

WASHINGTON STATE BAR ASSOCIATION

Board of Governors

March 18, 2019

Re: Written Testimony, Washington State Bar Association (“WSBA”) Board of Governors Testimony - ESHB 1788

Executive Summary: The WSBA Board of Governors urges the Senate Law and Justice Committee to reject ESHB 1788, which would (i) repeal the State Bar Act, (ii) eliminate the WSBA Board of Governors and all WSBA Member representation within the WSBA, and (iii) transfer all WSBA functions and assets to a new entity under the control of the Washington Supreme Court (“Court”).

- ESHB 1788 is premature, its implications are currently unknown, and its unintended consequences are potentially substantial, irreversible and likely to lead to federal litigation.
- The Court has established a WSBA Structures Workgroup to thoughtfully consider the future of the WSBA in light of important constitutional challenges facing bar associations nationwide. Once that process is complete, the WSBA and the Court should cooperate to propose whatever legislation might be needed, thoughtfully tailored to the specific recommendations of the Structures Workgroup.

Two likely options to be considered by the Structures Workgroup would not involve eliminating the existing entity, but rather causing the WSBA to (i) avoid all political speech and political activity or (ii) bifurcate into a voluntary bar association under the current entity and a mandatory set of licensing and disciplinary functions which would be transferred to the Court.

- The primary and potentially most dangerous component of the proposed legislation is its transfer of all WSBA functions, assets and obligations to the Court, a state agency, and the potential financial and legal consequences resulting therefrom.
- It could be difficult or even impossible in future sessions to affirmatively pass legislation to “fix” problems not explored or anticipated in passing ESHB 1788.

Faulty Justifications. This legislation has been rushed through based on misunderstandings and with virtually no input from a key constituency – the 40,000 Members of the WSBA who have funded it and who may have substantial legal rights concerning its dissolution.

- The stated reasons for ESHB 1788 to date have been: i) dues are too high, ii) it will provide a clean slate to help the Structures Workgroup and iii) it resolves potential constitutional challenges.
- None of these objectives will be solved by ESHB 1788, including that dues would be lowered under the Court. The Court has consistently resisted efforts to lower WSBA dues, unilaterally rejecting a Member referendum to lower dues in 2017.

Questionable Approach to Re-structuring. The idea of supporting legislation to eliminate the Bar Act and the WSBA as a legal entity before the Structures Workgroup begins is questionable and may result in costly mistakes.



There has been no discussion of the fact that the entity created by the Bar Act will disappear, let alone of the potential consequences.

- What is the point of transferring the WSBA under the Court at this time? Doing so has little to do with any looming constitutional challenges regarding compelled political speech or compelled political association.
 - Transferring the functions and assets of the WSBA will have no impact on whether the new entity's operations or activities constitute compelled political speech or association.
 - If the Supreme Court's Structures Workgroup determines the WSBA needs to bifurcate, which is not a foregone conclusion, the existing statutory entity that is the WSBA could carry on as the corporate structure for the voluntary/professional association, including the Sections, which have \$1.2 million of financial reserves, and the mandatory/licensing/discipline functions could be simply transferred to a new entity under the Court.
- The Washington Supreme Court stopped all Bylaw amendments at the WSBA so it could step back and assess the Constitutional challenges facing the WSBA before allowing any further governance changes. Similarly, the legislature should not legislate the wholesale elimination of the Bar Act and the WSBA before the Court's Structures Workgroup has completed its work.

Legal Uncertainties. Adoption of ESHB 1788 may constitute an "unconstitutional taking" of private property given that the WSBA is a statutorily authorized, wholly-Member-supported association.

Dissolving the association may also trigger a legal obligation to divide the assets among the Members instead of transferring them to the Court, as appears to be envisioned.

The Court's "plenary authority" over the WSBA has not been legally determined as meaning "ownership" over the WSBA as a legal entity or over its assets. There are substantial legal questions regarding the propriety of unilaterally transferring any of the WSBA's assets to the Court or to a Court-controlled entity.

These issues potentially create federal causes of action in favor of the Members. Given that virtually all of the WSBA's 40,000 Members are attorneys, many of whom live in other states, federal litigation to contest ESHB 1788 seems inevitable. None of these legal issues has yet been examined.

Adverse Impacts to the Public. The unknowns regarding eliminating the WSBA as a legal entity and recreating it under the Washington Supreme Court are substantial and could be extremely harmful to the public and to access to justice. The Court's plenary authority alone seems insufficient to close the gaps created by eliminating and purporting to recreate the legal status of the WSBA.

- The Washington State Constitution forbids the "gifting" of any state funds.
 - Many activities of the WSBA benefitting the public constitute "gifting of funds," including the millions of dollars of "gifts" made from the WSBA Client Protection Fund, funded solely by Washington attorneys to aid members of the public injured by attorney misconduct. These highly beneficial gifts may have to end and ESHB 1788 leaves in doubt the future status of the current balance of approximately \$3 million in the Client Protection Fund.

- WSBA contributions to the Washington Leadership Institute to train new generations of attorneys from traditionally underrepresented backgrounds and other similar activities not legally required for the administration of justice may have to end.
- Other programs benefitting the public that may be jeopardized by ESHB 1788 include the following:
 - The Moderate Means Program
 - The Access to Justice Board
 - The Call to Duty program
 - The Pro Bono and Public Service Committee
 - Other, similar Washington State Bar Association programs and activities that may be prohibited by statutory prohibitions or the State Constitution prohibitions on gifts of state funds and lending of state credit.

Other Unknown Consequences. Other unknowns regarding eliminating the WSBA as a legal entity and recreating it under the Washington Supreme Court included the following:

- The WSBA has myriad contracts and commitments, many of which the Court might not want to assume and may be legally unable to do so. Many of those commitments may not be freely assignable.
 - The WSBA is committed to \$4.8 million of lease payments. Who assumes that burden?
 - The WSBA has a \$21 million annual budget and is currently self-funded. The legislation is silent on fees and whether or not Washington taxpayers will be on the hook for those costs.
 - The Sections have reserve balances of \$1.2 million. They belong to the Sections, as they were voluntarily contributed by WSBA Members and earned by the Sections by sponsoring CLEs.
 - Would returning the \$1.2 million of reserves back to the 29 practice Sections from the Court be prohibited as gifts? And would the Section Members then have a legal cause of action against the state for taking their money?
- What kinds of contractual defaults or cross-defaults would be caused by the attempted wholesale transfer of contractual obligations and what would be the costs of such defaults?
- The WSBA has substantial indemnification and D&O coverage obligations to current and former officers and directors. How would those be honored? Could the insurers void their coverages? Do those intended insurance beneficiaries then have a lawsuit against the state or the Court if they themselves are sued?
- What would happen to pending litigation matters?
 - Is litigation automatically dismissed because there is no longer a WSBA?
 - Should the plaintiffs be given notice in advance and an opportunity to be heard?
 - Does some Court-created entity substitute in as a defendant or respondent?
 - What effect does that have on any appeals from trial court decisions?

The Board of Governors believes the elimination of the WSBA as a legal entity without analyzing the above issues would be imprudent, inconsistent with fiduciary standards, and likely to result in federal litigation by WSBA Members.

Input from WSBA Members. The rush to adopt ESHB 1788 without gathering input from the WSBA's Members is inappropriate, particularly in light of potential constitutional takings issues and questions regarding the rightful

ownership of the WSBA's assets. For the WSBA's 40,000 Members to have absolutely no voice in the demise of their organization and the apparent State-sponsored theft of its funds is ill advised. The political response could be substantial.

Adverse Impacts to WSBA Employees. The WSBA is currently fully self-funded by Member dues and it has more than 150 employees. In addition to questions regarding whether or not the WSBA would have to relocate its offices and its employees to Olympia as a Court-controlled agency under ESHB 1788, the WSBA's employees could experience substantial salary reductions under Washington State civil service rules and regulations. These potential impacts on the WSBA's employees have not been analyzed or discussed.

Unaddressed and Unknown Administrative Burdens. A final concern worth noting is that the approach of eliminating the Bar Act and the WSBA without understanding the repercussions of so doing could create substantial unnecessary administrative burdens for the Court. Again, those issues have not been considered.

- The most rational approach for addressing constitutional uncertainties is to leave the Bar Act and the WSBA intact for now, let the Structures Workgroup do its job, and precisely legislate any necessary changes to the Bar Act based on the Structures Workgroup's recommendations.
- Even if splitting the WSBA into mandatory and non-mandatory halves is ultimately the chosen path, the best course now is to keep the current legal entity and wait to see exactly what functions, funds and obligations need to be transferred to a new entity under the Court, if any. That approach would minimize wasted effort, costly mistakes, and risks of unintended consequences.

For the reasons described above and many others, the WSBA Board of Governors asks this body to not advance ESHB 1788 or any other legislation involving the State Bar Act until after the Washington Supreme Court Structures Workgroup has finished its work.

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