

**To: New Governor Exploration Board.**

**From: Daniel Clark, WSBA Governor District 4**

**Date: August 13, 2018**

**Re: Board Size Best Practices & Neighboring States use of Public Members.**

For my contribution for the Work Group, I am exploring what the 2014 Work Group on the new Governor's came up with as far as recommendations, then what the BOG ultimately did in 2016, and then examining best practices and how they relate to best practices of non-profit governing boards, specifically the BOG. I also will examine the current board sizes and compositions of seven (7) neighboring states.

Please note that any conclusions drawn in this report to the information are solely my own personal observations and not meant to represent that of the group.

**I. WSBA 2014 work group recommendations:**

The Governance Taskforce spent eighteen (18) months conducting an in-depth review of the governance of the WSBA and its final report was finished June 24, 2014. Pertinent to the discussion regarding the potential current bylaw change before the Board of Governors is a found in page 18 of the report. I will provide the actual pertinent quote from the report for the Taskforce:

**Recommendation: *To accommodate the additional Governors, the number of elected positions should be reduced to nine. The three current "at-large" positions should be retained to ensure participation by a "young lawyer and members that reflect historically under-represented groups. This would provide for a Board of 15 persons, one of which would be the President.***

Accommodating the two public and one LPO/LLLT members on the Board of Governors could be done by adding more seats. But that is not ideal. With the President, there are currently 15 members on the Board. Increasing the size of the Board will lead to reduced accountability and participation by members. Indeed governance best practices typically recommend smaller boards between 10 and 15 members. See e.g., Daniel Suhr, *Right-Sizing Board Governance*, Hasting Law Journal (2012). As such, the number of attorney members on the Board should be reduced. That reduction should come from the member elected positions, rather than from the at-large positions. This can be accomplished by reducing the number of member-elected positions from eleven to nine. The at-large positions should not be reduced; those positions provide diversity that may not be achieved through the member election process.

Reducing the number of member-elected positions from eleven to nine will require that the historical connection to congressional districts be changed. This linkage originated in the State Bar Act, which provides for at least one governor from each congressional district. See RCW 2.48.030. One way to approach this- and there may be others- is to elect three governors from each of the Court of Appeals districts. Doing so would continue to ensure geographic diversity among Board members. Given that the WSBA operates under the auspices of the Supreme Court, basing the election on districts drawn from judicial elections is a sensible alternative.

A footnote to this report indicated “If the Supreme Court and WSBA do not wish to reduce the number of electoral positions, we would still recommend adding two public and one LPO/LLLT member to the Board of Governors. In such circumstances, however, we would recommend that the Board consider steps that can be taken to ensure accountability and participation by members given the larger size of the Board.

(Governance Final Report Pages 18 & 19: [https://www.wsba.org/docs/default-source/about-wsba/governance/governance-task-force/wsba-governance-task-force-report-and-recommendations---final.pdf?sfvrsn=23163ef1\\_8](https://www.wsba.org/docs/default-source/about-wsba/governance/governance-task-force/wsba-governance-task-force-report-and-recommendations---final.pdf?sfvrsn=23163ef1_8)

#### **Pertinent Law Review Article Information:**

Reflecting the “current recommendations for smaller, more effective “working boards” 5 different ABA publications recommend board of directors ranging from 7 to 15 members.”

*ABA Coordinating Comm. on Nonprofit Governance, supra note 1, at 21. 32. Id. at 20 (suggesting 9 to 12 directors); ABA Corporate Laws Comm., Corporate Director’s Guidebook 42 (6th ed. 2011) (suggesting 7 to 11 directors); Gregory V. Varallo et al., Fundamentals of Corporate Governance 14 (2d ed. 2009) (citing a study recommending 8 to 9 directors); William G. Bowen, Inside the Boardroom: A Reprise, in Nonprofit Governance and Management 3, 5 (Victor Futter ed., 2002) (suggesting 10 to 15 directors); Martin Lipton & Jay W. Lorsch, A Modest Proposal for Improved Corporate Governance, 48 Bus. Law. 59, 67 (1992) (recommending boards of 8 or 9, and not more than 10); see Sanjai Bhagat & Bernard Black, The Uncertain Relationship Between Board Composition and Firm Performance, 54 Bus. Law. 921, 941 (1999) (reviewing literature arguing for small board size without delivering an independent conclusion). 33. Am. Law Inst., Principles of the Law of Nonprofit Organizations § 320 cmt. g(3), at 118 (Discussion Draft, 2006) (discussing a study of the board size and composition of S&P 500 companies); id. § 320 n.17 (same).*

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As Suhr argues:

This move to small boards is based on empirical research comparing the different organizational and interpersonal dynamics on a large boards versus small boards. Large boards tend to run on parliamentary procedure (particularly when the board comprises a group of lawyers!) where speakers are called on and identified, rather than the conversational style possible on a small board. This conversational style allows for consensus to emerge more organically, after a full and vigorous discussion, whereas decisions on big boards are almost always made by a formal vote after a stilted and often shortened discussion. Moreover, large boards allow for free-rider members who may attend a few meetings but who do not contribute to the actual governance of the organization: in the memorable phrase of William O. Douglas, “directors who do not direct”. By contrast, everyone on a small boards needs to contribute for the board to complete its work. Additionally, members of a small board have the opportunity to get to know one another, which fosters a sense of cohesion and collegiality. On a large board of 50 members, it is almost impossible to achieve this level of interpersonal intimacy along all the directors. Knowing one another as individuals helps directors operate more effectively as members of the board “team.” Finally, disengaged and unwieldy boards simply transfer power to the CEO and other staff, who manage the organization without effective oversight. On a smaller board, however, the CEO must work with engaged directors who hold him or her accountable through regular meetings in which the directors can make prompt decisions based on good information. In short, these small-board dynamics increase the productivity and cohesion of the board, making it more efficient, effective, and collegial.

See pages 5 & 6 of law review article at:

<http://www.hastingslawjournal.org/wp-content/uploads/Suhr-Voir-Dire.pdf>

Suhr concludes in his law review report recommending smaller Bar Association Governance by stating:

... Many bars operate with ill-structured, hands-off boards that almost necessarily delegate significant power to management. These boards are unwieldy, ineffective, and out of step with best practices for corporate and nonprofit governance. This problem stems from a fundamental misunderstanding about the role and goal of the board. Contrary to the assumptions that lead to bloated boards the role of a bar association’s board is not to be a representative legislative assembly, but rather to be the governing body atop a significant organization with thousands of

members, millions of dollars, and scores of staff. When bar leaders consider their role in that light, they may start to take their own advice and move to smaller, more effective boards that play a vital role in the organization's operations and strategic direction. Bar associations should follow California's lead by undertaking self-study evaluations. And the conclusion of those studies should be a course of action similar to that taken by Minnesota: a smaller board of directors that actually governs, and a larger representative assembly to speak for the profession on legal and legislative issues.

### **Corporate Board Best Practices:**

I next looked at what typical corporate board structures look like. A common question that several websites ask is "how many people are typically on corporate boards?"

**Answer:** Boards typically have between 7 and 15 members, although some boards have as many as 31 members. According to a Corporate Library, study the average board size is 9.2 members. Some analysis think boards should have at least seven members to satisfy the board roles and committees. See <https://www.2020wob.com/individuals/20-questions-about-boards>

There does not appear to be a universal agreement on the optimum size of a board of directors. **A large number of members represents a challenge in terms of using them effectively and/or having any kind of meaningful individual participation.** (emphasis added).

The pros of smaller boards is that they tend to meet more often because it's easier to accommodate everyone's busy schedules. Board discussions are generally shorter and more focused than those of larger boards, which typically leads to faster and better decision-making. Since smaller boards spend much time together, they form close bonds and are typically willing to give everyone a fair say.

Board dynamics also tend to differ with larger boards. Board discussions are typically longer with larger boards, as they bring forth a greater variety of perspectives. On the flip side, having many opinions around the table allows quieter members to kick back and disengage causing them to feel like their voices have no meaning. It's also easier for cliques to form with larger boards which can isolate some board members even further. Many large boards alleviate some of these problems by using an executive committee as a steering committee. See: <https://www.boardeffect.com/blog/board-size-nonprofit-governance/>

### **Discussion:**

The 2016 Board of Governors adopted the recommendation to amend the bylaws to add three (3) new potential Governors to the Board of Governors. It appears based upon the record, that the 2016 BOG completely failed to adopt any measures to address the ramifications to increase the size of the BOG from 14 to 17 members (18 including the WSBA President, and 20 including the President-Elect and Immediate Past President).

Taking this current action seems to violate the best practices as mentioned above with regard to the size of a Board. The BOG does not appear to have taken any steps to look to address the **“challenge in terms of using them effectively and/or having any kind of meaningful individual participation.”**

The 2016 BOG appears to have adopted some of the recommendations of the Taskforce but simply ignored others in their adoption of the current bylaws. There does not appear to be any mitigation considerations on the increase of the size of the board, how that will potentially impact current BOG dynamics, increased cost, increased time for BOG meetings, and potentially for increased BOG dysfunction.

The Taskforce recommended the BOG look at potentially changing the current 11 geographical congressional district Governor elections. The problem with that is that each Governor that has been elected arguably has a liberty and property interest having been elected as Governor for their respective District and with staggered elections on a three (3) year rotational basis, it seems unlikely and problematic that current Governors would be willing to forego the remaining terms of their elected service.

#### **Other potential considerations for the now BOG:**

##### **1. Look to change and reduce the 11 Geographically elected Congressional District Governor positions.**

The Taskforce recommended the BOG look at potentially changing the current 11 geographical congressional district Governor elections. The problem with that is that each Governor that has been elected arguably has a liberty and property interest having been elected as Governor for their respective District and with staggered elections on a three (3) year rotational basis, it seems unlikely and problematic that current Governors would be willing to forego the remaining terms of their elected service.

Another practical problem would be if the BOG were to adopt such a plan and reduce the 11 to 9, to retain the smaller ultimate BOG size, there were no recommendations on how to ensure that geographic diversity would occur within the three (3) appellate court districts which would be one way that the WSBA could redistrict elected governors. An example of this would be with District 4 and 5 currently, where District 4, encompasses the Tri-Cities, Moses Lake and Yakima areas, along with other much smaller populated areas of the central Washington. District 5, is predominately the remaining east side of the state and is overwhelmingly dominated in population and attorney membership in

Spokane County. From practical standpoints, unless WSBA were to carve out at least 1 geographically designated Governor for former District 4, almost certainly just by sheer membership location, Spokane County would end up with all three (3) of the Appellate III Governor positions.

**2. Look to Potentially reduce the size of the two-at large BOG Governor positions to accommodate new BOG Governor (potential Public and LPO/LLLT member).**

The 2014 Taskforce's final report recommended not changing the current makeup of the three (3) at-large Governor positions. They recommended that the current WYLC young lawyer at-large position be retained, along with the two other at large positions to ensure diversity. The 2014 report didn't give any basis for that decision. With WSBA having celebrated its five (5) year anniversary for equity and inclusion for its current Diversity emphasis, an argument could be made that as WSBA evolves and this program intends to reach its goals, that there may be a potential to look to reduce the size of the BOG to maintain optimal governance size by looking to reduce one or both of the current at-large Governor positions. Under this hypothetical potential, if WSBA and the Diversity Program are effectively working, the current BOG elections would seem to now afford equity and inclusion of traditionally under-represented WSBA member demographics.

If the BOG were to adopt such a change, it would seem reasonable to look to phase in the elimination of one (1) BOG at large position to help mitigate the increased size of the BOG if the BOG retains the current bylaw. The counter-argument to this would be that by eliminating the at large position, it will undermine the goals of equity and inclusion and potentially take away a current avenue for under represented WSBA membership to be able to serve on the BOG and/or have a meaningful voice in governance. This may be something that the BOG wants to look at though if the overall goal is not to increase the size of the current BOG and/or to avoid going past 15 overall Governors.

**3. Abolish the entire Geographic District representation and just have WSBA wide member elections.**

Another potential for the current BOG to consider would be to look to abolish all positions by a certain date and just have all WSBA member wide elections. Obviously doing this would seem to potentially violate the current State Bar Act, and from a practical standpoint would seem greatly problematic. Given that the vast amount of membership is centered in the Seattle/King County metro area, from a practical standpoint, one can clearly assume that most candidates that would ultimately be elected if there were no geographical Governor safeguards, it is more than likely that Governors in District 1, 2, 3, 4, and potentially 5 and WSBA members in those regions

would end up not having geographic representation. Given that there is a vast political differences in philosophies by geographical location in this state, and a real “divide” between the west and east of this state in regards to liberal v. conservative philosophies, doing this would seem to be ill advised and likely problematic.

#### **4. Roll Back 1 or 2 Public Member Governor positions.**

Another option to reduce the size of the BOG in order to maintain the ideal board size, would be to look to not implement both Public member positions, but instead only to adopt 1 of the 2. The 2014 Governance Taskforce recommended at least two because:

Adding one public member, however is not sufficient. There is a real danger that he or she would find him-or herself quickly outnumbered and isolated. At least two public members are necessary to provide a respectable counterweight to those members who are attorneys or other legal professionals.

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The report does not cite any basis for the conclusion to recommend two members. This BOG may want to look to eliminate one of the two public member positions to help mitigate the increased size of the BOG. Doing so would seem to accomplish the goal of ensuring that:

the WSBA must operate for the benefit and protection of the public, the inclusion of public members on the Board of Governors is essential. As other bar associations have discovered already, such members bring a unique perspective, and their relative lack of legal expertise helps to keep a board focused on monitoring, oversight, and providing direction as opposed to management.

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The addition of at least 1 public member may also help reduce the risk of Anti-trust claims being made against the WSBA.

#### **5. Roll Back and/or defer implementation of the guaranteed LPO/LLLT Governor position.**

The 2014 report found “Although the WSBA also supervises and regulates Limited Practice Officers (LPOs) and Limited License Legal Technicians (LLLTs), neither LPOS nor LLLTs are eligible to serve on the Board. (Page 17 of report).

The report further added, “The WSBA is also charged with the regulation of LPOs and LLLTs. Their inclusion on the Board is appropriate; one Governor should be appointed from the pool of LPO and LLLT members.

There are currently 37 LLLT members, with 34 active. There are currently 772 active LPO's who reside in the state of Washington and 153 total inactive LPOs that reside in the State of Washington.

The smallest geographic District with WSBA membership is District 4. Per the July 3, 2018 report from the Executive Director, District 4 had 1351 members and 1139 active members in it.

It would seem potentially reasonable to look to defer implementation of an automatic guaranteed Governor seat to these two limited license types until the aggregate combined total of both were equal to or greater of that than the lowest number of a geographic district.

If that were to be done, I would firmly believe it would make sense to then immediately allow both limited license types to run for any and all WSBA elections. It seems very fair that WSBA members are WSBA members, so we shouldn't be expecting these limited license types to pay the same membership license fees, but not receive the same benefits of membership, one of which is the ability to run for an elected office and/or vote in a WSBA election.

One very interesting quote from the 2014 Taskforce report that the 2016 BOG appears to have agreed with, but then appears to have ignored is the following:

The WSBA is also charged with the regulation of LPOs and LLLTs. Their inclusion on the Board is appropriate; one Governor should be appointed from the pool of LPO and LLLT members. **However, the Limited Practice Board indicated little interest in participation on the Board of Governors at this time. And LLLTs will not begin to be licensed until 2015. Until there is a sufficient pool from which to select a Governor, the LPO / LLLT "slot" should be filled with a public member.** (emphasis added).

The fact that currently there is 37 total LLLTs and 34 active LLLTs does not seem to be what would be a "sufficient pool" to guarantee a spot as Governor. While this issue may be open for debate and the 2014 Task Force did not really address what would be "sufficient", it seems to be an issue for discussion as far as if it would be better to potentially defer the LPO/LLLT position at this time for a public member, if the Board felt that overall board size was of paramount importance.

**6. Potentially have 1-3 of these currently scheduled position be "advisory" positions without voting power.**



One other potential discussion item would be in examining other neighboring states, some have public and/or other members that are part of the BOG in a non-voting member status. If the now BOG were to adopt something like this, it could satisfy having public members concerns and input by the current BOG as well as LPO/LLLT's, but that would not officially expand the current footprint of the overall BOG.

Doing so, would potentially be seen as disrespectful to both classes, would likely be argued to not really give either a meaningful voice, because they would not be empowered with a vote. However, it would seem as a potential to help give both currently unrepresented groups on the BOG input and voice and to have the current 14 Governors be able to better hear from both of these groups about issues involving governance.

## **II. OTHER NEIGHBORING STATE BAR ASSOCIATIONS TREATMENT OF PUBLIC MEMBERS & OVERALL GOVERNANCE SIZE**

With the goal of examining how other neighboring states to Washington dealt with self-governance issues of their respective state Bar Associations, and in wanting to examine how many states currently have public members on their BOGs, I examined at seven (7) neighboring State Bar Associations formation of Government. They varied in ranges in size between 5 and 30. Arizona seems the vast outlier, with 30 member which include Dean's from the 3 law schools and various other ex-officio members and 19 attorney members and 4 public members. Idaho was the smallest with 5 "Commissioners" that are analogous to WSBA Governors which serve WSBA's Governor functions.

Three (3) of the seven (7) states had thirteen (13) BOG members, with 2 other states having sixteen (16) and nineteen (19) respectively. Using averages for all seven (7) states, the mean score was: 15.57 members including the high and low. Removing Arizona and Idaho, the two states with the highest and lowest number of BOG members, the mean average was: 14.8 members.

The following is a breakdown of the various neighboring western states to Washington's bar governance structure:

**Idaho:** 5 Commissioners that run bar. No public members.

**Oregon:** 19 Governors, including 1 that serves as President. 4 public members with one each year elected.

**Montana:** They call their BOG the Board of Trustees. 16 total members. (does not appear to have public members).

**California:** 13 total members called Trustees. 5 attorneys appointed by California Supreme Court. 2 Attorneys appointed by legislature. 6 public or non attorney members four appointed by the Governor, one by the Senate Committee on Rules and one by the Speaker of the Assembly.

**Utah:** called Commissioners: 13 voting members, 11 attorneys and 2 public members. They also have ex-officio members: 13 total, who do not vote, including State ABA delegates, ABA YLD representative, Paralegal Division Representative, Women Lawyers Representative, Young Lawyers, Representative, LGBT & Allied Lawyer Representative, Law School Dean representatives (2), Minority Bar Representative, and Immediate Past President.

**Arizona:** Comprised of 30 people, four non-attorney, public members appointed by the Board, three at large members appointed by Arizona Supreme Court, 19 attorney members elected by fellow Bar members in their district, and four ex-officio members. (immediate and past president and deans of Arizona's three law schools).

**Alaska:** 13 total governors including 2 public members (1 currently is Treasurer, with 40 years in banking including masters degrees in finance.).

This was a limited sampling of neighboring states. It may be worthwhile to have WSBA staff continue to expand the sample size of states and what other states bars do for governance. The universal trend though does seem to include at least 1 public member on neighboring states.

### **Conclusion:**

The above information has been compiled by me in good faith. The thoughts and suggestions contained therein, are my own personal observations, and not meant to be that of the workgroup, and/or any other Governor's. The intent of this was to try to give a history of the 2014 Taskforce's final report, what concerns are over the overall size of the BOG, and to try to suggest various issues that our Taskforce and potentially the other all BOG will need to examine in ultimately deciding this issue.

In any event, thank you and please let me know if you have any questions or concerns.

Respectfully,

Dan Clark

District 4 Governor

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