

WASHINGTON STATE
BAR ASSOCIATION

The state Legislature creates
a dramatic new landscape for
noncompete clauses / p. 42

The Supreme Court
Bar Structure Work
Group wraps up / p. 52

NWLawyer



SEPT. 2019
VOL. 73, NO. 7

T E C H

ISSUES & THE LAW

Into the 'Deep'



How the rise of “deepfakes”—genuine-looking but falsified videos created with easily accessible AI technology—could undermine the reliability of evidence at trial / p. 22

MORE TECH COVERAGE



An inside look at UW’s Technology Law and Public Policy Clinic / p. 26

Two-party consent in the age of the “internet of things” / p. 30

Algorithmic bias in the workplace / p. 34

Offices in Tacoma & Seattle
Connelly-Law.com | 253.593.5100



PROVEN ADVOCATES - PROVEN RESULTS



John R. (Jack)
Connolly



Lincoln C.
Beauregard



Micah R.
LeBank



Nathan P.
Roberts



Julie A.
Kays



Amanda M.
Searle



Evan T.
Fuller



Meaghan M.
Driscoll



Marta L.
O'Brien



Samuel J.
Daheim



Jackson R.
Pahlke



Matthew J.
Wurdeman

We look forward to assisting you in your pursuit of justice.

TRUTH | JUSTICE | ACCOUNTABILITY | EQUAL ACCESS

PROTECT YOUR FIRM. HELP MORE PEOPLE. BE THE LAWYER YOU WANT TO BE.

Find out more about your WSBA-endorsed carrier at www.alpsnet.com/nwlawyer

MALPRACTICE INSURANCE FOR THE

LAW FIRM

WORTH PROTECTING

Endorsed by more state bars
(including yours) than any other carrier.



*THE NATION'S LARGEST DIRECT WRITER
OF LAWYERS' MALPRACTICE INSURANCE.*

(800) 367-2577 ● www.alpsnet.com ● learnmore@alpsnet.com

ON THE DOCKET

FEATURES

22

Too Good to Be True?

Deepfakes pose a new challenge for trial courts

→ BY RIANA PFEFFERKORN

26

Clinical Diagnosis

UW's Technology Law and Public Policy Clinic—old law in new tech, and how lawyers can guide smarter policy

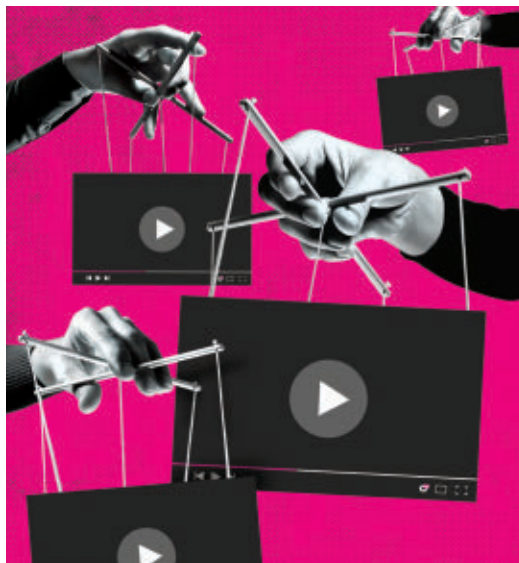
→ BY COLIN RIGLEY

30

Is My Doorbell Breaking the Law?

Two-party consent in the age of the “internet of things”

→ BY MICHAEL CHERRY



34

Prejudice by Proxy

Algorithmic bias in employment decisions and the modern “cat’s paw”

→ BY ANDRÉ M. PEÑALVER

38

Blockchains and Streaming and AI, Oh My!

Technology, law, and society—are we at an inflection point?

→ BY KAUSTUV M. DAS

42

Reshaping Noncompetes in Washington

The state Legislature creates a dramatic new landscape

→ BY LAWRENCE R. COCK, JACK M. LOVEJOY, AND BENJAMIN BYERS

COLUMNS

5

Editor’s Note

BY KIRSTEN ABEL

10

President’s Corner

BY BILL PICKETT

12

Ethics and the Law

BY MARK J. FUCILE

16

Innovation in Law

BY JORDAN L. COUCH

18

Write to Counsel

BY LAUREN E. SANCKEN

48

Treasurer’s Note

BY DAN BRIDGES

ESSENTIALS

- 4 NW Sidebar: There’s More on the Blog
- 6 Inbox
- 52 On Board
- 54 Need to Know
- 56 Discipline and Other Regulatory Notices
- 58 Announcements
- 61 Professionals
- 64 Classifieds
- 68 Beyond the Bar Number: Carolyn Ladd



The WSBA's Official Members' Magazine

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

All opinions, statements, and conclusions expressed in submitted articles and editorial comment appearing herein represent the views of the respective authors and do not necessarily carry the endorsement of the WSBA or its Board of Governors. Likewise, the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

PUBLISHED BY THE
WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Ave., Ste. 600
Seattle, WA 98101-2539

INTERIM EXECUTIVE DIRECTOR Terra Nevitt
206-727-8282
terran@wsba.org

NWLAWYER EDITOR Kirsten Abel
206-239-2127
kirstena@wsba.org

NWLAWYER DESIGNER Jessica Randleklev
206-727-8214
jessicar@wsba.org

NWLawyer Contact Information

QUESTIONS/SUBMISSIONS nwlawyer@wsba.org
LETTERS TO THE EDITOR/COMMENTS nwlawyer@wsba.org
IN REMEMBRANCE SUBMISSIONS nwlawyer@wsba.org
NWLAWYER ONLINE www.wsba.org/news-events/nwlawyer

NWLawyer is published nine times a year by the Washington State Bar Association, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539, and mailed periodicals postage paid in Seattle, Washington (ISSN 2327-3399). For inactive, emeritus, and honorary members, a free subscription is available upon request (contact nwlawyer@wsba.org). A portion of each member's license fee goes toward a subscription. For nonmembers, the subscription rate is \$36 a year. Washington residents, please add sales tax; see http://dor.wa.gov for sales tax rate.

POSTMASTER: SEND CHANGES OF ADDRESS TO:

NWLawyer, Washington Bar Association
1325 Fourth Avenue, Suite 600,
Seattle, WA 98101-2539

© 2019 by Washington State Bar Association.



The 2019 APEX Award Winners

Roger Sherrard
Award of Merit

Susan L. Carlson
Angelo Petrucci Award for Lawyers in Government Service

Hon. G. Helen Whitener
Justice Charles Z. Smith Excellence in Diversity Award

Ann M. Guinn
Lifetime Service Award

Erin Lovell
Norm Maleng Leadership Award

Hon. Brett Buckley
Outstanding Judge Award

Shaun T. Greer
Outstanding Young Lawyer Award

The Groves Law Offices, L.L.P.
Pro Bono and Public Service Award – Group

William D. Braun
Pro Bono and Public Service Award – Individual

Mike Pettit
Professionalism Award

Fred Rivera
Sally P. Savage Leadership in Philanthropy Award

The APEX Awards Celebration

Reception, Presentations, and Banquet

Thursday, September 26, 2019

5:30 p.m. – 8:30 p.m.

Sheraton Seattle Hotel

Reserve online today at:
www.wsba.org/awards



WASHINGTON STATE BAR ASSOCIATION

WSBA Board of Governors

| | |
|--------------------------------|------------------------------------|
| PRESIDENT | William D. Pickett |
| PRESIDENT-ELECT | Rajeev D. Majumdar |
| 1ST DISTRICT | Sunitha Anjilvel |
| 2ND DISTRICT | Carla J. Higginson |
| 3RD DISTRICT | Kyle Sciuchetti |
| 4TH DISTRICT | Daniel D. Clark |
| 5TH DISTRICT | Peter J. "P.J." Grabicki |
| 6TH DISTRICT | Hon. Brian Tollefson (Ret.) |
| 7TH-NORTH DISTRICT | Paul Swegle |
| 7TH-SOUTH DISTRICT | Jean Y. Kang |
| 8TH DISTRICT | Kim Hunter |
| 9TH DISTRICT, TREASURER | Dan Bridges |
| 10TH DISTRICT | Christina A. Meserve |
| AT-LARGE | Alec Stephens |
| AT-LARGE | Athanasios Papailiou |
| AT-LARGE (NEW & YOUNG LAWYERS) | Russell Knight |

2018 - 2019 WSBA Editorial Advisory Committee

| | |
|---------|-----------------------------|
| CHAIR | Ralph Flick |
| MEMBERS | Ruby Aliment |
| | Christopher Campbell |
| | Maria Fox |
| | Benjamin Gould |
| | Daniel Himebaugh |
| | Karrin Klotz |
| | Heidi Urness |
| | Michelle Young |

WSBA Contact Information

| | |
|---|---|
| WSBA SERVICE CENTER | 800-945-WSBA (9722) 206-443-WSBA (9722) questions@wsba.org |
| WSBA WEBSITE | www.wsba.org |
| WSBA ONLINE STORE | www.wsba.org |
| WSBA ETHICS LINE | 206-727-8284 800-945-9722, ext. 8284 |
| WSBA CONNECTS MEMBER ASSISTANCE PROGRAM | 800-765-0770 |
| WSBA PRACTICE MGMT. ASSISTANCE | 800-945-9722, ext. 5914 |
| NWSIDEBAR, THE WSBA BLOG | 206-733-5914 blog@wsba.org nwsidebar.wsba.org |
| WSBA CAREER CENTER | jobs.wsba.org |
| NWLAWYER | nwlawyer@wsba.org |

NWLawyer Submission Guidelines

NWLawyer relies on submissions from WSBA members and nonmembers that are of interest to readers. Articles should not have been submitted to any other publications and become the property of the WSBA. Articles typically run 1,000–2,500 words. Citations should be incorporated into the body of the article and be minimal. Please include a brief author's biography, with contact info, at the end of the article. High-resolution graphics and photographs (preferably 1MB in size) are requested. Authors should provide a high-resolution digital photo of themselves with their submission. Send articles to nwlawyer@wsba.org. The editor reserves the right to edit articles as deemed appropriate. The editor may work with the writer, but no additional proofs of articles will be provided. The editor reserves the right to determine when and if to publish an article.

NWLawyer Advertising

To purchase Display Ads, Announcements, and Professionals, and to receive a media kit, contact Robert Page of SagaCity Media Inc. at rpage@sagacitymedia.com, 206-454-3035. **Classifieds:** Advance payment required. See classified pages for rates, submission guidelines, and payment information. NWLawyer is published nine times a year with a current circulation of approximately 34,000.

THERE'S MORE ON THE BLOG



NWSidebar

The Voices of Washington's Legal Community

Lawyer as Witness: What the Court of Appeals Said About RPC 3.7



Mark Fucile explains the Supreme Court's analysis of RPC 3.7. RPC 3.7(a), which generally prohibits a lawyer from acting "as

advocate at a trial in which the lawyer is likely to be a necessary witness." [...]

nwsidebar.wsba.org

What Washington's New Law on Noncompete Agreements Means for Physicians



Gov. Inslee signed a new law that may upend how noncompetes are used with physician employees. The new

law imposes a potentially sizeable cost for overly broad restrictions. [...]

nwsidebar.wsba.org

Top Recent Developments in Ethics Rules Every Washington Lawyer Should Know



Get the latest updates on ethics amid new challenges to the rule of law. And take advantage of the last chance to save on

related on-demand CLEs. [...]

nwsidebar.wsba.org

Flying Cars, Deepfakes, and Other Boundary-Pushing Tech

I got into an argument with my partner recently while heading south down I-5. Lamenting the traffic, he remarked, "I'm glad flying cars aren't too far off."

I scoffed and responded, "That's ridiculous. Flying cars are decades away." He disagreed. I continued: "How would they be regulated? Where would they be allowed to fly? Would every fender bender become a fatality? Do we even have the technology? No way is this happening." Then he took out his phone (I was driving) and proved me wrong. Flying cars are, in fact, happening.

Just a few months ago, *The Atlantic* reported on an all-electric flying taxi made by a German startup company called Lilium. The company claims that sometime in the mid-2020s, "reserving a seat on one will be as easy as hailing an Uber." And speaking of Uber, the ride-share company announced that it could begin testing its line of flying vehicles in several cities including Los Angeles and Dallas by next year.

For the record, I'm still skeptical. But the point is that even if we consider ourselves to be technologically sophisticated, the almost-continuous development of new technologies makes it nearly impossible to keep up. And although it's fair for us to be a little under-informed in our personal lives, both accidentally (e.g., missing the boat on flying cars) or on purpose (e.g., ignoring the uncomfortable fact that we are constantly being tracked by our smartphones), keeping up with technology can be crucial in the legal world. Especially when downstream consequences of technology start to creep beyond the limits of current law.

In this issue, we delve into some of the technologies that are pushing boundaries and presenting challenges for legal professionals, judges, and lawmakers. Take, for example, the troubling and recent rise of the deepfake—a genuine-looking but falsified video that can make someone appear

Kirsten Abel is the *NWLawyer* editor and can be reached at kirstena@wsba.org.

to say or do something that they never said or did, created with easily accessible artificial intelligence programs.

"As they become increasingly common and realistic, deepfakes, by their very existence, will undermine the reliability of genuine evidence, creating headaches for the proponents of authentic videos," writes Ri-ana Pfefferkorn, an associate director of surveillance and cybersecurity at the Center for Internet and Society at Stanford Law School. Read more on page 22.


Also in this issue: a story about the University of Washington's Technology Law and Public Policy Clinic, a group that's on the front lines of thinking about laws that don't



CALL OUT Write for This Magazine

Did you know that most of the content published in *NWLawyer* comes from unsolicited submissions?

Help us make *NWLawyer* more representative of you and of the Washington legal community. Send us an article, an outline, an idea, or ask for a how-to guide on writing for the magazine, at nwlawyer@wsba.org. Submissions are reviewed by the *NWLawyer* editorial team, in consultation with an Editorial Advisory Committee made up of volunteer WSBA members, to determine when and if they will be published. Once accepted for publication, submissions are edited as appropriate for length, accuracy, clarity, grammar, and conformity with *NWLawyer* style.

exist yet to regulate technology that does (page 26); an exploration of the meaning of two-party consent in a world increasingly filled with recording devices (page 30); a closer look at the risks of utilizing biased hiring algorithms (page 34); and more. 

ON THE COVER
Staff illustration; source photo ©Getty/gremlin

**SMITH
GOODFRIEND P.S.**

CIVIL APPEALS

Washington's oldest, largest, and most experienced appellate law firm

206-624-0974
www.washingtonappeals.com

Available for referral, consultation and association in state and federal appeals

From Unrealistic to Flat-Out Wrong



The authors of “10 Critical Reforms Local Prosecutors Should Embrace” [June 2019 *NWLawyer*] argue that prosecutors should not seek jail for parents who can’t pay child-support debts. The short reply: Prosecutors don’t seek jail for those parents. We only seek it

for parents who should be able to pay but aren’t; and only following a court’s contempt findings and order, as well as intervening hearings.

Before a child-support contempt case is referred to a prosecutor’s office by the Division of Child Support (DCS), payments have been sporadic or nonexistent for months or years. Each case is screened to determine whether the parent has legitimate barriers to paying; if so, it isn’t referred. DCS offers payment agreements; social service application information; and programs to help obligors find work, housing, and transportation. Obligor may seek child-support modifications and administrative hearings to reduce or eliminate state-owed child-support debt. DCS often makes graduated payment agreements in which an obligor’s driver’s license is reinstated immediately on the promise of future compliance. Contrary to the article’s assertion, drivers’ licenses may be suspended—not revoked—by administrative procedure—not prosecutors—for failing to pay child support.

Prosecutors review the cases again before filing to make their own determinations if payment is viable. Many offer diversion programs; payment agreements; and information about social services, state-debt reduction, and modification prior to, or during the contempt action. Prosecutors and DCS do not seek interest on past-due support arrears despite statutory authority to do so. Obligor are entitled to court-appointed counsel when incarceration is requested. In Pierce County, almost all incarcerations are from bench warrants because the obligor failed to appear at a court hearing. “Bail” paid in these cases is paid directly to the obligor’s child support and results in his or her release. If the obligor doesn’t immediately bail out after arrest, a bail hearing is held the next court day. Some obligors are released with proof of employment or other reasons without bail being set. Years of efforts are made by county prosecutors, courts, and DCS to get *capable* parents to pay their support before incarceration is considered. Unfortunately, some parents who can financially support their children ignore their responsibility until incarceration is sought.

Sarah Richardson

Pierce County prosecuting attorney, Tacoma

Let us hear from you! We welcome letters to the editor on issues presented in the magazine. Email letters to nwlawyer@wsba.org.

NWLawyer reserves the right to select letters for publication and to edit letters for length, clarity, and grammatical accuracy. NWLawyer does not print anonymous letters, or more than one submission per issue from the same contributor.

• • •

The general theme of “10 Critical Reforms Local Prosecutors Should Embrace” is that prosecutors should do something we don’t like to do: ignore laws. The authors ask prosecutors to “reject the three-strikes approach”—the authors should ask the voters to pass an initiative invalidating that law. Rather than requesting prosecutors to “stop charging people for possessing small amounts of drugs,” they should ask the Legislature to legalize possession of, say, two grams of methamphetamine. If “larger amounts should not be charged as a felony and these individuals should never be imprisoned,” try to convince legislators that a person who is in possession of a kilo of cocaine should not be charged with a felony or go to jail. Are the authors serious in saying “prosecutors should never charge youth in adult court”? Good luck trying to convince anyone, much less the Legislature, that a 17-year-old charged with first-degree murder should stay in juvenile court and be released into the community when he turns 25. When they say “bail should be considered only for violent offenses,” are they asking to repeal CrR 3.2, which allows bail if the defendant is likely to fail to appear for future court hearings or intimidate witnesses?

The authors are wrong about some things: Prosecutors don’t “seek to have a driver’s license revoked due to someone’s failure to pay child support.” This happens by an administrative action and prosecutors don’t have any authority to block or approve such an action. In fact, prosecutors often try to convince the administrative agency not to revoke a person’s license on the condition that he or she seek employment. “Ending discretionary fines and fees” on indigents has already been accomplished by statute and case law.

But the most objectionable part of the article is the idea that prosecutors do not take their role in providing justice to all members of the state seriously. My experience with prosecutors throughout the state is that we try to treat those with mental illnesses with concern. We try to have consistent bail practices and request bail only if the defendant is a danger to the public or a flight risk. Prosecutors do not attempt to incarcerate everyone charged with a crime, and we supported a law

GET SOCIAL!



youtube.com/washingtonstatebar



facebook.com/wastatebar.main



twitter.com/wastatebar

decriminalizing Driving While Suspended in the Third Degree. As much as any group, prosecutors have been a driving force in getting drug courts, mental health courts, and veteran courts in place throughout the state. Prosecutors deliberate over plea agreements and consider what the consequences of a guilty plea will be to the defendant much more than the authors recognize.

Terry J. Bloor

Chief criminal deputy prosecuting attorney, Benton County



The authors of “10 Critical Reforms Local Prosecutors Should Embrace” do not respect our democratic process for enacting laws. The authors could take their platform of effectively legalizing meth, crack, and heroin and eliminating jail for shoplifters, trespassers, and those who threaten anyone but a household or family member to the Legislature or the voters. But they know that most citizens support holding individuals responsible for their crimes. ... Conspicuously absent from the article is any consideration of how these “reforms” would affect victims of crime or public safety.

One “reform” is for prosecutors to refrain from charging most misdemeanor crimes except in “extraordinary cases.” Since nearly every prosecutor will give first-time offenders an opportunity to divert a nonviolent misdemeanor charge (usually leading to a dismissal), it’s clear that the authors intend this proposal to benefit repeat offenders. What would be an “extraordinary case”? A fifth shoplifting arrest? A tenth? There’s not a word about the store owner who is repeatedly victimized by thieves.

The authors want prosecutors to “act to end money bail,” but ignore that the court rules presume that a defendant will be released on personal recognizance and money bail may be imposed only if the defendant has a history of not showing up for court or there is a substantial danger that the defendant will commit a violent crime, intimidate a witness, or otherwise unlawfully interfere with the administration of justice. CrR 3.2; CrRLJ 3.2. In other words, money bail is imposed only if a defendant has done something to earn it. It is disappointing that the authors believe those who show disrespect for

the justice system by repeatedly failing to appear for court hearings should be rewarded with an end to money bail. Moreover, prosecutors don’t impose bail; judges do.

The authors don’t tell us how they’ve determined that “the war on drugs has failed” but if it is because lots of people still take drugs despite them being illegal, then we should throw in the towel on the “war” against murder, robbery, and all other crimes, as folks keep engaging in these behaviors despite significant penalties for doing so. The idea that drug crimes are victimless ignores reality. Meth, crack, and heroin destroy the lives of far too many and even more are the victims of the behaviors spawned by drug addiction (often the very behaviors the authors want prosecutors to ignore). While the authors want even those possessing large amounts of meth, crack, and heroin to “never be imprisoned,” they don’t offer any alternatives to keep the community safe from the effects of these drugs. The authors’ patronizing statement that prosecutors “should learn to pursue treatment” ignores that prosecutors have invested significant resources in drug courts and mental health courts across the state.

If instead of upbraiding prosecutors, the authors worked to secure more resources for mental health and drug treatment, they would find support from all corners. Holding people accountable for destructive behaviors such as stealing, trespassing, resisting arrest, driving dangerously, and threatening others is important and jail is often an appropriate sanction. The result of the authors’ “reforms” would be to normalize this behavior by removing the stigma and penalties associated with it. That will only lead to more of this kind of behavior, not less, and runs contrary to prosecutors’ responsibility to work to keep our communities safe and livable.

Jon Walker
Marysville

Water Worries

I was disappointed to see that there was no discussion of environmental pollution, or the regulation (or lack thereof) of environmental pollution on farms, in the June issue of *NWLawyer* titled “Food for Thought: Washington’s agriculture economy is a

growing source of legal issues.” Farm operations can be the source of significant water-pollution problems that pose threats to environmental resources and public health here in Washington, yet agricultural pollution is severely under-regulated and often overlooked.

A single mature dairy cow can produce 120 pounds of feces and urine per day. If improperly handled, livestock manure can pollute our waterways and cause eutrophication, resulting in algal blooms that can reduce dissolved oxygen in water and cause hypoxia and fish deaths. Nutrient pollution also poses bacterial risks and contaminates shellfish beds, resulting in periodic shellfish bed closures in Washington. [citation omitted.]

The Yakima Valley has suffered for years from nitrate-contaminated drinking water from large upstream dairies. Under the terms of the 2015 Cow Palace settlement (an RCRA case), four dairies in Yakima must ensure their manure lagoons are lined at all times and provide clean drinking water to residents affected by the pollution. [citation omitted.]

Despite that, there are 37,000-plus farms in Washington and only a dozen or so are currently regulated by the Clean Water Act. The Clean Water Act exempts farms, with the exception of CAFOs (Concentrated Animal Feeding Operations). Several farm groups are currently challenging the state’s most recent update to the CAFO permit, which Puget Soundkeeper is also appealing to strengthen water-quality protections. [citation omitted.]

Non-dairy or livestock farm operations can also cause water pollution due to pesticide use, ditching and irrigation practices, and erosion resulting in sedimentation and turbidity in nearby waters. Voluntary incentive programs have failed to produce measurable water-quality improvements. Despite the known pollution problems from farms in Washington, the Department of Ecology is still struggling to make recommendations regarding best management practices. [citation omitted.]

I understand that farmers in the United States are working within a broken food system that pressures producers to consolidate and turn to industrialized practices, and that some feel that farm regulations are increasingly complex and difficult to navigate. These are systemic issues that need to be



We fight insurance bad faith.



PlaintiffLit.com • 206.203.9100

SPEEDING TICKET?
TRAFFIC INFRACTION?
CRIMINAL MISDEMEANOR?



Keep it off your record,
Keep insurance costs down

Jeannie P. Mucklestone, P.S. INC.

PO BOX 565
Medina, Washington 98039

(206) 623-3343

jeannie@mucklestone.com
www.mucklestone.com

- Successful Results
• Extensive experience
• Former Judge Pro Tem in King County
• Featured in Vogue magazine May '03 as a top lawyer for women in Washington
• Front page of Seattle Times
• "Drivers fighting tickets and winning" June 1, 2006
• Visa/Mastercard accepted

Inbox

CONTINUED >

addressed to ensure that our farmers can continue to make a living in a way that's environmentally sustainable. But at the local level, Washington has more than 2,000 polluted waters listed in areas where agriculture is the primary land-use activity, and this problem merits more attention and discussion.

Alyssa Barton

Puget Soundkeeper Alliance policy manager and executive coordinator, Seattle

Unified Bars Don't Pass the Smell Test

The "President's Corner" column in the June 2019 issue of NWLawyer clearly illustrates the indefensibility of the mandatory bar system. Regarding ESHB 1788, President Bill Pickett states: "The WSBA Board of Governors officially took a stand of opposition." This is, pure and simple, forced speech. Every WSBA member, whether or not they made a Keller deduction, is represented by the Bar and the Board of Governors. When the Board of Governors takes a political position, it does so on behalf of each member of the WSBA, including those who disagree with the Board's position. This is clearly violative of the recent and much-discussed Janus case, wherein the Supreme Court stated that "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning," and that "[c]ompelling a person to subsidize the speech of other private speakers raises ... First Amendment concerns" (italics in original). Furthermore, it forces individuals (like me) to relinquish their right to silence in order to protest such actions, an activity specifically disfavored by the Supreme Court in Pruneyard Shopping Center v. Robins and Pacific Gas & Electric Co. v. Public Utilities Commission.

In operating the Bar Structure Work Group, the WSBA is surely approaching the issue from the point of view of attempting to keep in place as much of

the existing bar structure as possible, changing or eliminating only what is necessary. The better and more constitutional approach is to scrap EVERY aspect of the bar system and start from scratch, implementing (and, by necessity, mandating) ONLY what is absolutely necessary. A disciplinary system? Certainly. Administration (to some degree)? Of course. Charitable or public interest work? I'm sorry, but as laudable a goal as that may be, it simply isn't a requirement to operate a bar. Political advocacy? Certainly not.

Forcing members to pay dues and join the Bar is, to some extent, a curtailment of their free speech. (Note, however, that even the payment of dues may be questionable under Buckley v. Valeo.) And like any other abridgement of a fundamental right, it should be narrowly tailored to abridge that right as slightly as possible. The gold standard here is that there are (I believe at present) 18 states that have non-mandatory bars. They have found a way to have a voluntary bar system while still maintaining discipline and administration. Therefore, a system evidently exists (and works) that is less restrictive than the unified bar system. Consequently, Washington (and all other unified bars) have a high constitutional burden to prove that the unified bar system, which abridges a fundamental right to a greater degree than a voluntary bar system, is necessary—nay, compelling—in light of the existence of a viable and less-restrictive option. The existence and continued success of voluntary bar systems proves that this burden has not, and cannot, be met. The WSBA does a disservice to its (forced) membership by ignoring constitutional precedent and fighting to maintain a unified bar.

Christopher Porter
Olympia

Editor's note: The WSBA does not operate the Bar Structure Work Group. The Washington Supreme Court convened this Work Group in November 2018, mandated its composition, and chartered the work it was to do in the next six to eight months. For an update on the Work Group's final meetings in July and recommendations, see page 52.



Powerful
LITIGATION SUPPORT

COURT REPORTING

LEGAL VIDEOGRAPHY

VIDEOCONFERENCING

TRIAL PRESENTATION

MOCK JURY SERVICES

LEGAL TRANSCRIPTION

COPYING AND SCANNING

LANGUAGE INTERPRETERS

NAEGELIUSA.COM

(253) 565-4400

(206) 622-3376

(800) 528-3335

**SERVING ALL OF WASHINGTON
AND THE NATION**

Let us exceed your expectations. **NAEGELI** Deposition and Trial continues to set the bar by offering the highest level of litigation support services for the legal community. Since our company's inception in 1980, we have been leading the industry and pushing the boundaries of innovation. **NAEGELI** utilizes only the most qualified professionals to assist you and your client at every stage of the legal process.



NAEGELI
DEPOSITION & TRIAL

A Word on Thankfulness

Thoughts from an inspired, humbled, and motivated departing president

When the gavel falls at the end of our September Board meeting, my season of service as WSBA president will conclude. As the end of my term approaches, I am often asked two specific questions about my tenure that I would like to share:

The first question always goes something like, “Can you even wait for this [insert colorful language] to be over?”

The second question is invariably, “Was it worth it?”

My response: While I am looking forward to having more time to actually practice law, my term as president has passed quickly and, when all is said and done, I have been blessed as a result. More directly to the point, I’m not running on empty. Rather, I am profoundly thankful for the opportunity to serve both the public and our Bar membership during this season. Why? It has brought incredible people into my life—people I might otherwise never have met, let alone served alongside. These people have taught me more about *giving to others* than I could ever have hoped to understand without their guiding hands. To everyone who stood alongside me on this journey: I will forever be *inspired* by your examples of leadership, *humbled* by your endless love of our profession, and *motivated* by your deep care for others.

Don’t get me wrong, the rearview mirror is not all rose-colored. My hard-earned title of longest-serving WSBA president came with some bumps and bruises, having assumed the mantle six months early after my predecessor resigned for health reasons. The Board of Governors during my term has aired its strong differences of opinion publicly and vocally and, often, discourteously. There has been a good deal of chaotic change at the Bar. And I would estimate that during my 18 months as president, zero days (perhaps even zero hours) passed without a related challenge.

Despite all that, my time leading this incredible organization has more than exceeded my expectations. I held resolutely to my touchstones of “trust, relationship, and service,” which will always yield better outcomes for all. This past year has been one of the most important for the Washington State Bar Association as it grapples with the question of what its structure should be into the future. As expected, times of such great uncertainty often bring turbulence. And it has been my honor—my great honor—to have been a leader through that messy and critical process. While I may have been called into question for my flexibility around things like *Robert’s Rules of Order*, I hope my unwavering adherence to my values—to trust, relationship, and service, to putting people and doing what’s right first and foremost—came through loud and clear.



Bill Pickett
WSBA President

Bill is a trial lawyer licensed to practice law in Washington, Alaska, Oregon, and Arizona. He can be reached on his cell phone at 509-952-1450.

My time leading this incredible organization has more than exceeded my expectations.

A WORD ON THE BAR

Yes, this past year has been a watershed for the state Bar—for the good. Times are, and actually should be, forever changing. We spent a great deal of time discussing the various aspects of unified bars (otherwise known as integrated/mandatory bars), like ours, versus voluntary bar associations; this was the central question for the recently concluded Washington Supreme Court Bar Structure Work Group. But to me, the mandatory-versus-voluntary debate can obscure a critical issue. It’s not whether we should split along regulatory and trade-association-like functions to withstand potential First Amendment and antitrust lawsuits. I submit the more critical question is what bar structure—mandatory or voluntary—best supports the WSBA’s devotion, adherence, and ongoing assistance to the legal profession’s long-standing history of self-regulation and self-governance.

The fact that the legal profession is the *last* of all professions to retain self-regulation and self-governance must not be underestimated. This is a foundation for our democratic adherence to the fundamental principle of the rule of law. It has been said that one danger of losing the unified/mandatory bar is that we will never get it back again. More importantly, I suggest that if we lose the unified/mandatory bar, we will eventually and most assuredly lose self-regulation, and that will mean nothing less than an erosion of the principle of the rule of law.

For those with any doubts about this chain reaction, I suggest looking to the inherent risks for any profession that becomes too deeply connected to legislative regulation as opposed to self-regulation. Make no mistake, our profession does need oversight. However, such oversight must come from those who are ultimately committed to adherence to the rule of law rather than the political divisiveness of the day. We would do well to consider this if and when the next opportunity to distance or divorce our profession from the Legislature comes along. In other words, oversight by a Supreme Court that is sworn to, and understands, the principle of the rule of law is a blessing to a self-regulated legal profession. On the other hand, oversight by an often-divisive political legislature can be a curse that leads to a lack of independent legal professionals and, ultimately, diminished adherence to the rule of law.

Again, I am thrilled to be intimately involved in the WSBA at this point in history, and I hope you are stepping forward to be en-

gaged, too. How we choose to ask and decide questions about the Bar's structure is critical to the future of our profession.

A WORD ABOUT LEADERSHIP

Service as WSBA president presents abundant opportunity to observe, learn, and participate in a growth cycle of leadership with others. Interestingly and perhaps naturally, almost everyone appears to enter into WSBA service with an initial desire to "gain" and/or "get" something. This can include a wide range of selfish to selfless desires: for example, "getting" power, respect, a sense of accomplishment, professional connections, or simply experience. Regardless of the specific reasons one may give as a basis for serving, most, if not all, initially come into a leadership position at the Bar with a transactional expectation—getting something in exchange for serving.

Remarkably, as people continue to engage in service, the focus on "getting" shifts toward "giving." I have both experienced and witnessed this phenomenon. Slowly but surely, the assumptions and blind spots and agendas people bring with them begin to yield to understanding and passion and relationships. When this happens, time, talent, and treasure are abundantly given in service to others. The end result is that hearts change and peoples' lives are truly enhanced in wonderful ways. I have been privileged to see this process unfold at the WSBA over the course of my time as president, most especially in myself. I encourage all future WSBA leaders to fast-track the learning curve and inspire giving in service to others as one of our profession's highest achievements.

A WORD ON TOGETHERNESS

The number of thank-you's I need to convey to people for supporting, challenging, and educating me during my time as president would fill the pages of this entire issue. So let me just say this: I am grateful to each and every one of you—as a colleague, as a friend, as a champion of justice—we stand together. Never forget that our profession was created to *serve* others above all else. We as members of the legal profession are blessed with gifts to serve other human beings in ways that elevate people and communities toward a more trusting, joyful, fruitful life. Let's each one of us strive for this always, in all that we do.

Wherever we go in the future, we go together in trust, relationship, and service.

Peace, Bill 

MCLE BOARD

APR 11 Amendment Discussion Update

On Aug. 28, a majority of the Washington Supreme Court Mandatory Continuing Legal Education (MCLE) Board voted to send to the WSBA Board of Governors for review at its September meeting a recommendation for a suggested amendment to Admission and Practice Rule (APR) 11. (As a Supreme Court board administered by the WSBA, the MCLE Board is tasked with reviewing and suggesting to the Court any new rules or rule amendments related to mandatory CLE.)

On a 5-2 vote, with one of the dissenters noting that he would have voted for the first provision in the suggested amendment as a stand-alone, one-credit ethics requirement, the MCLE Board advanced to the Board a proposal that, if approved by the Court, would identify specific topics for mandatory CLE credits that WSBA members would have to complete as three of their six total ethics credits. The MCLE Board will present the issue to the WSBA Board of Governors for review at the Board's final meeting of the fiscal year, Sept. 26-27 in Seattle.

The amendment originated from a proposal by the WSBA Diversity Com-

mittee and Washington Women Lawyers (with support from eight minority bar associations). A subcommittee of the MCLE Board recommended that Washington follow emerging national trends by amending APR 11 to require in each reporting period: Three credits, one credit in each topic, in (1) equity, inclusion, and anti-bias; (2) mental health and addiction; and (3) technology education focusing on digital security. In the suggested amendment, these three credits would be required as part of the currently required six ethics credits. The MCLE Board reviewed similar CLE requirements in other states—such as California, Illinois, New York, and Florida—and although no other state adopted all three, the subcommittee recommended doing so in order to best educate legal professionals on new types of ethical questions and to make the change at once rather than in a piecemeal manner.

Over 600 comments have been received from WSBA members in response to the proposed amendment. Read them all at www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/mcle-board.

ONLINE: For additional, up-to-date information and comments from MCLE Board members, head to the WSBA blog, <https://nwsidebar.wsba.org/>.



WWL
Washington Women Lawyers

KING COUNTY CHAPTER

A SPECIAL THANK YOU TO OUR 2019 JUDICIAL APPRECIATION LUNCHEON SPONSORS:

PREMIUM SPONSORS

LANE POWELL
PERKINS COIE
K&L GATES

PARTNER SPONSORS

STOEL RIVES
Boies Patterson
DORSEY
Stoel Rives

ASSOCIATE SPONSORS

BENNETT STOGDILL
Fox Rothschild
Littler

VANGUARD SPONSORS

Maitland
Mediation

FRIEND SPONSORS

GROSSMAN
IWAN SWANSON
JAMS

Electronic Files: Same Duties, New Dynamics

BY MARK
J. FUCILE

One of the most significant changes in law practice over the past decade has been the transformation of law firm files from paper to cloud-based electronic form. Although our core duties of competence and confidentiality in managing our files have not changed, the electronic form has altered the dynamics of those duties significantly. Not so long ago, for example, “file security” meant making sure the last person leaving the office in the evening locked the door. Today, by contrast, “file security” involves protecting electronic information from threats that were largely unknown to law practice a generation ago. That doesn’t mean physical security is unimportant—quite the contrary, in an era when the “file room” is often literally carried around on every firm laptop. But the convenience and efficiency of electronic files have created unique new challenges in protecting them.

In this column, we’ll first survey the basic principles that govern use by legal professionals of cloud-based electronic files. We’ll then examine how those principles apply in the context of storage, retrieval, and preservation of electronic files.

BASIC PRINCIPLES

The title of Comments 18 and 19 to Washington’s Rule of Professional Conduct (RPC) 1.6 neatly summarizes our basic duties of file management: “Acting Competently to Preserve Confidentiality.”

The twin comments underscore that protecting client confidentiality is a central element of competently representing our clients. RPC 1.6(c), for example, which is patterned on its American Bar Association (ABA) Model Rule counterpart and was added to the Washington RPC

in 2016, states: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” Comment 18, which was amended at the same time, elaborates on this duty, ties it directly to competence, and includes supervision of third-party vendors enlisted in providing our legal services:

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.

These duties are not simply regulatory requirements that may subject a lawyer to regulatory discipline. “Competence” in a regulatory sense echoes the “standard of care” in the legal malpractice context—with Washington Pattern Instruction (WPI) 107.04 noting: “An attorney has a duty to use that degree of skill, care, diligence, and knowledge possessed and used by a reasonable, careful, and prudent attorney in the State of Washington acting in the same or similar circumstances.” Comment d to Section 60 of the *Restatement (Third) of the Law Governing Lawyers* (2000) casts the duty of confidentiality, in turn, in fiduciary terms: “This [duty] requires that client confidential information be acquired, stored, retrieved, and transmitted under systems and controls that are reasonably designed and managed to maintain confidentiality.”

State data breach notification laws, such as RCW 19.255.010, add two further dimensions to electronic file management. First, they essentially codify a law firm’s duty to take reasonable measures to secure personal information such as Social Security and credit card numbers. Second, if there is a breach, they require notification to both clients and non-clients whose information has potentially been exposed. The Washington Attorney General’s Office has a variety of resources for businesses on its website focusing on Washington’s data breach notification laws—along with a series of sobering annual reports that starkly illustrate the extent of the risk in Washington. Law firms should also carefully review their malpractice insurance policies to make sure they include data-breach coverage.

STORAGE

WSBA Advisory Opinion 2215 (2012), which is available on the WSBA website, addresses two key facets of cloud-based file storage: selection of a vendor, and the continuing duty to evaluate the service chosen.

With respect to selection of a vendor, Advisory Opin-

ion 2215 notes that no one set of static guidelines is—or will remain—appropriate in light of ever-changing technology. Instead, Advisory Opinion 2215 offers a flexible set of considerations in evaluating vendors:

1. Familiarization with the potential risks of on-line data storage and review of available general audience literature and literature directed at the legal profession, on cloud computing industry standards and desirable features.
2. Evaluation of the provider's practices, reputation, and history.

3. Comparison of provisions in service provider agreements to the extent that the service provider recognizes the lawyer's duty of confidentiality and agrees to handle the information accordingly.
4. Comparison of provisions in service provider agreements to the extent that the agreement gives the lawyer methods for retrieving the data if the agreement is terminated or the service provider goes out of business.
5. Confirming provisions in the agreement that will give the lawyer prompt notice of any non-authorized access to the lawyer's stored data.
6. Ensure secure and tightly controlled access to the storage system maintained by the service provider.
7. Ensure reasonable measures for secure backup of the data that is maintained by the service provider.¹

Because both technology and threats are constantly evolving, Advisory Opinion 2215 emphasizes that, once a service has been chosen, lawyers and their firms must continually evaluate its suitability:


Because the technology changes rapidly, and the security threats evolve equally rapidly, a lawyer using online data storage must not only perform initial due diligence when selecting a provider and entering into an agreement, but must also monitor and regularly review the security measures of the provider. Over time, a particular provider's security may become obsolete or become substandard to systems developed by other providers.

In 2018, the ABA issued a comprehensive opinion—No. 483, which is available on the ABA website—that echoes this advice in the specific context of monitoring for cyber breaches.

We do not have to become computer programmers in order to initially select a vendor and continue to evaluate the system used. However, if we don't have sufficient technical competence in-house, we need to get that assistance through, for example, an independent technology consultant. Comment 8 to RPC 1.1 on competence requires lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]" In other words, if we are going to use a particular technology like cloud-based file storage, we can't "plead ignorance."

RETRIEVAL

When files were solely in paper form, "retrieving" a file typically meant walking to a storage location within a lawyer's office ranging from a "file cabinet" to a "file



Today, 'file security' involves protecting electronic information from threats that were largely unknown to law practice a generation ago.

Ethics and the Law

CONTINUED >

room.” Cloud-based electronic files, by contrast, raise specific security concerns with respect to file retrieval and use.

Although some elements of retrieval are the responsibility of the storage vendor, lawyers themselves play a vital role in three key aspects of file security.

First, lawyers are on the front line in terms of how they connect electronically to their cloud-based files. Often, this connection occurs within the security perimeter of a protected office network. The very mobility of cloud-based files, however, enables lawyers to work far from traditional “brick and mortar” offices, in venues ranging from coworking spaces to airport lounges.² Regardless of the location, the lawyer accessing cloud-based files must take reasonable precautions—consistent with RPC 1.6(c) noted earlier—to ensure that the connection is secure.³ Depending on the circumstances, this may mean using a “virtual private network” if connecting to the internet through a Wi-Fi network or using an encrypted cell system connection.

Second, and again reflecting the very mobility of electronic files, lawyers working outside their offices need to take care that confidential client information cannot readily be seen by others. An IP lawyer working on a commercially sensitive matter for a high-tech client, for example, likely would not want to review key proprietary documents on a large laptop screen in the middle seat of a crowded airplane. Comment 18 to RPC 1.6 emphasizes that the particular security measures implemented will vary with the situations encountered—in other words, one size does not fit all.

Finally, in addition to electronic security, lawyers need to remain mindful of physical security. As noted earlier, a lost mobile device today may be the functional equivalent of losing a law firm’s entire “file room” in the past. Therefore, lawyers need to understand and use basic security features commonly built into most mobile devices such as password protection, hard-drive encryption, and remote kill switches that can be activated if a device is lost or stolen.

PRESERVATION

Both the attorney-client privilege (*see Martin v. Shaen*, 22 Wn.2d 505, 511, 156 P.2d 681 (1945)) and lawyer confidentiality obligations (*see* RPC 1.9(c)) generally apply to closed files. Therefore, the file management duties discussed earlier do not end when we have completed work but retain the file involved.⁴ Electronic files present their own unique challenges in this regard.

With the shift to electronic-only files, questions can occasionally arise when a former client requests a paper copy instead. WSBA Advisory Opinion 2023 (2003) has long counseled that, once original documents with independent legal significance in their paper form such

as an original will be returned to a client, a lawyer is free to convert the file into electronic form for storage. The 2015 ABA Formal Opinion 471 on file transition notes that, generally, a client is entitled to a form that will protect the client’s interest. The 2017 Oregon Formal Opinion 2017-192 on file management picks up this thread and concludes that an electronic copy will typically suffice given the prevalence of computers today, and a firm could ordinarily charge for what amounts to a second copy if a former client requests it in paper form. The Oregon opinion cautions, however, that “[i]n some limited situations, such as when an in-custody client may not have regular computer access, a lawyer may be required to provide a file maintained in an electronic-only format in a format that can be accessed or read by the client.”⁵

The principal Washington opinion on file transition generally, Advisory Opinion 181 (rev. 2009), has long noted that lawyers and clients can agree contractually on file disposition issues in an engagement agreement. A conservative approach to electronic-only files, therefore, would be to include a specific provision requiring the client to bear the cost of producing an additional paper copy.

Although the RPCs generally do not impose any particular file-retention period,⁶ both the WSBA and most malpractice carriers have file-retention guidelines that reflect the kinds of legal work involved and the practical limits on a former client asserting a claim. The WSBA recommendations are available on its website. Cloud-based file repositories are typically both more convenient and generally less expensive than their paper counterparts. At the same time, “preservation” in electronic form also implies a continued ability to access the information involved. Firms should consider, for example, the electronic format used and whether information stored in that format will still be readily accessible for the duration of any recommended preservation period.

Similarly, firms should also assess how files can be securely erased on both cloud-based systems and physical devices when the recommended preservation period has come and gone. In particular, portable devices that “mirror” cloud-based files should have their storage systems securely destroyed by a reputable recycler when they have reached the end of their useful lives. 🗑️

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory, and attorney-client privilege matters, and law-firm-related litigation for lawyers, law firms, and legal departments throughout the Northwest. He is a former chair of the WSBA Committee on Professional Ethics and is a past member of the Oregon State Bar Legal Ethics Committee. He also teaches legal ethics as an adjunct for the University of Oregon School of Law. He can be reached at 503-224-4895 and mark@frllp.com.



NOTES:

1. ABA Formal Opinion 08-451 (2008) addresses supervisory duties generally under ABA Model Rule 5.3 in the context of outsourced services. Washington RPC 5.3 is patterned on its ABA Model Rule counterpart.
2. WSBA Advisory Opinion 201601 (2016) discusses electronic mobility issues in the specific context of “virtual” offices, but its advice applies with equal measure to lawyers generally who practice outside their traditional offices.
3. *See also* ABA Formal Opinions 477R (2017) and 99-413 (1999) that address related issues of securing confidential attorney-client communications in the electronic environment.
4. Client original documents that have independent legal significance in paper form should be returned to the client at the completion of a matter under RPC 1.16(d).
5. OSB Formal Op. 2017-192 at 4.
6. RPC 1.15A(c)(3) generally requires trust account records to be maintained for seven years.



WASHINGTON INITIATIVE FOR DIVERSITY

The Washington Initiative for Diversity thanks the generous sponsors of our 2019 Legal Executives Diversity Summit. We also thank our host committee members for their leadership and support.

THANK YOU TO OUR CHAMPION LEVEL SPONSORS



THANK YOU TO OUR HOST COMMITTEE MEMBERS

Peter S. Johnson, DWT

Mike Ryan, BECU

Andrew DeVore, Amazon

Pallavi Wahi, K&L Gates

Tom Robertson, Microsoft Corporation

Zabrina Jenkins, Starbucks Coffee Company

THANK YOU TO OUR LEADER LEVEL SPONSOR



www.initiativefordiversitywa.org | PO Box 1985 Seattle, WA 98111



When only the best will do.

Your clients, colleagues and friends deserve nothing less than the best. Refer with confidence to Brewe Layman: **One of Washington State's preeminent family law firms.**

Brewe Layman is highly regarded regionally and nationally for our adept and tenacious representation in complex divorce-related matters involving significant estates, business entanglements, prenuptial agreements, contentious support issues, cohabitation conundrums and other family law-related topics.

Sabrina Layman

BREWE LAYMAN P.S.

Attorneys at Law | Family Law

Seattle | Everett | Mount Vernon | 425.252.5167 | brewelaw.com

Essential Qualities of Innovative Legal Services

BY JORDAN L. COUCH

Every day, market forces nudge more consumers of legal services (our potential clients) away from lawyers and toward alternative legal service providers or self-representation.¹ The traditional, hour-based model of legal services provided by an attorney has thrived with a captive clientele—and that clientele is starting to push back.

How lawyers face new market forces will determine whether they fall behind or become leaders in the new legal industry. In this recurring column, I want to encourage you to be leaders and to help you find the tools that will enable you to offer better services to more clients in less time (and with higher profits). For this inaugural column I decided to lay out what innovation in the practice of law looks like to me, with real-world examples to show that the best innovation is neither complex nor controversial.

FOCUS ON SERVICE

Innovation is first and foremost service driven. Perhaps one of the most baffling aspects of the current legal industry is the cavernous disconnect between the perspectives of lawyers and their clients. Most notably, the service lawyers sell is not the product clients want to buy. Clients come to lawyers for the fastest, easiest solution to their problems. Lawyers in traditional practices sell clients hours of time that may or may not result in the desired solution. While it has its place, this is not a sustainable business model for most legal needs. Imagine if Amazon billed you not for the product you want, but for the time it took to get the product off the shelf and shipped to you.

Innovative attorneys have recognized this disconnect and are building their firms around client service. They focus on creating discrete legal products with clear (not cheap) pricing and a defined plan for tangible results. Sometimes it's as simple as flat-rate divorces; other times it's as complex as Megan Zavieh's legal ethics self-help guide² or a bundled "business startup" package. In every case, these lawyers thought hard about what their clients actually want to pay for. The billable hour is so far from a service-oriented model that the possibilities for improving on it are endless.

COLLABORATE

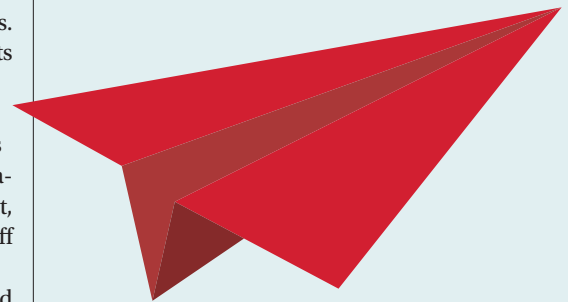
Innovation requires new ideas, and there is no better way to find new ideas than to work with others. Traditionally in the legal profession, lawyers are in competition with

each other (and this is often true even within a firm). Any work done by another lawyer is work that you could have done. This competitive mindset has been a hindrance to progress in the legal industry, and those who wish to innovate have learned to cast it aside.

One example of legal professionals collaborating successfully is Lawyerist's Lab.³ Lawyers from across the country, some with similar practice areas and markets, spend three days working together to build a better future for themselves and the legal profession. The results have been incredible: website redesigns, data analytics projects, access to justice initiatives, and even new firms and companies.

EMBRACE FAILURE

In her novel, *Torch Against the Night*, Sabaa Tahir writes, "It's what you do after you fail that determines whether you are a leader or a waste of perfectly good air." For innovation to work, failure has to be openly embraced. If failure isn't encouraged in your firm, employees (yourself included) will be afraid to admit mistakes and will spend even more



The service lawyers sell is not the product clients want to buy.

time trying to "fix" or "save" a failing project. In a firm where failure is encouraged, employees are empowered to acknowledge failures quickly so projects can be re-evaluated and readjusted often. To encourage failure, especially in the legal profession, may sound absurd, but only those lawyers willing to take this leap of faith will become legal innovators.

At my firm, Palace Law, we try a lot of new things, both in practice management and in our day-to-day work on our cases (always with our client's informed consent of course). Far from being upset, clients are generally excited to hear that our firm is willing to try something no one else will. About two years ago, we invested heavily in a project to make it easier for our clients to communicate with us through text messages. Throughout the process, client feedback was enthusiastic, but after the product launched, fewer than five of my clients ever used it. In a lot of ways this was a failure, but we embraced it, learned from it, and started a new project out of the ashes of the first one. Using the infrastructure from the first project, we created a new program that gives our clients automatic updates about their cases. And that project has been a huge success.

BE PREPARED TO SPEND TIME AND MONEY

I said earlier that innovation is not complex, but it does require dedicated resources. A lot of firms are happy to talk about practice improvement, but very few are willing to back that talk up with money. Talk is cheap, innovation is expensive, and the returns are not always immediately recognizable (let alone realizable). In addition to investing money, innovation requires lawyers to invest time (a law firm's most valuable asset) and change firm culture.

But it can be done. After Patrick Palace, the owner of Palace Law, finished his term as WSBA president in 2014, he decided it was time to take what he had learned and reinvent his own firm. It was not an easy task for a firm with 20 staff members and 25 years of history, but Palace knew it had to be done and was prepared to make a serious investment. In the time since the project began, Palace Law has hired staff for dedicated development positions, created multiple teams devoted to brainstorming and testing new processes, and invented new technologies (some in-house, some in partnership with tech companies).⁴

Another example is Eric Wood, the practice innovations and technology partner at the Chicago firm of Chapman and Cutler.⁵ Wood has no formal training in a technical field, but his firm saw his passion and the value of innovation, so they decided to invest in him. Now the firm may be one of the first to have a partner whose job doesn't involve traditional legal work. Wood's job (among other things) is to manage invest-

ment and implementation of legal technologies for the firm.

INVENT SOMETHING NEW

Typically, innovation is seen as making improvements to an existing system (e.g., Facebook could be considered an upgraded version of Myspace). But we sometimes forget that we can invent a new system altogether. Some of the most exciting legal innovations in recent years come from attorneys and other professionals who have created whole new models of delivering legal services.

Forrest Carlson, a local estate attorney who recognized that his fees could never compete with LegalZoom, went out and built wa-wills.com. The site enables Washington residents to create a simple will for free, without the aid of an attorney.

In British Columbia, the Civil Resolution Tribunal⁶ recognized that the traditional court structure, designed by and for lawyers, posed substantial barriers to self-represented litigants seeking justice. So they created a new, tech-enabled, service-driven court system to handle small claims.


These ideas don't all have to be free or government-enabled in order to offer great services to those who traditionally have not had access to meaningful justice. Modria[®], an online dispute resolution program,⁷ has been growing and profiting off tech-enabled dispute resolution since 2011, while improving access to justice at the same time.

WHAT'S NEXT

You may be thinking that I've said a lot about what innovation looks like, but very little about how you can adopt and practice innovation. Don't worry, there is plenty more to come. In future columns I plan to cover topics like practical legal applications of methodologies from other industries (like Kanban and Scrum) as well as interviewing

innovative thinkers (some in the legal field, some not). For now, I'll leave you with encouragement to get out and start innovating.

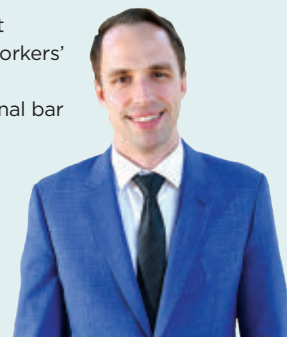
In his book, *Law is a Buyer's Market*, Jordan Furlong writes, "Generally, law firm owners are deeply reluctant to approve any initiative that might yield a higher market advantage unless there are several successful examples of highly similar firms undertaking that initiative." However, there may be just as much risk in hesitating as there is in being an early adopter. In Furlong's view, "[h]olding off on an innovation until its use is widespread means it's no longer an innovation, and any competitive advantage has been lost."⁸

If we as legal professionals continue to limit ourselves to practices that have been tested and perfected in other industries, then the 21st century will undoubtedly be our last. It's time for invention; it's time to lead. 

NOTES:

1. The details of this growing trend are more complex than I can address in a single column. Thankfully, numerous books have been written on the subject. Two of my favorites are Steven J. Harper's *The Lawyer Bubble: A Profession in Crisis* (2016), and Jordan Furlong's *Law is a Buyer's Market: Building a Client-First Law Firm* (2017).
2. <https://myshingle.com/2018/04/articles/profiles/innovative-law-practice-state-bar-defense-and-ethics-attorney-megan-zavieh-part-i/>.
3. <https://lawyerist.com/reviews/training-coaches/lab/>.
4. <https://www.clio.com/customers/palace-law-increasing-revenues-76-clio-central-platform/>.
5. <https://www.legalevolution.org/tag/eric-wood/>.
6. <https://civilresolutionbc.ca>.
7. <https://www.tylertech.com/products/modria>.
8. Jordan Furlong, *Law is a Buyer's Market* (2017).

Jordan L. Couch is an attorney and cultural ambassador at Palace Law where his practice focuses on plaintiff's side workers' compensation and personal injury litigation. Outside of his practice Couch is heavily involved in state, local, and national bar associations, advocating for a better, more client-centric future to the legal profession. Find him on social media at @jordanlcouch or email at jordan@palacelaw.com.



Words of a Feather

POETRY AS A TOOL
FOR LEGAL WRITING

BY LAUREN E. SANCKEN

Poems—expressions of inner life that had at first seemed purely fanciful to me—have become foundational to how I teach legal writing. Poems are built with similar conventions to those used to write a legal brief, and reading and writing poetry can help lawyers develop thoughtful prose, perspective, and style. Poems implicitly ask a reader to pay attention with a heightened awareness of language. They use imagery to convey ideas, inspire empathy in a reader, and communicate a theme, and they rely on structure and variety to shape a reader's experience. Legal writing has more practical ends than poetry—generally to advise or persuade a reader—but it is agile, too, and begins where all writing begins—with the search for a word.

WHAT (AND HOW) YOU READ IS WHAT YOU WRITE

“To pay attention, this is our endless and proper work.”
— *Mary Oliver*

Lawyers analyze volumes of information and often must communicate a legal analysis under time pressure. Attentiveness to critical facts and arguments takes a special form of grit, and constructing those facts into a coherent argument requires mental endurance. Reading poems can help. (I promise I am not paid by the poetry lobby.) Carefully reading poems (or carefully reading anything) can sharpen one's focus and consciousness of word choice and discrete facts, and lead to helpful inferences about a broader meaning.

Wallace Stevens, a lawyer and insurance executive by trade, but more widely known as a poet, shows how attentiveness to a subject enhances perspective and analysis. Consider these two stanzas from Stevens' *Thirteen Ways of Looking at a Blackbird*:

Among twenty snowy mountains,
The only moving thing
Was the eye of the blackbird.

• • •

I do not know which to prefer,
The beauty of inflections
Or the beauty of innuendoes,
The blackbird whistling
Or just after.

The reader is asked to focus on an object, the blackbird, but to pay specific attention to the observer's sensory experience of the blackbird—its moving eye, its song, and the atmospheric silence. These acute observations, along with the multiple angles from which to “look” at something at all, enhance the reader's perspective. A reader with an enhanced perspective more easily becomes a writer with an enhanced perspective. Carefully and consciously evaluating facts and a different perspective—be it that of a client, the other side,

or the court—is a valuable, empathic communication tool for a lawyer.

Poems help give meaning to experiences that are difficult to describe and translate, and in this way, provide a thoughtful prompt for legal writing on complex issues. *Special Problems in Vocabulary*, by Tony Hoagland, describes the challenge of finding the right words for nuanced circumstances. These excerpted stanzas highlight the limitations in language to fully define a complex event while simultaneously (and perhaps ironically) revealing the power of language to give voice to these very events.

There is no single particular noun
for the way a friendship,
stretched over time, grows thin,
then one day snaps with a popping sound.

• • •

No adjective for gradually speaking less and less,
because you have stopped being able
to say the one thing that would
break your life loose from its grip.

• • •

No word for waking up one morning
and looking around,
because the mysterious spirit
that drives all things
seems to have returned,
and is on your side again.

It is not just what you read that matters; it is *how* you read it. Poems are meant to be read aloud. For inspiration, Gwendolyn Brooks's poem, *Speech to the Young/ Speech to the Progress-Toward (Among Them Nora and Henry III)* lends itself to spoken verse:

Say to them,
say to the down-keepers,
the sun-slappers,
the self-soilers,
the harmony-hushers,
“Even if you are not ready for day
it cannot always be night.”
You will be right.
For that is the hard home-run.
Live not for battles won.
Live not for the-end-of-the-song.
Live in the along.

Reading aloud is *slower*, and therefore requires more vigilance. When editing a piece of legal writing, that vigilance is useful. Reading aloud reveals inconsistencies, places where phrases don't flow, useful repetition (when it is connected to theme, like “Say” and “Live”), and pointless repetition (when it is boring or inadvertent). Reading aloud will inevitably help a legal writer to find vibrant, more meaningful words to replace stale, flat ones.

?

ASK US: If you have a question or a pet peeve about legal writing that you'd like to see addressed in a future “Write to Counsel” column by UW Law writing faculty, please submit it to nwlawyer@wsba.org, with the subject line “Write to Counsel.”

USE IMAGERY TO ILLUSTRATE A THEME

Poems carry intrinsic persuasion; the reader is drawn into the poem by the imagery used to convey a theme, often beginning with a compelling hook. An effective poem shapes and changes its readers. Like most pieces of creative writing, a poem is a one-way journey; the reader ends in a different place than he or she began. An effective brief does the same thing, with a practical goal in mind: inspire a court to rule in your client's favor by creating a convincing theme. As an example of using imagery to create a theme, consider this excerpt from Dean Young's *Belief in Magic*:

How could I not?
Have seen a man walk up to a piano
and both survive.
Have turned the exterminator away.
Seen lipstick on a wine glass not shatter the wine.
Seen rainbows in puddles.
Been recognized by stray dogs.
I believe reality is approximately 65% if.
All rivers are full of sky.
Waterfalls are in the mind.

• • •

Nonetheless.
Nevertheless
I believe there are many kingdoms left.
The Declaration of Independence was written with
a feather.

And this excerpt from Mary Oliver, *The Wild Geese*:

You do not have to be good.
You do not have to walk on your knees
for a hundred miles through the desert, repenting.
You only have to let the soft animal of your body
love what it loves.
Tell me about despair, yours, and I will tell you mine.
Meanwhile the world goes on.

Both poems begin with captivating statements: a rhetorical question (“How could I not?”) and a declaration (“You do not have to be good.”). The “facts” in these poems are highly curated to create nuanced meanings: the nature of reality and belief on the one hand, and the scale of existence and sense of belonging on the other. In much the same way, vivid language

**An
effective
poem
shapes and
changes its
readers.
... An
effective
brief does
the same
thing.**

Lauren E. Sancken is a lecturer and co-director of the Legal Writing Program at the University of Washington School of Law, where she teaches legal writing courses. She also directs the Moot Court Honor Board.



Write to Counsel

CONTINUED >

can weave a theme that ultimately leads a reader to a favorable conclusion.

VARIETY IS THE SPICE OF WRITING

Writing a poem is a creative act that nonetheless requires restraint and discipline in language and form. Sometimes, the rules of a poetic form—like the haiku or sestina—dictate the type of restraint. Briefs, likewise, have an imposed structure, by court rule and tradition, but the author still makes countless stylistic choices. Reading or writing poems can provide a muse for stylistic variety, even in a world of rules. Take, for example, *[into the strenuous briefness]* by e.e. cummings, well-known for his nontraditional use of grammar and syntax:

into the strenuous briefness

Life:

handorgans and April
darkness, friends

• • •

(Do you think?) the
i do, world
is probably made
of roses & hello:

(of solongs and, ashes)

While legal writers are not as free to set aside grammatical convention, varying sentence structure and word choice will keep a reader engaged and turning the pages. Every sentence has infinite potential, and that can be as burdensome as it is beautiful. But with endless choice, words and phrases need not be austere or inert.

One way to create variety is to use a well-placed short sentence. A short sentence can break up many pages of text and deliver a punch. Short lines are provocative and memorable. These poems, from Nayyirah Waheed's book *salt*, illustrate their power:

you broke the ocean in
half to be here.

only to meet nothing that wants you.

— immigrant

i don't pay attention to the
world ending.

it has ended for me
many times

and began again in the morning.

The structure, the variety, and the exacting choice of words in each line create the impact of these poems. The varied lines are the essence of the composition, and the composition carries independent meaning. A similarly memorable, short line in a legal brief will stand out among other phrases, and this will often force a reader to pause, reflect, and hopefully understand a perspective different from their own.

Poems capture a snapshot of inner life. Legal writing captures a snapshot of outer life but relies on many of the same conven-

tions. Both, if done effectively, transform a reader—where one begins is not where one ends.

And where one ends
is where all writing ends
(and will begin again)

with the search—
however arduous or graceful—

for a word. 🌐

Justice for Victims of Mesothelioma



BERGMAN
DRAPER
OSLUND



PNW's Leading Asbestos Litigation Firm



Over \$700 million in recoveries for
Washington & Oregon clients.

We have just one practice area: we represent families struggling
with mesothelioma and other asbestos-related diseases.

Seattle
(206) 957-9510

BERGMANLEGAL.COM
(888) 647-6007

Portland
(503) 548-6345



**WE PROTECT WHAT OUR
CLIENTS VALUE MOST.**

For decades, McKinley Irvin has helped clients navigate through some of life's most difficult challenges. Our attorneys are known for their relentless pursuit of successful results, whether representing individuals in financially complex divorce or high conflict parenting disputes. But perhaps our most noted distinction is our steadfast commitment to protecting what our clients value most.



MCKINLEY IRVIN

FAMILY LAW



Super Lawyers®





Too Good to Be True?

“Deepfakes” pose a new challenge for trial courts



BY RIANA PFEFFERKORN

The client shows his lawyer a video he says he took on his cell phone. It shows the defendant saying things that, if seen by the jury, will be a slam dunk for the client's case.

The attorney includes the video in her list of evidence for trial, but the defendant's lawyers move to strike. They claim it's a fake. What's the plaintiff's lawyer—and the judge—to do?

Welcome to trial practice in the new world of "deepfake" videos.

A portmanteau of "deep learning" and "fake," so-called "deepfake" programs use artificial intelligence (AI) to produce forged videos of people that appear genuine. The technology lets anyone map their own or another's movements and words onto someone else's face and voice to make them appear to say or do something. The more video and audio of the person that can be fed into the computer's deep-learning algorithms, the more convincing the result. For example, two years ago University of Washington (UW) researchers used algorithms they'd created to make a realistic, but phony, video of former president Barack Obama, based on actual audio and video clips they fed the algorithm.¹ But it doesn't take a UW computer science degree to make a deepfake; the technology is freely available and fairly easy for anyone to use. Its usability, and the verisimilitude of its output, will keep improving over time.

The advent of deepfakes will affect the nation's lawyers and courts in multiple ways. For one, there will likely be ample litigation by victims of deepfakes relying on various tort or fraud theories. The point of this article, though, is to explore what the courts will do with deepfakes in the evidentiary context. Points where deepfakes could infect a court case run the gamut from clients who fabricate evidence in order to win, to fake videos ending up in archives that have historically been considered trustworthy. In the not-too-distant future, litigators will have to get creative in addressing these challenges, navigating ethical pitfalls, and managing the doubts and distrust jurors will have about what is real.

AUTHENTICATION STANDARDS

Authentication is fundamental to the admissibility of evidence. Generally, the authentication requirement

is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims."² To authenticate a video, some witness, not necessarily the videographer, must be "able to give some indication as to when, where, and under what circumstances the [video] was taken, and that the [video] accurately portrays the subject illustrated."³ If these criteria are met, the recording is admissible at the trial court's discretion.⁴

Firsthand knowledge by the authenticating witness of the events depicted is preferable, but not required.⁵ Despite not having been "present at the recording of the exhibit," "[a] witness with prior knowledge of the people and places depicted in the exhibit could still establish when the exhibit was created based on the age of people in the exhibit or things depicted in the background."⁶ Thus, a video can be authenticated by a witness testifying along the lines of, "I recognize the person speaking as the defendant, that's how he looked during the time period at issue, and that's his voice."

With a deepfake, of course, there can be no firsthand witness to the video's "recording." Washington's liberal policy thus leaves room for a witness familiar with the person depicted to unwittingly vouch for a forgery by identifying the person's face and voice.

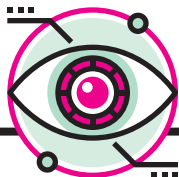
This could be a particular risk with materials held in third-party archives that historically have been considered trustworthy. Examples include a newsroom's archives, which are likely to hold both footage recorded by its own staff and cellphone videos contributed by eyewitnesses; or government databases, which nowadays include police department databases of officers' body camera footage. In addition to normal chain-of-custody standards governing physical access, cybersecurity is also a concern for such archives. Researchers have demonstrated that for many police body cameras currently on the market, the recordings can be remotely downloaded, digitally manipulated, and re-uploaded.⁷

The possibility of remote tampering may draw into doubt the reliability of video footage in third-party databases. The integrity of a video offered into evidence could be compromised without the knowledge of the witness who is called upon to authenticate it. Even the curator of the archive might not be aware of a problem and could unwittingly offer inaccurate testimony about an altered or ersatz video.

To overcome such testimony in a civil case, a party would have to move to strike the video, challenging its authenticity by producing some evidence that it is doctored or fake. The burden would then shift to the party moving for its admission to prove its authenticity. Ultimately, it may require the person depicted in a deepfake video (if available) to testify that the video is bogus. This strategy may be risky for individuals who are likely to have credibility problems even if their testimony is truthful, or for defendants in criminal cases, who have the right not to testify.



The deepfakes arms race is sure to spawn a cottage industry of expert witnesses who can assess disputed videos.



Too Good to Be True?

CONTINUED >

In addition to lay-witness testimony, litigators may be able to exclude deepfakes from evidence through existing strategies for challenging a video’s provenance and chain of custody, including forensic tools and expert testimony. Some tools have recently been developed that use AI to detect deepfakes automatically.⁸ If they can pass muster for use in litigation (a significant challenge in itself), these tools could help courts decide whether to exclude videos challenged as deepfakes. The deepfakes arms race is sure to spawn a cottage industry of expert witnesses who can assess disputed videos.

The proponent of video evidence, too, must be vigilant against forgeries. An attorney may not knowingly offer a deepfake into evidence, RPC 3.3(a)(4), and may refuse to offer a video she reasonably believes is a deepfake, RPC 3.3(e). In the deepfakes era, lawyers will have to exercise greater diligence in not assuming the authenticity of video evidence. Proper diligence before offering a video will shake out fake “chaff” and help the “wheat” survive any authentication challenge. That includes learning the signs of a deepfake, in some cases even consulting a forensic expert, and managing the client friction these measures may cause.

RAMIFICATIONS FOR GENUINE EVIDENCE

Deepfake authentication difficulties are twofold. One problem is how to show a video is fake; the other is how to show it isn’t.

As they become increasingly common and realistic, deepfakes, by their very existence, will undermine the reliability of



Riana Pfefferkorn is associate director of surveillance and cybersecurity at the Center for Internet and Society at Stanford Law School. She graduated from the University of Washington School of Law in 2009 and joined the Washington Bar in 2018. She can be reached at riana@law.stanford.edu.

genuine evidence, creating headaches for the proponents of authentic videos. In the era of digital evidence, practitioners are accustomed to handling challenges to digital photo, video, and sound recordings, despite the relatively low standard for admissibility under ER 901. The arrival of deepfakes will see still more challenges, be they specious or good-faith. As real and fake become harder to distinguish, such challenges may be harder for the proponent to overcome. As with other digital recordings, if anticipating an authentication challenge, the proponent of a video may need to make a strategic decision about whether the video’s probative value to the case outweighs the cost of getting it admitted.

Even if they lose on admissibility, opposing counsel may seek to minimize an authentic video’s weight to the jury. (This approach may be especially tempting for criminal defense attorneys, given the “beyond a reasonable doubt” standard.) If the tactic is used successfully in enough cases, video evidence may lose some of the persuasive power it presently holds with juries.

Indeed, there is a chance that litigators will start seeing a sort of “reverse CSI effect.” The “CSI effect” refers to the phenomenon of jurors demanding high-tech evidence even in run-of-the-mill cases, thanks to the popular TV police procedural.⁹ Similarly, sophisticated AI tools for detecting deepfakes may have an unintended consequence. If they know such tools exist, jurors may accord little weight to a video unless the proponent uses the latest whiz-bang computerized tools (at great expense) to satisfy them that it is *not* a deepfake.

It preserves the integrity of the judicial process to root out and exclude fake evidence. But when doubt about the authenticity of real evidence starts to pervade the minds of juries, the public’s trust in the courts’ truth-finding function is undermined. This is why attorneys must treat deepfake accusations very carefully, looking beyond the short-term goal of victory in a particular case. An attorney should not impugn the authenticity of a video that has been duly authenticated and admitted into evidence, where the attorney does not reasonably believe it is a fake and simply wants to weaken the other side’s case in the eyes of the jury. Indeed, to do so would likely cross an ethical line.¹⁰

CONCLUSION

Deepfakes will soon make trial attorneys’ and judges’ jobs more difficult. They will



SIDEBAR

Dealing with Deepfakes: Practice Pointers

Make use of existing strategies

for authenticating digital video, photo, and audio evidence against allegations of alteration or forgery.

Adjust your litigation budget estimates

to account for extended pretrial and trial timelines and increased lay and expert witness costs.


Avoid unpleasant surprises at trial.

Learn the telltale signs of deepfakes, verify a video’s provenance before offering it into evidence, and prepare how you’ll respond if its authenticity is questioned. If a “smoking gun” video seems too good to be true, it probably is.

If a client pushes you to go forward

with a suspected or known deepfake, consult the WSBA’s Ethics Line or your firm’s ethics counsel.

complicate normal trial proceedings and require courts to re-evaluate how to allocate the burden of authentication, the role of the jury in determining how much weight to accord evidence, and how active to be in giving jury instructions. Authenticating video evidence against deepfake suspicions will prolong litigation and run up costs through extra due diligence, additional motion practice and time in court (thereby delaying or extending trial), and increased expenditures on lay and expert witnesses. As deepfake technology improves and it becomes harder to tell what's real, jurors may start questioning the authenticity even of duly admitted evidence, to potentially corrosive effect on the justice system.

That said, the courts have ably handled authentication challenges before, from handwritten documents to still photographs to videotapes to digital media. They will survive deepfakes, too. With thoughtful advance preparation, you will be equipped to handle this new challenge in your trial practice. 

NOTES:

1. Jennifer Langston, "Lip-Syncing Obama: New Tools Turn Audio Clips into Realistic Video," UW News (July 11, 2017), <https://www.washington.edu/news/2017/07/11/lip-syncing-obama-new-tools-turn-audio-clips-into-realistic-video/>.
2. Washington Evidence Rule (ER) 901(a). Washington courts use the same liberal policy of admissibility to treat both videos and photographs. *State v. Newman*, 4 Wn. App. 588, 593 484 P.2d 473 (1971).
3. *Id.*
4. *State v. Tatum*, 58 Wn.2d 73, 75, 360 P.2d 754 (1961) (citations omitted).
5. *State v. Sapp*, 182 Wn. App. 910, 914-17, 332 P.3d 1058 (2014) (disapproving of the contrary holding in *Saldivar v. Momah*, 145 Wn. App. 365, 399, 186 P.3d 1117 (2008)).
6. *Id.* at 914-15.
7. Lily Hay Newman, "Police Bodycams Can Be Hacked to Doctor Footage," *Wired* (Aug. 11, 2018), <https://www.wired.com/story/police-body-camera-vulnerabilities/>.
8. See Will Knight, "The Defense Department Has Produced the First Tools for Catching Deepfakes," *MIT Tech. Review* (Aug. 7, 2018), <https://www.technologyreview.com/s/611726/the-defense-department-has-produced-the-first-tools-for-catching-deepfakes/>.
9. See generally Katie L. Dysart, "Managing the CSI Effect in Jurors," *Am. Bar Ass'n, Section of Litigation, Trial Evid. Cmte.*, May 28, 2012.
10. See RPC 3.1; see also Fed. R. Civ. P. 11(b).

APPEALS

OVER **600** CASES ARGUED ON THE MERITS

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

^oFellow, American Academy of Appellate Lawyers

*Founding Members, Washington Appellate Lawyers Association

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

When you need advice on attorney fees, an evaluation of fees, a declaration on fees, or testimony on fees—CALL US.

Our latest law review article on attorney fees in Washington is:

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

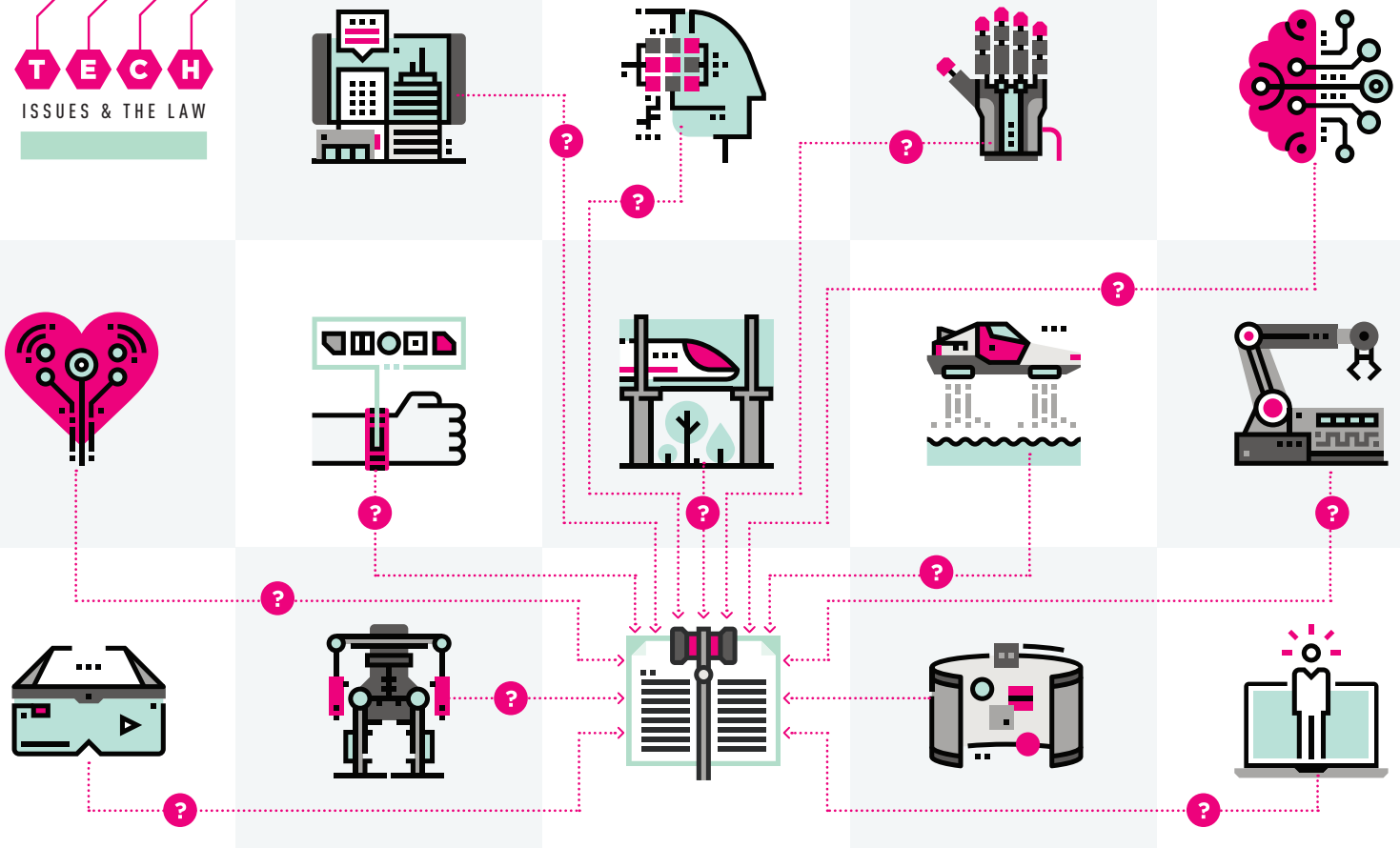
We have a track record of success in fee cases:

Easterly v. Clark County, 2 Wn. App. 2d 1066 (2018)
Arnold v. City of Seattle, 185 Wn.2d 510, 374 P.3d 111 (2016)
Bright v. Frank Russell Investments, 191 Wn. App. 73, 361 P.3d 245 (2015)
Tupas v. Washington State Dept. of Ecology, 191 Wn. App. 1036 (2015)

Knowledgeable ♦ Experienced ♦ Efficient

**TALMADGE
FITZPATRICK**

206-574-6661 ♦ www.tal-fitzlaw.com



Clinical Diagnosis

UW’s Technology Law and Public Policy Clinic—old law in new tech, and how lawyers can guide smarter policy

BY COLIN RIGLEY

Elliott Okantey is a self-described Luddite. He’s reluctant to adopt new technology—stubborn even. When it’s clear an industry is pushing the public in a certain direction—like telecomm companies incrementally creating an increasingly connected, smartphone-fueled world—he actively resists the new tech: Okantey didn’t get his first smartphone until 2014.

It’s important you know this about Okantey in order to appreciate that this wonkish public policy and government enthusiast, who now represents school districts and municipal governments through Porter Foster Rorick LLP, spent his final year of law school doing something

uncharacteristic. He spent it analyzing one of the hottest, most complex modern technological issues: autonomous vehicles.

“I figured I might as well use the organization of law school to get acquainted with the future,” he said.

Okantey was one of about a dozen students who participated in the University of Washington School of Law (UW Law) Technology Law and Public Policy Clinic that year, a staple at the school for more than 15 years and one of only a handful of similar clinics in the country. In 2018, the clinic members were assigned Gov. Jay Inslee’s 2017 executive order “tasking relevant agencies with supporting the safe testing and operation of autonomous vehicles in Washington.”¹ Over the course of the school year, they dove deep into the emerging field of autonomous vehicles in an attempt to fit the rapidly developing technology within a historical legal context. They worked to establish a legal and policy framework for a technology that might seem more fitting for science fiction but is now an impending reality in a world that arguably is not prepared for it. But that’s sort of the theme with projects the clinic takes on—finding the practical in the theoretical; grounding the future in the present, and in the past.

In its more than 15 years, the clinic has harnessed UW Law brainpower to explore other new and controversial technologies and has had real and direct impacts on Washington public policy, all while largely remaining out of the limelight.

Deborah Eddy served in the Washington Legislature

from 2007 to 2012 and was involved in the early years of the clinic, first learning of it during her time on the House Technology, Energy, and Communication Committee when clinic participants were examining telecommunication systems and fiber optic networks in the state.

“In that presentation, it was obvious to me that the policy clinic format had a lot to offer legislators,” she said. “These were wonderful experiences for me ... I learned a lot from them, and I hope they learned something from me.”

An attorney herself, Eddy said the clinic’s work outlives individual projects, is more than an academic exercise, and could be a model for practicing lawyers to provide objective counterpoints to the entrenched interests that typically dictate policy.

“The real-world impact is always the same: the lobbyists and paid interest groups still drive the discussion,” she said. “But with the policy clinic, there is a steady erosion of lobbyists’ monopolistic control of the conversation.”

BACK TO THE FUTURE?

Professor William (Bill) Covington, director of the Technology Law and Public Policy Clinic and senior law lecturer at UW Law, started his legal career in telecommunications, working on local policy and regulations during the early days of cable TV.

He launched the Technology Law and Public Policy Clinic in 2003 with initial funding through a cy pres grant. Each year since then, he combs through student applications to select a mix of diverse backgrounds, specialty areas, and technological proficiency. He then guides each group for a full year as the students take on projects ranging from purely exploratory (like the viability of public utility fiber internet in King County, found to be financially infeasible at the time) to boots-on-the-ground policy proposals. In 2016, for example, students in the clinic drafted Executive Order 16-01,² the basis for the state’s private personal data collection rules later incorporated in House Bill 2875, which was signed into law that same year.³

Covington identifies potential projects in a number of ways, but primarily by writing the Legislature to solicit emerging technology issues in need of legal research and analysis. He also coordinates with experts in the technology, legal, and legislative sectors. In 2015, the clinic worked closely with Alex Alben, who was then chief privacy officer for the state of Washington, on an analysis of non-consensual pornography, more commonly known as “revenge porn.” That project resulted in a background report for House Bill 1788, entitled “Sexual Exploitation in the Digital Age: Non-Consensual Pornography and What Washington Can Do to Stop It.”⁴ The bill ultimately stalled in committee, but was superseded by a similar bill that created misdemeanor and felony penalties for non-consensual disclosure of intimate images of another person. RCW 9A.86.010.

In 2017, Covington and his research assistant at the time, Alex Palumbo, collectively spotlighted several projects begging for legal minds to dissect: notably, a request for policies to guide autonomous vehicles, sometimes re-

ferred to as AVs but perhaps more commonly known as driverless cars. The project was part of a work group first established by Inslee’s executive order and codified in HB 2970,⁵ which clinic students helped lobby for.

“It was pretty much baptism by fire from the start,” Palumbo said of the learning process for that project.

Throughout the year, the students made several trips to Olympia to speak before the House Public Safety Committee, the Executive Committee, and the Washington State Transportation Commission. (At a July 2018 commission meeting, one commissioner called the clinic’s research a “win-win; they got some project credit and we got to use their brilliance.”)

Palumbo continued working as the chief liaison between UW Law and the Legislature for the Autonomous Vehicles Work Group after the project was officially finished. He’s since parlayed that experience, along with his master’s in public policy, into a job with the New York City Mayor’s Office of Information Privacy, which began last month.

“The responsibility is on me to understand the nuances of the technology world around me, of the social world around me, of the legal world, and to interpolate them,” Palumbo said. “So we have no other choice. ... We’re empowered with all this knowledge, all this education, unlimited information out there. As lawyers who like to think of themselves as sophisticated, professional individuals, the buck stops with us.”

Still, new tech like driverless cars can be slippery to regulate. With no easily identifiable precedent, members of the clinic have to get creative, whether they’re looking at historical context to guide topics such as blockchain cryptocurrency, remotely controlled drones, copyright and 3D printing—all of which are topics the clinic has explored—or other technological milestones that fundamentally challenge laws created when no one could anticipate the challenges the new technology would present.

“A sense of legal history gives me a perspective that we have dealt with big controversies before and that the tech economy will continue to develop and thrive, even if policy makers don’t understand it,” Alben, the former chief privacy officer, said via email about his experience working with the clinic on privacy issues.

Members of the clinic start with the fundamentals. For the autonomous vehicle project—as with all projects—Covington brought in engineers, programmers, public affairs representatives from tech companies, legislators, and other lawyers to share their expertise.

“When crafting public policy, you can never do enough,” Covington said. “You can never talk to too many people. You can never access too many resources.”

Doug Logan, now an associate at K&L Gates LLP, was in the clinic during his second year of law school. He worked primarily on a team examining the technical and privacy implications of domestic drones,⁶ but he also participated in the presentations and group discussions with the driverless car team.⁷ Surprisingly, he remembers, even some lawmakers thought driverless cars were too far from being a reality to worry about.



The UW clinic, and other non-traditional groups of legal professionals, provide at least one model for the constructive influence that attorneys can wield when they collaborate on not just the practice of law, but its creation.

Clinical Diagnosis

CONTINUED >

“I think the legislators were pretty surprised when we were like, ‘What are you going to do when these things show up on your roads?’” he said.

Students first had to settle on a clear definition of “autonomous.” In the 2014 paper, “Automated Vehicles,” the authors open with an outline of the levels of autonomy described by the National Highway Traffic Safety Administration: a scale ranging from no automation, to limited automation like blind-spot monitoring, to autonomous features like adaptive cruise control, to driver-assisted automation (think Tesla’s half-step “autopilot” software update), and finally to fully driverless cars—no human required.

In breaking down legal issues raised by the initially impenetrable new technology, clinic participants first cast a backward glance—to early cases in the nearly two-century process of adapting legal structures to new technologies and modern commerce. For example, there was a time when it wasn’t clear if liability could arise from hitting someone’s property with a horse and buggy. The question was answered in *Davies v. Mann*, 152 Eng. Rep. 588 (1842), in which “a wagon driven by a team of three horses traveling downhill on a highway at a ‘smartish pace’ collided into a donkey grazing alongside a highway and killed it,” Okantey, the self-described Luddite, said in a follow-up email to *NWL* Lawyer. Replace the donkey with a pedestrian and the wagon with a modern driverless car, and the same underlying questions of liability apply. “The court found that even though the donkey’s owner had allowed the donkey to graze along the side of a highway, the driver of the speeding three-horse team could still be found negligent and held liable for the consequences of his negligence.” Similarly, there was a time when the law was unclear as to whether manufacturer liability could arise from injuries suffered by a vehicle operator who did not purchase the vehicle. The early answer, in *Winterbottom v. Wright*, 10 M. & W. 109 (1842), was no.

As vehicles and commerce have become more sophisticated, so too have the legal frameworks. “If we can develop legal theories for manufacturer negligence and strict liability for putting dangerous products into the ‘stream of commerce,’ then surely we can figure out how to apportion liability for harm caused by a driverless vehicle,” Okantey continued. “A driverless vehicle still has manufacturers and is making choices that have been programmed by software developers. Manufacturers, software developers, passengers and pedestrians can still be required to exercise some minimum level of care, either in theories of negligence or strict liability. If any of these



Students with the Technology Law and Public Policy Clinic following an October 2018, meeting with the Washington Traffic Safety Commission Safety Subcommittee on the topic of autonomous vehicles in Olympia.

Front row
(left to right):
Alex Palumbo,
Estella Jung,
Silas Alexander,
Michael
Schmidt.

Back row
(left to right):
Leeza Soulina,
Mark Xiao,
Bill Covington.

actors fails to meet the minimum level of care, the law can still apportion fault, as it has throughout our evolution from horse and buggy to this very day. We just have to decide what that minimum level of care is based on the activity in which an actor is engaged.”

The clinic’s format also illuminates that in real-world public policy analysis, strict legal knowledge is only part of the equation—it’s equally if not more important to understand the people involved, their concerns, and the potential impacts of technology. That’s one of the things Rachel Wilka—who worked on an autonomous vehicle project in 2014—took with her. Wilka remembers hearing widely disparate viewpoints including from one legislator who believed that every private property owner should give permission before driverless cars could legally operate on roads in front of their property, and another from Google representatives who expressed concern that regulation would hamper their ability to innovate and go to market.

All in all, Wilka discovered through the clinic that policy and regulatory processes, in even the most technical areas, are a lot “muddier” than many people might think. “There isn’t really a uniform system,” she said. Instead, Wilka discovered a disconnected pooling of reactive input from people who have the investment, commitment, and time to shape the end result.

For Wilka, that insight has provided benefits in droves. She is senior corporate counsel for Zillow, the online real estate platform headquartered in one of the fastest-growing cities in the country that is neck deep in the converging waters of technology and community impact.

“I think people see technology and the technology sector as its own niche market; things that aren’t going to affect their lives in any meaningful way,” Wilka said. But technology isn’t the catalyst of societal change, she added, “technology is just an accelerant.”

LET'S GET CLINICAL

Within Washington, UW Law is the only law school with a legal clinic specifically focused on technological public policy issues.

Gonzaga University School of Law has hosted conferences around such subjects as new technology and IP, created courses on emerging issues like artificial intelligence, and is preparing to launch a Center for Law, Ethics & Commerce with a series of lectures planned on technology, IP, and the law, according to a university spokesperson.

Seattle University School of Law has the Summer Institute for Technology, Innovation, and Entrepreneurship, with an immersion course to provide an inside view of startup culture as well as policy, theory, and legal practice curriculum on subjects including technology, real estate, artificial intelligence, and IP.

Nationally, there are a handful of tech and policy clinics, including at NYU, Berkeley, Georgetown, Colorado at Boulder, USC, Harvard, and Stanford. The American Bar Association also has resources for law students and practicing lawyers, such as its Section of Science & Technology Law (SciTech), which recently produced a seven-part educational series on blockchain technology and published a book on the subject.

SEAT AT THE TABLE

"How do you get attorneys with practice experience who can really help inform the policy debate, but to do it in a way that is not interest-driven?" queried Eddy, the former legislator mentioned earlier in this article.

Consider a hypothetical consumer-protection law under consideration: An attorney who represents injured consumers might see a need to provide an informed advocate's opinion to their legislator. "But in truth, that Amazon lobbyist is going to pound you like a nail," Eddy said.

The UW clinic, and other nontraditional groups of legal professionals, provide at least one model for the constructive influence that attorneys can wield when they

collaborate on not just the practice of law, but its creation. Eddy was one of several Washington attorneys who helped establish Washington Appleseed, a social justice initiative fueled by collective efforts of "volunteer lawyers and community partners to develop systemic solutions to community needs," according to the nonprofit's federal tax filings. Washington Appleseed has since dissolved, but over nearly 15 years, it served as a platform for lawyers to lend their unique insights to policy debates on issues like food assistance funding.

"Part of this I think presents a way for attorneys who are in more specialized areas; they have enormous value in helping educate legislators and the public," Eddy said.

For her part, Eddy didn't necessarily have the technical chops, but it didn't inhibit her ability to help the clinic, as she recalled in one story about her experience there: "My daughter asked me where I was going and I said I was off to meet students in the clinic, which was about cryptocurrency," Eddy says. "And my daughter says, 'Mom, what do you know about cryptocurrency?' You don't have to know the ins and outs of every particular technology in order to be effective in discussing the interaction between technology and the law. You need to know what questions to ask about that technology to kind of tease out its impacts—what's its scalability?—so you can grasp enough of the details about the technology to understand what policy issues will arise and how to solve them."

Students who spoke about their experience in the UW Law clinic shared similar realizations: they don't have to be experts in technology; they have to be experts in the law. The specific technology is just another variable.

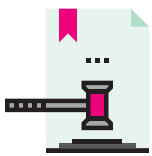
"Either formally or informally, the law will adapt to change or be left behind," Okantey said. "But something's going to happen. It's important to know that legal analysis will be and should be a part of it." 🗣️



Colin Rigley is a communications specialist for the Washington State Bar Association. Prior to joining the Bar, his experience included journalism and content strategy in California and Washington. He can be reached at colinr@wsba.org.

NOTES:

1. Professor Bill Covington, Elliott Okantey, Samuel Kim, Isaac Prevost, Jillian Stanphill, "Legislating Autonomous Vehicles in Washington: An Analysis of Current Autonomous Vehicle Law with Recommendations for Washington," University of Washington School of Law Technology Law and Public Policy Clinic, 2017-2018. <https://www.wstc.wa.gov/Meetings/AgendasMinutes/documents/July17/0717-BP7-UWFullReportAVLawScan.pdf>.
2. State of Washington Office of the Governor, Executive Order 16-01, "Privacy Protection and Transparency in State Government 'Modernizing State Agency Privacy Protection,'" http://www.governor.wa.gov/sites/default/files/exe_order/eo_16-01.pdf.
3. UW News, "UW law students lay groundwork for new state privacy office," <https://www.washington.edu/news/2016/04/08/uw-law-students-lay-groundwork-for-new-state-privacy-office/>.
4. Farah Ali, Brian Conley, Heather Lewis, Charlotte Lunday, "Sexual Exploitation in the Digital Age: Non-Consensual Pornography and What Washington Can Do to Stop It," University of Washington School of Law Technology Law and Public Policy Clinic, 2015, <https://digitalcommons.law.uw.edu/techclinic/3/>.
5. Establishing an autonomous vehicle work group, HB 2970, 65th Legislature, 2018, <https://app.leg.wa.gov/billsummary?BillNumber=2970&Year=2017>.
6. "Domestic Drones: Technical and Policy Issues," University of Washington School of Law Technology Law and Public Policy Clinic, 2013, <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1003&context=techclinic>.
7. James Barker, Nicholas Pleasants, Shudan Zhu, Peter Montine, Rachel Wilka, "Automated Vehicles," University of Washington School of Law Technology Law and Public Policy Clinic, 2014, <https://digitalcommons.law.uw.edu/techclinic/4/>.



SIDEBAR

Get Involved

If you would like to lend your expertise to the Technology Law and Public Policy Clinic, contact Bill Covington at covinw@uw.edu. WSBA Section Executive Committees provide another way for legal professionals to guide state legislation. (Learn more by reading "How a WSBA Section Committee Can Change the Rules of the Game" at <https://nwsidebar.wsba.org/>.)

Is My Doorbell Breaking the Law?

Two-party consent in the age of the “internet of things”

BY MICHAEL CHERRY

Many devices record video and audio. Smartphones have cameras capable of recording high-definition images and microphones capable of recording high-fidelity sound. Doorbells and other security devices have cameras programmed to record video and audio when they detect motion or someone rings the bell. Audio commands interact with smart speakers and TVs to play music, change channels, or order streamed programs. Such devices are always listening for commands and may record audio to learn how to better interpret commands. This means at any point in a day, your movements and conversations are being recorded, processed, and stored for replay.

Washington is a “two-party” consent state. This means that before a conversation can be recorded, all parties must consent to the recording. But what does two-party consent mean in a world where devices are always watching and listening?

TECHNOLOGY HAS ALWAYS IMPACTED PRIVACY LAW

In 1890, Samuel D. Warren and Louis D. Brandeis authored an article entitled “The Right to Privacy” in the *Harvard Law Review*.¹ The authors discussed how recent inventions like “instantaneous photographs” and business methods like that of newspapers that “invaded the sacred precincts of private and domestic life” were interfering with a person’s right “to be left alone.”² The authors argued for a common law right to privacy at a time when photography was a new technology and, compared to today’s digital photography, only “instantaneous” when compared to painting a portrait. It is interesting that the authors considered business methods as invading personal privacy, as even today it is the combination of emerging technology, such as social media, and evolving business methods, such as selling personal data to advertisers, that implicates privacy. Images and audio can now be published worldwide with the click of a button.

Today, devices such as smartphones and included apps can record conversations and take still and moving pictures. Security devices such as doorbells with embedded cameras can record audio and video which can be stored for review by the homeowner or forwarded to neighbors as a warning of suspicious activity. Smart speakers also raise interesting privacy questions. In at least one case, a judge ordered Amazon to hand over Echo recordings in a criminal case.³ Additional discovery demands are likely on the horizon.

Could these devices, connected together on the internet as they are today, put a homeowner in danger of a lawsuit for violating Washington’s Privacy Act?

THE PRIVACY ACT AND TWO-PARTY CONSENT

Chapter 9.73 of the Revised Code of Washington (RCW) is generally known as the Washington Privacy Act. Under RCW 9.73.030 of the Privacy Act, it:

shall be unlawful for any individual ... to ... record any: ... [p]rivate conversation, by any device electronic or otherwise designed to record or transmit such a conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.⁴

Interpretation of the Privacy Act involves case-specific facts. Generally, before analyzing the specific facts, Washington courts repeat two key points: the act is one of the most restrictive in the nation, and evidence obtained in violation of the statute is inadmissible in a criminal case.⁵

There is a four-part analysis under the Privacy Act:

1. Is the device anticipated by the statute;
2. Was there a conversation;
3. Was there an expectation of privacy in the conversation; and
4. Did the parties consent to recording the conversation?



Is the device anticipated by the statute?

In *State v. Townsend*, the Washington Supreme Court held that emails and instant message communications recorded on a computer were communications under the Privacy Act, even though a computer is not mentioned as a specific device under the Privacy Act.⁶ Courts generally interpret the statute broadly, making it likely that a court today would hold that today's devices capable of recording video and audio are devices covered by the Privacy Act.

Was there a conversation?

Whether there was a conversation is a trickier question. In *State v. Smith*, the Washington Supreme Court considered a case involving a husband who savagely beat his wife as his cellphone recorded the altercation. Ultimately, this case would be determined largely on an exception to the Privacy Act's two-party consent requirement, which comes into play when there is an underlying threat of bodily harm.⁷ However, in two *Smith* cases the justices provided some insight as to how they might interpret a conversation.

In the *State v. Smith* case (David Smith), the court held, "Gunfire, running, shouting, and ... screams do not constitute 'conversation' within that term's ordinary connotation of oral exchange, discourse, or discussion" that would fall within the statutory prohibition of RCW 9.73.030.⁸ The second *Smith* case, *Washington v. Smith* (John Smith), involved a cellphone recording of: "shouting, screaming, and other sounds, including a brief oral exchange between Mr. and Mrs. Smith in which Mr. Smith tells his wife he is going to kill her, and she responds I know" Although the recording in the second *Smith* case included sounds of a violent assault, and a brief exchange of words between the parties to the conversation, the court held, "Because the voicemail recording primarily contains the sounds of violent assault being committed, we hold that ... the content of the voice recording is not a conversation within the statutory prohibition of RCW 9.73.030."⁹

Consider a scenario in which a delivery person rings a security doorbell and says, "Delivery," and the homeowner responds, "Thanks." Based on the *Smith* cases it may be possible to argue that the snippet of audio recorded was merely

Is the fact that a security doorbell records audio and video obvious enough to find that a person implicitly consents to the recording? Probably not.

Is My Doorbell Breaking the Law?

CONTINUED >

a “brief oral exchange” and not a conversation.

Now imagine a different situation, in which a “porch pirate” attempts to steal a package from a person’s porch. Any audio recorded by the doorbell, such as the homeowner telling the person to leave, or that the police were called, also might not qualify as a conversation, and therefore would be admissible.¹⁰

Was there an expectation of privacy in the conversation?

Washington courts have held that “a communication is private when parties manifest a subjective intention that it be private, and where that expectation is reasonable.”¹¹ Whether the expectation is reasonable will depend on factors such as: (1) the duration and location of the communication, (2) the potential presence of third parties, (3) the role of the non-consenting party, and (4) the non-consenting party’s relationship to the other party.¹² Generally, inconsequential non-incriminating conversations lack the expectation of privacy, while incriminating statements of a serious subject likely are protected by the Privacy Act.

Let’s return to the security doorbell scenario. The communication is short, in public, potentially observable by third parties, and involves a temporary relationship between a delivery person and a homeowner. Here a court might find that there was no expectation of privacy.

Michael Cherry is the founder of LEXQUIRO PLLC, a firm specializing in technology law including privacy. Cherry has a Master of Laws degree in Innovation and Technology Law from Seattle University School of Law, and volunteers for the Housing Justice Project in Kent. He can be reached at mikech@lexquiro.com.



SIDEBAR

Can You Record In Court?



When every person with a smartphone is capable of recording conversations, what is the impact of such devices in a courtroom? Generally, people are asked to silence their devices in order to avoid disrupting the proceedings, but the devices could still easily record court proceedings.

Generally, video, still photography, and audio recording by the news media are allowed in a Washington courtroom when the judge has expressly granted prior permission and doing so is not disruptive to the court proceedings.¹ Other courts and jurisdictions set similar rules. For example, the Seattle Municipal Court’s rules and expectations require people in court to turn off all cellphones, pagers, and electronic devices, and using cameras or other recording devices is prohibited without approval of the judge or magistrate.² Similarly, Island County Superior Court Conduct and Dress Code, states: “No audio or video recording of any kind shall be allowed in the courtroom, except by official court personnel.”³

SIDEBAR NOTES:

1. General Rule (GR) 16, Courtroom Photography and Recording by the News Media, available at https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=gr&ruleid=gagr16.
2. Seattle Municipal Court, Court Rules and Expectations, Courtroom Etiquette, available at <https://www.seattle.gov/courts/coming-to-court/court-rules-and-expectations>.
3. Island County Superior Court, Conduct and Dress Code, LCR 77(b)(1)(A), available at <https://www.islandcountywa.gov/SuperiorCourt/Documents/courtrules.pdf>.

Did the parties consent to recording the conversation?

Courts have held that a party is deemed to have consented to a communication being recorded when another party has announced in an effective manner that the conversation would be recorded. In addition, a communicating party will be deemed to have consented to having his or her communication recorded when the party knows that the messages will be recorded.¹³

With some devices such as answering machines, or some systems such as emails or instant messaging, courts have held that parties understand the communication will be recorded. This is a form of implicit consent. For example, in *Townsend*, the court held that Townsend was “informed by the instant messaging software’s privacy policy and by his general understanding of instant messaging technology that the recording of messages by a recipient is a possibility.”¹⁴

However, is the fact that a security door-

bell records audio and video obvious enough to find that a person implicitly consents to the recording? Probably not. A court might find it is not obvious that the doorbell contains a camera. But what if there is a sign saying the house is monitored by a security system? Courts have held, “Generally, two people in a conversation hold a reasonable belief that one of them is not recording the conversation. But in evaluating this factor, we have found that the nonconsenting parties’ willingness to impart information to a stranger shows evidence that the communication is not private.”¹⁵ This cuts both ways—a person could reasonably believe that ringing a doorbell would not start a recording, but communicating with a stranger via a doorbell might limit that expectation of privacy.

THE LAW AND TODAY’S DEVICES

Much of the case law on the Privacy Act arises in the context of whether evidence should

be suppressed in a criminal case. But what about civil matters? Such cases are working their way through the courts under the Privacy Act, but also under newer Washington laws pertaining to biometrics such as fingerprints or unique biological characteristics such as facial markers for facial recognition.¹⁶

There does not yet appear to be any significant case law in Washington regarding such biometric data. However, in Illinois, where a similar law has been in effect since 2008, a lawsuit filed against Google in the federal district court was recently dismissed. Consumers had alleged that Google's search engine and storage service violated their privacy by storing images of their faces. Like many consumer privacy cases, the suit was dismissed for failure to show that the plaintiffs had suffered concrete injuries.¹⁷

Plaintiffs might face a similar hurdle in a case against a homeowner recording activity at the homeowner's front door. If the homeowner recorded the audio and video for the homeowner's personal use, where is the harm? But when the recording is circulated to neighbors, potentially alleging some nefarious activity, could there be harm?

At some point there will be cases involving these devices and the Privacy and Biometric Acts. Meanwhile, such devices should be used cautiously, or at least with a sign warning people that they might be recorded. Further steps will likely have to be taken as the internet of things expands. 📡

NOTES:

1. Samuel D. Warren, Louis D. Brandeis, "The Right to Privacy," Vol. IV, Number 5, Harvard Law Review, 193, available at https://www.jstor.org/stable/1321160?seq=1#metadata_info_tab_contents.
2. *Id.* at 195.
3. Cyrus Farivar, "Amazon Must Give Up Echo Recordings in Double Murder Case," Judge Rules, ARS Technica, Nov. 10, 2018, available at <https://arstechnica.com/tech-policy/2018/11/amazon-must-give-up-echo-recordings-in-double-murder-case-judge-rules/>.
4. RCW 9.73.030(1)(a)(b).
5. State v. Townsend, 147 Wn.2d 666, 672, 57 P.3d 255 (2002).
6. *Id.* at 675.
7. RCW 9.73.030(2).
8. State v. Smith, 85 Wn.2d 840, 846, 540 P.2d 424 (1975) (David Smith).
9. State v. Smith, 189 Wn.2d 655, 405 P.3d 997 (2017) (John Smith).

10. Elizabeth Weise, "Were Your Amazon Packages Stolen? Porch Pirates Run Rampant This Holiday Season," USA Today, Dec. 13, 2018, available at <https://www.usatoday.com/story/tech/2018/12/14/porch-pirates-package-theft-climb-more-americans-shop-online/2218910002/>.
11. State v. Townsend, 147 Wn.2d 666, 673, 57 P.3d 255 (2002).
12. State v. Kipp, 179 Wn.2d. 718, 729, 317 P.3d 1029 (2014).
13. State v. Townsend, 147 Wn.2d 666, 675, 57 P.3d 255 (2002).
14. *Id.* at 677.
15. State v. Kipp, 179 Wn.2d 718, 732, 317 P.3d 1029 (2002).
16. Ch. 19.375 RCW.
17. Ben Clayman, Daniel Wallis, "U.S. Judge Dismisses Suit Versus Google Over Facial Recognition Software," Reuters, Dec. 29, 2018, available at <https://www.reuters.com/article/us-google-lawsuit-illinois/u-s-judge-dismisses-suit-versus-google-over-facial-recognition-software-idUSKCN10T001>.

PETERSON
WAMPOLD
ROSATO
FELDMAN
LUNA

PWRFL

Felix Gavi Luna Ann H. Rosato Michael S. Wampold

DART PRESIDENT 2018-19 WSAJ PRESIDENT 2018-19 ABOTA PRESIDENT 2018



Core Value #6: Serve the community and the profession

Medical Malpractice / Appellate Practice / Construction Accidents
Personal Injury / Insurance Bad Faith / Medical Battery

PH 206.624.6800 / INFO@PWRFL-LAW.COM
1501 4TH AVE, SUITE 2800, SEATTLE, WA 98101-3677

PWRFL-LAW.COM

Prejudice by Proxy

Algorithmic bias in employment decisions and the modern “cat’s paw”

BY ANDRÉ M. PEÑALVER

Imagine a world where the quality of our lifestyle—our homes, our friends, our spouses, our jobs—has everything to do with a digital persona. Such is the quasi-fictional world of *Black Mirror*’s season three premiere, “Nosedive,” in which every person can rate any other person on the smallest interaction, from their social media posts to their small talk in the elevator. Points are compiled to build a person’s digital ranking, which in turn controls where a person can work and play, and who might deign to speak to them.

If that seems too far-fetched, consider the case of China, where the State Council is planning to implement a Social Credit System.¹ Under the system, the government would monitor your shopping and bill-paying, your interactions with friends, the videos you watch, and the video games you play, all to come up with your “citizen score,” which would tell everyone else whether you are trustworthy. Employers, lenders, school administrators—all could use the score to decide whether to let you through the door. China plans to implement citizen scores by 2020.²

What does Washington law say about such a future? And specifically with respect to employment, can an employer rely on computer algorithms to make decisions about an employee? Does it matter if the algorithms are racist? Can computer algorithms even *be* racist?

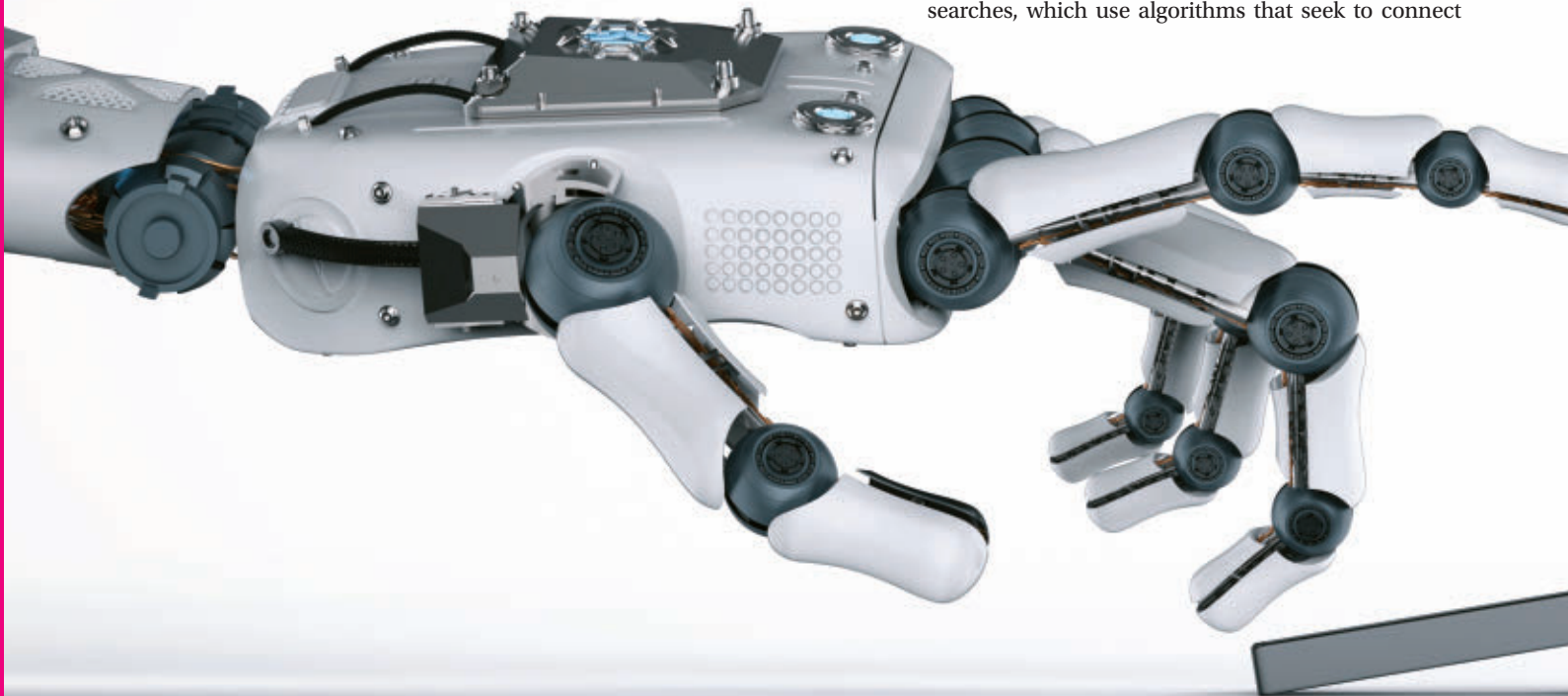
THE BIASED GHOST IN THE MACHINE

For anybody who has spent even a moderate amount of time on social media, it should come as no surprise that social media—and the algorithms that shape social media—have their flaws.

Sometimes, these flaws are just our own flaws amplified. That’s the case with Facebook’s original News Feed, which sorted news based on what it perceived as your likes and dislikes, thus turning your Facebook account into an echo chamber³—this in a nation where 67 percent of adults get at least some of their news from social media.⁴

Facebook has since made changes to its algorithms for news-sharing,⁵ but a recent MIT study found that “fake news was 70 percent more likely to be spread than real news. While the algorithms spread truth and lies at the same rate, “humans, not robots, are more likely to spread [fake news].”⁶

Sometimes, the flaws present in algorithms are created by other people’s biases. That’s the case with Google searches, which use algorithms that seek to connect



the searcher with the most popular results. That seems useful enough, but if other Google users are racist, Google search results may feed you racist results in an attempt to be helpful. Google might even suggest, through its autofill suggestions, racist searches that you might not have otherwise considered. When one reporter for *The Guardian* entered “are Jews” into a Google search bar, Google suggested four ways to complete the sentence: “are Jews a race?”; “are Jews white?”; “are Jews Christians?”; and finally, “are Jews evil?” When the reporter clicked the last suggestion, Google drummed up a number of websites that argued in the affirmative: nine out of 10 of the results were anti-Semitic.⁷

After *The Guardian* published its article, Google tweaked its algorithm. If you type “are Jews” today, you won’t get the same four results. That’s promising; unfortunately, Google’s algorithm editors are trying to drain a sea of racism one bucket at a time. A recent audit by *WIRED* found slanted results for “Hitler is,” “blacks are,” “feminists are,” and so on.⁸

As long as the users of Google, Facebook, YouTube, or any other algorithm-reliant platform have a bias, that bias will manifest itself within those platforms, regardless of any tweaks that might be made.

BIASED ALGORITHMS IN HIRING

This problem of algorithm bias becomes all the more pernicious when it enters the workplace. There is a potential problem with hiring platforms: software that allows an employer to efficiently recruit candidates, cull résumés, and select individuals for hire. The advantage over traditional hiring, with its piles of paper applications, is obvious enough. And employers have noticed: “nearly all Global 500 companies use automated hiring platforms that screen and sort applicants.”⁹

But as with all algorithms, there is a danger of bias creeping in. Sometimes, the hiring algorithm amplifies an existing bias in the workplace (think Facebook’s News Feed). Amazon discovered this when it sought to develop an algorithm to choose the best candidates. It based its algorithm on 10 years of its own hiring data, only to discover that the algorithm routinely devalued female candidates and any reference to the word “women.” It canceled its project.¹⁰

In other cases, algorithms have amplified a bias in society. When Xerox sought to create an algorithm for its hiring process, it found a correlation between worker retention and distance from work. But when it included this seemingly neutral variable into the algorithm, the results skewed white.¹¹

The results of such amplified bias can be absurd. When

one hiring platform audited its algorithm, it found two factors to be the strongest indicators of performance: the name “Jared” and playing lacrosse.¹²

If an employer relies on inherently biased or seriously flawed algorithms in deciding to hire or fire an employee, what does the law have to say about it?

CAT’S-PAW CASES: PROBLEMS WITH DELEGATED DECISION-MAKING

There are limits in Washington and Ninth Circuit law about what decisions an employer can delegate to others. Under the cat’s-paw theory of liability, when an employer relies on a biased source in making an employment decision, the court may impute that bias to the employer.

The concept of the “cat’s paw” comes from one of Aesop’s Fables, “The Monkey and the Cat,” in which the monkey persuades the cat to pull chestnuts from a fire. The cat does as the monkey suggests and retrieves the chestnuts, burning its paw in the process. The monkey eats all the chestnuts and the singed cat gets nothing out of the bargain. And so *Merriam-Webster* defines a “cat’s paw” as “one used by another as a tool.”

In the typical cat’s-paw case, a subordinate has a grudge against another employee, and the basis for that grudge is illegal (race, color, creed, etc.). The subordinate then gets the employer involved and tries to persuade the employer to take adverse action against the other employee. If the biased subordinate influenced the final decision of the employer to do so, then, as the Ninth Circuit decided in *Poland v. Chertoff*, the law may impute the subordinate’s bias to the employer: “Even if the biased subordinate was not the principal decision-maker, the biased subordinate’s retaliatory motive will be imputed to the employer if the subordinate influenced, affected, or was involved in the adverse employment decision.”¹³

“[The] purpose of the [cat’s paw] metaphor is to draw attention to the fact ‘that many companies separate the decision-making function from the investigation and reporting functions, and that ... bias can taint any of those functions.’ ”¹⁴ The employer might not have a single prejudiced bone in their body, but to the extent the biased subordinate “influenced or was involved” in an adverse

When it comes to employment decisions, a biased algorithm is a lot like a biased subordinate — only faster.

Prejudice by Proxy

CONTINUED >

employment action,¹⁵ then the employer is little better than the proverbial cat pulling chestnuts out of the fire at the behest of the monkey. In Washington, in short, there are limits to what employers may consider in their decision-making. And when it comes to employment decisions, a biased algorithm is a lot like a biased subordinate—only faster.

PROVING A DIGITAL CAT'S-PAW CASE

What if an employer uses some new algorithmic tool to decide whether to hire or fire an employee, and what if that tool (properly dissected by an expert witness) has some of the biases already discussed “baked in”?

It might be a tall order to prove that a particular algorithm is racist, particularly when its code is locked away from view as proprietary information. But in the world of employment law, the near impossibility of getting into the mind of an employer has never been defeating.¹⁶

In Washington, a plaintiff can establish a discrimination case based on circumstantial evidence. Such circumstantial evidence might be a study of the effects of the particular algorithm, even without examining the algorithm itself. *ProPublica*, for example, showed that Facebook ads were targeting potential hires based on age. Without looking at the algorithm's code, *ProPublica* researchers sifted through hundreds of publicly available ads and found patterns and

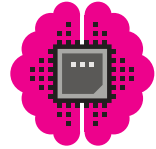
André M. Peñalver is an assistant United States attorney in Tacoma, where he prosecutes federal felonies. He previously litigated employment cases at the law firms of Gordon Thomas Honeywell in Tacoma and Stokes Lawrence in Yakima. The statements made in this article are his own, and do not reflect any position of the U.S. Department of Justice. He can be reached at andre.penalver@usdoj.gov.



SIDEBAR

Best Practices for Employers

Employers who find the convenience of technology tempting should not shy away simply because of flaws in algorithms. There are a number of steps that an employer should take to minimize risks from bias:



First, heal thyself. If you're using an algorithm to repeat your historical hiring patterns, those patterns better be spotless. If not, as Amazon learned, you'll just be amplifying past biases. This is as good a time as any to look at gaps in your workplace's diversity.

Cast a wide net in your job advertisements. As *ProPublica* discovered, micro-targeting on Facebook led to age discrimination in ad placement. When Xerox tried to target people closer to work, it inadvertently excluded by race. Any sort of targeting risks unintended consequences, some of which are illegal.

Inquire about the algorithms. Algorithms are complicated, which might discourage questions, but the results speak for themselves. Ask any third-party recruiter if they've done an audit on their algorithms. If the result is “Jared” and lacrosse, you should have some follow-up questions.

Make the technology work against bias. Biased hiring is a story as old as time, and several companies have now developed software explicitly to limit bias in the hiring process. Textio, for example, scores advertisements for inclusiveness.¹ Gender Decoder uses an evidence-based model to remove gender-coded words from ads.² Unbiasify is an app by StackAdapt that allows a user to hide names and profile photos on social networks, thereby removing some implicit bias in the hiring process.³ There are many other smart tools out there; use them!

SIDEBAR NOTES:


1. www.textio.com.
2. <http://gender-decoder.katmatfield.com/>.
3. <https://chrome.google.com/webstore/detail/unbiasify/affijhegklbkdinpepgphhlgphnhbenk>.

wording that demonstrated a discriminatory intent.¹⁷ The circumstantial evidence of such bias was simple enough: Facebook users between the ages of 25 and 36 could see the ad; others could not. But one can also imagine evidence from the results themselves: If the new hires chosen by an algorithm are disproportionately young or white or male, that might be evidence of a problem.

Should plaintiffs point to a discriminatory pattern in job ads or hiring decisions (and assuming they are in a protected class and suffered an adverse employment action), then they may have made a prima facie case of employment discrimination under the Washington Law Against Discrimination.¹⁸ It would then be the employ-

er's burden to produce a nondiscriminatory reason for the adverse employment action.¹⁹ If the employer can only shrug at the mystery of the algorithm, they would be in no better position than the employer who shrugs at the machinations of the racist subordinate.²⁰

CONCLUSION

Under the cat's-paw theory, Washington judges have the tool to limit an employer's reliance on any biased source, whether it be a biased subordinate or an algorithm. To the extent the biased source “influenced or was involved” in the employment decision, there is a cat's paw dynamic to consider—and an employer who may get “burned.” An ancient fable might be the key to a very modern problem. 

NOTES:

1. Rachel Botsman, "Big data meets Big Brother as China moves to rate its citizens," WIRED, Oct. 21, 2017, available at <http://www.wired.co.uk/article/chinese-government-social-credit-score-privacy-invasion>.
2. Mara Hvistendahl, "Inside China's Vast New Experiment in Social Ranking," WIRED, Dec. 14, 2017, available at <https://www.wired.com/story/age-of-social-credit/>.
3. Ben Gilbert, "Facebook is fundamentally flawed and it's all the News Feed's fault," Business Insider, May 10, 2016, available at <http://www.businessinsider.com/facebook-news-feed-is-flawed-2016-5>.
4. Angela Moon, "Two-thirds of American adults get news from social media: survey," Reuters, Sept. 8, 2017, available at <https://www.reuters.com/article/us-usa-internet-socialmedia/two-thirds-of-american-adults-get-news-from-social-media-survey-idUSKCNIBJ2A8>.
5. Jonah Engel Bromwich & Matthew Haag, "Facebook is Changing. What Does That Mean for Your News Feed?," New York Times, Jan. 13, 2018, B4, available at <https://www.nytimes.com/2018/01/12/technology/facebook-news-feed-changes.html>.
6. Alina Polianskaya, "Fake news travels much further and faster than real news on social media, study finds," The Independent, Mar. 9, 2018, available at <https://www.independent.co.uk/news/science/fake-news-twitter-spreads-further-faster-real-stories-retweets-political-a8247491.html>.
7. Carole Cadwalladr, "Google, democracy and the truth about internet search," The Guardian, Dec. 4, 2016, available at <https://www.theguardian.com/technology/2016/dec/04/google-democracy-truth-internet-search-facebook>.
8. Iffie Lapowsky, "Google Autocomplete Still Makes Vile Suggestions," Wired, Feb. 12, 2018, available at <https://www.wired.com/story/google-autocomplete-vile-suggestions/>.
9. Iffoma Ajunwa, "How AI can make employment discrimination worse," Superior Telegram, May 11, 2018, available at <http://www.superiortelegram.com/opinion/4444553-how-ai-can-make-employment-discrimination-worse>.
10. Dave Gershgorn, "Companies are on the hook if their hiring algorithms are biased," QUARTZ, Oct. 22, 2018, available at <https://qz.com/1427621/companies-are-on-the-hook-if-their-hiring-algorithms-are-biased/>.
11. Ben Porten, "Your hiring algorithm might be racist," Technical.ly, May 12, 2016, available at <https://technical.ly/philly/2016/05/12/solon-barocas-hiring-racism-big-data/>.
12. Dave Gershgorn, "Companies are on the hook if their hiring algorithms are biased," QUARTZ, Oct. 22, 2018, available at <https://qz.com/1427621/companies-are-on-the-hook-if-their-hiring-algorithms-are-biased/>.
13. Poland v. Chertoff, 494 F.3d 1174, 1183 (9th Cir. 2007).
14. *Id.* at 1182 (internal citation omitted); see also Boyd v. State, Dep't of Social & Health Svcs., 187 Wn. App. 1, 349 P.3d 864 (2015).
15. Poland, 494 F.3d at 1182.
16. Scrivener v. Clark Coll., 181 Wn.2d 439, 445, 334 P.3d 541 (2014) ("Summary judgment to an employer is seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motivation.").
17. Julia Angwin, Noam Scheiber & Ariana Tobin, "Facebook Job Ads Raise Concerns About Age Discrimination," New York Times, Dec. 20, 2017, available at <https://www.nytimes.com/2017/12/20/business/facebook-job-ads.html>.
18. See Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 753 P.2d 517 (1988) (applying burden-shifting analysis from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973)).
19. *Id.*
20. As with a racist subordinate, an employer may also be liable for the decisions of a racist recruiter: "The law recognizes that two entities may simultaneously share control over the terms and conditions of employment, such that both should be liable for discrimination relating to those terms and conditions." EEOC v. Global Horizons, Inc., 915 F.3d 631, 637 (9th Cir. 2019) (holding that employers may be liable for misconduct by recruiting firm).



Chemnick | Moen | Greenstreet

We work as a team on your
Neurosurgical cases.



Medical Malpractice.
It's All We Do.

206.443.8600 | cmglaw.com

use with Kodi raises copyright infringement concerns.

Kodi is simple to download and install, but users who want to avoid the hassle of setting up their own HTPC can simply buy a “Kodi box.”² This is a small computer with Kodi preinstalled and with enough memory for a user to rip and store movies and music that they own. The problem is that some versions of Kodi boxes available on the market include a lot of add-ons, some of which are questionable. Ripping a disc that you own, *for your own personal use*, would almost certainly be considered fair use under U.S. copyright law.³ The fair use statute was last amended, however, back in 1992, and it is hard to know whether and how the law would address issues arising from technology reflected in something like the Kodi box.⁴

For example, how would a court address a situation in which a person sells Kodi boxes containing an add-on that presents users with a long list of URLs that provide quick access to pirated, copyrighted media? Inclusion of the software on the box is not a copyright violation—Kodi and the add-on are open-source software that are being distributed with their authors’ permission. The list of URLs is not copyrightable because of the functional nature of URLs. Thus, the box itself does not include any copyrighted material that is being infringed. This issue has been addressed by a court in the Netherlands, which held that although Kodi itself is legal, the sale of Kodi boxes that have been configured to provide easy access to pirated, copyrighted materials is illegal.⁵ It will be interesting to see whether U.S. courts adopt the rationale of the Dutch court, whether they reach the same result using a different rationale, or whether they reach a different result altogether. Until then, however, Lena is probably safe setting up her Kodi box, as long as she remembers not to download or put on the box any media that she does not own.

NEURAL NETWORKS AND PROBLEMS WITH BIASES

Melanie’s problems with the hiring and placement vendor’s résumé/candidate-screening software arise from an underlying flaw in neural networks. Neural networks are programs that can be trained to be extremely good at pattern recognition. The basic principles are as follows:

- You provide the neural network with a training set—a large collection of items related to the pattern you want the neural network to recognize—and you tell the program the correct answers.
- The program learns patterns from the training set, and then you run the program on a test set—another large collection of items for which you know the answer. You provide the program its results and the correct answers.
- The program recalibrates parameters (i.e., re-learns the pattern).
- You rinse and repeat until the neural network starts providing answers within an acceptable error range.



Amazon’s facial recognition software incorrectly identified 28 members of Congress as having been arrested for committing a crime.



One problem with neural networks is that they are only as good as: (a) the training and test sets and (b) the definition of an “acceptable error range.”

For example, if you (as the programmer) decide that you are more concerned with false negatives than with false positives, you will get a neural network (or to use the popular vernacular, “an AI”)⁶ with very different characteristics than if you are more concerned with false positives. It is not surprising that companies and entities developing neural networks for security and law and order uses are more concerned with false negatives than false positives. In July 2018, the ACLU conducted a test of Amazon’s facial recognition software, called “Rekognition.” Rekognition incorrectly identified 28 members of Congress as having been arrested for committing a crime (in other words Rekognition showed a bias toward avoiding false negatives in favor of providing false positives). Further exacerbating the situation, Rekognition disproportionately identified members of Congress of color as having previously been arrested for having committed a crime, including six members of the Congressional Black Caucus.⁷

The problems arising from “faulty” training sets and test sets are best illustrated by Amazon’s own troubles with its résumé/candidate-screening software. Amazon’s machine-learning group had been working on a neural network to screen résumés “with the aim of mechanizing the search for top talent.”⁸ The problem was that most of the good matches identified in the training set for screening résumés for technical and software developer jobs were men. The neural network thus “learned” that it should screen out résumés that referred to the candidate having been the captain of the “women’s chess team” or having graduated from a women’s college.⁹ Needless to say, an AI could very easily display similar biases against candidates, like those with non-Anglo-Saxon names.

Amazon got a bit of a black eye from its failed experiment with its résumé-screening software. A smaller startup that decides to rely on a platform created and maintained by a third-party vendor—like Melanie’s company—may not be so lucky. It may face civil and criminal penalties and discrimination lawsuits from rejected candidates if it does not take the necessary precautions in its licenses to ensure that liability for biases built into the AI is properly allocated and the proper obligations to defend and indemnify are in place.

SMART CARS AND SOCIAL CUES

Charles’s smart car is extraordinarily good—because of its cameras, lidar, and radar—at detecting when he is veering out of his lane or getting too close to the car in front of it on the freeway. It isn’t “smart” in the same way that you and I are. The auto-navigation or assisted cruise control in his car is less likely to be distracted than you or me and will certainly react more quickly than we ever could. As Charles’s neighbor Ted points out on an almost daily basis—a smart car probably isn’t very good with “social” cues.

Blockchains and Streaming and AI, Oh My!

CONTINUED >

Imagine seeing a soccer ball roll out between two parked cars 20 feet in front of you on your drive home from work. Even if the ball is moving quickly enough that there is no chance you will hit it—at least not without tapping into your inner “Ludicrous Mode”—you are likely to ease off the accelerator and perhaps even start stepping on the brake pedal.¹⁰ That’s because you know that the soccer ball is quite likely to be followed by an 8-year-old who is focused only on the ball and is paying little or no attention to any oncoming cars.

Whether a smart car will be able to mimic your thought process and avoid the child is an interesting question. If it does not, the legal issue is: who bears liability? Is it Charles, because he should have overruled his auto-navigation system? Is it the car manufacturer, because there is a product defect? Or is it the software company that trained the AI that runs the auto-navigation system? What if Charles tried to overrule the auto-navigation system but was unable to do so? As auto-navigation systems and self-driving cars become more common, these are important questions that will need to be worked out—whether by various federal and state legislatures or by the courts. In the meantime, Charles will simply have to put up with Ted’s annoying habit of having the Roboleg kick soccer balls with unerring accuracy just in front of Charles’s car.¹¹

BREAKING THE BLOCKCHAIN

Although Brett is focused on mining for cryptocurrencies—which raises a ton of questions implicating various federal agencies and authorities that regulate currencies, domestic and international terrorism, and trafficking—it’s worth thinking about the broader legal issues raised by blockchains.

To understand what a blockchain is, you first need to know how hash functions work. A hash function is a function that when fed an input of data of any length returns an output value of fixed length (the “hash”). Hash

functions have been used for quite a while to authenticate digital documents. When an original document is run through a hashing algorithm, a hash is produced that can be sent along with the original document in a cover correspondence. The recipient can then confirm that the document has not been modified by running the same hash function on the original document and comparing the two hashes. A blockchain can be started by adding the hash to the original document, and then producing a new hash of the longer document.

Because of the properties of hash functions, blockchains are very resistant to modification and extremely amenable to independent and parallel authentication. Thus, they are likely to become more commonly used as distributed ledgers to record all sorts of commercial and financial transactions.


Technologies are disrupting society in ways that make the Industrial Revolution look like a minor blip.

The strength of blockchains and their resistance to modification, however, depends almost entirely on the strength of the hash function. A strong, cryptographic hash function should have the following properties: First, it must return the same value every time it is fed the same block of data. Second, it must not return the same value when fed two different blocks of digital data. Third, it should be difficult to determine the original block of data from the returned value.

A hash function can be “cracked” either by determining an original document (input) solely by examining its hash (output), or by producing the same hash for two different inputs. When the latter happens, it is called a collision. If a collision occurs, any blockchain created using that hash function is susceptible to modification and alteration.

The threat that a collision can be created for a hash function (systematically and not by blind luck) is not an idle one. The National Institute of Standards and Technology published SHA-1 (Secure Hash Algorithm 1) in 1995. It took only 10 years for SHA-1 to fall victim to an attack, and by 2010 it was recommended that organizations stop using SHA-1 as an encryption/authentication tool.¹² By 2017, all major web browsers ceased acceptance of SHA-1 SSL authentication certificates.¹³ Although, typically, most attempts to crack cryptographic hash functions have been at universities and by “white hat” organizations, it isn’t hard to imagine a scenario in which an entity or organization with less wholesome intentions manages to crack a hash function that is utilized to support a blockchain. If that were to happen, that entity would have a backdoor into distributed ledgers used to safeguard documents with significant commercial or financial impact. Any entity relying on that blockchain may then be exposed to significant penalties under the European Union’s General Data Protection Regulation or the data protection laws of various states (in addition to the harm arising from its ledger being compromised).

What Brett is doing is fairly harmless and unlikely to trigger legal ramifications (there is, after all, nothing inherently illegal about cryptocurrencies or blockchains). But the underlying technology has vulnerabilities that must be properly understood and addressed in any agreement governing the use of and reliance on blockchains.

What the Svensons are doing on this evening isn’t very different from what many, if not most of us, are getting used to doing daily. The convenience and efficiency that many of these technologies bring to our daily lives can, however, blind us to the legal issues and concerns they raise. Given that they impact so many aspects of society and culture, it will soon be impossible to practice law without some—if not many—of these technologies directly affecting our practices. 

Kaustuv M. Das is a director and IP attorney at Intellectual Ventures (IV), where he works on all aspects of patent prosecution and patent monetization across IV’s funds. He focuses on global portfolio development and management and often speaks on issues related to patent and technology law. Prior to joining IV, Das was in private practice with a focus on patent and trade secret litigation and worked as in-house counsel for Micron Technology, Inc. Das is also an adjunct professor at Seattle University School of Law, where he has taught patent law for the last eight years. He can be reached at kmdas@intven.com.



NOTES:

1. https://kodi.wiki/view/10-foot_user_interface (last visited June 3, 2019).
2. <https://www.techradar.com/news/best-kodi-xbmc-streaming-boxes> (last visited June 3, 2019).
3. 17 U.S.C. § 107.
4. It is worth noting that the fair use statute, as interpreted by the courts, has been more adaptable than some of its critics have posited. See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (finding that Google's unauthorized copying of copyrighted works, creation of a search functionality, and display of snippets from the works was fair use).
5. <https://www.theverge.com/2017/4/26/15433342/eu-court-of-justice-film-speler-kodi-piracy-box-ruling> (last visited June 3, 2019).
6. The term "AI" (Artificial Intelligence) is bandied about a lot in the popular press. There are, however, many different areas of research that fall within the broad description of AI. The advent of ever-faster processors, almost free memory, and sophisticated search algorithms have allowed massive advances in some areas of AI—for example, pattern recognition and neural networks—but other areas such as neuro-linguistic programming (NLP) still pose incredible challenges. Over 30 years ago, I tried and failed to write code to diagram this sentence: "Time flies like an arrow, fruit flies like bananas." I suspect that sentence continues to be extremely hard to parse. (For those readers who did not have the pleasure(!?!)) of having to diagram sentences in grammar school, a quick tutorial is *available at* <https://www.wikihow.com/Diagram-Sentences> (last visited June 3, 2019)).
7. Jacob Snow, "Amazon's Face Recognition Falsely Matched 28 Members of Congress with Mugshots" (ACLU July 26, 2018) *available at* <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28> (last visited June 3, 2019).
8. Jeffrey Dastin, "Amazon scraps secret AI recruiting tool that showed bias against women" (Reuters October 9, 2018) *available at* <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G> (last visited June 3, 2019).
9. *Id.*
10. We are all going to have to get used to talking about "the accelerator" and stop saying things like "step on the gas" soon.
11. Hagen Schempf et al., "Roboleg: A robotic soccer-ball kicking leg" (CMU 1995) *available at* https://www.ri.cmu.edu/pub_files/pub1/schempf_hagen_1995_1/schempf_hagen_1995_1.pdf (last visited June 3, 2019).
12. <https://en.wikipedia.org/wiki/SHA-1> (last visited June 3, 2019).
13. *Id.*

JSR LAW OFFICES OF
JAMES S. ROGERS



**Michelle Hyer Has Joined
The Law Offices of James S. Rogers**

**Product Liability ♦ Serious Personal Injury
Governmental Liability ♦ Sexual Abuse**

www.JSRogerslaw.com 206-621-8525
1500 4th Ave. Suite 500, Seattle, WA 98101

**For your really tough case on appeal – CALL US.
We have a track record of success:**

Brunson v. Lambert Firm & Bechtel Nat'l,
___ Fed. Appx. ___, WL 6620079 (2018)
(Court upholds district court confidentiality rulings in
qui tam action)

***Chan Healthcare Group v.
Liberty Mutual Fire Insurance Co.,***
431 P.3d 484, WL 6567085 (2018) (court dismissing
new class action based on Full Faith & Credit)

H.B.H.; S.A.H.; & Hamrick v. State of WA,
192 Wn.2d 154, 429 P.3d 484 (2018) (recognizing a duty
owed to children negligently placed in foster care)

Arp v. Riley,
6 Wn. App. 2d 1003, WL 5806605 (2018)
(application of judicial estoppel)

***Babbitt v. Kingsgate Ridge Manor
Assoc. of Apt. Owners,***
5 Wn. App. 2d 1052, WL 5538390 (2018)
(enforcing promissory note and prejudgment interest)

Sinsheimer v. Kruger,
2 Wn. App. 2d 1005 (2018) (affirming child support orders)

Sachdev, M.D. v. Oregon Medical Board,
292 Or. App. 778, 426 P.3d 118 (2018)
(reversing discipline against M.D.)

Kenco Constr. v. Porter Bros. Constr.,
4 Wn. App. 2d 1008, WL 2966785 (2018) (affirming
judgment for subcontractor in constr. project)

***Burien Town Square Condo. Ass'n
v. Burien Town Square Parcel 1,***
3 Wn. App. 2d 571, 416 P.3d 1286 (2018) (reversing
summary judgment on Wash. Condo Act claims)

Easterly v. Clark County,
2 Wn. App. 2d 1066 (2018) (rev'd fee decision: trial
court failed to address hourly rate and a multiplier)

Huynh v. Aker Biomarine Antarctic,
199 Wn. App. 1005, cert. denied, 139 S. Ct. 64 (2018)
(complex jurisdictional issue)

Knowledgeable ♦ Experienced ♦ Efficient

**TALMADGE
FITZPATRICK**

206-574-6661 ♦ www.tal-fitzlaw.com

Reshaping Noncompetes in Washington

The state Legislature creates a dramatic new landscape



BY LAWRENCE
R. COCK,
JACK M. LOVEJOY,
AND BENJAMIN
BYERS

With the passage of Engrossed Substitute House Bill 1450 (ESHB 1450), signed by Gov. Jay Inslee on May 8, 2019, the Washington Legislature dramatically reshaped the landscape of Washington's noncompetition law. This article introduces ESHB 1450, identifies ways in which it will change the common law, and discusses its purposes and goals.

APPROACHING DEADLINE: JAN. 1, 2020

Although the new law will take effect on Jan. 1, 2020, parts of the law will apply to noncompete agreements

signed *before* the effective date. ESHB 1450, Section 13. An employer whose current agreement does not satisfy the new standards applicable to noncompetition agreements must either persuade employees to sign new agreements, accompanied by new and independent consideration,¹ before Jan. 1, 2020, or risk possible litigation in which the covenant is declared void and the employer is ordered to pay a statutory penalty and attorney fees.

TOO MANY, TOO LONG, TOO BROAD

In the past few years, several state legislatures have addressed noncompetition and other restrictive covenants.² Legislative interest has been sparked by studies and articles that point out there are too many noncompetes, they are too long, and they are frequently overbroad.³ Many covenants are so broad that they prevent an employee from taking any position at a competitor, even one wholly unrelated to the scope of current employment (that is, they prohibit working in the industry, rather than restricting certain activities or focusing on a particular scope of prohibited activity).⁴

At a time when more workers are eager to exercise greater job mobility, noncompetition covenants have become increasingly widespread (affecting an estimated 30 million workers nationwide).⁵ Often, workers appear unaware of what they've agreed to, and 37 percent of workers are presented with the agreement only *after* accepting the job.⁶

Washington's legislative process had additional catalysts. Organized labor supported reform as a result of a "no-hire" provision in an asset purchase agreement between grocers Haggen and Safeway. Upon Haggen's bankruptcy, the no-hire provision resulted in grocery store workers being both unemployed and unable to secure employment at any Safeway. Separately, Attorney General Bob Ferguson has taken action against fast food franchisors using "no-poach" clauses,⁷ which prohibit a franchisee from hiring a person who works at a company store or another franchise store. The lobbying arm of the Washington Employment Lawyers Association also prioritized noncompete reform on its agenda.

Another catalyst was a slow but steady judicial trend in noncompete litigation away from relying on policies that prohibit restraints of trade and toward placing greater emphasis on contract law. Washington common law is well settled that noncompetition covenants should be evaluated differently from other contracts; courts should balance the employer's need for protection against general societal interest in prohibiting restraints of trade. One early example is the 1911 case involving a piano teacher, *Columbia College v. Tunberg*.⁸ The court ultimately decided that Tunberg could not be prohibited from giving piano lessons in Seattle, but should be restrained from soliciting Columbia College of Music pupils. The court's restructured restraint was narrow.

Compare that result to *Emerick v. Cardiac Study*

Center 100 years later,⁹ which involved a physician's noncompetition covenant. The contract duration was five years; the court revised it to four. The original geographic restriction was Pierce County or Federal Way; the court revised it to two miles from the original place of employment. There was no consideration of a lesser type of restraint, such as nonsolicitation or non-acceptance of business, which could have adequately protected the employer. Rather, the court rewrote and enforced a narrowed noncompetition covenant and then went on to award the former employer attorneys' fees exceeding \$200,000 under a contractual prevailing party attorney fee clause.¹⁰

The judiciary's increasing emphasis on the law of contracts and lessening discussion of restraint of trade principles explains the Legislature's findings in Section 1 of ESHB 1450: "The legislature finds that workforce mobility is important to economic growth and development. Further, the legislature finds that agreements limiting competition or hiring may be contracts of adhesion that may be unreasonable."

What's more, the Legislature announced that its reforms should not be walked back or minimized: "This chapter is an exercise of the state's policy power and shall be construed liberally for the accomplishment of its purposes." Section 12.

THE EXPANSIVELY DEFINED 'NONCOMPETITION COVENANT'

"Noncompetition covenant" is defined in Section 2(4), which states that it "includes every written or oral covenant, agreement, or contract by which an employee or independent contractor is prohibited or restrained from engaging in a lawful profession, trade, or business of any kind."

This definition is borrowed from California Bus. and Prof. Code § 16600, which provides extensive protection to employees: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The use of language from California's statute, together with the liberal construction requirement in Section 12, demonstrates that the Washington Legislature intended to encompass more, rather than fewer, covenants and types of covenants.

The Legislature carved out five circumstances that are not "noncompetition covenants" even though each of them may restrain another person from engaging to some extent in a lawful profession, business, or trade:

1. A nonsolicitation agreement (as defined in Section 2(5));
2. A confidentiality agreement (not defined);
3. A covenant prohibiting use or disclosure of trade secrets or inventions;
4. A covenant entered into by a person purchasing or selling the goodwill of a business or otherwise acquiring or disposing of an ownership interest; and

5. A covenant entered into by a franchisee when the franchise sale complies with RCW 19.100.020(1). (This provision must be read in conjunction with Section 7, which prohibits "no-poach" and "no-hire" clauses with respect to franchises.)

The new law defines these five circumstances narrowly, while the definition of "noncompetition covenant" is broad. Thus, the statute covers a range of covenants, not just those that have traditionally been considered "noncompetition" covenants.

NONCOMPETITION COVENANTS ARE VOID FOR WORKERS EARNING LESS THAN \$100,000

The new law's most substantial reform protects workers earning \$100,000 or less annually. If a worker's W-2 form, Box 1, earnings for the preceding calendar year are \$100,000 or less and the worker signed a noncompetition covenant, the covenant is void and unenforceable. Section 3(b). W-2 form, Box 1, earnings are less than Medicare earnings (Box 3) and do not include traditional retirement deferrals (but do include Roth retirement contributions). The \$100,000 will be adjusted for inflation each September and the new amount will take effect the following Jan. 1. Section 5.

A promise to pay a monetary benefit in the future might constitute consideration, but a noncompetition covenant will nevertheless be unenforceable if the previous year's earnings did not exceed \$100,000. Additionally, the \$100,000 must be paid by the "party seeking enforcement," which is defined in section 2(6): "Party seeking enforcement" means the named plaintiff or claimant in a proceeding to enforce a noncompetition covenant or the defendant in an action for declaratory relief."

Thus, an entity in a highly structured business (for example, one seeking to reduce or avoid taxation by establishing distinct operating and holding companies) will be unable to enforce a noncompetition covenant against an employee whose wages were paid by a separate, related entity.

The earnings threshold for independent contractors is \$250,000. Section 4(1). An employer who might see tax or liability advantages in classifying a worker as an independent contractor will have to consider the disadvantage of this higher earnings threshold. Additionally, the new law does not restrict its application to natural persons. In other words, the earning threshold applies equally to a noncompetition covenant signed by an entity.

Importantly, the new law does *not* provide a safe harbor for noncompetition covenants when the earnings threshold is met. (In fact, the law does not expressly authorize or approve any restrictive covenant.) All noncompetition covenants must satisfy the other standards enunciated in the statute. Covenants must also pass muster under the common law, which may continue to change. The new statute provides: "Except as provided

At a time when more workers are eager to exercise greater job mobility, noncompetition covenants have become increasingly widespread.

Reshaping Noncompetes in Washington

CONTINUED >

in this chapter, this chapter does not revoke, modify, or *impede the development* of the common law.”¹¹ Section 10(2). [Emphasis added.] The Legislature thus invites the judiciary to reshape restrictive covenant law while providing the judiciary with two new, overarching principles as guidance: Workforce mobility is important to economic growth, and restrictive covenant agreements may be contracts of adhesion and unenforceable. Section 1.

PROTECTIONS APPLICABLE REGARDLESS OF EARNINGS THRESHOLD

Not all aspects of the new law differ based on income. Many provisions apply equally to any worker, regardless of salary. Some of these are discussed below.

- **Advance notice.** An employer must notify a prospective employee in writing about “the terms of the covenant ... no later than the time of the acceptance of the offer of employment.” A separate notice requirement applies when the worker makes less than the threshold at the time of signing, but the employer nevertheless has him/her sign a noncompetition covenant because the worker might ultimately exceed the threshold. Under that circumstance, the employer must “specifically disclose that the agreement may be enforceable against the employee in the future.” Section 3(1)(a)(i).
- **Midstream covenants must have independent consideration.** As under common law, a midstream noncompetition covenant must be supported by independent consideration. Section 3(1)(a)(ii).
- **Eighteen-month cap on duration.** Rejecting existing common law holdings,¹² the new law establishes a presumption that noncompetition covenants exceeding 18 months are unreasonable. Section 3(2). This provision should void contractual tolling clauses and eliminate equitable tolling.¹³ Still, the law allows an employer to rebut the durational presumption with clear and convincing evidence proving that a longer duration is necessary to protect the ex-employer’s business or goodwill. The new law also includes a specific provision protecting performers from covenants lasting longer than three days. Section 4(2).
- **Layoffs.** A noncompetition agreement is unenforceable against an employee

if that employee “is terminated as the result of a layoff, unless enforcement of the noncompetition covenant includes compensation equivalent to the employee’s base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement.” Section 3(1)(c).

THE RESHAPED RULE OF REASONABLENESS

In *Wood v. May*, the Washington Supreme Court adopted the rule of reasonableness, described as “a new and different rule that a contract in restraint of trade will be enforced to the extent it is reasonable and lawful.”¹⁴ Still, the well-recognized problem with the rule of reasonableness is that “even to the well-meaning draftsman, there is less need to be careful.”¹⁵

A comment to *Restatement (Second) of Contracts* § 184 (1981) states that courts:

will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable. The fact that the term is contained in a standard form supplied by the dominant party argues against aiding him in this request.¹⁶

But no Washington court has cited the comment, and only a few other courts have.¹⁷ One federal court, applying Washington law, declined to rewrite an overly broad covenant, finding “it would result in an injustice” to the ex-employee.¹⁸ Still, lawyers frequently drafted broader and broader covenants and courts rewrote and rewrote them to make them reasonable, rather than striking them.

ESHB 1450 substantially reshapes the rule of reasonableness, but not by curtailing judicial power to rewrite covenants or by simply declaring some covenants to be void. Rather, the Legislature imposed a \$5,000 statutory penalty and required ex-employers to pay the ex-employee’s attorney fees under two circumstances. First, the penalty and attorney fee provision applies if the court or an arbitrator determines that the noncompetition covenant violates the new law. Section 9(2). Second, if the court or arbitrator reforms, rewrites, modifies, or only partially enforces any noncompetition covenant, the ex-employee is entitled to the statutory penalty and attorney fees. Section 9(3).

The message to drafters is unmistakable: draft covenants with limited durations, confined geography, and a narrow scope of prohibited activity, or your client may be on the hook for a penalty and an attorney fee award. These provisions legislatively overrule the attorney fee holding in *Emerick*.¹⁹ Given Section 9(2)-(3), the judiciary may take another look at comment b of the *Restatement (Second) of Contracts* § 184 and consider

If a worker’s W-2 form, Box 1, earnings for the preceding calendar year are \$100,000 or less and the worker signed a noncompetition covenant, the covenant is void and unenforceable.

applying it to all restrictive covenants. It is settled Washington law that the employer has the burden of proving that the covenant is reasonable and that “the equities are in his or her favor.”²⁰ Judicial adoption of comment b to section 184 seems like a logical next step.

THREE OTHER PROVISIONS GIVE THE NEW LAW MAXIMUM EFFECT


- **Retroactivity.** The Legislature decided to apply the new law to all legal proceedings initiated after the effective date, Jan. 1, 2020. Section 11. While limiting the application of the new statutory framework to actions commenced after the effective date, the new limitations on noncompete agreements are effective to all challenged agreements going forward—regardless of when such an agreement was entered—which is why the Legislature stated it was exercising the police power.²¹ The sole exception to retroactivity is Section 9(4), which does not allow an ex-employee to bring a cause of action for a noncompetition covenant that was signed before Jan. 1, 2020 if it “is not being enforced.”
- **Venue and choice of law protections.** The Legislature protected “Washington-based” workers from noncompetition covenants that require adjudication outside of Washington or deprive a person of the new law’s “protections or benefits.” Section 6. The phrase “Washington-based” comes from *Bostain v. Food Express, Inc.*²² Other state legislatures have enacted similar protections for residents or workers in their states.²³ Employers must heed the choice of law directives imposed by the Legislature.²⁴
- **Displacement of conflicting legal principles.** The Legislature wanted clarity and fewer legal disputes between ex-employers and ex-employees. Thus, it included a provision that displaces conflicting legal theories: “this chapter displaces conflicting tort, restitutionary, contract, and others laws of this state pertaining to liability for competition by employees or independent contractors with their employers or principals, as appropriate.” Section 10. This language is reminiscent of the Trade Secrets Act’s displacement provision contained in RCW 19.108.900, but it is broader. The new law displaces conflicting contract principles, but claims under the Trade Secrets Act are unaffected by the new law. Section 10(1)(b).

PROTECTION FOR WORKERS WITH SECOND JOBS

ESHB 1450 also offers a new protection for workers earning less than twice the applicable state minimum wage. Employers are prohibited from restricting, re-

straining, or prohibiting such workers from “having an additional job, supplementing their income by working for another employer, working as an independent contractor, or being self-employed.” Section 8(1). Section 8(2) limits this protection to some degree if the employee’s position raises “issues of safety” or the second job interferes “with the reasonable and normal scheduling expectations of the employer.” Section 8(2)(b) further limits the protection by stating that Section 8 does not alter the common law duty of loyalty or laws preventing conflicts of interest.

CONCLUSION

The Washington Legislature’s dramatic reshaping of noncompetition covenant law may become a well-spring of inspiration for Washington’s judiciary. The new law represents a fundamental reversal of common law and noisy rejection of restraints on worker mobility. The Legislature’s mandate is a warning to covenant drafters that the formerly free redrafting services by the judiciary now carry a hefty price tag. More changes are likely to come, as the Legislature has invited the judiciary to revisit and further reform restrictive covenant common law. 

NOTES:

1. Section 3(1)(a)(ii). The common law requires other midstream agreements not covered by the new law to be supported by new consideration (for example, a midstream nonsolicitation agreement). *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004).
2. See Ala. Code § 8-1-190 (effective 1/1/2016); Utah Code § 34-51-201 (effective 5/10/2016); Illinois 820 Ill. Comp. Stat. Ann. 90/10 (effective 2017); and Mass. Gen. Laws Ann. ch. 149, § 24L (effective 10/5/2018). In 2005, Washington’s Legislature addressed noncompetition agreements for broadcasting industry employees (but not those in sales or management). RCW 49.44.190.
3. See, e.g., “Non-compete Contracts: Economic Effects and Policy Implications,” Office of Economic Policy (U.S. Dept. of the Treasury) (March 2016); “Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses,” (The White House) (May 2016); and M. Marx, “Reforming Non-Competes to Support Workers,” The Hamilton Project (February 2018).
4. Washington does not yet have a published opinion enunciating the “janitor” rule of overbreadth. Examples from other jurisdictions include *Mutual Service Cas. Ins. Co. v. Brass*, 242 Wis.2d 733, 625 N.W.2d 648, 654-55 (2001) (clause that would prohibit ex-employee from working as a claim adjuster or “even a janitor” held overbroad), *Telxon Corp. v. Hoffman*, 720 F. Supp. 657, 665 n.7 (N.D. Ill. 1989) (“agreements which restrict the signer’s ability to work for a competitor without regard to capacity have repeatedly been declared contrary to law”), and *Weber Aircraft L.L.C. v. Krishnamurthy*, 2014 U.S. Dist. LEXIS 104041 *28 (E.D. Texas 2014) (restrictive covenant must bear “some relation to the activities of the employee”).
5. <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>.
6. *Id.* The defendants in *Knight, Vale & Gregory v. McDaniel*, 37 Wn. App 366, 367, 680 P.2d 448 (1984), for example, were presented with a restrictive covenant on their first day, well



Lawrence R. Cock is Of Counsel at Corr Cronin, LLP, and emphasizes restrictive covenant and trade secrets law in his practice. He worked with the Washington Employment Lawyers Association in drafting and testifying in favor of ESHB 1450. He can be reached at lrc@corrchronin.com.



Jack M. Lovejoy is Of Counsel at Corr Cronin, LLP. His practice emphasizes trade secrets, unfair competition, noncompetition and nonsolicitation agreements, and securities. He can be reached at jlovejoy@corrchronin.com.



Benjamin Byers is an associate at Corr Cronin, LLP. He is a member of the Public Policy Committee of the King County Bar Association. He can be reached at bbyers@corrchronin.com.

Editor’s Note:
One of the authors advocated for and helped draft the legislation addressed in this article.

Reshaping Noncompetes in Washington

CONTINUED >

after negotiating employment. "They signed the agreement, nevertheless, because they had changed their positions substantially in reliance on the offer of employment without such a stricture."

7. The Legislature authorized the Attorney General to bring an action for "any violation of this chapter." Section 9.
8. *Columbia Coll. of Music & Sch. of Dramatic Art v. Tunberg*, 64 Wash. 19, 116 P. 280 (1911).
9. See *Emerick v. Cardiac Study Center, Inc., P.S.*, 170 Wn. App. 248, 286 P.3d 689 (2012), and *Emerick v. Cardiac Study Center, Inc., P.S.*, 189 Wn. App. 711, 357 P.3d 696 (2015).
10. Despite the general trend toward greater enforcement of noncompetition covenants, there was an occasional judicial opinion favorable to ex-employees. See *Copier Specialists, Inc. v. Gillen*, 76 Wn. App. 771, 774, 887 P.2d 919, 920 (1995) (declining to enforce a noncompetition covenant because "skills acquired by an employee during his or her employment do not warrant enforcement of a covenant not to compete").
11. This feature of Washington's new law is consistent with Oregon's recent statute on noncompetition covenants. See *Nike, Inc. v. McCarthy*, 379 F.3d 576, 580-584 (9th Cir. 2004).
12. Washington common law has many examples of restrictive covenants with long durations. See, e.g., *Copier Specialists, Inc. v. Gillen*, 76 Wn. App. 771, 887 P.2d 919 (1995) (three-year, 50-mile noncompete); *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004) (three-year, 75-mile noncompete); and *Knight, Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 680 P.2d 448 (1984) (three-year nonsolicitation and nonacceptance of business).
13. *Compare Willman v. Beheler*, 499 S.W.2d 770 (Mo. 1973), *abrogated on other grounds* by State ex rel. *Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. 2004) (refusing to extend covenant beyond duration in the contract despite protracted litigation), *with Ocean Beauty Seafoods, LLC v. Pac. Seafood Grp. Acquisition Co.*, 2016 U.S. App. LEXIS 6983 (9th Cir. 2016) (a court sitting in equity may devise a remedy that extends a prior agreement).
14. 73 Wn.2d 307, 438 P.2d 587 (1968).
15. "Partial Enforcement of Post-Employment Restrictive Covenants," 15 *Columbia Journal of Law and Social Problems* 181, 192 (1979).
16. *Restatement (Second) of Contracts* § 184, comm. b.
17. *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 406 A.2d 1310, 1314 (N.H. 1979) (ex-employer not entitled to reformation because it failed to sustain its burden of proving good faith); *Data Management v. Greene*, 757 P.2d 62 (Alaska

1988) (remanding for determination of whether employer acted in good faith).

18. *Genex Coop, Inc. v. Contreras*, 2014 U.S. Dist. LEXIS 141417 *17 (E.D. Wash. 2014).
19. *Emerick, supra* n. 9.
20. *Sheppard v. Blackstock Lumber Co.*, 85 Wn.2d 929, 934, 540 P.2d 1373 (1975).
21. Section 12; see *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 151 Wn. App. 954, 969, 214 P.3d 954, 961 (2009), *aff'd*, 170 Wn.2d 768, 246 P.3d 785 (2011) (retroactive legislation affecting existing contract upheld due to "rational connection between the purpose of the statute and the method the statute uses to accomplish that purpose").

22. 159 Wn.2d 700, 153 P.3d 846 (2007). Without defining the phrase, the *Bostain* court held that an interstate truck driver, based out of a Vancouver, Washington terminal, driving with a Washington license, and living in Clark County, was Washington-based despite spending 63 percent of his time driving out of state.
23. See, e.g., California Labor Code § 925 and Mass. General Law 149 § 24L(e).
24. *Restatement (Second) of Conflict of Laws* § 6(1).

H

HOLMES & COMPANY PC

CERTIFIED PUBLIC ACCOUNTANTS
AND CONSULTANTS

is pleased to announce successful completion of litigation support re

FORMER CLIENT

v.

REGIONAL LAW FIRM

Testifying expert for defense counsel in connection with \$20 million legal malpractice claim made by former client. Performed forensic analysis of contracts and other financial / non-financial records, analyzed Plaintiff damages calculations and methods, prepared expert rebuttal report and exhibits in preparation for mediation, trial or settlement.

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

Forensic Accounting • Economic Damages • Business Valuation
Commercial Litigation • Accounting and Tax Malpractice Litigation
Full Service Public Accounting

7128 SW Gonzaga Street, Suite 100 • Portland, OR 97223
503.270.5400 • www.pdxcpas.com

CONGRATULATIONS **2019 SUPER LAWYERS**

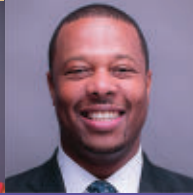
TOP 50 WOMEN



LINDSAY
HALM



REBECCA
ROE



JAMAL
WHITEHEAD



THOMAS
BREEN



SIMS
WEYMULLER



LIZ
McLAFFERTY



KAITLIN
WRIGHT

RISING STARS



ADAM
BERGER



WILLIAM
RUTZICK



KRIS
HOUSER



SERGIO A.
GARCIDUEÑAS-SEASE

EST. 1969



SCHROETER
GOLDMARK
BENDER

sgb-law.com

Keller Rohrback congratulates our newest partners,
Matthew Gerend & Ryan McDevitt



SEATTLE | OAKLAND | NEW YORK | PHOENIX | SANTA BARBARA | MISSOULA
800-776-6044 | info@kellerrohrback.com | www.kellerrohrback.com | www.krcomplexlit.com

The Cost of LLLTs

In 2012, over the WSBA Board of Governors' objection, the Washington Supreme Court created a new law license: Limited License Legal Technician (LLLT). LLLTs' practice was limited; they could, independent of a law firm, select and fill out preapproved divorce forms, explain procedures, timelines, and provide legal advice within that practice area. The Court acknowledged it was an experiment that may not work.¹ In my opinion, it is time to recognize the experiment on a program level is not working, fiscally or substantively, and without material changes never will. Fortunately, working with the Court we can make those changes.

The Court ordered the program must be "self-sustaining" and "the ongoing cost of [it] will be borne by the [LLLTs] themselves."² The program's advocates said it would. It is not. It is seven years later, and into next year the program will have an operating loss of over \$1.5 million. The WSBA will spend approximately \$250,000 on the program this year. Despite that, as of June 20, 2019, there are only 37 active LLLTs. However, saying there are 37 active LLLTs misses the point.

Advocates said the program was necessary to address an unmet legal need; emphasis was made on low-income families, pointing to family law dockets reportedly clogged with pro se parties. However, law firms *already had* nonlawyers helping select and fill out family-law forms. The Court, and even its proponents, realized licensing firm staff as LLLTs to do what they were already doing would not increase the availability of low-cost services. To deliver on that goal, LLLTs would need to be unmoored from firms. Thus, the Court in its 2012 order contemplated the program would create "stand-alone" LLLTs or they would "join non-profit organizations that provide social services with a family law component, (e.g., domestic violence shelters; pro bono programs; specialized legal aid programs) ..."³ Yet it appears by my count that *none* are employed by a "non-profit" or "social service" organization and 10 are employed by law firms. *We only have 27 "stand-alone" LLLTs*, assuming they are all actually practicing.

Representations were made to gain approval. When the WSBA Board of Governors rejected adopting the LLLT program, concerns were expressed over nonlawyers (1) practicing law even in a "limited" manner, (2) representing clients in court, and (3) entrusting them to identify nuances and risks lawyers occasionally miss. Even the Court in 2012 acknowledged that LLLTs, who need not even have a high school diploma provided they take certain LLLT classes, "no matter how well trained within a discrete subject matter, will not



Dan Bridges
WSBA Treasurer

Dan Bridges is a partner with McGaughey Bridges Dunlap PLLC. He can be reached at DanBOG@mcbdlaw.com.

In my opinion, it is not fiscally responsible to continue spending money and expanding into other practice areas when after seven years, so few family law LLLTs have been minted.

have the breadth of substantive legal knowledge or requisite practice skills to apply professional judgment in a manner that can be consistently counted upon to meet the public's need for competent and skilled legal representation in complex legal cases."⁴

After the WSBA Board of Governors rejected the program, its proponents went to the Court asking it to order the WSBA to create it. Both the Practice of Law Board and the Court addressed the concerns of members saying: (1) LLLTs would *not* represent clients in court, strictly limiting their practice, and (2) the program would be *self-sufficient through LLLT fees*. The Court relied on both statements to create the program and ordered it to be so.

The program has backtracked from its original representations.

LLLTs are representing clients in court. Despite saying LLLTs would never represent clients in court to gain approval, the program recently asked to do so; by a 5-4 vote the Court approved it in May. LLLTs may now "accompany and confer" with clients at depositions and court and "respond ... to direct questions from the court." (APR 28(B) (2)).

The program is not self-sufficient and as constituted never will be. After spending approximately \$250,000 a year, the program licensed only 10 LLLTs last year and *this year, with one LLLT exam complete, has licensed only three*. At the current rate of spending and without the license fee changing, it would require more than 1,000 LLLTs to break even. Ignoring the program will cost more if we have more licensees, it will be 100 years before the program is cost-neutral and ignores the millions spent to get it there.

It is unclear whether the program is materially delivering sustainable low- or moderate-means legal services. Law firms already had staff selecting and helping to fill out divorce forms. A firm having a LLLT do it, as 25 percent of current licensees do, and being billed as LLLT versus a legal assistant, does not increase the availability of low-income services. Also, reports are some LLLTs in rural areas charge the same as lawyers. That should be no surprise; landlords do not charge attorneys one rent and LLLTs a lesser rent. LLLTs charging the same as attorneys is not increasing service to even moderate-means families.

Trying to run before it can walk. After seven years and only 27 stand-alone LLLTs, the program seeks expansion before proving viability in family law. Last year it spent substantial time and your fees developing an expansion into trusts and estates over the objection of lawyers saying the area was too complex. The Court rejected the expansion. Recently the program spent more time and your fees developing a debtor/bankruptcy practice despite the fact that U.S. District Court allows only lawyers to practice. *After* spending the money and time developing the expansion, the program asked the Bankruptcy Court for an exception and was rejected.

APR 28 made the LLLT Board (separate from the WSBA Board of Governors) “responsible for ... recommending practice areas of law for LLLTs ...”⁵ However, *it did not dictate the speed at which it does so*. It is notable Justice Gonzales signed the 2012 order creating the program but wrote in dissent to the May 2019 expansion: “without any evidence of success,” the program continues to seek expansion and is of doubtful “financial sustainability” for either the WSBA or “LLLTs themselves.”⁶

In my opinion, it is not fiscally responsible to continue spending money and expanding into other practice areas when after seven years, so few family law LLLTs have been minted. *The program's proponents and the Court landed on family law for a reason:* it was believed to be the area of greatest need with the best chance of bringing licensees within the ranks. If not, a different area would have been chosen. Yet the LLLT Board has not explained how pursuing other practice areas, at more cost, when the most favorable area has yielded so few licenses, will net a different result. I submit the program would be better served spending its time and your fees to ensure the success of the LLLTs in the area we have, before spreading itself thinner in other areas. I submit it is far better, fiscally and substantively, to have one thriving LLLT practice area versus many struggling ones.

Further, on pursuing expansion, it is my impression the program is not giving sufficient weight to input from members on nonlawyers practicing law in some areas. Many spoke out on the complexities of trusts and estates but the LLLT Board forged ahead anyway. I predict that unless steps are taken, there is no area the program will not try to expand into, given time. Personal injury MAR cases? Medical releases are just



Congratulations, Kyle!

We congratulate partner **Kyle Sciuchetti** on becoming president-elect of the Washington State Bar Association.

**MILLER
NASH** | **GRAHAM
& DUNN**

Seattle, WA • Vancouver, WA • Portland, OR • Long Beach, CA
360.699.4771 • millernash.com

**PAULSON
COLETTI**
TRIAL ATTORNEYS PC

personal injury
wrongful death
product liability
medical malpractice



1022 NW Marshall Street #450 Portland OR | (503) 226-6361 | paulsoncoletti.com

Treasurer's Note

CONTINUED >

forms and demand letters are just transmitting records. LLC and corporate formation? More forms.

Finally, the program has not been a good guardian of your mandatory fees. It has functioned largely without Board of Governor oversight because the Board was told by some within WSBA that as a Supreme Court Board we could not question it. The program currently has WSBA hold two LLLT bar exams a year, at a cost just shy of \$10,000 each, despite only a few candidates sitting at each one. Additionally, without advising the Board of Governors, last year the LLLT program shifted money we budgeted for two meetings at the WSBA's office and spent it on a "retreat" during the summer in Wenatchee that was, by coincidence, only a few miles from the program's chairperson's office. Even as treasurer, I learned of that only by happenstance. APR 28 requires WSBA to fund the LLLT program's "reasonable" expenditures. APR 28 does not provide a blank check. I am pushing for changes in our fiscal policies to facilitate more oversight.

The road ahead. *I am not against LLLTs as originally conceived.* However, the program has strayed from the representations made to gain approval and has not achieved the metrics it set for itself. Worse, when legitimate questions are raised, the program asserts this as an "access to justice" issue, a term for increasing services to the underserved. I support that. But, framing it as that, people are afraid to hold the program accountable fearing being accused of being classist, racist, gender-biased, etc. I have been repeatedly attacked merely for asking basic cost questions.

Proponents will point to people LLLTs have helped; some have. However, anecdotal examples are not a response to objective numbers on a program level. The LLLT Board and LLLTs themselves intend well. However, your Board of Governors has a fiduciary duty to make judgments based on actual data and to objectively evaluate performance metrics without influence of personality.

With no data and based only on hopeful speculation, the program's proponents made representations, many of which were so quickly abandoned it is reasonable to ask

if they were ever intended to be kept. Was it always the intention to expand into court once approved, despite saying it would not, to gain approval? Did the program ever believe it could be self-supporting? As Justice Gonzales pointed out in his May 2019 dissent, the program never provided a roadmap for that and *still* has not. It seems impossible if the numbers are considered.

Worse, I fear the program is becoming an institutional perpetuation of gender bias. To date, all but one of the LLLTs are women and the entire LLLT Board, with one exception, are women. There is no intent to discriminate; we can only license those who sign up. But the LLLT Board has large control over who is on its Board. This program cannot become a "pink collar" version of the practice of law.

If the program is not eliminated outright, I urge returning to its 2012 scope and folding it into the LPO license, which offers a license limited to selection and completion of pre-printed legal forms. LLLTs could differ from LPOs and give legal advice within the scope of those forms; that is how the program was conceived and approved. That will require amendments to the LPO and LLLT rules, among others, but it is feasible. Also, the LLLT Board should not be independent and free from direct WSBA oversight as it is now. I am grateful for the passion of the LLLT Board. I want it to stay in some form. However, there needs to be a detached backstop. It is good we have strong advocates of the

program but enthusiasm without check is not a roadmap to long-term success.

The Court did not know in 2012 that seven years later we would have only 27 stand-alone LLLTs at a cost of approximately \$1.5 million, that now increases approximately \$250,000 every year. *But we know that now.* And knowing that, we are duty bound to address things as they actually are, not how we hoped they would be.

We need to establish a path to success for the program going forward with firm mileposts to keep us accountable. That will require material changes. We should all want a right-sized, right-scoped LLLT program; it is good for the profession and the public. However, the \$1.5 million price tag—going nearly \$250,000 deeper in the red each year, is an enormous opportunity cost for the profession and the public. We cannot expect different results doing the same thing year after year. Something must be done. ⁽¹⁾⁽¹⁾

NOTES:

1. 2012 Order, 25700-A-1005, p. 9 ("There is simply no way to know the answer to this question without trying it.")
2. *Id.* at 11.
3. *Id.* at 9, parenthesis in original.
4. *Id.* at 6 and 8 ("... (LLLTs will) not be able to represent clients in court...")
5. APR 28(c)(2)(a).
6. 2019 Order, 25700-A-1258.

Introducing
Stritmatter Trial Insider™: Dinh v Ride The Ducks,
a new podcast exploring the landmark Ride The Ducks trial.

Stritmatter TRIAL INSIDER

DINH v RIDE THE DUCKS

1,501 Episodes of The Crash
Dinh v Ride The Ducks — Season 1, Ep. 1

LAND & WATER TOUR

Available now at
www.thetrialinsider.com

S G B W E L C O M E S



COLIN
MIELING

MARGARET
DUÑO GRITTEN

LARISSA
MURAKAMI

SERGIO A.
GARCIDUEÑAS-SEASE

EST. 1969



SCHROETER
GOLDMARK
BENDER

Many Leaders. *One Team.*

sgb-law.com



Judge Sharon
Armstrong (Ret.)



M. Wayne
Blair, Esq.



Fred R.
Butterworth, Esq.



Judge Ronald
E. Cox (Ret.)



Judge William L.
Downing (Ret.)



Judge Anne L.
Ellington (Ret.)



Judge Deborah D.
Fleck (Ret.)



Judge Helen L.
Halpert (Ret.)



Judge J. Kathleen
Learned (Ret.)



Judge Richard F.
McDermott (Ret.)



Judge Thomas
McPhee (Ret.)



Lawrence R.
Mills, Esq.



James F.
Nagle, Esq.



Douglas S.
Oles, Esq.



Judge Jeffrey
Ramsdell (Ret.)



Judge Michael J.
Trickey (Ret.)



Comm. Eric B.
Watness (Ret.)

JAMS Seattle Neutrals

Mediators
Arbitrators
Neutral Evaluators
Problem Solvers



Local Solutions.
Global Reach.™

1420 Fifth Avenue • Suite 1650 • Seattle, WA 98101 • 206.622.5267 • jamsadr.com/seattle

ON BOARD

News from the Board of Governors and WSBA. The WSBA Board of Governors determines the Bar's general policies and approves its annual budget. Agendas, materials, and notes from each public meeting are available at www.wsba.org.

BAR STRUCTURE WORK GROUP WRAPS UP

Recommendation to Remain Unified; Final Report to be Ready by September

After five months and eight meetings, the Bar Structure Work Group concluded its work in mid-July and will now focus on completing a final report to submit before the Washington Supreme Court's September en banc meeting. The work group was chartered last November to review and assess the Bar's structure in light of recent case law with First Amendment and antitrust implications. The work group approved several recommendations to go to the court:

- To not significantly change the structure of the Bar through bifurcation;
- To maintain the court-created boards, such as Access to Justice and Practice of Law;
- To have the court review and reconsider the WSBA's 2014 Governance Task Force report;
- To have the court review and reconsider the Bar's Keller-deduction process for defensibility and transparency purposes; and
- To include public members on the WSBA Board of Governors, a provision that was part of a yet-to-be enacted court order from January 2018.

Chief Justice Mary Fairhurst, chair of the work group, explained that while the recommendation means "we are not proposing two bars or some kind of hybrid model; what we are looking at is continuing as a unified or integrated bar," there will likely be changes ahead as the court evaluates the final report. "The court needs September, October, and November to be thinking about and talking about how to move forward," Fairhurst added, especially if there are any legislative implications.

According to Justice Fairhurst, the work-group process was proof that "we can have thoughtful discussions in a way where you can agree and disagree, where you can be educated and learn, and where you can come to a resolution"—a level of civility and discourse often not modeled by leaders and highlighted in the media in this day and age, according to Justice Fairhurst.

ONLINE: The final report will be posted online at www.wsba.org/bar-structure-work-group, where more information, including videos of the meetings and member comments, is also available.

KUDOS!

Congratulations to the work-group members (and their representative group):

- **Hunter M. Abell** (WSBA section representative: small size)
- **Esperanza Borboa** (public representative)
- **Dan D. Clark** (WSBA Board of Governors representative)
- **Eileen Farley** (WSBA section representative: medium size)
- **Judge Frederick P. Corbit** (Supreme Court-appointed board representative)
- **Andrea Jarmon** (Supreme Court-appointed board representative)
- **Mark Johnson** (WSBA section representative: large size)
- **Andre L. Lang** (Supreme Court-appointed board representative)
- **Kyle D. Sciuchetti** (WSBA Board of Governors representative)
- **Jane Smith** (Tribal-member representative)
- **Paul A. Swegle** (WSBA Board of Governors representative)

Special thanks to **Dory Nicpon** and **Margaret Shane** for work-group support.

FISCAL YEAR 2020

WSBA Budget and Finances

The Board of Governors in July reviewed the WSBA draft budget for fiscal year 2020 (beginning Oct. 1). The Budget and Audit Committee will continue to fine tune the budget ahead of the Board of Governor's September meeting, when the budget will be on the agenda for final action. In light of potential structural change, Budget and Audit Committee members determined that next year's budget will essentially maintain the status quo of programs, services, and operations. License fees are set at \$458 for lawyers and \$200 for Limited Practice Officers and Limited License Legal Technicians (as previously deemed reasonable by the Supreme Court). The Budget and Audit Committee's meetings are open to the public, and all documents—including draft and final budgets—are posted online.

ONLINE: More information is at www.wsba.org/connect-serve/committees-boards-other-groups/budget-audit.

OTHER FINANCIAL NEWS:

- Dan Clark, governor from District 4 (Yakima), was elected as the incoming WSBA treasurer at the July Board meeting.
- The Board is considering an expanded scope for its annual independent audit in FY20. Budget and Audit Committee members have expressed a high degree of confidence in the WSBA's financial integrity following decades of clean audits; they also hope to establish a baseline of data and discovery with a more thorough scope of audit this cycle, which will support the Board and a new permanent executive director going forward.



MARK YOUR CALENDAR

The next regular BOG meeting will be held Sept. 26-27 in Seattle (the annual APEX Awards dinner will take place on the evening of Sept. 26).

Practice-Changing, Profession-Changing, Life-Changing

Applications for Class of 2020 due Sept. 20

Calling all WSBA members who have been practicing between three and 10 years: Are you ready for a leadership opportunity that will connect you with an incredible network of colleagues and mentors, help you realign your work with your mission and values, promote diversity and inclusion in the legal community, and shape the future of the profession?

Then consider applying for the Washington Leadership Institute (WLI).

The WLI is a collaborative leadership-development program between the WSBA and the University of Washington School of Law that is designed to recruit and train traditionally underrepresented lawyers for future leadership positions in the legal community. The program strives to enroll fellows for each class who reflect the full diversity of our state in race, ethnicity, gender, sexual orientation, disability, and geographic location. WLI sessions include topics such as the “nuts and bolts” of law practice, leadership styles, the judiciary, and the legislative process.

PROGRAM BENEFITS

The WLI provides fellows with numerous opportunities to interact with legal, judicial, and political leaders in person. The program offers a unique combination of benefits:

- No tuition fee or cost for program participation
- CLE credits, enough to satisfy approximately three full years of MCLE requirements, at no cost
- Introduction to practice and industry leaders
- Training in the law, courts, and the Bar processes
- One-on-one interaction with judges
- Mentorship from Bar leaders

The deadline for applications is 5 p.m., Sept. 20, 2019.

ONLINE: More information and the application form are at www.law.uw.edu/academics/continuing-education/wli.



Photo courtesy of Park Ranger Jason Janosky

ON THE ROAD

Lending a Hand

WSBA Board and staff members and their families joined together to serve the local community by picking up litter and debris along the Sacagawea Heritage Trail during the July meeting in Richland.

PERSONALIZED TRUST SERVICES FOR YOUR CLIENTS

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

Estate & Trustee Services, Special Needs Trusts, Investment Management



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

—Amy C. Lewis, Attorney



becu.org/trust | 206-812-5176

BECU Trust Services is a trade name used by MEMBERS® Trust Company under license from BECU. Trust services are provided by MEMBERS® Trust Company, a federal thrift regulated by the Office of the Comptroller of the Currency. Trust and investment products are not deposits of or guaranteed by the trust company, a credit union or credit union affiliate, are not insured or guaranteed by the NCUA, FDIC or any other governmental agency, and are subject to investment risks, including possible loss of the principal amount invested. This is for informational purposes only and is not intended to provide legal or tax advice. For legal or tax advice, please consult your attorney and/or accountant.

NEED TO KNOW

News and information of interest to WSBA members. Email nwlawyer@wsba.org if you have an item you would like to share.

WSBA NEWS WSBA Budget

Information on the WSBA's Fiscal Year 2019 budget, as well as the draft Fiscal Year 2020 budget, is available at www.wsba.org/about-wsba/finances.

VOLUNTEER Custodians Needed

The WSBA is seeking interested lawyers as potential volunteer custodians of files and records to protect clients' interests. Visit <https://www.wsba.org/connect-serve/volunteer-opportunities/act-as-custodian>, or contact Sandra Schilling: sandras@wsba.org, 206-239-2118, 800-945-9722, ext. 2118. Darlene Neumann: darlene@wsba.org, 206-733-5923, 800-945-9722, ext. 5923.

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 or 800-945-9722, ext. 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 or 800-945-9722, ext. 8284.

QUICK REFERENCE Usury Rate

The maximum allowable usury rate can be found on the Washington State Treasurer's website at <https://tre.wa.gov/partners/for-state-agencies/investments/historical-usury-rates/>.

WSBA COMMUNITY NETWORKING WSBA CLE Faculty Database

Current and interested CLE faculty are encouraged to register in the CLE faculty database. Log in to your myWSBA account, go to "My WSBA Profile" and select "CLE Faculty Database Registration."

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.

WSBA MEMBER WELLNESS WSBA Connects

WSBA Connects provides all WSBA members with free counseling in your community on topics including work stress, career challenges, addiction, and anxiety. Visit www.wsba.org/for-legal-professionals/member-support/wellness/wsba-connects or call 1-800-765-0770.

The "Unbar" Alcoholics Anonymous Group

The Unbar is an "open" AA group for attorneys that has been meeting weekly for over 25 years. Find more details at www.wsba.org/for-legal-professionals/member-support/wellness/addiction-resources or by calling 206-727-8268.

Career Consultation

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

RESOURCES WSBA Practice Management Assistance

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

Lending Library

The WSBA Lending Library is a free service to WSBA members offering hundreds of available titles free for short-term loan. Visit www.wsba.org/library to learn more and see what's available.

Free Practice-Management Consultations

Schedule a free phone consultation with a WSBA practice-management advisor to find answers to your questions about the business of law-firm ownership. Common inquiries we can help with include technology adoption, opening or closing a law office, and client relationship management. Visit www.wsba.org/consult to get started.

Member Discounts

Visit the Practice Management Discount Network for discounts on tools to help you improve your legal service delivery: www.wsba.org/discounts.

Free Legal Research Tools

WSBA offers resources and member benefits to help you with your research. Visit www.wsba.org/legalresearch to learn more and to access Casemaker and Fastcase for free.



THE BAR BUZZ
Practice management discounts just for you!

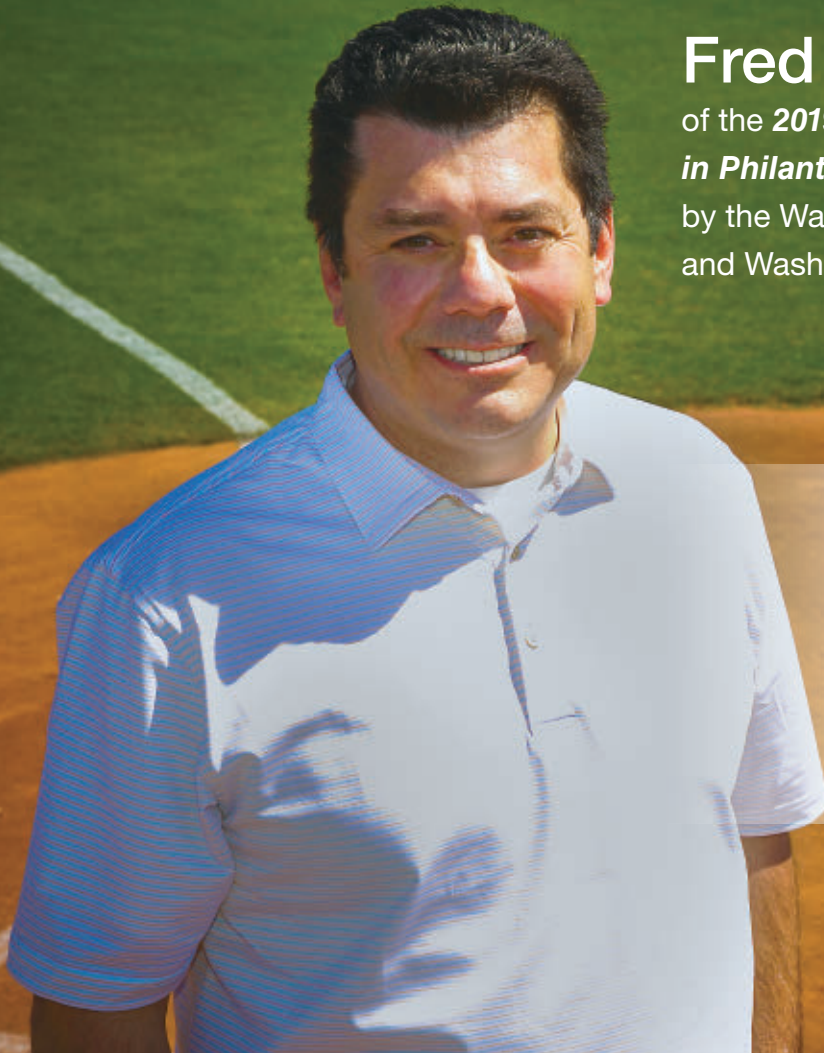
Save 10%

Marketing and Website support: WSBA members receive 10% off pre-paid services from Constant Contact, an email-marketing platform.

As a member of the WSBA, you have access to a collection of discounts on products and services to help you improve your law practice.

Browse them all at
www.wsba.org/discounts

Congratulations!



Fred Rivera is the recipient of the *2019 Sally P. Savage Leadership in Philanthropy Award*, presented jointly by the Washington State Bar Association and Washington State Bar Foundation.

Mr. Rivera exemplifies the same spirit of giving that Sally Savage demonstrated throughout her leadership of the Washington State Bar Foundation.

We are proud to present him with this award.

Please consider a tax-deductible donation to the Foundation in honor of Mr. Rivera, or any of this year's APEX Award recipients at wsba.org/foundation.

For APEX Awards reservations and info, visit wsba.org/apex.

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 *NWLawyer* at www.wsba.org/news-events/nwlawyer or by looking up the respondent in the legal directory on the WSBA website (www.wsba.org) and then scrolling down to "Discipline History."

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

Resignation in Lieu of Discipline

Roy Rainey (*WSBA No. 9512, admitted 1979*) of Silverdale, WA, resigned in lieu of discipline, effective 6/25/2019. The lawyer agrees that he is aware of the alleged misconduct in disciplinary counsel's Statement of Alleged Misconduct and rather than defend against the allegations, he wishes to permanently resign from membership in the Association. The Statement of Alleged Misconduct reflects the following violations of the 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), 8.4 (Misconduct). Joanne S. Abelson acted as disciplinary counsel. Roy Rainey represented himself. The online version of *NWLawyer* contains a link to the following document: Resignation Form of Roy Rainey (ELC 9.3(b)).

Suspension

John Cameron Bolliger (*WSBA No. 26378, admitted 1996*) of Richland, WA, was suspended for 36 months, effective 7/09/2019, by order of the Washington Supreme Court. The lawyer's conduct violated the following Rules of Professional Conduct: 1.16 (Declining or Terminating Representation), 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 3.5 (Im-

partiality and Decorum of the Tribunal), 8.4 (Misconduct). Francesca D'Angelo, Debra Slater, and Erica Temple acted as disciplinary counsel. John Cameron Bolliger represented himself. John A. Bender was the hearing officer. Randolph O. Petgrave III was the settlement hearing officer. The online version of *NWLawyer* contains links to the following documents: Disciplinary Board Order Conditionally Approving Stipulation; Consent to Conditional Term; Stipulation to Suspension; and Washington Supreme Court Order.

Souphavady Bounlutay (*WSBA No. 30552, admitted 2000*) of Seattle, WA, was suspended for 30 months, effective 6/25/2019, by order of the Washington Supreme Court. The lawyer's conduct violated the following Rules of Professional Conduct: 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.15A (Safeguarding Property), 8.1 (Bar Admission and Disciplinary Matters), 8.4 (Misconduct). Francesca D'Angelo acted as disciplinary counsel. Mark Clayton Choate represented Respondent. Anthony A. Russo was the hearing officer. Timothy J. Parker was the settlement hearing officer. The online version of *NWLawyer* contains links to the following documents: Disciplinary Board Order Approving to Stipulation to 30 Month Suspension; Order Granting Protective Order; Stipulation to Suspension; and Washington Supreme Court Order.

Robert E. Caruso (*WSBA No. 29338, admitted 1999*) of Spokane, WA, was suspended for one year, effective 6/25/2019, by order of the Washington Supreme Court. The lawyer's conduct violated the following Rules of Professional Conduct: 1.7 (Conflict of Interest: Current Clients), 1.16 (Declining or Terminating Representation). Debra Slater acted as disciplinary counsel. Stephen Kerr Eugster represented Respondent. Diana M. Dearmin was the hearing officer. Craig C. Beles was the settlement hearing officer. The online version of *NWLawyer* contains links to the following documents: Disciplinary Board Order Approving Stipulation to One Year Suspension; Stipulation to Suspension; and Washington Supreme Court Order.

Dallas William Jolley Jr. (*WSBA No. 22957, admitted 1993*) of Tacoma, WA, was sus-

pending for 30 days, effective 6/25/2019, by order of the Washington Supreme Court. The lawyer's conduct violated the following Rules of Professional Conduct: 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records). Kathy Jo Blake acted as disciplinary counsel. Brett Andrews Purtzer represented Respondent. David B. Condon was the hearing officer. Seth A. Fine was the settlement hearing officer. The online version of *NWLawyer* contains links to the following documents: Disciplinary Board Order Approving Stipulation to 30 Day Suspension; Stipulation to Suspension; and Washington Supreme Court Order.

Mark E. Smith (*WSBA No. 30924, admitted 2001*) of Bothell, WA, was suspended for 27 months, effective 6/25/2019, by order of the Washington Supreme Court. The lawyer's conduct violated the following Rules of Professional Conduct: 1.5 (Fees), 1.15A (Safeguarding Property), 1.15B (Required Trust Account Records). Debra Slater acted as disciplinary counsel. Cassandra L. Stamm represented Respondent. David A. Thorner was the hearing officer. Edward F. Shea Jr. was the settlement hearing officer. The online version of *NWLawyer* contains links to the following documents: Disciplinary Board Order Approving Stipulation to 27 Month Suspension; Stipulation to Suspension; and Washington Supreme Court Order.

Diane Sweet (*WSBA No. 35881, admitted 2004*) of Portland, OR, was suspended for four months, effective 6/25/2019, by order of the Washington Supreme Court. The lawyer's conduct violated the following Rules of Professional Conduct: 1.3 (Diligence), 1.4 (Communication), 1.15A (Safeguarding Property), 1.16 (Declining or Terminating Representation). Jonathan Burke acted as disciplinary counsel. Diane Sweet represented herself. Evan L. Schwab was the hearing officer. The online version of *NWLawyer* contains links to the following documents: Disciplinary Board Order Approving Stipulation to Four Month Suspension; Stipulation to Suspension; and Washington Supreme Court Order.

ONLINE

See full details of disciplinary and other regulatory notices by accessing the links in the online version: www.wsba.org/news-events/nwlawyer



EXPERIENCE TENACITY JUDGMENT DISPUTE RESOLVED

ADR Solutions

- All panelists are former Washington State Superior Court judges
- Mediation, arbitration, hearing officer, special master and litigation consultation
- Talented and responsive staff
- Comfortable mediation conference rooms
- Arbitration courtroom with audio/visual technology and party breakout rooms

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

GEORGE FINKLE
Former King County Superior Court Judge

STEVE SCOTT
Former King County Superior Court Judge

BRUCE HELLER
Former King County Superior Court Judge

PARIS K. KALLAS
Former King County Superior Court Judge

LARRY A. JORDAN
Former King County Superior Court Judge

LINDA LAU
Former Appellate and Superior Court Judge

PALMER ROBINSON
Former King County Superior Court Judge



Joshua Green Building · 1425 Fourth Avenue · Suite 300
Seattle, Washington 98101 · 206.223.1669 · jdrllc.com

**PUTNAM
LIEB
POTVIN
DAILEY**

is proud to announce our newest partner,

Dustin J. Dailey

Dustin J. Dailey is the recipient of two Bachelor degrees in Political Science and International Studies. He obtained his degree in law from The University of Washington. He worked in the capacity of assistant Attorney General for Washington State from the years 2007 to 2011. His focus during that time was on litigating third party, workers' compensation, and WISHA workplace safety workshops before the appellate courts and Board of Industrial Insurance Appeals. Dustin was the Third party program advisor and he was the direct supervisor of his fellow Assistant Attorneys General. He also served as program manager at Labor and Industries new Structured Settlement program with a focus on workers compensation law.

He joined our firm in 2013.

Putnam Lieb Potvin Dailey

Office: 360-754-7707
www.putnamlieb.com

"We take the insult out of injury"

DAVIES PEARSON, P.C.

Attorneys at Law

is pleased to announce that

Jennifer Doehne

has become an Associate of the firm and will practice in the areas of estate planning, wealth management, business, probate, trust and estate dispute resolution, and real estate.

Ms. Doehne graduated from Boston University School of Law with a Master of Laws in Taxation and from Michigan State University College of Law with a Juris Doctorate. She received her Bachelors of Arts from Averett University.

(253) 238-5120

jdoehne@dpearson.com

920 Fawcett Ave | PO Box 1657 | Tacoma, WA 98401

Tel: 253-620-1500 | Fax: 253-572-3052
www.dpearson.com

**FLOYD, PFLUEGER
& RINGER, P.S.**

is proud to announce the honors bestowed on our firm and attorneys.

Congratulations to:

John A. Safarli

AND

William J. Dow

They have been selected by Super Lawyers® as 2019 "Rising Stars"

Floyd, Pflueger & Ringer's diverse litigation team emphasizes defense of complex civil litigation matters, including medical malpractice and professional liability, retail and premises liability, construction claims (defect and injury), fire and catastrophic events response, employment law and transportation.

200 W. Thomas St., Suite 500 Seattle, WA 98119-4296

Tel: 206-441-4455 | Fax: 206-441-8484
www.floyd-ringer.com

REED LONGYEAR MALNATI & AHRENS, PLLC

is pleased to announce that

Jennifer Song

Employment Law

Joshua Reinertson

Estate Planning

Kristin Kelly

Family Law, Alcoholic Beverage Law,
Contract Law, Litigation

have joined the firm as associate attorneys

and

Celeste McDonell

Estate Planning, Probate, Family Law

has joined the firm as a member of the firm.

801 Second Ave, Suite 1415, Seattle, WA 98104

Tel (206) 624-6271 | Fax (206) 624-6672
reedlongyearlaw.com

ENVISION FAMILY LAW

is pleased to announce that

Andrew May

has joined the firm as an associate and

Kirstyn Palmisano

has joined the firm as an associate.

Envision Family Law is a family law firm with multiple locations throughout the Puget Sound. The firm's attorneys practice in all areas of family law, including but not limited to dissolutions, child support, child custody, third-party custody and adoptions.

Envision Family Law

600 University Street, Suite 3010 | Seattle, WA 98101

www.envisionfamilylaw.com
(206) 202-1952

FORSBERG & UMLAUF, P.S.

We are excited to announce that

Ryan J. Hesselgesser,

Laura E. Kruse,

Micah R. Steinhilb

have recently joined our firm

and

we are very proud to announce that

Meghan A. McNabb

has recently passed the bar!

Ryan L. Hesselgesser

is of Counsel with a primary focus on insurance coverage, bad faith litigation and third-party claims.

Ryan is a graduate of Gonzaga University
School of Law.

Laura E. Kruse

is of Counsel and specializes in transportation defense claims, employment litigation and personal injury litigation. Laura is a graduate of Gonzaga University School of Law.

Micah R. Steinhilb

is an Associate and specializes in all areas of insurance coverage matters in Oregon and Washington. Micah is a graduate of Lewis & Clark Law School, cum laude.

Meghan A. McNabb

recently became an Associate. Her work will primarily focus on personal injury litigation. Meghan is a graduate of the University of Washington School of Law.

Forsberg & Umlauf, P.S.

901 5th Ave., Ste. 1400
Seattle, Washington 98164

Tel (206) 689-8500 | Fax (206) 689-8501
www.FoUm.law

MIX SANDERS THOMPSON, PLLC

is pleased to announce that

Michael Kazuo Rhodes

has been named a Partner at the firm.

Michael joined Mix Sanders Thompson in 2016, and now nearing his tenth year of practice, continues to represent the firm's clients with skill and forward thinking. He specializes in complex defense litigation. He is on the board of the Washington Defense Trial Lawyers and is a proud husband and father of two daughters.

1420 Fifth Avenue, Suite 3300
Seattle, WA 98101

tel: 206.521.5989

fax: 888.521.5980

mixsanders.com

We are proud to announce

KADISH TWERSKY LAW FIRM

has merged with

PALACE LAW

Palace Law welcomes

Jeff Twersky & Glenn Kadish

into the Palace Law family.

Personal Injury and Workers' Compensation

from

Everett to Tacoma
& across Washington

Justice for Working Men and Women

Palace Law

4009 Bridgeport Way W, Suite B
University Place, WA 98466

Tel: 253.627.3883

www.PalaceLaw.com

Do you have an announcement to make?

New partner or associate at your firm? Have a legal service to offer? Advertise in *NWLawyer's* Announcements or Professionals section!

PLACING AN AD IS EASY:

Contact Robert Page
at SagaCity Media

206-454-3035
rpage@sagacitymedia.com

DUNLAP MEDIATION SERVICES

Debbie Dunlap is located in downtown Seattle and Moses Lake for availability to successfully mediate cases in Western and Eastern Washington locations at her office or offices of counsel for the parties.

Debbie has mediation training and experience. She has litigated insurance defense and plaintiff's personal injury cases for over 30 years in most counties in Washington, focused on minor to major catastrophic injuries and wrongful death, as well as brain and psychological injuries, sexual torts, abuse and harassment, and insurance bad faith, consumer protection, and subrogation. Debbie is also experienced in: landowner disputes such as boundary line, adverse possession, tree cutting, waste and nuisance; and product and school district liability.

Providing economical and fair mediations, any travel time is not charged for.

Contact Debbie at:

debbie@dunlapms.com

Or visit: www.dunlapms.com

3131 Western Avenue, Suite 410
Seattle, WA 98121

**Phone 425-765-0078
or fax 425-642-8700**

Upcoming Conferences

SEPTEMBER 13-15, 2019

Solo and Small Firm Conference

*Clearwater Resort and
Casino, Suquamish*

SEPTEMBER 20, 2019

Elder Law Conference

*The Conference Center at
Seattle-Tacoma International
Airport*

OCTOBER 3-4, 2019

Criminal Justice Institute

*The Conference Center at
Seattle-Tacoma International
Airport*



WE WORK FOR YOU.

As a not-for-profit credit union, BECU puts your bottom line first. We have the products and services legal professionals need, including flexible business checking accounts with no maintenance fees or minimum balances required. Plus now offering IOLTA accounts for your trust needs.

Give us a call at 206-812-5199 or visit:
www.becu.org/businessbanking for more information.

B|E|C|U

**BUSINESS
SERVICES**

Federally insured by NCUA

STATE & LOCAL TAX

Over 40 Years of Experience
25+ Reported Appellate Decisions
Available for Consultation
and Referrals
Audits, Appeals, Tax Planning
& Refund Claims

George C. Mastrodonato
mastrodonato@carneylaw.com
Tel: 206-622-8020

HOLMES & COMPANY, PC

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

William N. Holmes
CPA, ABV, CVA, CFE
7128 SW Gonzaga Street, Suite 100
Portland, OR 97223
Tel: 503-270-5400
Fax: 503-270-5401
wnholmes@pdxcpas.com
www.pdxcpas.com

COMPUTER FORENSIC

- analysis
- incident response
- investigations
- testimony

Dr. Gordon Mitchell
The eSleuth

Ph.D. UW Electrical Engineering
CPP, CISSP, SANS GSEC & GCIH
fellow of ISSA and SPIE

legal.enquiries19@eSleuth.com
888-375-3884 • Future Focus, Inc
WA PI 548

<https://eSleuth.com>

FORENSIC ACCOUNTING

Robert Loe, CFE, CPA

- Certified fraud examiner
- Forensic accounting
- Litigation support
- Expert witness testimony
- Experienced peer reviewer
- Former investigator for state board of accountancy
- Licensed in WA, AK, HI, & DC

221 First Avenue West, Suite 400
Seattle, WA 98119

Tel: 206-292-1747

www.loecpa.com

robert@loecpa.com

CIVIL APPEALS

Successful results in
personal injury, insurance,
family law, commercial,
and more.

Jason W. Anderson

Tel: 206-622-8020

anderson@carneylaw.com

MEDIATION AND ARBITRATION GROUP

Hon. Rosanne Buckner, Ret.
Barbara Jo Sylvester
Henry Haas
William P. Bergsten
Robert Beale
Cameron J. Fleury

Each with over 20 years
experience handling a
diverse range of cases.
Our team is ready to help resolve
your complex matters.

Please visit our website for
additional information.

McGavick Graves, P.S.

1102 Broadway, Suite 500
Tacoma, WA 98402

Local: 253-254-5900

Toll Free: 800-709-7015

www.mcgavickgraves.com

STOCKBROKER MISCONDUCT

We focus on recovering investment
losses. If your client has lost money
investing in the stock market,
REITs, or annuities, there may
be ways to recover those losses.
We work on a contingency fee
basis, and we pay referral fees in
accordance with WSBA RPCs.

206-795-5798

David Neuman

Israels & Neuman, PLC

506 Second Avenue, Ste. 1400
Seattle, WA 98104

dave@israelsneuman.com

www.israelsneuman.com

LAW FIRM BREAK-UPS PARTNER DEPARTURES AND EXPULSIONS

Discreet consultation and litigation of partner withdrawals or expulsions.

Smyth & Mason, PLLC

have years of experience successfully representing departing partners, expelled partners, and law firms. Operating agreements, divisions of profits, receivables, case files and clients; redistribution of debt and costs.

Don't go it alone.

Smyth & Mason, PLLC

1325 Fourth Avenue, Suite 940
Seattle, WA 98101
Tel: 206-621-7100
Fax: 206-682-3203

www.smythlaw.com

U.S. BUSINESS IMMIGRATION

Border, Waivers,
and Cannabis Issues
W. Scott Railton

Cascadia Cross-Border Law

Tel: 360-671-5945

srailton@cascadia.com
www.cascadia.com

INVESTOR CLAIMS

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

COURTLAND SHAFER

John G. Llewellyn, PLLC

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

Tel: 206-923-2889

courtland@l1llaw.net

FREEDOM OF SPEECH

(See, e.g.):

Yates v. Fithian,
2010 WL 3788272
(W.D. Wash. 2010)

City of Seattle v. Menotti,
409 F.3d 1113 (9th Cir. 2005)

State v. Letourneau,
100 Wn. App. 424 (2000)

Fordyce v. Seattle,
55 F.3d 436 (9th Cir. 1995)

LIMIT v. Maleng,
874 F. Supp. 1138 (W.D. Wash. 1994)

James E. Lobsenz

701 Fifth Avenue, Suite 3600
Seattle, WA 98104

206-622-8020

lobsenz@carneylaw.com

www.carneylaw.com

MEDIATION

Mac Archibald

Mac has been a lawyer in Seattle for over 40 years. He has tried a wide range of cases including maritime, personal injury, construction, products liability, consumer protection, insurance coverage, and antitrust law.

Mac has over 25 years of experience mediating cases. He has mediated over 2,000 cases including maritime, personal injury, construction, wrongful death, employment and commercial litigation.

Mac has a reputation for being highly prepared for every mediation and for providing as much follow-up as necessary.

Law Offices of Edward M. Archibald MEDIATION SERVICES

22832 S.E. 5th Terrace
Sammamish, WA 98074

Tel: 206-903-8355

Email: mac@archibald-law.com

SELF- DIRECTED IRA

Warren L. Baker

Legal and tax consulting for non-traditional retirement account investors. Avoid IRS scrutiny, prohibited transactions, UBTI, and other problems.

Tel: 206-753-0305

warren@fairviewlawgroup.com



WASHINGTON STATE
BAR ASSOCIATION

**Legal
Lunchbox™**
Series

The WSBA invites you to lunch and learn while earning 1.5 CLE credits. And the tab is on us! The WSBA hosts a 90-minute, live webcast CLE at noon on the last Tuesday of each month.

For more info and to register, visit www.wsba.org.

CLASSIFIEDS

FOR SALE

Busy solo-practitioner immigration practice for sale, International District. Mostly family-based immigration, some asylum. Very interesting and exciting work; owner willing to mentor the right person. Diverse client base exceeds 450, accounts receivable (already under contract) over \$100K, very low overhead, solid monthly income and HUGE potential. Medical condition requires owner to sell ASAP. Contact immigrationpracticeforsale@gmail.com.

Profitable Snohomish County plaintiff PI firm that was established in 2010 and has average gross revenues of over \$750,000 the last three years. The practice/case breakdown is 100% plaintiff personal injury and as of May 2019, there are approximately 30 active cases. Contact info@privatepracticetransitions.com or call 253-509-9224.

Established Tumwater family law & estate planning practice that has a practice/case breakdown by revenue of approximately 70% family law, 15% estate planning, 5% real estate, 5% business, and 5% other. The practice is located in a 2,650 SF building that is also available for sale, if desired. With 2018 gross revenue right around \$200,000 and 166 active clients, this practice is poised for growth under new ownership. Contact info@privatepracticetransitions.com or call 253-509-9224.

Established Pierce County insurance defense practice that was established in 1998 and has over 125 active clients as of April 2019. The average gross revenue the last three years was over \$1,017,000. The practice/case breakdown by revenue is 50% bodily injury, 10% property damage, 10%

product liability, 10% professional liability, 10% plaintiff work, and 10% other. Contact info@privatepracticetransitions.com or call 253-509-9224.

Thriving Bend, Oregon, law firm that has been a staple in the Bend community for over 42 years. In 2018, the practice brought in over \$540,000 in gross revenues and over \$357,000 in total owner perks. The practice has a case breakdown of 29% civil, 21% estate, 16% family/divorce, 16% other (contracts, real estate, criminal, business, PI, DUI, etc.), 5% land use, 5% landlord tenant, 4% corporate/LLC, and 4% water law. Contact info@privatepracticetransitions.com or call 253-509-9224.

Established Seattle estate planning practice that has a practice/case breakdown by revenue of approximately 45% estate & trust administration, 40% estate planning, and 15% other (collateral matters, estate tax preparation, real property issues, etc.). The practice is located in the heart of downtown Seattle, has averaged gross revenues of over \$286,000 the last three years (2016-2018), and is poised for growth under new ownership. Contact info@privatepracticetransitions.com or call 253-509-9224.

Successful King County insurance defense practice that is located in the heart of Seattle and had 2018 gross revenues over \$1,800,000. The practice was established in 2006, has a great reputation in the legal community, and has five total employees, including the owner. Contact info@privatepracticetransitions.com or call 253-509-9224.

Regional and international business law practice with a stellar reputation and average gross revenues over \$550,000 the last three years. The practice/case breakdown is 50% business law, 35% estate planning, 10% general legal services, and 5% intellectual property. The practice is located in East King County in a 2,000 SF leased office space. Contact info@privatepracticetransitions.com or call 253-509-9224.

Thriving Stevens County personal injury & family law practice that was established in 2009, has a strong client base, and brought in over \$855,000 in gross revenue in 2018. The practice/case breakdown by revenue is approximately 48% personal injury, 43% family law, and 9% other (estate planning, probate, general litigation, etc.). The practice employs five people: one (1) owner/attorney, three (3) legal assistants, and one (1) office administrator. Contact info@privatepracticetransitions.com or call 253-509-9224.

Growing Pierce County personal injury practice that was established in 1975, has a great reputation in the community, and has over 90 active clients as of January 2019. The gross revenues in 2018 totaled over \$415,000. The owner would like to sell the practice as a turnkey operation. The practice/case breakdown by revenue is 99% personal injury and 1% other. Contact info@privatepracticetransitions.com or call 253-509-9224.

Thriving virtual appellate law practice that has experienced 17%, 30%, and 47% YoY growth the last three years (2016-2018). In 2018, the firm's gross revenues were over \$915,000! The practice was established in 2009, has a great reputation in the legal community, and has over 150 active clients as of January 2019. The owner would like to sell the practice as a turnkey operation. The practice/case breakdown by revenue is 100% appeals. Contact info@privatepracticetransitions.com or call 253-509-9224.

Established Kitsap County estate planning, guardianship, & probate practice that has been a staple in Kitsap County for over 14 years. The practice/case breakdown is 40% guardianships and trusts, 25% probate, 25% estate planning, and 10% other (prenuptial, estate litigation, GAL). The owner runs the practice out of her home office, which makes this a great opportunity for an attorney wishing to grow his/her current practice and/or start a practice with an established book of business. The owner took in over \$125,000 in income and perks in 2017. Contact info@privatepracticetransitions.com or call 253-509-9224.

Thriving and well-rounded Pierce County law practice that has been a staple in Pierce County for over 20 years. The practice is absolutely thriving with average gross revenues over \$1.6 million the last three years. The practice/case breakdown is 30% trusts, estates, and probate; 15% business formation; 15% plaintiffs' personal injury; 15% commercial and corporate litigation; 8% real estate; 7% municipal; and 10% other. Contact info@privatepracticetransitions.com or call 253-509-9224.

Profitable Snohomish County personal injury and bankruptcy practice that has been in business for more than 27 years.

POSITIONS AVAILABLE ADS ARE ONLINE

Job seekers and job posters, positions available ads can be found online at the WSBA Career Center. To view these ads or to place a position available ad, go to <http://jobs.wsba.org>.

TO PLACE A PRINT CLASSIFIED AD

RATES, DEADLINE, AND PAYMENT:

WSBA members: \$50/first 50 words; \$1 each additional word.

Non-members: \$60/first 50 words; \$1 each additional word.

Email text to classifieds@wsba.org by the first day of each month for the following issue (e.g., Sept. 1 for the October issue). Advance payment required. For payment information, see <http://bit.ly/NWLawyerAds>. For questions, email classifieds@wsba.org.

The practice/case breakdown by revenue is approximately 60% personal injury, 35% bankruptcy, and 5% other. The practice is located in a 1,022 SF, fully furnished office that is also available for sale, if desired. Contact info@privatepracticetransitions.com or call 253-509-9224.

Established estate planning, probate, and business law practice with offices in King and Kitsap Counties. The practice/case breakdown is 60% estate planning and probate, and 40% real estate, business law, and bankruptcy. Contact info@privatepractice-transitions.com or call 253-509-9224.

East King County real estate and estate planning practice that has been operating for more than 40 years! A true staple in the community, the practice offers a variety of services, focusing on estate planning (35%) and real estate (25%). Contact info@privatepracticetransitions.com or call 253-509-9224.

SERVICES

Contract Attorney for Science and Engineering Consultation. Analysis of technical discovery across practice areas such as product liability (former auto industry engineer), medical malpractice (former hospital process improvement leader, B.S. Bioengineering [biomedical devices]), and construction (former quality control engineer, M.S. Mechanical Engineering). Contact Leslie English at 206-552-8321 or Leslie@LeslieEnglishLaw.com.

Seattle attorney with 20+ years' experience (Washington, California, New York licenses) ready to assist: Real estate (escrow instructions, deeds, excise tax affidavits, leases); criminal/civil defense, civil prosecution, appeals (research, prepare pleadings, draft/coach defendant's sentencing hearing statement); corporate minutes (review, update); employment manuals and policies' trademark registration. Contact Marcia McCraw, Esq., marcia@us-chinalegalservices.com.

Attorney with extensive research and writing experience drafts briefs and motions for busy attorneys. Reasonable rates. Prompt turnaround times for trial and appellate briefs, motions for summary judgment, interrogatories, and LEXIS research. Legal experience includes superior court clerkship. Excellent references! Elizabeth Dash Bottman, WSBA #11791; ebottman@gmail.com; 206-526-5777.

Briefs and research memos, including summary judgments, motions to dismiss and appeals. Extensive experience in federal courts. Reasonable hourly or by-project rates. Superb Avvo rating. Lynne Wilson at 206-328-0224 or lynnwilsonatty@gmail.com.

Legal research and writing attorney. Confidential legal research, drafting of pleadings, formatting, and citation checking for trial- and

appellate-level attorneys. Professional, fast, and easy to work with. Call Erin Sperger at 206-504-2655. Sign up for free case law updates at www.LegalWellspring.com; erin@legalwellspring.com.

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

Emerald City Attorney Network. Top contract attorneys and paralegals. Want increased revenue and free lunch? Let us turn your excess work into billable hours. Increase profit, satisfy waiting clients. Let us take you to lunch, or bring lunch for your office, and discuss how we can help: www.emerald-cityattorneynetwork.com, 206-388-7808, andy@emeraldcityattorneynetwork.com.

John A Liebert, M.D.—Forensic psychiatrist with extensive trial experience in both civil and criminal cases. Licensed in Washington and Arizona. Psychiatry residency completed at University of Washington. Published books and manuscripts are accessible via website,



“I LOOK FORWARD TO RETURNING WHERE I STARTED: TRYING CASES IN THE COURTROOM.”

Tim Bradshaw, former King County Superior Court Judge, joins Corr Cronin as a trial lawyer ready to do what he does best:

Win.



CORR CRONIN | LLP
corrchronin.com

Classifieds

CONTINUED >

www.johnliebert.com, by clicking "Publications." Active in Telemedicine. References available. 602-349-0025.

Forensic document examiner retired from the Eugene Police Department. Trained by the U.S. Secret Service and U.S. Postal Inspection Service. Court-qualified in state and federal courts. Contact Jim Green at 888-485-0832.

Gun rights restored! Your client lost gun

rights when convicted of a felony or DV misdemeanor, but in most cases can restore rights after a three- or five-year waiting period. AV-rated lawyer obtains superior court restoration orders throughout Washington. David M. Newman, The Rainier Law Group. Contact: 425-748-5200 or newman@rainierlaw.com.

Appraiser of antiques, fine art, and household possessions. James Kemp-Slaughter, FRSA, with 41 years' experience in Seattle for estates, divorce, insurance, and donations. For details, see <http://jameskempslaught.com>, 425-949-7964, or Comptonhouse65@gmail.com.

Thinking about buying or selling a practice?

If you are, we can help you—guaranteed! Private Practice Transitions, Inc., is the preeminent provider of specialized brokerage services in the Northwest, catered specifically to the owners of professional services businesses—like you! We have countless buyers and sellers waiting for the right opportunity. Take control of your tomorrow by calling us today at 253-509-9224 or check out our website at www.privatepracticetransitions.com.

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

STOKES LAWRENCE

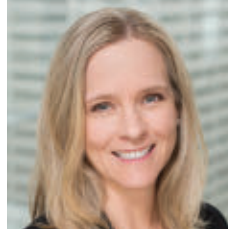
Our Team Is Expanding

We proudly welcome
our new colleagues
from Mills Meyers
Swartling to our firm
on September 1, 2019.

stokeslaw.com

1420 Fifth Avenue
Suite 3000
Seattle, WA 98101
206.626.6000

120 N. Naches Avenue
Yakima, WA 98901
509.853.3000



Caryn Jorgensen



John Fetters



Eric Robinson



Ray Weber



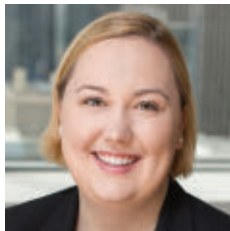
Bruce Winchell



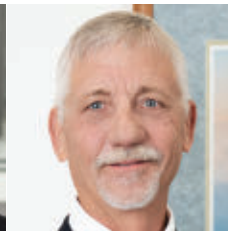
Rachael Wallace



Brett MacIntyre



Samantha Pitsch



Jim Wilkens

SPACE AVAILABLE

Class 'A' law office space in downtown Everett: Real estate and construction litigation attorney seeking attorney for office share. 1,400 SF, furnished, decorated, reception, conference room, Westlaw, phone/internet, janitorial, 2 available window offices plus storage room. Views of the Cascades and county courthouse. Justin Bristol, 425-257-1133.

Capitol Hill office space: Turnkey corner office in classic Capitol Hill mansion, collegial small practice group one block off Broadway at 707 East Harrison St., with parking. \$800 per month. Contact jtb@bwseattlelaw.com or 206-623-2020.

Upper floor corner office law office suite: \$1,150. Access to kitchenette, conference rooms, receptionist, phone, high-speed internet, and free parking for tenant/visitors. Our trained staff handles your mail, screens calls, and greets your guests, giving you the opportunity to be more productive with your time. Furnished office available. greg@communitylawpllc.com, 206-992-9957.

Downtown Seattle, 1700 7th Ave, top floor, next to Federal Courthouse. Approx. 15x10 office, south facing, in class action/litigation firm, workspace available. Receptionist, kitchen, conference rooms, and additional services. Great light. \$1,250 per month, and \$450 per month for additional secretarial space. Contact Tyler at 206-682-5600 or tfarr@tousley.com.

Pine & Melrose office space, Four private offices for rent in classic historic building. Easy access to freeways and transit. Office spaces range in sizes from 9x12 (108 SF) to 12x14 (168 SF). Rents vary from \$950 to \$1,100 per month depending on office size. Building amenities include reception, conference rooms, and kitchen. Contact Andrea Mas at amas@groffmurphy.com or call 206-628-9500.

Office space (Seattle—Pioneer Square): Beautiful shared office space just blocks from downtown courthouses with views of Elliot Bay

and stadiums. Rent (\$1,400) includes phone, internet, copier/printer/scanner, e-fax, reception, and after-hours answering service. We have two offices and one work space available; zach@wagnildlaw.com or 206-623-5822.

Two office spaces available in Rockwood Office Park in Bellevue. Building 1408 has two executive suites up for lease. Both suites come with their own A/C and heating systems with lots of natural light and privacy doors. They are located on the 2nd floor offering great views of our cozy office park. Building 1408 primarily houses personal injury attorneys and architects. Lessees will have access to the building's kitchen, three spacious conference rooms, and a receptionist. The building is 100% secured with key fobs and other security systems provided by Sontrol. There is free reserved parking below the building with security cameras monitoring the garage. If you are interested please email (shea@premierlawgroup.com) or call Shea Gorman (206-285-1743 ext.205), the building manager. We are asking \$1,300 a month if the two spaces are rented together. If the spaces are rented separately the large space is \$800 per month, and the medium space is \$600.

One Union Square (downtown Seattle) law firm has nine offices available (individually or as a group) for limited term sublease(s). Perfect for small group, transitioning professionals, overflow or limited project space. Seven perimeter, two internal, plus six workstations. Mt. views. Shared kitchen/break room. Copy/scanning and conference rooms. Contact Anita Sutherland at 253-620-6460.

Prime office space for rent in downtown Kirkland with views of Lake Washington. Includes access to kitchenette/break room, conference rooms, receptionist, multiline phone, internet, and free parking for tenant/visitors. Paralegal space also available. Contact Dylan Kilpatric for details, 425-822-2228 or Dylan@kirklandlaw.com.

Downtown Seattle, 1111 3rd Ave., Class A space. Receptionist, voicemail, conference room, copier, scanner, phone, gym, showers, bike rack, light rail and bus stop across the street, several offices available now, secretarial space available, share space with an existing immigration law firm, \$1,275 per office. 206-294-5060, ask for Jeri.

Bellevue Offices. AV business/estate plan law firm has office suite available with two offices and kitchenette. All other occupants are attorneys. Situated in a relaxed park-like setting near downtown Bellevue. Receptionist, mail/fax/copier/scanner/shredding, conference/seminar rooms, tax library, kitchen, shower plus FREE PARKING for tenants/clients, and with easy in-and-out, plus freeway access (I-405, I-90 and 520). Street signage and details at www.bellevueprofessional

offices.com. Call Hans, Mike, David, or George at 425-453-4455.

Private and virtual office suites in downtown Seattle available now! Located close to courts on the 32nd floor of Safeco Plaza Building. Includes fiber internet, reception services, conference rooms, kitchen facilities, fitness center. Call 206-624-9188 or email adm@bscofficespace.com to schedule a tour, www.bscofficespace.com.

VACATION RENTALS

PARIS APARTMENT — At Notre Dame. Elegant 2-bedroom, 2-bathroom apartment, in

the heart of Paris. **PROVENCE HOUSE** — In Menerbes. 4-bedroom, 3.5-bathroom house. Incredible views 503-227-3722 or 202-285-1201; angpolin@aim.com.

Charming condo in Whitefish, Montana, with easy access to Big Mountain Ski Resort, Glacier National Park, art galleries, fine dining, wine bars, and coffee shops (www.vrbo.com. #405582). Or, a picturesque log cabin in West Glacier with access to hiking, fly fishing, and snowshoe trails (www.vrbo.com, #991608). For information, contact susanraefox@gmail.com.

Workers
need strong
representation.

We go
the distance.

We're in the business of helping people.
If you know someone injured on the job,
we can discuss their rights and options.

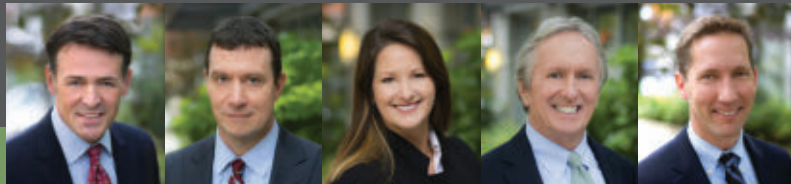
Patrick C.
Cook

Michael J.
Costello

Kathleen K.
Kindred

Thomas A.
Thompson

Jonathan K.
Winemiller



We know Workers' Comp.
Over 80 years strong.

Seattle & Everett
Walthew.com

206-623-5311
Se Habla Español

The
WALTREW
LAW FIRM

BEYOND

THE BAR NUMBER

Carolyn Ladd

BAR NUMBER: 22646

LAW SCHOOL: J.D.,
University of Oregon;
LL.M. (labor law),
Georgetown University
Law Center



➔ For the past 20 years I have been an employment lawyer at Boeing. I help ensure that the company complies with civil rights and other employment laws. Having lived with a hearing impairment for most of my life, I am most proud of the work I have done to provide reasonable accommodations for people with disabilities.

I became a lawyer because I took a women and the law class at the University of Washington that sparked my interest in gender equality.

After law school I became a beauty queen. To this day, I am the only licensed attorney to have competed in the Miss America pageant. I used my scholarship prize at Georgetown Law.

In my practice, I help ensure that all Boeing employees have an equitable opportunity to succeed at work.

My long-term professional goal is to become a trial judge. I serve now as a judge pro tem and love every minute of it.

We'd like to learn about you!
Email nwlawyer@wsba.org
to request a questionnaire.



I keep up with legal news and developments by reading

#LawTwitter and #AppellateTwitter. It's a vibrant online legal community.

The most memorable trip I ever took was to Japan in March 2019. I took my nephew to see the Mariners play in Tokyo and to see Ichiro Suzuki retire. Then we went hiking on an ancient Buddhist Shinto pilgrimage called the Kumano Kodo.

I enjoy reading autobiographies. I just read Shon Hopwood's book, *Law Man: Memoir of a Jailhouse Lawyer*. He served time in prison for bank robbery, went to UW School of Law, and is now a professor at my alma mater, Georgetown Law.

My best recipe I make at home is a chocolate cake that my grandmother used to make during World War II when she couldn't get eggs due to rationing.

My favorite place in the Pacific Northwest is anywhere in Puget Sound while riding on a ferry.

I am happiest when I am attending a live sporting event cheering a Seattle sports team to victory.

Clockwise from left: Ladd is a former Miss Oregon; in Tokyo watching a Mariners game with her nephew; her grandmother's cake recipe; visiting the Kumano Hongu Taisha Grand Shrine.

This changed my life: I fell into a crevasse on Oregon's Mount Hood while mountain climbing. I was fortunate to survive and credit my father with saving my life.

I regret not serving in the Peace Corps after college. President Jimmy Carter's mother entered the Peace Corps at the age of 68, so maybe someday . . .

Aside from my career, I am most proud of this: the international volunteer work I have done: [traveling] to Tanzania with Habitat for Humanity and to Ghana to teach first graders.

I give back to my community by volunteering to help transgender people legally change their name and gender marker. It is an honor to help someone live as their authentic self.

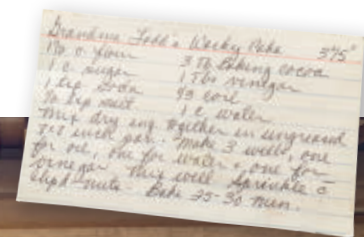
My favorite restaurant is Skillet Diner in Seattle. Try the cinnamon roll. Highly recommend.

My dream trip would be a honeymoon cruise to Alaska with my fiancé James Williams (WSBA No. 23613).

My secret superpower is that I am a notary public.

My all-time favorite movie is: *Amazing Grace*, a new documentary about Aretha Franklin made from footage shot in 1972.

I have been telling others not to miss the two Ruth Bader Ginsburg movies: *On the Basis of Sex* and the documentary *RBG*. She is an icon and a visionary for gender equality.

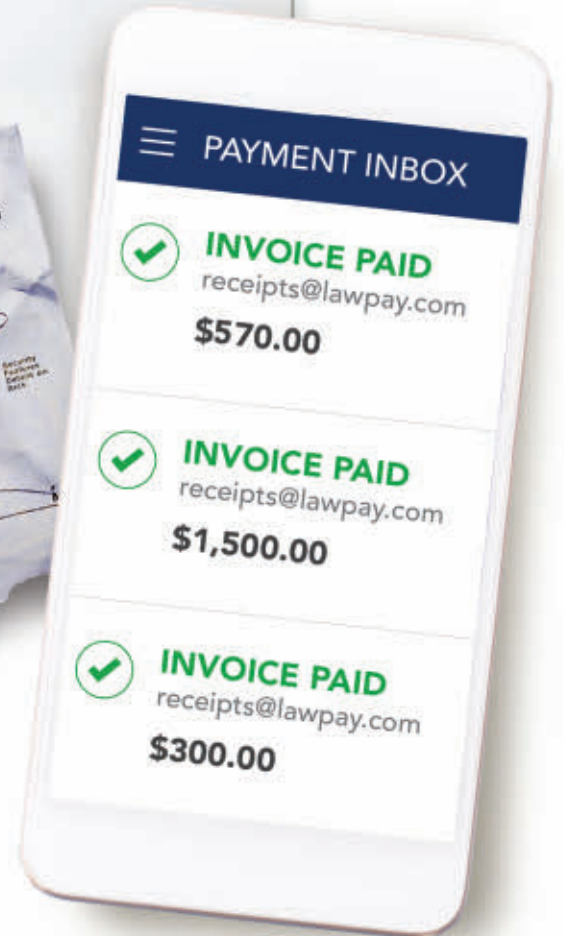


Photos courtesy of the author

Kiss paper checks goodbye

You deserve a payment solution that doesn't leave you waiting and wondering.

xoxo LawPay



Paper checks are notoriously unreliable. They get lost in the mail, they get tossed in the laundry, and they carry a lot of sensitive information around with them wherever they go.

LawPay changes all of that. Give your clients the flexibility to pay you from anywhere, anytime. Plus, we can guarantee you stay in compliance with ABA and IOLTA guidelines.



Proud Member
Benefit Provider

Schedule a demo today

866-645-4758 or visit lawpay.com/wsba

LAWPAY[®]

AN AFFINIPAY SOLUTION

Lauren Wegener.
Solution.

BRADLEY
JOHNSON
LAWYERS

Every mistake has a solution.

Trust us with your DUI and Criminal Defense referrals. With more than twenty-five years of experience handling these cases, we've seen just about everything. We know mistakes happen and we know how to solve them.

"Everything and more than I could ever ask for in an attorney. Lauren was always extremely professional, but also genuinely cared about me and my case. Thank you for everything!" – Kyle S., Sumner, WA



1-800-DUI-AWAY • Seattle Everett Tacoma Bellevue • 1800DUIAWAY.com