

WASHINGTON STATE BAR ASSOCIATION

BOARD OF GOVERNORS SPECIAL MEETING

Public Session Minutes

Seattle, WA

December 17, 2018

The Special Meeting Public Session of the Board of Governors of the Washington State Bar Association (WSBA) was called to order by President Bill Pickett on Monday, December 17, 2018, at 12:00 p.m. at the WSBA Conference Center, Seattle, Washington. Governors in attendance were:

Michael John Cherry
Daniel D. Clark (phone)
Peter J. Grabicki
Carla Higginson
Kim E. Hunter
Jean Y. Kang
Russell Knight (phone)
Christina A. Meserve
Athan P. Papailiou
Kyle D. Sciuchetti
Alec Stephens
Paul Swegle
Judge Brian Tollefson (ret.)

Also in attendance were President-elect Rajeev Majumdar (phone), Executive Director Paula Littlewood, General Counsel Julie Shankland, Chief Disciplinary Counsel Doug Ende, Chief Regulatory Counsel Jean McElroy, Chief Operations Officer Ann Holmes (phone), Director of Advancement/Chief Development Officer Terra Nevitt, Chief Communications and Outreach Officer Sara Niegowski, and Executive Assistant Margaret Shane.

President Pickett welcomed everyone in attendance. The Board and guests introduced themselves. He then explained the background and authority set forth in the WSBA Bylaws for

calling Special Meetings, and asked the Board for individual verbal confirmation of whether they had requested this Special Meeting. Governors Cherry, Grabicki, Higginson, Hunter, Knight, Swegle, and Tollefson confirmed that they called this Special Meeting.

CONSIDERATION OF PROPOSED PROCESS FOR LITIGATION MATTERS

Discussion ensued about the multiple draft litigation process proposals before the Board. There were three proposed processes presented to the Board for consideration: (1) the process contained in the December 12, 2018, memo, which had been posted to the BOG webpage as public session materials for this meeting; (2) the process amended by Governors Clark and Grabicki and posted to the BOG webpage as late materials shortly before the meeting; and (3) the process amended by Governor Cherry that was distributed by Governor Higginson at the meeting.

Governor Grabicki explained the background of the first two proposals: one in Public Session Materials (#1 in paragraph above) and one in Late Materials (#2 in paragraph above), and noted that the original proposal in the Public Session Materials contained major flaws in that it did not take into account the fact that the Board has no role in the areas of admissions, licensing, discipline, and character and fitness. A second process, contained in Late Materials, was being proposed to address these flaws. Governor Tollefson moved to adopt a third proposed process drafted by Governor Higginson with amendments by Governor Cherry (#3 in paragraph above), which was then distributed at the meeting by Governor Higginson. Governor Tollefson clarified that the proposed process in his motion refers to the version distributed at the meeting by Governor Higginson (#3 in paragraph above). President Pickett asked if the process distributed at the meeting had been sent to the membership for review and the reply was no. He then asked the Board which version of the proposed process the Board would like to discuss at this meeting and noted that he hoped the Board would work with a version that had been available for review by the membership prior to the meeting. Governor Higginson moved to amend Governor Tollefson's motion to have the Board adopt the version of the proposed process that was posted on the WSBA website in conjunction with the announcement of this Special Meeting (#1 in paragraph above). Governor Tollefson clarified that the version Governor

Higginson was referring to in her motion is the version included with the cover memo dated December 12, 2018, and posted to the WSBA webpage as public session materials.

Governor Papailiou stated that the Board should not proceed to adopt any version of the proposed process without advice and consultation with outside counsel. He then requested the names of those who authored the December 12, 2018, version and Governor Stephens joined in the request so that he would know who to direct his questions to. Governor Higginson declined to reveal the names of the authors and stated that, with the consent of the Governors who gave notice of this Special Meeting, she would be the point person to respond to any questions the Board might have regarding the proposed process. Those Governors gave their consent. Governor Papailiou noted that, if the proposed process is approved, it would be the first time the Board would involve itself in litigation matters at such a level and requested an explanation of the motivation and timing of the proposed process. Governor Higginson explained that she had noticed that the Board had not been consulted about the litigation process or been told information in a timely matter, in particular in regard to selection of counsel, and as such the Board had not been allowed to do its job. When asked whether the proposed process was one that would be intended to apply to dealing with litigation on an ongoing basis, or whether it would be meant to intervene in current pending matters, Governor Higginson replied that the process was meant to address litigation on an ongoing basis, but the Board would decide by majority vote whether the process would apply to current pending matters. Governor Papailiou again asked for the names of the authors of the proposed process, and Governor Higginson again declined to reveal the names. Discussion ensued regarding whether the proposed process, if adopted, would violate the Washington Supreme Court's direction not to amend the WSBA Bylaws; the rarity of a Board being involved in a day-to-day process of litigation matters for an entity and whether the Board has the expertise to do so; and the desire to clarify the process by which the Board is involved in litigation.

Governor Meserve asked why the Board's usual timeline and process for proposed matters was not being followed in order to serve the membership and adhere to the Board's stated goal regarding transparency: publication, comment, discussion at first reading, then action at a later

meeting, rather than rushing through to a resolution at this meeting resulting in a substantive change in the way the Board conducts its business. Governor Higginson replied that a short timeline and change in procedure are imperative as the Board is in the midst of several issues that are moving forward and the Board needs to start acting as a Board since it is under increased scrutiny by the public regarding how it is doing its job and because of the continuing lack of understanding between the Board and staff regarding handling litigation and potential litigation matters. Governor Meserve then stated that it appears the goal is not so much an overarching process in respect to litigation on a regular basis, but an attempt to get involved in pending claims that have been the topic of discussion in the press, including a claim for \$1 million by a sitting member and Treasurer of the Board, as well as allegations involving misconduct by a member of the Board, and to influence the course of that litigation by the proposed process. Governor Higginson replied that Governor Meserve's statement was not correct and that whatever the Board decides as a majority would be applied to current pending matters as well as all litigation matters.

Governor Stephens went on record to state that this would be the worst time to try to enact this proposed process as the decision maker is wrapped up in the issue as opposed to the process. He voiced concerns regarding how much of litigation matters the Board would be taking on and stated that the Board hears a litigation report at every Board meeting, but very few questions have ever been asked concerning litigation matters. He noted that he has served on boards of other public agencies and that those board members refrain from getting in the weeds so they can focus properly on policy issues and hold their executive responsible on a day-to-day basis and receive reports from their executive. He noted that the Board is being held up as a client, but it sounds like the Board is directing counsel, and he wondered how the proposed process fits in with the role of General Counsel. He expressed concern that the proposed process was ill considered and ill timed. He stated that if the Board adopts the proposed process, the next step would be to get engaged in current pending litigation and the Board would be doing so without all the details being worked through. He concluded by stating that there was no rush to adopt the proposed process.

Governor Tollefson stated that the Board is supposed to act in the best interest of all members of the Bar and the public and have overall responsibility for the budget; the President is the chief spokesperson and is supposed to take action to execute the policies established by the Board; if there was a litigation policy in place, the Board would have heard about it by now; the Executive Director is supposed to handle the day-to-day matters of the Bar as listed in the WSBA Bylaws; however, managing potential and existing litigation are not defined as one of the Executive Director's day-to-day tasks in the WSBA Bylaws, although performing other duties as the Board assigns is listed. He concluded by stating that the Board is adopting a process that it is supposed to adopt, and that it should have already been adopted, so the President can do the job of a President and the Executive Director can do the job of an Executive Director.

Governor Swegle stated that the fact there is pending litigation is the reason to push the proposed process forward expeditiously. He explained that some of the Board felt that decisions and information had not been put before the Board quickly and transparently enough and that no input was solicited from the Board on decisions. He noted that the Board is supposed to be the ultimate authority over the Bar, except for the Supreme Court, but that several Board members have not felt that way for a while. He noted that the Board would have the ability to look at more run-of-the-mill cases and decide it does not need to be involved, but with more significant matters, especially conflicts of interest, it was important for the Board to help direct and make decisions about that litigation. In answer to an inquiry regarding how that would work when the Board is sued, Governor Swegle replied that he did not see an issue with that scenario as the Board is the ultimate authority, but the Board may need to recuse itself from some cases and that decision could be handled on a case-by-case basis.

Governor Grabicki expressed concerns regarding the proposed process: (1) it includes areas in which the Board cannot be involved and so should be carved out such as admissions, character and fitness, discipline, and licensing; (2) it does not do enough to recognize the role of the insurer; (3) it needs to be subject to provisions of any applicable insurance policy; (4) it does not deal with delegation regarding litigation; (5) it is too broad regarding case management; and (6) it gets too much in the weeds; i.e., the Board will not be choosing either a mediator or the

terms of mediation. He commended the authors for taking the first steps of drafting, and suggested that the proposed process be reworked to encompass his concerns.

President Pickett expressed concern that the proposed process was being brought forth in the midst of potential pending litigation against a Board member, and so would look protectionist. In reply to concerns raised regarding a conflict of interest because President Pickett and the Executive Director attended the mediation for a claim against the Bar and now there is a claim against the Board, as well as concerns that the Board had not been receiving information about the mediation, President Pickett replied that the Board was fully informed and discussed the mediation at a previous board meeting and selected Governor Tollefson to attend the mediation along with himself, Executive Director Littlewood and General Counsel Shankland, and that it was the consensus of the Board to move forward. In addition, the Board was fully informed at numerous meetings that there was a process being followed and the Board was fully informed after the mediation. He noted that no conflict of interest was mentioned at the Board's Emergency Meeting.

Governor Meserve asked General Counsel Shankland whether the creation of the proposed committee and the adoption of the proposed process violate the directive from the Washington Supreme Court to stop all Bylaw amendments for the time being. General Counsel Shankland responded that, in her opinion, adoption of the proposed process would violate the Washington Supreme Court's directive as well as multiple WSBA Bylaws. She explained that at the time the directive was issued, one of the proposed Bylaw amendments (now held in abeyance) was to have the General Counsel report to the Board and it appears that the Board is now attempting to accomplish that same end by saying it is adopting a policy or a process rather than a Bylaw amendment, and she stated that she did not see any authority from the Court to allow the Board to do so. In addition, she stated that the proposed process violates WSBA Bylaws article IV(b)(5) that delineates the Executive Director's responsibility for day to day operations of the Bar. Day to day operations include tasks such as insurance contracts and litigation. Articles IV(A) and VIII(A)(1) state that the Board adopts policies, differentiating between policy and operational matters. Final Board actions are subject to referendum. This

makes sense for policy decisions, but does not make sense for and it would be out of the operational decisions. If the Board is involved in day to day operations decisions, this could break the entire structure of the WSBA Bylaws—and certainly represents a change in the Bylaws which is prohibited by the Court’s letter. Article IV(C) states that Board committees are to be appointed by the President and that these committees are to make recommendations to the Board, not make decisions. In addition, the proposed process violates Articles IV(b)(1), IV(e)(1), and IV(e)(4), effectively shutting the Bar out of these communications and representations. In addition, Article VII(b)(7)(a)(4) states when Executive Session is appropriate. Committees of individual board members are not legal counsel for the Bar and any discussions in the committee may not qualify for Executive Session, attorney-client privilege may not apply, and the Executive Session Minutes could then be discoverable. She concluded by suggesting that the Board consult with the Washington Supreme Court before moving forward to adopt the proposed process.

Governor Meserve moved to table action until the January 17-18, 2019, Board meeting, and to send a letter to the Court inquiring whether the proposed process would be in violation of the Court’s directive. Discussion ensued, but Governor Higginson interrupted and insisted the Board follow *Robert’s Rules of Order*, which state that no discussion can be held on a motion to table. Executive Director Littlewood referred to the grid regarding *Robert’s Rules of Order* motions that are in the front of Board materials at every meeting and explained that there are two different forms of tabling and that tabling to a time certain is debatable.

Comments from guests included potential conflict of interest if the Washington Supreme Court gets involved in WSBA litigation; confusion over why the Board is trying to take on lawyer duties when it considers itself the client; the possibility of losing insurance coverage if the Board gets too involved in litigation matters; and the importance of cooperating with any insurance carrier.

President-elect Majumdar stated that the Board had not exercised its full fiduciary authority over the past two years and that the Board should be overseeing litigation matters. He

suggested adopting an interim process and then tweaking it in the future if necessary. Governor Swegle stated that the Supreme Court's directive usurping large chunks of Board authority should be limited narrowly to the language of the letter and that he had no concern if the Board takes action and the Court decides to revisit this and further limit the authority of the Governors. He stated that the Board cannot be hamstrung and if that is the case, then disband the Board. Governor Higginson stated that she is strongly opposed to the motion on the table that calls for waiting until the Board hears from the Court, and that she disagrees with General Counsel Shankland's completely wrong analysis of the Bylaws. She stated that the proposed process is not an amendment to the Bylaws, but is simply a litigation process no different from any that a board would have, and that the Board is not recognized as the governing body of this organization and should be. President Pickett clarified that Governor Meserve's motion was to table action until the January 17-18, 2019, Board meeting. Discussion ensued regarding which proposed process to discuss and vote on; not voting on any proposed processes due to timing and the appearance of self-dealing; obtaining advice of coverage counsel prior to voting on any proposed process; taking the time for more thoughtful drafting and discussion prior to voting; and the appearance of attempting to influence current potential litigation. In response to an inquiry, General Counsel Shankland clarified that if the motion to table passes, no further work can be done on the proposed process to which the motion refers; however, inquiry can be made of the Washington Supreme Court regarding whether the proposed process is an attempt to circumvent its directive regarding the WSBA Bylaws, and continue the discussion at the Board's January 17-18, 2019, meeting, or submit a new proposed process for discussion at the January Board meeting. Governor Meserve's motion to table action until the January 17-18, 2019, Board meeting failed 6-7.

At this point Governor Tollefson clarified that he accepted Governor Higginson's earlier motion to amend as a friendly amendment, making the pending motion one to approve the process identified in the December 12, 2018 memo. Concern was expressed by Board members and guests that the discussion regarding the proposed process was confusing and lacked transparency. Governor Tollefson stated that if a process was not adopted at this meeting, the

organization would be like a rudderless ship. He urged the Board to adopt the proposed process and then tweak it in the future if necessary since there was no current process in place.

Governor Papailiou reiterated his concern that the same Board members who refused to appear for special meetings and emergency meetings called by President Pickett in order to keep board members informed about litigation matters are the same Governors pushing to pass the proposed process, which would result in the Board being much more involved in litigation matters, including current potential litigation mentioned earlier in this meeting. Governor Grabicki urged the Board not to adopt the proposed process or they would surely once again hear from the Washington Supreme Court and the Board would not like the message.

General Counsel Shankland stated that there is currently a process in place: the Board receives written litigation reports at every meeting and has few, if any, questions; and the Board was contacted for special and emergency meetings to provide it with copies of documents that have been received at the WSBA offices. She emphasized that the Board has known about the potential litigation, has known about the process, has known that counsel was appointed, and has known that counsel attended the mediation with President Pickett, Governor Tollefson, and herself. She noted that it was not clear to her why the Board was in a hurry to adopt the proposed process. In addition, she voiced concerns that the proposed process includes blinding the organization to communications with its own insurer about its own litigation and its own defense counsel. She emphasized that the client is the organization, not the Board, as stated in RPC 1.13. She reiterated her concern that the Board, with fiduciary duties to the organization, would rush into the kind of process set forth in the proposed process when the Board would have another meeting in one month. She stated that it appears that at least a cloud has been put over the Board's actions now where members and others could question the actual motive of the Board and, if the Board wants to adopt a process, why would the Board do so under such a cloud?

Governor Cherry moved to amend that Governors Clark, Grabicki, Higginson, and other interested Governors who choose to do so, take feedback from this meeting and amend the December 12, 2018, proposed process, circulate it among the Board, the membership, and General Counsel Shankland for comment, and bring it back for consideration at the Board's January 17-18, 2019, meeting. He clarified his amendment to include deleting discipline, licensing, and admissions from the proposed process.

Governor Higginson expressed concern that if action on the proposed process is not taken at this meeting, then by default the Board would continue on the current path and would not have any way to comment or weigh in on any new claim that might be filed. President Pickett stated that Governor Higginson's comment was incorrect in that the Board would continue to be informed and have the ability to comment and/or ask questions; Governor Tollefson would continue to be involved; and the Personnel Committee would continue to be involved. Governor Higginson clarified that the Board is informed, but has no ability to weigh in on anything new that might come before the Board. She noted that the WSBA Bylaws say that the Board has the authority, which it seems to have delegated to other people, and the Board reserves the right to continue to act. She concluded by stating that she is asking that the Board exercise its authority. Governor Cherry's motion passed 7-6.

ADJOURNMENT

There being no further business, the Public Session portion of the meeting was adjourned at 2:00 p.m. on Monday, December 17, 2018.

Respectfully submitted,

Paula C. Littlewood

Paula C. Littlewood
WSBA Executive Director & Secretary