

MINUTES

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

**PORT ANGELES, WA
July 21, 2006**

The Public Session of the Board of Governors of the Washington State Bar Association was called to order by President S. Brooke Taylor at 9:30 a.m., on Friday, July 21, 2006 at the Red Lion Hotel, Port Angeles, Washington. Governors in attendance were:

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

Also in attendance were President-elect Ellen Conedera Dial, Governor-elect Russell M. Aoki, Governor-elect Peter J. Karademos, Governor-elect Jason T. Vail, Executive Director and Meeting Secretary Jan Michels, and General Counsel Bob Welden.

LIAISONS, GUESTS AND STAFF IN ATTENDANCE:

Caitlin Davis Carlson	Legal Foundation of Washington, Executive Director
James Macpherson	WDTL
Daniel Gottlieb	ATJ Board
Rebecca Robertson	Criminal Law Section
Judge Christine Quinn-Brintnall	Court of Appeals/Division II

Jean Cotton	Family Law Section
Judge Suzanne Barnett	Superior Court Judges Association
Steve Toole	WSTLA
David Swartling	WSBA Court Rules and Procedures Committee, Chair
J.D. Smith	ABA Delegate
William Hyslop	Committee on Public Defense, Co-Chair
Noah Davis	WYLD, President
David A. Trieweiler	WACDL
Ed Holm	WAPA
Paula Littlewood	WSBA Deputy Director
Gail Stone	WSBA Legislative Director
Judy Berrett	WSBA Director, Member and Community Relations
Julie Mass	WSBA Director of Finance and Administration
Suzanne Kim	Office of the Executive Director, Secretary
Donna Sato	WSBA Executive Assistant

INTRODUCTIONS

Officers, governors, liaisons, guests, and staff introduced themselves.

REPORT ON EXECUTIVE SESSION

President Taylor reported that the Board approved the Executive Session minutes of June 9, 2006; received the litigation and discipline docket reports; reviewed one reprimand; denied a request to transfer from inactive to active status without retaking and passing the bar examination; discussed an issue relating to an appointment to the 2006-2007 Legislative Committee; and reviewed preliminary plans regarding the September 14-15, 2006 BOG meeting and other events scheduled in conjunction with the September BOG meeting.

APPROVAL OF THE MINUTES FROM THE JUNE BOARD MEETING

Governor Berg moved to approve the Public Session minutes of June 9, 2006 subject to Governor O'Sullivan's additions to the Executive Session minutes; Governor O'Sullivan

seconded. The motion passed by a vote of 10-0-4, Governors Lawrence, Mungia, Olson, and Pontarolo abstained.

CONSENT CALENDAR

The three consent items, as listed below, were approved by circulation of a written consent ballot:

- a. Approve Appointments to the Center for Court Research Advisory Board (2);
- b. Approve Additional Appointments to the 2006-2007 Legislative Committee (2);
- c. Approve the 2006 Hearing Officer Appointment Recommendations (28) and the 2006 Hearing Officer Selection Panel Appointment Recommendations (2).

Item "d" was removed from consent for discussion.

Governor Olson shared her concerns regarding the proposed future publishing of WSBA Annual Award nominees' names (Item "d"). Governor Bastian moved; seconded by Governor Anderson to publish WSBA Annual Award nominees' names (as outlined on page 85 of the board book). Discussion transpired. The motion failed by a vote of 4-9-0; Governors Anderson, Baker, Bastian, and Berg in favor.

GOVERNORS' OPEN FORUM

Kristal Wiitala, Governor – 3rd District

Governor Wiitala provided an update on the POLB legal technician issue. As BOG liaison to the POLB, Governor Wiitala has attended the POLB meetings and observed discussions on the legal technician issue as being an ongoing, slow process. Governor Wiitala informed the Board that the POLB is currently working on action steps to select a pilot practice area.

Marcine Anderson, Governor – At-large

Governor Anderson reported on the meeting held recently with Richard Mitchell, President Taylor, Jan Michels, and Judy Berrett concerning a proposed Judicial Recommendations Screening project and the Governor's request that the WSBA serve as the centralized communication point in relation to appellate and Supreme Court candidates; as well as Superior Court appointments. Discussions are ongoing regarding the feasibility of the WSBA compiling the results of standardized notification and evaluation packets for forwarding to the Governor's Office. President Taylor noted the importance of the WSBA's continued efforts to work with the Governor's Office in addressing the Governor's request. The 2007 budget includes an allocation

of \$20,000 (in the contingency cost center) so funds are available if the WSBA decides to pursue the coordination of this project.

S. Brooke Taylor, President

President Taylor took this opportunity to report on an issue that was discussed at the BOG Retreat on July 20 involving educating the public on the importance of the independence of the judiciary. Governor Mungia moved; seconded by Governor Berg that President Taylor be authorized, along with a committee of no more than three, to work with Judy Berrett to craft a memo addressing the importance of an independent judiciary as a blast e-mail to the WSBA membership; and that the WSBA be authorized to retain a short-term media consultant to assist with these efforts. The motion passed unanimously.

Douglas Lawrence, Governor – 8th District

Governor Lawrence requested to present item 11c under BOG Matters – KCBA Request for WSBA Support of Website: votingforjudges.org. Governor Lawrence moved; seconded by Governor Olson that the WSBA provide \$2,500 as a co-sponsor to the KCBA's votingforjudges.org website. Discussion transpired on concerns relating to liability as a co-sponsor; the extent of the site's disclaimers; whether or not the site will include languages in addition to English; whether the site would be accessible to individuals with disabilities; and the extent of the WSBA's role in insuring the continuity of "quality" neutrality. The motion to provide \$2,500 as a co-sponsor to the KCBA's votingforjudges.org website passed by a vote of 12-2-0; Governors de los Santos and Johnson against.

PIPELINE DIVERSITY RESOLUTION – J.D. Smith, ABA Delegate

ABA Delegate J.D. Smith presented and spoke to the efforts being made through the ABA in addressing diversity within the legal profession as essential for the maintenance of our justice system. In November of 2005, the ABA sponsored a Pipeline Diversity Conference to address diversity within the legal profession and the resolution before the Board was a result of this 2005 conference. Smith noted that 15% of practicing attorneys are minorities in comparison to 30%+ of an overall minority population. Governor Anderson moved; seconded by Governor Baker to co-sponsor the Pipeline Diversity Resolution. Discussion transpired on the definition of the word "minority." Smith assured the Board that the word minority is inclusive and not limited to race.

President-elect Dial shared that during her term as president she hopes to implement a 3-year pilot grant program through a task force of the Diversity Committee to focus these efforts in the State of Washington.

The motion to co-sponsor the Pipeline Diversity Resolution (as reflected on page 86 of the board book) passed unanimously.

COMMITTEE ON PUBLIC DEFENSE – William Hyslop, Co-Chair and Gail Stone

Co-chair of the Committee on Public Defense Bill Hyslop presented a history of the CPD and its creation. Hyslop spoke on the dynamics of the process as: working with public defense representatives who believe the CPD Charter should be broader; prosecutor representatives who believe the CPD Charter should be more specific; judicial representatives who believe the judiciary should decide based on identifiable concerns that do not necessarily occur in their courtrooms; and overwhelming public funding issues.

Hyslop reported that Governors Burke and Baker have participated as BOG Liaisons and welcomed all governors to sit in on the CPD meetings. Reference was made to the current timeline that includes a report to the BOG for action in March 2007 at which time implementation of the recommendations will also be addressed.

Discussion arose as to the broadness of the scope of the CPD; the cost associated with its final recommendations; and the likelihood of the matter being successful in the legislative process. Gail Stone, staff liaison to the CPD, anticipates identifying the recommendations in two groups: (a) aspirational goals; and (b) practical, achievable, deliverable goals.

BOG MATTERS

A. 2007 Keller Deduction Schedule – General Counsel Bob Welden

General Counsel Bob Welden presented the 2007 Keller Deduction Schedule. Governor Johnson moved; seconded by Governor Pontarolo that the Board approve the “base” Keller deduction for fiscal year 2007 be set at \$3.80. The motion passed unanimously.

B. Proposed Bylaw Change and Revised Member Data and Contact Information Policy – Deputy Director Paula Littlewood

Deputy Director Littlewood presented a proposed bylaw change and accompanying revision to the Member Data and Contact Information Policy which would provide WSBA members an option to select “unpublished” e-mail addresses. Discussion transpired on the clarification of requests for confidentiality. Governor Mungia moved; seconded by Governor Olson that the Board approve the proposed bylaw amendment and revised Member Data and Contact Information Policy as presented. The motion passed unanimously.

WSBA COURT RULES AND PROCEDURES COMMITTEE – Dave Swartling, Chair and Douglas Ende, Staff Liaison

Assistant Director for Publications of the WSBA CLE Department Margaret Morgan took this opportunity to acknowledge Dave Swartling for his tireless efforts as editor-in-chief of the *Washington Civil Procedure Deskbook* from 1992 through 2006. Swartling was presented with a token of appreciation and received a standing ovation by the Board and all in attendance.

GR 14.1 Citation to Unpublished Opinions

Chair Swartling introduced Judge Christine Quinn-Brintnall (Court of Appeals/Division II), who spoke not as a Court of Appeals judge but as an individual who has had 28 years of involvement and exposure with the Court of Appeals process in the State of Washington. Judge Quinn-Brintnall highly recommended no change in the prohibition of citing to unpublished decisions based on unintentional consequences, the fact that a party can move to publish decisions that have been issued as unpublished; citing to unpublished opinions will quadruple the number of decisions available for citation; and access to justice issues if there is no access to Lexis or Westlaw. Judge Quinn-Brintnall described unpublished decisions as scribed for parties addressing party issues vs. published decisions as being published for the courts, attorneys, the legislature, and the general public. Judge Quinn-Brintnall further believes that allowing citation to previously filed unpublished decisions could have serious effects on parties that relied on the unpublished nature of the opinion.

Governor Johnson moved; seconded by Governor Pontarolo that the Board adopt Option 1 as recommended by the Court Rules and Procedures Committee found on page 57 (adoption

would include concurrent suggested amendments to RAP 10.4(h), CR 10, RALJ 7.3(c), and CRLJ 10 found on pages 59-65). Option 1 includes no change to General Rule 14.1 about citing to unpublished Washington opinions; however, a new section allows cites to other states' unpublished opinions (if citation to that opinion is permitted under the law of the issuing court).

A lengthy discussion transpired. The motion passed by a vote of 9-5-0; Governors Anderson, Baker, Berg, de los Santos, and Wiitala against.

CR 45 Concerning Subpoenas

Chair Swartling reported that the proposed amendments to CR 45 were intended to conform CR 45 to Rule 45 of the Federal Rules of Civil Procedure (to the extent possible) and will aid in securing the just, speedy, and inexpensive determination of actions. The rule requires that all parties be served with the subpoena five days prior to service on the recipient and is designed to allow parties sufficient time to assert privileges or objections prior to the recipient's compliance. Chair Swartling addressed the remaining distinctions between the federal rule and the suggested revision to CR 45.

Governor Berg moved; seconded by Governor Olson that the Board adopt the proposed amendments to CR 45. Discussion transpired. The motion passed unanimously.

CrR 4.8 Concerning Subpoenas

Chair Swartling introduced the simultaneous revision to CrR 4.8 suggested to address the issuance of subpoenas in criminal matters. The new rule recognizes two types of subpoenas (1) directing a person to attend and give testimony and (2) those requiring production of documentary evidence. The new suggested rule sets forth requirements that apply only to a subpoena for production and incorporate provisions designed for the protection of persons subject to subpoenas. Discussion transpired. David Trieweiler representing the WACDL Rules Committee highly urged adoption of the proposed rule and described the proposed rule as a result of negotiations and a lot of hard work and compromise.

Governor Berg moved; seconded by Governor Pontarolo that the Board adopt the proposed amendments to CrR 4.8. The motion passed by a vote of 13-1-0; Governor Anderson opposed.

RAP 9.5, CR 53.4, CR 54, CR 78, CrR 4.4, CrRLJ 4.4, CrR 4.7, and CrR 7.8

Chair Swartling introduced all remaining proposals and each item was addressed and acted on as follows:

RAP 9.5

Governor Mungia moved; seconded by Governor Lawrence that the Board adopt the proposed amendment to RAP 9.5 which serves to correct an erroneous internal cross-reference within the rule. Motion passed unanimously.

CR 53.4

Governor Mungia moved; seconded by Governor Johnson that the Board adopt the proposed addition of new subsection (f)(9) to CR 53.4 which intends to comply with legislative requirement. Motion passed 13-0-0. Governor Olson was not present.

CR 54 and CR 78

Governor Mungia moved; seconded by Governor Johnson that the Board adopt the proposed amendments to CR 54 and CR 78 which would impose a 10-day deadline on the filing of motions for attorney's fees, costs, and the like; to prevent parties from raising these issues very late in the process; and to expressly include costs and disbursements. Motion passed unanimously.

CrR 4.4 and CrRLJ 4.4

Governor Mungia moved; seconded by Governor Olson that the Board adopt the proposed amendments to CrR 4.4 and CrRLJ 4.4 which corrects a drafting or typographical error. Motion passed unanimously.

CrR 4.7

Governor Johnson moved; seconded by Governor Pontarolo that the Board adopt the proposed amendment to CrR 4.7 which corrects a typographical error. Motion passed unanimously.

CrR 7.8

Governor Pontarolo moved; seconded by Governor Lawrence that the Board adopt the proposed amendment to CrR 7.8 as supported by the Superior Court and Court of Appeals.

Motion passed unanimously.

Chair Swartling concluded his report by listing the rules and/or issues for address and consideration in 2007 as including evidence rules; juvenile rules, the Board may want to consider placing the juvenile rules into the regular review cycle; calculation of time issues; and the proliferation of local rules.

President Taylor acknowledged Swartling with a crystal memento in appreciation for his years of service to the WSBA as Chair of the Court Rules and Procedures Committee. David Swartling was once again applauded and received a standing ovation from the Board and all in attendance.

FACILITIES REPORT – Ellen Conedera Dial, Chair

President-elect and Facilities Committee chair, Ellen Dial, reported that the Facilities Committee last met on June 29. One of two outstanding issues, furniture, was addressed and comes before the Board as a recommendation from the Facilities and Budget and Audit Committees. Based on the price differential between Option A (move in phases using existing furniture) and Option B (move over the weekend and purchase new cubicles) of \$35,000 – 50,000; coupled with the risk of delay and lost productivity under Option A, it is recommended that Option B be adopted. Governor Lawrence moved, seconded by Governor Berg that the Board adopt Option B (as outlined on pages 250-251 of the board book) and purchase new cubicles. The motion passed unanimously.

Dial concluded the Facilities Report by announcing that construction bids are anticipated to be back during the week of July 24; and the Arts Subcommittee remains active in their charge to provide a professional working environment with pleasing aesthetic value for the new Puget Sound Plaza offices.

FISCAL MATTERS – Treasurer Mark Johnson, Deputy Director Paula Littlewood and Finance and Administration Director Julie Mass

Treasurer Mark Johnson reported that the proposed 2007 Budget as recommended by the Budget and Audit Committee is before the Board for adoption and welcomed any questions or comments. Governor Pontarolo requested clarification on the 7.6% increase in salaries

(reflected on page 219 of the board book). Discussion transpired relating to the 3% “across the board” increase that staff received in January 2006. Executive Director Michels reported that the increase came out of the allocated salary pool and was supported by the availability of funds. President Taylor suggested that this matter be further discussed by the officers. Governor

Lawrence moved; seconded by Governor Pontarolo that the Board adopt the proposed 2007 Budget as recommended by the Budget and Audit Committee. The motion passed unanimously.

BOG MATTERS (Continued)

D. Amicus Brief Committee Recommendation RE: Jordan vs. Rawson-Sweet

Governor Mungia recused himself from discussion and voting on this matter based on a conflict of interest arising from his law firm’s representation of the Defendant/Petitioner.

Bertha Fitzer presented on behalf of the Amicus Brief Committee. Fitzer provided the Board with extensive background of Jordan vs. Rawson-Sweet in support of the committee’s recommendation that the Board approve the filing of an Amicus Curiae Memorandum in Support of the Petition for Review in this case (committee member Stephen DiJulio recused himself from consideration of this matter). The two issues the committee believes should be decided by the Supreme court are (1) whether lawyers bear the burden of proof in every case in which a violation of the RPCs is alleged; and (2) whether it is appropriate to apply the standards of the Rules of Professional Conduct to conduct that occurred prior to the adoption of the RPCs.

Steven Tubbs presented in opposition to the WSBA filing an Amicus Curiae Memorandum in Support of the Petition for Review in this case. Tubbs’ position is predicated upon two fundamental policies: (1) the lack of compelling interest for the Bar to weigh in; and (2) it is the Bar’s policy to preserve and protect clients from abuses by fiduciaries.

Discussion transpired on whether or not the standards for filing amicus curiae were met. Governor Berg moved; seconded by Governor Baker that the Board deny the request of the Amicus Brief Committee for the WSBA to file an Amicus Curiae Memorandum in Support of the Petition for Review in Jordan vs. Rawson-Sweet. The motion passed by a vote of 9-4-1; Governor Mungia abstained.

E. ETHICS OPINION RE: CHARITY DONATIONS IN EXCHANGE FOR REDUCED CHARGES

Executive Director Michels reported on the recent practice of criminal defense attorneys and prosecutors negotiating arrangements that include more favorable treatment for defendants in exchange for contributions to charities named by the prosecutors; and possible implications on RPC 8.4(d). However, because of probable WAPA activity in support of legislation in 2007 to address this issue, the Board may want to wait to review the situation.

Discussion transpired on the downside of requesting a formal opinion now or waiting until after the 2007 legislative session. Governor Mungia moved; seconded by Governor Davis that the Board proceed in requesting a formal ethics opinion regarding this issue. The motion passed by a vote of 11-3-0; Governors Burke, de los Santos, and Olson against.

PRESIDENT'S REPORT

By written report only.

PRESIDENT-ELECT'S REPORT

By written report only.

EXECUTIVE DIRECTOR'S REPORT

By written report only.

There being no further business to come before the Board, the Board of Governors meeting was adjourned at 4:20 p.m., Friday, July 21, 2006.

Respectfully submitted,

M. Janice Michels