

WASHINGTON STATE BAR ASSOCIATION

BOARD OF GOVERNORS SPECIAL MEETING - ETHOS

Minutes

WSBA Offices, Seattle, WA

March 5, 2022

Call to Order and Welcome ([link](#))

The special meeting of the Board of Governors of the Washington State Bar Association (WSBA) was called to order by Pres. Elect Dan Clark on Saturday, March 5, 2022, at 9:13 AM. Governors in attendance were:

Hunter Abell
Francis Adewale
Sunitha Anjilvel
Lauren Boyd
Pres. Elect Daniel D. Clark
Tom McBride
Treas. Bryn Peterson
Brett Purtzer
Serena Sayani
Alec Stephens

Also in attendance were Todd Alberstone, Sara Bove, Michael Cherry, Kevin Fay, Chief Regulatory Counsel Renata Garcia, John Gray, Nancy Hawkins, Chief of Staff Ana LaNasa-Selvidge, James E. Macpherson, Member Engagement Specialist Curtiss Melvin, Executive Director Terra Nevitt, Chief Communications & Outreach Officer Sara Niegowski, Broadcast Services Manager Rex Nolte, Kari Petrasek, Director of Advancement Kevin Plachy, Parliamentarian G. Kim Risenmay, Immediate Past Pres. Kyle Sciuchetti, General Counsel Julie Shankland, Equity & Justice Officer Diana Singleton, Member Services & Engagement Manager Julianne Unite, Sashy Vijay, and Randy Winn.

Approval of February 5, 2022 ETHOS Meeting Minutes ([link](#))

Executive Director Nevitt asked if there were any corrections to the minutes. Hearing none, Gov. McBride moved for approval. The motion passed unanimously. Govs. Peterson and Purtzer were not present for the vote.

How is the WSBA Funded? ([link](#))

Pres. Tollefson arrived and resumed the role of meeting chair. Chief Regulatory Counsel Renata Garcia presented an overview of WSBA's funding, as well as the General Fund and the Client Protection Fund. She noted that WSBA is not a non-profit organization, but is exempt from paying taxes as an instrument of the state. In terms of the general fund, Chief Garcia described its purpose and highlighted the revenue sources, which include a variety of fees in addition to license fees. She noted that about 75% of the annual

general fund revenue comes from license fees and walked through the license fee rate since 2012. Chief Garcia also presented on the use of license fees, noting that approximately 41% of the fee is used for mandatory functions, which are not exclusively regulatory; 32% is used for non-mandatory functions; and 27% goes towards management and organizational costs. She noted that if the organization were to bifurcate, the analysis of what the license fee would be for a regulatory organization would be more complex than adding the current cost of mandatory functions to some percentage of management costs. Chief Garcia briefly reviewed the categorization of general fund expenses and revenues. Chief Garcia described the purpose of the Client Protection Fund, which is to make gifts to address dishonesty or failure to account for client property by legal professionals. She noted that the fund is supported by an annual assessment required by the Supreme Court, which is currently set at \$20. She also walked through the 10-year history of the fund.

Director of Advancement Kevin Plachy presented an overview of the Sections and CLE Funds. In terms of the Section Fund, he noted that it is comprised of the reserve balances of all 29 WSBA sections. He noted that Sections pay a per-member-charge to WSBA which covers most of the direct and indirect costs for WSBA support, which is about \$70,821 of WSBA overhead for FY22. Director Plachy presented a history of individual section fund balances, as well as the total, noting that starting in FY20 the fund balances started to grow, which is likely due to the COVID-19 pandemic, which limited in-person activities and related expenses. He reported that the Section Fund balance currently sits at \$1,518,687, noting that the Fund was established by the Board of Governors and is subject to its control. Through fiscal policy, WSBA encourages sections to maintain at least 6 months, but no more than 2 years, worth of direct programming expenses.

Director Plachy addressed section revenue sources, explaining that section dues are the primary source, followed by CLE revenue, and he provided detail about the types of CLE revenue. He also walked through the per-member-charge (PMC), which is the primary expense for sections. Director Plachy reviewed how the PMC is calculated. He noted that the PMC was reduced in 2021 due to reorganization and consolidation of WSBA's support, and that for the past 6-7 years, the Board has made the decision to not raise the PMC over \$18.75, regardless of actual costs calculated.

In terms of the CLE Fund, Director Plachy explained that the CLE operation is self-sustaining, meaning it does not use any license fees. He noted that the fund is used to help the operation sustain market fluctuations and to make technology investments. He noted the operation develops 65-75 live programs each year, most of which are converted into an on-demand seminar which is available in the CLE store for three years. The live and on-demand products make up the primary sources of revenue for the CLE Fund. He also noted that WSBA Deskbooks are a part of the fund. Director Plachy explained that 9.92 FTE are allocated to the fund, including portions of finance staff and service center staff. He reported that the CLE Fund will cover approximately \$282,923 of WSBA overhead in FY22. Director Plachy walked through a history of the CLE Fund balance noting a renewed focus on the sustainability of the portfolio. He stated that as of January 2022 the fund has a balance of \$1.356 million, noting that this will be lower by the end of the fiscal year because the first three months of the year were revenue heavy – in part due to the double MCLE reporting year. Finally, Director Plachy described the interrelated nature of the CLE and

Section activities. He explained that CLE programming developed in partnership with sections makes up a substantial portion of the live and on-demand revenue.

Discussion followed including clarity that conferences are included in the CLE Fund along with half and full-day CLE programs.

Understanding WSBA's Regulatory Functions ([link](#))

Chief Garcia referenced GR 12, noting that the Supreme Court has the exclusive power to regulate the legal profession and that WSBA operates under delegated authority to carry out those functions. She also walked through WSBA's regulatory objectives, as set forth GR 12.1. She explained the primary regulatory functions carried out by WSBA, which are admissions, mandatory continuing legal education, licensing and membership records, and discipline. Chief Garcia noted that it's not always clear what is regulatory, such as administration of the client protection fund and some functions carried out by some of the Supreme Court boards. She also touched on the concept of proactive management-based regulation. Chief Garcia highlighted the role of WSBA, the Board of Governors specifically, Court Created Boards, and the Supreme Court in each area of regulation. In closing, Chief Garcia noted that while it is important to understand what WSBA's regulatory functions are, perhaps the most significant question for this process is what functions are germane to the purposes of the bar.

History and Activities of WSBA Sections ([link](#))

Director Plachy presented a chart with information about the activities that sections engaged in during the last fiscal year, the history of section formation, the size of section executive committees, section dues, and fund balances. He highlighted that CLE is a robust activity for many sections and that nine sections reported engaging in legislative activity in the last fiscal year. He noted that many more sections are tracking legislation than commenting on legislation, with 20 tracking legislation and only 2 commenting on legislation in the current year. Director Plachy provided a brief history of section involvement in legislative activity.

Discussion followed, including clarification that most, but not all, section list serves are administered by WSBA and whether any sections might have been formed before 1973.

Relationship Between WSBA and Sections ([link](#))

Nancy Hawkins presented on behalf of the Family Law Section, presenting the section's activities, including educational activities and legislative engagement. She noted a decrease in sections commenting on legislation and shared her view that the decrease is a result of restrictive policies that should be changed. Ms. Hawkins reported on the section's work with AOC on the development/improvement of forms for family law practice, which touches nearly every family. She explained that this work is not only focused on serving the members, but also for the benefit of the legal system and the public. Ms. Hawkins also noted that the section takes seriously its work to engage with all parts of WSBA and shared her perspective that it is critical that WSBA remain an integrated bar so that the section can continue to do its work, which is vital to the practice. Finally, Ms. Hawkins noted that the sections, like CLE, are self-sustaining.

Kari Petrasek presented on behalf of the Solo and Small Practice Section, which she noted existed in a different form prior to the date presented earlier. She described the activities of the section, including educational activities, mentorship, networking events around the state, curating member-only practice resources, and a robust list serve for sharing information relevant to the practice of law, which is often identified as one of the most valuable member benefits. She noted that one of the biggest sources of tension was the discussions of splitting off sections from the bar, noting that the section sees the value in being a part of the bar. Another area of tension has been the administration of section elections. She explained that the section's view is that the bar should not have any control over section reserves. She also noted that the staff support is supportive and high-quality, though the high-level of turnover has been challenging. Finally, Ms. Petrasek explained the value of sections operating as part of the integrated bar.

Kevin Fay presented on behalf of the Corporate Counsel Section, which he noted was formed in recognition that in-house counsel have challenges and needs that are different from other practicing attorneys and he highlighted the nature of those differences. He described the two primary activities of the section: providing relevant legal education, including a multi-day institute offered every other year; and networking activities for in-house counsel that can often be isolated in their roles. Mr. Fay explained that the section membership is not limited to current in-house counsel, which greatly benefits the effectiveness of the networking opportunities. In terms of tensions, he noted that the biggest was the Section Policy Work Group, which was viewed as an attempt to take section funds. He explained that the section is self-sustaining. He echoed Ms. Petrasek's comments that section funds should be exclusively under the control of sections. He also noted that he felt that many of their activities could be done less expensively apart of from WSBA, but that being a part of the WSBA adds value in terms of providing structure, guidance, budgeting, and calendaring and that sections may not always have alternative resources. He noted that even if WSBA did not add value, he would still support the integrated bar, noting the limitations of some of the voluntary bar associations that he is a part of.

Randy Winn, a member of the World Peace though Law Section, presented on his own behalf. He highlighted recent section activities, including providing educational to support members in providing legal assistance to Afghan refugees. He explained that this would not have happened without the partnership with WSBA, which he noted works well, especially for a section engaged in work that does not have significant commercial value. He urged WSBA to maintaining the integrated bar structure, while making any necessary tweaks. He explained the value of WSBA's resources to provide virtual programming that benefits members throughout the state. Mr. Winn highlighted recent work to market programming outside of Washington and urged the Board to consider reciprocity and joint action with other states regarding MCLE accreditation. Regarding past tensions, Mr. Winn addressed the Sections Policy Workgroup, and identified three learnings: 1) the money issues, which he noted were already addressed; 2) the lack of an institutional memory, in the sense that we don't maintain list serve histories; and 3) a concern about not adequately summarizing actions of the BOG in the meeting minutes. He noted that the minutes are much improved now and suggested that we add to the minutes a bulleted list with the precise language of all action taken.

Discussion followed, including appreciation for the work done in service of Afghan refugees; the rationale for keeping sections as a part of WSBA, including a concern that they would not exist separate from the

bar's structure, that they are self-funded, that they generate revenue for the bar association, and that sections are critical to the production of educational resources available to members; a perspective from the section representatives that focusing on tensions should not be a primary focus of discussions as tensions are to be expected and a focus could give rise to a sense that the structure must be changed; discussion as to why sections could not thrive on their own given all that they contribute to WSBA, which relates to section size, the fact that most business fail generally, and that volunteers aren't interested in doing the work currently performed by WSBA staff; a perspective that the WSBA needs the subject matter expertise of sections to develop substantive content for education and policy work; a perspective that the vast majority of members only contact with WSBA is paying license fees, taking mandatory education, and engaging with sections – and therefore for many members the sections are the bar; a perspective that the regulatory objectives are supported by section activities; frustration at sections having to defend their existence given all they contribute and in light of other challenges facing the Board and the staff; and a perspective that the only difference between sections and committees is that you pay to join a section.

Understanding Supreme Court Boards Administered by WSBA ([link](#))

Executive Director Nevitt provided an overview of General Rule 12.3, which guides WSBA's relationship with Supreme Court created boards. She explained that there is a significant amount of variety in terms of the Supreme Court boards, including how to define what they are. Director Nevitt explained the extent to which each board is engaged in regulatory work and policy work, whether members are appointed by the Court or the Board of Governors, how the chair of each board is appointed, whether the board has public members, and whether they meet annually with the Court. Director Nevitt also described the work of the Task Force Team Administering Xenial Involvement with Court Appointed Boards (TAXICAB), noting its purpose and its focus on the six Supreme Court boards whose members are also appointed by the Court. She highlighted questions for the Board of Governors to consider with respect to ETHOS, including the extent to which the Boards are independent of WSBA; the significance of which body appoints the members; the significance of their funding source; whether GR 12.2 applies to the boards; and the implication of first amendment litigation for the boards.

Relationship Between WSBA and Supreme Court Boards ([link](#))

Chair of the Practice of Law Board Michael Cherry began by noting that the Board does not have a position on the structure of the bar association at this time. He commented favorably on the discussions taking place at TAXICAB. He highlighted the many groups that the POLB works with and the rules that guide its work, including GR 25, GR 24, and RCW 2.48.180(2). Chair Cherry noted that the POLB has been reviewing the Fifth Circuit ruling related to *Keller* to determine whether the POLB's functions are germane, and he noted that believes the majority of its work is germane to the purposes of a bar association.

Sara Bove presented about the work of the LLLT Board. She noted that the order sunseting the LLLT licensure pathway did not change the nature of much of the Board's work relating to education, admissions, and discipline. She noted that there is not much interaction between the Board and the Board of Governors given that the Board reports directly to the Court and its members are appointed by the Court. In response to a question, Ms. Bove noted that the LLLT Board does not have a position on the bar structure question and is engaged in the work of TAXICAB to clarify the meaning of administration and the relationships.

Todd Alberstone described the work of the MCLE Board, including accrediting CLEs, considering appeals, and interpreting and suggesting amendments to the MCLE rules. He noted no strong views about the ETHOS questions.

Jennifer Taylor, Vice Chair of the Character & Fitness Board, described the work of the Board. She noted being personally impressed with how seriously the members of that board take its mission.

Chair Emily Rose Mowrey gave a brief overview of the Law Clerk Board. She noted that speaking only for herself, she views the work of the program to be critical to the work of the organization and is not sure who would administer the program if not the bar. She also noted that the program is cash positive, in terms of covering its own costs. She also highlighted the benefit to providing an alternative pathway to becoming a licensed attorney without having to leave their communities and attend law school at significant cost. She noted that reciprocity is a barrier and would appreciate the bar taking a larger role in advocating for reciprocity.

Discussion followed, including the potential impacts if the Law Clerk Board were to operate directly under the Supreme Court, noting the necessity of staff support and a concern that it might be challenging to have to take everything to the Court. Chair Cherry noted that the POLB is proposing the creation of a new Supreme Court Board and has considered the possibility of it being administered by the Administrative Office of the Courts (AOC). He noted that AOC is very focused on keeping courts running smoothly, which is very complex in our state and that moving a Board to AOC would result in a huge loss of institutional knowledge. Discussion continued, including a suggestion to invite the AOC to come present what they do; a perspective that having Boards administered by the same organization can facilitate collaboration among the boards; and a perspective that WSBA is the only state bar and being able to have a single organization to navigate difficult conversations serves to keep things consistent across the state. Representatives of the Character and Fitness and MCLE Boards both commented that the boards could not do their work without the support of the WSBA.

There was a suggestion to look into the reciprocity issue, and whether the APR 6 program could become ABA accredited.

Keller Deduction/What is Germane ([link](#))

General Counsel Shankland explained the reason for the Keller deduction, which arose out of the 1990 US Supreme Court Case, *Keller v. State Bar of California*. She noted that right now one of the questions before the US Supreme Court is whether the procedural safeguards WSBA has put in place in response to *Keller* are actually required. She noted that Article 15 of the WSBA Bylaws sets forth WSBA's procedures: 1) notice of the amount of the deduction is provided with the license fee; 2) defines the arbitration process; and 3) sets the scope of arbitration. She noted that in the most recent arbitration WSBA's process was upheld as "robust." General Counsel Shankland described how the calculation is made, noting the Bylaws require a conservative test that favors the members. She explained that she is only aware of two arbitrations in 2009 and 2018. In 2009, the arbitrator found that WSBA's support of same sex marriage legislation was not germane, but that the WSBA's support of a creation of a task force to examine capital

punishment was germane. In 2018, the arbitrator found that the WSBA discussion series intended to pull the public into discussions of law "Decoding the Law", the work of the Access to Justice Board, and the magazine were all germane. General Counsel Shankland described the origin of the germaneness concept. She also discussed the meaning of the term "administration of justice", which appears in GR 12.2 and the germaneness standard from *Keller*. She highlighted the court's analysis in a number of key cases, including *Janus*, *Gruber*, and *McDonald*. She noted that in *McDonald*, the Fifth Circuit found that bar associations that engage in non-germane activities are unconstitutional. She walked through the Fifth Circuit's test for germane legislative activity, as well as its treatment of other bar activities.

Comments from the Membership and the Public ([link](#))

The Board took comment from John Gray in favor of an integrated bar noting that he appreciates the efficiencies and the social aspect that come with everyone being in one place and talking about issues.

Board of Governors Questions, Comments and Discussion ([link](#))

The Board commenced discussion, including whether sections would be bound by GR 12 if they were bifurcated from the organization; encouragement to hear from more representatives of sections and supreme court boards and to hear evolving viewpoints; curiosity as to whether the mission statement is relevant to what is germane; whether sections in a separate organization, but still using the WSBA name would be subject to GR 12; support for a model where the Court takes on the regulatory pieces and WSBA continues to exist as a voluntary bar; a perspective that the BOG should present the pros and cons of a variety of structural models to the Court; and clarification that if there were to be some structural change, there would be significant work to determine the details to work out.

Future Agenda Items and Action Item Review ([link](#))

Executive Director Nevitt noted that the next meeting, March 25 will focus on hearing about what is going on across the country. There was an interest expressed in hearing from Colorado. There was a suggestion to develop a specific list of questions for other jurisdictions to answer. Executive Director Nevitt requested folks send their questions to her next week.

For future meetings there was a suggestion to look at WSBA governance and also a request to hear from the ACLU attorney that addressed the workgroup in 2019 to see if the view has changed. There was also a request to get more information about whether GR 12 would apply to any future iterations of WSBA's structure.

ADJOURNMENT

There being no further business, Pres. Tollefson adjourned the meeting at 3:30 PM.

Respectfully submitted,

Terra Nevitt

Terra Nevitt
WSBA Executive Director & Secretary