



Washington State
Bar Association
Intellectual Property
Law Section

March 18, 2019

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Via Email

Re: **Position of the WSBA Intellectual Property Section
on Engrossed Substitute House Bill (ESHB) 1788**

Intellectual Property Section

Chief Justice Mary Fairhurst mary.fairhurst@courts.wa.gov	Lieutenant Governor Cyrus Habib ltgov@ltgov.wa.gov
Senator Andy Billig andy.billig@leg.wa.gov	Senator Mark Schoesler mark.schoesler@leg.wa.gov
Senator Randi Becker randi.becker@leg.wa.gov	Senator Jamie Pedersen jamie.pedersen@leg.wa.gov
Senator Manka Dingra manka.dhingra@leg.wa.gov	Representative Frank Chopp frank.chopp@leg.wa.gov
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Dear Chief Justice Fairhurst, Lieutenant Governor Habib,
Senators Billig, Schoesler, Becker, Pedersen, and Dingra, and
Representatives Chopp, Wilcox, Jinkins, and Thai:



Writing on behalf of the Intellectual Property Section of the Washington State Bar Association (WSBA), the IP Section Executive Committee (IPEC) expresses its grave concern regarding the Washington State House's passage of Engrossed Substitute House Bill (ESHB) 1788. The IPEC asks all concerned attorney representatives and groups to join the IP Section in calling on the Washington State Senate to reject ESHB 1788. We are encouraged by the WSBA Board of Governors' express opposition to this legislation, and we hope that the Washington Supreme Court will also publically oppose ESHB 1788.

The IP Section takes its position opposing ESHB 1788 in view of recent and ongoing work by the Washington Supreme Court and the WSBA Board of Governors (BOG). In September 2018, the Washington Supreme Court directed the WSBA BOG to defer all action on proposed bylaw amendments while the Court conducted a comprehensive review of the bar structure. The Court then invited certain concerned parties, including leaders of the various WSBA Sections, to apply to serve on the Court's WSBA Structures Workgroup, and selected the Workgroup members on February 27, 2019. The Workgroup, chaired by Chief Justice Fairhurst, is tasked with reviewing and assessing the WSBA's structure "in light of recent case law with First Amendment and antitrust implications; recent reorganizations by other state bar associations and their reasoning; and the additional responsibilities of the WSBA due to its administration of Supreme Court-appointed boards." The Workgroup will make a recommendation to the Court as to WSBA's future structure.

In light of the Workgroup's mandate, the IP Section takes the position that ESHB 1788—which dissolves the WSBA as of January 31, 2020—is premature, and the IP Section respectfully encourages the State Legislature to reject this Bill. Others, including WSBA Governor Paul Swegle and the Board of Trustees of the WSBA, have already contacted the Court and the Legislature with their concerns regarding the prematurity of ESHB 1788. The IP Section shares many of those concerns, but for the sake of brevity does not repeat those concerns in this letter.¹ Instead, the IP Section takes this opportunity to address an unintended consequence of ESHB 1788 that is likely to affect many members of the WSBA's IP Section.

Part 11 of Chapter 37 of the Code of Federal Regulation governs the ability of attorneys to represent others before the United States Patent and Trademark Office (USPTO). In particular, “[a]ny citizen of the United States who is an attorney and who fulfills the requirements of [37 CFR § 11] may be registered as a patent attorney to practice before the [USPTO].” 37 CFR § 11.6(a) (emphasis added). Similarly, “Any individual who is an attorney as defined in § 11.1 may represent others before the Office in trademark and other non-patent matters.” 37 CFR § 11.14(a) (emphasis added). Section 11.1 defines an attorney as “an individual who is an active member in good standing of the bar of the highest court of any State.” 37 CFR § 11.1 (emphasis added).

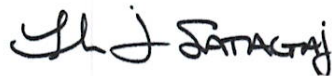
If passed as drafted, ESHB 1788 would, as of January 31, 2020, repeal RCW 2.48.010, which creates “an agency of the state ... an association to be known as the Washington State Bar Association, hereinafter designated as the state bar.” In light of the USPTO's definition of the term “attorney,” if the WSBA is dissolved before a substitute entity is created, it is exceedingly unclear what obligations our Section members who practice before the USPTO—whether as patent attorneys or on trademark and other non-patent matters—will have to inform the USPTO regarding this change in the State's bar structure. It is also unclear how quickly (or whether) the USPTO will be able to resolve this issue, and further unclear what obligations and restrictions the USPTO may impose on each WSBA IP Section attorney practicing before the USPTO to notify clients regarding this change and even to continue his or her practice. ESHB 1788 may, thus, have the unintended consequence of causing significant harm not just to the practice of thousands of Washington IP attorneys, but to the businesses and commercial plans of their clients (many of whom are based in Washington and undergird Washington's current economic boom).

In light of the unintended consequences of ESHB 1788 identified herein, as well as the concerns raised by other organizations and individuals, the IP Section believes that the Court's WSBA Structures Workgroup should, and must, be given an opportunity to review and study the structure of the WSBA and to gather evidence and take statements regarding the various consequences of restructuring the WSBA. After the Workgroup completes its mandated tasks, the IP Section believes that the Court and the Legislature will be well-informed and well-positioned to work together to make appropriate changes to the WSBA structure and to RCW Chapter 2.48.

¹ For your convenience, a copy of Governor Swegle's letter is attached.

For the reasons stated above, the IP Section joins the strong chorus of voices that have raised, and continue to raise, concerns regarding the haste with which ESHB 1788 was introduced and passed in the House, and we respectfully request the state Senate reject the Bill.

On behalf of the IP Section and its Executive Committee, yours sincerely,



Thomas J. Satagaj

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