

MINUTES

Public Session **Washington State Bar Association** **BOARD OF GOVERNORS**

Tumwater, WA
January 17, 2008

The Public Session of the Washington State Bar Association Board of Governors Meeting was called to order by President Stanley A. Bastian at 10:15 a.m. on Thursday, January 17, 2008, at the Tumwater Valley Lodge in Tumwater, Washington. Governors in attendance were:

Russell M. Aoki
Liza Burke
Anthony Butler
G. Geoffrey Gibbs
Lori Haskell
David Heller
Douglas C. Lawrence
Salvador A. Mungia
Kristal K. Wiitala
Brenda Williams

Also in attendance were President-elect Mark Johnson, Executive Director and Meeting Secretary Paula C. Littlewood, and General Counsel Bob Welden.

LIAISONS, GUESTS AND STAFF IN ATTENDANCE:

Jean Cotton	Family Law Section
Tracy Flood	Chair, Civil Rights Committee
Steve Crossland	POLB and RPPT Section
Greg Dallaire	ATJ Board
Jay Goldstein	
Meredith Wright Hutchins	GLBA
Adam Torem	Legal Assistance to Military Personnel Section
Roger Wynne	Chair, Court Rules & Procedures Committee
Judge Susan Craighead	Chair, Task Force on Dependency/Termination Appeals
Carol Murphy	Attorney General's Office
Anne Daly	King County Bar Association
Michele Radosevich	Legal Foundation of Washington
Caitlin Davis-Carlson	Legal Foundation of Washington

Judge Gordon Godfrey	Superior Court Judges Association
Mark O'Halloran	President, WYLD
Michael Dewitt	Trustee, WYLD
Christopher Mertens	Chair, Lawyers' Fund for Client Protection
James Bamberger	OCLA, Director
Thomas Brown	OCLA Oversight Committee
Judge Richard Fitterer	DMCJA
Gary Riesen	WAPA
Steven Toole	WSTLA
James Macpherson	Washington Defense Trial Lawyers
Michael Pellicciotti	ABA Delegate
John Cary	KCBA
Roger Goodman	Washington State Legislator
Jean McElroy	Director, Regulatory Services
Gail Stone	Director, Justice and Diversity Initiatives
Judy Berrett	Director, Member and Community Relations
Julie Mass	Deputy Director of Finance and Administration
Michael Heatherly	Bar News Editor
Pam Inglesby	Public Legal Education Manager
Gregg Hirakawa	Deputy Director for External Relations
Charu Verma	Administrative Assistant
Donna Sato	Executive Assistant

WELCOME AND INTRODUCTIONS

Officers, governors, liaisons, guests, and staff introduced themselves. President Bastian welcomed the Board to Olympia.

APPROVAL OF MINUTES FROM THE DECEMBER BOARD MEETING

There being no additions, deletions, or corrections to the minutes, President Bastian declared the Public Session minutes of December 7 – 8, 2007 adopted as distributed.

REPORT ON EXECUTIVE SESSION

President Bastian reported that in Executive Session the Board adopted the Executive Session minutes of December 7 – 8, 2007; received and acted on two recommendations by the Lawyers' Fund for Client Protection Committee; acted on a petition for reinstatement, a petition to waive the bar examination requirement, and two recommendations by the Judicial Recommendation

Committee; and received the President's Report, General Counsel Welden's Litigation Report, and Executive Director Littlewood's Report.

CONSENT CALENDAR

The following items were approved by the circulation of a written consent form:

- a. Proposed WSBA Bylaw Amendment Re Mandatory Indemnification;
- b. Appointment to the WSBA Leadership Institute Advisory Board;
- c. Three Additional Appointments to the Bar Examiners Committee;
- d. Proposed Bylaw Amendments for the Animal Law Section; and
- e. One additional Appointment to the Lawyers' Fund for Client Protection Committee.

LAWYERS' FUND FOR CLIENT PROTECTION COMMITTEE – Christopher Mertens, Chair

Chair of the Lawyers' Fund for Client Protection Committee, Christopher Mertens, reported on the state of the LFCP committee's fund in light of the potential exhaustion of funds.

Chair Mertens spoke to the potential crisis facing the LFCP committee with the 31 pending applications filed against disbarred attorney Barry Hammer, which represents a potential liability of \$1,882,000 if the fund cap of \$75,000 per application is applied and approved (the current balance of the fund is \$1,093,000). Mertens reported that Mr. Hammer has filed for bankruptcy and General Counsel Welden is working with the bankruptcy trustee.

The 31 pending applications have been categorized into three groups: current legal clients, clients for whom Hammer prepared tax returns, and referrals solely for investment purposes. Those individuals in the third category have been advised that under APR 15, they are ineligible for consideration. Further review of all other pending Hammer applications will be postponed until June 2008, when the statute of limitations for filing applications has run.

General Counsel Welden reminded the Board that in addition to the 31 pending applications filed against Barry Hammer, there are additional regular applications to be considered and requested the Board's direction, as Fund Trustees, on how best to proceed in distributing funds this year. The LFCP committee identified four possible approaches for the Board's consideration: Increase the annual assessment, impose a special assessment, reduce the current cap of \$75,000, or implement a pro-rata of payments.

Discussion transpired. Governor Lawrence shared his concerns and urged the Board to look at mechanisms to raise monies and further consider mandatory insurance coverage for all lawyers. Governor Mungia in opposition to an increase in the annual assessment, and/or the imposition of a special assessment, suggested that the Board revisit APR15 in its definition of the breach of duty arising out of the attorney/client privilege. Governor Heller suggested the Board consider postponing all payments with the understanding that the LFCP committee will continue to process applications that would normally be paid during the current fiscal year. Payments will then be made pro rata at the end of the fiscal year, or alternatively, paid over a period of several years until a balance is met.

President Bastian noted that the Hammer applications need to be deferred, and it is incumbent upon the Board to provide the LFCP committee direction regarding all other applications filed that are not related to Mr. Hammer. Discussion continued.

Governor Mungia moved, seconded by Governor Haskell, that the Board authorize the LFCP committee to use discretionary authority to either defer all applications for payment on a pro rata basis at the end of the fiscal year and continue to operate under the assumption that there will be no additional funds budgeted for this fiscal year; or, establish a threshold and make minimal payments with the balance of payments made on a pro rata basis in September. The motion passed with a vote of 6-1-1. Governor Heller voted against, and Governor Aoki abstained.

FISCAL MATTERS – Treasurer Douglas Lawrence and Deputy Director of Finance and Administration Julie Mass

Treasurer Doug Lawrence reported on the findings of Peterson Sullivan's Independent Auditors' Report. The WSBA's financial status is in excellent order, staff did a superb job, and the WSBA has good fiscal policies in place. Treasurer Lawrence commended Deputy Director of Finance and Administration Julie Mass and her entire staff for doing a fantastic job. The Board applauded Deputy Director Mass and staff. In closing, Treasurer Lawrence announced that the selection of an independent auditor will be placed out to bid in February and that this process is customary and is required every 6 years.

Treasurer Lawrence addressed the WSBA Leadership Institute's funding request by reporting that the Budget and Audit Committee has reviewed and fully supports the WLI's request.

However, he recommended that the Board consider deferring this matter until certain questions and issues are resolved. Governor Aoki reported that an enormous amount of time and work was spent by WLI Advisory Board member Marcine Anderson to ensure that the WLI remained within budget, that the funding request would basically cover travel expenses for geographically diverse fellows, and urged the Board's support of the WLI's request.

Treasurer Lawrence reiterated that his recommendation for deferment of this matter is to allow the Budget and Audit Committee additional time to ensure that the appropriate dollar amount is provided; moreover, it is the Budget and Audit Committee's intent to provide additional support.

OFFICE OF CIVIL LEGAL AID – James Bamberger, Director, and Thomas Brown, OCLA Oversight Committee Member

James Bamberger, Director of the Office of Civil Legal Aid, presented the Board with background about the establishment of OCLA in 2005 and its charge as an independent judicial agency. Governed by RCW 2.53.020 and 2.53.030, the OCLA administers and oversees the state's investment in civil legal aid services.

Thomas Brown, member of the OCLA Oversight Committee, reported that the oversight committee meets quarterly, the obligations of the OCLA are being fulfilled, the OCLA continues to move in the right direction, and the OCLA is operating in accordance with state plans. Director Bamberger was commended by Brown for his leadership and guidance.

CIVIL RIGHTS COMMITTEE REPORT – Tracy Flood, Chair

Chair of the Civil Rights Committee, Tracy Flood, presented the Civil Rights Committee's report relating to the Olympic Peninsula report and the intent of the committee to form a Civil Rights Law Section.

Chair Flood presented an overview of the committee's recommendation that the BOG take a leadership role in educating the public through (a) an expansion of the "We the Jury" program; (b) the distribution of brochures; and (c) the investigation of future incidents through continued work with the minority bar associations, the Access to Justice Board, the Committee for Diversity, and BOG Diversity Committee. As for the establishment of a Civil Rights Law Section, a subcommittee has been formed to begin the process which will commence with the notice of intent to be posted in the February Bar News.

Chair Flood reported that while the work of the Civil Rights Committee is sanctioned by the Board, a Civil Rights Law Section would operate more independently, i.e., with the ability to take legislative action and by being an investigative body. Chair Flood further clarified that the authorization sought by the Civil Rights Committee to engage in future investigations clearly stems from their understanding that the committee needs Board authorization to proceed.

Discussion transpired. Governor Williams acknowledged the work of the Civil Rights Committee. Governor Butler noted his support of the role of the Civil Rights Committee, however, he questioned what, if anything, the WSBA can reasonably do when a violation occurs. Further, organizations that are charged with taking action on such violations have a stronger position, therefore, the establishment of a section may be a more viable means to bring civil rights policies to fruition.

President Bastian suggested that the issues before the Board be reviewed in depth as the WSBA engages in its program review, and the Board take no action today.

General Counsel Welden commended Chair Flood for her work as chair of the Civil Rights Committee. President Bastian concurred and acknowledged Chair Flood's leadership and guidance during a difficult time. Mark O'Halloran, President of the WYLD, offered to work with the Civil Rights Committee (or proposed Section) to further expand the We the Jury program.

BOG MATTERS

King County Bar Association Drug Policy Project – Proposed Resolution to the ABA

John Cary presented the Board with the history relating to the King County Bar Association Drug Policy Project, specifically highlighting the resolutions adopted previously by the BOG supporting the work of the KCBA's Drug Policy Project. (Copies of the WSBA Resolution in Support of State's Rights to Govern the Medical Use of Marijuana dated July 2003, and the WSBA Resolution Regarding the Establishment of a Special Commission to Study Regulatory Options for Psychoactive Substances in the State of Washington dated October 2005 were included in the Board meeting materials at pages 293b-d.) Cary reported that the proposed resolution, currently before the Board for adoption, remains consistent with previous Board action. The proposed resolution is as follows:

States should be allowed to adopt and implement legislation governing

the production, distribution and use of marijuana; federal law should not impede or preempt the exercise of state authority in this area.

John Cary reported that current ABA President Bill Neukom is in support and encouraged the delegation to bring the matter forward. Plans are being made to lobby the resolution at the ABA Midyear Meeting in February for purposes of garnering support. In addition, the Washington delegation has unanimously supported the basic policy resolution (as cited above), and intends to actively work with the KCBA Drug Policy Project in their efforts.

State Representative Roger Goodman reiterated Cary's statements and noted that the intent to lobby in February at the ABA Midyear Meeting is to stimulate other states prior to formal presentation for action by the ABA House of Delegates at the ABA Annual Meeting in August.

As the BOG liaison to the King County Drug Policy Project, Governor Lawrence reported that the proposed resolution before the Board is a well thought out resolution and urged the Board to move the ball forward with its support in furthering the administration of justice and stressed that the initiative cannot move forward with current Federal laws in place.

Governor Lawrence moved, seconded by Governor Burke, that the Board support the KCBA basic policy resolution. The motion passed with a vote of 9-1-0 (Governors Butler and Wiitala were present for the duration of this meeting.) Governor Butler voted against.

ABA House of Delegates Alternate Appointment

Governor Lawrence moved, seconded by Governor Mungia, that the Board appoint Julia Bahner to serve as an alternate delegate to the ABA House of Delegates. Governor Heller moved, seconded by Governor Haskell, that the Board appoint Lish Whitson to serve as an alternate delegate to the ABA House of Delegates. Julia Bahner was appointed with the majority of 6 votes.

Proposed ABA Model Rule on Conditional Admission

General Counsel Bob Welden spoke in opposition to a proposed ABA Model Rule on Conditional Admission to Practice Law that is scheduled to be submitted to the House of Delegates at the Midyear Meeting in February 2008 and strongly urged the Board to oppose it and to instruct the WSBA delegation to vote against it.

President-elect Johnson supported General Counsel Welden's recommendation for the reason that the WSBA currently has a comprehensive, well thought out set of character and fitness rules. Furthermore, the WSBA's current character and fitness rules far exceed what the ABA is considering via the proposed ABA Model Rule on Conditional Admission to Practice Law.

Governor Gibbs moved, seconded by Governor Butler, that the Board oppose the proposed ABA Model Rule on Conditional Admission to Practice Law and instruct the WSBA ABA delegates to vote against it. The motion passed with a vote of 10-0-0.

Approval of Appointments to the Council on Public Legal Education

Governor Mungia moved, seconded by Governor Lawrence, that the Board approve the appointments to the Council on Public Legal Education as outlined on page 356 of the Board book. The motion passed with a vote of 10-0-0.

Appointment of Two Members to the Council on Public Legal Education

Governor Mungia moved, seconded by Governor Gibbs, that the Board appoint Mark Lindquist to the Council on Public Legal Education for a three year term. The motion passed with a vote of 10-0-0.

Governor Williams moved, seconded by Governor Gibbs, that the Board appoint Willie Gregory to the Council on Public Legal Education.

Governor Wiitala moved, seconded by Governor Lawrence, that the Board appoint Shawn Newman to the Council on Public Legal Education.

Governor Heller moved, seconded by Governor Burke, that the Board appoint Robert Russell to the Council on Public Legal Education.

A run-off vote was mandated between Willie Gregory and Robert Russell who each received 5 votes. President Bastian cast the tie breaking vote and Robert Russell was appointed to the Council on Public Legal Education for a two year term.

Section Membership for Law Students

Executive Director Littlewood provided the Board with background information on this issue and requested the Board's clarification on whether action by the Board in October 2004 provided that law students could join all sections as nonvoting members or only those sections that provided for law student nonvoting members in their bylaws.

Governor Lawrence moved, seconded by Governor Gibbs, that in furthering the WSBA's outreach to law students and to provide law students with practice area exposure, the Board approve and/or clarify that law students can join all sections as non-voting members.

Discussion transpired. Jean Cotton spoke on behalf of the Family Law Section in pointing out that procedurally section bylaws dictate a process for amending section bylaws and requested the Board's clarification as to whether or not it is the intent of the Board to bypass the cited procedures. Further, the \$8.00 rate offered to law students will financially impact the Family Law Section if the Board mandates law student membership for all sections. Cotton urged the Board to defer this matter to allow sections to take the issue to its memberships for comment.

Executive Director Littlewood did not view this issue as time sensitive and welcomed the opportunity to take the issue to the sections for input. However, she requested direction from the Board as to the disposition of the 87 law students who have joined the various sections to date for 2008 membership.

Governor Mungia moved, seconded by Governor Wiitala, that the Board postpone action on this matter. Further, all 2008 law students will be considered nonvoting members until final disposition of this issue. The motion passed with a vote of 6-3-1. Governors Butler, Haskell, and Lawrence voted against. Governor Gibbs abstained.

WSBA Bylaw Amendments re: Reelection of Governors

At the December 2007 Board of Governors Meeting, an issue was raised regarding the reelection of a governor who is elected to fill the remaining term when a governor position becomes vacant. It was suggested that the WSBA Bylaws be amended to provide that a governor elected to fill a vacancy for a term of 18 months or less would be eligible for reelection.

Governor Wiitala moved, seconded by Governor Mungia, that the Board approve the proposed WSBA bylaw amendment to allow governors elected to fill a vacancy who serve 18 months or less to run for reelection. The motion passed with a vote of 10-0-0.

Governor Lawrence proposed the need to consider the reelection of governors in addition to filling short-term vacancies in light of the many talented Board members the WSBA loses after they've completed their three year terms. In fulfilling this opportunity to return to the Board, Governor Lawrence suggests a moratorium of three terms, i.e., nine years.

Executive Director Littlewood questioned whether or not this additional option was intended for the WYLD At-Large position only. Discussion transpired.

Governor Wiitala reported that members in the past felt very strongly that governors serve no more than one term and suggested that the Board seek input from the membership before taking action. James Macpherson suggested that the option to seek reelection to the Board would be best served by WYLD members, therefore limiting this option to WYLD members would be a good compromise.

Executive Littlewood reported that the language as proposed on page 292 of the Board book addressing the reelection of governors, after a moratorium period, will be posted on the WSBA website and sent to members via blast e-mail for feedback, and ultimately brought back to the BOG for disposition.

Potential Bylaws Revisions re: Political Activity

Discussion transpired regarding political activity of officers, governors, and the Executive Director of the WSBA as currently cited in the WSBA Bylaws. Governor Mungia raised his opposition to the restrictions imposed in the election process for non-judicial offices, Governor Gibbs concurred.

President Bastian shared his concerns regarding this issue, which he describes as losing one's first amendment rights. In his personal situation, he is prohibited from endorsing his wife as a District Court Judge.

Governor Butler stated that the bar leadership has no place endorsing candidates citing that the uninformed public will not be capable of sorting out the differences between a WSBA entity endorsement and a personal endorsement, therefore, he remains comfortable with the current restrictions.

Steve Toole, WSTLA, shared his concerns regarding statewide elections and the potential impact endorsements may have on the WSBA's lobbying efforts. James Macpherson, WDTL, noted that polling members for comment on this issue will be well received by the membership.

President Bastian suggested a continued discussion on this issue at a later date.

Legislative Report – Director of Justice and Diversity Initiatives Gail Stone

Director Stone proposed a late-breaking request for support by the Board for Judicial Administration (BJA) on a bill scheduled for hearing on Tuesday, January 22, introduced by the Court Security Committee. This bill addresses knowingly bringing a knife into the courtroom. The Board deferred discussion on this issue, pending receipt of a copy of the actual bill language.

Director Stone presented a 2008 legislative preview and update and noted that there appears to be a focus on DUI and sex offender issues this year. Discussion transpired.

Further discussion transpired on knowingly bringing a knife, and the description of what constitutes a knife, into the courtroom. The Board did not feel it had sufficient information to take action on this issue.

COURT RULES AND PROCEDURES COMMITTEE – Roger Wynne, Chair and Judge Susan Craighead, Chair of the Supreme Court Commission on Children in Foster Care, Task Force on Dependency and Termination Appeals

Amendments to the RAPs to accelerate review of juvenile dependency disposition orders and orders terminating parental rights.

Chair Wynne presented the proposed amendments to the RAPs to accelerate review of juvenile dependency disposition orders and orders terminating parental rights which were forwarded to the WSBA by the Supreme Court for review and comment. Wynne reported that the rules were scrubbed and fully vetted with the assistance of the Family Law Section, Northwest Defenders Association, and the Juvenile Law Section. Discussion transpired.

Judge Godfrey, SCJA, spoke in favor of the proposed amendments and urged the Board's adoption. Governor Gibbs moved, seconded by Governor Williams, that the Board adopt the proposed amendments for submission to the Supreme Court.

Judge Craighead thanked the Court Rules and Procedures Committee for their diligence and hard work. Judge Craighead emphasized that appeals take a long time and the proposed amendments are an effort to reduce the known delays, i.e., the handoff of cases from the trial court to the appellate court system. Judge Craighead provided the Board with a description of the process.

Governor Heller requested clarification on the concerns raised by the Northwest Defenders Association. Judge Craighead offered that the Northwest Defenders Association did not fully understand the process, the process was fully clarified, and all concerns were addressed.

The motion to adopt the proposed amendments for submission to the Supreme Court passed with a vote of 10-0-0.

Possible Evidence Rules amendment dealing with the inadvertent disclosure and waiver of the attorney-client privilege and work product protection.

Chair Wynne requested Board direction in light of a proposed new Evidence Rule 502 to the Federal Rules of Evidence which is likely to be approved by Congress. The Court Rules and Procedures Committee would like to consider whether and, if so, how to amend the Washington Evidence Rules to track the anticipated federal rules dealing with the inadvertent disclosure and waiver of the attorney-client privilege and work product protection. The committee proposes to begin its review now, especially because it might generate particular attention from WSBA members, and bring its recommendation before the Board in July for consideration.

Governor Butler questioned whether or not the proposed rule addresses metadata. Chair Wynne reported that the committee's efforts would dovetail with the committee's consideration of whether and, if so, how to track recent amendments to the federal civil rules dealing specifically with the discovery of electronically stored information (ESI), and the committee's recommendation will be before the Board in July for consideration.

It was the consensus of the Board that the Court Rules and Procedures Committee proceed as outlined above.

EXECUTIVE DIRECTOR'S REPORT – Paula Littlewood

Executive Director Littlewood reported on the following: (a) "Marriage and the Law" discussion forums are being planned in conjunction with the March Board meeting in Tacoma and the April Board meeting in Spokane, at the University of Washington Tacoma campus, and Gonzaga Law School, respectively. Staff is currently working on panel compositions and hopes to have a faculty member on each panel. (b) A recent meeting, amongst the three Washington state law schools, the minority bar leadership, and the WSBA, was held by the Governor's Office. The meeting was called in order to discuss the judicial recommendation process and efforts to increase the number of minority candidates seeking judicial appointment. A work group will be established by the Governor's Office to investigate the suggestions and issues raised and the WSBA remains a part of this effort. (c) Two LRAP grants were awarded by the Washington State Bar Foundation's LRAP Advisory Board. The state of finances of the WSB Foundation is at a crossroads and the Foundation will be reporting to the Board at the March Board meeting with funding recommendations. (d) WSBA will be hosting, in partnership with the Law School Alumni Association, forums for the final candidates for the UW Law School's dean search in February.

Governor Brenda Williams

Governor Williams reported on the proposed interpretation of ABA Policy 301-6 scheduled to be raised at the ABA Midyear Meeting. Said policy, as interpreted, raises general concerns in that it may have a negative impact for traditionally minority law schools by jeopardizing the ABA accreditation.

General Counsel Welden noted that the Department of Education is empowered to determine whether or not the ABA is a qualified accrediting agency. Therefore, this is a very sensitive issue. The interpretation proposes that for a five year period 75% of all graduating law school students must sit/pass the bar examination, or, that in three of five calendar years, the school's pass rate for first time exam takers is not more than 15 points below the average for graduates at ABA accredited law schools, which may or may not have an impact on minority law schools.

Discussion transpired. WSBA ABA Delegate Michael Pellicciotti suggested options be made available to at risk schools to bring its status up to par, and the WSBA delegation stands ready to support alternative initiatives in support of at risk schools including a sunset clause for the proposal.

OFFICERS' REPORTS (Written Reports)

By written report only.

ADJOURNMENT

There being no further business, the Board of Governors meeting was adjourned at 5:12 p.m. on Thursday, January 17, 2008.

Respectfully submitted,

Paula C. Littlewood
WSBA Executive Director