SELECTED LAW RELEVANT TO WSBA (1933 on)

(last updated May 31, 2024)

State Law:

1933 State Bar Act – Creates Washington State Bar Association as an agency of the state; recognizes Supreme Court authority over admissions, licensing and discipline; establishes BOG.

1972 ***State ex rel. Schwab v. Wash. State Bar Ass'n***, 80 Wn.2d 266, 493 P.2d 1237 (1972) – "In short, membership in the state bar association and authorization to continue in the practice of law coexist under the aegis of one authority, the Supreme Court." – Affirms WSBA's regulatory function and holds that its principal place of business need not be in Olympia as required of state executive offices; Bar is "Sui generis".

1972 ***In re Schatz***, 80 Wn.2d 604, 497 P.2d 153 (1972) – "The language of [RCW 2.48.060] clearly lodges all ultimate authority in the Supreme Court. The [BOG], acting in this area, is an arm of the court, independent of legislative direction." – upheld BOG policy requiring (at that time) graduation from ABA-approved law school for admission to practice.

1975 ***In re Bannister***, 86 Wn2d 176, 543 P.2d 237 (1975) – refers to the WSBA as a "public rather than a private agency".

1976 ***Graham v. Wash. State Bar Ass'n***, 86 Wn.2d 624, 548 P.2d 310 (1976) – "The [Washington State Bar Association] is responsible to the Supreme Court, not the legislature or an agency of the executive branch, for the delineation of its responsibilities in the admission, discipline and enrollment of lawyers." – Noted that WSBA is *sui generis*, not funded by legislative appropriation, and "[a]nnual dues are collected under the authority of [the Supreme Court]"; held that WSBA is not a "state department or agency" within the meaning of state audit statutes.

1981 ***Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.***, 96 Wn.2d 443, 635 P.2d 730 (1981) – The WSBA furthers the Washington Supreme Court's "duty…'to protect the public from the activity of those who, because of lack of professional skills, may cause injury whether they are members of the bar or persons never qualified for or admitted to the bar'" – by conducting its regulatory function and administering the court rules governing the practice of law.

1987 **GR 12** adopted, setting forth the purposes and authorized functions of the WSBA (note: underwent significant amendments and restructuring effective September 1, 2017).

- 12 WA Supreme Court inherent and plenary authority to regulate practice of law
- 12.1 Regulatory Objectives
- 12.2 WA Supreme Court supervises WSBA; authorized purposes and prohibited activities
- 12.3 WSBA administration of Supreme Court created boards and committees
- 12.4 WSBA public records rule

1995 ***Wash. State Bar Ass'n v. State***, 125 Wn.2d 901, 890 P.2d 1047 (1995) – "This court's control over Bar Association functions is not limited to admissions and discipline of lawyers. The control extends to ancillary administrative functions as well." – Held the Legislature could not mandate

that WSBA engage in collective bargaining, because "[t]he ultimate power to regulate court-related functions, including the administration of the Bar Association, belongs exclusively to this court"; noted the WSBA is *sui generis*.

1999 ***Benjamin v. Wash. State Bar Ass'n***, 138 Wn.2d 506, 980 P.2d 742 (1999) -- the Court treated WSBA as a governmental employer for purposes of First Amendment employee speech analysis.

2018 ***In the Matter of the Approval of Amendments to WSBA Bylaws Regarding Members of the Board of Governors***, No. 25700-B-583 (Jan. 4, 2018) (approving WSBA Bylaws Amendments increasing the size and makeup of the WSBA Board of Governors) – "[WSBA] serves as an arm of the Court in regulating and administering licenses . . . and effectuating other purposes and functions as set forth in [GR 12, 12.1-12.5]. The Court's control over the WSBA extends to ancillary administrative functions as well, including the administration of the organization."

2020-In the matter of the Approval of Amendments to the WSBA Bylaws passed by the WSBA Board of Governors in January and March 2020, No. 25700-B-612 (April 3, 2020). Court approved Bylaw changes returning the WSBA Board of Governors to the pre-2018 size and makeup (eliminating the public members on the Board).

2018 ***In the Matter of the Supreme Court's Review of 2019 License Fees and Client Protection Fund Assessments for WSBA Members***, No. 25700-B-587 (Sept. 6, 2018) (approving WSBA's 2019 license fees for LPOs and LLTs, with exceptions) – "The Court considered the license fees as established by the Board of Governors and unanimously determined that the increase to the license fee for active LPOs and LLLTs is unreasonable and that a license fee of $200 for both LPOs and LLTs, as recommended by the WSBA Budget and Audit Committee, is reasonable"; the Court approved the recommendation that LLLTs contribute to the Client Protection Fund, and rejected that recommendation for LPOs.

2019-In the Matter of the Supreme Court's Review of Client Protection Fund Assessments for WSBA Members, No. 25700-B-599 (Dec. 13, 2019. Decreased Client Protection Fund Assessment from $30 to $25 beginning in calendar year 2021.

2020-In the Matter of the Supreme Court's Review of Client Protection Fund Assessments for WSBA Members, No 25700-B-641 (Sept. 9, 2020). Decreasing the Client Protection Fund Assessment from $25 to $10 for calendar year 2021 only. Returning the Assessment to $25 beginning in 2022 calendar year.

2019 Letter from Mary E. Fairhurst, Chief Justice of the Washington Supreme Court (Oct. 21, 2019). Bylaw amendments are subject to the Court's approval.

2021 ***Beauregard v. WSBA***, 197 Wn.2d 67, 480 P.3d 410 (2021) Finding that WSBA is not subject to the Open Public Meetings Act because it does not meet the definition of a state agency as specified in the statute. The Court also found that "WSBA functions not 'pursuant to' statute but, instead, pursuant to [the Supreme Court's] authority to regulate the practice of law."

Federal law:

1990 ***Keller v. State Bar of California***, 496 U.S.1 (1990). State Bar may constitutionally use compelled license fees to fund activities germane to regulating the legal profession and improving the

quality of legal services. State Bar may not constitutionally use compelled license fees to fund activities of a political or ideological mature that are not necessarily or reasonably incurred for purposes of regulating the legal profession or improving the quality of legal services provided to the people of the State.

2010 ***Eugster v. Washington State Bar Ass'n***, No. CV 09-357-SMM, 2010 WL 2926237 (E.D. Wash. July 23, 2010) -- the district court held that the WSBA is a state agency for purposes of Eleventh Amendment immunity from suit in federal court. The Ninth Circuit affirmed on other grounds without reaching the issue. 474 F. App'x 624 (9th Cir. July 17, 2012).

2015 ***Eugster v. Washington State Bar Ass'n***, No. C15-0375JLR, 2015 WL 51757722 (W.D. Wash. Sept. 3, 2015) -- the court held that because the WSBA acts as the "investigative arm" of the Washington Supreme Court, it is "a state agency immunized from suit [in federal court] by the Eleventh Amendment." The Ninth Circuit affirmed on other grounds without reaching the issue. 684 F. App'x 618, 2017 WL 1055620 (9th Cir. Mar. 21, 2017).

2015 ***Block v. Washington State Bar Ass'n***, No. C15-2018RSM, 2016 WL 1464467 (W.D. Wash. Apr. 13, 2016), *appeal dismissed*, No. 16-35274 (9th Cir. Sept. 28, 2016), the court held that because the WSBA acts as the "investigative arm" of the Washington Supreme Court, it is "a state agency immunized from suit [in federal court] by the Eleventh Amendment."

2015 ***N.C. State Bd. of Dental Exam'rs v. FTC***, 135 S. Ct. 1101 (2015), the Court clarified that in order to have antitrust immunity under the state action doctrine, state boards with a controlling number of decision makers who are active market participants in the occupation the board regulates must be (1) acting under a clearly articulated and affirmatively expressed state policy, and (2) actively supervised by their state actor that is not a participant in the regulated market.

2018 ***Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Counsel 31***, 138 S.Ct. 2448 (2018). Prohibits public sector unions from collecting agency fees from nonmembers unless employees affirmatively consent to pay. Janus explicitly overruled *Abood v. Detroit Bd. of Educ*., 431 U.S. 209 (1977), one of the cases underpinning *Keller*. *Janus* did not explicitly overrule *Keller*. Several cases claim that Janus prohibits, or should be extended to prohibit, state bars from compelling membership and using compelled license fees for political purposes without prior consent (violations of First and Fourteenth Amendments). (Cases filed in LA, MI, ND, OK, OR (2), TX, WA, and WI (2)). To date, all cases have found that *Keller* was not overruled by *Janus* and remains good law.

2021 ***Crowe v. Oregon State Bar***, 989 F.3d 714 (9th Cir. 2021). Challenge to Constitutionality of integrated bar structure based on freedom of speech and, separately, freedom of association under the First and Fourteenth Amendments based, in part on *Janus*. The case arose out of two statements published in the OSB Journal. Affirmed that mandatory bar dues are constitutional, and that *Keller* has not been overruled. Remanded the undecided issue of whether the First Amendment tolerates mandatory membership in an integrated bar that engages in nongermane political activities. The Court included three remand issues: (1) whether Janus supplied the appropriate standard for free association claims (exacting scrutiny); (2) whether the Oregon State Bar's integrated structure with mandatory license fees satisfies exacting scrutiny (compelling governmental interest and means least restrictive of First Amendment associational rights); (3) determine whether Keller's instructions regarding germaneness are relevant to the free

association inquiry. Contrary to several previous decisions, the Crowe Court held that the Oregon State Bar did not qualify for 11th Amendment sovereign immunity.

2021 ***McDonald v. Longley***, 4 F.4th 229 (5th Cir. 2021), *cert. denied sub nom. McDonald v. Firth*, No, 21-800, 2022 U.S. LEXIS 1872 (2022). Mandatory bars that engage in any non-germane activity fail exacting scrutiny in violation of the First Amendment right of free association. The 5th Circuit determined that the Texas Bar engaged in non-germane legislative and other non-germane activities and issued an injunction prohibiting the Bar from requiring the plaintiffs to associate with the Bar until completion of the damages phase of the litigation. The court noted that unanimity regarding what best regulates the profession is not required and that activities that are ideological in nature can still be germane under *Keller*, e.g., diversity initiatives.

2021 ***Schell v. Chief Justice and Justices of Oklahoma Supreme Court***, 11 F.4th 1178 (10th Cir. 2021), *cert. denied sub nom. Schell v. Darby*, 142 S. Ct. 1440, 212 L. Ed. 2d 537 (2022). Another challenge to constitutionality of integrated bar structure based on freedom of speech and separately, freedom of association under the First and Fourteenth Amendments based, in part on *Janus*. The case arose over articles published in the Oklahoma Bar Journal. Again, affirmed that mandatory bar dues are constitutional and that *Keller* has not been overruled. Remanded the freedom of association claim because '[n]either *Lathrop* or *Keller* addressed a broad freedom of association challenge to mandatory bar membership where at last some of the state bar's actions might not be germane to regulating the legal profession and improving the quality of legal service in the state."

2023 ***Crowe v. Oregon State Bar***, 2023 U.S. Dist. LEXIS 24597 (D. Or. 2023), *appeal docketed*, No. 23-35193 (9th Cir. Mar. 17, 2023). On remand from the Ninth Circuit, the District Court reviewed the free association claim. Choosing to follow *Schell*, the court held that the germaneness standard, not the exacting scrutiny standard in *Janus*, applies to the associational claim. Then, in applying the germaneness standard to OSB's activities, the court held that the bar's legislative activities were germane. In analyzing two statements from the OSB Journal, the court held that the first of the two statements, though perhaps ideological, was germane in that it was reasonably related to advancing the acceptable purposes of the bar. The second statement, however, created an issue of fact as to whether it was nongermane. Nevertheless, the Court concluded that *Lathrop* anticipated that some portion of the bar's activities may be potentially improper. The court declined, however, to "precisely delineate the acceptable threshold for nongermane activity contemplated by *Lathrop*, because whatever that threshold may be, a single statement (or even two statements) will not meet it." (note: This decision has been appealed to the Ninth Circuit. Oral arguments were held April 2, 2024, but a decision has not yet been issued.).

2023 ***Kohn v. State Bar of California***, 87 F.4th 1021 (9th Cir. 2023), *cert. denied Kohn v. State Bar of California*, No. 23-6922, 2024 U.S. LEXIS 1962 (U.S. Apr. 29, 2024). Sets forth the test for determining whether a state bar association is an arm of the state entitled to 11th Amendment sovereign immunity. *Kohn* rejects and replaces the *Mitchell* test for sovereign immunity applied in the Ninth Circuit *Crowe* decision. The *Kohn* test provides that whether a state bar is an arm of the state is based on: "(1) the [s]tate's intent as to the status of the entity, including the functions performed by the entity; (2) the [s]tate's control over the entity; and (3) the entity's overall effects on the state treasury." Applying those factors, the court held that California Bar was entitled to immunity from suit. The court emphasized that any future case against OSB

would need to be analyzed under the new test to determine whether OSB would be an arm of the state entitled to immunity.