

WASHINGTON STATE BAR ASSOCIATION

BOARD OF GOVERNORS SPECIAL MEETING - ETHOS

Minutes

Held Virtually

August 13, 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. Brian Tollefson on Saturday, August 13, 2022, at 9:05 AM. Governors in attendance were:

Hunter Abell
Francis Adewale
Sunitha Anjilvel
Lauren Boyd
Pres. Elect Daniel D. Clark
Jordan Couch
Matthew Dresden
Carla Higginson
Brett Purtzer
Serena Sayani
Alec Stephens
Brent Williams-Ruth

Also in attendance were Tom Atkinson, Executive Administrator Shelly Bynum, Michael Cherry, Carrie Donnelly, Paula Emery, Chief Disciplinary Counsel Doug Ende, Volunteer Engagement Advisor Paris Eriksen, Gov. Elect Kevin Fay, Tamara Garrison, Nancy Hawkins, Associate Director of Regulatory Services Bobby Henry, Director of Finance Tiffany Lynch, Executive Director Terra Nevitt, Chief Communications & Outreach Officer Sara Niegowski, Broadcast Services Manager Rex Nolte, Gov. Elect Kari Petrasek, Director of Advancement Kevin Plachy, Parliamentarian G. Kim Risenmay, Immediate Past Pres. Kyle Sciuchetti, General Counsel Julie Shankland, Chief Equity & Justice Officer Diana Singleton, and Member Services & Engagement Manager Julianne Unite.

Pres. Tollefson made preliminary remarks, including that the Washington State Supreme Court would like to receive the report of the Board in a meeting and has proposed September 8 as a potential meeting date. Discussion followed about the timeline for approving a final report and clarification that Gov. Williams-Ruth's proposal to create a legislative entity had not been withdrawn.

Welcome, Approval of ETHOS Meeting Minutes ([link](#))

Pres. Tollefson and Executive Director Nevitt explained that the minutes that were distributed for approval, noting that there was a proposed revision to the March 5, 2022, minutes. There was a concern

that the minutes were too detailed and too voluminous to be approved at this meeting. Gov. Higginson moved that the minutes be revised and resubmitted with the minimum requirements established by Roberts Rules of Order. Motion failed for lack of a second. Pres. Tollefson expressed a preference to approve the minutes individually. There was no objection.

Gov. Clark moved to approve the March 5 meeting minutes as amended this morning. Motion passed unanimously.

Gov. Couch moved to approve the April 23 meeting minutes. Motion passed unanimously.

Gov. Couch moved to approve the May 21 meeting minutes. Motion passed unanimously.

Gov. Couch moved to approve the June 18 meeting minutes. Motion passed unanimously. Govs. Boyd and Higginson abstained. Gov. Anjivel was not present for the vote.

Gov. Couch moved to approve the July 23 meeting minutes. There was a suggestion to amend the July 23 minutes at the second paragraph of page 30, second paragraph, to insert the language, "according to Ferguson," and "described herself." Gov. Couch accepted that revision as a friendly amendment. Motion passed unanimously. Gov. Higginson abstained. Gov. Anjivel was not present for the vote.

Public Comment ([link](#))

Carrie Donnelly provided comment that she had asked a question at the last meeting but was not able to stay to receive her answer and that she had not been able to view the recording to see if her question was answered. She re-asked her question as to whether there had been adequate public comment. She expressed concern that the process needed to be redone because of a lack of public participation.

There was no further public comment.

Board of Governors Discussion and Action: Adopt response(s) to Question 3 ([link](#))

Executive Director Nevitt presented an overview of the materials presented.

Gov. Couch presented the status quo proposal. He noted that the immediate legal threat was gone, that self-regulation is a privilege and his perspective that the organization is stronger and more efficient when all functions are in one organization. Gov. Couch expressed confidence in the results of the membership survey, which favor integration. He noted that the majority of complaints about the organization related to its diversity, equity, and inclusion work, which he believes are undeniably germane, and that a voluntary organization will be less able to lead on those topics. He stated his view that status quo is preferable in terms of cost. He argued that bifurcation will not eliminate risk because diversity, equity, and inclusion work will continue—perhaps with less oversight or input from members, if done completely by an agency of the Court—and that fear of litigation should not drive the decision. Gov. Boyd added that the integrated bar is the best way to support the profession and maintain the rule of law in our state because in a voluntary model, the folks most in need of the services the voluntary bar could provide would likely be the least able to afford joining two organizations.

There was a discussion about the margin by which the membership preferred an integrated bar based on the membership study; the extent to which bifurcation would resolve the complaints about diversity, equity, and inclusion work and how that work is carried out currently; an observation that the member survey results mirrored the two section surveys submitted and the employee survey; and a comment in support of an integrated bar. Chief Communication Officers Sara Niegowski clarified that the survey was not distributed to all members but was designed to take the pulse of a randomly chosen, statistically-valid sample, which was the method recommended by the professional company that implemented the survey. Discussion continued, including comments that accepting the proposal for "status quo" does not mean "do nothing," that the work to improve the organization continues, as does the need to identify a preferred alternative; and a comment about the value of diverse viewpoints as part of an integrated bar.

Gov. Abell presented the proposal for a bifurcated bar, noting that the proposal is rooted in affection for the organization and is not intended to throw rocks. He presented his responses to questions 3 and 2, noting that if the Board does accept the status quo option to question 3, he hopes the Board can accept his proposal as a response to question 2. Gov. Abell proposed to move the regulatory functions of WSBA under the direct supervision of the Court, while keeping trade association activities as a voluntary bar. Gov. Abell explained that this proposal would resolve the potential constitutional issues presented by the current model and address the issue of the divided mission to avoid the "distracted regulator" problem. He argued that there is a clear trend toward bifurcation, with no bifurcated bars looking to move to an integrated model. He explained that increased competition for members will be a benefit. Gov. Abell refuted the "stronger together" argument noting that being together by fiat gives rise to constitutional issues or at least dissatisfaction. He noted that it is possible that a valuable activity or entity could be negatively impacted by bifurcation but argued that if the activity is valuable and effective, it is likely to succeed in the new model. In terms of member feedback, Gov. Abell explained that the survey results are nearly a statistical tie. In terms of cost, he stated that costs are necessarily unclear, but that the mandatory fee is likely to go down. Gov. Abell also explained that diversity efforts would be better served by being under the direct control of the Supreme Court. Gov. Abell concluded that while it is understandable to defend the familiar, there is a better model. He also recommended that WSBA seek an advisory vote of the membership.

Discussion followed about how the organization's assets, lease, and contracts would be addressed and a perspective that the answer would largely depend on the Court's decision; the nature of the concerns about the organization from outside of the Puget Sound area; the extent to which the proposal to bifurcate would address the location of the WSBA office; the fiscal analysis and the estimated participation of members in a voluntary bar; and a perspective that that individuals choosing to associate elsewhere is not necessarily a negative result.

Executive Director Nevitt, Director Plachy, and Chief Disciplinary Counsel Doug Ende provided additional context and information for the fiscal analysis as to potential license fees under a bifurcation model, as well as the changes to license fee in California. Discussion continued about the proposal to bifurcate, including the extent to which preventative services would remain with the regulatory entity; the extent

to which diversity, equity, and inclusion efforts would remain with the regulatory entity and the impact on that work; and the extent to which the office location would be impacted under this proposal.

[\(link\)](#) After a short recess, discussion continued as to whether it makes sense to take action absent direction from the Court. The Board took comment from Michael Cherry who wondered whether there would be enough members to build a statewide voluntary bar, noting that some of the larger counties have robust bar associations. Discussion followed in response to the question, including the proposed relationship between the voluntary and mandatory entities; the extent to which member services, such as member wellness would survive under the proposal; and whether other states are appropriate models for WSBA. Chief Disciplinary Counsel Doug Ende made comments in support of the proposal noting that in his view it resolves the constitutional issues, resolves the moral issue of forced membership, and support some recommendations to separate disciplinary functions from the integrated bar.

The Board took public comment from Nancy Hawkins who asked for more detail about the concerns that the WSBA is too Seattle-centric; asked if there was a concern about disciplinary hearings occurring in Seattle; and the extent to which there is more political accountability under the new proposal given that governors are elected. Discussion followed in response. A point of order was raised expressing concern about Ms. Hawkins engagement with Gov. Abell. Pres. Tollefson did not rule on the point of order but asked if Gov. Abell could respond to Ms. Hawkins via email. Instead, Gov. Abell sought to answer her question about the perceived value differences between eastern and western Washington. Gov. Stephens made a point of order requesting that the parliamentarian rule on the point raised. There was no ruling.

Discussion continued, including a perspective in favor of self-regulation; a perspective that everything the organization does is germane and can arguably move to the mandatory organization; the ability to influence the regulation of the practice of law through political action; the value of traditional member benefits compared to the substantive services that an integrated bar can provide; and a perspective that under the proposal, there will be greater role clarity.

Gen. Counsel Shankland noted that a new petition for certiorari has been filed with the Supreme Court in an integrated bar case involving the Wisconsin bar. She also noted that currently, the location of parties and witnesses is considered in the disciplinary hearings. Director Plachy shared his perspective on the constitutional issues, noting that the Fifth Circuit found nearly all of the Texas State Bar's activities to be germane and that at the end of the case the Bar remained integrated. He also shared his views that there should not be a tension in the regulatory and non-regulatory work, but that WSBA could take steps to further align the work.

There was a suggestion that the Board take votes today and that those be shared with the membership as a decision of the committee of the whole to allow for one more opportunity for comment before the Board of Governors acts on its own recommendation. There was a question to Chief Disciplinary Counsel Ende as to whether he believes disciplinary and regulatory functions would work better under a bifurcated model. He responded that there are many synergies with the integrated bar, noted that the ABA has been recommending separation of discipline functions since 1992, and observed that if a discipline system were to be built from scratch, which in a sense is the intent behind Question 3, it would be preferable for

discipline, and regulation in general, to be separate from the professional association. There was a follow-up question as to whether his view is shared by his colleagues, and he responded that he was unaware of a consensus on the topic and could not speak to what the views of chiefs around the country might be.

[\(link\)](#) Following a recess for lunch, Gov. Williams-Ruth moved for adoption of PAWL as a response to question three. Motion died for lack of a second and Gov. Williams-Ruth noted that the proposal was no longer viable. Concern was expressed that there had been no presentation regarding PAWL. Discussion followed.

Executive Director Nevitt read Gov. Abell's motion that the Board of Governors answer question number three as follows, "The ideal structure of the WSBA is a reformed structure that transitions the regulatory functions under the Washington Supreme Court, and transitions professional trade association functions to a new voluntary entity to be created." Gov. Elect Fay commented that Washington is in a different posture than California was pre-bifurcation and noted that both representatives from California and Nebraska indicated that services to members reduced post-bifurcation, fees went up, and neither spoke in favor of bifurcation. He also commented on the criticism regarding the bar being Seattle-centric and expensive, as well his perspective on the freedom of association concerns and the extent to which bifurcation would address them. Discussion followed regarding interpretation of the results of the membership survey; the extent to which the structure is fair to those that dissent; how an integrated bar can serve the public; and a perspective that Nebraska and California are not models of hope.

Gov. Clark moved to amend the motion to take an advisory vote of the entire active membership regarding the structure of WSBA and that the Board table making a decision on questions two and three until it has results from the membership. Discussion followed on the amendment, comments included that a survey should not be limited to active members; that the information from a survey will not be helpful as it will not likely address the legal issues; that there should be no further delay; that the option to survey all members was already considered and rejected; that a statistically relevant survey has already been conducted; a perspective that there is no reason the governors-elect that have been participating in the process can't vote; a perspective that it would be disrespectful to take action after those that have participated in this process can no longer vote.

The Board took comment from Nancy Hawkins who reminded the Board that sections had asked to have a seat at the table and the feedback was that this was a decision for the Board and that if this is to go to a vote of the members, sections should have a vote too. She noted that the Board has heard from many members already.

Discussion continued on the motion to amend, including support for the motion and a perspective that it can be done quickly; a perspective from an outgoing governor that they would like the opportunity to vote and a suggestion that the Board vote today and seek the advisory opinion after; a perspective that the section viewpoints do not necessarily represent the views of the members of those sections; support for the motion as well as a perspective that the motion does not preclude taking votes today; clarification on how the Solo and Small Practice Section reached comment; that the membership survey provides the information that is being sought; that one of the concerns expressed by members of the Spokane County

Bar is that a statewide voluntary bar will hurt regional bar associations; that the location of the bar is irrelevant to this discussion because it exists regardless of how we address the structure; and comments on whether discipline is better overseen by the bar association or the Governor of the State of Washington. Gov. Clark sought to withdraw his motion. There was no objection.

Discussion resumed on the underlying motion. Michael Cherry asked whether the Practice of Law Board is a regulatory function under the motion. It was clarified that the Supreme Court Boards would be unaffected by the proposal, other than that the funding would have to shift back to the Court. Discussion continued, including support for the proposal to bifurcate; a perspective that government is already in control of the regulation of the practice; a concern that the GR 12 analysis is not well understood and not well followed and that that is a problem the Board of Governors has an obligation to address; and that those that don't want to associate should not have to, while there should also be more robust political participation.

Gov. Adewale called the question on the motion. Motion to call the question passed unanimously. The underlying motion failed 8-4. Gov. Abell made comments of appreciation for the process and discussion.

Gov. Couch moved that the Board answer question three by saying that WSBA should work to preserve the current unified structure of the bar. Gov. Stephens called the question. The motion to call the question carried by a two-thirds majority. The underlying motion carried 9-3.

Board of Governors Discussion and Action: Adopt Response(s) to Question 2 ([link](#))

There was a discussion as to whether the PAWL proposal could be considered as a response to question two. Gov. Stephens moved that Gov. Abel's proposal be considered as the answer to question two. Discussion on the motion followed, including a perspective that additional thought should be put into the back-up plan; what the Court might be expecting; support for PAWL as an answer to question two; and confusion as to whether question two is seeking to know what is the second best structure or what to do in the event that the law changes. The Board took comment from Nancy Hawkins that the Board should not put forth, as a back-up plan, ideas that were just rejected by a significant majority of the Board. Executive Director Nevitt commented on her interpretation of comment two and her perspective that it would be difficult to plan for an outcome we can't predict, but that planning around when to take up the issue again and some planning around the process would be useful. Gov. Stephens' motion was withdrawn without objection. Discussion followed that it would not be effective to seek to bind a future Board; support for Executive Director Nevitt's comments; and that it does not make sense to make a finite plan knowing that the development of the law is dynamic. Michael Cherry spoke in support of the Board and Executive Leadership Team building a checklist as to decisions that would have to be made in the event of an emergency, including a timeline.

Executive Director Nevitt commented on potential next steps regarding the report, as well as a suggestion that the Board decide how to respond to question two. Gov. Stephens proposed that in response to question two, the Board say that it cannot decide a plan without a specific case to respond to, but to share the work done on the other two proposals. Discussion followed in agreement that the answer to question two is to wait until such time as a case directly impacts Washington comes down. That the *Crowe* decision is the closest and there is enough information there to understand what the likely issues are. There was a

suggestion that the Board take up some form of contingency planning in September then let the Court know that is the direction. A desire to move on to other important matters of the organization. A perspective that the back-up plan is to pull the work WSBA has just done out and apply it to the current situation. Nancy Hawkins voiced support for Executive Director Nevitt's suggestion that the staff develop an estimated timeline and list of questions to be answered in the event that the law changes and in opposition of continuing this conversation into next year instead of getting back to substantive work.

Gov. Williams-Ruth moved to answer question two that there are currently cases pending in the Ninth Circuit and the US Supreme Court and the Board will continue to follow the cases and will work to develop a plan as necessary and needed. Gov. Adewale made a friendly amendment that the process the Board has engaged in has gathered comments from different parts of the state that can be drawn upon in developing a plan. Discussion followed. Director Plachy commented that part of the process included doing a preliminary analysis of a host of scenarios, which is part of the work of contingency planning. The motion passed 8-1. Govs. Abell, Higginson, and Sayani were not present for the vote.

[Board of Governors Discussion: Final Report Drafting and Other Next Steps](#) ([link](#))

Executive Director Nevitt outlined next steps for developing a report for the Board's approval.

ADJOURNMENT ([link](#))

There being no objections, Pres. Tollefson adjourned the meeting at 3:08 PM.

Respectfully submitted,

Terra Nevitt

Terra Nevitt
WSBA Executive Director & Secretary