WDTL
WASHINGTON DEFENSE TRIAL LAWYERS
*Fighting for Justice and Balance in Civil Courts*

**Summer 2017 - In This Issue**



# DEFENSE NEWS

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# Thank You for Another Successful Convention!

*The 2017 WDTL Convention was a success!*


The sun was shining in beautiful Victoria, B.C. After soaking up some sun, we learned about important topics, including preemptory challenges, tech for depositions and trials, and defenses to the "Reptile Theory." We will all dedicate more time to pro bono efforts after a fantastic panel moderated by Justice Steven Gonzalez. Mel Sorenson updated us on WDTL's efforts in the Legislature, and Kristin Baldwin showed us the new website. We raised our champagne flutes in a toast to Jennifer Campbell's successful year as President. Many members returned to the Lower 48 with treats purchased at the silent auction.

**Cowboy Up!** The next convention will be at Sun Mountain Lodge. Mark your calendars for July 19-22!

# Message from the Outgoing President

*Jennifer Campbell, the outgoing president, at the WDTL Convention President's Party.*

*By: Jennifer Campbell, WDTL Past President*

It has been my privilege and honor to serve as President of this fine organization. When I was elected President, my goal was to leave WDTL better than I found it. No catchy slogans, just a strong desire to make this organization relevant and valuable to our members. As I reflect back on what we have accomplished over the past year, my heart is full of admiration and respect for my fellow Trustees, our members, and our Executive Director Maggie Sweeney. A few highlights . . .On behalf of our members, we testified before the Legislature on issues important to our clients, strengthened our relationships with the judiciary through four regional judicial receptions, submitted numerous solid amicus briefs, organized a 5k to support Courthouse Dogs, given back to our community through the wonderful activities of the Pro Bono committee, educated our

*Continued on Page 18*

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The Defense News is published quarterly by the Washington Defense Trial Lawyers, c/o WDTL, 800 5th Ave., Suite 4141, Seattle, WA 98104.  SUBSCRIPTION: Included in dues of all active members. EDITORIAL POLICY: Defense News is edited for members of the Washington Defense Trial Lawyers. Publishing and editorial decisions are based on the editors' judgment of the quality of the writing, the timeliness of the article, and the potential interest to Defense News readers. The views expressed in the Defense News are those of the authors and may not reflect the official policy or position of WDTL or Defense News. SUBMISSIONS: All submissions must be typewritten, single-spaced (including citations), and include a short biography. An article-writing guide is available on the website. Articles may be submitted to kdanielson@schwabe.com or maggie@wdtl.org ADVERTISING: All advertising inquiries should be directed to: Maggie Sweeney, 800 5th Ave., Suite 4141, Seattle, WA 98104, (206) 749-0319 or e-mail: maggie@wdtl.org

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# Defense Verdict for U.S. President Charged with Crimes Against Humanity

*By: Kate Brooks and Michael Guadagno*

No. Not *that* President. On March 30, 2017, U.S. District Court Judge John C. Coughenour presided over a one-day jury trial, in which U.S. President Andrew Jackson was charged with Crimes Against Humanity for his treatment of the Cherokee Nation during the "Trail of Tears." The trial was conducted by 8th graders from Villa Academy, an independent Catholic school in Seattle's Laurelhurst neighborhood. At the conclusion of the trial, the jury, comprised of 8 parents and WDTL's own Melissa Roeder, returned a verdict of not guilty.

*"If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined."* - Chief Justice John Marshall, Cherokee Nation v. State of Georgia [1]

By way of background, Andrew Jackson, our nation's 7th president, signed the Indian Removal Act into law in 1830. The Act authorized the president to negotiate with Native American tribes located in the eastern United States to sell their lands and move west of the Mississippi. Under duress and trickery, many tribes sold their lands and moved west, often under inhumane conditions. The Cherokee Nation was unique, however, in that it chose to resist Jackson's removal policy. It refused to sell its lands, which were located in present day Georgia. Instead, the Cherokee adopted an American way of life and sought to ingrain themselves into American culture. They established an American-style government, created a written language, adopted a written constitution, and published their own newspaper. They fought Jackson all the way to the U.S. Supreme Court – and *won!* In *Worcester v. State of Georgia,*[2] Chief Justice John Marshall held that the Cherokee had an unqualified right to their land. Jackson, however, defied the Court's ruling. According to legend, Jackson stated "Marshall has made his decision; now let him enforce it!" It is the only time a sitting U.S. President openly defied an order of the Supreme Court.

In 1835, Jackson convinced a small minority of Cherokee (about 20 individuals out of a total population of 16,000) to sign the Treaty of New Echota, in which Cherokee lands east of the Mississippi were ceded to the United States. The Cherokee were given land in Oklahoma, where the Nation is currently located today. The treaty provided that the Cherokee would be transported safely, comfortably, and with ample food and medicine. In truth, however, the Cherokee were rounded up by the U.S. military and state militia, placed in concentration camps, and forced to march west through droughts and extreme winters. Roughly one-quarter of the Cherokee population died on what has come to be called the "Trail of Tears."

While a trial premised on this story may appear rather one-sided, it translates well into a mock trial – with ample evidence for both the prosecution and defense. Jackson's personality was a bizarre contradiction. One the one hand, he wanted to rid the country of these "savages"; on the other, he adopted a Creek boy and raised him as his own child after he was orphaned in the Creek Wars. Moreover, although the Indian Removal Act and the Treaty of New Echota were both authorized by Jackson, the forced move did not occur until 1837, the year *after* Jackson left office. His Vice President, Martin Van Buren, had, by

*Continued on Next Page*

then, replaced him. In fact, it is not too surprising that this trial, which has been performed each year by Villa Academy's 8th graders since 2011, has yielded *five* defense verdicts.

Now in its 7th year, the program encompasses 8 weeks of preparation, during which the students learn the historical context of Native American removal as well as the format and mechanics of a criminal trial. The students study America's Manifest Destiny and westward expansion and then digest 30 pages of primary source material, which ranged from historical speeches to letters, from first-hand accounts to Supreme Court decisions, and from maps to formal portraits. The students meet with practicing attorneys to discuss trial themes and strategies and to prepare all aspects of a modern day trial – from *voir dire* to closing arguments and from cross examination to legal objections.

Each year, the trial opens with jury selection. The jury pool is made up primarily of the students' parents, and it is comical to watch these young teenagers grill their parents in open court and kick them out of the jury box as they exercise their strikes.

The prosecution's questions focus on the prospective jurors' thoughts and opinions regarding Nazi concentration camps and Japanese-American internment camps. The defense tends to focus on the difficult and painful choices a president must make when various groups of his or her constituents conflict with one another. This year, the prosecution team drew an interesting parallel between the Trail of Tears and the recent remake of *Beauty and the Beast*. Ultimately, four potential jurors were dismissed by the students – leaving an unusual jury of nine.

As opening statements began, the students laid out their themes involving greed and corruption, hardship and confusion, and the threads that weave our diverse American history. The prosecution focused on the destruction of the Cherokee Nation and other Native American groups at the hands of greedy politicians. They showed the jury two competing maps: "The White Man's Map, 1812," and "The Indian Map, 1812," which demonstrated that maps depend on perspective. On one map, the jury saw clearly delineated states. On the other, they saw the same land divided by five distinct native groups known as the "Civilized Tribes."

The defense focused on the difficult decisions that Presidents and Heads of State are often required to make. They suggested that Jackson was forced to choose between the lesser of two evils. By deciding to move the Cherokee, they argued, Jackson made a difficult decision that he believed would cost the fewest lives while also providing the best option for long

*Continued on Page 7*

# Member Spotlight
# Gauri Shrotriya Locker

*"Gauri is a valued member of the Torts Division the AGO. She works on some of our toughest cases, and that notwithstanding is always willing to help other AAGs with theirs when the call for help goes out. Even so, she still finds time to dedicate her off time to public service opportunities. Gauri's public service work includes volunteering at the Union Gospel Mission, for Habitat for Humanity projects, and for the WDTL Annual Coat Drive to name just a few. I and her other AGO colleagues were very pleased that her work was acknowledged by WDTL's recent community service award."*

- Michael A. Nicefaro, Jr.
Senior Counsel, Assistant Attorney General

*By: Kyler Danielson*

WDTL thrives through participation of its faithful members. The Defense News is proud to highlight its members in this Member Spotlight column.

We are pleased to introduce **Gauri Shrotriya Locker**. Gauri is the 2016 recipient of WDTL's Community Leadership Award for her pro bono contributions to WDTL. She is also a regular contributor to the Defense News and the Co-Chair of the Diversity Committee. Gauri organizes an annual WDTL volunteer day at the Union Gospel Mission Men's Shelter in downtown Seattle. In her day job, she works as an Assistant Attorney General in the Torts Division of the Office of Attorney General.

**A Double Buckeye in the Pacific Northwest**

Raised in Ohio, Gauri spent her formative years in the small town of Sidney, the county seat of Shelby County, Ohio. Traveling to her town is like "going back in time." An inside look at her hometown was presented in a 2009 documentary film entitled 45365.[1]

Gauri swam competitively from the time she was five years old until her second year of college. She played water polo at The Ohio State University, but left the team for fear of losing her teeth after several of her teammates lost teeth at aggressive matches. The coach demanded hard work from college athletes, who were expected to swim laps at practice without pushing off the walls of the pool.

Gauri is a "double buckeye," as a graduate of The Ohio State University for both her undergraduate and law studies. She went straight to law school from undergrad. Her decision to become a lawyer stemmed from her college work experience at the Ohio Women's Policy and Research Commission and as a non-lawyer member of an Ohio Supreme Court committee for women's issues. Through her positions, Gauri supported pro bono and low bono legal clinics, helped to write a "know your rights" handbook for victims of abuse, and staffed a hotline to guide women facing challenges.

After a brief stint in Detroit, Gauri moved to Seattle. Her early days in Seattle were spent planning her wedding, studying for the Washington State Bar, and working at the local staff counsel office for Farmers Insurance.

*Continued on Next Page*

# Gauri Shrotriya Locker *From Page 5*

**Fearless**

As a "baby lawyer," Gauri attended a boot camp for young lawyers hosted by the Washington State Bar. Several of her fellow boot camp attendees were public defenders and prosecutors. Their courage at the camp and in the courtroom inspired Gauri to serve as a public defender. Her goal: to be fearless.

Gauri spent one year as a trial attorney for the Snohomish County Public Defender Association. She describes that year as the "toughest but most rewarding experience" of her legal career, thus far. Most of Gauri's clients appeared in court for misdemeanors or show cause hearings for alleged probation violations. One client worked for an abysmal income to pick feathers off chickens. He was one of the happiest men Gauri has ever met. The clients that Gauri wanted most to fight for were uninterested in fighting.

Through her experience as a public defender, Gauri is now fearless in the courtroom. At times, she may be more comfortable in the courtroom than in a deposition. Now, Gauri is finishing her fourth year at the Attorney General's Office in a trial attorney position for the Torts Division, where she represents Washington State agencies and state employees on a wide range of issues.

**Volunteerism for Life**

Gauri's early volunteer work started in Ohio. In college, she would walk dogs at the Humane Society, prepare and serve meals at the local Ronald McDonald house, and tutor at a local children's shelter. Gauri is known now for her work at WDTL as a Pro Bono Committee member, a contributor to the WDTL Annual Coat Drive, and a volunteer for the Union Gospel Mission. This year, Gauri participated in the Washington State Bar Association "Call


to Duty" program, providing pro bono legal services to veterans on probate and family law issues.

When asked why she returns to the Union Gospel Mission, Gauri described one volunteering memory from 2015. While serving fruit and pastries in the dining area, a homeless, shoeless man sat at a table near her. Before he finished his meal, shelter staff brought him a pair of used sneakers in his size. Gauri will always remember his look of awe and relief. He arrived at the shelter for a hot meal, and left with a full belly, warm feet, and gratitude. Gauri enjoys seeing the reaction of new volunteers at Union Gospel Mission as well.

*"It is hard to describe Gauri without being cliché. She is simply an awesome person.*

*The one-of-a-kind Gauri Locker is Generous, Articulate, Ultra-friendly, Reliable, and simply an Incredible human being."*

- Celeste Stokes
Assistant Attorney General

**Save the Drama for Your Mama**

Gauri is an engaged, fun-loving attorney. She enjoys traveling and will cruise in the Adriatic Sea in September to see Croatia, Slovenia, Italy, Malta, and Greece.

Gauri owns a commercial shaved-ice machine and creates deliciously fluffy shaved ice at home, after much experimentation to alter the texture

*"Gauri works tirelessly for diversity, serving on a recent panel presentation on diversity, co-chairing the WDTL Diversity Committee, and actively promoting diversity goals within the AGO."*

- Michael A. Nicefaro, Jr.
Senior Counsel, Assistant Attorney General

and consistency of the ice. She is married to a lovely actuary who is also a Buckeye. She has a pet dog and fundraises for animal charities, including Paws and the Humane Society.

Her advice to young lawyers is to dance like no one is watching, but email like it could one day be read aloud in a deposition. Gauri is thankful for her supportive family, past mentors and friends from all walks of life. At each of her legal positions, she has found fantastic mentors to share wisdom and advise her.

*Kyler Danielson is a land use and environmental associate with Schwabe, Williamson & Wyatt. She is also the current Editor-in-Chief of the Defense News. She works primarily with ports, individuals, and developers on matters relating to the State Environmental Policy Act (SEPA), Model Toxics Control Act (MTCA), local permitting, and compliance with federal environmental regulations.*

*[1] The film is available to watch on Vimeo. It explores the Shelby County fair, a local judicial campaign, and relationships between a father and son, cops and criminals, and high school youth.*

*[2] For more information about the Call to Duty program, please visit http://www.wsba.org/Legal-Community/Volunteer-Opportunities/Public-Service-Opportunities/Call-to-Duty-Initiative*

term security for both the country and Native American sovereignty. They conceded that while Jackson did, in fact, aim to help the Cherokee, his actions did not have the intended impact.

The students called twelve witnesses, which were comprised of historical figures from the early 1800s. The witness line-up changes each year, because each class is permitted to select the witnesses they think will best support the legal theories they wish to pursue that year. Chief Justice Marshall is often selected by the prosecution, and Judge Coughenour often comments gleefully how excited he is to have a member of an appellate court subpoenaed to testify before him. "So watch it!" he warns the young teenager playing the role of the Chief Justice.

The jury members were instructed by Judge Coughenour, and this year, they returned a verdict of not guilty after debating the charges and testimony. While the jury agreed that this was an inexcusable event in American history, they believed that Andrew Jackson could not shoulder the blame legally.

The students impressed everyone. Judge Coughenour himself commented that the mock trial presents an exceptional way to meaningfully explore all facets of a complicated and unfortunate part of our history. He awarded four students with "Best Witness" and "Best Attorney" gavels, and then invited the students to ask questions about his career, including his appointment by President Reagan and his most well-known cases. The students were able to tour Judge Coughenour's office, library, jury room, and holding cells.

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One student commented, "This is extremely important if we want to be able to empathize in any way with the past." Another reflected, "Mock trial allows us to think outside the box[.] I … think it is really cool to go to a real courthouse, in front of a real judge and learn all at the same time. This project can be a valuable and fun lesson to all, even for students who do not plan to become lawyers. I think it's important for students to see how their government works and to be a part of the process[.] In today's casual world it is valuable for youth to participate in a formal courtroom setting."

Indeed, many educators turn to mock trial as a project-based learning opportunity for their students, who are provided with a broad range of benefits. Students are less quick to judge a defendant in a trial. They are more likely to see an ongoing trial as a genuine dispute between two parties rather than an automatic indictment of the accused. Judge William Downing of King County Superior Court has commented that mock trial fosters "analytical ability, the ability to put together a cogent argument on your feet, public speaking, [and] teamwork." He said "for the 98% of [mock trial students] that don't go on to law school, they become better citizens, better voters, [and] better consumers of the media."

Attorneys from both WDTL and WSAJ regularly help Villa Academy's mock trial program. To some extent, it provides an opportunity to keep up relevant trial skills. Moreover, RPC 6.1(b) encourages lawyers to "provide *pro bono publico* service through delivery of legal services … to … educational organizations in matters in furtherance of their organizational purposes … or participation in activities for improving the law, the legal system or the legal profession." Most importantly, it's just plain fun. Only so much enjoyment can be had from a claim file or a dense stack of medical records. But, to guide a future lawyer as he or she prepares to argue before Judge Coughenour regarding the abuse of power by a U.S. President? No – not *that* president. But, in mock trial, it's all make believe – so you can pretend as you wish.

*If you would like to assist with this program, please contact Michael Guadagno at Bullivant Houser Bailey.*

*Kate Brooks is a middle school teacher at Villa Academy. She teaches 7th and 8th grade humanities.*

*Michael Guadagno is a shareholder at Bullivant Houser Bailey. His practice focuses on insurance coverage disputes and bad faith litigation.*

*[1] 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831).*
*[2] 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832).*

# Defense Successes!

*In each edition, the Defense News features successes of our members and colleagues. WDTL is proud of our defense attorneys and we would like to share their accomplishments. We would love to hear from you. Please share your stories with our Editor-in-Chief for publishing in the Defense News.*

**Mark O'Donnell** and **John Lee** of Preg O'Donnell & Gillett, PLLC successfully obtained a dismissal with prejudice in a whistleblower retaliation lawsuit. Plaintiff, a former department director, filed suit against Defendant employer, a municipal government, after being terminated following the election of a new mayor. Despite an independent investigator failing to substantiate nearly all of her whistleblower allegations, Plaintiff later alleged whistleblower retaliation and wrongful termination. After Defendant filed its summary judgment motion, Plaintiff stipulated to dismiss her Complaint with prejudice.

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**Dan Bentson** and **Owen Mooney** of Bullivant Houser Bailey succeeded for the defense in a Pierce County Condominium Act coverage case. The Association asserted its "wind-driven rain" and/or "water intrusion" claim against all four insurers, including their client, Eagle West. The Association also asserted a collapse claim, which was directed only against Eagle West. Eagle West (which was on the risk at the time the Association made its insurance claim) had issued payment for the "collapse" damage in the amount of $90,685.84. The Association argued that Eagle West actually owed over $1 million for the collapse claim, and $4.9 million for the "water intrusion" claim. Thankfully, Eagle West prevailed completely against both claims. Dan and Owen were able to convince the jury that Eagle West paid the appropriate amount for the collapse claim to the penny. In addition, the jury concluded that the efficient proximate cause of the loss was either inadequate or defective design, construction, or maintenance; wear and tear; or deterioration, rot, or decay. Because Eagle West's policies excluded coverage for all of these perils, the jury didn't need to make any additional factual findings. The jury's findings entail that Eagle West did not breach the policies and therefore the Association will be awarded nothing. The client was very pleased with the jury's verdict.

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**John M. Randolph**, a Spokane Associate of Bohrnsen Stocker Smith and Luciani obtained a full summary judgment in Pierce County for a stolen vehicle case. The Defendant was a corporation that left keys in their commercial delivery truck and a third party stole the truck during business hours. The thief then went on a rampage followed by no less than six law enforcement entities causing several accidents. Plaintiff was an innocent motorist injured in a violent collision caused by the thief. The Court held that there was no duty to prevent this criminal activity and held that the criminal activity was a superseding intervening cause. Plaintiff argued the truck was a large commercial vehicle and Defendant's act of leaving the vehicle unlocked with keys in the ignition created a genuine issue of foreseeability that a criminal could steal it; therefore, proximately causing the Plaintiff's harm. Plaintiff did not appeal.

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Seattle Partner **Michael A. Jaeger** with **Lewis Brisbois** recently obtained a defense verdict in a personal injury lawsuit stemming from a fall from a skateboard.

The Plaintiff was drinking with a friend outside of his brother-in-law's house after work when the Defendant rode by on his longboard and fell in the street in front of the house. The Plaintiff approached laughing and took the skateboard without permission. He was starting to skate away when the Defendant got up and put his foot behind the rear wheels to stop the skateboard, causing the Plaintiff to fall forward onto his outstretched arms. The fall dislocated and fractured the plaintiff's right elbow.

The Plaintiff, a carpenter by trade, claimed medical expenses of $91,000, lost wages of $10,000, and damages for pain and suffering. He sustained a right elbow dislocation and fracture with a disruption to the ulnar nerve and subsequent surgery to repair the damage. Furthermore, the Plaintiff claimed a permanent 30 percent reduction in range of motion on extension and loss of sensation in his dominant right arm.

The Defendant admitted that he stuck his foot behind the rear wheel of the board but argued that the Plaintiff's intoxication was a proximate cause of the fall. The Defendant argued that the Plaintiff could have simply stepped off the board had he not been intoxicated, given the slow speed of the skateboard.

The Plaintiff claimed he drank a 16-ounce beer and a shot of "moonshine" before the accident. When he was taken to the emergency room, his blood alcohol content measured at .107 percent. Based on the medical record and testimony, the Defendant contended that the Plaintiff had consumed at least five or six alcoholic beverages before the subject incident. The Defendant's expert toxicologist testified it would be impossible for the Plaintiff to only have consumed two drinks and have a blood alcohol content of .107 percent. Furthermore, an individual with a .107 percent blood alcohol content would experience significant alcohol-related impairment of his reflexes, reaction time, and ability to balance.

The Defendant moved for summary judgment, asking the court to rule that the Plaintiff was under the influence of intoxicating liquor at the time of the subject accident and that his intoxication was a proximate cause of the accident. The court ruled that the Plaintiff was intoxicated but declined to find proximate cause, leaving the allocation of fault for a jury to decide.

The Plaintiff had demanded $300,000 in limits. Just before trial, the Plaintiff lowered his demand to $100,000. The Defendant extended an offer of $20,000. At trial, the Plaintiff presented his own testimony as well as the testimony of his brother-in-law and a billing expert to testify that the medical charges were reasonable. The defense presented the testimony of the Defendant, a witness to the subject accident, and a toxicologist.

Following the three-day trial, the jury found both the Plaintiff and Defendant were negligent and a proximate cause of the accident. However, Washington law provides that if a plaintiff is intoxicated and more than 50% at fault, then he cannot recover in tort. RCW 5.40.60. The jury found the Plaintiff in the instant suit more than 50 percent at fault, resulting in a defense verdict for our client.

# Global Clients and Washington Rules

*By: Zachary Nelson and Christopher Howard*

Your clients are global; their operations cross numerous boundaries, and they need lawyers from across the country and across the world to make it work. A client's out of state in-house counsel wants to take deposition and be an active participant in the case. Can in-house counsel do this? Can that counsel handle transactions around the country for the company you are being asked to defend? If you do not know, keep reading. There are some quirks for out of state lawyers to practice in Washington.

In general, a lawyer practicing law in a jurisdiction other than that in which the lawyer is licensed must comply with the rules of both the state in which the lawyer is licensed and the state in which the work is being done. One should not assume the rules are the same in each state. Washington handles out-of-state lawyers working in-house in a unique way, demonstrated by the differences between the Washington and ABA versions of Rule 5.5 of the Rules of Professional Conduct. Rule 5.5 has five subsections, but the focus here will be sections (d) and (e). The ABA amended Model Rule 5.5 in 2002, 2013, and 2016; Washington adopted some of these amendments and rejected others, and Washington has added some custom comments to the rules on lawyers working in-house.

> Washington's rules open clients to significant risk if they use Rule 5.5(d)(1) to hire foreign lawyers to work in-house.

Your client wants to hire an out-of-state lawyer to work in-house in Washington. Being a helpful and diligent attorney, you want to ensure that any such lawyer is authorized to work in Washington. Thus, you inform the client that there are four ways to authorize an out-of-state lawyer to work in-house in Washington:

**(1) Authorization for Multijurisdictional Practice**

Washington's Rule 5.5(d) authorizes out-of-state lawyers, domestic and foreign, to work in-house, and it differs significantly from the ABA's Model Rule 5.5(d).[1] Unlike the ABA, Washington maintains a blurry "temporary" practice limit that could affect attorney-client privilege. Washington rejected the phrase "through an office or other systematic and continuous presence," which is in the ABA version. Instead, Washington requires that in-house services be "provided on a temporary basis...." However, it is unclear when in-house services become "nontemporary." Comment 6 states "[t]here is no single test to determine whether a lawyer's services are provided on a 'temporary basis.'" Services provided "on a recurring basis, or for an extended period of time" may be "temporary." This fuzzy concept of "temporary" could impact attorney-client privilege; if an out-of-state attorney is authorized to practice in Washington only by Rule 5.5(d)(1) and their work becomes "nontemporary," they lose authorization to practice in Washington. This would significantly affect their attorney-client privilege.

Furthermore, if the out-of-state lawyer did not attend an accredited law school in the United States, the rules impose additional constraints. Both the ABA Model Rule and the Washington Rule 5.5(e) define "foreign lawyer" as it is used in section (d).[2] Before 2016, the ABA Model Rule failed to account for the diversity of the legal profession internationally, resulting in the "de facto exclu[sion of] over 70% of foreign lawyers…"[3] Differences in the composition of foreign bars made it impossible for many foreign attorneys to comply with the original requirements of Rule 5.5(e). For example, if your client hired a private practice lawyer from France to work in-house in Washington, the lawyer would have to "surrender her bar admission status," making her unqualified to work in-house under Rule 5.5(e).[4] This paradox was fixed by the recent addition of section (e)(ii), which states that foreign attorneys unable to comply with Rule 5.5(e)'s original requirements may be "authorize[d]" to work in-house by the jurisdiction's highest court.

*Continued on Next Page*

# Global Clients *From Page 11*

Washington has not adopted section (e)(ii), leaving the paradox in place. Washington's rules open clients to significant risk if they use Rule 5.5(d)(1) to hire foreign lawyers to work in-house. Clients hiring foreign attorneys that do not qualify under Rule 5.5(e) may be unable to rely on the protection of attorney-client privilege.[5] Thus, if a foreign attorney cannot satisfy the requirements of Washington's Rule 5.5(e), they cannot be authorized to work in-house under Rule 5.5(d)(1).

Washington's Comment 15 explains that if a non-admitted attorney working in-house in Washington "establishes an office or other systematic or continuous presence" she "must either be generally admitted to practice under APR 3 or obtain a limited license to practice law as in-house counsel under APR 8(f)." Washington changed its Admission and Practice Rules (APR) along with Rule 5.5. Now APR 3 and 8(f) circumvent the issues with Washington's Rule 5.5(d) and (e) by providing alternative ways to authorize out-of-state attorneys to work in-house.

**(2) Admission by Motion**

If the out-of-state lawyer is admitted to practice law in another U.S. jurisdiction, they can be admitted in Washington by motion under APR 3(c). The lawyer only needs to prove their admission status in another U.S. state or territory, good standing in that jurisdiction, and "active legal experience" for three of the last five years. The Washington State Bar Association's APR Task Force stated the "simplicity" of this process will cause "very few lawyers" to need "to seek admission as house counsel" under Rule 5.5(d)(1) or APR 8(f).[6] And lawyers admitted by motion are not limited to working in-house "because they will be fully licensed."[7]

**(3) Limited License**

If the out-of-state lawyer does not qualify for admission under Rule 5.5(d)(1) or APR 3(c), they may obtain a limited license to practice law as in-house counsel in Washington. The APR Task Force stated that "essentially only [lawyers] with less than three years of practice experience" will need to register as in-house counsel this way.[8]

However, APR 8(f) is also useful for foreign attorneys who cannot satisfy the requirements of Washington's Rule 5.5(e). Because APR 8(f) asks, in part, for "satisfactory proof" of "admission to the practice of law" of "any jurisdiction," problems with Rule 5.5(e)'s requirements are circumvented. A foreign lawyer applying for authorization under APR 8(f) need only prove that they are professionally admitted to practice law in their home

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jurisdiction, rather than also proving that their home bar association sufficiently resembles the ABA.

**(4) General Admission**

If the out-of-state attorney does not qualify under Rule 5.5(d)(1), APR 3(c), or APR 8(f), they could try to be admitted generally to practice law in Washington. An out-of-state lawyer can take the bar exam in Washington if they can "present satisfactory proof" of:

(i) graduation from a law school approved by the Board of Governors; or

(ii) [section (ii) applies only to law students]

(iii) graduation from a United States law school not approved by the Board of Governors together with the completion of an LL.M. degree for the practice of law as defined by these rules; or

(iv) graduation from a university or law school outside the United States with a degree in law together with the completion of an LL.M. degree for the practice of law as defined by these rules; or

(v) admission to the practice of law, together with current good standing, in any jurisdiction where the common law of England is the basis of its jurisprudence, and active legal experience for at least 3 of the 5 years immediately preceding the filing of the application.[9]

If the lawyer can "present satisfactory proof" of one of the above and complete the other general admission requirements, they are not restricted to working in-house.

*Continued on Page 20*

# Allies in the Workplace – a WDTL Co-Hosted Breakfast with Washington Women Lawyers

*By: Jillian Hinman*

On June 15th, the WDTL Women's Commission and Washington Woman Lawyers hosted a panel discussion on finding allies in the legal workplace. The esteemed panel included: **Felix Luna**, Shareholder at Peterson Wampold Rosato Luna Knopp, **Katina Thornock**, Director, Corporate Counsel, Litigation at Starbucks Coffee Company; **Gauri Shrotriya Locker**, Assistant Attorney General; **Caryn Jorgensen**, Managing Shareholder at Mills Meyers Swartling P.S.; and **Joel Paget**, Senior Member at Ryan, Swanson & Cleveland.

The panel discussed many examples of being and finding allies in the workplace. A key focus was on making decisions for your own career to be sure you are surrounded by the best allies for YOU! The panel discussed ridding not just our own minds, but the broader legal community, of any negative connotations with the word "feminist." Many of the successful women our panel members admire have characteristics of strong attorneys and did not let labels interfere with their career paths. Mr. Luna talked about two women he admires and their successes. He expressed how one of these women showed him a different, and very successful, way to litigate and really connect with a jury – something that has helped him become a very successful litigator.

Ms. Thornock discussed how companies, even those without written policies on diverse counsel, work to hire diverse counsel and carefully monitor those teams. She used her experience with Starbucks as an example. Companies need to ensure that diverse attorneys are not just assigned, but actively work on matters. Ms. Thornock expressed the importance of diverse counsel on matters and her hope that, eventually, monitoring outside counsel firms for diversity will not be necessary. Unfortunately, in today's environment, companies must be deliberate in efforts to increase and encourage diversity among their outside counsel firms.

The panel discussed the importance of enriching the legal community through mentorship of diverse attorneys at all stages of practice. Associates can seek mentors by raising issues with management and help management see issues that exist – such as realizing turnover is a firm problem and not the problem of those leaving the firm. The panel discussed that mentorship in the firm, and finding a partner or "ally" in management who understands the issues or would be open to understanding the issues, is key. When asked how to handle a situation when no such allies exist in management, the panel's resounding response is to question why you would be at a place with no allies – perhaps it is time to consider a change.

The audience, over 50 strong, presented our panel with many great questions – including inquiring into different organization's outlooks on parental leave policies, tips for handling your own career when faced with management that is not an "ally," and suggestions for making the best decisions for your career.

*Jillian Hinman is a co-chair of the WDTL Women's Commission and a member of the Board of Trustees. She is an associate at Forsberg & Umlauf, where she practices in the fields of insurance coverage, insurance special investigations, insurance defense and general corporate defense.*

# From the World of Asbestos...

*By: Mike King and Chris Nicoll*

It has been almost fifty years since a jury in a federal district court in Texas handed down the first verdict in an asbestos case. And the flood of asbestos claims that followed still shows no signs of stopping. WDTL members have been on the front-lines of these "Asbestos Wars," in the trial and appellate courts. In the past twelve months, our local version of the ongoing Asbestos Wars generated two major victories for the defense, with ramifications that go well beyond asbestos, and WDTL members and the WDTL amicus committee played key roles in achieving these victories.

- *Deggs v. Asbestos Corp., Ltd.*, 186 Wn.2d 716, 381 P.3d 32 ("Yes, Virginia, stare decisis is still a thing in the state of Washington"). In *Deggs*, our Supreme Court was asked to revisit, and reconsider, a case-law gloss on Washington's wrongful death statute, which had emerged out of a series of decisions starting when Woodrow Wilson was in the White House and ending with a classic judicial "summing up" handed down soon after America had decided we liked Ike so much we should make him president. The facts of *Deggs* were straightforward. After Gordon Sundberg was diagnosed with a battery of asbestos-related afflictions, he sued several defendants, ultimately settling with all but one and obtaining a $2,000,000+ jury verdict against that one. Sundberg died several years later, and daughter Judy Deggs as his personal representative brought a wrongful death action, naming the defendant who had gone to trial and lost, as well as several other defendants who had not been sued the first time around. By now, the statute of limitations had run. The trial court dismissed, Division One of the Court of Appeals affirmed (in an opinion by Judge Marlin Applewick, joined by Judge Linda Lau, over a vigorous dissent by Judge Stephen Dwyer), the plaintiff petitioned for review, review was granted, and the battle was joined.

*Continued on Next Page*

And the defense, championed by Kevin Craig and Terry Hall, prevailed! The Supreme Court split 5-4. Justice Stephen Gonzalez wrote the majority opinion, Justice Debra Stephens the dissent. For Stephens, the issue was a matter of judicial housecleaning: the old case law gloss on our wrongful death statute, dating from the first half of the last century, was "nonsensical" and should be abrogated, forthwith! *See* 186 Wn.2d at 739 (Stephens, J. dissenting). For Justice Gonzalez and his colleagues in the majority, the matter was not so easy. Although Justice Gonzalez agreed that, were the issue one of first impression, the Court would likely come out the other way, the fact remained that this was not a matter of first impression, the case for the harmfulness of the existing approach had not been made, and there was at least the risk of unsettling legitimate expectations. See 186 Wn.2d at 728-730. And although the majority demurred to the suggestion of WDTL as amicus curiae in a brief authored by Mike King and Stew Estes that the case was most properly analyzed as a matter of legislative acquiescence (the Legislature had "witnessed" the development over decades of this case law gloss limiting a statutory remedy and had done nothing then or since to abrogate it), the majority agreed that the Legislature's "lack of response" added weight to the conclusion that the existing approach had not been harmful. *Id.* at 728, n. 7, 729.

In sum—stare decisis is still alive and well in Washington. And the implications of its application in *Deggs* go well beyond the world of asbestos!

- *Noll v. Am. Biltrite, Inc.*, ___ Wn.2d ___, No. 91998-4, 2017 Wash. LEXIS 615 (June 8, 2017), *as amended by* 2017 Wash. LEXIS 713. The law of personal jurisdiction is changing! As was recently reported in this publication, the U.S. Supreme Court "has been busy in the personal jurisdiction arena." Consequently, so have the Washington Supreme Court and WDTL's amicus committee. The worlds of personal jurisdiction and asbestos collided in the case of *Noll v. Am. Biltrite, Inc*., and thanks to the work of WDTL members Melissa Roeder, Mike King, Rory Cosgrove and Justin Wade defending the component supplier, "Special Electric," and WDTL's amicus committee's briefing, authored by Chris Nicoll, Noah Jaffe and Stew Estes, an errant broadening of the test for jurisdiction over component manufacturers was reversed.

Mr. Noll contracted mesothelioma after exposure to a variety of asbestos containing products throughout a lifetime of work, including in particular, a certain type of asbestos-cement pipe manufactured by a California company named Certain-Teed. As a war raged from 1975 – 1982 between rock and disco for the soul of American youth, Special Electric, a Wisconsin company, had a contract to supply the asbestos that Certain-Teed used to make asbestos-cement pipe. During the key period, Certain-Teed sold and shipped a substantial amount of its pipe into Washington. Based on that, Mr. Noll, and later his representative, alleged that Washington courts could exercise specific personal jurisdiction over Special Electric purely because it had sent a harmful product into the stream of commerce where it was incorporated by Certain-Teed into a finished product that made its way into Washington where, allegedly, it injured Mr. Noll. Noll made no allegations in support of jurisdiction other than his stream of commerce claim.

The trial court granted Special Electric's motion to dismiss, but the Court of Appeals reversed,

*Continued on Next Page*

expanding prior stream of commerce jurisprudence to sweep up any component manufacturer whose product ended up entering the state in sufficiently large quantities regardless of the component manufacturer's knowledge or intent that its product would be marketed in Washington. After granting review, a majority of the Washington Supreme Court decided that Noll failed to alleged sufficient facts for Washington courts to exercise specific personal jurisdiction over Special Electric under the stream of commerce doctrine and remanded the case to the trial court for further consideration in light of State v. LG Electronics, Inc., 186 Wn.2d 169, 375 P.3d 1035 (2016), cert. denied, 137 S. Ct. 648 (2017). In so doing, the court took the opportunity to provide further guidance.

The court noted that stream of commerce cases have caused deep divisions within the U.S. Supreme Court, citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 1028, 94 L. Ed. 2d 92 (1987), and *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011). The court reaffirmed the position it adopted in *LG Electronics*, that, based on Justice Breyer's concurrence in *J. McIntyre, a prima facie* case for specific personal jurisdiction over a component manufacturer is satisfied where the complaint alleges that the defendant sold its product into the stream of commerce with the intent that the product would come into Washington. The majority concluded that the intent allegation was missing in *Noll*. This was important, according to the majority, because recent Supreme Court precedent in cases involving specific jurisdiction has "reaffirmed that the relevant relationship between a defendant and a forum must arise out of the contacts that the *defendant itself* creates with the forum state." *Noll,* 2017 Lexis 615 at * 14 (italics in original, internal quotes omitted, citing *Walden v. Fiore*, __ U.S. __, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014)). In reaching its conclusion that the Court of Appeals' decision was in conflict with *Walden*, the Court specifically relied on WDTL's *amicus* briefing:

> In this case, amicus WDTL argues that the Court of Appeals' decision erred under *Walden* because it failed to limit its focus to Special's suit-related conduct. Amicus WDTL's argument is persuasive on this point. The Court of Appeals focused on Special delivering asbestos to Certain-Teed's plant in California and Certain-Teed then purposefully availing itself of Washington's laws by selling large quantities of asbestos-cement pipes to Washington companies. But the Court of Appeals acknowledged that Special may not have been aware that Certain Teed was supplying the asbestos-cement pipes to companies in Washington, and it did not require any other evidence that Special purposefully availed itself of Washington's laws.

*Noll*, 2017 Wash. LEXIS 615, at *15-16. Regrettably, the court did not decide whether a showing of actual knowledge or awareness is necessary or sufficient to support specific jurisdiction in stream of commerce cases. Instead, the court expressed the requirement more generally as consisting of allegations of facts which, if true, would show that the defendant has done something to purposefully avail itself of the privilege of doing business in the forum. *Id.* at *16. Importantly,

*Continued on Next Page*

## Asbestos *From Page 17*

the court clearly stated that merely alleging that an out-of-state component part manufacturer sold a part to an out-of-state manufacturer who then sold the finished product into Washington will not satisfy the requirements of due process.

Take heart, colleagues! Victory is possible and *stare decisis* lives!!

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*Chris Nicoll is a trial and appellate lawyer and one of the founders of Nicoll Black & Feig, PLLC. He is a member of WDTL's Amicus Committee as well as the Maritime and Insurance practice sections. Chris works with local and international clients who are vessel owners and operators, ship builders, owners and shippers of cargo, and marine insurers on a wide range of defense and commercial litigation that frequently involve questions of personal jurisdiction. You can find out more about Chris at http://www.nicollblack.com/our-team/chris-nicoll/.*

## Message *From Page 1*

members through timely CLEs and complimentary lunch time brown bags, and held an incredible Annual Convention last month in Victoria, BC.

We still have a lot to accomplish. The good news is that we can do it. Our new President, Lori O'Tool, is enthusiastic, engaged, and ready to take this organization to the next level. Our Board of Trustees has never been stronger and more committed. Our members (over 700 of you!!) are the sharpest litigators out there and always willing to share information and assistance when we need it. And, of course, Maggie will keep us focused on the future and full of laughs. It has been my pleasure to serve. Thank you, WDTL!

# MAR 7.3 Attorney Fees:
## What is the Test to Determine Whether You Improved Your Position on Trial De Novo?

*By: Marilee Erickson*

The mandatory arbitration scheme in Washington places a significant risk on the party who exercises the statutory and constitutional right to a jury trial. If the party who de novos does not improve the position on trial de novo, the de novoing party must pay the opponent's attorney fees and expenses. The fees and expenses award usually exceeds by double, triple, or more the amount of the jury's award. Litigants have hotly contested what it means to improve one's position on the trial de novo. Neither the mandatory arbitration statutes (RCW 7.06 et seq) nor the mandatory arbitration rules ("MAR") define what it means to improve one's position. Thus, it has been left to the appellate courts to interpret and apply the phrase.

The bulk of the cases interpreting mandatory arbitration involve personal injury disputes---disputes where plaintiff gets an arbitration award and defendant seeks de novo. And the majority of cases interpreting the MAR 7.3 fee awards are personal injury disputes.

The Supreme Court has spoken twice on what it means to improve one's position on trial de novo from an RCW 7.06.050 offer of compromise. *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012) and *Nelson v. Erickson*, 186 Wn.2d 385, 377 P.3d 196 (2016).

In *Niccum*, after the defendant sought a trial de novo from mandatory arbitration, the plaintiff made a confusing offer of compromise. The offer of compromise was "$17,350.00 including costs and statutory attorney fees." No one knew the amount of costs and attorney fees. In determining whether defendant improved his position on de novo, the trial court subtracted $1,016.28 in "costs" from the offer of compromise before comparing it to the $16,650.00 jury award. The trial court awarded MAR 7.3 fees.

The Supreme Court reversed. The *Niccum* Court held that the trial court should have made "a comparison of damages to the lump sum that he offered to accept in exchange for settling the lawsuit." *Id*. at 450. The Court further explained:

> It is our view that an ordinary person would consider that the "amount" of an offer of compromise is the total sum of money that a party offered to accept in exchange for settling the lawsuit.

*Id.* at 452. Despite the confusing language about inclusive costs in the offer of compromise, the Court determined that the amount the plaintiff was willing to settle for was $17,350. That offer of compromise was compared to the amount of damages awarded at trial: $16,650. Defendant had improved his position on de novo.

In 2016, the Supreme Court again took up the issue of what it means to improve one's position after rejecting an offer of compromise. *Nelson v. Erickson*, 186 Wn.2d 385, 377 P.3d 196 (2016). In Nelson, the arbitrator awarded plaintiff $43,401.59 in compensatory damages and taxable costs of $1,522.19. Defendant requested a trial de novo. Plaintiff presented defendant with a RCW 7.06.050(1)(b) offer of compromise to settle for $26,000 plus taxable costs incurred at arbitration. Defendant confirmed that plaintiff would settle the case for $27,522.19: the $26,000 plus the $1,522.19 taxable costs awarded at arbitration.

Defendant did not accept the offer of compromise, and the case proceeded to a jury trial. The jury awarded plaintiff $24,167 in compensatory damages and the trial court granted additur of $3,000. Plaintiff was also awarded statutory costs of $729.98. Plaintiff moved for MAR 7.3 attorney fees, arguing defendant had not improved his position on trial de novo. The trial court ruled plaintiff's offer of compromise was $26,000 and the jury award and additur totaling $27,167.00 was more than the offer of compromise. The Supreme Court reversed, holding the offer of compromise was $27,522.19 so the trial result of $27,167 was an improvement.

Again, the *Nelson* Court held that a compromise offer should be read as an ordinary person would understand it. And determining whether a party has improved his position on the trial de novo is determined from the perspective of an ordinary person. The *Nelson* Court compared the

*Continued on Page 21*

*Zachary Nelson is a summer associate in Schwabe, Williamson & Wyatt's Seattle office and a rising 2L at Lewis & Clark Law School. Zachary serves on the board of the LGBT Bar Association of Oregon and is Vice President of the Lewis & Clark Law School Chapter of the American Constitution Society. He earned his MA in Political Science from Colorado State University and his BA from the University of South Dakota.*

*Christopher Howard is a Shareholder at Schwabe, Williamson & Wyatt and serves on the WDTL Pro Bono Committee. He focuses his practice on commercial litigation and the defense of professionals in the medical, legal, financial, hospitality and real estate industries. He has extensive trial and appellate experience in state, federal and administrative law courts.*

[1] *Appendix A shows the differences between Washington's Rule 5.5(d) and the ABA's Model Rule 5.5(d).*

[2] *Appendix B shows the differences between the Washington and ABA versions of Rule 5.5(e).*

[3] *ABA Proposed Res. and Rept. 103, Rept. 3 (Feb. 2016)*

[4] *Id. at Rept. 1.*

[5] *See id.*

[6] *APR Task Force Report to the Board of Governors, Washington State Bar Association, 7 (Sep. 2012).*

[7] *Id. at 3.*

[8] *Id. at 7.*

[9] *Wash. APR 3(b).*

## APPENDIX A

### Rules of Professional Conduct 5.5(d)

Differences between the ABA's Model Rule and Washington's Rule are underlined.

### ABA Model Rule 5.5(d)

*(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof,* or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, *may provide legal services* through an office or other systematic and continuous presence *in this jurisdiction that:*

*(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or*

*(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.*

### Washington Rule 5.5(d)

*(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services in this jurisdiction that:*

*(1) are provided to the lawyer's employer or its organizational affiliates* and are (i) provided on a temporary basis and (ii) *are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or*

*(2) are services that the lawyer is authorized by federal law or other law or rule to provide in this jurisdiction.*

## APPENDIX B

### Rules of Professional Conduct 5.5(e)

Differences between the ABA's Model Rule and Washington's Rule are underlined.

### ABA Model Rule 5.5(e)

*(e) For purposes of paragraph (d):*

*(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority;* or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

### Washington Rule 5.5(e)

*(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.*

# MAR 7.3 Attorney Fees *From Page 19*

pre-trial position to the post-trial position without statutory costs being a factor. 186 Wn. 2d. at 392.

In both *Niccum* and *Nelson*, the offer of compromise amount was compared to the jury award. In both *Niccum* and *Nelson*, plaintiff was the prevailing party for purposes of statutory costs. Plaintiff was awarded statutory costs at trial. Those costs were not included in determining whether the de novoing party had improved his position at the trial de novo.

In de novo trial without an offer of compromise, the non-de novoing party (i.e. usually the plaintiff) frequently persuades the trial court to use the statutory costs when determining if the de novoing party (i.e. usually the defendant) has improved his position on trial de novo. The Supreme Court has not yet addressed how the courts should determine whether a party has improved its position where there is no offer of compromise. Soon the Supreme Court will address and perhaps decide this issue.

Recently Division I of the Washington State Court of Appeals decided what it means to improve one's position on trial de novo where there is no offer of compromise. *Bearden v. McGill,* 193 Wn.App. 235 (2016) ("Bearden I") and *Bearden v. McGill*, 197 Wn.App. 852 (2017) ("Bearden II").

In *Bearden*, the arbitrator awarded plaintiff $44,000 in damages. Plaintiff submitted a $1,187.00 cost bill for the filing fee, costs of service of process, records, reports, and statutory attorney fees. The arbitrator awarded $1,187.00 in costs and issued an amended arbitration award of $45,187.00.

Defendant requested trial de novo. The case proceeded to trial. The jury awarded $42,500.00. After trial, plaintiff sought costs of $4,049.22 and the court awarded costs of $3,296.39. Plaintiff then sought MAR 7.3 and RCW 7.06.060 attorney fees and costs. He argued defendant had not improved his position on the trial de novo when the arbitration award plus costs was compared to the jury award plus costs. The trial court ruled defendant had not improved his position at the trial de novo. Plaintiff was awarded MAR 7.3 fees of $71,800. Defendant appealed. The Court of Appeals reversed the MAR 7.3 fee award explaining:

> We hold that a court determines if a party improved its position at a trial de novo by comparing every element of monetary relief the arbitrator considered with the trial court's award for those same elements. Here, this means the damages and statutory costs that both the arbitrator and the trial court considered. It excludes those statutory costs requested only from the trial court.

***Bearden v. McGill*, 193 Wn. App. at 239 (2016).**

Bearden petitioned for review of Division I's 2016 decision (i.e. Bearden I). The Supreme Court granted the petition but did not issue a decision. Instead, the Supreme Court remanded the case to Division I to reconsider its decision in light of *Nelson v. Erickson*.

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# MAR 7.3 Attorney Fees *From Page 21*

In 2017, after further briefing and another oral argument, Division I reached the same result—that defendant McGill had improved his position on trial de novo--on a different rationale. *Bearden II*, 197 Wn. App. at 852 (2017). Division I explained:

> [] Nelson and Niccum apply the same rule: a court applying MAR 7.3 must view the pretrial and posttrial positions of the party requesting the trial de novo from the perspective of an ordinary person. Also, in both Nelson and Niccum the court determined the requesting party's posttrial position by looking at only the jury verdict, not the final judgment including costs.
>
> . . .
>
> [W]e follow the Supreme Court's example and adopt the jury verdict as McGill's posttrial position.
>
> . . .
>
> To determine a requesting party's position pretrial when no offer of compromise has been made, a court looks at the arbitration award.
>
> . . .
>
> [W]e conclude that like the posttrial "position" of the requesting party, that party's pretrial position is the initial arbitration award without costs.

197 Wn. App. at 858-860 (footnotes omitted).

Division I also reasoned that not including statutory costs in the formula supports the purposes of mandatory arbitration. If arbitration statutory costs are included to determine the de novoing party's pretrial position, the pretrial position will generally be a greater amount and would make it easier for a de novoing party to improve the position at the trial de novo. Division I concluded:

> On reconsideration in light of Nelson, we revise our view of the MAR 7.3 analysis. We hold that a trial court should determine a requesting party's position after trial by looking at the damages the court awarded, exclusive of costs, as the Supreme Court did in Nelson and Niccum. Under this test, McGill improved his position at trial. We therefore reverse the trial court's award of attorney fees to Bearden under MAR 7.3 and remand.

**197 Wn. App. at 861. Mr. McGill petitioned for review again.**

After *Bearden II*, Division I decided *Hedger v. Groeschell*, ___ Wn.App. ___ (Div. I No. 74149-7-1 May 15, 2017). In *Hedger*, plaintiff was awarded MAR 7.3 fees because the arbitration award was less than the jury verdict plus amounts awarded for costs and sanctions. Division I reversed the MAR 7.3 award.

The Court of Appeals concluded that in determining whether the party requesting the trial de novo improved her position from the arbitration, the court should consider only the jury's verdict attributable to the claims that were arbitrated. The Court looked at

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the initial arbitration award of $17,880.10 and the jury's award of $10,620. Based on those figures, defendant improved her position on the trial de novo. The Court reversed the MAR 7.3 fee award of $62,167.50. Division I explained:

> Until recently, this court consistently held the court should assess a party's position by comparing comparables. See, e.g., Wilkerson v. United Inv., Inc., 62 Wn.App. 712, 717, 815 P.2d 293 (1991); Tran v. Yu, 118 Wn.App. 607, 615-16, 75 P.3d 970 (2003). But, in Bearden v. McGill, this court concluded that the trial court should compare only the jury verdict and the arbitrator's initial award. 197 Wn.App. 852, 860 61, 391 P.3d 577 (2017). The court will not conclude that a party has improved its position when the party did so only by prevailing on a claim that was not arbitrated. See *Christie-Lambert Van & Storage Co., Inc. v. McLeod*, 39 Wn.App. 298, 304, 693 P.2d 161 (1984). Accordingly, the court should consider only the portion of a jury's verdict attributable to claims that were arbitrated.

***Hedger v. Groeschell*, No. 74149-7-I, 2017 WL 2105991, at *4 (Wash. Ct. App. May 15, 2017)**

On June 27, 2017, the Supreme Court accepted Bearden's petition for review of *Bearden II*. Oral argument will occur in the fall of 2017. The Supreme Court website lists the issue as: "Whether in a trial de novo following mandatory arbitration, trial costs awarded to the nonmoving party should be included in the determination of whether the party that sought trial de novo improved its position at trial for purposes of the nonmoving party's entitlement to attorney's fees under the Mandatory Arbitration Rules." A year from now, we should have the Supreme Court's view on when a de novoing party improves its position when there is no offer of compromise.

*Marilee C. Erickson is a shareholder at Reed McClure. For over 28 years, Marilee has been representing parties in trial and appellate courts. She focuses her practice on defense of tort claims and insurance disputes, including bad faith claims. She also defends employment disputes and premises, product, and professional liability claims. She devotes a substantial portion of her practice to appellate matters.*

# Major Changes on the Horizon for Chiropractors Performing Cr 35 Exams: Insurance Defense Counsel Beware

*By: Jonathan Hammond*

For anyone who handles automobile personal injury cases on the defense side, it is an all too familiar fact pattern: plaintiff is rear-ended at 5 miles per hour, resulting in minimal damage to either vehicle, yet somehow racks up $15,000 in medical bills, most of which are chiropractic. Suspecting overtreatment, you retain a chiropractor to serve as an expert and opine as to the reasonableness and necessity of the plaintiff's treatment, and possibly perform a CR 35 exam. Your expert's report concludes that only 40% of the plaintiff's claimed medical specials are reasonable and accident-related.

Armed with the favorable report you head to trial (or, more likely, mandatory arbitration) confident in a good outcome. While you expect to have your expert's opinions challenged on cross-examination by the plaintiff's attorney, you probably do not expect the state chiropractic licensing board to be on patrol, poised to initiate a disciplinary proceeding against your expert for failing to conduct a proper CR 35 exam. However farfetched that sounds, it is a very real danger if the state's Chiropractic Quality Assurance Commission ("CQAC" or "Commission") is successful in implementing proposed rules governing chiropractic forensic work—rules which could make the successful defense of your client in our hypothetical a much more difficult prospect.

**Background**

Among other functions, the Commission is responsible for establishing qualifications for licensure of chiropractors; serving as reviewing members on disciplinary cases; and, as pertinent here, developing "rules, policies and procedures that promote the delivery of quality healthcare to state residents." RCW 18.25.002. The CQAC is made up of 11 chiropractors, and three public members, all of whom are appointed by the governor. RCW 18.25.0151. This article will focus on the rulemaking function of the CQAC.[1]

There are currently no rules in the WAC governing the manner in which a chiropractor must perform an in-person Independent Chiropractic Exam ("ICE") under CR 35, or in an automobile PIP coverage context. Neither do any standards exist which dictate how chiropractors must carry out a "paper-only" review of a patient's medical records at the request of a personal injury defendant or an insurance carrier. This may not come as a surprise given the fact that unlike a treating chiropractor, a consultant hired to provide opinions on the care rendered by another professional is acting as an expert witness who does not form a physician-patient relationship with the patient or provide instructions to the patient himself about what future treatment is needed.[2]

The lack of rules governing an ICE has been a topic of discussion among Commission members for the past several years, and efforts are now underway to write rules which will define what an expert chiropractor can and cannot opine to, who is allowed to serve as a chiropractic independent examiner, and even how the expert may be compensated. To that end, the CQAC initiated its rulemaking process by filing a Pre-Notice Inquiry on October 16, 2015. This notice is found at WSR 15-21-047 of the Register[3] and provides in pertinent part as follows:

> **"Reasons Why Rules on this Subject may be Needed and What They Might Accomplish:** Currently chiropractors are able to perform [an] ICE on chiropractic patient care…The commission is considering **outlining the legal standards a chiropractor must follow when performing [an] ICE** to ensure all chiropractors follow the same standards and ***do not jeopardize the patient's access to care***… (emphasis added).
>
> **Other Federal and State Agencies that Regulate this Subject and the Process Coordinating the Rule with These Agencies:** No other agency regulates ICE physical examinations or patient records review. However, the department of labor and industries (L&I) has jurisdiction over workers compensation ICE examinations... The commission's draft ICE rules will be sent to L&I giving them an opportunity to provide comment and to also testify at the future rules hearing."

Although the Pre-Notice Inquiry was published over 18 months ago, the process of drafting the proposed rules

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has only begun in earnest in the last several months.

**Proposed Rules**

On February 25-26, 2017, the CQAC conducted a business meeting which included a workshop in order to commence work on drafting rules applicable to how an ICE may be conducted within the state. Circulated to Commission members at or before the meeting was a packet of information entitled *Documents Reviewed at February 25-26, 2017 Rules Workshop and Business Meeting*[4] (hereinafter referred to as "Proposals"), which contains a list of recommendations considered by Commission members at the meeting regarding the implementation of ICE rules. Although authorship credits are not provided, most of the comments in the Proposals are written in the first person, e.g., "I think the rules should provide X" or "we should consider doing Y"), and it is assumed that they were written by current Commission members.

An even cursory reading of the Proposals reveals a high degree of hostility among the CQAC members toward chiropractors doing in-person or records-only ICE work. Forensic chiropractors are portrayed as biased and only acting in the interests of the insurance company (who pays their bill), rather than as neutral experts. Consistent with this hostile attitude, many of the recommendations are designed to place constraints on the types of opinions which may be rendered and who can perform the review; more importantly, the proposals would bring a chiropractic expert's forensic review work within the purview of the CQAC's disciplinary authority. In other words, if the CQAC has its way, it could come after your expert based on his or her opinions, which will undoubtedly dissuade many qualified and talented chiropractors from doing expert work.

The excerpts from the proposals set forth below provide a snapshot of the some of the proposed rules being floated by Commission members, which, if promulgated, could tie the hands of the defense bar (emphasis supplied by the author in all cases):

- *Purpose of "paper reviews"*: paper reviews are defined as "the review of documentation of care provided at the request of a payer" in order to "determine the *quality of the documentation*. Without a physical examination, any chiropractor performing a paper review *cannot establish a diagnosis or make treatment recommendations.*"

- *Purpose of ICEs*: the Proposals document suggests that "[i]t should be the responsibility of the ICE chiropractic physician to place the patient's needs at the forefront and to avoid any interruption of his/her continuity of care."

- *Qualifications for ICE Examiners:* One of the Proposals is to establish criteria as to "who can be an ICE examiner, including factors such as "[y]ears in practice, percentage of income from practice, etc." Several Commission members appear to be in favor of rules prohibiting ICE by chiropractors who do not devote at least X% of their time to treating patients (e.g., "50% of their practice time [must be devoted to] direct patient care in the two years immediately preceding the examination").

  One proposal goes so far as to recommend that the chiropractor publish a "list of outcomes" from prior ICE which would include "[w]hat percentage referred back to the primary doctor for more care versus cutting them off post ICE exam." A similar proposal would require ICE examiners to publish how many times he she has been hired by the payer and provide the "% of finding *in favor of* the insurance company and *in favor of* the patient."

- *Compensation of Examiners:* The Proposals document includes a citation to a 2016 Minnesota statute which provides that a "doctor of chiropractor must not accept a fee of more than $500 for each independent exam conducted". Fee caps are apparently under consideration by the Commission.

- *Hostile Attitude Toward ICE Examiners:* One final observation from the Proposals document is that it includes multiple disparaging comments about ICE professionals such as "[u]nfortunately, ICE doctors have *an incentive to minimize the patient's condition"* (for which mandatory video recordings of all exams is proposed in order to "clear up the ICE DC's *tarnished reputation* and at times *questionable motives*"). One of the final comments in the Proposals tellingly concludes as follows: "[w]e all know specific

*Continued on Next Page*

> ICE DC's that 9 times out of 10 'will have "objective" findings be 100% in favor of the insurance company. **This needs to stop [and we need to] hold ICE DC's responsible for their actions.**"

In short, although no formal rules have been proposed, the above excerpts leave no doubt that the CQAC is headed towards creating rules that are designed to tip the scales in favor of the plaintiff's bar which may hinder insurers from conducting a meaningful review of claims.

**Fighting Back**

Before too many alarm bells are sounded, it is important to recall that the CQAC is still in "step 1" in its rulemaking process under the APA. It does not appear that the public comment stage has been concluded as no actual proposed rules have been drafted as of this time. As such, additional comments from members of the public (ahem, you and your clients!) are welcome and are required to be considered under the statute. Below are some possible talking points the author believes should be presented to the CQAC.

**A. Insurers are Permitted to Perform Utilization Reviews to Ferret Out Fraudulent Claims**

The Administrative Code expressly authorizes automobile insurers to perform utilization reviews when evaluating PIP claims by their insureds. See WAC 284-30-395(3) (authorizing carriers to consult with health care professionals when deciding whether to "deny, limit, or terminate an insured's medical and hospital benefits"). Moreover, the authority to deny a claim or cut off benefits (whether in the context of PIP treatment, or an active litigation) lies with the insurance carrier, not the consultant retained to provide opinions. As such, it makes little sense to discipline the chiropractic expert for a decision rendered by the carrier.

**B. The Plaintiff/Patient Has Other Remedies Available**

A second argument is that there is no need for the CQAC to exercise its oversight over chiropractors performing forensic work, given the many options available to personal injury plaintiffs who feel their benefits were wrongfully terminated or their treatment unfairly criticized by an expert. First, in the context of reviews of PIP benefits (commonly referred to as a "utilization review"), a patient may appeal the decision of the insurer denying or cutting off benefits. If this route is not successful, the patient may initiate PIP arbitration under most policies. Of course, a legal action against the carrier is also a potential avenue.

Similarly, in personal injury litigation, the most obvious recourse for a plaintiff who is dissatisfied with the defense expert's findings is to cross-examine the expert and undermine the bases for his or her opinions, and present testimony by a rebuttal expert. The jury can choose whom to believe and there is no need for the CQAC to put its thumb on one side of the scale.

**C. Utilization Reviews in the Context of PIP Claims Are Designed to Benefit Insureds**

Finally, utilization reviews are a tool designed to protect not only a carrier's resources, but also a patient's. To the extent a patient "burns through" the PIP limit on unnecessary treatment, there is a risk that necessary tests and studies (such as CT scans) will not be covered, since there will be no money left under the policy. On a more global level, utilization reviews also have the salutary effect of keeping healthcare costs down for all policyholders. For example, the more paid out on unreasonable and unrelated chiropractic treatment claims, the more we all suffer by way of increased premiums.

**Conclusion**

Although the proposed rules set forth above could lead to an unwelcome departure from the norms of claims adjusting and insurance defense work, the good news is that we are still very early in the process. The CQAC has a statutory obligation to consider input from all members of the public who wish to be heard. This means that you, your clients, carriers and experts can all weigh in with recommendations about how the CQAC should proceed with its rulemaking regarding ICEs.

*Jonathan Hammond is a litigation attorney with the Spokane firm of Bohrnsen, Stocker, Smith, Luciani. His practice focuses on the defense of contractors, developers and design professionals in construction matters. He also handles a variety of personal injury, professional liability, and real property disputes.*

*[1] CQAC is subject to Washington's Administrative Procedure Act ("APA") pursuant to RCW 34.05. et seq.*

*[2] The Commission has long taken the position that performing forensic exams and reports constitute the practice of chiropractic even though treatment is not provided. See, 2013 Interpretative Statement No. CH-12-13-12, available at www.doh.wa.gov/Portals/1/Documents/2300/12-13-12.pdf. Although, this Interpretive Statement is advisory only and does not provide a basis for disciplinary action (see RCW 34.05.230), it should be noted that this has not stopped the CQAC from initiating disciplinary proceedings against multiple forensic chiropractors based on their failure to perform an in-person exam, among other issues. These efforts have largely proved unsuccessful given the lack of administrative rules providing the CQAC jurisdictional support.*

*[3] Available at http://lawfilesext.leg.wa.gov/law/wsr/2015/21/15-21-047.htm*

*[4] The author of this article has a copy of this information packet and would be pleased to make it available to WDTL members upon request.*

# Welcome New Members

**Eric Anderson**
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*Referred by Jesse Blaisdell*

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Todd A. Bowers & Associates
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*Referred by Michael Sanders*

**Sean Worley**
Meyer, Fluegge & Tenney, P.S


# WDTL Events Calendar for 2017-2018 (register online at www.wdtl.org)

**September**
19 South Central WA Judicial Reception - Yakima

**October**
4-8 DRI Annual Meeting – Chicago
14 Defender Donut Dash - Seward Park
17 Judges' Reception, Seattle – Davis Wright Tremaine

**November**
30 CLE – Annual Ethics Seminar

**December**
8 CLE – Annual Tort Law Update

**January**
30 South Sound Judicial Dinner - Pacific Grill, Tacoma

**February**

**March**
1 Eastern Washington Judicial Reception – The Davenport Hotel, Spokane
TBD Young Lawyer March Madness- Schwabe Williamson & Wyatt
TBD CLE – PSAA and WDTL Joint Symposium

**April**
TBD CLE - Insurance Law Update - Jason Vacca - Convention Center

**June**

**July**
19-22 Annual Meeting & Convention – Sun Mountain Lodge, Winthrop WA

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# 2017 - 2018

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# WASHINGTON DEFENSE TRIAL LAWYERS

## Application for Membership

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Firm Name _____

Office Address _____

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Phone (_____) _____ WSBA# _____ OSBA# _____

FAX (_____) _____

E-mail _____

2. Year of Admission to Bar _____ Legislative District _____

3. If you were referred to WDTL by a fellow attorney, please list name here:

_____

4. 2017-2018 Membership Dues

| | | |
|---|---|---|
| Attorneys | Admitted to the Bar more than 5 years | $295.00 |
| | Admitted to the Bar less than 5 years | $240.00 |
| Other | Government Attorney | $170.00 |
| | Retired Member | $125.00 |
| | Associate Member (Non-Attorney) | $65.00 |
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- ☐ Caucasion
- ☐ Asian American
- ☐ Multi-Racial
- ☐ Hispanic
- ☐ LGBT
- ☐ Native American
- ☐ Other: _____
- ☐ Gender: _____

6. ☐ I would like to contribute $150.00, $100.00, $50.00 (minimum $20.00) to fund WDTL's legislative advocacy and outreach program.

*I understand that pursuant to Public Law 103-66, this portion of my annual WDTL dues is not deductible from federal income taxes as a business expense*

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8. Dated this _____ day of _____, 20 _____

9. Signature of Applicant: _____