Litigation Section

INSIDE THIS ISSUE

Greetings from the WSBA Litigation Section Executive Committee! This is the fall edition of the renewed Litigation Section newsletter. The Section releases a newsletter twice a year in order to capture up-to-date information about the Section and changes in the law. As always, we welcome feedback from Section members on topics or submissions for future issues. Please email Litigation Section Chair **Bil Childress** with your comments or questions.

All articles in this newsletter are written by Michael Brandenberg, Janelle Elysee, & Zachary Strom

AI Is Not Just in the Chatbot:

Litigation Risks When Vendors and Clients Use AI

Most lawyers are now at least generally aware of the obvious AI cautionary tale: Do not put confidential client information into a public chatbot and do not file a brief with cases you have not checked. That advice is sound, but it is also incomplete. For litigators, the issue may not be the lawyer who intentionally uses a public AI tool. It may be the AI that quietly enters the representation through someone else: a court-reporting vendor, an e-discovery platform, an office-productivity tool, a translation service, a document-review vendor, or even the client.

That is where the conversation gets more practical and more uncomfortable. Litigation already requires lawyers to trust a network of third parties. Court reporters create the record. E-discovery vendors host and process client data. Review platforms classify documents. Vendors may prepare deposition summaries, translate records, organize exhibits, or support trial presentations. Increasingly, some of those services may use AI in ways that are not immediately obvious to the lawyers relying on them.

The risk is not simply that a vendor "uses AI." The risk is that the firm will fail to assess the consequences of not knowing enough about how AI is being used. Is the vendor using AI to transcribe testimony, summarize depositions, classify documents, suggest privilege calls, translate records, identify "hot" documents, or generate chronology drafts? Are prompts, outputs, logs, summaries, tags, or audit trails being created? Is confidential information retained? Is it used to train or improve a model? Are subprocessors involved? Can the firm explain the workflow if the accuracy, integrity, privilege status, or discoverability of the output is later challenged?

The Washington State Bar's AI guidance is worth reading with those questions in mind. WSBA Advisory Opinion 202505 does not treat AI as a narrow chatbot issue. It defines AI-enabled tools broadly, including standalone tools and familiar products that incorporate AI, and discusses the implications under Washington RPCs 1.1, 1.3, 1.4, 1.5, 1.6, 3.3, 5.1, and 5.3. That breadth matters. For a litigator, AI may appear in the everyday tools and services that support the case, not just in a legal research product or drafting assistant.

The advisory opinion is also useful because it frames the issue in practical professional responsibility terms. It states that lawyers must sufficiently understand technology used in law practice, in order to use it consistently with their duties under the RPCs. It also discusses the importance of reviewing contractual assurances of confidentiality, terms of use, vendor handling of information, and whether data may be used for training. That is not a command that every lawyer become an AI aficionado. But it is a reminder that lawyers should pause long enough to understand where client information is going, what a tool or vendor may be doing with it, and whether the lawyer can still competently supervise and stand behind the work.

There is also a separate client-side problem that deserves more attention. A law firm may be careful about its own approved tools and vendor contracts, while a client independently pastes privileged material into a consumer AI tool. A client might upload counsel's email to "translate it into plain English," summarize a deposition-preparation outline, test a litigation theory, ask for weaknesses in a draft demand letter, or generate questions for the next call with counsel. To the client, that may feel like using a search engine, grammar tool, or note-taking app. But in litigation, it may be something very different.

That client may have just created a new set of prompts, outputs, logs, saved chats, or generated documents outside the attorney-client relationship. Depending on the tool's terms, retention practices, access rights, and the circumstances of use, an adversary may argue that the information was not kept confidential, that AI-generated material is not work product, or that related AI records are discoverable.

For litigators, that should be a wake-up call. The issue is not only whether the lawyer used AI properly. It is whether clients, employees, witnesses, consultants, or vendors are using AI in ways that affect the record, the discovery landscape, or the confidentiality of attorney-client communications. If a client uses AI to analyze claims, summarize legal advice, organize facts, or draft narratives, those prompts and outputs may become part of the universe of potentially relevant information. At least one recent discussion of AI discovery notes that discovery requests may seek prompts, outputs, AI-generated summaries, transcripts, drafts, limited metadata, logs, and administrative or audit information when tied to the issues in dispute.

Lawyers should review the applicable ethics guidance, understand where AI may enter the litigation workflow, and appreciate the practical implications. That includes asking vendors more specific questions. It also includes considering whether clients need early, plain-language guidance about not uploading attorney-client communications, work product, confidential business records, discovery materials, deposition testimony, or litigation strategy into public or unapproved AI tools without first talking to counsel.

The Washington guidance is helpful because it invites lawyers to think about AI as part of an ordinary law practice—not as a separate novelty. The WSBA's Legal Technology Task Force was formed after the WSBA Board of Governors identified technology (particularly AI) as an area requiring assessment of opportunities, threats, regulation, consumer protection, and support for legal professionals. The WSBA's *Bar News* publication has also reported uneven adoption of generative AI among Washington legal professionals and noted cybersecurity concerns, including a gap between confidence in cybersecurity practices and implementation of particular tools. That context is useful. Lawyers are not all using these tools in the same way, and the profession is still developing shared expectations around responsible use.

The common thread is control. Litigation depends on lawyers being able to say, with confidence, how information was collected, protected, reviewed, used, and produced. AI does not change that basic obligation, but it can make the path of information harder to see. That is why the important questions are often practical ones: What tools touched the data? What did they create? Who had access? What was retained? And would the lawyer be comfortable explaining that process to a client, a court, or opposing counsel? As AI becomes more embedded in routine litigation services, those questions should become part of the ordinary case-management conversation.

SECTION UPDATES

- The Litigation Section Executive Committee has been incorporating new members and meets regularly each month to discuss changes in the law, new Section events, and legislative updates.
- In the spring of 2026, the Litigation Section awarded scholarships to the following law students for demonstrating exemplary interest in, and commitment to, a career in litigation:

  Seattle University - Anna Parchman
  University of Washington – Jazzlyn Joni Woods
  Gonzaga University (Linden Cup Winners) - Emily Palm and Conner Hunting

  The Litigation Section received many excellent submissions from well-qualified law students. The Section thanks each of the applicants, congratulates the winners, and encourages all aspiring litigators to apply or re-apply next spring.

- The Litigation Section Executive Committee is in the process of nominating and electing new members of the Executive Committee. If you are interested in volunteering to participate on the committee but missed the window to apply this year, we encourage you to contact the committee about the process and steps to become nominated next year.
- The Litigation Section is planning to host several continuing legal education events in the second half of this year. Be sure to follow the Section's LinkedIn page for additional details, especially as the deadline approaches for many lawyers to fulfill their CLE obligations: www.linkedin.com/company/wsba-litigation-section.
- The Litigation Section is in the process of planning additional events and continuing legal education, as well as continuing to pair mentees with mentors practicing litigation throughout the state. For more information, visit the WSBA Litigation Section website and keep an eye out for more newsletters going forward.

CASE LAW UPDATES

Supreme Court: SCOTT V. AMAZON, No. 103730-9 (Feb. 19, 2026)

Plaintiffs were the families of four individuals who died by suicide after ingesting high-purity sodium nitrite they had purchased on Amazon. The families alleged that there was no household use for the concentrated product, which was marketed on Amazon's website alongside a handbook which "contain[ed] instructions on how to use sodium nitrite to die by suicide," as well as an acid-reduction medicine to prevent vomiting once the compound was ingested. The plaintiffs also alleged that Amazon knew of the compound's improper use as early as 2018 and was legally required to limit its sale elsewhere but continued marketing it in the United States. Their complaint asserted claims under the Washington Products Liability Act, common-law negligence, and negligent infliction of emotional distress.

The trial court denied Amazon's CR 12(b)(6) motion to dismiss, but the Court of Appeals reversed on discretionary review, holding that under existing case law, suicide was a voluntary act such that no liability could attach absent a special relationship between the defendant and the decedent, or a negligent act that proximately caused the suicide, such that it was not truly voluntary, and that the plaintiffs had not alleged sufficient facts to show either exception applied.

The Supreme Court reversed, holding that the facts alleged by plaintiffs showed the decedents' suicides to have been proximately caused by Amazon's negligence, and "whether the act of suicide was a foreseeable consequence and harm of the act of selling sodium nitrite to the decedents" was a question of fact properly reserved for the jury. Moreover, the decedents' misuse of the product did not negate Amazon's duty of care at the pleading stage.

While the Supreme Court majority did not overturn the so-called "suicide rule" that suicide was generally a voluntary, willful act, it rejected the proposition that suicide as a superseding cause could bar a negligence case at the pleading stage, signaling a greater willingness to entertain such claims from the families of decedents.

Division I: KING COUNTY V. AQUATHERM GMBH, No. 85572-7-I (Filed Feb. 2, 2026; Published Mar. 23, 2026)

This case represents the latest guidance from the Court of Appeals on the constitutional limits of specific personal jurisdiction as well as a trial court's authority to level monetary sanctions for discovery violations.

King County contracted with Aquatherm to install domestic potable water pipes at the King County Correctional Facility. The pipes began failing soon after installation was complete, eventually requiring an emergency re-piping. At the outset of this litigation, Aquatherm represented to King County that it used only one recipe for plastic piping sold in the United States, but it did not disclose the existence of a second recipe—a recipe not shown to be certified by the relevant industry organization—for two years while the County undertook an expensive sampling process to analyze the pipe. When the existence of the second recipe was revealed and the County asked Aquatherm to supplement its discovery responses, counsel responded, "it is not our job to do your discovery" and threatened CR 11 sanctions against the County for failing to investigate the second formula itself. Before trial, the County sought and obtained sanctions for this non-disclosure in the form of an adverse inference instruction. On the second-to-last day of trial, Aquatherm's witness revealed the existence of samples of the "masterbatch" of both recipes, leading the County to seek—and the trial court to impose—substantial monetary sanctions against both Aquatherm and its attorney.

Aquatherm appealed from the verdict for the County, asserting that it was not subject to the trial court's personal jurisdiction, that the discovery sanctions were unwarranted, and that the trial judge showed personal animus toward its counsel. The Court of Appeals rejected all of these challenges. As to personal jurisdiction, the court held Aquatherm "did more than have mere knowledge that its products would end up in Washington," having shipped pipe directly to the state, sent its managing director to Washington to meet about the project, stayed in regular contact through performing warranty repairs, and even lobbied to change state plumbing codes to ensure its pipes were approved. The Court of Appeals also clarified that the trial court had discretion to defer its determination on personal jurisdiction until trial.

As to sanctions, the Court of Appeals rejected the proposition that the broad wording of the County's discovery requests justified its failure to provide material information about the pipes it supplied, noting that "there was likely no request that could have been made which would have prompted Aquatherm to produce the documents" and rejecting the proposition that a duty to supplement answers equated to an independent duty of disclosure. The court also held: that the adverse inference instruction was a reasonable sanction; that the discovery violation was willful; that the County did not fail to mitigate its damages, and; that the $1.5 million monetary award was not excessive in light of the timing of the second discovery violation on the second-to-last day of trial. Finally, the court upheld the levy of sanctions against defense counsel personally, as counsel had both notice and an opportunity to be heard, and dismissed the notion that the trial judge's comments—telling counsel to "quit being coy" and comparing a model of the facility to a dollhouse—were made "during a lengthy six-week jury trial and in response to what the trial court concluded were serious discovery violations," and did not reflect animus toward counsel or gender bias.

For litigators, this opinion underscores the importance of diligent compliance with discovery obligations, as Division Three underscored last year in *Green v. Kootenai Heart Clinics*. Attorneys should not treat disclosure as a challenge to reveal as little information as possible or disregard their duty to supplement discovery responses when new information becomes available. As the Aquatherm case makes clear, judges have ample discretion to remedy discovery violations and cannot be required to recuse simply because they show frustration with a pattern of nondisclosure. Separately, the opinion reminds attorneys that the analysis of specific personal jurisdiction is based on the totality of a defendant's in-forum activities, not a "divide-and-conquer" analysis of whether discrete activities each amounted to purposeful availment of the forum's laws.

2026 ADMISSIONS TO THE WASHINGTON BAR
LETTER TO THE SUPREME COURT

As many of you will be aware, the July 2026 Washington State Bar Examination could not be administered this summer and was instead postponed until September 2026. On August 3, 2026, recognizing the potential hardship faced by qualified applicants to the Bar, as well as clients, courts, agencies, and employers who are relying upon new litigators to become licensed in the state, the WSBA Litigation Section Executive Committee voted and approved the following letter, which was sent to the Washington Supreme Court justices for their consideration.

The Honorable Chief Justice Debra L. Stephens
Washington Supreme Court
415 12th Avenue SW
Olympia, WA 98504

Re: Diploma Privilege for July 2026 Washington State Bar Examination Candidates in Light of Today's Disastrous Attempted Administration

Dear Madam Chief Justice:

The Executive Committee of the Washington State Bar Association, Litigation Section respectfully submits this statement for the Court's consideration in connection with the failed administration of the July 2026 NextGen Bar Examination in Yakima. The Section recognizes and respects the Court's constitutional authority over admission to the practice of law in Washington, as well as the Court's responsibility to protect the public, maintain the integrity of the profession, and ensure that any remedy is consistent with those obligations. In light of the extraordinary circumstances presented, the Section respectfully asks the Court to consider prompt relief for affected applicants, including diploma privilege or another remedy that avoids unnecessary delay in licensure for applicants who appeared ready and able to sit for the examination but were prevented from completing it by circumstances outside their control.

The Litigation Section represents the interests of litigators throughout Washington, including attorneys in private practice, public service, prosecution, criminal defense, civil litigation, legal aid, and government agencies. From that perspective, the Section is concerned not only with the hardship imposed on individual applicants, but also with the effect that delayed licensure may have on clients, courts, agencies, employers, and communities throughout the state.

Based on public reports, the affected applicants spent months preparing for the July 2026 bar examination, incurred substantial expenses for bar preparation, lodging, and travel, and

traveled to Yakima prepared to sit for the examination as scheduled. After arriving, many spent hours on the first day of testing in the examination room while awaiting word on whether the examination could proceed. They were then informed that the examination would be delayed by one day, made or attempted to make corresponding changes to lodging and travel arrangements, and later learned that the examination would not proceed.

The Court has previously recognized that extraordinary circumstances may justify a temporary licensure remedy outside the ordinary examination process. In 2020, in response to the COVID-19 public health emergency and the "extraordinary barriers" facing applicants registered for the July or September 2020 bar examination, the Court granted eligible applicants the option of receiving diploma privilege in lieu of sitting for the examination. The circumstances here are different, but the equitable concern is similar: applicants who satisfied the prerequisites to sit for the examination, prepared for months, and appeared ready to test were prevented from completing the licensing process through no fault of their own.

Nor does it appear that the problem was inherent in the NextGen Bar Examination itself or unavoidable across jurisdictions. Public reports indicate that the inaugural NextGen administration proceeded across multiple jurisdictions and testing locations, and that most applicants outside Washington completed the examination as scheduled. Although some other jurisdictions experienced technical issues, those issues were reportedly addressed without the same statewide cancellation that occurred in Washington. In these circumstances, the Section respectfully submits that affected Washington applicants should not be required to absorb the professional, financial, and personal consequences of a site-specific administrative failure.

The consequences of this disruption extend beyond individual hardship. Many affected applicants have accepted positions with law firms, public defender offices, prosecutor offices, government agencies, courts, and legal service organizations throughout Washington. Delayed licensure may affect their ability to begin serving clients as planned, increase supervision and staffing burdens on employers, and reduce the availability of legal services in communities where the need is already substantial.

These concerns are particularly important in public service and access-to-justice settings. Washington litigators serve individuals, businesses, government entities, crime victims, accused persons, families, tenants, consumers, and others who depend on timely access to legal representation. Employers across the profession have structured hiring, onboarding, and staffing decisions around the expected admission of new attorneys from the July 2026 examination cycle. Requiring affected applicants to wait weeks or months to retake an examination they were prepared to take in July would impose the consequences of an administrative failure on applicants and, in practical effect, on the clients and communities they are prepared to serve.

The Section does not suggest that attorney licensing standards should be relaxed lightly, nor does it minimize the importance of ensuring competence and protecting the public. But the July 2026 examination disruption presents unusual and compelling circumstances. In considering an appropriate remedy, the Section respectfully asks the Court to account for the applicants' reliance interests, the reliance interests of employers throughout the legal

profession, and the broader effect that delayed licensure may have on the administration of justice in Washington.

For these reasons, the Litigation Section respectfully supports prompt relief that prevents unnecessary delay in the admission of affected applicants while preserving the Court's oversight of admission to practice and its responsibility to protect the public and the integrity of the profession.

Sincerely,

The 2025-2026 Executive Committee of the Litigation Section

LOCAL RULE UPDATES

Many counties as well as the Western District of Washington updated their local rules in 2025. The Litigation Section has compiled hyperlinks to the updated local rules below.

- Adams
- Asotin
- Clallam
- Clark
- Columbia
- Cowlitz
- Ferry
- Garfield
- Grant
- Grays Harbor
- Island
- Jefferson
- King
- Lincoln
- Okanogan
- Pacific
- Pend Oreille
- San Juan
- Skagit
- Snohomish
- Spokane
- Stevens
- Thurston
- Wahkiakum
- Walla Walla
- Western District of Washington (federal)
- Whatcom
- Whitman
- Yakima

Learn more about the WSBA Litigation Section by visiting our webpage.

2025-2026 Litigation Section Executive Committee Members

Chair: Bil Childress
Secretary/Treasurer: Janelle Elysee
Immediate Past Chair: Tiffany Wilke
Committee Members: Mike Brandenberg, Isaac Prevost, Cole Douglas, Zachary Strom, Ian Leifer
New Member Liaison: Matthew Audish
Board of Governors Liaison: Tom Ahearne