

MINUTES

Special Public Session Washington State Bar Association BOARD OF GOVERNORS

May 13, 2009

The Special Public Session of the Board of Governors of the Washington State Bar Association was called to order by President Mark Johnson at 9:15 a.m. on Wednesday, May 13, 2009. Governors in attendance were:

Russell M. Aoki
Anthony L. Butler
Brian L. Comstock (phone)
Loren S. Etengoff
G. Geoffrey Gibbs
Anthony D. Gipe
Lori S. Haskell
David S. Heller
Peter J. Karademos (phone)
Carla C. Lee
Catherine L. Moore
Patrick A. Palace
Edward F. Shea Jr. (phone)
Brenda Williams (phone)

Also in attendance were President-elect Salvador Mungia, Immediate Past-President Stanley A. Bastian, Executive Director Paula Littlewood, General Counsel Bob Welden, Executive Assistant Margaret Shane, and various liaisons and guests.

President Johnson welcomed the Board and attendees to the Special Public Meeting and advised that there would be only one issue on the agenda: the proposals put forth by various Governors relating to the current crisis in civil legal aid funding.

Brian Comstock

Governor Comstock encouraged the Board to take a holistic approach to stabilize and keep things moving. He noted that the cornerstone of his proposal is to make a major impact contribution. He informed the Board that he is in favor of campaigning for voluntary contributions from members rather than mandating a surcharge and combining this effort with

ways to help attorneys who are unemployed or underemployed. In addition, he noted that his proposal is based on maintaining the dues increase request; however if that is not approved, budgeting problems would need to be addressed.

Specifically, Governor Comstock's proposal is:

- Make an immediate contribution to the Legal Foundation of Washington (LFW) of at least \$1.5 million, more likely, \$2 million.
- Appoint a group to study how budgetary adjustments can best be made to preserve the mission and stability of the WSBA with recommendations submitted to the Board of Governors for consideration and approval within 60 days.
- The WSBA and LFW enter into a contract assuring that the funds are well spent.
- Launch a major campaign for contributions to solve the civil legal aid crisis concurrent with the contribution to LFW.
- Appoint a group to study and recommend budgetary adjustments, along with immediate measures to cut costs across the board.
- Immediately consider ways to combine the WSBA's key missions to keep attorneys productively employed and to preserve access to justice.

Geoff Gibbs

Governor Gibbs advised that he borrowed liberally from the ideas of other Governors and that he has a philosophical problem with imposing a mandatory assessment on the members. He noted that his proposal is based on an enhanced campaign for voluntary contributions, achieving \$2 million in the near future and sustaining another \$2 million, resulting in a goal of \$4 million, and that this campaign should be facilitated by fundraising professionals. In addition, Governor Gibbs advised that, not only should the Board withdraw the pending dues increase currently before the Supreme Court, but it should request the Court reduce dues to \$400, which would result in the necessity of trimming \$1 million from the budget. He noted that this is a separate issue, but he wanted to bring it up because he believes it will be harder to obtain contributions with a fee increase, adding that he believes the economic climate will be a long-term problem. In addition he advised that he believes it appropriate to use CLE reserves, but the \$500,000 amount suggested in the Moore-Lee proposal is not enough to meet the immediate need.

Specifically, Governor Gibbs' proposal is:

- Enhanced campaign for voluntary contributions from members, developing a culture of giving within the WSBA membership, with a goal of \$4 million. This can be accomplished by: individual contacts; partnering with parallel organizations; presentations at CLEs; media communication techniques; a discount on CLEs for members who contribute when signing up for a CLE; and approaching the Federal government and charitable foundations for grants.
- Use CLE reserves to fund a voluntary contribution campaign for such things as hiring a professional PR firm, producing professional public service announcements, and engaging a contract grant writer.
- Consider major revisions to the WSBA budget resulting in eliminating or scaling back the proposal before the Supreme Court for increased dues (from \$415 to \$450), with the possibility of requesting a dues rollback to \$400.

Salvador Mungia

President-elect Mungia stated that crisis is a time for opportunity and that it is his vision to change the culture of the Board of Governors. He reviewed his civil legal aid background and encouraged a change in the way the Bar Association looks at civil legal aid, noting that the Association has run a deficit for at least the last four years and that there is no extra money to make contributions. He noted that he is philosophically against a mandatory assessment and against suspending a lawyer's license because they don't, or can't, donate. He stated that there is much money to be raised, but that the WSBA is not in the fundraising business and suggested the Board get advice from LAW Fund, each Governor step up with their own time and money, change the policy and give email addresses and phone numbers to LAW Fund, and make reserves available for a low interest loan to the Legal Foundation of Washington (LFW), to be paid back within three years, minimizing the pain everyone is facing and changing the culture of the Association. He stated that it is his belief that this would be a very safe loan and could be easily paid back due to the proposed comparability rule, but in the event LFW could not pay back the loan, the end result would be the same as if the funds had been given as a charitable contribution.

Specifically, President-elect Mungia's proposal is:

- An all-out commitment from the WSBA to help, but not take over or take the lead, to raise funds for civil legal aid.

- Take a leadership role nationwide in getting the federal restrictions lifted on Legal Services Corporation money.
- Seek the abolition of state and federal restrictions for civil legal services funding.
- Offer to provide a line of credit to LFW to borrow up to \$1 million with no interest for a three year period.

Governor Gibbs clarified that his vision in terms of a campaign is to obtain professional expertise for promoting the campaign under the WSBA logo with LAW Fund, resulting in a promotion of the Association's commitment to access to justice. In addition, he noted that he believes it is not fiscally prudent for the WSBA to loan money from its reserves, nor will it pass the "smell test."

Immediate Past-President Bastian noted that the primary duties of the Board are as Governors and Officers of the Bar Association and that, although legal services is an identified and primary goal, it is not the Board's duty to finance it - it is the Board's duty to balance the budget and to serve the members. In addition, he noted that he believes, if the Board goes forward with a charitable contribution, it would send an inconsistent message to the members and to the Supreme Court and predicted that the Court will not authorize the license fee increase. He noted that, philosophically, he is not in favor of the mandatory assessment as he believes the civil legal aid crisis is an issue that society at large needs to deal with, not the legal profession. In closing, he suggested that this is an opportunity to solve the problem long-term and encouraged the Board to slow down and to think seriously of a Task Force with the Access to Justice community to discover alternative ways to fund legal services on a long-term basis.

Governor Haskell noted that the mandatory assessment is, in fact, a business tax and stated that the Board would experience a huge loss of credibility with the members if the Board does send a request to the Supreme Court to add a \$70 business tax on the members' licenses and the Court denies it.

Cathy Moore and Carla Lee

Governor Lee reminded the Board that the substance of their proposal was presented at the previous Board meeting in Richland and emphasized that they do not support any kind of mandatory assessment, rather they propose a "nudge factor" consisting of a voluntary check-off containing an opt-out provision in which a \$50 assessment is automatically attached to annual

license fees unless the member chooses to select an alternate amount. She also noted that they do support the concept of using the WSBA's CLE reserves and the facilities reserves, which can be almost completely replenished by the projected WSBA moving date of 2021, by taking an additional \$40,000 from license fees to add to the reserves, and see it as a fiscally prudent approach, as well as demonstrating leadership. She encouraged the Board to institutionalize the GAAP program, which could be funded by requiring judges to pay the inactive fee, in order to meet the needs of those within the 200%-400% modest means community. She emphasized that the Board has a duty to the members and to the public, and that theirs is a win-win proposal.

Executive Director Littlewood clarified that a potential move in 2021 is not a given, but is an option that will of course be considered at that time.

Specifically, Governors Moore's and Lee's proposal is:

- A \$1.5 million total contribution to the LFW granted in increments of \$500,000 for 2010, 2011, and 2012 respectively; the 2010 and 2011 payments to be made from the CLE reserve and the 2012 payment to come from the facilities reserve.
- The facilities reserve to be replenished by an increase of \$40,000 (from \$210,000 to \$250,000) in the annual contribution.
- Institute a "nudge factor" which would consist of an opt-out provision in which a \$50 assessment is automatically attached to license fees unless the member chooses to select the opt-out check-off of zero, \$25, \$75, \$100, or other.
- Require judicial members of the WSBA to pay the proposed new \$200 inactive fee, resulting in an additional \$155,000 annually.
- Eliminate one Board of Governors meeting per year.
- Approve funding, contingent upon the securing of an appropriate community partner, for a pilot statewide pro bono/low bono moderate means program.
- Create a permanent, viable, statewide safety net of pro bono/low bono attorneys for moderate means litigants.
- Create a Civil Gideon Litigation committee to spearhead Civil Gideon litigation.

Loren Etengoff and Anthony Gipe

Governor Etengoff noted that the Board is concerned with the crisis in the civil legal aid system and that everyone is working hard to develop a proposal to deal with the crisis, but that a

mandatory surcharge does not carry a great deal of favor. He advised that he is concerned about the concept of a charitable contribution to the LAW Fund as he does not see the Board's obligation to civil legal aid as charitable. He went on to state that the WSBA is charged by the Supreme Court to deal with civil legal aid in Washington and so is obligated to do so. He stated that it is his opinion that taking monies from the reserve funds to help with the civil legal aid crisis is not a charitable donation, but is a matter of reallocating funds.

Governor Gipe noted that all proposals to date have focused on short-term solutions and put the burden of funding the solution on different constituencies, which is the issue that needs to be discussed. A long-term solution is needed, but a short-term funding gap needs to be bridged and using the WSBA's reserves is a prudent way to do so, and can be done without sacrificing programs already in place. He suggested the Board arrive at a dollar amount that is needed and let the Budget & Audit Committee advise where it can come from. He stated that he believes a voluntary contribution system could work short-term if funds are supplied this year, but if it fails, then the Board would need to resort to a mandatory assessment. In addition, he noted that he is not comfortable with the concept of loaning money and becoming a creditor.

Governor Moore expressed concern that the present budget is based on a growth agenda, which may not sit well with the Supreme Court since they are looking at a 20% cut in their budget. She stated she believes the Court is looking for a logical explanation from the Board as to why the fee increase is justified, and also looking to the Board to lead in the civil legal aid crisis, and that a cogent and logical argument could be made that the fee increase would be reallocated on a temporary basis to deal with this unforeseen crisis.

Treasurer and Governor Aoki noted that these are extraordinary times and the Governors are proposing extraordinary ways in which to address the crisis, but the WSBA's Guiding Principles require a well-managed organization to support its members. He advised that any contribution from the WSBA would have to be made with new money, otherwise, programs, services to members, and staff would have to be cut. He cautioned against using Budget & Audit, or any other committee, to make the determination where the money would come from if WSBA's reserves are tapped.

President Johnson emphasized that the meeting with the Officers and the Supreme Court is informational only. He informed the Board that the basis for the Budget & Audit Committee and

the Board approving the fee increase will be explained and then guidance will be received from the Court.

Executive Director Littlewood informed the Board regarding the license fee increase that an initial letter was sent to the Supreme Court explaining why the request was being made. Voluminous supplemental information was then sent to the Court in response to a member complaining of no notification. This information was not received by all the Justices prior to the first en banc, but they do all have the material at this time.

Governor Etengoff raised concern about the amount of time and effort that would be involved in fundraising and the difficulty of performing those duties as well as Board duties. Governor Heller suggested hiring a Development Director to manage the process, but that members of the Board must all make a meaningful donation, make phone calls, write letters, and display a moral commitment to the cause. He noted that a \$250 donation from 30% of the members is a sizably greater amount than a \$50 mandatory assessment from the entire membership. Executive Director Littlewood concurred, noting that there is no reason to recreate the wheel as Karen Falkingham, one of the best fundraisers in the state and Director of LAW Fund, and is ably leading the state's charitable efforts for the state.

Governors Etengoff's and Gipe's proposal specifically is:

- Move \$800,000 from the CLE Reserve Fund, subject to entering into a contract with the LFW, for the purpose of funding legal aid programs with no amount used for administration.
- Recommend the Supreme Court approve a special assessment of \$50 annually for all active WSBA members, to be paid annually in a lump sum to LFW solely for the purpose of funding civil legal aid services on a temporary basis to help bridge the gap created by the precipitous drop in IOLTA revenues, none of which may be used for administration.
- Waive the special assessment for any member who provides an affidavit of hardship stating that he/she has an annual income of less than 200% of the federal poverty level for a family of four.
- Commence the special assessment with the 2010 license year and continue through the 2013 license year, at which time it will expire. If LFW certifies annual revenues have exceeded \$7.5 million in the preceding calendar year, the special assessment will expire.

- Encourage all members of the Supreme Court and all active and retired judges contribute no less than \$50 per year to the Campaign for Equal Justice administered by the LAW Fund.

Patrick Palace

Governor Palace stated that he was impressed with the brainpower of the Board and that it is his opinion that the civil legal aid crisis is an opportunity for the membership to own a problem and solve it on their own rather than being mandated to solve it. He further stated that he is not opposed to raising bar license fees, but it is not his preferred method. He suggested coming up with a need-based formula in order to ascertain the amount of deficit that civil legal aid faces each year. He stated that he believes the easiest method is to use WSBA's reserves, especially the CLE reserves and to contribute the initial amount of money immediately. Governor Palace emphasized the need to develop a culture of giving and that the Governors need to set the example and reach out to other leaders in the community to do the same. He encouraged using an outside body to do fundraising, but stressed that the Bar needs to throw its full force behind it. He noted that this is a short-term solution to a long-term problem and that this is an invitation for the Board to step up and come up with long-term solutions. In addition, he stated that he fully endorses expanding GAAP.

Governor Palace's proposal specifically is:

- Actively solicit voluntary contributions from WSBA members and others.
- Reallocate up to \$250,000 from CLE reserves to support civil legal aid in 2009, and up to \$500,000 in 2010 from WSBA reserves.
- Create a permanent statewide infrastructure for low bono services.
- Sunset non-voluntary civil legal aid funding in 2012.

Governor Haskell stated that she is fully behind building a charitable foundation and urged the concept of putting a face on the problem so people will open up their hearts and their wallets. In addition, she encouraged the Board to slow down and look at the big picture and the culture the Board is attempting to create. She suggested putting the Board's efforts behind the concept of charitable contributions before taking money out of reserves.

Executive Director Littlewood noted that there are a number of videos and stories already created by the LAW Fund and available on their website, so the tools are available and it is thus a question of how the WSBA can help to get the word out.

Guests

Greg Dallaire informed the Board that he was at the Access to Justice (ATJ) Board Executive Committee meeting the preceding Monday and wanted to relay some of the discussion about the civil legal aid issue. He reminded the Board of the letter from the ATJ Board (included in the Late Materials for the April 24-25 BOG meeting) which stated that anything the BOG does must be meaningful and temporary. He advised that the ATJ Board has divided the civil legal aid crisis into three issues:

- *license fee assessment* – anything below \$50 may hamper rather than help other fundraising efforts;
- *transfer from reserves* – to achieve maximum impact, the money must be received up front rather than over a three-to-four-year period; and
- *fundraising* - this is the obligation of the Governors and of every attorney in the state, but is a complex problem with no easy solutions. In addition, he urged the BOG to immediately look for ways to break down the policy obstacles between the WSBA and the LAW Fund so they can work together.

Ron Ward noted that this is not an unforeseen crisis and not indigenous to civil legal aid, but to the justice system as a whole and to the state. He advised that since this is an immediate crisis, up-front money is needed immediately. He noted that he agrees this is a core function of the Bar because public interest is a core function and civil legal aid is part of that. He suggested that a pro rata mandatory assessment based on years of experience is the method by which to accomplish a long-term solution.

Thomas Mengert advised the Board that he has a problem with the idea of attorneys bestowing mercy out of their pockets as it enforces the perception of lawyers owning the law. He suggested if the solution is a moral one, then the funds should be voluntary; if it is a corporate one, then the funds should be drawn out of reserves, but it is unclear to him how these funds suddenly became discretionary. He noted that the economic crisis may not end within three years as predicted but may result in prolonged inflation, thereby extending the civil legal aid crisis. He suggested developing internships for attorneys and providing a certification for

participation in the program for one year after law school. He urged imposing the assessment only as a last resort.

ADJOURNMENT

There being no further business, the Special Public Session was adjourned at 11:20 a.m. on Wednesday, May 13, 2009.

Respectfully submitted,

Paula C. Littlewood
WSBA Executive Director