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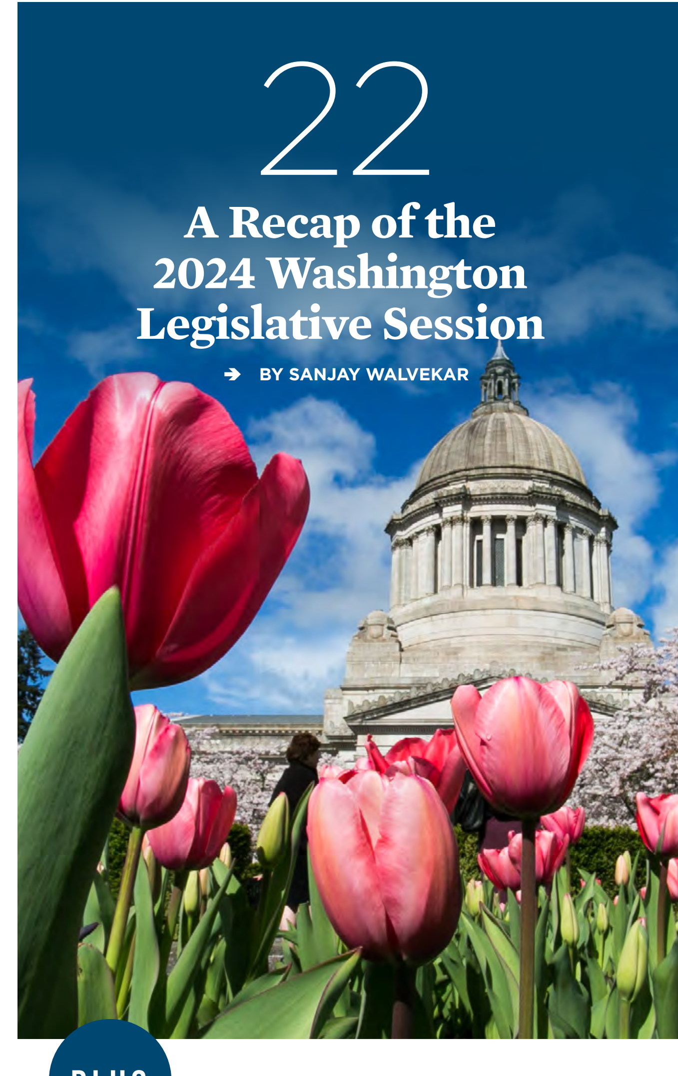

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Editor's Note

Examining Another Type of AI Threat

Another one of the WSBA's 2024 strategic goals (I covered the strategic goal related to member well-being last month) is focused on technology: assess technology-related opportunities and threats and determine the WSBA's role vis-à-vis regulation, consumer protection, and support to legal practitioners. We have talked quite a bit about technology and artificial intelligence (AI) in past issues. AI and creative ownership: Can generated works be copyrighted, patented, or trademarked? AI and legal writing: How should the use of generative AI be cited? Even AI and ethical considerations: How can you ensure confidentiality when using an AI tool?

In this issue, we're looking at another aspect of AI—consumer protection. Two authors from the WSBA's Antitrust, Consumer Protection, and Unfair Business Practices Section discuss potential antitrust risks from AI, biases embedded in AI algorithms, penalties for unlawful development and deployment of AI, neurotech devices, cognitive liberty, and more. Read the article on page 26.

Also stemming from the technology strategic goal—the WSBA Board of Governors chartered a new task force at its March meeting. The Legal Technology Task Force, chaired by Jenny Durkan, will undertake a 15-month assessment of the statewide and national legal tech landscapes and present a final report that includes recommendations for how to support and strengthen the use of technology in legal practice in ways that enhance equitable access to justice. Read the summary of the March Board meeting on page 44.

Other articles in this issue include: the cover story detailing what Washington practitioners need to know about the My Health My Data Act (page 32); a recap of the recently concluded state legislative session (page 22); summaries of three significant Washington Supreme Court decisions (page 18); and an ethics column on attorneys' duties to their deceased clients (page 14). BN

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

ON THE COVER
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*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.

Chainsaw Instead of Scalpel Not a Cure

The WSBA has made a serious mistake.

I am the director of public defense for Mason County. Before anyone accuses me of "meet and plead" tactics used by some overworked public defenders, Mason County has one of the highest per-capita jury trial rates in the state—roughly 10 times that of King County. We work our cases, and we work them hard.

We also keep our attorneys at or near the maximum caseload limits allowed *prior* to the March 8 Board of Governor's meeting.

There is a shortage of attorneys. And there are attorneys leaving public defense entirely. The caseload is certainly a part of that—but not all. The fact is, public defense is a job where the court, prosecutor, Board of County Commissioners, the public in general, and possibly one's own client are going to be grumpy about. It's also one of the lowest-paid ways to practice law.

The original caseloads were certainly high. They were at the high end of what is doable for a good attorney. Now my staff and I pride ourselves on being good attorneys—and we handled it. Could they have used some reduction? Possibly. But was that the primary factor in the staffing crisis? Or did low pay and the stigma associated with public defense also play a major role?

Because the WSBA has used a chainsaw where a scalpel would have served. It has opted to fix the shortage

of public defenders by drastically lowering caseloads. For reference, had the 2027 standards been in place in 2023, here in Mason County we would have entirely run out of available public defense attorneys in mid- to early-April. Roughly 70 percent of 2023 felonies and 75 percent of 2023 misdemeanors would not have had available counsel.

In short, the WSBA has observed a problem with *supply* and has chosen to fix it by quadrupling *demand*. While I understand that many of us became lawyers because math was not our strong suit, it should be apparent that this is not how markets work.

In order to continue defending cases, Mason County now needs to increase its public defense staff. But we can't. There are still no attorneys to be hired. So even if we were able to get Mason County to devote the required *additional 5 percent of its entire budget* to public defense, we wouldn't have the attorneys to hire. They do not exist, and no amount of money or leisure will cause their materialization.

And this is true statewide.

So, what will happen? Well, we're about to see one of three things happen. Either (1) prosecutors will be forced to limit which crimes will be charged in order to accommodate defense availability, (2) people will spend time in custody without the availability of counsel, or (3) courts will begin dismissing cases *en masse* on due process grounds.

Under (1) and (3), this state is ill-served. Either of those decriminalizes … a lot. In a recent criminal work group meeting, I suggested binge-watching the *Purge* movies and taking notes.

Under (2), our clients are ill-served. Nobody should be held in custody for an extended period with no access to counsel. But it is happening.

Different counties will attempt to control the damage from this in different combinations of the above, but it is entirely damage control. The gutting of our ability to serve our clients has left the state without a functioning criminal justice system—and without the political will to rebuild one.

And the funding for all of this falls squarely on the counties. Which means the more rural counties are, once again, hit disproportionately hard with the problems. If King County is having problems attracting attorneys—how much more so Stevens or Ferry? Where is Garfield County going to get their additional attorneys from? How in the world does Okanogan County—already in trouble—triple their staff?

The WSBA has acted at the whim of King County—and sacrificed the rest of us in doing so. Mason County has, as a result, gone from having an office to be proud of to a criminal justice system teetering into crisis.

In short, the WSBA has given us a year to get our doomsday bunkers built before the purge begins.

Peter Jones
Shelton

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Federal Court Denies Disqualification on Lawyer-Witness Rule in Bad-Faith Litigation

The federal district court in Seattle recently denied a disqualification motion based on the lawyer-witness rule, RPC 3.7. *Arrowood Indemnity Company v. Thompson*, 2024 WL 115509 (W.D. Wash. Jan. 10, 2024) (unpublished), is a declaratory judgment proceeding in which the plaintiff insurer argues it has no duty to pay a settlement of [...]

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Why Pro Bono Matters in Washington

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Court of Appeals Discusses Emotional Distress Damages for Legal Malpractice

In *Schmidt v. Coogan*, 181 Wn.2d 661, 671, 335 P.3d 424 (2014), the Washington Supreme Court set broad outlines for emotional distress damages as a part of a legal malpractice claim: "We hold that [...]

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Attorneys as Family

"I have a case! Daddy, I have a case!" One of my daughters broke off squabbling with her sister just long enough to shout up toward the front seat. While focused on driving, I was dimly aware that the two had been arguing (largely out of boredom) about the proper name of one of their stuffed animals. And now one of my daughters was bringing the dispute to the court of last resort: Dad.

Over the last year, my daughters (10 and 8) have discovered more about the role of attorneys and judges. Having done so, they started bringing me "cases" for informal and prompt resolution. I follow the same procedure: I have the "plaintiff" tell me in her own words why she thinks she is right, do the same for the "defendant," and then hear a brief reply. Decisions are issued from the bench. There is no appeal. The rules of evidence are relaxed (to put it mildly). It is a fun and worthwhile exercise in logic and reason for my daughters. In a telling and possibly frightening development, my youngest daughter *has never lost*.

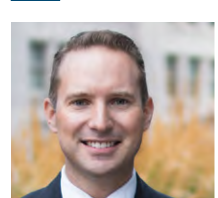
After the most recent "case," I thought about what being part of a family teaches me about the law. As I spend this year as your WSBA president, attempting to build the public's trust and confidence in our Washington legal profession, I am reminded that great professional care and study separates attorneys from the public we serve. That said, attorneys and members of the public are frequently united by being components of a family structure. As I examine below, that is not always the case, but frequent enough that it merits attention.

What can family teach us about the law? Some thoughts from my own family. I am part of the "sandwich" generation, the group of Americans simultaneously raising children and caring for aging parents. As such, I am privileged to be the son of two wonderful parents. Both are still alive. My dad is in his mid-80s, and my mom, while younger, is battling pancreatic cancer. Both are tremendous sources of knowledge. They have "been there, done that, and got the T-shirt" on all that life has to offer. They are invaluable founts of wisdom.

The law, similarly, is a source of wisdom. Our common law system, with its emphasis on predictability and roots in common sense, teaches us how people interact with each other in civil society. Relatedly, our appellate court decisions teach us how laws apply in various contexts, providing enlightenment to practitioners and public alike.

I take different lessons from interacting with my daughters. Every parent hears the phrase, "It's not fair!" The accompanying look is often devastating. Even at a very young age, children intimately understand the concept of fairness. Moreover, they thrive in fair environments, and hurt in unfair environments. Now, to be sure, my daughters' concepts of what is fair may or may not be the same as mine. Nevertheless, they need and want fairness.

The same is true for the law. At least one study shows that litigants are more concerned with being heard and the fairness of the process than they are about whether or not they are ultimately successful.[1] Key to that is the litigants' belief that they were meaningfully heard



Hunter M. Abell
WSBA President

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The state of the law, like our family structure, is not permanent. One day, the lawyer looks up and realizes both have changed.

The author's daughters on a field trip to the Ferry County Courthouse.

in a fair process before an impartial decision-maker.

Both my parents and children reinforce in me the importance of order and predictability. As we walk with my mom in this fight against cancer, I have to grapple with the likelihood of losing a parent in the near future. Many of you have already done so or perhaps have already lost both parents. This is a first for me. It introduces the likelihood of my own family order suddenly being very different.

The law, meanwhile, provides predictability for the public as they navigate their lives. It changes slowly, which is often a good thing. But it does change, either through legislation or court precedent. It may be that we become accustomed to a certain legal landscape, only to realize one day it has changed before our very eyes. The state of the law, like our family structure, is not permanent. One day, the lawyer looks up and realizes both have changed.

As I mentioned above, attorneys and the public are frequently united by being components of a family structure. I say "frequently" because it is not always the case. We have members of our Association and the public that navigate life alone. Many of these individuals find extended family in friends and coworkers. For the members of our Association in that position, I hope they consider the WSBA as part of their broader professional family.

Every time I hear the phrase "I have a case," it makes me smile. It means there is an opportunity to help resolve a dispute between my daughters. It means they look to me for wisdom, fairness, and stability. In turn, I am reminded that the public looks to legal professionals to promote these same values. As each daughter argues her case, their arguments make me a better attorney. Even more importantly, however, the opportunity to resolve their dispute makes me a better father. It is a wise use of time, as both the miles and years go speeding by. BN

Photo courtesy of the author

NOTE

1. Tom R. Tyler, "Social Justice: Outcome and Procedure," *International Journal of Psychology* 35, No. 2 (2000): 117.

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First-Quarter Financial Review

During the first meeting of the year for the WSBA Budget & Audit Committee, we were presented with the first-quarter fiscal outlook. The report bodes well for your Bar Association. To understand why this first-quarter fiscal report is so positive, I asked WSBA's finance director, Tiffany Lynch, to provide an overview. We hope this information helps members understand and appreciate the diligent efforts WSBA staff and the Board of Governors put into the fiscal health of our Bar Association. This interview has been edited and condensed for clarity.

Q. Could you explain why the first quarter of the WSBA's fiscal year 2024 ends in December and not March?
A. The WSBA fiscal year begins Oct. 1, which is different from organizations that operate on a calendar year where the fiscal year begins Jan. 1. Therefore, Dec. 31, 2023, marks the end of the first quarter (October – December) of fiscal year 2024.

Q. What is the state of the general fund?
A. With 25 percent of the year complete, the general fund is outperforming against budget, with revenue and indirect expenses on target and direct expenses under budget. The general fund net income is $308,063 as of Dec. 31, 2023. Through the remainder of this column, we can highlight the major variances and estimates moving forward.

Q. Let's start with revenue. How are we holding up?
A. Total revenue is on budget at 25 percent (+$110,311) with major variances in licensing, bar exam, and Mandatory Continuing Legal Education (MCLE) fees due to timing of collection caused by seasonality. For example, licensing fees are under budget at the end of the first quarter. The majority of licensing fees are collected in January and pro-rated on a monthly basis, and the budget assumes an even timing distribution of revenue between each month. The budget also includes revenue from late fees (assessed after Feb. 1) and newly admitted members, which are not earned until after February, so revenue will increase and level out closer to budget later in the year. Meanwhile, bar exam fees and MCLE fees are ahead of budget because the timing of collection of fees for the winter exam and MCLE reporting deadlines cause higher revenue to be collected in the first quarter.

Two areas where we are tracking ahead of budget and are likely to come in over budget at the end of the year are interest income and new member product sales. In both instances the budget was conservative, and we expect revenue collection to continue through the year. Interest income is generated from the investment of the WSBA's available cash based on the Board-approved investment policy, and it has been impacted by higher market interest rates. New member product sales are impacted by the timing of when products become available, the popularity of the topics, and how they align with MCLE reporting deadlines.

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Tiffany Lynch
Director of Finance

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Q. Let's talk about expenses; this is usually an area our members are more interested in. Are we able to control expenses given the inflationary trends in the economy?
A. Total expenses are under budget by $454,821 (-2 percent), primarily due to lower direct expenses, which include program costs such as board/council/task force meetings, event expenses, supplies, staff travel, etc. These vary depending on the timing of activities. It is normal for the WSBA's direct expenses to run under budget in the first half of the year. We expect spending in these areas to pick up as we move into the second half of the fiscal year.

Indirect expenses, which are comprised of staffing and overhead costs, are on budget at 25 percent with minimal variance attributed to salary savings from open positions (including corresponding benefits for payroll taxes, retirement, and unemployment insurance) and lower YTD costs for rent and legal fees. These savings are offset by areas trending above budget, which include temporary staffing salaries (timing due to use of seasonal employees assisting with licensing renewals), medical insurance (employee coverage changes resulted in higher-than-expected budget), and IT direct expenses (higher due to timing of annual payments).

Q. What is the Continuing Legal Education (CLE) fiscal outlook in the first quarter?
A. The CLE fund includes CLE seminars, CLE products, and Deskbook cost centers, which collectively have budgeted a surplus of $157,341 for FY 24. Actual results as of Dec. 31, 2023, reflect a surplus of $426,877.

Revenue is higher than budget by $352,540 (+20 percent) due to higher product sales and seminar registrations. This is a seasonal trend caused by year-end CLE reporting requirements. Expenses overall are under budget by $35,002 (-2 percent), mostly due to lower expenses from timing of direct expenses that have not been incurred yet for seminars held later in the fiscal year, and higher indirect expenses, mainly for medical benefits.

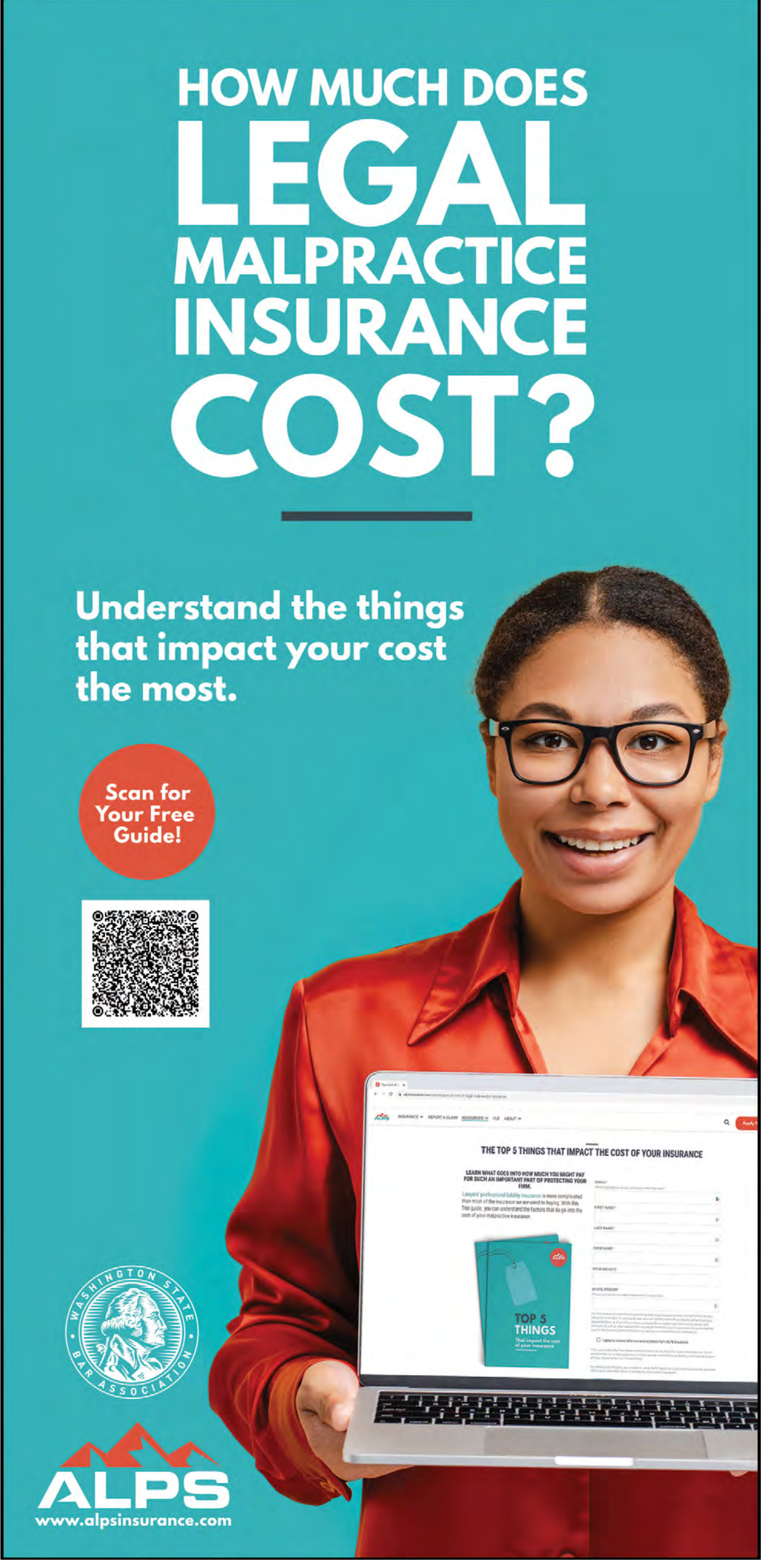
Q. What about the Client Protection Fund?

A. The Client Protection Fund (CPF) budgeted a use of reserves of ($92,700) for FY 24. Actual results as of Dec. 31, 2023, reflect a surplus of $194,830. Revenue is ahead of budget by $94,670 (+16 percent) due to increased revenue for all sources, the highest of which is interest income. As noted under the general fund, interest income was budgeted conservatively, and we have been able to lock in higher interest rates for investments through FY 24. Additionally, member assessments are running higher than budget by $28,013, which is to be expected because revenue is recognized upon collection of license fees, which are primarily collected between November and January each year. Overall expenses are under budget by $123,335 (-18 percent), mainly due to direct expenses for gifts to injured clients, which are paid out toward the end of the fiscal year.

Q. Now to the Sections operation cost center. What is the financial outlook?

A. The Sections operation cost center represents the collective total of financial activity for all 29 Sections. Sections budgeted a loss of ($328,603) for FY 24. Actual results as of Dec. 31, 2023, reflect a surplus of $26,440, mainly related to timing of programming and Section activities which are planned throughout the year at different times.

My thanks to Director Lynch for this overview. I hope we can maintain this sound financial outlook as we continue through the rest of the fiscal year. In the online version of this article, there will be a link to the first-quarter report as outlined in the March Board meeting materials. BN



MEMORIAL DAY: Duties to Deceased Clients

BY MARK J. FUCILE

When we think about our duties to former clients, we usually focus on the former client rule, RPC 1.9. That rule embraces both our duty of confidentiality and duty of loyalty to former clients.[1] We instinctively know that these duties can last a long time. Generally, however, they continue even beyond the death of the client involved and often arise in relatively unusual settings. As an example of the duty of confidentiality, litigants over a deceased client's property may subpoena the file of a lawyer who did work for the client concerning the property involved. With the duty of loyalty, a lender may ask a lawyer to foreclose a trust deed that the lawyer negotiated for a deceased client.

In this column, we'll survey both the duty of confidentiality and the duty of loyalty to deceased clients. Before we do, however, three qualifiers are in order.

First, we'll focus on *human* clients. While former corporate clients that have undergone restructurings, bankruptcy, or dissolution can present similar issues, they are sufficiently different that we'll leave them for another day.[2]

Second, although we'll discuss the extent to which a personal representative may assert or waive confidentiality or conflicts, it is important to remember that as agents, our authority to act for our principal (the client) generally ends under RCW 2.44.010 at the client's death.[3]

Finally, although confidentiality and conflicts are recurring issues involving deceased clients, they are by no means the only ones. WSBA Advisory Opinion 2188 (2008), for example, addresses handling funds held in trust when a client dies. ABA Formal Opinion 95-397 (1995), in turn, discusses the duty to disclose a client's death when negotiating the settlement of a personal injury claim.

The lawyer's file may be subpoenaed in a dispute tangential to the work the lawyer did for the deceased client.

CONFIDENTIALITY

RPC 1.9(c) outlines our duty of confidentiality to former clients:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.[4]

The Washington Supreme Court has long held that the attorney-client privilege survives the death of the client.[5] The U.S. Supreme Court reached the same conclusion.[6] WSBA Advisory Opinion 175 (rev. 2009) applies this point to the broader duty of confidentiality under the RPCs.[7] The influential *Restatement of the Law Governing Lawyers* takes the same approach to the duty of confidentiality from a national perspective.[8] In many routine circumstances, a client during their lifetime will have given the lawyer instructions for the release of information following death—such as notifying the intended personal representative and beneficiaries of the client's wishes or releasing the client's original will so it can be admitted to probate. Confidentiality issues can loom larger, however, for the balance of the lawyer's file—such as notes reflecting conversations with the deceased client regarding the relative allocation of assets under a will—and in situations in which there is a dispute among the beneficiaries.[9] In still other instances, the lawyer's file may be subpoenaed in a dispute tangential to the work the lawyer did for the deceased client.[10]

Following the death of a client, a personal representative appointed in probate ordinarily steps into the shoes of the decedent to either invoke or waive privilege.[11] WSBA Advisory Opinion 175 takes a generally consistent approach under the broader confidentiality rule, noting that disclosures to a personal representative beyond privilege may be impliedly authorized by the nature of the decedent's representation.[12] WSBA Advisory Opinion 2041 (2003), however, cautions that making any required disclosures to a personal representative does not create an attorney-client relationship between the deceased client's lawyer and the personal representative.[13]

Depending on the circumstances and the sensitivity of the information involved, a lawyer should also independently assess whether to release the information concerned even if the personal representative has waived privilege.[14] If, for example, the deceased client had told the lawyer that certain information should not be revealed under any circumstances, the lawyer should seek direction from the probate court notwithstanding the personal representative's waiver.

If no personal representative has been appointed, the deceased client's lawyer in most instances is expected to assert privilege and confidentiality pending appointment of a personal representative or further direction from a court.[15] On the latter, RPC 1.6(b)(6) allows a lawyer to reveal confidential information in response to a court order. Washington Superior Court Civil Rule 45(c)-(d) and Federal Rule of Civil Procedure 45(d)-(e) provide avenues for court intervention. Both Washington state and federal procedure permit a court to review material *in camera* without waiving privilege to determine whether production is required.[16]

Absent a personal representative, courts can provide useful direction to lawyers. At the same time, this is not a circumstance that lawyers encounter often. Given the sensitivity of the duty of confidentiality, malpractice insurance carriers today often provide counsel to their law firm insureds in this situation to help them navigate responding to a file subpoena and associated requests for testimony regardless of whether there is any claim against the law firm.

LOYALTY

RPC 1.9(a) speaks to the duty of loyalty to former clients:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

While rare, conflicts can arise involving deceased clients. Although Washington has not yet spoken directly[17] to the issue, cases from other states have held that the former client conflict rule—RPC 1.9(a)—applies with equal measure when the former client is dead.[18] In *In re Hostetter*, 348 Ore. 574, 238 P.3d 13 (2010), for example, a lawyer was disciplined under Oregon's version of RPC 1.9(a) when he represented a lender

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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 *Washington 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 503-860-2163 and mark@frllp.com.

Illustration © Getty/reni martiana

collecting on loans he had negotiated for a client who subsequently died. Similarly, in *Hutchinson v. Hutchinson*, 2013 WL 6510761 (Conn. Super. Ct. Nov. 14, 2013) (unpublished), a lawyer was disqualified under Connecticut's version of RPC 1.9(a) from representing the plaintiff in a quiet title action that turned on an agreement he had negotiated for a former client who later died. The courts in *Hostetter* and *Hutchinson* both noted that while the former clients were dead, the former client conflict rule is premised on a matter in which the lawyer's current client is adverse to the "interests" of the former client—which can survive and, if so, are represented by the decedent's estate.[19] As with privilege, a personal representative is generally able to waive former client conflicts that arise from work a lawyer or law firm did for a deceased client.[20] BN

Cases from other states have held that the former client conflict rule—RPC 1.9(a)—applies with equal measure when the former client is dead.

NOTES

1. Washington RPC 1.9 is based on its ABA Model Rule counterpart. RPC 1.9(c) focuses on the duty of confidentiality to former clients. RPC 1.9(a), in turn, addresses the duty of loyalty to former clients (while also underscoring the duty of confidentiality). For general discussions of these duties, *see*, respectively, In re Cross, 198 Wn.2d 806, 500 P.3d 958 (2021), and Plein v. USAA Casualty Insurance Company, 195 Wn.2d 677, 463 P.3d 728 (2020). *See also* ABA Formal Op. 479 (2017) (discussing confidentiality under ABA Model Rule 1.9 for information that has become "generally known"); *Restatement (Third) of the Law Governing Lawyers* (*Restatement*) § 132 (2000) (discussing former client conflicts).
2. *See generally* Henry Sill Bryans, "Business Successors and the Transpositional Attorney-Client Relationship," 64 Bus. Law. 1039 (2009) (discussing ABA Model Rule 1.9 and attorney-client privilege in the context of business restructurings).
3. *See generally* Douglas J. Ende, 15 *Wash. Prac., Civil Procedure* § 52.3 (3d ed. 2023) ("An attorney's authority to act for a client is terminated by the client's death."); Vincent v. Vincent, 16 Wn. App. 213, 219, 554 P.2d 374 (1976) ("A client's death terminates the relation of attorney and client and the attorney's authority to act by virtue thereof[.]").
4. RPC 1.9(a) also addresses confidentiality through its reference to "substantially related matter[s]." Comment 3 to RPC 1.9 notes that matters can be "substantially related" when they put a former client's confidential information at risk.
5. *See* Martin v. Shaen, 22 Wn.2d 505, 511, 156 P.2d 681 (1945) ("[T]he privilege does not terminate with the cessation of the protected relationship, but continues thereafter, even after the death of the person to whom the privilege is accorded[.]").
6. *See* Swidler & Berlin v. United States, 524 U.S. 399, 403-11, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998).
7. Advisory Opinion 175 cites both RPC 1.9(c) and RPC 1.6, which is the duty of confidentiality to current clients that is effectively incorporated into RPC 1.9(c) through the reference to other "Rules."
8. *See Restatement*, *supra* note 1, § 60, cmt. e ("The duty of confidentiality ... extends beyond the death of the client.").
9. *See* Martin v. Shaen, *supra* note 5, 22 Wn.2d at 511; *see generally* Robert H. Aronson, Maureen A. Howard, and Jennifer Marie Aronson, *The Law of Evidence in Washington* § 9.05[8][f] (rev. 5th ed. 2023) (Aronson) (noting that Washington has not recognized a "testamentary exception" to privilege when there is a dispute among beneficiaries); In re Estate of Covington, 450 F.3d 917, 925-26 (9th Cir. 2006) (surveying Washington law on the testamentary exception).
10. *See, e.g.,* Young v. Rayan, 27 Wn. App. 2d 500, 533 P.3d 123 (2023) (law firm estate planning files subpoenaed in context of real estate dispute).
11. *See* Martin v. Shaen, *supra* note 5, 22 Wn.2d at 511; *see generally* Aronson, *supra* note 9, § 9.05[4] ("The privilege may be asserted or waived by a client's personal representative after the client's death.").
12. Some states have limited the extent to which information can be shared with a personal representative to that necessary to settle the estate. *See generally* ABA, *Annotated Model Rules of Professional Conduct* 139 (10th ed. 2023) (surveying authority). Washington has not yet addressed this issue precisely. *Restatement*, *supra* note 1, § 77, cmt. d, addresses situations in which a personal representative may have interests adverse to the decedent. In that circumstance, the *Restatement* suggests seeking guidance from the court involved.
13. In rare instances, there may be disputes over the authority of a personal representative that may ultimately call for court determination. *See, e.g.,* Matter of Estate of Burroughs, 2021 WL 321513 (Wash. Ct. App. Feb. 1, 2021) (unpublished) (differing instructions from original and successor personal representatives on assertion of attorney-client privilege); *see also* Harris v. Griffith, 2 Wn. App. 2d 638, 413 P.3d 51 (2018) (discussing lawyer conflicts in the context of dueling proposed personal representatives).
14. *See* Maine Board of Overseers Op. 192 (2007) (discussing interplay between a personal representative's waiver and a lawyer's need to independently assess the duty of confidentiality); *see also Restatement*, *supra* note 1, § 77, cmt. d (discussing seeking guidance of the probate court).
15. *See* RPC 1.6, cmt. 15 ("Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law."); *see also* ABA Formal Ops. 94-385 (1994) and 473 (2016) (responding to subpoenas of law firm files).
16. *See* Snedigar v. Hoddersen, 114 Wn.2d 153, 166-67, 786 P.2d 781 (1990); United States v. Zolin, 491 U.S. 554, 568-69, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989); *see, e.g.,* Grassmueck v. Ogden Murphy Wallace, P.L.L.C., 213 F.R.D. 567, 569 (W.D. Wash. 2003) (ordering *in camera* review of law firm files).
17. WSBA Advisory Op. 2155 (2007) notes the potential application of RPC 1.9 to deceased clients.
18. RPC 1.8(b) also frames a lawyer's impermissible use of a client's information to the disadvantage of that client as a conflict.
19. *See also* Stark County Bar Association v. Phillips, 544 N.E.2d 237 (Ohio 1989) (disciplining lawyer under similar circumstances for former client conflict and noting that the lawyer's law firm had been disqualified in the underlying proceeding as well); Trust Corp. of Montana v. Piper Aircraft Corp., 701 F.2d 85, 87 (9th Cir. 1983) (noting trial court found law firm had a conflict in defending wrongful death case when decedent was former client and the firm had learned material confidential information in the earlier representation); Fiduciary Trust Int'l. v. Superior Ct., 160 Cal. Rptr. 3d 216 (Cal. App. 2013) (law firm that had prepared will for decedent disqualified from representing trustees adverse to decedent's interest in substantially related matter).
20. *See generally* In re Hostetter, 348 Ore. 574, 238 P.3d 13, 22 (noting that the personal representative is charged with representing the decedent's "interests" that form the conflict); Linn Davis, "Addressing Ethical Issues After the Death of a Client," 82 Or. St. B. Bull. 9, 11-12 (Aug./Sept. 2022) (analyzing conflict waivers in this context under the statutory powers of a personal representative); *see also* RCW 11.48.010 (powers of personal representative).

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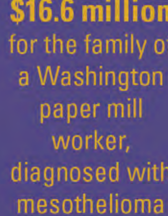

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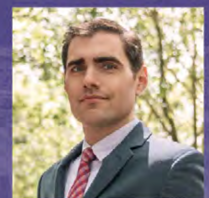

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FROM THE SPINDLE

Recent significant cases decided by the Washington Supreme Court

BY VALERIE McOMIE AND ALEX McOMIE

SIDEBAR

What is a 'Spindle'?

To this day, in the Temple of Justice hallway between the clerk's office and the courtroom, there's a spindle on top of a wooden lectern where on any Thursday the Supreme Court's newly issued opinions are placed for public viewing. This is the paper version of the "slip opinion" of the court. In the "old days," before the internet, the press and media, or members of the public, would have to check the spindle to quickly access the latest decisions from the court. Although we now all have near-instant access to the court's decisions via cyberspace, for reasons that seem more ceremonial than practical, the spindle remains—a small relic and enduring symbol of the open administration of justice.

Medical Negligence Statute of Repose Ruled Unconstitutional Under the Privileges and Immunities Clause of the Washington State Constitution

In *Bennett v. United States*, 2 Wn.3d 430, 539 P.3d 361 (2023), the Washington Supreme Court addressed whether the eight-year medical negligence statute of repose in RCW 4.16.350(3) comported with the privileges and immunities clause in Wash. Const. art. I, § 12.

Bette Bennett underwent sinus surgery at Naval Hospital Bremerton in May 2009. Soon after, she experienced nasal bleeding and went to the hospital's emergency room (ER). The ER doctor inserted packing into her nasal cavity, causing a cracking sound and severe pain that caused Bennett to lose consciousness. Over the next several years, Bennett experienced a variety of unexplained symptoms including memory loss, migraines, and cognitive impairment. She visited a number of doctors, but none could diagnose her condition or explain its cause. In December 2017, a specialist finally diagnosed Bennett with "traumatic brain injury to her prefrontal cortex caused by the nasal pack insertion in [May] 2009." *Bennett,* 2 Wn.3d at 436 (citation omitted).

In August 2018, Bennett filed an administrative tort claim against the Department of the Navy. *See id.* When the Department denied her claim, Bennett filed suit against the federal government in the United States District Court for the Western District of Washington. *See id.* The defendant moved to dismiss, arguing that Bennett's claims were barred by the eight-year outer limit for medical negligence claims outlined in RCW 4.16.350(3). *See id.* In response, Bennett argued that the statute was unconstitutional. The district court certified questions to the Washington Supreme Court, asking whether the statute violates Wash. Const. art. I, § 10 (access to courts) or § 12 (privileges and immunities). *See id.* at 435. The Supreme Court accepted certification and focused its analysis on art. I, § 12, declining to reach art. I, § 10. *See id.* at 452.

Wash. Const. art. I, § 12 provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Art. I, § 12 is sometimes interpreted in lockstep with the Equal Protection Clause of the 14th Amendment to the United States Constitution, which is generally concerned with protecting disfavored groups from discriminatory treatment. *See id.* at 442 (citation omitted). Most equal protection claims are examined under the rational basis standard, which provides that statutes are constitutional if they bear a rational relationship to a legitimate state aim. *See DeYoung v. Providence Med. Ctr.,* 136 Wn.2d 136, 144, 960 P.2d 919 (1998). This relationship does not necessarily need to be grounded in evidence or data—the highly deferential rational basis standard generally permits statutes to be based on "rational speculation." *Id.* at 148 (citation omitted).

However, Washington's founders had a concern independent of the antidiscrimination principles of the federal Equal Protection Clause—preventing grants of favoritism to certain groups that disadvantage others in the exercise of common rights. *See Bennett,* 3 Wn.3d at 442. In *Grant County Fire Protection District. No. 5 v. City of Moses Lake,* 145 Wn.2d 702, 731, 42 P.3d 394 (2002), the

Washington Supreme Court relied on history surrounding the state's founding to hold that art. I, § 12 provides heightened protection "when the threat is not of majoritarian tyranny but of a special benefit to a minority and when the issue concerns favoritism rather than discrimination." Under the *Grant County* framework, legislation is examined under a heightened "reasonable grounds" test if it both affords a special benefit to certain groups and implicates "fundamental rights which belong to the citizens of the state by reason of such citizenship." *Bennett*, 2 Wn.3d at 443. The reasonable grounds test requires courts to "scrutinize the legislative distinction to determine whether it *in fact* serves the legislature's stated goal." *Id.* at 446 (citation omitted; emphasis in original).

Bennett argued that the reasonable grounds test applied because the statute of repose granted the benefit of limited liability to certain medical providers (those providers not exempted by the statutory exceptions). She further maintained that this benefit implicated medical negligence plaintiffs' fundamental right to bring a common law-based cause of action.[1] In an 8-1 opinion written by Washington Supreme Court Justice Mary Yu, the court agreed:

> If a medical malpractice action does not accrue within the eight-year repose period, then it can never be brought. In such a case ... the defendant is granted an article I, section 12 immunity from the plaintiff's common law cause of action. Such immunity explicitly does not equally belong to all citizens, or corporations because the statute of repose is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, and it does not apply to a civil action based on intentional conduct ... for injury occurring as a result of childhood sexual abuse.... Thus, only certain defendants are entitled to immunity pursuant to the statute of repose, thereby triggering article I, section 12's reasonable ground analysis.

Id. (internal quotations and citations omitted).

Having concluded that the statute constituted a grant of favoritism that implicated a fundamental right of state citizenship, the majority applied the heightened "reasonable grounds" test and held that the Legislature's stated aims were not sufficient to satisfy this standard of review. *See id.* at 448-52. In response to the argument that the statute would "tend" to reduce the cost of malpractice insurance "if" it had an effect, the court emphasized that speculation about the potential impact of the statute is insufficient to establish reasonable grounds. To the defendant's argument that the statute would eliminate stale claims, the court noted that the statute's exceptions (for instance in cases of fraud or intentional concealment), demonstrated that it does not serve the goal of eliminating stale claims *generally*. Finally, the defendant argued that the statute should be upheld because it reflects a legislative compromise that strikes a balance between the rights of plaintiffs and the health care industry. The court relied on its prior decision in *Schroeder v. Weighall*, 179 Wn.2d 566, 581, 316 P.3d 482 (2014), to deem this justification insufficient to satisfy the reasonable grounds standard. *Bennett,* 2 Wn.3d at 450.

In a separate concurrence/dissent, Justice Barbara Madsen agreed that the statute implicated a fundamental right but concluded that the defendant's justifications satisfied reasonable grounds. *See id.* at 453 (Madsen, J., concurring/dissenting).

Detainees Held in Private Civil Immigration Detention Center Qualify as Employees Under Washington's Minimum Wage Act

In *Nwauzor v. The Geo Group, Inc.*, 2 Wn.3d 505, 538 P.3d 263 (2023), the Washington Supreme Court answered three questions certified to it by the Ninth Circuit. Those questions addressed the rights of detainees who are held at privately-owned civil immigration facilities and perform work for the facility during their period of detention:

> 1. Whether detained workers at the Northwest ICE Processing Center (NWIPC), a private detention center, are "employees" under the Washington Minimum Wage Act (MWA).
>
> 2. Whether the MWA's government-institutions exemption in RCW 49.46.010(3)(k) applies to work performed by detainees confined in a private detention facility operating under a contract with the state.
>
> 3. Whether the award of damages to the class forecloses an unjust enrichment award to the state.

Nwauzor, 2 Wn.3d at 508.

The GEO Group, Inc. (GEO) housed civil immigration detainees at the NWIPC pursuant to a contract with United States Immigration and Customs Enforcement (ICE). GEO was contractually obligated to provide necessities and essential services including a safe and sanitary living environment, clean uniforms and bedding, and three nutritious meals per day. They were also required to manage a Voluntary Work Program (VWP), which allowed detainees to work and earn income. The contract required GEO to pay detainees a minimum of $1 per day of work. GEO had the discretion to pay a higher rate, but generally paid $1 per day. The contract prohibited GEO from assigning to detainees work that was necessary to run the facility. In practice, however, GEO relied on detainees to perform a substantial portion of such work including laundry, cooking, and cleaning.

A class of NWIPC detainees sued GEO, alleging that GEO's failure to pay detainees the state-mandated minimum wage violated Washington's MWA. *Id.* at 511. The state of Washington filed an action for unjust enrichment based on similar allegations, and the actions were consolidated. *Id.* A jury found that GEO violated the MWA and awarded $17,287,063.05 to the class in back pay damages, $5,950,340 to the state for unjust enrichment, and injunctive relief. *Id.* GEO appealed to the Ninth Circuit, which certified the questions of state law listed above. *Id.*

The primary issue addressed by the Supreme Court was whether the detainees qualified as employees under Washington's MWA. RCW 49.46.010(3) defines "employee" as "any individual employed by an employer." GEO argued that the detainees were excluded from this definition under one of two statutory exceptions:

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Spindle photo © Camilla Faulk

- RCW 49.46.010(3)(k), which exempts any "resident, inmate or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution," *Id.* at 514;
- RCW 49.46.010(3)(j), which exempts workers whose "duties require that he or she reside or sleep at the place of his or her employment." *Id.* at 517.

In a unanimous opinion written by Washington Supreme Court Justice Charles Johnson, the court held that the detainees qualified as employees under RCW 49.46.010(3) and did not fall within either statutory exception. *Id.* at 514-17. The court noted at the outset that "Washington has a long and proud history of being a pioneer in the protection of employee rights[,]" and "[c]onsistent with Washington's priority of protecting employee rights, courts must liberally construe the MWA [in favor of the employee]." *Id.* at 512-13 (citation omitted).

Turning to RCW 49.46.010(3)(k), the court agreed with the plaintiffs that this exception "unambiguously applies only to individuals detained in *public, government-run institutions*." *Id.* at 514 (emphasis added). Because the class members were detained in a private facility, this exception did not apply.

The court also rejected application of RCW 49.46.010(3)(j), agreeing with the plaintiffs that the exception only applies to those who sleep or reside at the workplace *because their duties require them to do so*. *See id.* at 517. In this case, the plaintiffs resided at NWIPC not because of work responsibilities but because they were detained for immigration processing.

Having found the language of the MWA dispositive, the court rejected GEO's alternative arguments under other legal theories or bodies of law, including the economic-dependence test and the federal Fair Labor Standards Act. *Id.* at 522-24.

Finally, the court held that an award of damages to the detainees would not foreclose an unjust enrichment award to the state, which represented "the rights and interests of those harmed by GEO's failure to pay the minimum wage from 2005-2021," including the detained workers. *Id.* at 526. The court identified three factors necessary to sustain an unjust enrichment claim:

> 1) A benefit conferred upon the defendant by the plaintiff,
>
> 2) An appreciation by the defendant of the benefit, and
>
> 3) Acceptance of the benefit such that it would be inequitable for the defendant to retain the benefit without payment of its value.

Id. at 525.

Noting that the district court found all three elements present, the Supreme Court held that nothing would preclude the state from recovering an award for unjust enrichment. *Id.* at 526.

Eviction Moratorium During COVID-19 a Legitimate Exercise of Governor's Emergency Power

In *Gonzales v. Inslee,* 2 Wn.3d 280, 535 P.3d 864 (2023), the Washington Supreme Court addressed whether Gov. Jay Inslee exceeded his authority by implementing Washington's eviction moratorium in 2020 in response to the COVID-19 pandemic.

In January 2020, the World Health Organization and the United States Centers for Disease Control confirmed the outbreak of COVID-19, an easily-transmitted and sometimes fatal virus. The first case in Washington was soon identified. Given the high rate of transmission, it quickly became clear that social distancing would limit infection and promote public health. Gov. Inslee declared a state of emergency, limiting public gatherings, closing schools, and directing Washington residents to stay home whenever possible.

As a result, many people's jobs were suspended or terminated, leading to widespread financial hardship. Recognizing the crisis that would follow if tenants were evicted on a large scale, the governor issued Proclamation 20-19, which generally prohibited residential landlords from evicting tenants for failure to pay rent. While tenants' *obligation* to pay rent continued, landlords were prevented from evicting tenants or treating unpaid rent as an enforceable debt. The Legislature eventually implemented a variety of measures to mitigate the losses suffered by landlords during this period, including a rent repayment plan and compensation for unpaid rent. *Gonzales,* 2 Wn.3d at 288 (citing Laws of 2021, ch. 115 §§ 4-5; RCW 59.18.630; RCW 43.41.605). However, landlords nonetheless sustained significant financial losses as a result of the eviction moratorium.

Gene and Susan Gonzales and other landlords (Petitioners) sued Gov. Inslee for injunctive and declaratory relief, contending that the governor exceeded his statutory emergency powers in RCW 43.06.220. *See id.* Petitioners also alleged that even if the moratorium were otherwise a valid exercise of the governor's statutory powers, it was unconstitutional because it delegated legislative powers to the governor, impaired contracts, constituted a taking, violated the petitioners' right of access to the courts, and violated separation of powers. *See id.* at 288-89. The trial court granted the state's motion for summary judgment, and the Court of Appeals affirmed. *See id.* at 289.

RCW 43.06.220 establishes the governor's emergency powers. Section .220(1)(h) authorizes the governor, after proclaiming a state of emergency, to prohibit "[s]uch activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace." Section .220(2) describes the governor's authority to take action concerning the "waiver or suspension of statutory obligations" and enumerates specific instances in which such action is permissible. § .220(2)(a)-(g). Petitioners claimed that the moratorium "waive[d] or suspen[ded]" tenants' statutory obligation to pay rent under the Landlord Tenant Act and should thus be analyzed under Section .220(2). The lower

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courts agreed with the state that the eviction moratorium was properly analyzed under Section .220(1), as it concerned landlords' rights to evict and enforce debts, which it characterized as "activities...[that] should be prohibited to help preserve and maintain life, health, property or the public peace," and not "waiver or suspension of statutory obligations" as described in Section .220(2).

In a five-justice majority opinion written by Justice Steven González, the Washington Supreme Court upheld the moratorium as a valid exercise of the governor's statutory emergency powers. *Id.* at 285. First, the court concluded that the moratorium on evictions was properly analyzed under RCW 43.06.220(1)(h). *Id.* at 290-92. It characterized the relevant "activit[y]" as "initiating or enforcing an eviction or a debt." *Id.* at 291. The court emphasized that the moratorium did not "waive[] or suspend[]" tenants' obligation to pay rent. *Id.* at 292. Instead, it simply eliminated landlords' ability to enforce debt or evict for nonpayment. *Id.* The court then dispensed with petitioners' other arguments, holding that the moratorium did not violate the contracts clause in Wash. Const. art. I, § 23, did not constitute a taking of property under Wash. Const. art. I, § 16, did not violate the right of access to courts in Wash. Const. art. I, § 10, and did not violate the separation of powers doctrine. *Id.* at 293-300.

Justice Charles Johnson wrote a dissenting opinion that was joined by Justices Barbara Madsen, Susan Owens, and Helen Whitener. *Id.* at 301 (Johnson, J., dissenting). The dissenting justices concluded that the moratorium "waive[d] or suspen[ded] statutory obligations" and thus fell under RCW 43.06.220(2). They further stated that because the moratorium did not fall under any of the enumerated provisions of Section .220(2) permitting emergency action that waives or suspends statutory rights, it exceeded the emergency powers afforded to the governor under RCW 43.06.220. *See id.* BN

NOTE

1. While medical negligence claims in Washington are asserted as statutory claims under Ch. 7.70 RCW, they are "fundamentally negligence claims, rooted in the common law tradition." *Bennett*, 2 Wn.3d at 444. As such, medical negligence claims implicate the fundamental right to assert a common law cause of action. *Id.*

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FEATURE

A Recap of the 2024 Washington Legislative Session

BY SANJAY WALVEKAR

The 60-day 2024 legislative session began on Jan. 8 and adjourned sine die on March 7. Legislators passed a $71 billion supplemental operating budget[1] with approximately $2 billion in new spending for fentanyl and opioid treatment, K-12 schools, and behavioral health facilities, among other priorities. Legislators also passed a $1.3 billion supplemental capital budget[2] to fund statewide construction and infrastructure projects, and a $14.6 billion supplemental transportation budget,[3] adding $1.1 billion to fund road preservation, existing ferry fleet support, and the removal of fish barriers across the state.

INITIATIVES LOOM LARGE

In addition to passing several significant policy measures, including bills ending child marriage in Washington (House Bill 1455), creating a task force to study artificial intelligence issues (Engrossed Second Substitute Senate Bill 5838), and encouraging participation in public defense and prosecution professions (Second Substitute Senate Bill 5780), the Legislature considered a slate of six citizen initiatives. The Legislature agreed to hear three of those initiatives during the session:

- Initiative 2111 prohibits the state, counties, cities, and other local jurisdictions from imposing or collecting income taxes;
- Initiative 2113 removes restrictions imposed by the Legislature on when police can legally engage in vehicular pursuits; and
- Initiative 2081 allows parents to review K-12 instructional materials and other records and requires notification of medical care provided to their children.

All three initiatives were passed by the Legislature and will become law.

Three remaining initiatives were not considered by the Legislature and will go on the ballot in November: Initiative 2109 repeals the state's new tax on capital gains on certain investment profits of more than $250,000 annually; Initiative 2117 repeals the state's 2021 Climate Commitment Act, which requires oil refineries and other major greenhouse gas emitters to pay for pollution permits and reduce emissions over time; and Initiative 2124 allows people to opt out of the WA Cares Fund, a .58 percent payroll tax that funds a long-term care insurance benefit of up to $36,500 per person.

LEARN MORE

More information about each of the bills and initiatives mentioned in this article can be found at **https://app.leg.wa.gov/billinfo/.**

BAR-REQUEST BILL PASSES LEGISLATURE

One of the WSBA's main priorities during each legislative session is to support Bar-request legislative proposals initiated by WSBA Sections and approved by the Board of Governors. This year's request legislation, Substitute Senate Bill (SSB) 5786, passed both chambers unanimously and was signed into law by Gov. Jay Inslee. Originating from the Corporate Act Revision Committee of the Business Law Section, SSB 5786 aims to modernize and clarify portions of Washington's Business Corporations Act (WBCA) by amending chapters of the WBCA regarding merger and share exchanges, quorum and voting, and social purpose corporations.

WSBA BOARD SUPPORTS COURT AND PUBLIC DEFENSE PROPOSALS

In addition to supporting Bar-request legislative proposals, the WSBA endorses non-Bar request bills that seek to create and promote access to justice for all Washington residents. The WSBA Board of Governors voted to support several bills this session originating from the Administrative Office of the Courts and the Office of Public Defense, including:

- **Substitute House Bill 1911:** Specifying three activities in which the Office of Public Defense may engage without violating the prohibition on direct representation of clients. The bill passed the Legislature and was signed into law by the governor.
- **House Bill 1992:** Adding a superior court judge in Whatcom County. This bill increases the number of statutorily authorized superior court judges in Whatcom County from four to five. The bill passed the Legislature and was signed into law by the governor.
- **Senate Bill 5836:** Adding a superior court judge in Clark County. This bill increases the number of statutorily authorized superior court judges in Clark County from 11 to 12. The bill passed the Legislature and was signed into law by the governor.
- **Engrossed Substitute Senate Bill 5828:** Concerning water rights adjudication commissioners and referees. This bill authorizes court commissioners for water rights adjudications, specifies the power of water commissioners, and authorizes

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A Recap of the 2024 Washington Legislative Session

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the appointment of water adjudication referees without consent of the parties. The bill passed the Legislature and was signed into law by the governor.

- **House Bill 2034:** Requiring municipalities and counties to provide sufficient notice to the Administrative Office of the Courts prior to the creation or termination of municipal courts and agreements for court services. The bill passed the Legislature and was signed into law by the governor.

- **Substitute House Bill 2056:** Creating information sharing and limited investigative authority of Supreme Court bailiffs. This bill authorizes bailiffs of the Washington Supreme Court to conduct threat assessments on behalf of Supreme Court justices and to receive criminal history record information that includes non-conviction data for purposes exclusively related to investigating threats against a justice. The bill passed the Legislature and was signed into law by the governor.

WSBA SECTIONS WEIGH IN

The WSBA Legislative Affairs team monitors and takes appropriate action on legislative proposals significant to the practice of law and administration of justice. The team was busy this year, referring and tracking nearly 300 bills for WSBA Sections through the end of session. Key bills involving WSBA Section action and collaboration include:

ENGROSSED SUBSTITUTE SENATE BILL 5589

Concerning probate. This bill modifies provisions relating to family support and exemptions from creditor's claims for probate and non-probate property; clarifies the exemptions from attachment, execution, and forced sale that apply after a decedent's death; establishes a procedure for allocating the exempt property among claimants; and establishes a procedure by which the decedent's surviving spouse, surviving registered domestic partner, or surviving dependent children may request basic financial support during the pendency of any court proceedings relating to the decedent's probate or non-probate assets. The bill was supported by the Real Property, Probate and Trust Section and was signed into law by the governor.

SUBSTITUTE SENATE BILL 5787

Enacting the Uniform Electronic Estate Planning Documents Act. This bill authorizes the use of electronic non-testamentary estate planning documents and electronic signatures on non-testamentary estate planning documents. It also establishes guidelines for the validity and recognition of electronic non-testamentary estate planning documents and electronic signatures on non-testamentary estate planning documents. The bill received significant technical input from the Real Property, Probate and Trust Section and was signed into law by the governor.

SUBSTITUTE HOUSE BILL 2237

Concerning limitations in parenting plans. This bill amends provisions governing limitations that may be imposed in a parenting plan on residential time with a child, decision-making authority, and dispute resolution by reorganizing language and making revisions and additions to substantive provisions. The bill was supported by the Family Law Section but did not pass the Legislature this year. These issues are expected to be reconsidered in future legislative sessions.

The next legislative session will begin in January 2025 and is scheduled for 120 days, marking the first half of the 2025-2026 biennium. During the interim and the upcoming session, the WSBA will continue to monitor and act on legislation significant to the practice of law and administration of justice. BN

NOTES

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FEATURE

COMPETITION, CONSUMER PROTECTION, AND ARTIFICIAL INTELLIGENCE

(and the Future of Freedom of Thought)

BY BISMA SHOAIB AND DANICA NOBLE

It is hard to write about artificial intelligence (AI) without using hyperbole, and it is also difficult to find a comprehensive definition of AI.[1] But it is not difficult to conclude that AI is already fundamentally reshaping societal norms and revolutionizing our interaction with the world. As companies actively engage in providing and leveraging AI systems, significant opportunities emerge for enhancing productivity, gaining new insights, creating new capacities, and even solving old problems. This transformation is happening fast. The AI paradigm shift is already impacting our daily lives in both overt and subtle ways. The potential for leaps forward in progress offers profound benefits but also introduces notable risks and vulnerabilities.

We experience the benefits of AI-powered systems every day. Scientists have utilized AI to discover a new class of antibiotics effective against drug-resistant Staphylococcus aureus, marking the first breakthrough in antibiotic development in over 60 years.[2] AI-driven XO Exam System has revolutionized eye care, enhancing diagnostic accuracy and early disease detection while more effectively meeting global demand and expanding access to ophthalmology services in rural and non-health-care settings.[3] Using a machine-learning method to assess DNA, AI can even enable real-time classification of brain tumors during surgery, aiding surgeons in identifying tumor types and adjusting their strategies in the moment.[4]

While not always visible, AI and machine-learning algorithms are already touching your life—determining things like the ads you see online, the interest rate you receive on a loan, whether you get a call back on a job application, the prices you see online, and even the surge pricing for an Uber. As another example, machine learning is employed to safeguard our email accounts.[5] Similarly, Google Maps and other travel apps utilize AI to track traffic, providing real-time updates on traffic and weather conditions.[6] Most recently, ChatGPT became the fastest-growing app in history, beating out Google, Instagram, and TikTok.[7]

At the same time, AI has the ability to supercharge fraud, amplify discrimination, create nonconsensual and harmful images, aid attacks on digital infrastructure at enormous scale, disrupt democracies, and yes, maybe someday enable killer robots.

Given AI's widespread application and its potential for harm, legal practitioners should be working to understand the technical aspects of AI and to become proficient in the swiftly developing legal standards applied to it. As counsel to companies using or producing AI, practitioners must adeptly apply the existing legal frameworks to safeguard against AI misuse.

This article will offer practical guidance for navigating the intricacies of AI with respect to competition, consumer protection, and even basic human rights.

The intersection of AI and competition law is approaching rather than upon us, but there has been plenty of ink spilled in speculation.

AI AND COMPETITION LAW

In October 2023, the WSBA Antitrust, Consumer Protection, and Unfair Business Practices Section hosted a mini-CLE with speakers from government, technology, academia, and private practice to discuss the intersection of AI and competition law. To some degree, the intersection is approaching rather than upon us, but there has been plenty of ink spilled in speculation. As companies across various sectors increasingly integrate AI into their core business operations, they may be able to leverage benefits such as enhanced operational efficiencies, cost reduction, streamlined processes, improved customer experiences, and optimized profitability. However, access to the AI building blocks—huge amounts of data, processing and computing power, and specialized talent—is not widely distributed, and concentrated market structures can raise antitrust concerns. For example, the chips that power most foundational generative AI models are currently made in highly concentrated markets, and the supply does not satisfy the demand.[8] As a result of chip supply being highly concentrated, the market may be vulnerable to anticompetitive conduct.[9] Further, the companies with the largest cloud computing capacity may also be some of the platforms with the largest access to the talent and the data that large-language and other base AI models require.

A flurry of public statements from the Federal Trade Commission (FTC) and the Department of Justice (DOJ) over the last year has addressed potential anticompetitive risks from AI. In February 2023, DOJ Principal Deputy Assistant Attorney General Doha Mekki addressed the potential antitrust risks arising from companies utilizing AI for data aggregation and making collaborative decisions impacting pricing and output.[10] Mekki highlighted findings from several studies indicating that algorithms could induce either implicit or explicit collusion in the marketplace, leading to the possibility of increased prices or, at the very least, a weakening of competitive dynamics.[11] Mekki underscored the DOJ's commitment to facilitating businesses employing AI for innovative and competitive uses.[12] Simultaneously, she emphasized the agency's resolve to intervene and prevent the misuse of AI that could adversely affect fair competition.[13]

The FTC has also pointed to potential antitrust risks linked to AI.[14] FTC Chair Lina Khan emphasized the necessity for both state and federal enforcers to maintain vigilance in the early stages of AI development, ensuring that businesses adhere to existing laws.[15] Khan has emphasized that the FTC is well equipped with existing authority and expertise to address issues arising from the swiftly evolving AI sector, specifically those related to collusion and unfair competition practices.[16] Furthermore, the FTC discussed platform/network effects and open-source dynamics, cautioning against tactics where companies leverage AI resources as open-source initially but later close their ecosystem, restricting competition and leading to lock-in.[17]

In January of this year, the FTC launched a market study inquiry into generative AI investments and partnerships under its statutory authority of Section 6(b) of the FTC Act.[18] This FTC 6(b) investigation seeks to analyze corporate collaborations and investments involving AI providers to understand the associations' effects on competition.[19] Compulsory orders for information were issued to Alphabet, Inc.; Amazon.com, Inc.;

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Illustration © Getty/Moor Studio

Anthropic PBC; Microsoft Corp.; and OpenAI, Inc.[20] Similarly, Assistant Attorney General for Antitrust Jonathan Kanter stated that the DOJ has initiated multiple investigations into competition in AI.[21]

To anticipate potential antitrust risks associated with AI use, antitrust attorneys should adopt several strategic measures. Attorneys should initiate detailed antitrust risk assessments tailored to their clients' AI applications, examining factors such as AI's role in decision-making, competitor data reliance, dataset size, industry AI adoption rate, and human involvement in decisions.[22] They must scrutinize data sources, including aggregated third-party data sources, pricing algorithms, and revenue-management tools employing AI, to ensure accurate and unbiased data usage and to guard against misuse or collusion allegations.[23] It is important to update antitrust compliance policies and training programs to educate employees across relevant departments on the antitrust risks posed by AI. It is equally important to educate consumers of products as well.

Antitrust counsel should actively participate in AI development, implementation, and marketing processes, especially when linking AI applications or transitioning from open-source to proprietary ecosystems, to assess and mitigate risks of such technology. Likewise, clients should be encouraged to collaborate with antitrust and licensing counsel to secure appropriate compliance representations and indemnification in AI product and service licenses.

CONSUMER PROTECTION IN THE AGE OF AI

On Feb. 14, the WSBA Antitrust, Consumer Protection, and Unfair Business Practices Section hosted another mini-CLE, this time on consumer protection and generative AI, exploring the nearly boundless applications—and substantial implications—for consumer protection. While AI enables consumers to benefit from tools like chatbots and rapid (automated) decision-making, it also introduces challenges. These may include algorithmic opacity, embedded biases, and privacy-invasive practices. It will be necessary for counsel to help companies balance approaches leveraging AI's benefits against potential risks.

One case illustrating the serious consequences of algorithmic decisions was reported in 2019. A study published in *Science* demonstrated that a widely used algorithm that helped determine health care for some of the most seriously ill Americans discriminated based on race.[24] The research demonstrated that software guiding additional and fast-tracked health care services for more than 10 million Americans systematically advantaged the care of white patients over Black patients, resulting in worse outcomes for Black patients.[25] Many hospitals use algorithms to identify primary care patients with complex health needs to provide additional support.[26] Analysis of more than 50,000 patient records showed that white patients were provided higher quality health care than similarly presenting Black patients based on the determinations made by an algorithm employed by many hospitals.[27]

Regulatory bodies are diligently addressing the various adverse effects of AI on consumers. In a joint statement, the FTC, Consumer Financial Protection Bureau, Justice Department's Civil Rights Division, and U.S. Equal Employment Opportunity Commission emphasized their collective enforcement efforts against discrimination and bias in automated systems, cautioning that AI could lead to unlawful discrimination.[28] The FTC specifically maintains that AI is subject to the same regulatory and legal principles designed to protect against deception and unfairness, emphasizing that it will regulate AI in a manner consistent with its approach to other products in the past.[29]

The FTC aims to deter companies engaging in unlawful development and deployment of AI through the imposition of meaningful penalties. For example, algorithmic disgorgement involves the systematic removal of the data as well as the algorithms used to monetize that data. The FTC issued an algorithmic disgorgement order to WW International, asserting that the company's mobile application, providing weight-management and tracking services for children, teenagers, and families, violated the Children's Online Privacy Protection Act.[30] The FTC alleged WW International marketed a weight loss app targeting children as young as eight and subsequently gathered their personal information without obtaining parental consent. WW International was required to delete data and the algorithm it was using for the app.[31]

In another recent enforcement action, Rite Aid was prohibited from utilizing AI facial recognition technology by the FTC.[32] This action comes in response to the retailer's use of the technology without sufficient safeguards, resulting in the misidentification of consumers, particularly women and individuals of color, as shoplifters over a period of eight years.[33] The imposed ban will remain effective for five years.[34]

AI technologies are facing heightened federal scrutiny based on international, domestic, state, and municipal frameworks such as President Biden's comprehensive executive order on AI issued in October 2023. These frameworks have some similar tenets, such as the eight guiding principles and priorities included in the White House

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executive order for how AI systems should be developed and deployed. The eight principles are:

1. Safety and security through robust evaluations and transparency;
2. Responsible innovation and competition, including investments in education and research;
3. Support for American workers amid AI-driven job changes;
4. Alignment of AI policies with equity and civil rights;
5. Enforcement of consumer protection laws against AI-related fraud and privacy infringements;
6. Protection of privacy and civil liberties in AI data handling;
7. Management of risks from government AI use and capacity enhancement for regulation; and
8. Leadership in global AI progress and collaboration.

Completely unbiased AI systems may be unattainable. When organizations employ AI systems for decision-making that may have legal implications of discrimination, it is imperative for attorneys to collaborate with data scientists during the development process. Ethics should not be an afterthought. Attorneys should engage with external parties like academic researchers and consumer advocacy groups or independent auditors to identify and address potential issues of bias, discrimination, or unfairness in AI models. Additionally, attorneys may recommend setting up internal ombudsman services dedicated to receiving and reviewing complaints from various groups involved, including employees and consumers.

AI, NEUROTECHNOLOGY, AND PRIVACY

Advancements in neuroscience and AI have intersected, resulting in the emergence of consumer neurotech devices. Consumer neurotech devices connect human brains to computers, employing increasingly sophisticated algorithms for the analysis of received data.[35]

Large platforms including Meta,[36] Microsoft,[37] and Apple[38] are making significant investments in brain-tracking and decoding technology. While other biotech ventures like Neuralink (Elon Musk), Synchron (Jeff Bezos and Bill Gates), and Blackrock Neurotech have embarked on trials for human-implantable neurotech devices,[39] consumers have already begun submitting to brain scans. French beauty and fragrance industry leader L'Oréal has established a strategic collaboration with Emotiv, a neurotech company, introducing in-store consultations utilizing multi-sensor EEG-based headsets to detect and decode customers' brain activity through advanced machine-learning algorithms, aiming to personalize fragrance selection based on individual emotions.[40] Similarly, Ikea offered limited edition art pieces, but only to consumers willing to don headwear that was used to detect whether they actually loved the art or instead were more likely making a speculative purchase for resale.[41] Do these initial offerings suggest that some consumers are willing to trade brain data for products such as personalized perfume recommendations?

The potential benefits of consumer neurotech devices are profound. On the health side, companies are developing and marketing wearable gadgets capable of monitoring EEG signals, which have the potential to notify individuals with epilepsy about impending seizures.[42] Similarly, individuals with quadriplegia are beginning to operate electronic devices using their thoughts.[43] In the workplace, neurotechnology promises advantages like fatigue tracking to avoid accidents and promote heightened concentration, improved emotional and cognitive skills, and reduced bias in recruitment processes.[44]

Nevertheless, progress in consumer neurotech devices raises substantial privacy concerns, particularly in the context of data privacy, self-determination, and freedom of thought. While privacy challenges may arise from processing any personal data, the processing of brain data presents specific ethical concerns because it contains especially sensitive data. Collecting brain data raises questions about the capacity for informed consent, detection of unuttered or even unconscious thoughts, or unintentional revelation of sensitive health data.[45] There is a proliferation of claims that the detected brain signals can predict health (neurological) status, individual preferences, attitudes, and behavior.[46] Coupled with AI and the emergence of consumer-grade brain data detection devices, there is also a proliferation of the collection, processing, and availability of neurodata expanding beyond clinical and research settings into medical, academic, and even commercial applications.[47] Consequently, many novel legal and ethical issues are emerging and it is unclear if the law is keeping up.

For example, such technology raises questions about privacy and oversight in the workplace.[48] While federal monitoring regulations provide employers with significant authority to monitor the activities

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SIDEBAR

Join the WSBA Antitrust, Consumer Protection, and Unfair Business Practices Section

Legal professionals seeking to stay informed about the ever-changing AI legal landscape are encouraged to become members of the WSBA Antitrust, Consumer Protection, and Unfair Business Practices Section. Our recent CLE series has focused on addressing emerging issues in AI, including sessions on the intersection of AI with competition law and consumer protection. In a CLE in April, we will explore privacy and best practice issues in AI development and deployment in connection with neurotechnology and freedom of thought.

Membership in the Section not only offers practical guidance for navigating emerging issues but also gives access to cutting-edge resources, networking opportunities, and a community of experts.

Could employees consent to the surveillance of their thoughts and brain activity? Possibly.

Competition, Consumer Protection, and Artificial Intelligence (and the Future of Freedom of Thought)

CONTINUED >

of their employees during work hours,[49] these workplace surveillance laws primarily center on matters of consent.[50] Could employees consent to the surveillance of their thoughts and brain activity? Possibly. Meanwhile, more than 5,000 companies worldwide already use SmartCap, a wearable system that tracks brain signals to monitor employee fatigue.[51]

As neurotechnology and AI rapidly converge, establishing definitive rights to cognitive liberty should be prioritized.[52] Currently, the U.S. Constitution, state and federal laws, and even international treaties lack explicit recognition of a right to cognitive liberty.[53] Establishing that right will better allow us to reap the benefits of neurotechnology without sacrificing the rights to mental privacy and self-determination over our own brains. BN

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12. *Id*.
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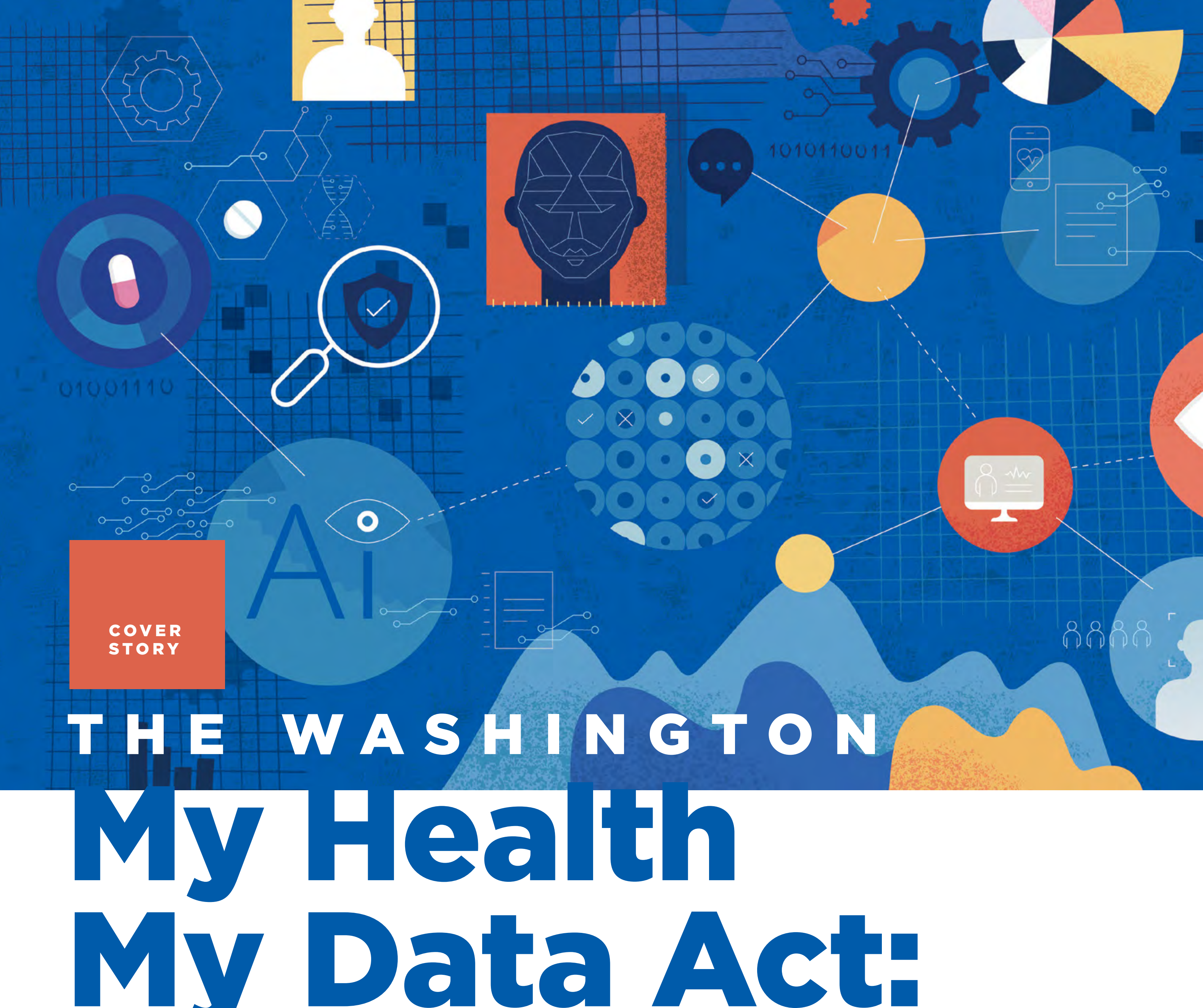


THE WASHINGTON My Health My Data Act:

Complying With New and Novel Protection for Health-Related Data

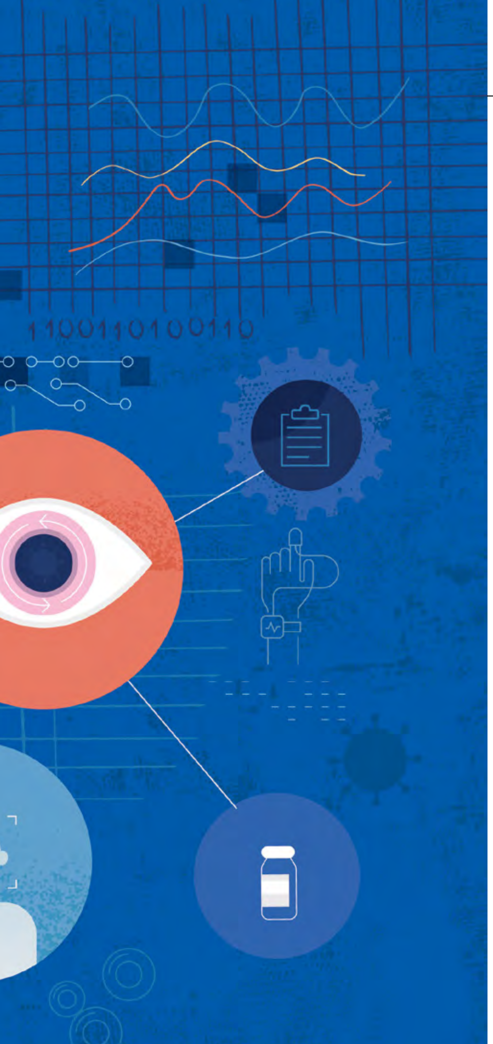
BY NATHANIEL GALLEGOS

The Washington "My Health My Data Act" (WMHMDA)[1] was signed into law by Gov. Jay Inslee on April 27, 2023, and took effect on July 23, 2023. This consumer protection law creates extensive consumer data rights and obligations for regulated entities and small businesses as to how and when they can collect and share personal health-related data.

This article will give a brief overview of the WMHMDA with an emphasis on its novel geofencing provision, why it matters for privacy advocates, and what compliance will look like. Washington attorneys representing business clients that handle health-related data—regardless of whether they are in the health-care industry—need to be familiar with the WMHMDA—especially since the two largest cloud-based data process providers are domiciled in the state of Washington.

OVERVIEW

The WMHMDA should be thought of as a privacy law to protect Washington residents from misuse of wellness, nutrition, fitness, location, and other health-related data—and more specifically, as a privacy law with consumer protection teeth. Although some may assume that the federal Health Insurance Portability and Accountability Act (HIPAA) already provided these consumer protections, HIPAA only covers health data collected by specific health-care entities like



hospitals or pharmacies. The Washington Legislature creatively included consumer protection in the WMHMDA and tucked it under Title 19 of the Revised Code of Washington (RCW) for business regulations.

The legislative intent was to make the WMHMDA broadly applicable, but there was notable health-care industry pushback. During the Jan. 24, 2023, hearings held before the House Civil Rights & Judiciary Committee, health-care industry advocates testified that they wanted a right to cure, which was not ultimately included in the Act. They were also concerned with the private right of action that ultimately *was* included in the legislation—the Legislature expressly made the Consumer Protection Act, Chapter 19.86 RCW, applicable to violations of the WMHMDA. RCW 19.373.090. The private right of action under the Consumer Protection Act enables plaintiffs to pursue entities with slight connections to Washington, even if their consumer health data is not processed in the state, and a prevailing plaintiff may recover attorney fees and treble damages of up to $25,000.

The WMHMDA applies to any entity that offers "health care services," which are defined as "any service provided to a person to assess, measure, improve, or learn about a person's mental or physical health." RCW 19.373.010(15). This definition can apply broadly to grocery stores, gyms, health food stores, and traditional health-care facilities like hospitals and clinics. The WMHMDA applies not only to entities that gather information on an individual's mental and physical health conditions, treatment, diseases, or diagnoses, but also to entities that gather data related to reproductive health, genetic data, gender-affirming care, and even biometric information.

The WMHMDA should be thought of as a privacy law with consumer protection teeth.

The WMHMDA defines consumer broadly as "(a) a natural person who is a Washington resident; or (b) a natural person whose consumer health data is collected in Washington." RCW 19.373.010(7).

These broad definitions present enormous potential for "unanticipated consequences," according to one commentator.[2] However, the Washington State Attorney General's Office (AGO) has posted guidance[3] that attempts to assuage confusion. Notably, the guidance states that information that does not identify a consumer's past, present, or future physical or mental health status *does not* fall within the Act's definition of consumer health data.[4] However, the guidance from the AGO also affirms that the definition of consumer health data *includes* extrapolations from non-health data when that information is used by a regulated entity or their respective processor to associate or identify a consumer with consumer health data. The AGO provides the following example on this point:

> **Does the definition of consumer health data include the purchase of toiletry products (such as deodorant, mouthwash, and toilet paper) as these products relate to "bodily functions"?**
>
> Information that does not identify a consumer's past, present, or future physical or mental health status does not fall within the Act's definition of consumer health data. Ordinarily, information limited to the purchase of toiletry products would not be considered consumer health data. For example, while information about the purchase of toilet paper or deodorant is not consumer health data, an app that tracks someone's digestion or perspiration is collecting consumer health data.

GEOFENCE REGULATION

The WMHMDA defines "geofence" as:

> technology that uses global positioning coordinates, cell tower connectivity, cellular data, radio frequency identification, Wifi data, and/or any other form of spatial or location detection to establish a virtual boundary around a specific physical location, or to locate a consumer within a virtual boundary. For purposes of this definition, "geofence" means a virtual boundary that is 2,000 feet or less from the perimeter of the physical location.

RCW 19.373.010(14).

Geofencing technology can be used to create a perimeter around a predetermined area and prompt a device (smartphone, smartwatch, car, e-scooter, drone, etc.), through a mobile app, to take an action when it is inside or outside that area.[5]

Individual users can set up geofencing on their office or home devices to do such things as turn off lights, adjust room temperature, or lock doors.[6] Musicians can use geofencing at concerts to greet fans, help locate seats, and offer discounts on merchandise. Geofencing

CONTINUED >

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Illustration © Getty/DrAfter123

can allow retailers to give customers the option to sign up to receive discounts or other personalized experiences when they enter a retail store.[7] Geofences can limit the area of use of e-scooter and e-bike rentals as well as limit the area where mobile gambling can occur. And perhaps most notably, geofencing can be used with location-based marketing (LBM) or location-based advertising (LBA) to send targeted advertisements to persons who are inside or outside of a geofenced perimeter.

The WMHMDA makes the use of a geofence around an entity that provides in-person health care services unlawful under specified circumstances:

> where such geofence is used to: (1) Identify or track consumers seeking health care services; (2) collect consumer health data from consumers; or (3) send notifications, messages, or advertisements to consumers related to their consumer health data or health care services.

RCW 19.373.080.

Beyond marketing and advertising purposes, law enforcement agencies are also using the technology. Police have begun using "geofence warrants" at increasingly higher rates.[8] A single warrant in connection with a federal case resulted in nearly 1,500 device identifiers being sent to the Bureau of Alcohol, Tobacco, Firearms, and Explosives.[9] There are also "keyword search warrants," where Google search history and location data can be examined to find anyone who did a particular keyword search.

Not surprisingly, geofencing technology is considered to be impermissibly intrusive by privacy advocates. Some fear this technology could aid in locating and prosecuting people who used Google to search for an abortion.[10] In December 2023, Google announced it would soon change the way it stores and accesses users' opt-in "location history" in Google Maps, making the data retention period shorter, and making it impossible for the company to access it.[11] The implication is that Google will no longer be able to respond to "geofence warrants" and hand over information about all users within a given location during a specific timeframe.

Thus, in the context of Washington and the WMHMDA, attorneys advising clients who deal with consumer health data and utilize geofencing technology should encourage a detailed review of the virtual geofence boundaries in place and the type of data being collected and/or sent.

COMPLIANCE

The WMHMDA requires regulated entities to implement a specific health-data policy that asks for explicit consent from consumers. Attorneys representing employers in Washington that deal in health data, foreign businesses with a presence in Washington, and/or entities that have cloud data processed with Amazon Web Services or Microsoft should consider the following three items related to compliance with the WMHMDA.

1. Consumer Health-Data Policy

Simple privacy policies will not ensure compliance with the WMHMDA. There must be a unique consumer health-data privacy policy that clearly and conspicuously addresses five requirements, as stated in the Act:

> (i) The categories of consumer health data collected and the purpose for which the data is collected, including how the data will be used;
>
> (ii) The categories of sources from which the consumer health data is collected;
>
> (iii) The categories of consumer health data that is shared;
>
> (iv) A list of the categories of third parties and specific affiliates with whom the regulated entity or the small business shares the consumer health data; and
>
> (v) How a consumer can exercise the rights provided in RCW 19.373.040.

RCW 19.373.020.

Predictive AI can take all our digital clues to find our locations, signatures, and biometric and health data and use it in ways that none of us may know about or consent to.

2. Placement of the Link to the Policy

The WMHMDA requires that an entity's consumer health-data privacy policy be published on its own unique webpage. A link to the consumer health-data privacy policy must appear "prominently" on the entity's homepage and on any webpage where personal information, not just health data, is collected. "Personal information" is defined as any information that "identifies or is reasonably capable of being associated or linked, directly or indirectly, with a particular consumer." RCW 19.373.010(18)(a). That includes cookie IDs, IP addresses, device identifiers, or any other form of persistent unique identifier. This could mean that the link is required to appear on every single page of a business's website.

3. Consent

The consumer consent required by the WMHMDA is defined as "a clear affirmative act that signifies a consumer's freely given, specific, informed, opt-in, voluntary, and unambiguous agreement." RCW 19.373.010(6)(a). It cannot be buried in any other consent or policy. In addition, consent cannot be given by "hovering over, muting, pausing, or closing a given piece of content." RCW 19.373(6)(b)(ii).

CONCLUSION

The WMHMDA is legally novel and technologically current and protects privacy in a way that is not being done in other states. The need for such protection is clear: As just one example, in 2012, Target knew when a teenage girl was pregnant before her family did.[12] That was 12 years ago, and now predictive AI can take all our digital clues to find our locations, signatures, and biometric and health data and use it in ways that none of us may know about or consent to. The European Union has extensive privacy

laws as part of its General Data Protection Regulation (GDPR) laws[13]; the WMHMDA gives Washington residents a little more control over our digital clues and moves us closer to the GDPR.

Enforcement under the WMHMDA began on March 31 for all regulated entities that are not small businesses. Enforcement begins on June 30 for small businesses, as defined by the WMHMDA. RCW 19.373.010(28). Washington attorneys representing businesses handling health data need to consider compliance. Compliance is not onerous, but it does require businesses to be aware of how consumers' health-related data is being used, to give notice to consumers of that use, and, most importantly, to ask for consumers' consent. BN

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REVIEW

Psssst ... Want to Buy a Law School?

30 years later, recalling shock and awe at the super-secret sale of U.P.S. Law School to Seattle University

BY MARGARET MORGAN

Annette E. Clark, "'What's Past is Prologue': The Story of the Sale of the University of Puget Sound School of Law to Seattle University," 46 Seattle University Law Review 773 (2023), *available at* **https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2833&context=sulr.**

If you weren't part of the Washington legal community at the time, weren't living along the I-5 corridor, or perhaps weren't even born yet, you won't remember the stunning announcement on the front pages of *The Seattle Times, The News Tribune,* and other local papers on Nov. 9, 1993, that the University of Puget Sound (U.P.S.) Law School had been sold to Seattle University.

And even if you do remember, you may not know the full backstory. Now, in a masterful 90-plus-page law review article that reads more like an espionage novel, Annette E. Clark, former dean of Seattle University Law School and current dean emerita and professor emerita, has given it to us.[1] Yes, it's a law review article and yes, there are 629 footnotes, but trust me, it's a page-turner: Clark gives us an almost minute-by-minute, behind-the-scenes account of the prevailing politics and personalities, the opening overtures, secret meetings, anonymous phone calls, and "need-to-know-only" consultations with selected members of the senior administration and boards of trustees of both institutions. Then, as Clark characterizes it, "NOVEMBER 8, 1993: THE FATEFUL DAY ARRIVES" when the deal was announced at a press conference at the Tacoma Dome Hotel, followed by a meeting with the editor of *The News Tribune*, "whose negative and bitter reaction to the news of the sale foreshadowed the storm to come."[2]

At the point of this "dark and stormy night" foreshadowing, we're only a third of the way through the article! Reaction to the sale and especially to the secrecy with which it was negotiated (almost unimaginable in a 2024 world of leaks, online media, and 24/7 news cycles) was immediate and intense on the part of U.P.S. law students ("You didn't sell a building, you sold our futures!"[3]), faculty, alumni, the communities that housed the institutions, and the press. The personal impact on the people affected is well and sensitively described by Clark in sections titled "PICKING UP THE PIECES" and "THE AFTERMATH" that include "Grieving the Loss, Fearing the Future," "Calming the Students," "The Local Community Erupts," "The Press Piles On," and "Attempts to Upend the Sale."

What follows is a meticulously documented account of how the new Seattle University School of Law was created. It is absorbing both as a business transaction and as a look at the process of "winning hearts and minds"[4] of U.P.S. Law School faculty, staff, and students. As a business transaction, an overall goal was "to maintain a civil relationship with the selling entity and to prioritize preserving and running the asset well for the benefit of the new owner."[5] The task list facing the law school community was "daunting"—"seeking and maintaining ABA accreditation; implementing the provisions of the purchase and sale agreement; determining compensation and benefits for faculty and staff; ensuring continuity of law school programs and the curriculum; maintaining high-quality student services; integrating the law school into Seattle University; managing public relations; and conducting fundraising for the new building."[6]

On the "winning hearts and minds" front, Clark gives major kudos to William J. Sullivan, S.J., then-president of Seattle University who, according to one Seattle University administrator, "could have been the CEO of a Fortune 500 company in that he was a brilliant strategist and knew precisely what needed to happen to make the acquisition a success."[7] U.P.S. law faculty had to be reassured, given its religious affiliation, that Seattle University was strongly committed to academic freedom. There were some U.P.S. faculty "who were part of a solid conservative intellectual tradition within the law school and for whom Seattle University's focus on social justice was not a comfortable fit."[8] One way that was found to work through the issues was the creation of a new mission statement for the law school.[9]

U.P.S. law students were somewhat mollified when the tuition increase for 1994-95 was the lowest in 14 years, coupled with a

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Civil rights groups call white staffs a sign of 'blatant discrimination'

UPS law school to leave Tacoma

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Fat's the star on kids' TV, study reports

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GOOD MORNING

It's Tuesday, November 9, 1993

Rumor

Ohio lawyer picked to direct PDC

Today's tip

Sports

The sale of the U.P.S. Law School was front-page news in The News Tribune (Tacoma) and The Olympian in 1993.

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Yes, it's a law review article and yes, there are 629 footnotes, but trust me, it's a page-turner.

24-percent increase in student scholarship support. Faculty were "heartened" by announcement of an average 4-percent pay increase.[10] Over months of negotiations, other compensation and benefits terms and policies were nailed down.

Just as things were heading toward resolution, more drama: After the public announcement of the sale and impending transition in sponsorship of the law school, U.P.S. Law School Acting Dean Don Carmichael learned that the ABA Standards and Rules of Procedure required a university to consult with the ABA *before* entering into an agreement to transfer the sponsorship of a law school. Further complicating the matter, there was no precedent for "a thriving law school" being transferred "from one strong university to another."[11] Could the law school avoid receiving only "provisional accreditation status" on the basis that this was "a 'normal' transfer rather than a 'fire sale' of a failing law school"?[12]

You'll have to read Clark's account to learn the outcome of these "accreditation woes"[13] and of other bumps in the road, such as the 1995 lawsuit filed against the University of Puget Sound by 12 tenured U.P.S. law faculty (settled by U.P.S., with all 12 plaintiffs having accepted employment with Seattle University),[14] before the road leveled out and led to the doors of Seattle University School of Law's Sullivan Hall, which opened on Aug. 23, 1999.

In thoughtful and surprisingly candid reflections at the end of the article, Clark expresses agreement that "the affiliation with Seattle University was the best thing to happen to the law school" and gratitude that "things ended up the way they did."[15] But she goes on to note the "remnants of angst and even anger among some of the law faculty and staff" and considers "why the sale might still hurt despite the very positive outcome."[16] These last five pages of her article are particularly worth reading as she addresses possible reasons, even 30 years later, for lingering bitterness: the idea that the sale did not have to happen in the first place,[17] and the failure by the leadership team of the University of Puget Sound to express any gratitude for the efforts of the law school faculty, appreciation for legal education, or regret at losing the law school.[18] She also acknowledges that the failure to consult with or inform the law school faculty and staff (and business and legal communities) about the sale before it was announced caused pain but comes down on the side of its having been "a reasonable and necessary business decision," since "public disclosure would not only have doomed the deal. It would also have destroyed the law school because of the uncertainty and fear such knowledge would have created in the minds of faculty, staff, students, and prospective students."[19] Clark also has some harsh words relating to the media coverage of the sale, which she perceives as an abuse of the power of the press.[20]

With a backward glance as she nears the end of her time as an administrator and faculty member at Seattle University Law School, Clark muses that there were times during her 10 years as dean, which included financial struggles, followed by the COVID-19 pandemic, when she thought no dean of the law school had ever led during a more difficult time. Writing the law review article and "learning and relearning our history," she concludes that she was wrong and ends on a graceful and grateful note: "The events surrounding the sale of the law school and its aftermath were a crucible, and that we came through the fire and are thriving today is a testament to the extraordinary leaders who came before me."[21] BN

NOTES

1. Clark, a 1989 graduate of the University of Puget Sound School of Law who joined its tenure-track faculty upon graduation, was asked to write an updated history of Seattle University School of Law for its 50th anniversary in 2023. In researching the school's history, she notes: "I was drawn over and over again to one particular part of our story: the announcement in 1993 that the University of Puget Sound had sold its law school to Seattle University. … I am the lone remaining faculty member who was here for that remarkable period in our history. … I have chosen to travel back in time to the defining moment on November 8, 1993, when everything changed." 46 Seattle University Law Review at 775.
2. *Id.* at 806.
3. *Id.* at 807 n.243.
4. *Id.* at 833.
5. *Id.* & n.434.
6. *Id.* at 834.
7. *Id.* at 835 & n.445.
8. *Id.* at 837.
9. *Id.*
10. *Id.* at 837-38.
11. *Id.* at 843.
12. *Id.* at 846.
13. *Id.* at 842-47.
14. *Id.* at 850-52.
15. *Id.* at 860.
16. *Id.*
17. *Id.* at 860-61.
18. *Id.* at 861.
19. *Id.* at 862.
20. *Id.*
21. *Id.* at 865.

CALLING ALL WSBA MEMBERS

JOIN THE WSBA VOLUNTEER COMMUNITY

WSBA COMMITTEES & COUNCILS

A rewarding opportunity to refine a skill, explore an interest, join a professional community, and advance your own professional development while strengthening the legal profession.

NOTE : Those marked with an asterisk (*) welcome public members; some eligibility requirements may apply.

WSBA Committees *(created and authorized by the Board of Governors)*

- **Committee on Professional Ethics***
- **Continuing Legal Education Committee**
- **Council on Public Defense***
- **Court Rules and Procedures Committee**
- **Diversity, Equity & Inclusion Council**
- **Editorial Advisory Committee**
- **Judicial Recommendation Committee**
- **Legislative Review Committee**
- **Member Engagement Council**
- **Pro Bono and Public Service Committee**
- **Section Executive Committees** (29 Sections) Application deadlines may vary.
- **Small Town and Rural Committee**
- **Washington Young Lawyers Committee**

BOARDS & PANELS

A unique opportunity to work with the Supreme Court and the WSBA on the regulation and discipline of Bar members, while providing insight into the dynamics of a self-regulated profession.

Regulatory Boards and Panel *(created by court rule)*

- **Adjunct Disciplinary Counsel Panel**
- **Board of Bar Examiners**
- **Character & Fitness Board***
- **Client Protection Board**
- **Law Clerk Board**

Supreme Court Boards and Panels *(administered by the WSBA)*

- **Access to Justice Board***
- **Disciplinary Board***
- **Disciplinary Selection Panel**
- **Hearing Officer Panel**
- **Limited License Legal Technician Board***
- **Discipline Advisory Round Table*** *(joint venture of the WSBA and the Supreme Court)*
- **Limited Practice Board***
- **Mandatory Continuing Legal Education Board***
- **Practice of Law Board***

Other Court-Created

- **Conflicts Review Officer**

MORE ONLINE

» Apply online at **myWSBA.org**. The deadline for applications is May 31, 2024.

» For questions, email barleaders@wsba.org.

Learn About Opportunities at the WSBA Before You Apply!

WSBA Volunteer Information Session

WHEN: **Tuesday, April 30, noon – 1 p.m.**
ZOOM LINK: https://wsba.zoom.us/j/89041169236?pwd=0eY0BP1h48dtPHcRQah4osoS4VoSOm.1
MEETING ID: 890 4116 9236
PASSCODE: 562265

» **Application opens May 1**
» **Deadline is May 31**

Priority review given to those who apply by the deadline.

To learn more, visit **www.wsba.org/volunteer**

Note: Certain entities have specific eligibility requirements. The skills and descriptions described are general and not intended to limit an eligible applicant from applying and seeking appointment.

YOUR INTERESTS, SKILLS, EXPERIENCES, AND GOALS

Administrative Processes	Civil Legal Aid, Pro Bono, and Public Service	Critical Thinking and Analysis	Discipline System	Delivery of WSBA Events and Programs	Diversity, Equity and Inclusion	Education and Ethics	Effectuate Systemic Change	Event Planning	Group Collaboration	Leadership Development and Mentorship	Centers Voices of Oppressed Communities	Policy/Rules/Legislation	Public Protection	Recruitment and Peer Recognition	Regulatory Oversight	Research, Writing and Communications	Technology
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LEARN MORE AT WSBA.ORG

Want to learn more about each of these committees, boards, and panels? Scan the QR code to read details about each. »

Updated as of March 1, 2024

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

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

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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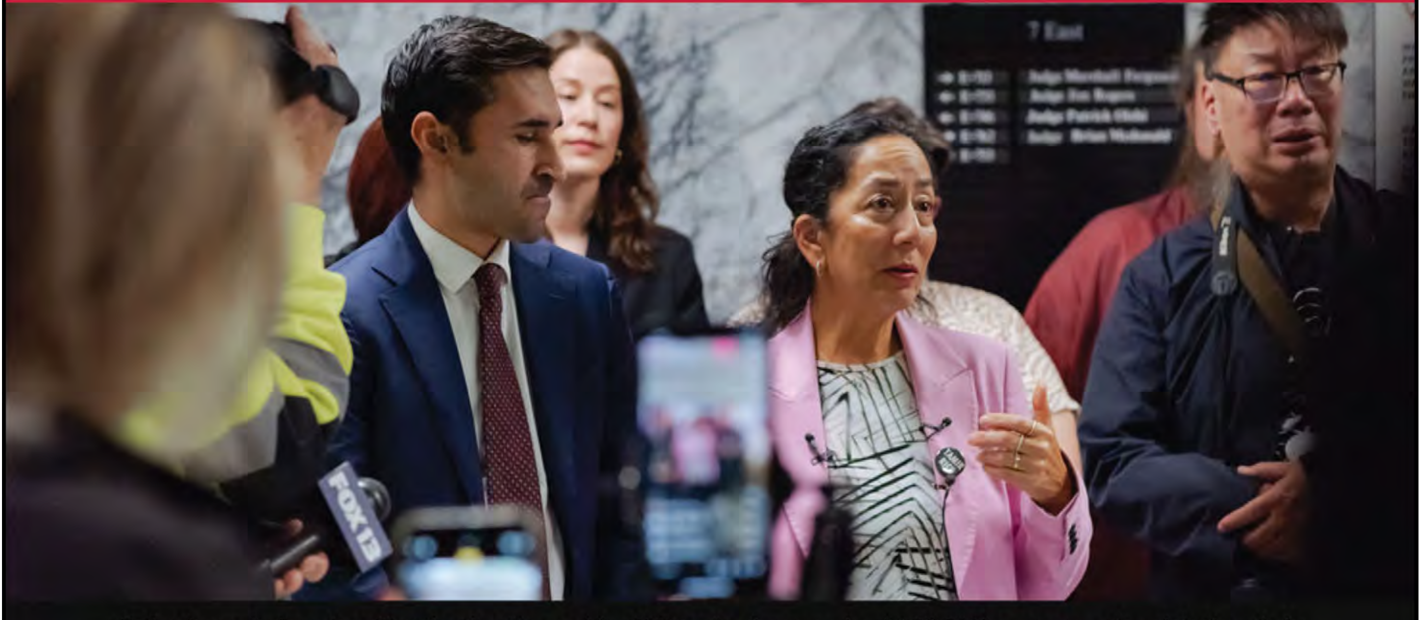
503.270.5400 • www.pdxcpas.com

SEATTLE SETTLES WITH 50 BLM PROTESTERS FOR $10M



Following a furious legal battle, the City and its SPD took a knee and paid 50 BLM protesters for violating their civil rights and causing injury. Whether the City will do better the next time, remains to be seen.

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Need to Know

NEWS & INFORMATION OF INTEREST TO WSBA MEMBERS

SAVE THE DATE

Register for the Trial Advocacy Program

The annual WSBA Trial Advocacy Program (TAP), May 8-9, offers a two-day online intensive trial skills training followed by an in-person mock trial. This seminar is appropriate for attorneys working in either the criminal or civil arena with little or no trial experience. Attendees can earn up to 17.25 CLE credits for full participation. Tuition for this program is deeply discounted for new WSBA members. Additionally, WSBA New Member Programs will offer two scholarships for new and young lawyers to attend the 2024 program for free. Learn more at **www.wsba.org/for-legal-professionals/wsba-cle/new-member-education.**

WSBA NEWS

Proposed Rules of Court Published for Comment

The WSBA encourages members to actively monitor and provide feedback when the Washington Supreme Court is considering any amendments to its rules. Dozens of proposed rule changes are currently published for comment, with some comment periods expiring on Apr. 30. View all opportunities to comment at **www.courts.wa.gov/courtrules.**

Licensing Suspensions

All licensing and MCLE requirements must be complete and received by 4 p.m. PDT on April 30. If you have not complied by 4 p.m. PDT on April 30, then on May 1 the Washington Supreme Court will receive a recommendation from the WSBA for suspension of your license to practice law (APR 17). Licensing requirements, including MCLE certification, must be completed online at **www.licensing.wsba.org**. Visit **www.wsba.org/licensing** to learn more.

THE BAR BUZZ

Well-Being Week in Law

On May 10, the Member Wellness Program will host a half-day virtual CLE: Grace and Space: Making Room for Social Connections, Vulnerability, and Boundaries in Your Legal Practice. To learn more and sign up, visit **www.wsba.org/wellness**.

Free Postings for Positions in Rural Parts of Washington State

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.

Work at the WSBA

The WSBA is hiring! A new opening was recently listed for general counsel, who serves as director of the Office of General Counsel Department and as a member of the WSBA Executive Leadership Team. Visit **www.wsba.org/career-center/work-at-the-wsba** for all of our current openings and to apply.

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.*

VOLUNTEER

Legal Clinic Volunteers Needed

A free legal clinic put on by the Latina/o Bar Association of Washington, the King County Bar Association, and El Centro de la Raza is looking for attorney volunteers interested in doing pro bono work. The clinic takes place from 6-8 p.m. on the second Wednesday of every month through November 2024 at El Centro de la Raza in Beacon Hill (2524 16th Ave. S, Seattle, 3rd Floor). Volunteers

CONTINUED >

Need to Know

CONTINUED >

provide general consultations in areas of the law including immigration, family law, auto accidents, personal injury, worker's rights/wage claims, tenant rights, and criminal law. For more information, email **clinics@lbaw.org.**

RESOURCES

IOLTA FAQs

Have questions about trust accounts? Check out the new IOLTA FAQs to learn important information about such topics as unidentified owners and unclaimed property, recordkeeping, disbursements, general banking, reconciliation, and more. Find the FAQs at **www.wsba.org/for-legal-professionals/member-support/practice-management-assistance/iolta-faqs.**

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.

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.**

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 >

Virtual Career Guidance Group

This free group meets on the first Thursday of the month at 3 p.m. This is a chance to receive guidance on your résumé, informational interviewing, applying for positions, and where you see yourself in your legal career. This group is led by Dan Crystal, Psy.D. Sign up at **www.wsba.org/for-legal-professionals/member-support/wellness/group-sessions.**

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.

WSBA MEMBER WELLNESS

Pathways to Productivity

Presented in collaboration with the WSBA's Practice Management Assistance Program, this free group meets via Zoom every other week for six sessions from noon–1 p.m. We will continue offering additional six-week-long groups later in the year. If you're a legal professional navigating productivity challenges in the workplace, this group is tailored for you. Learn more and sign up at **www.wsba.org/for-legal-professionals/member-support/wellness/group-sessions.**

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 WSBA staff Adely Ruiz, LSWAIC, and Dan Crystal, Psy.D, meets every other Thursday from 1-2 p.m. Learn more and sign up at **www.wsba.org/for-legal-professionals/member-support/wellness/group-sessions.**

Telehealth is Here!

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

Judges Need Help Too

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

The 'Unbar' Alcoholics Anonymous Group

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

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, valuable HR tools, 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.**

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 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.**

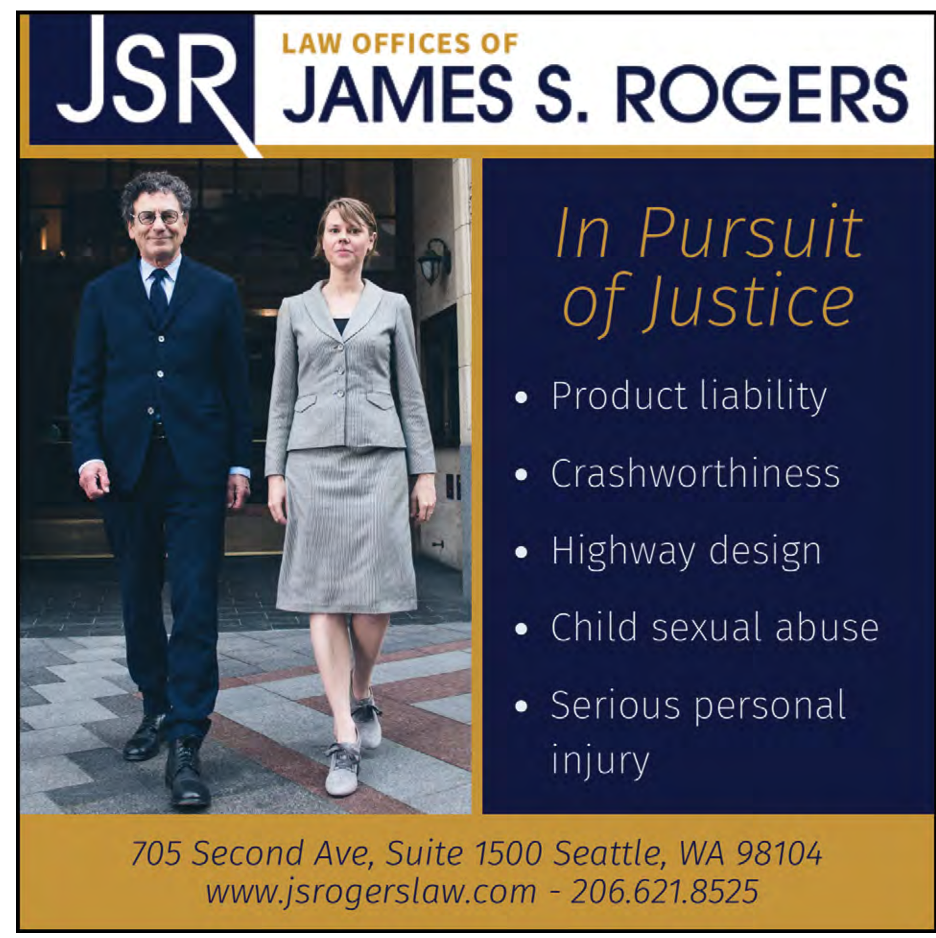
QUICK REFERENCE

April 2024 Usury

The usury rate for April 2024 is 12.00%. The auction yield of the March 4, 2024, auction of the six-month Treasury Bill was 5.313%. The interest rate required by RCW 4.56.110(3)(a) and 4.56.115 for March 2024 is 7.313%. The interest rate required by RCW 4.56.110(3)(b) and 4.56.111 for March 2024 is 10.50%. BN

HAVE SOMETHING NEWSWORTHY TO SHARE?

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



On Board

NEWS FROM THE BOARD OF GOVERNORS & THE WSBA

MARCH 7-8, 2024

A Summary of the Board of Governors Meeting

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

TOP MEETING TAKEAWAYS

1 **New WSBA Standards for Indigent Defense Services.** After several hours of passionate testimony from many interested parties across the state, the Board adopted new standards for indigent defense services that address concerns in three distinct areas: support staff, attorney qualifications, and caseloads. The Washington Supreme Court asked the WSBA's Council on Public Defense (CPD) to review the current standards based on a watershed national public defense study released last fall. The CPD had already been studying concerns about caseload since early 2022, and the national study underscored the daily experiences of Washington defenders—in recent years, there has been a steep increase in the number and complexity of cases, especially compared to 50 years ago when the standards were first written. Before voting, the Board heard from public defenders advocating for much-needed relief to be able to adequately safeguard Washington citizens' constitutional right to counsel as well as from others, such as prosecutors and county representatives, concerned that the new standards would cause significant financial hardship and unintended consequences in the criminal legal system.

The newly adopted WSBA defense standards, as prescribed by RCW 10.101.030, will serve as guidelines to counties and cities as they adopt their own local standards for delivery of public defense services. Separately, the Washington Supreme Court maintains its own *Standards for Indigent Defense*, which are codified in court rules that govern lawyer ethical and professional obligations. With adoption of new defense standards based on the CPD's recommendations, the WSBA is now asking the court to do the same. More information about the new standards and what comes next is available here: **www.wsba.org/news-events/media-center/media-releases/state-bar-adopts-new-public-defense-standards**.

2 **Local Heroes.** The WSBA recognized Allan Bonney and Lisa Dickinson as Local Heroes, an honor bestowed by the WSBA president in partnership with county bar associations to recognize colleagues who make noteworthy contributions to their communities. Both were nominated by the Spokane County Bar Association. Bonney was heralded for his work with the Spokane Bar's Volunteer Lawyers Program, especially his efforts to help community members facing hardships after the state's post-pandemic eviction moratorium was lifted. Dickinson was honored for her mentoring work in the local legal community and tireless advocacy for Spokane on the state and national levels.

3 **Legal Technology Task Force.** The Board chartered a new task force and approved appointment of Chair Jenny Durkan to help fulfill one of the WSBA's strategic priorities addressing technology-related opportunities and threats for legal practitioners. Over the next 15 months, the task force will undertake a comprehensive assessment and investigation of the legal technology landscape in Washington and across the U.S. The final goal is a report to the Board with recommendations to support and strengthen the use of technology in WSBA members' practices—emphasizing effective, efficient, and ethical use of technology that enhances equitable access to justice.

4 **Go Zags!** The Board held its meeting at Gonzaga University School of Law and took the opportunity to get to know the next generation of Bulldog lawyers and the Spokane community. Events included a community service project at the Habitat for Humanity Spokane storefront, a reception with Spokane County Bar Association leaders, a welcome by Dean Jacob Rooksby, a panel discussion with current law students, attendance at the annual Quackenbush Lecture featuring U.C. Berkeley School of Law Dean Erwin Chemerinsky speaking on the topic of "Reforming the Supreme Court," and a meeting with the student bar association.

MORE ONLINE

The agenda, materials, and video recording from this Board of Governors meeting (held at the Gonzaga University School of Law in Spokane), as well as past meetings, are online here: **www.wsba.org/about-wsba/who-we-are/board-of-governors**.

SAVE THE DATE

The next regular meeting is May 2-3, 2024, in Richland. To subscribe to the Board Meeting Notification list, email barleaders@wsba.org.

WSBA NEWS

The Washington Supreme Court Adopts Many Recommendations From the Bar Licensure Task Force

WSBA leaders who served on the Washington Bar Licensure Task Force announced breaking news: The Supreme Court just adopted many of the recommendations from the task force, including implementation of the NextGen Bar Exam and creation of an experiential pathway as an alternative to the bar exam for law-school students, law-school graduates, and APR 6 Law Clerk candidates. The justices expect to take up the task force's recommendations regarding the character and fitness process at a future en banc.

Read more on the court's website at **www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newid =50389** or scan the QR code to learn more at **wsba.org**.

THE BOARD ALSO:

- **Held a panel** with county-bar leaders from across the state to hear what's happening in different legal communities and understand how the WSBA can support them.
- **Held a budget retreat** to talk about the process and priorities shaping the 2025 WSBA budget. The Board previously set a no-increase license fee for 2025, holding the fee steady for the sixth year in a row.
- **Approved** the Court Rules and Procedures Committee's comment to the Washington Supreme Court in opposition to proposed amendments to CR 28, regarding court reporters, and CR 30, regarding videographers. BN

APPEALS

FULL-SERVICE APPELLATE PRACTICE

Jason W. Anderson • Nicholas A. Carlson • Linda B. Clapham
Rory D. Cosgrove • Michael B. King • James E. Lobsenz
Gregory M. Miller • Isaac C. Prevost • Sidney C. Tribe

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Former King County Superior Court Judge

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In Remembrance

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

Please email notices to **wabarnews@wsba.org.**

Douglas Albright, #5027, 12/19/2023

Thomas Burke, #6577, 5/18/2023

Robert Magnuson, #1183, 11/2023

Hon. Harry McCarthy, #8946, 1/8/2024

Angela Morrill, #26559, 8/8/2023

Jon Parker, #5769, 6/19/2023

Carl Roehl, #832, 6/28/2023

George Taylor, #12852, 11/28/2023

Chester Teklinski, #11542, 1/8/2024

Daniel Tolfree, #3026, 3/3/2024

Frances Walker, #55437, 8/8/2023

David Weeks, #7455, 3/12/2023

John Wood, #8208, 12/4/2023

MORE ONLINE

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

wabarnews.org

Join Me in Leaving a Legacy of Justice

"Leaving retirement assets to support the Endowment for Equal Justice was easy and supports a cause my husband and I care deeply about: equal justice for all. It took us just a few minutes to update my 401k beneficiary designation form and file it with my plan administrator.

Please join me in remembering the Endowment in your estate planning, and make justice for all part of your own legacy."

— **Gail Mautner**
Shareholder, Lane Powell PC

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annie@legalfoundation.org

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Notices

DISCIPLINE & OTHER REGULATORY NOTICES

THESE NOTICES OF THE IMPOSITION OF DISCIPLINARY SANCTIONS AND ACTIONS are published pursuant to Rule 3.5(c) of the Washington Supreme Court Rules for Enforcement of Lawyer Conduct. Active links to directory listings, RPC definitions, and documents related to the disciplinary matter can be found by viewing the online version of *Washington State Bar News* at **www.wabarnews.org** or by looking up the respondent in the Discipline Notice Directory at **https://mywsba.org/PersonifyEbusiness/DisciplineNoticeDirectory**.

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

Disbarred

John O'Neill Green (WSBA No. 33827, admitted 2003) of Liberty Lake, WA, was disbarred, effective 2/22/2024, by order of the Washington Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of Texas. Henry Cruz acted as disciplinary counsel. John O'Neill Green represented themselves. For more information, see *https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/Sanction.cfm&JWID=6435015.*

Decision document: The Washington Supreme Court Order.

Kristi Pimpleton (WSBA No. 34419, admitted 2003) of Bothell, WA, was disbarred, effective 2/19/2024, by order of the Washington Supreme Court. Erica Temple acted as disciplinary counsel. Kristi Pimpleton represented themselves. Randolph O. Petgrave, III was the hearing officer.

The lawyer's conduct violated the following Rules of Professional Conduct: 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.15A (Safeguarding Property), 1.16 (Declining or Terminating Representation), 3.2 (Expediting Litigation), 3.4 (Fairness to Opposing Party and Counsel), 8.1 (Bar Admission and Disciplinary Matters), 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation), 8.4(d) (Prejudicial to the Admin of Justice), 8.4(j) (Violate a Court Order).

Pimpleton was found to have violated the Rules of Professional Conduct by: 1) failing to diligently represent a client and/or failing to appear for the client's hearing; 2) failing to keep the client reasonably informed about the status of the case, and failing to respond to the client's reasonably necessary requests for information, and/or failing to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; 3) failing to refund unearned fees; 4) failing to respond to disciplinary counsel's requests for a written response to the grievance and for documents, failing to appear at deposition, and/or failing to produce records in response to a subpoena; 5) failing to refund unearned fees; 6) failing to deposit client funds into a trust account; 7) failing to respond to disciplinary counsel's requests for a response to a grievance; 8) failing to respond timely to discovery requests from opposing counsel, failing to respond to motions to compel and for sanctions, and/or failing to diligently represent a client; 9) failing to respond timely to discovery requests from opposing counsel, failing to respond to motions to compel and for sanctions, failing to appear at hearings on the motions, and/or failing to comply with the court orders; 10) failing to communicate with client about the status of the case, providing client with inaccurate information, and/or failing to respond to client's reasonable requests for information; 11) collecting and retaining fees for representation when the services were not performed and/or failing to refund unearned fees upon termination of the representation; 12) failing to promptly respond to a client's grievance; 13) failing to communicate with client regarding the client's case and/or failing to respond to the client's requests for information; 14) failing to diligently handle client's case and/or abandoning the client's case; 15) charging and collecting an unreasonable fee and/or failing to refund unearned fees; 16) failing to respond promptly to a client's requests for information, failing to keep client reasonably informed about the status of the matter, failing to explain the matter to the extent reasonably necessary to permit client to make informed decision regarding the representation, and/or providing with false and/or misleading information; 17) failing to diligently represent client; 18) continuing to charge client a retainer fee after client already paid the fee by credit card and/or collecting fees for work that was not performed; 19) falsely representing to ODC that lawyer spoke with opposing party's lawyer regarding client's case and/or submitting a false billing record to ODC; 20) failing to respond to discovery requests from opposing counsel, failing to respond to a motion to compel discovery, failing to appear for a hearing on the motion, and/or failing to diligently represent a client; 21) failing to pay the sanctions ordered by the court; 22) failing to communicate with client about the status of the case, failing to inform client about opposing counsel's discovery requests and motion to compel,

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Notice of Hearing on Petition for Reinstatement of William Henry Waechter

A petition for reinstatement after disbarment has been filed by William Henry Waechter (WSBA No. 20602), who was admitted in 1991 and disbarred in 2018. A hearing on Waechter's petition will be conducted before the Character and Fitness Board on Friday, April 19, 2024. Anyone wishing to do so may file with the Character and Fitness Board a written statement for or against reinstatement, setting forth factual matters showing that the petition does or does not meet the requirements of Washington Supreme Court Admission and Practice Rule (APR) 25.5(a). Except by the Character and Fitness Board's leave, no person other than the petitioner or petitioner's counsel shall be heard orally by the Board.

Communications to the Character and Fitness Board should be sent to Counsel to the Character and Fitness Board, Washington State Bar Association, at OGC@wsba.org. This notice is published pursuant to APR 25.4(a).

and/or failing to respond to client's reasonable requests for information; 23) failing to promptly respond to client's grievance and/or failing to appear for deposition; 24) failing to communicate with client regarding the status of the case and/or failing to respond to client's reasonable requests for information; 25) failing to diligently handle client's case; 26) charging and collecting an unreasonable fee and/or failing to refund unearned fees to client; 27) failing to respond to disciplinary counsel's written requests for a response to a client's grievance, failing to appear for deposition, and/or failing to produce records in response to a subpoena; 28) committing the acts described in the Formal Complaint, thus Pimpleton demonstrated unfitness to practice law.

Decision documents: Hearing Officer's Decision; Disciplinary Board Order Declining Sua Sponte Review and Adopting Hearing Officer's Decision; and Washington Supreme Court Order.

Resigned in Lieu of Discipline

Robert Scott Huff (WSBA No. 20507, admitted 1991) of Mill Creek, WA, resigned in lieu of discipline, effective 2/01/2024. The lawyer agrees that they are aware of the alleged misconduct in disciplinary counsel's Statement of Alleged Misconduct and rather than defend against the allegations, they wish to permanently resign from membership in the Association. Francesca D'Angelo acted as disciplinary counsel. Robert Scott Huff represented themselves.

The Statement of Alleged Misconduct reflects the following violations of the Rules of Professional Conduct: 1.4 (Communication), 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records), 1.16 (Declining or Terminating Representation), 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation), 8.4(i) (Moral Turpitude, Corruption or Disregard of Rule of Law).

Huff's alleged misconduct includes: 1) committing the crime of theft and/or converting client funds; 2) failing to provide a written accounting to the client; 3) failing to maintain a check register and/or failing to maintain a client ledger; 4) making false statements about the amount of client's funds remaining in the trust account; 5) failing to return client's file after the representation terminated; 6) failing to deposit client's checks into trust account; 7) failing to notify the client about receiving the client's checks; 8) failing to provide the client with an accounting of the disbursed funds.

Decision document: Resignation Form of Robert Scott Huff (ELC 9.3(b)).

Interim Suspension

Nathan L. McAllister (WSBA No. 37964, admitted 2006) of Bellingham, WA, is suspended from the practice of law in the state of Washington pending the outcome of disciplinary proceedings, effective 2/15/2024, by order of the Washington Supreme Court. ***This is not a disciplinary sanction.***

Lee Howard Rousso (WSBA No. 33340, admitted 2003) of Renton, WA, is suspended from the practice of law in the state of Washington pending the outcome of disciplinary proceedings, effective 2/16/2024, by order of the Washington Supreme Court. ***This is not a disciplinary sanction.*** BN

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Shariah Olomua
Shariah is originally from Hilo, Hawai'i, and has called Washington home for the last six years. Shariah is a member of the Transactional and Civil Litigation practice groups, focusing her practice on mergers and acquisitions, real estate transactions, corporate formation, and commercial disputes.

NEW PARTNER

Hayden Taylor
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LAWYER ANNOUNCEMENT

Cornelia Brandfield-Harvey

BAR NUMBER: 59746

I am a senior litigation associate at BakerHostetler. I was born and raised in Houston, Texas, and graduated from Columbia University and the University of Houston Law Center. I am the eldest of five daughters. I am also a former internationally-ranked epee fencer and member of the U.S. World Championship Team, Columbia University varsity fencing team, and New York Athletic Club fencing team.

What is the most interesting case you have handled in your career so far and why?

I filed suit against NFL quarterback Deshaun Watson and the Houston Texans on behalf of over 25 massage therapists based on allegations of sexual assault and sexual harassment. The case received national and international press coverage. The case was most interesting because of the bravery of the women who came forward. I was in awe of their courage. If not for them, this story would never have come to light. The case changed my life forever. For the first time I realized the enormous impact I could have as a lawyer, that I could make real change in the world. Because of this case, the NFL changed its personal conduct policy, increasing the penalties for sexual misconduct.

How do you define success as a lawyer?

No fear.

At the end of your career, how would you like to be remembered professionally?

I stayed true to myself and remained authentic. Never change who you are. Clients will appreciate it.

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

Breathe. It will all work out in the end. BN

If you had to give a 10-minute presentation on one topic other than the law, what would it be and why?

I would put on a presentation about the difference in techniques between the three weapons in fencing: epee, foil, and sabre. In epee you can hit anywhere on the body, in foil you can only hit the chest, and in sabre you can only hit from the waist up.

What's your favorite breakfast cereal that you're slightly embarrassed to buy?

Life cereal, cinnamon flavor. So addicting. And I am not embarrassed to admit it! Haha.

What is one thing your colleagues may not know about you?

I have a dark and sarcastic sense of humor!

What is your favorite word?

Bossy.

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

The Good Fight. Diane Lockhart as a senior female partner at a big law firm is a force of nature.

What is the worst movie you've ever seen?

Snow Dogs.

What did you think was cool when you were younger that makes you cringe to think about now?

A rolling backpack with wheels that lit up in different colors. I thought I was set for life.

Staff illustration

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