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WASHINGTON STATE Bar News

THE OFFICIAL PUBLICATION OF THE WASHINGTON STATE BAR ASSOCIATION



Pathways into the Profession



NOV. 2023
VOL. 77, NO. 9

Washington's Bar Licensure Task Force
recommendations, new and improved bar
exam, Q&A with law school deans / **pp. 26-46**



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Established, Upgraded, and New Pathways into the Profession

This issue, we're dedicating space to the topic of pathways into the Washington legal profession. If you're reading this, you're most likely already a member of that community. You probably passed the bar exam. You may have attended law school, or you may have gone through the Law Clerk Program.

Now Washington is considering creating new pathways into the legal profession and new ways to measure competency to

practice. On page 26, read an overview of what the Washington Bar Licensure Task Force, a group created by the Supreme Court and made up of many professionals in the state, is recommending. In addition, hear insights from the co-chairs of the task force, Washington Supreme Court Justice Raquel Montoya-Lewis and Seattle University School of Law Dean Anthony Varona (page 30); and thoughts from two of the WSBA's representatives on the task force, Governor Brent Williams-Ruth (page 36) and Governor Jordan Couch (page 34). Also up for discussion is upgrading the bar exam. Find out what could change in a move from the current UBE to the new "NextGen Bar Exam" on page 38.

The ideas explored on these pages are still very much under consideration. Members of the legal community and the public in Washington are encouraged to provide their feedback by Jan. 5, 2024, to licensurepathwaysfeedback@wsba.org.

Lastly, plug in to the state's two established pathways into the profession. On page 43, two members of the Law Clerk Board explain a bit about the program and its benefits. On page 44, the state's three law school deans answer questions about the challenging and exciting things ahead in legal education. **BN**

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

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

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

In Response to 'My So-Called Disorder'

Regarding the article by Peter O'Neil in the September 2023 issue of *Bar News*: Fantastic article. I'm in awe of Mr. O'Neil. Thank you to him and to *Bar News* for sharing.

Andy Hess
Lebanon, OR

In Response to September Letters About 'Wokeness,' Equity, and Racism

In response to Inez Petersen's letter to the editor, "The Bar Should Deemphasize Wokeness," Ms. Petersen needs to understand that the opposite of being woke is being asleep and unaware of the world and other human beings around you.

Teresa Keene
Spokane

First things first: I'm a white woman, and I do not pretend to understand the lived experience of people who are not white and cisgender like me. That said, I have spent significant time attempting to educate myself about issues surrounding equity. Also, after 28 years as an attorney, I think I've gotten pretty good at spotting flawed arguments and logical fallacies.

The logical fallacy in both letters is that they are based on

APPEALS

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a false premise: that everyone is equal to begin with. Based on this fallacy, the writers falsely conclude that “merit” (of what sort is not specified) will result in fair outcomes, and therefore, no one should consider race or ethnicity as a potential source of inequity or make any efforts to counteract inequity based on race or ethnicity. Put in baseball terms, the letter writers assume that everyone begins their at-bat at home plate, that everyone advances from base to base in the same way in order to score a run, and that everyone is playing under the same set of rules.

But that is not reality. In reality, some people are born on third base while others are still struggling to get to the on-deck circle. While it is true that some people in the latter circumstances—through *extraordinary* effort—succeed in making their way around the bases, they are still running far behind the people who started on third base. At the same time, many of the people born on third base mistakenly believe they hit a triple, and then wonder what everyone else is complaining about.

This is why “equity” is not the same thing as treating everyone equally—because, sadly, even in 2023, we are still not equal to begin with. If that constitutes “wokeness” (whatever that is), just call me Wokey McWokerson.

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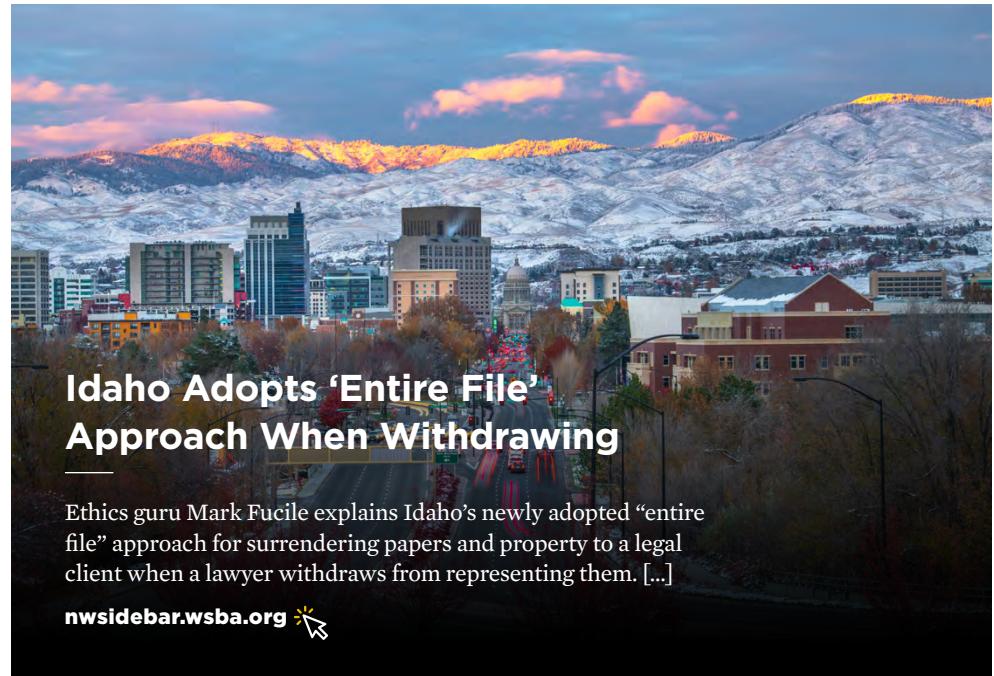
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A photograph of a city skyline at sunset, with mountains in the background. The sky is filled with orange and pink clouds. The city buildings are visible in the foreground.

Idaho Adopts 'Entire File' Approach When Withdrawing

Ethics guru Mark Fucile explains Idaho's newly adopted "entire file" approach for surrendering papers and property to a legal client when a lawyer withdraws from representing them. [...]

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WSBA Legislative Proposals

The WSBA Board of Governors is considering whether to get behind two legislative proposals—one from the Bar's [...]

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Thank You, Mr. President

WSBA's new President Hunter Abell pays tribute to the accomplishments of his predecessor Dan Clark. [...]

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A NOTE FROM THE WSBA EXECUTIVE DIRECTOR

A Deep Dive Into Bar Admission Processes

In June 2021,¹ I wrote about work being done to examine the process by which a person becomes a legal professional in Washington. In this issue of *Bar News*, we are excited to share the draft recommendations from the Bar Licensure Task Force, including multiple perspectives about why the Washington Supreme Court is considering historic changes to the bar admissions process.

By definition, every single one of us has brushed up against the Admission and Practice Rules (APR) (you may even have some deeply held beliefs about their value). If you have a license to practice law, you have likely passed a bar exam and character and fitness review. In addition, our admissions processes rely on you, members, who volunteer to do the work of grading the bar exam or serving on the Character and Fitness Board.

As a fully integrated bar, the WSBA has been delegated the authority of the Washington Supreme Court to administer and ensure the integrity of the admissions process. Our employees and volunteers live this body of work daily, and our knowledge comes with a steadfast obligation. Our highest priority is public protection. Full stop. We protect the public by recommending admission of only those who can demonstrate competency, good moral character, and fitness to practice law. As the executive director of the Bar, I can tell you that the staff and each of the volunteers that I have encountered that carry out this work do so with the utmost integrity and with equity and fairness as guiding principles. So in carrying out this work, they are the first to experience the tension when a particular rule subset or process is not working or when a new challenge or outlier or study compels us to wave a red flag.

Our advocacy comes in the form of recommending rule changes to the court and/or altering our own way of doing business within allowable parameters. For example, we continually refine the character and fitness application questions so that applicants need only disclose information relevant to the most current interpretation of the APR factors. We recently eliminated questions about matters resolved in juvenile court. Washington has also been a leader in the effort to destigmatize mental illness in the context of bar admissions. Based on a recommendation from a workgroup we formed with representation from disability rights organizations, the court in 2016 adopted APR amendments that fundamentally shifted the definition of “fitness to practice law”² to focus on conduct and not mental health. I am incredibly proud that we were one of the first states to remove questions about mental

health and substance use issues from our application for admission.

In terms of the bar exam, we support the National Conference of Bar Examiners’ work to address relevance and equity concerns about the current Uniform Bar Exam (read more about this issue on page 38). We also focus on exam administration that prioritizes applicants’ well-being, security, comfort, and empowerment. We work to demystify the process and respond to feedback. As an example, when the pandemic forced us to hold a remote exam, we held live Q-and-A sessions with applicants and modified our administration in response to community concerns and feedback. We also provided hotel rooms to ensure a safe exam site for those that didn’t have a suitable location of their own.

What I hope to convey is how deeply we at the WSBA think about admission to the practice of law. It keeps me up at night, considering how to protect the public—not just the worry of letting unqualified candidates in, but also the inverse: a fear that the systems we’ve established and administered for decades are exacerbating the access-to-justice gap and lack of representation in the legal community.

When then-Chief Justice Debra Stephens created the Bar Licensure Task Force in 2020, its mission was to study the efficacy of our bar exam and character and fitness process and their potential adverse effects on certain groups of people. It was with a sense of eagerness and honor that our WSBA representatives—Chief Regulatory Counsel Renata de Carvalho Garcia and Board of Governors members Jordan Couch and Brent Williams-Ruth, alongside myself—stepped up to serve.

Three years later, the task force has issued its final reports, and here is my perspective: Some sort of exam and character review have been part of bar licensure since Washington’s inception,³ and while the bar exam certainly needs a modern makeover (again, see page 38), it will likely remain the competency benchmark for many applicants. But—and this is a big but—many, many studies show conclusively that using the bar exam as the *only* competency benchmark systemically and negatively impacts qualified applicants in communities of color.⁴ Morally speaking, we all want an admissions



Terra Nevitt

WSBA Executive Director

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process that is fair, equitable, and narrowly tailored to protect the public. Practically speaking, we need a diverse, robust, and healthy community of legal professionals if we ever hope to close the access-to-justice gap and instill confidence among all Washingtonians that our legal system is effective, just, and trustworthy. Towards that end, one of the task force's most important recommendations is the creation of multiple pathways to licensure that will allow applicants a variety of ways to demonstrate their competence.

And don't let that report steal the spotlight from other significant recommendations to clarify and modernize our character and fitness review factors and timing; and to support professionals—not just at the singular point of time of admissions—but throughout their career with ethics guidance, practice management advice, and well-being resources, as well as support from colleagues and mentors.

Whatever the outcome, we stand ready at the Washington State Bar Association to continue to implement the court's admissions process with fidelity, just as we will continue to advocate for changes that we believe, through frontline experience, will best protect the public and support access to justice.

My thanks to you, for coming along this APR journey with us. Please read more about the task force's work and recommendations in this magazine, and offer your feedback by Jan. 5, 2024, via licensurepathwaysfeedback@wsba.org. 

NOTES

1. See wabarnews.org/2021/06/01/bar-in-brief-examining-the-bar-exam-exploring-alternative-models-for-licensing.
2. See Kevin Bank & Emily Cooper, "Changes to the Character and Fitness Rules: Amendments for a New Era," *NWL Lawyer*, Dec. 2016/Jan. 2017, at 13.
3. WSBA records indicate "good moral character" and examination for possession of the "requisite qualifications and learning" have been on the books since Washington's territorial laws of 1863.
4. See "A Proposal for the Future of Washington State Bar Admissions" at www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.LicensureTaskForce.



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As we embark on this exciting new chapter, we honor the past and embrace the future.

Lawyers as Heroes

Last month, I outlined how I hope to spend my brief time with you in this role as your WSBA president: increasing the public's trust and confidence in our Washington legal profession. In going out and speaking with the Washington public, I hope to re-kindle a public recognition of our profession as one that is devoted to public service, rule of law, and defending individual freedoms.

The task is difficult. The public views our profession with profound skepticism. In 2010, when addressing the American College of Trial Lawyers, Laurence Tribe recounted one of his favorite *New Yorker* cartoons that depicted a well-dressed gentleman talking with an attractive younger woman at a cocktail party. "Oh yes, I am a lawyer," he says to her, "but not in the *pejorative* sense."¹ Thirteen years later, it is apparent that most Americans view lawyers very much in the pejorative sense.

One way to counter that perception is by speaking directly to the public and, in particular, to students, about the role that lawyers play in our system and by holding up examples of lawyers as heroes. Real-life lawyer heroes abound. A classic example is John Adams defending the British troops after the Boston massacre. Another example is Thurgood Marshall leading the fight against Jim Crow. More locally (and recently), this year's APEX Award winners, including Caesar Kalinowski IV, Michael Goldenkranz, Rebecca Bernard, and others, are real-life, contemporary heroes.²

Not only are there plenty of real-life lawyer heroes, but, if fiction is to be believed, the public *wants* lawyers to be heroes and recognizes the essential role they play in any fair judicial system. One of my favorite movies is the 2012 film *The Dark Knight Rises*. In it, Gotham City is taken over by the villain Bane, who institutes a reign of terror. Among my favorite scenes are the kangaroo court situations involving Dr. Jonathan Crane as a Bane-empowered judge distributing "justice" en masse. Dr. Crane has been sentencing citizens resistant to Bane's rule to exile by sending them at gunpoint across a frozen river, where they inevitably fall through the ice and drown. One scene involves captured Gotham City Commissioner Gordon and his men being haled before "Judge" Crane:

Jim Gordon: "No lawyer, no witnesses? What sort of due process is this?"

Jonathan Crane: "Your guilt has been determined. This is merely a sentencing hearing. Now, what will it be? Death or exile?"

Jim Gordon: "Crane, if you think we're going to walk out on that ice willingly, you've got another thing coming!"

Jonathan Crane: "So it's death then?"

Jim Gordon: "Looks that way."



Hunter M. Abell

WSBA President

—
Hunter Abell is a civil practitioner with the Spokane office of Williams Kastner. He can be reached at habell@williamskastner.com.

—
NOTE: The views expressed are those of the author and do not reflect the official policy or position of the U.S. Navy or the Department of Defense.

Jonathan Crane: "Very well. Death!"

[Smashes gavel]

Jonathan Crane: "By exile!"³

As Commissioner Gordon notes, the proceeding is a charade. In case the public missed it, the tip-off was in his opening observation: "No lawyer?"

From revolutionary Gotham to revolutionary France, the theme is the same. In my opinion, perhaps the best example of a "lawyer as hero" comes from Charles Dickens' *A Tale of Two Cities*. I readily confess that anyone reading Dickens hoping for an original insight is likely setting themselves up for failure. In *A Tale of Two Cities*, however, we are introduced to Sydney Carton, the hero of the tale, who falls in love with Lucie Manette. Carton, a skilled (if dissolute) attorney, is employed to defend Manette's husband, the French aristocrat Charles Darnay, and does so successfully. When Darnay is arrested in revolutionary France, Carton secretly switches places with him and ascends to the guillotine in his stead, uttering the famous words: "It is a far, far better thing that I do, than I have ever done; it is a far, far better rest that I go to than I have ever known."⁴

Much ink has been spilled on Carton as the heroic, unrequited lover. Even more on Carton as a soul redeemed. But few (if any?) authors spend much time on Carton's role as an attorney.

One of the expectations of our profession is that we will *sacrifice* for our clients. We are expected to advocate capably and professionally on their behalf and serve in the role of "attorney as counselor." In Washington, that role is memorialized in RPC 2.1, addressing the role of attorney as advisor.

Carton skillfully advocates for Darnay, but he goes much further. Carton sacrificed *completely* for Manette. Trial

Fiction tells us that the public wants lawyers as heroes. Real life reminds us that there are heroic lawyers all around.

lawyers will readily recognize that sense of utter fatigue after a trial where they have poured themselves out entirely for their clients. In *A Tale of Two Cities*, however, Carton pours himself out to the extent of taking his client's punishment. While attorneys are not called to sacrifice to that extent, the impulse to identify with our clients resonates in the scene where Carton mounts the scaffold. He is not merely going to the guillotine as a lover and a soul redeemed, but as an attorney providing a last act of service for a client.

Fiction tells us that the public wants lawyers as heroes. Real life reminds us that there are heroic lawyers all around. In speaking with members of the Washington public this year, I am highlighting modern-day heroic lawyers and the role they play in a free and open society.⁵ It is my hope that students, in particular, will want to join our ranks. If they do, as noted by Commissioner Gordon, they will serve a vital role in upholding due process. That result may be a small step toward the public not viewing our profession solely in the pejorative sense. While the public still may not view us as heroes, I hope they will recognize us as vitally important to a free society. 

NOTES

1. Laurence Tribe, 2010. Transcript of speech delivered at the American College of Trial Lawyers 2010 Annual Meeting, Sept. 25, 2010. www.justice.gov/opa/speech/laurence-tribe-senior-counselor-access-justice-speaks-american-college-trial-lawyers-2010.
2. "The 2023 APEX Awards," *Washington State Bar News*, Sept. 11, 2023, <https://wabarnews.org/2023/09/11/this-years-winners-are-3/>.
3. *The Dark Knight Rises*, 2012, www.imdb.com/title/tt1345836/characters/nm0614165
4. Carton's final words proved both entertaining and inspirational for a Maryland court addressing a prison break. See *Gray v. State*, 53 Md. App. 699, 700 (1983).
5. I have chosen an informal anthem for this effort. Some of the lyrics go as follows: "Courage is your claim to fame, when hero is your middle name." The first WSBA member who emails me stating the name of the song and the musical it comes from will receive a small token of appreciation from me in the mail. No googling the answer!



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Introducing Your 2023-2024 WSBA Budget & Audit Committee Members

In this installment of the Treasurer's Report, I'd like to introduce you to this fiscal year's WSBA Budget and Audit Committee members. They are also members of the full WSBA Board of Governors. The Budget and Audit Committee reviews, recommends, and takes action, as empowered by the Board of Governors, on WSBA financial matters regarding the annual budget and long-range financial planning, annual audits, financial reports, significant fiscal policies, investments, and designated expenditure approvals. The next committee meeting will occur on Dec. 15 from 1-3 p.m.

COMMITTEE MEMBERS



Tom Ahearne represents first-year members of the Board of Governors on the Budget and Audit Committee. Permanently paralyzed in a wheelchair, Ahearne was elected to the Board of Governors in 2023 to fill the at-large seat for diversity, equity, and inclusion. He has been a Seattle litigator since 1986 (with Foster Pepper Riviera, now Foster Garvey). Most of his cases involve constitutional law, municipal compliance, insurance coverage, cybercrime losses, and/or high-profile appeals.



Kristina Larry is also a first-year member of the Board of Governors, having been elected to the full Board in 2023. She is a true solo with her firm Sassy Litigations where she practices trademark, small business, cybersecurity, and data privacy law. From 2015 to 2019, she served as a trustee of the Washington State Bar Foundation and from 2019 to 2021, she served as president. She also served on the executive committee of the WSBA Solo & Small Practice Section for eight years and was a member of the Practice of Law Board. She brings a wealth of experience to the Budget and Audit Committee's work.



Kevin Fay represents second-year members of the Board of Governors on the committee. Fay was elected to the Board of Governors in 2022. He recently retired from three decades of service as in-house counsel for VMware, Inc., PACCAR Inc, and

Microsoft, with an eclectic practice that included corporate and securities work, software licensing and services, equipment financing, mergers and acquisitions, real estate and construction, and immigration. In his first year as a WSBA governor, even though he was not a Budget and Audit Committee member, he attended all committee meetings and provided invaluable input to the budget process.



Kari Petrasek is a second-year member of the Board of Governors and a returning member of the Budget and Audit Committee. She is a solo attorney, having started her own firm, Petrasek Law, in Mukilteo in January 2015. She is a past-chair of the WSBA Solo & Small Practice Section, the treasurer of Washington Women Lawyers, a past-president of the Snohomish County Bar Association, a member of Washington CASA Association, and a leader in the ABA GPSolo Division. Her invaluable experience as treasurer of other organizations in Washington will be an asset to the committee.



Francis A. Adewale
WSBA Treasurer

Francis Adewale can be reached at francisadewalebog@gmail.com.



Nam Nguyen is a returning Budget and Audit Committee member. He was elected to the Board of Governors in 2022. He is an assistant attorney general in the Revenue and Finance Division in Tumwater. Prior to the Attorney General's Office, Nguyen worked in private practice in Bellevue and Houston, Texas. Aside from the WSBA, Nguyen serves on the board for the Family Support Center, a nonprofit social service organization serving homeless families in the Olympia area, and he is the chair of the Commission on Asian Pacific American Affairs. His contributions to last year's successful budget process were invaluable.



Tiffany Lynch
Director of Finance

Tiffany Lynch can be reached at TiffanyL@wsba.org.



Brent Williams-Ruth is largely credited with originating the idea of an immersive budget retreat where members of the WSBA Board of Governors have an opportunity to evaluate priorities and determine how to fund such priorities with organizational values in tow. Williams-

MORE ONLINE

The full meeting schedule can be found here: www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/budget-audit.



Ruth was elected as a district governor to the Board of Governors in 2020 and was elected to an at-large position in 2022. Since 2015, he has been the sole proprietor of a concierge estate planning, probate/trust, and elder law firm.



Jordan Couch represents the third-year members of the Board of Governors on the committee. Couch is a partner at Palace Law, practicing workers' compensation and personal injury law. Prior to joining the Board of Governors, he served as a trustee for the Tacoma-Pierce County Bar Association, chair of the Access to Justice Board's Technology Committee, and chair of the Washington Young Lawyers Committee, and has held various leadership roles on the Solo & Small Practice Section's Executive Committee.

EX-OFFICIO & NON-VOTING MEMBERS

This year's ex-officio/non-voting members are President Hunter Abell, President-Elect Sunitha Anjilvel, and Executive Director Terra Nevitt.

LEADERSHIP TEAM

For the second year running, I am honored to serve as your treasurer and chair of the Budget and Audit Committee, alongside the WSBA's indefatigable director of finance, Tiffany Lynch.

CONCLUSION

If you or anyone you know has any questions or concerns with regard to the Budget and Audit Committee, please feel free to contact any of the committee members listed above. 

Isaac Ruiz

answers

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THE CHATBOT MADE ME DO IT!

*Competence and confidentiality
in an age of artificial intelligence*

BY MARK J. FUCILE

The 9000 series is the most reliable computer ever made. No 9000 computer has ever made a mistake or distorted information. We are all, by any practical definition of the words, foolproof and incapable of error.

—HAL the computer
2001: A Space Odyssey (1968)¹

Earlier this year, a lawyer in New York City was handling a personal injury case against an airline for a passenger who was injured on an incoming international flight. The lawyer filed the case in state court in Manhattan. The defendant airline removed the case to federal court and moved to dismiss the claim as time-barred under the “Montreal Convention” governing international air travel. The lawyer was unfamiliar with the Montreal Convention but had heard of the web version of a “chatbot” that he thought was “like a super search engine.”² The lawyer fed case-spe-

cific information into the application and it produced a brief complete with multiple case citations supporting the lawyer's client's position. The lawyer was not admitted in federal court, so he had his partner, who was admitted in that federal district court, sign and file the brief. Neither verified the citations.

Unfortunately for the lawyers, the chatbot made up the citations. The fictitious citations came to light when first the defendant and then the court could not locate any of the decisions. Eventually, the lawyers fessed up. The lawyer who used the chatbot confessed he didn't understand how it worked. He offered that, like HAL the computer in our opening quote, he was "operating under the false perception that this website ... could not possibly be fabricating cases on its own."³

Understandably, the court was not amused. It sanctioned both lawyers and their law firm.⁴ In doing so, the court noted that while "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance[,] ... existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings."⁵

In this column, we'll look at two aspects of the emerging use of artificial intelligence (AI) tools in law practice. First, we'll survey our duty of technological competence under RPC 1.1. Second, we'll examine the interplay between information supplied to tools like the one used by the New York lawyer and our duty of confidentiality under RPC 1.6.

Before we do, four qualifiers are in order.

First, although we will focus here on the rules governing competence and confidentiality, these should by no means be considered an exhaustive list. Emerging AI issues may include—among others—permissible billing for specialized AI products under RPC 1.5, supervision of the use of such products by lawyers and staff under RPCs 5.1 and 5.3, and communicating with clients under RPC 1.4 about how AI products are being used in the delivery of their services.⁶ These are not necessarily new areas as applied to technology generally. The ABA, for example, issued an ethics opinion 30 years ago on billing for "computerized" legal research.⁷ Like any emerging technology,

It is not hard to imagine that if client harm resulted from a lawyer's incompetent use of practice technology, a common law negligence claim for legal malpractice would follow.

however, there will undoubtedly be nuances specific to AI.

Second, again like other technologies that preceded it, AI will likely touch many aspects of the legal profession and legal services over time.⁸ In this column, however, we'll focus on lawyers using this emerging technology in their practices today.

Third, we'll focus on the Rules of Professional Conduct and associated law firm risk management. Other areas of substantive law, such as copyright, can also come into play depending on the circumstances.⁹

Fourth, like the technology itself, potential guidance is not static. The ABA, for example, recently established a task force to examine the impact of AI on the legal profession.¹⁰ Other bar organizations have created similar study groups.¹¹ These efforts may result in further guidance tailored to specific issues as they emerge in this rapidly developing area.

COMPETENCE

RPC 1.1 sets our benchmark duty of competence:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

In 2016, the Washington Supreme Court adopted an amendment to the comments to

RPC 1.1 that stressed that our duty of competence includes understanding the technology we use to serve clients:

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]¹²

The Washington amendment followed a similar change to the corresponding ABA Model Rule adopted in 2012 on the recommendation of the ABA "20/20" Commission that reviewed the ABA Model Rules in light of, among other developments, changes in law practice technology.¹³ The 20/20 Commission noted that the addition reflected in the comment "would serve as a reminder to lawyers that they should remain aware of technology, and its benefits and risks, as part of their ethical duty."¹⁴

While RPC 1.1 frames competence as a regulatory requirement, it is not hard to imagine that if client harm resulted from a lawyer's incompetent use of practice technology, a common law negligence claim for legal malpractice would follow. In fact, the court in the New York case observed that the lawyer's inept citation to non-existent cases harmed his client by depriving him of "arguments based on authentic judicial precedents."¹⁵ Washington Pattern Jury Instruction 107.04 frames the standard of care in the legal malpractice context, in relevant part, as follows: "An attorney has a duty to use that degree of skill, care, diligence, and knowledge possessed and used by a reasonable, careful, and prudent attorney in the State of Washington acting in the same or similar circumstances."

Although the comment to both the ABA and Washington versions of RPC 1.1 is comparatively new, the idea reflected is not. Going back to the late 1990s, a series of ABA opinions has addressed a broad spectrum of law practice technology through that same lens, including the use of email,¹⁶ metadata in shared electronic documents,¹⁷ cloud-based files,¹⁸ cybersecurity,¹⁹ and virtual practice.²⁰ Washington has a series of advisory opinions on many of these same topics that make essentially the same point.²¹

None of these authorities suggest that we need to stop practicing law until we have

CONTINUED >

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CONTINUED >

advanced degrees in computer science. At the same time, they all counsel that if we are going to use a technology in law practice, we need to do it competently and understand its benefits and risks so that our clients are protected. In some circumstances, we can meet that standard through our own review. In others, however, we may need to employ the assistance of technology professionals either within our law firms or outside consultants.²²

In some situations, our decision to use—or not use—a particular technology may be a matter of choice. In others, however, we are required to embrace technology through imperatives like mandatory electronic court filings or client electronic billing guidelines. In still other situations, particular technologies such as email, mobile phones, and electronic files have become so ubiquitous that they are now essentials of practice management for many lawyers and law firms.

As the court in our New York illustration noted, “[t]echnological advances are commonplace.”²³ Readers of a certain vintage, for example, may recall when the term “Shepardize” meant a meticulous search through a series of red hardcover books and softbound supplements to make sure a case was still “good law.” Now, the same task occurs automatically in commonly used electronic legal databases. The New York court also underscored, however, that whatever technology we may use in law practice, we—and our law firms—are responsible for using it competently.

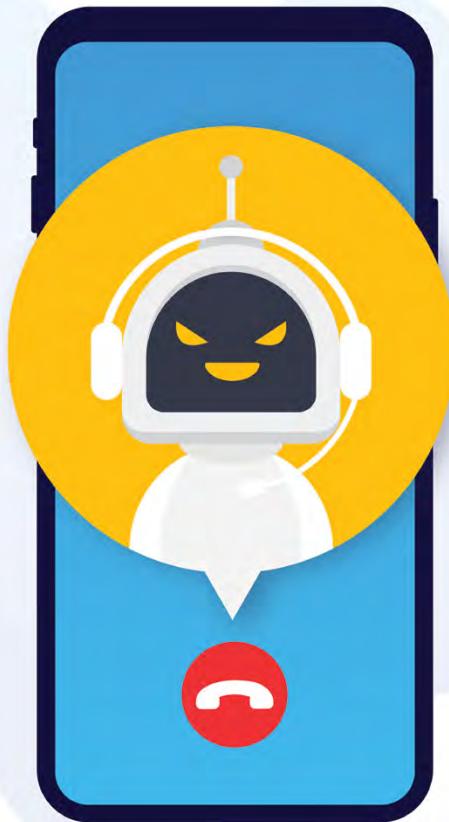
It remains to be seen how AI tools—whether as standalone products or incorporated into other technologies—will ultimately impact law practice. “Early adopters” of tools like chatbots today, how-

ever, need to familiarize themselves sufficiently with the technology to integrate it competently into their practices.

CONFIDENTIALITY

Although the accent in the New York decision was on competence, there is another facet that should not be overlooked: confidentiality. The lawyer used an increasingly case-specific series of prompts with the chatbot that eventually produced the brief that his partner filed.²⁴ Because AI tools have the ability to translate research into work product, the confidentiality risk is potentially much sharper than in a traditional electronic database where, in an analogous context, a lawyer might simply enter a search query along the lines of “statute /2 limitation! /25 Montreal /2 Convention.”

Our duty under the confidentiality rule—RPC 1.6—is broad and is framed around protecting “information relating to the representation of a client” rather than privileged attorney-client communications standing alone. Albeit in a non-electronic setting, the Washington Supreme Court in *In re Cross*, 198 Wn.2d 806, 500 P.3d 958 (2021), recently emphasized both the broad sweep of the



Mark J. Fucile of Fucile & Reising LLP handles professional responsibility and risk management for lawyers, law firms, and legal departments throughout the

Northwest. He is a former chair of the WSBA Committee on Professional Ethics and has served on the Oregon State Bar Legal Ethics Committee. He is editor-in-chief of the WSBA *Legal Ethics Deskbook* and is a principal co-editor of the WSBA *Law of Lawyering in Washington* and the OSB *Ethical Oregon Lawyer*. He can be reached at 503-224-4895 and mark@frllp.com.



Because AI tools have the ability to translate research into work product, the confidentiality risk is potentially much sharper than in a traditional electronic database.

duty of confidentiality under RPC 1.6 and that a “knowing” violation occurs when a lawyer intends the act involved that resulted in disclosure of confidential information (in *Cross*, the act was providing a declaration that included confidential information).²⁵

Comments 18 and 19 to RPC 1.6 specifically link competence to confidentiality and neatly capture this notion in the title to their subsection: “Acting Competently to Preserve Confidentiality.” Given this link, it would not be remarkable for a theory of legal malpractice under WPI 107.04 to be predicated on a lawyer’s failure to protect client confidentiality by disclosing otherwise protected information to a chatbot if client damage followed. In fact, the particular chatbot the lawyer used in the New York case includes a routine warning not to disclose sensitive information precisely because it is not a confidential forum.²⁶ In the analogous context of the attorney-client privilege, voluntary disclosure to a third person is generally considered a waiver.²⁷ Moreover, waiver generally applies to the subject concerned rather than a specific conversation.²⁸ Although a reader might ask how this might be discovered, the practical answer is: “you never know.” The New York lawyer in our example found himself explaining the specific information he had used with the chatbot in a sanctions hearing that *The New York Times* described as “cringe-inducing.”²⁹

As the court in the New York case noted, “there is nothing inherently improper about

using a reliable artificial intelligence tool for assistance.”³⁰ Because these tools are fundamentally different than a traditional electronic legal database, however, lawyers need to be appropriately sensitive to confidentiality considerations. These can range from ensuring that prompts don’t reveal sensitive client information when using a product that is not confidential to carefully reviewing the contractual terms and related technological safeguards when purchasing systems that promise confidentiality. Again, these are not necessarily new concerns as applied to technology generally. The ABA’s recent virtual practice opinion, for example, addresses confidentiality issues with “smart speakers” that in many respects are similar to those with “free” chatbots.³¹ The WSBA’s advisory opinions on cloud-based file storage and virtual practice, in turn, survey contractual and technological considerations when evaluating third-party vendors with whom we share confidential client information.³²

SUMMING UP

Even in an age of artificial intelligence, it remains the lawyer’s job to competently use the technological tools chosen, preserve client confidentiality when doing so, and vet the results. [BN](#)

NOTES

1. See www.imdb.com/title/tt0062622/quotes/.
2. *Mata v. Avianca, Inc.*, ___ F. Supp. 3d ___, 2023 WL 4114965 at *8 (S.D.N.Y. June 22, 2023) (*Mata*).
3. *Id.* at *3.
4. *Id.* at *17.
5. *Id.* at *1.
6. In addition to these more prosaic issues, emerging considerations may also include more exotic variants such as whether AI is considered a “nonlawyer assistant” under RPC 5.3, lawyer liability for misrepresentation by AI under RPCs 3.3, 3.4, 4.1, and 8.4, and potential unauthorized practice issues under RPC 5.5.
7. See ABA Formal Op. 93-379 (1993) (addressing billing for a variety of cost items, including computerized legal research).
8. See, e.g., Anthony E. Davis, “The Future of Law Firms (and Lawyers) in the Age of Artificial Intelligence,” 27 No. 1 Professional Lawyer 3 (2020) (surveying the potential impact of AI on traditional law firms and their lawyers).
9. See, e.g., Matthew Henson, “Artificial Intelligence, Copyright Law, and the Future,” June 15, 2023, available on the ABA website at www.americanbar.org.
10. See ABA Task Force on the Law and Artificial Intelligence (accessible on the ABA website at www.americanbar.org).
11. See, e.g., New York State Bar Association Task Force on Artificial Intelligence (accessible on the NYSBA website at www.nysba.org).
12. Washington Supreme Court Order No. 25700-A-1146, June 2, 2016.
13. ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct*, 1982-2013 (2013) at 42-43.
14. *Id.* at 43.
15. *Mata*, *supra* note 2, 2023 WL 4114965, at *1.
16. See ABA Formal Ops. 99-413 (1999), 11-460 (2011), and 477R (2017).
17. See ABA Formal Op. 06-442 (2006).
18. See ABA Formal Op. 477R (2017).
19. See ABA Formal Op. 483 (2018).
20. See ABA Formal Op. 498 (2021).
21. See, e.g., WSBA Advisory Ops. 2175 (2008) (email), 2217 (2012) (email), 2216 (2012) (metadata), 2215 (2012) (cloud-based files), and 201601 (amended 2022) (virtual offices).
22. When employing outside consultants, it is important to remember that we remain responsible under RPC 5.3, which addresses supervision of nonlawyers, for ensuring the consultants understand and agree to carry out their work consistent with our duties—such as confidentiality. See generally ABA Formal Op. 08-451 (2008) (discussing outsourced services); ABA Formal Op. 498, *supra* note 20, at 7 (addressing use of outside technological services).
23. *Mata*, *supra* note 2, 2023 WL 4114965, at *1.
24. *Id.* at *8.
25. See also RPC 1.6(c) (requiring lawyers to make “reasonable efforts” to prevent inadvertent disclosure of confidential information).
26. See chat.openai.com.
27. See Robert H. Aronson, Maureen A. Howard & Jennifer M. Aronson, *The Law of Evidence in Washington* § 9.04[3] (rev. 5th ed. 2023).
28. *Id.*, § 9.05[7][a].
29. Benjamin Weiser & Nate Schweber, “The ChatGPT Lawyer Explains Himself,” N.Y. Times, June 8, 2023 (available at www.nytimes.com).
30. *Mata*, *supra* note 2, 2023 WL 4114965, at *1.
31. ABA Formal Op. 498, *supra* note 20, at 6.
32. WSBA Advisory Ops. 2215, *supra* note 21 (cloud-based file storage), and 201601, *supra* note 21 (virtual practice). See also Daniel W. Linna, Jr. & Wendy J. Muchman, “Ethical Obligations to Protect Client Data When Building Artificial Intelligence Tools: Wigmore Meets AI,” 27 No. 1 ABA Professional Lawyer 27, 32 (2020) (noting that cloud computing provides a general template for vetting confidentiality considerations with third-party vendors).



A Group for Healing Minds

BY DAN CRYSTAL, PSY.D.

When the WSBA Member Wellness Program hired Adely Ruiz, LSWAIC, in January 2023, we were finally fully staffed and could resume group offerings. I was contacted by an attorney who had connected with other attorneys who had experienced significant mental health challenges and wanted a place at the Bar to speak with others in confidence. The Member Wellness Program has produced CLEs on confronting stigma by asking for help,¹ but had we made space for attorneys with these issues to connect? Our goal was to create a true support group without any of the structured skill-building goals of cognitive behavioral therapy or our current Career Guidance Group.

But what to call it? Using words like “depression” or “severe” or “mental illness” all seemed too grim or psychiatric. In brainstorming names for the group, Adely came up with the name Healing Minds,² as that is what attendees are attempting to do. It is well documented that healthy individuals

SIDE BAR Healing Minds

The group meets every other Thursday at 1 p.m. Find more information about Healing Minds and other groups at www.wsba.org/wellness. 

can become depressed in law school.³ Add to that the imposter syndrome and lack of mentoring that can characterize the first years of legal practice, along with the array of stressors associated with being a lawyer, and the relevancy of a Healing Minds group becomes clear.

When Adely and I hosted our first group in June we did not anticipate that many of

the stories shared would concern the intense challenges attorneys have faced with hyper-critical, manipulative, or demanding managers; punishing work demands with little recourse; and, in some cases, firings. Other topics of interest included procrastinating, underperforming, not finding one's legs in legal practice, and the law around accommodations and GR 33.⁴

These topics are all fair game. We can show interest and empathy for our members' anxieties, psychiatric history, and traumatic challenges while also validating stressors like lack of medical leave and accommodations or anxiety over a letter from the WSBA about a grievance. Recently, we invited Gail Bennett from The Vital Lawyer⁵ to discuss her educational strategies for supporting struggling attorneys. We have other speakers in mind for future sessions.

The Healing Minds group is being developed at a time when the WSBA is contemplating the formation of a Well-Being Task Force to better understand and improve the well-being of the legal profession in Washington. The work of the task force could include examinations of various segments of the profession: firms large, small, and solo; government; judiciary; law students; and regulatory functions, to name a few. Another consideration is to offer a listening forum for those who have struggled in their practice environments. Perhaps Healing Minds is the first step towards something greater.

WHAT'S NEXT FOR GROUPS?

Our Virtual Career Guidance Group⁶ resumed after a two-year hiatus and is now meeting on the first Thursday of every

MEET YOUR MEMBER WELLNESS PROGRAM TEAM

Dan Crystal has been working at the WSBA since 2008. He achieved his Psy.D. in clinical psychology from the University of Denver in 2007 and completed a postdoctoral fellowship at the Seattle VA Hospital in 2008. At the Member Wellness Program, Dr. Crystal provides phone support and referrals for mental health concerns; leads career search and meditation groups; and delivers outreach to bar groups statewide on mental health issues. He works with the Office of Disciplinary Counsel as the diversion administrator.



Adely Ruiz previously worked at Sound's Belltown clinic, a community mental health facility where she worked with a vulnerable low-income population. Ruiz also spent several years with the nonprofit organization El Centro de la Raza, where she focused on community engagement and outreach. Ruiz received her master's degree in social work from the University of Washington. Her thesis sought to understand how to improve the cultural humility of therapists working with a Latino population in order to improve patient outcomes.



month at 3 p.m. We have all the usual tips for your résumé, informational interviewing skills, applying for jobs online, and identifying the ideal career. In January, we are planning to launch a stress and productivity group to help attorneys stay engaged in their work. This one will be co-led by Adely Ruiz and WSBA Practice Management Advisor Margeaux Green. 

NOTES

1. www.youtube.com/watch?v=6tNzprRpTQo.
2. www.wsba.org/for-legal-professionals/member-support/wellness/group-sessions#healing.
3. "The Mental Health Status of Law Students: Implications for College Counselors," www.researchgate.net/publication/332234681_The_Mental_Health_Status_of_Law_Students_Implications_for_College_Counselors.
4. General Rule 33 addresses requests for accommodation by persons with disabilities.
5. www.thevitallawyer.com/.
6. www.wsba.org/for-legal-professionals/member-support/wellness/group-sessions.

SIDE BAR

More From the WSBA Member Wellness Program

Virtual Mental Health Support Group



The free group, "Healing Minds: Managing Persistent or Overwhelming

Challenges to One's Well-Being as a Lawyer," led by Adely Ruiz, LSWAIC, and Dan Crystal, Psy.D, meets every other Thursday from 1-2 p.m. Learn more at www.wsba.org/wellness.

Telehealth is Here!



The Member Wellness Program is now offering hi-def, HIPAA-protected video consultations

using the telehealth portal Doxy.me. Visit www.wsba.org/wellness and click "Book Your Initial Consultation" to schedule time with our licensed providers.

Monthly Virtual Career Guidance Group



This free drop-in group is for legal professionals seeking support in their job search or in other career dilemmas. This group will be led by Dan Crystal, Psy.D, or Adely Ruiz, LSWAIC. They can assist with résumé review, best practices for applying online, informational interviewing, identifying the ideal career, transitioning between practice areas, and other workplace challenges. The group will meet on Zoom on the first Thursday of each month from 3-4 p.m. Sign up at www.wsba.org/wellness.

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The Washington Young Lawyers Committee honors two local leaders

BY AARON HAYNES

The Washington Young Lawyers Committee (WYLC) recently asked the legal community to nominate new or young lawyers who are dedicated to serving their communities for its annual Public Service and Leadership Award. The WYLC selected award recipients with a history of exemplary leadership and commitment to public service.

For each nominee, the committee weighed the following factors:

- leadership and service in the local community or within a bar association;
- mentoring;
- involvement in the WSBA, American Bar Association, and/or local bar association activities; and
- volunteer work with pro bono or public service programs.

The committee balanced the factors in light of the award's goal of highlighting the exceptional public service work of new or young lawyers across Washington.

Within this framework—and after deliberating over the nominees—the committee selected Danielle Dallas and Angélica María González to receive the 2023 Public Service and Leadership Award.



Aaron Haynes is an associate at CSD Attorneys at Law in Bellingham and chair of the Washington Young Lawyers Committee. He can be reached at ahaynes@csdlaw.com.



Danielle Dallas

Danielle Dallas is a staff attorney at TeamChild in Spokane. She also provides outreach services at Camp Hope in Spokane and regularly volunteers at Crosswalk, a shelter for homeless and runaway youth, and the Youth Crisis Residential Center.

Since graduating from law school in 2022, Dallas has worked tirelessly as an advocate for homeless and unaccompanied youth as a staff attorney for TeamChild. She has helped youth abandoned in hospitals, counseled them through minor guardianships, assisted them in securing housing and Social Security benefits, and served as their advocate in emancipation proceedings. In the words of her nominator, “Danielle is a fierce attorney for trans youth. She does it all: gender marker changes, name changes, and ... legal safe placement solutions. She is ... saving lives [and] many trans youth have come from hospitals or the streets into safe and stable living options because of her.”



Angélica María González

Angélica María González is an associate at Lane Powell in Seattle. She currently serves on the Board for the Children's Campaign Fund and is Region 16 president (Alaska, Idaho, Oregon, Montana, and Washington) for the Hispanic National Bar Association. She also serves as the vice president of development for the Latina/o Bar Association of Washington.

González is an exemplary community leader. She has a history of pro bono work for women and children and recently completed a term as co-chair for the Legal Foundation of Washington's Associates Campaign for Equal Justice. Beyond her volunteer work, González is a dedicated mentor. She has spent countless hours helping guide law students through their bar studies, job applications, and interviews. Her nominators praised her for giving them “hope for a new generation of lawyers who genuinely care about the legal community.”

LEARN MORE

For additional information about the Public Service and Leadership Award, or to learn about ways to volunteer with a pro bono or public service program, please visit www.wsba.org.



PUTTING OTHERS FIRST

Danielle Dallas and Angélica María González have shown a strong public service ethic and a track record of responding to the needs of their community. The WSBA is fortunate to have such inspiring members.



Lawyer Bar Exam Pass List

Of the 699 candidates who took the July 2023 Lawyer Bar Exam, 492 passed. Congratulations! The list of passing candidates is printed below.

A

Aceveda, Cody Davis
Allen, Gayle
Allen, Rebecca LaRae Shaffer
Allinder, Matthew Joseph
Alvarado, Lesley-Anne
Ames, Laura
Anderson, Adrianna Marie
Anderson, Jessamine Elizabeth Jarris
Andreescu, Mihnea Andrei
Aoki, Mitchell Masuichi
Apsens, Kathryn
Arnold, Jonathan
Asgharzadeh, Omid
Aslin, Steven Douglas
Ayers, Phillip

B

Bader, Jill
Baird, Nathaniel Banner
Balderas, Celia Lizbeth
Barbara, Brendan James
Barnes, Hope Elizabeth
Barnett, Andrew
Barrett, Kelly
Basra, Hannapreet
Batey, Jessica Carolyn
Baucom, Bennett
Bauter, Landes Jane
Beard, Connor
Beckett, Claire Bronwyn
Becnel, Emily Elizabeth
Bell, Nicolas Martin Kaplan
Bentfield, Katherine
Bernard, Emily
Bhat, Akansha
Bible, Jennifer
Biggins, Andrew
Bitar, Brittany Sage
Bladin, Julia Catarina
Blood, Roberta
Bogolyubov, Konstantin
Boinest III, William Calhoun

Boley, Charla Marie
Bolich, Delaina Jo
Bordas, June Alejandra
Borumand, Simon
Bradley, Kate
Brawner Jr., Bruce Honnoll
Brenden, Sarah Barbara
Brenner, Alexander Richard
Brett, Kevin Joseph
Briese, Lindsay Ann
Brocato, Neela Roja
Brown, Jaime Nicole Dienst
Brumfield, Talia Korrine
Brunmeier, Adam James
Bryant, Madisan Nicole
Bryck, Bridget
Buckles, Danielle Kelly
Buckles, Jonathan
Buehler, Gabriel Donald
Butrim, Lauren
Bykov, Erika

C

Cabral, Alejandra
Calabrese, Matthew Ralph
Camacho, Janae Donniese
Camarda, Golnaz Jankhah
Campbell-Roos, Hallie Elisabeth
Cannon, Dalton Curt
Capelouto, Jeffrey David
Capone, Patricia
Capp, Charles Wayne
Carl, Samantha
Carrillo, Kari
Cassidy, Sara Rikalo
Chang, Katie
Chelobitchenko, Valeria
Chen, Angela
Chen, Charity Y.
Cheney, Hannah Rose
Choi, Seunghwa
Christensen, Jewel Irene
Clampitt, Elizabeth Lee
Clifton, Adriena
Coffman, Malcolm David
Cooper, Justin Edward

Cossey, Danielle Victoria
Cota, Magali
Cowan, Coby Jerome
Cowan, Grace
Cowan, Jenna
Cozza, Emily Rose
Craig, Phillip Andrew
Crespo Leal, Jair Elena
Crowther, Taylor

D

Daiss-Scheibe, Olivia Simone
Damitio, Daniel John
Dana-Farley, Jennifer
Daniels, Emma Li
Daniels, Hannah Rose
Daugherty, Cassidy Marie
David, Benjamin Michael
Davila Navarro, Riczy Andreina
Davis, Sophia Jane
Deaver, Cole
DeFilippis, Juliana
Dekker, Tjitske
deQuay, Sarah Claar
Desch, Benjamin Ross
DeWeirdt, Cameron Hugh
Dhami, Mamit K.
Diaz, Abigail Sedona Eve
DiLillo, Rosalyn
Diop, Safietou Marieme
Do, Julie
Doherty, Julia Patricia
Doneskey, Michael Jeffrey
Dooley, Meghan Frances
Douglas, Jefferson James Thomas
Doyle, William Robert
Druyon, Avery Kay
Duda, Mary Bethany
Duncan, Cheryl Ann
Durland, Peter Daniel Coit

E

Easley, Logan Alexandra

Eberdt, Katherine D.
Edano, Chelsa Camille
Eklof, John
Elbasiony, Rania R.
Elder, Emily Anne
Eliot, Kenton Prescott
Elizondo, Cassandra Rae

F

Fadaeiforghan, Doreen
Faison, Aaron Nicholas
Field, Moon Do Tomas
Fillis, Gabrielle Elise
Finch, Elizabeth Yina
Fiorito, Jami Dawn
FitzGerald, Henry Patrick
Fitzmorris, Hannah Rose
Fleming, Andrew Scott
Fletcher, Nichol AlecSandran
Fogassy-Farrell, Moira
Fontes, Natalie
Forcino, Isabella
Fortunato, Isaac Paul
Foster, Daniel
Foster, Daniel James
Fox, Stuart Adam
Frey, Kiel A.
Fujioka, Kendall
Fulgaro, Lia Maria
Furrer, Michelle Jean

G

Galai, Sagiv
Gales, Antonia Joy
Gardner, Taylor Paige
Garland, Hannah Rose
Varrichione
Garrison, Oliver
Gaudio, Cosimo
Gieger, Caleb W.
Gillan, Nicholas
Gilreath III, James Lawrence
Godwin Jr., Anthony Dakota
Goel, Pooja
Goetz, Tristen
MorganBarnum
Goldman, Alexander Gale
Gonzalez, Marcos
Marcellinus Silva
Goodson, Annabel Rose
Gould, Natalie
Gray, Samantha Perry
Griffith, Katelyn Marie
Gripp, Eric Russell
Grisaffi, Carmen
Griswold, Ian Gregory
Gundavajhala, Smitha
Gustafson, Makayla Rae
Gutierrez Rodriguez, Eugenia
de Guzman, Jared Daniel
Johnson

H

Halle, Freeman
Haller II, Jonathan Keith
Halvorsen, Gregory Philip
Hammer, Erika Marie
Hampson-Medina, Asuncion Cheskaga
Handick, Kathryn Elizabeth
Hanon, Christine
Harbaugh, Erin
Harder, Henry
Harris, Joshua Colin
Harris, Taryn Michaela
Hartman, Amanda Lillian
Hasan, Shaizah
Hawk, Ayana
Henning, Sarah Elizabeth
Heuberger-Yearian, Levi T.
Hickey, Shawn Patrick
Higgs, Bailey
Hill, Cory Joe
Hockley, Tanner Jeffrey
Hofferth, Sydney A.
Holcombe, Andrew Steven
Hollingsworth, Katherine Lee
Holmes, Megan
Howard, Elise Kristin Snelgrove
Howells, Bradley David
Huff, Molly
Hughes, Madelyn Grace
Human, Rebecca Joy
Humphreys, Caroline
Hunt, Keren
Hurria, Chakshu

I

Ibrahim, Dalia
Incorvaia, Michael Arthur
Ingram, Jakini Auset Sharmane
Irani, Briana Boman

J

Jaech, Lauren
Jeandin, Austin Emile
Jiao, Rong
Johnson, Jesse
Johnson, Skye Christian
Jones, Jonathan

K

Kadah, Ayla
Kalbfleisch, Derek Boucher
Kamitomo, Kelsey
Kang, Roger
Kaur, Nomandeep
Kaya, Rikio James
Keal, Richard F.

<p>Kelly, Madison Denise Kettner, Jayde Logan Khadivi, Rachel Eileen Khan, Aaron Winston Khan, Sara Kidd, Elizabeth Knapp Kim, Duk Kinross, Casey Knutzen, Bryce Eric Kocztorz, Jakub Lukasz Kondepudi, Ramita Kroeger, Victoria Jean Krolczyk, Theodora Grace Kurtzman, Blake Robert Kwon, Seoyoung</p>	<p>Maybrown, Perry Mazzarino, Paula Abrahamson McCarthy, Benjamin Kenjiro McCrum, Jean Hanna McGill, Kylee Brianna McKeegan, Liam Francis McLaughlin, Ian Michael Medwin, Chelsea Renee Meegan, Christine Melnick, Katherine Grey Men, Yuxuan Mendoza, Soledad Mendoza Ayala, Alan Maximiliano Menon, Priyanka Meyers, Grant Sinclair Michelbrink, Emily Ann Miller, Megan Elise Miller, Melissa Jordan Mohammad Hosseini, Navid Molina, Zana Tyler Mollinet, Mary Ruth de la Montanya-Hatfield, Nicole Moody, Jillian Torrey Moore, Rachel Kathryn Moore, Ryan Don Morrison, Eilidh Jenness Morse Jr., Scott Matthew Mrsich, Joanna Elizabeth Murnion, Zachary J. Murray, Daniel</p>	<p>Ortiz, Joseph P Packer, Zachary Stephen Pagsanhan, Francis Elvin Punzalan Pappas, Sabrina Parker, Lily Parry, Samantha Paterson, Noel Pecaro, Jacqueline Catherine Peterdy, Nicola Peters, Donald Robert Peterson, Amy M. Petrino, Anne Mari Petuchowski, Abigail Pfeifer, Jaysson Friedl Pfeiffer, Madeline M. Platou, Ian Stoud Porter, Brittany Leigh Postma, Luke Benjamin Potter, Garrett Thomas Pouley, Jessica Lillian Powell, Kameron Preston, Jason William Price, Emily Mildred Putnam, Nathaniel Jordan</p>	<p>Schatz Cordero, Elizabeth Schinabeck, Joseph Schoening, Peter Lockhart Schormann, Ana Maria Schroeder, Zachary de van der Schueren, Willem John Scida, Daniel Paul See, Manuel Jonathan Nolasco Seitz, Steffen Senten, Samantha Rose Senter, Isak Alexander Shaffer, Randi Shangrow, Olivia Shavers, Clyde Shaw Jr., James Russell Shely, Kimberly Ann Shen, Caroline Lee Shen, Natalie Dayton Shmigol, Valerie Shoaib, Bisma Shutter, Heather Noel Siitonens, Anni Johanna Silver, Ethan Ray Simmons, Joshua Allen Simonova, Daria Simons, Harrison Roy Sincos, Chelsea Singh, Bandhanjit Singh, Sharan Preet Skavhaug, Noah Lane Skiffer, La Tanya Elaine Smith, Dalton James Smith, Maria Giuliana Sohn, Christine Splawn, William Brock Spurgetis, Gregory Thomas Steinberg, Elie Dora Stenberg, Rachel Stepanyuk, Mark Stephan, Emelia Ann Stevens, Philip Michael Story, Maddison Anne Sula, Miia Kati Janette Summers, Benjamin James Summers, Brianna Yoshiko Anela Swanberg, Elizabeth Stacie Swank, Jessica Elizabeth Swedlow, Elijah David Sylvester, Erin Lianne</p>	<p>Trenina, Daria Trilokekar, Rajdeep Tsarouhtsis, Theodora Anemonie Turcios, Stephanie Gordon Tursi, Ryan John</p> V Vaisey, Ariana Brynn van Belle, Alexandra Diane Caprice VanderWeyst, Emma Alyse Vanderyacht, Bryce Vatne, Sarah Elisabeth Velazquez-Arenas, Ximena
<p>L Laginess, Alexis Lai, Alisha Laidlaw, Rowan Gwyneth Lally, Charles Colman Lautanen, Emma Lavenski, Travis Lawler, Kaelly Ann Lawson, Alexandra Michelle Lazarek, Katelyn Mary Lazzaro, Johannes Le, Anna T. Lee, Amanda Lee, Eugene Lee, Hye Young Lester, Sabrina Lewis, Kasey Blain Lindig, Ryan Joseph Little, Angela Ruth Long, Anna Rose Long, Emma Joi Lopes, Sydney E. Lopez, Kiara Fernanda Love, Kylie Loveness, Cierra Paige Lowry, Stephanie Ann Lubiner, Sarah Acadia Lucache, Georgiana Luer, Sara Ann</p>	<p>Nassar, Rasham Neale, Zeyu Song Nelson, Taylor Garn Nemec, Kyle J. Neuner, Lena Marie Nguyen, Mai Khue Thai Nickel, Sloan Nickol, Benjamin Thomas Nolting, Brennan Nutley, Megan Kathleen Nuttall, Savannah Eliese Grossarth Nystrom, Trevor David</p>	<p>N Rabin, Tess Rader, Amy Rose Rai, Humza R. Rash, Nicole Lang Reiber, Alek Christopher Reid, Hannah Schae Reuther, Donald Reynolds, Mairead Angelica Richardson, Siena Pauline Ridgway, Martha Eloise Riesenbergs, Jedediah Douglas Roberts, Cambre Carol Robson, Anna Rodriguez, Alex Richard Rogers, Stacey Renee Roll, Bridgette Amber Romero, Ana Yaressy Rosenblatt, Nathan Henry Rosenstein, Wendy Lauren Roy, Nathan Fraser Roy, Reagan Patrick Rustad, Carl Lindholm Rychkov, Anthony Slava</p>	<p>R Saccio, Zoe Bastille Salinas, Tristan Randal Sande, Cierra Nichole Sass, Monica Rachel Saudagar, Mina Sheila Scavo, Krystal Nicole</p>	<p>W Wadsworth, Madison Racquel Wakefield, Whitney Waldo, Kristine Marie Wallace, Peyton Wallum, Mitchell Joseph Waltar, Anna Grace Wamser, John Kurtis Wan, Grace Wang, Yuyang Ward, Joseph Benjamin Weber, Jenna M. Weeks, Gregory Weigel, Chaisten Joseph Weiss, Daniel Wells-Edwards, Bryn Wen, Ellen J Westman, Haley Marie Wilson, Breanna Morgan Withers, Patrick Ernest Wolff, Ryan Kyle Wood, Tessa Regelle Woodard, Kennedy Wooldridge, Alena Marie Worley, Ryan Wu, Heather Marie Wu, Willa Qian</p>
<p>M Macomber, Benjamin Lewis Maeng, Yujin Magness, William Lee Makfinsky, Calvin Manahle, Gizachew Admasu Mantchev, Jessica Marie Marion, Jennifer Rebecca Martin, Miles K. Martin-Shakya, Emily Mason, Hannah Caroline Mathews, Madeline Mattila, Brianne Rose Mauer, Lauren Beth Maurer, Ty Basketball Jones Max, Sarah</p>	<p>O'Brien, Jennifer Lynn O'Connor, William Dale O'Neill, Flynn Thomas Ocean, Amy Marie Ochsner Utt, Alicia Oguejiofor, Vivian Oki, Elisabeth Callan Olds, Molly Anne Lyonie Olomua, Shariah Mae Kanoaeaokapualehua Olson, Gunnar Kneeland Floyd</p>	<p>O Tangvald, Annika C. Tatum, Emily Elizabeth Taylor, Mackenzie Lynn Taylor, MacKenzie Scott Taylor, Zoe Claire Tellessen, Kacy Olaf Terlep, Michael Fenn Thompson, Anna Kristine Torres Mann, Angelina Mary M.</p>	<p>X Xu, Tong</p>	<p>Y Yan, Jingyi Yelle, Michael Yerman, Claire Lillie Yovetich, Philip M Yu, Jesse Wang</p>
				<p>Z Zhang, Xinyuan Zhu, Ke Zhu, Tiantian</p>

Alternative Pathways

TO LAWYER LICENSURE



Task Force recommends bar exam alternatives, more equity and clarity in character and fitness process



BY WSBA STAFF

The bar exam has been, to some extent, part of the licensing process since the earliest days of the legal profession in Washington and the United States. In early 2020, however, the Washington Supreme Court met extraordinary world circumstances with an extraordinary decision—to grant one-time diploma privilege to some bar applicants, in consideration of the dangers and challenges of administering a bar exam during a global pandemic and momentous civil unrest.

For the first time in Washington, therefore, lawyers were licensed without passing some sort of bar exam. The court received much feedback, positive and negative, and then-Chief Justice Debra Stephens recognized a ripe opportunity arising from the debate. She chartered the Washington Bar Licensure Task Force (WBLTF) by court order in November 2020. Task Force membership—co-chaired by a court justice and a law school dean—spanned a broad swath of voices, including private and public lawyers and representatives from minority and specialty bars and the National Conference of Bar Examiners. Their study brought together the most current data and research; interviews of leaders in other jurisdictions such as Oregon, which has already committed to alternative pathways to the bar exam; and testimony from scholars.

Now, almost three years later, WBLTF members have presented their recommendations to the court. There are two reports, authored by subcommittees, with one focused on alternatives to the bar exam and the other covering the character and fitness process. Here's a summary of each:

DRAFT REPORT

Bar Exam Alternatives

Executive Summary from the report:

The best available data indicates that the bar exam disproportionately and unnecessarily blocks marginalized groups from entering the practice of law. In addition to the racism and classism written into the test itself, the time and financial costs of the test reinforce inequities in our profession. Despite these issues, data indicates that the bar exam is at best minimally

CONTINUED >

SIDE BAR

Resources to Learn More

ONLINE > The WBLTF's webpage contains the charter, roster, and full draft reports; it will be updated as the process continues. It is located at www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supreme_court.LicensureTaskForce.



SCAN
TO LEARN
MORE

VIDEO > The WBLTF's presentation to the court in October is archived at <https://tvw.org/video/washington-state-supreme-court-bar-licensure-task-force-2023101112/>.

FEEDBACK > The WBLTF's dedicated feedback email box is licensurepathwaysfeedback@wsba.org. It will remain open through Jan. 5, 2024, and comments and suggestions will be forwarded to the entire task force for consideration.



Alternative Pathways to Lawyer Licensure

CONTINUED >

effective for ensuring competent lawyers. Among the deficiencies and common complaints about the bar exam is that it bears little resemblance to actual practice and tends to simply restate the same results already provided by law school grades.

For these reasons and others, the WBLTF proposes creating additional, experiential pathways to bar licensure that protect the public by improving lawyer skills while reducing the unproductive barriers for historically marginalized groups to enter the profession. This proposal would have a substantial positive impact on the profession using the existing infrastructure in law schools and the WSBA.

Recommendations: First, the WBLTF asks the court to continue to offer the bar exam as a pathway (and likely the primary pathway) to licensure; this is predicated on working with the National Conference of Bar Examiners to address many of the identified flaws in the current Uniform Bar Exam, and WBLTF members are optimistic about the changes coming in the NextGen bar exam debuting in 2026 (see NextGen coverage on page 38.) As bar exam alternatives, the WBLTF recommends an experiential pathway for law school graduates and law school students. For the former, this would entail a six-month apprenticeship under the guidance and supervision of a qualified attorney; during that time, the graduates would be required to complete three courses of standardized APR 6 (Law Clerk) coursework. For law students, the experiential pathway would allow them to graduate practice-ready by completing 12 qualifying skills credits and 500 hours of work as a licensed legal intern; they would be required to submit a portfolio of this work to waive the bar exam. In addition, the report makes recommendations regarding APR 6 Law Clerk bar exam alternatives, reciprocity with other jurisdictions, the bar exam pass score, and alternative assessments and interventions to help ensure lawyers remain competent throughout their careers.

DRAFT REPORT

Character and Fitness

Findings from the report:

- The limited guidance, lack of transparency, and ambiguity in criteria in the character and fitness assessment may serve to hide biases, disadvantage minorities, and prevent diversity in the profession.
- The character and fitness criteria can exacerbate the harm caused by systemic injustices.
- Continued research, assessment, and reportable data is needed to fully understand and address the impact of the process.

Recommendations: In terms of the character and fitness standards, the WBLTF endorses specific APR changes to limit consideration of unlawful conduct, eliminate consideration of "neglect of financial responsibilities," revise and define parameters pertaining to "omissions" and "candor," revise and/or weight aggravating and mitigating factors, eliminate "sufficiency of punishment," and lower the burden of proof. In terms of process, the WBLTF recommends implementation of a conditional admission process and expansion of the timing of the inquiry. The subcommittee asks to continue to study and discuss the character and fitness process so they can possibly expand their recommendations "to provide clarity in purpose, predictability in enforcement, and equity in application for all candidates seeking entry into the legal profession in Washington."

NEXT STEP: YOUR FEEDBACK!

As the task force members and court decide whether and how to move forward, a significant consideration will be feedback from WSBA members and the public. The following three pieces in this magazine offer a more nuanced and personal perspective on the WBLTF's work from the co-chairs and the WSBA's two representatives on the task force. They ask for your careful consideration of the WBLTF's charter, research, and draft reports; any feedback you provide will be shared with the entire task force. **BN**



CHARLES S. BURDELL JR.
Former King County Superior Court Judge



PARIS K. KALLAS
Former King County Superior Court Judge



GEORGE FINKLE
Former King County Superior Court Judge



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



LINDA LAU
Former Appellate and Superior Court Judge



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THE BAR EXAM:

An Urgent Need for Alternative Pathways to Licensure



Q&A with the Washington Bar Licensure Task Force Co-Chairs, Washington Supreme Court Justice Raquel Montoya-Lewis and Seattle University School of Law Dean Anthony E. Varona



How and why did this task force come about?

Justice Raquel Montoya-Lewis [RML]: In 2020, the court was figuring out how to administer the bar exam while keeping examinees safe during the COVID-19 pandemic. It became evident early on that holding the exam was going to be dangerous, so the court chose to grant a one-time diploma privilege to applicants who had graduated from an accredited law school. That meant that applicants who chose to go that route were sworn into the profession without taking a bar exam. Following that decision, the court received a whole host of suggestions about what to do moving forward. Much of that feedback was from students saying that this was an important milestone and opportunity for the court to reconsider the relevance of the bar exam to the practice of law. We also had a big group of people, mostly lawyers, who said they felt the bar exam is an integral part of licensure. So we had all this range of possibility, and then-Chief Justice Stephens asked me and Dean Rooksby from Gonzaga Law School to co-chair a task force to examine the history of the bar exam and to look at what alternatives there might be—keeping in mind the primary reason the bar exam exists, which is protecting the public. The charter called for wide representation on the task force. Initially, we set about breaking down the project into smaller pieces and forming subcommittees. We looked at the history of the bar exam, within the state of

Washington and throughout the states—you are probably aware that Oregon, for example, has been undergoing a very significant change to its licensure process—and other jurisdictions, like Canada. We had a number of guest speakers that came to talk to us, including law scholars and deans and representatives from the National Conference of Bar Examiners.

Dean Anthony E. Varona [AEV]: That's about the time I joined the task force as a co-chair, on July 1 of last year, which also happened to be my first day as dean at Seattle University School of Law. The Chief Justice called me two weeks before I started and let me know that Dean Rooksby was stepping off for personal reasons, and that he, the Chief, wanted me to assume the co-chair role. I said, yes, of course, it would be my tremendous honor to serve with Justice Montoya-Lewis, and it very much has been so.

RML: That's when we began the challenge of putting pen to paper, saying, "Okay, what are we going to do with all this?"

AEV: We spent time absorbing and analyzing all the research. We took a very studied and measured approach to assessing the data. We ended up at a half-day retreat that we hosted here at Seattle University last spring. We deliberated and voted, and the recommendations that we are presenting now are the result of those votes.



Justice Raquel Montoya-Lewis was appointed to the Washington State Supreme Court by Governor Jay Inslee in December 2019 and took the oath of office on Jan. 6, 2020. Justice Montoya-Lewis is an enrolled member of the Pueblo of Isleta and a descendant of the Pueblo of Laguna, two federally recognized tribes in New Mexico. She is the first enrolled member of any tribe to sit on a state supreme court in the U.S. and the second Native American to sit on a state supreme court. She is also of Jewish descent. Prior to becoming an associate justice, she served as a Superior Court judge for Whatcom County for five years. In the 15 years prior to her work on the Superior Court, she served as a tribal court judge for multiple tribes in the Pacific Northwest and the Southwest.



Anthony E. Varona is in his second year as dean at Seattle University School of Law, where he just welcomed the most diverse entering class in the law school's history, as well as its academically strongest in 13 years, and the largest cohort of international LL.M. students ever. A former dean and dean emeritus at University of Miami School of Law, vice dean and academic dean at American University Washington College of Law, general counsel and legal director at the Human Rights Campaign, and associate at Mintz Levin and Skadden Arps, Varona received his A.B. and J.D. degrees from Boston College and an LL.M. from Georgetown.

CONTINUED >

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

Kayshel v. Chae, Inc., 486 P.3d 936 (2021)
Estate of Hunter (\$2.8 million fee award in arbitration) (2019)
Easterly v. Clark County, 2 Wn. App. 2d 1066 (2018)
Arnold v. City of Seattle, 185 Wn.2d 510, 374 P.3d 111 (2016)
Bright v. Frank Russell Investments, 191 Wn. App. 73, 361 P.3d 245 (2015)

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EHouse Dev., LLC v. Lam,
2023 WL 5202420 (2023) (affirming seller's retention of non-refundable payment in real estate sale)

Nay v. BNSF Ry. Co.,
2023 WL 5740244 (2023) (reversing dismissal on federal preemption grounds of rail crossing claims)

Jones Estate v. State of Wash.,
P.3d ___ 2023 WL 5763490 (2023) (reversing dismissal of childhood sexual abuse claims against State on statute of limitations grounds)

Schireman v. Williams,
26 Wn. App. 2d 1003, 2023 WL 2645875 (2023) (reversed trial court's submission of case-within-case causation to jury in legal malpractice action)

Aguda v. Aguda,
25 Wn. App. 2d 1069, 2023 WL 2570709 (2023) (successfully dismissing appeal as untimely)

Dr. Conklin v. Univ. of Washington School of Medicine,
1 Wn.3d 1011, 528 P.3d 362 (2023) (reversing and holding University of WA liable for PRA violations)

Wash. State Council of County & City Employees v. City of Spokane,

200 Wn.2d 678, 520 P.3d 991 (2023) (invalidating Spokane's anti-union open bargaining measure as preempted by state law)

Dodge v. Evergreen School District No. 114,

56 F.4th 767, 2022 WL 17984059 (2022) (reversing adverse grant of qualified immunity on First Amendment retaliation claims)

B.M. on behalf of A.M. and J.M.,

25 Wn. App. 2d 1003, 2022 WL 17815791 (2022) (reversing protection order entered w/o statutory authority)

In re Parenting & Support of K.G.-S.,

24 Wn. App. 2d 1045, 2022 WL 4095380 (2022) (reversing unfavorable parenting plan, child support award, and atty fee award)

IHF Com., LLC v. City of Issaquah,

23 Wn. App. 2d 1011, 2022 WL 3583970 (2022) (provided amicus support on vesting doctrine)

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The Bar Exam: An Urgent Need for Alternative Pathways to Licensure

CONTINUED >

Q The final report recommends alternative pathways to licensure in addition to the traditional bar exam. Why are these alternatives needed, given that the bar exam has been such a heavily relied upon part of licensure for more than 100 years?

AEV: When it comes to assessing lawyer competence, we saw again and again and again in our research conclusive evidence that the existing bar exam is far from a foolproof or even reliable measure of competence; and, to the detriment of both candidates and the profession, it replicates and perpetuates bias.

RML: One of the things I have become completely convinced of is that the bar exam tests something—but that something is not necessarily competency or readiness to practice law. It does not test someone's ability to represent a client in court or properly advise them of the law. The bar exam tests a very limited set of facts and subjects, and in terms of what people assume about the bar exam—that if an applicant passes the bar exam, they are qualified to practice law—well, the work we have done in the task force has made it clear that is a false assumption.

There is another consideration, which gets to the imperative of the alternative pathways. The impacts of the bar exam on communities of color are undeniably negative—they fail at higher rates. From our studies, we see there are reasons that are explicable and other reasons that we don't necessarily understand, but the data is clear and unignorable. It is reflective of what you see in standardized testing across the board, including the SATs. Personally speaking, as a professor of law, I have had students fail the bar exam; all of them have been students of color and all of them have been absolutely qualified to practice law. Some of them have been my best students, and they have gone on to have remarkable legal careers. That tells me there is a disconnect between what is being tested and the competency of these

students. There is an imperative when we look at the people we are disproportionately barring from the practice of law, and I don't know how to address those issues without, at minimum, providing an alternative pathway to licensure. Having a singular pathway, as we do now, is hurting the profession. We are failing to adequately represent all the communities we should serve.

AEV: I would add that in my experience—and especially over the last 15 months as I have been getting to know the Washington communities we serve as a law school—there is a significant problem of legal deserts, where there is a tremendous demand for lawyers and legal education but inadequate or entirely nonexistent supply. I have learned that some of the most effective lawyers in these areas are bilingual or multilingual—bicultural and multicultural—because they deeply understand the community. They are able to transcend linguistic and cultural and sociological barriers to build trust and provide much-needed services. From that perspective, I have to ask—does the bar exam assess competency in any of those areas? No, not at all. And if the bar exam is preventing these lawyers from practicing and helping underserved communities, then we have a major problem on our hands that calls for redress.

RML: I would add that the current bar exam presents real hurdles for people with disabilities, including people with learning disabilities. As a profession, we need to do a much better job of eliminating barriers for people with disabilities.

Q Why do you think lawyers themselves are going to be among the hardest group to convince alternative pathways are necessary and legitimate?

RML: I think there are a few reasons. One is simply the idea that "I had to go through it, it was hell," and that is the ritual for gaining entry into this profession. I frequently hear from applicants who, as soon as they find out they have passed the bar, say, "everything I learned has already fallen out of my head." That is accurate, you can't

hold all that information in your head, and you don't need to. The laws change all the time, so one of the legal skills we should prioritize is the ability to find the best resources for every case. If I were to hire a lawyer, it would be one who would consult the law and colleagues and experts—not static, memorized knowledge—all before answering a difficult question.

One other reason, maybe the hardest to confront head on, is the belief that if we open alternative pathways to practice law, we will be admitting people as lawyers who look a lot different than the people we have historically admitted to be lawyers. I

'That is what this entire task force has been about: In our modern world, what do we need to do to reevaluate our licensing standards to make sure they are truly upholding the integrity of the legal profession? That's the imperative.'

Justice Raquel Montoya-Lewis

recently overheard a lawyer say, in respect to me and my work, that, "She is going to be admitting more illiterate brown lawyers like herself." That actually happened. He was not hiding his bias, but I think many do. That's a real undercurrent we are battling.

AEV: What Justice Montoya-Lewis has experienced is so indicative of the gatekeeping perpetuated by the traditional bar exam. I agree that it has become almost a rite of passage or hazing, like an admissions ticket to a private club. This form of gatekeeping has been very detrimental in shaping the legal profession. Just using one metric, I have been speaking as part of Hispanic Heritage Month at various law firms. What I have been sharing is that we comprise almost 20 percent of

the American population and yet only about 5 percent of attorneys across the nation are Hispanic and Latinx. Out of about 193 accredited law schools in the 50 states and D.C., only nine have Hispanic and Latinx deans. That is a problem, considering it's just one slice of diversity data.

Q What do you say to people who might have concerns about the alternative pathways and public protection?

AEV: We share concerns about protection of the public. That has been our primary lens. We believe that many law-school graduates are still going to be opting for the traditional bar exam because the pathways we have devised are difficult, rigorous pathways. They have assessment points and real-world application that, in some ways, will be more challenging and certainly more time-consuming and resource intensive than the traditional bar exam. So, when you take into account that the traditional bar exam is a very flawed and imperfect measure of assessment, the alternative pathways perhaps should give some confidence; the pathways we have devised may not be perfect, but they have a lot more assessment and application to them.

Q In addition to recommendations about the bar exam, your final report addresses the character and fitness process. Why is that important?

RML: One of the things I have learned as a Justice in terms of looking at character and fitness is that the number of cases that come before us is very small, so it can feel like there is an inconsistency in the way we deal with those cases. What I am pleased about is the possibility of providing more guidance about our standards to the Character and Fitness Board and applicants. In historical perspective, the things that mattered in a character and fitness hearing 30 years ago are probably very different than now. In some ways, that is what this entire task force has been about: In our modern world, what do we need to do to reevaluate our licensing standards to make sure they are truly upholding the integrity of the legal profession? That's the imperative. **BN**

In Support of Other Options in Addition to the Bar Exam

Thoughts from one of the WSBA's representatives on the Washington Bar Licensure Task Force

BY JORDAN COUCH
GOVERNOR AT-LARGE



Jordan Couch was elected to the Board of Governors in 2021 to represent new and young lawyers in an at-large position. Couch is a partner at Palace Law, practicing workers' compensation and personal injury. In his spare time, he is an avid outdoorsman—probably stemming from his childhood spent between an island in Alaska and the Bighorn River valley in Montana. Prior to joining the Board of Governors, Couch served as a trustee for the Tacoma-Pierce County Bar Association, chair of the Access to Justice Board's Technology Committee, and chair of the Washington Young Lawyers Committee, and has held various leadership roles on the WSBA Solo & Small Practice Section's Executive Committee. Couch is passionate about solving access to justice by helping lawyers build better, more client-centric practices, and never gets tired of talking about how to improve our profession (or fishing).

I think we all agree it's important for the Washington Supreme Court and the WSBA to ensure the basic competence of the lawyers who are entrusted with the lives and rights of the people of Washington. When I became a WSBA governor I swore an oath to serve the public and to uphold the mission of the WSBA. In fact, the first several words of the WSBA's mission include "to serve the public." I take that oath seriously. And yet here I am telling you we should create additional pathways to licensure that allow lawyers to practice law without passing a bar exam. I even chaired the Washington Bar Licensure Task Force's subcommittee dedicated to researching and proposing those pathways.

I passed the bar exam on my first attempt. I was really proud. Being the first of my family to go to graduate school and the first to become a lawyer was a big accomplishment for me. So years later, when I started researching the bar exam and saw how ineffective it was, acceptance wasn't easy. It's hard to reflect on one of your biggest accomplishments and be told that it was, on some level, unnecessary, but both can be true. I can be proud of my accomplishment and aware that it says absolutely nothing about my qualifications to practice law.

Another oath I swore when I became a governor was to approach the role with "unbiased opinion, mature judgment, and enlightened conscience." I hope as

you continue reading what led me to my change of heart you will offer the same courtesy to me.

By every measure, the bar exam is a failure. The report from our task force subcommittee sets forth a lot of the data we uncovered. In short, the best studies we have all point to one conclusion. There is little to no correlation between the bar exam and effective lawyering or the bar exam and reducing lawyer complaints, malpractice, or discipline.¹ What the bar exam does do is exclude a disproportionate number of people of color from entering the profession.²

Over the last few decades, the bar exam has gone through a number of iterations in an attempt to make the test more relevant and close the racial equity gap. Despite these changes, there has been no meaningful impact on the effectiveness of the bar exam in ensuring competence or in reducing the racial equity gap.³

There is no such thing as an objective test. Every decision we make has an impact, and just because we don't know the impact doesn't mean we aren't putting our fingers on the scale or nudging people in a certain direction. As I studied the history of the bar exam, the stated purpose from many advocates in the exam's early days was explicitly to keep out people of color and "undesirable whites."⁴ It was hard at first for me to understand how a seemingly objective test can reinforce inequities in our profession. But when you look at exam statistics,⁵ it's clear that the exam's design and structure favor a specific social-economic class. Regardless of whether we understand all the complexities of what makes the bar exam disproportionately exclude people of color, we know for a fact that it does.⁶ And what it offers in return is nothing. It is not an effective tool for protecting the public.

How can we do better? As the task force set about its assignment, we looked at what other states were doing and what they had done in the past. We also looked for guidance from other countries and other industries. As we did so we asked ourselves what was lacking in law school curriculum that made the bar exam seem like a good idea. Common feedback we heard was that law students lacked practical experience, that the bar exam doesn't prepare people

LEARN MORE

Read the full report, "A Proposal for the Future of Washington State Bar Admissions," at www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.LicensureTaskForce.



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for practice, and that we couldn't trust all law schools to graduate only students who were competent. With those ideas and more in mind, we created proposed additional pathways to licensure that tackled each of those problems. First, we recommend maintaining the bar exam as an option. This will provide a baseline by which we can measure the success of our additional pathways to licensure. Second, we proposed the creation of experiential pathways to licensure in which law school students and graduates can demonstrate their competence through supervised practice. For these experiential pathways we relied on existing successful programs in Washington like the APR 9 Licensed Legal Intern program and the APR 6 Law Clerk Program. Using these existing structures gives us more control over the licensing process, ensuring that only qualified graduates are allowed to practice law in this state. In addition to these proposals, we made a couple minor proposals to improve the bar exam and investigate how we can ensure the competence of lawyers serving the public throughout their career rather than just at a snapshot moment at the start of their career.

I'd strongly encourage reading the entire proposal and reaching out to me if you have any questions. **BN**

NOTES

1. See "A Proposal for the Future of WA State Bar Admissions — Working Draft," at 3, n.4.
2. *Id.* at 2, n.1.
3. *Id.*
4. *Id.* at 2, n.2.
5. *Id.* at 2, n.1.
6. *Id.* at 2, n.1.



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In Support of Changes to the Character and Fitness Process

Thoughts from one of the WSBA's representatives on the Washington Bar Licensure Task Force

BY BRENT WILLIAMS-RUTH
GOVERNOR AT-LARGE



Brent Williams-Ruth was first elected as a district governor to the Board of Governors in 2020 and was elected to an at-large position in 2022. Williams-Ruth has had a varied career ranging from working as a 1L intern with the King County Prosecuting Attorney's Office to working in a nonlegal role with (formerly) Fisher Radio Seattle. Since 2015, he has been the sole proprietor of a concierge estate planning, probate/trust, and elder law firm. Since starting his own firm, Williams-Ruth has volunteered with Seattle University School of Law as a mentor and judge for legal writing oral arguments. He began his volunteer service with the WSBA in 2018 when he joined the Character and Fitness Board, serving as its 2019-2020 vice chair. He resigned his position with Character and Fitness in 2020 to take his seat as a governor. In September 2023, Williams-Ruth was appointed to the Board of Regents for Seattle University. When not working or volunteering, you will find him traveling, scuba diving, and training for the 2024 Dopey Challenge at Walt Disney World with his husband, Justin, where they will both run 48.6 miles over four days.

Tarra Simmons.¹ It really is just that simple. Her character and fitness review sparked my deep conviction to learn more, to step up to bar leadership, and, my ultimate goal, to author and advocate for changes that will provide for a clearer, more transparent admissions process rooted in modern research.

My journey of advocacy began in 2016 when I had just launched my own law firm and accepted a contract with Seattle University School of Law to evolve the Public Interest Law Foundation Auction from student focused to community focused. That task² put me inside Sullivan Hall every day for nearly a year. During that time, I had the opportunity to meet Simmons, an extraordinary 3L with a colorful, legal-system-involved past. Because of this past, when she applied to sit for the Washington bar exam, she was referred to a hearing before the WSBA Character and Fitness Board, which denied her application. The result of that process—a successful appeal to the Washington Supreme Court in *In re Simmons*, 190 Wn.2d 374, 414 P.3d 1111 (2018)—has been widely discussed.

I am proud to say that I had subscribed to the amicus brief on behalf of Simmons and was in the Temple of Justice when oral arguments were heard. Beyond that, I felt a call to action to understand: What is the

Character and Fitness Board? How could they come to such a different conclusion than the court? From incarceration to Skadden Fellow³—Simmons seems like the exact person we want as a member of the Bar.

Like everything in the law, the situation was vastly more complicated than it first appeared. Fortunately, I was appointed to join the Character and Fitness Board and in doing so became one of a super minority of people who know exactly what happens in those hearings and deliberations that lead to a recommendation to the Supreme Court. My tenure on the board was still fresh when I started asking questions about the process and rules by which character and fitness determinations are made. To summarize what I learned: I believe it would be easier to explain nuclear fusion than it would be to explain the analysis under the existing Admission and Practice Rules (APR). And that is a problem for prospective candidates who, at the very least, deserve a review process that is transparent and understandable.

Because it was considered inappropriate for members of the Character and Fitness Board to lobby the court to change the rules, I resigned and joined the WSBA Board of Governors, whereupon I immediately presented a proposal to open a conversation about how the process could be improved. It just so happened that at the same time I was pushing for this reform, a spirited conversation was emerging in the legal community about establishing alternative pathways to licensure. Then WSBA-President Kyle Sciuchetti approached me with the idea of wrapping my proposed task force into one that was being discussed by the Supreme Court that would look at the whole licensure process under one

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umbrella. I agreed and gladly accepted the nomination to represent the WSBA on the Washington Bar Licensure Task Force.

Over the past two years, I have chaired the task force's Subcommittee on Ethics/Character & Fitness and have spent hundreds of hours talking with national scholars and leaders who have dedicated their professional lives to this topic (including reading sneak previews of books with cutting edge research on the issues raised). Our subcommittee heard from law schools that their students maintain a persistent but incorrect belief that seeking help for depression or mental illness will prevent them from sitting for the bar exam. This takes me back to my own time in law school, when there were 1,000 students in the building and seven were openly identifying as being LGBT. Although I never hid who I was, I also did my very best to code switch and present as "normal."

I personally believe the entire character and fitness process should be abandoned as the research indicates to me that you cannot predict someone's future conduct based upon their past behavior; however, our subcommittee understood that such a proposal at this time would be a non-starter. What we ultimately discovered is that there is room for significant improvement in the process with rules that could at least make the analysis less burdensome on the applicants, the members of the Character and Fitness Board tasked with upholding the rules, and even the court itself.

The proposals put forth are not set in stone. Our subcommittee comprises dedicated volunteers willing to dive into the process to produce in-depth proposals ready for implementation, but we understand the need to get a better sense of whether the court is open to such changes before we invest time in significant additional work. So our initial report lays out the reasons we believe the court should be open to our recommendations, which include:

- joining the nearly 30 other jurisdictions that have a provisional admission (like probation, but private);
- allowing for those with histories that might result in a character and fitness hearing to have that part of their life examined *before* incurring three years of law school debt;

What the subcommittee ultimately discovered is that there is room for significant improvement in the process.

- creating an ombudsman-style contact to help applicants navigate the process if they are referred to a hearing; and
- most concretely, revising some of the rules themselves.

When I began my term on the Character and Fitness Board, I thought it was going to be easy. I would see the next Tarra Simmons and I would vote to recommend her admission. What I found was that each and every case is different. During my term, I never had another Tarra Simmons. I voted based on what I believed the rules required me to do in each case. There were times when the court agreed with and endorsed the recommendation of the board, and there were times when it did not. I don't like the idea that we got it "wrong," but sometimes that happens. The most frustrating outcome in these situations was that we had no clear explanation or reason why—we had nothing to help us avoid making the same mistake in analysis again. How could we ever improve? This is why we are asking the court to consider improving the character and fitness process by adopting the recommendations of the Subcommittee on Ethics/Character & Fitness.

And to think—it all started with Tarra Simmons. **BN**

NOTES

1. With gratitude to now-friend and State Representative Tarra Simmons, who has granted me permission to share my journey via her character and fitness review; read her story in the July 2018 issue of *Bar News* at wabarnews.org/archive/.
2. A success that carries through today; please attend the Public Interest Law Foundation annual auction and dinner on Feb. 24, 2024: law.seattleu.edu/student-life/community/student-activities/student-organizations/public-interest-law-foundation/.
3. www.skaddenfellowships.org/.

G A T E W A Y E V O L U T I O N :

Introducing the 'NextGen Bar Exam'

The future of legal licensing and what it means for aspiring attorneys in Washington

BY NOEL BRADY

In the realm of legal education and licensure, change is a slow and tortuous process often met with resistance. Nevertheless, evolution—in, for example, the mechanisms by which future attorneys are best assessed and granted entry to the practice—is inevitable. What's soon to evolve is the bar exam.

The Uniform Bar Exam (UBE), taken by law school graduates¹ in Washington and 40 other jurisdictions, has long served as the benchmark for legal competency. Developed by the nonprofit National Conference of Bar Examiners (NCBE), the UBE is uniformly administered and graded with scores that can be used for legal licensing in other UBE states and jurisdictions. Since the exam was introduced in 2012, it

has remained largely unchanged, especially regarding format, although there have been some relatively small changes related to content and introduction of new multiple-choice questions. Today, however, after so many advancements in technology, shifting legal demands, and an ever-diversifying and changing profession, many voices have called for a more adaptable and forward-thinking bar exam. Enter what the NCBE calls its "NextGen Bar Exam"—an evolution poised to reshape the way jurisdictions assess legal competence.

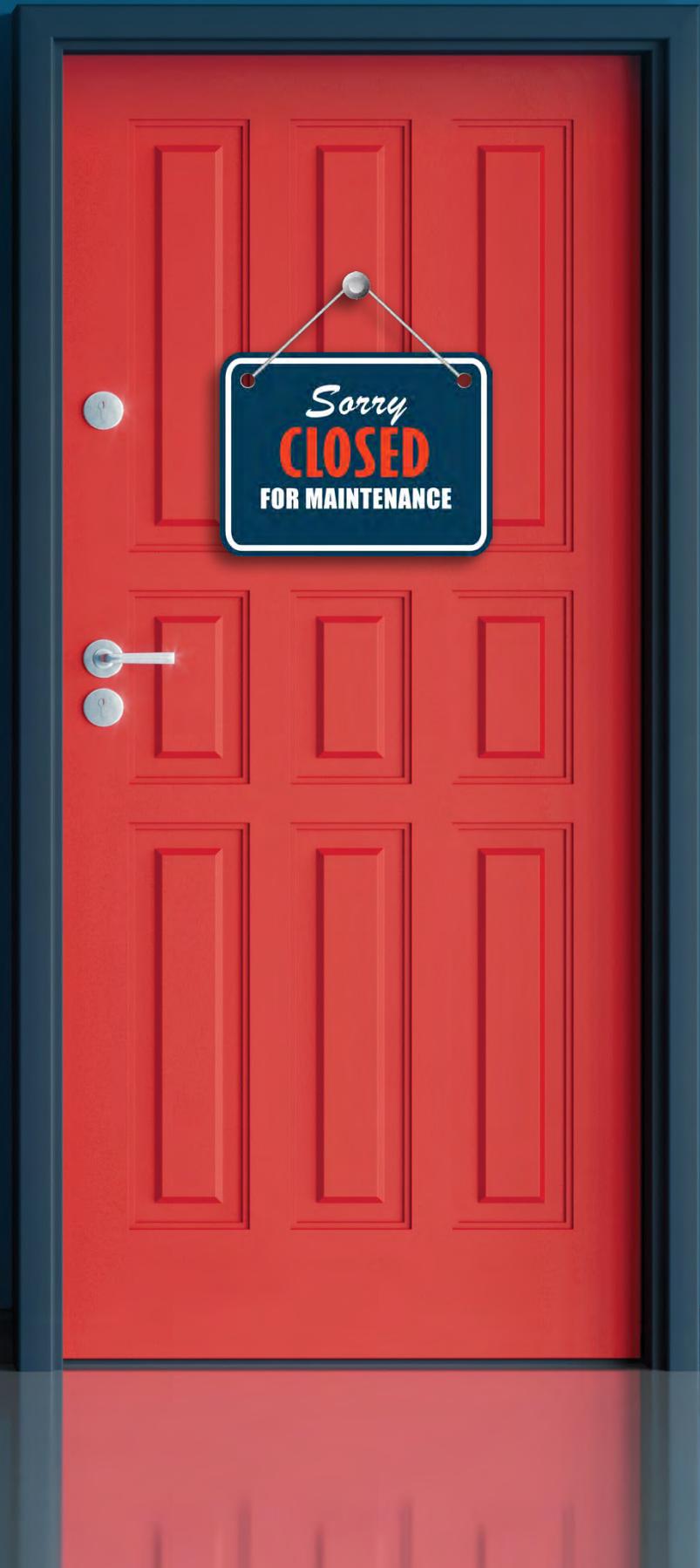
CALLS FOR CHANGE

Twenty-first-century technologies such as artificial intelligence and blockchain have

changed the way legal services are delivered. Legal issues related to the environment, data privacy, and digital currencies have taken center stage, challenging established norms and demanding a new breed of legal experts. At the same time, the demographics of those entering the legal profession have broadened, bringing fresh perspectives and highlighting the need for a more inclusive and equitable legal system.

First administered in Washington state in July 2013, the existing UBE has come under scrutiny in recent years both for its slowness in adapting to evolving demands for legal services and for its questionable ability to thoroughly assess the competency of candidates seeking to enter legal practice. Critics point out that the UBE does not adequately account for certain skills required of modern lawyers, such as technological competence, cross-cultural communication, and a deep understanding of emerging legal fields. People who have taken the UBE also question its demand for rote memorization of black-letter law when, in the real-world, attorneys research the finer

CONTINUED >



SIDE BAR Sneak Peek

Take a sneak peek at sample questions recently published by NCBE. These questions were tested by more than 2,500 law students, bar examinees, and newly licensed lawyers. Several law schools across the country also participated in the testing. www.ncbex.org 

Enter what the National Conference of Bar Examiners calls its 'NextGen Bar Exam'—an evolution poised to reshape the way jurisdictions assess legal competence.

Evolving the Legal Gateway: Introducing the NextGen Bar Exam

CONTINUED >

points of law as needed. Finally, the UBE has been criticized for its one-size-fits-all approach that fails to account for regional variations in legal practice.

In response, the NCBE began developing a next generation uniform bar exam in January 2021, after its Board of Trustees adopted recommendations by its Testing Task Force. NCBE will launch the NextGen Bar Exam in July 2026, making it available for use by jurisdictions.

The Washington Bar Licensure Task Force, commissioned by the Washington Supreme Court, in October recommended that the court adopt the new bar exam; however, the task force told the court, work remains to adequately improve the assessment of lawyer competency and representation in Washington. It is now up to the court whether and when it chooses to do that. The court's only deadline is July 2027, when the final UBE will be administered. Afterward, the NCBE will no longer offer the existing UBE.

"This new exam is going to be an intertwining of the skills and the doctrine, because we're trying to make this exam much more relatable to the practice of law, much more relatable to what a lawyer is going to face in the first five years of practice," NCBE's Chief Strategy and Operations Officer Marilyn Wellington explained at a recent meeting of the WSBA's Board of Governors. "Our goal is to make sure we're providing an assessment product that allows people in their jurisdictions to really evaluate the candidates that they have for bar admission, for licensure, in a way to allow them to focus on their role in protecting the public," she said.

If Washington adopts the NextGen Bar Exam, it will continue to be responsible for determining eligibility for taking the exam; for administering the exam in person, twice a year, in February and July; for reviewing and granting examinees' testing-accommodation requests; and for setting the state's own minimum passing score. Scores will continue to be portable for admission to any jurisdiction administering the exam based on that jurisdiction's minimum passing score.

SIDE BAR

The 3 Factors

According to the NCBE, the following three factors were considered in determining the breadth of topics to be covered within each concept and skill area in the NextGen Bar Exam:

FREQUENCY > How often is a newly licensed lawyer likely to encounter the topic in general entry-level practice (loosely defined as solo practice or working at a full service law firm)?

UNIVERSALITY > How likely is a newly licensed lawyer to encounter the topic in more specialized types of entry-level practice?

RISK > How likely is it that there will be serious consequences if a newly licensed lawyer does not have any knowledge of the topic when it arises?

WHAT'S CHANGING?

The NextGen Bar Exam is divided into three sessions of three hours each over a day and a half. The existing UBE is 12 hours long over two full days. Each session of the NextGen exam includes a performance task with two sets of integrated short-answer questions and two sets of multiple-choice questions with four to six choices and one or more correct answers (significantly fewer multiple choices questions than the current 200 on the UBE), all asked and answered on a computer. No longer will every examinee receive paper test booklets or be asked to complete a paper scantron answer sheet. NCBE recently released samples of the integrated question sets and multiple-choice questions; they're available on the NextGen website.² NCBE and its partners developed the subjects and skills to be tested through a multi-year, nationwide legal practice analysis focused on the most important knowledge and skills for newly licensed lawyers—that is, lawyers in their first five years in practice. Exam questions are written by diverse teams of law professors and deans, practicing attorneys, and judges drawn from jurisdictions throughout the U.S. and are thoroughly pretested prior to administration to examinees.

According to the NCBE website, the NextGen Bar Exam will balance the skills and knowledge needed in litigation and transactional legal practice. It will reflect many of the key changes that law schools are making to their own curricula, building on the successes of clinical legal education programs, alternative dispute resolution programs, and legal writing and analysis programs. It does away with the current exam's three separate components—the Multistate Bar Examination, the Multistate Essay Examination, and the Multistate Performance Test—in favor of an exam designed to better integrate knowledge and skills.

The new exam will cover eight foundational concepts: civil procedure, contract law, evidence, torts, business associations, constitutional law, criminal law, and real property. It will no longer test conflict of laws, family law, trusts and estates, or secured transactions, because those areas of law differ by state and are covered in the separate Washington Law Component of the exam. The exam will provide greater emphasis on assessing lawyering skills, in-



Noel Brady is a former newspaper reporter who spent nearly 20 years on the criminal legal system beat. He has worked in WSBA's Communication Department for eight years.



cluding legal writing, issue-spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and client management.

“Another major change is simply moving away from memorization of subject matter rules that can be looked up in practice and moving toward an exam that more realistically resembles real practice,” said WSBA’s Chief Regulatory Counsel Renata de Carvalho Garcia, who has also been involved with the Washington Supreme Court’s Bar Licensure Task Force.

“This new exam is going to be an intertwining of the skills and the doctrine, because we’re trying to make this exam much more relatable to the practice of law.”

Marilyn Wellington,
NCBE Chief Strategy and Operations Officer

“So far, the feedback from early exam takers has been generally positive,” Garcia said. “I think that people appreciate reducing the number of multiple-choice questions and the memorization component.”

The NextGen Bar Exam tests foundational knowledge that transcends practice areas, skills, and know-how about things like contracts, civil procedure, evidence, and statutory interpretation, said University of Maine Law School professor John Lee, who volunteered to help draft the new exam. The lawyering tasks are narrower in scope than on the UBE. Rather than drafting a complete brief, exam takers may have to edit part of a brief or identify errors that were made.

Ethical considerations are at the core of the legal profession, and the NextGen Bar Exam reflects this by incorporating an ethics component that goes beyond rote memorization of rules. Candidates will engage with realistic scenarios that raise ethics issues and must make complex, real-world decisions that balance legal, moral, and practical considerations. This approach aims to produce attorneys who are not just knowledgeable but also ethically sound and capable of navigating the often-gray areas of legal practice.

“One new aspect to the NextGen exam is that as part of the integrated assessment, examinees will need to have working knowledge of some of the rules of professional conduct,” Lee said. Included will be rules such as client counseling and client management, but they’ll be tested in connection with particular lawyering tasks.

In drafting the test, Lee said he and his colleagues focused on the skills of lawyering and differentiated between knowing how to spot an issue and work with available sources on the one hand and information a new lawyer must know from memory on the other, the latter being what he considers a deeper level of knowledge.

the law but also the tools that facilitate its practice, ensuring they are well equipped to navigate the digital landscape.

DIVERSITY & INCLUSION ASSESSMENT

Recognizing the importance of diversity and inclusion in the legal profession, the NextGen Bar Exam assesses candidates’ knowledge of and commitment to promoting diversity and inclusion in the legal field. This initiative encourages aspiring attorneys to consider the broader social implications of their work and fosters a legal community that is representative and welcoming to all.

To minimize bias for or against a particular group or groups, designers of the NextGen Bar Exam avoided unfamiliar terminology and insensitive phrasing by having questions reviewed by a committee whose members brought multiple perspectives and experiences to the table. Drafters received training and guidelines specifically designed to help them avoid problematic test content. NCBE also conducted equity studies³ jurisdiction.

Once the questions were drafted and sent through a review process, the exam was presented to a battery of pilot- and field-test exam takers. Pilot-test exam takers included third-year law students and recent graduates. Field-test exam takers included new lawyers in their first three years of practice, said Danette McKinley, NCBE’s Director of Diversity, Fairness, and Inclusion Research. If a subset of test examinees performed significantly worse (or better) on a question than expected, that question went through further review.

“When we’re talking about fairness here, it’s our concern that the test allows the same interpretation about the assessment of competence for everyone who sat through that exam,” McKinley said. “When they get their test results, have we given them equal opportunity to show what they know and what they can do?” **BN**

NOTES

1. Individuals who complete the APR 6 Law Clerk Program can also sit for the Uniform Bar Exam in Washington state.
2. <https://genbarexam.ncbex.org/nextgen-sample-questions/>.
3. www.ncbex.org/about/diversity-fairness-and-inclusion.



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Ms. Bamberger is a skilled negotiator who has settled hundreds of cases over her more than 35-year career as a litigator in private practice. She has tried jury and bench trials in both state and federal courts. She has served as lead counsel and is known for her thorough preparation, knowledge of the law, ability to develop rapport with the parties and collegiality in dealing with opposing counsel. Ms. Bamberger has also served as an arbitrator on three-member UIM panels throughout her career and in mandatory arbitration cases for over a decade. She is available as a mediator and arbitrator to resolve **civil rights, insurance, personal injury/torts, product liability and real property** matters.

Visit jamsadr.com/bamberger or contact Case Manager Michelle Nemeth at mnemeth@jamsadr.com or 206.292.0441.

An Established Alternative Pathway: Washington's Law Clerk Program

BY CHRISTELL CASEY AND BENJAMIN PHILLABAUM

LAW CLERK BOARD MEMBERS

The Law Clerk Program is Washington's affordable alternative to a traditional law school education, in which the classroom is replaced by on-the-job legal education and training. This four-year program is available anywhere in the state and allows tutors—lawyers or judicial officers with at least 10 years of experience—to open career pathways to aspiring lawyers and potentially train a future law firm successor.

Under Washington Supreme Court Admission and Practice Rule (APR) 6, those who successfully complete the program are eligible to sit for Washington's bar exam. To qualify for the program, applicants must have a bachelor's degree and regular, paid, full-time (at least 32 hours per week) employment with a primary tutor who regularly practices within the state of Washington.¹

With the help of their tutor, law clerks follow a course of study comparable to any Washington law school curriculum, in combination with employment. Each year, law clerks are required to study six subjects, pass 12 exams, and submit three reports on books related to any of the following topics: legal history, philosophy and theory, biography, policy, and procedure. The tutor develops, administers, and grades the exams; provides at least three hours each week of personal supervision, which includes the recitation and discussion of pertinent cases and critical analysis of the law clerk's written assignments; and evaluates the law clerk's progress.

In recent years, much attention has been paid to equal access to the legal profession, the rising costs of law school education, and how to address the attorney shortage in ru-

ral and underserved counties of Washington state. The APR 6 Law Clerk program is uniquely situated to address these issues.

The Law Clerk Program costs a fraction of a traditional law school education. In addition, because it requires paid employment, it is accessible to populations who do not have the privilege to stop working to attend law school. Single parents who need an income to support their family can still train as an attorney and work at the same time. Peo-

Christell Casey has been a resident of Spokane since 1984 and has a long history of community service. She completed the APR 6 Law Clerk Program in 2014 and has served on its board since 2017. She currently practices family law at The Law Office of Julie C. Watts, PLLC, and was honored to receive the 2021 Attorney Partner Award from the Spokane County Volunteer Lawyers Program.



Benjamin Phillabaum was born and raised in Eastern Washington. He received his B.A. from Washington State University in 2001. After working as a commercial lender at various banking institutions, he successfully completed the APR 6 Law Clerk Program. As a partner with Phillabaum, Ledlin, Matthews & Sheldon in Spokane, Phillabaum's practice now specializes in consumer and commercial collections, as well as business formation, real estate, contracts, estate planning, and probate. He has been a member of the Law Clerk Board for seven years and served as its chair for four.



ple from lower socio-economic situations or marginalized communities who think that the price tag of a legal education is out of reach for them may more easily be able to afford the cost of the APR 6 Law Clerk Program: \$2,000 a year, plus materials that they can source from a variety of different places, including other law clerks.

Completing the Law Clerk Program with little to no debt also allows those attorneys who feel called to public service or pro bono work the freedom to follow their passion and permits them to accept an offer from a non-profit, because they are not faced with paying off law school debt.

Law clerks do not have to leave their community to participate in the program. Because a law clerk does not study in a brick-and-mortar university law school, the law clerk can reside anywhere in the state, from Othello to Omak. Law clerks who study under experienced attorneys in these rural areas know their communities, work with the people who reside there, and are positioned to continue to serve these areas when they become practicing attorneys. We won't need to lure attorneys to these areas; they already live and work there with their families.

It has been reported several times in this publication that we have an aging attorney population and a significant lack of mentorship. The law clerk has a built-in mentor in their employer/tutor. Law clerks are trained in the traditional subjects of the law, but also the *practice* of law. Law clerks routinely are ready to handle their own cases immediately upon receiving their license, because they have already been working in a supervised position for four years. In addition, many law clerks are trained to take over the solo practices their tutor/employers have built, and our retiring attorneys feel confident transitioning their practice to an attorney they trained themselves.

The Law Clerk Program is rigorous and demanding. It takes self-discipline and sacrifice, but it is highly rewarding. If you, or someone you know, is interested in accessing this alternative pathway as a law clerk, want to serve as a tutor guiding someone through the program, or just want more information, please contact lawclerks@wsba.org. BN

NOTE

1. Please see APR 6 and Regulations for more information.

HOT TOPICS

Legal Deserts, Diversity and Inclusion, and Technology

A Q&A with Washington's three law school deans on some of the challenges and exciting changes ahead for the state's legal profession and its future members



Q **What do you perceive as the biggest challenges facing the legal profession?**

University of Washington Law School

Dean Tamara Lawson (TL): I think one of the biggest challenges is also fundamental to equitable progress—figuring out how to serve all the communities that need legal expertise and representation. As it stands, there are regions within our state and regions within our country that are without adequate legal services. It is my goal for UW Law to play a pivotal role helping to remedy these shortages and incentivize lawyers to serve these underserved communities.

Seattle University School of Law

Dean Anthony Varona (AV): Access, diversification, and artificial intelligence. First, law school leaders must make legal education accessible and affordable to a broader range of potential law students—especially in legal deserts. Second, we need to intensify our efforts to diversify the legal profession, which remains one of the least representative professions in the nation. Finally, we need to get ahead of the opportunities and challenges posed by artificial intelligence, and its creative disruptions, in the study and practice of law.

Gonzaga University School of Law Dean

Jacob Rooksby (JR): As someone who holds an active bar license in Washington, the challenges I see are integration of new technology into all practice areas, embracing attorney well-being, and continuing to build an inclusive and diverse profession representative of society. Our profession has been change resistant, setting unnecessary barriers both to legal education and access to justice. Ritualistic hazing, attorney burnout, and sexist, racist, and classist practices have been common. We have both the opportunity and the moral obligation to do better.

Q **What is your law school doing to address those challenges?**

TL: Strengthening programs, both outreach programs as well as clinical education

programs, that attract more lawyers who will dedicate their practice to underserved communities. UW Law has deep roots in public interest law and increasing public access to justice—a lot of the passion for that work comes from having unique opportunities and experiences. Our students go to the U.S./Mexico border in El Paso to learn about legal intake services, travel to rural Alaska to help prepare taxes, and pursue prestigious fellowships to advance the cause of workers' rights. To quote a student, "You learn advocacy by working with impacted community members."

AV: As a Jesuit, Catholic law school with a justice-rooted mission, access and diversity have always been in our institutional DNA, and we have long been the most diverse law school in the Pacific Northwest. While the *Students for Fair Admissions v. Harvard*¹ decision has required us to adjust our recruiting and admission process, our nonnegotiable commitment to diversity and access are as strong as ever. Our hybrid-online Flex J.D. Program is attracting diverse/non-traditional students who otherwise would not be able to attend law school, and we are creating a law school presence in Pacific Northwest legal deserts to further attract and support diverse students. We are longstanding co-hosts of a workshop to address diversity in legal education. And we have a leading role in the Washington Supreme Court's efforts to identify potential reforms to the attorney licensure process. We are at the forefront of incorporating AI topics across our curriculum—including a new Technology, Innovation Law, and Ethics (TILE) Program.

JR: Collaborating with our university, we are building an Institute for Informatics and Applied Technology to study and teach about AI, big data, and the intersection of science and technology across the professions. We have actively embraced law student well-being, eliminating hyper-competitive practices that do not serve our students. And we continue to increase the diversity of our faculty, staff, and student



Tamara F. Lawson is the Toni Rembe Dean and professor of law at the University of Washington School of Law in Seattle. Lawson is regularly invited to speak on issues of criminal justice and race, her work is often cited, and she is the recipient of the AALS Clyde Ferguson Award. She serves on several leadership boards related to higher education and the legal profession.

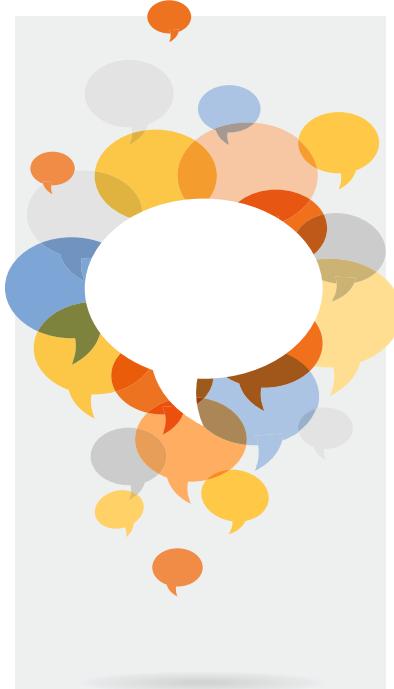


Anthony E. Varona is in his second year as dean at Seattle University School of Law. A former dean and dean emeritus at University of Miami School of Law, vice dean and academic dean at American University Washington College of Law, general counsel and legal director at the Human Rights Campaign, and associate at Mintz Levin and Skadden Arps, Varona received his A.B. and J.D. degrees from Boston College and an LL.M. from Georgetown.



Jacob H. Rooksby is Smithmoore P. Myers Dean of Gonzaga Law School, where he also is a professor of law and leadership studies. He holds an active law license in Washington and is IP Optimization Strategist with FIG. 1 Patents, PLLC, an IP law boutique based in Spokane. He began his deanship at Gonzaga in June 2018.

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Legal Deserts, Diversity and Inclusion, and Technology: A Q&A with Washington's Three Law School Deans

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body, celebrate what makes us unique, and work to build inclusive pathways and systems that will outlast us.

Q **What makes you most excited about the academic year ahead?**

TL: In my second year at UW, I'm working across the school to connect our planning and strategy to a singular priority: championing student excellence. I am excited to innovate in this area across the spectrum of the UW Law experience, beginning with a prospective student's initial interest in law school and continuing decades into their careers as UW Law alumni. We're working to enhance everything from wellness, to mentorship, bar support, leadership skills, and opportunities to explore a wide range of career possibilities.

AV: We are about two months into academic year 2024, and we are firing on all cylinders! In addition to bringing in a history-making J.D. class—with the most diversity in our history and the strongest academic credentials in 13 years—we welcomed the largest class of international LL.M. students in our history and an inaugural class of S.J.D. candidates. We also welcomed six terrific new tenure-line faculty members, exciting new visiting professors, and several new senior administrators. There is a lot of energy and positive momentum at Seattle U Law.

JR: Friday, April 19, when we will hold the first-ever nationwide summit on LGBTQ+ rights advocacy in legal education. The event will draw legal academics, clinicians, and practitioners from around the country. Gonzaga was the first Catholic law school to launch such a clinic, and we are proud of the work we are doing for the LGBTQ+ community across the region. Law School Admission Council (LSAC) CEO Kelly Testy,

a trailblazer and friend to many of us in legal education, will be the keynote speaker.

Q **What is something that would surprise established legal practitioners about the next generation of lawyers?**

TL: The next generation of lawyers is extremely engaged and connected—advocacy for themselves and others is a high priority. They are interested in individual and structural inequities and how those can be solved. They value flexibility and autonomy, especially when it comes to work/life balance. It shouldn't necessarily surprise anyone established in their legal careers, but maintaining the status quo is not high on the list for this next generation of lawyers.

AV: The next generation of lawyers is comprised of changemakers. They are reinventing the practice of law and law itself and challenging longstanding shibboleths of our profession. In particular, I see in our new graduates an exciting generation of lawyers who are improving our profession and the delivery of legal services by bringing to bear new technologies, a strong commitment to social justice and diversity in law, and the many hard lessons of the COVID-19 pandemic. They make me excited about our future as lawyers and legal educators.

JR: Many students expect work/life balance and are disinclined to pursue activities without articulable return on investment. Their time is valuable and gone are the days when students could be convinced to try to do something solely because their professors did it or valued it. Additionally, students are hungry to make change and have a determination rooted in life experience, including living through the pandemic. At Gonzaga Law School, we are encouraged by what we are seeing in our student body. **BN**

NOTE

1. *Students for Fair Admissions v. President & Fellows of Harv. Coll.*, ___ U.S. ___, 143 S. Ct. 2141, 216 L. Ed. 2d 857, 2023 U.S. LEXIS 2791, 2023 WL 4239254 (2023).



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U.S. Supreme Court's Free Speech Decision in *303 Creative*—a Return to a Dangerous Past?

BY J. DENISE DISKIN AND DALLAS AGUILERA MARTINEZ

On June 30, 2023, the United States Supreme Court issued its opinion in *303 Creative LLC v. Elenis*,¹ holding that Colorado could not enforce its state anti-discrimination law against a Christian website designer who does not want to create wedding websites for gay and lesbian couples because doing so would violate the designer's First Amendment right to free speech.

While some proponents of free speech and religious freedom lauded the decision, other advocates, particularly within communities of color and LGBTQ2S+² communities, are concerned that the holding sets a frightening precedent, marking the first time the Court "grants a business open to the public a constitutional right to refuse to serve members of a protected class."³

Colorado has long been a site for challenges to anti-discrimination laws, particularly in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, where a Lakewood, Colorado, baker refused to create a wedding cake for a gay couple and was held by the Colorado Civil Rights Commission to have violated state anti-discrimination law.⁴ The United States Supreme Court skirted directly addressing the baker's free exercise rights to refuse service, but instead determined that his rights were violated when the Commission showed "animus" to his religious beliefs in its administrative process.⁵

Washington courts have also handled such challenges—most notably, in *State v. Arlene's Flowers*, wherein the owner of a floral shop refused to serve a gay couple seeking flowers for their wedding due to the owner's religious beliefs. The florist raised a First Amendment speech challenge, but the Washington Su-

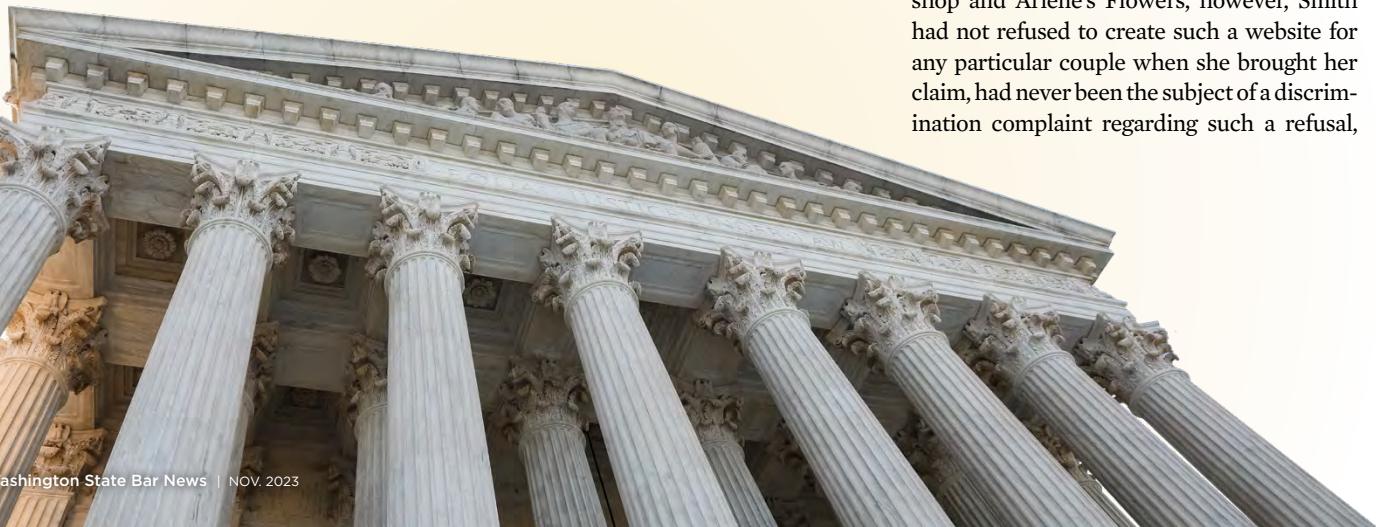
preme Court determined that arranging flowers was conduct, not speech, and that floral arrangements lack the requisite likelihood that a particular message would be understood from that conduct.⁶ The U.S. Supreme Court vacated the court's decision and remanded it for further consideration in light of *Masterpiece Cakeshop*,⁷ to ensure that no similar anti-religious animus had affected its consideration. The Washington Supreme Court ultimately affirmed its decision and found that their prior decision had not been tainted by anti-religious animus.⁸

The history of anti-discrimination protections, like the Washington Law Against Discrimination (WLAD) and the Colorado Anti-Discrimination Act (CADA)⁹ at issue in *303 Creative*, is barely a century old. But while the process of creation and building can be slow and subtle, destruction can be swift and abrupt.

BACKGROUND AND DECISION

Lorie Smith is the owner of 303 Creative, a Colorado business offering website and graphic design, marketing advice, and social media management services.¹⁰ Smith sought to expand her services to couples seeking website design services for their weddings, but worried that if she did so, Colorado would "force her to convey messages inconsistent with her belief that marriages should be reserved to unions between one man and one woman" by enforcing its anti-discrimination laws to compel her to create websites serving all couples.¹¹ She claimed to be "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender," and to be willing to "gladly create custom graphics and websites" for clients of any sexual orientation.¹²

Unlike the owners of Masterpiece Cakeshop and Arlene's Flowers, however, Smith had not refused to create such a website for any particular couple when she brought her claim, had never been the subject of a discrimination complaint regarding such a refusal,



and had not experienced any state enforcement of anti-discrimination law.¹³ Instead, her standing derived from having established a “credible threat that, if she follows through on her plans to offer wedding website services,” Colorado will invoke its anti-discrimination law to “force her to create speech she does not believe or endorse.”¹⁴

Nevertheless, represented by Alliance Defending Freedom,¹⁵ Smith filed suit, claiming a First Amendment exemption from Colorado’s anti-discrimination law. The case eventually made its way to the United States Supreme Court without a significant challenge to Smith’s standing to bring her claim, whereupon the Court granted certiorari on the question of whether Smith’s free speech rights were unconstitutionally infringed by Colorado’s law.

Importantly, while Smith was motivated by her religious belief that gay, lesbian, and other same-sex couples should not be permitted to marry, the Court decided that it was her right to free speech, and not her right to religious expression, that had been infringed. The decision, therefore, exempts *all* owners and employees of “expressive” businesses¹⁶ to refuse to create *any* work that would conflict with their personal beliefs, establishing a new normal for anti-discrimination protections and the standing necessary for business owners to claim exemptions.

Writing for the majority, Justice Neil Gorsuch held that Colorado’s law would “force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance.” Effectively, Justice Gorsuch posited, the law would force Smith to choose between following the law and following her conscience. Justice Gorsuch compared Smith’s dilemma to ones where the “government could require ‘an unwilling Muslim movie director to make a film with a Zionist message,’ or ‘an atheist muralist to accept a commission celebrating Evangelical zeal,’ or a gay website designer to create websites for a group advocating against same-sex marriage, so long as these speakers would accept commissions ‘for other members of the public with different messages.’¹⁷ Finding that Colorado’s law forces Smith to speak in ways which defy her conscience, though her views may be “unattractive,” “misguided, or even hurtful,” Smith’s free speech argument prevailed.¹⁸

IS IT THE MESSAGE OR THE GROUP?

We are lawyers who have advocated for LGBTQ2S+ rights for many years, and we are LGBTQ2S+ individuals who have personal experience with discrimination in employment, housing, parenting, and yes, even our wedding services. Justice Gorsuch’s sanitized analysis of Smith’s claims belies the actual function of discrimination, which is to turn away an individual from services they would be otherwise able to access if they were not a member of a particular group. The Court’s comparisons to movie directors, muralists, or gay website designers are inapposite because each of those projects can be rejected without intrinsically rejecting a group of

riage without rejecting heterosexual people, Christians, or any other particular group.

Smith, as did the owners of Masterpiece Cakeshop and Arlene’s Flowers, maintained that she had no issue with serving LGBTQ2S+ people; it was any project conveying support for same-sex marriage that she rejected.¹⁹ But while a heterosexual couple might request her services to build a wedding website which also conveys a message of marriage equality (an unusual circumstance at best), that couple could, faced with Smith’s statement of her conflicting beliefs, choose to excise the message of marriage equality from their website plans, could reach some other compromise mes-

Justice Gorsuch’s sanitized analysis of Smith’s claims belies the actual function of discrimination, which is to turn away an individual from services they would be otherwise able to access if they were not a member of a particular group.

people. For example, Zionists hold many different religious beliefs, so rejection of a Zionist film project rejects the message, not the Christians, Jews, or others who hold Zionist beliefs. Similarly, because there is no particular sexual orientation or religious group that uniquely rejects same-sex marriage (indeed many in the LGBTQ2S+ community do not endorse marriage for gays and lesbians because of their religious beliefs, or reject marriage entirely due to its patriarchal history), a gay website designer could freely reject a website project denouncing same-sex mar-

sage with Smith, or could choose another website designer. They would leave the interaction perhaps upset on behalf of their family or friends, but without a sense that their marriage was unwelcome. A gay or lesbian couple does not have the option of compromise—there is no way for them to be who they are and use Smith’s services.²⁰

Our country has experienced eras where a business owner was free to communicate their desire to selectively conduct their services; they did so with messages like “Whites Only,”²¹ “No Dogs, Negroes, or Mexicans,”²² or “No Irish Need Apply.”²³ While such discrimination is experienced differently and with varying historical weight by members of various protected groups, the unifying conclusion is that discrimination “threatens not only the rights and proper privileges of [Washington’s] inhabitants but menaces the institutions and foundations of a free democratic state.”²⁴ In other words, if the United States is to realize the vision of being a free democratic state, the Court must understand and correct for the imbalances of power that arise from personal biases, not create legal exemptions for them.

J. Denise Diskin (she/her) is the litigation and sustainability director of QLaw Foundation of Washington, where she directs civil rights strategy development with Washington’s vibrant LGBTQ2S+ communities.



Dallas Aguilera Martinez (he/they) is the legal director of QLaw Foundation of Washington. Dallas focuses their work on creating and extending affirming legal services to LGBTQIA2S+ communities statewide.



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U.S. Supreme Court's Free Speech Decision in *303 Creative*—a Return to a Dangerous Past?

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And this is the particularly insidious danger that the precedent set by *303 Creative* presents: By resting her argument on her religious beliefs about LGBTQ2S+ people but achieving a much broader holding applicable to free speech rights generally, Smith has leveraged the recently acquired, limited legal protections afforded of LGBTQ2S+ communities to produce a decision we read as a shift backward toward our country's ugly history of discrimination motivated by one group's use of social and political power to subjugate another.

WHAT PRE-ENFORCEMENT STANDING LEAVES OUT

A second significant precedent set by *303 Creative* is that the United States Supreme Court ruled on Smith's claims prior to any enforcement action by the state of Colorado against her business. As a result, there is no factual record to describe the demonstrated harm her discrimination would have caused.

Admittedly, most constitutional litigation takes place on a pre-enforcement basis, and a plaintiff has standing if she "alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."²⁵ But as recently as 2021, the United States Supreme Court held that "this Court has always required proof of a more concrete injury and compliance with traditional rules of equitable practice[.]" and that the chilling effect of a potentially unconstitutional law is not enough to automatically justify pre-enforcement review.²⁶ In other words, the Court could have declined to hear Smith's claim on the grounds that she had not sufficiently proven the injury posed to her by Colorado's law, but it opted to rule on her claims nonetheless.

A pre-enforcement ruling—one where Smith could reasonably imagine consequences for violating Colorado's anti-discrimination law—deprives courts as well as communities of a full understanding of the balance resting at the core of anti-discrimination law.

Anti-discrimination laws deem a wide array of harms to be unlawful, but it is up to the individuals experiencing the harm to articulate *why* the treatment they experienced violated the law, *how* it impacted them, and *how much*. The harm claimed by the plaintiff must be real, and it must be tested. Smith underwent no such process. Her claim of harm—whether she would in fact have to turn away gay and lesbian clients, whether any of those clients might report her business for discrimination, and if they did, whether Colorado would in fact penalize her business or grant an exemption, was left unexamined. As a result, there was no opportunity for the court to consider the impact of Smith's desired business practices on others—the only story the court heard was Smith's own.

COMMUNITY IMPACTS

The harms caused by businesses refusing services to LGBTQ2S+ people and other marginalized communities are well established. For example, other individuals who have experienced wedding-related service refus-

nities are rampant and defy isolation. Half of surveyed LGBTQ2S+ individuals reported experiencing workplace discrimination in the prior year; 30 percent reported housing discrimination (including harassment by housemates or neighbors).³¹ More than half of transgender and nonbinary individuals reported negative experiences with doctors or other health care providers in the prior year, with 23 percent reporting the provider made "religious statements" about their gender identity; and nearly 10 percent reported "physically rough or abusive" behavior.³² Racism is inextricably intertwined into these experiences: LGBTQ2S+ people of color are nearly 15 percent more likely than white LGBTQ2S+ people to have experienced discrimination in the past year; when disaggregated by race, people of color nearly universally report higher rates of a wide variety of specific discriminatory experiences.³³

It is indisputable that LGBTQ2S+ communities, and particularly LGBTQ2S+ communities of color, are disproportionately harmed by these experiences long-term.

***303 Creative* demonstrates that the legal system is, above all things, a malleable system, as subject as any other to the evolution of social and political bias.**

als report intense emotional experiences, including feeling "[they] weren't good enough to be served in their own community," feeling "very sad and stressed" and "dread[ing] her own wedding."²⁷ And services are not easily replaced: between 10 and 20 percent of LGBTQ2S+ people surveyed in 2017 said it would be "very difficult" or "not possible" to find the type of service they were denied at another establishment.²⁸ This rises to between 20 and 40 percent when isolated to suburban and rural LGBTQ2S+ individuals.²⁹

It is tempting to read the black-letter law of *303 Creative* and determine that it is firmly cabined in a narrow category of artistically expressive businesses. But to do so is to pretend Smith's discrimination is something other than what it is: a single cell in a broader social cancer. Prior to the *303 Creative* decision, a 2022 Center for American Progress³⁰ survey found that experiences of discrimination within LGBTQ2S+ commu-

According to the American Psychological Association, "Dealing with discrimination results in a state of heightened vigilance and changes in behavior, which in itself can trigger stress responses—that is, even the anticipation of discrimination can cause stress."³⁴

Unmeasured, however, are the losses to our broader communities when categorical biases like Smith's are not only privately held but publicly expressed. How else might this outcome be applied as a vehicle to openly deprive people of dignity through the loss of public accommodations? *303 Creative*'s holding places even more power into the hands of those whose viewpoints are overrepresented politically and socially, exempting them from responsibility for the negative impact of their behavior toward not just LGBTQ2S+ and communities of color but anyone whose identity group is the subject of others' prejudices. In this case, Smith based her exclusion of expressive services on just one facet of her

religious convictions, but how much social impact are an individual's convictions entitled to cause?

The *303 Creative* decision has already begun to embolden business owners to freely exercise their prejudices. For example, this summer a salon owner in Michigan declared on a neighborhood Facebook page that she would no longer serve transgender clients, saying, "If a human identifies as anything other than a man/woman please seek services at a local pet groomer. You are not welcome at this salon."³⁵ It is a shocking statement to have been made publicly, and its presence in a community debases not only the speaker but everyone who lives within its reach.

While it is premature to discuss all of the prospective impacts of this decision, it is reasonable to expect they will be far reaching, because the Court placed no clear limiting provisions in the holding. It will, as it so often does, fall to those who are marginalized already to prove that bias has harmed us, to place limits on the definitions of expressive activity, and to push back over and over again when a business claims an exemption it is not entitled to.

As advocates, we cannot afford to distance ourselves with the false truths Smith posited—that she would serve LGBTQ2S+ people but not our marriages, and that her exemption from compliance with state law prohibiting discrimination is necessary in order to protect other expressive businesses from being forced to create content that conflicts with their personal views. *303 Creative* demonstrates that the legal system is, above all things, a malleable system, as subject as any other to the evolution of social and political bias. As attorneys, we owe a duty to our communities to continue to advocate for a legal system that holds our families, beliefs, and businesses open to one another. **[BN]**

NOTES

1. *303 Creative LLC v. Elenis*, ___ U.S. ___, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023).
2. LGBTQ2S+ is an acronym for Lesbian, Gay, Bisexual, Transgender, Queer, and Two Spirit. The "+" indicator is meant to capture the many diverse gender identities, expressions, and sexual orientations present in the United States, and which have existed in cultures and communities around the world for generations. Many other abbreviations for this broad and diverse community are commonly used, including LGBTQ+, LGBTQIA, etc.
3. 303 Creative, 143 S. Ct. at 2322 (Sotomayor, J., dissenting).
4. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ___, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).
5. *Id.*
6. 187 Wn.2d 804, ___, 389 P.3d 543 (2017).
7. *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (mem.).
8. *State v. Arlene's Flowers, Inc.*, 193 Wn.2d 469, 480, 41 P.3d 1203 (2019).
9. Colo. Rev. Stat. §24-34-601(1).
10. 303 Creative, 143 S. Ct. at 2307.
11. *Id.* At 2308.
12. *Id.* At 2309.
13. Smith, represented by the Alliance Defending Freedom, initially claimed that she received a request for her website contact form to create a wedding website for a same-sex couple. The factual claim went unexamined during litigation but now appears to have been fabricated, as the request came within days of her filing her legal claim against Colorado, and when contacted by a reporter in 2023, the person alleged to have made the request had no knowledge of it, had been married in a heterosexual relationship since well prior to the alleged request, and had lived in another state since well before Smith opened her business. See Sam Levine, "Key document may be fake in LGBTQ+ rights case before US supreme court," *The Guardian*, June 29, 2023, www.theguardian.com/law/2023/jun/29/supreme-court-lgbtq-document-veracity-colorado.
14. *Id.*
15. Alliance Defending Freedom is a Southern Poverty Law Center-identified anti-LGBTQ2S+ hate group that has represented each of the business owners discussed in this article with nearly identical legal arguments. See www.splcenter.org/news/2020/04/10/why-alliance-defending-freedom-hate-group.
16. The parties here stipulated that Smith's creation of wedding websites was "expressive in nature." *303 Creative*, 143 S. Ct. at 2309. She would use "images, words, symbols, and other modes of expression," creating an "original, customized" site to "celebrate and promote the couple's wedding and unique love story" and to "celebrat[e] and promot[e]" the marriage. *Id.* at 2312. The majority distinguished Smith's expressive services from "the dissemination of purely factual and uncontroversial information." *Id.* at 2317.
17. 303 Creative, 143 S. Ct. at 2314.
18. *Id.* At 2321.
19. *Id.* at 2317.
20. It is beyond the scope of this article to evaluate why neither the majority nor the dissent addressed the broad body of case law holding that discrimination based on conduct (same-sex marriage) is too intrinsically related to status (sexual orientation) to be distinguishable. See *State v. Arlene's Flowers*, 187 Wn.2d 804, ___, 389 P.3d 543 (2017). See also *Christian Legal Soc'y Chapter of Univ. of Cal. V. Martinez*, 561 U.S. 661, 672, 688, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010) (student organization was discriminating based on sexual orientation, not belief or conduct, when it excluded from membership any person who engaged in "unrepentant homosexual conduct"; thus, the university's antidiscrimination policy did not violate First Amendment protections); *Elane Photography LLC v. Willock*, 2013-NMSC-040, 309 P.3d 53 (2013) ("[t]o allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the NMHRA.").
21. www.loc.gov/rr/print/list/085_disc.html.
22. www.loc.gov/exhibits/civil-rights-act/segregation-era.html#obj024.
23. www.nytimes.com/2015/09/08/insider/1854-no-irish-need-apply.html.
24. RCW 49.60.010 (WLAD; Purpose of Chapter).
25. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014).
26. *Whole Women's Health v. Jackson*, ___ U.S. ___, 142 S. Ct. 522, 538, 211 L. Ed. 2d 316 (2021).
27. Caitlin Rooney and Laura Durso, "The Harms of Refusing Service to LGBTQ People and Other Marginalized Communities," *American Progress*, Nov. 29, 2017, www.americanprogress.org/article/harms-refusing-service-lgbtq-people-marginalized-communities/.
28. "The Harms of Refusing Service to LGBTQ People and Other Marginalized Communities," *American Progress*, Nov. 29, 2017, www.americanprogress.org/article/harms-refusing-service-lgbtq-people-marginalized-communities/.
29. *Id.*
30. The Center for American Progress is an independent, nonpartisan policy institute that conducts research and analysis on a broad range of social issues.
31. Caroline Medina and Lindsay Mahowald, "Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022," *American Progress*, Jan. 12, 2023, www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/.
32. *Id.*
33. *Id.*
34. American Psychological Association, quoted in "The Harms of Refusing Service to LGBTQ People and Other Marginalized Communities," *American Progress*, Nov. 29, 2017, www.americanprogress.org/article/harms-refusing-service-lgbtq-people-marginalized-communities/.
35. Molly Olmstead, "Citing 'Free Speech,' a Michigan Hair Salon Refuses to Serve Transgender People," *Slate*, July 11, 2023, <https://slate.com/news-and-politics/2023/07/traverse-city-salon-supreme-court-discrimination.html>.

Need to Know

NEWS & INFORMATION OF INTEREST TO WSBA MEMBERS



WSBA NEWS

2024 License Renewal and Sections

License Renewal is now paperless (online only). Online licensing opened in November and must be completed by Feb. 1, 2024. License renewal includes paying the annual license fee and any mandatory assessments, certifying MCLE compliance, completing the trust account declaration, and disclosing professional liability insurance or financial responsibility. Pay online via credit card or electronic funds transfer, or print an invoice to mail in with a check.

Certify MCLE Compliance.

If you are in the 2022-2023 reporting period, then you are due to report CLE credits and certify MCLE compliance. The deadline for completing credits is Dec. 31, 2023. The certification must be completed online by Feb. 1, 2024. Visit www.wsba.org/MCLE to learn more.

License fee payment plan option available.

If you are experiencing financial challenges, you may contact us about our payment plan option available to all licensed legal professionals. Payments may be made in up to five installments with the balance required to be paid in full by Feb. 1, 2024. A license fee hardship exemption is available for active licensed legal professionals who qualify. Visit www.wsba.org/licensing to learn more.

Voluntary Demographic Information.

Please update your information at licensing.wsba.org when online licensing opens in November. This information assists the WSBA in understanding the demographic makeup of our licensed legal professionals.

THE BAR BUZZ

Volunteer for the 2024 WSBA Practice Primer

WSBA CLE is seeking volunteers to serve as CLE faculty for the 2024 Practice Primer on Business Law. The Practice Primer consists of a series of learning tracks that build upon one another, providing a solid educational foundation for practice in a substantive area of law. The primer's three tracks will take place January–March 2024. Volunteers are needed to serve as new-member faculty and subject matter experts. If you have any questions or would like to apply to volunteer, please email WSBA Education Programs Lead Rachel Matz at rachelm@wsba.org. To learn more, visit www.wsba.org/docs/default-source/legal-community/2024-wsba-practice-primer-overview.pdf.

Join or renew your Section membership.

The section membership year is Jan. 1-Dec. 31. Visit www.wsba.org/legal-community/sections/sections to learn more.

Pro Bono Status. If you are considering going inactive, pro bono status (formerly known as emeritus pro bono status) is a great alternative that lets you provide pro bono services through a qualified legal services provider. The license fee will be waived for pro bono status members who completed at least 30 hours of pro bono service with a qualified legal services provider in the prior year. Learn more at www.wsba.org/for-legal-professionals/license-renewal/status-changes/emeritus-pro-bono-membership-and-return-to-active-membership.

Judicial Status.

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

IMPORTANT DATES

- **Dec. 31, 2023:** Licensed legal professionals in the 2022-2023 reporting period must complete required MCLE credits.
- **Feb. 1, 2024:** Deadline for requesting the one-time license fee hardship exemption.
- **Feb. 1, 2024:** License renewal, payment(s) and MCLE certification, if applicable, must be completed online.

Work at the WSBA

The WSBA is hiring! Visit www.wsba.org/career-center/work-at-the-wsba to see what's available.

WSBA Membership Counts

Did you know that the WSBA publishes membership statistics—including total count by license type, location, year of admission, practice type, and certain demographics—refreshed each month as part of the Who We Are page? Visit www.wsba.org/docs/default-source/licensing/membership-info-data/countdemo_20190801.pdf, or you can search “WSBA demographics” on any search engine to easily get to the right webpage.

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/pro-bono-public-service/mmp for more information and join now through your myWSBA account, www.mywsba.org.

Engage With WSBA Leaders

The Member Engagement Council, which seeks member input and involvement in decision-making processes,

wants to hear from you! The first agenda item of each meeting (the first Thursday of each month from 1-3 p.m. via Zoom) is reserved for member comments. All topics are welcome. Visit the events calendar at www.wsba.org for more information.

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

WSBA Office Space for Sublease

The state Bar is offering space for sublease at its headquarters in the Puget Sound Plaza Building in the heart of downtown Seattle. There is a mix of size and space configurations available with competitive terms. All interested parties should go through broker Adam Chapman at 206-521-2672 or adam.chapman@am.jll.com. The WSBA's current lease runs through December 2026, and space has become available as many positions have transitioned to remote or hybrid work. The WSBA's Long-Range Strategic Planning Council is currently investigating the future of the WSBA's office location beyond 2026.

CONTINUED >



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has joined the firm as an associate attorney.

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Eleana earned her Juris Doctorate from the University of Washington School of Law. She is a proven advocate for marginalized, disabled individuals and will employ finely-honed skills from her experience as a public defender to advance the rights and protect the entitlements of injured workers.

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LAWYER ANNOUNCEMENT

Is pleased to announce a Multnomah county jury agreed with my testimony and awarded the Plaintiffs \$65.5 million.

John M. Marshall, et al
vs.
Pricewaterhouse Coopers LLP ("PwC")

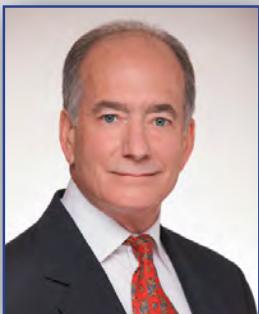
Testifying expert for the Plaintiffs regarding claims PwC violated the applicable Standards of Care for Certified Public Accountants in connection with services rendered to client. Result: Jury verdict in favor of the Plaintiffs, total damages of \$85.5 million, and \$65.5 million apportioned to the Plaintiffs.

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Need to Know

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Free Postings for Positions in Rural Parts of Washington

Many rural communities in Washington do not have enough lawyers to meet the legal needs of their residents. In an effort to increase awareness among WSBA members about employment opportunities in rural parts of the state, the WSBA and the Career Center are offering free 30-day postings of jobs for legal professionals in "rural" areas, defined as: "any job not in Thurston, Clark, Pierce, King, Snohomish, Spokane, and Whatcom counties, *with the proviso that if the job is in a town of 5,000 or less within said county, it may also be posted for free.*" To determine eligibility for a free posting, please contact memberbenefits@wsba.org with "RURAL EMPLOYMENT OPPORTUNITY" in the subject line.

RESOURCES

Check Out the DEI Resource Library

The DEI Resource Library is where WSBA members can learn more about diversity, equity, and inclusion concepts. There are compiled resource lists, books, and articles on the criminal legal system, identity and intersectionality, microaggressions/bias, and race. Visit www.wsba.org/about-wsba/equity-and-inclusion/dei-resource-library.

HAVE SOMETHING NEWSWORTHY TO SHARE?

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



DISCOUNTS AVAILABLE

Software & Services for Your Practice

As a member of the WSBA, you have access to the Practice Management Discount Network, a collection of discounts on products and services to help you improve your law practice. We offer discounts on conflict-checking, credit-card processing, encryption, cybersecurity, document editing, document management, e-discovery, marketing and website support, office supplies, practice management software, remote receptionists, and retirement planning. Learn more and access your discounts today at www.wsba.org/for-legal-professionals/member-support/practice-management-discount-network.

SCAN TO LEARN MORE >



and Sundays, 7–8 p.m. Currently, the group meets online via Zoom. For more information and Zoom credentials contact unbarwa@gmail.com.

Health Benefits

The WSBA Private Health Insurance Exchange offers members access to the most competitive group health insurance solutions on the market. Enjoy unique cost-saving opportunities, complimentary enrollment technology, and voluntary premier-level ancillary benefits with special pricing and concessions. Speak to a benefits counselor and request a free quote today: www.memberbenefits.com/wsba.

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

Nov. 2023 Usury

The usury rate for Nov. 2023 is 12.00%. The auction yield of the October 2, 2023 auction of the six-month Treasury Bill was 5.580%. The interest rate required by RCW 4.56.110(3) (a) and 4.56.115 for Nov. 2023 is 7.580%. The interest rate required by RCW 4.56.110(3) (b) and 4.56.111 for Nov. 2023 is 10.50%. **[BN]**

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.

Free Practice-Management Consultations

The WSBA offers free resources and education on practice management issues. For more information, visit www.wsba.org/pma. You can also schedule a free phone consultation with a WSBA practice-management advisor. Visit www.wsba.org/consult to get started.

ETHICS Ethics Line

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

WSBA Advisory Opinions

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

WSBA MEMBER WELLNESS

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.,

Notices

DISCIPLINE & OTHER REGULATORY NOTICES

THESE NOTICES OF THE IMPOSITION OF DISCIPLINARY SANCTIONS

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

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

Suspended

John David Du Wors (WSBA No. 33987, admitted 2003) of Bainbridge Island, was suspended for six months, effective 8/24/2023, by order of the Washington Supreme Court. Du Wors' conduct violated the following Rules of Professional Conduct: 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation), 8.4(d) (Prejudicial to the Admin of Justice), 8.4(i) (Moral Turpitude, Corruption or Disregard of Rule of Law).

In relation to his handling of an automobile accident and related insurance claim, Du Wors stipulated to suspension for: 1) committing acts that resulted in Du Wors' conviction for hit and run – unattended vehicle, and conviction for driving under the influence; 2) making false statements to the police; and 3) making false statements to his insurance company regarding the hit and run and regarding Du Wors' insurance claim.

Marsha Matsumoto and Marina Busse acted as disciplinary counsel. Todd Maybrown represented respondent. Anthony A. Russo was the hearing officer. Joseph M. Mano Jr. was the settlement hearing officer. The online version of *Washington State*

Bar News contains links to the following documents: Order Approving Stipulation; Stipulation to Suspension; and Washington Supreme Court Order.

Brian M. Solodky (WSBA No. 36540, admitted 2005) of Portland, OR, was suspended for 30 days, effective 8/05/2023, by order of the Washington Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of Oregon. For more information, see www.osbar.org/members/membersearch_display.asp?b=975232&s=1. Henry Cruz acted as disciplinary counsel. David J. Elkanich represented respondent. The online version of

Washington State Bar News contains a link to the following document: The Washington Supreme Court Order.

Reprimanded

Robert Patrick Brouillard (WSBA No. 19786, admitted 1990) of Shoreline, was reprimanded, effective 6/28/2023, by order of the chief hearing officer. Brouillard's conduct violated the following Rules of Professional Conduct: 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records).

In relation to his handling of his trust account, Brouillard stipulated to reprimand for: 1) failing to maintain client funds in a trust account, as evidenced by the shortages in his trust account, and transferring funds from the trust account to the general account before disbursing funds to clients and third persons; 2) disbursing funds from the trust account before the deposited funds cleared the banking process in a client's matter; 3) disbursing funds in excess of the amounts on deposit for a client and on deposit for himself, and using other clients' funds to cover the disbursements; 4) making cash withdrawals from the trust account; 5) failing to maintain a trust account check register and failing to maintain client ledgers meeting the requirements of RPC 1.15B(a)(2); and 6) failing to perform bank and client ledger reconciliations for the trust account.

Marsha Matsumoto and Kathy Jo Blake acted as disciplinary counsel. Robert Patrick Brouillard represented himself. The online version of *Washington State Bar News* contains links to the following documents: Order Approving Stipulation; Stipulation to Reprimand; and Notice of Reprimand. BN

MORE ONLINE

Access further details of the notices by clicking the links in the online version: www.wabarnews.org 

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 noon on the last Tuesday of each month.

FOR MORE INFORMATION AND TO REGISTER, PLEASE VISIT

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LAWYER ANNOUNCEMENT

Invitation for Public Comment on the Reappointment of U.S. Bankruptcy Judge Timothy W. Dore

The current term of the Honorable Timothy W. Dore, U.S. Bankruptcy Judge for the Western District of Washington, is due to expire in April 2025. The U.S. Court of Appeals for the Ninth Circuit is considering the reappointment of Judge Dore to a new 14 year term of office. The Court invites comments from the bar and public about Judge Dore's performance as a bankruptcy judge. The duties of a bankruptcy judge are specified by statute, and include conducting hearings and trials, making final determinations, and entering orders and judgments.

Members of the bar and public are invited to submit comments concerning Judge Dore for consideration by the Court of Appeals in determining whether or not to reappoint him. Anonymous responses will not be accepted. However, respondents who do not wish to have their identities disclosed should so indicate in the response, and such requests will be honored.

Comments should be submitted no later than **Thursday, January 25, 2024**, to the following address:



Office of the Circuit Executive
P.O. Box 193939
San Francisco, CA 94119-3939
Attn: Reappointment of U.S. Bankruptcy Judge Dore
Email: Personnel@ce9.uscourts.gov

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Michael Goldenkranz

BAR NUMBER: 11041



Michael Goldenkranz was the recipient of the 2023 WSBA Apex Award for Pro Bono and Public Service and the 2023 King County Bar Association Pro Bono Award. Now retired, Goldenkranz was formerly a health care attorney and part of a hospital's executive team. After working with a police department outside of Boston in community affairs and as a deputy prosecutor in San

Francisco, he moved to Seattle in 1980 with his cockatiel, Baretta, to law clerk/bailiff for the late King County Superior Court Judge Stephen Reilly. After several years with a general practice firm, Goldenkranz went in house to Blue Cross of Washington and Alaska and later to Good Samaritan Hospital. But he loved his evening gig teaching at the paralegal programs at Highline and Edmonds Community Colleges.

Goldenkranz later served on his neighborhood's community board and was active in the Seattle Council PTSA and the Seattle school levy group. He enjoyed helping co-coach high school mock court teams and helping as a volunteer substitute teacher. Having just turned 70, he's been fortunate to have volunteered for almost 20 years with KCBA Pro Bono and served on its related committees.

What led you to become a lawyer? With my graduate school applications for clinical psychology ready to roll, a faculty advisor gave me cause to pause. My professor said that he'd be doing me a "disservice" by recommending me to grad school in psychology. He thought I was more suited by "temperament and nature" to be an advocate and should consider lobbying, law, social work, or maybe politics. So I sought counsel from the magnificent bronze statue of my university's namesake (Justice Louis D. Brandeis), worked with a police department, got over myself, and realized he was right.

Who inspires you? My dad, who volunteered nonstop into his 90s. He used to constantly tell my brothers and me, "The world does not revolve around you." Also, the gifted children's show host, Mr. Rogers. He beautifully explained the Jewish value that guides me: "We are all called to be 'Tikkun Olam,' repairers of creation."

Where do you volunteer? I volunteer almost weekly with KCBA's Southeast Legal Clinic. If I can connect with, help, and provide hope to people who often share with me just the tip of their personal iceberg, it's a blessing. To watch a client leave the clinic with a bit more spring in their step because they were heard, empowered, and given options when they didn't think they had any, we as volunteers are fortunate and consider that a success. **[BN]**

What would people be surprised to learn about you outside of your career or volunteering?

I ran several marathons, sang doo wop on stage with some renowned a capella fellas, and did three Friday nights at Seattle's Comedy Underground club on a dare. Since I was very young, my extended family bonded around humor, like the Marx Brothers, Abbott and Costello, W.C. Fields, and Laurel and Hardy. And that my pickle ball serve is lame.

What book have you read more than once that you'd recommend?

Tuesdays with Morrie by Mitch Albom. It's about learning what's important in life, letting go of the rest, and becoming a "mensch."

What's your favorite word?

Persistence.

How would your family and friends describe you?

A big nudge with an even bigger heart. Or maybe vice versa. And a silly, doting grandpa.

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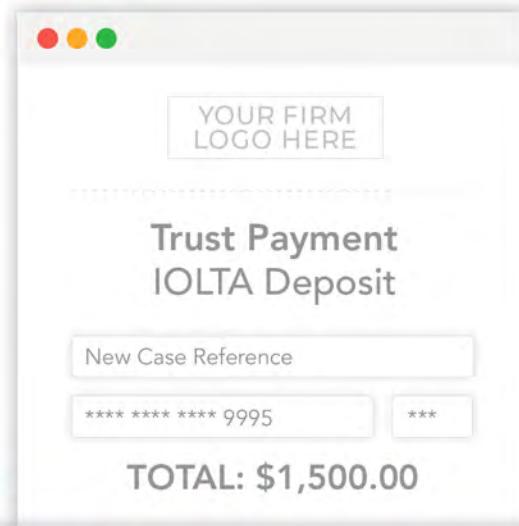
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