

January 22, 2016



Memo

To: WSBA Sections' Policy Workgroups

From: Criminal Law Section Executive Board (Unanimously)

Subject: Sections' Policy Proposed Reforms

The Criminal Law Section opposes the draft Section Policy proposals outlined in the memorandum dated December 30, 2015, from Anthony D. Gipe on behalf of the Sections' Policy Work Group to the section leaders. While the Criminal Law Section sympathizes with some of the goals of the proposed policy, aspects of the Work Group proposal would substantially interfere with the functioning of the Criminal Law Section as it is designed.

The Criminal Law Section recognizes that there are both economic and structural issues that the Board of Governors wishes to address. Aspects of the goals which the Criminal Law Section does support are simplifying administration of sections, finances, and minimizing administrative costs to assist the sections. Much of what the Work Group proposes is *not* necessary to accomplish those purposes and much of what the Work Group proposes is antithetical to the functioning of our Section and therefore we oppose the proposals.

The Criminal Law Section originally functioned largely as a criminal defense voice. By virtue of sheer numbers, the number of private counsel and public defenders exceeded the number of prosecuting attorneys by multiple factors. As a result, the Section was treated by prosecuting attorneys as irrelevant or an adversary. The Washington Association of Prosecuting Attorneys (WAPA) was an effective voice both on legislation and other matters for the prosecuting attorneys of Washington. With the advent of WACDL, the Washington Association of Criminal Defense Lawyers, a counterpart to WAPA was formed outside of the WSBA.

No institutional structure, let alone a WSBA structure, looked at the criminal justice system from the perspective of both prosecution and defense, even though there were often many areas where prosecution and defense could agree as well as many areas, of course, in which they could not. The Section rewrote its Bylaws to create an equally divided Board between prosecution and defense elected representatives and created staggered officer terms with an alternating chairmanship each year between prosecution and defense. That system has been in place for over thirty (30) years. It has allowed effective CLE's appealing to both prosecution and defense; a unified voice where a two-thirds (2/3rds) agreement by super majority vote of the Executive Board can be reached on legislative proposals where both prosecution or defense either support or oppose the proposal. As a result, when the Criminal Law Section has chosen to speak as the Section, we receive substantially more credibility from the Legislature than used to be the case. The primary function of the Criminal Law Section is to fill the unique requirements of a criminal justice voice

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Memo To: WSBA Sections' Policy Workgroups

From: Criminal Law Section

Subject: Sections' Policy Proposed Reforms

Page 2

where super majority agreement can be reached between prosecution and defense designated Board members. The Board speaks on behalf of the criminal justice system as opposed to either prosecutor or defense perspective. There is no other such organization in Washington.

The Criminal Law Section has never required subsidies from the Bar. Indeed, we have been an active participant in generating revenue for the Bar through our annual Criminal Justice Institute and other CLE's. We do maintain a fund balance from year to year which we have slowly been spending down, mainly by providing member benefits, low cost CLE's, and/or other member benefit activities. We are not part of the financial problem of the WSBA. The Work Group Memo and the proposed Charter imposed on all WSBA sections would make our current functioning and role in the criminal justice and legislative process in Washington impossible and significantly reduce benefits to our members.

Although our Section has been advised orally that the Charter as proposed in the Sections' Work Group Memo does not allow for staggered terms and mandates an officer structure that would not function for us, that "a work plan" can be worked out with Bar staff that might allow our current structure as modified by set election dates to continue. The Charter makes no such provision. It is unsatisfactory that the structure of the Criminal Law Section depends on the whim of WSBA staff outside of what is provided in the Charter itself. Our Bylaws were designed specifically to create the existing structure and a discretionary "work plan" is insufficient to replace them when the proposed Charter itself rejects them.

We have reviewed the objections of the Real Property and Trust (RP&T) Section to the proposed draft policy and, while not agreeing with all of them, substantially agree with their opposition. Among the issues we do agree with, the RP&T section objections are as follows:

The method and membership of the Sections' Work Policy Group was ill designed from the beginning and certain to generate hostility precisely among those who were supposed to benefit from the new sections' policy by excluding the sections themselves from participating in the Work Group and then imposing a set of standards which do not take into account the sections' concerns. The process lends itself to unnecessary conflict and resistance. The process itself was flawed from the beginning, and the late production of a finished project without substantial input from our Section, let alone the sections generally, was a serious procedural error. The Work Group should be expanded and told to go back to the drawing board.

It is insufficient and inaccurate to dismiss objections as "objection to change" for the product of unreasoned concern as has been stated by the Chair and other members of the Work Group.

The mandatory Charter might be acceptable if it included provisions for section variance, such as the Criminal Law Section, Real Property and Trust, Debtor/Creditor, etc. Although the Work Group is aware that the proposed Charter is inadequate to address those issues, it has not been responsive to providing a charter basis for variance necessary to the functioning of the type of section the Criminal Law Section represents.

The Board composition requirements of the Charter and the mandatory terms of office also create problems for the Criminal Law Section which are *not* necessary to impose to accomplish the legitimate purposes of restructuring administration and costs of the sections generally. We need to have designated prosecutor and defense alternating positions as chair (not allowed by the current Charter proposal). We need to have the chairmanship position switched on a year-by-year basis not a three (3) year term. The Charter proposals on membership and progression from secretary to chair to former chair, etc., would require essentially a substantial commitment well beyond a three-year (3) term. It is difficult enough to

Memo To: WSBA Sections' Policy Workgroups

From: Criminal Law Section

Subject: Sections' Policy Proposed Reforms

Page 3

recruit members for such positions. Making a substantially mandatory commitment for multiple three (3) year terms, unlike our current one (1) year requirement will make recruitment for executive committee positions substantially more difficult and unnecessarily so. The one-size-fits-all model is not necessary to effective administration. We generally agree with the Real Property and Trust concerns about permitting training and development of officers as well as the timing of officer and designation of officer positions for election.

The Criminal Law Section is concerned about the proposed taking of all section fund balances and expanding the scope of what that money may be spent upon outside of the Section activities. The Real Property and Trust Memo is accurate in describing the promises that were made in the 1990s when a similar event occurred causing substantial internal dispute within the WSBA and a lot of very hard feelings because of the unilateral actions of taking the section reserves to satisfy a financial problem not created by the sections. Part of the resolution of that dispute was a promise that the Bar would never do it again. The actual cost of section assistance from WSBA staff to the sections would be covered by the minimum dues from each section. Our Section has done so and complied with all requests including, sharing forty-five percent (45%) of our major CLE as overhead expense with the WSBA. It is difficult to understand why efficiency requires taking of the sections' money balances as proposed.

We note that the exclusion of the sections from participation in this process only exacerbates the appearance of a fund grab and unnecessary consolidation.

In conclusion, our concerns are largely focused on the executive board structure mandated by the Charter and the one-size-fits-all election requirements, and the taking of the Criminal Law Sections' continuing balance to be used for purposes other than the Criminal Law Section's members' benefits. We are also concerned with lack of transparency with the Sections' Work Group membership proposals issued as a *done deal* in the middle of the Christmas holidays with deadlines that close written comment today, January 22, 2016, and which appear largely designed to minimize section involvement and input. This is a flawed process and a flawed document. It needs to be restructured by a broader based work group. It is ironic that in an attempt to assert administrative efficiency and cost saving as reasons for centralized control over the sections, that the very process excludes the sections from a significant voice and participation in the development of that policy.

Very truly yours,

A handwritten signature in black ink, appearing to read "John A. Strait". The signature is fluid and cursive, with a large loop at the end.

John A. Strait

On behalf of unanimous authorization from the Executive Committee of the Criminal Law Section