

MINUTES

Public Session Washington State Bar Association BOARD OF GOVERNORS

**Seattle, WA
September 24-25, 2009**

The Public Session of the Washington State Bar Association Board of Governors was called to order by President Mark Johnson at 10:00 a.m. on Thursday, September 24, 2009, at the Washington State Bar Association (WSBA) Conference Center, Seattle, Washington. Governors in attendance were:

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

Also in attendance were President-elect Salvador Mungia, Immediate Past-President Stan Bastian, Executive Director and Meeting Secretary Paula C. Littlewood, and General Counsel Bob Welden.

LIAISONS, GUESTS, AND STAFF IN ATTENDANCE:

Greg Dallaire	Access to Justice Board
Don Horowitz	Access to Justice Board, Technology Committee
The Hon. Marlin Appelwick	Court of Appeals
The Hon. Steve Shelton	District & Municipal Court Judges Association
Nell McNamara	Equal Justice Coalition, Staff Director
John Sklut	Gonzaga University School of Law, Assistant Dean of Students
Paul Fjelstad	Kitsap County Bar Association, President
Dick Manning	LAW Fund, President

Karen Falkingham	LAW Fund, Director
Jeanne Sockle	Law Clerk Program, Board Member
Jeffrey Smoot	Law Clerk Program, Board Member
Ben McGiven	Law Student
Sims Weymuller	Lawyers' Fund for Client Protection, Chair
Nick Gellert	Legal Foundation of Washington, President
Rima Alaily	Legal Foundation of Washington, President-elect
Caitlin Davis Carlson	Legal Foundation of Washington, Executive Director
Jean Cotton	Local Rules Task Force, Member
Cesar Torres	Northwest Justice Project, Executive Director
Steve Crossland	Planning Ahead Committee, Chair
Rea Culwell	Washington Association of Prosecuting Attorneys
Heather Carr	Washington Defense Trial Lawyers
James Macpherson	Washington Defense Trial Lawyers
Bob Boruchowitz	WSBA Council on Public Defense; Seattle Univ. School of Law Professor
Jackie McMurtrie	WSBA Council on Public Defense; UW School of Law, Professor
Dave Savage	WSBA Past President
Steve Toole	WSBA President-elect 2009-2010
Nancy Isserlis	WSBA BOG-elect, District 5
Lee Kerr	WSBA BOG-elect, District 4
Roger Leishman	WSBA BOG-elect, District 7W
Marc Silverman	WSBA BOG-elect, District 1
Roger Wynne	WSBA Court Rules and Procedures Committee, Chair
Ken Masters	WSBA Court Rules and Procedures Committee, Chair-Designate
Todd Nunn	WSBA Court Rules and Procedures Committee, ESI Subcommittee Chair
Bill Garcia	WSBA Leadership Institute Advisory Board Co-Chair
Joanna Plichta Boisen	WSBA Pro Bono and Legal Aid Committee
Tim Burkart	WSBA RPPT Section
Art Lachman	WSBA Rules of Professional Conduct Committee, Chair
Julia Bahner	WSBA WYLD, President-elect
Jaime Hawk	WSBA WYLD, President
Michael Heatherly	WSBA <i>Bar News</i> , Editor
Judy Massong	Washington State Association for Justice
Joanne Moore	Washington State Office of Public Defense
Ronald Ward	Washington State Bar Foundation President

Sally Savage	Washington State Bar Foundation, Trustee
Steve Larsen	WSBA Deputy Director, External Relations
Julie Mass	WSBA Deputy Director, Finance & Administration
Doug Ende	WSBA Chief Disciplinary Counsel
Natalea Skvir	WSBA Disciplinary Counsel
Elizabeth Turner	WSBA Assistant General Counsel
Judy Berrett	WSBA Director, Member and Community Relations
Frances Dujon-Reynolds	WSBA Director, Human Resources
Barbara Harper	WSBA Director, Lawyer Services
Mark McDonald	WSBA Director, Information Technology
Jean McElroy	WSBA Director, Regulatory Services
Mark Sideman	WSBA Director, Continuing Legal Education
Gail Stone	WSBA Director, Justice & Diversity Initiatives
Mary Barnes	WSBA Admissions Manager
Joan Fairbanks	WSBA Justice Programs Manager
Bobby Henry	WSBA Special Admissions Manager
Pam Inglesby	WSBA Public Legal Education Manager
Moni Law	WSBA Bar Leaders Program Manager
Tiffany Lynch	WSBA Finance Manager
Chach Duarte White	WSBA Diversity Programs Manager
Talia Clever	WSBA Special Admissions Analyst
Toni Doane	WSBA Section Leaders Liaison
Brian Halcomb	WSBA WYLD Liaison
Anna Schmidt	WSBA Office of the General Counsel Paralegal
Brenda Jackson	WSBA Office of the General Counsel Secretary
Jim Roberg	WSBA Accountant
Ramana Pendyala	WSBA Administrative Assistant/Paralegal
Julia Nardelli	WSBA Administrative Assistant - WYLD
Emily Robinson	WSBA Events Coordinator
Margaret Shane	WSBA Executive Assistant

WELCOME AND INTRODUCTIONS

Officers, Governors, liaisons, guests, and staff introduced themselves. President Mark Johnson welcomed the Board and everyone in attendance to the WSBA Conference Center in Seattle, Washington.

APPROVAL OF MINUTES

The Minutes of the July 24-25, 2009, Public Session were deemed approved by consensus.

REPORT ON EXECUTIVE SESSION

President Johnson reported that in the Executive Session: the Litigation Report was received; goals for the Executive Director for 2009-2010 were adopted; a report was received from the Executive Director and the Personnel Committee regarding their goals, respectively, and compensation was decided upon for the Executive Director for 2009-2010; and two persons were removed from the list of Hearing Officers at the recommendation of the Hearing Officer Selection Panel.

EXECUTIVE DIRECTOR'S REPORT – Paula Littlewood

Executive Director Littlewood reported that: (a) the Home Foreclosure Legal Aid Project is moving ahead with just under 400 volunteer attorneys and referred the Board to the update by Project Manager Aline Carton contained in the meeting materials; (b) the WSBA is in the planning stages of a moderate means program, formerly known as GAAP or “low bono,” using the Home Foreclosure Project as a model to form a partnership with Seattle University Law School to handle client-related tasks in order to reach out to people in the 200%-400% range of the poverty level not eligible for civil legal aid services, and advising that the other Washington state law schools are very interested in partnering with the WSBA in this endeavor once it is established; (c) *mywsba* will be launched on October 15, and a blast email containing instructions will be sent to the membership; (d) all in attendance are invited to lunch with the WSBA Board of Governors and the Legal Foundation of Washington Board, as well as to the WSBA Annual Awards Dinner the same evening, noting that 460+ people have RSVP'd, the largest response ever.

CONSENT CALENDAR

The Consent Calendar was approved by circulation of a written consent form.

- a. Approve 2010 Keller Deduction Schedule

- b. Approve Civil Legal Aid Oversight Committee Appointment
- c. Approve Proposed Vice-Chair Appointments to Regulatory Boards
- d. Approve WSBA Leadership Institute (WLI) Board Appointments
- e. Approve Revisions to WSBA Leadership Institute (WLI) Policies and Procedures
- f. Adopt Discipline Review Committee Final Report
- g. Approve Appointments to Hearing Officer Selection Panel
- h. Approve Appointment to Law Clerk Board
- i. Approve WSBA Committee, Board, and Panel Nominations
- j. Approve Appointment to Judicial Information Systems Committee

WASHINGTON STATE BAR FOUNDATION (WSBF) – Ron Ward, President, and Sally Savage, Trustee

WSBF President Ward referred the Board to the information in the meeting materials and noted that the WSBF is bringing forward three items for action by the Board: (1) a proposed bylaw change that would increase the number of members on the WSBF Board of Trustees by adding a representative of a minority or specialty bar association and a student of a Washington law school who has completed at least one year of law school; (2) reappointment of present WSBF Board members Bill Maxey and Bart Wilson; and (3) a proposed business plan and staffing request.

Governor Williams moved, seconded by Governor Palace, to approve action items #1 and #2 as noted above. Motion passed unanimously with a vote of 13-0-0. Governor Haskell was not present for the vote.

WSBF President Ward referred the Board to the information in the meeting materials, including the recommendation by the WSBA Budget and Audit Committee, regarding the proposed business plan and staffing request, noting that furthering the goals, mission, and programs of the WSBF is attainable only with the aid of a professional to help raise funds.

Ms. Savage explained that the request being made by the WSBF is for a .5 FTE Director of Development position which would report to Executive Director Littlewood and work closely with the Trustees so the priorities and goals for both entities remain the same. In addition, WSBF is requesting a .5 FTE administrative support position to help the requested Director of Development. She informed the Board that the Budget and Audit Committee, as well as

Executive Director Littlewood, felt the .5 FTE administrative support position could be absorbed by existing staff and noted that the WSBF is deeply appreciative of the work Executive Director Littlewood and Events Coordinator Emily Robinson have done for the WSBF to date. Ms. Savage continued by asking the Board to view the WSBF request as an investment that will be returned many-fold in the future, noting that the WSBF will report to the Board on an annual basis and will work closely with the Board to determine the WSBF's future direction.

Treasurer Aoki reported that the Budget and Audit Committee is excited about the leadership and the future of the WSBF and is recommending the .5 FTE Director of Development position, but that the Committee felt the .5 FTE support staff position could be absorbed by current staff, noting that it is easier to add a position later than to add it in the beginning and then decide it is not needed.

WSBF President Ward gave a presentation delineating the duties and responsibilities of the proposed Director of Development position and noted that the purpose of the position is to further the goals and programs of the WSBA and to remove some of the pressure on license fees, as well as possibly absorb some programs that may be more appropriate under the WSBF. He noted that the WSBF's aspirational goal is to raise \$100,000 for the Presidents' and Governors' Diversity Scholarship Fund and to enhance the potential for private fundraising for the WSBA Leadership Institute.

Governor Butler moved, seconded by Governor Shea, to approve the WSBF's request for a .5 FTE Director of Development and a .5 FTE administrative support person, clarifying that his motion includes benefits and overhead.

Treasurer Aoki further elaborated by stating that WSBF's request is for a .5 FTE Director of Development for three years, but that the Budget and Audit Committee is recommending two years so a review to determine success could happen sooner. In addition, the Committee felt support staff needs would remain unknown until the Director of Development is brought on board, and so it would be more fiscally prudent to use existing support staff at no additional cost until such time as actual staffing needs are determined. Discussion ensued regarding the most opportune timing for approval of the .5 FTE administrative support position.

Governor Gibbs moved, seconded by Governor Gipe, to amend the motion to strike the portion dealing with the .5 FTE administrative support position. Governor Gibbs noted that he means no disrespect to the WSBF's direction, but it is important to balance the administrative capabilities on hand and keep a close watch on the WSBA budget, and that his intent is, should a problem arise, it can be revisited through the WSBA Budget and Audit Committee.

Further discussion ensued regarding the expertise envisioned for the Director of Development, the availability of qualified applicants for a this half-time position, the potential for diluting the effectiveness of the Director of Development if dedicated administrative support is not available, and the advisability of shortening the time frame from three years to two years.

Governor Gibb's motion to amend Governor Butler's original motion failed 6-8-0. Governors Butler, Etengoff, Heller, Lee, Moore, Palace, Shea, and Williams opposed.

Governor Heller moved, seconded by Governor Karademos, to amend Governor Butler's original motion to shorten the timeframe from three years to two years, and clarified that his amendment includes the .5 FTE administrative support position. Motion passed 7-6-1. Governors Butler, Comstock, Etengoff, Lee, Moore, and Williams opposed. Governor Haskell abstained.

A vote was then taken on Governor Butler's original motion, amended to shorten the timeframe from three years to two years, as follows: Governor Butler moved, seconded by Governor Shea, to approve the WSBF's request for a .5 FTE Director of Development and a .5 FTE administrative support person for two years, clarifying that his motion includes benefits and overhead. Motion passed 11-2-1. Governors Karademos and Lee opposed. Governor Haskell abstained.

Executive Director Littlewood informed the Board that recruiting will be staged: the .5 FTE Director of Development will be brought on board first, then the .5 FTE administrative support will be recruited.

FISCAL MATTERS – Russ Aoki, Treasurer; Julie Mass, Deputy Director for Finance and Administration; and Tiffany Lynch, Finance Manager

Adoption of FY 2010 Budget

Treasurer Aoki stated that he is before the Board seeking approval of the FY 2010 budget as recommended by the Budget and Audit Committee. He reminded the Board that the budget is a policy-setting document, the first reading was at the July Board meeting, some changes have been made since that meeting, and the Alternative Dispute Resolution program has been sunsetted. He referred the Board to the Summary in the meeting materials, advising that there is a projected loss of a little over \$1 million, which includes the \$1.5 million grant to civil legal aid.

Deputy Director Mass noted that the FY 2010 budget was explained during the July Board meeting and continued by pointing out some of the changes since: \$55,000 cost savings in medical insurance; \$55,000 savings by reallocating capital labor; \$10,000 increase in real estate taxes; \$8,000 added for the Home Foreclosure Legal Aid Project; adding funding for one more conference for the President-elect, thereby changing the conference policy so the President-elect can attend both National Conference of Bar Presidents conferences rather than just one; a reduction in new lawyer education expenses; and minor line item changes. Deputy Director Mass noted that line items that have been added to the budget include the \$1.5 million grant to LAW Fund and \$44,000 for the .5 FTE WSBF Director of Development, and explained that the budget will have to be recalculated to include the .5 FTE for the WSBF administrative support position, but that this addition will not affect the bottom line as the Budget and Audit Committee recommends that funding for the Foundation staffing come from Board program reserve since there are no funds left in the operating budget to cover these WSBF additions.

Deputy Director Mass further informed the Board that the budget summary includes which expenses will be paid for using which reserve funds in FY 2010: approximately \$100,000 from the General Fund reserves will cover costs for the WSBA website redesign; partial funding for the LAW Fund grant will be paid using \$522,000 from the CLE Reserve Fund and \$400,000 from the General Fund reserves; and the new WSBF staffing will come from the Board Program Reserve Fund. Continuing Legal Education (CLE) budgets as presented have an anticipated loss of about \$181,000 as has been discussed during the preceding year; and section budgets are also presented and the Board was advised that staff and Budget and Audit are keeping a close eye on a few sections to be sure they do not go into deficit spending.

President Johnson asked for an explanation regarding the civil legal aid grant and Deputy Director Mass referred the Board to the Budget and Audit memo in the meeting materials outlining the funding sources: \$522,000 from CLE reserves; \$200,000 from the capital reserve fund; \$200,000 from the unrestricted general fund; and \$578,000 from FY 2010 net income; equaling \$1.5 million. She noted that the Legal Foundation of Washington (LFW) has agreed to three installments of \$500,000 each, to be paid on December 31, 2009, March 30, 2010, and June 30, 2010.

Deputy Director Mass then reviewed the projected balances at the end of the 2010 fiscal year. Treasurer Aoki clarified that the projected loss for FY 2010 is \$1 million, and that it will not impact programming, but will reduce the WSBA's safety net through reserve funds. In addition, Deputy Director Mass explained that the summary page reflects the civil legal aid grant shown as an expense on the income statement, reflecting the fact that WSBA is dipping into its reserves to make the grant payment.

Discussion ensued regarding the new .5 FTE ethics line position and General Counsel Welden assured the Board that this position will be devoted to ethics calls and the current unmet needs on the ethics line will be met. He was asked if it was sufficient to meet the existing needs and he affirmed.

Governor Gipe moved, second by Governor Palace, to approve the FY 2010 budget as recommended by the Budget and Audit Committee. Motion passed unanimously with a vote of 14-0-0.

Deputy Director Mass then informed the Board that the Budget and Audit Committee is proposing forming a Facilities Committee, whose members would be appointed by the WSBA President, report to the Budget and Audit Committee, and be composed mainly of experts in the real estate community, (non-lawyers/non-governors), such as developers, contractors, and commercial real estate brokers, to advise the Budget and Audit Committee regarding the WSBA's future facilities needs, the real estate market, the decision-making process for remaining at the current site or moving to a new site, and determining if facilities reserves are adequate and on track. In essence, this would be an advisory group to the Budget and Audit Committee giving guidance on how to best plan for the future and build the WSBA's reserves

appropriately. She emphasized that the Facilities Committee members would be volunteers who would have no voting or policy- or decision-making authority. It was suggested that “Advisory” be a part of the subcommittee’s name. The Budget and Audit Committee will be working out the details of the proposal at its upcoming meetings.

Investment Update

Treasurer Aoki referred the Board to Finance Manager Tiffany Lynch’s report in the meeting materials and noted that the WSBA’s investments are starting to regain losses due to the economy. In addition, he reported that a portion of the investments that were in CDs have been moved into municipal and treasury bond funds.

President Johnson thanked Governor Aoki for his service as the WSBA Treasurer and expressed appreciation for a job well done.

LAWYERS FUND FOR CLIENT PROTECTION (FUND) BOARD COMMITTEE ANNUAL REPORT – Sims Weymuller, Chair, and Bob Welden, General Counsel

Chair Weymuller referred the Board to the Fund Board’s Annual Report contained in the meeting materials and informed the Board that the Fund Board is asking that the Board approve its recommendation to pay the balance of previously approved applications regarding Kevin Healy up to the Fund cap of \$75,000 and to approve the 2009 Fund Annual Report.

General Counsel Welden reported that the Board of Governors previously approved four of the applications in the Healy matter and that there are currently five additional applications pending. He noted that Assistant General Counsel Turner has been working on these additional applications and it appears two are likely to be eligible. He further noted that the current Fund balance is \$500,000 and that \$866,000 in revenue is anticipated in FY 2010 as a result of the increase in assessment, with the result that the Fund is in good financial shape for the Board to approve the recommendations up to \$75,000. Discussion ensued regarding the possibility of further Healy claims, bankruptcy status, and the strict interpretation of the eligibility requirements by the Fund Board.

Governor Lee moved, seconded by Governor Gibbs, to approve the Fund Report. Motion passed unanimously with a vote of 14-0-0.

Governor Gipe moved, seconded by Governor Lee, to ratify its prior approval to pay the four applications up to the \$75,000 limit. Motion passed 11-0-3. Governors Aoki, Karademos, and Palace abstained.

Chair Weymuller informed the Board that the 50-year anniversary of the Lawyers Indemnity Fund, which is the predecessor of the Lawyers' Fund for Client Protection, will be in 2010. General Counsel Welden also informed the Board that the American Bar Association Professional Responsibility Conference and National Client Protection Forum will be meeting in Seattle in May 2010, and might be a good opportunity for a tie-in.

REPORT ON AMERICAN BAR ASSOCIATION (ABA) ANNUAL MEETING – Lish Whitson, WSBA ABA Delegate

Delegate Whitson reported that: (a) the reception for Bill Gates was a tremendous success and thanked the Board for its support, adding that Mr. Gates was very appreciative of the Board's support and received a long-standing ovation; (b) all eight guidelines passed for enhancing criminal representation by public defenders by reducing caseloads and being more responsive to concerns about disparity between public defenders; (c) Resolution 103 regarding the representation of juveniles, which the WSBA Board sponsored, was withdrawn and sent back to committee for review because of strong opinions on each side of the issue; (d) proposed changes in the bankruptcy code passed to make it more consumer-friendly; (e) Attorney General Holder spoke eloquently on the need for public defender initiatives, which passed; and (f) retired Justice Souter spoke about the need for civics education in the public schools and urged every state to do something within their bar associations regarding civics education initiatives.

LEGAL FOUNDATION OF WASHINGTON (LFW) REPORT – Nicholas Gellert, President, and Rima Alaily, President-elect

LFW President Gellert thanked the WSBA Board and staff, as well as LFW Executive Director Caitlin Davis Carlson and her staff, for their support of legal aid and access to justice, and in particular President Johnson for his leadership in various initiatives throughout the year, adding that he looks forward to working with President-elect Mungia in the coming year.

LFW President Gellert reported that IOLTA remains at historic lows with revenues of less than \$2 million annually compared to \$5 million the previous year; however, with the help of the

WSBA, other revenue sources are available and he opined that the working arrangement between LAW Fund and the WSBA is going to be very fruitful. He noted that grantees have been working very hard to deal with the current situation and have absorbed grant cuts of 15%-18% from the 2008/2009 levels with as little impact on delivering civil legal aid services as possible. He also advised that Campaign for Equal Justice private giving remains robust and may even exceed last year's giving if the current pace is sustained. In addition, he reported that the Comparability Rule is still in the works, that the comment period ended this summer with no negative comments and many letters of support, and he remains hopeful it will pass.

In conclusion, LFW President Gellert reported that the grant-making process is at the beginning stages and it is anticipated that the infrastructure for the delivery system will be maintained by further depleting reserves in order to meet the grant requests. He noted that requests have been made of private grant organizations to help supplement existing grant funds.

GOVERNORS' FORUM

Governor Gibbs reported on the work of the ELC Drafting Task Force, which was convened to review all the Rules for Enforcement of Lawyer Conduct (ELC) in the wake of the Board's action on recommendations from the BOG Discipline Committee and the Discipline Review Report. He noted that the Task Force has been divided into three subcommittees, which are working to resolve those issues that can be addressed on consent. Governor Gibbs expects the Task Force to present its recommendations to the Board at its March 5-6, 2010, Board meeting.

Governor Gipe reported on his attendance at the American Bar Association's National Gay and Lesbian Bisexual and Transgender (NGLBT) Conference in New York, where he served as one of five panel members. He opined that it was a very successful program, noting that it quickly became evident that WSBA is a leader in diversity in the profession as we had all the interesting and programmable ideas and attendees wanted to know what we do and how we do it. He concluded by stating that he received a great deal of positive feedback.

Governor Lee reported that the new President for the Washington Young Lawyers Division (WYLD) is Julia Bahner and the new President-elect is Kari Petrasek, noting that one of WYLD President-elect Petrasek's main goals is to get an American Bar Association Young Lawyers national conference to Seattle. Governor Lee noted that the WYLD would like the Board's support in a proposal being submitted to the American Bar Association vying for the conference

to be held in Seattle in either 2011 or 2012, which would result in no fiscal impact to the WSBA's budget.

Governor Gibbs moved, seconded by Governor Lee, to authorize the endorsement of the proposal by the Board and have the WSBA President sign whatever documentation might be needed (e.g., a letter or a resolution) in support of the application and the WYLD's efforts. President Johnson declared the motion passed by consensus.

LIAISONS' FORUM

The Honorable Steve Shelton, on behalf of the District and Municipal Court Judges' Association (DMCJA), reported that the DMCJA has approved amendments to the Diversity Committee Bylaws to be much more proactive in attracting individuals who might be interested in being on the bench. In addition, he reported that an agreement has been signed with the WSBA to create a pro tem judge training CLE, curriculum is being developed, and plans are for a CLE to be presented in Seattle in February and in Spokane at a later date. The goals envisioned are to develop a larger pool of attorneys interested in becoming judges who can be of assistance to courts across the state by serving as pro tems. He expressed thanks to Mark Sideman, Director of the WSBA's Continuing Legal Education Department, and remarked that Director Sideman has been great to work with as they developed the program.

Judge Shelton then reported that the Association is looking at a rule proposal to the Supreme Court to mirror the Superior Court rule, noting that consistency is important. He further advised that the DMCJA is attempting to change the culture of the courts within its jurisdiction, which will not be possible if separate court rules continue to be maintained.

President Johnson thanked the DMCJA for its \$5,000 donation to LAW Fund. Governor Gibbs complimented the DMCJA and reported that the Superior Court Judges' Association (SCJA) has decided to match the donation.

BOG MATTERS

Various Committee and Board Appointments

- Approve Appointment to Council on Public Legal Education (CPLE)

Executive Director Littlewood noted that there are additional appointments to the CPLE in the Late Materials and the Board agreed to vote on those separately.

Governor Karademos moved, seconded by Governor Shea, to approve the reappointment of Linda McLane (term ending 2012), and the two new appointments of Nell McNamara (term ending 2012) and Marcus Hochstetler (term ending 2011), as recommended by CPLE in the meeting materials. Motion passed unanimously with a vote of 11-0-0. Governors Butler, Comstock, and Williams were not present for the vote.

Governor Gibbs moved, seconded by Governor Lee, to approve the additional reappointments in the Late Materials of Shannon Smith (term ending 2012) and Julia Gold (term ending 2012), as well as two new appointments of Anita Crawford-Willis (term ending 2010) and Justice James Johnson (term ending 2012), as recommended by the CPLE in the Late Materials. Motion passed 11-0-0. Governors Butler, Comstock, and Williams were not present for the vote.

- Approve Recommendation for Appointment to Practice of Law Board

Governor Karademos nominated, seconded by Governor Haskell, Ruth Edlund to the Practice of Law Board. Motion passed unanimously with a vote of 11-0-0. Governors Butler, Comstock, and Williams were not present for the vote.

- Approve Appointments to Judicial Recommendation Committee

Governor Lee moved, seconded by Governor Gibbs, to approve the recommendation to appoint Sean Flynn, Karla Kane, Kenneth Kato, Brian McDonald, Shawn Otorowski, Erik Price, and David Savage to three-year terms on the Judicial Recommendation Committee, beginning October 1, 2009, and ending September 30, 2012. Motion passed unanimously with a vote of 11-0-0. Governors Butler, Comstock, and Williams were not present for the vote.

- Nomination to Board for Judicial Administration (BJA) Best Practices

Governor Karademos nominated, seconded by Governor Gibbs, Steven J. Kinn to serve on the BJA Best Practices Committee, term to begin upon appointment and expire in June 2011. Motion passed 11-0-0. Governors Butler, Comstock, and Williams were not present for the vote. President Johnson noted that the appointment will be made by the Supreme Court.

- Approve Hearing Officer Appointments

Governor Gibbs moved, seconded by Governor Karademos, to approve the recommendations of the Hearing Officer Panel to appoint Kimberly Boyce, Carl Carlson, Donald Carter, Malcolm Edwards, Dennis Smith, David Thorner, and Lish Whitson to the list of Hearing Officers for five-year terms each. Motion passed unanimously with a vote of 13-0-0. Governor Williams was not present for the vote.

- Approve Additional Appointment to Disciplinary Board

President Johnson brought the Board's attention to the Late Materials asking for approval of the appointment of Vincent T. Lombardi II to the Disciplinary Board for the term of October 1, 2009, through September 30, 2012. President Johnson declared the appointment approved by consensus.

Proposed Joint Agreement Between WSBA and LAW Fund – Caitlin Davis Carlson, Legal Fund of Washington (LFW) Executive Director; Karen Falkingham, LAW Fund Director; and Dick Manning, LAW Fund President

Executive Director Littlewood brought the Board's attention to the second draft of the Agreement contained in the meeting materials and noted the changes from the version the Board reviewed at its July meeting. In addition, she reported that some changes will need to be made to the Member Data and Contact Information Policy in order to make the Policy consistent with the Agreement and explained that both the updated Policy and the Agreement will need to be adopted in order to complement the Agreement.

LAW Fund President Manning thanked the Board for its past actions on behalf of civil legal aid and opined that what the Board is doing for indigent civil legal aid services is historic. He encouraged the Board to consider providing LAW Fund with the email address and telephone number of WSBA contributors because a prompt "thank you" is very important for building a donor base for the future.

Discussion ensued regarding potential overlap of donor outreach to WSBA members by the Washington State Bar Foundation and LAW Fund. Executive Director Littlewood responded by stating that she did not feel they would be competing with each other and that, even though both

organizations will be using the same prospect base, donors give to what they feel compelled to and this gives them a choice.

Governor Etengoff moved, seconded by Governor Gipe, to adopt the Agreement with Section 1)F changed to permit LAW Fund to receive the email and telephone contact information of members who make a contribution.

Discussion ensued regarding release of member email and telephone information, loss of WSBA control over such information, the possibility of LAW Fund responding with a letter rather than an email or telephone call and the resulting cost and staff burden, the importance of building a donor base, and clarification of the difference between 1) F and 3) F.

It was suggested that "VI. Email" and "VII. Phone contact" be added to section 1) F and that the following statement be added: This information shall not be shared with any other person or entity. In addition, in 3) F after "...but no member's telephone number shall be provided more than one time in any given year," the following be added: with the exceptions of information shared under 1) F VI and 1) F VII. Governor Etengoff accepted the suggestion as a friendly amendment to his motion and Governor Gipe agreed. Motion passed 12-2-0. Governors Butler and Palace opposed.

Executive Director Littlewood noted that email addresses and phone numbers of WSBA members who have asked for their information to be restricted will not be shared under the Agreement with LAW Fund.

- Proposed Amendments to Member Data and Contact Information Policy

Governor Gipe moved, seconded by Governor Moore, to adopt the proposed amendment to be consistent with changes adopted in the previous motion regarding the Agreement. Motion passed 13-0-1. Governor Butler abstained.

Proposed Comment to RPC 1.3 Re Succession Planning – Art Lachman, Rules of Professional Conduct (RPC) Committee Chair

Chair Lachman reported that he is before the Board to recommend it forward the following Comment #5 to RPC 1.3 to the Supreme Court for adoption, based on the recommendation of the Planning Ahead Task Force, whose Chair is Steve Crossland:

[5] [Washington revision] In complying with the duty to act with reasonable diligence, a lawyer should plan for protecting client interest in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a competent attorney who has agreed to make arrangements of the protection of client interests in the event of the lawyer's death, disability, impairment, or incapacity. Such arrangements will typically consist of reviewing client files; notifying each client of the lawyer's death, disability, impairment, or incapacity; returning client property; and determining whether there is a need to take other immediate protective action.

Chair Lachman concluded by stating that this Comment will fill a gaping hole in the Rule, that it is a good idea and an ethical prerogative. Discussion ensued regarding the force of law of a Comment with Chair Lachman stating that charges would not be based on Comments and will not result in discipline and that this Comment is more an ethical roadmap. Chief Disciplinary Counsel confirmed that the Office of Disciplinary Counsel does not charge violations of Comments, and explained that in most scenarios where a failure to have a succession plan comes to light, the lawyer has died or abandoned practice; hence, the lack of advance planning is either not relevant or not a significant element of the lawyer's misconduct.

Governor Gipe moved, seconded by Governor Gibbs, to approve the recommendation to forward the proposed Comment to RPC 1.3 to the Supreme Court for adoption. Motion passed unanimously with a vote of 14-0-0.

WSBA Professionalism Outreach Initiative

Executive Director Littlewood reviewed the background of this Initiative, noting that the Professionalism Committee instituted the concept of going into various Professional Responsibility classes at the three Washington State law schools and talking with the students about professionalism. She reported that she has met with each of the deans of the three law schools to present the proposal and that all three have embraced the proposal, so currently the concept is being discussed with various professors who are also quite excited about it. She noted that formal adoption by the Board is being sought since this is a WSBA-sponsored Initiative.

Governor Butler moved, seconded by Governor Haskell, to adopt the Professionalism Outreach Initiative. Motion passed unanimously with a vote of 14-0-0.

Executive Director Littlewood noted that this is not the WSBA's only professionalism initiative currently undertaken at the Washington state law schools. She reported that someone from

WSBA now speaks at every orientation, and noted that this particular initiative is different in that it is the only one that is required. It was recommended that the individuals tasked with this activity work on producing curriculum materials that have a focus that defines the relationship of professionalism to the Rules for Professional Conduct. In addition, it was urged not to forget the inspirational component of making the students proud to be lawyers.

Update from BOG Diversity Committee – Brenda Williams, Chair

Chair Williams reported that the Committee hosted a second gathering with diversity stakeholders on September 18, 2009, and had a strong showing with a broad spectrum of attendees. In addition, two proposals have been developed for restructuring the volunteer entities working on diversity efforts within the WSBA, one by Chair Williams and one by Governor Gipe, and that the two documents will be merged and presented to the Board for its approval in the near future.

Reports from WSBA Standing Committees on FY09 Activities and FY10 Plans

Executive Director Littlewood referred the Board to the information in the meeting materials and noted that the information is a report of what the WSBA standing committees have done for the past year and what their plans are for the upcoming year. She noted that this is an opportunity to make sure the committees are doing what the Board wants them to do with their time and to provide feedback to the committees.

President-elect Mungia's Proposed Mentoring Program

President-elect Mungia referred the Board to the information in the meeting materials and advised that the Program will be coming before them at the October Board meeting for a vote. He noted that the Program is focused on the importance of civics in school and emphasized the role of WSBA in ensuring that society has a good understanding of the three branches of government, the rule of law, and an independent judiciary.

Discussion ensued regarding fiscal impact, schools' acceptance of the Program, and the target group. President-elect Mungia stated that the proposed Program is targeted to Title 1 schools whose students are disadvantaged and it has been well received by both educators and the union, and emphasized that we're not telling them how to do their jobs, but simply offering our help. He concluded by stating that the goodwill already generated is huge. Executive Director

Littlewood noted that there would be no additional fiscal impact, as she and Deputy Director for External Relations Steve Larsen are adding this Program to their existing workload.

PROGRAM REVIEW – Russ Aoki, Chair, and Julie Mass, Deputy Director for Finance and Administration

Mandatory Continuing Legal Education (MCLE)

Chair Aoki explained that MCLE falls within the WSBA's Guiding Principles by providing public confidence and then iterated the history of MCLE, noting that the current issues pertain to the growing number of lawyers in Washington state. He reported that the Program Review Committee is recommending that MCLE continue to make improvements in efficiently handling the workload of all MCLE staff, explore ideas to encourage active WSBA members to deal with earning credits and certifying compliance earlier in their reporting periods, and continue to monitor workload and staffing issues within the MCLE Division.

Governor Karademos moved, seconded by Governor Shea, to adopt the recommendations of the Program Review Committee for MCLE. President Johnson declared the motion passed by consensus.

Limited Practice Officers (LPO)

Chair Aoki explained the history of the LPO Program, noting that this is a self-funded program established by the Supreme Court. He reported that the Program Review Committee is recommending that the WSBA should continue to appropriately administer the program and make changes consistent with the program's needs and the WSBA's abilities, as well as continue to monitor program revenue and expenses to ensure that the program remains self-funding without providing "windfall profits" to the WSBA.

Governor Karademos moved, seconded by Governor Lee, to adopt the recommendations of the Program Review Committee for the LPO. President Johnson declared the motion passed by consensus.

Law Clerk Program – Russ Aoki, Chair

Chair Aoki referred the Board to the information contained in the meeting materials, noting that the Program has been running for quite some time and that there is a lack of recognition in the work involved in becoming a lawyer through the Law Clerk Program. He reported that the

Program Review Committee is recommending that two primary concerns with the Program be addressed: (1) number of participants is small compared to the resources and efforts that are put into the Program; and (2) that WSBA may not necessarily be the best entity to be running an education program. In light of these concerns, the Committee is recommending that the Board begin a dialogue with the Supreme Court to discuss the Law Clerk Program and clarify its mission and goals, examine the best way to accomplish those goals, and take steps to raise awareness that the Law Clerk Program education is equivalent to a J.D.

Discussion ensued regarding ethnic and socioeconomic makeup of the Program compared to law schools, the Program as an avenue to encourage professionalism, the Program's potential, keeping the Program on the Board's agenda for further study, shutting the program down while continuing to support those currently in the Program, and the appropriateness of WSBA running an educational program.

WSBA Special Admissions Analyst Talia Clever reported that ethnic and socioeconomic information is not asked for as part of the application process; however, the Program did receive an award from the Asian Bar Association for providing an avenue for foreign lawyers to become eligible to take the Bar exam. She noted that two key elements of difference between program participants and law school students is age and geographic diversity. She explained that people tend to apply to the Program later in their lives or careers, when they could not afford or wish to take on loans for law school, and that they live outside of Seattle and Spokane and want to stay in their communities.

Law Clerk Board Member Jeanne Sockle encouraged the Board to take a closer look at the Program, to continue it, and to find ways to improve it. She noted that she disagrees that the WSBA is not here to educate and that education is a very strong part of what the WSBA should provide. She concluded by encouraging the Board to look at ways to attract mentoring prospects and have reciprocity for Law Clerk Program graduates the same as law school graduates. Law Clerk Board Member Jeffrey Smoot opined that it would be a mistake to get rid of the Program or to take it outside of the WSBA and hand it over to an educational institution as a private business. He concluded by offering to be part of the dialogue.

Governor Gibbs moved, seconded by Governor Gipe, to adopt the recommendations of the Program Review Committee to engage the Supreme Court in dialogue to get its initial input and thereafter continue the Board's review of the Law Clerk Program.

Governor Lee noted that she is a liaison to the Law Clerk Program, along with Governor Comstock, and is impressed with the students, the tutors, and the Law Clerk Board. She opined that everyone is very dedicated and the individuals participating in the Program are going to be prepared to practice law. Governor Comstock encouraged the Board to look into the Program, rather than dialoging with the Supreme Court, get to understand it better, and find ways to give it more support.

Motion passed 7-4-0. Governors Etengoff, Haskell, Karademos, and Shea opposed. Governors Butler, Moore and Williams were not present for the vote.

Practice of Law Board (POLB)

President Johnson handed the gavel to Immediate Past-President Stan Bastian for this discussion. Chair Aoki explained that the POLB is mandated by Court rule and that it issues its own advisory opinions based on complaints it looks into regarding the unauthorized practice of law, including addressing the issue of the Legal Technicians Rule. He noted that funding at present appears adequate to provide needed services, but depending on the outcome of the Legal Technicians Rule, funding and staffing could change. He reported that the Program Review Committee is recommending that the WSBA continue to fund and staff the POLB at the current levels and that the POLB be encouraged to develop partnerships with other entities and examine other means of accomplishing their goals.

Governor Lee moved, seconded by Governor Gipe, to adopt the recommendations of the Program Review Committee for the POLB. Motion passed 11-0-3. Governors Butler, Gibbs, and Karademos abstained. President Johnson resumed the gavel and continued the meeting.

UPDATE FROM COUNCIL ON PUBLIC DEFENSE (CPD)

Council on Public Defense Recommendation Re District and Municipal Court Judges Association (DMCJA) Proposed Revision to CrRLJ 4.1 – Jackie McMurtrie and Bob Boruchowitz, CPD Members

Mr. Boruchowitz referred the Board to the information in the meeting materials and reported on the process which culminated in the recommendations before the Board. He noted that what is

going on in the courts is stunning in that judges feel pressure to move the cases and there is no money to provide public defenders, with the result that those most vulnerable are being pressured to plead guilty without a lawyer. He explained that what the CPD is proposing with regard to the Rule is that it be made clear that waivers need to be real and that the judge has an obligation to do a thorough inquiry or to provide a lawyer.

Governor Heller moved, seconded by Governor Lee, to adopt the CPD's recommendation to endorse the proposed revision to CrRLJ 4.1 by the DMCJA, as amended by the CPD. Motion passed unanimously with a vote of 11-0-0. Governors Butler, Moore, and Williams were not present for the vote.

Office of Public Defense (OPD) Status Report on Public Defense in Washington State – Joanne Moore, OPD Director

OPD Director Moore thanked the Board for receiving the Report on Public Defense and explained that it is the mission of the Office of Public Defense to implement the constitutional right to counsel on behalf of the State. She noted that the status report is created annually to report to the justice system what the OPD has accomplished during the previous year and what the direction is for the coming year, including the progress made by the WSBA's Council on Public Defense and what jurisdictions are doing to solve imbedded problems. In addition, she explained that the OPD works with the legislature to encourage appropriations as needed, giving examples from civil and criminal courts. She concluded by enumerating the progress of the OPD and noted that good, steady incremental changes are being made that make a difference to thousands of people. Finally, she reported that given the economic forecast for the coming year OPD will not be seeking additional appropriations in the 2010 Supplemental Budget but will be focusing this session on educating legislators and the public in anticipation of the next biennial budget.

WASHINGTON YOUNG LAWYERS DIVISION (WYLD) ANNUAL REPORT AND SWEARING-IN OF PRESIDENT – Jaime Hawk, President, and Julia Bahner, President-elect

WYLD President Hawk referred the Board to the WYLD Annual Report contained in the meeting materials and thanked the Board for its support over the past year. She enumerated several highlights of the WYLD's achievements, explaining that the focus was on providing more structure and direction, which was accomplished through the program review process. This resulted in three main areas in which all future programming will fit: pro bono and public

service, transition into the practice, and new and young lawyer advocacy. She then shared that the WYLD was presented with three awards by the American Bar Association Young Lawyers Division: Most Outstanding Single Project Service to the Bar Award for its diversity plan and Bar Leaders Summit; 1st place category in Service to the Bar; and 1st place category for its Minority Project. She concluded by stating that it was an honor to serve as the WYLD President this year, thanking Board for its help and recognizing Executive Director Littlewood and WYLD Liaison Brian Halcomb for their help and support, reiterating that much has been accomplished during the year regarding access to justice and unmet legal needs.

WSBA President Johnson then swore in Julia Bahner as the 2009-2010 WYLD President, who noted that outgoing President Jaime Hawk will be the Co-Chair of the Greater Access and Assistance Project (GAAP) Committee for the 2009-2010 term.

COURT RULES AND PROCEDURES (RULES) COMMITTEE – Roger Wynne, Chair; Ken Masters, Chair-Designate; and Todd Nunn, ESI Subcommittee Chair

CR 43 Telephonic Testimony

Chair Wynne explained that this item addresses allowing testimony by contemporaneous transmission where appropriate and that the Board had tabled this item in July so the Rules Committee could return with additional information on the Federal Rule. He noted that the GR 9 cover sheet contained in the meeting materials provides the requested information. Discussion ensued regarding the definition of “appropriate safeguards.”

Heather Carr, of the Washington Defense Trial Lawyers (WDTL), advised that the WDTL is against this amendment regarding telephonic testimony because there is no way to determine demeanor credibility, which is very important in evaluating whether or not to believe testimony, and that it is more difficult for a juror to hear, understand, and retain what has been said when it is not presented by in-person testimony. Judy Massong noted that the Washington State Association for Justice is in favor of the recommendation because it does give flexibility and includes safeguards.

Governor Shea moved, seconded by Governor Haskell, to approve the Rules Committee’s unanimous recommendation to submit this proposed amendment to the Supreme Court.

Discussion ensued regarding advance notice requirements, potential increase in expense for state and local courts, and the need for a Rule to govern what is already happening in the court system. Comments were made that this is an access to justice issue and the amendment promotes justice. Chief Disciplinary Counsel Ende noted that at the July meeting he had expressed concerns about the amendment being over-restrictive, but that his concerns have been addressed by the revised purpose statement, and he supports the amendment.

Motion passed 10-0-1. Governor Gibbs abstained. Governors Butler, Moore, and Williams were not present for the vote.

Recommended Response Re “Claw back” Amendments to CR 26 and CR 45

Chair Wynne reviewed the history of the recommendation and the Court's response, noting that the WSBA's suggested amendment to CR 26(b)(6) clarifies procedures for assertion of privilege or of work-product after production in discovery, and the WSBA's suggested amendment to CR 45 clarifies “abode service” and procedures for assertion of privilege or work-product protection after production in response to a subpoena, and conforming the form subpoena to the text of the Rule. These amendments were approved by the Board for submission to the Court last year, and the Court has now asked the WSBA to respond to the comments it received on the proposals. Chair Wynne explained the Rules Committee's recommendations for each amendment and the changes incorporated. Discussion ensued regarding anecdotal examples.

Governor Gibbs moved, seconded by Governor Gipe, to adopt the GR 9 cover sheet and the recommendations of the Rules Committee regarding the responses to the comments on CR 26(b)(6) and CR 45. Motion passed 10-1-0. Governor Palace opposed. Governors Butler, Moore, and Williams were not present for the vote.

Proposed New Evidence Rule ER 502

Chair Wynne explained the background of the new Rule ER 502, which pertains to inadvertent disclosure of privileged material, noting that the new Rule supplies guidance for judges to resolve the dispute and to fill in the gap with substantive law. In addition, he noted that it mirrors the new Federal ER 502.

Discussion ensued regarding the definition of “inadvertent” and what case law was reviewed in order to ascertain the definition, concern about Washington’s ER 502 violating the Federal ER 502, and how the Rule deals with third parties who provide documents to attorneys.

Governor Palace moved, seconded by Governor Heller, to adopt the recommendation of the Rules Committee with the exception of Section (b) (2): “the holder of the privilege or protection took reasonable steps to prevent disclosure.”

Discussion ensued with caution expressed regarding amending on the fly. It was pointed out that elimination of Section (b) (2) would change the standard and would entail amending Section (b) (3) as well.

Governor Palace withdrew his motion and Governor Heller agreed. In addition, Governor Palace suggested sending this item back to the Committee with the considerations discussed.

Governor Lee moved, seconded by Governor Gipe, to accept the Rules Committee recommendations on the new Rule ER 502. Motion passed 6-5-0. Governors Comstock, Haskell, Heller, Karademos, and Palace opposed. Governors Butler, Moore, and Williams were not present for the vote.

Proposed Electronically Stored Information (ESI) Amendments

Chair Wynne informed the Board that a hallmark of what the Rules Committee does on behalf of the Board is to take the Rules on the road and vet them, and reported that the level of vetting done with the ESI set of proposals is unprecedented. He then referred the Board to the information in the meeting materials and opined that the Board will not be able to make a decision on this slate of proposals that will please everyone. In addition, he reported that the Rules Committee requests that the Board bring specific and focused direction to any future requests for help from the Rules Committee regarding these proposals.

Discussion ensued regarding whether or not special rules are needed on this subject since there are already many rules that could currently be applied to electronic information as well as paper information, and the potential of causing a wholesale revision of the discovery process if these rules are adopted. ESI Subcommittee Chair Nunn replied that the Rules Committee was unanimous in voting through the proposal, even though there were differences during the

discussion. He noted that changes to the rules do not create new rules, rather they supply specific protocols and procedures that are unique to electronic discovery. In addition, he noted that the suggested rules cover electronic information in all its forms and are broad enough to handle any future changes.

Don Horowitz informed the Board that the Access to Justice (ATJ) Board passed a motion that if the WSBA Board did not pass the ESI Amendments at this meeting, the ATJ Board gives the ATJ Technology Committee authority to work with the Rules Committee to come up with an appropriate Rule that deals with the concerns related to access to justice. He noted that the ATJ Technology Committee is not against the rules, but they prefer rules that will reflect the concerns of pro se litigants, of single and small firms without resources, and of nonprofits, and that contain greater definition and guidelines with respect to undue burdens.

Discussion ensued regarding guidance for the Rules Committee, keeping the existing Rule or making new rules specifically for electronic discovery, and reducing litigation cost through rule-making. Chair Wynne reiterated that the directive of the Rules Committee is to help the Board, and informed the Board that the 2009-2010 Rules Committee will have its first meeting in October, then will not meet in December, and if no real guidance come to the Rules Committee until January, that will leave January through June for the work. He concluded by suggesting it would be very helpful if the Board would wrestle with the policy issues as much as possible, and then give the Rules Committee focused items to work on.

Chair-Designate Masters noted that a massive outreach has been made to prosecutor and defense bars to let them know that Criminal Rules are in the cycle for this year, adding that more work remains to be done on Mandatory Arbitration Rules (MARs).

ADJOURNMENT

There being no further business, the meeting was adjourned at 11:45 a.m. on Friday, September 25, 2009.

Respectfully submitted,

Paula C. Littlewood
WSBA Executive Director