

Report and Recommendations

by

**Washington State Bar Association
Governance Task Force**

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I. INTRODUCTION

At its September 20-21, 2012, meeting, the Board of Governors of the Washington State Bar Association (WSBA) approved the Charter and Roster for an independent governance task force to examine the organization's governance structure. Since its origin, the responsibilities of the WSBA have grown significantly. The membership of the WSBA has grown from 35 to more than 36,000. Today, the WSBA is one of the largest state bar associations in the country. Legal practice has become increasingly specialized and diversified. Women and minorities have joined the profession. Technological advances have changed how attorneys work. And the "practice of law" is being incrementally opened up to non-attorneys. In parallel, research and experience have yielded a wealth of learning and best practices for organizational governance. Over the past 80 years, important steps have been taken to diversify membership of the Board of Governors and the WSBA has made incremental changes to its governance practices and processes to try to keep pace with new demands. But more significant change to its governance structure is required to keep the organization vital and strong so that it can tackle the complexity before it today and in the future.

As the Governance Task Force, we have investigated the organization and operation of the WSBA, collected input from internal and external stakeholders, and studied available literature on best practices for governance. Based on that work, we conclude that the governance structure of the WSBA presents many practical problems that should be addressed.

Before doing so, there are a couple of points worth noting. First, this report identifies problems the Governance Task Force believes exist and what could be done better. There are many aspects of the WSBA, including aspects of the Board of Governors and the management staff, which work well and ought to be commended. But given our Charter and our own limited time, we have not catalogued all of those here. Second, this report is *not* a critique of those individuals who have participated or who currently participate in governance of the WSBA, whether the Board, the Supreme Court, or the WSBA staff. The problems we identify in this report are not of their making. And, the lawyers who volunteer tremendous amounts of professional and personal time in service to the WSBA and the public are dedicated individuals whose contributions should be recognized and appreciated. Our aim is to design a structure that best serves the needs of the organization, without consideration of who is in any particular position.

Not surprisingly, the Board of Governors—its relationship with key stakeholders and its organization and selection—is the focus of our conclusions and recommendations. The Board is *the* governing body of the WSBA. If the organization is to manage the complexity facing it today and in the future, efficiently and effectively, it needs a strong and sophisticated Board. Yet practices, procedures, and rules that have accrued over the years stand in the way of this goal. Today, governing and descriptive documents inconsistently define the role of the Board, leading to confusion among stakeholders. The schedule of elections and term limits lead to a loss of critical institutional knowledge, skills, experience, and continuity. Over time, the Board's agenda has grown too broad, placing unreasonable demands on Governors. And the multitude of matters before the Board prevent it from devoting the time and attention necessary for strategic planning and policy-making. The Board has not been armed with any formal or informal institutional mechanisms to engender that focus. And, as the Board reaches into areas that some may consider

to be the province of others, it generates significant tension between itself and its partners in WSBA governance: the Supreme Court and the WSBA staff.

Another concern is the State Bar Act. The Supreme Court has made it clear that the Legislature has virtually no authority over the WSBA. But the State Bar Act creates the WSBA and purports to regulate the organization. And, just about every year, one or more legislators propose to abolish or restrict the WSBA. As a result, the authority and status of the WSBA remains uncertain and unclear.

After providing additional background on the Governance Task Force, our charter, and our process, this report discusses in detail each of our concerns along with our recommendations to address them. Appendix A contains a complete list of our recommendations.

II. THE WSBA GOVERNANCE TASK FORCE

At its September 20-21, 2012, meeting, the Board of Governors approved the Charter and Roster for a task force to examine the governance structure of the WSBA. It asked the Governance Task Force to consider the following:

- WSBA overall governance, including but not limited to structure of representation, boards and committees, staff, and financial matters;
- Continuity of operations from year to year;
- Interrelationship between staff and the governing body; and
- Effective means of reviewing programs and goals.

Appendix B includes a copy of the Governance Task Force Charter.

Membership of the Governance Task Force was adjusted over time, but ultimately settled at seven attorneys hailing from a variety of backgrounds (government service, large and small private law firms, in-house counsel, and academia) and geographies (Redmond, Seattle, Spokane, Vancouver, and the Tri-Cities). Some had extensive experience with the Board of Governors as a member or officer; others had none, but brought alternative experiences and expertise to the Governance Task Force. It also included a Governor as liaison from the Board of Governors and two WSBA staff members. Appendix C contains a list of the Governance Task Force participants.

Once convened in November 2012, the Governance Task Force generally met monthly through June 2014. Our meetings were open to the public; meeting times, places, agenda, and minutes were made available on a dedicated web page on the WSBA web-site. The WSBA President, President-Elect, and Immediate Past-President attended the majority of our meetings and provided input. In August 2012, we held a town hall meeting (also available via web-cast) to solicit input from WSBA licensees. We also invited and received input from multiple groups, including the Supreme Court, several Supreme Court-created Boards, and various minority bar associations. We also received input from the Board of Governors at four Board meetings and from an informal “workgroup” appointed by the President and comprised of the President, President-Elect, and three Governors. Finally, we met with the WSBA Executive Management Team (not including the Executive Director) on one occasion in the presence of the Board leadership. Thereafter, the Board permitted the management team to provide data on request but asked it not to provide any opinions or recommendations that were not approved by the Board. The Governance Task Force subsequently met with and received feedback from the Executive Director. Appendix D contains a complete list of the individuals and groups who provided input.

III. BACKGROUND ON THE WASHINGTON STATE BAR ASSOCIATION

The WSBA originated in 1888 as a voluntary professional association of attorneys. At the time, responsibility for the admission and discipline of attorneys was vested in the Supreme Court and the Board of Bar Examiners. Subsequently, a movement swept the nation to professionalize the bar and establish more consistent regulation of the practice of law. As a result, in 1933, the Legislature passed the State Bar Act (RCW ch. 2.48). That Act did not recognize the prior existence of the WSBA but instead purported to “create” it. In doing so, the State Bar Act changed the existing organization from a voluntary to a “mandatory” bar, meaning membership was, and is, required for any attorney to practice law in the State of Washington. The State Bar Act also vested the WSBA with responsibility for the admission and discipline of attorneys. Section VII below contains a more detailed discussion of that Act and our concerns and recommendations regarding it.

Notwithstanding its origins, the WSBA is not subject to the authority of the Legislature. It is a *sui generis* organization, important functions of which are “directly related to and in aid of the judicial branch of government.” *Graham v. State Bar Association*, 86 Wn.2d 624, 632, 548 P.2d 310 (1976). The power to supervise and regulate the WSBA resides with the judiciary. *Id.* The Supreme Court has the right of control of the WSBA and its functions as a separate, independent branch of government. *Id.*

The primary function of the WSBA is the regulation of the legal profession. This stems from the duty of the Court “to protect the public from the activity of those who, because of lack of professional skills, may cause injury whether they are members of the bar or persons never qualified for or admitted to the bar.” *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 447, 635 P.2d 730 (1981); *WSBA v. Great Western Union Federal Sav. & Loan Ass’n*, 91 Wn.2d 48, 60, 586 P.2d 870 (1978). In fulfillment of this obligation, the WSBA “is responsible to the Supreme Court . . . for the delineation of its responsibilities in the admission, discipline and enrollment of lawyers.” *Graham*, 86 Wn.2d at 628.

The Supreme Court has promulgated court rules to govern the WSBA. *See* GR 12.1. The WSBA may undertake only those activities within the purview of GR 12.1. The Board of Governors determines which of the permissible activities the WSBA will engage in. *Graham* at 628.

GR 12.1(a) states that the purposes of the WSBA are to strive to:

- 1) Promote independence of the judiciary and the bar;
- 2) Promote an effective legal system, accessible to all;
- 3) Provide services to its members;
- 4) Foster and maintain high standards of competence, professionalism, and ethics among its members;
- 5) Foster collegiality among its members and goodwill between the bar and the public;
- 6) Promote diversity and equality in the courts, the legal profession, and the bar;

- 7) Administer admissions to the bar and discipline of its members in a manner that protects the public and respects the rights of the applicant or member;
- 8) Administer programs of legal education;
- 9) Promote understanding of and respect for our legal system and the law;
- 10) Operate a well-managed and financially sound association, with a positive work environment for its employees;
- 11) Serve as a statewide voice to the public and the branches of government on matters relating to these purposes and the activities of the association.

Each of these is intended to foster an effective and efficient legal system in the State of Washington for the benefit of the people. Although the organization is cast as an association of lawyers, its purpose is not that of a traditional “trade association” that operates for the primary or exclusive benefit of its members. In Washington, voluntary bar associations play that role. Rather, the WSBA is charged with the protection and enhancement of the legal system. Other permitted activities further that goal. For example, member services are permitted under GR 12.1(3), not because they serve the interests of the membership, but because they promote a more competent and skilled body of legal professionals *to the benefit of the public*.

The internal affairs of the WSBA including its membership, governance, and operations are established by its Bylaws. The WSBA Bylaws provide for governance by a Board of Governors. *See* WSBA Bylaws IV.A. Today, the Board is composed of 14 Governors and a President. *See* WSBA Bylaws IV.A.1. One Governor is elected from each of the Congressional districts in the State with the exception of the Seventh Congressional District, which elects two Governors. *Id.* Three additional “at-large” Governors are elected by the Board. *Id.* One of the “at-large” Governors must be elected from the nominations of at least two “young lawyers” (defined as lawyers with less than five years of experience or under the age of 36) made by the Washington Young Lawyers Committee. WSBA Bylaws VI.D.1. The remaining two “at-large” Governors must have “the experience and knowledge of the needs of those lawyers whose membership is or may be historically under-represented in governance, or who represent some of the diverse elements of the public of the State of Washington.” WSBA Bylaws VI.D.1. The determination of which groups are under-represented or diverse is left to the Board and may include “age, race, gender, sexual orientation, disability, geography, areas and types of practice.” *Id.*

Once elected, an individual may serve a single three-year term as a Governor. Governor election is staggered; one-third of the positions are elected each year. *See* WSBA Bylaws VI.C. As a result, one-third of the Board of Governors is replaced each year. Any “Active” attorney member of the WSBA may serve as a Governor. No prior experience or familiarity with the WSBA is required. *See id.* at VI.A.1.

The President is a member of the Board of Governors and presides over the body. The President is elected for a one-year term by the Board. Any “Active” attorney member of the WSBA may submit his or her name for election; no additional qualifications are required. *See* WSBA Bylaws VI.D.2. However, to ensure geographic diversity, every fourth year the President must be an individual whose “primary place of business is located in Eastern Washington.” *Id.* Once elected,

the President serves for one year as “President-Elect” before assuming office. *See id.* Following his or her term of service, he or she serves as “Immediate-Past President” for one more year. As such, election to the Presidency entails a three-year commitment.

At present, the Board of Governors has seven committees comprised of Governors and WSBA staff. In addition, it has created and oversees ten additional committees, six boards created by Court rule, one council, one roundtable, three task forces, two panels, and various workgroups. These organizations are made up primarily of volunteer attorneys from the WSBA membership. At least one Governor serves as a liaison to each. The Board must also oversee and nominate members for appointment (by the Supreme Court) to six Supreme Court-created boards: the Access to Justice Board (ATJ), the Disciplinary Board, the Limited License Legal Technician (LLLT) Board, the Limited Practice (LP) Board, the Mandatory Continuing Legal Education (MCLE) Board, and the Practice of Law Board (POLB). Finally, the Board oversees 28 WSBA member sections. (A diagram of the WSBA entities is available on the organization web-site.¹) Again, at least one Governor serves as a liaison to each Supreme Court-created board and to each section.

¹ See <http://www.wsba.org/~media/Files/WSBA-wide%20Documents/WSBA%20Entities%20Diagram%20rev%2010813.ashx>.

IV. THE SUPREME COURT AND THE WSBA: ISSUES AND RECOMMENDATIONS

As detailed above, the WSBA's authority to admit, discipline, and otherwise regulate and provide services to its members, including attorneys, Limited Practice Officers, and Limited License Legal Technicians, derives from the Supreme Court. *Graham v. State Bar Association*, 86 Wn.2d 624, 548 P.2d 310 (1976); GR 12.1. The WSBA is therefore accountable to the Court for its actions. And the nature and strength of the relationship between the Supreme Court and the WSBA will impact the effectiveness of the organization.

At the leadership level, that relationship involves three stakeholders: the Supreme Court, the WSBA Executive Director, and the Board of Governors. The WSBA Executive Director currently appears to enjoy good communication with the Court and the Board. But there is only limited communication between the Court and the Board. As a result, the Board often drives the organization in directions that turn out to be at odds with the Court's desires. This creates friction in their relationship. For example, in 2012, the Board publicly endorsed R-74 (referendum to allow same-sex marriage) on behalf of the WSBA. Subsequently, some members of the Court objected to the Board doing so. The objection was not based on the merits, but on the ground that GR 12.1(c) prohibited the Board from taking a position on R-74. That rule bars the Board from taking a position on a political or social issue that does not relate to or affect the practice of law or the administration of justice.

In addition, poor communication between the Board and the Supreme Court can lead to inefficiency. For example, in 2013, the Court rejected extensive revisions to the family law rules proposed by the Board. The proposed revisions represented thousands of hours of work by numerous volunteers over a multi-year period. The proposed revisions, however, were not aligned with the Court's goals and priorities. Earlier feedback from the Court's Rules Committee might have resulted in a more successful process and a more acceptable proposal.

There are also few structural mechanisms through which the Supreme Court can exercise oversight. GR 12.1 defines the purposes of the WSBA and authorizes specific activities in furtherance of those purposes. But most of GR 12.1 is very broad. The details of WSBA governance are spelled out in the organization's bylaws, a document in which the Supreme Court plays no role. Further, the Court assigns regulatory or service functions to the WSBA (most importantly the disciplinary system) but plays no part in the selection or dismissal of either the WSBA Executive Director or the Chief Disciplinary Counsel.

Another area of ongoing tension arises from the Supreme Court's creation of six boards that it has assigned to the WSBA for operations, staffing, and funding. These are the Disciplinary Board, the Mandatory Continuing Legal Education (MCLE) Board, the Limited Practice Board, the Access to Justice (ATJ) Board, the Practice of Law Board, and the Limited License Legal Technician (LLLT) Board. While the Court sets the mission of these boards, it provides no funding or staffing for them. Instead, the Court expects funding and staffing to be provided by the WSBA. In most instances, the work of these boards is aligned with that of the WSBA. But there are occasional areas of disagreement between these boards, their respective stakeholders, the Court, and the WSBA.

Recommendation: The Supreme Court should meet with representatives of the Board of Governors and the WSBA Executive Director at regular and frequent intervals during the year to discuss priorities and ongoing projects.

The Supreme Court has determined that it has ultimate authority over the WSBA. Therefore, it is appropriate that the Court spend more time and attention on its WSBA oversight function. At present, the Court meets with the Board of Governors once a year and once again with the officers. The Board has noted that these meetings are not adequate for it to solicit and receive sufficient guidance from the Court. We agree. More frequent meetings and communications, designed to discuss WSBA priorities and to gather timely input and feedback on the direction and focus of ongoing projects, should take place. This will improve alignment between the Court and the Board to the benefit of the WSBA. Consensus among key stakeholders is critical to the efficiency and effectiveness of the organization.

The full Board need not be involved in all such meetings. These meetings and communications may be limited to representatives of the Board or an Executive Committee if available (see recommendation to establish Executive Committee in Section VI.B below). To prevent miscommunication and ensure alignment across the key stakeholders, the WSBA Executive Director should also be included in those meetings.

Recommendation: Amendments to the WSBA Bylaws should be approved by the Supreme Court.

The WSBA Bylaws are the primary governing document of the WSBA. They define the purpose and mission of the organization and set forth its governance structure. Today, the Board of Governors may amend the WSBA Bylaws by a simple majority vote. *See* WSBA Bylaws XVII. As detailed in Section V below, the Bylaws do not accurately reflect the accountabilities and duties of the Board and its members. Court oversight is needed.

Submitting Bylaw amendments to the Supreme Court for review and approval would reinforce the Court's authority over the WSBA. It would also provide the Court with the opportunity to ensure that the purpose, mission, activities, and governance structure of the WSBA is consistent with GR 12.1 and other applicable court rules.

Recommendation: The Dismissal of the WSBA Executive Director or the Chief Disciplinary Counsel should be subject to veto by the Supreme Court.

Governance best practices generally place responsibility for the hiring and firing of the executive director or chief executive officer (CEO) solely with the board of directors of an organization. The board leverages this power to hold the executive director or CEO accountable. But unlike other organizations, the WSBA carries out important regulatory functions mandated by the Supreme Court, including the admission and discipline of attorneys. Responsibility for the administration and execution of those regulatory functions largely rests with the Executive Director and the Chief Disciplinary Counsel. They are accountable to the Court for execution of those regulatory functions. By design, the Board of Governors has limited control over those regulatory functions.

Tensions may arise between the Board of Governors and the Executive Director or Chief Disciplinary Counsel with respect to those functions. For example, the Executive Director is

obliged to implement certain rules that the Court has promulgated. But if the Board does not support a specific rule, then she or he could be at odds with the Board. To preserve the Executive Director's and Chief Disciplinary Counsel's administrative independence and to protect the integrity of these regulatory functions, particularly the disciplinary process, the Supreme Court should have the authority to veto the dismissal of either one. Any proposed dismissal should be promptly communicated to the Court, which should have a reasonable period of time in which to countermand the dismissal decision.

Recommendation: The Supreme Court should re-evaluate the placement of certain Boards under the WSBA as well as their funding. For those that remain under the WSBA, the Court help ensure adequate funding.

Historically, there have been tensions between the Board of Governors and the six boards created by the Supreme Court and placed under the WSBA for purposes of funding and staffing. On these occasions, the WSBA staff has been caught between these two entities. While the WSBA staff is obligated to fulfill the Court's mandate, it is also accountable to the Board.

Examples of these tensions abound. Most recently, the Board of Governors threatened to refuse to allocate license fees to the Practice of Law Board. And while it opposed the creation of Limited License Legal Technicians (LLLTs), it now must provide funding and staffing to the LLLT Board. The Access to Justice (ATJ) Board operates with a high level of volunteer involvement and receives some project funding from the Supreme Court and other outside entities. In the past, this has created some concerns for the Board of Governors and WSBA staff about both funding and policy matters. As a result, in 2006, the ATJ Board and WSBA entered into a memorandum of understanding to address these concerns. However, questions remain about the staffing and funding of the ATJ Board. Recent WSBA budget cuts forced elimination of the ATJ Conference, reduced staffing, and stoppage of work on some projects.

The Disciplinary Board by its very nature must operate independently from the Board of Governors and WSBA staff (other than those employed to assist in its functions). In the past, there has been significant discussion of issues regarding due process, lawyer self-regulation, and methods of ensuring the independence of the Disciplinary Board. The entities concerned have worked diligently and quite successfully to deal with these concerns. Out of necessity, the Disciplinary Board operates quite autonomously. However, the manner in which the work of the disciplinary process is funded has the potential to create a significant conflict in the future. Chief Hearing Officer Joseph Nappi appeared before the Board of Governors and indicated that there is a need for more hearing officers, that changes to the Rules for the Enforcement of Lawyer Discipline will significantly increase workloads, and that it will soon be necessary to pay hearing officers because of the time demands created by extended hearings. When and if that happens, given budget concerns, the Board of Governors could be faced with significant funding challenges for this important function.

For these reasons, we recommend that the Supreme Court carefully and methodically evaluate the structural tensions that have been created by mandating that the WSBA be responsible for staffing the six Court-created boards. One possibility to be explored is transferring some of these boards to the Administrative Office of the Courts. If the Court determines that the WSBA is still the right "home" for one or more of these boards, then it should work with the Board of Governors to

identify sufficient funding for the tasks involved. The Court might consider a separate assessment, where appropriate, to defray the costs. But, if the Court decides that license fees are an appropriate funding source, then the Court should help ensure that an appropriate portion of the fees are mandatory and cannot be reduced through a referendum or other means.

V. THE BOARD OF GOVERNORS AND THE WSBA: ISSUES AND RECOMMENDATIONS

The proper role of the Board of Governors vis à vis the WSBA is not clearly defined or well understood. First, as described in Section III above, GR 12.1 permits the WSBA to engage in various pursuits, all of which ultimately should accrue to the benefit of the public. This orientation should be reflected in the governance structure of the WSBA. It is not. Governors are elected by Congressional District. And the WSBA Bylaws note that “[e]ach Governor represents a constituency of the Bar.” WSBA Bylaws IV.A.2.b. They direct the Board of Governors to operate as a “representative body of all members.” *Id.* at IV.A.2.a. Taken together, these feed into the erroneous notion that Governors should represent the wishes and desires of their “constituents.” Indeed, when asked about their roles, both new and experienced Governors have spoken of representing their constituents and fulfilling their “fiduciary duty” to members within their districts. This lack of understanding as to the purpose and focus of the WSBA can cause the Board to lean towards protecting WSBA members instead of the public when those two interests diverge. It can also create unrealistic expectations among members, who may insist that *their* Governor protect *their* interests and vote in accordance with *their* wishes and desires.

Moreover, by emphasizing the representative character of the Board, the WSBA Bylaws fail to alert Governors of the common law duties that they owe to the organization. The list of Governor Responsibilities (*see* Appendix E) provided by the WSBA to all Governors does not correct this omission. It identifies Governors only as “the fiduciary of WSBA assets.”

Under common law, a board member owes to the organization the fiduciary duties of care, loyalty, and obedience. The duty of care requires a Governor to participate actively in making decisions on behalf of the WSBA and to exercise his or her best judgment while doing so. The duty of loyalty insists that a Governor, when acting on behalf of the WSBA in a decision-making capacity, set aside his or her own personal and professional interests and put the WSBA needs first. Finally, the duty of obedience demands that a Governor ensure that the WSBA remain true to its mission and purpose through compliance with all applicable federal and state laws.

Second, the line between the Board of Governors and the WSBA staff is often not well understood. The WSBA Bylaws designate the Board as the governing body of the organization. They assign the Board of Governors responsibility for “determin[ing] the general policies of the Bar and approv[ing] its budget each year,” WSBA Bylaws IV.A. Yet understandably there is confusion in practice as what this directive means. On occasion, the Board has overstepped its bounds and delved into management of the organization, which is the purview of WSBA staff. At times, individual Governors have inappropriately sought to direct WSBA staff without the approval of the Executive Director. When that occurs, it leads to friction between the Board and WSBA staff as well as inefficiency. In addition, when it comes to management, in particular, the Board often lacks expertise.

The recommendations below seek to clarify the roles and responsibilities of Governors and the Board vis à vis WSBA members as well as the organization and its staff. Such clarity will help new Governors when they join the Board, existing Governors when they face constituent demands that are at odds with the mission of the WSBA and the public interest, and eliminate a source of tension between the Board and the WSBA staff.

Recommendation: Clarify the duties of the Board and Governors in the WSBA Bylaws and other relevant materials.

As noted above, the WSBA Bylaws should be amended to eliminate characterization of the Board as a representative body whose members represent a constituency of the WSBA. Provisions should be added to highlight the responsibility that the WSBA bears to the public, the Board's responsibility to ensure that the organization fulfills that responsibility, and the fiduciary duties owed by Governors to the organization. This will create greater clarity for Governors, the Board, and WSBA members.

In addition, the WSBA Bylaws should expressly state that, except for the purpose of inquiry, the Board and Governors should deal with WSBA staff solely through or with the approval of the Executive Director. Doing so will help reinforce the appropriate roles of the Board (responsible for monitoring, oversight, and direction) versus the Executive Director (responsible for management) and is consistent with best practices in board governance.

Recommendation: Change the name of the Board of Governors to the Board of Trustees and change the name of the Washington State Bar Association to "The State Bar of Washington."

Titles and names create perceptions and expectations. The title of the Board of Governors, its members as well as the name of the organization should be consistent with their roles and purpose.

The title of "Governor" is given to the elected executive of our state government. As an elected official, the Governor has accountability to his or her constituents. Governors on the Board of Governors, while responsible for governing the WSBA, do not have the same relationship with their constituents. Use of the term can be misleading for Governors themselves as well as for WSBA members (and their expectations of Governors). Changing the name of the Board of Governors to the Board of Trustees (and, accordingly, identifying the members as "Trustees") emphasizes the position of trust that the Board sits in vis à vis the organization.

The name "Washington State Bar Association" also carries erroneous connotations; it suggests that the organization is an "association" of members akin to a trade association. It is not. The name "The State Bar of Washington" corrects this error.

Recommendation: The Board of Governors should provide governance training to new Governors and adopt practices that help to define the respective roles of the Board vis à vis WSBA staff and provide opportunities for self-reflection and self-improvement.

Governance training is essential for new members of the Board of Governors. Many new members join without having had experience serving on a board. And others, while experienced, may be unfamiliar with best practices or how they apply in the context of the WSBA governance. While the WSBA has provided board governance training in the past, typically, because of time limitations, it does not receive adequate attention.

At a minimum, the training should discuss the foundations and scope of the WSBA's authority; its relationship and responsibilities to the Supreme Court; its responsibilities to the public; the

fiduciary duties of care, loyalty, and obedience owed by Governors to the organization; and the distinct role of the Board versus the role of the WSBA staff. Supporting materials that reiterate and reinforce these concepts should be made available to Governors for future reference. To ensure alignment within the organization, it may prove useful to make these training sessions and supporting materials available to relevant WSBA staff as well.

Additionally, the Board of Governors should encourage its members to provide feedback on Board performance and to identify changes that would improve the effectiveness and efficiency of the Board. These opportunities may vary. For example, the Board might devote 10-15 minutes of each meeting to “Ideas for Improving the Board.” It may make available articles and materials on best practices for board governance. The Board should periodically review its performance. Doing so is considered essential to good governance. The annual retreat presents a good opportunity for the Board to reflect on its overall functioning. The Board may also consider engaging a professional consultant to assist in this effort and to provide independent guidance and feedback. Whatever the means chosen, if done regularly, these practices will raise the awareness of Board members and create a culture of self-reflection and self-improvement.

Recommendation: The Board agenda should focus on strategic matters.

When planning Board of Governors meetings, the President and the Executive Director should work together to ensure that the agenda is focused on strategic matters and not administrative issues.

Simply put the board is responsible for the ends and the staff is responsible for the means. To use a nautical analogy, the board determines where the organization needs to head, charts the appropriate course, and checks progress along the way. The staff members, with the chief executive as their captain, move the organization toward its destination, taking care to avoid rough waters.

The NonProfit Board Answer Book: A Practical Guide for Board Members and Chief Executives, BoardSource at 75 (2d ed. 2007). Supporting materials should present high-level information that facilitates discussion. Governors can help enforce the focus on strategic matters by asking themselves and each other what the role of the Board ought to be with respect to each agenda item. What unique perspective does the Board bring to a particular item? During Board meetings, the President should be prepared to redirect discussion that impedes management function and discretion.

VI. ORGANIZATION AND SELECTION OF THE BOARD OF GOVERNORS: ISSUES AND RECOMMENDATIONS

A. Board Member Selection

As detailed in Section III above, Governors serve a single three-year term; they are prohibited from serving successive or additional terms. The President (who may not have previously served as a Governor) is in role for one year. As a result, each year, a new President is installed and one-third of the Board is replaced. And every three years, the Board turns over entirely. With these changes, institutional knowledge and wisdom are lost. There is little continuity on the Board. On many occasions, a committee or task force has been asked by one Board to address a problem, but finds that their proposal, a year or more later, is evaluated by a different Board with different goals, priorities, and opinions. When the subsequent Board rejects the proposal or provides new direction, hundreds, if not thousands, of hours of volunteer time is wasted to the detriment and frustration of all involved.

In addition, the current electoral system that is used to select the majority of Governors is not strong. It achieves geographic diversity and produces Governors with a variety of perspectives and opinions. And it ensures that direct participation in the highest level of WSBA governance is open to any “Active” attorney, regardless of background, experience, knowledge, or connections. But frequently, less than 25% of WSBA attorney members vote in any given election (LPOs and LLLTs are not permitted to vote). Historically, many candidates have been uncontested, and this year there was no candidate at all for one district. The current electoral system has also failed to generate adequate representation of certain racial and ethnic groups. In addition, it reinforces the erroneous notion that Governors primarily represent, and are accountable to, their constituencies.

The absence of any minimum qualifications often results in the election of Governors who are unfamiliar with the business of the WSBA and who lack experience with board governance. These Governors must and do climb a long and steep learning curve. But, as a result, their ability to meaningfully contribute to the work of the Board of Governors is delayed. Board members often report spending at least one year learning about the WSBA and therefore participate in important debates without adequate understanding of the business of the WSBA. Additionally, the combination of skills and experience on the Board varies from election to election. Unlike organizations that appoint their board members, the WSBA has no ability to ensure that the Board has the diversity of skills and experience that are needed for effective governance of the organization. For example, there may or may not be any Governor with substantial financial experience on the Board at any given time, impairing the ability of the Board to provide financial oversight. This requires the Board to rely almost entirely on WSBA staff, which while competent, undermines the Board’s oversight capability.

Taken together, these problems reduce the effectiveness and impact of the Board of Governors. The recommendations detailed below seek to produce a more skilled and experienced Board to the benefit of the WSBA.

Recommendation: Increase Governor terms to four years and permit former Governors to serve a second term at a later date.

Increasing the term length from three to four years would improve institutional knowledge and continuity. Adjusting the election cycle accordingly (so only one-fourth of the members are elected or appointed in a given year) would result in a smaller portion of the Board of Governors being “in training” in any given year. The WSBA would benefit from the additional experience and maturity of the Board. This change would require reducing the burden on Governors (see recommendation to reduce Governor workload in Section VI.B below) to encourage and enable persons to serve the longer term.

In addition, the Board of Governors would benefit from the experience of individuals who have served in the past. We recommend, however, that the second term not be in succession, *i.e.*, that individuals be allowed to serve a second term after a break of at least four years (assuming a four-year term). Requiring a break ensures that control of the Board is not vested in a closed group and that membership of the Board does not stagnate.

Recommendation: The WSBA President should be selected from the Board of Governors and continue to serve as a voting member of the Board.

Aside from being an “Active” attorney member of the WSBA, there are no minimum requirements to serve as President of the Board of Governors. Some individuals have served in that role without any previous experience on the Board. In addition, because the President is usually selected outside the current Board membership, he or she comes to the position fresh, without any connection to the work of the Board over the most recent years. This unique status makes the President almost a separate entity from the Board. It also creates difficulties when that person has his or her own agenda and projects to be pursued during his or her tenure.

We recommend that the President be selected from the pool of existing Governors. In the year selected, the President would hold the position of President-Elect. Then, he or she would serve as President in the next year of his or her term. This would ensure that the President has appropriate experience, institutional knowledge, and continuity with the current work of the Board of Governors.

We believe that geographic diversity in the office of President is important. We recommend that the Board of Governors make provisions in the WSBA Bylaws to preserve this diversity given the new selection system.

Recommendation: Two public, non-attorney members and one LPO / LLLT member should be added to the Board of Governors. These three members should be appointed by the Supreme Court.

The Board of Governors is composed entirely of attorneys. Although the WSBA is charged with protection of the public, non-lawyer public members may not serve on the Board. This is in marked contrast to other bar associations, such as The California State Bar and the Oregon State Bar as well as other Washington State regulatory agencies and associations that include public members. Although the WSBA also supervises and regulates Limited Practice Officers (LPOs) and Limited License Legal Technicians (LLLTs), neither LPOs nor LLLTs are eligible to serve on the Board.

Given that the WSBA must operate for the benefit and protection of the public, the inclusion of public members on the Board of Governors is essential. As other bar associations have discovered already, such members bring a unique perspective, and their relative lack of legal expertise helps to keep a board focused on monitoring, oversight, and providing direction as opposed to management.

Adding one public member, however, is not sufficient. There is a real danger that he or she would find him- or herself quickly outnumbered and isolated. At least two public members are necessary to provide a respectable counterweight to those members who are attorneys or other legal professionals.

The WSBA is also charged with the regulation of LPOs and LLLTs. Their inclusion on the Board is appropriate; one Governor should be appointed from the pool of LPO and LLLT members. However, the Limited Practice Board indicated little interest in participation on the Board of Governors at this time. And LLLTs will not begin to be licensed until 2015. Until there is a sufficient pool from which to select a Governor, the LPO / LLLT “slot” should be filled with a public member.

The Supreme Court should appoint both the public and LPO / LLLT members. Nominations for those members may be made by the Search Committee, provided for below.

Recommendation: To accommodate the additional Governors, the number of elected positions should be reduced to nine. The three current “at-large” positions should be retained to ensure participation by a “young lawyer” and members that reflect historically under-represented groups. This would provide for a Board of 15 persons, one of which would be the President.

Accommodating the two public and one LPO / LLLT members on the Board of Governors could be done by adding more seats. But that is not ideal.² With the President, there are currently 15 members on the Board. Increasing the size of the Board will lead to reduced accountability and participation by members. Indeed governance best practices typically recommend smaller boards between 10 and 15 members. *See, e.g., Daniel Suhr, Right-Sizing Board Governance, Hasting Law Journal (2012).* As such, the number of attorney members on the Board should be reduced. That reduction should come from the member elected positions, rather than from the at-large positions. This can be accomplished by reducing the number of member-elected positions from eleven to nine. The at-large positions should not be reduced; those positions provide diversity that may not be achieved through the member election process.

Reducing the number of member-elected positions from eleven to nine will require that the historical connection to congressional districts be changed. This linkage originated in the State Bar Act, which provides for at least one governor from each congressional district. *See RCW*

² If the Supreme Court and the WSBA do not wish to reduce the number of electoral positions, we would still recommend adding two public and one LPO/LLLT members to the Board of Governors. In such circumstances, however, we would recommend that the Board consider steps that can be taken to ensure accountability and participation by members given the larger size of the Board.

2.48.030. On way to approach this – and there may be others – is to elect three governors from each of the Courts of Appeals districts.³ Doing so would continue to ensure geographical diversity among Board members. Given that the WSBA operates under the auspices of the Supreme Court, basing the election on districts drawn for judicial elections is a sensible alternative.

Recommendation: A Search Committee, appointed by the Board of Governors, should solicit qualified candidates for the Board.

Any attorney who is an “Active” WSBA member may run for the Board of Governors. That should continue. As noted above, this results in governors with a wide variety of skills and experience. Some have been deeply involved with the organization for many years or served on multiple boards, but others are new to the WSBA or board service. This range in skills and experience (which varies from year to year) can impede the effectiveness of the Board. Service as a Governor necessarily involves a steep learning curve. A lack of skills and experience exacerbates the problem.

Establishing a set of minimum qualifications is one option to improve the quality of candidates. But evaluating whether or not a candidate fulfills those qualifications would necessarily involve subjective judgment by some body. Regardless of how well-intentioned that body, its existence may create a perception of elitism and discourage less-known candidates. Instead, we recommend that the WSBA expand and improve the pipeline of candidates and provide voters with the information needed to make educated decisions.

The Board has taken positive steps in this direction. The WSBA Bylaws require Governors to hold at least two informational meetings for prospective candidates in their respective districts. The Addendum to Governor Responsibilities (adopted by the Board in April 2006) “assign[s] to each Governor whose term is expiring and whose position will be filled by the election of a successor, the responsibility to chair a committee of not more than five persons to recruit two or more candidates to file for the position” (see Appendix E), and outgoing Governors are required to report on the work of his or her recruiting committee at a Board meeting. But Governors, who are already overburdened, often lack time, resources, and know-how to do such outreach effectively. So the organization must do more.

The Board of Governors should create a Search Committee to identify candidates. We believe the committee should have seven to nine members, enough to reflect a diversity of perspectives, *e.g.*, minority bar associations, specialty bar associations, geographic diversity, and current and former Governors, but not so many that accountability and participation are diluted. Regardless, current Governors should compose only a minority of the Search Committee members.

The Search Committee should solicit, review, and nominate candidates for the appointed and at-large positions. In addition, working in tandem with individual Governors, the Search Committee should be responsible for soliciting qualified candidates for the nine member-elected positions. Any “Active” member, however, should be able to submit his or her name for nomination (for the appointed and at-large positions) or election (for the member-elected positions). To keep the door

³ The Board of Trustees for The State Bar of California includes six lawyer members who are each elected from one of the state’s six appellate court districts. See <http://www.calbar.ca.gov/AboutUs/StateBarOverview.aspx> (last visited Dec. 30, 2013).

open to all, it may also be advisable to bar candidates for elected positions from indicating or suggesting that they were “identified” or “endorsed” by the Search Committee.

Key characteristics to be considered by that Committee may include:

- Age, race, gender, sexual orientation, disability, geography, areas and types of practice;
- Minimum years of practice;
- Experience on a private or public board;
- Previous service in WSBA committees, sections, boards, task forces, or workgroups;
- Legislative or public policy experience;
- Public or community involvement;
- Financial knowledge and experience;
- Demonstrated ability to work effectively on a board or group setting; and
- Demonstrated leadership skills.

Recommendation: The WSBA should provide more information regarding candidate qualifications.

The WSBA should improve the information provided to voters about candidate qualifications. Currently, the WSBA provides several means for candidates to tell voters about themselves (*e.g.*, website, *NW Lawyer*, candidate forums, and mailing lists). While useful, they do not ensure that relevant information is provided. One way to address this gap is to develop a standard candidate questionnaire regarding those skills and experiences that are relevant to Board of Governors service. Candidate responses would then be disseminated to voters. This information would help voters make informed choices and select Governors who are qualified for the position.

B. Board Organization and Workload

In addition to clarifying the duties of the Board of Governors, changing its name, providing training and opportunities for self-reflection and self-improvement, and giving voters more information about candidates, there are organizational changes that should be made to improve the functioning of the Board.

Today, the Board of Governors is busy and active with many matters of varying degrees of importance that distract it and thus limit its impact. Unless it can reduce the quantity of the work before it, the Board will be unable to create opportunities for it to engage on what matters most the organization.

Recommendation: Establish an Executive Committee to address routine and non-strategic matters on behalf of the Board of Governors.

A formal Executive Committee with the power to make recommendations to the Board of Governors and to act on behalf of the Board in defined areas is needed. In the past, some Governors

have objected to the use of an Executive Committee for fear that it would usurp the power of the Board. Other Governors, who erroneously viewed themselves as representatives of a constituency, have felt that full Board participation is required in each and every decision to ensure their constituents have a voice. But the use of such a committee by boards is commonplace and is considered a best practice by governance experts. If the Executive Committee's jurisdiction is wisely defined, the Executive Committee can free the Board to focus its attention and effort on strategic planning and policy making—matters which are of the most importance and consequence to the WSBA. And operations of the Executive Committee can and should be open and transparent to all Governors.

The Executive Committee should include the President, the President-Elect, the Treasurer, two current Governors and the Executive Director. Assuming the President and President-Elect are chosen from the existing Board (see Section VI.A above), then only the Executive Director would not have a vote. The Board should agree on a “job description” for the Executive Committee and its relationship to the Board. Tasks that could be assigned to the Executive Committee include making appointments to committees, boards, panels, and task forces; hearing routine reports from those groups; identifying key policy questions presented by the work of those groups and ensuring that those questions are properly and timely presented to the Board; and determining the agenda and planning for Board meetings. As noted in Section IV above, the Executive Committee may be charged with meeting and communicating with the Supreme Court.

To provide openness and transparency, the agenda for Executive Committee meetings should be made available to all Governors in advance of its meetings. Executive Committee meetings should be open to attendance by any interested Governor. Shortly following each of its meetings, the Executive Committee should provide a brief written report to all Governors. Any actions taken by the Executive Committee should be reviewed and affirmed by the Board at the next Board meeting. This can be done on a Consent Agenda or via some other expedited process so as to avoid re-doing the work of the Executive Committee.

Recommendation: Establish a permanent process designed to reduce Governor workload.

Governor workload must be materially reduced. Service as a Governor is too demanding. Materials for meetings are typically 1,200 pages, and sometimes more. There are seven Board meetings per year. With travel (which may be considerable for those outside King County), each meeting can require two or more days of a Governor's time. In addition to preparing for and participating in Board meetings, Governors must serve on one or more assigned Board committees. And they must serve as a liaison to several WSBA committees and sections as well as six external entities and other various specialty bar associations. Governors are also encouraged—although not required—to attend lunches, dinners, and other events in the legal community. Uniformly, at the ends of their terms, Governors report that they could not continue to sustain the level of time commitment that is required of them.

The excessive workload has several negative effects. First, it reduces the pool of potential candidates. The only individuals able to serve on the Board are those who can afford to take a significant time away from their practice, which the vast majority of attorneys are not in a position to do. Second, to manage the workload, individual Governors make their own decisions about how much time and attention to pay to particular issues or groups. Those decisions may not be consistent with the organization's priorities or the needs of any particular issue or group. Third, it is unlikely that any Board member would be willing to serve for a longer term or serve a second

term. As detailed in Section VI.A above, we recommend that Governor terms be extended to four years and that Governors be permitted to serve a second non-consecutive term. Both recommendations would improve the institutional knowledge, skills, experience, and continuity on the Board.

To be clear, reducing the workload of Governors should not be accomplished at the expense of effective monitoring, oversight, and direction by the Board of Governors. But there are more and less time-consuming and burdensome ways of doing so. Indeed, in recent years, the Board has made a number of smart changes in its operations that have reduced the workload of Governors without sacrificing its oversight and governance capabilities, *e.g.*, expanded use of a Consent Agenda and an improved appointment process. But these efforts have been *ad hoc* and have not kept pace with changes that have added to the workload of Governors.

The Board of Governors should establish a formal process to reduce its workload. In many respects, good governance practices can help to reduce workload. Consensus regarding the proper role of the Board can help it place limits on its agenda and on when and what it delegates to WSBA staff or other groups. And wise use of an Executive Committee can free up time for Governors. Not surprisingly, the various means to reduce workload are the same as those suggested in Section V and VI.A above for improving governance.

In addition, the Board of Governors should further reduce the number of meetings from seven to six (or even less). Such a change will force the Board to re-examine what it does and improve efficiency. Existing responsibilities should be reviewed. Simply because a responsibility has always been assumed by the Board or has been assigned to the Board should not end the inquiry. The Board should ask why it has assumed or been assigned the responsibility and whether or not it can be competently be carried about by another group.

For example, how beneficial is the Board of Governors liaison role to the Board and to the groups that the liaisons serve? Are there alternative means to meet the needs of the Board and those groups? Rather than providing a liaison to each section, should there be a single liaison available to field questions and concerns from any section? Should the Board provide individual liaisons only to those groups whose work requires consistent input and communication from the Board? Could WSBA staff provide the necessary connection point for others? Is there a better format for meeting materials and WSBA staff reports that tees up the key questions and issues for quicker and easier consumption?

The WSBA staff should be tapped for ideas. Because of their role in supporting the Board, they may have good ideas on how to reorganize and streamline tasks and materials more efficiently. In some instances, reducing the Board workload might require changing court rules or long-standing practice.

Additionally, as with board governance, it is critical that any effort to reduce workload is not a one-time evaluation but rather a permanent on-going process. The WSBA is a dynamic and complex organization. There will always be new issues and challenges competing for the Board's attention. Constant vigilance and adaptation is required to ensure that the Board's workload remains reasonable and well-managed.

VII. STATE BAR ACT: ISSUES AND RECOMMENDATIONS

The continued existence of the State Bar Act despite the Supreme Court’s assertion of authority over the WSBA leads to questions regarding the authority and status of the organization. What is the WSBA? Is it a wholly public agency, and if so, should it be regarded as an agency within the judicial branch? Or does it retain some quasi-private aspects?⁴

We surmise that the Legislature adopted the State Bar Act, creating the WSBA, to ensure that the entity could enter into contracts, hold and dispose of property, and sue and be sued. The Legislature had to create it “as an agency of the state” (RCW 2.48.010) because Article XII, Sec. 1 of the Washington State Constitution bans the statutory creation of individual private corporations, and Article XI, Sec. 10 forbids the statutory creation of individual local government corporations.⁵

But the Supreme Court has made it clear, based on separation of powers, that it holds ultimate authority over the regulation of the Bar, the practice of law, and the WSBA itself—notwithstanding conflicting statutes. *State ex rel. Schwab v. Wash. State Bar Ass’n*, 80 Wn.2d 266, 272, 493 P.2d 1237 (1972); *Graham v. State Bar Association*, 86 Wn.2d 624 (1976); *WSBA v. State of Washington*, 125 Wn.2d 901 (1995). For example, in *Schwab*, the Court held that “membership in the state bar association and authorization to continue in the practice of law coexist under the aegis of one authority, the Supreme Court.” 80 Wn.2d at 269. The Court has also enacted a number of rules governing admission to practice, discipline of attorneys, and related matters. Importantly, the Court enacted GR 12.1 which outlines permissible, required, and impermissible activities of the WSBA.

Whatever the legal status of the WSBA, it is clear that over the past 80 years, the rules, orders and cases from the Supreme Court have created a large number of inconsistencies with the State Bar Act. These include:

- RCW 2.48.060 (Admission and Disbarment). This statute provides that the Board of Governors, subject to the Supreme Court, is responsible for “fixing” the qualifications for admission to practice and the rules of professional conduct. In practice, the Board recommends those qualifications and rules. They are formally “fixed” by the Court by court rule.
- RCW 2.48.130 and 2.48.140 (Membership “Fees”). These statutes provide for annual “membership fees,” which the Supreme Court and the WSBA now characterize as “license fees.” Annual fees for inactive members are statutorily fixed at two dollars, but the Board of Governors with the Court’s approval, now enforces an inactive member fee of \$200.
- RCW 2.48.150 (Admission Fees). This statute sets the fee for a new lawyer’s application for admission and to take the bar exam at \$25, and for an attorney admitted elsewhere the

⁴ See, Jay A. Reich and Taki V. Flevaris, *Memorandum to Washington State Bar Association Board of Governors* at 5-8 (July 2, 2013).

⁵ For more detailed background, see Robert D. Welden and Jean K. McElroy, *A History of the Washington State Bar Association: Facts, Law, Organization and Who We Are* (June 2012).

fee at \$50. These amounts have been superseded by court order and are currently set at \$585 and \$620 (plus an investigative fee), respectively.

- RCW 2.48.190 (Qualifications to practice). This statute requires that a Washington attorney be a United States citizen and a Washington State resident. Both requirements have been superseded by Supreme Court Admission to Practice Rules and by rulings of the United States Supreme Court. *See In re Griffiths*, 413 U.S. 717 (1973); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).
- RCW 2.48.021, 2.40.070-100, 2.48.165, 2.48.166, 2.48.180, 2.48.220, 2.48.230 (Admission, Suspension, Disbarment, Specific Unlawful Practices). Among other things, these statutes suggest that the Supreme Court suspend lawyers for nonpayment of education loans or for noncompliance with certain DSHS orders, and make unlawful a number of practices such as fee sharing with non-lawyers or allowing non-lawyers to hold an investment or ownership interest in a legal practice. RCW 2.48.230 purports to mandate that the “code of ethics of the American Bar Association” shall be the standard of ethics for the members of the bar of this state.” These are all matters that have come entirely under the control of the Supreme Court and are governed by the Rules of Professional Conduct and the Admission to Practice Rules.
- RCW 2.48.210 (Oath of Admission). This statute prescribes a specific oath on admission to the practice of law. The 1917 language of the oath is somewhat quaint, including a promise not to “delay any man’s cause for lucre or malice.” In any event, it has been replaced by an oath set forth in APR 5(e).

Generally speaking, most of the State Bar Act’s provisions have been wholly or partially superseded by court decisions and court rules. At the same time, portions of the Act continue to be followed as a matter of practice, most importantly RCW 2.48.010 (creating the WSBA as an entity), RCW 2.48.030-.035 (prescribing the membership of the Board of Governors and the selection of certain Governors from congressional districts), and RCW 2.48.180(2)(a) (making the unlicensed practice of law a gross misdemeanor). This creates confusion as to the structure and regulation of legal practice in Washington State.

Recommendation: Repeal most provisions of the State Bar Act, with that statute then serving simply to create the WSBA as an agency “within the judicial branch” under the Supreme Court’s control.

To clarify the authority and status of the WSBA, the substantive portions of the State Bar Act (RCW ch. 2.48) should be repealed. RCW 2.48.010 should remain and be simplified: it would create the WSBA as “an agency of the state within the judicial branch” and would acknowledge that the Supreme Court has “full control over the powers, governance and operation of the Washington State Bar Association and over the practice of law.” *Id.* The Court then would be statutorily responsible for establishing the operating parameters of the WSBA by court rules that presumably would be more extensive than GR 12.1. This approach would also recognize and formalize the reality that has evolved over the past 80 years. It would clarify that the WSBA is an entirely public agency. And it would provide the Court with the flexibility to adjust the details of WSBA governance from time to time (including the size and composition of the Board of

Governors) in order to protect the public interest and to respond to changes in the practice of law and the judicial system. The only other section of Ch. 2.48 RCW that should be retained is a provision outlawing the unauthorized practice of law. This should remain either in Ch. 2.48 or in Title 9A, the State's Criminal Code.

If the recommendation above cannot be carried out in full in the near future, it would still be beneficial to repeal those portions of Ch. 2.48 RCW that are directly contrary to court rule or are outdated, including many of those listed above in this section. The sections that are currently most operative would be left intact, including the formation of the WSBA (RCW 2.48.010) and the establishment of unlicensed practice as a crime (RCW 2.48.180(2)(a)). These adjustments might be practicable with a modest commitment of WSBA time and effort, and with the Supreme Court's support.

VIII. NEXT STEPS

The concerns and recommendations outlined in this report are the first step to improving governance of the WSBA. They provide a template for change. But the next steps lie with the Supreme Court, the Board of Governors, and the WSBA Executive Management Team. Each is a key stakeholder in governance of the WSBA and so each should be involved in the process moving forward. That being said, leadership from the Court is critical. The Board that will receive our report is vastly different than the Board that authorized our Charter; the presidency of the Board has changed twice and more than half of the Board has been replaced. Nonetheless, the Board has shown great interest and attention to this report. But the Board will change again as it considers our report in the coming months. In September 2014, a new president will assume office, presiding over a Board with six first-year members. Even if continuity can be maintained, the Board will be under strain as it works to get the new members up the learning curve while managing its extensive agenda. Court leadership can help sustain the momentum created by this report, keeping governance as a priority topic.

Specifically, we recommend that the Supreme Court convene a workgroup that includes no more than three representatives each from the Court, the Board of Governors, and the WSBA Executive Management Team to consider the issues and recommendations outlined in this report. Not all of the issues and recommendations require consensus or collective decision-making to implement. But the workgroup may be a useful forum for the stakeholders to hold each other accountable for appropriately and thoroughly vetting those portions of the report that apply only to themselves.

As for prioritization, we recommend that the workgroup consider whatever is easiest to implement first. For example, the Board of Governors could easily convene an Executive Committee, initiate a process to reduce its workload, and implement some of the suggestions made to improve governance (e.g., annual performance evaluation, “Ideas for Improving the Board” agenda item, training of new governors). These should be relatively uncontroversial. Implementing them would engage the entire Board’s attention on the problem of governance and could create some early successes that may help sustain momentum as the workgroup tackles the more difficult recommendations. As reflected in Section VII, we do not believe amending the State Bar Act is a high priority. It is not necessary to implementing the other recommendations in this report. Most of those recommendations can be implemented by court rules or orders and adjustments to the WSBA Bylaws. Political considerations should dictate when and how amendment of the State Bar Act takes place.

APPENDIX A:

Recommendations

SUPREME COURT AND THE WSBA

- The Supreme Court should meet with representatives of the Board of Governors and the WSBA Executive Director at regular and frequent intervals during the year to discuss priorities and ongoing projects.
- Amendments to the WSBA Bylaws should be approved by the Supreme Court.
- The dismissal of the WSBA Executive Director or the Chief Disciplinary Counsel should be subject to veto by the Supreme Court.
- The Supreme Court should re-evaluate the placement of certain Boards under the WSBA as well as their funding. For those that remain under the WSBA, the Court should help ensure adequate funding.

THE BOARD OF GOVERNORS AND THE WSBA

- Clarify the duties of the Board and Governors in the WSBA Bylaws and other relevant materials.
- Change the name of the Board of Governors to the Board of Trustees and change the name of the Washington State Bar Association to “The State Bar of Washington.”
- The Board of Governors should provide governance training to new Governors and adopt practices that help to define the respective roles of the Board vis à vis WSBA staff and provide opportunities for self-reflection and self-improvement.
- The Board agenda should focus on strategic matters.

ORGANIZATION AND SELECTION OF THE BOARD OF GOVERNORS

- Increase the Governors terms to four years and permit former Governors to serve a second term at a later date.
- The WSBA President should be selected from the Board of Governors and continue to serve as a voting member of the Board.
- Two public, non-attorney members and one LPO / LLLT member should be added to the Board of Governors. These three members should be appointed by the Supreme Court.
- To accommodate the additional Governors, the number of elected positions should be reduced to nine. The three current “at-large” positions should be retained to ensure participation by a “young lawyer” and members that reflect historically under-represented groups. This would provide for a Board of 15 persons, one of which would be the President.

- A Search Committee, appointed by the Board of Governors, should solicit qualified candidates for the Board.
- The WSBA should provide more information regarding candidate qualifications.

BOARD ORGANIZATION AND WORKLOAD

- Establish an Executive Committee to address routine and non-strategic matters on behalf of the Board of Governors.
- Establish a permanent process designed to reduce Governor workload.

STATE BAR ACT

- Repeal most provisions of the State Bar Act, with that statute then serving simply to create the WSBA as an agency “within the judicial branch” under the Supreme Court’s control.

APPENDIX B:

Governance Task Force Charter



WSBA

WASHINGTON STATE BAR ASSOCIATION

GOVERNANCE TASK FORCE

CHARTER

The present form of governance of the Washington State Bar Association (WSBA) was originally established in the Washington State Bar Act, which was adopted in 1933. The WSBA BOG had begun a process of program review in fiscal year 2010-2011 and that process was spurred with the passage of the Referendum in 2012.

The WSBA BOG believes it is appropriate to undertake a review of how the WSBA is operated in light of the fact that the times and circumstances surrounding the operation of the organization have changed dramatically since 1933. Therefore, the WSBA BOG authorizes and creates the Governance Task Force to undertake an in-depth review of the governance of the WSBA, including but not limited to the following aspects of WSBA governance:

- WSBA overall governance, including but not limited to structure of representation; boards and committees; staff; and financial matters
- Continuity of operations from year to year
- Interrelationship between staff and governing body
- Effective means of reviewing programs and goals

The Chair of the Work Group will be 2011-2012 President Steve Crossland. The Task Force membership will not exceed ten members total. Given the short timeline for the Task Force to complete its work, the Chair recommends that the membership remain small with diversity being a priority in membership selection, including diversity of experience with WSBA.

The Chair of the Work Group will make an informational interim report to the Washington State Bar Association Board of Governors and Washington State Supreme Court within six months of appointment and a second interim report, for information and comment, within the following six months. Thirty days after disseminating the second interim report for review and comments, the final report with recommendations shall be prepared and submitted to the Washington Supreme Court and the Washington State Bar Association Board of Governors for consideration and action. Copies of the final report and recommendations will be submitted to all other interested stakeholder groups.

APPENDIX C:

Governance Task Force Roster

Members

Rima J. Alaily (Chair) Assistant General Counsel, Microsoft Corporation, Redmond

Ellen Conedera Dial (resigned), Perkins Coie, Seattle

Steve Crossland (resigned), Crossland Law Office, Cashmere

Loren S. Etengoff, Law Offices of Loren S. Etengoff, Vancouver

Nancy Isserlis, Office of the City Attorney, Spokane

Leland B. Kerr, Kerr Law Group, Kennewick

Douglas C. Lawrence, Stokes Lawrence PS, Seattle

Carla Lee (resigned), King County Prosecuting Attorney's Office, Seattle

Craig A. Sims, Seattle City Attorney's Office, Seattle

Hugh D. Spitzer, Foster Pepper PLLC, Seattle

BOG Liaison

Paul A. Bastine, Spokane

WSBA Staff

Jean McElroy, General Counsel / Chief Regulatory Counsel

Margaret Shane, Executive Assistant

APPENDIX D:

Individuals and Organizations Who Provided Input to the Governance Task Force

Professor Tom Andrews, WSBA Attorney

David L. Broom, WSBA Attorney

Greg Dallaire, WSBA Attorney

Ellen Conedera Dial, WSBA Attorney and former President of the WSBA

Joe Dunn, CEO, State Bar of California

Anthony Gipe, President-Elect 2013-2014, Washington State Bar Association

Douglas D. Lambarth, WSBA Attorney

Paula Littlewood, Executive Director, Washington State Bar Association

Patrick Palace, President 2013-2014, Washington State Bar Association

Michelle Radosevich, President 2012-1013, Washington State Bar Association

Robert Weldon, Former General Counsel, Washington State Bar Association

Access to Justice Board

Asian Bar Association (Helen Ling)

Board of Governors Workgroup (Patrick Palace, Daniel Ford, Brian Kelly, Judy Massong, and Wilton Viall)

Limited License Legal Technician Board

Limited Practice Board

Loren Miller Bar Association (Elijah Ford)

MCLE Board

Practice of Law Board

Washington State Bar Association Executive Management Team (Francis Dujon-Reynolds, Megan McNally, Deborah Carnes, Doug Ende, and Kathryn Leathers)

Washington State Bar Association Members via Town Hall Discussion

Washington Supreme Court

Sarah Jordan (member of Washington Women Lawyers)

Washington Young Lawyers Committee (Helen Ling)

APPENDIX E:
Governor Responsibilities

Governors are the fiduciary of WSBA assets. These assets include cash and investments, the organization’s good name and the organization’s goodwill with members. Assets must be managed under a “good faith/prudent care/best interests” standard. Meeting this standard includes the exercise of sound business principles, attendance at meetings and the exercise of due diligence in making decisions affecting the organization’s assets.

The office of governor is a three-year commitment from October through the end of September three years later. Governors may only serve one term unless the initial term is 18 months or less.

A director acts as part of a board. Anyone serving as a director of a corporation must be aware of what a director is – and isn’t. As a body, a board of directors has considerable powers. In most corporations the board plays a substantial part in the beginning or end of any corporate activity, and the board appoints or removes corporate agents, executives, and officers. In contrast, an individual director, acting alone, has almost no power: rather each director exerts her or his power as one participating in the board of directors. (Guidebook for Directors of Nonprofit Corporations)

It is expected that a governor will:

- Participate in the New Governor Orientation Program.
- Attend eight BOG meetings per year – generally all day Friday through Saturday morning.
- Be a member of 2 to 3 BOG committees and some special committees (serve as chair on some generally in the third year).
- On a rotating basis with other governors, attend various law-related events such as annual dinners, award events, special events, etc.
- Be a liaison and attend key meetings for 3 to 5 WSBA sections, standing committees and other boards or commissions as assigned by the president.
- Occasionally represent the WSBA for public speaking and appearances.
- Using WSBA electronic distribution groups, communicate periodically with constituents.
- Establish contact and maintain relationships with local bar associations in their congressional district.
- Be a WSBA-BOG liaison to minority or specialty bar association(s).
- Attend section and committee orientation meetings at the WSBA.
- Approve the hiring and compensation level of the executive director.
- Assist with the recruitment and orientation for a replacement governor and president when in their district.
- Conduct leadership recruitment and recommend constituents for appointments.
- Appoint standing committee members annually.
- Maintain the confidentiality of information discussed in executive sessions.
- Refrain, as required by the WSBA bylaws, from endorsement of political candidates for offices reserved for lawyers.

Most governors find that they can meet these commitments in about 40 hours a month.

Revised July 2009 (NOTE addendum dated April 2006)

ADDENDUM to GOVERNOR RESPONSIBILITIES

Excerpt of the WSBA President and Governor Selection Task Force Report

(Adopted by the Board of Governors in April 2006)

- Assign to each Governor whose term is expiring and whose position will be filled by the election of a successor, the responsibility to chair a committee of not more than 5 persons to recruit 2 or more candidates to file for the position.
 - Diversity among committee members is desired, and might include, *inter alia*, former Governors from that district, local bar presidents or officers, and representatives of minority and specialty bars.
 - The outgoing Governor should be reminded by the Executive Director, or her delegate, of this responsibility not later than November 1 of the Governor's third year.
 - The outgoing Governor should report on the work of his or her recruiting committee at the January BOG meeting.
- Immediately upon receipt of the application, post on the WSBA website the name and district of each individual who files for election to the BOG.
- Make available to each candidate for the BOG, without charge and for a one-time use only, the ability to contact all members residing in the candidate's district by e-mail and by direct mail. For example, direct mail contact could be accomplished through providing address labels, or by including candidate flyers in the balloting material, while e-mail contact could be accomplished by WSBA forwarding candidate messages to all district members.
- Develop a description of the duties and responsibilities of a member of the BOG, the time commitment, representative issues that come before the Board for decision, and the rewards and satisfaction of service on the Board of Governors, and publicize the information to the WSBA membership prior to the deadline for each BOG election.
- Set up a direct outreach system to local and specialty bars to assist in recruiting candidates for the BOG.