

MINUTES

Public Session **WASHINGTON STATE BAR ASSOCIATION BOARD OF GOVERNORS**

**BREMERTON, WA
December 9-10, 2005**

The Public Session of the Board of Governors of the Washington State Bar Association was called to order by President S. Brooke Taylor at 9:05 a.m., on Friday, December 9, 2005 at the Kitsap Conference Center, Bremerton, Washington. The Public Session continued to 5:00 p.m. that day, recessed and reconvened from 8:30 to 9:15 a.m. on Saturday, December 10 when it was adjourned. Governors in attendance were:

James Baker
Stanley Bastian
Eron Berg
Liza E. Burke
Lonnie Davis
Eric C. de los Santos
Mark Johnson
Douglas C. Lawrence
Salvador A. Mungia
Kristin Olson
Kathleen O'Sullivan
Michael Pontarolo
Kristal K. Wiitala

Also in attendance were President-elect Ellen Conedera Dial, Executive Director and Meeting Secretary Jan Michels, and General Counsel Bob Welden.

LIAISONS, GUESTS AND STAFF IN ATTENDANCE:

James Macpherson	WDTL
Peter Karademos	Legislative Committee and Family Law Section
Judge J. Robin Hunt	Court of Appeals, Division II
Daniel S. Gottlieb	Access to Justice Board
Ed Holm	WAPA

Judge Leonard Costello	Superior Court Judges Association
Karen Weaver	Washington Women Lawyers
Lisa Stone (presenter)	Chair, Amicus Brief Committee
J.D. Stahl	Litigation Section
Thomas Campbell	WACDL
Noah Davis	WYLD, President
Jason McGill	Government Lawyers Bar Association
David Trieweiler	WACDL
John Muenster (presenter)	Muenster & Koenig, Attorneys at Law
Steve Toole	WSTLA
Jon Ostlund (presenter)	Committee on Public Defense, Co-Chair
Roger Wynne (presenter)	Court Rules and Procedures Committee
Joaquin Hernandez (presenter)	WSBA Committee for Diversity, Co-Chair
Jean McElroy (presenter)	WSBA Director of Regulatory Services
Myke Gettle (presenter)	WSBA Membership Records System Assistant
Joy McLean (presenter)	WSBA Director of Lawyer Discipline
Anne Seidel (presenter)	WSBA Assistant Director of Lawyer Discipline
Randy Beitel (presenter)	WSBA Team Manager, ODC
Douglas Ende (presenter)	Assistant General Counsel
Norm Maleng (presenter)	King County Prosecuting Attorney
Patrick McIntyre	Northwest Justice Project
Judge Marilyn Paja	District and Municipal Court Judges Assn.
Patrick McIntyre	Northwest Justice Project
Geoff Gibbs	Snohomish County Bar Association, President
Caitlin Davis	Legal Foundation of Washington, Executive Director
Nancy Pacharzina	Legal Foundation of Washington, Trustee
Alfredo Tryferis	WSBA Communications Specialist
Gail Stone	WSBA Legislative Director

INTRODUCTIONS

REPORT ON EXECUTIVE SESSION

President Taylor reported that the Board approved the minutes of the October 28, 2005 Executive Session; were presented with the litigation and discipline docket reports; reviewed a reprimand; approved the JRC recommendations; approved a Lawyers' Fund for Client Protection recommendation; and received an update on legislative strategy presented by Gail Stone.

APPROVAL OF THE MINUTES FROM THE OCTOBER BOARD MEETING

Governor Pontarolo made a motion to approve the minutes of the October 28-29, 2005 meeting; Governor Berg seconded. Governor Mungia requested two corrections. The minutes were approved, as corrected, by a vote of 12-0-1. Governor Olson abstained (she was not present at the October meeting).

CONSENT CALENDAR

All consent items (as listed below) were approved by the circulation of a written ballot.

- a. Approve the Appointment of a Non-lawyer Member to the Lawyers' Fund for Client Protection Committee
- b. Approve the Appointment of a Chair for the Electronic Communications Committee
- c. Approve an Additional WSBA Committee Appointment
- e. Approve the Reappointment of Representatives on the Northwest Justice Project Board of Directors (2)
- f. Approve Appointments to the Rules of Professional Conduct Committee (4)
- g. Approve Additional Appointment to the WSBA Committee for Diversity

The nomination for two non-lawyer positions to the Limited Practice Officers Board was removed from the Consent Calendar (item d) and added as a BOG matter later in the agenda.

FISCAL MATTERS/FACILITIES COMMITTEE – Treasurer Mark Johnson and Facilities Chair Ellen Conedera Dial

Treasurer Mark Johnson reported that the Budget and Audit Committee was reviewing a possible change to the WSBA investment policy to enhance WSBA's return on investments.

Facilities Chair Ellen Conedera Dial reported that the work of the Facilities Committee and internal staff committee is ongoing. Current concentration is working with the project manager and architect to design the tenant improvements needed and proceeding with obtaining an estimate of costs. Final numbers should be available by the 2nd Quarter of 2006. Dial also noted that the Facilities Committee planned to establish an Art Committee to oversee the purchase of art for the new space that reflected diversity and NW tastes.

COMMITTEE ON PUBLIC DEFENSE REPORT – Jon Ostlund, CPD Co-Chair

Committee on Public Defense Co-chair Jon Ostlund reported for the committee on the Grant County settlement and its likely positive effect on public defense throughout Washington. He reviewed the committee's workplan for the coming year and discussed OPD's budget request for an increase of \$15,000,000 to fund HB #5412 and \$12,000,000 to complete the state funding for dependency parent representation.

Ostlund circulated the mock-up brochure about the constitutional right to counsel which will be distributed to judges, lawyers and the public.

DRAFT SUBSTITUTE NEW OPINION 198 IN RE: ENGAGEMENT RETAINERS AND ADVANCE PAYMENTS – WSBA Director of Lawyer Discipline Joy McLean

WSBA Director of Lawyer Discipline Joy McLean introduced the topic with an explanation that the issue was about "when a client gives money to a lawyer to do work can the lawyer spend the money before doing the work." Formal Ethics Opinion 186 was vague and in some areas misleading on this question. Recent case law appeared to say "no", that funds needed to be deposited into a trust account until earned, since the court held, in the DeRuiz matter, that all fees must be reasonable and could be refundable. McLean urged that Formal Ethics Opinion 186 be withdrawn and that the substitute new Formal Ethics Opinion 198, as developed by the November study group which she chaired, be adopted.

The Board considered differing proposals for a new ethics opinion. Presentations focused on protection of the public interest versus a lawyer's ability to pay overhead from fee deposits. The Board discussed whether guidance to members should be in the form of a law, court rule or new

formal opinion; whether this issue needed to be clarified; the confusion over the various terms regarding advance fees; the narrow definition of availability retainers; whether civil and criminal interests should be severed in this area; and, the history of hourly versus flat fees.

Governor Berg made a motion to withdraw Formal Ethics Opinion 186 and create a task force to further review the proposed new opinion and related issues; Governor Pontarolo seconded. After further discussion Governor Johnson moved to sever the motion; Governor Mungia seconded. The motion to sever passed unanimously.

The motion to withdraw Formal Ethics Opinion 186 passed by a vote of 7-5-1, Governors Baker, Burke, Mungia, Olson and O'Sullivan against and Governor de los Santos abstaining. The motion to create a task force to develop recommendations regarding a law, court rule or formal opinion about advance fees passed by a vote of 13-0-0. President Taylor asked Governor Johnson to chair the task force and agreed to solicit members for the effort. The Board committed to including a member representing the public interest.

Governor Davis made a motion to adopt newly proposed Formal Ethics Opinion 198; Governor Olson seconded. The motion was defeated by a vote of 3-10-0, Governors Davis, de los Santos and Olson in favor.

AMICUS BRIEF COMMITTEE RECOMMENDATION – STATE V. ATHAN – Lisa Stone, Chair Amicus Brief Committee and Fred Tausend (who had volunteered to draft the amicus brief)

Amicus Brief Committee Chair Lisa Stone described that the police ruse of posing as a law firm served as a detriment to the integrity of the profession and the administration of justice. She explained that the letter sent to defendant Athan established an attorney-client relationship and the practice of law. The purpose of the amicus was to send a clear statement that police or investigators holding themselves out as lawyers was not an allowable ruse. She recommended that the WSBA amicus address that issue but not address remedy.

John Muenster agreed that WSBA should not address remedy for the use of the ruse.

King County Prosecutor Norm Maleng argued that the case did not implicate the issues cited and that the Practice of Law Board had ways of addressing the attorney-client issue. He felt that

it should be the POLB which addresses the possible unlawful practice. He referred to the proposed brief as an advocacy brief that appeared to support the defendant's appeal and proposed defendant remedy.

Fred Tausend agreed that the brief was an advocacy brief but was not intended to imply support for the remedy the defendant requested.

Governor Mungia made a motion that WSBA file the amicus brief as outlined and that the brief take no position on remedy; Governor Burke seconded. The motion passed by a vote of 12-1-0; Governor Bastian against.

COURT RULES AND PROCEDURES COMMITTEE - Roger Wynne and Douglas Ende

Roger Wynne appeared for the Court Rules and Procedures Committee and presented the history of proposed changes to CrR4.11 and companion rule 4.6 (and parallel CrRLJs). He highlighted the bounces the rule modifications had had between the rules committee, the Board of Governors and the Supreme Court as well as the Superior Court Judges Association. He argued that the issue of whether the recording of victim and witness statements should be allowed, had been fully vetted, and that the current version strikes a good balance between prosecution and defense in the effort to disclose truth but protect vulnerable witnesses and victims. Despite the issues of notice, judicial oversight, transcription standards, possible intimidation, review and procedural questions, the rule is meant to heighten accuracy and enhance discovery. Governor Mungia made a motion to endorse the proposed rule changes to the Court; Governor Olson seconded. The motion passed by a vote of 11-2-0; Governors Bastian and Davis against.

COMMITTEE FOR DIVERSITY REPORT – Joaquin Hernandez, Co-Chair

Joaquin Hernandez, Co-Chair of the WSBA Committee for Diversity reported on the successes of the committee of the last year and highlighted the 2006 plans for the Committee for Diversity. He noted the value of the honest talk about roles and responsibilities that occurred at the October Diversity Retreat. He noted that one of the most important issues to the diverse community was making progress in law firm hiring and retaining of minorities. He noted the work ahead as planning diversity events, sponsoring the June 1 and 2 Diversity Conference and maintaining ties with the law schools.

BOG MATTERS

A. Legal Foundation of Washington

Governor Pontarolo moved; seconded by Governor Berg to appoint Michele Radosevich to the Legal Foundation of Washington's Board of Trustees; Governor Mungia moved; seconded by Governor Davis to appoint Julian Dewell; and Governor O'Sullivan moved; seconded by Governor Baker to appoint Judge Michael Schwab.

Michelle Radosevich and Judge Michael Schwab were elected as the WSBA appointments to the Legal Foundation of Washington Board of Trustees effective January 1, 2006.

B. Limited Practice Officers Board

Governor Pontarolo moved; seconded by Governor Olson to nominate Chariese Adams and Robert Severns to the Supreme Court for reappointment to their second terms on the Limited Practice Officers Board effective January 1, 2006. Motion passed unanimously.

REGULATORY SERVICES DEPARTMENT REPORT – Jean McElroy, WSBA Director of Regulatory Services

Jean McElroy, WSBA Director of Regulatory Services, presented an overview of the "New and Improved Department of Regulatory Services." She highlighted the many changes and enhancements to RSD programs of admissions, licensing, MCLE, status changes and member data maintenance and reporting.

WYLD PRO BONO AWARD PRESENTATION – Noah Davis, WYLD President

WYLD President Noah Davis joined President Taylor who presented the WYLD Pro Bono Award to Silverdale attorney, Stephen King.

2006 WSBA LEGISLATIVE COMMITTEE RECOMMENDATIONS – Gail Stone, WSBA Legislative Director and Pete Karademos, Legislative Committee Chair

The WSBA 2006 legislative agenda includes:

Sponsoring a Real Property, Probate and Trust clean up bill - presented by Al Falk. This bill is a 'fix-up / clean-up' bill. Governor Lawrence made a motion to sponsor the bill; Governor O'Sullivan seconded. The motion to sponsor passed by a vote of 13-0-0.

Sponsoring a Corporate Act revision bill - presented by John Steel. This bill brings Washington's two corporate acts and the uniform law into conformity with each other. Governor Lawrence made a motion to sponsor the bill; Governor Johnson seconded. The motion to sponsor passed by a vote of 13-0-0.

Supporting a Securities bill which NEUCUSAL will sponsor - presented by Keith Baldwin, Mike Beatty and Mike Stevenson. This is a bill that is a uniform act which now incorporates Washington law. Governor Johnson made a motion to support the bill; Governor Lawrence seconded. The motion to support passed by a vote of 13-0-0.

Supporting a bill which furthers the Incorporation of Civics Education in the K-12 Curricula - presented by Jan Michels. This bill has been supported by the WSBA in the past. Governor Johnson made a motion to support the bill; Governor Lawrence seconded. The motion to support passed by a vote of 13-0-0.

PRESIDENT'S REPORT

By written report only.

PRESIDENT-ELECT'S REPORT

By written report only.

EXECUTIVE DIRECTOR'S REPORT

Executive Director Michels relayed the following recent activities:

- Sala Dandan has been appointed by the Supreme Court to the Washington State Court Interpreter Certification advisory Commission;
- Mandatory Insurance Disclosure – published for comment;
- WSBA had nominated Wayne Blair for the newly created National Council of Bar Presidents "Fellows Award";
- A productive and informative Multi-State Meeting was held in November;
- License fee increases (2007, 2008, 2009) have been endorsed by Supreme Court Order; and
- WSBA Staff Holiday Auction raised over \$5,000 for the Make-a-wish and the Treehouse charitable organizations.

There being no further business to come before the Board, the Board of Governors meeting was adjourned at 9:15 a.m., Saturday, December 10, 2005.

Respectfully submitted,

M. Janice Michels