

# WASHINGTON STATE BAR ASSOCIATION

Board of Governors

Paul Swegle, Governor District 7 North

March 10, 2019

Dear Chief Justice Fairhurst and Justices of the Washington State Supreme Court,

As you know from our meeting last Friday, some of us on the Board of Governors are very concerned about the speed with which legislation is proceeding to repeal the Bar Act and that it is do so with insufficient input concerning the legislation's consequences and ramifications. Regarding the testimony to date, there has been nothing of substance presented as reasons for the repeal. The stated reasons are i) bar dues are too high and ii) a clean slate will help the Structures Workgroup. There has been no discussion of the fact that the legal entity created by the Bar Act will disappear, let alone any of the potential consequences flowing from that fact.

As both a governor and a member of the Court's Structures Workgroup, I wish to share my significant concerns about the legislation. It is my hope that the Court will agree and oppose the legislation in the interest of all concerned – the WSBA, the Court, the public and the Members of the WSBA.

Illogical 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 has begun its work is illogical and likely to result in costly mistakes. The Court itself stopped all reform efforts at the WSBA so it could step back and assess the Constitutional challenges facing the association before allowing any further governance changes. If modest governance reforms were deemed ill-advised, surely the Court should not suddenly and without meaningful input or consideration support or allow the wholesale elimination of the Bar Act and the WSBA. The question is whether you really want to get rid of the association or thoughtfully design and implement more precise changes once the Structures Workgroup has completed its analysis. It seems easier and more logical to leave things in place and have a known quantity to work from, than to have nothing and have to rebuild things from the ground up.

Unknown Consequences. The unknowns regarding repealing the Bar Act and eliminating the WSBA as a legal entity are substantial and could be very harmful. While I understand and appreciate the Court's plenary authority, that authority alone seems insufficient to close the gaps created by eliminating the legal status of the WSBA. The WSBA has myriad contracts and commitments, many of which the Court might not want to assume. Many of those commitments may also not be freely assignable. That analysis has not even begun.

- What kinds of defaults or cross-defaults would be caused?
- 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?
- 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?
- What are the implications for Washington attorneys, LLLTs and LPOs regarding their individual malpractice coverage, reciprocity with other states, federal Bar memberships and representing clients before administrative agencies if the WSBA ceases to exist before such other entities are satisfied regarding the status of whatever is to replace the WSBA?



- *The breadth and severity of wholly unconsidered issues is bewildering - what happens to the client protection fund, employment contracts, the office space lease, the contract with countless vendors such as Fastcase, employment and retirement benefits, etc.?*
- *As was mentioned Friday, there is a concern that the scope of plenary power visualized by the Court and the Federal courts may be out of alignment, which, absent the Bar Act, could be problematic for WSBA programs and functions that fall outside of the regulation of law.*

Unaddressed Questions Regarding Funds. The WSBA has a \$20+ million annual budget and is responsible for managing funds on behalf of countless committees, boards and the 29 Sections. As was discussed on Friday, allowing those funds to default into the hands of the Court could cause serious repercussions. Without the WSBA, those funds will have to go somewhere. These issues require much more careful consideration than simply saying "we'll figure it out later," which seems to be how the bill sponsors have approached this. To put the WSBA on track for elimination as a legal entity without thinking through these issues would be highly imprudent and inconsistent with fiduciary standards. The Sections alone have reserve balances somewhere near \$2 million. Those reserves *belong* to the Sections – they were voluntarily committed to the Sections by the Members and earned by the Sections from their revenue splits with the WSBA for sponsoring CLEs.

An Affront to the Members. The hasty and very poorly thought out rush to adopt the subject legislation is an affront to every one of the WSBA Members who have paid virtually every penny ever received by the WSBA. To have absolutely no voice in the demise of their organization is an affront to them. Out of respect for all of the attorneys of Washington, the Court should step forward and stop this process.

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 safest and most rational approach to addressing the evolving constitutional uncertainties is to leave the Bar Act and the WSBA wholly intact for now, let the Structures Workgroup do its job, and then address any necessary changes to the Bar Act. If bifurcation is the chosen path, the best course may in fact be to keep the current association and support legislation that splits off various mandatory functions to a yet-to-be created structure *under the Court's authority*. That would likely prevent the need for seeking permission to unnecessarily assign a great number of contracts and other commitments, especially given the current uncertainty regarding the assignability of the WSBA's many commitments, none of which have yet been examined.

I have carefully considered the proposal to amend the Bar Act to provide that the WSBA be created within the judicial branch. This would be premature until the Structures Workgroup completes its analysis of whether anything should be changed and, if so, how.

For the reasons described above, I ask that the Court vote to oppose the legislation and authorize the Administrator of the Courts to advise the Washington State Legislature to reject ESHB 1788.

Sincerely,



Paul A. Swegle