

MINUTES

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

**VANCOUVER, WA
October 28 - 29, 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 1:30 p.m., on Friday, October 28, 2005 at the Heathman Lodge, Vancouver, Washington. The Public Session continued to 5:00 p.m. that day, recessed then reconvened from 8:30 to 9:50 a.m. on Saturday, October 29 when it was adjourned. 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
Michael Pontarolo
Kristal K. Wiitala

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

LIAISONS, GUESTS AND STAFF IN ATTENDANCE:

1. James Macpherson	WDTL
2. Jean McCoy	Real Property, Probate and Trust Section
3. Judge Stephen Warning	Superior Court Judges Association
4. Thomas A. Campbell	WACDL
5. Peter Karademos	Family Law Section and Legislative Committee

6. Michael DeWitt	WYLD Trustee
7. Colleen Harrington	Litigation Section
8. Daniel Gottlieb	ATJ Board
9. Nancy Pacharzina	Legal Foundation of Washington, Trustee
10. Jason McGill	Government Lawyers Bar Association, Vice President
11. Steve Toole	WSTLA
12. Christopher Veley	WYLD Trustee
13. Norman Maleng (presenter)	King County Prosecuting Attorney
14. Bonnie Glenn	King County Prosecuting Attorney's Office
15. Lisa Stone (by phone)	Amicus Brief Committee
16. Julian Dewell (presenter)	Amicus Brief Committee
17. John Muenster (presenter)	Muenster & Koenig, Attorneys at Law
18. Art Lachman (presenter)	Rules of Professional Conduct Committee
19. Pam Anderson (presenter)	Rules of Professional Conduct Committee
20. Jim Bamberger (presenter)	Office of Civil Legal Aid
21. Mike Vaughn	WSBA Criminal Law Section
22. Ed Holm	WAPA
23. G. Geoffrey Gibbs	Snohomish County Bar Association, President
24. Joy McLean (presenter)	WSBA Director of Lawyer Discipline
25. Anne Seidel (presenter)	WSBA Associate Director of Lawyer Discipline
26. Randy Beitel (presenter)	WSBA Team Manager, ODC
27. John Cary	KCBA
28. Judy Berrett	WSBA Director, Member and Community Relations
29. Gail Stone	WSBA Legislative Director
30. Paula Littlewood	WSBA Deputy Director
31. Donna Sato	WSBA Executive Assistant

INTRODUCTIONS

REPORT ON EXECUTIVE SESSION

President Taylor reported that in Executive Session the Board developed some “Rules of the Road” for the coming year and participated in a diversity communication workshop. The Board then convened the business portion of Executive Session and discussed pending litigation, the discipline docket, legislative strategy and the Judicial Recommendation Committee screening process.

APPROVAL OF THE MINUTES FROM THE SEPTEMBER BOARD MEETING

Governor Mungia made a motion to approve the minutes of the September 15, 2005 meeting; Governor Pontarolo seconded. The minutes were approved by a vote of 13-0-0.

MINUTES OF THE OCTOBER 17 SPECIAL SESSION

Governor Mungia made a motion to approve the minutes of the October 17, 2005 Special Session; Governor Pontarolo seconded. The minutes were approved by a vote of 11-0-2. Governors Anderson and de los Santos abstained since they were unable to attend the meeting.

CONSENT CALENDAR

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

- a. Approval of Proposed Bylaw Amendments – Real Property, Probate and Trust Section;
- b. Approval of Non-lawyer Member on the Disciplinary Board – Nomination;
- c. Approval of Resolution Authorizing Banking Relationships; and
- d. Approval of Additional WSBA Committee Appointments

AMICUS BRIEF COMMITTEE RECOMMENDATIONS

- a. **State v. Athan - Julian Dewell, Lisa Stone (by phone), John Muenster and Norm Maleng**

Governor Anderson recused herself. Assistant General Counsel Ende related the underlying facts regarding the Athan request that WSBA file amicus on the aspect of a police ruse where the police represented themselves as a law firm and then used evidence (saliva) gathered in that ruse to secure a murder conviction. Dewell explained the amicus process and reported that

the Amicus Brief Committee nearly unanimously recommended that the WSBA file amicus on the issue of privacy and practicing law without a license.

John Muenster arguing for the appellant's request that the WSBA file amicus argued that the ruse violated privacy rights, the 4th Amendment, and was improper government procedure.

Norm Maleng argued that the conviction should be upheld and this was not an appropriate case in which to seek clarification on whether the masquerading-as-a law-firm ruse was proper. He argued that the case did not meet WSBA amicus standards, did not implicate public harm, and that there was no compelling justice reason for WSBA to weigh in.

The Board discussed matters implicated in the case and amicus process. They wondered if a decision was needed before the Supreme Court agreed to accept direct review and which issues the amicus brief would actually address. The Board assessed whether adequate notice had been given, that WAPA was unanimously against filing amicus in this case, and that the Washington Association of Criminal Defense Trial Lawyers had already filed amicus.

Governor Bastian made a motion to table the matter until after the Supreme Court decided about accepting direct review, and at that time discuss which issues the brief should address; Governor Johnson seconded. The motion passed by a vote of 12-0-0, Governor Anderson excused.

b. Puget Sound Title

Governor Mungia recused himself. Assistant General Counsel Ende explained the facts in this matter and the Amicus Brief Committee's recommendation to decline to file in this matter. Their reasons were that LPOs are already regulated by the APRs. Governor Davis made a motion to decline to file in this matter; Governor Pontarolo seconded. The motion to decline passed by a vote of 12-0-0, Governor Mungia excused.

c. Tingey

Governor Berg made a motion to decline filing amicus in this matter as recommended by the Amicus Brief Committee; Governor Davis seconded. Governor Johnson made a motion to table to see if the Supreme Court accepts review on the matter; Governor Bastian seconded. The vote on the motion to table was 6-6-0, Governor Anderson excused. The president broke the tie

with a vote against tabling. On the original motion to decline filing amicus the vote was 10-2-0, Governors Johnson and Pontarolo against.

WITHDRAWAL OF FORMAL OPINION 186 AND ADOPTION OF NEW FORMAL OPINION 198 – Art Lachman and Pam Anderson

Subcommittee chair of the Rules of Professional Conduct Committee Art Lachman presented the case for the withdrawal of Formal Opinion # 186 and the substitution for it of a new Formal Opinion #198. Opinion 186 deals with the question of which advance fee payments must be deposited to the trust account. Lachman indicated that the Committee believes that it is no longer appropriate for lawyers to use the terms “nonrefundable” or “earned upon receipt” to characterize advance fee payments for specific matters, following the Supreme Court decision in *In re DeRuiz*. Opinion 186 is therefore misleading and doing damage to lawyers’ ability to understand what is required of them. The Committee drafted Opinion 198 to clarify the law on that point and to propose a procedure whereby lawyers could put advance fee payments in their general (operating) account, instead of the trust account, if the client agrees that the fee should be characterized as belonging to the lawyer and if various notices and warnings are given to the client.

The Board heard from various groups interested in this issue. The Office of Disciplinary Counsel noted that at least two groups asked that this matter be set over to a later Board meeting to allow more time to study the matter and suggested that Opinion 186 be rescinded immediately, while the Board decides what opinion to substitute for it. Disciplinary Counsel and the Legal Foundation of Washington both expressed concern about the procedure proposed in Opinion 198 purportedly allowing lawyers and clients to contract around the trust account rule.

Criminal defense lawyers expressed that they need to be able to charge nonrefundable fees because of the difficulty of resolving fee disputes with the type of clientele they have and to economically represent clients. By charging flat amounts and then pleading some cases and trying other cases, the lawyer can keep the set fee lower. The family law section also expressed concerns.

It was suggested that this situation might call for an RPC amendment rather than simply an ethics opinion. Governor Anderson proposed the withdrawal of Opinion 186 pending further review of the new proposed opinion but the suggestion was not considered friendly. Governor

Davis moved to table the issue until December pending Legal Foundation of Washington review and the effort of a special work group convened by Joy McLean to attempt to reach an agreed solution; Governor Mungia seconded. The motion passed by a vote of 12-1-0, Governor Anderson against. Governor Berg clarified that the work group focus on client protection, consider input from the trust account auditors, and consider the impact of the opinion of criminal defense practitioners.

APPOINTMENT OF WSBA TREASURER

Governor Berg nominated Mark Johnson as the WSBA Treasurer for 2005-2006; Governor Pontarolo seconded. Mark Johnson was appointed Treasurer by a vote of 13-0-0.

ANNUAL DISCIPLINE REPORT – Chief Disciplinary Counsel, Joy McLean

Director of the Office of Disciplinary Counsel, Joy McLean described the functions of the various entities involved in the discipline process from the original call or letter through adjudication and appeal. She related the statistics about those disciplined as to offense, age, type of practice and patterns and closed with an example case of how the process worked.

OFFICE OF CIVIL LEGAL AID – Report by James Bamberger, Director

Jim Bamberger, the newly appointed director of this 2005 created judicial agency briefed the Board about the inception of the agency, its responsibilities and authorities, and about the 2006 budget request approved by the OCLA Board.

WSBA MOVE PLANNING - Ellen Conedera Dial, Facilities Committee Chair

WSBA Facilities Committee Chair Dial briefed the Board on the status of the move to Puget Sound Plaza which will occur in December 2006. A Project Manager has been hired and representatives of both the Facilities Committee and the WSBA Staff Committee (BARGE the “Bar Association Relocation Group Extraordinaire”) were in the process of selecting an architect. She described the roles of all these entities and noted key dates in the move planning process.

WASHINGTON STATE COURT INTERPRETER CERTIFICATION ADVISORY COMMISSION

Working with the list of names submitted for nomination to the Washington State Court Interpreter Certification Advisory Commission at the September Board meeting and with the Supreme Court’s request for a total of three names, Governor Anderson nominated Octavia

Hathaway; Governor Bastian seconded. Octavia Hathaway was chosen for nomination by a vote of 13-0-0.

Governor Lawrence nominated Salah Dandan; Governor Johnson seconded. Salah Dandan was chosen for nomination by a vote of 13-0-0.

DRUG POLICY PROJECT RESOLUTION – Governor Douglas Lawrence

BOG Liaison to the King County Drug Policy Project Doug Lawrence brought a recommendation to the Board that WSBA adopt a resolution calling for the Washington state legislature to establish a special commission to study the issue of psychoactive substances for the purpose of investigating alternate regulatory approaches to the production and distribution of psychoactive substances. Lawrence explained the Board's history in this area. Governor Berg made a motion to adopt the recommended resolution which seeks study of the issue; Governor Pontarolo seconded.

Ed Holm, Washington Association of Prosecuting Attorneys spoke vehemently against the idea of civil regulation and any legalization of drugs. Governor Bastian made a motion to table the issue until December to allow further WAPA and other input; Governor Wiitala seconded. The motion to table was defeated by a vote of 6-7-0, Governors Anderson, Baker, Bastian, Burke, Pontarolo and Wiitala in favor. The Board worked to modify the resolution in hopes of making it more acceptable and clear. Many of these changes were not acceptable to the maker of the original motion or to the second. The maker of the motion withdrew the original motion and moved to adopt the resolution with the first sentence and first 5 words of the second sentence removed and the word "control" added to the last sentence. Governor Johnson suggested removing the first explanatory paragraph but the suggestion was not seen as friendly to the motion. The motion to adopt the modified resolution (as attached) passed by a vote of 9-4-0, Governors Johnson, Bastian, O'Sullivan and Pontarolo against.

Governor Lawrence made a motion to sponsor the December 2-3 Drug Policy Summit with a donation of \$250; Governor Mungia seconded. The motion passed by a vote of 10-3-0, Governors Bastian, O'Sullivan and Pontarolo against.

LEGISLATIVE STRUCTURE – Legislative Director Gail Stone

Legislative Director Stone reiterated the roles of the entities involved in WSBA's legislative process: WSBA Legislative Committee, BOG Legislative Committee, Legislative Department, BOG alumni network, sections, and other stakeholders.

She proposed a resolution (as attached) in support of the Public Criminal Defense budget request for additional funding for parent representation and general local defense costs, Governor O'Sullivan made a motion to adopt the proposed resolution; Governor Pontarolo seconded. The motion passed by a vote of 13-0-0.

There being no further business to come before the Board, the Board of Governors meeting was adjourned at 9:50 a.m., Saturday, October 29, 2005.

Respectfully submitted,

M. Janice Michels



WSBA

WASHINGTON STATE BAR ASSOCIATION BOARD OF GOVERNORS

Resolution Regarding the Establishment of a Special Commission to Study Regulatory Options for Psychoactive Substances in the State of Washington

In December of 2001 the Board of Governors of the Washington State Bar Association adopted a resolution regarding drug abuse policies in Washington State, commending the King County Bar Association Drug Policy Project and the Washington State Medical Society for taking a leadership role on these critical issues. In that resolution it was recognized that although criminal sanctions are a legitimate tool and have been effective in fighting some of the ill effects and conduct associated with drug and alcohol abuse, society's approach to drug and alcohol abuse problems should be expanded and reoriented. It was also resolved that a working group of statewide experts should be convened to improve Washington State's comprehensive substance abuse prevention plan.

The King County Bar Association Drug Policy Project issued a resolution on January 19, 2005, recommending that the Washington State Legislature establish a special consultative body to provide specific recommendations for legislation to establish regulatory systems and structures for the State of Washington to control psychoactive substances. The Board has considered that resolution and supporting resolutions and letters of support from the Washington State Medical Association, the Washington State Public Health Association, the Washington Physicians for Social Responsibility, King County Medical Society, the League of Women Voters of Seattle, the Loren Miller Bar Association, and the Church Council of Greater Seattle.

Having reviewed, debated and considered the matter, it is hereby resolved:

The Washington State Bar Association advocates that a special commission be established by the legislature of the State of Washington that is composed of experts in pharmacology, medicine, public health, law, law enforcement, and education, as well as public officials and civic leaders, for the purpose of investigating alternative regulatory approaches to the production, distribution and control of psychoactive substances that may have a more positive impact on the health and safety of the citizens of Washington.

Adopted by the Washington State Bar Association Board of Governors on October 29, 2005.

M. Janice Michels
Executive Director



WSBA

**WASHINGTON STATE BAR ASSOCIATION
BOARD OF GOVERNORS**

**Resolution in Support of Funding in the 2006 State Supplemental Budget
Consistent with the Purposes of HB 1542**

Whereas, the WSBA Board of Governors fully supported the enactment of HB 1542;

Now, Therefore, Be It Resolved That:

The Board of Governors of the Washington State Bar Association supports a request to the legislature for funding in the 2006 state supplemental budget consistent with the purposes of HB 1542.

Adopted by the Washington State Bar Association Board of Governors on October 29, 2005.

M. Janice Michels
Executive Director