September 12, 2016

Board of Governors
Washington State Bar Association
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539

Re: Comments on Proposed Bylaw Amendments

Dear Members of the Board of Governors and other WBSA Leaders,

I provide these comments solely as a member of the WSBA, not in my capacity as Chair of the Corporate Counsel Section, as a member of the Securities Law Committee of the Business Law Section or as a Section Leader Representative of the Sections Policy Workgroup.

Increasing Centralization at the WSBA

Consistent with my remarks at the Board of Governors ("BOG") meeting in Walla Walla on July 22, and at the BOG meeting in Seattle on August 23, the proposed Bylaw amendments seem to be part of a larger trend in which the WSBA is becoming more centralized and more insulated from its members.

Among other concerns I have already pointed out:

- In addition to these significant Bylaw amendments under hurried and somewhat haphazard consideration now, the BOG *will* soon also consider whether and how to limit members' referendum rights. President Hyslop made it very clear to me at the August 23 meeting that the BOG intends to address this issue separately. That, in fact, is part of my concern, as explained more completely below.

- No specific reasons have been provided to justify or explain the proposed Rule 12 changes and it remains unclear to me whether or not the WSBA leadership seeks through these and/or other changes to place the WSBA under tighter control and supervision by the Washington State Supreme Court (the "Court"). If so, why, and what would that look like ultimately?

  At the August 23 meeting, with Chief Justice Madsen seated off to my right (invited I'm sure to facilitate the free flow of constructive feedback from members), I asked Executive Director Littlewood the same question. She replied simply that she envisions no changes.

  Other BOG members added in later discussions that no substantive changes are intended with the Rule 12 changes.

  These answers beg the question of why the Rule 12 changes are necessary or appropriate. They must be important to someone. Please explain. What is changing vis-à-vis the Court? Why is every aspect of WSBA activity increasingly considered to be "state action" by the WSBA leadership? This is becoming increasingly problematic from the perspective of many members, myself included. I hope to be able to ask Chief Justice Madsen for greater clarity at the Town Hall on September 14, but I am not optimistic about receiving a more expansive explanation.

- Just months ago the BOG debated relinquishing its right to terminate the WSBA Executive Director unless such termination is approved by the Court. This is presumably something that could come up again and I would like to understand why this would be good for the WSBA. And how would the Court go about making such a decision?

- The original proposals of the Sections Policy Workgroup would have taken all of the Sections' funds away, along with much of their ability to self-govern.

  The Sections Policy Workgroup's surprising initial proposals may or may not have been part of a larger, integrated plan to transform the Bar, but it would be illogical for members to ignore (i) the fact that the Sections Policy Workgroup and the Bylaws Workgroup are both simultaneously chaired by the same person, Anthony Gipe, (ii) the fact that Mr. Gipe also played a key role on the Governance Task Force from which the proposed Bylaw amendments have emanated, or (iii) the fact that Mr. Gipe was appointed and not elected by the members to both the BOG and to the Presidency.

  If nothing else, Mr. Gipe's rise to power without being elected and his subsequent role in bringing about rapid and substantial changes demonstrates the fact of and the relevance of both (i) centralization and (ii) the simultaneous reduction of the role of members in governing the WSBA.

<u>Reducing Members' Governance Influence Insulates the WSBA Leadership</u>

Many of the proposed changes coming from the current WSBA leadership tend to reduce the ability of the members to influence WSBA governance. I believe the justification for this is a desire to make the WSBA more like a government agency that is directly accountable to the public for delivering a more just and equitable legal system. From a governance perspective, however, I am very concerned that changes that reduce the members' say in governance actually insulate the WSBA leadership from constructive critique and also further alienate the members. These unintended consequences could substantially reduce the effectiveness of the WSBA in meeting the very objectives it might be hoping to pursue with a more free hand and a free purse.

As noted above, it is unclear to me how the BOG or the WSBA executive leadership want to change the WSBA's relationship with the Court, but I believe any increase in the Court's day-to-day control over WSBA administration will insulate the existing WSBA Executive staff from critique by the members, especially in the near term, given the close personal relationships that appear to exist between the Court and the WSBA's senior staff (according to persons who are more knowledgeable about such behind the scenes details than I am).

<u>Where are These Changes Leading?</u>

At the August 23 meeting I said that I wish the WSBA leadership's approach to the proposed Bylaw amendments more closely resembled what is required under the Williams Act when a person or company starts buying up the stock of a company. Specifically, Item 4 of Schedule 13D requires one to:

> *"… state the purpose or purposes of the acquisition of securities" and "describe any plans or proposals which the reporting persons may have which relate to or would result in certain"*

enumerated types of changes in the management, composition, operation and policies of the issuer."

As a former SEC lawyer, this strikes me as a perfect parallel for the disclosures I would like to see. Please tell us the big picture.

There are analogous concepts throughout the law that BOG members should be familiar with, including the requirement in an Environmental Impact Statement to disclose and analyze future anticipated activities and their "cumulative impacts" when combined with presently proposed activities, and also the "step transaction doctrine" in tax law, under which a series of formally separate steps is combined, resulting in tax treatment as a single integrated event.

The members simply do not understand how the proposed Bylaw amendments, Rule 12 changes, possible changes to the referendum rules, clamping down on routine Section budgeting and spending, changes to the Executive Director's terms of office, and other aspects of decision making authority that might be turned over to the Court all fit into the overall vision that the WSBA leadership has in mind.

Absent any other explanation, my hypothesis is that the Court, through Chief Justice Madsen, is consulting with the WSBA leadership, perhaps behind the scenes, to steer the WSBA in a more centralized direction, with less risk of member interference, in order to impose even more aggressive strategies toward the laudable goals of increasing access to justice and increasing diversity in the profession. Perhaps the Chief Justice will shed light on whether and how she would like to re-shape, re-direct or reinvent the WSBA at the September 14 Town Hall meeting.

As noted above and below, I not believe centralization and decreasing member influence in governance will actually enhance the WSBA's ability to pursue its goals and aspirations.

<u>Member Sentiment is Shifting Regarding Bifurcation</u>

Another observation I made at the August 23 meeting is the increasing number of members who tell me they have given up on the WSBA. Many have decided to take their professional activities and interests elsewhere - voting with their feet to commit their volunteer time and energy to other groups. They're gone. I also noted that a number of other very experienced and respected members are now actually committed to the goal of bifurcating the Bar. These members say, each in their own way, that they have lost interest in the increasingly futile struggle to meaningfully influence the WSBA. For these folks, the uncertainty, the difficulty and the potential benefits of bifurcation now look better than staying the course with a professional relationship that dates back some 133 years.

The WSBA leadership should consider asking members a simple question - "Dear Member, if the professional association side of the house was offered a clean, supportive break from the licensing and regulatory side, would you vote to stay or go?"

I believe the answer would be surprising to all – and much different today than just a couple years ago. The BOG's recent actions seem to be greatly increasing the popularity of bifurcation as a solution to a growing range of concerns and grievances.

At the August 23 meeting, I asked Executive Director Littlewood if bifurcation might not be the best solution for the professional association side of the house. I was pleased to hear her say that the WSBA

is much stronger as an integrated Bar. In responding, though, she added that bifurcation would require approval by the Court and she said, as I recall, that such approval was unlikely. In saying this, I believe she even gestured toward the Chief Justice.

As I responded then, and as I say here again, in slightly different words, I would not be so confident that a group of 30,000+ lawyers wouldn't be able to successfully devise a plan to take back their professional association, particularly if the benefits of doing so clearly and substantially outweigh the costs. Transaction lawyers and litigators frequently take on "impossible" causes with great success.

Many years ago at Plum Creek Timber, Inc. I worked on the successful I-90 Land Exchange. Many environmental groups initially opposed the transaction and it looked fairly impossible. But through ingenuity and persistence we succeeded and it yielded great benefits for the company and for the public. Not much after that we also converted Plum Creek into the first publicly traded timber-REIT. I remember splitting the company into 14 separate operating entities, paying $20 million for a single-purpose tax insurance policy, arguing with the SEC and fighting a major proxy battle. Again, complex, uncertain, expensive and heavily litigated for sure, but not impossible. And ultimately quite successful and worth the effort, as might be bifurcation at some point.

<u>Proposed Bylaw Amendments</u>

In my following comments on the proposed amendments I am focusing on just a few issues – the proposals that I believe will cause the most harm to the unity and functioning of the WSBA and that will be the most difficult to reverse in the future.

An important change I'm not addressing is the addition of LLLTs and LPOs as full "Members" of the WSBA. I tend to favor an inclusive view of the Bar Association. I accept the overall logic of the limited licensee program and I believe integrating those persons fully into the WSBA is the best way to protect and best serve the public. That said, there are persons in other Sections who are much closer to these issues and they should take the lead in commenting on them.

Ruth Edlund, for example, has pointed out several important unaddressed concerns, including that the projected cost of member benefits by the 2018 dues cycle is well in excess of what the limited licensees will be contributing and yet there has apparently been no financial assessment of that imbalance by the BOG as the WSBA's fiduciaries.

Name Change

First, I continue to urge the BOG to vote against dropping the word "Association" from the WSBA's name – a name in continuous use since 1883. Frankly, in the present context, this proposal looks and feels like a symbolic slap in the face to the members.

The initial reason for the change, offered early on by the Governance Task Force, was "to correct the erroneous impression" that the WSBA is "something like a trade association." The WSBA may not be "something like a trade association," but to most members it *is* something like a professional association. And yes, I know the WSBA leadership now wants to give a different reason or two for the proposed change, but that's not how it works - no un-showing your cards, sorry. If the current leadership cares to show that it's not downgrading the relevance of the members it should ditch this wholly unnecessary and highly divisive proposal.

Creation of Three More Board of Governors Seats

The proposed Bylaw changes to create three more BOG seats beyond those provided in the Bar Act directly reduce member influence over WSBA governance.

As I and others have noted, giving limited license practitioners two seats on the BOG is vastly out of proportion to their numbers – are there even twenty registered limited license practitioners yet? Two seats for such a small group is facially unreasonable.

The third proposed seat on the BOG is for a member of the public. The most commonly offered reason for this recommendation is that both California and Oregon have members of the public on their Bar Boards of Governors and have found them helpful. I do not find this logic or any other explanations provided to date compelling. I have seen no evidence that either of those states' Bars are doing a better job in any respect than we are. I also have seen no outcry for public representation on the BOG anywhere in the media.

I urge that the BOG scale back these proposed amendments to eliminate the public BOG seat and to provide the LLLTs and LPOs with <u>one</u> BOG seat, elected by all of the members, not appointed, for the reasons described below.

<u>Appointing Versus Electing Board of Governors Members</u>

I and others have spoken out against creating more "appointed" BOG seat in violation of the Bar Act. There are already three appointed seats – seats which just as easily could have been elected seats. As I said at both the July 22 and August 23 meetings, appointments are clearly undemocratic and subject to more potential mischief from a governance perspective than free elections. As explained herein, the currently appointed seats are already having outsized impacts that the members seem powerless to question, understand or resist.

At the August 23 meeting, incoming WSBA President Robin Haynes gave a spirited defense of appointing the proposed seats, arguing that appointments are necessary to ensure diversity and adding that far too many of the elected seats *still* go to older white males.

I emphatically reject Ms. Haynes logic and the accuracy of her statement. Many of the elected seats are held by persons who are not older white males and the BOG is diverse by any measure. The suggestion that more "appointed" seats are necessary to make the BOG diverse is false. If there must be any new BOG seats, there is simply no compelling reason for those seats not to be elected by the members.

The appointed leadership model is the rule in China because the Chinese government believes it makes better decisions than the people. The Chinese people don't like it and nor do I.

On a final note, Ms. Haynes' position in support of appointing the members of the BOG is not surprising, as she too was appointed and not elected to her BOG seat and to her position as in-coming President of the WSBA. The power of her appointments and Mr. Gipe's, and the resulting changes those appointments are now rapidly producing, dramatically underscore that power in the WSBA is shifting substantially away from the members and that the members are largely powerless to object.

Thank you for considering my feedback.

Sincerely,

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