What No One Teaches Lawyers About Communication

by Thomas M. O'Toole, Ph.D., and Jill D. Schmid, Ph.D.

During a recent lunch with a client, an attorney made an interesting comment about his experience as a law student: “Law school teaches you everything you need to know about the law except how to practice it.” When questioned, the attorney explained that because so much time is required to learn the law, little time is left to learn how to practice it in front of the trier of fact. Regrettably, this point is often repeated by even the most established and successful trial attorneys.

As consultants for the largest litigation consulting firm in the Pacific Northwest, our days are spent focusing exclusively on how the trier of fact, whether it be a judge, a jury, an arbitrator, or mediator, makes sense of the tremendous amount of information communicated to them by attorneys. From these experiences, we have isolated some of the key factors attorneys should consider as they prepare to present their case at trial, mediation, or arbitration. The purpose of this article is to arm attorneys with a theoretical, yet practical, foundation for effectively arguing their case in front of jurors.

To do so, we will focus on five important things they didn’t teach you in law school.

Speaker versus audience-based communication

In 1990, Elizabeth Knight, then a graduate student at Stanford University, conducted a study involving a simple game in which she divided participants into two groups: tappers and listeners. The tappers were assigned the task of selecting songs from a list of well-known songs such as “Happy Birthday” and “Jingle Bells.” They were then instructed to tap the song out on the table, making no other sound but that of the tapping. The listeners were asked to guess the song the tapper was tapping. The interesting part of the study arises from the fact that the tappers were asked beforehand to guess the rate at which the listeners would guess correctly the song. The tappers optimistically predicted that the listeners would guess correctly only 2.5 percent of the time. However, the data revealed that listeners guessed correctly only 2.5 percent of the time.

This study highlights a fundamental communication error to which we are all susceptible: blaming the audience for our own communication inadequacies — “It’s not my fault. You just didn’t get it.” We summarize this phenomenon as “sender-based communication.” Sender-based communication assumes that the audience should adapt to and understand the sender’s world view (their experience, knowledge, and beliefs) instead of the sender adapting to the audience’s. In essence, it says the sender is the most important party in the communication — everyone else should learn to understand them.

How does this affect you at trial? By the time a case reaches a jury, the trial team
is waist-deep in depositions, evidence, and briefs, which have been collected over a course of months or even years. The attorneys have thought through a plethora of conceivable issues that could arise at trial and have formulated responses. The case is ingrained in their minds and, consequently, they can overestimate the ease with which jurors will understand their case. Counsel has the benefit and the limitation of knowing too much about the case and the law, often resulting in too many layers of assumptions and presumptions about the messages sent to jurors. It is naive to believe that someone hearing your case for the first time is going to automatically “get it,” and it is not because they do not have the mental capacity; it is because you failed to tailor your message to the audience. Understand your audience. Do not assume your world view is theirs. Put simply, make it all about what’s important — the jurors.

The narrative approach to juror sense-making

So, the audience is king, but how do you speak to them? From a very early age in life, we are told stories — stories about how things work and why things work. Whether it was the bedtime stories our parents told us at night, or the stories our friends and family tell us in daily conversations, we are inundated with stories — with narratives that help us make sense of the world around us.

There is a vast difference between the technical (data-based) reasoning attorneys learn in law school and the everyday reasoning deployed by jurors. One of the reasons you might have been drawn to law school to begin with is that you are a logical, linear-based thinker who makes what you feel are reasoned decisions based on data. For years, communication research has posited that people (jurors) make sense of the world (case facts) through stories. Walter Fisher, father of the narrative world paradigm (as opposed to the rational world paradigm) focused his work on the importance of stories as one of our most basic and natural communication processes, providing a principal way in which we learn and comprehend new ideas and information. They are a basic tool of human reasoning, and a means to arrive at a moral judgment. In a nutshell, a story provides the mechanism for jurors to make sense of complicated issues presented at trial.

Stories are important because they provide the framework for how all of the evidence, facts, testimony, and arguments hang together and make sense. A narrative framework focuses jurors on particular evidence or testimony and not on others. Without a story, it is just bits of information that a juror has no particular way to make sense of and store for retrieval. It is difficult, if not impossible, to make sense of thousands of details (the evidence, legal concepts, parties, statements, etc.) when presented piece by piece; but, present all of this information in a framework, in a narrative, that puts all the pieces in a coherent, complete, and compelling story, and you have made the juror’s job easier. You have learned to speak their language — to focus on the audience in a meaningful manner. Failure to do so can lead to confused jurors at best, and a jury that adopts the narrative of opposing counsel, at worst.

A few key questions to consider as you develop your case narrative are:

1. What are the themes and principles that drive my case narrative? Is it a story of responsibility, as is often the case in product liability cases? Is it a story of the rewards of hard work in a patent case? These themes and principles serve as psychological motivators for jurors to engage in and embrace your client’s case narrative. The first step to a favorable verdict is motivating jurors to find for your client.

2. Who are the central characters of my case narrative? The central character, in many ways, defines the narrative framework by providing the key focal point, which in turn, shapes the perspective by which jurors will judge the case. An old Tsongas cliché is that “a verdict is the product of what jurors choose to talk about.” To exemplify the importance of central characters, consider the difference between “The Wizard of Oz” and “Wicked,” the popular Broadway musical. “The Wizard of Oz” is told from Dorothy’s perspective, a perspective which casts her as an innocent victim of an evil witch. “Wicked,” on the other hand, is told from the perspective of the witch, which casts her as a misunderstood, socially isolated individual who is also a sympathetic victim of circumstance.

3. Where does my story start and end? The starting and stopping points for a story can significantly impact the substance of the story, as well as the principles or morals by which the narrative will be judged by jurors.

De-select, don’t select, your jury

Speaking to your audience using stories they understand sounds perfectly reasonable until you realize that there will be some jurors who, no matter how hard you try, will never accept your message. You say “black,” they think “white.” You say “run,” they hear “walk.” You say “fair competition,” they argue “monopoly.” Even in politics, candidates speak to their core to generate hype (increase others’ motivation), and they speak to the undecideds to win their vote. They do not, however, waste time speaking to the other side’s core.

As jury consultants, common questions we receive from attorneys include: “Who do I want on my jury?” “Do I want males or females?” and “How can I best sell my themes in voir dire?” Unfortunately, none of the above questions are productive for attorneys. Jury selection is not like the NBA draft. You do not get to “pick” your jurors. Even if such a strategy were possible, the risks far outweigh the rewards when compared to an alternative strategy of de-selection. The risks of accidentally placing a “bad” juror on the jury are enormous when compared to the risks of accidentally striking a “good” juror from the venire.

In trial, having someone on the panel who fundamentally views the world differently than what you are advocating is only going to cause headaches. They must be discovered in voir dire and either excused for cause
or by using a peremptory strike. This means that your goal in voir dire is de-selection (not selection), and you can only do this by doing what attorneys fear — asking questions that highlight your potential weaknesses.

"Hold on," many attorneys will say, "Won't I poison the well?" The answer, simply and emphatically, is "No!" People's attitudes are built upon years and years of experiences and viewing the world in a particular way. They are not going to change their mind just because a stranger across the room happened to say something that contradicts their personal opinion. It would be paramount to someone who hates cats suddenly changing her mind simply because someone else said, "Oh, cats are so lovable." It's silly, and the example is silly to make a point: People do not change deep-seated opinions easily, and that is why you need to ask the tough questions: "How many of you have ever had a negative experience with a physician?" "How many of you feel that corporate executives will lie to cover up wrongdoing?" "How many of you think that corporations engage in unethical behavior to squash their competition?" If you're afraid to ask the question in voir dire, you are potentially leaving a juror on the panel who holds the negative opinion you fear, and it will be in deliberations where they finally unleash their true thoughts. Now that truly is something to fear.

The fact is that there is simply no evidence that supports the theory that jurors are persuaded in jury selection. Even if it does occur from time to time, the malleable juror who is easily influenced over the course of voir dire will likely change his or her mind again over the course of the trial, plus is unlikely to be a force in the deliberation room.

An image is worth a thousand words

We live in a visual culture. Studies have shown that the average person watches 15,000 hours of television by the time he or she graduates from high school, compared to 11,000 hours spent in the classroom (Gass & Solomon, 1996). Jurors have learned more than 80 percent of what they know visually (Wilentz, 1968). An image truly is worth a thousand words.

A 2007 Animators at Law study that compared attorney learning styles to that of the general public found that the general public (in other words, your jury) are much more likely to be visual learners than attorneys, who tend to be auditory or kinesthetic learners. Additionally, a 1986 3M study by Douglas Vogel found that combining verbal with visual presentations led to significantly greater retention of information. Specifically, the study found that when information was presented in visual form only, retention was 70 percent after three hours and 10 percent after three days. When presented in visual form only, retention was 72 percent after three hours and 20 percent after three days. However, when presented in both verbal and visual form, retention was 85 percent after three hours and 65 percent after three days.

Contrary to current common practices, turning your opening (or closing, expert reports, etc.) into a PowerPoint presentation does not make it "visual." PowerPoint is a medium, not a "graphic." Bullet point after bullet point, even when they zoom onto the screen in an interesting fashion, is not visual communication. As former public speaking teachers at the university level, we used to teach our students that a visual aid is only productive when it adds something to the presentation that cannot be accomplished by words alone. The same holds true for attorneys in the courtroom. So, here are a few questions you should consider as you develop your litigation graphics:

1. Do I have variety in my presentation? The human brain takes a break every ten to twelve minutes. Consequently, this means attorneys face the burden of finding ways to constantly regain jurors' attention. Variety in your visual presentation can help you accomplish this. Instead of relying on PowerPoint exclusively, mix it up by including some boards, transparencies, videos, etc.

2. Do I have too much information in my graphic? Last year, at the King County courthouse we watched an attorney present a large eight-foot board with a timeline of "key" events. Unfortunately, there were a great number of key events, which created massive clutter on the timeline, making it difficult for jurors to gain a sense of the chronological order of events. Seeing this was a reminder of the old saying, "If everything's important, nothing's important." We understand that it is a painful process, but it is crucial that attorneys simplify information by narrowing it down into key points. Otherwise, jurors will fail to see the forest through the trees.

3. Does my graphic have a core message? Now that you are thinking about visual communication, take it one step further and think of it in terms of visual argument. Graphics not only communicate information; they engage in advocacy. One of the most famous cultural images of the past century is that of Buzz Aldrin placing the American flag on the moon. This image was not only a picture, but an argument about American superiority in the Cold War.

Jurors without motivation will never be your advocates

Many attorneys think their job is to simply persuade a majority of the jurors, thinking that if there are more of them than the other, they will finish the job in deliberations. We know you've all heard of "12 Angry Men," but perhaps a more recent and true experience will highlight the dangers of this assumption.

After a Las Vegas jury listened to evidence and testimony over the course of several weeks in a trial with potential exposure in the hundreds of millions of dollars, they were finally sent off to the deliberation room to render a verdict. A straw poll at the beginning of deliberations revealed that six of the eight jurors favored the plaintiff. But after a few short hours of deliberation, two well-equipped, defense-oriented jurors had successfully argued for the defense, resulting in a defense verdict in which only one juror held out.

Another long-standing Tsongas cliché is that the attorney's job is to "motivate and arm jurors to be effective advocates for the client in the deliberation room." Persuading a juror to favor your client is not enough if he or she does not have the ability to effectively respond to the arguments put forth by adverse jurors in the deliberation room. Additionally, persuading a juror is not enough if he or she is not motivated to persuade others.

Motivation and the ability to process information are crucial components of persuasion. Consequently, both are vital aspects of audience-based courtroom communication. Once a juror is motivated to embrace a case theory, he or she must have the ability to be your advocate. Jurors' abilities are strengthened through some of the points previously discussed — an effective narrative and compelling visuals, since these things help jurors recall and place the critical information into the appropriate context. Additionally, jurors must be provided with the language and explanations to effectively argue the case to others in the deliberation room. Without this, the natural human tendency, when lacking the
confidence to articulate an opinion, is to remain relatively silent. Silent advocates do not often lead to favorable verdicts.

These five factors will help any attorney gain a competitive advantage in the courtroom. Attorneys should carefully consider each as they prepare for trial. Attorneys must recognize how their knowledge and experience creates what communication scholar Kenneth Burke dubbed “trained incapacities” — in other words, what you know can actually hurt you. The key to success in the courtroom can be summed up in the following lines from a standard college textbook for freshman public-speaking courses. “The audience writes the speech. Although developed and delivered by the speaker, a good speech is centered on the needs, values, and hopes of the audience. We believe the audience should be first and foremost in the speaker’s mind during every step of the speech development and delivery process, thus helping to ‘write’ the speech” (Beebe and Beebe).

For further reading:

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**Editor’s Column**

by Cynthia B. Jones

I just returned from a lovely lunch with Angela Macey-Cushman. Angela and I are on the KCBA YLD Board together. We were talking about this column and how difficult it is to write about current events in a publication that is published every other month. The obvious topic is the historic election in November of our president-elect, Barack Obama. It is the most significant election of my lifetime, and probably yours, too. But by the time we go to press (even though we are now electronic and not printing anymore), anything that I have to contribute about the election will be old news by the time you read it. I perused the New York Times last night in search of ideas. Did you happen to catch the article in the Week in Review in mid-November? The one that talked about Sarah Vaughan? When she first came to Washington, she could not find a hotel room; and it was not due to any problem with room availability — it was because of the color of her skin. Years later, the New York Times informs us, Ms. Vaughan would dance with the President after performing at the White House.

Ms. Vaughan, a three-time Grammy Award winner, would not live to see the day that the first African-American President of the United States would occupy the White House she performed in all those years ago. I continued my search for ideas for the column. I turned the pages of Ms. Magazine and found under the “Milestones” section the names of two African-Americans who had achieved “firsts” in their fields but died shortly before Obama’s historic election. Stephanie Tubbs Jones, the first African-American woman to be elected to the House of Representatives from Ohio, died in August 2008. She was known as a leading advocate for the rights of women and minorities. And Nancy Hicks Maynard, the first black woman to become a reporter for the New York Times, in 1968, died in September 2008.

After reading about Nancy Hicks Maynard, it struck me what these three women had in common: they were, of course, role models. Ms. Maynard, in fact, was a mentor to hundreds of minority journalists over the past 31 years who attended the Maynard Institute for Journalism Education, an institute cofounded by Ms. Maynard.

So, I thought, I’ll write about mentors. If you look up the word “mentor” in the Merriam-Webster dictionary you will find the following: a trusted counselor or guide, tutor, coach. Then, I did an Internet search using “mentor + Obama” and found a plethora of hits, including this odd fact (or maybe I just missed reading this until now): When Obama was sworn into the Senate in 2005, guess who was assigned to be his mentor? Joe Lieberman! He became Obama’s mentor? Probably a technicality more than a reality. Especially given the fact that Lieberman stumped for McCain. I wonder how that’s going over in the Senate now… probably better than my column…

Cynthia B. Jones is the editor of De Novo. She practices in the area of commercial litigation at Rafel Law Group PLLC, of Seattle. Cynthia can be reached at 206-838-4195 or cjones@rafellawgroup.com.

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**References**


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**For Further Reading**


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Profile: Jamila A. Johnson, De Novo Associate Editor

WSBA Admit Date: I was admitted to practice in November 2007.


Employer: I am proud to be a civil litigation associate at Schwabe Williamson & Wyatt. I worked as a consultant at a local criminal law firm while in law school and I was also an extern for the Secretary of State's Office in the Elections Division. Before law school, I worked as a freelance journalist.

Contact Information: 206-407-1555 or jajohnson@schwabe.com.

Professional Memberships: American Inns of Court (William L. Dwyer Chapter); Washington Defense Trial Lawyers; American Bar Association.

Civic Activities: I serve on the advisory committee for the High Point Community Center, a recreational center that seeks to create open access to lifelong learning, fit play, and civic discovery. I also participate in fundraising for the Richard Hugo House. The Richard Hugo House is a home for writers and readers that provides writers of all ages and backgrounds with the resources they need to foster the creation of new work and promote the literary arts and its part in our culture.

Hobbies: When not working, I enjoy spending time with my family and friends. I also enjoy writing, watching bad ‘80s movies, and theater.

President’s Column

by Jaime M. Hawk

This is the first electronic issue of De Novo. WYLD has gone green in an effort to be environmentally and fiscally responsible. We hope to expand our readership and have De Novo arrive in the inboxes of thousands of attorneys and law students every two months. Now, with the click of a mouse, readers will be able to send their favorite De Novo issues to friends and other young lawyers around the country.

De Novo in electronic version will allow readers to send quick e-mails to promote WYLD events, programs, and articles. Disseminating De Novo electronically will further expand and increase WYLD’s efforts to outreach to WYLD members and provide membership benefits. We are continually working to create timely and relevant programming.

As this historic election season has been completed and as the nation prepares for a new president, we can take pride in our democratic process and the importance of the rule of law. Equally historic was the fact that there were viable female presidential and vice-presidential candidates. A high percentage of our WYLD trustees and the presidents of the minority bar associations of Washington are currently women.

To recognize this important election, the WYLD Membership Committee, through the leadership of WYLD member Tim Spellman, provided a four-part campaign and election law program series over the past few months around the state. We continue to look for ways to bring programs and services to every corner of Washington.

The WYLD Board of Trustees had its first board meeting of this bar year in Spokane on Saturday, October 18, 2008. The focus of this board meeting was on leadership and diversity. In furtherance of our outreach efforts, the WYLD organized a joint reception for Gonzaga law students at the Center for Justice in Spokane, with the WYLD BOT, Gonzaga School of Law, and the SCBA Diversity Committee. Special thanks to Sam Colito, our WYLD Gonzaga trustee; Gonzaga Dean of Student Affairs John Sklut; and Breean Beggs, of the Center for Justice, for hosting this wonderful event. Additionally, former WSBA President Ellen Conedera Dial presented at the meeting and shared her wisdom and insight on issues of bar leadership and the future of the profession. Her inspirational words
focused on the important role of WYLD in promoting diversity within our profession. We especially appreciate her support of WYLD and our Division’s efforts.

The WYLD is reviewing and considering a diversity plan, modeled after the ABA YLD Diversity Plan. We are beginning a discussion as to how we can strategically ensure the Division is recruiting and appointing young lawyers of diverse backgrounds to run for board leadership positions, serve as committee and program chairs, and participate as speakers at all WYLD events and programs.

The WYLD is also looking for ways to provide our membership with leadership opportunities within the larger Association. We are considering a new liaison program to WSBA’s sections. We eventually would like to have young lawyers serving as liaisons with all interested WSBA sections. This would connect young lawyers with sections relevant to their interests, while connecting these liaisons with the work of the WYLD Board of Trustees. The goal and vision of this program is to increase young lawyer involvement in sections and increase collaboration between the WYLD and all 26 WSBA sections. Eventually, we hope this proposed program will lead to more targeted substantive programming for young lawyers.

Throughout the next year, the WYLD will be undergoing programmatic review by the WSBA. The WYLD will be focused on what we as young lawyers are uniquely positioned and qualified to accomplish and provide for our members.

One of our main roles has been serving as the public-service arm of the Bar. The WYLD Public Service Committee has decided to provide programming in four targeted areas: 1) domestic-violence prevention and awareness; 2) providing free will and estate planning clinics for first responders; 3) partnering with TeamChild to provide juvenile-record-sealing clinics; and 4) organizing pre-law conferences for disadvantaged high school students. Where each Board of Trustees meeting is scheduled, the Board is committed to reaching out to the young lawyers in that area, as well as to organizing a public-service project in that community. This month, the Board will be in Bellingham along with the WSBA Board of Governors. Next February, we hope to see you in Seattle.

Thank you for your involvement in WYLD. Please take a few minutes to review all WYLD committees, programs, and public service projects, and then sign up for a list serve or committee that most interests you, all at our webpage at www.wsba.org/lawyers/groups/wyld. As always, please contact me with any questions or comments that you have.

Jaime M. Hawk is the 2008-2009 WYLD president. She is a trial attorney with the Federal Defenders of Eastern Washington and Idaho in Spokane. She can be reached at jaimehawk@hotmail.com.

Board of Governors Update
by Carla C. Lee, Governor, At-Large Governor Representing WYLD

greetings, WYLD members. Happy fall! By the time you receive this note you may have had your fill of all those wonderful celebratory treats and the sweet smells of your favorite recipes. My favorite is my grandmother’s famous sweet potato pie—or is it yam pie? I am sure some of you have enjoyed a slice of scrumptious pumpkin pie, or maybe two. Whatever your favorite comfort foods are during this time of year, I hope you have enjoyed the festivities and are looking forward to quality time with family and friends.

It has been a pleasure to represent you these past several months and I look forward to representing you in the coming months. By the time you receive this note, the Board of Governors (BOG) will have met in Seattle in September, Spokane in October, and Bellingham in December. While the information below is retrospective, I thought it important to share highlights from the September meeting, just in case you missed the notices about some key decisions:

- The BOG voted unanimously to raise license fees in fiscal year 2010 and fiscal year 2011. The BOG will send a request in December asking the Supreme Court Justices to approve the increase.
- The BOG voted 9-3 in opposition of the Practice of Law Board’s (PoLB) Family Law Legal Technician Rule. For more information, see the July Bar News at www.wsba.org/media/publications/barnews/jul08.htm for a full discussion about the proposed rule.
- The BOG unanimously approved the Marriage Equality Resolution. See the Resolution at: www.wsba.org/media/releases/marriagelawresolution.pdf.

For more general information about the work of the Washington State Bar Association, the Board of Governors, and the Washington Young Lawyers Division, please visit the websites below:

- “News Flash” from the Executive Director’s Office: www.wsba.org/lawyers/links/flash.htm.
- Calendar of Events: www.wsba.org/info/event-calendar.htm.
- WYLD: www.wsba.org/lawyers/groups/wyld/default.htm.

As your representative, I am committed to adequately representing your interest and articulating your concerns as we make decisions that will impact you as lawyers. That said, I would like to hear from you and strongly encourage you to contact me to share your thoughts and experiences. Also, be sure to watch your emails for more BOG meeting updates in De Novo as it goes green. I look forward to hearing from you and serving you.

Carla C. Lee is on the Board of Governors and serves as the at-large governor representing the WYLD. She can be reached at 206–261–4632 or at carlaclee@comcast.net. Lee periodically provides updates to the membership regarding the actions of the Washington State Bar Association.
Major federal and state regulatory schemes to address global climate change are on the horizon, and these regulations will create new job opportunities for lawyers.

President-elect Barack Obama favors a cap-and-trade approach that sets overall limits on the amount of global warming gases emitted by allocating a set number of pollution credits (the cap), and creating a market where emitters may buy or sell credits (the trade). Moreover, about a dozen legislative proposals in Congress, many of which have bipartisan support, have been introduced to address climate change. Climate-change legislation is poised to pass the next Congress and be signed into law. Such legislation “will almost certainly be enacted within two years,” said Professor Victor Flatt, A.L. O’Quinn Chair of Environmental Law at the University of Houston.

Congress has already enacted a law requiring companies to report their greenhouse gas emissions to the Environmental Protection Agency (EPA), and gathering that information is the first step in reducing emissions via a cap-and-trade system.

Even absent expected legislation, federal climate-change regulations are a possibility. The U.S. Supreme Court ruled, in Massachusetts v. EPA (2007), that greenhouse gases fall within the Clean Air Act’s definition of an air pollutant; hence, the EPA already has authority to regulate greenhouse gas emissions from motor vehicles if it determines that such emissions endanger public health.

Washington state is a partner in the Western Climate Initiative (WCI), a coalition of seven states and four Canadian provinces that have collaborated on the regulation of greenhouse gases under a regional cap-and-trade system. WCI has set an economy-wide greenhouse gas emissions target of fifteen percent below 2005 levels by 2020. Pursuant to the WCI, Washington has adopted legislation setting goals for reducing greenhouse gas emissions, and has incorporated climate change-impacts into planning under the state’s Growth Management Act.

Several law firms have created climate-change practice groups to position themselves as leaders in this emerging practice area. Regulated companies will need counsel to monitor, report, and verify carbon credits, make trades, conduct due diligence for a variety of transactions, and site new clean-energy projects. Attorneys, for example, will assist energy companies to obtain permits for the tens — perhaps hundreds — of thousands of new power-generating wind turbines sited in the coming decade. Moreover, on the other side of the coin, government agencies will need attorneys to implement the new laws and regulations, and bring enforcement actions. Because reducing point source emissions, e.g., smoke stacks, alone may not be enough to meet targets, new regulations will address mobile sources of greenhouse gases, e.g., vehicles, by encouraging or requiring transportation and land-use reforms.

Attorneys with backgrounds in energy, land use, construction and transportation would be wise to monitor climate-change initiatives and generally increase their knowledge of the topic. That list is not exhaustive: the vast scale and dire consequences of the problem mean that its solutions will be multifaceted, penetrating many areas of the law. The coming regulations are comparable to the wave of new federal legislation in the
Washington Gets Tough on Leaded Toys... and More

by Benjamin T. Nivison

Everyone loves a gift. Whether given or received, gifts are very much a part of American culture. So is shopping for them. But never are gifting and shopping more intertwined than during the holiday season. Each year, the shelves are full of new products and an array of old favorites. This holiday season, pay attention to what you see on these shelves, because a new Washington law will likely change the availability of some gifts.

From Main Street to Wall Street, companies doing business in Washington state are suddenly faced with an evolving new set of products liability regulations, limiting the type and content of products that can be sold in the state. As a result, the liability landscape has changed for businesses small and large alike — only most don’t know it yet. This change may also bring new lawsuits this time next year — lawsuits that a savvy young lawyer may be able to help land for his or her firm.

As of July 1, 2009, it will be illegal to manufacture or sell any children’s product or product component containing more than the allowed amount of lead, cadmium, or phthalates in Washington. Penalties payable to the state for failure to comply include $5,000 for the first violation, and $10,000 for every subsequent violation. Washington will have some of the most significant restrictions in the nation regarding the permissible content of lead, cadmium, and phthalates in children’s products and product components.

The Children’s Safe Products Act imposes these stringent requirements on children's products sold in Washington. But it is not just toys that are affected. The law imposes limitations and restrictions on the content of certain chemicals in “children's products.” The legislation defines “children's products” to include toys, children's cosmetics, children's jewelry, child car seats, and any product designed for teething, feeding, or clothing a child. Though there are several narrow classes of products that are expressly excluded from the definition (such as consumer electronics and most sporting equipment), most products manufactured or sold for use by children will fall within the scope of the new law.

There may also be significant exposure to civil liability for violations of the new regulations. Under existing Washington products-liability law, RCW 7.72.050, when an injury is caused by a product that is not in compliance with a specific, mandatory government design specification at the time of manufacture, the product is deemed “not reasonably safe.” Though the regulations of the Children's Safe Products Act have not yet been interpreted by a court, the potential interaction of this new law with existing Washington products-liability law could lead to significant liability exposure for manufacturers, retailers, or sellers of children’s products.

Under the new legislation, the manufacturers of children's products/toys will be required to notify state government regulators if their products contain certain “high-priority” chemicals. By January 1, 2009, the Washington Department of Ecology will compile a list of chemicals that qualify as these “high-priority” substances. Although the law does not appear to impose any direct penalties or prohibition on the manufacture, sale, or marketing of children's products containing any “high-priority” substance, the legislation charges state government with developing recommendations for methods of informing consumers about products containing these chemicals, including labeling. This is an area that almost certainly will be subject to further regulation in coming legislative sessions.

The law requires manufacturers to notify all known sellers of its products about the impact of the new law by April 1, 2009. The law is slightly ambiguous, but it appears that...
a manufacturer must advise its sellers about the lead, cadmium, and phthalates content in products it supplies. Manufacturers will also have to advise their sellers of “high-priority” chemical content in products it supplies, once such chemicals are identified. Any product in violation of the content requirements established in the new law must be recalled by the manufacturer, and any seller or retailer is to be reimbursed its costs by the manufacturer.

The potential for liability under the Washington Children’s Safe Products Act is substantial. Manufacturers and sellers of toys, cosmetic products, clothing, and innumerable other children’s products are faced with a new and evolving regulatory scheme governing their business activities in Washington. The law imposes fines for its violation, and the potential for civil liability to consumers or other affected persons is very real. Given the interaction of this new law with the Washington Products Liability Act, future litigation based on these regulations is a near-certainty.

The best defense to a lawsuit starts before any suit is filed. Young lawyers with contacts in this industry can get business by being proactive in working with their contacts, designers, suppliers, sellers, and other legal counsel to ensure that your contacts and clients are in compliance with this new law. Consumers and courts will demand compliance with the new law, and lawyers should be prepared to assist their clients, plaintiff or defendant, come this time next year.

Benjamin T. Nivison practices in the area of civil litigation, including product liability litigation, at the regional law firm of Schwabe Williamson & Wyatt. He can be contacted at 206-407-1556, or bnivison@schwabe.com.

Washington Constitutional Law Being Redefined
by Jonathan Bechtle

If someone asked you to name the five individual rights protected by the First Amendment to the U.S. Constitution, could you do it? If memories of law school have not faded too much, you probably can. But can you also name five rights protected by Article I of the Washington State Constitution?

That is a little harder, but understanding our state’s constitution is becoming ever more important, because state constitutional jurisprudence is making a comeback. If your practice involves defending the rights of individuals, you are missing valuable tools in your arsenal if you don’t look for opportunities to used Article I in your arguments.

But if your law school was like mine, you did not get much teaching on state constitutional law. So earlier this year when my employer asked me to review the history and case precedents behind Article I, the Declaration of Rights, I wasn’t surprised to find very little written material on the subject. To increase that very small history and case history behind Article I, the Declaration of Rights, I wasn’t surprised to find very little written material on the subject. To increase that very small history and case history behind Article I, the Declaration of Rights, I wasn’t surprised to find very little written material on the subject. To increase that very small history and case history behind Article I, the Declaration of Rights, I wasn’t surprised to find very little written material on the subject. To increase that very small history and case history behind Article I, the Declaration of Rights, I wasn’t surprised to find very little written material on the subject. To increase that very small history and case history behind Article I, the Declaration of Rights, I wasn’t surprised to find very little written material on the subject.

The constitutional delegates made their intended purpose for the new government clear in Article I, Section 1, declaring, “all political power is inherent in the people, and governments derive their just power from the consent of the governed, and are established to protect and maintain individual rights.” The other sections of Article I “declare” the most important of these rights. Many are similar to provisions in the federal Bill of Rights. But as we all know, even the smallest variations can create an entirely different meaning.

Unfortunately, for most of our state’s history our courts have interpreted the meaning of Article I’s provisions to be identical to the federal Bill of Rights. With a hundred or so years of federal case history to draw from, it was simply easier. And it especially made sense after the federal courts started applying the Bill of Rights to the states through the Fourteenth Amendment.

But the writers of our Constitution intended for Article I to be the first line of defense for individual rights, not merely a copy of the federal Bill of Rights. State constitutions are much more detailed and specific to the particular needs of the state, whereas the federal Constitution must address the lowest common denominator of the entire country. In many instances, Article I provides stronger protections for individual rights than the federal Bill of Rights.

Several influential members of the Washington legal community, including Supreme Court Justice Robert Utter, grasped this problem and started advocating for an independent state constitutional analysis in the early 1980s. The trend quickly gained ground in cases involving Article I, Section 7. While traditionally viewed as parallel with the Fourth Amendment “search and seizure” protections, the wording of Section 7 differs dramatically: “No person shall be disturbed in his private affairs or his home invaded, without authority of law.”

In the 1978 case of State v. Hehman, the Washington State Supreme Court began the trend toward an independent constitutional analysis by finding that Section 7 prohibited the arrest of someone who had committed a minor traffic violation and had promised to appear in court. Prior federal decisions had allowed such an arrest under the Fourth Amendment.

Several more departures from federal precedent followed, culminating in State v. Myrick (1984), where the State Supreme Court opined that the “unique language of [Section 7] provides greater protection to persons under the Washington constitution than [the Fourth Amendment] provides to persons generally.”

Since the 1980s, courts have increasingly looked at individual rights through the lens of Article I. An independent analysis is still in its infancy for some sections, but it’s safe to say that state constitutional law in Washington is alive and well, and cannot be ignored by practitioners. Currently the duty lies on attorneys to argue the merits of an independent state constitutional analysis in their briefs.

Thankfully, the court has set up a guide for attorneys to follow in briefing the issue.
In the 1986 case of State v. Gunwall, the Supreme Court laid out six elements for the court to examine, which have become the standard test. The six elements are:

1. An analysis of the text of the state constitutional provision;
2. Whether there are significant differences between parallel federal and state provisions (if there is a parallel federal provision);
3. A review of the history of the section and any applicable common law history;
4. A review of any pre-existing state laws that clarify the protected right;
5. Whether the differences in structure between the federal and state constitutions sheds any light on the issue; and
6. Whether the issue at hand is of particular local interest, or if there is a need for a national consensus.

The last thirty years have seen some exciting changes in state constitutional law, changes that provide a host of new tools for attorneys seeking to protect the rights of individuals. As with any new area of law, however, it takes a little extra effort to utilize in practice. But I would encourage you to take a few moments to familiarize yourself with Article I, and the next time you have a case dealing with individual rights, include the state constitution in your list of items to research.

Jonathan Bechtle is legal counsel for the Evergreen Freedom Foundation, a non-partisan, non-profit think tank in Olympia that advocates for economic liberty and limited government. Bechtle is a member of the Washington and California bars and lives in Lacey. The book he co-authored, To Protect and Maintain Individual Rights, is available online at www.guide.effwa.org.

**YMCA Mock Trial Provides Opportunities for Civic Engagement**

*by Janelle D. Nesbit*

Each year, the Washington State Bar Association partners with YMCA Youth and Government to support the YMCA High School Mock Trial Program. The 2008–09 academic year will mark the 22nd year of High School Mock Trial in Washington state and brings with it many opportunities for attorneys around the state to get involved. For two decades, the Mock Trial Program has helped shape the citizens of Washington state, and now is your opportunity to help usher, mentor, and support a new generation of ethical and opportunity to help coach teams and rate student performances during district events.

Volunteers are needed around the state to help coach teams and rate student performances during district events. Attorneys are also needed to act as raters and score teams during the state competition March 27–29, 2009, in Olympia. And, in addition to donating your time and professional skills, your financial support in the form of both individual and corporate contributions is needed to help the program continue offering quality programs to all young people who wish to participate without regard to their ability to pay. Currently, program fees cover only 40 percent of the cost of each student’s participation. Please consider a gift that will provide the full cost of the program to at least one student — a contribution of $50 would support one student’s full cost of participation. Finally, you can help by spreading the word about Mock Trial. Let your colleagues and friends know about this amazing opportunity to support the democratic education of our state’s young people.

Mock trial is not just debate, it is not just theatre, and it is not just law. Mock trial is a mental battle, fought in a courtroom, combining elements of theatre, law, debate, and speech.”

“Through Mock Trial, I have learned a great deal about trial litigation, I have gained confidence in my public speaking, and I have made lifelong friendships. In my time in the program, I have experienced the ecstasy of a state championship, and the disappointment and disbelief of a lost round, and as a result, I have grown, I have matured, and I have witnessed the same growth in my teammates.

Louis Brotherton
2008 Mock Trial Student
Seattle Preparatory School

In addition to the benefits the program has given students throughout the years, Mock Trial has also given members of the legal community the opportunity to become civically engaged in something that gives them inspiration and hope for the future of our state and the legal profession as a whole. Volunteering for Mock Trial gives legal professionals a platform to teach the importance of teamwork and compromise in a competitive world, and to foster the values of honesty, caring, respect, and responsibility that often get overlooked in our race to get ahead.

Teacher and attorney Andy McCarthy, of the Seattle Prep Mock Trial team, had this to say about the adults who volunteer their time with students in the Mock Trial
program:
Thanks to them, teenagers see that they can be part of the court system, and they see that those generous lawyers and judges come in both genders, and all shapes and sizes. Every kid sees someone to emulate. A few of the students I teach may go on to be top-notch trial attorneys. Most of them will not, but they will come of age as citizens with first-hand experience of the courtroom and the skilled advocates who make it work.◊

Janelle D. Nesbit is the executive director of YMCA Youth and Government. For more information on how to get involved in the YMCA Mock Trial program contact the YMCA Youth & Government office at 360-357-3475 or e-mail youthandgovexec@qwestoffice.net. Donations may be sent to YMCA Youth & Government; PO Box 193; Olympia, WA 98507. This article is reprinted with permission of the King County Bar Association.

WYLD Membership Committee Travels to Yakima/Zillah for Express CLE No. 10

by Julia A. Bahner and Kristen Guberman

On September 13-14, WYLD treated young lawyers to a low-cost CLE in Zillah, followed by a fun-filled weekend in Yakima and its environs, during the semi-annual “WYLD Express.” The CLE took place in a unique and beautiful setting at the Silver Lake Winery. For $15, attendees received three CLE credits and a BBQ lunch. Recognizing the great deal, young lawyers from not only Yakima, but Seattle, Bellingham, Richland, Kitsap, and other locales converged in Yakima. Before the CLE, the lunch was served on the balcony at the winery, overlooking the vineyard and providing sweeping views of the entire valley.

Sachia Stonefeld Powell, WSBA disciplinary counsel, began the CLE by speaking on the ethical traps for the unwaried young lawyer. She described how bar complaints often arise from poor business management practices, such as failing to keep a calendar and trust account mistakes due to poor bookkeeping. She encouraged young lawyers to use WSBA resources like the Law Office Management Assistance Program (LOMAP), the Ethics Line, peer counseling, and other resources found on the WSBA website. Powell also encouraged questions from the audience that led to an engaging conversation about topics such as prepaid legal fees and the factors that disciplinary counsel consider in evaluating complaints.

William D. Pickett also spoke at the CLE. He gave a high-energy presentation about §1983 claims, with particular emphasis on police misconduct litigation. Pickett explained the elements of §1983 claims, the leading cases in that area, the defenses that lawyers may raise, and the procedural steps for bringing suits against a government entity. A solo practitioner in Yakima, Pickett was able to give attendees the benefit of his experience, as well as his insights on the importance of §1983 claims in preserving Fourth Amendment rights.

The last speaker, Rafael “Ray” A. Gonzales, from the Benton-Franklin Office of Public Defense, spoke about how to use experts. Gonzales focused on how to effectively utilize experts, by using them to get cross-examination materials for the other side’s expert. Expert witnesses can also improve your credibility before a jury and give you the vocabulary needed to explain technical aspects of your case. He advised that every young lawyer should examine the expert’s credentials apart from their résumé, and that not every case is amenable to using an expert witness. He also covered how to qualify an expert in court. His commonsense tips were helpful to the audience members and warmly received.

Every WYLD Express combines fun social events with CLE credits, and Yakima did not disappoint. After the CLE, the participants moved next door to the Silver Lake Tasting Room for a winey presentation, optional tasting, and a “YLD Mingle” over appetizers. The group then headed to the nearby Two Mountain Winery, a family-owned operation nestled in the Rattlesnake Hills.

On Sunday morning, 21 WYLD members and guests met to raft the Tieton River, one of the state’s top whitewater rafting trips. The great rafting in September is the result of what is known as the annual Flip Flop, caused by the release of water from the dams for agriculture purposes. This turns the Tieton River into a rafter’s dream, and whitewater enthusiasts come from all over to experience it. The WYLD members were not disappointed and enjoyed almost two hours on the river, followed by a delicious BBQ lunch. The warm weather and the rafting combined for a perfect end to Express No. 10 in Yakima.

The WYLD Membership Committee would like to thank social co-chair Ritee Parikh for helping to check in members at the event, the YLD CLE Committee for their generous donation of funds, and the rest of the Membership Committee for their great ideas on topics and location. The Membership Committee is already hard at work on WYLD Express Number 11, to be held this winter. Stay tuned for more information.

An easy way to stay informed about upcoming WYLD social events and CLEs is to join the WYLD Membership Committee list serve! Just send an e-mail to: WYLD-Membership-subscribe@yahoo-groups.com.◊

Julia A. Bahner and Kristen Guberman are the 2007–2008 co-chairs of the WYLD Membership Committee. Bahner is associate claims counsel at LandAmerica Financial Group, and is currently the president-elect of the WYLD. She can be reached at jbahner@landam.com. Kristen Guberman provides legal support for Microsoft’s Advertising group and can be reached at krig@microsoft.com. Guberman will again co-chair the Membership Committee during the 2008–2009 bar year.
Meet the Trustees

Name: Alma Zuniga
Trustee District: South Central
WSBA Admit Date: 06/12/07
Education: Attended University of Oregon - obtained Bachelors in Psychology 2002; University of Oregon School of Law - obtained J.D. 2005
Employer: Northwest Justice Project, Yakima

Areas of Practice: Housing, consumer, and family law
Hobbies: Watch movies, dance, and listen to music

Get Involved in the WYLD Membership Committee

Meeting schedule: Meetings are generally held on the second Tuesday of every month from 6:00 to 7:00 p.m. at the WSBA offices, unless otherwise noted. Members not located in Seattle will be given a toll-free call-in number so they can participate. Please contact Moni Law at monil@wsba.org for more information.

To receive regular e-mails with details about WYLD’s upcoming events, subscribe to the WYLD list serve. Send an e-mail to “WYLD-Membership-subscribe@yahoogroups.com” to sign up. The Membership Committee organizes weekly social and networking events, and being on the list serve gives you the latest information.

Meetings for the 2008–2009 bar year will be held on the following dates:

Tuesday, October 28
Wednesday, November 18

Tuesday, December 9 — Meeting and WYLD holiday party; 6:00 to 9:00 pm at the Spitfire Grill in Belltown, Seattle

Tuesday, January 13
February — N/A — WYLD Express 11 (Ski/LE) will be held

Tuesday, March 10
Tuesday, April 14
Tuesday, May 12
Tuesday, June 9
Tuesday, July 14
Tuesday, August 11

September — N/A — WYLD Express 12 will be held
VABAW’s Fourth Annual Banquet

(left) Traditional to VABAW’s annual banquets, the Fourth Annual Banquet concluded with live entertainment that reflects Vietnamese culture as guests were treated to a fashion show of the traditional Vietnamese “ao dai” dress by designer Thai Nguyen. (Photograph courtesy of Hien Nguyen)

(right) VABAW’s Fourth Annual Banquet keynote speaker, Jerilyn Brusseau, co-founder and president of PeaceTrees Vietnam, speaks of the clearance of landmines and unexploded ordinance in the Quang Tri Province of Vietnam as a means of realizing the mission to reverse the legacy of war on October 28, 2008, at the Triple Door. (Photograph courtesy of Hien Nguyen)

WYLD Trial Advocacy Program

Lawyers present a case in mock jury trial in WYLD’s annual Trial Advocacy Program (TAP)
King County Superior Courthouse - November 15, 2008
2008 Race Judicata 5K a Great Success

One hundred and thirty-five runners and walkers participated in the WYLD-sponsored 2008 Race Judicata 5K on October 19. The event, held at Seward Park in Seattle, was also sponsored by the UW Law School Alumni Association, Student Bar Association, Public Interest Law Association, and Student Health Law Organization. The race raised $3,000 to support students working in public-health-related legal externships. Final results for can also be found at: www.buduracing.com/raceresults.php.

WYLD members interested in helping to plan next year’s Race Judicata 5K should contact race coordinator Megan Vogel at meganvogel@dwt.com.

Participants line up at the starting line

The near-photo finish, between Wyatt Golding (16:32.0) (left) and Mike Gavareski (16:31.3) (right)
Aspiring Youth
Crissy Anderson

Committee for Diversity
Naomi Kim
msklaw@gmail.com
Wilberforce Agyekum
forcelaw@yahoo.com
J. Kahila Gibson
kahila.gibson@gmail.com
Donna Emmingham
donnae@agt.wa.gov

Continuing Legal Education
Meredith Virant
meredithvirant@gmail.com
Ritee Parikh
rparikh@aciu-wa.org
Marie Kang-Shutey
mshutey@workwith.com
Genevieve Mann-Morris
genevieve@pkp-law.com
Mamie S. Brown
mamiebrown711@msn.com

Editorial Advisory Board
Editor, Cynthia B. Jones
cjones@rafellawgroup.com

Greater Access and Assistance Program
Rachelle Anderson
rachelle@asiswa.org

Long Range Planning Committee
Jaime Hawk
jaimehawk@hotmail.com

Membership Committee
Kristen Gubernan
kristengubernan@yahoo.com

Margette Baptist
margette.baptist@kingcounty.gov

Cassidy Saitow
csaitow@fgzlaw.com

Pre-Law Student Leadership Conference
Michael Talbott
michael.talbott@co.yakima.wa.us

Public Service/Pro Bono Committee
Erin Trusler Hall
erin@seattle-immigration.com
Jason Amala
jama@th-law.com
Crissy Anderson
crissy@nwjustice.org
Jenni Frere Volk
www.volklawfirm.com
Ethan J. Anderson
ethan22@gmail.com

Trial Advocacy Program
Kari Petrasek
kari@carsonlawgroup.com
YMCA Mock Trial Program
Dubs Hership
dubs@newtonkight.com

Youth and Law Forum
Jennifer Porto
jenniferporto@hotmail.com
April Boutillette Brinkman
brinkman_april@yahoo.com

President
Jaime Hawk
jaimehawk@hotmail.com

President-elect
Julia Bahner
jbahner@landam.com

Immediate Past President
Mark O’Halloran
markohalloran@earthlink.net

King District
Manish Borde
mborde@williamskastner.com

David Estudillo
destudillo@estudillolaw.com
Michael Pelliccitti
pellicciti@hotmail.com

North Central District
Beth Wilcox
beth@wblawfirm.com

Northwest District
Marie Gallagher
mgallagher@adelstein.com

Olympia District
Grace O’Connor
gracespencer78@hotmail.com

Peninsula District
Jennifer Andrews
jadandrews@wapa-sep.wa.gov

Pierce District
Kimberly April
kapril@tacomalaw.com

For detailed contact information, please visit www.wsba.org/lawyers/groups/wyld