALPS, renewal always brings peace-of-mind! Thanks to ALPS for continuing to do what they do.”

— William D. Pickett, The Pickett Law Firm, Yakima, WA

★ Trustpilot
★★★★★

Proud to be endorsed by the Washington State Bar Association. Apply now and get back to what matters most.

www.alpsinsurance.com/washington
When I asked him to reschedule, he asked how he could help.

I’ve never been the best at remembering dates. My wife jokes that I would forget my own birthday if she didn’t write it down for me. In fact, it wasn’t until I saw her reminder next to my morning coffee that I realized I had forgotten to pay our insurance. After calling our provider, I learned that our coverage had been cancelled and could not be reinstated. When I asked my wealth advisor, Jim, if we could reschedule our meeting given the circumstances, he responded with: “We’ll handle it”. Within a few days he had secured us new policies for our vehicles, home and investment properties. I found out later that he had even put down his company card to expedite the process. Jim isn’t in the insurance business. He just wanted to ensure we had coverage. For us that was monumental, but for Jim, he was just taking care of the little things.

— Adrian, West Hollywood
On the Docket
WASHINGTON STATE BAR ASSOCIATION • SEPT. 2022

FEATURES

28
MBA SPOTLIGHT
Northwest Indian Bar Association

Q&A WITH JESSICA PEYTON ROBERTS
PLUS • DEI Resource of the Month: Belonging is Created / p. 29

36
The No Surprises Act: A Federal Cure for Unexpected Medical Bills

BY WILLIAM CORNELL AND NAOMI AHSAN

What the Uniform Electronic Wills Act Changes About Wills in Washington

30
BY SHERRY BOSSE LUEDERS

41
Whatever Doesn’t Kill You ... Can Make You A Better Lawyer

Reflections on living and practicing law with mental illness

BY AARON D. PAKER

44
Strategies for Converting Your Practice Into a Business: A Failure to Plan is a Plan to Fail

BY CHRISTOPHER T. ANDERSON

48
Answers to Your Questions About Amended APR 11

New anti-bias CLE requirement as of Sept. 1 does not increase required number of ethics credits

BY TODD ALBERSTONE

COLUMNS

4
Editor’s Note
A Season of Transitions
BY KIRSTEN ABEL

10
The Bar in Brief
Reflections on the Bar Exam: The Only Indicator of Competence?
BY TERRA NEVITT

12
President’s Corner
Thank You and Farewell for Now
BY JUDGE BRIAN TOLLEFSON (RET.)

15
Treasurer’s Report
Coming to the End of Fiscal Year 2022
BY BRYN A. PETERSON

16
Ethics & the Law
Disqualification: The ‘Red Card’ of Litigation Ethics
BY MARK J. FUCILE

20
Write to Counsel
Coach the Court: Writing Tips from the Bench
BY BENJAMIN S. HALASZ

24
From the Spindle
Recent Significant Cases Decided by the Washington Supreme Court
BY BRYAN HARNETIAUX AND VALERIE MCOMIE

ESSSENTIALS

6
Inbox

8
NWSidebar: There’s More on the Blog

50
On Board

52
Need to Know

54
In Remembrance

57
Discipline & Other Regulatory Notices

58
Marketplace of Professionals

62
Classifieds

64
Beyond the Bar Number: Michaela Murdock
A Season of Transitions

Many things are coming to an end this month—the Board of Governors’ ETHOS bar structure study process (see page 52), Judge Brian Tollefson’s term as WSBA president (see page 12), Governor Bryn Peterson’s term as WSBA treasurer (see page 15), the really good Seattle weather, triathlon season, and my dog’s almost daily supply of frozen treats.

But fear not, this issue has something worth reading for everyone (except, perhaps, my dog). This month’s cover story discusses the Washington Uniform Electronic Wills Act and the new requirements for executing, filing, and storing electronic wills (see page 30). MCLE Board Chair Todd Alberstone answers questions about the recent amendment to APR 11 to now provide that one of the three required MCLE Ethics credit hours per reporting period must relate to equity, inclusion, and mitigation of bias in the legal profession (page 48). WSBA member Aaron Paker shares his story of learning to live with mental illness and how that journey has made him a better lawyer (page 41). Ethics guru Mark Fucile explains lawyer disqualification (page 16). And Write to Counsel author Ben Halasz interviews a Washington Court of Appeals judge and comes away with tips for writing a persuasive brief (page 20).

Also in this issue: an article detailing the federal No Surprises Act (page 36), a newly launched regular feature called the DEI Resource of the Month (page 29), a Beyond the Bar Number feature on Walla Walla lawyer Michaela Murdock (page 64), and more. Oh, and if you’d like to see your own face beautifully illustrated on the last page of an issue of Bar News, let us know. We would love to send you a questionnaire. EN

WRITE A BLURB

Send Us Your Book Review

What’s that one book you can’t stop raving about, the thing that everyone just has to read? We want to help you spread the word. Submit a review of no more than 150 words on any genre (law-related books welcome but not mandatory) to wabarnews@wsba.org or here: https://forms.gle/FDfbqdDbuC75ahs17.
YOU CAN’T WIN WITHOUT A GOOD ASSIST

Alexander G. Dietz
Associate, Tacoma Office

“Great cases require careful planning, hard work, and support for a righteous cause. Our clients provide the righteous cause and can rely on me to provide the support, planning, and hard work required to obtain justice.”

Lesley A. O’Neill
Associate, Seattle Office

“Institutional abuse flourishes in the darkness. I’m tenacious and won’t stop digging on behalf of our clients until the full truth is uncovered. I’m proud to work on behalf of survivors.”

Catastrophic Injury • Medical Malpractice • Sexual Abuse

800.349.PCVA
www.pcva.law
GR 12.2(c) states that the WSBA is not authorized to "(1) Take positions on issues concerning the legal profession or improving the quality of legal services. (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.

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.

Systemic Racism Is Long Gone

Regarding Paul Majkut’s letter concerning systemic racism (“Consider the Evidence,” Bar News, June 2022), he does not define systemic racism. Therefore, I will offer a definition.

Systemic racism is an organized structure of laws, rules, regulations, and institutional practices that enforce racism throughout the entire society. We have none of that today.

Instead, we have systemic anti-racism. There is the Equal Employment Opportunity Commission, fair housing laws, and a line of court cases exemplified by Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), and Shelley v. Kraemer, 334 U.S. 1 (1948), striking down racist discrimination. Shelley v. Kraemer nullified racist restrictive covenants in deeds by forbidding state courts from enforcing them. That was in 1948. Most people alive today were not even born then. We are a long way past any systemic racism.

It has been argued that disparity of income is evidence of racism. But there are other more likely reasons that explain disparity of income such as personal preferences for various jobs, aptitudes, work ethic, and cultural values.

There is disparity of income in the United States among racial groups. According to [recent PEW Research Center and] U.S. Census Bureau...
figures, there are racial groups of Americans who have higher median household incomes than white Americans. They include Indian (India) Americans, Filipino Americans, Japanese Americans, Chinese Americans, Pakistani Americans, and Korean Americans. So much for “white supremacy.”

African Americans are lowest at a median household income of $45,438, according to the Census Bureau figures. Thai Americans, Bangladeshi Americans, Nepali Americans, and Hispanic Americans are all ahead of African Americans. But does this mean that these groups of people of color are all practicing systemic racism against Black people? Probably not.

I am a white American and I left the practice of law some years ago to return to the family farm. My income fluctuates from year to year and often does not meet the national average. But does this mean that the groups ahead of me are practicing systemic racism against me? Probably not.

Income disparities alone do not support the argument for systemic racism.

Tom Stahl
Ellensburg

LexFin makes it easy for your clients to pay

Get paid in full and on time
LexFin financing lets clients make payments over time – while you get paid when due.

Give your clients a better option
Over 75% of family law clients introduced to LexFin apply for financing.

Learn more about our family law financing services at LexFin.com
NMLS ID 2023310
The State of Rural Practice in Washington: Urgent Needs for Moderate Means Program

Finding affordable legal services in Washington state is challenging; the problem only intensifies in Washington’s rural counties. Consider the WSBA’s Moderate Means Program (MMP), a statewide program that matches moderate income [...] nwsidebar.wsba.org

How the IRS Views Structured Legal Fees

All lawyers pay taxes and know that legal fees are income. They are ordinary income and even subject to self-employment taxes. But what about timing? Much in the tax law is about timing. A [...] nwsidebar.wsba.org

A Reservation Attorney’s Thoughts on the Castro-Huerta Decision

Several members of the U. S. Supreme Court deem themselves originalists or strict constructionists whose duty it is to decide cases based upon constitutional intent at the [...] nwsidebar.wsba.org

William N. Holmes, CPA / ABV / CVA / CFE

Forensic Accounting • Economic Damages
Business Valuation • Accounting and Tax Malpractice
Litigation (Plaintiff/Defense) • Full Service Public Accounting

7128 SW Gonzaga Street, Suite 100 • Portland, OR 97223
503.270.5400 • www.pdxcpas.com
WE ARE NOW OFFERING FREE REMOTE DEPOSITIONS FOR ALL PARTICIPATING PARTIES!

- Prior to the deposition, we will test the connection for all participants
- We set up the entire deposition the day of the assignment
- We monitor and troubleshoot your deposition from start to finish
- Our Remote Certified Technicians have decades of experience and a total of 3 Emmy® nominations

(800) 528-3335 Schedule@NaegeliUSA.com NaegeliUSA.com
You are financially responsible for all services requested excluding streaming fees.
Reflections on the Bar Exam: The Only Indicator of Competence?

Last month I served as the presiding officer for the Washington State Bar Exam, held (for the first time) in Yakima. Examinees filled the hotels and restaurants surrounding the conference center where the exam was being held and the anxious vibe was even more noticeable to me than the 100-plus-degree temperatures. As I greeted one examinee in the elevator, I told him that I still remembered when I took the bar in both Washington, D.C., and at the Meydenbauer Center in Bellevue. He responded with what I perceived to be sarcasm that he was glad to hear that he would still remember this experience for years to come.

Putting on the bar exam—in the midst of a pandemic no less—is a huge undertaking. It takes months of preparation, the full-time energy of more than 20 staff during the week of the exam, and the support of approximately 40 proctors. It also takes a really big room! Last month we welcomed over 600 applicants to the Yakima Convention Center. As I observed the exam over the course of two days, I often felt overwhelmed with empathy for the folks in the room; sitting for an exam that will impact their ability to begin their legal careers in Washington and—for some—to pay back their law school loans.

Washington is one of 41 jurisdictions that administers the Uniform Bar Exam (UBE) created by the National Conference of Bar Examiners (NCBE). NCBE describes the UBE as being “designed to test knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law.”¹ The WSBA supports the passing of a bar exam prior to licensure as a way to ensure a competent, ethical, and diverse legal profession.² NCBE is currently developing its NextGen bar exam. This project began in 2018 with the creation of a Testing Task Force to engage in a three-year study to identify the foundational knowledge and skills that should be assessed as part of the bar exam. In January 2021, the task force’s recommendations³ were approved by the NCBE Board of Trustees. This new exam is still a few years out, but ultimately it will focus on eight foundational concepts and principles (civil procedure, contract law, evidence, torts, business associations, constitutional law, criminal law, and real property) and seven foundational skills (legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and management). Overall, the test is said to focus less on memorization and more on legal skills.⁴ The NextGen exam may come with other changes as well, including the possibility of tests being administered at computer testing centers. NCBE also continues to work to eliminate bias in developing the bar exam. All of this is promising in terms of having a fair exam that serves our goal of protecting the public.

But what about the applicants who couldn’t sit for the exam because they tested positive for COVID-19? What about the people whose laptops fail in the middle of the exam? What about the competent, hardworking folks who simply struggle to demonstrate their knowledge through a standardized test?

The bar exam seems to evoke strong feelings for many of us. As I wrote in my June 2021 column, when the Washington Supreme Court granted diploma privilege for the summer 2020 exam in recognition of a global pandemic and national civil unrest, the reaction from the legal community was intense. Many worried that we couldn’t safeguard the public without some sort of competency assessment, while others applauded the decision and questioned whether there is any proof that the bar exam is a reliable indicator of competency. Attorney Jordan Couch, now a member of the WSBA Board of Governors, wrote in 2020 that there is little to no empirical evidence linking bar-exam passage with an individual’s ability to practice law and, worse, “there is
substantial data and historical precedent to indicate that the purpose and effect of the bar exam is to prevent people of color, women, and the non-wealthy from entering our profession.\footnote{2}

This impassioned conversation has far outlasted diploma privilege, and it ultimately led the Washington Supreme Court to form the Bar Licensure Task Force\footnote{6} to do a much deeper analysis. This process too is supported by the WSBA. In its “Resolution in Support of a Bar Exam to Ensure a Competent, Ethical and Diverse Legal Profession,” the Board of Governors voiced support for the Bar Licensure Task Force’s work to “examine current and past bar examination methods, passage rates, and alternative licensure methods, assess disproportionate impacts on examinees of color and first generation examinees, consider the need for alternatives to the current bar exam, and analyze those potential alternatives.”\footnote{7} In that resolution, the Board further articulated its support for a bar exam and its disapproval of diploma privilege as an alternative to the bar exam. It also voiced support for review and potential changes to the bar exam to “improve the bar exam as a tool to ensure the competent and ethical practice of law and to ensure there is no discriminatory effect on examinees of color and first-generation examinees.”\footnote{8}

What I appreciate about the resolution is the acknowledgement that there may not be one right way to gauge the competency of every bar applicant. There are alternatives out there to examine. For example, there is a skills-course/supervised-practice pathway in Canada\footnote{9} and a performance-based pathway in New Hampshire.\footnote{10}

Our neighbor to the south, Oregon, is a few years ahead of us on the journey toward alternative exam pathways. The Oregon Supreme Court has approved in concept two additional routes in addition to the traditional bar exam—experience or supervision, in essence.\footnote{11} The former involves completing an approved, standard curriculum in law school (based on core competencies necessary to provide effective and responsible legal services) with a capstone project/portfolio assessed by the Oregon State Bar Board of Bar Examiners; the latter would involve an applicant to apprentice 1,000 to 1,500 hours with a qualified Oregon-licensed attorney doing a series of qualified legal tasks.

As I have followed closely the work being done in Oregon, I have been impressed by the dual focus on consumer protection and equity in admissions. More diverse pathways to licensure means a more diverse legal community, which means more people able to find legal services to suit their needs. In a recent CLE, the former chair of Oregon’s Alternatives to the Bar Exam Task Force, Joanna Perini-Abbott, noted that no pathway to licensure is perfect or free from disparate impact, which is why the Oregon task force found it critically important from an equity lens to provide more than one pathway and to let aspiring lawyers decide what is right for them.

Please stay tuned, as I am confident there will be ample opportunities to learn more and weigh in as the court considers how to move forward. And to all those that took the July exam, I’m rooting for your success!”\footnote{12}
Thank You and Farewell for Now

I have good news and bad news for you, my readers. First, the bad news: This is my last President’s Corner article. Now, the good news: This is my last President’s Corner article. It has been both a pleasure and a serious obligation to use this coveted space in Bar News. I sincerely hope my thoughts have enriched your time reading my writing.

I want to thank all who have worked with me, contacted me, and helped me to have a mostly positive year as your Bar president. Your names are too many to list individually given all I want to say in this last piece, but you know who you are. I sincerely thank each and every one of you.

At the beginning of my presidency, I was optimistic that I could pursue my agenda of “common ground and common purpose” and focus more on the needs of the members who pay for the majority of what the WSBA spends its discretionary dollars on. Obviously not all money spent on members is within the Board of Governors’ control—consider regulatory and disciplinary expenses. But then other forces outside the Bar Association redirected my and the Board of Governors’ attention and thus my goal took a back seat.

Here is a case in point: the ETHOS (Examining the Historical Organization and Structure of the Bar) process. The last few years have seen another group of cases in federal courts around the country challenging the constitutionality of integrated bar associations like ours that undertake both mandatory/regulatory work and also non-mandatory but often laudable work. The controlling question is whether mandatory-integrated bar associations can force all of their members to be a part of the mandatory organization that promotes certain non-germane activities.

Because of those cases, in 2021 the Washington Supreme Court directed the Board of Governors to, once again, restudy its structure. The Supreme Court asked that the WSBA answer three questions: (1) Does current federal litigation regarding the constitutionality of integrated bars require the WSBA to make a structure change now? (2) Even if the WSBA does not have to alter its structure now, what is the contingency plan if the U.S. Supreme Court does issue a ruling that forces a change? (3) Litigation aside, what is the ideal structure for the WSBA to accomplish its mission?

The Board of Governors chose to undertake this task by having seven full-day meetings to do the work in a manner suggested by one Board member and supported by Bar staff time. This was, and is, a tremendous effort in terms of WSBA staff time, resources, and Board of Governors volunteer time and attention. And it was in addition to the six regularly scheduled Board of Governors meetings this fiscal year (for a total of 13 meetings).

So rather than focusing on what didn’t happen—the Board of Gov-

ernors having voted to retain the WSBA’s integrated structure, and recommending no major changes to the WSBA’s structure—I have a few suggestions for the Board of Governors moving forward now that the ETHOS process is nearly complete.

First, refocus on the WSBA’s mission statement. Here it is again: “The mission of the Washington State Bar Association is to serve the public and the members of the Bar, to ensure the integrity of the legal profession, and to champion justice.” In my opinion, the most important phrase is: “to serve the public and the members of the Bar.” Notice that there are no qualifiers like “some” or “few.” Every program, policy, department, etc., should have that select phrase as the paramount focus. It does not.

Second, adopt the business project-management model called the “Working Together Management System” used by successful businesses managers, such as Alan Mulally. This management system focuses on collaborative management. Those “working together” principles can help the Board of Governors analyze its approach to almost all projects or programs. Reading more about this system, more fully explained in the book cited in the endnotes, should be mandatory reading for every governor. This goes in the “virtual” suggestion box.

Third, with regard to the “People first—everyone is included” principle from collaborative management above, it’s important for the Board of Governors to focus more on the members and less on themselves. In other words, look outward and not inward. I realize there are different philosophies about what is better, looking inward versus looking outward. My point, however, is that over the five years of my involvement with the Board of Governors, there has been enough focus on the internal operations of the WSBA and its different silos. Now is the time to refocus on the members and the public with a view to improving services and programs that benefit more, not fewer, individuals and groups. This too will go into the “virtual” suggestion box.

Fourth, one of the principles the WSBA keeps repeating is the phrase “diversity, equity, and inclusion.” I am aware that the phrase has different meanings to different groups. Regardless, how about applying that phrase as a method to enhance participation in the volunteer needs of the WSBA? Currently, the
WSBA has more opportunities (vacancies) than volunteers to fill available volunteer positions. Several WSBA committees and boards are struggling to fill some spots.

Volunteers at the WSBA, including the Bar Association president, are uncompensated for their time because they are volunteers. What is the solution to attracting and retaining volunteers? Might I suggest some ideas? How about making it easier to volunteer? How about reducing the barriers to participation? Would you volunteer more if you received free CLE credits? How does the WSBA demonstrate meaningful appreciation or recognition? Members of any organization want to feel appreciated, respected, listened to, and valued. Since volunteer participation is down, it’s time for the Board of Governors to develop volunteer engagement strategies and reverse that trend before there is an irreversible decline. I’m confident that our Bar staff is eager for Board of Governors leadership to take up this important endeavor.

Improving the willingness to participate in elections for the Board of Governors is also especially important. When I ran for WSBA governor in 2017, it was a five-way race for my district. I haven’t seen that type of participation in any race since. I am concerned that busy legal professionals are aware of what the Board of Governors has been focusing on over the past few years and find little value in the agendas for them or their constituents. Is it time to reevaluate what the Board of Governors spends its valuable time and attention on?

Each person serving on the Board of Governors should explore the idea of making quarterly reports of their activities to let everyone in their district know what a governor is doing as an ambassador and liaison. This used to happen, and admittedly it is time consuming if the governor is truly fulfilling those roles. But it is enlightening, helpful, and productive, nonetheless.

Fifth, district governors should have full access to their constituents’ email addresses. Is it because some legal professionals have expressed concern that they do not support having their email addresses released to the legal profession or the public? There are many ways to both protect privacy and enhance communication between a governor and constituents. Consider asking each member to have a public email address devoted solely to informal WSBA communications.

Finally, and related to almost all the points above, I hope that the Board of Governors will consider adopting a real “benefit-cost” review of almost every part of the organization. This BCA (Benefit-Cost Analysis) has not been part of the ETHOS structure study. I realize that this is not an easy ask. It will require hiring an outside organization that specializes in such work. The Board of Governors, the staff, the members, and the public deserve to know what programs and services the WSBA has that are meeting the WSBA mission statement, and I believe this methodology is the best approach.

Thank you to all. It’s been a great year to be president of the WSBA, and with my virtual “suggestion box” full to the brim, it’s time to welcome your incoming president, Dan Clark, and support him as he navigates the volunteer waters in his own way.

Welcome aboard, Dan!

NOTES

2. Facts and data
3. Compelling vision, comprehensive strategy, and relentless implementation
4. One plan—propose a plan, positive, “find-a-way” attitude
5. Clear performance goals
6. Respect, listen, help, and appreciate each other
7. Everyone knows the status and areas that need special attention
8. Emotional resilience—trust the process

SPEEDING TICKET?
TRAFFIC INFRACTION?
CRIMINAL MISDEMEANOR?

Keep it off your record,
Keep insurance costs down

Jeannie P. Mucklestone, P.S. INC.
PO BOX 565
Medina, Washington 98039
(206) 623-3343
jeannie@mucklestone.com
www.mucklestone.com

• Successful Results
• Extensive experience
• Former Judge Pro Tem in King County
• Featured in Vogue magazine as a top lawyer for women in Washington
• Front page of Seattle Times
  “Drivers fighting tickets and winning”
• All credit cards accepted

Employment • Healthcare • Personal Injury • Wrongful Death
Trust & Estate Litigation • Qui Tam • Civil Rights • Business Disputes

SAM SMITH, ANNE FOSTER, AND JAIMEE KING
are proud to announce the formation of their new firm.

www.smithfosterking.com
503.567.7100

Original artwork designed by students at Chapman Elementary School in Portland, Oregon.
Coming to the End of Fiscal Year 2022

First and foremost, I would like to publicly recognize WSBA Advancement Department Director Kevin Plachy for serving as the interim Executive Leadership Team liaison to the Budget and Audit Committee for most of this fiscal year. Director Plachy not only kept the WSBA’s fiscal ship afloat, but he has helped us make the ship more seaworthy. He has been a pleasure to work with and made my job easier. I would also be remiss if I did not thank former Budget and Finance Manager Liz Wick and Interim Director of Finance Maggie Yu for all the great work they did to support Director Plachy and the Budget and Audit Committee. It is also important to mention that the WSBA just hired a new director of finance, Tiffany Lynch, and we are very excited to have her join the WSBA—again! Lynch is a licensed Certified Public Accountant and previously worked for the WSBA as controller and associate director of finance. Before returning to the WSBA, Lynch served in an executive leadership role at a nonprofit as chief finance and operations officer, overseeing finance, human resources, information technology, and facilities.

As we come to the end of FY 2022 it is important to look back at the challenges and accomplishments over the course of the fiscal year. Over this last year we held our first ever full-day Budget and Audit Committee retreat to ensure that everyone on the Budget and Audit Committee understood the basics of WSBA finances and budgeting. In addition, a fiscal policy subcommittee recommended substantial revisions to the WSBA Fiscal Policies; these recommended revisions have been forwarded to the WSBA Board of Governors for its review and approval. The investment subcommittee has made progress to determine ways to invest WSBA reserve funds in a safe and prudent manner, while also earning a reasonable return. We continue to try to sublease some of the WSBA’s downtown office space, but the supply and demand make this a challenging endeavor. If you know anyone who would like office space in downtown Seattle, please tell us!

One of the things that I have been most proud of this last year is that members of the Budget and Audit Committee have done an excellent job of expressing their views and opinions in a respectful manner. I have encouraged diverse and differing opinions, while asking that we disagree with each other in a respectful manner. I have encouraged diverse and differing opinions, while asking that we disagree with each other in a respectful manner. I have encouraged diverse and differing opinions, while asking that we disagree with each other in a respectful manner. I have encouraged diverse and differing opinions, while asking that we disagree with each other in a respectful manner. I have encouraged diverse and differing opinions, while asking that we disagree with each other in a respectful manner.

This is in line with the Budget and Audit Committee’s motto of “Do good and have fun.” All the Budget and Audit Committee members have contributed something of significance to the betterment of the whole and I would like to thank them for their hard work over this last year: Governor Francis Adewale, President-Elect Dan Clark, Governor Matthew Dresden, Governor Carla Higginson, Governor Alec Stephens, Governor Brett Purtscher, and Governor Tom McBride.

Through June 2021 (the latest final financial figures available at the time of this column’s publication), the WSBA is operating favorable to budget. In the original FY 22 budget we anticipated an approximate $89,000 loss to the general fund, which would have come out of the reserves. The latest forecast indicates that the WSBA should end FY 22 in September with a net gain of approximately $400,000. If so, the WSBA will start the new fiscal year with an estimated $74 million in total reserves, which includes $1.05 million in our facilities reserve fund, and $1.5 million in a restricted operating reserve fund. Overall, we have performed better than projected this fiscal year, because of increased revenues and cost savings from remote meetings and events, which have continued under COVID-19 restrictions.

The Budget and Audit Committee is in the process of reviewing the FY 23 budget. The committee had two meetings in July, and the FY 23 budget was also submitted to the WSBA Board of Governors for its review and comment at the July Board of Governors meeting. The Board of Governors gave the Budget and Audit Committee several comments and recommendations which the committee is taking into account. The Budget and Audit Committee will have another meeting in August where we will continue to work with WSBA staff to finalize the FY 23 budget and send it to the Board of Governors for its final review and approval.

Another piece of good news is that license fees for all license types will not increase for the 2023 license year. Additionally, the Budget and Audit Committee recommended that license fees for WSBA members remain the same for the 2024 licensing year and that we lower the Client Protection Fund’s fees by $5 for the 2024 license year. The recommendation for 2024 license fees still must be reviewed and approved by the Board of Governors and the Washington Supreme Court. If this recommendation is approved, the net result will be that WSBA members will pay $5 less in the 2024 license year. As an attorney who pays for my own WSBA license fee every year, this makes me happy and hopefully it makes some of you happy as well.

This is my last Treasurer’s Report, as I pass the torch to newly elected Treasurer Francis Adewale (District 5 governor). I have no doubt that Treasurer Adewale will do a great job in this role.
Second, although disqualification is sometimes limited to individual lawyers, the far more common practice is to disqualify entire law firms based on the conduct of individual lawyer-members. By contrast, disqualification is not automatically imputed to co-counsel at separate firms and instead turns on the particular conduct involved or knowledge actually acquired from the firm that has been disqualified.

Third, although disqualification is a significant remedy, it is not the only “bad thing” that can happen to lawyers and their law firms stemming from the conduct involved. Courts can impose other sanctions within the context of the case at issue and the conduct involved may also lead to related civil claims or regulatory discipline.

Fourth, we’ll focus primarily on civil litigation involving private clients. Disqualification of public officers, prosecuting attorneys, public defenders, and judges often involves other specialized rules and procedures.

BY MARK J. FUCILE

Like a soccer referee tossing a player out of the game, a court may disqualify a lawyer or law firm from further participation in a case. Disqualification is often described as flowing from the inherent authority of a court to regulate the conduct of counsel appearing before it. The procedural aspects of disqualification are largely court-made. The substantive grounds for disqualification, in turn, typically come from the Rules of Professional Conduct. In this column, we’ll survey both the procedural and the substantive elements of disqualification as applied in Washington’s state and federal courts.

Before we do, four qualifiers are in order.

First, we’ll focus on disqualification in trial courts. Although appellate courts can and occasionally do disqualify counsel, it is much less frequent than in trial courts.

Second, although disqualification is sometimes limited to individual lawyers, the far more common practice is to disqualify entire law firms based on the conduct of individual lawyer-members. By contrast, disqualification is not automatically imputed to co-counsel at separate firms and instead turns on the particular conduct involved or knowledge actually acquired from the firm that has been disqualified.

Third, although disqualification is a significant remedy, it is not the only “bad thing” that can happen to lawyers and their law firms stemming from the conduct involved. Courts can impose other sanctions within the context of the case at issue and the conduct involved may also lead to related civil claims or regulatory discipline.

Fourth, we’ll focus primarily on civil litigation involving private clients. Disqualification of public officers, prosecuting attorneys, public defenders, and judges often involves other specialized rules and procedures.
PROCEDURAL CONSIDERATIONS
Although courts in theory can exercise disqualification authority *sua sponte,* the far more common scenario in practice is that a party seeks an order disqualifying opposing counsel. The procedural rules governing motion practice generally in the court concerned apply with equal measure to disqualification. Courts have also fashioned three areas of decisional law specific to disqualification addressing standing, waiver, and appeal.

Standing. Generally, the moving party on a disqualification motion must be either a current or former client of the lawyer or law firm against whom the motion is directed. If not a current party to the case involved, intervention is permitted at the discretion of the court for the limited purpose of seeking disqualification of a current or former lawyer or law firm. Although courts have occasionally recognized standing by non-client opposing parties when the conduct of the lawyers involved impacts the fundamental fairness of the proceedings, standing on that basis is the exception rather than the rule.

Waiver. When parties become aware of circumstances that may give rise to the remedy of disqualification, they generally must pursue that remedy promptly or risk losing it. In the disqualification context, courts often use the term “waiver” in the procedural sense of “estoppel” or “laches”—a party has impliedly relinquished its right to seek disqualification through delay. Courts’ approaches to waiver in disqualification reflect both the traditional notion that procedural rights must generally be exercised in a timely fashion and a degree of practical skepticism if a party seeking disqualification waits until what it views as a more opportune time to raise it. There is no uniform yardstick on how long is too long. Rather, waiver turns on the specific facts of a given case.

Appeal. Trial court orders granting or denying motions for disqualification are not immediately appealable as a matter of right. Rather, interlocutory review may be available in state court and mandamus in federal court at the discretion of the appellate court concerned. Although interlocutory review is granted sparingly, it is usually the only practical path to timely appellate consideration.

SUBSTANTIVE BASES
Because the RPCs regulate the conduct of lawyers appearing before courts, they also effectively form the substantive law of disqualification. Most disqualification motions turn on alleged conflicts and a smaller number involve other litigation conduct.

Conflicts. Although accurate statistics on the ground for disqualification motions are not available, even a cursory electronic search quickly reveals that the majority involve asserted multiple-client conflicts. Because such conflicts presuppose a current or former attorney-client relationship, conflict decisions in the disqualification area often examine this question directly or variants as whether an affiliate of a corporate group should be considered a client for conflict purposes. With current client conflicts, the broad duty of loyalty reflected in RPC 1.7 can mean (absent an enforceable waiver) that if a court finds a current client relationship between the movant and the law firm, disqualification often follows. With former clients, the narrowed duties of loyalty and confidentiality reflected in

CONTINUED >
LITIGATION CONDUCT

Although less common, disqualification motions are also occasionally predicated on litigation conduct—such as asserted improper invasion of an opponent's privilege or work product under RPC 4.4(a), which proscribes “methods of obtaining evidence that violate the legal rights” of another. When used in this vein, disqualification is essentially a form of discovery sanction.

SUMMING UP

A disqualification order may not be quite as colorful as soccer's “red card.” For the law firms and parties involved, however, disqualification can have profound consequences both for the litigation at hand and beyond the courthouse.

NOTES

1. See, e.g., In re Marriage of Wixom and Wixom, 182 Wn. App. 881, 905, 332 P.3d 1063 (2014) (“[S]everal Washington decisions imply that a court has inherent authority to disqualify an attorney.”); Kaiser Steel Corp. v. Frank Coluccio Constr. Co., 785 F.2d 656, 658 (9th Cir. 1986) (“[T]he district court generally must control the professional conduct of attorneys who practice before it.”).

2. RPC 1.10 usually result in disqualification proceedings that revolve around two issues: (1) whether the interests of the current client are materially adverse to those of the former client; and (2) whether the current matter is the "same or substantially related" to the matter the firm handled in the past for the former client.29


6. See, e.g., Ivy v. Outback Steakhouse, Inc., 2008 WL 11506622 (W.D. Wash. Apr. 14, 2008) (unpublished) (disqualifying lawyer as trial counsel where lawyer would be necessary witness at trial). In the analogous context of a bar proceeding, the Washington Supreme Court noted that a disqualification from being trial counsel under the lawyer-witness rule, RPC 3.7, is better thought of as a limitation on the scope of a lawyer's role at trial rather than disqualification from the case as a whole. See In re Pfefer, 182 Wn.2d 716, 725-26, 344 P.3d 1200 (2015). See also CR 43(g) (generally precluding lawyer-witness from being trial counsel in a jury case).

7. Many disqualification motions involve asserted conflicts and RPC 110(a) generally imputes a law firm lawyer's conflicts to the lawyer's firm as a whole. See, e.g., REC Solar Grade Silicon, LLC v. Shaw Group, Inc., 2010 WL 11506252 at *7 (E.D. Wash. Nov. 5, 2010) (unpublished) (citing RPC 110(a) in disqualifying law firm for conflict arising in firm's London office). Similarly, the asserted conflicts or other conduct may involve non-lawyer staff for whom the law firm is responsible. See, e.g., Daines v. Alcatel, S.A., 194 F.R.D. 678 (E.D. Wash. 2000) (seeking disqualification of law firm based on asserted conflicts of lateral-hire paralegal).


12. See, e.g., State v. Nickels, 195 Wn.2d 132, 456 P.3d 795 (2020) (addressing disqualification of elected prosecutors and associated imputation to their offices); see also RPC 1.11, cmt. 2 (noting Nickels).

13. See, e.g., In re Marriage of Wixom and Wixom, 182 Wn. App. at 904 (noting that court can disqualify counsel sua sponte).

14. See, e.g., King County Superior Court L.C.R. 7 (civil motions); U.S. District Court/Western District of Washington L.C.R. 7 (same). Courts have struggled with who bears the burden of proof on disqualification motions—especially those arising from asserted conflicts. The U.S. District Court in Seattle, for example, noted recently that “courts in this district typically place the burden on the firm whose disqualification is sought to show that no conflict exists.” United States Fire Ins. Co. v. Jocie Seafoods, Inc., 523 F. Supp. 3d 1262, 1268 (W.D. Wash. 2020). By contrast, the Washington Supreme Court recently observed that “[w]e join the majority of jurisdictions that place the burden of showing that matters are substantially related on the former client.” Plein v. USAA Casualty Ins. Co., 195 Wn.2d 677, 687, 463 P.3d 728 (2020). In most situations, these competing views effectively blur because both sides typically proffer evidence and arguments supporting their respective positions.


17. See, e.g., Cotton v. Kronenberg, 111 Wn. App. at 263 (prosecutors moved to disqualify defense counsel with conflicts to protect defendant's Sixth Amendment rights); Richards v. Jain, 68 F. Supp. 2d 1195 (disqualifying law firm as sanction for improper invasion of opponent's privilege).


21. Id.


23. As with other affirmative defenses, the party asserting waiver bears the burden of proof on that issue. See Paul E. Iacono Structural Engineer, Inc., 722 F.2d 435, 443 (9th Cir. 1983) (classifying waiver as a defense of “avoidance” and putting the burden on the party asserting it).


26. See, e.g., RWR Management v. Citizens Realty Company, 133 Wn. App. 265, 280, 135 P.3d 955 (2006) (“The [trial] court’s...[disqualification] decision was not presented for discretionary appellate review. Consequently, we question the viability of the issue now that the matter has been tried with able counsel.”).


Coach the Court: Writing Tips from the Bench

An interview with Judge Rebecca Glasgow

BY BENJAMIN S. HALASZ

During a recent visit to the University of Washington, Judge Rebecca Glasgow of the Washington Court of Appeals, Division II, sat down with UW School of Law Professor and Write to Counsel columnist Ben Halasz to talk about persuasive brief writing that “coaches” judges to reach the result you want. What follows is an edited transcript of the conversation.

MOVING FROM PRACTICE TO BEING A JUDGE

Q. Before you joined the court, Judge Glasgow, you had been an assistant attorney general. Are there writing techniques you developed as a practitioner that you find yourself using now, in drafting opinions?
A. One key technique is an understanding of what kinds of principles appellate judges might turn to in a difficult case. In many cases, the law only gets you so far, and the court could go either way. In those cases, I think that judges tend to return to some fundamental principles or values. Some examples are things like: we want the law to be predictable; we want everyone to have their day in court, so we value procedural fairness; if a purpose of the law we’re interpreting is to protect a particular party or community, we want to fulfill that purpose in our interpretation;

we want to stay in our lane both vertically and horizontally, meaning we want to respect the role of the factfinder below us who saw witnesses testify, for example, and we want to respect the policymaking and enforcement roles of other branches of government.

This isn’t a comprehensive list, obviously, but I think that those kinds of fundamental principles are the things that judges tend to turn to when a case could go either way.

Q. If you could go back in time and talk to your advocate-self, what advice would you give?
A. I didn’t spend enough time studying the briefing of the advocates I respected the most. If I could do it again, I think I would have stacked those briefs on my desk and taken some time to re-read them and then kept them around so that I could pick them up and just try to absorb more from them.

ORGANIZATION

Q. How important is the organization of a brief to making it persuasive?
A. I don’t think anything is more important. If I get a well-organized and well-structured brief, my job is so much easier. The days when my job is soul-sucking are the days when I get briefs that are sort of walking me through a meandering stream-of-consciousness analysis, where I can tell it’s a first draft and the attorney didn’t really think hard about how they were going to put it together, and it makes my job exponentially harder.

That’s OK, I’m willing to do the work, but the chances of you being persuasive diminish exponentially if I can’t easily see the path that you want me to take to get to the result you want.

Q. Is there specific advice you have for organization?
A. Before you start writing anything, sit down with just a pen and legal pad and think: If I’m the judge and I need to write an opinion that will get to the result that I am advocating for, what do I need to do? What are the legal steps that I need to take, starting with how the issue is framed and ending at the conclusion? Show me what that opinion should look like.

Then, don’t start writing yet. Outline what the opinion looks like if you lose, and figure out the most effective barriers to writing the opinion that way.

Taking these two prewriting steps will put you in the mindset of coaching me on how to get the opinion that you want, and coaching briefs are the most valuable ones to me.

Benjamin S. Halasz is an associate teaching professor at the University of Washington School of Law, where he teaches legal writing and doctrinal courses.
In addition, the specific place where the structure tends to fall apart is in the application of the law to the facts. I think a lot of people just don’t do that part. Sometimes they skip it, they just jump to the conclusion. And sometimes those are the people who are too smart for their own good, so smart that it’s obvious to them how the law they’ve recited leads to the result they want in this case. But sometimes, if you don’t spell it out, a non-expert generalist who has to read fast like me might not understand it. The other mistake that people make is they just re-recite the facts. And then they write the conclusion and they think that’s what application is. That’s not what it is. It’s explaining how the law should be applied in these particular circumstances.

Q. I teach the IRAC [Issue, Rule, Application, Conclusion]/CRAC [Conclusion, Rule, Application, Conclusion] structure. Do you like to see it?
A. IRAC/CRAC structure is really important for the Court of Appeals in particular. If you look at our opinions, Division II is very formulaic in how we write, and I challenge you to find a Division II opinion that doesn’t adhere to an IRAC/CRAC structure.

Our best briefs will always use the IRAC/CRAC/ICREA [Issue, Conclusion, Rule, Explanation, Application] structure because those advocates understand that’s how we write our opinions, and they are coaching us on how to write the opinion in the way that will make them win. In the best and most efficient briefs, I could label each paragraph in the analysis according to which job that paragraph is doing: issue framing, rule statement, explanation of the rule and how it has been applied in other cases, application to these facts, and conclusion.

Q. Are there any other tips you have for attorneys about organization—things that you like to see or you dislike seeing?
A. One of the challenges that can break up that IRAC/CRAC flow is responding to an opponent’s arguments. Often, there’s so much in an opponent’s brief that has made you angry and you want to respond to it. It’s sometimes really hard to figure out how to structure your brief so that you can make sure that you’re hitting all of the points and you’re not missing any counterarguments, but also to present a cohesive picture of what the analysis should be.

The best solution is to create a subsection or paragraph at the bottom of each main analysis section in your brief that raises and dismisses counterarguments. For example: “The other side is relying on State v. Smith, so the chances of you being persuasive diminish exponentially if I can’t easily see the path that you want me to take to get to the result you want.”
but that case is completely irrelevant for two reasons .... ” And you’ll notice in our opinions we often have a “raise-and-dismiss” subsection or paragraph after we’ve provided our main analysis.

**AUTHORITY**

**Q.** One issue that often comes up in brief writing is how to use the different types of cases you have. For instance, how heavily should I rely on persuasive authority? How do you see that effectively addressed in briefs?

**A.** At the Court of Appeals, I’m bound by what the Washington Supreme Court says, and so controlling authority is really going to be front and center in our analysis—whether you want it to be or not. Facing the music is better than not. For overall persuasiveness, the people who hide from their biggest problems are the ones who most often lose.

As far as persuasive authority versus controlling authority, I’m always happy to hear more about persuasive authority. One way to coach me on how to write the analysis in the way you want is to show me how other courts have done it. And remember, under PRP of Arnold, I am allowed to depart from other panels of the Court of Appeals, whether they’re in my division or not, although there are really good reasons why I would hesitate to do so. But in almost all cases, it is fair game to ask me to depart from a Court of Appeals case, as long as you’re explaining why. And remember, you’re coaching me on how to explain why I am departing from my colleagues if I adopt your argument.

**FACTS**

**Q.** What do you look for in the parties’ descriptions of the facts that make them particularly reliable?

**A.** I am a huge fan of attorneys who understand what the worst facts are for their case. Rather than not mentioning them or mischaracterizing facts, the best attorneys confront hard facts head on. Acknowledging a bad fact conveys an implied promise that the attorney is going to deal with it in the analysis. And that sets me back on my heels as a reader. Instead of wondering, “Well, how are they going to handle that?” I’ve got this assurance, “We’ve got this, no big deal.”

Something that can get you into real trouble is mischaracterizing the record, because the law clerk and judge who are assigned to write the bench memo for the rest of the panel are going to read the record. I’m still amazed when people are willing to mischaracterize either the facts or the law, because that assumes I and my law clerk are not going to do our job; but worse, it impacts your persuasiveness in all of your cases, because now I’m suspicious of you.

Your facts sections should not rehash your notes on how the record reads from start to finish, walking through what each witness said in the order they testified. That is not as helpful to me as a cohesive story that pulls facts from various parts of the record. Telling a cohesive chronological story is far better than marching me through the record from page one to page 3,000.

A final downfall can be including too many details that are unimportant and not enough of the details that are important. When I’m reading the facts, I’m trying to figure out which of these details is key to the analysis. Authors of the most persuasive briefs don’t bog me down in details like precise dates that I don’t need. When they do drill down on precise details, they signal to me that this is something I need to focus on.

**ADVICE FOR NEW ATTORNEYS**

**Q.** I’m sometimes asked by newer attorneys or law students, what should I be doing to improve my writing? What would you say to those newer lawyers?

**A.** Honestly I would tell them to take time to think about structure and application.

I also recommend focusing on the introduction, [which is] a great opportunity that few people do well. Your introduction is the place for you to tell me what you understand the crux of the case to be, and then provide a snapshot of how you’re going to solve that problem.

I also think you should develop multiple checklists in your practice. For example, when I had Professor [Eric] Schnapper for Civil Procedure in law school, he taught us how to build a checklist of all of the procedural bars that could be raised in a civil case. Every time you come across a new procedural hurdle, you can write it down on your checklist. Similarly, I can imagine that some of the best criminal defense appellate attorneys probably have checklists that they work through for things that they’re looking for in the record.

I recommend checklists, partly because the most heartbreaking thing for us as appellate judges is to see clearly how an appellant could have won, but they didn’t bring the right argument and our hands are tied. Everybody is super busy and it’s easy to miss something when you’re moving fast, so quickly reviewing a checklist is some of the best practical advice I can give.

**FURTHER READING**

**Q.** There have been thousands of books and articles about persuasion. Obviously we’re just touching the surface here. Is there a favorite book or article about writing you recommend to people who want more detailed treatment?

**A.** I spend a lot of time with both Point Made: How to Write Like the Nation’s Top Advocates and Point Taken: How to Write Like the World’s Best Judges, by Ross Guberman, in part because those books have so many concrete examples and I learn best from reading samples.

**Q.** I’ll be sure to check those out again. Thanks so much for chatting with me!

---

**NOTE**

FROM THE SPINDLE

Recent significant cases decided by the Washington Supreme Court

BY BRYAN HARNETIAUX AND VALERIE McOMIE

Legal Sufficiency of Recall Petition Against Gov. Jay Inslee for Proclamations Issued in Response to the COVID-19 Pandemic

In the Matter of the Recall of Inslee, 199 Wn.2d 416 (April 28, 2022), the Supreme Court considered the sufficiency of a recall petition asserting a number of challenges to proclamations issued by Gov. Jay Inslee in response to the COVID-19 pandemic. Under Washington law, an elected official may be subject to voter recall if he or she commits acts of misfeasance or malfeasance or violates the oath of office. Id. at 424. When an official exercises discretionary authority, such discretionary acts are subject to recall only upon a showing that the discretion was exercised in a manifestly unreasonable manner. Id. at 425.

Petitioner C. Davis asserted that Gov. Inslee exceeded his authority in issuing numerous executive proclamations. Id. at 420-21 & nn.1-6. The ballot synopsis prepared by the Washington state attorney general summarized the charges as follows:

2. Governor Inslee violated the constitutional separation of powers by issuing Proclamation 20-19 (March 18, 2020), “Evictions,” which prohibited landlords from initiating judicial actions for writs of restitution involving dwellings for failure of tenants to timely pay rent.
3. Governor Inslee violated constitutional rights to petition the government for redress of grievances and to peaceably assemble by issuing Proclamation 20-28 (March 24, 2020), which prohibited public agencies from conducting in-person meetings and suspended certain provisions of the Open Public Meetings Act.
4. Governor Inslee violated the constitutional right to peaceably assemble by limiting the size of in-person gatherings through Proclamations 20-05 (Feb. 29, 2020), 20-06 (March 10, 2020), 20-07 (March 11, 2020), and 20-11 (March 13, 2020), and subsequent proclamations.
5. Governor Inslee issued emergency proclamations related to the COVID-19 pandemic without finding that a public disorder, disaster, energy emergency, or riot existed in Washington State due to COVID-19.

Id. at 423.

The superior court deemed all the charges factually and legally insufficient. Id. Davis sought direct review, and, in a unanimous opinion by Justice Stephens, the Supreme Court affirmed. See id. at 419. Davis abandoned charge 1 in the Supreme Court, so the court only reviewed the validity of charges 2 through 5. See id. at 424. It found the petitioner’s remaining challenges lacking under governing standards, concluding:

Governor Inslee has used his discretion to navigate this pandemic, making difficult decisions in an effort to balance the health and safety of Washingtonians with their individual liberties. While reasonable minds may disagree with the governor’s discretionary decisions, such disagreement is insufficient to support a recall. We hold the charges are legally and factually insufficient and affirm the superior court order dismissing the recall petition.

Id. at 434 (citation omitted).
Constitutional Validity of Requirement of Certificate of Merit in RCW 7.70.150 for Medical Negligence Actions Asserted against State Defendants

In *Martin v. State* (slip op. # 100103-7, decided May 26, 2022), the Supreme Court considered whether the requirement in RCW 7.70.150 that plaintiffs filing medical negligence actions provide a “certificate of merit”—which the court previously invalidated in a case involving a private defendant in *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 977-78 (2009)—could be constitutionally applied to a suit against a state defendant. Timothy Martin, an inmate at a state correctional institution, sued the Washington State Department of Corrections. Martin asserted federal civil rights claims and a state medical negligence claim based on injuries he allegedly suffered as the result of negligent medical care while incarcerated. *Martin*, slip op. at 3-6. After removing the case to federal court, the State moved for summary judgment on a number of bases, including that Martin failed to file a certificate of merit. *Id.* at 6. Ultimately, the district court certified questions of state law to the Washington Supreme Court regarding the constitutionality of RCW 7.70.150, either facially or as applied to a state defendant. *Id.* at 7.

Enacted in 2006, RCW 7.70.150 requires a plaintiff in a medical negligence action to file a certificate of merit, executed by a health care provider who qualifies as a medical expert, attesting that in his/her/their opinion “there is a reasonable probability” that the defendant in the action failed to comply with the accepted standard of care. RCW 7.70.150; see also *Martin*, slip op. at 7-8. In *Putman*, a medical negligence action brought against a private health care provider, the court invalidated this requirement on two grounds. First, it held that the provision violated the right of access to courts guaranteed by Wash. Const. art. I, § 10, because it threatens to extinguish potentially meritorious claims without allowing discovery, an essential tool for pursuing a cause of action. *Putman*, 166 Wn.2d at 979. Second, the court held that the requirement violated the separation of powers principle implicit in the Washington Constitution. *Id.* at 985. This principle recognizes that the court, not the Legislature, is generally authorized to establish procedural rules governing causes of action. Because the certificate of merit requirement constituted a legislative procedural rule that conflicted with the court’s procedural rules, it violated this principle. The court in *Putman* did not reach the question of the constitutionality of the statute as applied to a state defendant.

In a unanimous opinion authored by Justice Johnson, the Supreme Court held that the certificate of merit requirement is facially invalid.

---

**Legal Lunchbox™ Series**

The WSBA invites you to lunch and learn while earning 1.5 CLE credits. And the tab is on us!

The WSBA hosts a 90-minute, live webcast CLE at noon on the last Tuesday of each month.

---

For more information and to register, please visit [www.wsbacle.org](http://www.wsbacle.org).

---

**Bryan Harnetiaux** is a 1973 graduate of Gonzaga University School of Law and has practiced in Spokane since 1974. He is also a playwright. Harnetiaux originated this column, but has found it’s time to turn his full attention to family and his playwriting, and is delighted that Valerie McOmie will take it from here. He can be reached at bryanpharnetiauxwba@gmail.com.

**Valerie McOmie** is a 1998 graduate of New York University School of Law and practices in Camas. She can be reached at valeriemcomie@gmail.com.

---

CONTINUED >
immunity embodied in art. II, § 26, permits the Legislature to set rules governing suits against the State.

In a unanimous opinion authored by Justice Johnson, the Supreme Court held that the certificate of merit requirement is facially invalid. Martin, slip op. at 2. Regarding the State’s sovereign immunity argument, the court reasoned that whatever authority the Legislature may have to impose a certificate of merit requirement on plaintiffs asserting claims against state defendants, here there is no evidence of legislative intent to craft a particular rule uniquely applicable to such actions. Id. at 12-13. The court noted that the Legislature’s broad waiver of sovereign immunity subjects the State to actions based on its tortious conduct “to the same extent” as private entities. RCW 4.92.090. It concluded that “[b]ecause the statutory language does not apply explicitly to State defendants,” slip op. at 14, art. II, § 26-type immunity is inapplicable, and the certificate requirement is unconstitutional as to all defendants, private or governmental. Id.

Proper Standard for Determining Whether a Criminal Defendant was “Seized” Under Wash. Const. Art. I, § 7, and Whether the Analysis Should Include the Race and Ethnicity of the Defendant

In State v. Sum (slip op. # 99730-6, decided June 9, 2022), Palla Sum, an Asian/Pacific Islander, was charged and convicted of unlawful possession of a firearm in the first degree, attempting to elude a pursuing police vehicle, and making a false or misleading statement to a public servant. Slip op. at 7, and Whether the Analysis Should Include the Race and Ethnicity of the Defendant.

The Supreme Court concluded that, under art. I, § 7, a defendant’s race and ethnicity are proper considerations under the objective test developed by previous case law. Id.

Prior to trial, Sum unsuccessfully moved to suppress certain evidence, arguing that at the time the evidence was obtained, he had been “seized” by the law enforcement officer, and that the evidence collected therefrom must be suppressed because the officer lacked a warrant or reasonable suspicion. Id. at 7. The superior court held no seizure occurred, and the Court of Appeals affirmed by unpublished opinion. Id.

Sum sought review in the Washington Supreme Court, reiterating his arguments below and urging, for the first time, that the race of the person detained by police is a relevant factor in evaluating whether the police contact constituted a seizure under Wash. Const. art. I, § 7, prohibiting unlawful searches and seizures. The court granted review. Id. at 7-8.

In a unanimous opinion authored by Justice Yu, the court first acknowledged that “[i]t is long past time for this court to explicitly determine whether the race and ethnicity of an allegedly seized person are relevant to the determination of whether a seizure occurred.” Id. at 12. The court concluded that, under art. I, § 7, a defendant’s race and ethnicity are proper considerations under the objective test developed by previous case law. See id. at 2, 12, 18, 31.2 The court held:

[W]e now clarify that a person is seized for purposes of article I, section 7 if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate the encounter due to law enforcement’s display of authority or use of physical force. For purposes of this analysis, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color (BIPOC) in Washington.

Finally, in accordance with our precedent, if the person shows there is a seizure, then the burden shifts to the State to prove that the seizure was lawfully justified by a warrant or an applicable exception to the warrant requirement....

Id. at 2-3, 12. In reaching this result, the court’s analysis drew upon the protections provided in Washington State Court Rule GR 37, addressing the issue of implicit racial bias in the exercise of peremptory challenges in jury selection. See id. at 15-16, 18, 24-31.

Having clarified that the objective “totality of the circumstances” test must include consideration of race and ethnicity, the court examined the facts in this case and determined that Sum had been unlawfully seized, requiring that certain evidence be suppressed. The court reversed the Court of Appeals and remanded the case to the superior court for further proceedings consistent with the opinion. See id. at 3, 35-36.

NOTES

1. Valerie McOmie is one of the co-coordinators of the Washington State Association for Justice Foundation Amicus Program. As co-counsel, she submitted an amicus curiae brief in the Washington Supreme Court in Martin on behalf of the Foundation. Ms. McOmie’s comments in this article are purely her own and do not reflect the views of the Foundation.

2. The court did not address this issue under the Fourth Amendment to the United States Constitution. See Sum, slip op. at 8-9 & n.2. The court addressed the merits of the issue despite the State’s concession that, under art. I, § 7, the seizure determination must include consideration of the person’s race and ethnicity. See id. at 12-13.
**MBA SPOTLIGHT**

Northwest Indian Bar Association

A Q&A with NIBA Governing Council Secretary Jessica Peyton Roberts

**Q.** How and when did your MBA get started?

A group of Native American legal professionals based in the Pacific Northwest founded the Northwest Indian Bar Association (NIBA) in 1991. They aimed to fill a gap in support for Native American attorneys and other legal professionals in the region for mentorship, education, and networking. The Native American bar is one of the smallest minority bars in the country, but its members stand to have a great impact on the legal issues facing Native communities. NIBA's geographic scope encompasses Alaska, Idaho, Oregon, and Washington.

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

NIBA seeks to:
- Represent and foster the education and welfare of Native American attorneys and other legal professionals; and
- Provide mentors in the legal profession for Native people; and
- Encourage and promote civic engagement for the benefit of Native people in the Pacific Northwest.

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

NIBA serves the local community of attorneys, judges, and Native American law practitioners. We are uniquely focused on Native American communities, people, and issues; this unique focus is not provided by any other local bar association.

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

NIBA provides members with opportunities for networking and mentorship with other Native American legal professionals and practitioners of Native American law. We also receive and circulate job opportunities to our members.

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

Yes, NIBA offers scholarships to Native law students who are attending law school in Alaska, Idaho, Oregon, or Washington, or who are enrolled in a tribe located in one of these states. NIBA also offers stipends to support recent graduates who are preparing for a bar examination in Alaska, Idaho, Oregon, or Washington, and who intend to work in the field of American Indian law or policy in the Northwest.

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

NIBA is proud of the continued financial support that it provides to Native American students in the region. For example, we recently helped send Native students to the Federal Bar Association’s Indian Law Conference. Additionally, NIBA looks forward to resuming in-person gatherings in the near future to promote NIBA initiatives and provide opportunities for networking among the Native American law community.

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

Although NIBA is a relatively small bar association, we have an outsized impact in our region. We seek to provide a voice for the Native American law community, and we seek to promote greater inclusion and representation of Native people in the legal profession. We also endeavor to raise the profile of federal Indian law and tribal law as areas of the legal practice.

Jessica Peyton Roberts serves as secretary on the Northwest Indian Bar Association’s Governing Council and is a member of the Cherokee Nation. She is an associate at Davis Wright Tremaine where her practice includes debt financing, M&A, and corporate governance. She also advises on Indian law issues. She can be reached at JessicaRoberts@dwt.com.

**LEARN MORE >**

WSBA members can become a Northwest Indian Bar Association (NIBA) member or make a donation to NIBA at our website: [www.nwiba.org/](http://www.nwiba.org/).
DEI RESOURCE OF THE MONTH

Belonging is Created

By the WSBA Equity & Justice Team

Imagine a workplace where every employee feels accepted and their unique backgrounds, voices, and perspectives are valued. Getting to such a place requires not only representation from underrepresented communities (diversity), not only inclusion but cross-cultural competency and a willingness to challenge the deep-rooted beliefs and assumptions we may have about others. It requires a sense of belonging.

Belonging is one way to address structural inequities and create a space where all feel accepted, by looking at who is inside and outside of the Circle of Human Concern. The Circle of Human Concern, adapted by Dr. John Powell, shows how belonging is created in our society. People with social capital, those who are part of dominant culture, create who belongs. People who fall outside of dominant culture are othered, or excluded from the circle. Othering is a generalized set of practices that marginalize a group, making people feel smaller because of their identities. Our identities are interwoven and intersectional, but othering takes people from nuanced and complex to just one identity—often race, sexuality, age, disability, or gender identity. People are then excluded based on that.

A 2021 study from the ABA shows that, nationwide, diversity has not increased significantly in the legal profession in over a decade. As legal professionals, we can foster a sense of belonging for law students (future colleagues), and our current colleagues who have been underrepresented. We can do this by imagining new structures and organizational practices that honor nuanced and intersectional identities. For example, establish an organizational practice to consider travel options and how far it is from Point A to Point B for people with mobility aids before scheduling holiday parties. We can collaborate with diverse stakeholders and community partners to advance belonging in the legal profession. Having both diversity of body and diversity of thought can allow us to engage with and learn from the leadership of people with lived experiences of working against exclusion.

NOTES
“And you better start swimmin’,
Or you’ll sink like a stone
For the times they are a-changin’”
– Bob Dylan

Ready or not, electronic wills have arrived in Washington. The Washington Uniform Electronic Wills Act (UEWA) became effective on Jan. 1, 2022.¹ Is it time for estate planning attorneys to toss their stockpiles of archival-quality bond paper into the recycling bin? Probably not just yet.

Washington is not the first state to adopt the UEWA—Utah has that distinction²—but it is one of only a few states to have done so as of this writing. North Dakota and Colorado joined Washington in enacting the UEWA in 2021,³ and the U.S. Virgin Islands became the fifth jurisdiction this year.⁴ In addition, bills to enact the UEWA have been introduced in Georgia, Massachusetts, and the District of Columbia.⁵ Other states, including Arizona, Florida, Indiana, and Nevada, have enacted electronic wills statutes not based on the uniform law.⁶

While electronic wills are unlikely to become the default testamentary document anytime soon, the number of Washingtonians executing them is likely to grow over time, as both clients and attorneys become more comfortable with the concept, and as more states enact versions of the UEWA or similar statutes. Now is the time for attorneys who advise estate planning and probate clients to review the legal requirements for electronic wills. Practitioners should also keep in mind the directive in RPC 1.1 Comment 8, that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology” in maintaining competence.⁷

This article discusses how the UEWA impacts the law in Washington regarding wills, including the UEWA changes in the
form a valid will may take, the requirements for executing a will, and when a will must be treated as a lost will; the “qualified custodian” requirement included in the UEWA; and, finally, some administrative hurdles that will need to be cleared before the widespread use of electronic wills is adopted by practitioners.

CHANGES TO THE FORM OF A VALID WILL
Electronic wills represent a significant change to the law of wills in Washington. “An electronic will is a will for all purposes of the law of this state.”8 The UEWA changes what constitutes a valid will by amending the definition of “will” itself at RCW 11.02.005(24) to mean “an instrument validly executed as required by RCW 11.12.020 or 11.12.400 through 11.12.491” (emphasis added to indicate new statutory language). The UEWA modifies the requirement at RCW 11.12.020(1) that “every will shall be in writing” to make an exception for electronic wills.9 Instead, an electronic will must be “[a] record that is readable as text at the time of signing.”10 What is a record? Under the UEWA, “‘Record’ means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”11

The UEWA also recognizes electronic wills executed under the laws of other jurisdictions. A will executed electronically qualifies as an electronic will even if it fails to comply with RCW 11.12.440, so long as it is executed in compliance with the laws of the jurisdiction where the testator is physically located when signing the will or where the testator resides or is domiciled at death.12

LIKE PAPER WILLS, ELECTRONIC WILLS MAY BE SIMULTANEOUSLY EXECUTED, ATTESTED, AND MADE SELF-PROVING.

CHANGES TO REQUIREMENTS FOR EXECUTING WILLS
Washington courts require strict compliance with the formalities for executing a will for admission to probate.13 The UEWA revises RCW 11.12.020 to provide for witness signatures to be either in the testator’s physical presence or electronic presence. In addition, the UEWA includes specific execution requirements for electronic wills at RCW 11.12.440.14

CONTINUED >
Like paper wills, electronic wills may be simultaneously executed, attested, and made self-proving. RCW 11.12.450 provides language to include in an electronic will for the testator's acknowledgement and self-proving witness affidavits made under oath, and allows for sworn affidavits to be signed either in the physical presence of a notary or in the electronic presence of an electronic records notary public. The UEWA also provides language for when the testator acknowledgement and self-proving witness affidavits are in the form of unsworn declarations.

What does it mean to be in the testator’s electronic presence? A videoconference is the likely scenario at present that meets the standards for remote notarization. The definition of “electronic presence” included in the UEWA is more general, however, and anticipates changes in technology: “Electronic presence’ means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.”

The UEWA also changes what it means to “sign” a will. Per RCW 11.12.410, “Sign” means, with present intent to authenticate or adopt a record, to affix to or logically associate with the record an electronic symbol, an electronic sound, or process. Electronic wills may be signed by typing the testator’s name, by entering a digital signature, or by otherwise manifesting a party’s intent to electronically adopt the record.

QUALIFIED CUSTODIANS AND CHANGES TO WHAT CONSTITUTES A LOST WILL

If an electronic will has not remained in the custody of a “qualified custodian,” it cannot be treated as a self-proving will, and the electronic will must be treated as a lost or destroyed will under RCW 11.20.070. Simply saving a PDF of a signed electronic will on a thumb drive is likely not going to be sufficient for it to be admitted to probate.
as self-proving.

Washington is alone among states that have adopted the UEWA in its requirement that an electronic will be maintained in the custody of a qualified custodian. Benjamin Orzeske, chief counsel of the Uniform Law Commission, confirms that no state enacting the UEWA other than Washington has adopted the qualified custodian requirement. In response to an inquiry regarding the qualified custodian requirement, Orzeske wrote, “The ULC drafting committee made a policy decision not to include the requirement in the UEWA. Washington is an outlier in this respect.”

While requiring an electronic will to be maintained by a qualified custodian imposes an additional burden on Washingtonians wishing to execute self-proving electronic wills, it also serves as a protective measure against potential fraud. Mark Vohr is a member of the committee assembled by the Real Property, Probate and Trust Section of the WSBA to review and comment on the Uniform Electronic Wills Act for adoption in Washington. Vohr said that the majority of committee members were concerned that because Washington has such a streamlined process for admitting self-proving wills, the potential for fraud with electronic wills appeared to be too great without the safeguard of a disinterested third party serving as custodian of the electronic will.

Under RCW 11.12.470, the qualified custodian of an electronic will must, within 30 days of receiving notice of the death of the testator, deliver the will to the court or to the personal representative named in the electronic will and make an affidavit under oath stating “(i) the manner in which the qualified custodian received the electronic will; (ii) that the electronic will was at all times in the custody of the qualified custodian; and (iii) that the electronic will in the possession of the qualified custodian has not been altered in any way since the custodian received the electronic will.”

RCW 11.12.460 establishes who can, and who cannot, serve as a qualified custodian of an electronic will as follows:

(1) The following may serve as a qualified custodian:
   (a) Any suitable person over the age of 18 years, who is a resident of the state of Washington at the time the electronic will was signed;
   (b) A trust company regularly organized under the laws of this state and national banks when authorized to do so;
   (c) A nonprofit corporation, if the articles of incorporation or bylaws of that corporation permit the action and if the corporation is in compliance with all applicable provisions of Title 24 RCW;
   (d) Any professional service corporations, professional limited liability companies, or limited liability partnerships, that are duly organized under the laws of this state and whose shareholders, members, or partners, respectively, are exclusively attorneys; and
   (e) A will repository in the county in which the testator is domiciled.

(2) The following are disqualified to serve as a qualified custodian:
   (a) Minors, persons of unsound mind, or persons who have been convicted of (i) any felony or (ii) any crime involving moral turpitude;
   (b) An individual who is an heir, beneficiary, or otherwise has an interest in [the] testator’s estate; and
   (c) Corporations, limited liability companies, limited liability partnerships, except as provided in subsection (1) of this section.

Good policy reasons exist for preventing someone with an interest in an estate from maintaining custody of an electronic will. However, this also creates a potential pitfall for the unwary. Suppose, for example, that John Dashwood created an electronic will leaving his country home to his sister, Marianne. John provided the original electronic will to Marianne for safekeeping because she was nominated to be personal representative of his estate, in addition to being a beneficiary. John dies just a few months later. When Marianne meets with a probate attorney to discuss John’s estate, she learns that John’s will must be admitted to probate as a lost will, rather than as a self-proving electronic will, because, as a beneficiary, Marianne was not a qualified custodian.

The UEWA does not address what happens if the qualified custodian wishes...
to transfer custody of an electronic will. It may be acceptable for an affidavit that meets the requirements of RCW 11.12.470 to be executed by each qualified custodian when relinquishing custody of an electronic will to another. However, until this process is tested in practice or the UEWA is amended, this remains an open question.

**FUTURE CHANGES MAY BE AFOOT**

Changes to the court rules may be needed to implement the UEWA. For example, King County Local General Rule 30, which makes electronic filing mandatory for most documents filed with the court, requires that original wills and codicils be filed in paper form. For example, in a Clerk’s Alert issued on Jan. 3, 2022, the King County Superior Court Clerk’s Office clarified that only paper copies of electronic wills may be filed under the current King County Local General Rule 30. The King County Superior Court Local Rules Committee has proposed a revision to Local General Rule 30(b)(4)(A)(i) to require only original wills and codicils “that do not conform to the Electronic Wills Act” to be filed in paper form. However, until this change to the court rules is implemented, practitioners in King County must obtain a certified paper copy of an electronic will—which is provided for under RCW 11.12.480—and file the paper copy with the court.

In addition, it is unclear whether an electronic will can be filed under seal in a will repository under current court rules. The UEWA sets the framework for will repositories to be a potential option as a qualified custodian of electronic wills in the future, however. RCW 11.12.460(1)(e) provides that a will repository in the county in which the testator is domiciled may serve as a qualified custodian of an electronic will. RCW 11.12.265, which provides for filing an original will before the death of a testator, specifies the will be filed under seal. Further, this filing may be in “any court having jurisdiction.”

It is likely only a matter of time before electronic wills and other estate planning documents cease to be a novelty. The Uniform Law Commission is currently considering a draft Electronic Estate Planning Document Execution Act that addresses electronic versions of estate planning documents in addition to wills. As Washingtonians begin to execute electronic wills, and potentially other electronic estate planning documents, estate planning and probate attorneys should become familiar with the unique execution requirements and custody rules for such documents. Provided that the procedures for executing the electronic will are followed and that a qualified custodian maintains custody of it, a self-proving electronic will can be admitted to probate in a manner no different from a self-proving original paper will. The devil, as always, is in the details.

---

**NOTES**


5. Id.


7. See WSBA Advisory Opinion 2215 (2015) (discussing the ethical obligations of attorneys utilizing cloud data storage, and stating, in relation to RPC 11 Comment 8, “[t]o the extent that a lawyer uses technology in his or her practice, the lawyer has a duty to keep informed about the risks associated with that technology and to take reasonable precautions”).


9. The revised RCW 11.12.020 now states: “Except as provided in RCW 11.12.400 through 11.12.491, every will shall be in writing signed by the testator or by some other person under the testator’s direction in the testator’s presence or electronic presence...”


11. RCW 11.02.005(16).


13. See In re Estate of Hook, 193 Wn. App. 862, 870 (Div. I 2016) (where only one witness attested to the will in the presence of the testator, will held invalid under Washington law).

14. Both RCW 11.12.020 and RCW 11.12.440 provide for an electronic will to be signed by another individual at the direction of the testator. However, the requirements are inconsistent. While RCW 11.12.020(1) states that a will shall be “signed by the testator or by some other person under the testator’s direction in the testator’s presence or electronic presence” (emphasis added), RCW 11.12.440(1)(b)(i) requires that the individual signing an electronic will at the testator’s direction be in the testator’s physical presence.


17. RCW 11.12.450(3)(b).

18. WAC 308-30-310 establishes the standards for communication technology for remote notarial acts.

19. RCW 11.02.005(5).

20. RCW 11.20.020.


22. King County Local General Rule 30.

23. King County Superior Court Clerk’s Alert, January 3, 2022, available at https://kingcounty.gov/-/media/courts/Clerk/docs/Alerts/22-002.ashx?la=en. Washington Superior Court GR 30 does not explicitly prohibit the electronic filing of wills; it states that “[c]ertain documents are required by law to be filed in non-electronic media.”


On Jan. 1, 2022, the federal No Surprises Act (the Act) took effect.\(^1\) 26 U.S.C. § 223. The Act diminishes or eliminates the pain associated with unexpected or “surprise” medical bills when health care plans deny out-of-network claims or apply higher out-of-network cost-sharing. Surprise medical bills can arise when a patient, typically an enrollee in a group insurance plan, is treated in an out-of-network facility for emergency care or with an out-of-network provider at an otherwise in-network facility. Surprise bills hurt because out-of-network services are associated with higher deductibles, copayments, and out-of-pocket limits. Despite informed and vigilant efforts to stay within their health care plan’s network, otherwise “covered” patients have received unforeseen charges even for care provided at an “in-network” hospital. COVID-19 not only overwhelmed the country’s health care infrastructure but added to the surprise billing problem.

While several states—including Washington, Oregon, and California—enacted protections against surprise billing before the Act took effect, the inability of the states to regulate self-insured group health plans left many enrollees unprotected. This spurred Congress to pass the No Surprises Act, bridging the gaps left by well-intentioned yet piecemeal state legislation that could not regulate employers’ self-insured plans. The impact of the Act on how costs for medical care in our country are processed and funded extends well beyond simply banning surprise medical bills. It takes the medical consumer out of the dispute and brings predictability to providers and payors. The Act also provides a dispute resolution system for addressing disagreements between payors and providers when charges for medical services can no longer be passed on to the patient.

**Surprise Billing Defined**

Many academics and analysts prefer using the term “balance bill,” over “surprise bill,” to describe the associated costs when a plan enrollee seeks or requires out-of-network medical care. Whether referred to as a surprise or a balance bill, the patient’s insurance company (payor) pays only part of a bill, leaving the provider to bill the patient for the unsatisfied remainder, or the “balance.” Surprise bills usually come about when the insurance plan enrollee receives emergency care at an out-of-network facility or with an out-of-network provider at an otherwise in-network facility. Not only can the payor refuse to cover the entire bill, out-of-network services typically have higher deductibles, copayments, and out-of-pocket limits. Patients insured by public programs such as Medicare, Medicaid, and TRICARE are generally protected from balance bills.

The most common scenario involves an emergency that deprives the patient of choice in where they are treated. An infamous example is a Texas schoolteacher in his 40s who was rushed to an out-of-network hospital for a heart attack.\(^2\) He walked out of the hospital four days later, healthy, but burdened with significant medical debt. Ultimately the hospital sought less than $1,000 of the $164,000 originally billed, after the story gained national attention.\(^3\) There are many such stories predating the pandemic, but the stress of COVID-19 on the nation’s health care system forced many

---

**By William Cornell and Naomi Ahsan**

---

**THE NO SURPRISES ACT: A Federal Cure for Unexpected Medical Bills**

---

**Surprise billing has been more significantly driven by private equity ownership of large physician-staffing companies.**
patients to unknowingly seek care from out-of-network providers and facilities.

Surprise billing was a common phenomenon on an upward trend well before the pandemic. In 2016, 43 percent of patients received surprise emergency room and hospital inpatient bills, more than double the number in 2010. In 2020, one in six commercially insured adults had an unexpected out-of-network physician bill. At the same time, close to 140 million Americans have faced medical financial hardship, requiring liquidation of personal assets, assumption of credit card debt, borrowing from friends and family, and dipping into retirement funds. A 2019 study showed that two-thirds of U.S. bankruptcies were related to medical expenses or health-related work loss.

Having to shoulder the costs of out-of-network care, insurers and self-insured employers responded by offering very narrow-network insurance plans. Surprise billing, however, has been more significantly driven by private equity ownership of large physician-staffing companies. Private equity deals in health care doubled between 2010 and 2020, and in 2019, health care accounted for about 13 percent of all private equity transactions. Large physician-staffing companies in specialties like emergency medicine and anesthesia, owned by private equity investor groups, have intentionally not participated in insurance networks as a business strategy. Two private equity firms control half of all helicopter ambulance trips that have routinely “surprised billed” patients as much as $30,000 to $40,000. Not surprisingly, private equity groups invested heavily in efforts to block passage of the Act. Despite well-funded opposition, the Act was passed as a result of building momentum in the court of public opinion and bipartisan support in Congress and in the Biden White House. A 2020 poll showed that 78 percent of Americans supported federal legislation against surprise medical bills. The same year, the White House threatened to intervene if Congress took no action by 2021. The need for patient protections once the pandemic set in pushed the Act across the finish line.

PROTECTIONS AFFORDED BY STATE LAW

Thirty-three states offer some level of protection against surprise billing. Of these, 17 have adopted more robust and comprehensive restrictions. These include Washington, Oregon, and California. In 2019, Washington adopted the Balance Billing Protection Act, which applies to all state-regulated health plans and state and school employee benefit plans. Self-funded group health plans, not regulated by the state, have the ability to opt in, and many have. Other states have enacted COVID-19-specific balance billing protections, such as Colorado and New Mexico.

The extent to which states can provide complete protection is limited because they do not have the ability to regulate self-insured group health plans. Such plans are federally regulated under the Employee Retirement Income Security Act of 1974. Most Americans with private insurance—more than 135 million people—are enrolled in such plans. Sixty-one percent of Americans are enrolled in employer-sponsored health insurance plans, and about 60 percent of the benefits offered are self-insured. Additional federal restraint in the form of the Airline Deregulation Act prohibits states from controlling air ambulance prices. Emergency air ambulance transport is a common source of surprise medical bills. Therefore, federal action was needed to extend protections from surprise bills for all patients, including residents of states that had already legislated on the issue.
The extent to which states can provide complete protection is limited because they do not have the ability to regulate self-insured group health plans.
The factors an arbitrator may also consider include the provider’s training, experience level, and the acuity and complexity of the patient’s medical condition. The arbitrator may also consider the market share of both parties, the provider’s teaching status, any history of good faith effort by the provider to join the payor’s network, and prior contracted rates over the previous four years. For air ambulance providers, the arbitrator may also consider the location of the patient’s pickup, the population density of that location, and the vehicle type and medical capabilities.

All these factors are meant to be secondary to the QPA, such that the arbitrator deviates from the offer closest to the QPA only in limited circumstances. Furthermore, arbitrators cannot consider the billed charges or the “public payor” rates (for Medicare, Medicaid, CHIP, and TRICARE). From states that have used IDR in their legislative schemes to prevent surprise bills, data shows that including billed charges in the process tends to inflate the final amount.21

Finally, the Act also establishes a payment dispute resolution process for providers and uninsured (or self-pay) patients. Under the Act, uninsured patients can request a good faith estimate of their costs for health care services, and if the actual amount charged exceeds the estimated amount by $400 or more, the patient can ask an IDR entity selected by the U.S. Department of Health and Human Services to review the charges and decide whether they should be reduced.

**IDR UNDER THE ACT AND WASHINGTON’S BALANCE BILLING PROTECTION ACT**

Some form of IDR is included in the surprise billing protection laws of nine states, including Washington. Six of those states, including Washington, involve baseball-style arbitration. In Washington, the providers and payors also can only request arbitration after 30 days for informal negotiation.

There are two main differences between IDR under Washington’s Balance Billing Protection Act and the federal No Surprises Act, and Washington law will supersede the federal Act on both. First, in Washington, claims are automatically bundled when they occur between the same provider and payor within two months of each other. This makes arbitration more financially feasible for providers that may not have bills large enough to justify arbitration on an individual basis. Second, the arbitrator has a different resource to use in place of the QPA: an All Payor Claims Data Base (APCD). The APCD includes not just the median payment rate for the payor at issue, but median in-network, out-of-network, and billed rates for other providers and payors in the same region.

**CONCLUSION**

One of the most significant impacts of the No Surprises Act will be to deliver on its name and make healthcare more affordable to patients by eliminating surprise billing. Balance billing will no longer be a viable business strategy among payors and providers. The Congressional Budget Office expects that the Act could reduce commercial insurance premiums by 0.5 percent to 1 percent, as payors will no longer need premiums to help cover the costs they absorb for out-of-network care. The IDR component of the Act provides both structure and incentive to payors and providers to resolve payment disputes efficiently.

The similarities between the Act and Washington’s Balance Billing Protection Act mean that Washingtonians participating in self-insured plans will finally benefit from the same protections that enrollees in state-regulated plans have had since 2019. However, there are only 16 other states that have enacted patient protections as comprehensive as Washington’s. For the remaining states—and the majority of Americans with private insurance, on self-insured plans in all states—the No Surprises Act provides overdue and comprehensive reform and relief to patients from the burden of surprise medical bills.  

**NOTES**

7. Id.
9. John Tozzo. “Air ambulances are flying more patients than ever, and leaving massive bills behind,” Bloomberg, June 11, 2018; Christopher Roland. “Why the flight to the hospital is more costly than ever,” Washington Post, July 1, 2019.
12. Id.
13. See supra note 5.
15. See supra note 2.
Medical Malpractice

It’s All We Do.

Follow us at cmglaw.com/the-cmg-voice

WE DON’T JUST SERVE THE WASHINGTON LAW COMMUNITY. WE’RE PART OF IT.

Our expert lenders are here to help.

From being active members of many Washington law associations to serving hundreds of firms, as well as the Legal Foundation of Washington, we’re committed to supporting the law community and helping your firm succeed. Our bankers understand the needs of attorneys and firms, because they’ve spent time getting to know them. See how good your relationship with a bank can be. Visit ColumbiaBank.com or call Vlad Grigoryev at 206-359-0797.
Whatever Doesn’t Kill You ... Can Make You A Better Lawyer

Reflections on living and practicing law with mental illness

BY AARON D. PAKER

Editor's note: This article briefly discusses suicide and suicidal ideations.

As I approached adulthood many people in my life, from family to school counselors, had pointers on how to get into the “good” colleges and how to get the “good” jobs. This traditional wisdom taught that you had to follow the rules by dressing and speaking professionally, being polite, talking about your strengths, hiding your weaknesses, and never sharing more than you had to unless it made you look better. To this I say: Horsesh*t!

Traditional wisdom says that I should not be sharing the story of my journey with mental illness, that it will put a black mark on my record and no one will ever want to hire me or work with me again. I’m sharing it anyway, for a few reasons. First, I hope that talking about my struggles might help even one attorney reading this to feel empowered to get help for their own mental illness. Second, my experiences make me a better attorney in my field. And finally, no one with any disability, mental or physical, should ever be made to feel ashamed of what they have had to overcome.

I spent over 30 years of my life with daily suicidal ideations, attempted suicide over a dozen times in my youth, constantly fought urges to harm myself or others, and even spent entire days doing things that I could not remember because my false memories were more real to me. I have experienced the effects of going five days without any sleep and the only slightly less disorienting effects of sleeping for nearly 24 hours straight. I have lost friendships because I was too terrifying to be around and nearly lost the most important relationship in my life because of addictions to alcohol and gambling—my first attempts at self-medication.

I was first diagnosed with bipolar disorder, Attention-Deficit / Hyperactivity Disorder (ADHD), and Obsessive Compulsive Disorder (OCD) at age 21, after over a decade of denying my illness. I tried medication but the ones prescribed for me at that time made things worse. I spent over a decade getting to a place where I felt nearly normal on a daily basis without medication and more than another decade fine tuning the process.

Today I am a person who has learned to live with mental illness. It was not, and still is not, an easy life to live, but the funny thing is, now that I have it more or

Aaron D. Paker has worked on Medicaid cases for Life Point Law for about seven years as a paralegal, as an intern, and now as an attorney. He heads the Medicaid Planning and Probate Departments. He earned his J.D., cum laude, at Seattle University School of Law in 2019, with Cali Awards in elder law and advanced elder law. Prior to joining the legal field, he worked in early childhood education, special education, physical labor, customer service, management and administration, and communications jobs. He can be reached at APaker@lifepointlaw.com or 253-237-7036.
less under control, I thank God every day for this struggle, because it has made me a stronger and more empathetic person as well as a more effective lawyer.

Specifically, my experience controlling my illnesses makes me uniquely qualified for the work I do in Medicaid planning and probates. High on the list of ways that this experience helps is my ability to understand the struggles that clients and their families face as dementia and other illnesses slowly set in. I understand how frustrating it is not to know which memories are real and which are not. I have seen the concern on the faces of friends as they watched me struggle to get through the most basic functions of my day because of physical or emotional pain and exhaustion. I understand that the struggle is often 10 times worse than we let on to others.

Also important to my particular practice areas is my ability to remain calm and rational without being cold and detached. After decades of working to keep my mood in the normal range while it tries to soar into manic flights or crash into a weeping wreck, I am able to sit in a room full of people who are going through terrible struggles, openly sobbing, and keep a calm, reassuring manner while still engaging. Many attorneys grow uncomfortable around such displays of emotion and try to stop the crying or detach and become ultra-focused on getting through the business and getting out of the room. I encourage my clients to express what they are feeling and to talk about things that may appear to have nothing to do with the legal work I will be doing, because I know that I cannot help them until I know the depth of their struggle.

The fact that I have endured and persevered through incredible hardship and come out on the other side also helps me meet the common challenges that all attorneys, whatever their practice area, face. I try to keep myself to a 40- to 50-hour workweek, but I know that a 60- to 70-hour week now and again won’t break me because I have seen worse. I try not to let the pile of files that need immediate attention grow to more than two or three feet tall, but when it does I do not grow anxious or throw in the towel because I have overcome worse. When a client complains that what I did is not good enough, for whatever reason, I do not take it personally or question my worth as an attorney because I have had thoughts that are a lot worse. There are not many things that this career can throw at me that are worse than the things I have overcome in my life, and that allows me to push through the challenges that cause this profession to have such high rates of mental illness.1

There are two types of attorneys who I expect and hope are reading this article: those with mental health struggles and those without. If you do not have any mental health issues, I am overjoyed for you. I ask that you keep an eye out for colleagues who may be struggling and, rather than giving them a hard time about getting emotional in a meeting or jumping on them for seeming sluggish at the end of the week, talk to them and support them. If you are looking to hire new attorneys and a candidate self-discloses a mental health issue, don’t let it negatively impact your consideration of them as a candidate; with some support, they could be the best hire you ever make.

For those of you who have or suspect that you have a mental illness, seek professional help. Don’t let pride or stigma prevent you from getting the help you need to be the best, most functional version of you. If you are avoiding treatment because you are an attorney and dammit you can fix this on your own, it’s likely that you cannot. There are much better treatments now than there were when I was 21, and most of the professionals prescribing medications are better versed in potential side effects. Yes, you are an attorney and that means that you are good at pitting yourself against anything and coming out on top but, hopefully, it also means that you are intelligent enough to recognize the fights that you cannot win without help. Your struggle is part of who you are and it gives you incredible power and insight, so long as you get the help needed to allow you to control it and not the other way around. Whether you learn techniques to control it on your own or you control it through medication and therapy, you can learn to turn your “weakness” into one of the greatest strengths in your life. But it all starts with admitting that you need help.

You can seek help on your own or contact the WSBA Member Wellness program at 206-727-8267 or wellness@wsba.org. If you are not ready to take that step, talk to a trusted friend or coworker, or even call or email me and I will find time to sit down with you over coffee and just listen and be a first line of support. I am not a trained professional but I have a pretty good sympathetic ear. It is not as important how you start getting help as it is that you start getting help.

1. The WSBA recognizes the urgent need for mental health help in the legal profession and cites, on its Member Wellness page, to an article in the Journal of Addiction Medicine that identifies “significantly higher rates of depression, anxiety, and stress” in attorneys and law students. www.wsba.org/for-legal-professionals/member-support/wellness/mental-health.
AN OUNCE OF PRENUPTIAL PREVENTION

Ken Brewe reviews and prepares marital agreements and has served as an expert witness involving prenuptial agreements in litigation. He speaks regularly on the subject and authored the Washington Practice chapter on prenuptials. We can help draft, review or critique your prenuptial or postnuptial agreements.

BREWE LAYMAN P.S.
Attorneys at Law | Family Law

PERSONALIZED TRUST SERVICES FOR YOUR CLIENTS

When planning their legacy, your clients count on thoughtful, personalized guidance. Offer them the benefits of the credit union difference with BECU Trust Services. We’ll help them prepare for the uncertainty of tomorrow regardless of the size of their estate. Give us a call. Let’s talk about how we can partner to protect your client’s wealth and secure their family’s future.

Estate & Trustee Services, Special Needs Trusts, Investment Management

"With a depth of experience... and an insightful regard to all of their clients' needs, BECU Trust Services makes the whole process more successful and efficient."

—Amy C. Lewis, Attorney

becu.org/trust | 206-812-5176
The law is a “learned profession.” As such, lawyers traditionally “set up practice,” “hang a shingle,” and apply all the knowledge that law school and other learning opportunities has given them. This process is often relatively devoid of any practical knowledge of how to run a business. And, for many of us, it shows.

Since my early days in the profession, many things about the practice of law have changed. The complexity of the law has changed, our clients’ expectations have increased, our professional responsibilities have evolved, and our employees’ hopes, dreams, and desires are evolving, too. We must serve our clients, our team, and ourselves.

What follows are some strategies for ensuring that you are not just an excellent practitioner of the law, but also a savvy business owner who is able to meet your obligations to clients, employees, and other stakeholders.

**STRATEGIES FOR CONVERTING YOUR PRACTICE INTO A BUSINESS:**

**A Failure to Plan is a Plan to Fail**

BY CHRISTOPHER T. ANDERSON

The law is a “learned profession.” As such, lawyers traditionally “set up practice,” “hang a shingle,” and apply all the knowledge that law school and other learning opportunities has given them. This process is often relatively devoid of any practical knowledge of how to run a business. And, for many of us, it shows.

Since my early days in the profession, many things about the practice of law have changed. The complexity of the law has changed, our clients’ expectations have increased, our professional responsibilities have evolved, and our employees’ hopes, dreams, and desires are evolving, too. We must serve our clients, our team, and ourselves.

What follows are some strategies for ensuring that you are not just an excellent practitioner of the law, but also a savvy business owner who is able to meet your obligations to clients, employees, and other stakeholders.

**DECIDE WHY YOUR LAW FIRM EXISTS**

It doesn't matter if you've been practicing for 35 years or 35 days, it is always time to decide why your law firm exists. This is an exercise that you must engage in at least annually to keep your operations headed in the same direction as your goals.

Before diving into your own goals, it is important to first get clarity around two concepts:

- **The business of a law firm.**
- **The purpose of the business.**

It is in within these constructs that you can effectively establish goals for your law firm and understand how meeting those goals will serve you.

**The business of a law firm** is exceedingly simple:

- Selling legal services (solutions to problems that lawyers are best suited to solve); and
- Delivering the legal services that were sold.

That is all. A successful law firm must do both. If you sell legal services but don't deliver what you've sold, you risk disciplinary action.
from the Bar and possible civil action from unhappy clients. If you deliver legal services without selling (and being paid for) them, you will likely find yourself out of business.

Don’t be distracted from these core tenets. Do these well, and the rest becomes much, much easier.

**The purpose of a law firm business** is likewise straightforward. The purpose is to satisfy the needs of the owner(s), to fund their ideal lifestyle, to give them the ability to live the way they want to live, and to be the vehicle through which they achieve their professional goals. If the business does not serve the owners, the likely result is a terrible business and unhappy owners.

The purpose is not to provide jobs, pay taxes, or support the community. The purpose is not even to improve clients’ lives or make employees happy. These are all things that we get to do when we run a successful business.

Serving the owner sounds like a nebulous concept. This first strategy is all about making sure that it is anything but. No one else can determine for you whether your law firm business is serving you; that is something you must do for yourself—repeatedly. I recommend that you work on this at least once, and preferably twice, per year.

**DETERMINE YOUR BUSINESS GOALS**

Begin by asking yourself to honestly define four things about the life you want to be leading five years from now. It requires you to think big. We tend to overestimate what we can do in the short term, yet underestimate what we can do in the long term.

**In five years:**
- What do I want to BE?
- What do I want to DO or be doing, or have done/accomplished?
- What do I want to HAVE?
- How do I want to FEEL?

Examples of answers sometimes include:

**BE**
- I want to be the owner of a $XXX,XXX-per-year business.
- I want to be a good, loving, attentive, present spouse/parent.
- I want to be healthy.

**DO**
- I want to be working 30 hours/week.
- I want to ski 30 days a year.
- I want to have completed my fifth marathon.
- I want to donate $XXX per year to XXX charities.

**HAVE**
- I want to have (a specific) vacation home.
- I want to have $X,XXX saved up for my children’s college.
- I want to have $X,XXX invested toward retirement.
- I want to have an amazing garden.

**FEEL**
- I want to feel professionally fulfilled.
- I want to feel in control of my finances.

The BE/DO/HAVE model is used by coaches and authors as diverse as Steven Covey, Tony Robbins, and L. Ron Hubbard. In working with our clients, my team has added FEEL to round out this model. Because many people are not used to articulating what they want out of life, we don’t recommend trying to do this on your own the first few times. You will be less likely to complete it, and more likely to limit yourself, which will limit your business, which, in the end, will limit the number of people you help. And that would be a shame! Working with a colleague who has successfully done this several times, or with a professional coach or facilitator, will enhance your likelihood of success.

After completing the five-year vision, you then start over, but this time asking yourself: “In order to BE who I want to be in five years, what/who do I want to BE in two years?” Repeat the question for DO, HAVE, and FEEL. Some of the answers are
We tend to overestimate what we can do in the short term, yet underestimate what we can do in the long term.

Strategies for Converting Your Practice Into a Business: A Failure to Plan is a Plan to Fail

create a written plan

Do you own stock, sit on a board, or have a stake in the outcome of any other enterprise? If you do, you may ask, from time to time, “Why should I continue to put my time, energy, and money into this?” You owe it to the stakeholders in your law firm business to be able to answer that same question for them, whenever they ask it.

Stakeholders? Yes! Anyone in your life who feels they have, or who you feel has, a claim on your time, your money, or your presence and happiness is a stakeholder in your business. You have a tacit agreement with them that you will invest into your business time, energy, presence, temperament, etc., that you might otherwise give to them. What return should they expect from that? Seriously, you owe them an answer. You owe you an answer!

You should be able to describe to your stakeholders, to your employees, even to your clients, how your business will operate to produce the results that each of them expect. This description should explain how the following three main components of your business will work together:

- **Acquisition**—the addition of new clients and/or new business from your clients;
- **Delivery**—the activities across the business that produce the results that your clients are entitled to receive in exchange for the revenue they deliver to your business; and
- **Results**—what the business delivers to the owners; defined under each of the owner’s business goals.

For each component, your written description will address four key areas:

- What are the relevant policies that guide this part of the business? (WHY do we operate the way we do?)
- What are the key standard operating procedures to which the business adheres to deliver consistent results? (HOW do we get things done?)

FEEL exercise should be concrete definitions of what you want your business to do for you, in three key areas:

- **Financial**—How much money must the business provide to you to achieve the life you’ve defined?
- **Temporal**—How much time will you need to provide to the business, and how much time will you insist on having for the rest of your life’s goals?
- **Professional**—How will your business affect the world in a way that makes you proud?

When you have answered these questions, you have the basis for planning your business to achieve your desired outcomes. Your business is a vehicle. There is no point in owning and operating it without knowing where you’re going!
Artifacts: forms, checklists, and examplars. What does excellent production look like?

Objectives: Putting all these things together, what are the results we’re expecting from each component of the business? How will we know we’ve achieved them?

When you begin, you may have most of this, some of this, or none of this filled in. You can rate yourself, on a scale of 1 to 5 (with 1 being almost nothing, 5 being perfect written descriptions). Your goal is to bring the lowest areas up—to perhaps a 3 and then improve from there. Fives are hard to achieve because we should always be improving—a 5 today might be a 2 tomorrow. Evaluating and reevaluating these descriptions is the essence of business planning. Always ask the question: “How well suited is this part of the grid to producing the business results upon which your personal plan depends?”

The result should be a succinct and clearly stated document that explains how each of the key areas of your business should operate to produce results. It is essential to then share this document with a peer or advisor—who should review it and question you as to how well it fits your objectives—before sharing it with your team.

FURTHER STRATEGIES

Building upon this framework, some further strategies to build out your practice into a sustainable business that produces the results that you desire from it include:

- A well-defined acquisition plan, including:
  - A marketing plan.
  - A client education plan that reliably converts leads into clients.
- An operational plan that moves some work away from you, so that you can focus on your highest and best contributions to the business.
- A measurement plan that defines objectives and key results that you expect from your business, so that you can compare progress to your expectations and make course corrections along the way.

APPEALS

OVER 600 CASES ARGUED ON THE MERITS

JASON W. ANDERSON | LINDA B. CLAPHAM*
RORY D. COSGROVE | MICHAEL B. KING*
JAMES E. LOBSENZ* | GREGORY M. MILLER*
SIDNEY C. TRIBE | TIERNEY E. VIAL

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

CARNEY BADLEY SPELLMAN  (206) 622-8020 WWW.CARNEYLAW.COM

APPEAL SPECIALISTS with a track record of success.
Call us with your tough cases.

Smith v. Gen Con LLC,
2022 WL 2662003 (2022)
(reversing CR 12(b)(6) dismissal of defamation, false light, and intentional interference claims)

Bresnahan v. Bresnahan,
21 Wn. App. 2d 385, 505 P3d 1218 (2022)
(awarding fees and holding spouses have fiduciary duty to disclose assets during a dissolution)

Morrone v. Northwest Motorsport, Inc.,
2022 WL 1466789 (2022)
(reversing default order that should have been vacated by the trial court)

Harris v. Federal Way Public Schools,
505 P3d 140 (2022)
(district liability for athlete’s sudden cardiac arrest)

Banner Bank v. Reflection Lake Community Assoc.,
2022 WL 214694 (2022)
(affirming dismissal of challenge to valid HOA board election and awarding fees)

Schuck v. Reinland,

19 Wn. App. 2d 1011 (2011) (claims of PIP service provider barred under Illinois class settlement)

Nau v. Vogel,
19 Wn. App. 2d 1026 (2021) (affirming dismissal of RESPA claims and trial court CR 11 sanctions)

Griswold v. Fred Meyer Stores,
19 Wn. App. 2d 1063 (2021) (affirming judgment for premises liability where dolly fell on shopper’s foot)

Mancini v. City of Tacoma,
196 Wn.2d 864, 479 P3d 956 (2021) (holding police may be liable for negligently executing search warrant)

Meyers, et al. v. Ferndale School District,
197 Wn.2d 201, 481 P3d 1084 (2021) (district responsible for student killed by driver who ran off road striking him during improper off campus walk)

Knowledgeable • Experienced • Efficient

TALMADGE FITZPATRICK
206-574-6661 • www.tal-fitlaw.com
Answers to Your Questions About Amended APR 11

New anti-bias CLE requirement as of Sept. 1 does not increase required number of ethics credits

BY TODD ALBERSTONE

Many Washington practitioners are aware by now that the Washington Supreme Court amended Rule 11 of the Admission and Practice Rules (APR), effective Sept. 1, to include a requirement of a single hour of Mandatory Continuing Legal Education (MCLE) credit relating to equity, inclusion, and mitigation of bias in the legal profession and the practice of law in each MCLE reporting period. MCLE staff at the Washington State Bar Association and the MCLE Board have received a number of activity applications, requests, and questions concerning the application of this new requirement. This article is intended to respond to some of the common questions received and to clarify the application of the amended rule to the accreditation of new courses.

**BACKGROUND AND LANGUAGE OF AMENDED RULE**

The amendment to APR 11 originated from a proposal presented to the MCLE Board in 2018 by the WSBA Diversity Committee (now the Diversity, Equity and Inclusion Council), together with Washington Women Lawyers. The specific wording of the amendment, as promulgated by the MCLE Board, supported by the WSBA Board of Governors, and adopted by the court, appears within the overall MCLE ethics requirement at APR 11(c)(i)(ii):

(ii) at least six credits must be in ethics and professional responsibility, as defined in subsection (f)(2), with at least one credit in equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law. (Emphasis added.)

The new language, highlighted above, became effective on Sept. 1. This amendment does not increase the number of credits required under the ethics or general MCLE requirements; it simply requires that one hour out of the six required ethics credit hours every three years be devoted to the study of issues relating to equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law.

**TIMING AND REPORTING OF CREDIT**

As with all MCLE requirements, the credit must be obtained during the individual professional’s relevant reporting period. Since the amendment became effective Sept. 1, the credit must be obtained on or after that date.

The first group required to report based on this amendment is the 2023-2025 reporting group. The deadline for the first group to earn this one-hour credit is Dec. 31, 2025. The deadline to report and certify credits is Feb. 1, 2026. This requirement will then apply to each subsequent reporting period.

**AVAILABILITY OF COURSES**

The WSBA Board of Governors and WSBA CLE Department are committed to ensuring the availability of courses to fulfill this requirement, including a free online course, available both live and on-demand, provided by the WSBA CLE Department each year in this subject. Licensed legal professionals may find this and other free online courses by visiting the WSBA CLE webpage (www.wsba.org-for-legal-professionals/wsba-cle), under “Featured Seminars.” Additionally, CLE sponsors frequently offer courses in this subject area. You may search for approved courses on this and other topics on the MCLE Board Activity Search webpage (https://mcles.wsba.org/Search/Activity). Please note only courses offered on or after Sept. 1, 2022, will be eligible to fulfill the new requirement.

**ACCREDITATION**

The MCLE Board carefully drafted this amendment to tie the subjects of equity, inclusion, and mitigation of bias specifically to the legal profession and the practice of law for Washington legal professionals. As with any ethics course, the goals are closely linked to the individual legal professional’s own practice and conduct, and to the improvement of legal institutions, the legal profession generally, and the community. To be accredited, courses must be intended for lawyers and legal professionals, and geared toward the legal profession and the practice of law. More general courses in history, current affairs, or community issues that relate to equity and inclusion, as laudable as they may be, will not qualify if they are not intended and designed for legal professionals.
or do not relate to the practice of law, legal institutions, access to justice, the court system, administrative bodies, or the wide range of other topics of particular relevance to legal professionals in Washington.

REVIEW OF ACTIVITY APPLICATIONS
MCLE staff and the MCLE Board are often called upon to review activity applications from individual members seeking credit for courses that are not currently accredited in Washington (e.g., a course accredited in another state). The same accreditation standards set by APR 11 will apply to those applications. However, MCLE staff at the WSBA and the MCLE Board are aware that the individual member is typically in the best position to explain why a course they attended should qualify for credit. Accordingly, each application is reviewed on an individual basis to determine whether it fulfills the requirements of APR 11, including whether it relates to the legal profession and the practice of law.

The first group required to report based on this amendment is the 2023-2025 reporting group.

IMPACT OF AMENDED RULE
The MCLE Board strongly believes that this amendment will positively affect the legal community, the practice of law, and legal institutions in Washington. The Board was glad to see the Washington Supreme Court order that this important amendment become effective this year, and applauds the Board of Governors and the WSBA CLE Department on their commitment to make free online courses on the topics listed in the amendment available.

MORE ONLINE >
For more information about MCLE requirements visit: www.wsba.org/for-legal-professionals/mcle.
TOP MEETING TAKEAWAYS

1 Bar Structure. The Washington Supreme Court asked the Board to make a recommendation about whether the WSBA must change structure (considering federal litigation about the integrated-bar structure) or should change structure (to best achieve its mission). In response, the Board launched a study process to evaluate case law, consider what an ideal bar structure looks like, and, perhaps most importantly, to hear from members. The Board held its final meeting in the ETHOS process on Aug. 13, and approved its final recommendation to the Washington Supreme Court. For more information, see page 52 or www.wsba.org/ethos.

2 Bar Leadership. Congratulations to Governor Francis Adewale, elected by the Board as the WSBA’s treasurer for the 2022-23 fiscal year.

3 Next Year’s Budget. The Board reviewed the first draft of the WSBA’s Fiscal Year 2023 budget. License fees for 2023 have already been set and will remain steady (no increase). The final budget is scheduled for approval in September.

4 Local Hero. Prosecutor Diane Clarkson was honored as a Local Hero (nominated by the Tacoma-Pierce County Bar Association) for tenacity, compassion, and exceptional leadership in service to others. The Local Hero Award is bestowed by the WSBA president to recognize colleagues who make noteworthy contributions to their communities.

5 Amendment to Board Policy Based on MBA Request for Action. In April, the Board received a proposal signed by 11 minority bar associations (MBAs) that proposed several actions for the Board to take “to continue our dialogue and encourage the [Board of] Governors in its progress and efforts on diversity, equity, and inclusion in the legal community.” In response, the Board in May formed a task force to continue to work with the MBAs to come up with recommended action items from the proposal. After robust analysis and discussion, the task force returned with a recommendation for the Board to require an equity analysis—in addition to a fiscal and legal analysis—as part of every request for action. The Board approved the equity analysis. Additional recommendations are anticipated for consideration at the September meeting of the Board of Governors.

6 Support for Hybrid In-Person/Virtual Court System. The Board in June 2020 created the Equity and Disparity Work Group “to reckon with the harsh reality that laws, policies, and procedures in place in the legal system have historically led to disparate and inequitable results that disproportionately harm people of color.” A subgroup of that work group returned with a report about one of its priority areas: advocacy for continued remote court procedures, post-pandemic, to decrease disparity and expand access to civil and criminal legal services. The subgroup brought its proposal to the Board of Judicial Administration (BJA), and the BJA agreed to take up the issue (continued hybrid court access) as a strategic initiative.

7 WSBA Volunteer Vaccination Policy. The Board discussed whether it was time to change its policy mandating COVID-19 vaccination for all in-person WSBA volunteer work. The governors ultimately retained the policy and decided to invite, in the near future, a state health expert to come answer questions about best COVID-19 safety practices for organizations.

8 MCLE Credit for Law Clerk Tutors. The Board approved the recommendation from the MCLE Board to amend Admissions and Practice Rules to establish MCLE credit for tutors in the APR 6 Law Clerk Program. If the Supreme Court approves the rule change, tutors will be able to claim teaching credit under AP11(e)(6). The Board hopes the MCLE credit will encourage lawyers to serve as tutors and expand the Law Clerk program.
SAVE THE DATE

The next regular meeting is Sept. 22-23 in Bellevue. To subscribe to the Board Meeting Notification list, email barleaders@wsba.org.

OTHER BUSINESS

The Board also:

• Approved moving forward with an election for a District 8 governor, given the current governor has been elected to an at-large position and will resign the District 8 seat in September. Notification of the vacancy will soon be sent to all eligible members.

• Approved the Council on Public Defense recommendation to revise the Public Defense Workloads statement, which is intended to help public defenders express to funding authorities their concerns (and potential solutions) about workloads exceeding capacity due to the pandemic.

• Approved the Construction Law Section’s request to post amended and new model residential construction contracts on its webpage for public use.

• Approved a policy amendment to extend the number of terms Law Clerk Board members may serve to three consecutive 3-year terms.

• Approved a proposal to transition the WSBA Diversity Committee to the Diversity, Equity, and Inclusion (DEI) Council. Among other things, the new DEI Council Charter broadens the scope of membership eligibility to include not only active WSBA members and Board members, but also judicial status members, pro bono status members, law school students, faculty, and staff, as well as members of the public.

• Approved a WSBA Bylaw amendment to allow the Board Legislative Committee to approve comments from a WSBA entity to the Supreme Court regarding proposed rule changes, if the full Board of Governors does not have a regularly scheduled meeting before the comments are due.

LAWYER ANNOUNCEMENT

Tyler Waite

Campbell & Bissell, PLLC is pleased to announce that Tyler Waite has accepted an offer to be a member of the firm. Mr. Waite has worked as an attorney in the firm for nearly ten years. He earned an undergraduate degree from the University of Nevada Las Vegas and subsequently obtained a law degree from Gonzaga University. Over the last decade, Mr. Waite has been heavily involved in real estate transactions and commercial litigation with an emphasis in construction law. He is an active member of local construction industry trade associations, and he enjoys assisting clients navigate through legal issues.

(509) 455-7100
www.campbell-bissell.com

GUADAGNO LAW PLLC

**WSBA NEWS**

**Bar Structure (ETHOS) Update**

The WSBA Board of Governors held its final meeting in the ETHOS process on Aug. 13, and approved its final recommendation to the Washington Supreme Court. In regards to the three questions below, the recommendations are:

1. **Current federal litigation**
   
   does NOT require the WSBA to make a structural change.

2. **It will be important for WSBA and Washington Supreme Court leaders to act upon the actual decision if there is a ruling that forces structural change. Part of the process if such a ruling occurs will include looking at all the documents and information gathered for ETHOS.

3. **Litigation aside, the ideal structure is the current integrated model, which provides critical programs and services that work together to support the public and the profession.**

In September, the Board expects to finalize its report and send it to the Washington Supreme Court. When available, it will be posted at [www.wsba.org/ethos](http://www.wsba.org/ethos).

**Help Fill the Moderate Means Legal Need**

The statewide Moderate Means Program serves moderate income clients through a network of attorneys and limited license legal technicians who offer assistance in family, housing, consumer, and unemployment law cases at reduced fees scaled to the client’s income. There is an urgent need for legal professionals to serve. Visit [www.wsba.org/connect-serve/innovation-fund](http://www.wsba.org/connect-serve/innovation-fund) for more information and join now through your myWSBA account, [www.mywsba.org](http://www.mywsba.org).

**New WSBA Treasurer Elected**

Congressional District 5 Governor Francis Adewale was elected as the 2022-2023 treasurer by a vote of the Board of Governors at the regular meeting in July.

**Annual WSBA Solo and Small Firm Conference: Sept. 15-17**

*Designing the Future: Presented in partnership with the WSBA Solo & Small Practice Section. Three half-day virtual sessions beginning at 8:30 a.m. each day. This year’s conference includes presentations by, among others:*

- **Jordan L. Couch**, Palace Law; member, WSBA Board of Governors (and liaison to the Solo & Small Practice Section); 2020 WSBA APEX Award recipient.
- **Tahmina Watson**, Watson Immigration Law; incoming KCBA president; chair of the Response Committee of the bono-public-service/mmp for more information and join now through your myWSBA account, [www.mywsba.org](http://www.mywsba.org).

**WASHINGTON SUPREME COURT**

**Recommendation to the Governor**

In September, the Board expects to finalize its report and send it to the Washington Supreme Court. When available, it will be posted at [www.wsba.org/ethos](http://www.wsba.org/ethos).

**Follow Board Meetings and Submit Feedback**

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](http://www.wsba.org/about-wsba/who-we-are/board-of-governors). Send your feedback to boardfeedback@wsba.org. Please note that all WSBA emails are subject to public records requests.

**Volunteer With the WSBA**

The Board of Governors is seeking applications to serve on one of the WSBA’s many committees, boards, and councils. Take a moment to learn about the various volunteer opportunities and find the one that matches your skills and interests. Visit [www.wsba.org/volunteer](http://www.wsba.org/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: darlenen@wsba.org, 206-733-5923, 800-945-9722, ext. 5923.

RESOURCES
DEI Resource Library Available
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 race. Visit www.wsba.org/about-wsba/equity-and-inclusion/dei-resource-library.

Practice Guides

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.

CYNTHIA PARK
American University Washington College of Law
Associate

Schwabe, Williamson & Wyatt welcomes associate, Cynthia Park, to the firm’s Seattle office. Cynthia works with a variety of clients to navigate the different stages of litigation from discovery to appeal. She approaches each client’s concern with the respect and consideration needed to guide them through the process toward a successful resolution.

ALLEN BENSON
Gonzaga University School of Law
Associate

Schwabe, Williamson & Wyatt welcomes associate, Allen Benson, to the firm’s Seattle office and Real Estate and Construction industry group. He counsels clients on an array of legal concerns, including claims, disputes, drafting and negotiation of construction contracts and change orders. Allen helps clients move strategically through the many stages of the litigation process. Allen’s exceptional attention to detail and wide range of experience makes him a trusted advisor to his clients.
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.

Robert Adelman, #9084, 6/25/2022
Tom Austin Alberg, #200, 8/5/2022
Christopher Bates, #37705, 2/28/2022
Brian Budsberg, #11225, 7/9/2022
Timothy Clifford, #2454, 6/27/2022
John Craddock Coart III, #2165, 5/1/2022
Lori Ferguson, #29018, 7/12/2022
Wayne W. Hansen, #8912, 6/12/2022
Donald Madsen, #9342, 6/30/2022
Llewellym Matthews, #9535, 6/16/2022
Kellie Nielsen, #45890, 6/12/2022
John Polk, #33720, 5/1/2022
Thomas Michael Roberts, #14706, 7/22/2022
Jeffrey Wishko, #12885, 6/15/2022
Angela Wong, #22471, 6/10/2022

---

Donald Madsen · #9342, 6/30/2022

Donald Madsen was a leader and a powerhouse in the legal community. He was known and admired for his skills as an attorney and his deep commitment to his clients.

He was born in Omaha, Nebraska, in 1953 and took pride in the fact that he shared a birthplace with Malcolm X. Donald's family relocated to Las Vegas when he was 8. There he developed a deep bond with his siblings—his late older brother John, younger sister Kathy, and late youngest sister Kim—through a devotion to family and hard work.

With his mother's encouragement, and financial help from his Aunt Ethel, Donald eventually left Las Vegas to attend college at Pacific Lutheran University in Tacoma. However, his time was cut short when his mother passed away during his sophomore year and he returned to Las Vegas to finish school at the University of Nevada, Las Vegas.

Donald's love of Perry Mason, and a strong desire to help others, led him to the next big step in his life—to become an attorney. He worked his way through law school in Sacramento selling Electrolux vacuum cleaners door to door, and did the same after moving to Seattle while he searched for a job in the legal field. In 1979, Donald knocked on the door of Irving Paul, the organizer of the Associated Council of the Accused (ACA). Despite having no job openings, Irving offered Donald a job on the spot.

His first day at the ACA marked the beginning of his career, and even more importantly the first time he met the love of his life, Barbara, who would become his wife of 41 years. Donald worked at the ACA until his retirement in 2015 and served as the organization's director for seven years.

In 2013, the WSBA awarded Donald its Lifetime Service Award, one of its highest honors. A video created for the event includes footage of him talking in his no-nonsense style about why he became a public defender: “I've always had a desire to help out others and to help people in trouble and to help the underdog,” he said. “Clients have very little power,” he added. “That's what motivates me.”

Donald loved going to trial and was often described as a blond, six-foot-seven-inch Abe Lincoln. In addition to his job, Donald was an avid golfer. Barbara and Donald had four children, Sam, Hillary, Eleanor, and Beau; and three grandchildren, Levi, Paris, and Clare.

Donald passed away on June 30, 2022, after battling ALS for several years.

---

MORE ONLINE

When available, links to obituaries can be found in the online version of this article.

Free Consultations and Practice-Management Assistance

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

Want to Work at WSBA?

Interested in joining the WSBA team? Current openings include: Deputy Executive Director, MCLE Analyst, Member Wellness Clinical and Outreach Lead, and Sections Program Coordinator. Visit www.wsba.org/career-center/work-at-the-wsba to learn more.

ETICS

Ethics Line

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

WSBA Advisory Opinions

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

WSBA Member Wellness

Telehealth Available

The Member Wellness Program offers hi-def, HIPAA-protected video consultations using the telehealth portal Doxy.me. Visit www.wsba.org/for-legal-
MAREN CALVERT

Schwabe, Williamson & Wyatt welcomes Maren Calvert to the firm. Maren advises commercial property owners on purchase and sale agreements and leases, and assists developers with commercial, industrial, and multi-family residential development projects. She is adept at preparing and negotiating permits, land use applications, development agreements, and inter-governmental and public-private partnership agreements.

University of California Los Angeles School of Law

700 Washington Street, Suite 701
Vancouver, WA 98660

mcalvert@schwabe.com
www.schwabe.com
360-597-0804

Lawyer Announcement

LAWYER ANNOUNCEMENT

D. JEAN SHAW

Gonzaga University School of Law

700 Washington Street, Suite 701
Vancouver, WA 98660

jshaw@schwabe.com
www.schwabe.com
360-597-0803

Lawyer Announcement

professio nal s/m e m ber- s uppo rt/ wellness and click “Book Your Initial Consultation” to schedule time with our licensed providers.

Judges Need Help Too

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

The ‘Unbar’ Alcoholics Anonymous Group

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

WSBA COMMUNITY NETWORKING

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

Sept. 2022 Usury

The usury rate for Sept 2022 is 12%. The auction yield of the Aug. 1, 2022, auction of the six-month Treasury Bill was 2.93%.
The Pacific Northwest’s Premier Mesothelioma Law Firm

Available 24/7: 866-644-6915 - Free Consultation
Over $1 Billion Recovered For Our Clients
Accepting Referrals
WWW.BERGMANLEGAL.COM
**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](http://www.wabarnews.org) or by looking up the respondent in the legal directory on the WSBA website ([www.wsba.org](http://www.wsba.org)) and then scrolling down to “Discipline History.”

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

---

**Resigned in Lieu of Discipline**

**Patrick James Leahy** (WSBA No. 10912, admitted 1980) of Port Orchard, resigned in lieu of discipline, effective 7/05/2022. Leahy 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: 3.15A (Safeguarding Property), 3.15B (Required Trust Account Records).

Leahy's misconduct, as stated in disciplinary counsel's Statement of Alleged Misconduct, related to his handling of his trust account. Leahy's alleged misconduct includes: 1) failing to maintain complete and/or current check registers; 2) failing to maintain complete and/or current client ledgers; 3) failing to reconcile Respondent's account check register to the client ledgers; 4) failing to deposit client funds into an interest-bearing trust account that remitted interest monthly to the Legal Foundation of Washington in accordance with ELC 15.7(a); 5) authorizing a non-lawyer as a signatory on the trust account; and 6) disbursing funds on behalf of clients who did not have funds in trust, and by disbursing one client's funds on behalf of another.

Francesca D’Angelo acted as disciplinary counsel. Leland G. Ripley represented Respondent. The online version of Washington State Bar News contains a link to the following document: Resignation Form of Patrick James Leahy (ELC 9.3(b)).

**Terry L. Williams** (WSBA No. 21831, admitted 1992) of Colville, resigned in lieu of discipline, effective 7/18/2022. Williams 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: 3.4 (Fairness to Opposing Party and Counsel), 8.4(b) (Criminal Act), 8.4(d) (Prejudicial to the Admin of Justice), 8.4(i) (Moral Turpitude, Corruption or Disregard of Rule of Law).

Williams's misconduct, as stated in disciplinary counsel's Statement of Alleged Misconduct, related to his conduct during the representation of a client in a civil case while the client had a concurrent criminal case. William's alleged misconduct involves attempting to induce a witness to withhold testimony in a criminal case and by committing the crime of Attempted Tampering with a Witness.

Francisco Rodriguez acted as disciplinary counsel. Robert R. Cossey represented Respondent. The online version of Washington State Bar News contains a link to the following document: Resignation Form of Terry L. Williams (ELC 9.3(b)).

---

**Suspended**

**Brian L. Berkenmeier** (WSBA No. 20421, admitted 1991) of Longview, was suspended for three months, effective 5/17/2022, by order of the Washington Supreme Court. Berkenmeier's conduct violated the following Rules of Professional Conduct: 1.8 (Conflict of Interest: Current Clients: Specific Rules).

In relation to his conduct with Client A, Berkenmeier stipulated to suspension for having sexual relations with Client A, a current client with whom Berkenmeier did not have a preexisting consensual sexual relationship.

Amanda Lee acted as disciplinary counsel. Brian L. Berkenmeier represented himself. The online version of Washington State Bar News contains links to the following documents: Disciplinary Board Order Approving Stipulation; Stipulation to Suspension; and Washington Supreme Court Order.

---

**Interim Suspension**

**Ray Garland Deonier** (WSBA No. 33609, admitted 2003) of Seattle, is suspended from the practice of law in the state of Washington pending the outcome of disciplinary proceedings, effective 5/20/2022, by order of the Washington Supreme Court. This is not a disciplinary sanction.

---

**Transfer to Disability Inactive Status**

**Douglas Lowell Davies** (WSBA No. 16750, admitted 1971) of Bainbridge Island, was by stipulation transferred to disability inactive status, effective 7/14/2022. This is not a disciplinary action.

Rodney Giovanni Pierce (WSBA No. 5317, admitted 1973) of Seattle, was by stipulation transferred to disability inactive status, effective 4/18/2022. This is not a disciplinary action.

---

**MORE ONLINE**

Access further details of the notices by clicking the links in the online version: [www.wabarnews.org](http://www.wabarnews.org)
Marketplace

PROFESSIONAL LISTINGS OF INTEREST — TO ATTORNEYS IN WASHINGTON

ACCOUNTING

**Truepoint Analytics, PC**

*William N. Holmes*

*CPA, ABV, CVA, CFE*

7128 SW Gonzaga Street, Suite 100 Portland, OR 97223

*PH: 503-270-5400  FX: 503-270-5401*

*EMAIL: info@teamtruepoint.com*

- Fraud and Forensic Accounting
- Economic Damages
- Business Valuation
- Commercial Litigation
- Accounting and Tax Malpractice
- White Collar Financial Crime
- Expert Testimony
- Plaintiff and Defense
- Full Service Public Accounting

www.teamtruepoint.com

**Freedom of Speech**

*James E. Lobsenz*

701 Fifth Avenue, Suite 3600
Seattle, WA 98104

*PH: 206-622-8020*

*EMAIL: lobsenz@carneylaw.com*

(See, e.g.,):

- *Ground Zero v. United States Navy*, 860 F.3d 1244 (9th Cir. 2017)
- *Seattle v. Long (2021)*
- *Witt v. the Air Force*, 527 F.3d 806 (9th Cir. 2008)
- *Daybreak Youth Services (2021)*

www.carneylaw.com

**Forensic Accounting**

*Robert Loe, CFE, CPA*

*Licensed in WA, AK, & DC*

2400 NW 80th St, #302, King County Seattle, WA 98117

*PH: 206-292-1747*

*EMAIL: robert@loe CPA.com*

- Certified fraud examiner
- Forensic accounting
- Litigation support
- Expert witness testimony
- Experienced peer reviewer
- Former investigator for state board of accountancy

www.loe CPA.com

**Forensic Dynamics LLC**

*Jan Seaman Kelly, Owner*

*PH: 702-682-0629*

*EMAIL: forensics dynamics llc@gmail.com*

- Civil/criminal cases, testified in state/fed courts, 30+ yrs experience, ABFDE certification.
- Proficiency tested annually. Handwriting, typewriting, indented writing, printing processes, mechanical impressions, rubber stamps, & shredded documents. Wills, Deeds, Contracts, Medical Records.

www.forensics dynamics.org

CONSULTANTS

**Investor Claims**

*Courtland Shafer*

*Llewellyn & Shafer, PLLC*

4847 California Ave. SW, Ste. 100
Seattle, WA 98116

*PH: 206-923-2889*

*EMAIL: courtland@llllaw.net*

- Former NASD Series 7, 66 and life/annuity insurance licensed broker/investment advisor.
- Available for consultation and referrals in claims involving broker/dealer error, fraud, and investment suitability.

https://llewellynandshafer.com/

**Freedom of Speech**

*James E. Lobsenz*

701 Fifth Avenue, Suite 3600
Seattle, WA 98104

*PH: 206-622-8020*

*EMAIL: lobsenz@carneylaw.com*

(See, e.g.,):

- *Ground Zero v. United States Navy*, 860 F.3d 1244 (9th Cir. 2017)
- *Seattle v. Long (2021)*
- *Witt v. the Air Force*, 527 F.3d 806 (9th Cir. 2008)
- *Daybreak Youth Services (2021)*

www.carneylaw.com

**Investor Claims**

*Courtland Shafer*

*Llewellyn & Shafer, PLLC*

4847 California Ave. SW, Ste. 100
Seattle, WA 98116

*PH: 206-923-2889*

*EMAIL: courtland@llllaw.net*

- Former NASD Series 7, 66 and life/annuity insurance licensed broker/investment advisor.
- Available for consultation and referrals in claims involving broker/dealer error, fraud, and investment suitability.

https://llewellynandshafer.com/

HANDWRITING

**Forensic Dynamics LLC**

*Jan Seaman Kelly, Owner*

*PH: 702-682-0629*

*EMAIL: forensics dynamics llc@gmail.com*

- Civil/criminal cases, testified in state/fed courts, 30+ yrs experience, ABFDE certification.
- Proficiency tested annually. Handwriting, typewriting, indented writing, printing processes, mechanical impressions, rubber stamps, & shredded documents. Wills, Deeds, Contracts, Medical Records.

www.forensics dynamics.org

HOTELS & RESORTS - OFFICE SPACES

**Fairmont Olympic Hotel**

*Lorraine Allen*

411 University St, Seattle, WA 98101

*PH: 206-467-9378*

*EMAIL: Lorraine.Allen@Fairmont.com*

Dare to impress with top floor executive office suites in the newly renovated Fairmont Olympic. With close proximity to courts and access to conference room and reception with food & beverage and hotel discounts. Seattle’s premier address, rated #1 Best Hotel in Seattle by Travel + Leisure.

Fairmont.com/Seattle

MORE LISTINGS >
Schwabe, Williamson & Wyatt welcomes Steve Horenstein to the firm. Steve has decades of experience representing commercial real estate developers, public sector entities and tribal entities in some of the region’s most complex projects. Utilizing his business perspective and extensive background in land use, environmental permitting, property development, Growth Management Act planning and compliance, leasing, and financing, he advises clients while keeping their larger objectives in mind.

700 Washington Street, Suite 701
Vancouver, WA 98660
shorenstein@schwabe.com
www.schwabe.com
360-597-0806

SKELENGER BENDER, P.S. is pleased to announce that ten of our attorneys have been included on the 2022 Washington State Super Lawyers and Rising Stars lists!


SUPER LAWYERS are selected annually through an unbiased, multiphase process that includes peer nomination, evaluation, and independent research. No more than 5% of attorneys in each state are selected as Super Lawyers. To be selected as Rising Stars, candidates must be either 40 years or younger or in practice for 10 years or less; they are selected using the same unbiased, multiphase process. No more than 2.5% of attorneys in each state are named on the Rising Stars list. Skellenger Bender is honored and thrilled to have so many of our attorneys attain such a high degree of peer recognition and professional achievement!

Phone: 206-623-6501
www.skellengerbender.com
1301 Fifth Ave, Suite 3401, Seattle, WA 98101

WANT TO PLACE A LISTING IN THE MARKETPLACE?
See page 60, to learn how >
LEGAL NOTICES

**Best Value For Legal Notice Publishing In Skagit County**

**The La Conner Weekly News**
P.O. Box 1465, La Conner WA 98257
**PH:** 360-466-3315
**EMAIL:** production@laconnernews.com

The La Conner Weekly News is your best choice for publishing legal notices in Skagit County.
We are an adjudicated newspaper publishing every Wednesday, and we make it easy. Submit notices online, via email, or by phone. We work with you on costs and schedules and promptly notarize and invoice, so you don’t have to wait to bill your clients.
We prize our accuracy and our customer service and follow all Washington State guidelines.

[www.laconnerweeklynews.com/legals](http://www.laconnerweeklynews.com/legals)

MEDIATION

**Dunlap Mediation Services**

**Debbie Dunlap**
3131 Western Avenue
Suite 410 Seattle, WA 98121
**PH:** 425-765-0078  **FX:** 425-642-8700
**EMAIL:** debbie@dunlapms.com

Debbie Dunlap is located in downtown Seattle and Moses Lake for availability to successfully mediate cases in Western and Eastern Washington locations at her office or offices of counsel for the parties.
Debbie has mediation training and experience. She has litigated insurance defense and plaintiff’s personal injury cases for over 30 years in most counties in Washington, focused on minor to major catastrophic injuries and wrongful death, as well as brain and psychological injuries, sexual torts, abuse and harassment, and insurance bad faith, consumer protection, and subrogation.
Debbie is also experienced in landowner disputes such as boundary line, adverse possession, tree cutting, waste and nuisance; and product and school district liability. Providing economical and fair mediations.
Videoconferencing mediation available during COVID-19 and its restrictions.

[www.dunlapms.com](http://www.dunlapms.com)

PROFESSIONALS

**Law Firm Break-Ups, Partner Departures & Expulsions**

**Smyth & Mason, PLLC**
1325 Fourth Avenue, Suite 940
Seattle, WA 98101
**PH:** 206-621-7100  **FX:** 206-682-3203

Discreet consultation and litigation of partner withdrawals or expulsions.
Smyth & Mason, PLLC have years of experience successfully representing departing partners, expelled partners, and law firms. Operating agreements, divisions of profits, receivables, case files and clients; redistribution of debt and costs. Don’t go it alone.

[www.smythlaw.com](http://www.smythlaw.com)

**Ruby Receptionists, Inc.**

**Sarah Allen**
**PH:** 866-611-7829
**EMAIL:** partners@ruby.com

Ruby delivers exceptional experiences to callers and website visitors, building trust and long-lasting client relationships. Our highly trained US-based virtual receptionists and chat specialists answer calls and chats live, 24/7/365, saving you time to focus on what you do best.
Over 14,000 business owners trust Ruby with front-line communications. In return, they get increased sales inquiries and measurably better client and customer satisfaction. Learn more about how Ruby can help you grow your practice! Remember, as a bar member, you can get 7% off Ruby with promo code: WSBA

[www.ruby.com/campaign/wsba/](http://www.ruby.com/campaign/wsba/)

WANT TO BE FEATURED IN THE MARKETPLACE?

Placing an ad is easy! To learn more, contact Ronnie Jacko at LLM Publications at **503-445-2234** or **ronnie@llmpubs.com**

Please support the advertisers seen here in our new and improved Marketplace of Professionals.

[Check out our featured listings online at wabarnews.org](http://wabarnews.org)
SEIZE THE OPPORTUNITY!

“My favorite aspect of the Moderate Means Program (MMP) is that it gives opportunities to the public, attorneys, and law students.

As a Moderate Means Program attorney I was able to help clients with critical legal needs who had nowhere else to turn.

As the former President of the Washington State Bar Foundation I was able to showcase how the generous donations of WSBA members support public service initiatives like this.

Now, in my current role, I have the opportunity to support law students as they gain hands-on experience working with clients.”

Kristina Larry
Staff Attorney, Moderate Means Program
School of Law
University of Washington

The need is greater than ever—especially in rural counties where requests for help are going unmet!

Learn how the Moderate Means Program can benefit your practice at wsba.org/mmp

Apply to serve MMP via MyWSBA.org or support with a donation at wsba.org/foundation
FOR SALE

Profitable top-rated immigration law firm (#1199)
This reputable Northwest immigration law firm is multilingual and known for providing diversified and dedicated legal services, coupled with personal attention to each and every client. As of June 2022, the practice has approximately 320 active clients with approximately 6,500 total clients in its database. For the past three years, the practice has averaged gross revenue of approx. $815,000 (2019-2021). The firm employs a multilingual staff and is well-positioned to expand into other law practice areas to a diversified population. If you are a buyer who is an experienced immigration attorney, or an existing law firm that would like to expand its client base, this is the business opportunity for a new owner. To learn more about this exciting business opportunity, call us at 253-509-9224 or send an email to info@privatepracticetransitions.com, with “1199 Profitable Top-Rated Immigration Law Firm” in the subject line.

Profitable Western Washington insurance defense firm (#1203)
Established back in 1997, this Western Washington insurance defense firm has a service by revenue breakdown of 88% insurance defense, 8% miscellaneous civil litigation, and 4% estate planning. The firm is known for its longevity of practice, quality of work, responsiveness, and overall excellence. For the past three years, the practice has averaged impressive gross revenue of approx. $721,661 (2019-2021). In total, the firm employs three staff members including the owner, who is willing to provide transition assistance and help with goodwill transfer, business development, and other “mentoring” functions for up to one year. To learn more about this thriving insurance defense firm has a service by revenue breakdown is 85% patent law and 15% trademark law. In 2021, the practice brought in gross receipts of $2,485,533 which was a YOY increase of 30% from 2020. In total, the practice employs six staff, including the owner, and contracts with nine independent contractors. The owner is willing to provide transition assistance and help with goodwill transfer, business development, and other “mentoring.” The practice is entirely virtual, making it a great opportunity for a new owner. If interested, call us at 253-509-9224 or, send an email to info@privatepracticetransitions.com with “1201 100% Virtual Intellectual Property Law Firm” in the subject line.

100% virtual intellectual property law firm (#1201).
Established in 2014, this thriving intellectual property law firm specializes in patents and trademarks. As of June 2022, the practice has about 548 active clients, approximately 2,000 clients in the practice’s database, and a large social media following. The practice’s service by revenue breakdown is 85% patent law and 15% trademark law. In 2021, the practice brought in gross receipts of $2,485,533 which was a YOY increase of 30% from 2020. In total, the practice employs six staff, including the owner, and contracts with nine independent contractors. The owner is willing to provide transition assistance and help with goodwill transfer, business development, and other “mentoring.” The practice is entirely virtual, making it a great opportunity for a new owner. If interested, call us at 253-509-9224 or, send an email to info@privatepracticetransitions.com, with “1189 Successful Multnomah County Personal Injury Law Firm” in the subject line.

Profitable Central Washington estate planning law firm w/two locations (#1197).
Established back in 1947, this Central Washington estate planning law firm has been completely dedicated to providing top-notch legal services to its clients. The firm’s service by revenue breakdown is 31% estate planning, 31% probate, 17% real estate and commercial transactions, 16% business formation/management, and 5% other. As of May 2022, the firm has approximately 130-150 active client matters. For the past three years, the firm has averaged gross revenue over $1 million (2019-2021). In total, the firm employs nine full- and part-time staff, including the owner. To learn more about this listing call us at 253-509-9224 or send an email to info@privatepracticetransitions.com, with “1197 Profitable Central Washington Estate Planning Law Firm w/2 Locations” in the subject line.

Preeminent virtual-ready law firm (#1192).
Established, highly successful, business and trust
litigation law firm, with 50% profitability and poised for growth and set up to become 100% virtual. While the main office is based in Oregon, the firm serves California, Idaho, and Washington and is completely turn-key and ready for new ownership. The firm’s service by revenue breakdown is 25% closely held business disputes, 25% trust and probate litigation, 20% complex commercial litigation, 15% real estate litigation, 10% construction law, and 5% other. For the past three years, the practice has averaged gross revenue of approx. $597,621 (2019-2021) and in 2021, brought in gross receipts of $799,190. As of February 2022, the practice employs four staff, including the owner. To learn more about this listing, call us at 253-509-9224 or email info@privatepracticetransitions.com, with “1190 Preeminent Virtual-Ready Law Firm” in the subject line.

Lucrative King County law firm w/high SDE* in the subject line.

**FREE**

**Free Offer**

**FREE**

Free Desk. The desk has clean lines, is made with light oak veneer, and served well during a career’s worth of complex litigations. It now seeks new opportunities with another owner. Size: 71” x 36” x 30.” For further info, text or call Allen Bentley at 206-669-5914.

**SERVICES**

Considering the sale or purchase of a private practice? As the preeminent provider of business brokerage and consulting services in the Northwest, we work exclusively with owners of professional practices in the legal, health care, financial services, and tech industries. Need to prepare your practice for sale? Looking for a business valuation? Ready to sell your practice for top dollar? Let our team guide you through this life-changing transition.

Call us at 253-509-9224 or visit our website to learn more about our services and top-notch team waiting to help you: PrivatePracticeTransitions.com.


Make your web copy shine! Freelance writer and attorney of 15+ years, ready to perfect your web content, blog posts, newsletters, marketing materials, white papers, e-books, etc. One hundred percent professional and reliable. Almost a decade of professional writing/marketing experience. Dustin Rechard: dustin@dwrwrites.com or 206-451-4660. Please visit www.dwrwrites.com for more information.

**NATIONWIDE CORPORATE FILINGS**

Nationwide corporate filings and registered agent service. Headquartered in Washington. Online account to easily manage 1,000 of your clients’ needs: www.northwestregisteredagent.com; 509-768-2249; sales@northwestregisteredagent.com.

**SPACE AVAILABLE**

Fully furnished office space for lease in Kirkland. Six private offices, front desk, paralegal workstation, plus conference room. Free parking. $5,000 per month, with water/sewage/garbage paid by landlord. Electricity and security system fees paid by tenant. Contact 425-284-1128.

Two light-filled offices for sublease in five-attorney downtown Bellevue law firm specializing in business, real estate, and estate planning. Located in Key Bank Building. Available individually or as a pair. Includes reception services, conference rooms, shredding. Available now. Complementary practice areas preferred. Cross referrals possible and encouraged. Contact Sara at 425-454-2344 ext. 121 or email sberkenwald@jgslaw.com.

**OFFICE SPACE FOR LEASE**

Office space for lease in Tacoma. Adjacent to county/city building. Four private offices; two workstations; secretarial station; kitchenette; private bathroom and HVAC System; two secured covered parking spaces with additional pad parking available. Access to six community conference rooms. $2,450 per month full service. Call 253-905-0430.

Office space to be available for sublet in a beautiful, 31st floor suite at 1000 Second Avenue, in downtown Seattle. Reception is included, with paralegal support available on a contract, as-needed basis. This 145 SF space includes north-facing and Puget Sound views, use of a large exterior conference room, and a warm, collegial group of experienced criminal defense lawyers. This building has bike storage and is pet friendly. Contact robert@gordonsaunderslaw.com for more details.

Full-service attorney/CPA professional offices and workstations available for monthly rental. Ample free parking with easy freeway access without the traffic! Private offices start at $1,000 a month. Workstations start at $500 a month. Plus additional services selected. 2135 112th Ave NE Bellevue, WA 98004. Contact Hannah: hannah@mosercpas.com, 425-818-9400.

**VACATION RENTALS**

PARIS APARTMENT—at Notre Dame. Elegant 2-bedroom, 2-bathroom apartment, in the heart of Paris. PROVENCE HOUSE—in Menerbes. 4-bedroom, 3.5-bathroom house. Incredible views. 503-227-3722 or 202-285-1201; angpolin@aim.com.
Michaela Murdock

BAR NUMBER: 43252

Michaela Murdock is an assistant district counsel for the U.S. Army Corps of Engineers, Walla Walla District. Her practice includes advising the district’s regulatory and planning/civil works offices. She enjoys spending time with her husband, twin daughters, three cats, and new puppy—all of whom make untimely appearances in her teleconferencing calls.

If you could change one thing about the legal system, what would you change?
I would make low-cost or free legal services widely available to everyone in civil cases, particularly in family law. Like criminal cases, civil cases can irreparably alter lives, and having access to competent, individualized legal counsel can make all the difference for the better. Everyone should be able to obtain fair, reasonable, and effective solutions to life’s problems regardless of their ability to pay. This is one of the reasons I love government work. When I am trying to understand a problem and help my clients, I am not limited by how much they can pay.

How did you become interested in your practice area?
I graduated from law school in 2010 during the recession without a solid plan. I took interesting opportunities as they arose and tried not to be afraid of change. This led me down a bit of a winding path—criminal defense and family law in Walla Walla and Columbia Counties, nonpartisan counsel for the Office of Program Research in Olympia, and civil deputy prosecuting attorney for Benton County. I learned a lot about what I loved (government work, writing, advising, and learning new areas of the law) and a lot about what I didn’t (billable hours, marketing, narrowly specializing, and commuting). In 2017, I found myself in the right place at the right time when a position with the Corps came up. Not only did it check all the “like” boxes for me, but it also let me do work for the region and nation from small town Walla Walla.

How do you define success as a lawyer?
Success is when my clients show me that they trust me and value my advice; when I am proud of my work because I know it is well researched, accurate, and represents my best effort to achieve the goal at hand, whether that is communicating something to a colleague, client, or opposing counsel, or attempting to persuade a court; or when I am able to go home and be fully present with my family because I know I have accomplished what I needed to at work. I try not to measure success in wins or losses (although I AM a lawyer and sometimes I can’t help it). I try to remind myself that success is an ongoing practice, rather than a single event.

If you had to give a 10-minute presentation on one topic other than the law, what would it be and why?
Sleep training twins. Why? Because sleep is important, twins are hard, and I have spent the past three years attempting to get back my 7-8 hours of sleep a night.

If you could go back in time, where/when would you go?
February 2020 to warn myself to get comfortable. Working at the coffee table is bad for your back, so make yourself a proper COVID-19 teleworking station sooner rather than later.

What did you eat for breakfast this morning?
The rest of my toddlers’ yogurts.

What is one thing your colleagues may not know about you?
I played a spirit in Mozart’s opera The Magic Flute when I was 17.

What is your favorite smell?
A Pacific Northwest rainforest.

What is your favorite podcast?
Hidden Brain.

What is the last thing you watched on television?
The Marvelous Mrs. Maisel.

What is the best fictional representation (TV, movie, book) of a lawyer?
Daredevil’s Matt Murdock.
“I love LawPay! I’m not sure why I waited so long to get it set up.”

– Law Firm in Ohio

Trusted by 50,000 law firms, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.

- 22% increase in cash flow with online payments
- Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA
- 62% of bills sent online are paid in 24 hours

Get started at lawpay.com/wsba 866-645-4758

Data based on an average of firm accounts receivables increases using online billing solutions.

LawPay is a registered agent of Wells Fargo Bank N.A., Concord, CA, Synovus Bank, Columbus, GA., and Fifth Third Bank, N.A., Cincinnati, OH.
Every mistake has a solution.

Trust us with your DUI and Criminal Defense referrals. With nearly three decades of experience handling these cases, we’ve seen just about everything. We know mistakes happen, and we know how to solve them.

“Alister is literally the best lawyer you could ever ask for. He is personable, smart, articulate, and truly has a passion for his clients. This was one of the hardest experiences for us to go through and Alister was our rock the entire time.” –Tami E., Bonney Lake, WA