

WASHINGTON STATE BAR ASSOCIATION

BOARD OF GOVERNORS SPECIAL MEETING - ETHOS

Minutes

WSBA Offices, Seattle, WA

April 23, 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 Friday, April 23, 2022, at 9:09 AM. Governors in attendance were:

Hunter Abell
Sunitha Anjilvel
Lauren Boyd
Pres. Elect Daniel D. Clark
Jordan Couch
Matthew Dresden
Carla Higginson
Tom McBride
Treas. Bryn Peterson
Brett Purtzer
Alec Stephens
Brent Williams-Ruth

Also in attendance were Elly Baxter, Executive Administrator Shelly Bynum, Michael Cherry, Chief Disciplinary Counsel Doug Ende, Gov. Elect Kevin Fay, Cameron Fleury, Chief Regulatory Counsel Renata Garcia, Miryam Gordon, Nancy Hawkins, Robert Krabill, Dusty LaMay, Rajeev Majumdar, Carolyn MacGregor, Executive Director Terra Nevitt, Chief Communications & Outreach Officer Sara Niegowski, Gov. Elect Nam Nguyen, Ed Pesik, Webcast Specialist Clay Peterson, Gov. Elect Kari Petrasek, Director of Advancement Kevin Plachy, Genissa Richardson, Parliamentarian G. Kim Risenmay, David Rose, Immediate Past Pres. Kyle Sciuchetti, John Straight, Member Services & Engagement Manager Julianne Unite, and Barnaby Zall.

Comments from the Membership and the Public, Part 1 ([link](#))

John Straight commented that he was primarily present to observe on behalf of the Criminal Law Section and noted that the Section was generally in favor of maintaining the existing bar structure.

Discussion followed, including a suggestion that an opportunity for comment be provided once the Board has something to react to; a perspective that despite the US Supreme Court denying cert, there is still the Oregon case and the Washington Supreme Court's request that the Board consider a contingency plan as well as examine the desired structure of the organization.

David Rose highlighted some of the issues that are important to the Litigation Section, including legislative work related to the administration of justice in the state. As an example, he noted the impacts of moving away from in-person trials. He commented that he believes this work is important to the state and is worth preserving. John Straight echoed this comment noting the legislative work of the Litigation Section and distinguished it from the work of other associations, which do not represent the same cross-section of viewpoints that the sections do.

There was a question from a member of the Board of Governors as to whether the views being presented represent the view of section members or the view of the executive committees. In response, the criminal and litigation section represented noted that the executive committees had not yet taken formal positions and had not yet sought the feedback of section members. Discussion followed about the role of sections executive committees.

Elly Baxter, President of the International Practice Section commented that the section had not felt ready to reach out to section members to education them on the issues, and that the Executive Committee is able to represent the section. She further commented that the Section Executive Committee is advocating that the structure of WSBA not change, and she highlighted the work of the section. She noted that the work could not be done without the support of the WSBA staff and highlighted the value the name WSBA adds value to the work the section is able to do, particularly in continuing legal education.

Nancy Hawkins spoke on behalf of the Family Law Section. She noted that while the section has identified things they would like to see changed about the WSBA, they believe overhauling the structure would be a mistake for the sections and the WSBA. She noted that the section benefits other sections, benefits WSBA, and receives a benefit from being a part of WSBA. She noted that considering the US Supreme Court denying cert in the three cases challenging the structure of integrated bars, the answer to question number one is no and that WSBA should not be concerned about a sudden change to the structure. In terms of question number two, Ms. Hawkins explained that the section believes it is not possible to develop a contingency plan because there are too many possibilities to consider. The Section advises waiting until there is a specific case that affects WSBA. She commented that the section believes that WSBA should be proud of its work and the effectiveness of the Keller deduction. She commented on the feedback from dissenting members of the bar association and noted that those concerns can be addressed in other ways, and more effectively, in a bar that does more than licensing and discipline. Ms. Hawkins commented on the value of WSBA sections being able to advise the legislature. She noted that sections would struggle to succeed without the WSBA infrastructure, but also noted that sections pay for that support. She spoke in support of the Keller Deduction process, which she noted has been upheld by courts and in her view is better than the approach other bar associations take. Ms. Hawkins commented on the perspective that WSBA should not be engaged in any activities they don't agree with and noted the benefits of those programs to those that do need it and are supported by it, including member wellness programs and CLEs. She noted some of the challenges the organization has faced and noted that all organizations have those challenges, and her view that a structure change will not resolve them. She shared her perspective on the cases and why she believes WSBA would be in a good position to defend a challenge. Finally, Ms. Hawkins commented that focusing on the development of contingency plans will detract from other important work that WSBA should be engaged in.

Director of Advancement Kevin Plachy asked for comment from section leaders as to what the impact would be to sections if the Ninth Circuit were to identify commenting on substantive legislation as non-germane and not appropriate for integrated bars to engage in. Feedback included that not all comments on legislation are clearly "substantive" and could be considered procedural and that WSBA should work to distinguish some of this legislative work as germane because it does impact the practice of law and the administration of justice; that WSBA should make the comments, should be proud of the comments, and should fight for the right to make them; that sections could continue to function, but that legislation is a significant part of the work; and a perspective that it would be tragic if WSBA sections could not comment on discriminatory legislation. Discussion followed, including that there are ideas for the ideal structure of the WSBA that might allow the legal profession to engage more robustly in legislative work and a perspective from a section leader that WSBA is an ally to sections.

Chief Disciplinary Counsel Doug Ende sought comment on the hypothetical scenario where WSBA remained, but the regulatory functions were returned to the Court and/or the legislature. Responses included a concern that the overall cost to lawyers will go up in that scenario and a perspective that most sections' activity does not raise issues; a concern that lawyers would lose their opportunity to input on the regulatory aspects of the organization's work; that legal professionals would lose the privilege of self-regulation and a perspective that we are capable of doing that well and worth holding on to; a perspective that question three doesn't presuppose a legal problem, but rather asks what the ideal structure would be and that the focus of the discussion feels too narrowly focused on solving problems; a perspective that the cost of being licensed and also participating in a voluntary association – possibly on a state and local level – may outweigh the concern for some of paying for some non-germane activities; and a perspective that the WSBF might be a useful model to consider and a perspective that legislative work is critical and difficult to do under the current model.

Michael Cherry made comments on behalf of the Practice of Law Board. He commented that WSBA provides the board with access to specialized knowledge and resources that are centralized at the WSBA. He expressed a concern that if WSBA were limited to regulatory work, smaller counties would not be supported by a voluntary organization and other legal professionals would likely not be supported by a voluntary organization. He noted that the POLB benefits greatly from the infrastructure and expertise that WSBA is able to provide. In terms of challenges, he noted the speed at which the organization moves, which is not fast enough to address the challenges and that the work being done to discuss the bar structure is taking up capacity and delaying work that should be done in the areas of access to justice and diversity, equity and inclusion. He questioned whether WSBA is keeping up with the needs of the public and asked the Board to look for ways to move more quickly.

Discussion followed, including a perspective that given the denial of cert by the US Supreme Court, the imminent threat is gone and so the larger issue is GR 12 and other potential remedies, including amending GR 12; that GR 12 is being looked at; a perspective that GR 12 and the structure of WSBA provide value that will be lost if that activity is separated from WSBA; a concern that a statewide voluntary bar would not be viable; and a perspective that the legal issues are not yet resolved.

The Board took public comment from Nancy Hawkins that there are other activities of the organization that are not subjected to a GR 12 analysis and that members are much more concerned about some of these other activities than to section comments on legislation. Discussion followed, including a perspective that the overall process is not focused on sections, but that it has been the focus of this discussion due to the structure of the meeting; and that the Board will be looking at potential scenarios in the next meeting.

Comments from the Membership and the Public, Part 2 ([link](#))

The Board engaged in discussion about how to gather input from Minority Bar Associations.

Hearing no one wishing to make comment, Pres. Tollefson asked the Board whether the challenge with the organization is a matter of size. Responses included that it is a matter of history and not size; and that geography and concentration of lawyers can be a factor.

Discussion followed as to whether GR 12 would apply to sections if they were a separate, voluntary entity; the history of GR 12 and the perspective that GR 12 could be stricken or amended by the Washington State Supreme Court if the structure changed; that GR 12 is out-of-alignment with First Amendment development; a perspective that it will be more productive to answer these questions against any proposals we might develop; that splitting off the sections from WSBA would have a different and more negative impact than the impact of rebranding an organization; that the constitutional issues are more central to the discussion than GR 12; that if a separate entity were set up for legislative work it would likely be broader than just section comment; a perspective that the separate organization would not necessarily have less influence; that it is relevant that no section has requested to be spun off; a perspective that WSBA may not be the right entity to create a separate entity; that sections are part of the bar despite collecting voluntary fees for participation in them and are likely stuck with our limitations; the distinction between *Keller* precedent and the freedom of association at issue in the *Crowe* case; the challenge of reconciling the *Keller* language with the GR 12 language; that the staff will make some broad assumptions in terms of bringing models for the Board to explore; and clarification as to who the decision maker will be in terms of WSBA structure and scope of work.

Comments from the Membership and the Public, Part 3 ([link](#))

The Board took public comment from Nancy Hawkins who underlined the point that no sections are asking to be made a separate entity or to have a safe harbor to engage more robustly in legislative work, noting that WSBA is not the organization for some legislative advocacy and lawyers have other avenues for legislative advocacy. She further commented that if every section had to be a separate entity, they would not survive. With regard to sections forming an organization together, Ms. Hawkins noted that they would likely all have to agree or develop a process for approving legislative comment and therefore the problem would not be resolved.

John Straight commented in support of Nancy's comments. He further commented that at the time GR 12.2 was adopted there was debate as to whether sections would be included under the rule. As a result, an exception to the process was developed for sections to address concerns about the need to comment on legislation timely.

Discussion followed regarding the significance of a lack of member engagement; and a perspective that the organization is generally strong and should not be changed unless a much better model is demonstrated. There was a recitation of some of the online reviews of WSBA and a perspective on what those might tell the Board. Discussion continued, including a perspective that section speech is WSBA speech and under the current structure must follow the rules; whether sections are speaking agents for WSBA; a perspective that the organization should not become hyper-concerned about not permitting legislative comment for fear of being sued; a note that the Fifth Circuit rejected the idea that sections are voluntary because their speech is regulated by the governing body of the bar association; whether if the BOG stopped regulating the speech and were self-funded that would mean there was no longer a first amendment issue; a perspective that it makes sense that sections are a part of WSBA, because if they aren't, what are they; whether a disclaimer indicating that the speech is separate would protect WSBA from first amendment claims; a perspective that sections are not a separate entity and that the use of disclaimer would not change that.

John Straight further commented that WSBA should do away with the screening of section speech and not label it as part of the bar association. Gov. Elect Kevin Fay read the factors from the *McDonald* noting that those are all factors that WSBA could change.

Board discussion followed, including an example of what happens when sections have conflicting views and a perspective that there's value to that process, but that sections should be able to distinguish themselves and their perspectives; and an example of a section comment having an impact on WSBA's reputation with the legislature and a perspective that the section cannot be distinguished from WSBA, which gives rise to a first amendment issue. Nancy Hawkins commented on the value of having unique perspectives from different sections. Elly Baxter commented on how sections at WSBA compare to sections at other bar associations. John Straight commented that the focus should be on getting as many perspectives as possible to the legislature and not on trying to speak with one voice.

Executive Director Nevitt provided an update on future agenda topics. There was a suggestion to add a discussion of WSBA governance.

ADJOURNMENT

Pres. Tollefson adjourned the meeting at 3:45 PM without objection.

Respectfully submitted,

Terra Nevitt

Terra Nevitt

WSBA Executive Director & Secretary