

INTRODUCTION

We know it's an exciting time for you as you prepare for admission to the Washington State Bar Association (WSBA or the Bar). We are here not only to help you further understand the responsibilities that come with joining the legal profession, but to provide you with support and resources throughout your career.

When you are admitted to the practice of law in Washington, you are admitted to a self-regulated profession. WSBA members work with and through the Washington Supreme Court and the Washington State Bar Association to oversee and administer the admission, licensing, and discipline of licensed legal professionals. WSBA's mission is to serve the public and the members of the Bar, ensure the integrity of the legal profession, and to champion justice. The Bar offers a variety of valuable programs and services to its members in furtherance of its obligation to protect and serve the public.

WSBA's governing body is the Board of Governors, made up of active members of the Bar. Every few years, the Board of Governors establishes strategic goals for the organization to ensure its work continues to support the Bar's mission-focus areas, which are to ensure competent and qualified legal professionals and to promote the role of licensed legal professionals in society.

The Supreme Court has plenary authority over the regulation of the practice of law in Washington, and WSBA operates under the delegated authority of the Court to license and regulate the state's licensed legal professionals. To regulate the profession and to accomplish the goals and mission of WSBA, we rely on our members and community representatives to volunteer, contribute, lead, and exhibit professionalism. Professionalism includes acting with integrity and respect, which members promise to do when they take their Oath. As a self-regulated profession, we hold ourselves to a higher standard than other occupations and expect each other to act professionally at all times, not just when practicing law.

WSBA welcomes your support and input. There are many committees, task forces, boards, and panels where your volunteer service is much needed and valued; including those that help the Bar protect the public. For instance, the WSBA Character and Fitness Board protects the public by assisting the Washington Supreme Court in making sure that only people who demonstrate good moral character and fitness to practice law enter the legal profession. The Disciplinary Board serves as an appellate body for lawyer discipline cases and can recommend discipline including disbarment of those lawyers who have committed very serious ethical violations. Protecting the public is an important part of ensuring the competence and integrity of the legal profession.

There are many other ways that you can contribute. Attend meetings of any of WSBA's entities, express your opinion on current issues with the Board of Governors, become a contributing writer for WSBA's magazine, *NWLawyer*, or pen a post for WSBA's blog, *NWSidebar*. We rely on volunteers for our CLE faculty and other professionalism activities. You can also contribute financially by donating to the Washington State Bar Foundation, which helps sustain WSBA's public service and diversity and inclusion programs.

We encourage you to participate in whatever way you are able and most comfortable — even if that simply means keeping apprised of what is happening at WSBA and with the practice of law.

This first section of the Washington Law Component provides you with information that you should know or that may be helpful for you to know about WSBA. We look forward to your becoming a member of the Washington State Bar Association.

I. History

- A. The Washington State Bar Association was first formed as a voluntary organization in 1888, the last year of the Washington Territory. There were 35 members.
- B. In 1933, the Washington Legislature enacted the State Bar Act. RCW 2.48.
 - 1. The State Bar Act created an integrated Bar that is officially organized and performs both regulatory and professional-association functions.
 - 2. Integrated bars, like the Washington State Bar Association, otherwise known as integrated or unified bars, require membership to practice law.
 - a. Integrated bars combine regulatory functions such as admissions, licensing, and discipline, with other professional activities such as access to justice, pro bono work, continuing education, and member assistance programs.
 - b. The constitutionality of integrated (or mandatory) bars has been upheld by the United States Supreme Court. *Lathrop v. Donohue*, 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961); *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990).
- C. While created by statute, the Washington Supreme Court has plenary authority over WSBA and, also, the practice of law in Washington. The Court has delegated to WSBA much of the administration of the regulation of the practice of law through the adoption of rules such as the Admission and Practice Rules (APR) and the Rules for the Enforcement of Lawyer Conduct (ELC). In 1987, the Supreme Court adopted General Rule (GR) 12 et seq. (since amended several times), which among other things, set out the regulatory objectives and general purposes of WSBA, and specify authorized activities and activities that are specifically not authorized.
- D. With regard to the State Bar Act, the Washington Supreme Court has determined that several of the State Bar Act's provisions and other legislative attempts to regulate the bar are contrary to the inherent power of the Supreme Court to regulate the judiciary and bar.

The two most notable cases are *Graham v. State Bar Association*, 86 Wn.2d 624, 548 P.2d 310 (1976), and *WSBA v. State of Washington*, 125 Wn.2d 901, 890 P.2d 1047 (1995). In the *Graham* case, which concerned an attempt by the state auditor to conduct a post-audit of WSBA treasury and accounts, the Supreme Court held that despite the language in RCW 2.48, WSBA is not a state agency for the purpose of such audits. The Court held that:

...the source of the court's power to admit, enroll, disbar, and discipline is exclusively in the Supreme Court as one of its inherent powers.... It was not necessary, therefore, for the Legislature to act to accomplish the purposes achieved by the 1933 legislation [RCW 2.48]. The power to

accomplish the integration of the bar, its supervision and regulation is found in this court, not the Legislature.

In *WSBA v. Washington*, which concerned a statute passed by the Legislature which would have made WSBA subject to collective bargaining, the Supreme Court held:

This court's control over Bar Association functions is not limited to admissions and discipline of lawyers. The control extends to ancillary administrative functions as well.... The ultimate power to regulate court-related functions, including the administration of the Bar Association, belongs exclusively to this court.

- E. Currently, WSBA has nearly 40,000 total members including approximately 33,000 active members consisting of about 32,000 lawyers, 800 limited practice officers, and 35 limited license legal technicians who are able to practice law in Washington.

II. Governance

- A. WSBA operates pursuant to court rules adopted by the Washington Supreme Court and WSBA Bylaws adopted by the Board of Governors. The Board of Governors employs an Executive Director who manages the day to day operations of WSBA.
- B. The Board of Governors is the governing body of WSBA that determines the general policies of the Bar and approves its budget each year.
 1. Under the current WSBA Bylaws, the Board of Governors consists of the President and 17 governors. The President Elect, who performs the duties of the President when requested or necessary as well as other duties, and the Immediate Past President who performs those duties when requested or necessary and other duties as requested, are officers of the Bar who attend Board meetings but are not voting members of the Board. The Executive Director serves as the Secretary to the Board in an *ex officio capacity*.
 - a. There is one governor elected by the members in each of the 10 Congressional Districts except the 7th Congressional District, which is divided into two districts by the Lake Washington Ship Canal. There is one governor for the northern part of the 7th Congressional District and one governor for the southern part of the 7th Congressional District.
 - b. There are three lawyer governors who are elected at-large.
 - c. The Bylaws currently provide for three additional at-large governors, one to be selected from among the Active LPOs and LLLTs, and two governors selected from the public at large.
 2. Only active members may vote in WSBA governor elections and only active members are eligible to be a governor.
 3. WSBA members are encouraged to keep apprised of items on the Board of Governors' agenda and to provide input and comment on agenda items to a governor.

III. Membership

A. Active Members. Active WSBA members are permitted to practice law in Washington and are eligible to vote on Bar matters. Active members include individuals who are licensed as lawyers, limited license legal technicians, and limited practice officers.

A limited license legal technician (LLLT) is licensed to render limited legal assistance or advice within a specified scope of services in approved practice areas of law; currently, only practice in family law is authorized. The authorized scope of practice for an LLLT is set forth in APR 28.

A limited practice officer (LPO) is licensed to select, prepare, and complete legal documents incident to the closing of real estate and personal property transactions. The authorized scope of practice for an LPO is set forth in APR 12.

B. Inactive Members

There are three types of inactive members.

1. **Inactive.** Inactive members are not permitted to practice law, are not required to earn continuing legal education credits, and pay a reduced license fee. Some members choose Inactive when they move out of state, take time off from the practice of law to be a caregiver, or otherwise do not need a license to practice law but want to remain a member and want to have the option to more easily return to active membership at a later date.
2. **Honorary.** Honorary members have been Active or Judicial members for 50 years or more. They are not permitted to practice law, are not required to earn continuing legal education credits, and are not required to pay a license fee.
3. **Disability Inactive.** Disability inactive membership is available to those members who have a physical or mental disability or condition that prevents them from practicing law but who want to remain members of the Bar. They are not permitted to practice law, are not required to earn continuing legal education credits, and are not required to pay a license fee.

C. Judicial Members. Judicial membership is for members who are serving in a judicial position as defined in the WSBA Bylaws. Judicial members are not permitted to practice law and they pay a reduced license fee.

D. Emeritus Pro Bono Members. Emeritus pro bono membership is for members who are otherwise retired from or otherwise no longer practicing law, but who wish to provide pro bono services. Emeritus pro bono members must volunteer with a Qualified Legal Services Provider and are not permitted to practice law outside their volunteer work. They pay the same license fee as Inactive members, and they are not required to comply with standard continuing education requirements but do have to comply with the emeritus pro bono training requirement.

E. Voluntary Resignation. When you no longer wish to be a member of WSBA, you may resign your membership. Resigned members are not permitted to practice law and will be required to reapply for admission in order to practice law again in Washington. This process may include retaking the bar exam.

IV. Regulatory Functions

The Washington Supreme Court has exclusive responsibility for regulating the practice of law in Washington, including who is eligible to receive a license to practice law. WSBA administers the admissions, licensing, and license renewal processes for Washington licensed legal professionals on behalf of and under rules adopted by the Washington Supreme Court. The Regulatory Services Department, the Office of Disciplinary Counsel, and the Office of General Counsel regulate licensed legal professionals who are practicing law in Washington.

A. Admissions. To be admitted to practice law, most individuals must pass a bar exam, but there are other ways to be admitted or licensed to practice law in Washington as a lawyer. All applicants must pass a character and fitness review. In addition, there are several limited licenses to practice law. Only the Supreme Court has authority to enter an order admitting someone or issuing a license to practice law in Washington.

1. *Admission by Examination.* WSBA administers several types of examinations for admission to practice law.
 - a. **Lawyer Bar Exam.** For applicants to become licensed as a lawyer in Washington, Washington administers the Uniform Bar Exam (UBE) and requires the Multistate Professional Responsibility Exam (MPRE) and the Washington Law Component (WLC). The minimum passing scores are 270 for the UBE, 85 for the MPRE, and 80 percent correct answers for the WLC.
 - b. **LLLT Exam.** For applicants to become licensed as an LLLT, Washington administers an LLLT practice area exam and an LLLT professional responsibility exam. The minimum passing score is 75%. LLLT candidates must also complete 3,000 hours of substantive legal work under the supervision of a licensed attorney as a requirement for licensure.
 - c. **LPO Exam.** For applicants to become licensed as an LPO, Washington administers an LPO exam that includes LPO professional responsibility. The minimum passing score is 75%.
2. *Admission by Motion.* Lawyers from another U.S. jurisdiction who have at least three years of active legal practice out of the previous five years may be admitted without sitting for the Washington bar exam. These lawyer applicants must pass the WLC and character and fitness review, and complete all other licensing requirements.
3. *UBE Score Transfer.* As a UBE jurisdiction, Washington will accept UBE scores from other UBE jurisdictions for up to three years from the date of passing as long as the applicant's score meets Washington's minimum pass score of 270. The applicant does not need to re-sit the UBE but

must meet all other application requirements including educational requirements and taking and passing the MPRE and WLC.

4. *Additional Licenses or Authorizations.* There are several limited licenses that authorize various levels of limited practice in Washington.
 - a. **Pro Hac Vice under APR 8(b).** This allows U.S. licensed lawyers to practice in Washington courts for a particular case or proceeding.
 - b. **Indigent Representation under APR 8(c).** This license permits U.S. licensed lawyers to represent indigent individuals through a bar association or governmentally sponsored legal services organization or public defender's office or similar program while they are waiting to be admitted by exam, motion or UBE score transfer.
 - c. **House Counsel under APR 8(f).** This license permits lawyers who are licensed in any jurisdiction worldwide to practice as house counsel for a company in Washington that is not primarily engaged in the practice of law. No in-court practice is permitted.
 - d. **Licensed Legal Interns under APR 9.** This license permits law students who have completed two years of law school, and APR 6 Law Clerks who have completed not less than five-eighths of the required four-year course of study, to practice law under the supervision of a Washington lawyer, including some in court practice.
 - e. **Foreign Law Consultants under APR 14.** This license permits lawyers licensed to practice law in foreign countries to advise and consult about the law of that country while in Washington.

B. Annual License Renewal. All members must renew their license to practice law and membership in WSBA each year. Licensing forms are made available to members around Nov. 1 and all requirements must be completed by Feb. 1. Failure to complete your licensing requirements may result in suspension by the Washington Supreme Court of your license to practice law. All parts of license renewal can be done online at myWSBA.org. There are several parts to the renewal process.

1. **License Fee.** Each member, with a few exceptions as noted above, must pay an annual license fee.
2. **Client Protection Fund Assessment.** Each active lawyer member must pay an annual assessment to fund the Client Protection Fund. This fund is established to provide monetary gifts to individuals who are harmed by members who engage in dishonest or criminal conduct.
3. **Professional Liability Insurance.** Each active lawyer member must disclose whether or not he or she is covered by professional liability insurance. There is no requirement for lawyers to be covered, only required disclosure of whether there is coverage. LLLTs and LPOs must provide proof of financial responsibility by insurance or other method specified by Washington Supreme Court rule.

4. **Trust Account Declaration.** Each active member must inform WSBA if he or she handles client funds, and, if so, provide the trust account information and certify that the funds are being handled in accordance with the rules of professional conduct.

C. Mandatory Continuing Legal Education (MCLE)

All active members are required to continue their legal education throughout the period of their active practice of law. One-third of the membership reports credits each year at the same time as and as part of the annual license renewal process. If you are due to report, you will be notified in your license renewal information. MCLE reporting also may be completed online at www.myWSBA.org.

1. Every three years, beginning the first January 1 after your year of admission, you must complete and certify a certain number of MCLE approved CLE credits (45 for lawyers and 30 for LLLTs and LPOs). At least 15 of the total credits must be in the area of law and legal procedure and at least 6 credits must be ethics. The remaining credits may be earned in those or other approved subject areas or by participating in other approved activities such as mentoring and pro bono service. Washington Supreme Court [APR 11](#) lists all the approved subjects and activities.
2. MCLE credits must be completed and earned by December 31 of the third year of your reporting period. You also must certify completion of the credits by February 1 of the following year.
3. You are able to track your credits, enter courses you attended, and see your reporting period and history information at myWSBA.org.

D. Voluntary Contributions to the Profession and the Public. There are a few optional items that are part of the annual license renewal process.

1. Every year during the licensing process WSBA will ask you to voluntarily provide demographic information such as gender and race. The opportunity to provide this information is completely voluntary and is kept in strict confidentiality. Providing this information is a vital part of helping WSBA track its progress on diversity and inclusion initiatives.
2. Voluntary reporting of pro bono and public service hours. You may choose to report the number of hours you provided as pro bono or public service, as defined in RPC 6.1. If you report more than 50 hours, you will receive a commendation from WSBA.
3. Washington State Bar Foundation. You can make a charitable donation to help sustain WSBA's public service and diversity and inclusion programs. Learn more at wsba.org/foundation.
4. Legal Foundation of Washington's Campaign for Equal Justice. You can make a charitable donation to support 20 civil legal aid programs that serve our state's poorest families and individuals. Learn more at the [Legal Foundation of Washington](#).

E. Your Contact and Member Information

1. By court rule and because you are an officer of the court, you are required to make sure your contact information with WSBA is accurate, including making sure any changes are reported to the Bar within 10 days of the change. (Washington Supreme Court APR 13) Keep your contact information up-to-date on your member profile at myWSBA.org throughout the year. Keeping your contact information current also ensures that you will receive important news and information from WSBA in a timely manner.
2. You may control what non-official information is sent to your physical and email addresses from WSBA by setting your own contact restrictions. This is always available at myWSBA.org.

V. Professional Discipline

- A.** Similar to its role with respect to the system for admission and licensing of licensed legal professionals, the Washington Supreme Court has exclusive responsibility for the licensed legal professional discipline and disability system in Washington. Under the Washington Supreme Court's Rules for Enforcement of Lawyer Conduct and similar rules for LLLTs and LPOs, the Supreme Court delegates some of its regulatory authority to the Washington State Bar Association through the Office of Disciplinary Counsel and the Office of General Counsel. Ethics rules adopted by the Washington Supreme Court are the Rules of Professional Conduct, with a set of RPCs for each of the three member types – lawyers, LLLTs, and LPOs. For additional information on discipline for limited practice officers and limited license legal technicians, see the [Discipline System Annual Report](#).
1. The Office of Disciplinary Counsel is the WSBA department responsible for reviewing, investigating and prosecuting grievances about the unethical conduct of Washington licensed legal professionals. After a first review, some grievances are dismissed and others proceed to investigation. After a confidential investigation, if disciplinary counsel believes there is evidence of an ethical violation or member's incapacity to practice law, disciplinary counsel may refer a matter to a review committee of the Washington Supreme Court's Disciplinary Board, which may dismiss a matter, order further investigation, or order a hearing in a matter involving a lawyer, or to the LLLT Board or Limited Practice Board (LP Board), respectively, for a matter involving an LLLT or LPO.
 2. The Office of General Counsel administers the hearing structure and process, including the hearing officers, and also administers the Disciplinary Board. Disciplinary hearings are public, conducted by volunteer hearing officers. The Disciplinary Board considers appeals from hearing officer decisions in cases involving lawyers, and the LLLT Board or LP Board hear those appeals in cases involving LLLTs and LPOs, respectively.
 3. Disciplinary actions include admonition, reprimand, suspension up to three years, disbarment, probation, and restitution. All recommendations for suspension or disbarment are reviewed by the appropriate Board and the Supreme Court. Only the Supreme Court has authority to order a lawyer's, LLLT's, or LPO's suspension or disbarment.

4. Grievances filed against lawyers, LLLTs, and LPOs are confidential unless a hearing or admonition is ordered. If a grievance against a lawyer is dismissed, a grievant can request review by a review committee of the Disciplinary Board, which consists of lawyers and community representatives. Grievance files are typically destroyed three years after the original dismissal.
5. Discipline imposed against WSBA members appears in WSBA's publication, *NWLawyer*, and on the member's profile in WSBA's online [Legal Directory](#). Additional information on public disciplinary proceedings can be requested through a public records request. Annual discipline reports and discipline statistics are available at [wsba.org](#) under For Legal Professionals/Professional Discipline.

B. What you should know about the grievance process under the Rules for Enforcement of Lawyer Conduct (ELC). (See the Enforcement of Limited License Legal Technician Conduct (ELLLTC) and Enforcement of Limited Practice Officers Conduct (ELPOC) rules for the grievance processes for LLLTs and LPOs.):

1. In Washington, anyone can file a grievance against a lawyer. ELC 5.1(a). There is no standing requirement.
2. Disciplinary counsel must review and may investigate any alleged or apparent misconduct by a lawyer whether disciplinary counsel learns of the misconduct by grievance or otherwise. If there is no grievant, the Office of Disciplinary Counsel may open a grievance in its own name. ELC 5.3(a).
3. A grievance can be filed at any time. ELC 1.4. There is no statute of limitations, but the passage of time since an act of misconduct occurred may be considered in determining what if any action is warranted.
4. Grievances against Washington lawyers are filed with the Office of Disciplinary Counsel. ELC 2.8(a). They can be filed electronically from [wsba.org](#).
5. If a grievance is filed against a lawyer, the lawyer must promptly respond to any inquiry or request made under the ELC for information relevant to the grievance. ELC 5.3(f). A lawyer's failure to cooperate fully and promptly with an investigation can also be grounds for discipline. ELC 5.3(h)(3), RPC 8.4(l).
6. The Office of Disciplinary Counsel staff suggest ways to resolve some problems informally (primarily non-communication matters between lawyers and their clients and disputes about client files), explaining disciplinary jurisdiction and grievance procedures, and suggesting other resources or services that may be helpful.

VI. Education and Professional Development

WSBA is dedicated to supporting members' professional growth and ongoing learning throughout their careers, through CLE seminars, CLE publications, Sections, New Member Education, Public Service Training, Member Wellness Program, and Practice Management Assistance.

A. CLE Seminars

1. WSBA Continuing Legal Education is one of many CLE sponsors, and by itself or in conjunction with sections or others, presents many seminars each year, usually taught by Washington practitioners and judges who volunteer their time and share their expertise in major practice areas and in ethics and law practice management topics.
2. Members can attend WSBA CLEs in person, via live, interactive webcasts and webinars, or through downloading audio-visual or MP3 products accessible through the WSBA CLE online store.

B. CLE Publications. WSBA publishes deskbooks in most practice areas and ethics that are written and edited by leading Washington practitioners. In addition to publishing physical copies, online subscriptions are also available for deskbooks and coursebooks.

C. Sections

1. Membership in one or more of the 29 WSBA Sections provides an avenue for members who wish to explore and strengthen their interest and connections in various areas of the law. Sections are typically organized around a specific practice area or practice type. Benefits include professional development, continuing legal education, legislative activities, leadership opportunities, and professional and personal connections with other practitioners in the field.
2. Section membership is voluntary and open to any WSBA member (membership eligibility varies). Dues range from \$20–40 per membership year (January 1 – December 31). New members are entitled to one free section membership their first year after being admitted to WSBA.
3. WSBA Sections must follow the WSBA Bylaws and policies. Each section is run by a group of volunteers from the section who are elected by Section members to serve on the Executive Committee. The Executive Committee creates (with the approval of the BOG) and upholds individual section bylaws and has discretion on how to prioritize section activities and budgets within the parameters of WSBA policies.

D. New Member Education (NME). WSBA NME programs offer the following:

1. Free four-hour preadmission education seminar in support of statewide new lawyer orientation. The Preadmission Program is offered as a live seminar at various locations throughout the state. By Supreme Court rule, lawyer applicants for admission must complete the free preadmission education program prior to admission to practice law.

2. Free four-hour preadmission online video education alternative for new lawyers. Applicants can fulfill the preadmission education requirement by watching the video series instead.
3. Free and low-cost skill-building CLE seminars in various areas of law.
4. New member leadership opportunities in NME seminar development.

E. Public Service Training

1. As part of WSBA's strategic goal of enhancing a "culture of service" among its members, CLE courses are offered free of charge to support volunteers who provide pro bono assistance in their communities, work with legal services programs, and/or participate in WSBA's public service programs and initiatives.

F. Member Wellness Program (MWP)

1. The Member Wellness Program (MWP), authorized under Admission and Practice Rule 19, promotes the health and well-being of WSBA members by providing counseling referrals, community support, and informational resources.
2. MWP has a contract with KEPRO, which has a network of providers offering three free, confidential sessions of psychotherapy to WSBA members in their communities throughout Washington State. KEPRO also offers financial and legal consultation and a suite of personal and work related resources and referral services.
3. MWP offers job search groups and consultation to assist unemployed or transitioning attorneys and offers trainings and support to our Peer Advisor network. We also connect with and support groups for attorneys struggling with addiction.
4. MWP provides informational resources to the membership through our website and CLEs on mental health and career related topics.

G. Practice Management Assistance

1. WSBA offers professional assistance and support to members in law practice management. Our goal is to help members improve their business practices for a greater client experience.
2. Resources include a free lending library, online templates and resources, and confidential consultations by phone.
3. As a WSBA member, you will also be eligible for discounts on products and services to help you improve your law practice. You can save an average of 15% on cybersecurity tools, practice management software, and more.

VII. Other Member Resources and Communication/Networking

WSBA has several opportunities available to members for communicating and networking with other members. Here are just a few to get you started.

- A. *NWLawyer magazine.*** All active members receive a copy of WSBA's official publication nine times per year. *NWLawyer* informs, educates, engages, and inspires by offering a forum for members of Washington's legal community to connect and to enrich their careers as well as learn more about WSBA news and events.
- B. Professional Responsibility Program.** This program includes the Ethics Line, a free resource for WSBA members to call and discuss their own prospective ethical conduct with Professional Responsibility Counsel. PR counsel will help clarify the ethical issues involved so that you are able to make a decision consistent with the rules of professional conduct. The Program also includes outreach presentations to local and specialty bar associations as well as online FAQs and Washington ethics advisory opinions.
- C. Legal Research Tool.** As a member, you have free access to Casemaker, an online legal research tool. In addition to searching for cases, Casemaker includes CaseCheck+ and CiteCheck to make sure the law is still good. Also included is CasemakerDigest that provides summaries, updated daily, on state and federal appellate cases.
- D. Washington Young Lawyers Committee.** The Washington Young Lawyers Committee (WYLC) is the vehicle for new and young lawyers to get involved with the Washington State Bar Association. By learning about and engaging in resources, programs, and events, committee members become ambassadors to WSBA, help the Bar understand emerging needs of new and young lawyers, and identify ways the Bar can address these issues.
- E. Mentorship Program.** WSBA mentorship programming provides online resources, builds community, provides education, and promotes external mentorship opportunities for mentors and mentees. As a member, WSBA provides you with a list of mentorship programs in the state, an attorney matching tool, mentorship mixer event, and mentorship guides to help you establish and develop meaningful mentorship programs and relationships.
- F. WSBA Community Networking Events.** WSBA offers networking events around the state. These events provide an opportunity for WSBA members to connect across social, professional and cultural boundaries. Members learn about a wide array of WSBA resources and opportunities such as law practice management, public service, minority bar associations and diversity and inclusion.
- G. Electronic and Social Media.** WSBA offers several ways to stay informed and connect with other members.

 - 1. *WSBA website* (wsba.org). The website serves as a comprehensive resource of important and useful information, while also keeping you updated on current news and events relevant to the profession.

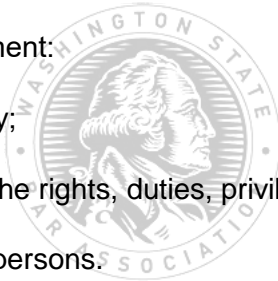
2. *WSBA blog, NWSidebar* (nwsidebar.wsba.org). The blog provides an online format for members of the legal community to contribute articles and share thoughts, opinions, and ideas.
3. *WSBA on Facebook*. Connect and engage with other members on WSBA's [Facebook page](#).
4. *WSBA on Twitter*. Join the WSBA community on [Twitter](#) and keep up with the latest conversations.
5. *WSBA's e-news digest, Take Note!* Twice each month, members receive a digest of news and updates about events, programs, and resources available.



ADMINISTRATIVE LAW

I. Introduction – The Washington Administrative Procedures Act (“WAPA”), Chapter 34.05 RCW

- A.** The WAPA generally applies to both state executive agencies and some state and local agencies that perform state functions. (RCW 34.05.030)
- B.** The WAPA does not apply to the state Military Department, the Department of Corrections, or the Board of Clemency and Pardons (as well as partial exemptions for other departments) with respect to people who are in their custody or people who are subject to the jurisdiction of those agencies. RCW 34.05.030.
- C.** Some important definitions (RCW 34.05.010):
 - 1. “Agency” means any executive branch state board, commission, department, college or university, or officer that either makes rules or conducts adjudicative proceedings. It excludes the governor and the attorney general, but includes any local government entity that requests the appointment of an administrative law judge.
 - 2. “Order” means a written statement:
 - a. of particular applicability;
 - b. that finally determines the rights, duties, privileges, immunities, or other legal interests;
 - c. of a specific person or persons.
 - 3. “Order of adoption” means the official written statement by which an agency adopts, amends, or repeals a rule.
 - 4. “Rule” means any agency order, directive, or regulation of general applicability that:
 - a. violation of which subjects a person to a penalty or administrative sanction;
 - b. establishes, alters, or revokes a procedure, practice, or requirement related to agency hearings;
 - c. establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law;
 - d. establishes, alters, or revokes any qualification or standards for issuance, suspension, or revocation of commercial, trade, or professional licenses; or
 - e. establishes, alters, or revokes any mandatory standards for any product or material that must be met before distribution or sale.
 - 5. “Rule” does NOT include:



- a. statements of internal agency management not affecting private rights;
 - b. declarative rulings by the agency pursuant to RCW 34.05.240;
 - c. traffic restrictions for cars, bicyclists, or pedestrians;
 - d. higher education policies regarding admission, academics, graduation, employment, or fiscal processes; or
 - e. determination and publication of updated nexus thresholds by the department of revenue in accordance with RCW 82.04.067 (RCW 34.05.010(16)).
6. "Rulemaking" means the process for formulation and adoption of a rule.

II. Delegation of Authority

- A.** Before an agency can act, it must have authority to do so. The Washington State Legislature grants authority to executive agencies. In order to be appropriate, a delegation of authority must include:
1. Adequate standards (which may include both standards by which agencies are to act and standards for judicial review of agency actions); and
 2. Procedural safeguards. *Brown v. Vail*, 169 Wn.2d 318, 329, 237 P.3d 263 (2010).
- B.** Some delegations may not be valid. For example, the legislature cannot delegate the power to criminalize actions to a state agency. *State v. Ramos*, 149 Wn. App. 266, 271, 202 P.3d 383 (2009). State agency actions are also subject to due process requirements under the U.S. and Washington State Constitutions. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

III. Agency Legislative Functions

- A.** Agencies may engage in three kinds of rulemaking under the WAPA: regular rulemaking, emergency rulemaking, and expedited rulemaking.
- 1. Regular Rulemaking**
- a. Agency legislative action or rulemaking consists of three major periods: the time between pre-notice inquiry and notice, between notice and the opportunity to comment, and the period after the opportunity to comment and publication of the final rule.
 - b. All rules must be properly adopted and published in the Washington State Register (WSR) before they become effective.
 - c. The Rulemaking Process

- i. **Pre-notice Inquiry (RCW 34.05.310)**
At least 30 days before filing a notice of proposed rulemaking, an agency must publish statement of inquiry in the WSR. It must detail the statutory authority to adopt a rule, why a rule is needed, any coordination with other agencies that is necessary, and the process by which the rulemaking will be conducted. This is done using form CR-101.
- ii. **Notice (RCW 34.05.320)**
At least 20 days before a rulemaking hearing, an agency must publish notice in the WSR. In addition to and within three days of publication, the agency must notify any persons who have expressed an interest in agency rulemaking (most agencies maintain an “interested persons list”). Notice must contain, at a minimum,
 - a. an explanation of agency authority to make the rule;
 - b. a summary of the proposed rule;
 - c. a short explanation of the purpose and anticipated effects of the rule; and
 - d. information regarding the time, manner, and place for public input. Once notice is published, an agency has 180 days to adopt the rule. If it does not do so, the rule is considered withdrawn. RCW 34.05.335(3). Notice is accomplished using form CR-102.
- iii. **Opportunity to Comment (RCW 34.05.325)**
An agency must conduct at least one rulemaking hearing, at which it must receive oral comments from any interested person. A record must be made of the hearing. Agencies must also take and consider written comments at any time during the rulemaking process.
- iv. **Concise Explanatory Statement (RCW 34.05.325 & .370)**
Before adopting a rule, an agency must prepare a concise explanatory statement (CES). The CES must, at a minimum, contain an explanation of:
 - a. why the rule is being adopted;
 - b. any differences between the rule as described in the notice and the version adopted; and
 - c. why comments were or were not incorporated into the final rule.

The CES must also summarize all comments received by the agency during the rulemaking.
- v. **Significant Variance (RCW 34.05.340)**
If a rule varies significantly from the version in the published notice and used at the rulemaking hearing, an agency must either:
 - a. publish a supplemental notice and seek additional comments on the current draft; or
 - b. withdraw the rule and start the process again.

- vi. **Publication (RCW 34.05.380)**
Once a rule is ready to be adopted, the agency must publish it in the WSR. It does so by submitting the final rule, along with a completed form CR-103P.
- vii. **Effective Date (RCW 34.05.380)**
Unless a later date is specified in the rule, a rule becomes effective 30 days after publication in the WSR.
- viii. **Justification (RCW 34.05.328)**
Some agencies have heightened requirements to justify their rulemaking, and any agency may decide to define a rule as a “significant legislative rule.” Agencies subject to this include:
 - a. Ecology;
 - b. Labor and Industries;
 - c. Health;
 - d. Revenue;
 - e. Social and Health Services;
 - f. Natural Resources;
 - g. Employment Security;
 - h. The Forest Practices Board;
 - i. The Office of the Insurance Commissioner; and
 - j. Some Fish and Wildlife actions.

These agencies, and any that opt to define their rules as significant legislative rules, have significantly more disclosure and notice requirements.

2. Emergency Rulemaking (RCW 34.05.350)

Agencies may engage in emergency rulemaking when:

- a. immediate adoption, amendment, or repeal of a rule is necessary to preserve the public health, safety, or welfare; and notice and comment requirements are contrary to the public interest;
- b. state or federal law requires immediate adoption of a rule; or
- c. it is necessary to implement budget-saving provisions of specific legislative acts.

3. Emergency rules are effective immediately upon filing for publication with form CR-103E, but are only effective for 120 days. Any person may petition the governor to overturn the emergency rule.

4. Expedited Rulemaking (RCW 34.05.353)

In certain circumstances, agencies may conduct expedited rulemaking. This generally only applies to situations where the agency has no discretion on a rule. For example, expedited rulemaking may be appropriate where:

- a. federal or state law has been changed, and a rule must specifically mirror those changes;
- b. statute authorizing a rule is repealed, and no other authority for the rule exists;
- c. the rule is the subject of a negotiated rulemaking, pilot rulemaking, or other process involving extensive stakeholder involvement before the formal rulemaking process; or
- d. changes are typographical, or clarify language without changing its effect.

Expedited rules must be published in the WSR (after submitting form CR-105) and mailed to interested persons. If no objections are registered within 45 days (or all objections are withdrawn) the rule becomes effective.

B. Challenging Rulemaking (RCWs 34.05.375, 34.05.570). Within the two years after the effective date, rules may be challenged on the following grounds:

1. **Ultra Vires:** Agencies must have authority to adopt rules. If a rule exceeds an agency's authority, the rule is void. Rules are presumed valid, and will be upheld if they are "reasonably consistent" with the statute being implemented.
2. **Procedural Violations:** State agencies must substantially comply with the WAPA. Failure to do so may invalidate a rule. However, the inadvertent failure to mail notice of a proposed rule adoption to any required party does not invalidate a rule.
3. **Constitutional Violations:** Rules may not violate either the Washington or United States Constitutions.
4. **Arbitrary and Capricious:** Arbitrary and capricious rules are void. A rule is arbitrary and capricious if:
 - a. the agency action is willful and unreasoning; and
 - b. taken without regard to the attending facts or circumstances. (*Wash. Independent Telephone Association v. Wash. Utilities and Transportation Comm.*, 148 Wn.2d 887, 904-05, 64 P.3d 606 (2003)).

C. Rule-like Functions. In addition to rulemaking, agencies may engage in several other types of rulemaking-like activities.

1. **Declaratory orders:** persons may petition an agency for a declaratory order regarding the applicability to themselves of a rule, order, or statute enforced by the agency. The agency then has 30 days to enter a declaratory order, set a hearing within 90 days of receipt of the petition, set a date no later than 90 days by which it will provide a declaratory order, or decline to issue a declaratory order (though it must state its reasons for so declining). RCW 34.05.240.
2. **Interpretive and policy statements:** an agency is encouraged (but not required) to issue statements of its current opinions, approaches, and likely courses of action through interpretive and policy statements. These statements are advisory only and not binding on the agency, but their existence must be published in the WSR. RCW 34.05.230.

IV. Agency Adjudicative Functions

A. Adjudicative Proceedings

1. An Adjudicative Proceeding means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. RCW 34.05.010.
2. The rules for Adjudicative Proceedings do not apply to rule-making proceedings unless required by another statute. RCW 34.050.410(2).

B. Request For Adjudication (RCW 34.05.419)

1. If an adjudicative proceeding is requested, within 90 days of receiving an application, the agency shall:
 - a. approve or deny the application in whole or in part;
 - b. commence an Adjudicative Proceeding; or
 - c. issue a decision in writing that it has decided not to conduct an adjudicative proceeding, along with a statement of the agency's reasons and a description of any administrative review available.

See Kadlec Regional Medical Center v. Dep't of Health, 177 Wn.App. 171, 180, 310 P.3d 876 (2013).

2. The 90-day requirement does not require commencement of a full adversarial hearing within that timeframe. Notice of a pre-trial hearing within the 90 day period is adequate if the party will not be otherwise prejudiced. *In re Forfeiture of One 1988 Black Chevrolet Corvette Automobile*, 91 Wn. App. 320, 324, 963 P.2d 187 (1997).
3. After receiving the application, within 30 days the agency shall:
 - a. notify the applicant of any obvious errors or omissions,
 - b. request any additional information the agency wishes to obtain and is permitted by law to require, and
 - c. notify the applicant of the name, mailing address, and telephone number of an office that may be contacted regarding the application.

C. Presiding Officer

1. The Presiding Officer in an administrative hearing shall be:
 - a. the agency head or one or more members of the agency head;
 - b. if authorized by statute, a person other than the agency head or an administrative law judge designated by the agency head to make the final decision and enter a final order; or

- c. one or more administrative law judges assigned by the office of administrative hearings. RCW 34.05.425(1).
2. A Presiding Officer is subject to disqualification for bias, prejudice, interest, or any other cause for which a judge is disqualified. RCW 34.05.425(3).
3. If disqualification is requested, the request shall be determined by the individual that is being sought to be disqualified. RCW 34.05.425(5).

D. Adjudicative Hearing

1. Default

- a. Failure to file an application for an adjudicative proceeding within the time limit established by statute or agency rule constitutes a default and results in the loss of that party's right to an adjudicative hearing. RCW 34.05.440(1).
- b. If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, the presiding officer may serve upon all parties a default or dispositive order, which shall include the grounds for the order. RCW 34.05.440 (2).
- c. Within 7 days after service of a default order for failure to attend or participate (or a longer period if provided for by agency rule), the party against whom the default applies may seek to have it vacated. RCW 34.05.440 (3).

2. Discovery

- a. The presiding officer may issue subpoenas and may enter protective orders. RCW 34.05.446(1). This subpoena power has statewide effect. RCW 34.05.446(6).
- b. A subpoena also may be issued by the agency or attorney of record in whose behalf the witness is required to appear. RCW 34.05.446(1).
- c. The agency may by rule determine whether or not discovery is available in adjudicative proceedings for that agency and in what forms it may be used. RCW 34.05.446(2).
- d. Except as provided for otherwise by agency rules, the presiding officer may decide whether to permit the taking of depositions, requests for admissions, and all other procedures authorized for discovery under the Civil Court Rules. Such discovery may be conditioned upon a showing of necessity and unavailability of information by other means. RCW 34.05.446(3). The officer shall consider the following in exercising discretion:
 - i. whether all parties are represented by counsel;
 - ii. whether undue expense or delay in bringing the case to hearing will result;
 - iii. whether discovery will promote the orderly and prompt conduct of the proceeding; and
 - iv. whether the interests of justice will be promoted.
- e. Discovery orders and protective orders may be enforced as provided for by civil enforcement of agency action. RCW 34.05.446(4).

- f. Subpoenas are enforced by the agency or attorney petitioning the superior court of the county where the hearing is being conducted, the county where the person resides or is found, or where subpoenaed documents are located, for enforcement of the subpoena. RCW 34.05.588.

3. Hearing

- a. During the hearing, the presiding officer shall afford all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order. RCW 34.05.449(2).
- b. The presiding officer has the discretion to allow all or part of the hearing to be conducted by telephone, television or other electronic means if the rights of the parties will not be prejudiced. Each party must have an opportunity to participate effectively in, to hear, and if technically and economically feasible, to see the entire proceeding. RCW 34.05.449(3).
- c. The presiding officer shall cause the hearing to be recorded by a method chosen by the agency. The agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. RCW 34.05.449(4).
- d. Hearings are open to public observation except for parts the presiding officer states to be closed based on a provision of law expressly authorizing closure or under a protective order properly entered by the presiding officer.
 - i. The presiding officer may exclude witnesses upon a showing of good cause.
 - ii. If the hearing is conducted by telephone, television, or other electronic means, public observation is satisfied if members of the public are given an opportunity at reasonable times to hear or inspect the agency's record and any transcript obtained by the agency. RCW 34.05.449(5).
- e. Evidence, including hearsay, is admissible if the presiding officer decides it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452(1).
 - i. Evidence that is excludable on constitutional grounds, statutory grounds, or on the basis of evidentiary privilege recognized in the courts of this state shall be excluded. RCW 34.05.452(1).
 - ii. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious. To the extent not inconsistent with this section, the Washington Rules of Evidence shall be referred to as a guideline for evidentiary rulings. RCW 34.05.452(1),(2).
 - iii. All testimony of parties and witnesses shall be under oath or affirmation. RCW 34.05.452(3).
 - iv. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. RCW 34.05.452(4).
 - v. Official notice may be taken of the following:

- a. judicially cognizable facts;
- b. technical or scientific facts within the agency's specialized knowledge;
- c. codes or standards that have been adopted by an agency of the U.S., Washington or another state, or by a nationally recognized organization or association. Parties shall be given notice and afforded an opportunity to contest the facts and material. RCW 34.05.452(5).

4. Separation of Functions

- a. A person who has served as an investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage (or one subject to the authority, direction or discretion of such person) may not serve as a presiding officer in the same proceeding. RCW 34.05.458(1).
- b. A person, including an agency head, who participates in the determination of probable cause or equivalent preliminary determination may serve as presiding officer or assist or advise a presiding officer in the same proceeding unless grounds for disqualification exist. RCW 34.05.458(2).
- c. A person may serve as presiding officer at successive stages of the same adjudication proceeding. RCW 34.05.458(3).

5. Review of Initial Orders (RCW 34.05.464).

- a. An agency may by rule provide that initial orders become final without further action unless within a specified period of time the agency head determines it should be reviewed, or a party files a petition for administrative review.
- b. An agency head may appoint a person to review initial orders and prepare and enter final agency orders.
- c. The person reviewing the initial order is the reviewing officer and shall personally consider the whole record or such portions cited by the parties.
- d. Each party shall be afforded the opportunity to present written argument on the review.
- e. The reviewing officer shall enter a final order disposing of the proceeding or remand the matter for further proceedings. The final order or order remanding shall be served on each party.

V. Judicial Review of Agency Action

A. Petition for Review

1. Judicial review is instituted by paying the required fee and filing a petition in the superior court of Thurston County, the county where the petitioner resides or has his/her principal place of business, or in any county where property owned by the petitioner and affected by the decision is located. RCW 34.05.514.
2. A petition for judicial review shall be filed and served on the agency, the office of the attorney

general, and all parties of record within 30 days after service of the final order. RCW 34.05.542(2). The time to file is extended during any period that the petitioner did not know and was under no duty to discover that the agency had taken the action. RCW 34.05.542(3).

3. Failure to timely serve the office of the attorney general is not grounds for dismissal of the petition. RCW 34.05.542(5).
4. The petition for review must set forth:
 - a. Name and mailing address of the petitioner;
 - b. Name and address of the petitioner's attorney, if any;
 - c. Name and mailing address of the agency whose action is at issue;
 - d. Identification of the agency action at issue, along with a copy, summary or description of the action;
 - e. Identification of persons who were parties in any adjudicative proceedings that led to the agency action;
 - f. Facts to demonstrate that the petitioner is entitled to obtain judicial review;
 - g. Petitioner's reasons for believing relief should be granted; and
 - h. A request for relief, specifying the type and extent of relief requested. RCW 34.05.546.

B. Standing (RCW 34.05.530)

1. A person has standing to seek judicial review of agency action if that person is aggrieved or adversely affected by the agency action.
2. A person is aggrieved or adversely affected if:
 - a. The agency action has prejudiced or is likely to prejudice that person;
 - b. That person's asserted interests are among those that the agency was required to consider when it engaged in the action challenged; and
 - c. A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

C. Issues

Issues not raised before the agency may not be raised on appeal except to the extent that:

1. The person did not know and was not under a duty to discover or could not have reasonably discovered the facts giving rise to the issue;
2. The agency action at issue is a rule and the party has not been a party in the adjudicative proceedings that provided an adequate opportunity to raise the issue;
3. The agency action subject to judicial review is an order and the person was not notified of the

adjudicative proceeding as required;

4. The interests of justice would be served by resolution of an issue arising from:
 - a. a change in controlling law after the agency action; or
 - b. agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency. RCW 34.05.554.

D. Evidence

1. Judicial review by the Court shall be conducted without a jury and confined to the agency record. RCW 34.05.558.
2. Additional/new evidence – the Court may receive evidence in addition to that contained in the agency record for judicial review only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
 - a. improper constitution as a decision-making body or grounds for disqualification of those taking agency action;
 - b. unlawfulness of procedure or of decision-making process; or
 - c. material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record. RCW 34.05.562.

E. Court's Judicial Review

1. The burden is on the party asserting the invalidity of agency action. RCW 34.05.570(1).
2. Based on its experience in the area for which it exists, an agency's interpretation of relevant statutes is entitled to substantial weight and deference. *Silverstreak, Inc. v. Dept. of Labor & Industries*, 159 Wn.2d 868, 884-85, 154 P.3d 891 (2007). However, the appellate courts are not bound by an agency's interpretation of a statute. *PT Air Watchers v. State Dep't of Ecology*, 179 Wn.2d 919, 925, 319 P.3d 23 (2014).
3. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines:
 - a. the order, statute, or rule on which the order is based is in violation of constitutional provision on its face or as applied;
 - b. the order is outside the statutory authority or jurisdiction of the agency;
 - c. the agency has engaged in an unlawful procedure or decision making process, or has failed to follow proscribed procedure;
 - d. the agency has erroneously interpreted or applied the law;
 - e. the order is not supported by evidence that is substantial when viewed in light of the whole record before the court;
 - f. the agency has not decided all issues requiring resolution by the agency;

- g. a motion for disqualification was made and improperly denied or, if no motion was made, facts are shown to support the grant of such motion that were not known and were reasonably discoverable by the challenging party at the appropriate time for making such motion;
- h. the order is inconsistent with a rule of the agency; or
- i. the order is arbitrary or capricious. RCW 34.05.570(3).



CIVIL PROCEDURE, STATUTE OF LIMITATIONS AND WASHINGTON COURTS

I. Commencement and Pretrial

A. General

The Civil Rules encompass the procedures to follow in regard to commencement of an action and pretrial practice. They give guidance for pleadings such as Complaints, Answers, Counterclaims and Replies to Counterclaims. They also prescribe the mode and manner of Pretrial Discovery.

B. Pleadings

1. Amendment

Pleadings may be amended once, as a matter of right, before a responsive pleading is served, or if it is a pleading to which no responsive pleading is allowed, then within 20 days. CR 15. Otherwise, the party must seek leave of court to amend.

2. Defenses

CR 12(b) provides for certain defenses that can be made by motion prior to Answer. These defenses include lack of personal jurisdiction, improper venue, and insufficiency of process or service of process. If a Pre-answer Rule 12 motion is made, but does not include one of these defenses or they are not asserted in the answer, such defenses are waived. CR 12(h). Similarly, if a CR 12 motion is made which does not include one of the defenses the party will not be allowed to move to dismiss on that basis later. CR 12(g).

3. Venue

RCW 4.12.020(3) provides that an action for personal injury may be filed in the county where it arose or in the county where the defendant resides.

4. Jurisdiction/ Minimum Contacts

To establish jurisdiction in this state, Plaintiff must show that the nonresident defendant purposely availed itself of the privilege of conducting business in Washington State. *CTVC of Hawaii Co. v. Shinawatra*, 82 Wn. App. 699, 715, 919 P.2d 664 (1996).

5. Time and Computations

CR 6 describes the procedure for computing the passage of time in civil actions. The computation of the time period begins the day after the triggering act or event, and the last day is computed. The time period cannot end on a Saturday, Sunday or legal holiday. When the time period is less than 7 days, then intermediate Saturdays, Sundays or legal holidays are excluded from the calculation. Under the Federal counterpart, Fed. R. Civ. Pro. 6(a), Saturdays, Sundays, and legal holidays are included in the calculation.

C. Discovery

1. Inadvertent Production of Privileged Material

The information is produced in discovery but is subject to privilege. The party providing discovery

and seeking to maintain privilege must notify the party receiving it. CR 26(b)(6). Under this rule the receiving party must, among other things, take reasonable steps to retrieve any such information from anyone else to whom they had previously delivered it.

2. Discovery Disputes

Parties often object to one another's discovery requests and seem to be at an impasse. Before an attorney can seek the court's intervention in a discovery dispute, however, counsel involved in the dispute must "meet and confer" regarding the matters in dispute. CR 26(i). Any subsequent motion must include counsel's certification that conferencing requirements have been met.

3. Sequence/Timing of Discovery

Absent a court order setting the sequence or timing of discovery, the methods of discovery, such as interrogatories, requests for production, and depositions, may be used in any sequence, and one party's ongoing discovery shall not delay the other party's discovery. CR 26(d).

II. Trials

A. Generally

When discovery has been completed and the case is "at issue" with the complaint and answer filed and served, it can be set for trial by service of a note for trial. Most counties have local rules that supplement the civil rules for trial setting that must be complied with. The case can either be tried to the court alone with the court sitting as both the trier of fact and of law or to the court and a jury of six or twelve, with the jury as trier of fact and the court as trier of law. Both the court and counsel will propose jury instructions that the court will finalize.

B. Jury Trial

1. Demand

At or before a case is set for trial, a party may demand trial by jury of any issue triable by jury by serving a jury demand, filing the demand with the clerk, and paying a fee. If a jury has been demanded but before the case is set for trial, and no party serves or files a demand for a jury of 12, it will be tried by a jury of 6 with 5 required to reach a verdict. CR 38(b). A potential juror may not be struck by peremptory challenge because of race or ethnicity. GR37

2. Waiver

The failure of a party to serve a demand, to file it, and pay the fee, results in a waiver by that party of trial by jury. A demand for trial by jury may not be withdrawn without the consent of the parties. CR 38(d).

3. Significant Distinction

There is no provision in the applicable Federal Rules providing for an automatic six person jury on filing the demand.

C. Assignment of Cases

1. Notice of Trial

Any time after the issues of fact are completed in a case by the service of the complaint and answer, either party may bring the issues of fact to trial, by serving upon the other party a notice of trial, and notifying the party that the issues will be brought on for trial at a time set by the court.

The party giving notice of trial files with the clerk of court a **note of issue**; and the clerk enters the case upon the trial docket. CR 40(a).

2. Trials

When a case is set and called for trial, it will be tried or dismissed, unless good cause is shown for a continuance. The court may in a proper case, and on terms, reset the same. CR 40(d).

3. Continuances

A motion to continue a trial on the ground of absence of evidence must be made by affidavit showing the materiality of the evidence, that due diligence has been used to obtain it, and the name and address of the witness. The court may require the moving party to state in an affidavit the expected evidence, and may impose terms or conditions upon the moving party. CR 40(e).

4. Change of Judge

The statutory right to disqualification of a judge is waived unless a motion and affidavit to disqualify is filed with the court thirty days prior to trial. CR 40(f).

5. Significant Distinction

Under Federal Rule 40 the District Court must provide by rule for the scheduling of trials. There is no provision for continuance or change of judge.

D. Voluntary Dismissal

1. Mandatory

- a. Stipulation. When all parties who have appeared stipulate to dismiss in writing. CR 41(a)(1)(A).
- b. Plaintiff Before Resting. The plaintiff may move to dismiss without prejudice any time before resting at the conclusion of their opening case. CR 41(a)(1)(B).

2. Permissive

Dismissal without prejudice is permissive when the plaintiff has rested after their opening case for good cause and on terms and conditions the court finds proper. CR 41(a)(2).

3. Counterclaim

If a counterclaim has been pleaded by a defendant prior to service of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending. CR 41(a)(1)(B), (3).

4. Significant Distinction

Under Federal Rule 41(a)(1)(A), the plaintiff may dismiss an action without a court order by filing a notice of dismissal or by a stipulation by all parties. Under the Washington rules the court enters an order dismissing the case.

E. Subpoena

1. Court or Clerk

A subpoena may be issued in a court in which an action is pending under the seal of the court or by the clerk of court. CR 45(a)(4).

2. Attorney

An attorney of record of a party may issue and sign a subpoena. CR 45(a)(4).

3. Fee

A witness fee must be paid to the person being subpoenaed. RCW 2.40.020.

F. Jury Instruction

1. Objections

Before instructing the jury, the court supplies counsel with copies of its proposed instructions. Counsel, without the jury present, makes objections to any proposed instruction and to the refusal to give a requested instruction. Counsel states the matter to which they object and the grounds, with the number, paragraph or part of the instruction to be given or refused objected to. CR 51(f).

2. Instructing the Jury

After counsel have completed their objections and the court has made any modifications, the court then provides each counsel with a copy of the instructions in their final form. The court then reads the instructions to the jury. CR 51(g).

3. Argument

After the court has read the instructions to the jury, the plaintiff or party having the burden of proof first addresses the jury on the evidence and the law as contained instructions. Then the defendant addresses the jury, followed by the rebuttal of the plaintiff. CR 51(g).

4. No Comment on Evidence

The trial court is prohibited from commenting on the evidence. CR 51(j).

5. Significant Distinction

Under Federal Rule 51 a party may submit requests at the close of the evidence unless the court orders submission an earlier time. In addition to the method for objecting to a proposed instruction, the rule sets out the method for assigning error to an instruction. The rule contains no provision regarding comments on the evidence by the trial court.

III. Judgments

A. Generally

After the evidence has been presented to the court or the court and jury and the case decided or dismissed by stipulation or default after failure to appear, judgment may be entered against a party. The judgment is the final determination of the rights of the parties in writing, must be signed by the judge in the action, and includes any decree or order from which appeal may be taken. Every direction of a court or judge, entered in writing, not included in a judgment, is an order. An oral opinion and a written memorandum opinion by the court or judge is not a judgment and is subject to change. CR 54(A)(1)(2); 14A Tegland, Washington Practice § 35.1 (2009).

B. Default

1. Entry

When a party against whom a judgment is sought fails to appear, plead, or defend, a motion for default may be made by motion and affidavit. If a party has appeared before the motion is filed, the party may respond and defend any time before the hearing on the motion. If the party has not appeared before the motion is filed the party may not respond or defend without leave of court. CR 55(a)(1), (2).

2. Notice

An appearance for any purpose in the action is an appearance for all purposes under the rule and any party who has appeared in the action shall be served with notice of the motion for default before the hearing on the motion. Any party who has not appeared before the motion for default is filed is not entitled to a notice of the motion. CR 55(a)(3).

3. Default Judgment

Once an order of default is entered a Judgment may be entered against the party in default. If the claim is for a sum certain or for one that can be made certain by computation, the court on motion and affidavit of the amount due will enter judgment for that amount and costs against the party in default. If the amount is uncertain and not subject to computation the court may take evidence by hearing to determine it. CR 55(b)(1), (2)

C. New Trial, Reconsideration and Amendment of Judgments

1. Motion for New Trial

A motion for new trial or for reconsideration must be filed no later than 10 days after entry of the judgment, or order. The motion must set out the specific reasons in fact and law on each ground on which the motion is based. A motion to alter or amend the judgment must also be filed no more than 10 days after entry. CR 59(b), (h).

2. Significant Distinction

Under Federal Rule 59 the motion for a new trial must be filed no later than 28 days after the entry of judgment, and a motion for new trial may be granted based upon any reason for which a new trial has been previously granted in federal court. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

D. Relief from Judgment or Order

1. Grounds

The court may relieve a party or his legal representative from a final judgment, order, or proceeding on a number of grounds, including mistake, inadvertence, excusable neglect, newly discovered evidence, and fraud. CR 60(b).

2. Time

The motion must be made within a reasonable time, except for mistake, erroneous proceedings against a minor, and newly discovered evidence, which must be made no more than 1 year after the judgment, order, or proceeding was entered. The motion does not affect the finality of the judgment or suspend its operation. CR 60(b).

E. Stay of Proceedings to Enforce a Judgment

1. Mandatory Stay

No execution is allowed on a judgment or proceedings to enforce it, until 10 days have expired after its entry; on filing a notice of appeal, enforcement is stayed 14 days after entry. CR 62(a).

2. Significant Distinction

Federal Rule 62 provides that no execution is allowed on a judgment or proceedings to enforce it until 14 days have expired after its entry unless the proceedings involve a receivership, injunction, or accounting for which there is no stay. There is no stay on appeal unless a supersede as bond is provided or the court orders otherwise. The rule also provides that if the judgment is a lien on the debtor's property under the law of the state where the court is located, the judgment debtor is

entitled to the same stay of execution the state court would give.

F. Offer of Judgment

1. Time

No less than 10 days before the trial, a party defending a claim may serve on the adverse party an offer to allow judgment to be taken against them with costs. CR 68.

2. Effect

If within 10 days after the service of the offer the adverse party serves notice the offer is accepted, either party may file the offer and notice of acceptance with proof of service and the court shall enter judgment. An offer not accepted is deemed withdrawn and is not admissible except in a proceeding to determine costs. If judgment obtained by the offeree is not more favorable than the offer, they must pay the costs incurred after the making of the offer. CR 68.

IV. Appellate Procedure

A. Rules

1. Generally

The rules determining appellate procedure in the State of Washington are called The Rules of Appellate Procedure, abbreviated as RAP. The rules govern civil and criminal proceedings in both the Supreme Court and the three Courts of Appeals, unless otherwise noted, and establish the procedure for seeking review of a decision of the Court of Appeals in the Supreme Court. The rules are to be liberally construed, and appeals are not to be decided on the basis of compliance or noncompliance except in compelling circumstances where justice demands. RAP 1.1; RAP 1.2.

2. Significant Distinction

Under Federal Rule of Appellate Procedure 47 the Circuit Courts of Appeal are authorized to enact local rules of governing their practice. There is no provision in the Washington Rules on Appeal for local rules. Under the Washington Rules, extraordinary writs are eliminated in RAP 2.1(b), while they are preserved in Federal Rule of Appellate Procedure 21. Under Article III of the United States Constitution, the United States Supreme Court has original jurisdiction in certain cases such as actions between states.

B. Methods of Review and Scope of Review

1. Appeals

There are two basic types of appeal of a superior court decision under the rules, appeal as a matter of right (“appeal”) and review by permission of the reviewing court (“discretionary review”). RAP 2.1(a)(1), (2).

2. Decisions Reviewable

- a. Appeal.** A party may only appeal from a final judgment of the superior court, and certain other decisions set out in the rule. RAP 2.2(a)(1).
- b. Discretionary Review.** A party may seek discretionary review of any act of the trial court not appealable as a matter of right. Considerations for discretionary review include obvious error or certification by the superior court or the parties of the need for immediate review of a matter. RAP 2.3(a), (b).

C. Reviewing Court

1. Court of Appeals

A party may seek review in the Court of Appeals of any trial court decision which is subject to review as provided under RAP Title 2 and typically will be a final judgment from the superior court. RAP 4.1(a).

2. Supreme Court

A party may seek review in the Supreme Court of a decision of the superior court which is subject to review as provided under RAP Title 2 in limited cases, which include review authorized by statute, the constitutionality of a law, and the imposition of the death penalty. RAP 4.2(a).

D. Initiating Review

1. Notice

A party seeking review of a superior court decision as a matter of right must file a notice of appeal; a party seeking discretionary review must file a notice of discretionary review. Both documents must be filed with the trial court and a filing fee paid. RAP 5.1.

2. Time

The notice of appeal or for discretionary review must be filed within 30 days after entry of the decision for which review is sought, unless otherwise provided by statute or rule. RAP 5.2(a), (b), (d).

3. Significant Difference

Under Federal Rule 4(a)(1)(B) any party has 60 days to file a notice of appeal if one of the parties is the United States.



E. Acceptance of Review

1. Appeal as a Matter of Right Review is accepted by the appellate court upon the timely filing in the trial court of a notice of appeal from a decision reviewable as a matter of right. RAP 6.1.

2. Discretionary Review

The appellate court accepts discretionary review of a trial court decision by granting a motion for discretionary review. The motion must be filed with the appellate court within 15 days after filing the notice of discretionary review with the trial court. RAP 6.2(a), (b).

3. Significant Distinction

Under Federal Rule of Appellate Procedure 5, the discretionary review process is referred to as "Appeal by Permission." The petition to appeal is filed with the Circuit Court of Appeals and there is no motion to grant the appeal. The petition is considered without oral argument, and if granted, the petitioner is required to pay a filing fee, and may be required to file a cost bond, which the court may require of the appellant in any appeal under Federal Rule of Appellate Procedure 7.

F. Record on Review

1. Record

The record on review may consist of, or include a verbatim "report of the proceeding", clerks papers, exhibits, or a certified record of an administrative proceeding. RAP 9.1.

2. Significant Distinction

Under Federal Rule of Appellate Procedure 10(a)(3), the record on review will include a certified copy of the docket entries prepared by the district clerk.

G. Briefs

1 Briefs

The briefs that may be filed are the brief of the appellant or petitioner, the respondent, and a reply brief by the appellant or petitioner. RAP 10.1(b).

2 Significant Distinction

Under Federal Rule of Appellate Procedure 26.1, a corporate party must file a corporate disclosure statement with their principal brief, identifying any parent corporation and any publicly held corporation that owns 10% or more of its stock.

H. Oral Argument

1. Argument

A party of record may present oral argument if the party has filed a brief. Oral argument will take place on a date set by the clerk of court. RAP 11.2(a); RAP 11.3(a).

2. Significant Distinction

Under Federal Rule of Appellate Procedure 34(a)(1), (2) a party may file a request for oral argument with a statement why it is necessary and oral argument will be allowed unless the court determines it is not necessary.

I. Decisions

1. Basis

The appellate court will decide a case only on the issues in the briefs. It may conclude an issue not set forth in the briefs needs to be addressed and will then notify the parties to address the issue in writing. RAP 12.1(a), (b).

J. Disposition on Review

1. Disposition

The appellate court may reverse, affirm or modify the decision being reviewed and take any other action the merits of the case and justice may require. RAP 12.2.

2. Form of Decision

The decision of the court may be in the form of an opinion, order, or ruling, and includes a decision on the merits “terminating review” after review has been accepted or an “interlocutory decision” that is not final. A majority of the panel issuing an opinion will determine if it is to be published. RAP 12.3(a), (b), (d).

3. Significant Distinction

Under Federal rule of Appellate Procedure 36(a) the clerk notes on the docket judgment when he or she receives the opinion of the court, or if there is no opinion, judgment as instructed by the court. All opinions are published.

K. Mandate

1. Mandate

The mandate is the notification by the clerk to the trial court and the parties of an appellate court

decision terminating review. Upon the issuance of the mandate, the action or decision of the appellate court is effective and binding on the parties to the review and in all subsequent proceedings. RAP 12.5 (a); RAP 12.2.

2. Significant Distinction

Under Federal Rule of Appellate Procedure 41(a), unless the court directs that a formal mandate be issued, the mandate consists of a certified copy of the judgment, the opinion of the court, if any, and any ruling on costs.

L. Review by Supreme Court

1. One Method

Review by the Supreme Court of a Court of Appeals decision is only by discretionary review. The petition for review should be filed in the Court of Appeals and must be filed within 30 days after the decision of the Court of Appeals is filed. A petition for review will be accepted only if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, or another Court of Appeals, or the issue has a substantial constitutional law issue, or is of great public interest. RAP 13.1; RAP 13.4(a), (b).

2. Significant Distinction

Under Article III of the United States Constitution, the United States Supreme Court has original jurisdiction in certain cases such as actions between states. Under Supreme Court Rule 17 the initial pleading in such an action is preceded by a motion for leave to file. Under Supreme Court Rule 18, where appeal from a US District Court is authorized by law, an appeal is commenced by filing a notice of appeal with the district court clerk. Under Supreme Court Rule 12, in cases involving a Writ of Certiorari, the petition is filed with the Supreme Court, and under Supreme Court Rule 13 must be filed within 90 days after the judgment for which review is sought.

V. Statute of Limitations

A. Limitation of Actions

1. General

The Statute of Limitations provides fixed time periods for the bringing of various kinds of claims. Statutory limitation periods are keyed to the type of claim being brought. The most common limitation periods are contained in RCW 4.16.

2. Examples of Time Periods

The Statutes of Limitations in Washington for some of the most common claims are as follows:

- a. Personal injury claims - Three years. RCW 4.16.080(2).
- b. Written contract claims - Six years. RCW 4.16.040.
- c. Oral contract claims - Three years. RCW 4.16.080(3). The 6 year Statute of Limitations (RCW 4.16.040) applies where the claim to restitution arises from a written contract. See *Hornback v. Wentworth*, 132 Wn. App. 504, 514, 132 P.3d 778 (2006).

B. Commencement

To be within the applicable Statute of Limitations, an action must be “commenced” within the required

number of years. For purposes of tolling the Statute of Limitations, an action is commenced by filing of a complaint or by service of summons and complaint, whichever occurs first. RCW 4.16.170.

C. Tolling After Commencement

Once an action has been commenced, the plaintiff has 90 days thereafter to complete the two-part segment of filing and service. So, once a case is filed, plaintiff has 90 days to perfect service. RCW 4.16.170. Under this procedure, if the action is “timely” filed, service within 90 days (even if after the statute of limitation period has run), it is deemed within the statutory period. See *Wothers v. Farmers Insurance*, 101 Wn.App 75, 5 P.3d 719 (2000).

RCW 4.16.170 also provides that once an action is commenced against multiple defendants, service on one of the defendants tolls the statute as to all the defendants.

A. Failure to Perfect

If service is not made within 90 days, however, then the “commencement” tolling statute has no effect on the running of the Statute of Limitations. The case is subject to the initial Statute of Limitation period. Unless there are multiple defendants, filing of the complaint and service on one defendant tolls the statute, and service on the other defendants need only be “within a reasonable time.” See *Bosteder v. City of Renton*, 155 Wn.2d 18, 47-48, 117 P.3d 316 (2005).

B. Tolling Based on Evasion of Service

RCW 4.16.180 provides that for defendants who are out of state or “concealed,” the time out of state or while concealed will not be taken into consideration for “timely” commencement of the action. See *Bethel v. Sturmer*, 3 Wn. App. 862, 479 P.2d 131 (1970). Willful evasion is required for “concealment.” *Brown v. Prauest Transport*, 76 Wn. App 412 (1994). If they are available or amenable for service under long arm jurisdiction or if the Non Resident Motorist Statute, RCW 46.64.040 applies, and there will be no tolling under RCW 4.16.180. See *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 111 P.3d 271 (2005); *Summerrise v. Stephens*, 75 Wn.2d 808, 454 P.2d 224 (1969); *Sidis v. Brodie/Dohrmann Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991); Washington Handbook on Civil Procedure 2017-2018, Teglund and Ende, sec. 4.2, p. 87.

VI. Washington Court System

The judicial power of the State of Washington is vested in its courts. Washington State Constitution art. IV, sec 1.

A. Supreme Court

1. Generally

The State Supreme Court sits officially in the Temple of Justice in Olympia, Washington. As the highest court in the state; its opinions are published and have precedential value for the courts of Washington. It has original jurisdiction over some matters and appellate jurisdiction to review decisions of lower courts, final rule-making authority for all state courts, and administrative responsibility for operation of the state court system. Guide to Washington State Courts by the Washington State Administrative Office of the Courts, 12th edition 2011.

2. Establishment, Composition, and Election

The Court is established in article IV, section 2 of the State Constitution. It is comprised of nine

Justices who are elected at large, serving staggered six year terms. Vacancies are filled by appointment by the Governor. An appointed Justice serves until the next general election and then must stand for election to remain on the Court. RCW 2.04.070; RCW 2.04.071; RCW 2.04.100.

3. Jurisdiction

a. Original

The Court has original jurisdiction in habeas corpus, quo warranto, and mandamus as to all state officers. It has appellate jurisdiction in all actions and proceedings except that its appellate jurisdiction does not extend to civil actions for the recovery of money or personal property when the amount in controversy does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, assessment, toll, fine, or the validity of a statute. It also has the power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary for the exercise of its appellate and revisory jurisdiction. Each of the Justices has the power to issue writs of habeas corpus, upon petition by any person in custody, and may make the writ returnable before that Justice, the Supreme Court, or before any superior court, or superior court judge. Const. art. IV, sec 4; RCW 2.04.010.

b. Appellate

Direct Supreme Court review of a trial court decision is permitted if the action involves a state officer, a trial court has ruled a statute or ordinance unconstitutional, conflicting statutes or rules of law are involved, or the issue is of broad public interest requiring a prompt final decision. All cases where the death penalty has been imposed are reviewed directly by the Supreme Court. RAP 4.2; Guide to Washington State Courts by the Washington State Administrative Office of the Courts, 12th edition 2011.

c. Transfer

The Supreme Court may on its own initiative, on certification, or upon a motion of a party transfer a case from the Court of Appeals to itself. RAP 4.4.

4. Finality

Judgments and decrees of the Supreme Court are final and conclusive on all parties before it.

5. Rule Making

a. Rules of Pleading, Practice and Procedure

The Supreme Court has the authority to establish the rules of pleading, practice, and procedure for all courts in the state, including the form of writs, the taking of evidence, and the form and manner of entry of orders and judgments. RCW 2.04.190.

B. Court Of Appeals

1. Generally

The three Courts of Appeals, (Division I, Division II, and Division III) were established by the State Legislature and are the intermediate appellate courts for the State of Washington where most appeals are heard. Cases are decided by three judge panels within the court, who also determine if their decision is to be published with resulting precedential value. Guide to Washington State Courts by the Washington State Administrative Office of the Courts, 12th edition 2011.

2. Establishment, Composition, and Election

The Court of Appeals is a statutory court, and contains three geographic divisions, or panels: Division I in Seattle, Division II in Tacoma and Division III in Spokane. Division I has 12 Judges,

Division II has 8 and Division III has 5. The judges are elected at large, serving staggered six year terms. Vacancies are filled by appointment by the Governor; appointed judges serve until the next general election and then must stand for election to remain on the Court. RCW 2.06.010; RCW 2.06.020; RCW 2.06.070; RCW 2.06.080.

3. Jurisdiction

The Court of Appeals has exclusive appellate jurisdiction in all cases except those reserved to the Supreme Court. It has the power and authority by statute necessary to carry out its judgments, decrees and determinations in all matters within its jurisdiction, according to the rules and principles of the common law and the State Constitution. RCW 2.06.030.

4. Rules and Procedure

The rules and procedure of the Court of Appeals are established by the Supreme Court. RCW 2.06.030.

5. Divisions and Panels

The court is divided into three geographic divisions and sits in panels of three judges. Decisions are by a majority of the panel and are in writing. All decisions having precedential value are published as opinions of the court and those without precedential value are not published. RCW 2.06.020; RCW 2.06.040.

C. Superior Court

1. Generally

Each county in the State of Washington has a Superior Court located at the county seat. The less populated counties may share a superior court judge or several, while the more populated counties have a large number of judges composing the bench. The Superior Courts are courts of general jurisdiction and of record, with an official court reporter and a Clerk of Court. Guide to Washington State Courts by the Washington State Administrative Office of the Courts, 12th edition 2011; RCW 2.08.010; RCW 2.08.030.

2. Establishment, Composition, and Election

The Superior Courts of the State of Washington for each county of the state are established by the State Constitution in article IV, section 5. The number of Superior Court judges for each county is set by the legislature. The judges are elected at large in their home county or counties, serving staggered four year terms. Vacancies are filled by appointment by the Governor; appointed judges serve until the next general election and then must stand for election to remain on the court. RCW 2.08.061-065; RCW 2.08.060; RCW 2.08.070; RCW 2.08.069.

3. Jurisdiction

The Superior Courts have original jurisdiction in all cases in equity, and in all cases at law involving title or possession of real property, the legality of any tax, assessment, toll or municipal fine, and in all other cases where the value of the property in controversy amounts to three hundred dollars or more; in all criminal cases amounting to felony; actions of forcible entry and detainer; proceedings in insolvency, nuisance, probate, divorce and for annulment of marriage, and all cases and proceedings not otherwise provided for. The Superior Court and its judges also have power to issue various writs. Const. art. IV, section 6; RCW 2.08.010.

4. Rules and Procedure

The rules and procedure of the Superior Courts are established by the Supreme Court. RCW 2.04.190.

5. Local Rules

The Superior Courts have been granted the authority to establish and have established local rules of procedure consistent with the rules established by the Supreme Court, usually involving trial and motion settings, notice of the same, the filing of pleadings and briefs, and things unique to the particular county. Local rules vary considerably from county to county. CR 83; GR 7.

6. Arbitration

By statute, in counties with a population of 100,000 or more, arbitration of civil claims is required when the relief sought is a money judgment of \$15,000. If approved by the Superior Court, maintenance and child support are also subject to arbitration in these counties. Counties with a population of less than 100,000 are not required to have arbitration. The rules for mandatory arbitration are included in the Superior Court Mandatory Arbitration Rules established by the Supreme Court. RCW 7.06.010; RCW 7.06.020.

D. District Courts

1. Generally

Each county in Washington has a District Court, a court of limited jurisdiction, established by the Legislature, with authority to hear and decide certain civil matters and criminal misdemeanors, including traffic infractions. Civil and criminal trials are heard by the court with or without a jury. The district courts hear a large volume of cases, and the number of judges comprising the district court will vary substantially depending on the population of the county. Guide to Washington State Courts by the Washington State Administrative Office of the Courts, 12th edition 2011; RCW 3.02.010; RCW 3.66.020.

2. Establishment, Composition, and Election

The authority to establish county District Courts has been left to the Legislature by the Washington State Constitution. Const. art. IV, sec 12. The Legislature sets the number of District Court Judges for each county, a District Court Judge's term of office is four years, and they are elected at large in their "districts." Vacancies are appointed by the "County Legislative Authority" in their district. An appointed district court judge remains in office until the next general election in the district and then must stand for election to remain on the court. RCW 3.34.010; RCW 3.34.050; RCW 3.34.100.

3. Jurisdiction

The District Courts have jurisdiction over civil actions and proceedings where the value of the claim does not exceed \$100,000.00, exclusive of interest, costs, and attorneys' fees, and includes: actions on contract; actions for damages for injuries to the person, or involving personal property, for injury to real property not involving title or possession and for recovery of personal property; actions for damages for fraud concerning personal property; and proceedings to issue writs of attachment, garnishment and replevin. By statute the District Courts do not have jurisdiction over actions involving title to real property, actions to foreclose a mortgage or to enforce a lien on real property, actions for false imprisonment, libel, slander, malicious prosecution, and probate-type actions against an executor or administrator, or actions to dissolve marriage, establish child support, or related matters. The District Courts are authorized to hold Jury trials in both civil and criminal actions. The District Courts also have jurisdiction by statute over criminal misdemeanors, bail proceedings and arraignments. RCW 3.66.020; RCW 3.66.030.

4. Rules and Procedure

The rules and procedure of the District Courts are established by the Supreme Court. RCW 2.04.190.

5. Local Rules

The District Courts have been granted the authority to establish and have established local rules of

procedure consistent with the rules established by the Supreme Court that are peculiar to their own requirements, usually involving trial and motion settings, notice of the same, the filing of pleadings and briefs, and as a result, vary considerably from county to county. CRLJ 83; GR 7.

E. Municipal Courts

1. Generally

The Legislature has authorized Municipal Courts for the more populous cities of Washington. Municipal Courts are courts of limited jurisdiction hearing misdemeanors and traffic infractions under their respective municipal codes, with no civil jurisdiction. Some trials may be heard by a jury when demanded by a party. Guide to Washington State Courts by the Washington State Administrative Office of the Courts, 12th edition 2011; RCW 3.50.020; RCW 35.20.010.

2. Establishment, Composition, and Election

Municipal Courts have been authorized by the legislature for cities with a population over 400,000 in title 35 of the Revised Code and for cities under 400,000 in RCW 3.50.005. Under title 35 Municipal Court Judges in cities over 400,000 are elected at large in the Municipality and serve four year terms. Municipal Court Judges under RCW 3.50.040 are appointed with a four year term and the municipality under RCW 3.50.050 has the option of making the position an elective one.

3. Jurisdiction

The Municipal Courts have jurisdiction over misdemeanors and infractions that are violations of municipal or city ordinances. They do not hear civil actions. RCW 35.20.030; RCW 3.50.020.

4. Rules and Procedure

The rules and procedure of the Municipal Courts are established by the Supreme Court. RCW 2.04.190.

5. Local Rules

The Municipal Courts have been granted the authority to establish and have established local rules of procedure consistent with the rules established by the Supreme Court that are peculiar to their own requirements, and may vary considerably. CRLJ 83; GR 7.

F. Small Claims Courts

1. Generally

Small Claims Courts are courts of limited jurisdiction that hear and decide limited civil claims for money damages in an informal manner and without the parties being represented by counsel.

2. Establishment and Procedure

The District Courts are required by statute to provide a small claims department where claims for the recovery of money damages only under \$5,000 can be heard by the court and adjudicated in an informal manner without the parties being represented by counsel. The procedure for Small Claims Court is set out by statute. RCW 12.40.010; RCW 12.40.050; RCW 12.40.080; RCW 12.40.090.

COMMUNITY PROPERTY AND DOMESTIC PARTNERSHIPS

I. Community Property

(All references to spouses and marriage in this section relate equally to domestic partners and domestic partnerships. See § II below)

- A. Community property** is property that is equally owned in undivided one-half interests by each spouse because of the marital status. *Lyon v. Lyon*, 100 Wn.2d 409, 413, 670 P.2d 272 (1983); RCW 26.16.030.
- B.** Community property is distinguishable from the separate property of the spouses and from other types of property ownerships such as tenancy in common and joint tenancy by right of survivorship.
- C.** Property owned by married individuals will be treated as either separate or community property, based on the following considerations (RCW 26.16.010-.030):
 - 1. The character of the source of the item.
 - 2. The actions of a spouse that may affect a change in the character of the item.
 - 3. The presumption of community property if the character of the source of the item is unclear.
- D. Characterization of Property Owned by Spouses**

Generally, property takes on the character of the item used to acquire or produced it. The character of the item, however, may change based on actions taken by the spouses. For example, separate property may be changed to community property by agreement of the spouses.

1. **Separate Property** – RCW 26.16.010-.020 Separate property consists of:

- a. All of the assets a spouse owned before marriage or acquired after dissolution of the marriage. RCW 26.16.010; RCW 26.16.020.
- b. The assets received by a spouse before, during or after a marriage by gift, bequests, devises, or inheritance. RCW 26.16.010; RCW 26.16.020.
- c. Damages for personal injuries suffered by a spouse. The pain and suffering portion of a personal injury award recovered by one spouse from a third party will be the separate property of the injured spouse. *In re Marriage of Brown*, 100 Wn.2d 729, 738, 675 P.2d 1207 (1984).
- d. An asset that the spouses agree to be separate property. Washington favors community property, thus evidence of an agreement changing community property into separate property must be clear and convincing. *In re Diafos*, 110 Wn. App. 758, 767, 37 P.3d 304 (2001).
- e. The earnings and accumulations of a spouse when living separate and apart. RCW 26.16.140. The separation must be intended to be permanent, meaning that the spouses are in fact living apart in separate households with no intention to reunite. Where there is a

desire to reunite, such as where the spouses are living apart because of employment or military service, the character of the spouses' earnings and accumulations are not affected by the separation. *In re Marriage of Short*, 125 Wn.2d 865, 870-71, 890 P.2d 12 (1995).

- f. The proceeds from one of the above, which is often referred to as the “rents, issues, and proceeds of separate property,” even when received during marriage. RCW 26.16.010; RCW 26.16.020.

2. Community Property – RCW 26.16.030.

Community Property consists of:

- a. all assets acquired during marriage (excluding personal injury damages to a spouse, gifts, bequests, and devises) unless the evidence establishes that they are separate property;
- b. all assets that the spouses agree to be community property; and
- c. all assets that are converted into community property due to commingling.

3. The Community Property Presumption

- a. All property acquired during marriage is presumed to be community property unless there is no question of its separate character. *Short*, 125 Wn.2d at 870; *In re Marriage of Mueller*, 140 Wn. App. 498, 501, 167 P.3d 568 (2007).
 - i. Joint gifts presumed to be community property. *In re Salvini's Estate*, 65 Wn.2d 442, 448, 397 P.2d 811 (1964).
 - ii. If separate property and community property have been commingled such that it is difficult to ascertain and identify the source, the commingled property will be presumed to be community property. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5-6, 74 P.3d 129 (2003).
 - iii. Income derived from community funds or services used to enhance value of separate property may be deemed community property in the absence of contemporaneous segregation of the income between the separate and community funds. *In re Marriage of Elam*, 97 Wn.2d 811, 816-17, 650 P.2d 213 (1982).
 - iv. Gifts between spouses. Either spouse may, at any time during marriage, make a gift of a separate property to the other spouse or to the community. In addition, either spouse may relinquish his or her share of the community property to the other spouse. RCW 26.16.050.
- b. Rebutting the Presumption – Clear and Convincing Evidence.
The community property presumption may be overcome by clear and convincing evidence that (a) the acquisition falls into one of the statutory separate property categories; (b) the acquisition can be traced to a separate property source or (c) the parties agreed to some form of ownership other than community property. *In re Marriage of Gillespie*, 89 Wn. App. 390, 400-02, 948 P.2d 1338 (1997); RCW 26.09.080.
- c. Rights of Creditors to Reach Community Property
 - i. Contractual obligations. The basic presumption is that a debt incurred by either

spouse is a community debt. *Oil Heat Co. of Port Angeles v. Sweeney*, 26 Wn. App. 351, 353, 613 P.2d 169 (1980). An exception to this may be found in RCW 26.16.205. Under this RCW, the expenses of the family and the education of the children, including stepchildren, are chargeable upon the community property and separate property of both spouses. However, with regard to stepchildren, the obligation ceases upon the dissolution of the marriage.

- ii. Tort liability. If the tortious act was committed in the course of managing the community property or during an activity performed for the benefit of the community, there will be community liability. It is irrelevant whether the tort was either intentional or negligent. *Clayton v. Wilson*, 168 Wn.2d 57, 63, 227 P.3d 278 (2010); *Farman v. Farman*, 25 Wn. App. 896, 901, 611 P.2d 1314 (1980).

E. Dissolution of Marriage (applies equally to domestic partnerships)

1. Disposition of Community Property upon Dissolution

- a. Separation Agreements Spouses often convert community property into separate property as part of a separation agreement. The court, however, has power to change the allocation of property made in the agreement only when the court finds that the separation agreement was “unfair at the time of its execution.” RCW 26.09.070(1); RCW 26.09.070(3).
- b. Powers of the Court In the case of termination of the marriage by dissolution or decree of invalidity, the law clearly recognizes the power of the courts to distribute property in an equitable manner that looks to how the parties will be left upon the termination of the marriage, which includes the power of the court to invade the separate property ownership of one spouse for the benefit of the other spouse. *Webster v. Webster*, 2 Wash. 419-20, 26 P. 864 (1891); *In re Marriage of Hadley*, 88 Wn.2d 649, 655-56, 565 P.2d 790 (1977).
- c. Effect of Dissolution on Testamentary Rights
Upon dissolution, all provisions granting rights and interests to a former spouse in a testator’s will are revoked, unless the will expressly provides otherwise. RCW 11.12.051.

2. Liability upon Dissolution of Community

- a. If spouses have separated
If the spouses have separated, damage or injury caused by one will usually create only separate liability in the acting spouse since it was not for the community benefit. *Casa del Rey v. Hart*, 31 Wn. App. 532, 539-40, 643 P.2d 900 (1982).
- b. After Dissolution
After dissolution, enforcement of a community property contract or tort liability existing prior to the dissolution can be enforced against the former community property. *Oil Heat Co. of Port Angeles v. Sweeney*, 26 Wn. App. 351, 353-54, 613 P.2d 169 (1980).
- c. Upon Death of a Spouse
Upon the death of a spouse, the immunity of community property to separate obligations disappears, permitting separate obligations of the surviving spouse to be enforced against their respective shares of the former community property. *Edmonds v. Ashe*, 13 Wn. App. 690, 695, 537 P.2d 812 (1975).

II. State Registered Domestic Partnerships

A. Context

1. In 2007, the Legislature passed SB 5336, authorizing domestic partnerships. Domestic partnerships acted as a civil contract between two adults—including same-gendered couples—who met the requirements.
2. In 2008, the Legislature passed HB 3104, which provided expanded rights and responsibilities for state registered domestic partners, including dissolutions, community property, estate planning, taxes, court process, service to veterans, public assistance, conflicts of interest for public officials, and guardianships.
3. In 2009, voters approved Referendum 71 (effectuating SB 5688), which provided that state registered domestic partners were to be treated the same as married spouses, to the extent consistent with federal law.
4. In 2012, voters approved Referendum 74 (effectuating SB 6239), which preserves domestic partnerships only for seniors. All existing state-registered domestic partnerships—including same-gendered partnerships—automatically converted to marriages on June 30, 2014, unless at least one of the partners was over 62 years old.

B. Rights and Obligations

1. For all purposes under state law, state registered domestic partners are treated the same as married spouses. Any privilege, immunity, right, benefit, or responsibility granted by statute, rule, or law to an individual because he or she is a spouse or an in-law in a specified way to another individual is granted on equivalent terms as if the state registered domestic partnership is or were a marriage. RCW 26.60.015.
2. Any state registered domestic partnership in which the parties are the same sex, and neither party is sixty-two years of age or older, that has not been dissolved or converted into a marriage by the parties by June 30, 2014, is automatically merged into a marriage and is deemed a marriage as of June 30, 2014. The date of the original state registered domestic partnership is the legal date of the marriage. RCW 26.60.100.
3. Registered Domestic Partners have spouse-like rights in:
 - a. Medical or death-related rights
 - i. Hospital visitation, medical decision-making, privacy and shared room in long-term health care facility, and receipt of health information about his or her partner; RCW 26.60.070;
 - ii. Intestate succession. RCW 11.04.015;
 - iii. Administration of his or her partner's estate; RCW 11.28.030;
 - iv. seeking damages for wrongful death or loss of consortium. RCW 4.20.020.

- b. Public employee benefits; RCW 41.05.066;
 - c. Spousal privilege; RCW 5.60.060.
4. The terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family are interpreted as applying equally to state registered domestic partnerships. RCW 1.12.080.
 5. Not all rights and responsibilities are conferred on state registered domestic partnerships. Rights and responsibilities conferred under state law cannot conflict with federal law. RCW 1.12.080.

C. Requirements Prior To Registration – RCW 26.60.020; RCW 26.60.030.

1. Both persons share a common residence (only one of the domestic partners needs to have legal ownership of the common residence, either domestic partner may have an additional residence or residences that are not shared, and a domestic partner may leave the common residence if he or she has an intent to return).
2. Both persons are at least eighteen years old and at least one is 62+ years old;
3. Neither person is married or in a state registered domestic partnership with another person;
4. Both persons are capable of consenting to the domestic partnership; and
5. The persons are not closely related (persons cannot be nearer of kin to each other than second cousins, and neither person is a sibling, child, grandchild, aunt, uncle, niece, or nephew to the other person).

D. Registration – RCW 26.60.040.

The Secretary of State maintains forms entitled “declaration of state registered domestic partnership.” RCW 43.07.400. In order to register the domestic partnership, the parties to the agreement must:

1. Each sign the declaration;
2. Have each signature notarized;
3. Pay the filing fee and submit the declaration to the Secretary of State.

E. Reciprocity - RCW 26.60.090.

A legal union, other than a marriage, of two persons that was validly formed in another jurisdiction and that is substantially equivalent to domestic partnership is recognized as a valid domestic partnership registered in the State of Washington, regardless of whether it bears the name domestic partnership.

F. Community and Separate Property - RCW 26.60.080; RCW 26.16.020.

1. Community assets and liabilities are created in the same manner as a marriage, beginning on the date the domestic partnership is registered with the state, or June 12, 2008, whichever is later. RCW 26.60.080.
2. The rights and interests in the community-like property acquired during a domestic partnership are extended to the surviving party after the death of one of the parties, including the rights to inherit under the intestate laws. RCW 11.04.015.

3. Property and pecuniary rights owned by a person in a state registered domestic partnership before registration are treated in the same manner as the separate property of a spouse in a marriage. See RCW 26.16.020.

G. Children of Registered Domestic Partnerships

1. Presumption of parentage - State registered domestic partners are entitled to the legal presumption that both partners are parents of children born into the domestic partnership. RCW 26.26A.115.
2. Adoption - A state registered domestic partner may adopt the other partner's child. For a state registered domestic partner to adopt the other partner's child, no pre-placement report is required, as in step-parent adoptions. RCW 26.33.140; RCW 26.33.220; RCW 26.33.902.
3. De facto parentage – Persons may petition for a determination of de facto parentage. RCW 26.26A.440. In a proceeding to adjudicate parentage of an individual who claims to be a de facto parent of the child, the individual must establish by a preponderance of the evidence that:
 - a. The individual resided with the child as a regular member of the child's household for a significant period;
 - b. The individual engaged in consistent caretaking of the child;
 - c. The individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;
 - d. The individual held out the child as the individual's child;
 - e. The individual established a bonded and dependent relationship with the child which is parental in nature;
 - f. Another parent of the child fostered or supported the bonded and dependent relationship required under (e) of this subsection; and
 - g. Continuing the relationship between the individual and the child is in the best interest of the child.
4. Establishment of a parent-child relationship gives the non-biological parent the right to petition to establish a residential schedule, or the custodial parent the right to seek support of the child. RCW 26.18 et. seq.; RCW 26.26A.110; RCW 26.26B.020.

H. Dissolution – RCW 26.09 et. seq.

References to dissolution of marriage in the RCW apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, unless the Code expressly states otherwise and the interpretation does not conflict with federal law. RCW 1.12.080.

1. Through the dissolution process, state registered domestic partners can obtain:
 - a. Dissolution of the domestic partnership in family court; RCW 26.09.030;
 - b. Just and equitable division of separate and community property; RCW 26.09.080;

- c. Just and equitable division of separate or community debts; RCW 26.09.080;
- d. Establishment of a parenting plan; RCW 26.09.050;
- e. Establishment of an order of child support; RCW 26.09.100;
- f. Establishment of an order of spousal maintenance; RCW 26.09.090;
- g. Protection under domestic violence and crime victim laws. RCW 26.09.060(3); RCW 26.50.010.



CONSTITUTIONAL LAW

I. Generally

Most of the original thirteen states enacted their constitutions prior to the drafting of the United States Constitution. At that time, few Americans contemplated the size and scope of national government that eventually would evolve in this country. Politically-active residents in the revolutionary and post-revolutionary period saw states as the governments that would undertake the vast majority of governmental functions, and they saw state governments as posing a greater potential threat to their individual liberties than the limited federal government. The first state constitutions, and most state constitutions today, have rights provisions that are more specific than their federal analogues. Many state constitutions have also included express requirements of a separation of powers, and detailed controls on the legislative process. Finally, most state constitutions include separate articles on topics such as taxation, debt, public institutions, education, and, in the west, provisions on land, water and resource management. G. Alan Tarr, *Understanding State Constitutions*, 65 Temple Law Review 1169 (1992).

The Washington State Constitution is no exception. And it is a more responsive “political” document than its federal counterpart. Its roots in the Populist era of the late nineteenth century, and the relative ease with which it can be amended in response to changes in the underlying political ethos, makes our state constitution much more reflective of major movements that have washed across our political landscape. The impact of the ruggedly individualistic views of Washingtonians in 1889 (and today) cannot be minimized. At the time the Washington State Constitution was written, a majority of the new state’s residents lived on farms, and they were suspicious of banks, railroad monopolies, and big business in general. They were also suspicious of government, which they believed was vulnerable to influence and control by large corporate interests. This led to very strong rights provisions in Article I, controls on legislative process in Article II, numerous restrictions on corporations and railroads in Article XII, and several other provisions to guarantee equal treatment of all citizens by government. See, Hugh Spitzer, *Washington: The Past and Present Populist State*, in THE CONSTITUTIONALISM OF AMERICAN STATES 771–84 (George E. Connor and Christopher W. Hammons, eds., University of Missouri Press, 2008).

Many rights guaranteed by the Washington constitution are consistently construed more broadly than similar rights protected by the United States Constitution. Since 1986, the Washington State Supreme Court has applied six nonexclusive factors when determining when and how the state constitution should be interpreted differently than its federal counterpart. These include: 1) textual language; 2) differences in the texts; 3) constitutional history; 4) preexisting state law; 5) structural differences; and 6) matters of particular state or local concern. See *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

However, where the Washington State Supreme Court has “already determined in a particular context the appropriate state constitutional analysis under a provision of the Washington State Constitution, it is unnecessary to provide a threshold *Gunwall* analysis.” See *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 641, 211 P.3d 406 (2009), (citing, *State v. Reichenbach*, 153 Wn.2d 126 (Wash. 2004)). Furthermore, in *City of Woodinville v. Northshore United Church of Christ*, the Washington Supreme Court made it clear that *Gunwall* is “better understood to prescribe appropriate arguments,” and when parties to litigation do not provide a detailed *Gunwall* analysis of an issue, the Court is free to apply an independent state constitutional analysis. *Id.* at 641-642.

II. Legislation

The Washington State Constitution includes a variety of provisions that circumscribe how the legislature functions. These include, among others, the requirement that each bill be limited to a single subject and that the subject be expressed in the bill title (art. II, §22); a requirement that an amendment to an existing statute be depicted clearly in legislation (art. II, §37); and a ban on most special legislation that does not generally affect all persons in the same manner (art. II, §28). These restrictions, and many others, also apply to initiative measures. For example, an initiative may not contain unrelated topics, the initiative's subject must be appropriately reflected in the ballot title that voters see, and an initiative may not effectively amend statutes that are not listed within the measure proposed to the electors. Further, an initiative cannot be used to amend the constitution, for example, by requiring an automatic referendum referral for all tax increases. *Amalgamated Transit Union Local No. 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000).

A. There are two types of initiatives:

1. Initiatives to the People, if certified to have sufficient signatures, are submitted for a vote of the people at the next state general election. Wash. Const. art. II, § 1(a).
2. Initiatives to the Legislature, if certified, are submitted to the legislature at its next regular session in January. Once submitted, the legislature must take one of the following three actions under Washington Constitution article II, section 1(a):
 - a. The legislature can adopt the initiative as proposed, in which case it becomes law without a vote of the people;
 - b. The legislature can reject or refuse to act on the proposed initiative, in which case the initiative must be placed on the ballot at the next state general election; or
 - c. The legislature can approve an alternative to the proposed initiative, in which case both the original proposal and the legislature's alternative must be placed on the ballot at the next state general election.

B. There are also two types of referenda:

1. Referendum Measures are laws recently passed by the legislature that are placed on the ballot because of petitions signed by voters. Wash. Const. art. II, § 1(b).
2. Referendum Bills are proposed laws referred to the voters by the legislature. Wash. Const. art. II, § 1(b).

No initiative or referendum may be amended or repealed by the legislature within a period of two years following its enactment, except by a two-thirds vote in each house of the legislature. Wash. Const. art. II, § 1(c).

III. Executive Powers

Article III, §2 declares that the Governor is vested with "supreme executive power," but most of the other eight constitutional executive officers have limited powers listed in the constitution, together with such other powers that may be prescribed by law. For example, under art. III, §21, the Attorney General is "the legal adviser to the state officers, and shall perform such other duties as may be prescribed by law." He or she has no common law powers, and was ordered to provide legal representation for the Commissioner of

Public Lands when the latter decided to appeal a case that the Attorney General thought was not suitable for appeal. *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1087 (2011).

The governor has the power to veto bills, including line-item vetoes to sections of appropriations bills. Wash. Const. art. III, §12; *Washington State Legislature v. State*, 139 Wn.2d 129, 137-38, 985 P.2d 353 (1999). However, except with respect to appropriations bills and very unusual situations, the governor usually must veto entire sections of legislation. *Washington State Legislature v. Lowry*, 131 Wn.2d 309, 931 P.2d 135 (1997). Furthermore, the Governor may not veto provisions in initiatives or referenda. Wash. Const. art. III, §12 (amend 62).

IV. The Judiciary

Article IV, Section 1 vests “the judicial power” in the Washington State Supreme Court and in various other specified courts. In 1968, Amendment 50 permitted establishment of a new intermediate appellate court in addition to those listed in Section 1 (Art. IV, Sec. 30). These two sections, along with the rest of Article IV, establish a relatively uniform system of courts for the state.

The State Supreme Court has been very protective of the judicial power, the judiciary generally, and the practice of law. Although not expressly stated in Article IV, the Court has ruled that it, rather than the legislature, has control over court rulemaking (*State ex rel. Foster-Wyman Lumber. Superior Court*, 148 Wash. 1, 267 P. 770 (1928)); that it may force legislative bodies to provide adequate funding for the court system in extraordinary circumstances (*In re Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163 (1976)); and that it has almost exclusive control over the State Bar (*Graham v. Washington State Bar Association*, 86 Wn.2d 624, 548 P.2d 310 (1976)). However, in order to cause an appropriation of funds for the judiciary, the burden is on the courts to show, through clear, cogent, and convincing evidence, that the funding is so inadequate that the courts cannot perform their duties. *In re Juvenile Director*, 87 Wn.2d at 252.

V. Taxation

All property taxes must be uniform upon the same class of property within the territorial limits of the authority levying the tax, and taxes may be levied and collected for public purposes only. Wash. Const. art. VII, § 1. There is no rational basis exception to the state constitutional uniformity requirement for taxation of property, and all real estate constitutes a single class for tax purposes. Discrepancies in uniformity are permitted as required by practical necessities of revaluing property when the program is carried out in an orderly manner and pursuant to a regular plan, and if it is not done in an arbitrary, capricious or intentionally discriminatory manner. Wash. Const. art. VII, § 1. *Belas v. Kiga*; 135 Wash.2d 913, 937, 959 P.2d 1037 (1998). A City ordinance that provided property tax relief for senior citizens and disabled veterans did not meet the municipal property tax uniformity requirement provided in the state constitution. Wash. Const. art. VII, § 9. See [The State Cons City of Spokane v. Horton](#), 189 Wn.2d 696 (2017)

In 2011, voters enacted former RCW 43.135.034 (2011) (Initiative 1053 (I-1053)). The first provision of I-1053 requires that any bill containing a tax increase be passed by a two-thirds majority vote (Supermajority). The second provision requires that any tax bill increasing spending beyond that state spending limit be approved by the voters (Referendum). In 2013, I-1053 was challenged on constitutional grounds. *League of Educ. Voters v. State*, 176 Wn.2d 808, 295 P.3d 743 (2013). The petitioners alleged that the Supermajority requirement violated Article II, Section 22 and that the Referendum requirement violated Article II, Section 1(b). The State Supreme Court held that the Supermajority requirement was unconstitutional because it required *certain* legislation to receive a two-thirds majority vote. See *League of Educ. Voters*, 176 Wn. 2d at 813. The Court reasoned that the plain language of Article II, Section 22 sets both a minimum and maximum voting requirement for all bills. See *id.* Conversely, the Court held that the Referendum requirement did not present a justiciable controversy because of the “hypothetical nature of

the claim and lack of injury.” See *id.*

VI. Loans or Gifts of Public Funds

Article VIII, Sections 5 and 7 forbid the state and local governments from giving away public money to private persons or corporations, “except for the necessary support of the poor and infirm.” Although worded differently, these two sections of art. VIII are interpreted as though they were identical. *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 785 P.2d 447 (1990). While the Washington State Supreme Court has interpreted the provisions to allow certain types of public-private arrangements to proceed, the Court has been fairly strict in requiring that the public receive adequate consideration for any outlay of public money. Government agencies have also been barred from providing credit support to the private sector. The Court uses a four-prong test in its analysis of Sections 5 and 7 cases, together with other tests focused on the individual elements. For example, “gift” has been held to connote a transfer of property without consideration and with donative intent. When a government program is challenged as providing a “gift,” it will be presumed constitutionally valid and the burden of overcoming that presumption lies with the challengers of that authority. *Tacoma v. Taxpayers*, 108 Wn.2d 679, 743 P.2d 793 (1987). Unless there is proof of grossly inadequate return or donative intent, the courts do not inquire into the adequacy of the consideration. *Citizens for Clean Air v. Spokane*. However, there is no gift if adequate consideration has been provided. *Adams v. University of Washington*, 106 Wn.2d 312, 722 P.2d 74 (1986.). A court may not substitute its evaluation of the adequacy of consideration for that of elected legislators, so long as that consideration is legally sufficient and not grossly inadequate. *King Co. v. Taxpayers*, 133 Wn.2d 584, 949 P.2d 1260 (1997).

VII. Education and the Common Schools

The state constitution provides as high a standard with respect to education as any state in the Union. Article IX, §1 declares “it is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.” In *Seattle School District v. State*, and again in *McCleary v. State*, the court held that the State did not meet its duty to provide “ample education” because it did not adequately fund basic education via dependable and regular tax sources. *Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978); *McCleary v. State*, 173 Wn.2d 477, 527, 269 P.3d 227 (2012). The Court has held that the legislature has a responsibility under article IX, section 1 to provide specific details of constitutionally required “education.” The word education means the opportunity, not a guaranteed outcome, to obtain the basic knowledge and skills needed to compete in today’s economy and to meaningfully participate in the state’s democracy. See *Seattle School District*, 90 Wn.2d at 517. Moreover, the legislature has an obligation to “review the basic education program as the needs of students and demands of society evolve.” See *McCleary, id.* Article IX, §2 requires a “general and uniform system of public schools.” Article IX generally applies to K-12 schools and not colleges or universities.

Note: On June 12, 2014, the Court issued a “show cause” order, which indicated that the State is summoned to appear before it to address why the State should not be held in contempt of court for violating the Court’s order dated January 9, 2014 (the order directed the State to submit a complete plan for fully funding education pursuant to *McCleary*. In September 2014, the Court found the State in contempt for failing to comply with the January 2014 order. In August 2015, the Court ordered sanctions against the State. In October of 2016 and again in November of 2017, the Court affirmed that the sanctions would remain in place because the State still did not meet its duty to provide “ample education.” In June 2018, the Court lifted the sanctions, terminated its jurisdiction, and held that the State met its duty.

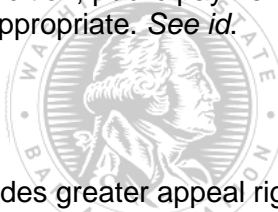
VIII. Procedural Due Process

Procedural due process provides the notice and opportunity to be heard whenever a state deprives a person of a life, liberty, or property interest. See U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3. The Washington State Supreme Court may decide to analyze the state’s due process clause independent of the federal due process clause based on the context of each specific case. See *Bellevue School District v. E.S.*, 171 Wn.2d 695, 710-14, 257 P.3d 570 (2011).

The Washington State Supreme Court held that the *Gunwall* factors do not support an independent analysis of the state constitution in the context of appointing counsel to represent a child in an initial truancy hearing. See *id.* Moreover, the Washington State Supreme Court held that the state due process clause does not provide greater protection than the United States Constitution’s Fourteenth Amendment regarding the state’s duty to preserve potentially exculpatory evidence. See *State v. Ortiz*, 119 Wn.2d 294, 304-05, 831 P.2d 1060 (1992).

A. Public Funding for Civil Litigants

The state constitution provides that public funding for indigent civil litigants, who have a right to counsel at “all stages of the proceeding,” includes public funding for counsel and fees during the appellate process that differs from the federal constitution. Wash. Const. art. I, § 3. Indigent civil litigants who have a statutory right to counsel at all stages of the proceeding have a right to counsel on an appeal of right, including motions for discretionary review of interlocutory trial court orders, in those cases where the indigent litigant has a statutory right to counsel at all stages of the proceeding. See *In re Dependency of Grove*, 127 Wn.2d 221, 226-27, 897 P.2d 1252 (1995). These litigants are not required to prove a constitutional right to appeal at public expense nor to prove the probable merit of their claims in order to appeal at public expense. See *id.* In addition, public payment of the fees for expenses necessary to process and to present the appeal is appropriate. See *id.*



B. Appeal Rights

The state constitution specifically provides greater appeal rights than the federal constitution. The United States Supreme Court has consistently held that there is no federal constitutional due process right to appeal, even in a criminal case, and that due process does not require a state to provide an appellate system. See *Ross v. Moffitt*, 417 U.S. 600, 606, 94 S.Ct. 2437, 41 L. Ed. 2d 341 (1974). The state constitution expressly grants a right of appeal in criminal cases. See Wash. Const. art. I, § 22 (amend. 10); *Housing Auth. v. Saylor*, 87 Wn.2d 732, 740, 557 P.2d 321 (1976). However, there is no comparable right in civil cases, and none can be inferred. See *Id.* at 740-41. In civil cases, if the right to appeal exists, it is a right that is granted by the Legislature or at the discretion of the court. See *id.*

IX. Civil Jury Trial Rights

In addition to criminal jury trial rights protected by the U.S. Constitution’s Sixth Amendment, the Washington State Constitution provides civil jury trial rights as well. Article I, Section 21 provides that the “right of trial by jury shall remain inviolate.” In *Sofie v. Fibreboard*, 112 Wn.2d 636, 771 P.2d 711 (1989), the Washington State Supreme Court has ruled that once the determination of damages in a personal injury action is vested in a jury, that jury’s decision cannot be constrained by statutory limits.

X. Equal Protection/Privileges and Immunities; Equal Rights Amendment

The state and federal constitutions prohibit treating similarly situated persons differently by the state and federal government. See U.S. Const. amend. XIV, § 1; Wash. Const. art. I, §§3 and 12. Both the state and

federal constitutions consider whether the law is facially discriminatory or if the law is facially neutral, whether it has a disparate impact and an obvious or given discriminatory intent when determining if similarly situated persons were treated differently. If the law is either facially discriminatory or has a disparate impact and an obvious or given discriminatory intent, the identity of the class treated differently dictates the analysis used to determine whether the law is constitutional. See *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L. Ed. 2d. 855 (1996). The Washington State Constitution does not have an “Equal Protection Clause,” *per se*; Article I, §12 is used as a proxy, although it speaks in terms of “privileges and immunities” rather than equal protection. The Washington State Supreme Court applies an independent analysis when faced with governmental actions that award special privileges to a small number of people or entities at the expense of the majority, but the Court tends to follow federal court Equal Protection doctrines when dealing with discrimination against minority groups. *Andersen et al. v. State*, 158 Wn.2d 1, 138 P.3d 963 (2006).

Washington also has a robust Equal Rights Amendment, Article XXXI that seems to have had its greatest impact in education and sports. For example, in *Darrin v. Gould* 85 Wn.2d 859, 540 P.2d 882 (1975), the State Supreme Court held that a school could not deny two fully qualified students permission to play on the high school football team in interscholastic competition solely on the grounds that they were girls. In another case the Court directed that a state university football program could not be excluded from the calculation of participation opportunities, scholarships, or the distribution of nonrevenue funds. *Blair v. Washington State University*, 108 Wn.2d 558, 740 P.2d 1379 (1987).

XI. Search and Seizure

Article I, §7 is a rights provision that the State Supreme Court has for many years interpreted quite differently than the federal courts have interpreted the Fourth Amendment. Article I, §7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The language itself demonstrates a strong constitutional commitment to privacy rights. Washington State jurisprudence is so well developed concerning this section that the Court does not require parties to retread well-worn ground and carry out a “*Gunwall* analysis” when arguing about the meaning of the provision. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). The Washington State Constitution, much more frequently than the federal Constitution, requires a warrant based on probable cause, supported by an oath or affirmation, prior to a search or seizure. See *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). For example, the Washington State Constitution prevents a defendant's long distance home telephone records from being obtained from the phone company; or a pen register from being installed on telephone connections, without a search warrant or other appropriate legal process first being obtained. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). In contrast with federal search law, Washington law enforcement officials may not pick through a homeowner's garbage without a warrant. *State v. Boland*, 115 Wn.2d 571, 580, 800 P.2d 1112, 1116 (1990). A request by an officer for identification from a passenger in a motor vehicle stopped for a traffic infraction was found to be an unlawful seizure under Article 1, Section 7 in *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004). The right of privacy is violated if an officer reads and responds to messages on a defendant's cell phone. *State v. Hinton*, 179 Wn.2d 862, 872-73, 319 P.3d 9 (2014).

XII. Confrontation Clause

Article I, section 22 indicates that the accused has a criminal procedural right to meet the witnesses against him face-to-face. In *State v. Lui*, 179 Wn.2d 457, 462, 315 P.3d 493, 495 (2014), the Washington Supreme Court addressed when the state confrontation clause requires testimony from lab analysts who conduct forensic tests on evidence. The Court decided that because it had consistently held in the past that the state confrontation clause did not provide greater protection than the federal Confrontation Clause, that it would adopt a test to determine the scope of the confrontation clause that was consistent with

United States Supreme Court precedent. See *Lui*, 179 Wn. 2d at 469. Thus, to determine whether an expert witness comes within the scope of the Confrontation Clause, two conditions must be satisfied: 1) the person must be a “witness” by virtue of making a statement of fact to the tribunal, and 2) the person must be a witness “against” the defendant by making a statement that tends to inculpate the accused. See *Lui*, 179 Wn. 2d at 462.

XIII. Eminent Domain

The Washington State Constitution provides greater protection for individuals with respect to what constitutes a taking for purposes of depriving or taking private property. For a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose. See *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005).

XIV. Religious Freedoms

A. Free Exercise

The Washington constitution provides broader protection for individuals under the freedom of exercise provision versus the First Amendment of the federal constitution. See U.S. Const. amend. I; Wash. Const. art. I, § 11. Numerous cases decided by the Washington State Supreme court held that under the Washington Constitution, article I, section 11, freedom of religious sentiment, belief and worship “absolutely protects the free exercise of religion and extends broader protection than the first amendment to the federal Constitution.” *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 635, 211 P.3d 406 (2009).

A party challenging government action under the Washington State Free Exercise Clause has the burden to show that the belief is sincere and that the government action burdens the exercise of religion. See *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 152, 995 P.2d 33 (2000). The State must then show it has a narrow means for achieving a compelling goal. See *id.*

The state may require compliance with reasonable police power regulation. The right to religious belief and worship does not excuse practices inconsistent with peace and safety. See Wash Const. art. I, § 11.

B. Establishment Clause

The Washington State Constitution enumerates a *much* stricter test than the federal constitution to determine whether the state has preferred one religion over another or religion over non-religion or spent public funds to promote religion. Article I, § 11 provides that no “public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.” The Washington Supreme Court has repeatedly overturned legislative attempts to apply public funds for purposes related to religion or religious training. For example, a disabled man was barred from receiving vocational funds because he would have “applied” the funds to a Bible college. *Witters v. State Commission for the Blind*, 112 Wn.2d 363, 77 P.2d 1119 (1989). Public teachers were not allowed to give students a test to evaluate what they had learned in an out-of-classroom religious education program. *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 173 P.35 (1918). The United States Supreme Court upheld the right of the State of Washington to enforce a state constitutional ban on the use of state scholarship funds for a religious education. *Locke v. Davey*, 540 U.S. 712 (2004). To determine if the state has “established” religion, the court will determine whether 1) public money or property is involved, and if so, whether 2) that money is being “appropriated or applied to religious worship, exercise or instruction, or the support of any religious establishment.” *Health Care Facilities Auth. v. Spellman*, 96 Wn.2d 68, 69, 633 P.2d 866 (1981).

XV. Free Speech

Generally, the Washington State Constitution and the Federal Constitution provide the same rights with respect to free speech, except that Washington may provide an exemption to the private forum rule with respect to content neutral speech, content specific speech, and freedom of the press. Washington law also does not permit any prior restraint on constitutionally protected speech. See U.S. Const. amend. I; Wash. Const. art. I, § 11; *State v. Coe*, 101 Wn.2d 364, 366-67, 679 P.2d 353 (1984). Free speech is a preferred right under the Washington Constitution, and this provision is interpreted differently than the First Amendment of the U.S. Constitution. *Ino Ino, Inc. v. Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997). Nevertheless, the government may impose reasonable time, place, and manner restrictions on all expressions, whether written, oral, or symbolized by conduct. The restraint must be content neutral, must be narrowly tailored to serve a compelling state interest, and must leave ample alternative channels of communication. *Adult Entertainment Ctr., Inc. v. Pierce Co.*, 57 Wn. App. 435, 788 P.2d 1102 (1990). Public libraries may filter Internet sites without violating this provision. *Bradburn v. Reg. Library Dist.*, 168 Wn.2d 789, 817 (2010). A city ordinance that prohibited begging at on and off ramps leading to and from state intersections from any city roadway or overpass violates the state constitution. The court held that the city's ordinance imposed content-based speech restrictions in a substantial number of locations that are traditional public forums. While the city can impose certain restrictions on speech in a public forum, such as reasonable time, place, and manner restrictions, it cannot impose restrictions based on content. Citing [Reed v. Town of Gilbert](#) (2015), the court noted that a law is content based if "on its face' [it] ... define[s] regulated speech by particular subject matter ... [or] by its function or purpose" and that the city's ordinance met that definition. [Willis v. City of Lakewood](#), 186 Wn.2d. 210 (2016).



CONSUMER PROTECTION ACT

I. Overview: Unfair Business Practices – Consumer Protection Act – RCW 19.86

The Unfair Business Practices-Consumer Protection Act ("the Act"), Chapter 19.86 RCW, is Washington's principal consumer protection statute. RCW 19.86.020 is Washington's counterpart to Section 5(a) of the Federal Trade Commission Act. Washington's Act contains consumer protection and antitrust provisions prohibiting unfair and deceptive acts or practices. In addition, many other Washington statutes provide for a Consumer Protection Act remedy.

II. Substantive Law Discussion

A. Unfair or Deceptive Acts or Practices Statute

1. General Standards: In 1961, the Washington legislature enacted the Unfair Business Practices-Consumer Protection Act ("CPA"), chapter 19.86 RCW. RCW 19.86.020 is the focal section of Washington's Act and provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. The CPA provides for a private right of action and public enforcement by the Attorney General. RCW 19.86.080, RCW 19.86.090.
2. Elements of a Consumer Protection Act Case: In *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986), the Washington Supreme Court redefined the private right of action under the CPA. In *Hangman Ridge*, the Washington Supreme Court sought to modify existing standards for determining a CPA violation and clarify the public interest requirement. The standard for a private right of action differs from an action by the State under the CPA. See *Robinson v. Avis Rent-A-Car System, Inc.*, 106 Wn. App. 104, 114, 22 P.3d 818 (2001).

To prevail in a consumer protection action, a private litigant must prove five elements: (i) an unfair or deceptive act or practice, (ii) in or affecting trade or commerce, (iii) injurious to the public interest, (iv) injury to plaintiff's property or business, and (v) causation. *Hangman Ridge*, 105 Wn.2d at 784-85. A plaintiff must satisfy all elements to prove a CPA violation. *Id.* at 784-85. In a public enforcement action, the Attorney General must establish an unfair or deceptive act or practice in or affecting trade or commerce. RCW 19.86.080; see generally *Nuttal v. Dowell*, 31 Wn. App. 98, 110-11, 639 P.2d 832 (1982), review denied, 91 Wn.2d 1015 (1982).

- a. Unfair or Deceptive Acts or Practices: A plaintiff can establish this element by showing that the defendant's act or practice had the capacity to deceive a substantial portion of the public in the conduct of trade or commerce, or by showing that the alleged act constitutes a per se unfair trade practice. *Hangman Ridge*, 105 Wn.2d at 785-86. "A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated." *Id.* at 786. The following is a typical declaration:

The commission by any person of an act or practice prohibited by this chapter is hereby declared to be an unfair act or practice or unfair method of competition in the conduct of trade or commerce for the purpose of the application of the Consumer Protection Act, Chapter 19.86 RCW.

See Charitable Solicitations, RCW 19.09.340.

Although not all statutes contain such clear statements, Washington courts do not require specific declarations of an unfair or deceptive practice or incorporation of the CPA. The *Hangman Ridge* decision provided specific examples of *per se* unfair or deceptive practices statutes that do not include trade or commerce language. *Id.* at 786-87. Also, courts have analyzed statutes that do not reference the CPA under *Hangman Ridge* as a *per se* unfair trade practice. See *Villella v. Pemco*, 106 Wn.2d 806, 725 P.2d 957 (1986). In *Villella*, the plaintiff alleged a bad faith denial of an insurance claim. The insurance code prohibits businesses from engaging in unfair and deceptive practices as defined in RCW 48.30.010(2). One such practice is "refusing to pay claims without conducting a reasonable investigation." *Id.* at 820. Although the insurance code contained no reference to the Consumer Protection Act, the court analyzed the case under *Hangman Ridge* as a *per se* unfair trade practice. *Id.*

To state a claim of a *per se* violation of the CPA, a plaintiff must show (1) the existence of a pertinent statute, (2) its violation, (3) that such violation was the proximate cause of damages sustained, and (4) that the plaintiff was within the class of people the statute sought to protect. *Fidelity Mortgage Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 471, 128 P.3d 621 (2006).

Under the direct method, courts determine whether the defendant's act or practice is unfair or deceptive under traditional analysis of those terms. *State v. Reader's Digest Ass'n*; 81 Wn.2d 259, 274-275, P.2d 290 (1972). The CPA does not define the terms "unfair" or "deceptive". Courts are statutorily required to provide a liberal construction of the Act's provisions. RCW 19.86.920. See *State v. Ralph Williams' NW Chrysler Plymouth, Inc.*; 82 Wn.2d 265, 277-78, 510 P.2d 233 (1973); *Dwyer v. JJ. Kislak Mortgage Corp.*, 103 Wn. App. 542, 548, 13 P.3d 240 (2000). The legislature directs Washington courts to federal law for additional guidance in construing the CPA. RCW 19.86.920. A jury is free to determine what constitutes an unfair and deceptive act or practice under the CPA. *Accord Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 921, 32 P.3d 250 (2001).

- i. Unfairness: The CPA does not contain a definition for the term "unfair," and little precedent in Washington exists on what constitutes an "unfair" practice. Washington courts may look to decisions construing the Federal Trade Commission Act (FTCA) for guidance. For example, Washington courts have applied the three-part test adopted by the U.S. Supreme Court in *FTC v. Sperry & Hutchison*, 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972) to determine an unfair trade or practice: (1) whether the practice offends public policy as it has been established by statutes, the common law or otherwise; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers, competitors, or other business people. *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537 (1983).
- ii. Deception: An act or practice is "deceptive" under the CPA if the act or practice has a "tendency or capacity to deceive a substantial portion of the general public." *Fisher v. World-Wide Trophy Outfitters*, 15 Wn. App. 742, 748, 551 P.2d 1398 (1976). For example, a false statement that is communicated to only one customer but that is contained in a standard form contract, sales materials, or routine sales presentation will have a capacity to deceive the general public. *Paller v. Wilbur-Ellis Co.*, 62 Wn. App. 318, 328, 814 P.2d 670 (1991). The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs; therefore, it is not necessary to prove actual deception or an intent to deceive. *Hangman Ridge*,

105 Wn.2d at 785. However, the deceptive act must relate to out of court conduct. *Gujosa*, 144 Wn.2d at 921.

- b. In or Affecting Trade or Commerce: RCW 19.86.010(2) defines "trade" and "commerce" to include "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." See generally *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). The statute further defines assets as anything of value. RCW 19.86.010(3). The terms include not only the sale of goods to consumers and conduct preceding such sale, but also conduct occurring during the course of performance and acts performed in the enforcement of a transaction. See *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 359-60, 581 P.2d 1349 (1978).

The CPA also applies to commerce transpiring partly outside the state of Washington, but affecting Washington citizens. RCW 19.86.010(2). Washington courts have applied the CPA to persons outside the state who mailed materials as part of an unfair or deceptive practice to Washington residents, and to Washington businesses who have solicited business from residents in other states. See, e.g., *Reader's Digest Ass'n*, 81 Wn.2d 277-78. In *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 794, 804, 363 P.3d 587 (2015), the court recognized that an out-of-state plaintiff may bring a claim against a Washington corporate defendant for allegedly deceptive acts. Similarly, an out-of-state plaintiff may bring a CPA claim against an out-of-state defendant for the allegedly deceptive acts of its in-state agent. *Id.* In *State v. Heckel*, 143 Wn.2d 824, 24 P.3d 404 (2001), the court upheld Washington's Commercial Electronic Mail Act, which prohibits misrepresentation in the subject line or transmission path of any commercial e-mail sent to Washington residents or from a Washington computer.

- c. Injurious to the Public Interest: A plaintiff can establish the public interest element by either proving *per se* public interest, by showing the violation of a statute containing a public interest declaration, or directly. See *Hangman Ridge*, 105 Wn.2d at 791-793. In *Hangman Ridge*, the court said that *per se* public interest must be based on a statute containing a legislative declaration. *Id.* at 791. However, in *Nordstrom, Inc. v. Tampourlos*, the court did not require a claim based on a statute. *Tampourlos*, 107 Wn.2d at 742-43. There the defendant infringed on Nordstrom's trade name, violating 15 U.S.C. § 1126. The plaintiff could not establish the public interest requirement either directly or by proving *per se* public interest. *Id.* The court held:

While we have eschewed the use of judicially created *per se* violations of the Consumer Protection Act in *Hangman Ridge*, we nevertheless recognize that certain acts, by their very nature, must fulfill certain prongs of the *Hangman Ridge* test.

Id. at 742.

This is true of the typical trade name infringement case. A necessary component of a trade name infringement case is that the plaintiff must establish that the name used is likely to confuse the public. This confusion of the public, absent some unusual or unforeseen circumstances, will be sufficient to meet the public interest requirement of the CPA. This is not a *per se* rule, but rather a function of the overlapping nature of proof in both trade name infringement cases and consumer protection violations. *Id.* at 742-43.

Many statutes that include statements of legislative policy and intent use the words "public interest," while others do not. See e.g., Unsolicited Goods, Chapter 19.56 RCW. RCW 19.56.030 specifically provides that a violation of RCW 19.56.020 "is a matter affecting the public interest for the purpose of applying chapter 19.86 RCW." Also see, e.g., Interest-

Usury, Chapter 19.52 RCW. RCW 19.56.030 states that its provisions “are enacted in order to protect the residents of this state.” Statutes that do not contain the specific words “public interest” may or may not satisfy the legislative declaration requirement. In *Cuevas v. Montoya*, 48 Wn. App. 871, 878, 740 P.2d 858 (1987), the Washington Court of Appeals held that the usury statute (Chapter 19.52 RCW), which does not contain the words “public interest,” meets the *per se* public interest requirement of *Hangman Ridge*. The usury statute’s declaration provides that it was:

enacted in order to protect the residents of this state from debts bearing burdensome interest rates; and in order to better effect the policy of this state to use this state’s policies and courts to govern the affairs of our residents and the state; and in recognition of the duty to protect our citizens from oppression generally. RCW 19.52.005.

In comparison, the court in *Crane & Crane, Inc. v. C&D Elec.*, 37 Wn. App. 560, 565, 683 P.2d 1103 (1984), analyzed the statute pertaining to electrical wiring, which stated “for safety to life and property,” and found that an implied public interest was involved, but held that it was not a clear statement of public interest.

A practitioner can generally find legislative declarations of public interest in codified statutes designed to protect the public. However, public interest declarations may be included in the public laws enacted but not codified as part of the substantive statute. See, e.g., Telecommunications, RCW 80.36.400 (CPA incorporation provision found in Laws of 1986, chapter 286, section 1). Therefore, if a statute does not contain a public interest declaration, a practitioner should check the appropriate session laws.

Under the direct test, the trier of fact must consider two sets of nonexclusive questions that should be answered to decide whether the facts involved give rise to a CPA violation. See *Hangman Ridge*, 105 Wn. 2d at 793-94. One set of questions applies when the transaction is a consumer transaction, and the other when the dispute is private. *Id.* No criteria exist regarding how to distinguish between consumer transactions and private disputes. The *Hangman Ridge* decision merely provides examples of cases that fall into each category. *Id.* at 790.

In a consumer transaction the questions to ask are: (1) were the alleged acts committed in the course of defendant’s business? (2) are the acts part of a pattern or generalized course of conduct? (3) were repeated acts committed prior to the act involving plaintiff? (4) is there a real and substantial potential for repetition of defendant’s conduct after the act involving plaintiff? (5) if the act complained of involved a single transaction, were many consumers affected or likely to be affected by it? See *Hangman Ridge*, 105 Wn. 2d at 790; *Travis v. Washington Horse Breeders Ass’n, Inc.*, 111 Wn.2d 396, 407, 759 P.2d 418 (1988).

A private dispute also can affect the public interest if it is likely that the defendant’s actions have or will injure additional plaintiffs in the same fashion. *Id.* If the transaction is claimed to be a private dispute the questions to ask are: (1) were the alleged acts committed in the course of defendant’s business? (2) did defendant advertise to the public in general? (3) did defendant actively solicit this particular plaintiff indicating potential solicitation of others? (4) did plaintiff and defendant occupy unequal bargaining positions? *Cotton v. Kronenberg*, 111 Wn. App. 258, 274, 44 P.3d 878 (2002) (citing *Hangman Ridge*, 105 Wn.2d at 784-91). However, none of these factors is dispositive nor is the presence of every factor required to prove the public interest element. *Id.*

- d. Injury to the Plaintiff's Business or Property: RCW 19.86.020 provides that any person injured in his or her business or property by a CPA violation may sue to recover damages or injunctive relief. Washington courts distinguish between the terms "injury" and "damages" and hold a plaintiff need not prove monetary damages. See e.g., *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 852, 854, 792 P.2d 142 (1990). Deprivation of the use of property as a result of an unfair or deceptive practice satisfies the injury element of a CPA claim. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002). Non-quantifiable injuries, such as damage to business reputation and loss of goodwill, or a non-specific or minor monetary injury, also satisfy this element. *Tampourlos*, 107 Wn.2d at 740. However, pain and suffering are not compensable damages under the CPA. See, e.g., *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993). If a statute provides automatic damages for violations without condition, injury does not need to be proven to receive damages under the CPA. See *Wright v. Lyft, Inc.*, 189 Wn. 2d 718, 732 406 P.3d 1149 (2017).
- e. Causation: The *Hangman Ridge* case specifically requires a direct relationship between the injury sustained and the alleged unfair or deceptive act. *Hangman Ridge*, 105 Wn.2d at 792-93. Washington courts define causation as a causal link between the unfair or deceptive acts and the plaintiff's injury. *Id.* The defendant's acts must be the proximate cause of the plaintiff's damages. See *Fisons*, 122 Wn.2d at 314. Causation is established if a plaintiff loses money as a result of an unfair or deceptive practice; actual reliance is not required. See *Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 196-199, 35 P.3d 351 (2001). The causation element is satisfied if the defendant induced the plaintiff to act or to refrain from acting. *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 113-14, 22 P.3d 818 (2001). The test for whether causation is too remote to state a cause of action under the CPA is (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general, (2) whether it will be difficult to ascertain the amount of a plaintiff's damages attributable to defendant's wrongful conduct, and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries. *Fidelity Mortgage Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 470-71, 128 P.3d 621 (2005). If a statute provides automatic damages for violations without condition, causation does not need to be proven to receive damages under the CPA. *Wright*, 189 Wn. 2d at 732.

3. Specific Practices

- a. *Per se* violations: As discussed above, many statutes contain unfair trade practice and public interest statements. Also, there are those statutes that may be argued to contain such legislative declarations.
- b. Other violations: Washington courts have applied the Consumer Protection Act to a variety of business practices. The following cases do not comprise an exhaustive list of holdings under RCW 19.86.020, but provide illustrative examples of conduct that will give rise to a claim of unfair trade practices under Washington law.
- i. An insurance company's breach of the duty of good faith and fair dealing with its insured is a CPA violation. See, e.g., *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 359-61, 581 P.2d 1349 (1979); see also *Overton v. Consolidated Ins. Co.*, 101 Wn. App. 651, 661, 6 P.3d 1178 (2000) *aff'd in part rev'd in part* 145 Wn.2d 417, 38 P.3d 322 (2002). However, a denial of an arguable insurance claim is not considered bad faith as long as the decision was based on reasonable conduct of the insurer. See, e.g., *Phil Schroeder, Inc. v. Royal Globe Ins.*, 99 Wn.2d 65, 73-74,

659 P.2d 509 (1983). Bad faith will not be found where the legal sufficiency of the insurer's reasons for denying coverage is unclear. *Overton*, 101 Wn. App. at 661.

- ii. A real estate agent risks CPA liability if he or she fails to disclose known material defects in the sale of real estate. See, e.g., *McRae v. Bolstad*, 101 Wn.2d 161, 166, 676 P.2d 496 (1984). One court found that a builder's inaccurate estimates as to when construction would be completed constituted an unfair trade practice where a likelihood existed that others would be injured in the same manner. See *Keyes v. Bollinger*, 27 Wn. App. 755, 760, 621 P.2d 168 (1980).
 - iii. The sales of automobiles have produced quite a share of unfair trade practices cases. In *Ralph Williams' NW Chrysler Plymouth, Inc.*, 82 Wn.2d at 268-69, the court found the following to be unfair practices under the CPA: false claims that the dealer sold cars at lower prices than other area car dealers; refusal to return customers' cars retained for trade-in evaluation purposes; and failure to retain profit from the resale of repossessed automobiles for the benefit of the initial buyers. Advertising to the public the sale of a new car, but selling a used car, constitutes an unfair practice under the CPA. See, e.g., *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). Also, an unsecured dealer's non-judicial, unconsented-to repossession of a motor vehicle falls under the CPA. See *Sherwood v. Bellevue Dodge, Inc.*, 35 Wn. App. 741, 676 P.2d 1557 (1984).
4. Mobile Home Tenancies: The CPA was construed by the Washington Court of Appeals to apply to mobile home tenancies. *Ethridge v. Hwang*, 105 Wn. App. 447, 457, 20 P.3d 958 (2001). This decision marks a departure from *State v. Schwab*, 103 Wn.2d 542, 693 P.2d 108 (1985), which held that the CPA does not apply to residential tenancies. The analogy drawn between the Mobile Home Landlord Tenant Act (MHLTA) and Residential Landlord Tenancy Act (RLTA) was rejected by the appellate court because the MHLTA differed from the RLTA not only in its scope and purposes, but also in its provision of remedies. *Ethridge*, 105 Wn. App. at 457.
5. Exemptions: The Washington legislature has exempted certain areas from the reach of the CPA. Exemptions include:
- a. Labor, agricultural, and horticultural organizations; See *Golob & Sons, Inc. v. Schaake Packing Co. Inc.*, 93 Wn.2d 257, 260-63, 609 P.2d 444 (1980).
 - b. Municipal corporations; See, e.g., *Washington Natural Gas. Co. v. Public Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).
 - c. Acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest. RCW 19.86.920.
 - d. RCW 19.86.140 grants the advertising media a limited exemption for advertisements made in good faith and without knowledge that the advertisement contained a false claim.
 - e. Partially exempt from the CPA are "learned professions." See Craig C. Beles & Daniel Wm. Wyckoff, Comment, *The Washington Consumer Protection Act v. The Learned Professional*, 10 Gonz. L. Rev. 435 (1974-75). In *Short v. Demopolis*, 103 Wn.2d 52, 60, 691 P.2d 1631 (1984), the Washington Supreme Court held that the CPA only reaches the entrepreneurial or commercial aspects of the legal profession. The court stated that the entrepreneurial aspects of legal practice are those related to how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses

clients. *Id.* at 61. Claims for malpractice and negligence are not subject to the CPA, since those claims go to the competence and strategy of lawyers. *Id.*

Washington courts have applied the holding in *Short* to medical professions, real estate closings, handling of attorney fees, and failing to disclose conflicts for the purpose of obtaining clients or increasing profits. See, e.g., *EOO v. Denver*, 118 Wn. 2d 451, 824 P.2d 1207 (1992); *Quinn v. Connelly*, 63 Wn. App. 733, 821 P.2d 1256 (1992); *Styrk v. Cornerstone Inv., Inc.*, 61 Wn. App. 463, 810 P.2d 1366 (1991); *Quimby v. Fine*, 45 Wn. App. 175, 724 P.2d 403 (1986). The regulated industries exemption, RCW 19.86.170, is the major exemption section of the CPA. Washington courts have indicated that they will construe this section narrowly. *Robinson*, 106 Wn. App. at 111. This section does not exempt actions or transactions merely because they are regulated generally. See, e.g., *Vogt v. Seattle-First Nat'l Bank*, 117 Wn. 2d 541, 552, 817 P.2d 1364 (1991). It applies only if the particular practice found to be unfair or deceptive is specifically permitted, prohibited or regulated as provided in RCW 19.86.170 or some other statute. *Id.* The CPA exempts, or partially exempts, the following regulatory bodies from its coverage:

- i. Washington Utilities and Transportation Commission and the Federal Power Commission: RCW 19.86.170 exempts entities regulated by the Washington Utilities and Transportation Commission to the extent their "actions ... [are] otherwise permitted, prohibited or regulated under the ... Commission."
 - ii. Insurance Commissioner: Under RCW 19.86.170, the CPA grants a limited exemption for business transactions regulated by the Insurance Commissioner if the act or practice is required or permitted to be done pursuant to Title 48 RCW. However, an implied reasonableness requirement exists in the regulations of the Insurance Commissioner defining unfair or deceptive acts or practices. *American Mfrs. Mut. Ins. Co. v. Osborn*, 104 Wn. App. 686, 699, 17 P.3d 1229 (2001). The Insurance Commissioner may have concurrent jurisdiction along with Washington courts over these consumer protection violations, as the legislative intent behind the CPA was to provide a remedy in cases where an insured has been injured by the unfair or deceptive practices of an insurance company. See, e.g., *Rounds v. Union Bankers Ins. Co.*, 22 Wn. App. 613, 590 P.2d 1286 (1979).
 - iii. Other regulatory body or officer: Under this section of RCW 19.86.170, activities are exempt only if permitted by a regulatory body or officer acting under statutory authority or specifically permitted by a regulatory board or commission acting within the statutory scheme of Title 18 RCW. The Title 18 exemption does not apply unless an agency has taken some overt affirmative action indicating approval of the action or transaction in question. See, e.g., *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 680-83, 911 P.2d 1301 (1996). Non-action or acquiescence in the action of a regulated industry is not sufficient to constitute specific permission. For the purposes of defining a regulatory body, neither the Federal Trade Commission nor the U.S. Attorney General are considered regulatory agencies/officers. *Reader's Digest*, 81 Wn.2d at 279. Title 18 agencies regulate the following professions (among others): Accountants, Architects, Attorneys, Chiropractors, Dentists, Pharmacists, Physicians, Nurses, Veterinarians, Real Estate Brokers and Salesmen.
6. Constitutionality: Defendants have challenged the CPA on a variety of constitutional grounds. The Washington Supreme Court stated in *Reader's Digest*, 81 Wn.2d at 274-75, that the phrase "unfair methods of competition" and "unfair and deceptive acts or practices" were not unconstitutionally vague, finding that the CPA meets constitutional requirements of certainty. In *Ralph Williams' NW*

Chrysler Plymouth, 82 Wn.2d at 276-77, the court held that the restitution remedy for aggrieved citizens provided in connection with a public enforcement action is not unconstitutional.

7. Defenses: As noted, the CPA exempts certain businesses from its coverage. In addition, RCW 19.86.920 provides that the CPA "shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest." See *Dwyer*, 103 Wn. App. at 548.
8. Influence of the FTC Precedent: RCW 19.86.020 is identical to Section 5(a) of the Federal Trade Commission Act (FTCA). Decisions construing the FTCA and Federal Trade Commission regulations provide guidance but do not control construction of RCW 19.86.020. See *Boeing v. Sierracin Corp.*, 108 Wn.2d 38, 54, 738 P.2d 665 (1987). Washington courts must engage in the same "gradual process of judicial inclusion and exclusion" that federal courts have utilized while interpreting section 5 of the FTCA. *Reader's Digest*, 81 Wn.2d at 275.
9. Procedural Issues: The Superior Court and District Court have concurrent jurisdiction in CPA cases. RCW 19.86.090. RCW 19.86.120 provides for a four-year statute of limitations for any private consumer protection action. The running of the statute is tolled during the pendency of any action based upon the same matter brought by the Attorney General. RCW 19.86.120.

A finding that a defendant in a CPA action did or did not engage in certain conduct is a factual issue and reviewable under the substantial evidence test. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007). The determination of whether a particular statute applies to a factual situation is a conclusion of law. *Fisher v. World-Wide Trophy Outfitters*, 15 Wn. App. 742, 743-44, 551 P.2d 1398 (1976). Because the CPA has no common law analogy, no constitutional right to a jury trial exists. See *State v. State Credit Assoc., Inc.*, 33 Wn. App. 617, 620-21, 657 P.2d 327 (1983).

III. Civil Enforcement

A. Attorney General

The Attorney General of Washington has authority to enforce the CPA. RCW 19.86.080. The statute permits the Attorney General to initiate court proceedings in the name of the State of Washington or as *parens patriae* on behalf of persons residing in the state against any person to enjoin present and future violations of the CPA. RCW 19.86.080.

1. Investigative Powers: The CPA provides the Attorney General Civil Investigative Demand ("CID") authority. RCW 19.86.110. The CID gives the Attorney General, prior to initiating a civil proceeding, the power to require all persons having knowledge of any information relevant to the subject matter of an investigation, under oath, to answer written interrogatories, produce documents or give oral testimony about possible CPA violations. RCW 19.86.110(1). Washington courts hold that a CID investigation is not considered a Fourth Amendment search and seizure, so there is no need for probable cause. *Steele v. State*, 85 Wn.2d 585, 592-93, 537 P.2d 782 (1975). The CPA provides court sanctions for non-compliance. RCW 19.86.110(8).
2. Remedies: RCW 19.86.080 provides that the Attorney General may seek an injunction to restrain and prevent CPA violations. A court can issue an injunction even if the defendant has discontinued the unfair or deceptive practice. See *Ralph Williams' NW Chrysler Plymouth, Inc.*, 87 Wn.2d at 311-12.

The CPA requires the court to impose a civil penalty of not more than \$25,000 against any person who violates a court injunction. RCW 19.86.140. Further, the CPA requires the court to assess a maximum \$2,000 civil penalty for each violation of the Act. RCW 19.86.140.

The civil penalty provision of the CPA vests the trial court with the power to assess a penalty for each CPA violation, rather than merely on the basis of one penalty per consumer. RCW 19.86.140. See *Ralph Williams' NW Chrysler Plymouth, Inc.*, 87 Wn.2d at 317. The CPA also authorizes the Attorney General to petition the court for consumer restitution. RCW 19.86.080. Finally, the court has the discretion to award attorney fees and costs to the prevailing party. RCW 19.86.080.

Remedies for violations of regulations under the CPA are limited to those set forth in the Act and do not include preclusion or estoppel. *Hayden v. Mutual of Enumclaw, Ins. Co.*, 141 Wn.2d 55, 63, 1 P.3d 1167 (2000).

B. Private Enforcement

1. Standing: Any person who is injured in his or her business or property by a violation of the CPA may bring a civil action in superior court. RCW 19.86.090. See, e.g. *Hayden*, 141 Wn.2d at 62. An injured party need not be a consumer of goods or services to have standing under the CPA. See, e.g., *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 312-13, 858 P.2d 1054 (1993). A physician, for example, has standing in an action by a patient injured by a drug prescribed by the physician and manufactured by the drug company. *Id.* Also, a third party beneficiary of an insurance contract is entitled to enforce an insurer's duty to act in good faith and has standing to sue under the CPA. *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 387, 743 P.2d 832, 859 (1987).
2. Relief Available: A private litigant may seek to enjoin present and future CPA violations. RCW 19.86.090; *Scott v. Cingular Wireless*, 160 Wn.2d 843, 161 P.3d 1000 (2007); *Hockley v. Hargitt*, 82 Wn.2d 337, 349-50, 510 P.2d 1123 (1973). A violation of an injunction issued in a private action is actionable by both the private litigant and the Attorney General. RCW 19.86.090. The CPA authorizes awarding actual damages to a prevailing private litigant. RCW 19.86.140. Pursuant to RCW 19.86.090, a court may, in its discretion, award treble damages in an amount not to exceed \$25,000.

The CPA also permits the court to award reasonable attorney fees and costs to the prevailing private litigant. RCW 19.86.090. A court may award attorney fees independently, without a showing of actual monetary damages. See *St. Paul and Marine Ins. Co. v. Updegrave*, 33 Wn. App. 653, 658-60, 656 P.2d 1130 (1983). Attorney fees under the CPA are calculated using the lodestar method. *Svendson v. Stock*, 143 Wn.2d 546, 559, 23 P.3d 455 (2001). Under the lodestar method, the attorney's reasonable hourly rate is multiplied by the number of reasonable hours worked and then adjusted upward or downward at the court's discretion. *Id.* A court must separate the time spent on theories relating to CPA and non-CPA causes of action. See, e.g., *Travis v. Washington Horse Breeders Ass'n., Inc.*, 111 Wn.2d 396, 410-11, 759 P.2d 418 (1988).

Upon a violation of RCW 19.86.030 – 19.86.060, the court may also make such additional orders or judgments as may be necessary to restore any person in interest any moneys or property (real or personal), which may have been acquired, regardless of whether such person purchased or transacted goods or services directly with the defendant or indirectly through resellers. However, the court will exclude any amounts obtained that may be duplicative. RCW 19.86.080.

Recovery for costs of the suit is not dependent upon the issuance of an injunction or the award of actual damages. See *St. Paul Fire*, 33 Wn. App. at 660. In a CPA case, courts limit costs to those

defined in RCW 4.84.010. See *Tampourlos*, 107 Wn.2d at 743. That section, which statutorily defines costs, limits recovery to a narrow range of expenses such as filing fees, witness fees, and service of process expenses. RCW 4.84.010. Photocopying and telephone expenses are not recoverable as "costs" and can only be recovered to the extent that it would be included in a reasonable attorney fee. See *Tampourlos*, 107 Wn.2d at 743. The insured's loss of use of his or her own money to pay defense costs and experts on claims-handling constitutes damages under the CPA. *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 148-49, 29 P.3d 777 (2001).



CRIMINAL LAW AND PROCEDURE

I. Introduction

A. Codified Criminal Law

The majority of the codified criminal law in the State of Washington is contained in RCW titles 9 and 9A, although various criminal statutes are contained elsewhere in the code.

B. Courts

In Washington, the Superior Court is the court of record and has general jurisdiction, meaning all criminal matters may be filed in Superior Court. Gross misdemeanors and misdemeanors may be filed in District or City Municipal Courts. District Courts have jurisdiction over matters occurring within a county. Municipal Courts jurisdiction extends only within their city limits. As a matter of practice, misdemeanor offenses are generally filed at the district level.

Many counties also have established specialty courts (RCW 2.28.170), such as drug courts (RCW 2.28.175), mental health courts (RCW 2.28.190), and veterans' courts. The County Prosecutor's Office is the gatekeeper for pre-sentence diversion court. While there is statutory authority for drug courts, they are not mandatory, nor are they all run in a similar manner. Some are pretrial diversion courts while others are post conviction. Appellate courts have rejected claims that the patchwork existence of these courts is violative of due process. *State v. Harner*, 153 Wn.2d 228, 103 P.3d 738 (2004).

Juvenile Courts are a division of the Superior Court. As such, all matters involving juveniles (those under 18 years of age, or older if jurisdiction is extended prior to reaching their 18th birthday) are filed in juvenile court by prosecutor's information. However, minors, over 16, who commit a hunting or fishing violation or certain traffic offenses, may be directly charged in district or municipal courts.

C. Criminal Charging

Charging in the district and municipal courts is done primarily by citation issued by law-enforcement officers, but may also be done by a complaint filed by the prosecuting authority. Charging in the Superior Court is by information filed by the prosecuting attorney's office.

II. Classes of Crimes (RCW 9A.04.040)

A. Crimes are classified under Washington law as felonies, gross misdemeanors, misdemeanors, or civil infractions.

1. Felonies are defined as crimes for which a person convicted thereof may be sentenced to imprisonment for a term in excess of one year. They are defined as A (maximum of life in prison), B (maximum of 10 years) and C (maximum of 5 years). Each, however, is subject to the Sentence Reform Act (SRA) which proscribes a sentence range affixed by the legislature. A sentence range is derived by the number of "points" (prior convictions, generally felony convictions although some misdemeanor convictions can count) and the seriousness level of the offense.
2. Gross misdemeanor. The maximum sentence for a gross misdemeanor is three hundred sixty-four days in jail and/or a \$5,000 fine. RCW 9A.20.021.
3. Misdemeanors are defined as crimes for which the maximum punishment is imprisonment for not more than 90 days and/or \$1,000 fine.

4. Civil infractions carry no jail sentence but instead a fine and/or other civil impairment, such as loss of hunting and fishing privilege. Violations of the traffic code (such as speeding) and a limited number of hunting or fishing violations are civil infractions.

II. Persons Capable of Committing Crimes (RCW 9A.04.050)

A. Every adult is presumed capable of committing a crime.

B. Children under the age of 8 are incapable of committing a crime.

Children between the ages of 8 and 12 years of age are presumed to be incapable of committing crimes, but the presumption may be rebutted by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

III. Statutes Of Limitations (RCW 9A.04.080)

A. No Statute of Limitations

The following crimes may be prosecuted at any time after their commission: murder, attempted murder, homicide by abuse, arson if a death results, vehicular homicide, vehicular assault if a death results, and hit and run injury-accident if a death results.

B. Felony Statutes of Limitations

Limitations that apply to other felonies vary widely, and the appropriate statute should be consulted when questions regarding these various crimes arise. The general limitation for felony offenses is 3 years. Organized crime, money laundering, identity theft, theft in the first or second degree, and trafficking in stolen property have a six-year statute of limitation. Sex offenses involving minor victims may be prosecuted up to the victims' thirtieth birthday. Arson if no death results, first and second degree rape, indecent liberties, and crimes committed by public officers arising from a breach of their public duty or violation of oath of office have a 10-year statute of limitations.

C. Misdemeanor and Gross Misdemeanor Statutes of Limitations

No gross misdemeanor may be prosecuted more than two years after its commission and no misdemeanor may be prosecuted more than one year after its commission.

IV. Principles of Liability (RCW 9A.08)

A. Requirement for Culpability

1. Intent

A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result that constitutes a crime.

2. Knowledge

A person knows or acts knowingly or with knowledge when: (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he or she has information that would lead a reasonable person in the same situation to believe that facts exist, which facts are described by a statute defining an offense.

3. Recklessness

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk

that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

4. Criminal Negligence

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Substitutes for Criminal Negligence, Recklessness, and Knowledge. When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly, or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

Requirement of Willfulness Satisfied by Acting Knowingly. A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

B. Liability for Conduct of Another (RCW 9A.08.020)

1. Complicity (accomplice). A person is guilty of the conduct of another when they act with the culpability to commit the crime, but cause an innocent or irresponsible person to engage in the conduct. Or, with the knowledge that it will promote or facilitate the commission of a crime, they solicit, command, encourage or request another to commit the crime; or aid or agree to aid another in the planning or commission of a crime; or engage in conduct that is expressly declared a crime.
 - a. A victim cannot be an accomplice. Someone is also not an accomplice if they terminate their complicity and give timely warning to law enforcement or otherwise make a good faith effort to prevent the commission of the crime.
2. Conspiracy. Requires proof that a person acted with the intent that the conduct constituting a crime be performed and he or she agrees with one or more person to engage in or cause the performance of such. Washington follows the *Wharton's Rule*, which holds that when a substantive offense necessarily requires the participation of two persons, and no more than two persons are involved in the agreement to commit it, they cannot be charged with conspiracy. See, e.g. *State v. Miller*, 131 Wn.2d 78, 929 P.2d 372 (1997).

V. Defenses (RCW 9A.16)

(See also duress, necessity, entrapment, voluntary intoxication, alibi, diminished capacity, consent)

A. Self Defense

The law of self-defense in the State of Washington is somewhat similar to that of other states. In general, an individual may use force upon or toward another person in preventing or attempting to prevent an offense against his or her person as long as the forced use is not more than is necessary.

B. Deadly Force

Deadly force is allowable when the slayer has reasonable grounds to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or in the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling or other place of abode in which he is. RCW 9A.16.050(1).

Washington law is different from many other states, however, in that self-defense, once properly raised (meaning with sufficient admissible evidence) by the accused, must be disproved beyond a reasonable doubt by the prosecution. *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984).

Washington law also provides for reimbursement to the accused of attorney's fees and certain other costs upon a self-defense acquittal. The matter is submitted to the trial jury for a determination of what, if any, reimbursement is appropriate. RCW 9A.16.110.

C. Intoxication

Voluntary intoxication is not a defense, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

D. Use of Force on Children

Physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child. The following actions are presumed unreasonable when used to correct or restrain a child: (1) throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks.

E. Entrapment

Defense must establish by preponderance of the evidence that the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and the actor was lured or induced to commit a crime which the actor had not otherwise intended to commit. The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

F. Consent

It is a defense to first and second degree rape and indecent liberties.

VII. Insanity (RCW 9A.12.010), and diminished capacity

A. M'Naghten Rule

Washington follows the M'Naghten rule in determining insanity. *State v. White*, 60 Wn.2d 551, 374 P.2d 942 (1962)

B. Insanity Defense: Mental Disease or Defect

A defendant may assert the defense of insanity if he suffers from a mental disease or defect at the time the crime is committed and that disease or defect affects his mind to such an extent that he or she is either (a) unable to perceive the nature and quality of the act charged, or (b) unable to tell right from wrong with reference to that act. The defendant has the burden of proving the defense of insanity by a preponderance of the evidence. RCW 10.77.030.

C. Insanity Defense: Under the Direct Command of God

The defense of insanity is available to a defendant who believes he or she is acting under the direct command of God. This defense applies even though the defendant may know that his or her acts are prohibited by earthly laws, but only applies if his or her free will has been negated by such a deific decree. *State v. Cameron*, 100 Wn.2d 520, 674 P.2d 650 (1983).

D. Diminished Capacity

Diminished capacity may be raised as a defense when either specific intent or knowledge is an element of the crime charged. If specific intent or knowledge is an element, evidence of diminished capacity can then be considered in determining whether the defendant had the capacity to form the requisite mental state. *State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004).

The battered spouse and battered child defenses involve diminished capacity. If other requirements are met, evidence of post-traumatic stress disorder impairing a defendant's ability to premeditate may support a diminished capacity instruction. *State v. Janes*, 64 Wn. App. 134, 822 P.2d 1238 (1992), *remanded on other grounds* at 121 Wn.2d 220 (1993).

VIII. Defendant's Statement

A. Defendant's Statements

Criminal Rule CrR 3.5 (CrRLJ 3.5 in district and municipal courts) governs the use of a defendant's statement to law enforcement. CrR 3.5 provides that the State must seek admission of the defendant's statement, whereas CrRLJ places the burden of exclusion on the defense. Statements that were the product of an interrogation require the advice of a defendant's constitutional warnings, but do not specifically require adherence to *Miranda* warnings. A custodial interrogation requires both custody *and* interrogation. Custody means physical arrest or curtailing a defendant's freedom to a degree associated with formal arrest. However, traffic stops, field sobriety tests are not testimonial. *Heinemann v. Whitman County*, 105 Wn.2d 796, 718 P.2d 789 (1986).

1. A defendant's request for counsel must be unequivocal. *State v. Radcliffe*, 164 Wn.2d 900, 906-08, 194 P.3d 250 (2008). Once invoked, the police must scrupulously honor the request and questions must cease. *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).
2. Juveniles: there is an additional warning for juveniles and no child under 12 years of age can waive their *Miranda* Rights. (RCW 13.40.140 (10)). The child's parent, guardian, or custodian must waive the child's *Miranda* rights in order for a confession to be admissible. Minors over 12 require a totality of the circumstances test to determine whether any waiver was sufficient. *Dutil v. State*, 93 Wn.2d 84, 93, 606 P.2d 269 (1980).

Juveniles being questioned in a school or principal's office or other place where they "would not feel free to leave" (even though an adult would) are "in custody" and should be provided *Miranda* warnings. *State v. D.R.*, 84 Wn. App. 832, 930 P.2d 350 (1997).

B. Corpus Delicti Rule

Washington maintains a corpus delicti rule that prohibits admission of the defendant's statements if the State is not able to establish the corpus delicti of the crime. Generally, if the State cannot produce evidence independent of the accused's confession that is sufficient to establish the corpus delicti of the charged crime, the defendant's statement will be inadmissible. If that independent evidence supports hypotheses of both guilt and innocence, the corpus is insufficient and defendant's statement will be

inadmissible. Washington law differs from many states in that it maintains a traditional view of corpus delicti and requires that the statement of a defendant be supported by independent evidence showing the corpus of the charged crime, while many states allow admission of an defendant's statement if it is found to be trustworthy. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996). Corpus delicti is a corroborative rule and must be established by independent evidence sufficient to support a logical and reasonable inference of the facts that the State seeks to prove. The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant's incriminating statement. All reasonable inferences are considered in the light most favorable to the State and assume the truth of the State's evidence. To establish the corpus delicti of a crime, the State must present prima facie evidence of two elements: (1) an injury or loss and (2) a criminal act causing such injury or loss. While the State must establish the mental element of the crime beyond a reasonable doubt to sustain a conviction, mens rea is not required to satisfy corpus delicti.

C. Dead or incompetent victims

By statute, however, the corpus delicti rule is different when the victim is dead or incompetent. In those cases, a defendant's statement will be admissible "if there is substantial independent evidence that would tend to establish the trustworthiness of the confession." This statutory law reflects the majority view of corpus delicti, but again, only applies in cases where the victim is dead or incompetent. RCW 10.58.035.

V. Malicious Mischief (RCW 9A.48)

A. Definition

Malicious Mischief is committed by knowingly and maliciously causing physical damage to property. RCW 9A.48.070.

B. Community Property

Washington is a community property state, and while one may generally dispose of one's own property, *State v. Webb*, 64 Wn. App. 480, 824 P.2d 1257 (1992) holds that a spouse may be convicted for maliciously damaging community property. Washington does not extend privileged communication as between spouses or domestic partners when one commits a crime upon the other, or their children. RCW 5.60.060.

IX. Sentencing (RCW 9.94A)

A. Sentencing Reform Act of 1981

Felony sentencing in Washington is governed by the Sentencing Reform Act of 1981 ("SRA") which is contained in RCW 9.94A and which was established to promote uniformity for similar crimes and defendants.

B. Level of Seriousness

Under the SRA, each felony crime is assigned a seriousness level ranging from I to XVI and each offense carries an offender score that is based upon the crime charged and the defendant's criminal history. The intersection of the offender score and the seriousness level results in a standard range sentence that is expressed in months. RCW 9.94A.510; 9.94A.530. There are also "unranked" felony offenses that carry a standard range sentence of 0-364 days in jail.

C. Range of Sentences

The sentencing court is obligated to impose a sentence within the standard range unless it finds, after considering the purposes of the Sentencing Reform Act, that there are "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. An exceptional sentence may be either

above or below the standard range. Nonexclusive lists of mitigating and aggravating circumstances that may be considered in imposing an exceptional sentence are set forth in RCW 9.94A.535.

D. Aggravating Circumstances

Any aggravating circumstances upon which the State intends to rely for an exceptional sentence must be proved to a jury beyond a reasonable doubt, and the jury must be unanimous. RCW 9.94A.537. Once an aggravating circumstance is found, a trial court is then permitted, but not obligated, to impose an exceptional sentence. In no case may an exceptional sentence exceed the statutory maximum sentence allowable for any particular crime. RCW 9.94A.537.

E. Persistent Offenders

The SRA provides for life sentences of “persistent offenders.” A persistent offender is an offender who has been convicted on at least two separate occasions of felonies considered to be “most serious offenses.” RCW 9.94A.030(33) defines what Washington designates as a most serious offense. Certain sex offenses require life imprisonment as a “persistent offender” upon a second conviction.

F. Death Penalty

Washington also maintains the death penalty. Aggravated First Degree Murder, the only crime eligible for the death penalty under Washington law, is defined in RCW 10.95.020. The procedures for the special sentencing proceeding required to impose a death penalty are contained in RCW 10.95.030 et seq.

G. Aggravated First Degree Murder RCW 10.95.020

A person is guilty of aggravated first degree murder if he or she commits a murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

1. The victim was a law enforcement officer, a corrections officer, or firefighter who is performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;
2. At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;
3. At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;
4. The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;
5. The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;
6. The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;
7. The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a boat or motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;
8. The victim was:

- a. A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and
 - b. The murder was related to the exercise of official duties performed or to be performed by the victim;
9. The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;
 10. There was more than one victim and the members were part of a common scheme or plan or the result of a single act of the person;
 11. The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:
 - a. Robbery in the first or second degree;
 - b. Rape in the first or second degree;
 - c. Burglary in the first or second degree for residential burglary;
 - d. Kidnapping in the first degree; or
 - e. Arson in the first degree;
 12. The victim was regularly employed or self-employed as a news reporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;
 13. At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contact with the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;
 14. At the time the person committed the murder, the person and the victim were “family or household members” as that term is defined in RCW 10.99.021(1), and the person had previously engaged in a pattern or practice of 3 or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:
 - a. Harassment as defined in RCW 9A.46.020; or
 - b. Any criminal assault.

H. Special Sentencing When an accused is found guilty of aggravated first degree murder, a special sentencing proceeding must be held. RCW 10.95.050. A defendant may be allowed to waive jury for the special sentencing proceeding, but only with the consent of the prosecuting attorney. RCW 10.95.050(2).

At the end of the special sentencing proceeding, the jury will deliberate upon the following question; “Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?” RCW 10.95.060(4). If the jury does not impose the death penalty, the only other possible sentence is life imprisonment without possibility of parole. RCW 10.95.030(1).

X. Sexually Violent Predators (RCW 71.09)

A. Civil Commitment Process

Washington law also allows for the incarceration of sexually violent predators through what is essentially a civil commitment process with many of the due process safeguards of a criminal prosecution.

RCW 71.09 provides the procedure by which the government can incarcerate an individual found to be a sexually violent predator (SVP). “Sexual violent predator” means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18)

A commitment proceeding under RCW 71.09 may be begun by the prosecuting attorney in the county where the person sought to be committed was convicted or charged or by the Attorney General if requested by the prosecuting attorney. RCW 71.09.030. Upon filing such petition, the court shall determine whether probable cause exists to believe the person named in the petition is a sexually violent predator. If probable cause is found, the judge shall direct that person to be taken into custody. RCW 71.09.040(1). The alleged SVP has a right to challenge the probable cause finding, a right to counsel throughout the proceeding, and a right to a trial by jury. RCW 71.09.040; 71.09.050.

If a jury determines beyond a reasonable doubt that the person accused is a sexually violent predator, that person will be committed to the custody of the Department of Social and Health Services to be placed in a secure facility until such time as either the person’s condition has so changed that he or she no longer meets the definition of a sexually violent predator or conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that would adequately protect the community. RCW 71.09.060(1).

Every person committed as a sexually violent predator shall be examined at least yearly to determine whether that person currently meets the definition of sexually violent predator and whether conditional release to a less restrictive alternative is appropriate. RCW 71.09.070. Either the State or the individual being detained may petition the court for conditional release to a less restrictive alternative or for unconditional discharge. The State generally bears the burden of proving that release or discharge is not appropriate.

An individual released to a less restrictive alternative shall be subject to a yearly review by the court that released him or her. If the authorities believe that the conditionally released person is not complying with the terms and conditions of release, the State may file a motion to revoke or modify such release and the State bears the burden of proving by a preponderance of the evidence that the conditionally released person did not comply with the terms and conditions of release. If that burden is met, such person shall be recommitted to total confinement. RCW 71.09.098.

XI. Criminal Procedure

While the 4th Amendment to the United States Constitution provides protection against unreasonable searches and seizures, Article 1, section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Article 1, section 7 has been interpreted as providing greater protection for individual privacy than the federal constitutional provisions. *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984). Washington courts will engage in an independent analysis of state constitutional grounds where appropriate. *State v. Gunwall*, 106 Wn.2d 54 (1986).

Courts will consider the following six nonexclusive factors in determining whether a state constitutional provision provides more protection than its federal counterpart: (1) textual language of state provisions; (2) significant differences in texts of parallel provisions of federal and state constitutions; (3) state constitutional and common law history; (4) pre-existing state law; (5) differences in structure between federal and state constitutions; and (6) matters of particular state interest or local concern. *Robinson v. City of Seattle*, 102 Wash. App. 795, 10 P.3d 452 (2000).

The protections of article 1, section 7 have been applied in several different areas, including the following:

- A. Random DUI automobile checkpoints are impermissible under the Washington State Constitution. *Seattle v. Messiani*, 110 Wn.2d 454, 755 P.2d 2d 775 (1988).
- B. While consent can provide an exception to the warrant requirement, under art. 1 section 7, police officers who want to obtain a suspect's consent to search must advise that suspect that consent need not be given, consent may be revoked at any time, and consent to search may be limited. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).
- C. A garbage can left on the curb for collection outside a home may not be searched by law enforcement without a warrant. *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990). A search by a drug dog of a garage adjacent to a private residence conducted without a warrant violates art.1 section 7 of the Washington Constitution. *State v. Dearman*, 92 Wn. App. 630, 962 P.2d 850 (1998).
- D. Pretextual stops violate art. 1 section 7 of the Washington Constitution. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). A pretext stop occurs when a police officer utilizes the traffic code in an attempt to conduct some unrelated criminal investigation. A traffic stop is not pretextual even where the officer has an additional motivation for conducting the stop apart from a suspected traffic violation, so long as the officer's purported motive in investigating a suspected traffic violation was an actual, conscious, and independent reason for the stop. *State v. Arreola*, 176 Wn.2d 284, 299-300, 290 P.3d 983 (2012).
- E. Random checking of a motel registry violates the privacy provisions of article 1 section 7. *State v. Jorden*, 160 Wn.2d 121, 156 P.3d 893 (2007).
- F. Search of a defendant's cell phone, including stored data and text messages, is not permissible without a warrant.
- G. Citizens have a protected privacy interest in their electric consumption records under art. 1 section 7. *In re Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997).
- H. The installation of a GPS device for satellite tracking of a person's vehicle involves a search and seizure and requires a warrant. *State v. Jackson*, 150 Wn. 2d 251, 76 P.3d 217 (2003).
- I. A defendant charged with a crime that has possession as an element automatically has standing to challenge a law enforcement search if the contraband was in his possession at the time of the search. *State v. Goucher*, 124 Wn.2d 778, 787-88, 881 P.2d 210 (1994).

Article I, section 7, does not prevent:

- A. Police officers from searching Department of Licensing data bases to obtain license information. *State v. McKinney*, 148 Wn.2d 20, 60 P.3d 46 (2002).
- B. Private commercial records. A customer has no expectation of privacy in receipts kept at a store, at least as to transactions that the customer discloses to a third party, such as an insurance company. *State v. Farmer*, 80 Wn. App. 795, 911 P.2d 1030 (1996).
- C. Inmate property. Law enforcement may examine any inmate's possessions without a warrant in connection with the investigation of a crime unrelated to the crime for which the defendant was arrested. *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003).
- D. Search of stolen or fraudulently obtained property. *State v. Zakel*, 61 Wn. App. 805, 812 P.2d 512 (1991), *aff'd*, 119 Wn.2d 563, 834 P.2d 1046 (1992).
- E. Saliva. There is no expectation of privacy in voluntarily produced and relinquished saliva. *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2007).
- F. Jail phone calls. A pre-trial detainee has no reasonable expectation of privacy in non-privileged jail telephone conversations. *State v. Modica*, 164 Wn.2d 83, 186 P.3d 1062 (2008). The recording of a detainee's phone conversations did not violate Const. art. I, § 7. *State v. Haq*, 166 Wn. App. 221, 268 P.3d 997 (2012).
- G. Violations for unreasonable search and seizure are subject to exclusion and evidence derived therefrom is inadmissible. An officer's good faith is irrelevant. *State v. Afana*, 169 Wn.2d 169, 179-184, 233 P.3d 879 (2010).

Warrants grant authority to search and seize property, including persons. In order for a warrant to issue, an officer must provide a sworn oath (affidavit) either in writing or telephonically made before a neutral and detached magistrate who has authority to issue such an order, directing a law enforcement officer to search for personal property (or for the body of a person) and to bring the same before the court. It must be issued by a judge with jurisdiction. A superior court judge or commissioner may issue a state-wide warrant; district and municipal court judges may issue warrants within their county. The affidavit must describe with particularity the person or place to be searched. A warrant for a home will not allow the search of an outbuilding or vehicle not specifically authorized by the warrant; however, if the affidavit is attached to the warrant authorizing the search and describes the outbuilding by reference, it may be searched. *State v. Kelley*, 52 Wn. App. 581, 762 P.2d 20 (1988), and *State v. Riley*, 121 Wn.2d 22, 29-30, 846 P.2d 1365 (1993). The warrant must state with specificity the crime being investigated. *State v. Riley*, 121 Wn.2d 22, 29-30, 846 P.2d 1365 (1993). It need not specifically identify the controlled substance. *State v. Dodson*, 110 Wn. App. 112, 39 P.3d 324 (2002). The warrant must identify and specifically authorize the seizure of items that constitute evidence of the specific criminal offense. *State v. Chambers*, 88 Wn. App. 640, 645, 945 P.2d 1172 (1997). The magistrate must find that there is probable cause to believe there is criminal conduct afoot and that the evidence of the crime will be found at the location to be searched.

Washington is an *Aguillar-Spinelli* state, meaning informant testimony that forms the basis for issuing the warrant must satisfy both the veracity and knowledge prongs of the test. *State v. Kennedy*, 72 Wn. App. 244, 864 P.2d 410 (1993); *State v. Olson*, 73 Wn. App. 348, 869 P.2d 110 (1994).

Informants are divided into types:

- a. Anonymous (unknown to the police) and citizen informants, which require independent police investigation to verify the information provided. *Olson, id.* See also *State v. Tarter*, 111 Wn. App. 336, 44 P.3d 899 (2002).

- b. Criminal informants. The proven track record of reliability may reasonably support an inference that the informant is telling the truth. *State v. Lair*, 95 Wn.2d 706, 710, 630 P.2d 427 (1981). Additionally, statements against penal interest have some indicia of reliability. *Id.*, at 710-11.

The information cannot be “stale” or old, which is a function of the type of evidence. For example, alcohol and drugs dissipate quickly and a warrant requested a several hours after arrest may be deemed stale. (A warrant is required to draw a defendant’s blood. It is not required for a breath test.) However, evidence of possession of child pornography would not be stale months later. *State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009), *review denied*, 168 Wn.2d 1027 (2010)

XII. Public Trial

A. Public Trial or Closed Hearing

The State Constitution provides for a public trial. In *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), the Washington Supreme Court addressed the issue of closing a hearing in a criminal matter ostensibly for the protection of an undercover officer’s identity. The court ruled that in considering such a closure, the trial court must weigh the request considering the following:

1. The proponent of closure must make a showing of a compelling interest and, where that need is based on something other than defendant’s right to a fair trial, must show a serious and imminent threat to a fair trial;
2. Anyone present when a closure motion is made must be given an opportunity to object;
3. The method of closure must be the least restrictive available;
4. The court must weigh competing interests of the proponent of the closure and the public; and,
5. The order must be no broader in application or duration than is necessary.

Bone-Club has generated numerous cases, with the courts siding strongly in favor of open proceedings. *State v. Tinh Trinh Lam*, 161 Wn. App. 299, 254 P.3d 891 (2011); *State v. Savoie*, 164 Wn. App. 156, 262 P.3d 535 (2011)

XIII. Knapstad

Washington law allows a criminal defendant to make a pre-trial motion to dismiss the charges pending against him or her in a procedure somewhat akin to a motion for summary judgment in a civil case. *State v. Knapstad*, 41 Wn. App. 781, 706 P.2d 238 (1985), *aff’d*, 107 Wn.2d 346, 729 P.2d 48 (1986). *Knapstad* is based upon the inherent authority of the court to dismiss a criminal case if it is apparent that the State cannot prove all the elements of the crime charged.

Under *Knapstad*, the court will consider all the material undisputed facts, and if those facts are insufficient to support a conviction, the court will dismiss.

XIV. Misdemeanor Compromise and Deferred Prosecution

Two other methods exist under Washington law for the resolution of criminal cases. The first is misdemeanor compromise, which is available in both the District and Superior Courts.

A. Misdemeanor Compromise

In any case in which a defendant is prosecuted for a misdemeanor (other than a violation of RCW 9A.48.105, in which the injured party may have a remedy by civil action for any damages caused), the offense may be compromised unless it was committed 1) By or upon an officer during the execution of the duties of his or her office; 2) Riotously; 3) With intent to commit a felony; or 4) By one family or household member against another as defined in RCW 10.99.020 and was a crime of domestic violence as defined in RCW 10.99.020.

In any case eligible for compromise of misdemeanor, if the injured party appears in court and acknowledges in writing that he or she has received satisfaction for the injury, the court has the discretion to dismiss the case. In doing so, the court will order payment of costs incurred and must set forth on the record its reasons for dismissing. Such a dismissal is with prejudice and bars any further prosecution for the same offense. RCW 10.22.020.

B. Deferred Prosecution

The second alternative means of resolving criminal prosecutions is deferred prosecution, which is available only in courts of limited jurisdiction.

Anyone charged with a misdemeanor or gross misdemeanor in a court of limited jurisdiction may petition the court to be considered for deferred prosecution. A person charged with a traffic infraction, misdemeanor, or gross misdemeanor under title 46 RCW is not eligible for deferred prosecution program unless the court makes specific findings that the petitioner has 1) stipulated to the admissibility and sufficiency of facts is contained in the police reports; 2) acknowledged the admissibility of the stipulated facts in any subsequent criminal hearing held pursuant to revocation of the order granting the deferred prosecution; 3) acknowledged and waived the right to testify, the right to a speedy trial, the right to call and question witnesses, the right to present evidence in his or her defense, and the right to a jury trial; and 4) stipulated that the petitioner's statements were made knowingly and voluntarily. RCW 10.05.010; 10.05.020.

The petitioner must allege under oath that the wrongful conduct charged is the result of or caused by either alcoholism, drug addiction, or mental problems for which the petitioner is in need of treatment and unless treated the probability of future recurrence is great. The petitioner must also agree to pay the costs of diagnosis and treatment if financially able to do so. The petition must also contain a case history and written assessment prepared by an appropriate treatment professional. RCW 10.05.020.

In a deferred prosecution involving a driving offense, the court shall dismiss the charges pending against petitioner upon proof of successful completion of treatment and compliance with any of the conditions imposed by the court, but not before five years has elapsed following entry of the order of deferred prosecution. In a deferred prosecution involving allegations of child mistreatment, the court may dismiss upon proof that the petitioner has successfully completed the child welfare service plan or that the plaintiff was terminated because the alleged victim has reached his or her majority and there are no other minor children living in the home. RCW 10.05.120.

While RCW 10.05.030 provides that the arraigning judge may continue arraignment and may refer an individual for a diagnostic investigation and evaluation "with the concurrence of the prosecuting attorney," the Washington Supreme Court has ruled that requiring the prosecutor's consent for entry of a deferred prosecution order is an unconstitutional delegation of authority when not accompanied by standards to guide the exercise of such authority by the prosecution. *State ex rel. Schillberg v. Cascade District Court*, 94 Wn.2d 772, 621 P.2d 115 (1980).



EVIDENCE

I. Source of Washington's Law of Evidence

- A.** Washington adopted the Federal Rules of Evidence in the late 1970s. For the most part, Washington's rules are the same as the federal rules. If you learned the Federal Rules of Evidence in law school, this knowledge will serve you well in Washington, with only a few exceptions.

This outline reviews the principal areas of evidence in which Washington's rules (ER) differ from the Federal Rules of Evidence (FRE).

II. Character evidence

Washington does not allow testimony expressing a personal opinion on the character of a party.

A. Generally

FRE 404 and Washington's ER 404 are the same with regard to the *admissibility* of character evidence. Under both rules, the character of a party is admissible: (1) in a civil case if character is actually at issue (e.g. custody dispute, defamation); (2) not admissible in other civil cases; (3) a criminal defendant's character is admissible if the defendant opens the door by being the first to present evidence only of his or her good character; (4) a crime victim's character is admissible only if the defendant claims self defense.

B. Methods of Proof

Both FRE and ER then make a distinction between *admissibility* and *methods of proof*, but on this point the FRE and ER differ. In the FRE, when the character of a party is admissible under one of the rules summarized above, the permissible methods of proof include testimony regarding the party's reputation, personal opinion on the party's character and (under very narrow circumstances) specific instances of the party's conduct. FRE 404, 405.

In Washington, the same federal rules apply except that a witness's personal opinion is never allowed as proof of a party's character. ER 405; *State v. Mercer-Drummer*, 128 Wn. App. 625, 116 P.3d 454 (2005).

Permitted under FRE: "D has a reputation in the community for being a peaceful person, and in my own opinion, D is a peaceful person. He would never hurt anybody." FRE 405.

Permitted in Washington: "D has a reputation in the community for being a peaceful person." (No mention of personal opinion is allowed.) ER 405.

C. Reputation

In order to testify regarding a party's reputation, the witness must confine his or her testimony to the party's reputation in a neutral, generalized community, such as the community of the party's neighbors or the community of people with whom the witness works. Testimony about a party's reputation in a small, potentially biased community (e.g., among the party's family members, or among police officers) is not admissible. *State v. Thach*, 126 Wn.App. 297, 106 P.3d 782 (2005).

III. Impeachment: Washington does not allow testimony expressing a personal opinion on the credibility of another witness

A. Generally

In the FRE, when Witness A is allowed to attack the general credibility of Witness B, the permissible

methods of proof include reputation, personal opinion and (under narrow circumstances) specific instances of Witness B's prior misconduct. FRE 608.

In Washington, Witness A's personal opinion on Witness B's general credibility is never allowed. ER 608. Permitted under FRE: "I am familiar with Witness B's reputation on the community on the question of truthfulness. She has a reputation of being an untruthful person. That is also my own opinion – she never tells the truth." FRE 608 (a).

Permitted in Washington: "I am familiar with Witness B's reputation on the community on the question of truthfulness. She has a reputation of being an untruthful person." (No mention of personal opinion allowed). ER 608 (a).

B. Direct and Indirect Opinions

The ban on personal opinion extends to both direct opinions ("Witness B never tells the truth") and indirect opinions ("I did not believe Witness B when he told me the same story before trial.") *State v. Walden*, 69 Wn.App. 183, 847 P.2d 956 (1993) (testimony of Witness A that Witness B was "mistaken" was an impermissible, albeit indirect, opinion on credibility of Witness B).

C. Positive and Negative Opinions

The ban on personal opinion extends to positive opinions as well as negative opinions. In a criminal case, for example, a character witness for D would not be allowed to say that D is somebody who can be believed. Similarly, a witness for the State would not be allowed to say that a witness for the state is somebody who can be believed. See, e.g., *State v. Stevens*, 127 Wn.App. 269, 110 P.3d 1179 (2005), *aff'd* 158 Wn.2d 304, 143 P.3d 817 (2006) (testimony by Witness A that statements by Witnesses B and C were "consistent" held inadmissible as comment supporting the credibility of B and C); *State v. Thach*, 126 Wn.App. 297, 106 P.3d 782 (2005). (Witness A should not have been allowed to testify that he "believed" Witness B).

D. Expert Testimony

The ban on personal opinion extends to expert testimony. See, e.g., *State v. Barr*, 123 Wn.App. 373, 98 P.3d 518 (2004) (testimony by prosecution expert that defendant was being "deceptive" held inadmissible).

An expert can, however, express a professional opinion on a related subject other than credibility. See, e.g., *State v. Aguirre*, 168 Wn.2d 350, 229 P.3d 669 (2010) (in prosecution for rape, expert for prosecution was properly allowed to testify regarding the general demeanor of victims of sexual assault, and to describe the victim's demeanor in the present case).

As might be expected, the line between what is forbidden and what is allowed can be a gray area. The key to admissibility is in phrasing the question and answer in terms of generalizations, not statements about the credibility of one particular person.

E. Factual Contradiction Distinguish

The ban on personal opinion does not extend to simply contradicting a witness on the facts. If Witness A testifies he was in Spokane two weeks ago, an opposing witness can testify that she saw Witness A in Los Angeles two weeks ago. If Witness A testifies that the light was red, an opposing witness can testify that the light was green. See, e.g., *State v. Stambach*, 76 Wn.2d 298, 456 P.2d 362 (1969) (prosecution witness allowed to contradict defendant's alibi).

IV. Hearsay: Washington's rule about admissions by party-opponent differs from the federal rule

A. Generally

The FRE and Washington law both contain the familiar rule that admissions by party-opponent are not objectionable as hearsay. For the most part, the FRE and Washington law are the same. Thus, for example, statements personally made by an opposing party are routinely admissible. Most of what you learned in law school about admissions by party-opponent should serve you well in Washington. The FRE and Washington law do differ significantly on one issue – the admissibility of admissions by agents and employees.

B. Admissions by Agents and Employees

As mentioned, the FRE and Washington law differ on the issue of whether an out-of-court statement by the agent or employee of the opposing party is admissible against the opposing party.

For example, suppose that P slips and falls on a wet floor in a supermarket. P sues the supermarket (D) for negligence. Meanwhile, in a tavern, a witness (X) for P happens to hear a cashier (C) for the supermarket say, “You know, I did spill that water and did not call anybody to clean it up.”

P cannot locate C to testify at trial. Can P call X as a witness, to recount what C said in the tavern?

C. Federal Law vs. Washington Law

Referring back to the hypothetical, C’s out-of-court statement is likely to be admissible as an admission in a federal court, but not in a Washington court.

D. Washington’s Speaking Agent Rule

Under ER 801(d) (2)(iii) and (iv), the following is said to be admissible: a statement by the party’s agent or employee acting within the scope of that agency or employment which included the authority to make the statement for the party. As a practical matter, (d) (2)(iii) and (iv) operate together and are known collectively as the speaking agent rule. In Washington, an admission by an agent or employee of a party is admissible against the party only if the speaker was specifically authorized to speak on behalf of the party.

E. Examples

1. Speaking agents: business owners or officers, high-level managers or supervisors, and public relations persons. An attorney-in-fact, or an attorney at law representing a client. *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987) (corporate Director of Environmental Affairs was speaking agent for corporation); *State v. Williams*, 79 Wn.App. 21, 902 P.2d 1258 (1995) (attorney was speaking agent for client).
2. Not speaking agents: C, the cashier in the hypothetical above. A maintenance person who cleans the building at night. The factory worker who builds the company’s product. A hotel bartender who is neither an owner nor supervisor. See, e.g., *Ensley v. Mollmann*, 155 Wn.App. 744, 230 P.3d 551 (2010) (restaurant employee was not a speaking agent for the restaurant).

Each case is fact-specific and comes down to a determination on whether the employee, as part of his or her job, was authorized to speak on behalf of the employer.

V. Hearsay: Washington’s hearsay exception for public records is narrower than the federal exception

A. Generally

The FRE and Washington law both contain the familiar hearsay exception for public records. For the most

part, the FRE and Washington law are the same, and what you learned in law school about public records should serve you well in Washington. The FRE and Washington law do differ significantly on one issue – the admissibility of public records reflecting the exercise of judgment or discretion.

B. Federal Law vs. Washington Law

Under FRE 803(8), an exception to the hearsay rule is made for a variety of public records reflecting the exercise of judgment or discretion, including findings resulting from any “legally authorized investigation.” The federal courts have interpreted the rule broadly to include the results of investigations by administrative agencies.

FRE 803(8) was not adopted in Washington. Washington continues to instead apply RCW 5.44.040, which provides as follows:

RCW 5.44.040. Certified copies of public records as evidence. Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.

C. Interpretation of RCW 5.44.040.

Washington’s courts have consistently interpreted RCW 5.44.040 as not creating a hearsay exception for public records reflecting the exercise of judgment or discretion (e.g., judgments, administrative findings, reports following safety inspections, reports prepared for experts in anticipation of litigation).

The hearsay exception created by the statute applies only to public records of objective facts – records that the courts have described as “nearly clerical” accounts of objective facts. See, e.g., *State v. James*, 104 Wn.App. 25, 15 P.3d 1041 (2000).

E. Examples

Admissible in Washington: Vital statistics (births and deaths), weather records, driving records to the extent made available to the public by the Department of Licensing, police records of arrests and bookings to the extent made available to the public. See, e.g., *State v. Monson*, 113 Wn.2d 833, 784 P.2d 485 (1989) (driving record); *State v. Iverson*, 126 Wn.App. 329, 108 P.3d 799 (2005) (jail booking records).

Inadmissible in Washington: An administrative finding of disability, offered later in a personal injury case. An administrative finding of discrimination, offered later in a civil case. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 191 P.3d 879 (2008) (report by OSHA, finding fault with defendant’s safety measure in workplace).

VI. Hearsay: Washington has no catch-all hearsay exception

The FRE contain a catch-all hearsay exception, defined as other out-of-court statements having guarantees of trustworthiness similar to the guarantees associated with the other hearsay exceptions. FRE 807. This rule has not been adopted in Washington.

Argument allowed under FRE but not ER: “Your honor, we concede that this document does not fall within any codified exception to the hearsay rule. Under the circumstances, however, the document is every bit as reliable as a business record or a public record.”

VII. Privileges: Washington's privilege for spouses and domestic partners includes the rule of incompetency, which is not part of federal law

A. Privilege for Confidential Communications

Washington and the federal courts both recognize a privilege for confidential communications between spouses. Under Washington and federal law, H could not be forced to reveal a discussion between H and W, if the discussion took place under conditions suggesting a reasonable expectation of privacy. RCW 5.60.060(1). In Washington, the privilege also extends to registered domestic partners. RCW 5.60.060(1). The privileged nature of the communication survives death of a spouse or partner. It also survives dissolution of the marriage or partnership.

B. Rule of Incompetency to Testify (Washington only)

In Washington, but not in the federal courts, the privilege includes the so-called rule of spousal incompetency. This rule has nothing to do with confidential communications or the preservation of privacy. Instead, the rule restricts testimony by one spouse or registered partner against the other, on any subject. The rule is based upon the theory of preserving family harmony.

Allowed in federal court but not in Washington: "I waited in the car while my husband went inside the 7-11 to rob the cashier." The Washington rule also applies in civil cases. *See, e.g., Lyen v. Lyen*, 98 Wash. 498, 167 P. 1113 (1917) (alienation of affections).

C. Rule of Incompetency Applies Only During Valid Marriage or Partnership

RCW 5.60.060(1) makes it clear that the rule of incompetency applies only to persons who are legally married or are registered partners at the time criminal charges are filed. The rule evaporates upon death of one party, or upon dissolution of the marriage or partnership. *State v. Denton*, 97 Wn. App. 267, 983 P.2d 693 (1999).

Thus, if the marriage or partnership dissolved prior to trial, the rule does not apply at trial, and the two persons can be required to testify against each other (except as to confidential communications, which remain barred by the privilege for confidential communications). *State v. Snyder*, 84 Wash. 485, 147 P. 38 (1915).

D. Exceptions

The following exceptions apply to both the privilege for confidential communications and the rule of incompetency (RCW 5.60.060(1)):

1. The rules do not apply in a civil action or proceeding by one spouse or partner against the other.
2. The rules do not apply in a criminal action or proceeding for a crime committed by one spouse against the other; by one partner against the other; by a spouse or partner against a child for whom the other spouse or partner is a parent or guardian; or in a criminal action or proceeding against a spouse or domestic partner if the marriage or domestic partnership occurred subsequent to the filing of formal charges.
3. The rules do not apply to statements offered as evidence in a proceeding for child support or desertion. RCW 26.20.071; RCW 26.21.

VIII. Competency of witnesses: Washington law includes a dead-man statute, which is not part of federal law

A. Generally

Washington is one of only a handful of states that have a so-called dead man statute. Under RCW 5.60.030, a party is barred from testifying about a transaction with a deceased person whose estate is the adverse party in the action. The statute applies only in civil cases. It is inapplicable in criminal cases. RCW 5.60.030.

B. Purpose

The dead-man statute is based upon the belief that it would be unfair for the court to reach a decision about the transaction based upon only one side of the story. “Death having closed the lips of one party, the law closes the lips of the other.” *In re Cunningham’s Estate*, 94 Wash. 191, 161 P. 1193 (1917).

C. Disabled Persons, Minors

For the same reasons, a party is barred from testifying about a transaction with a person who is the adverse party and who is incompetent, disabled, or a minor under the age of fourteen. RCW 5.60.030. For simplicity, the term “decedent” will be used here, but it should be understood as also including others within the scope of the statute.

D. Estate as Plaintiff or Defendant

The statute applies regardless of whether the deceased’s estate is the plaintiff or defendant. Either way, the opposing party cannot testify as to a transaction with the decedent. *Lasher v. University of Washington*, 91 Wn.App. 165, 957 P.2d 299 (1998).

E. Definition of Transaction

The courts have defined transaction broadly to include statements by the decedent, conversations with the decedent, oral agreements with the decedent, and even acts of negligence by or against the decedent. *Thor v. McDearmid*, 63 Wn.App. 193, 817 P.2d 1380 (1991) (statute barred testimony about real estate transaction with decedent); *Hofsvang v. Estate of Brooke*, 78 Wn.App. 315, 897 P.2d 370 (2007) (statute barred client’s testimony against deceased attorney in malpractice action).

F. Applies Only to Testimony by Party in Interest

The statute restricts only testimony by a party who was involved in a transaction with the decedent. The statute does not restrict testimony by a nonparty witness. *In re Estate of Cordero*, 127 Wn.App. 783, 113 P.3d 16 (2005) (statute did not bar testimony by nonparty witness).

G. Applies Only to Oral Testimony

The statute restricts only testimony by a party who was involved in a transaction with the decedent. The statute does not restrict the admissibility of documentary evidence, such as written contracts. *Thor v. McDearmid*, 63 Wn.App. 193, 817 P.2d 1380 (1991) (statute did not bar letter purportedly written by decedent).

H. Wrongful Death

The courts have held that the statute does not apply in wrongful death cases, and thus does not limit testimony by the defendant in such cases. The reason is that the decedent’s Personal Representative is not suing on behalf of the decedent, but instead on behalf of the statutory beneficiaries. *Fleming v. City of Seattle*, 45 Wn.2d 477, 275 P.2d 904 (1954).

I. Discovery, Potential Waiver

The statute applies only at trial; it does not apply during discovery. Thus, the statute does not restrict the

-serving of interrogatories, the taking of depositions, or the like. *Wildman v. Taylor*, 46 Wn.App. 546, 731 P.2d 541 (1987).

However, if the party who is protected by the statute offers protected information gained during discovery (e.g., answers to interrogatories) as evidence at trial, the protection of the statute is waived. For example, a disabled person (P), through a guardian, sues a physician (D) for malpractice. P takes D's deposition. Later at trial, P offers the deposition as evidence. P has now waived the protection of the statute, thus opening the door to D's testimony about relevant transactions with P. *Estate of Lennon v. Lennon*, 108 Wn.App. 167, 29 P.3d 1258 (2001).

IX. Testimony by experts – Washington follows the Frye rule

A. Generally

In Washington, the testimony of an expert witness is subject to the so-called Frye rule. In Washington, an expert's testimony should not exceed the limits of the expert's underlying science or art. If the expert's opinion is based upon a scientific theory or method, the theory or method must be one that is generally accepted in the scientific community. This is the so-called *Frye* rule, derived from *Frye v. U.S.*, 293 F. 1013, 34 A.L.R. 145 (App. D.C. 1923).

The *Frye* rule most often applies in criminal cases involving medical or scientific testimony, but the rule applies across the board to all cases – civil and criminal – and to other areas of expertise such as engineering and economics. See, e.g., *Eakins v. Huber*, 154 Wn.App. 592, 225 P.3d 1041 (2010) (medical testimony in civil case); *Moore v. Harley-Davidson Motor Co. Group, Inc.*, 158 Wn.App. 407, 241 P.3d 808 (2010), *review denied*, 171 Wn.2d 1009, 249 P.3d 1028 (2011) (cause motorcycle engine failure in civil case).

On this point, the Washington courts do not follow the federal rule – the so-called *Daubert* rule – that is a more complex, multifactor formula for determining admissibility. *Moore v. Harley-Davidson Motor Co. Group, Inc.*, 158 Wn.App. 407, 241 P.3d 808 (2010) (rejecting federal rule).

B. Method of Analysis

Determinations under Frye are on a sliding scale. Some underlying theories are so well-established and so noncontroversial that they satisfy the Frye rule as a matter of law. Examples include DNA as a means of identifying human trace evidence, comparison of fingerprints (and the theory that no two people have the same fingerprints), and the examination of footprints as a way of finding where a person might be. See, e.g., *State v. Copeland*, 130 Wn. 2d 244, 922 P.2d 1304 (1996) (DNA); *State v. Hayden*, 90 Wn.App. 100, 950 P.3d 1024 (1998) (fingerprints); *State v. Ortiz*, 119 Wn.2d 294, 831 P.3d 1060 (1992) (following defendant's tracks).

In the cases just described, the opposing party is still free to raise questions about the evidence (fingerprints were too latent to be helpful, the crime laboratory did not follow the proper procedures, etc.). But these questions go only to the weight of the evidence, not its admissibility. *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996) (extended discussion of this point).

At the other extreme are opinions based upon theories that are so questionable – popularly known as junk science theories – that they fail the Frye test as a matter of law. An example is polygraph testing, the results of which are not admissible in Washington unless the parties stipulate to admissibility. *State v. Renfro*, 96 Wn.2d 902, 639 P.2d 737 (1982). For cases falling between these two extremes, the trial court decides Frye issues case-by-case. The court conducts a special Frye hearing, typically before trial, and the court determines whether the expert's opinion is admissible or inadmissible at trial under Frye.

FORECLOSURES AND LIMITED PRACTICE OFFICERS

I. Foreclosures

A. Valid Mortgage Creation

1. A mortgagor has the power to mortgage any existing interest in property. 59 CJS Mortgages § 71.
2. Underlying Obligation: To have a valid mortgage, there must be some debt capable of identification, in some ascertainable amount, which is enforceable and was intended by the parties to be secured by the mortgage. *Tesdahl v. Collins*, 2 Wn. 2d 76, 81-82, 97 P.2d 649 (1939). Normally, there is an underlying note, but it is not necessary for a mortgagor to be personally liable on an underlying obligation for a mortgage to exist (i.e., a mortgage may be given to secure a third-party debt). *Seattle-First Nat'l Bank v. Hart*, 19 Wn.App. 71, 573 P.2d 827 (1978); RCW 61.12.050.
3. Interest: Generally, the amount of interest charged on the debt is limited by usury statutes. In Washington State, the limit is the higher of 12% or four percentage points above a figure based on the rates for federal treasury bills. (See RCW 19.52.020).
4. Formalities of Creation: A mortgage must be created by a deed, and the formalities required for a deed must be followed. (See RCW 64.04.010, 64.04.020). The failure to specifically meet the statutory requirements does not vitiate the mortgage as between the parties or as to third parties if the mortgage is recorded. *Spedden v. Sykes*, 51 Wn. 267, 273, 98 P. 752 (1908). If both spouses do not sign a mortgage of community property, the mortgage is voidable at the election of the nonjoining spouse or partner. *Sander v. Wells*, 71 Wn.2d 25, 28, 426 P.2d 481 (1967).
5. Deed of Trust: A deed of trust is subject to all laws relating to mortgages on real property. *Gardner v. First Heritage Bank*, 175 Wn.App. 650, 303 P.3d 1065 (2013); RCW 61.24.020. A deed conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or another to the beneficiary may be foreclosed by trustee's sale. (RCW 61.24.020). The county auditor shall record the deed as a mortgage and shall index the name of the grantor as mortgagor and the names of the trustee and beneficiary as mortgagee. (RCW 61.24.020).
6. Lien Theory State: In Washington the mortgagor retains title to the property until the sheriff's deed is delivered. *Parks v. Yakima Valley Prod. Credit Ass'n*, 194 Wn. 380, 78 P.2d 162 (1938). A creditor under a deed of trust may opt for a judicial foreclosure or a non-judicial foreclosure process. RCW Ch. 61.24.

B. Foreclosure Process

1. In Washington, a mortgage foreclosure is a judicial process, RCW 7.28.230(1), and is a proceeding in rem. *State v. Superior Court*, 63 Wn. 312, 115 P. 307 (1911).
2. Default: When a mortgagor/debtor defaults on his performance of any condition contained in a mortgage, the mortgagee/creditor may foreclose on the mortgage. (RCW 61.12.040). All parties with an interest in the property that the foreclosing party seeks to eliminate are necessary parties to the action (except a mortgage foreclosure cannot affect a prior lien). See, *City Sash & Door Co.*

v. Bunn, 90 Wn. 669, 156 P. 854 (1916). The Court issues an order of sale to satisfy the judgment. There may be a deficiency judgment. RCW 61.12.060.

3. Requisites to Non-Judicial Foreclosure under a Deed of Trust

- a. A Notice of Default may not be issued under RCW 61.24.030 until
 - i. 30 days after satisfying due diligence requirements and the borrower has not responded, see RCW 61.24.031(1)(a); or
 - ii. if the borrower responds to the initial contact, 90 days after the initial contact with the borrower was made. RCW 61.24.031(1)(a).
- b. Initial contact with the borrower shall be by letter and telephone to provide the borrower with information, RCW 61.24.031(1)(b), including the right to a 60-day window of opportunity for an in-person meeting with the lender before the lender issues a Notice of Default, RCW 61.24.031(1)(c)(i), and right to request mediation through a housing counselor or attorney in front of a neutral third-party RCW 61.24.031(1)(c)(i).
- c. At least thirty days before sale, notice by letter and telephone in the manner required by statute must be properly given. RCW 61.24.030(8).

4. Mediation Process

- a. The referral to mediation may be made any time after a Notice of Default has been issued but no later than 20 days after the date a Notice of Sale has been recorded. RCW 61.24.163(1).
 - b. A housing counselor or attorney referring a borrower to mediation shall send a notice to the borrower and the Department of Commerce. RCW 61.24.163(2). The Department then sends notice and selects a mediator. RCW 61.24.163.
 - c. A mediator shall be selected and the parties notified. The parties then exchange documents. RCW 61.24.163. The mediator convenes a mediation session in the county where the property is located unless the parties agree otherwise. Both parties are required to mediate in good faith. RCW 61.24.163. The mediator issues the results of the mediation and a finding of whether the parties participated in good faith.
5. Cure of Default: Up until the 11th day before the sale, the borrower may cure the default, in which case no sale may be held. RCW 61.24.090(1).
 6. Deficiency Judgments: Deeds of trusts securing residential loans shall not be subject to deficiency judgments after a trustee's sale. RCW 61.24.100(1).
 7. Proceeds of Sale: The proceeds of the foreclosure sale are used first to pay the principal due, interest and costs. Any surplus shall be applied to liens or claims of liens against the property which were eliminated by the foreclosure sale. Any remaining surplus is paid to the mortgage debtor. RCW 61.12.150.

II. Commencement and Pretrial

A. Limited Practice Rule for Limited Practice Officers (LPO) (Admission to Practice Rule (APR) 12)

1. Certain persons may select, prepare and complete legal documents incident to the closing of real estate and personal property transactions. (APR 12(a))
2. The rule establishes a Limited Practice Board, which consists of nine members appointed by the Supreme Court of the State of Washington. (APR 12(b)(1))
3. The Limited Practice Board:
 - a. Accepts and processes applications for certification as LPO.
 - b. Conducts examinations for certification.
 - c. Investigates and recommends applicants for admission.
 - d. Approves individual courses to satisfy the educational requirement of the LPO.
 - e. Adopts hearing and appeals procedures, hears complaints of persons aggrieved by the failure of LPO to comply with requirements of Rule 12 and the Limited Practice Officer rules of Professional Conduct, and disciplines LPOs found in violation.
 - f. Approves standard forms for use by LPO in performance of services authorized by Rule 12.
 - g. Establishes and collects examination and annual fees.
4. Members of the Limited Practice Board are not compensated for their services. (APR 12(b)(3)).
5. LPO applicant must be of sufficient age, of good moral character, satisfy examination requirements established by the Board, and execute an application under oath (APR 3(f); APR 5(d)).
 - a. LPO's must be licensed through the Washington Supreme Court pursuant to APR 12. *Robinson v. The Employment Security Department*, 84 Wn. App. 774, 776, 930 P.2d 926 (1996).
6. An LPO may select, prepare and complete forms previously approved by the Board for use by others in, or in anticipation of, closing a loan, extension of credit, sale or other transfer of interest in real or personal property.
 - a. Such documents shall be limited to deeds, promissory notes, guaranties, deeds of trust, reconveyances, mortgages, satisfactions, security agreements, releases, Uniform Commercial Code documents, assignments, contracts, real estate excise tax affidavits, bills of sale, and powers of attorney. (APR 12(d))
 - i. An LPO engages in the unauthorized practice of law and exceeds the grant of authority if the LPO uses documents not approved by the Washington Limited Practice Board. *Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. 833, 847, 28 P.3d 802 (2001).
 - ii. A comparison of the form used by an LPO with the forms authorized by the Limited Practice Board raise significant issues of material fact that must be resolved at trial. *Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. at 844.
7. An LPO may prepare and complete documents only under the following conditions and limitations:

- a. agreement of the clients, and
 - b. disclosure to the clients that
 - i. LPO is not an advocate.
 - ii. Documents prepared by LPO will affect legal rights of clients.
 - iii. Clients' interests in the documents may differ.
 - iv. Clients have a right to be represented by lawyers of their own selection.
 - v. LPO cannot give legal advice as to the manner in which documents affect the clients (APR 12(e)).
 - c. An LPO is required to advise parties not only of the five items separately delineated by the rule but also of the limitations of the services rendered under the limited practice rule. *Bishop v. Jefferson Title Co., Inc.* 107 Wn. App. 833, 844, 28 P.3d 802 (2001).
8. LPOs are subject to continuing certification, proof of financial responsibility, and payment of an annual fee (APR 12(f)).

B. LPO legal standard of care

1. Generally, when a non-lawyer selects and prepares a legal document for another, the non-lawyer engages in the unauthorized practice of law. Despite this, the non-lawyer (including an LPO) will be held to the standard of a lawyer. "Despite this, the non-lawyer (including a licensed limited practice officer) will be held to the standard of a lawyer." APR 12, Comment [2], *citing Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 246 (1992).
2. However, an LPO has limited duties compared to an attorney when selecting and preparing legal documents
 - a. An LPO, though having a limited license to practice law as defined and limited in Rule 12, will not be authorized nor charged with many of the duties of a lawyer. Except as provided otherwise in Rule 12 rules and regulations, these include the duty to investigate legal matters, to form legal opinions (including but not limited to the capacity of an individual to sign for an entity or whether a legal document is effective), to give legal advice (including advice on how a legal document affects the rights or duties of a party), or to consult with a party on the advisability of a transaction. (Comment [2] to APR 12)
 - b. A party should not expect an LPO to provide the same services as an attorney. (Comment [2] to APR 12)
 - c. An escrow company that employs an LPO to select and complete closing forms by which legal rights and obligations are established is held to the same standard of care as a practicing attorney. *Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. 833, 845, *citing Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93, 97, 969 P.2d 93 (1999).
3. An LPO's failure to advise parties concerning the use of a modified closing document modified from an approved form and of the limitations on practice by LPOs constitutes breach of the

standard of care to which the LPO is held. *Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. 833, 846–47.

- 4 The failure of an LPO to advise parties concerning the use of a closing document not approved by the Limited Practice Board constitutes a breach of duty and exceeds the grant of authority for a limited practice officer under APR 12(d). *Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. 833, 846–47.

C. The Consumer Protection Act (CPA)

1. The unauthorized practice of law by an LPO employed by an escrow company may subject the escrow company to liability in a private action for damages under the Consumer Protection Act. *Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. 833, 850, citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983).

D. LPO unauthorized practice of law (UPL)

1. An LPO engages in the unauthorized practice of law by selecting a document that the Limited Practice Board has not approved and by completing the document using designations and language significantly affecting the parties' obligations, without knowing or understanding the legal impact of doing so. *Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. at 845.

E. Trust Account Provisions (LPORPC)

1. The Limited Practice Officer Rules of Professional Conduct (LPORPC) 1.12A provides rules for LPOs or closing firms dealing with client funds, including the following trust account provisions:
 - a. LPO must deposit and hold client funds in a trust account. LPORPC 1.12A(c)(1).
 - b. LPO must not deposit LPO's own funds into a trust account except for funds belonging potentially to the LPO. LPORPC 1.12A(h)(2)(i),(ii).
 - c. An LPO must not disburse funds from a trust account until deposits have cleared the banking process and been collected. LPORPC 1.12A(h)(7).
 - d. Trust accounts must be interest bearing, and if funds will not produce a positive net return, they must be held in an IOLTA account. LPORPC 1.12A(i)(1). Client or third-person funds that will produce a positive net return to the client or third person must be placed in either a separate, interest-bearing trust account for the particular client or third person, or a pooled interest bearing trust account that allows for interest to be computed and paid to the appropriate client or third person, unless the client or third person requests that the funds be deposited in an IOLTA account. LPORPC 1.12(i)(2)(i), (ii).
 - e. LPORPC 1.12B sets forth rules for maintaining trust account records.
2. Rules for Enforcement of Limited Practice Officer Conduct ELPOC 15.4 provides rules for trust account overdraft notification and specifically requires the LPO to notify the clerk of the Limited Practice Board of the LPO's full explanation of the cause of the overdraft.

INDIAN LAW

I. Scope of Topic

A. Scope

This topic is generally limited to federal and state statutory and common law regarding American Indians and Indian property in Washington. Many federal statutes apply to Indians and Indian country. It is important to recognize that each tribe has a distinct legal history, and often unique statutes apply, so generalization is risky.

B. Areas of Testing.

1. Federal law:

- a. Tribal sovereignty/sovereign immunity;
- b. Civil and criminal jurisdiction;
- c. Indian Child Welfare Act;

2. Washington state law:

- a. Civil and criminal jurisdiction in RCW Title 37;
- b. Recognition of judgments;

3. Tribal law is not tested. Tribal law refers to the internal laws of a tribe.

II. Definitions

A. “Indian”

For most purposes, an Indian is a member of a federally recognized Indian tribe. *E.g. U.S. v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) . Membership in an Indian tribe is generally determined by the tribe itself based upon its Constitution and laws.

B. “Indian Tribe”

A tribe is “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.” *Montoya v. United States*, 180 U.S. 261, 266 (1901). To be considered an Indian tribe under federal law, the group of Indians must be recognized by the United States and included on a list published pursuant to 25 U.S.C. § 5131. There are 29 federally recognized tribes in Washington. Compare <http://www.goia.wa.gov/Tribal-Directory/TribalDirectory.pdf> with Notice, 79 Fed. Reg. 4748 (January 29, 2014).

III. Land Ownership

A. “Indian country”

Consists of three categories of land, defined in 18 U.S.C. § 1151

1. All land within any federal Indian reservation;

2. All dependent Indian communities; and
 3. All Indian allotments with restrictions on alienation by operation of federal law.
- B.** The term “reservation” originally referred to lands reserved to an Indian tribe from a treaty cession of land to the United States. Reservations have also been created by federal statutes and Executive Orders. For jurisdictional purposes “Indian country” is the important term and it includes Indian reservations, 18 U.S.C. § 1151(a).
- C.** Land reserved for or now owned by an Indian tribe may only be conveyed where specific federal statutory authority exists. 25 U.S.C. § 177; 25 CFR § 152.23.
- D.** Indian country includes parcels within the three categories of § 1151 that are owned in fee simple absolute by Indians or non-Indians as well as rights of way across § 1151 lands.
- E.** Dependent Indian communities are lands set aside by the United States for Indians that remain under federal superintendence. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 533, 118 S. Ct. 948 (1998) (former reservation land that passed into fee status pursuant to Native Claims Settlement Act was not a dependent Indian community).
- F.** Allotments are parcels of land distributed to individual Indians by the United States which initially, or permanently, carry restrictions on alienation imposed by federal law. Some allotments are now owned by non-Indians. The 19th Century federal policy of allotting tribal lands to individual Indians led to millions of acres passing out of Indian ownership. The allotment process was largely halted in 1934 but has not been undone. Allotments carrying restrictions on alienation may be probated only pursuant to federal law. See 25 CFR Part 15.
- G.** Most of the land in Washington State was included in areas ceded by the tribes to the United States by treaties in 1854-1855. Portions of southwest Washington and northeast Washington were not included in any treaty area. Indian country is not coextensive with treaty ceded areas.

IV. Tribal Sovereignty

A. Nature of tribal governance power

Indian tribes possess inherent sovereign power that pre-dates the formation of the United States. Tribes are considered domestic dependent sovereigns. Tribal sovereign power continues to exist until divested by Congress, which has plenary authority over Indian affairs. Congress’ authority means that the federal government has a guardian-ward relationship with Indian tribes. The United States acts as trustee for certain Indian properties and programs, as defined by federal law. State laws have no effect upon Indians within Indian country unless Congress says otherwise, as it did, e.g., in Public Law 280.

B. Sovereign Immunity

1. Tribal Immunity: Like states or the United States, Indian tribes may not be sued without their consent. Immunity is an attribute of tribal sovereignty.
2. Waiver of Immunity: Tribal sovereign immunity can be waived in two ways:
 - a. By the tribe:

- i. By contract. Need not contain magic language of “sovereign immunity.” Waiver can be found in a tribe’s agreement to arbitration. *C&L Enterprises v. Citizen Band Potawatomie*, 532 U.S. 411, 418, 121 S. Ct. 1589 (2001).
 - ii. By tribal law that specifies a waiver of sovereign immunity clause.
 - iii. By filing suit. Tribes waive immunity to a cause of action when they file suit. However, immunity may still be asserted against counterclaims, except set off. *United States v. U.S. Fidelity and Guar. Co.*, 309 U.S. 506, 512 (1940).
- b. By Congress, where the waiver is clearly expressed in statute.

3. Scope of Immunity

- a. Sovereign immunity applies to tribal property and funds, both on and off Indian country. *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 112-13, 147 P.3d 1275 (2006) (trial court properly dismissed for lack of subject matter jurisdiction claim by non-Indian employee of tribal corporation working outside Indian country because tribal sovereign immunity protects a tribal corporation absent express waiver); *North Sea Products Ltd v. Clipper Seafoods Co.*, 92 Wn.2d 236, 237, 595 P.2d 938 (1979) (immunity precluded garnishment).
- b. Sovereign immunity protects the tribe, subordinate units of tribal government, and tribal officials acting within the scope of their authority.
- c. Sovereign immunity does not prohibit prospective relief (e.g. injunctions) against tribal officials. See *Ex parte Young*, 209 U.S. 123, 174, 28 S. Ct. 441 (1908). Instead, sovereign immunity protects the tribal treasury and property.
- d. Sovereign immunity may be asserted as a jurisdictional defense in any federal, state, or tribal court.
- e. Suits by the United States against an Indian tribe are not barred by sovereign immunity.

V. Tribal Jurisdiction Within Indian Country

A. Tribal Civil Jurisdiction

- 1. Indians
 - a. Tribes have complete civil jurisdiction over their own tribal members, subject to the tribe’s own Constitution.
 - b. Limitation on tribal civil jurisdiction over Indians. Indian tribes are not subject to the provisions of the United States’ or the State of Washington’s constitutions. Congress made many provisions similar to those found in the federal Bill of Rights applicable to Indian tribes through the Indian Civil Rights Act, 25 U.S.C. § 1302. Actions brought under that statute, however, are not enforceable in federal courts except for habeas corpus petitions.
- 2. Non-Indians (including non-member Indians)
 - a. The rule: aka the “Montana test”

- i. General Rule: It is presumed that tribes lack jurisdiction over non-Indians for activities taking place within Indian country.
 - ii. *Montana v. United States*, 450 U.S. 544, 554, 101 S. Ct. 1245 (1981), applied the presumption to non-Indian-owned fee land, but the presumption has been expanded to apply to all types of land in Indian country.
- b. No jurisdiction UNLESS one of the two following exceptions applies:
- i. Consensual relationship, such as express contracts, employment agreements, and leases. However, a nexus between the consensual relationship and the regulated activity is also required. For example, a contract between a tribe and a landscaping business will not permit tribal court jurisdiction over the claim of an individual Indian involved in a highway accident with the landscaper's truck. *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1404 (1997). However, a tribal tax upon all utilities operating within an Indian reservation was properly passed on to all customers, including non-Indian residents. *Willman v. Washington Utilities and Transportation Comm.*, 154 Wn.2d 801, 809, 117 P.3d 343 (2005).
 - ii. Conduct that threatens or has a direct effect on tribal political integrity, economic security, or health or welfare. While broadly phrased, this exception is applied rarely; it applies where real jeopardy exists, such as takeover of tribal office buildings by security guards, *Attorney's Process and Investigation Services v. Sac & Fox Tribe*, 609 F.3d 927, 936 (8th Cir. 2010), or igniting forest fires, *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849 50 (9th Cir. 2009).
- c. Federal delegation: Congress may delegate federal authority to Indian tribes to exercise jurisdiction over non-Indians. Environmental statutes such as the Clean Water Act and the Clean Air Act authorize such delegation. If delegated, the Montana test does not apply.
- d. Concurrent jurisdiction: The fact that the federal government or the State may have jurisdiction over a matter does not eliminate the tribe's jurisdiction.

B. Tribal Criminal Jurisdiction

1. Non-Indians

- a. Indian tribes do not have criminal jurisdiction to prosecute non-Indians in tribal court except where Congress has delegated federal authority. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194-95, 98 S. Ct. 1011 (1978).
- b. The Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304, allows qualifying tribes to exercise special domestic violence criminal jurisdiction over certain non-Indian abusers. Currently, only one tribe, Tulalip, exercises that authority.

2. Indians (tribal members and non-member Indians)

- a. Indian tribes do have criminal jurisdiction over Indians who are members of any federally recognized tribe. 25 U.S.C. § 1301(2).
- b. Limitations on tribal sentencing authority. The Indian Civil Rights Act, as amended in 1986, permits a tribe to impose criminal punishments up to a term of one year and a fine of

\$5,000 for any one criminal offense. In 2010 Congress amended 25 U.S.C. § 1302 establishing conditions under which tribal courts may exercise broader criminal jurisdiction. To date, only one tribe in Washington, Tulalip, has adopted that option.

- c. Limitations on rights of criminal defendants in tribal court. The Indian Civil Rights Act provides for protections similar to those of the Bill of Rights except that the assistance of counsel is normally at the defendant's expense (subject to exceptions).
3. Tribal jurisdiction may be concurrent. Tribes may exercise concurrent criminal jurisdiction with that of the federal government and the state government over crimes committed by Indians within Indian country or elsewhere within a tribe's jurisdiction. Because tribes are separate sovereigns, a successive criminal prosecution by a tribe and by the federal government is not barred by the Double Jeopardy Clause. *United States v. Wheeler*, 435 U.S. 313, 316-17, 98 S. Ct. 1079 (1978).

VI. Federal Jurisdiction Within Indian Country

A. Federal Civil Jurisdiction

1. Sources of federal law over Indians:
 - a. The Commerce Clause ("to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"), U.S. Const. art. I, § 8, cl. 3.
 - b. The Treaty Clause, U.S. Const. art. II, § 2, cl. 2. Since 1871, federal legislation has replaced treaty-making with tribes.
2. Constitutionality:
 - a. Federal laws affecting Indian tribes and their members are not considered race related legislation. It is subject to the rational relationship requirement instead of strict scrutiny. *Morton v. Mancari*, 417 U.S. 535, 553-54, 94 S. Ct. 2474 (1974).
3. General Federal Laws:
 - a. General federal laws are laws that are applicable to non-Indians as well as to Indians and Indian tribes. For example, the Fair Labor Standards Act applies to members of a tribe doing business on tribal lands. *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009).
 - b. Test: Federal laws of general applicability apply to Indian tribes and Indians unless:
 - i. The law touches exclusive rights of tribal self-governance in purely intramural matters;
 - ii. The application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or
 - iii. There is proof by legislative history or some other means that Congress intended the law not to apply to Indians on the reservation. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).
4. Federal court jurisdiction.

- a. Subject matter jurisdiction:
 - ii. Indians are considered citizens of the State where domiciled for diversity purposes.
 - iii. Indian tribes are not citizens of a State for diversity purposes. Jurisdiction requires a Federal Question.
 - iv. Tribal corporations are citizens of the State where located or incorporated.
- b. Personal jurisdiction: Minimum contact analysis applies.
- c. Exhaustion of remedies: Federal courts may hear challenges by non-Indians to tribal jurisdiction based on claims that federal law divested the tribe of authority. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856-57, 105 S. Ct. 2447 (1985). However, such challenges must first be heard in tribal court unless it is plain that tribal court jurisdiction is lacking so that exhaustion would serve no purpose other than delay. *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S. Ct. 2304 (2001). A tribal court plainly lacks jurisdiction where the basis of jurisdiction is not “colorable” or “plausible.”

VII. State Jurisdiction Within Indian Country

A. Acknowledgement of Tribal Court Jurisdiction

Cases brought in superior court shall be dismissed if a tribal court has exclusive jurisdiction. CR 82.5(a). If a tribal court has concurrent jurisdiction, the superior court may transfer the action to tribal court in the interest of justice. CR 82.5(b).

B. Recognition of Tribal Court Judgments

Tribal court orders are recognized and enforced in Washington state courts in matters where the tribal court had exclusive or concurrent jurisdiction unless the state court determines that the tribal court lacked jurisdiction over a party, or the subject matter, or denied due process of law as provided by the Indian Civil Rights Act. CR 82.5(c): “The superior courts of the State of Washington shall recognize, implement and enforce the orders, judgments and decrees of Indian tribal courts in matters in which either the exclusive or concurrent jurisdiction has been granted or reserved to an Indian tribal court of a federally recognized tribe under the Laws of the United States, unless the superior court finds the tribal court that rendered the order, judgment or decree (1) lacked jurisdiction over a party or the subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of orders, judgments and decrees of the superior courts of the State of Washington.” See e.g., *State v. Esquivel*, 132 Wn. App. 316, 321 22, 132 P.3d 751 (Div. III 2006) (violation of tribal court restraining order).

C. State jurisdiction generally

1. General rule: States have no jurisdiction over Indians within Indian country unless Congress has authorized that jurisdiction. However, states have jurisdiction over non-Indians within Indian country unless federal law preempts state authority. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45, 100 S. Ct. 2578 (1980) (timber regulations preempted state taxation of non-Indian logging for tribe).
2. Public Law 280, enacted in 1953, authorizes jurisdiction.

- a. Non-Indians. Washington has full civil and full criminal jurisdiction over non-Indians on all land within Indian country. *State v. Zack*, 2 Wn. App.2d 667, 413 P.3d 65 (2018).
- b. Indians. Washington has assumed some criminal jurisdiction and some civil jurisdiction over Indians within Indian country. In 1959, the Legislature authorized assumption of full civil and criminal jurisdiction upon the specific request of the tribe, and nine tribes so requested. In 1963, Washington amended RCW 37.12.010 to impose, without tribal consent, state criminal and civil jurisdiction as follows:
 - i. The State has full jurisdiction over Indians on off-reservation allotted trust lands. *Compare State v. Cooper*, 130 Wn.2d 770, 773, 928 P.2d 406 (1996) (child molestation on property held in trust as an Indian allotment outside Indian reservation) with *State v. Jim*, 173 Wn.2d 672, 680-81, 273 P.3d 434 (2012) (federal in-lieu fishing site held for tribes is an “established reservation” for purposes of RCW 37.12.010).
 - ii. The State has full jurisdiction over Indians on “non-trust” lands within reservations (i.e. fee patented lands of Indians or non-Indians);
 - iii. The State has civil jurisdiction over Indians anywhere else within an established reservation (i.e. tribal trust and allotted trust lands) with respect to only the following eight subject matters:
 - a. Compulsory school attendance;
 - b. Public assistance;
 - c. Domestic relations;
 - d. Mental illness;
 - e. Juvenile delinquency;
 - f. Adoption proceedings (modified by the Indian Child Welfare Act);
 - g. Dependent children (modified by the Indian Child Welfare Act); and
 - h. Operation of motor vehicles on public streets, alleys, roads, and highways.
- c. In other words, Washington does not have civil or criminal jurisdiction over Indians on trust lands within Indian country for any other issues besides these eight.

D. State Civil Jurisdiction

1. Within Indian Country – under Public Law 280

- a. Limited scope to adjudicate civil matters.
 - i. Public Law 280 was designed to allow states to adjudicate disputes in state courts involving Indians, not to allow the State to regulate. *Bryan v. Itasca County*, 426 U.S. 373, 391-92, 96 S. Ct. 2102 (1976) (excludes property tax). Public Law 280 opens Washington State courts to settle disputes between individuals arising within Indian country.
- b. Public Law 280 does not provide regulatory jurisdiction. For example, Public Law 280 does not give the State jurisdiction over the following Indian activities within Indian country:
 - i. Hunting and fishing;
 - ii. Taxation;

- iii. Zoning;
- iv. Gaming (except pursuant to a tribal state compact as provided in 25 U.S.C. § 2710);
- v. Probate of trust property;
- vi. Driving infractions that are not criminal offenses. *Colville Tribes v. Washington*, 938 F.2d 146, 148-49 (9th Cir. 1991) (state reduced speeding from a criminal offense to a traffic infraction).

2. Outside Indian Country

The State has full civil jurisdiction over Indians outside Indian country absent express federal law to the contrary. *Compare Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267 (1973) (state can tax tribal property outside reservation) with *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658, 674, 99 S. Ct. 3055 (1979) (treaties reserved off-reservation rights to take fish by Washington tribes).

E. State Criminal Jurisdiction

1. Within Indian country under Public Law 280.

- a. Non-Indians. Full jurisdiction over crimes committed by non-Indians.
- b. Indians. Full jurisdiction over crimes committed by Indians on reservations where tribe requested full criminal jurisdiction. Full jurisdiction over crimes committed by Indians on off-reservation trust lands, and on-reservation fee lands, and partial jurisdiction over crimes committed by Indians on trust or allotted lands within the eight subject matter areas.
 - i. Which state laws are criminal?
 - a. Law enforced must be prohibitory. The shorthand test is whether the conduct at issue violates the State's public policy.
 - b. A law is regulatory (not prohibitory) if state law permits the conduct at issue, subject to regulation.
 - c. The prohibitory/regulatory distinction is unclear, and courts consider a variety of factors such as nature of penalty, number of exceptions, revenue purpose. Example: Washington State has asserted criminal jurisdiction over operation of motor vehicles. However, Washington cannot regulate speeding because it is not a criminal offense, but only a civil infraction sanctioned by a fine. Washington can enforce against driving while intoxicated, however, because it is a criminal prohibitory statute. *State v. Abrahamson*, 157 Wn. App. 672, 683, 238 P.3d 533 (Div. I 2010) (driving while under the influence and attempting to elude). Example: Operation of a motor vehicle – State lacked jurisdiction over an Indian charged with unlawful possession of a firearm in a motor vehicle on a tribal road because the statute is regulatory.
- c. State Law Only. Public Law 280 applies only to state laws; it does not make county or city ordinances applicable.

2. **Outside Indian Country**

Indians and non-Indians: Full jurisdiction over crimes committed by non-Indians and Indians outside Indian country except where federal law provides otherwise. E.g. Indian treaty rights to take fish.

VIII. Indian Child Welfare Act

A. **What is ICWA?**

A federal statute that regulates state court “child custody” proceedings involving Indian children. The 1978 federal statute responded to the alarmingly high percentage of Indian families broken up by removal of children by non-tribal public and private agencies. See 25 U.S.C. § 1901 et seq. Washington adopted all substantive and procedural mandates of ICWA in 2011. RCW Chap. 13.38.

1. “Child custody” proceedings include:
 - a. Foster care placement;
 - b. Termination of parental rights;
 - c. Adoption. RCW 13.38.040(3).
2. “Child custody” does NOT include:
 - a. Placements arising out of dissolution of marriage or commission of a crime. RCW 13.38.040(3) or
 - b. Placements if the Indian parent never had custody of the Indian child. *Adoptive Couple v. Baby Girl*, 570 U.S.637, 133 S. Ct. 2552 (2013).
3. “Indian child” means an unmarried person under the age of 18 who is an enrolled member of a federally recognized tribe or is eligible for enrollment in the tribe and who has a biological parent who is a member of an Indian tribe. RCW 13.38.040(7). RCW 13.38.050 requires the party initiating a child custody proceeding to make a good faith effort to determine whether the child is an “Indian child.” The relevant Indian tribe is the final arbiter of whether the child is an Indian child. RCW 13.38.070(3)(b).

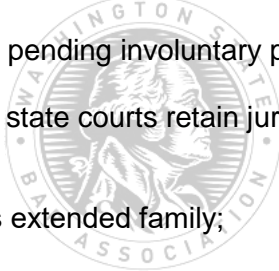
B. **Court Jurisdiction**

1. Tribal domiciled children.
 - a. Exclusive tribal court jurisdiction if the Indian child is:
 - i. Residing within the tribe’s reservation;
 - ii. Domiciled within the tribe’s reservation;
 - iii. Domicile of the child is the domicile of the parent;
 - iv. A ward of the tribal court. RCW 13.38.060.

- b. RCW 13.38.060 exceptions to exclusive tribal jurisdiction:
 - i. Consent by the tribe to the State's concurrent jurisdiction;
 - ii. Express declination of jurisdiction by the tribe; or
 - iii. Exercise of emergency jurisdiction by the State.
- 2. Off-Reservation Domiciled Children:
 - a. The state court has jurisdiction subject to transfer from state court to tribal court.
 - b. State courts must transfer the proceedings to tribal court upon request of the tribe or the Indian custodian, unless
 - i. Good cause exists not to transfer, or
 - ii. Either parent objects to transfer. RCW 13.38.080.

C. Rights of Tribes under ICWA

- 1. The tribe can intervene in state court proceedings covered by ICWA. RCW 13.38.090.
- 2. The tribe is entitled to notice of pending involuntary proceedings in state court. RCW 13.38.070(1).
- 3. Placement Preferences. When state courts retain jurisdiction they must follow ICWA placement preferences which are:
 - a. A member of the child's extended family;
 - b. Other members of the Indian child's tribe;
 - c. Other Indian families. RCW 13.38.180(3).



LAND USE

I. Growth Management Act. RCW 36.70A

A. Overview

1. Requires most Washington counties and cities to develop comprehensive plans and development regulations. RCW 36.70A.040.
2. Comprehensive plans must be coordinated and consistent with adjacent counties or cities. RCW 36.70A.100.
3. GMA spawned by controversy, not consensus, and will not be liberally construed. *Woods v Kittitas County*, 162 Wn.2d 597, 612 n. 8, 174 P.3d 25 (2007).
4. GMA Hierarchy – for some counties, planning starts with an overarching plan developed by more than one county. RCW 36.70A.210 (7). The overarching plan guides individual county comprehensive plans.
5. GMA sets out non-prioritized planning goals. RCW 36.70A.020.
6. Counties and cities must update comprehensive plans every eight years. RCW 36.70A.130(5)(a).
7. Plan must address eight elements: land use, housing, capital facilities, utilities, rural, transportation, economic development, and parks and recreation. RCW 36.70A.070(1)-(8).
8. Plan may include elements for conservation, solar energy, and recreation. RCW 36.70A.080(1)(a) and (b).
9. Local governments have broad discretion to adopt comprehensive plans under GMA. *Manke Lumber Co., Inc. v. Diehl*, 91 Wn. App. 793, 804, 959 P.2d 1173 (1998).
 - a. GMA is a “bottom up” approach (e.g., local approach), rather than a state-level decision-making approach. *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 511, 139 P.3d 1096 (2006).
 - b. Comprehensive plans are presumed valid upon adoption. RCW 36.70A.320(1).
10. Review
 - a. Standard of Review
 - i. Growth Hearing Board is required to find compliance unless the local action is clearly erroneous in view of the entire record and the goals and requirements of the GMA. RCW 36.70A.320(3).
 - b. Appellate review of GMHB decisions is pursuant to the APA, RCW Ch. 34.05, and based on the record before the agency. A court shall grant relief from an agency’s adjudicative order if it fails to meet any of nine standards delineated in RCW 34.05.570(3).

11. Amendments

- a. Comprehensive plans can be amended only once per year (some jurisdictions have longer cycles). RCW 36.70A.130(2)(a).

12. Development regulations (e.g., zoning) are required to carry out comprehensive plans and GMA. RCW 36.70A.040(2)(a).

- a. GMA does not create “bright line rules” regarding growth limitations or densities, and local governments may deviate from statewide planning norms if justified by “local circumstances” RCW 36.70A.070(5)(a). A county’s discretion “is bounded [...] by the goals and requirements of the GMA”. *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000).

B. Content of Comprehensive Plan

1. Urban Growth Areas

- a. An Urban Growth Area is subject to citizen challenge and may be invalidated if found contrary to the Growth Management Act. *King County v. Central Puget Sound Growth Mgt. Hearings Bd.*, 138 Wn.2d 161, 177, 979 P.2d 374 (1999).
- b. Inside UGA, growth is encouraged; outside UGA, growth is discouraged. RCW 36.70A.110 (1).

2. Natural Resource Lands

- a. Must be designated by counties. RCW 36.70A.170. And county must designate natural resource lands before it designates urban growth areas. *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn2d 38, 48, 959 P.2d 1091 (1998).
- b. Resource lands are “protected not for the sake of the ecological role but to ensure the viability of the resource-based industries that depend on them.” *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn2d 38, 47, 959 P.2d 1091 (1998).
- c. After resource lands are designated, adoption of implementing development regulations are required, to assure conservation of resource lands and protect use from incompatible activities. RCW 36.70A.040(4), .060(1)(a).
- d. Designations of natural resource lands are forest lands, agricultural lands and mineral resource lands. RCW 36.70A.170(1)(a)-(c).
 - I. Forest Lands Forest lands are lands that have long-term significance for the commercial production of timber. RCW 36.70A.170(1)(b).
 - II. Agricultural Lands Agricultural lands are lands with long-term significance for the production of food and other agricultural products. RCW 36.70A.170(1)(a).
 - a. Certain factors must be taken into account, including the land and soil, as well as the USDA Soil Survey information that identifies soil types. *Clark County v. Western Washington Growth Management Hearings Board*, 161

Wn. App. 204, 232-33, 254 P.3d 862 (2011), review granted and vacated in part on different grounds at 177 Wn.2d 136 (2013).

- b. Soil suitability is important factor in resource classification. *Futurewise v. Central Puget Sound Growth Management Hearing Bd.*, 141 Wn. App. 202, 207, 169 P.3d 499 (2007).
- c. Landowner intent is not conclusive. *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 42, 53, 959 P.2d 1091 (1998).
- d. Counties are authorized to exempt designated agricultural lands from other regulatory processes. *Clallam County v. Western Washington Growth Management Hearing Board*, 130 Wn. App. 127, 140, 121 P.3d 764 (2005).

- i. Mineral Resource Lands

Mineral resource lands are lands that have long-term significance for the extraction of minerals, RCW 36.70A.170(1)(c), and prohibit uses that conflict. RCW 36.70A.040(1) and .060(1).

- e. Consequence of designation – development regulations must conserve the land. RCW 36.70A.040(1) and .060(1).

3. Critical Areas

- a. GMA requires counties and cities to designate critical areas in their jurisdictions. RCW 36.70A.040(3); RCW 36.70A.060(2). There are five types of critical areas: wetlands, geologically hazardous areas, frequently flooded areas, fish and wildlife habitat, and aquifer recharge areas. RCW 36.70A.030(5).

- i. Wetlands

- a. DOC guidelines encourage cities and counties to use wetland ranking system developed by Washington Department of Ecology, federal government, and army corps of engineers. WAC 365-190-090(2).

- ii. Geological Hazards

- a. These are areas not suited to siting commercial, residential, or industrial development because of public health or safety concerns. RCW 36.70A.030(9).
- b. DOC guidelines identify different geological hazards (e.g., erosion hazard areas, landslide hazard areas, mine hazard areas, seismic hazard area, etc.). WAC 365-190-030(5), (10), (12), (18).

- iii. Frequently Flooded Areas

- a. These are lands within the 100-year flood plain and areas subject to flooding from high groundwater. WAC 365-190-030(8).
- b. DOC guidelines encourage cities and counties to identify and designate areas that may be impacted by global climate change, including sea-level rise. WAC 365-190-110(2)(d).

iv. Fish and Wildlife Habitats

- a. Areas that “serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may reduce the likelihood that the species will persist over the long term” WAC 365-190-030(6)(a).

v. Aquifer Recharge Areas.

- a. Defined as areas with a critical recharge effect on aquifers used for potable water. RCW 36.70A.030(5)(b).
- b. DOC guidelines recommend that cities and counties rank or categorize aquifer recharge areas based upon the vulnerability of the recharge area. WAC 365-190-100(4)(a).

b. General Provisions re: Critical Areas.

i. Designation of Critical Areas.

- a. All cities and counties in the state, regardless of whether they plan under the GMA, must designate critical areas, RCW 36.70A.170(1)(d), and must adopt development regulations to protect critical areas, RCW 36.70A.060(2).
- b. Local government does not have to enhance or improve function or values of critical areas, and it does not require restoration of critical areas, though GMA does permit it. *Swinomish Indian Tribal Cmty.v. WWGMHB*, 161 Wn.2d 415, 431, 166 P.3d 1198 (2007).
- c. Best Available Science- all counties and cities must “include best available science in developing policies and development regulations to protect the functions and values of critical areas.” RCW 36.70A.172(1).
- d. Limitations on critical area protections:
1. State law prohibits local governments from imposing any tax, fee, or charge on the development of land. RCW 82.02.020
 2. There are constitutional limitations on a government extracting property rights as condition of approving development. RCW 82.02.020; *Dolan v City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed 304 (1994).

4. Development Agreements

- a. The GMA requires that an applicant for a building permit for a single family residence or a development must produce water that is both legally and factually available. A county’s comprehensive plan cannot assume that water is available for all permit-exempt wells. The GMA requires evidence of water availability – i.e., even if water is legally available, can it be appropriated without conflicting with applicable minimum instream flows of surface water? *Whatcom County v. Hirst*, 186 Wn.2d 648, 687, 381 P.3d 1 (2016).

(i) *Hirst* prompts legislative amendments in 2018 to statutes governing building permit applications, RCW 19.27.097; factors considered in subdivision approvals, RCW 58.17.110; and applications for water permits, RCW 90.03.290.

- b. Must include development standards. RCW 36.70B.170(3)(h), including review procedures, project elements, design standards, and mitigation measures pursuant to SEPA. RCW 36.70B.170(3)(a), (c).
- c. Must address financing questions, including the amount and payment of impact fees, etc. RCW 36.70B.170(3)(b).
- d. Must negotiate phasing, build-out, or vesting period. RCW 36.70B.170(3)(g), (i).
- e. Parties
 - i. Between local government and a person having ownership or control over real property. RCW § 36.70B.170 (1).
- f. Vesting
 - i. Cannot vest impact fees, because impact fees are not “land use regulations” *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 529, 94 P.3d 366 (2004).

II. State Environmental Policy Act. RCW 43.21C.010, et seq

A. Purposes

1. To declare a state policy that encourages productive and enjoyable harmony between humankind and the environment.
2. To promote efforts that will prevent or eliminate damage to the environment and biosphere.
3. To stimulate the health and welfare of human beings.
4. To enrich the understanding of the ecological systems and natural resources important to the state and nation. RCW 43.21C.010.

B. 1995 Regulatory Reform

1. The Legislature stated its intent that “a primary role of environmental review under chapter 43.21C RCW is to focus on the gaps and overlaps that may exist in applicable laws and requirements related to a proposed action. The review of project actions conducted by counties, cities, and towns planning under RCW 36.70A.040 should integrate environmental review with project review. Chapter 43.21C RCW should not be used as a substitute for other land use planning and environmental requirements.” Finding-Intent-1995, ch.347, sec. 202, following RCW 43.21C.240(2).
2. To that end, the Legislature enacted RCW 43.21C.240, which required local planning commissions that approve development applications to mitigate any probable adverse environmental impacts by

reference to mitigation measures contained in local comprehensive plans and land use regulations or elsewhere in state law. RCW 43.21C.240.

3. Specifically, the Legislature began a process of integrated project review that has streamlined the incorporation of environmental analysis into the local project review process, eliminating some overlap and duplication of SEPA requirements with those of the GMA and other statutes. RCW 43.21C.240.
4. Counties, cities, or towns have the authority to determine, in the course of project review, that development regulations, the comprehensive plan, and other laws adequately address “specific probable adverse environmental impacts.” RCW 43.21C.240(4). If the local authority makes this determination in conformance with the statute, and if local approvals are conditioned on compliance with these requirements or mitigation measures, the local government “shall not impose additional mitigation under this chapter during project review.” *Id.*, Legislative finding (f). Project review shall be integrated with environmental analysis under this chapter. RCW 43.21C.240(4).

III. Shoreline Management Act. RCW 90.58 et seq

A. Purpose and Construction

1. The Shoreline Management Act of 1971 seeks to protect fragile shorelines through appropriate utilization, protection, restoration, and preservation. RCW 90.58.020. *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 103 P.3d 244 (2004), *aff'd*, 162 Wn.2d 683 (2007).
2. The SMA is to be liberally construed: “This chapter is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives and purposes for which it was enacted.” RCW 90.58.900.

B. Requirements

1. Local governments must develop shoreline master programs (SMPs). RCW 90.58.080(1).
2. “RCW 36.70A.480 governs the relationship between the shoreline master program and development regulations to protect critical areas that are adopted under RCW 36.70A RCW.” RCW 90.58.610.
 - a. “Development” under the SMA has been broadly defined to include dredging, filling, and hydraulic clam harvesting. RCW 90.58.030 (3)(a); *Clam Shacks of Am., Inc. v. Skagit County*, 109 Wn.2d 91, 743 P.2d 265 (1987).
3. SMPs have no effect until approved by the Department of Ecology. RCW 90.58.090(1).

C. Private Property Rights

1. “Local government should use a [planning] process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights. A process established for this purpose, related to the constitutional takings limitation, is set forth in a publication entitled, ‘State of Washington, Attorney General’s Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property,’ first published in February 1992. The attorney general is required to review and

update this process on at least an annual basis to maintain consistency with changes in case law by RCW 36.70A.370.” WAC 173-26-186(5).

2. Public Trust Doctrine.

- a. The requirements of the public trust doctrine are fully met by the legislatively drawn controls imposed by the Shoreline Management Act of 1971. *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987).
- b. The public trust doctrine does not allow trespass, but does protect public use of navigable water bodies up to and including ordinary high water mark. *Caminiti v. Boyle*, 107 Wn. 2d 662, 666, 732 P.2d 989 (1987).

D. “No net loss” shoreline

1. Local master programs shall include policies and regulations designed to achieve no net loss of those ecological functions.” WAC 173-26-186(8)(b). “Local master programs shall include regulations ensuring that exempt development in the aggregate will not cause a net loss of ecological functions of the shoreline.” *Id.* at (8)(b)(ii).
2. Shoreline master programs shall provide a level of protection to critical areas located within shorelines of the state that assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources. RCW 36.70A.480(4)

E. Restoration

1. Shoreline guidelines require local government to include planning for restoration of impaired shoreline ecological functions in their SMPs; plans will vary among local jurisdictions. WAC 173-26-201(2)(f).
2. “Restore” does not mean “returning the shoreline area to aboriginal or pre-European settlement conditions.” WAC 173-26-020(31).

F. Scientific Information

1. The shoreline guidelines do not use the term “best available science,” which is the term used in the GMA for considering science when designating critical areas. The shoreline guidelines for consideration of scientific information are similar, but different. WAC 173-26-201(2)(a), and (3)(d)(i)(A) and (B).

G. Shoreline Management Act As it Relates to the Growth Management Act

1. Critical areas within shoreline jurisdiction - GMA requires protection at least equal to level required by local government’s critical areas ordinances. RCW 36.70A.480(4)
2. Shorelines are not critical areas just by virtue of being shorelines; there must be critical area qualities to be a critical area. RCW 36.70A.030(5).
3. When a planning jurisdiction designates critical areas in its GMA, it is not required to designate, as critical, shorelines within the jurisdiction which have been designated as shorelines of statewide significance under the Shoreline Management Act (chapter 90.58 RCW). 2006 Op. Atty. Gen. Wash. No. 2.

4. Counties or cities planning under the GMA must include their shoreline goals and policies as an element of their comprehensive plan adopted under that Act. RCW 36.70A.480(1).
5. Use regulations and other parts of a local shoreline master program are classified as development regulations. RCW 36.70A.480(1).
6. Critical areas within jurisdiction of SMA are governed by SMA; critical areas outside the jurisdiction of the SMA are governed by GMA. RCW 36.70A.480 3(d) and 6.
7. The Growth Management Act (GMA), RCW 36.70A.010 et seq., does not apply to shoreline development. *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 866, 103 P.3d 244 (2004), disagreed with by *Preserve our Islands v. Shorelines Hearings Board*, 133 Wn. App. 503, 523, 137 P.3d 31 (2006).

IV. Growth Management Hearing Boards (GMHB). RCW 36.70A.250

- A.** The Board hears and determines allegations that a city, county, or state agency has not complied with the requirements of the GMA, and related provisions of the SMA and the SEPA. RCW 36.70A.280(1)(a).
1. GMHBs provide review of land use decisions. RCW 36.70C.030(1). A superior court has jurisdiction only if all parties to the proceeding before the board have agreed to direct review in the superior court. RCW 36.70A.295(1).

B. Authority of GMHB

1. “[T]he Board is empowered with the authority to invalidate a jurisdiction's comprehensive plan or development regulations where the Board (1) makes a finding of noncompliance; (2) remands; (3) makes a determination supported by findings and conclusions that the continued validity of the plan or regulation will substantially interfere with the fulfillment of the goals of the GMA ; and (4) specifies the portion of the action that is invalid and explains why. RCW 36.70A.302(1).” *Davidson Serles & Assocs. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 159 Wn. App. 148, 157, 244 P.3d 1003 (2010).
2. Hearing board's jurisdiction is limited to challenges of comprehensive plans, development regulations, and amendments to comprehensive plans and development regulations, and the board does not have jurisdiction to hear a petition challenging a special use overlay of an existing zone. *Feil v. E. Wash. Growth Mgmt. Hearing Bd.*, 153 Wn. App. 394, 406, 220 P.3d 1248 (2009).

V. Land Use Petition Act. RCW 36.70C

- A.** The 1995 regulatory reform legislation enacted provisions governing judicial review of land use determinations, known collectively as the Land Use Petition Act (LUPA).
- B.** LUPA does not apply to land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body such as the Shorelines Hearings Board or the Growth Management Hearings Board. Nor does LUPA apply to land use decisions made by bodies that are not part of a local jurisdiction or to claims for monetary damages or compensation.

- C. LUPA provides for expedited review of land use decisions and establishes specific review procedures, standing requirements, necessary petition contents, and standards for granting relief. The petition must be filed in the superior court and served on parties identified in the statute within twenty-one days of the issuance of the land use decision. RCWA 36.70C.040(3).
- D. A “land use decision” is defined as, “a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on ...: (a) An application for a project permit.” RCW 36.70C.020(2).
- E. The petition must include facts demonstrating the petitioner's standing, a concise statement of each error alleged to have been made, facts supporting the allegations of error, and a specific request for relief. RCWA 36.70C.070(6)-(9).

VI. Subdivisions

- A. **Generally**, divisions of land larger than five acres must get subdivision approval. RCW 58.17.040(2).
- B. **Other statutory exemptions exist**, such as for burial plots or divisions made by testamentary provisions. RCW 58.17.040(1) and (3).
- C. **Application process** – A proposed subdivision shall be considered at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official. RCW 58.17.033(1).
- D. **Vesting**
 1. The date on which development rights vest determines which land use laws, rules, and policies will apply to that development. *Adams v. Thurston County*, 70 Wn. App. 471, 475, 855 P.2d 284 (1993).
 2. Submission of a completed short plat application vests the right to develop, not merely divide, the land under the regulations in effect at the time of the submission. *Noble Manor Co. v. Pierce County*, 81 Wn. App. 141, 145, 913 P.2d 417 (1996), *aff'd*, 133 Wn.2d 269, 277, 943 P.2d 1378 (1997).
- E. **Under RCW 58.17.033 and RCW 19.27.095(1)**, rights vest in the zoning or other land use control ordinances in effect at the time or on the date of application.
- F. **Preliminary plat hearing**. Upon receipt of an application for preliminary plat approval, a date for a public hearing will be set. RCW 58.17.090(1).
- G. “[A] planning commission or planning agency... shall review all preliminary plats and make recommendations thereon to the city, town or county legislative body to assure conformance of the proposed subdivision to the general purposes of the comprehensive plan and to planning standards and specifications as adopted by the city, town or county.” RCW 58.17.100.
- H. **Final plat approval**. When subdivision proposed for final plat is approved, the relevant legislative body shall inscribe and execute its written approval on the face of the plat. RCW 58.17.170(1).

- I. Judicial review. Any decision approving or disapproving any plat shall be reviewable under 36.70C RCW. RCW 58.17.180.
 - 1. Standard of review
 - a. The proper review standard is limited to determining whether the action by the county was arbitrary or capricious. *Sparks v. Douglas County*, 127 Wn.2d 901, 908, 904 P.2d 738 (1995).
 - b. An action is arbitrary or capricious when the legislative body reaches its decision willfully and unreasonably, without consideration and in disregard of facts or circumstances. *Id.*
- J. Vacation and alteration of plats may be filed with the legislative authority of the city, town, or county in which the subdivision is located. RCW 58.17.212.



LANDLORD TENANT LAW

I. General Scope and Definitions of Washington “Residential Landlord Tenant Act”



A. Act applies to following living arrangements

1. “Dwelling unit” – structure or part of structure used as a home, residence, or sleeping place by one person or two or more people maintaining a common household. “Dwelling unit” includes single family residences, multiplexes, apartment buildings and mobile homes-RCW 59.18.030(9)
2. “Premises” – includes dwelling units as defined above, grounds, facilities and other areas or facilities held out for use by the tenant RCW 59.18.030(18)

B. Act does not apply to the following living arrangements: (RCW 59.18.040)

1. Residences at an institution where the residence is merely incidental to the provision of medical, religious, educational, or other services, such as a hospital, correctional facility, nursing home, or convent.
2. Occupancy under a bona fide money agreement to purchase or contract for sale of a dwelling unit where the tenant is the purchaser.
3. Residence in a motel, hotel, or other type of transient lodging.
4. Rental agreements for single family residences which are merely incidental to land leases used for agricultural purposes.

5. Rental agreements providing housing for seasonal agricultural employees where housing is provided in conjunction with employment.
6. Rental agreements with the State of Washington, Department of Natural Resources, on public lands.
7. Occupancy of an employee of a landlord who is providing services to the landlord on or about the premises.

C. Other Definitions

1. "Landlord" means owner, lessor, or sublessor of a dwelling unit or the property of which the unit is a part RCW 59.18.030 (14).
2. "Tenant" means any person entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement RCW 59.18.030(27).
3. "Rental Agreement" means all agreements that establish or modify the terms, conditions, rules, regulations or any other provision concerning the use and occupancy of a dwelling unit RCW 59.18.030(25).

II. Duties of a Landlord and Tenant Remedies

A. Duties of a Landlord (RCW 59.18.060)

1. In general, the landlord is required to, at all times during the tenancy, keep the premises fit for human habitation.
2. Landlord's specific duties include the following:
 - a. Maintain the premises according to all applicable codes, statutes and ordinances pertaining to the health and safety of the tenant (RCW 59.18.060(1)).
 - b. Maintain structural components including but not limited to, roofs, floors, walls, chimneys, fireplaces, foundations and other structural components in reasonably good repair as so to be usable (RCW 59.18.060(2)).
 - c. Keep common or shared areas clean, sanitary and safe from defects that could create fire hazards or accidents (RCW 59.18.060(3)).
 - d. Provide a reasonable program to control the infestation of insects, rodents or other pests at the outset of the tenancy, and during the tenancy unless the infestation is caused by the tenant (RCW 59.18.060(4)).
 - e. Make repairs and keep the premises in as good a condition as it was at the beginning of the tenancy (except for normal wear and tear) (RCW 59.18.060(5)).
 - f. Provide adequate locks and furnish keys to the tenant (RCW 59.18.060(6)).
 - g. Maintain all electrical, plumbing, heating and other facilities and appliances in reasonably good working order (RCW 59.18.060 (7)).
 - h. Maintain the units in reasonably weather tight condition RCW 59.18.060(9)).

- i. Except in the case of a single-family residence, provide and maintain appropriate receptacles in common areas for removal of ashes, rubbish and garbage incidental to the occupancy, and arrange for the reasonable and regular removal of such waste. RCW 59.18.060 (10)
 - j. Provide heat and hot water to tenants (RCW 59.18.060(11)).
 - k. Provide written notice to tenants regarding fire safety and protection information, including a statement that the dwelling is equipped with smoke detectors, and informing the tenant of his or her duty to maintain the smoke detector. (RCW 59.18.060(12(a))).
 - l. Provide tenants with information provided or approved by the department of health about the health hazards associated with exposure to indoor mold. (RCW 59.18.060(13))
 - m. Provide the tenant with the name and address of the landlord RCW 59.18.060(15).
3. The landlord is not required to repair a defective condition in the dwelling unit where the condition is caused by the tenant, the tenant's family, or the tenant's invitee, or where the tenant fails to allow the landlord access to the property to make repairs (RCW 59.18.060(14)).

B. Tenant's Remedies

1. If during the tenancy, a landlord fails to comply with or carry out the duties in RCW 59.18.060, the tenant may provide written notice to the landlord regarding the defect, specifying the premises involved and the nature of the defective condition (RCW 59.18.070).
2. After receiving written notice of a defective condition or needed repairs, the landlord has the following time frames in which to respond/repair:
 - a. Where the defective condition involves hot or cold water, heat, electricity or is imminently hazardous, the landlord has 24 hours to take action (RCW 59.18.070(1)).
 - b. Where the defective condition involves the refrigerator, range/oven, or major plumbing fixture, the landlord has 72 hours to respond/repair (RCW 59.18.070(2)).
 - c. For all other defective conditions or repair, the landlord has no more than 10 days to respond/repair (RCW 59.18.070(3)).
3. If the landlord fails to respond to or repair a defective condition in the above time frames, and if the tenant is current on his or her rent (RCW 59.18.080) the tenant has the following options:
 - a. Terminate the rental agreement and quit the premises upon written notice to the landlord, without any further obligation to pay rent after the quitting date (RCW 59.18.090(1)). The tenant will also be entitled to a pro rata refund of any pre-paid rent (RCW 59.18.090(1)).
 - b. Bring a lawsuit (RCW 59.18.090(2)).
 - c. Obtain and submit a written estimate to the landlord of the cost to repair the defective condition (RCW 59.18.100(1)) and deduct up to one month's rental of the tenant's unit for the cost of repair after the landlord has had an opportunity to inspect the repair (RCW 59.18.100(2)).

III. Duties of Tenant and Landlord Remedies

A. Tenant's Duties (RCW 59.18.130)

1. Tenant has the duty to pay rent at the agreed upon rate at the agreed upon intervals (RCW 59.18.130).
2. In addition to paying rent, the tenant has the following specific duties:
 - a. Keep the tenant's premises reasonably clean and sanitary (RCW 59.18.130(1)).
 - b. Dispose of trash and pay for any necessary extermination and fumigation needs if caused by tenant (RCW 59.18.130(2)).
 - c. Properly operate all electrical, gas, heat, plumbing and other fixtures or appliances (RCW 59.18.130(3)).
 - d. Avoid intentional or willful destruction or damage to the property (RCW 59.18.130(4)).
 - e. Not permit nuisance or common waste on or to the premises (RCW 59.18.130(5)).
 - f. Not engage in any drug-related activity or allow any subtenant, sublessee, or anyone else to engage in drug-related activity on the premises (RCW 59.18.130(6)).
 - g. Maintain all smoke detection devices in working order (RCW 59.18.130(7)).
 - h. Avoid any activity on the premises which is imminently hazardous to the safety of others on the premises, including any assaults that result in arrest, or the use of a firearm that results in arrest (RCW 59.18.130(8)).
 - i. Not engage in any gang-related activity on the premises or allow others to engage in such activity (RCW 59.18.130(9)).
 - j. Upon termination of the tenancy, restore the premises to their initial condition, except for normal wear and tear (RCW 59.18.130(10)).

A. Landlord's Remedies (RCW 59.18.180)

1. If the tenant fails to comply with his or her duties during the term of the tenancy, the landlord may give written notice to the tenant, specifying the failure (RCW 59.18.170).
2. If the tenant's failure to comply with his or her duties affects the health and safety of the tenant or others, or increases the risk of fire or other hazards, the tenant must correct the defect or failure within 30 days of written notice from the landlord (RCW 59.18.180(1)).
3. If the tenant fails to remedy the defect within 30 days of written notice, the landlord may enter the premises, remedy the repair, and submit a bill for the actual cost of repair to the tenant, to be paid with the next rental payment (RCW 59.18.180(1)).
4. Any substantial failure to comply with the tenant's duties will be grounds for starting an unlawful detainer action against the tenant (RCW 59.18.180(1)).

IV. Landlord's Rights and Limits on those Rights

A. Landlord's Right of Entry

1. The tenant shall not unreasonably withhold his or her consent to the landlord to enter the premises in order to inspect the premises, make necessary or agreed repairs, or provide services or improvements (RCW 59.18.150(1)).
2. The landlord may not abuse the right of entry/access or use the right to harass the tenant. Except in cases of emergency, the landlord must give the tenant at least two days' notice of intent to enter, and may only enter at reasonable times (RCW 59.18.150(6)).

B. Retaliatory Action by Landlord

1. As long as the tenant is in compliance with his or her duties, the landlord may not take or threaten to take any retaliatory action against the tenant because of a good faith complaint to a governmental authority concerning the landlord's failure to comply with any codes, statutes, ordinances, or other regulations regarding the maintenance or operation of the premises, if the condition could impair the health or safety of the tenant or the tenant's assertion of any rights or remedies under the statute (RCW 59.18.240(1)).
2. Reprisal or retaliatory action includes (RCW 59.18.240):
 - a. Eviction of the tenant.
 - b. Increasing the tenant's rent.
 - c. Reducing services to the tenant.
 - d. Increasing the obligations of the tenant.
2. Any eviction, rent increase, or service decrease taken by the landlord within 90 days after a good faith or lawful act by the tenant is presumed to be a "reprisal or retaliatory action" against the tenant (RCW 59.18.250).

C. Deposits

1. A landlord cannot require a fee from a prospective tenant for being placed on a waiting list to be considered as a tenant (RCW 59.18.253(1)).
2. If any money is collected from the tenant by the landlord to secure performance under a lease, the lease must be in writing and must specify the terms and conditions under which the deposit, or a portion of the deposit, may be withheld by the landlord at the termination of the lease (RCW 59.18.253(2)).
3. If all or part of a deposit may be withheld by a landlord for damages to the premises, the rental agreement must so state in writing (RCW 59.18.253(2)).
4. No deposit may be taken by the landlord unless the rental agreement is in writing and the landlord provides the tenant with a written checklist specifically describing the condition of the unit at the outset of the tenancy (RCW 59.18.260).
5. No deposit may be withheld on the basis of normal wear and tear from ordinary use of the premises (RCW 59.18.260).

6. Deposits paid to a landlord must be kept in a trust account in a financial institution or with a licensed escrow agent (RCW 59.18.270).
7. Within **21** days of the termination of the rental agreement, the landlord must return the deposit, or portion of deposit with a written statement of the basis for retaining any of the deposit (RCW 59.18.280). If the landlord fails to give a written statement together with any refund due within **twenty one** days of the termination of the tenancy, the landlord will be liable to the tenant for the full deposit amount (RCW 59.18.280).
8. Any “nonrefundable” fees paid to the landlord must be specified in a written lease as nonrefundable. Such fees cannot be designated as or called “deposits” (RCW 59.18.285).

D. Removal and Hold Over of a Tenant

1. It is illegal for the landlord to remove or exclude a tenant from his or her premises, except under a court order authorizing the removal of the tenant (RCW 59.18.290(1)).
2. It is illegal for the tenant to hold over in the premises after the termination of the rental agreement, except pursuant to a court order so authorizing (RCW 59.18.290(2)).

E. Tenant’s Failure to Pay Rent/Abandonment of Property

1. If the tenant is month to month and fails to pay rent, and indicates by words or actions that he or she does not intend to resume or continue the tenancy, the tenant is responsible for rent for the 30 days following the date the landlord learns of the abandonment or the date the next regular payment would have been due (whichever occurs first) (RCW 59.18.310(1)).
2. If the tenancy is for a term greater than month to month, the tenant is liable for the lesser of the entire rent due for the remainder of the term, or all rent accrued during the period reasonably required to rerent the premises, plus any different in the rental prices, plus actual costs incurred in rerenting the premises (RCW 59.18.310(2)).
3. If the tenant is a member of the armed forces, or the tenant’s spouse or dependent is a member of the armed forces (including National Guard or Reserves), the tenant may terminate the rental agreement on less than 20-days’ notice if the tenant receives reassignment or deployment orders that do not allow for a 20-day notice of termination (RCW 59.18.200(b)).

F. Tenant’s Property

1. If a tenant abandons the rental property, and defaults in rent, the landlord may enter the premises and take possession of any property of the tenant and store the property in a reasonably secure place (RCW 59.18.310).
2. The landlord shall notify the tenant in writing that he or she has possession of the property, the address/location of the secured property, and notice of intent to dispose of the property/sell the property, and the tenant’s right to reclaim the property (RCW 59.18.310).
3. After 45 days from the date of notice to the tenant, the landlord may sell the property, including personal papers, family pictures, and keepsakes. Any income derived from the sale may be applied to any money due to the landlord, including the costs of storage (RCW 59.18.310).
4. If the tenant makes a written request to the landlord for the return of the property, prior to the expiration of 45 days, the landlord shall return the property after the tenant has paid the drayage and storage costs (RCW 59.18.310).

V. Unlawful Detainer Actions

- A.** Unlawful detainer actions are the sole legal means for removing a tenant that is wrongfully occupying (“unlawfully detaining”) the premises (RCW 59.18.290(1)).
- B.** A landlord may evict a tenant from the premises pursuant to an unlawful detainer action (RCW 59.18.29(1)). The Residential Landlord Tenant Act forbids “self-help” to remove a tenant wrongfully in possession of the premises: “It shall be unlawful for the landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing.” (RCW 59.18.290(1)). As such, a landlord may not use physical force or even peaceable means (such as changing the locks in the tenant’s absence) to oust a holdover tenant (17 Wash.Prac. Real Estate §6.80 (2d ed.) citing W. Stoebuck & D. Whitman, Law of Property § 6.80 (3d ed. 2000)).
- C.** The Washington Unlawful Detainer Statute (RCW 59.12 et seq) permits the landlord to bring an action to evict a tenant, and also allows the landlord to collect back rent and in some cases recover penalties, damages, or even attorney fees (RCW 59.18.290).
- D.** A tenant becomes a “holdover tenant” or a tenant who is wrongfully occupying the premises after he or she has acted wrongfully in some way, described by statute, and after the landlord has given some statutorily proscribed notice, and the tenant has failed to cure or vacate within the time described. Only after that time is the tenant “in unlawful detainer” (RCW 59.12.030).\
- E.** Following are the six wrongful acts, with the required notice period listed in parentheses: (1) holding over after the end of a fixed term (no notice required); (2) holding a periodic tenancy after a general notice to quit is received (20 days); (3) default in rent (three days); (4) breach of any covenant other than a covenant to pay rent (10 days); (5) committing or permitting waste, conducting an unlawful business, or committing or permitting a nuisance (three days); (6) entering as a trespasser (three days); and (7) committing or permitting gang-related activity on the premises. (RCW 59.12.030).

Under RCW 59.18.180(4), “[i]f criminal activity on the premises as described in RCW 59.18.130(8) is alleged to be the basis for termination of the tenancy, and the tenant is arrested as a result of this activity, then the compliance provisions of this section do not apply and the landlord may proceed directly to an unlawful detainer action against the tenant who was arrested for this activity.”

1. With acts 1,2,5,6,and 7, the default is not curable, and the tenant has no choice but to vacate within the notice period, or be in “unlawful detainer” (17 Wash.Prac. Real Estate §6.80 (2d ed.)).
2. With acts 3 and 4, the tenant may either cure or vacate within the notice period (Id.).

F. Notice Requirement for Unlawful Detainer Actions

1. Notice must be in writing, and should also contain the usual requirements for notice:
 - a. Notice should be dated;
 - b. Designate the termination date;
 - c. Describe the premises;
 - d. Describe statutory grounds for notice;
 - e. State how the tenant may cure if the notice is in the alternative;

- f. State that the tenancy will end and the tenant will be in unlawful detainer if he or she does not comply; and
 - g. Be signed by the landlord or his/her agent (17 Wash.Prac. Real Estate §6.80 (2d Ed.)).
 2. If the tenant fails to comply with the landlord's notice provision, the landlord may proceed with an unlawful detainer action, and he or she must prove that the landlord complied with the notice requirements. (*Woodward v. Blanchett*, 36 Wn.2d 27, 31, 216 P.2d 228 (1950)).
 3. Manner of serving notice, therefore, should be strictly followed. RCW 59.12.040 enumerates three alternative methods for serving notice, with personal service being the preferred method.
 - a. The landlord or agent should go to the leased premises and attempt personal service on the tenant there, by handing him or her the notice in person; or
 - b. If the tenant is not on or in the premises, then a copy of the notice must be left with/handed to a "person of suitable age and discretion" who is present, and the landlord must also mail a copy of the notice to the tenant "at his place of residence" if known; or
 - c. If service cannot be made personally, as in a., or if both steps of method b. cannot be accomplished, then the person serving notice must affix a copy in a "conspicuous place" on the premises; hand a copy to any person "there residing" if any such person is present; AND mail a copy to the tenant at the demised premises.
 4. After service of the notice is accomplished by one of the three above methods, the person serving the notice must file an affidavit of service (similar to an affidavit of process), which will be filed in the subsequent unlawful detainer action (RCW 59.12.040).

G. Commencing the Unlawful Detainer Action

1. If the notice period passes and the tenant does not vacate or cure the default, he or she is in "unlawful detainer," and the landlord may now commence a statutory unlawful detainer action by summons and complaint (RCW 59.12.070 and RCW 59.12.080).
2. The unlawful detainer statute contains special provisions for the summons, complaint, and service that may differ from regular civil actions.
 - a. Return time for the summons is anywhere from 7 to 30 days, rather than the usual 20 days (RCW 59.12.070) (17 Wash. Prac., Real Estate, § 6.80 (2d Ed)).
 - b. If the unlawful detainer action is based on default of rent, the complaint must state the amount of rent sought (RCW 59.12.070).
 - c. If a landlord wishes to seek a judgment for "double" the amount of "rent" plus "damages" the complaint must state or request such a doubling of damages. Doubling is only allowed if specifically requested in the complaint. (*Peterson v. Crockett*, 158 Wash. 631, 641, 291 P.721 (1930).
2. At the commencement of the action, or anytime during the pendency of the action, the landlord may obtain possession of the premises under a writ of restitution (RCW 59.12.090). The landlord must first post a bond in an amount proscribed by the court before such a writ will issue. If the tenant wishes to block restitution of the premises, the tenant must post a counter-bond (RCW 59.12.100).

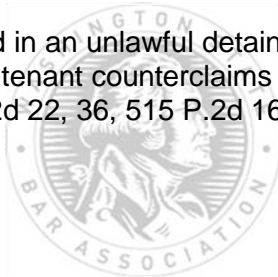
- H.** The tenant must answer the complaint (regardless of whether the landlord obtains a writ of restitution). If the tenant fails to do so, the court shall render a judgment by default (RCW 59.12.120).

I. Unlawful Detainer Trial

1. If the tenant answers the complaint, the matter is set for trial (which may be a jury trial) (RCW 59.12.130).
2. If the landlord prevails at trial, he or she will be awarded possession (if he or she has not already obtained possession by writ of restitution) AND will be awarded judgment for twice the amount of any damages and rent found due (RCW 59.12.170).
3. When the unlawful detainer action is based on non-payment of rent, the judgment is suspended for 5 days, during which the tenant may “defeat” the judgment and preserve the tenancy by paying the amount of the judgment (RCW 59.12.170).

J. Unlawful Detainer is a Special Action

1. Because an unlawful detainer action is a special statutory action, in which procedures are different and speedier than ordinary civil actions, it cannot be turned into any ordinary action (17 Wash. Prac., Real Estate §6.80 (2d ed)).
2. The court has no jurisdiction over issues, other than those set forth in the statute. Therefore, the plaintiff may not add claims to the unlawful detainer action, such as an ordinary action for rent, and action for ejectment; for injunction; or to determine the ownership of goods on the leased premises. These issues would have to be tried in a separate action (17 Wash. Prac., Real Estate §6.80 (2d ed)).
3. A counterclaim may be allowed in an unlawful detainer action, where the claim is brought on the ground of rent default, and the tenant counterclaims for money damages that can be offset against rent (*Foisy v. Wyman*, 83 Wn.2d 22, 36, 515 P.2d 160 (1973)).



PROFESSIONAL RESPONSIBILITY

The Washington Rules of Professional Conduct (RPC) are modeled on the American Bar Association's Model Rules of Professional Conduct (MRPC). In 2003, a committee performed a comprehensive study and considered appropriate changes to the RPC. In 2006, the Supreme Court adopted the MRPC together with the associated commentary, except where a compelling and articulable reason for deviation existed, most notably with the rules dealing with trust accounts. This outline summarizes those RPC sections that deviate significantly, with links to those rules.

I. RPC 1.5 Fees

- A. [RPC 1.5](#) deals with fees and outlines factors to consider in determining the reasonableness of a lawyer's fee. This rule outlines specific types of fee arrangements and how each is to be administered and handled, including contingent fees, flat fees and retainers.
- B. Significant Washington Differences: The MRPC does not contain the equivalent of RPC 1.5(a)(9), which states that, in Washington, one factor to consider in determining the reasonableness of fees is the terms of the agreement, including whether the fee agreement or confirming writing demonstrates that the lawyer reasonably and fairly disclosed to the client the material elements of the fee agreement and the lawyer's billing practices.
- C. RPC 1.5(e)(2) allows the lawyer and a duly authorized lawyer referral service of one of the county bar associations of this state to divide fees. The MRPC do not.
- D. The MRPC does not contain an equivalent to RPC 1.5(f), which outlines the circumstances under which a lawyer may charge a retainer or flat fee and not put the funds into a trust account. Washington allows a lawyer to charge a retainer fee if agreed to in writing. Such retainer fee shall not be placed in the lawyer's trust account. Washington also allows a lawyer to charge a flat fee so long as the flat fee is agreed to in writing ahead of time, in a manner that can easily be understood by the client, and includes the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt and will not be placed into a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed. If the flat fee arrangement meets the RPC requirements, it shall not be placed in the lawyer's trust account.
- E. MRPC 1.5 does not contain subsection RPC 1.5(f)(3), which requires a lawyer to take "reasonable and prompt action" in resolving a fee dispute.

II. RPC 1.6 Confidentiality of Information

- A. [RPC 1.6](#) sets forth those circumstances in which a lawyer must reveal information regarding client representation. This rule also outlines those instances in which disclosure is allowed, but not required, and those instances in which disclosure is prohibited.
- B. Significant Washington Differences: Unlike the MRPC, Washington requires disclosure to prevent reasonably certain death or substantial bodily harm. RPC 1.6(b)(1). Washington also allows disclosure to prevent the client from committing a crime. RPC 1.6(b)(2). The MRPC do not contain such an exception to

non-disclosure. Comment 14 to 1.6(b)(1) provides some limitations on disclosure such as, where practicable, persuading “the client to take suitable action to obviate the need for disclosure” and limiting adverse disclosure to the extent necessary to prevent death or substantial bodily harm.

Washington has not adopted the equivalent of MRPC 1.6(b)(6), which allows disclosure pursuant to “other law.” Washington has not adopted this wording out of concern that confidentiality issues in this context are best left to a judicial body. See RPC Comment 24.

Washington has not adopted the equivalent of MRPC 1.6(b)(7). This provision allows a lawyer to reveal information to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Washington’s RPC 1.6(b)(7), which is not found in the MRPC, permits a lawyer to reveal client information to inform a tribunal about a client’s breach of fiduciary responsibility if the client is a court-appointed fiduciary..

Washington RPC 1.6(c) was added adopting the relevant MRPC provision requiring a lawyer to make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to representation of a client.

III. RPC 1.7 Conflict of Interest: Current Clients

- A. [RPC 1.7](#) describes those circumstances that result in a conflict of interest affecting a current client. The rule also outlines those steps that must be taken to cure such a conflict if representation is undertaken. The rule makes clear that not all conflicts of interests are curable.
- B. Significant Washington Differences: Unlike the MRPC, in Washington, where a concurrent conflict of interest exists, a lawyer must obtain authorization from a client before any disclosures relating to waiver of that conflict can be made.

Comment 22 to MRPC 1.7 discusses waiver of future conflicts. The MRPC appear to allow such future waiver with limitation and a determination of the extent to which the client reasonably understands the material risk such waiver entails. Washington has reserved this comment and has not explicitly allowed waivers of future conflicts.

IV. RPC 1.8 Conflict of Interest: Current Clients: Specific Rules

- A. [RPC 1.8](#) outlines a series of specific prohibited actions between a lawyer and a client. The rule specifically disallows certain types of business transactions with clients; disclosures that would harm the client; substantial gifts (unless the client and lawyer are related); literary or media rights regarding the representation; aggregate settlements; agreements or settlements regarding malpractice, proprietary rights in the case outcome; sexual relations between lawyer and client and cases against a related lawyer. This rule also deals with certain financial issues, such as restrictions on lawyers advancing money for litigation, limitations on accepting payment by third parties and limitations on financial arrangements for indigent contracts.

B. Significant Washington Differences: RPC 1.8(e) allows a lawyer to advance litigation costs if the client remains ultimately liable, win or lose, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence. Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. See, Comment 21. Washington also allows for the advancement of costs in a class action, in which case repayment may be contingent upon the outcome. By contrast, the MRPC permit repayment of advanced court costs and expenses to be contingent on the outcome of a matter.

RPC 1.8(j)(2) specifically prohibits sexual relations with a representative of a current client if it would damage or prejudice the client. RPC 1.8(j)(3) clarifies that this prohibition applies to any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

The MRPC do not contain a provision equivalent to RCP 1.8(l), which prohibits representation based on a lawyer's personal conflict arising from his or her relationship with another lawyer unless a client gives informed consent, etc. See Comment 24. The RPC list these relationships to include parent, child, sibling, or spouse, or other close familial or intimate relationship. The MRPC do comment that personal relationships can create a concurrent conflict, but it does not include the specifics that RPC 1.8(l) includes. See MRPC 1.7, Comment 11.

MRPC 1.8 does not contain a provision equivalent to paragraph RPC 1.8(m) of Washington's Rule. Paragraph (m) specifies that it is a conflict of interest for a lawyer to enter into or accept compensation under an indigent defense contract that does not provide for the payment of funds to compensate conflict counsel for fees and expenses. Washington acknowledges that an indigent defense contract by which the contracting lawyer or law firm assumes the obligation to pay conflict counsel from the proceeds of the contract, without further payment from the governmental entity, creates an acute financial disincentive for the lawyer either to investigate or declare the existence of actual or potential conflicts of interest that require the employment of conflict counsel. These same concerns apply when indigent defense contracts require the lawyer or law firm to pay for costs and expenses of investigation and experts services. See RPC Comments 25, 27-28.

V. RPC 1.10 Imputation of Conflicts of Interest: General Rule

- A.** [RPC 1.10](#) outlines those circumstances in which a specific lawyer or an entire firm may be unable to represent a client because of a conflict of interest. The rule also outlines the specific steps that must be taken to effectively screen a conflicted lawyer from a case so that other members in the firm may handle the case.
- B.** Significant Washington Difference: While both the MRPC and the RPC permit screening of lateral hires, the screening provisions in Washington RPC 1.10 differ from those in the Model Rule. Under RPC 5.3, RPC 1.10 applies to nonlawyer assistants and those who previously worked as non-lawyers at a law firm. See *Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000); *Richard v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001). See also RPC Comment 11.

VI. RPC 1.13 Organization as Client

- A. [RPC 1.13](#) outlines a lawyer's obligations and responsibilities when representing an organization as opposed to an individual client, including representation of a governmental agency. This rule also outlines those actions a lawyer may take to protect substantial injury to the organization.
- B. Significant Washington Difference: The MRPC do not include an equivalent to RPC 1.13(h). Washington adopted this provision to address the obligations of a lawyer who is not a public officer or employee but is representing a discrete governmental agency unit. Washington will generally consider such a lawyer to be representing the discrete governmental agency or unit rather than the broader entity. There are exceptions where a written agreement to the contrary exists or the chief legal officer or chief executive officer of the broader governmental agency gives the lawyer timely written notice of designation of the client.

VII. RPC 1.15A Safeguarding Property

- A. [RPC 1.15A](#) primarily deals with client trust accounts. The rule outlines a lawyer's obligation to hold and protect client funds in an appropriate trust account. While outlining the types of trust accounts appropriate in each circumstance, the rule also specifically addresses the types of funds that must be deposited in trust accounts versus those funds that should not be placed in trust accounts. It also addresses the withdrawal and disbursements of trust account monies.
- B. Significant Washington Differences: RPC 1.15A is substantially different from MRPC 1.15. While both sections refer to trust accounts in general, Washington is much more specific about the set up and use of trust accounts.

Types of trust accounts: Washington requires that a lawyer either use an interest-bearing account or an interest-bearing IOLTA account. The type of account used will depend on the circumstances. Generally, if the money to be placed in trust will produce a positive net return for the client, it must be placed in a non-IOLTA trust account with interest paid to the client, or a pooled account with accounting allowing interest to be paid to each person. If the trust money will not be held for a longer period of time or will not produce a positive net return, the lawyer may place the money in an IOLTA account. A client whose funds should be held in a non-IOLTA account may request that his or her funds be placed in an IOLTA account. In determining what type of account to use and whether funds will produce a positive net return, the lawyer may only look at factors as follows: the amount of interest the funds would earn based on the current interest rate and expected period of deposit; the cost of establishing and administering the account, including the lawyer's services; the cost of preparing tax reports for accrued interest to beneficiary; and the capability of the financial institution to calculate and pay interest to individuals.

Deposits: Client trust money must be kept separate from the lawyer's money. Legal fees and costs paid in advance must be deposited in the trust account and withdrawn only as earned or as expenses are incurred (see below for withdrawal requirements). Property in which two or more persons claim interest must be placed in trust until the dispute is resolved. No funds belonging to the lawyer may be kept in the client trust account, except for funds to cover bank charges, amounts potentially due to lawyer (which must be withdrawn at the earliest opportunity), and funds necessary to restore proper balances.

Records: Trust records must be kept for seven years after return of property. Trust assets must be identified by proper records. Receipts must be deposited intact. Records must be reconciled as often as bank statements or at least quarterly. A lawyer must reconcile his or her check register balance to his or her bank statement balance and to the combined total of all client ledger records. Only a lawyer admitted to practice law may be a signatory on the account.

Withdrawals/Disbursements: Trust property must be properly disbursed to the proper party. Funds may be withdrawn to cover client costs when necessary, and after giving reasonable notice to the client through a billing statement or other document, may be withdrawn for earned fees. Withdrawals must be made only to a named payee, not to cash and can be done by check or electronic transfer. Disbursements cannot be made until trust account deposits have cleared the banking process, unless the lawyer and bank have a written agreement for personal guarantee by the lawyer. Disbursements to a client cannot exceed the funds of that person and funds of one client cannot be used for anyone else.

VIII. RPC 1.15B Required Trust Account Records

- A. A lawyer must maintain current trust account records. [RPC 1.15B](#) provides detailed requirements for client trust account records, including the length of time records must be kept and the specific types of information that must be kept by a lawyer.
- B. Significant Washington Differences: RPC 1.15B has no substantially similar counterpart in the Model Rules. It is, however, based on the ABA Model Rules for Client Trust Account Records (formerly Model Rules on Financial Recordkeeping).

Generally, trust account records must be kept for a minimum of seven years and must include, at least:

1. Checkbook register or equivalent for each trust account, including entries for all receipts, disbursements, and transfers, and containing at least:
 - a. identification of the client matter for which trust funds were received, disbursed, or transferred;
 - b. the date on which trust funds were received, disbursed, or transferred;
 - c. the check number for each disbursement;
 - d. the payor or payee for or from which trust funds were received, disbursed, or transferred; and
 - e. the new trust account balance after each receipt, disbursement, or transfer.
2. Individual client ledger records containing either a separate page for each client or an equivalent electronic record showing all individual receipts, disbursements, or transfers, and also containing:
 - a. identification of the purpose for which trust funds were received, disbursed, or transferred;
 - b. the date on which trust funds were received, disbursed or transferred;
 - c. the check number for each disbursement;
 - d. the payor or payee for or from which trust funds were received, disbursed, or transferred; and

- e. the new client fund balance after each receipt, disbursement, or transfer.
3. Copies of any agreements pertaining to fees and costs;
4. Copies of any statements or accountings to clients or third parties showing the disbursement of funds to them or on their behalf;
5. Copies of bills for legal fees and expenses rendered to clients;
6. Copies of invoices, bills or other documents supporting all disbursements or transfers from the trust account;
7. Bank statements, copies of deposit slips, and cancelled checks or their equivalent;
8. Copies of all trust account client ledger reconciliations; and
9. Copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them. (Note: Washington does not require that the lawyer keep the complete client file for seven years, although many lawyers choose to do so).

IX. RPC 3.3 Candor Toward the Tribunal

- A. [RPC 3.3](#) governs a lawyer's conduct before a tribunal. This rule generally prohibits a lawyer from making false statements, offering false evidence or failing to correct false statements already made. The rule requires the lawyer to disclose all non-protected material facts to the tribunal.
- B. Significant Washington Differences: RPC 3.3 and its counterpart in the MRPC differ in important respects. In general, the MRPC require a lawyer to disclose certain client actions such as false testimony and evidence to the tribunal, even if these disclosures would require disclosure of information otherwise protected by RPC 1.6. Washington does not allow disclosures to be made to the tribunal if the disclosure would be prohibited by RPC 1.6. In Washington, if a lawyer learns of false evidence or testimony that was offered, the lawyer shall try to convince the client to consent to disclosure. Where the client refuses, the lawyer may seek to withdraw from representation in accordance with RPC 1.16. See Comment 15.

RPC 3.3(a)(2) prohibits a lawyer from failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, unless such disclosure is prohibited by RPC 1.6.

RPC 3.3(e) allows a lawyer to refuse to offer evidence that the lawyer reasonably believes is false.

X. RPC 3.4 Fairness to Opposing Party and Counsel

- A. [RPC 3.4](#) prohibits certain actions and behaviors by a lawyer toward another party or toward a tribunal. This rule generally requires a lawyer to act with honesty and fairness toward third parties.
- B. Significant Washington Difference: Washington did not adopt MRPC 3.4(f), which delineates circumstances in which a lawyer may request that a person other than a client refrain from voluntarily

giving information to another party, because this provision is inconsistent with Washington law. See, *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984) (holding that only employees who have authority to bind the corporation are parties to litigation). Under the MRPC, a lawyer is allowed to ask an employee of a client to refrain from voluntarily giving information. The RPC do not allow this. Advising or requesting that a person other than a client refrain from voluntarily giving information to another party may violate other Rules. See, e.g., Rule 8.4(d).

XI. RPC 3.6 Trial Publicity

- A. [RPC 3.6](#) prohibits extrajudicial statements that will likely be made public and which have a tendency to materially prejudice the proceedings. This rule also outlines the types of statements that are generally allowed. The rule allows a lawyer to make an extrajudicial statement in order to protect a client from prejudice to recent publicity not initiated by the lawyer or client.
- B. Significant Washington Difference: Washington has provided guidelines for applying this rule. See [RPC Comment 9](#). These guidelines are not found in the MRPC and can be found in the Appendix to the RPC.

XII. RPC 3.7 Lawyer as a Witness

- A. [RPC 3.7](#) prohibits a lawyer acting as both an advocate and necessary witness at trial. This rule outlines a number of exceptions to the general prohibition.
- B. Significant Washington Difference: In addition to the exceptions contained in the MRPC to the general rule that a lawyer not advocate at a trial in which the lawyer is likely to be a necessary witness, Washington includes several exceptions, including where the testimony is uncontested and where the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate. When a lawyer is called to testify as a witness by the adverse party, there is a risk that Rule 3.7 is being inappropriately used as a tactic to obtain disqualification of the lawyer. RPC 3.7(a)(4) is intended to confer discretion on the tribunal in determining whether disqualification is truly warranted in such circumstances. See [RPC Comment 8](#). The lawyer must also consider whether a conflict of interest exists (e.g. a substantial conflict exists between client's and lawyer's testimony) under [RPC 1.7](#). See [Comment 6](#).

XIII. RPC 3.8 Special Responsibilities of a Prosecutor

- A. [RPC 3.8](#) outlines the special duties imposed on a prosecutor in criminal matters. Under this rule, prosecution of a charge must be supported by probable cause, a prosecutor must use reasonable efforts to ensure a fair trial, a prosecutor may not seek to obtain waiver of important pre-trial rights, a prosecutor must timely disclose evidence, a prosecutor generally may not subpoena a lawyer to present evidence about a client, and a prosecutor must refrain from making prejudicial extrajudicial statements. This rule also imposes post-conviction obligations relating to evidence of innocence.

- B.** Significant Washington Differences: MRPC § 3.8(g) differs in wording from RPC 3.8(g). In Washington, the post-trial requirement that a prosecutor disclose new evidence tending to mitigate the guilt of the accused to the court and to the defendant comes into play if the prosecutor believes the new evidence creates a reasonable likelihood that the convicted defendant *is innocent* of the offense. MRPC 3.8(g) requires that the prosecutor undertake investigation to determine whether the defendant was convicted of an offense that the defendant *did not commit*. RPC 3.8(i) includes a safe harbor provision, found only in the MRPC comments, which states that a prosecutor's good faith but erroneous independent judgment about the significance of post-conviction evidence of innocence does not violate the Rule. Finally, MRPC 3.8(h), which would require that a prosecutor seek to remedy a conviction if he or she knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was wrongly convicted of an offense, was not adopted in Washington.

XIV. RPC 4.2 Communications with Person Represented by Counsel

- A.** [RPC 4.2](#) prohibits a lawyer from communicating with a person the lawyer knows to be represented by counsel unless the other lawyer consents or the communication is authorized by court order.
- B.** Significant Washington Difference: Unlike the MRPC, Washington does not prohibit a lawyer's communication with employees of a represented organization, even if those employees' acts or omissions may be imputed to the organization. The rule only prohibits communication with employees who supervise, direct, regularly consult with the organization's lawyer concerning the matter, or who have the authority to obligate the organization regarding the matter. Comment 7. For example, in a medical malpractice suit against a hospital, a plaintiff's lawyer would not be prohibited from interviewing the nurses or other employees outside of the presence of the hospital's lawyer. Employees should be considered "parties" for the purposes of RPC 4.2 only if, under applicable Washington law, they have managing authority sufficient to give them the right to speak for, and bind the corporation. *Wright v. Group Health Hospital*, 103 Wn.2d 192, 201, 691 P.2d 564 (1984).

XV. RPC 4.3 Dealing With Unrepresented Person

- A.** [RPC 4.3](#) proscribes a lawyer's communications with potentially adverse, unrepresented persons. If the lawyer is representing a client, the lawyer must affirmatively act to correct any misunderstanding about the lawyer's role in a case. Where the interests of a person could be in conflict with the interests of the lawyer's client, the rule prohibits the lawyer from giving legal advice, other than the advice to secure counsel.
- B.** Significant Washington Differences: Washington adds two comments to MRPC 4.3. The first, Comment 3, provides that a person who has limited representation under RPC 1.2(a) should be considered unrepresented for the purpose of RPC 4.3 unless the lawyer had been notified that he or she is to communicate only with the limited representation lawyer during a specified period of time and/or on a specified subject matter.

Comment 4 clarifies that a government lawyer can give general information about laws and procedures related to claims against the government without violating the rule.

XVI. RPC 4.4 Respect for Rights of Third Persons

- A. RPC 4.4(a) prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person while representing a client. The rule also prohibits a lawyer from using methods of obtaining evidence that violate the legal rights of a person. RPC 4.4(b) requires a lawyer who receives an inadvertently sent document or electronically stored information relating to the representation of the lawyer's client to promptly notify the sender.
- B. Significant Washington Differences: The text of RPC 4.4 is identical to MRPC 4.4, but Washington adds Comment 4 which clarifies that the rule can apply to a lawyer's assertion or inquiry about a third person's immigration status when the lawyer's purpose is to intimidate, coerce, or obstruct that person from participating in a civil matter. Such an assertion carries a significant danger of interfering with the proper functioning of the justice system. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010).

XVII. RPC 5.1 Responsibilities of a Partner or Supervisory Lawyer

- A. [RPC 5.1](#) addresses a managing lawyer's responsibility to ensure that other lawyers in his firm conform to the Rules of Professional Conduct. The Rule also sets out circumstances where a lawyer could be held responsible for another lawyer's misconduct.
- B. Significant Washington Difference: Washington's Comment 7 to RPC 5.1 clarifies that, outside of the circumstances described by this rule and by RPC 8.4(a) (prohibiting a lawyer from violating the rules of professional conduct through the acts of another), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate lawyer.

XVIII. RPC 5.4 Professional Independence of a Lawyer

- A. [RPC 5.4](#) aims to protect the professional independence of a lawyer by prohibiting a lawyer from sharing legal fees with a non-lawyer except in certain circumstances; prohibiting a lawyer from forming a partnership or professional corporation with a non-lawyer if the partnership or corporate activities include the practice of law; and prohibiting third parties from directing the lawyer's professional judgment.
- B. Significant Washington Difference: Unlike the MRPC, the RPC allows a lawyer who is authorized to complete the legal business of a deceased lawyer to pay the lawyer's estate a proportion of the lawyer's total compensation so long as it "fairly represents the services rendered by the deceased lawyer." RPC 5.4(a)(5).

However, unlike MRPC 5.4(a)(4), Washington's RPC does not allow lawyers to share court awarded legal fees with a nonprofit organization that employed, retained or recommended the lawyer in the matter.

XIX. RPC 5.5 Unauthorized Practice of Law: Multijurisdictional Practice of Law

- A. [RPC 5.5](#) addresses the multijurisdictional practice of law and prohibits a lawyer from practicing in any jurisdiction in which he or she is not licensed. The rule also provides a number of exceptions, such as when a lawyer associates with a lawyer licensed in the jurisdiction or when the legal services are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is licensed. The lawyer admitted in this jurisdiction must actively participate in and share responsibility for the representation of the client. The rule also allows for lawyers licensed outside of the jurisdiction to act as in-house counsel within Washington and allows lawyers admitted to the federal courts to practice in those courts so long as the lawyer is in good standing in another jurisdiction.
- B. Significant Washington Difference: Both MRPC 5.5(d)(1) and RPC 5.5(d)(1) allow an in-house corporate lawyer or government lawyer to provide legal services to his or her institutional client or to its organizational affiliates. But Washington differs in that it applies this exception only to lawyers who are providing services on a temporary basis. If an employed lawyer establishes an office or other systematic presence in Washington for the purposes of rendering legal services to the employer, he must seek the appropriate admission to the Bar of the State of Washington, i.e., general admission under Admission to Practice Rule 3 or house counsel admission under Admission to Practice Rule 8(f). RPC Comment 17.

XX. RPC 5.6 Restrictions on Right to Practice

- A. [RPC 5.6](#) prohibits lawyers from offering or making an agreement that restricts his or her right to practice.
- B. Significant Washington Difference: The Washington revision to this rule makes clear that RPC 5.6 does not preclude restrictions in a lawyer's plea agreement in a criminal matter, or a stipulation to discipline under the Rules for Enforcement of Lawyer Conduct [ELC]. RPC Comment 3.

XXI. RPC 5.8 Misconduct Involving Disbarred, Suspended, Resigned and Inactive Lawyers

- A. [RPC 5.8](#) prohibits a lawyer from engaging in any practice of law without an a form of license authorizing the active practice of law. The rule further proscribes a lawyer's professional association with a lawyer who has been disbarred, suspended, or who has resigned in lieu of disbarment or discipline. For example, the rule prohibits a lawyer from practicing law with or making an arrangement or the division of fees with such a lawyer.
- B. Significant Washington Difference: There is no equivalent Rule in the MRPC.

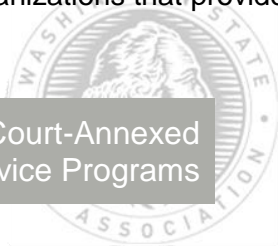
XXII. RPC 6.1 Pro Bono Publico Service

- A. [RPC 6.1](#) imposes an aspirational professional responsibility on a lawyer to provide at least 30 hours of pro bono publico services every year. The rule describes the types of services that a lawyer should provide to meet this responsibility. The responsibility set forth in this rule is not intended to be enforced through a disciplinary process.
- B. Significant Washington Differences: Washington reduces the aspirational target for pro bono publico service contained in the MRPC from 50 hours annually to a minimum 30 hours. See MRPC 6.1. However, the Washington rule sets up a voluntary pro bono publico reporting system and provides for recognition by the WSBA if lawyers render at least 50 hours of pro bono publico service.

The Washington rule also eliminates the preference contained in the MRPC that a substantial majority of pro bono publico hours be delivered without fee or expectation of fee to persons of limited means or organizations designed to address the needs of persons of limited means, with the remainder of pro bono publico service provided through other types of civic, charitable, or religious work. The RPC treats both types of service as equal in fulfilling the pro bono publico service obligation. Compare RPC 6.1(a) and (b) with MRPC 6.1(a) and (b).

Finally, RPC 6.1 does not include the final paragraph of MRPC 6.1, which states that a lawyer should voluntarily contribute financially to organizations that provide legal services to low income clients.

XXIII. RPC 6.5 Nonprofit and Court-Annexed Limited Legal Service Programs



- A. [RPC 6.5](#) loosens the conflicts of interest rules in recognition of the conflicts that could occur when a lawyer provides short-term legal services through a non-profit organization or court. In general, these rules apply in this context only if the lawyer knows of the conflict.
- B. Significant Washington Differences: The Washington rule clarifies that for RPC 6.5 to apply, there must not be any expectation that the lawyer will continue the representation or receive a fee for the services. RPC 6.5(a).

The Washington rule includes RPC 1.18(c) as one of the conflict rules affected by this rule. See RPC 6.5(a)(1) and Comments 1 and 3.

Even if a lawyer knows there is a conflict of interest, the lawyer can still provide sufficient assistance to determine the eligibility of the client for assistance and to make an appropriate referral of the client to another program. RPC 6.5(a)(1).

The rule states that a lawyer is not subject to the rules regarding conflicts of interest in providing limited legal services to a client if (i) the program lawyers representing the clients are screened by effective means from the opposing client's protected client information; (ii) each client is notified of the conflict and the screening mechanism used to prohibit the dissemination of protected client information; and (iii) the program is able to demonstrate by convincing evidence that no material protected client information was transmitted by the personally disqualified lawyers to the lawyers representing the client before implementation of the screening mechanism and notice to the opposing client. RPC 6.5(a)(3)(i)-(iii).

As noted in comment 6 to the Washington rule, Washington has a unique civil legal services delivery system, which uses a centralized telephone intake and referral system to access free civil legal services and recognizes that lawyers who help provide these services will likely receive confidential information from adverse parties. The risk that information gleaned will be used against the material interests of either party is low in comparison to the need for services. When there is a risk, screening and notice are required. Even if there is actual knowledge of a conflict, the conflicts rules do not apply if there is an effective screening program enacted within the program.

XXIV. RPC 7.2 Advertising

- A.** [RPC 7.2](#) contains rules regulating lawyer advertising. RPC 7.2 allows a lawyer to advertise services through written, recorded or electronic communication, including public media, so long as this advertising does not violate RPC 7.1 and 7.3. The rule also prohibits a lawyer from paying for referrals, except for certain defined instances. The rule requires that any advertising communication include the name and office address of at least one lawyer or law firm responsible for its content.
- B.** Significant Washington Differences: Unlike the MRPC, Washington prohibits reciprocal referral agreements with non-lawyer professionals. *Compare* RPC 7.2(b)(4) with MRPC 7.2(b)(4).

Washington only permits a lawyer to pay the usual charges of a not-for profit lawyer referral service. RPC 7.2(b)(2). Unlike the MRPC, Washington does not recognize an exception for “qualified lawyer referral services,” i.e., a lawyer referral service that is approved by an appropriate regulatory authority as affording adequate protections. MRPC 7.2, Comment 6.

XXV. RPC 7.3 Solicitation of Clients

- A.** [RPC 7.3\(a\)](#) prohibits a lawyer from “live” solicitation of clients, whether by in-person, telephone or real-time electronic contact when a significant motive is the lawyer’s pecuniary gain. The rule contains exceptions when the client is a lawyer, has a prior relationship with the lawyer, or has consented to the contact by requesting a referral through a non-profit referral service. The proscription does not apply to solicitations by third parties for pre-paid insurance plans. RPC 7.3(d)

Even if otherwise allowed under RPC 7.3(a), a lawyer is prohibited from such live contact if the client has made known that he or she does not want to be solicited or the solicitation involves coercion, duress, or harassment. See RPC 7.3(b).

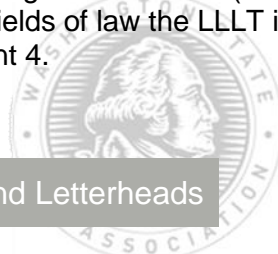
- B.** Significant Washington Difference: The Washington rule clarifies that a lawyer cannot use a third person to directly solicit professional employment from a potential client, except under certain circumstances. Compare RPC 7.3(a) with MRPC 7.3(a). In Washington, such circumstances include a client who has consented to the contact by requesting a referral from a not-for-profit referral service. RPC 7.3(a)(3). This provision was adopted to facilitate communications between lawyers and potential clients who have specifically requested a referral. RPC Comment 10.

Even if a lawyer receives a referral from a third party, the lawyer should exercise caution in contacting the client directly by in-person live telephone or real time electronic contact. The lawyer should confirm the request for contact with the source of the referral prior to initiating the contact. RPC Comment 9.

Unlike MRPC 7.3(c), Washington does not require that written, recorded or electronic communication from a lawyer soliciting professional employment include the words “Advertising Material” on the outside envelope. RPC Comment 11.

XXVI. RPC 7.4 Communications of Fields of Practice and Specialization

- A. [RPC 7.4](#) permits a lawyer to indicate an area of practice in communications about the lawyer’s service, but does not allow a lawyer to call himself or herself a “specialist” except under certain circumstances. The rule also allows patent and admiralty attorneys to use particular designations regarding their fields of practice.
- B. Significant Washington Difference: The MRPC allow a lawyer to call himself or herself a specialist if he or she has been certified by an approved organization or the American Bar Association. MRPC 7.4(d). In contrast, Washington does not recognize specialties in the practice of law. Lawyers in Washington can only use the terms “certified,” “specialist” or “expert” upon issuance of an identifying certificate or award, or upon recognition by an organization and if the reference is (1) truthful; (2) the certifying organization is identified; and (3) the reference also contains a statement that the Supreme Court of Washington does not recognize certification and that the certification is not a requirement to practice law in the state. RPC 7.4(d). In advertising a limited license legal technician’s (LLLT) services, Washington requires communication regarding the limited fields of law the LLLT is licensed for and not state nor imply a broader authority to practice. Comment 4.



XXVII. RPC 7.5 Firm Names and Letterheads

- A. [RPC 7.5](#) allows a lawyer to use a trade name if it is not misleading under RPC 7.1. A law firm with multi-jurisdictional offices may use the same name in each jurisdiction, but the letterhead must contain jurisdictional limitations for each of the lawyers listed. RPC 7.5(b). A lawyer holding a public office cannot be included in a law firm name during any period where the lawyer is not actively and regularly practicing with the firm. RPC 7.5(c). Finally, lawyers cannot state or imply that they practice in a partnership or other organization unless that statement is factually true. RPC 7.5(d).
- B. Significant Washington Difference: Comment 3 to RPC 7.5 is not contained in the MRPC. This comment further clarifies RPC 7.5(d). It states that lawyers practicing out of the same office who are not partners, shareholders of a professional corporation, or members of professional limited liability company or partnership may not join their names together. Such lawyers must have separate letterheads, cards and pleading paper and must sign their name individually at the end of all pleadings and correspondence, unless they are employees or of counsel to the firm.

XXVIII. RPC 8. 1 Bar Admission and Disciplinary Matters

- A. [RPC 8.1](#) provides that, in making an application to the Bar in connection with admission, reinstatement, or in a disciplinary matter, it is misconduct for a lawyer to knowingly make a false statement of material fact or fail to disclose a fact necessary to correct a misapprehension. It is also misconduct to knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.
- B. Significant Washington Differences: Unlike MRPC 8.1, which references only bar admission or disciplinary matters, Washington extends the rule to reinstatement applications. Comment 4 makes clear that a lawyer's obligation under this rule is in addition to the lawyer's obligations under the Rules for Enforcement of Lawyer Conduct [ELC].

XXIX. RPC 8.3 Reporting Professional Misconduct

- A. [RPC 8.3](#) provides that a lawyer should report violations of the RPC that raises a substantial question as to a lawyer's or judge's honesty, trustworthiness, or fitness to practice or hold office, unless doing so would violate RPC 1.6.
- B. Significant Washington Differences: In Washington, lawyers are encouraged, but not required, to report the misconduct of other lawyers or judges. Unlike the MRPC, which would not require a lawyer to report misconduct if it would require disclosure of information protected under RPC 1.6, the RPC specifically prohibits such disclosure. See, *In re Schafer*, 149 Wn.3d 148, 66 P.3d 1036 (2003).

Washington also provides that there is no aspiration of reporting when a lawyer learns about information or misconduct in the course of a lawyer's or judge's participation in an approved lawyers or judges assistance program.

XXX. RPC 8.4 Misconduct

- A. [RPC 8.4](#) contains a catch-all list of prohibitions on a lawyer's conduct. RPC 8.4(a) through (f) are identical to the MRPC and apply whether or not the misconduct occurred during the representation of a client.
- B. Significant Washington Differences: RPC 8.4(d) provides that it is misconduct to engage in conduct prejudicial to the administration of justice. As stated above, this rule subpart is identical to its MRPC counterpart. However, the Washington Supreme Court has limited construction of the phrase "conduct prejudicial to the administration of justice" to extend only to violations of practice norms and physical interference with the administration of justice. *In re Curran*, 115 Wn.2d 747, 766, 801 P.2d 962 (1990).

Washington's RPC 8.4(f)(2) also states a lawyer is prohibited from knowingly assisting a limited license legal technician (LLLT) in conduct that violates the RPCs or other law.

Washington's RPC 8.4(g)-(n) do not appear in the Model Rules.

1. RPC 8.4(g) provides that it is professional misconduct for a lawyer to 1) commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital state, 2) in connection with the lawyer's professional activities. The rule does not, however, preclude a lawyer from declining to represent a client in accordance with RPC 1.16.

2. RPC 8.4(h) provides that, in representing a client, it is professional misconduct to engage in conduct that is: 1) prejudicial to the administration of justice; 2) toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or other court personnel or officers; and 3) that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status. This rule does not prohibit legitimate advocacy based on these factors. RPC Comment 3.

While the MRPC do not have a counterpart to RPC 8.4(h), comment 3 to the Model Rule has similar language. This comment provides that a lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, would violate RPC 8.4(d) when such actions are prejudicial to the administration of justice.

3. RPC 8.4(i) prohibits a lawyer from engaging in acts involving moral turpitude, unjustified act of assault, or other acts which reflect disregard for the rule of law. It does not matter if the behavior was committed by a lawyer acting in the course of his or her profession, or if the act constitutes a felony or a misdemeanor. A finding of moral turpitude is separate from the determination of guilt in a criminal proceeding. *In re McGrath*, 98 Wn.2d 337, 342, 655 P.2d 232 (1982). Moral turpitude is determined from the inherent immoral nature of the act. *Id.* Conduct reflecting disregard of the rule of law applies only to violations of the criminal law. *Curran*, 115 Wn.2d at 758.
4. RPC 8.4(j) states that it is misconduct for a lawyer to willfully disobey a court order.
5. RPC 8.4(k) states that it is professional misconduct for a lawyer to violate his oath as attorney. See, [Rule 5 of the Admission to Practice Rules](#).
6. RPC 8.4(l) provides that it is misconduct to violate a disciplinary duty or sanction under the Washington Rules for Enforcement of Lawyer conduct, including the duties in [ELC 1.5](#). This rule provides that a lawyer violates RPC 8.4(l) and may be disciplined for failing to respond, appear, or otherwise participate in a disciplinary matter.
7. RPC 8.4(m) provides that it is misconduct for a lawyer, while serving as a judge, to violate the Code of Judicial Conduct. This rule gives the court the ability to limit a former judge's practice of law based on conduct while on the bench. Tom Andrews, et. al., *The Law of Lawyering in Washington* (Wash. State Bar Assoc. 2012), 12-30. *But see* RPC 8.5(c), which limits RPC 8.4(m) as a vehicle for the discipline of judges.
8. RPC 8.4(n) provides that it is misconduct for a lawyer to engage in conduct demonstrating unfitness to practice law. This rule requires that there be a nexus between the conduct and the characteristics relevant to the practice of law. *See Curran*, 115 Wn.2d at 768 (lawyer's conduct in driving while intoxicated did not have the required nexus to the practice of law, although the conduct did violate other provisions of the rule).

XXXI. RPC 8.5 Disciplinary Authority; Choice of Law

- A. [RPC 8.5\(a\)](#) deals with disciplinary jurisdiction and choice of law. Washington has jurisdiction over any lawyer admitted in the state, regardless of where the conduct occurred. Washington also has disciplinary authority over a lawyer who is not admitted to practice in Washington, but provides or offers to provide

legal services here.

RPC 8.5(b) states that the ethics rules of another jurisdiction may apply in determining whether a lawyer has engaged in misconduct. If the conduct occurred in connection with a tribunal, the rules of the jurisdiction in which the tribunal sits apply. RPC 8.5(b)(1). For all other conduct, the rules of the jurisdiction where the conduct occurred or where its predominant effect will occur may be used. RPC 8.5(b)(2).

RPC 8.5(c) states that a lawyer, while serving as a judge or justice, is not subject to the disciplinary authority under the RPC or the Rules for Enforcement of Lawyer Conduct (ELC) for acts performed in his or her judicial capacity or as a candidate for judicial office. Further, this rule provides that disciplinary authority should not be exercised for the identical conduct if the violation of the CJC pertains to the role of the judiciary and does not relate to the judge or justice's fitness to practice law.

- B. Significant Washington Difference:** The Washington Supreme Court added subsection (c) to this rule in 2010. As noted above, RPC 8.4(m) provides that it is misconduct for a lawyer to violate the Code of Judicial Conduct. RPC 8.5(c) limits the application of RPC 8.4(m) by stating that a judge is not subject to the disciplinary authority under this rule unless there is disciplinary action by the Commission on Judicial Conduct or the Supreme Court. Even then, the disciplinary authority should not be exercised unless the misconduct relates to the judge or justice's fitness to practice law.

Comments 8- 13 are not contained in the comments to the model rules.

Comment 8 describes the Commission on Judicial Conduct's authority in Washington and provides definitions of "judge" and "justice." The terms are defined to include justices of the Supreme Court, judges of the court of appeals, superior courts, judges pro tem, court commissioners and magistrates.

Comment 9 describes circumstances where acts would be considered in a judicial capacity. Generally, these include acts involving the making of judicial decisions, the performance of judicial duties, or the discharge of administrative responsibilities in connection with judicial office. Such acts do not include conduct occurring prior to service as a judge (except during a successful judicial campaign) or conduct outside of a judge's judicial capacity.

Comment 10 confirms that RPC 8.4(c) does not prevent the exercise of disciplinary authority over a judicial officer after he or she has been disciplined by the Commission on Judicial Conduct or the Supreme Court. Nor does it prevent the exercise of such authority over a former judicial officer or a lawyer who serves part time as a judicial officer for acts performed by him or her as a lawyer.

Comment 12 clarifies that 8.5(c) applies only to successful candidates for judicial office. An unsuccessful candidate could be disciplined under RPC 8.2(b) and/or 8.4(m).

Comment 13 states that RPC 8.5(c) applies only to judges and justices who are within the jurisdiction of the Commission on Judicial Conduct. It does not apply to federal judges, administrative law judges, or tribal judges.

PUBLIC RECORDS ACT

I. What is the Public Records Act?

- A. In 1972 the voters in Washington adopted Initiative 276, which required that most records maintained by state, county, and city governments be made available to members of the public.
- B. The latest revisions of the public records statutes are found in chapter 42.56 RCW which is referred to as the Public Records Act.
- C. The Public Records Act is a “strongly worded mandate for broad disclosure of public records” and should be “liberally construed to promote full access to public records, and its exemptions are to be narrowly construed.” *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997); see also RCW 42.56.030 (“the people insist on remaining informed so that they may maintain control over the instruments that they have created.”)
- D. The Washington State Attorney General’s Office has created model rules, chapter 44-14 WAC, that may be consulted for best practices and may be adopted by state and local agencies, WAC 44-14-00001.

II. What are Public Records?

- A. “Public record,” under the Public Records Act, includes “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW 42.56.010(3).
- B. “Writing,” under the Public Records Act, means “handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.” RCW 42.56.010(4).
- C. The Public Records Act applies to government agencies as defined by statute. “Agency” includes all state agencies and all local agencies. “State agency” includes “every state office, department, division, bureau, board, commission, or other state agency.” “Local agency” includes “every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.” RCW 42.56.010(1).
- D. The Public Records Act applies to electronic records in addition to paper records. *E.g.*, *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011); *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 141, 240 P.3d 1149 (2010) (metadata associated with public records is subject to disclosure under the Public Records Act).
- E. Public records can include records that are not stored at an agency. *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 141, 240 P.3d 1149 (2010) (“If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined.”); see WAC 44-14-03001(3).

1. Example: If an agency employee uses personal email or texting from a mobile device to conduct agency business, emails contained on the employee's computer or texts on the employee's cell phone may be subject to disclosure under the Public Records Act. *O'Neill v City of Shoreline*, 170 Wn. 2d at 138 (email); *Nissen v. Pierce County*, 183 Wn. 2d 863, 357 P.3d 45 (2015) (texting).

III. How Is a Request Made Under the Public Records Act?

- A. A public records request must be directed to a government entity that is subject to the Public Records Act. RCW 42.56.080.
- B. No particular form of request is required by the Public Records Act. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004). An agency must make its own reasonable rules and regulations, and these rules can include the preferred form of requests, but agencies must honor requests made to it for "identifiable public records," regardless of form, unless there is an applicable exemption. RCW 42.56.080; RCW 42.56.100.
- C. A records request is considered to include an "identifiable public record" when the requestor provides a "reasonable description" of the record "enabling the government employee to locate the requested records." *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998). Requests for research to be done, or information to be provided that is not the subject of an identifiable public record, does not constitute a proper request for public records. *Smith v. Okanogan County*, 100 Wn. App. 7, 13-14 (2000).
- D. A request does not need to provide information as to the purpose for the request, except to establish whether inspection and copying might violate an exception within the Public Records Act. RCW 42.56.080. Further, the Public Records Act forbids agencies from distinguishing among persons requesting records, with the exception of inmates who may be subject to a different standard. RCW 42.56.080; RCW 42.56.565.
- E. Failure to respond to a request for clarification from an agency excuses the agency from responding to the initial request. RCW 42.56.520.

IV. How Does An Agency Respond to a Public Records Request?

- A. Responses to requests for public records shall be made promptly. RCW 42.56.520.
- B. Within five business days of receiving a public record request, an agency must, under RCW 42.56.520:
 1. Provide the record; or
 2. Provide an internet address and link on the agency's web site to the specific records requested (Note: if the person who made the request notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow that person to view copies using an agency computer); or
 3. Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to respond to the request. This may include:
 - a. Time to locate and assemble the information requested.

- b. Time needed to notify third persons or agencies affected by the request.
 - c. Time to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.
 - d. Time for the government to ask the person to clarify what information he or she is seeking. If the person fails to clarify the request, the agency need not respond to it; or
4. Deny the request. If responsive records are withheld, the agency must provide a written statement of the exemption that supports the withholding of each record and a brief explanation of how the exemption applies to the withheld record. *Sanders v. State*, 169 Wn. 2d 827, 838, 240 P.3d 120 (2010).

C. Redactions on records must be accompanied by a written statement of the exemption supporting each redaction and a brief explanation of how the exemption applies to the redacted material. *Id.*

D. An agency cannot deny a request because the request is overbroad, but is allowed to seek clarification from the person who made the request in order to better ascertain what records are being sought. RCW 42.56.080; RCW 42.56.520; WAC 44-14-04003(8).

E. Agencies are not required to create documents in order to comply with a request for public information. *Smith v. Okanogan County*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000).

F. Charges for Public Records.

1. No fee shall be charged for the inspection of public records, and no fee shall be charged for locating public records or preparing them for copying (e.g., applying redactions). An agency may include charges for staff costs that are directly related to copying or transmitting public records as part of its fee schedule if it has adopted one (see F.2, below). RCW 42.56.120; see WAC 44-14-07001.
2. An agency may adopt, after notice and public hearing, a fee schedule for providing copies of public records, based on the agency's actual costs. Alternatively, an agency may adopt a statutory default fee schedule if it meets certain requirements. RCW 42.56.120.
3. The agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. *Id.*

G. Providing Records on Installment Basis.

1. When the request is for a large number of records, the government will provide for access, inspection, and copying in installments, if it would be practical to provide the records in that way. RCW 42.56.080; WAC 44-14-040.
2. If, within thirty days, the requestor fails to inspect the entire set of records or one or more of the installments, the government may stop searching for the remaining records and close the request. WAC 44-14-040(10).

H. Notification to Persons Named in the Requested Record.

1. A person named in a request for records, or to whom the requested record specifically pertains, may enjoin the release of such records. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. RCW 42.56.540. The Superior Court may issue an injunction if "examination would clearly not be in the public interest and would substantially and irreparably damage any person." The person

who requested the records is a necessary party to such an action in superior court. *Burt v. Dep't of Corr.*, 168 Wn.2d 828, 834, 231 P.3d 191 (2010).

V. What Public Records Are Exempt From Disclosure?

- A. All agency records are available for review by the public unless they are specifically exempted or prohibited from disclosure by statute. RCW 42.56.070(1).
- B. Chapter 42.56 RCW serves as the primary basis for exemptions from public disclosure. Some common exemptions under the Public Records Act include:
 - 1. Attorney-client privilege. See *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004); RCW 42.56.290.
 - 2. Deliberative process exemption: "Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt . . . except that a specific record is not exempt when publicly cited by an agency in connection with any agency action." Courts have viewed this exemption narrowly and once the agency implements the policies or recommendations, such records are no longer exempt under the deliberative process exemption. RCW 42.56.280; *West v. Port of Olympia*, 146 Wn. App. 108, 117, 192 P.3d 926 (2008).
 - 3. Certain investigative and law enforcement records. RCW 42.56.240.
 - 4. Personal information. Example: Credit card numbers and financial account numbers. RCW 42.56.230(5).
 - 5. Information related to individual claims resolution structured settlement agreements submitted to the board of industrial insurance appeals, other than final orders. RCW 45.56.230(8).
- C. If the request does not seek a "public record," as defined by the Public Records Act, it is not necessary to determine if an exemption applies because the Public Records Act requires disclosure only of "public records."
- D. An agency cannot enter into an agreement or promise not to disclose a record. *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989). An agency cannot use its rule making authority or policy to define the scope of a statutory exemption. *Servais v. Port of Bellingham*, 127 Wn.2d 820, 834-35, 904 P.2d 1124 (1995).
- E. There is no general "privacy" exemption, but several exemptions incorporate privacy as one of the elements of the exemption. A violation of "privacy" under one of those exemptions would occur when the disclosure of information "(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.56.050; *King County v. Sheehan*, 114 Wn. App. 325, 344, 57 P.3d 307 (2002).

VI. How Does An Agency Respond When Public Records Contain Exempt Information?

- A. If a record is exempt from disclosure, the record is still considered a “public record” under the Act. An agency may withhold a record that is exempt from disclosure in its entirety, but if a record contains some information that is disclosable and some that is exempt, the agency must disclose the record, redacting any information that it claims exempt. WAC 44-14-04004(5).
- B. Agencies that withhold records or redact information must include a statement of the specific exemption authorizing the withholding or redaction of the record and a brief explanation of how the exemption applies to the record withheld. RCW 42.56.210.

VII. What Is the Legal Recourse for Violations of the Act?

- A. A requesting party that is dissatisfied with an agency's response to a records request may bring an action under the Act but must do so “within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” RCW 42.56.550(6); *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 528, 199 P.3d 393 (2009).
- B. The complaint must be filed in the superior court of the county where the record is maintained, or in cases where the record is a county record, in the adjoining county. RCW 42.56.550(1) and (5).
- C. The agency bears the burden of proving that refusal to disclose “is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.56.550(1); *King County v. Sheehan*, 114 Wn. App. 325, 336, 57 P.3d 307 (2002).
- D. Any person who prevails against an agency seeking the right to inspect or copy any public record or the right to receive a response to a public records request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. RCW 42.56.550(4).
- E. The Court has discretion to award a prevailing person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record. RCW 42.56.550(4).
- F. There is no liability for a public agency, official, or employee for any loss or damage that occurs based upon the release of a public record if the public agency, official, or employee acted in good faith in attempting to comply with the Public Records Act. RCW 42.56.060.

TORTS AND PRODUCT LIABILITY

I. Vicarious Liability

A. Parental Liability for Acts of a Child

Parents are not generally liable for the torts of a child. Parents may be held liable under a theory of negligent supervision for injuries caused by a child. Plaintiff must satisfy the following elements:

1. The child has a dangerous proclivity;
2. The parents knew or should have known of the child's dangerous proclivity; and
3. The parents failed to exercise reasonable care in controlling that proclivity. *Sun Mountain Productions, Inc. v. Pierre*, 84 Wn.App. 608, 614-15, 929 P.2d 494 (1997).

B. Parents Liable for a Child's Intentional Torts

1. Parents can be liable for willful or malicious injury to person or property by any minor child under the age of 18 who is living with a parent and/or parents. (RCW 4.24.190).
2. The parents' liability for the willful or malicious acts of the child is limited to \$5,000. (RCW 4.24.190).

C. Automobile Owner Liability for Driver

Washington applies "family car" or "permissive use" doctrines to impose liability on an automobile owner for the tortious conduct of a driver. Liability under the family car doctrine arises when (1) the car is owned, provided, or maintained by the parent, (2) for the customary conveyance of family members and other family business, and (3) at the time of the accident, the car is being driven by a member of the family for whom the car is maintained, (4) with the parent's express or implied consent. *Pascua v. Heil*, 126 Wn.App. 520, 530 n.6, 108 P.3d 1253 (2005); *Hart v. Hogan*, 173 Wash. 598, 603, 24 P.2d 99 (1933) ("One who furnishes an automobile for the use of his family is liable to a third person for injuries sustained as the result of the negligence of a member of the family in the operation of the automobile. . .").

II. Punitive Damages

Since its earliest decisions, the Washington Supreme Court has consistently disapproved punitive damages as contrary to public policy. *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996) (citing *Spokane Truck & Dray Co. v. Hofer*, 2 Wash. 45, 50-56, 25 P. 1072 (1891)). Punitive damages not only impose on the defendant a penalty generally reserved for criminal sanctions, but also award the plaintiff with a windfall beyond full compensation. *Dailey*, 129 Wn.2d at 574. However, punitive damages are allowed when expressly authorized by the Legislature. *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981). Punitive damages may also be allowed if the plaintiff's claims are governed by another jurisdiction's substantive law under the "most significant relationship" test. *Tabingo v. American Triumph LLC*, 188 Wn.2d 41, 391 P.3d 434 (2017).

III. Alcohol Supplier Liability

A. Commercial Supplier Liability

A commercial host has a duty to exercise reasonable care when serving patrons and can be liable for damages to third parties for furnishing alcohol to an “apparently intoxicated” person. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 264, 274-75, 96 P.3d (2004); RCW 66.44.200(1).

1. “Apparent intoxication” means “seemingly” drunk. *Barrett*, 152 Wn.2d at 269.
2. Evidence of whether a patron is apparently under the influence of alcohol at the time of service must be based on “direct, observational evidence or by reasonable inference deduced from observations shortly thereafter.” *Faust v. Albertson*, 167 Wn.2d 531, 539, 222 P.3d 1208 (2009).
3. A patron’s “blood alcohol content” taken at the time of the accident is not, by itself, evidence of apparent intoxication at the time alcohol was served, but is relevant and corroborative. *Faust v. Albertson*, 167 Wn.2d at 542-43.
4. RCW 66.20.210 provides that

In an action brought against a commercial vendor for damages resulting from the sale of alcohol to a minor, a Washington statute provides a complete defense if the vendor checked the buyer’s identification, and the buyer signed a proper certification card. The certification card is a five-inch by eight-inch card containing in bold-face type a statement that “the signer understands the conviction for unlawful purchase of alcoholic beverages or misuse of the certification card may result in criminal penalties including imprisonment or fine or both.

B. Liability of a Social Host

1. A social host generally owes no duty to third persons to ensure adult guests do not over-consume alcohol. *Burkhart v. Harrod*, 110 Wn.2d 381, 388, 755 P.2d 759 (1988).
2. A social host may, however, be liable for injuries sustained by a minor when the social host serves alcohol to the minor. *Hansen v. Friend*, 118 Wn.2d 476, 482, 824 P.2d 43 (1992) (citing RCW 66.44.270(1)). The minor may be found contributorily negligent for consuming alcohol in violation of RCW 66.44.270(2). *Hansen*, 118 Wn.2d at 484. The minor’s ability to recover may be limited further by RCW 5.40.060. *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 483, 951 P.2d 749 (1998) (citing *Hansen*, 118 Wn.2d at 484). A minor is barred by statute (RCW 5.40.060) from receiving damages from a social host where the minor is found to be more than 50% at fault. *Hansen*, 118 Wn.2d at 487.

C. The Intoxication Defense

RCW 5.40.060 provides a complete defense to an action for damages for personal injury or wrongful death if:

- a. the person injured or killed was “under the influence” of alcohol or any drug;
- b. this condition was a “proximate cause” of the injury or death; and
- c. the person injured or killed was more than 50% at fault.

IV. Joint and Several Liability

A. Fault-Free Plaintiff

If the plaintiff is fault-free and suffered an indivisible injury, the defendants against “whom judgment is entered shall be jointly and severally liable for the total sum of their proportionate shares of the claimant’s total damages”.... RCW 4.22.070(1)(b).

B. At-Fault Plaintiff

If the plaintiff is at fault, then the liability of the defendants against whom judgment is entered, unless acting in concert or as an agent or servant of the defendant, shall be several. RCW 4.22.070(1)(a) & (b).

C. Proportionate Liability

In cases involving the fault of more than one entity, the jury shall determine every entity which caused the plaintiff’s damages. The Court determines the “entities” to be included in the calculation including defendants, third-party defendants, entities released by the plaintiff through, for example, settlement, entities immune from liability or “any other individual defense against the ... plaintiff.” RCW 4.22.070(1). Employers are not to be included among the entities assigned a share of fault. RCW 4.22.070(1); *Edgar v. City of Tacoma*, 129 Wn.2d 621, 624, 628, 919 P.2d 1236 (1996). Judgment shall be entered against each defendant, except those who have been released by the claimant or are immune from liability to the claimant, or have prevailed on any other individual defense against the claimant, in an amount which represents that party’s proportionate share of the claimant’s total damages. RCW 4.22.070 (1). However, a parent entitled to claim parental immunity may not be allocated a percentage of fault under RCW 4.22.070. *Smelser v. Paul*, 188 Wn.2d 648, 398 P.3d 1086 (2017).

V. Governmental Tort Immunity – State Government & Public Entities

The Washington Legislature waived sovereign immunity as to the political subdivisions of the State and its municipalities in 1967. RCW 4.96.010 did away with Washington's shield of absolute sovereign immunity. Local governments may be liable for damages arising out of their tortious conduct, or the tortious conduct of its employees “to the same extent as if they were a private person or corporation.” RCW 4.96.010(1); *Bailey v. Town of Forks*, 108 Wn.2d 262, 265, 737 P.2d 1257, 753 P.2d 523 (1987). Traditional defenses available to governmental agencies, such as the public duty doctrine, may also apply.

VI. Negligence-- Standard of Care

A. Premises Liability

1. Standard of Care Determined by Plaintiff’s Status --The common law classification of invitee, licensee and trespasser determines the extent, if any, of the duty a possessor/owner of real property owes to persons on the property. *Frederickson v. Bertolino’s Tacoma, Inc.*, 131 Wn.App. 183, 188-189, 127 P.3d 5, 8 (2005).
 - a. Duty Owed to Invitee Generally -- A possessor/owner of land owes business and public invitees the duty to use reasonable care, which includes the duty to discover dangerous

conditions. *Barker v. Skagit Speedway, Inc.*, 119 Wn.App. 807, 812, 82 P.3d 244 (2003). Generally, a business owner is liable to an invitee for an unsafe condition on the premises if the condition was (1) caused by the proprietor or his employees, or (2) the proprietor had actual or constructive notice of the unsafe condition.

Frederickson v. Bertolino's Tacoma, Inc., 131 Wn.App. 183, 189, 127 P.3d (2005) (citing *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 460, 805 P.2d 793 (1991)).

A possessor's duty to invitees extends only to the "area of invitation"; *i.e.*, that portion of the premises arranged so as to lead an invitee to reasonably believe it is open to him or her. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 132, 606 P.2d 127 (1980).

- b. Duty owed to Licensees – The possessor/owner owes a duty of care to a licensee or social guest if:
 - i. there is a known dangerous condition on the property; and
 - ii. the possessor can reasonably anticipate the licensee either will not discover the condition or will not realize the risk associated with the dangerous condition. *Singleton v. Jackson*, 85 Wn.App. 835, 843, 935 P.2d 644 (1997).
- c. Duty Owed to Trespassers -- An owner/occupier of a land has no duty to an adult trespasser except to refrain from causing willful or wanton injury. *Zuniga v. Payless Drug Stores*, 82 Wn.App. 12, 14, 15, 917 P.2d 584 (1986).
 - i. Attractive Nuisance Exception -- The common law doctrine of attractive nuisance is an exception to the general rule that a landowner owes no duty to a trespasser. *Ochampaugh v. City of Seattle*, 91 Wn.2d 514, 518, 588 P.2d 1351, 1353-1354 (1979).
 - ii. Before the Attractive Nuisance exception will apply the following conditions must be satisfied: the condition must be dangerous in itself; the condition must be attractive and alluring, or enticing, to young children; the children must have been incapable, by reason of their youth, from comprehending the danger; the condition must have been left unguarded and exposed at a place frequented by young children; and it must have been reasonably practicable and feasible to prevent access to the condition. *Ochampaugh*, 91 Wn.2d at 518.

B. Recreational Use Statute

1. RCW 4.24.210, et seq., determines the duties of an owner or occupier of land held open to the public for recreational use. The statute supersedes the common law status categories and sets forth the legal duty owed to visitors to recreational properties. *Davis v. State*, 144 Wn.2d 612, 616, 30 P.3d 460 (2001).
2. The recreational use statute provides immunity to a landowner for "unintentional injuries" if:
 - a. the land was open to members of the public;
 - b. for recreational purposes including numerous activities listed in the statute; and
 - c. no fee of any kind was charged. RCW 4.24.210

Although landowners generally are not liable for the injuries incurred by recreational users of their land, there are three limited circumstances under which liability will attach: 1) a fee for the use of the land is charged; 2) the injuries were intentionally inflicted; or 3) the injuries were sustained by

reason of a known dangerous artificial latent condition for which no warning signs were posted. RCW 4.24.210(1), (3).

RCW 4.24.210 extends to both premises liability and negligence claims. It is not necessary that the land in question be used solely for recreational purposes before immunity may be granted. *Lockner v. Pierce County*, ___ Wn.2d ___, 415 P.3d 246 (2018).

C. Negligence Per Se

1. A Breach of Any Duty Imposed by a Statute, Ordinance or Administrative Law “Shall Not be Considered Negligence Per Se, but May Be Considered . . . as Evidence of Negligence.” RCW 5.40.050.
2. RCW 5.40.050 identifies specific exceptions where a violation shall be considered negligence per se. These include any breach of duty as provided by statute, ordinance, administrative rule relating to: 1) electrical fire safety; 2) use of smoke alarms; 3) sterilization of needles and instruments used by persons engaged in practice of body art, piercing, tattooing, or electrology.....or 4) driving while under the influence of alcohol or drugs.

VII. Wrongful Death/Survival Actions

A. Wrongful Death Actions

1. RCW 4.20.010 provides for a cause of action that is brought by the personal representative of the deceased where decedent’s death is caused by the wrongful act of another.
2. Washington recognizes a cause of action under this statute for the wrongful death of a viable unborn child. *Cf. Fast v. Kennewick Public Hospital District*, 187 Wn.2d 27, 384 P.3d 232 (2016) (trial court erroneously dismissed wrongful death statute claim for unborn child.).
3. The beneficiaries of a wrongful death action are:
 - a. The wife or husband, state registered domestic partners, and child(ren), including step-children (RCW 4.20.020);
 - b. If there is no wife or husband, state registered domestic partner, or child(ren), the action may be maintained for the benefit of the parents, sisters or brothers “who may be dependent upon the deceased person for support....” RCW 4.20.020. “The phrase ‘dependent for support’ as used in these statutes has consistently been interpreted by the courts to mean financial dependence.” *Philippides v. Bernard*, 151 Wn.2d 376, 386, 88 P.3d 939, 944 (2004). In *Philippides*, the Court confirmed the requirement, under RCW 4.24.010, that parents be financially dependent on an adult child in order to recover for that child’s injury or death. *Id.* at 388, 88 P.3d at 945. RCW 4.20.020 allows the trier of fact to consider services that have a monetary value when assessing a parent’s alleged dependency on the decedent for support, provided that such services are not everyday services a child would routinely provide. *Armantrout v. Carlson*, 166 Wn.2d 931, 214 P.3d 914 (2009).
4. The measure of damages is the “actual pecuniary loss,” including monetary contributions the decedent would have made to the beneficiary and intangible losses such as loss of affection, care and consortium. *Parish v. Jones*, 44 Wn.App. 449, 453, 722 P.2d 878 (1986).

5. There is no recovery for the decedent's unconscious pain and suffering. RCW 4.20.046; *Otani ex rel. Shigaki v. Broody*, 151 Wn.2d 750, 758-61, 92 P.3d 192 (2004).

B. Survival Actions

1. General Survival Statute

- a. RCW 4.20.046(1) allows the personal representative to bring an action on behalf of the decedent's estate unrelated to the decedent's death.
- b. The decedent's estate is the beneficiary of any recovery. *Tait v. Wahl*, 97 Wn.App. 765, 772, 987 P.2d 127 (1999).
- c. The personal representative may assert a claim for pain and suffering and other non-economic damages personal to and suffered by a deceased. RCW 4.20.046(1).
- d. The beneficiaries under the general survival statute are those enumerated in RCW 4.20.020. (See wrongful death discussion above).

2. Special Survival Statute

- a. The special survival statute authorizes the personal representative of the decedent's estate to pursue a cause of action for personal injuries, but only if the injuries were the proximate cause of death. RCW 4.20.060.
- b. The statute allows recovery to the beneficiaries listed in RCW 4.20.020 for the decedent's pain and suffering and other non-economic losses, and economic losses, including future loss of income. (See wrongful death discussion above). RCW 4.20.046(1). *Otani ex rel. Shigaki v. Broody*, 151 Wn.2d 750, 758, 760-63, 92 P.3d 192 (2004).

VIII. Medical Malpractice Claims

- A.** In Washington, medical malpractice claims are generally governed by Chapter 7.70 RCW. Washington recognizes three different types of claims against healthcare providers, including claims for professional negligence (i.e., failure to follow accepted standards of care), breach of warranty and failure to provide informed consent. RCW 7.70.030.
 1. The collateral source rule was statutorily modified to allow introduction of evidence that the plaintiff received compensation for his or her injury from another source, such as from plaintiff's insurer or employer's insurer. RCW 7.70.080. But the Supreme Court held the statute, as applied, violated the separation of powers doctrine. See *Diaz v. State*, 175 Wn.2d 457, 471, 285 P.3d 873 (2012).
- B.** Statute of Limitations -- Medical malpractice actions must be commenced within three years of the conduct or omission alleged to have caused the injury, or within one year of the time the patient or patient's representative discovered, or reasonably should have discovered, that the injury was caused by the conduct or omission, whichever period expires later. RCW 4.16.350(3).
- C.** Statute of Repose -- No medical malpractice action can be maintained more than eight years after the act or omission. RCW 4.16.350(3). However, the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect. The tolling continues until the date the patient or the patient's representative

has actual knowledge of the injury; thereafter, the plaintiff has one year to commence a civil action. *Id.* (Prior version held unconstitutional in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998).

- D. Mandatory Mediation** -- All medical malpractice or other healthcare entities are subject to mandatory mediation, which good faith request for mediation tolls the statute of limitations for one year. RCW 7.70.100-110.

IX. Products Liability

A. Washington Products Liability Act.

- B.** In a product liability action, the plaintiff must prove that his or her injuries were proximately caused by a product that is “not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.” RCW 7.72.030(1).

C. Elements of Products Liability Cause of Action.

1. **Plaintiff’s Burden.** A plaintiff establishes that a product is not reasonably safe by showing that “at the time of manufacture, the likelihood that the product would cause the claimant’s harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.” RCW 7.72.030(1)(b). A plaintiff must show that a product was “unsafe to an extent beyond that which would be contemplated by the ordinary consumer” based on the failure to warn as an alternative. RCW 7.72.030(3); *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 325, 971 P. 2d 501(1999).
2. **Proximate Causation/Liability.** Washington’s product liability statute provides that “[a] product manufacturer is subject to liability to a claimant if the claimant’s harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed.” RCW 7.72.030(1). Strict liability is the applicable standard for a design defect product liability claim maintained under RCW 7.72.030(2). *Falk v. Keene Corp.*, 113 Wn.2d 645, 653, 782 P.2d 974 (1989). A plaintiff may attempt to establish liability by showing that, at time of manufacture, the likelihood that the product would cause the plaintiff’s harm or similar harms, and the seriousness of those harms, outweighed the manufacturer’s burden to design a product that would have prevented those harms and any adverse effect a practical, feasible alternative would have on the product’s usefulness. *Id.* at 654. Alternatively, a plaintiff may employ the “consumer expectations” test, which requires the plaintiff to show that the product was “unsafe to an extent beyond that which would be contemplated by the ordinary consumer.” *Id.*
3. **Non-Negligent Product Sellers.** RCW 7.72 provides a defense for the non-negligent product seller. Under RCW 7.72.040, a product seller is liable to a claimant for harm proximately caused by its negligence, breach of express warranty made by the product seller, or the intentional misrepresentation of facts about the product or intentional concealment of information about the product, by the product seller. The act defines “product seller” as any person or entity that is “engaged in the business of selling products.” RCW 7.72.010(l). Specifically excluded from the definition is “[a] provider of professional services who utilizes or sells products within the legally

authorized scope of the professional practice of the provider.” RCW 7.72.010(l)(b). As a general rule, manufacturers of defective products are held to a higher standard of liability than product sellers, including strict liability for manufacturers where injury is caused by a manufacturing defect or a breach of express or implied warranties. RCW 7.72.030(2); *Johnson v. Recreational Equip., Inc.*, 159 Wn.App. 939, 946-47, 247 P.3d 18 (2011).

In contrast, product sellers are ordinarily liable only for negligence, breach of express warranty, or intentional misrepresentation. RCW 7.72.040(1). In limited circumstances, however, product sellers are subject to “the liability of a manufacturer,” including where “[t]he product was marketed under a trade name or brand name of the product seller.” RCW 7.72.040(2)(e). If a product seller assumes the liability of a manufacturer, the product seller may not allocate fault to the manufacturer under RCW 4.22.070. *Johnson*, 159 Wn.App. at 945-46.

