



## Diversity Committee Meeting Agenda DRAFT

September 21, 2019  
 10 AM – 3 PM  
 In-Person: WSBA Office

The Washington State Bar Association's Diversity Committee is dedicated to implementing WSBA's Diversity and Inclusion Plan. The work of the committee promotes historically underrepresented groups to enter and stay in the profession of law. The Diversity Committee does this through collaborative relationships and community building activities which highlight the numerous societal benefits of a diverse law profession.

Members: Roger Hillman, Nam Nyguen, Gov. Jean Kang, Lisa Mansfield, Laura Wulf, Chelsea Brisbois, Gov. Sunitha Anjilvel, Ailene Limric, Gov. Alec Stephens, Andrea Jarmon, Allison Ross, William Locke, Jennifer Cruz, Gov. Dan Clark, Gov. Athan Papailiou

Staff: Dana Barnett, Tyler Washington

1. **Call to Order, Welcome and Approval of Minutes**– Ailene Limric, Co-Chair
2. **Introductions and Appreciations**
3. **Diversity Training Activity – MCLE Proposal** – Dana Barnett, Diversity and Inclusion Specialist
4. **BOG Report – Alec Stephens, Co-Chair**
5. **Structures Workgroup Report** – Andrea Jarmon & Dan Clark
6. **Diversity Program Update** – Dana Barnett
7. **Program Updates and Reports**
  - a. Non-retaliation Policy Update – Alec
  - b. Legal Pathways Reception – Andrea, Lisa Mansfield
  - c. IL programs – Chelsea Brisbois and Laura Wulf
  - d. Legal Lunchboxes – Dana
  - e. Train the Trainer – Dana
  - f. WADA event – Dana
  - g. IILP Conference – Ailene
  - h. MBA annual events – Dana
  - i. Oregon Bar Lawsuit Update
  - j. Thurston County Bar Diversity Committee

**8. MBA Updates and Reports**

**9. Announcements**

**Next Meeting: FY20 Orientation, October 2019**

**If you need special accommodations contact [diversity@wsba.org](mailto:diversity@wsba.org)**



## Diversity Committee Meeting Draft Minutes

July 17th  
12-1:30 PM  
Conference Call

---

The Washington State Bar Association's Diversity Committee is dedicated to implementing WSBA's Diversity and Inclusion Plan. The work of the committee promotes historically underrepresented groups to enter and stay in the profession of law. The Diversity Committee does this through collaborative relationships and community building activities which highlight the numerous societal benefits of a diverse law profession.

---

In Attendance: Gov. Dan Clark, Allison Ross, Gov. Jean Kang, Roger Hillman, Ailene Limric, Gov. Alec Stephens, Nam Nyguen, Andrea Jarmon,

Unable to Attend: Gov. Sunitha Anjilvel, Chelsea Brisbois, William Locke, Laura Wulf, Lisa Mansfield, Jennifer Cruz, Gov. Athan Papailiou

Guest: Rajeev Majumdar

Staff: Dana Barnett, Tyler Washington

### **Call to Order, Welcome and Approval of Minutes**– Ailene Limric, Co-Chair

Ailene called the meeting to order at 12:17 p.m. On motion by Roger and seconded by Allison, the committee unanimously approved the June meeting minutes.

### **BOG Report** – Alec Stephens, Co-Chair

Alec provided the BOG report. He informed the committee that the next BOG meeting will be held in Richland on July 27-28 and that the non-retaliation policy is up for the first reading. The bill proposes that if there is a complaint against a BOG member or the Executive Director, the entire BOG would recuse itself and refer to Supreme Court.

### **Structures Workgroup Report** – Andrea Jarmon & Dan Clark

Dan Clark emailed a report to the group prior to the meeting. Andrea shared the Structures Workgroup has reached the last of their scheduled meetings and there will be a discussion if there is a need for the meetings to continue. The workgroup is considering conducting a deeper dive into various WSBA programs with a Keller analysis in mind. She also shared that there are several motions on the table but no votes have yet been taken. In the past meeting there was a discussion about governance, but no motions or recommendations have been made.

Justice Fairhurst stated that the Court has taken no official position but shared some comments made by various Justices. One view held by a Justice was that the workgroup had completed their work and a Keller analysis could be conducted by the BOG or the Supreme Court. Another Justice was disappointed that the workgroup hasn't made any recommendations to significantly change the bar structure.

Andrea also shared that there are several motions on the table but no votes have yet been taken. In the past meeting there was a discussion about governance, but no motions or recommendation have been made.

Alec asked for clarification about the diversity program's role and whether or not it would be a part of a mandatory bar. He also asked if the current climate of lawsuits have been considered in the workgroups discussions. Andrea stated that a good number of workgroup members understand the social and political context where the lawsuits have arisen from and that the essential thrust of litigation has been against diversity and ATJ programming. Workgroup members have made it clear that they believe equity and justice issues are important to keep in the legal profession. But there have been discussion about ideological speech and if it will implicate first amendment rights. There are competing narratives of what is ideological language and that issue is unresolved.

### **September Meeting – Dana Barnett**

Dana proposed that the committee invite the new incoming members to the September meeting. She shared that there are three open slots and encouraged current committee members to recruit applicants. Dana will email outgoing committee members to gauge their interest in leading presentations for the new members regarding the work the committee has done in the past year.

### **OPMA – Dana Barnett**

Dana informed the committee that a judge ruled that the WSBA is subject to Open Public Meetings Act. The WSBA filed an appeal, but currently the bar is complying with OPMA. To avoid violating OPMA, the committee should avoid conducting committee business over email. Dana shared that the committee should not reply-all to any emails otherwise there is a risk triggering OPMA.

### **Structures Workgroup statement**

Andrea shared that she does not believe it is too late for the committee to draft a letter to the Structures Workgroup and Supreme Court. Dana stated that the letter will need to be drafted in a special meeting in order to comply with OPMA. Andrea volunteered to create a first draft. Dana will poll the committee to find a suitable date for a special meeting.

### **Program Updates and Reports**

Dana shared the Train the Trainers session will now be held on September 20. Dana will reach out via email to gauge who is committed to this date.

The diversity committee adjourned the meeting at 12:55

**Next Meeting: September 21<sup>st</sup> 10 AM - 3 PM, WSBA Office**  
**If you need special accommodations contact [diversity@wsba.org](mailto:diversity@wsba.org)**

A work group convened by the Washington Supreme Court reports its recommendations regarding the structure of the Washington State Bar in light of recent constitutional and antitrust cases.

# Report and Recommendations

by the Washington  
Supreme Court Work  
Group on Bar Structure

September 2019

---

## Contents

Executive Summary .....	3
Background .....	4
State Bar Structures .....	4
History of the Washington State Bar Association.....	4
Current Structure .....	4
Legal Developments Precipitating the Work Group.....	5
Charter .....	5
Scope of Work.....	6
Members of the Work Group .....	6
Meetings .....	7
Public Access.....	7
Public Comment Opportunities .....	7
Solicitation of Input from Leaders within Washington’s Legal Community .....	7
Phases.....	8
Information Gathering and Analysis.....	8
Presenters.....	8
Reading Materials.....	10
Washington Historical Narratives and Legal Authorities .....	10
United States Supreme Court Cases.....	10
Cases Pending Against State Bar Associations .....	10
[Re]organizations of Bar Structures in Other States.....	10
Trade, Media, Regulatory, Academic and Other Publications .....	11
Documentation about the WSBA .....	11
Public Comments Submitted to the Work Group .....	11
Discussion .....	11
Constitutional Issues (First and Fourteenth Amendments) .....	12
Antitrust Issues .....	13
Other Topics (Out of Scope) .....	13

Recommendation Development ..... 14  
Recommendations to the Court..... 16  
Closing Comments by the Work Group Chair, Chief Justice Mary E. Fairhurst..... 17

## Executive Summary

In November 2018, the Washington Supreme Court (Court) convened a work group to review and assess the structure of the Washington State Bar Association (WSBA) in light of recent case law with First Amendment and antitrust implications, recent reorganizations by other state bar associations, and the additional responsibilities of the WSBA due to its administration of Court appointed boards. The work group completed a detailed review consistent with its charter, and a majority of the work group recommends to the Court as follows:

- Retain an integrated bar structure;
- Make no fundamental changes to the six Court appointed boards administered and funded by the WSBA: the Access to Justice Board; the Disciplinary Board; the Limited License Legal Technician Board; the Limited Practice Board; the Mandatory Continuing Legal Education Board; and the Practice of Law Board;
- Consider amending court rules to specify that the prohibitions in General Rule (GR) 12.2(c) apply to Court appointed boards;
- Consider ordering the WSBA Board of Governors (BOG) and staff to adopt and execute a thorough *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228 (1990) interpretation when calculating all future *Keller* deductions;
- Reexamine the *Report and Recommendations* from the WSBA Governance Task Force dated June 24, 2014; and
- Consider adding public member(s) to the WSBA BOG.



## Background

### State Bar Structures

States vary widely in their structure for regulating the practice of law. Typically, the highest court in the state issues a license to practice law, and a bar association exists that legal practitioners are either permitted or required to join. In a state with a voluntary bar association, legal practitioners choose whether to join the association and the association does not administer regulatory functions. In a state with a mandatory bar association, legal practitioners are required to join the association and the association may or may not administer regulatory functions. In a state with an integrated or unified bar association, legal practitioners are required to join the association, and the association administers regulatory functions as well as professional association services. Most states have adopted some variation of these three primary structures, adjusted to suit local interest.

### History of the Washington State Bar Association

The WSBA began as a voluntary organization formed by a group of attorneys in 1888, the last year of the Washington Territory. Its original name, the Washington Bar Association, changed to the Washington State Bar Association in 1890. In 1933, the Washington State Legislature codified chapter 2.48 RCW, known as the State Bar Act, which established the WSBA as a state agency, made membership in the WSBA mandatory for legal practitioners in Washington, and addressed a BOG for the WSBA.

### Current Structure

The WSBA operates as an integrated bar pursuant to the delegated authority of the Court. The Court adopted GR 12.2 to prescribe the general purposes and activities of the WSBA, and GR 12.3 to delegate to the WSBA the authority and responsibility for administering certain Court appointed boards. In addition to administering many regulatory functions for the Court, the WSBA coordinates activities to benefit WSBA members. Legal practitioners in Washington must be members of the WSBA and pay an annual license fee that funds the WSBA and Court appointed boards administered by the WSBA. The WSBA facilitates practice area-specific sections, which legal practitioners may choose to join by paying an additional amount.

## Legal Developments Precipitating the Work Group

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782 (1977), the United States Supreme Court upheld an agency shop provision in a public sector union context to the extent that the service charges are used to finance collective bargaining expenditures. Under *Abood*, an agency shop provision did not violate the First Amendment to the United States Constitution as long as dues collected are used for collective bargaining, contract administration, and grievances. While acknowledging distinctions between public unions and state bars, many cases regarding government regulation of legal practitioners and the amount that may be charged as a requirement to practice law, cite *Abood*. In another public sector union case, *Janus v. American Federation of State, County, and Municipal, Employees, Council 31*, 585 U.S. \_\_\_, 138, S. Ct. 2448 (2018), the United States Supreme Court overruled *Abood*. The *Janus* decision has caused speculation about the implications to state bar related cases that cite *Abood*.

The Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-38 (Sherman Act), prohibits certain anticompetitive practices. In *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943), the United States Supreme Court ruled that state governments were exempt from the Sherman Act, noting that the Sherman Act “makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.” In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. \_\_\_, 135 S. Ct. 1101 (2015), the United States Supreme Court held that a state occupational licensing board primarily composed of persons active in the market it regulates has immunity from the Sherman Act only when it is actively supervised by the state. This case has caused speculation about potential antitrust liability, or the scope of immunity from it, in states where market actors, such as the attorneys serving on the governing boards, participate in the regulation of the legal profession.

## Charter

In a [charter](#) dated November 9, 2018, the Court announced that it was convening a work group chaired by Chief Justice Mary E. Fairhurst. The charter specified the work group’s composition and selection, the scope of work contemplated, the expected manner and duration of work group deliberations, and the process for applying to work group positions that the Court selects. The charter specifies a work group size of 11 members, including the Chief Justice. The Court subsequently added a work group member from a tribal perspective, for a total of 12 participants.

## Scope of Work

The charter requires the work group “[t]o review and assess WSBA structure in light of (1) recent case law with First Amendment and antitrust implications; (2) recent reorganizations by other state bar associations and/or groups and their reasoning; and (3) the additional responsibilities of the WSBA due to its administration of Supreme Court appointed boards.” The charter contemplates that the work group will review information, including from subject matter experts. Based on its review and assessment, the work group must make recommendations to the Court as to the future structure of Washington’s bar.

## Members of the Work Group

The Court invited the BOG to select three work group members who are BOG officers or members. The Court consulted with the BOG to select three work group members from the WSBA sections. The Court selected three members from Court appointed boards, a public member, and a tribal member.

At the first meeting of the work group, the members included Industrial Insurance Appeals Judge Dominique Jinhong as a Court appointed board representative from the Practice of Law Board. After the first meeting, Judge Jinhong resigned from the work group for personal reasons. Effective April 2, 2019, the Court appointed Andre L. Lang, a private attorney, as a Court appointed board representative from the Practice of Law Board to replace Judge Jinhong. So, for seven of the eight work group meetings, the members were:

- Hunter M. Abell, a private attorney, as a WSBA section representative (small size);
- Esperanza Borboa, a legal assistance program director, as the public member;
- Daniel D. Clark, a senior deputy prosecuting attorney, as a BOG representative (District 4 Governor);
- Frederick P. Corbit, a federal bankruptcy judge, as a Court appointed board representative (Access to Justice Board);
- Mary E. Fairhurst, Chief Justice of the Court as chair of the work group;
- Eileen Farley, a private attorney, as a WSBA section representative (medium size);
- Andrea Jarmon, a private attorney, as a Court appointed board representative (Limited Legal License Technician Board);

- Mark Johnson, a private attorney, as a WSBA section representative (large size);
- Andre L. Lang, a private attorney, as a Court appointed board representative (Practice of Law Board);
- Kyle D. Sciuchetti, a private attorney, as a BOG representative (District 3 Governor);
- Jane M. Smith, administrator at the Colville Tribes, as the tribal member; and
- Paul A. Swegle, a private attorney, as a BOG representative (District 7-North Governor).

## Meetings

The work group met at the WSBA headquarters located at 1325 Fourth Avenue, in Seattle, Washington, eight times between March 28, 2019 and July 17, 2019, for three hours per meeting. As the work group chair, Chief Justice Fairhurst managed each meeting. Staff posted and regularly updated information about work group meetings on the Court's website and the WSBA's website, and WSBA staff communicated work group updates to WSBA members.

## Public Access

The work group invited the public to attend work group meetings telephonically, in person, or via live webcast. Staff posted the agenda and meeting materials on the internet before each meeting, and added a link to a recording of each meeting's webcast shortly after each meeting.

## Public Comment Opportunities

Consistent with the charter, all work group meetings were open to the public. At its first meeting, the work group prioritized creating opportunities for public comment. Staff disseminated messaging to the public and to WSBA members about the opportunity to submit written comments to the work group, and the WSBA posted comments received on its website. During multiple meetings, the chair invited comment from members of the public attending in person, telephonically, or via the internet.

## Solicitation of Input from Leaders within Washington's Legal Community

At the work group's behest, the chair wrote to many leaders within Washington's legal community to invite their input. The chair's memorandum explained the scope of the work group's undertaking and offered links to the information posted on the

internet about it. It encouraged recipients to send advice or recommendations to the work group. The recipients included WSBA section leaders, specialty and local bar association leaders, prosecuting attorneys, tribal judges, advocacy community leaders, law school deans, past WSBA leaders, United States attorneys, and more. Correspondence received in response to the memorandum was posted on the internet.

## Phases

When the work group convened on March 28, 2019, the chair reviewed the charter, and explained that she anticipated that the group would approach its work in three primary phases: 1) information gathering and analysis; 2) discussion of options and concerns; and 3) recommendation development. During the information gathering and analysis phase, the work group received materials to analyze and presentations from subject matter experts. The materials and presentations related to compelled or subsidized speech and compelled association issues under the First Amendment, anticompetitive practices and antitrust case law developments, pending state bar litigation across the nation, changes in other jurisdictions' approach to regulating the practice of law, and the WSBA's responsibilities to administer Court appointed boards. Following the information gathering and analysis phase, the work group discussed Washington's needs and the options available to meet those needs. Finally, the work group developed recommendations for the Court's consideration.

## Information Gathering and Analysis

### *Presenters*

The work group hosted several presenters in person and two presenters telephonically. They covered the following topics:

<b><i>Presenter(s)</i></b>	<b><i>Topic(s)</i></b>
<i>Professor Hugh Spitzer, University of Washington School of Law</i>	Washington State History and Constitution <ul style="list-style-type: none"> <li>○ WSBA's Inception</li> <li>○ State Constitutional Limitations               <ul style="list-style-type: none"> <li>▪ Article XII, Section 1</li> <li>▪ Article VIII, Section 4</li> <li>▪ Article VIII, Section 5</li> </ul> </li> </ul>
<i>WSBA Executive Team</i>	WSBA Current Structure and Functions

<p><i>Julie Shankland, WSBA General Counsel</i></p>	<p><i>Janus v. American Federation of State, County, and Municipal Employees, Council 31</i>, 585 U.S. ___, 138 S. Ct. 2448 (2018). <i>North Carolina State Board of Dental Examiners v. Federal Trade Commission</i>, 574 U.S. ___, 135 S. Ct. 1101 (2015). <i>Mentele v. Inslee</i>, 2019 U.S. App. LEXIS 5613 <i>Crowe v. Oregon State Bar</i> [Complaint]</p>
<p><i>Associate Dean Charlotte Garden, Seattle University School of Law</i></p>	<p><a href="#">Janus Walked Into a Bar . . .</a></p> <ul style="list-style-type: none"> <li>○ Detailed Case Analysis</li> <li>○ State Bar Litigation Post-<i>Janus</i></li> <li>○ State Bar Reorganizations Post-<i>Janus</i></li> </ul>
<p><i>Jean McElroy, WSBA Chief Regulatory Counsel</i></p>	<p>“Germane” to the Regulation of the Practice of Law and Computing of the <i>Keller</i> Deduction</p>
<p><i>Carole McMahon-Boies, Attorney Services Administrator for the Nebraska State Bar Association</i></p>	<p>Nebraska Model and Lessons Learned</p>
<p><i>Paula Littlewood, Former WSBA Executive Director</i></p>	<p>Trends Among Integrated Bars</p>
<p><i>Geoffrey Green, Assistant Director, Anticompetitive Practices, Federal Trade Commission</i></p>	<p><a href="#">Antitrust Considerations for Regulating the Practice of Law</a></p>
<p><i>Emily Chiang, Legal Director, American Civil Liberties Union Foundation Washington</i></p>	<p>Compelled Speech, Compelled Association and the First Amendment</p> <ul style="list-style-type: none"> <li>○ <a href="#">ACLU Letter to Bar Structure Work Group</a></li> </ul>

### *Reading Materials*

In addition to the presentations and written materials supplied by presenting subject matter experts, the work group reviewed Washington historical narratives and legal authorities, additional cases decided by the United States Supreme Court related to First Amendment and antitrust issues, cases pending against state bar associations around the nation, reorganizations of bar structures in other states, trade and academic publications, and documentation about the WSBA. Complete materials may be accessed [here](#), but they included:

#### Washington Historical Narratives and Legal Authorities

- [History of the WSBA](#)
- [Washington State Constitution](#)
- [Selected Law Regarding the WSBA](#)
- [Court Rules related to the WSBA](#)

#### United States Supreme Court Cases

- [Janus v. AFSCME, Council 31, 585 U.S. \\_\\_\\_, 138 S. Ct. 2448 \(2018\).](#)
- [Lathrop v. Donohue, 367 U.S. 820, 81 S. Ct. 1826 \(1961\).](#)
- [Abood v. Detroit Board of Educ., 431 U.S. 209, 97 S. Ct. 1782 \(1977\).](#)
- [Keller v. State Bar of Cal., 496 U.S. 1, 110 S. Ct. 2228 \(1990\).](#)
- [North Carolina State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 574 U.S. \\_\\_\\_, 135 S. Ct. 1101 \(2015\).](#)
- [California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937 \(1980\).](#)
- [Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307 \(1943\).](#)
- [Fleck v. Wetch, \[Supreme Court 2018\], and Fleck v. Wetch, 868 F.3d 652 \(2017\).](#)

#### Cases Pending Against State Bar Associations

- [Mentele v. Inslee, 2019 U.S. App. LEXIS 5613.](#)
- [Crowe v. Oregon State Bar \[Case 3:18-cv-02139-AC\] Complaint.](#)
- [Gruber v. Oregon State Bar \[Case 3:18-cv-01591-MO\] Complaint.](#)
- [Schell v. Williams \(Oklahoma Bar Association\) Complaint.](#)
- [McDonald v. Longley \(Texas State Bar\) Complaint and Plaintiffs' Motion for Partial Summary Judgment on Liability.](#)

#### [Re]organizations of Bar Structures in Other States

- [NABE Presentation Regarding Bar Structures](#)
- [Nebraska Supreme Court Opinion](#) and [Nebraska Court Rule](#)
- [Comparative Analysis: Bar Association Memorandum](#)

- [Bar Functions Nationally](#)

#### Trade, Media, Regulatory, Academic and Other Publications

- [“Exaggerating the Effects of Janus,” 132 Harv. L. Rev. 42, November 2018.](#)
- [“After Janus, Free the Lawyers,” Wall Street Journal Editorial, April 26, 2019.](#)
- [“Lawyers Look for Lessons in Dental Examiners Debacle,” Antitrust & Trade Regulation Daily \(BNA\), June 8, 2016.](#)
- [FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants.](#)
- [“The Winds of Change are Definitely \(Probably, Possibly\) Blowing -- Pending First Amendment Challenges to Mandatory Bar Association Membership and Attorney Professional Licensing Fees,” submitted by Mark Johnson for publication in King County Bar Association Bar Bulletin.](#)
- [“Application of North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S. Ct. 1101 \(2015\), to the WSBA Structure,” a memorandum prepared by Fred Corbit and Hayley Dean for consideration by the work group.](#)

#### Documentation about the WSBA

Staff from the WSBA provided extensive documentation about the organizational structure, programs, activities, publications, cost and revenue centers, sections, facilities, new BOG member orientation, and membership of the WSBA. All materials, including those supplied by the WSBA staff, are located [here](#).

#### Public Comments Submitted to the Work Group

With assistance from the WSBA staff and work group chair, the work group received and reviewed comments from the public, members of the WSBA, and leaders within Washington’s legal community, which are posted [here](#).

#### Discussion

The work group discussed the history and programs of the WSBA, the State Bar Act (chapter 2.48 RCW), and the Court appointed boards that are administered by the WSBA and funded through license fees, and assessed whether recent United States Supreme Court cases require changes to the WSBA structure or Washington’s regulation of the practice of law. The work group determined that an integrated bar structure remains constitutional under current law. However, the work group identified opportunities to limit liability through relatively minor adjustments to particular operations of the WSBA.



### *Constitutional Issues (First and Fourteenth Amendments)*

The work group members and presenters reiterated that *Janus* addresses compelled speech in the context of service fees (dues) imposed to support a public sector union pursuant to an agency shop provision.<sup>1</sup> Cases related to state bars often focus on charges imposed on legal practitioners and the activities such charges may be used to support. These cases cite many public sector union cases, but differ from union cases in significant ways. In *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228 (1990), members of an integrated bar sued claiming that the bar violated the First and Fourteenth Amendments when it used membership dues to advance political and ideological causes to which the petitioners did not subscribe. The court in *Keller* referenced the justification for compelled association and an integrated bar as “the State’s interest in regulating the legal profession and improving the quality of legal services” and stated, “[t]he State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.” *Id.* at 496 U.S. 13-14.

To comply with *Keller*, the WSBA computes what is referred to as a “*Keller* deduction,” which is an amount that a WSBA member may elect to pay to support political or ideological activities of the WSBA. WSBA members are not required to pay the amount identified as the *Keller* deduction for the privilege of being licensed to practice law in Washington. The WSBA’s current invoicing practice for annually assessing a member’s license fee allows members to “opt-out” of paying the amount of the *Keller* deduction by subtracting it from their remittance to the WSBA.

The work group and presenters spoke about the inability to predict whether or how the *Janus* decision overruling *Abood* may impact the holding of *Keller*. The work group discussed at length: the importance of computing accurately the cost of activities of an ideological or political nature and including those costs in the *Keller* deduction; that careful scrutiny of the *Keller* deduction and its calculation is important to maintaining its defensibility but should not be understood as a criticism of the particular amount of deduction or the WSBA staff computing it; the advisability of prescribing an audit of the WSBA’s *Keller* deduction determinations; the Court’s policy regard of the vital relationship between improvement of the quality of legal services in Washington and access to justice and diversity and inclusion programs administered by the WSBA; the prudence of clarifying that

---

<sup>1</sup> Some of the complaints pending against state bars raise compelled association claims. But neither *Janus* nor any other case decided since *Janus* found compelled association to be unconstitutional in a public sector union or state bar context.

limitations on the WSBA's activities of an ideological or political nature also apply to the WSBA's administration of Court appointed boards; and the merit of requiring the WSBA to convert from an "opt-out" invoicing practice for the *Keller* deduction to an "opt-in" protocol whereby a member would be invoiced for the mandatory license fees and presented the option to pay an additional amount to fund WSBA's political or ideological activities.

### *Antitrust Issues*

The legal profession has long been a "self-regulated" profession in that attorneys assist and advise the state entity that prescribes the standards for licensure, competence, ethical practice, and imposition of discipline. In Washington, as in many states, the Court has plenary authority over the bar and the regulation of the practice of law. The Court relies on the WSBA to administer many of the functions related to the licensure of legal practitioners, drafting of proposed rules of professional responsibility (ethical practice), investigation of allegations of misconduct, and recommendations for disciplinary sanctions.

Given that the WSBA BOG includes legal practitioners, Washington's regulation of the legal profession is subject to antitrust scrutiny unless the Court establishes clear state policy and actively supervises its implementation. *See California Retail Liquor Dealers Ass'n.*, 445 U.S. 97. The work group reviewed the detail in existing court rules, the process by which the Court adopts or amends Rules of Professional Conduct, and the Court's reservation of authority regarding imposition of discipline on legal practitioners. The work group discussed the advisability of the Court reserving certain WSBA personnel-related decisions to itself. Specifically, the work group debated whether the Court, and not the BOG, should make employment decisions for the WSBA's Executive Director and Chief Disciplinary Counsel positions. The work group did not adopt specific recommendations related to these considerations, but a majority of the work group did support a recommendation that the Court reexamine the *Report and Recommendations* produced by the WSBA Governance Task Force in June 2014.

### *Other Topics (Out of Scope)*

The work group discussed several other topics before concluding they were outside the scope of the work group's charter. Such topics included:

- Whether the current WSBA structure is the structure preferred by a majority of WSBA members;

- Governance practices of the BOG, except those governance practices that are related to BOG members' roles as market actors participating in the regulation of the legal profession;
- Whether the current WSBA structure best protects the public, including through regulation of the legal profession and imposition of discipline;
- The duties, fiduciary obligations, or loyalties of BOG members, or their compliance with employment law or any allegations related thereto;
- Whether the current WSBA structure is "optimal" or strategic;
- The number of BOG members or their terms of office; and
- Whether the current WSBA structure meets the needs of current and future WSBA members.

### Recommendation Development

After the information gathering and discussion phases, the work group focused its efforts on whether the Court should consider changes in light of recent constitutional and antitrust case law. Members of the work group offered motions for consideration to articulate proposed recommendations to the Court. The chair invited members to submit motions in writing or orally. Staff included written motions in the meeting materials; oral motions were captured in the meeting notes. The chair invited debate on motions made and seconded. Only work group members present in person or on the telephone participated in votes. The chair abstained from all votes.

The work group discussed many potential motions, including written motions included in the reading materials. Not every potential motion discussed was advanced by a work group member; sometimes a work group member would articulate a rationale associated with a potential motion or recommendation, but would not proceed to introduce the motion. Work group members introduced motions regarding recommendations to the Court as follows:

- Retain an integrated bar structure. (Motion passed 10-1.)
- Make no fundamental changes to the six Court created boards administered and funded by the WSBA: the Access to Justice Board; the Disciplinary Board; the Limited License Legal Technician Board; the Limited Practice Board; the Mandatory Continuing Legal Education Board; and the Practice of Law Board. (A motion to table this motion failed 4-6, then this motion passed 10-1.)

- Consider a more robust supervision of the bar by the Court, including active supervision by the Court of the discipline process. (Motion did not receive a second.)
- Require that the WSBA funded boards, committees, and activities be systematically reviewed by experts outside the WSBA who would perform both a legal analysis of the bar’s activities and a financial analysis of the bar’s activities and report to the Court as soon as possible to determine whether: 1) any WSBA funded boards, committees, or other activities identified by the experts use compulsory dues to finance political and ideological speech when the expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services, and 2) the formula used by the WSBA to set the *Keller* deduction is not accurate and, if not, what the correct deduction should be. Through friendly amendment, this motion was changed to: Determine whether the *Keller* deduction and its calculation is accurate then, if necessary, review and amend GR 12, the State Bar Act, and the WSBA Bylaws before requiring a review by an outside expert and representatives from the Court, the BOG, and the WSBA Structure Work Group. (Motion failed 4-6.)
- Consider amending GR 12.2(c) as follows: “(c) Activities Not Authorized. The Washington State Bar Association will not: . . . (2) Take positions on political or social issues which do not directly relate to or affect the practice of law or the administration of justice.” (Motion was withdrawn.)
- Consider reviewing GR 12.2 broadly and more specifically clarify under GR 12.2(c)(2) that there must be a heightened relationship between the political or social issues under consideration and the practice of law or the administration of justice. Through friendly amendment, this motion was amended, and then trifurcated for votes, as follows:
  - Consider reviewing GR 12 broadly. (Motion failed 4-5.)
  - Consider clarifying under GR 12.2(c)(2) that there is a heightened relationship between the political or social issues under consideration and the practice of law or the administration of justice. (Motion failed 3-6.)
  - Consider clarifying that the prohibitions of GR 12.2(c) apply to Court created boards. (Motion passed 5-4.)
- Consider retaining veto power over the BOG’s personnel decisions. (Motion was withdrawn.)
- Reconsider prior requests to have public members on the BOG, and examine the size of the BOG. (Motion was withdrawn.)

- Consider ordering the WSBA board and staff to adopt and execute a thorough *Keller* interpretation when calculating all future *Keller* deductions. (Motion passed 10-0.)
- Reexamine the [WSBA] Governance Task Force *Report and Recommendations* dated June 2014. (Motion passed 8-2.)
- Consider including public member(s) on the BOG. (When initially introduced, this motion did not receive a second. Following further discussion, the motion was reintroduced, seconded, and passed 6-4.)
- Consider ordering the WSBA BOG to design, establish, and support an oversight body of no more than five individuals to oversee the *Keller* calculation and deduction process. (Motion failed 3-7.)

## Recommendations to the Court

After detailed analysis and discussion consistent with the scope of inquiry specified in its charter, the work group felt that the current state of constitutional or antitrust law does not demand a major structural change to the Washington bar or WSBA. The work group identified opportunities to limit liability through specific adjustments. A majority of the work group voted in support of the following recommendations to the Court:

- Retain an integrated bar structure.
- Make no fundamental changes to the six Court created boards administered and funded by the WSBA: the Access to Justice Board; the Disciplinary Board; the Limited License Legal Technician Board; the Limited Practice Board; the Mandatory Continuing Legal Education Board; and the Practice of Law Board.
- Consider clarifying that the prohibitions of GR 12.2(c) apply to Court created boards.
- Consider ordering the WSBA BOG and staff to adopt and execute a thorough *Keller* interpretation when calculating all future *Keller* deductions.
- Reexamine the [WSBA] Governance Task Force Report and Recommendations dated June 2014.
- Consider including public member(s) on the BOG.

## Closing Comments by the Work Group Chair, Chief Justice Mary E. Fairhurst

The residents and Supreme Court of Washington have the good fortune to be served by a dedicated and thriving community of legal practitioners and advocates who tirelessly give their time and talents to improve legal services in Washington. They serve clients, boards, commissions, advocacy groups, WSBA sections, specialty bars, local communities, and the legal profession with an extraordinary commitment to the law and the legal system, and an unrivaled fidelity to ensuring that everyone has access to justice in Washington. The willingness to serve on the Supreme Court Bar Structure Work Group and spend countless hours analyzing complex legal issues and promulgating recommendations to the Court exemplifies remarkable devotion to legal practitioners and the public they serve. The bench, the bar, and all residents of Washington are fortunate and I am profoundly grateful for the participation of work group members Hunter M. Abell, Esperanza Borboa, Daniel D. Clark, Frederick P. Corbit, Eileen Farley, Andrea Jarmon, Mark Johnson, Andre L. Lang, Kyle D. Sciuchetti, Jane M. Smith, and Paul A. Swegle, and the staff supporting the work group's work: Dory Nicpon, Margaret Shane, Rex Nolte, Clay Peters, and Cindy Phillips. Thank you to all of the presenters and to the WSBA for hosting our meetings at their facilities.

August 28, 2019

Chief Justice Mary Fairhurst  
Washington State Supreme Court  
Temple of Justice  
Olympia, WA

Re: Washington Supreme Court  
Bar Structure Work Group - Minority Report

Dear Chief Justice Fairhurst:

Thank you for the opportunity to serve on the Washington Supreme Court Bar Structure Work Group (“Work Group”). It was an honor to serve with you and other Work Group members to address important questions about the structure of the Washington State Bar Association (“WSBA”) raised by recent United States Supreme Court cases.

The Majority Report accurately summarizes the Work Group’s process and the information it reviewed. We feel, however, that the Majority Report does not fully capture the strong disquiet felt by some members about the recommendation to maintain, without further discussion, the current WSBA structure. Consequently, we submit this Minority Report for your consideration. The comments below are solely those of the signatories acting in their individual capacities, and do not reflect the opinions of any other outside organizations or entities.

The Court should seriously evaluate whether a voluntary bar association would be more vibrant and engage more members than the existing mandatory association. The information presented by WSBA staff and comments sent by WSBA members raise significant questions about the WSBA’s member engagement, finances, and calculation of the licensing fee deduction for WSBA political activity (“*Keller* deduction”). Each issue is addressed below. Additionally, at minimum, we recommend the Court also address the concerns raised in the June 2014 Governance Task Force Report.

#### 1-Member Engagement.

Emily Chiang, Legal Director for ACLU-Washington, advised the Work Group that the United States Supreme Court decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. \_\_\_\_ (2018) did not require bifurcating the WSBA. This is only part of the analysis. The other part, and the question for the Court, is whether the WSBA should be bifurcated. Past WSBA President Anthony Gipe notes that

less than 20% of WSBA members vote in elections for the Board of Governors (“BOG”). (Comment 11, Anthony Gipe, Past WSBA President April 30, 2019 Letter). Of the 34 Comments submitted to the Work Group, at least one-third said they wanted the WSBA to become a voluntary bar association. Reasons for this ranged from the amount of bar licensing fees to complaints that the WSBA is too “Seattle-centric” and irrelevant to much of the rest of the State, particularly eastern Washington. This latter opinion reflects the geographic distribution of active lawyers throughout the state. In 2018, of the 26,313 active Washington lawyers, slightly more than 80% were in the seven counties that border I-5. Fewer than 19% of active lawyers are found in the remaining 32 counties. (See Mandatory Insurance Task Force Report, Exhibit B.) If the WSBA cannot meaningfully engage with a majority of its members and develop and maintain the trust necessary to secure broader member support, the Court should consider whether a voluntary association might be more vibrant and responsive.

## 2-Financial Stability.

In 2014 WSBA’s General Fund was “in the red” \$1.57 million; in 2015 \$2.7 million; in 2016 \$1.84 million; and in 2017 \$554,000. In 2018 the WSBA General Fund had net positive revenue of \$430,000 but the 2019 adopted budget assumed a General Fund loss of \$101,600, and the proposed 2020 budget assumed a General Fund loss of \$560,000.

The WSBA accumulated these deficits even as revenue increased from \$14.56 million in 2014 to \$16.9 million in 2017 and a projected \$20.8 million in 2020. This is not a sustainable path.

## 3-Keller Deduction.

Ms. Chiang advised the Work Group that *Janus* did not require splitting the WSBA, but reminded members that *Keller v. State Bar of California*, 496 U.S.1 (1990), requires bar associations to allow members to deduct from mandatory dues money spent on activities not related to regulation of the profession and improvement of the quality of legal services.

In 2019 the WSBA *Keller* deduction was \$1.25 for lawyers admitted before 2017, and \$.63 for lawyers admitted in 2017 or later. To many members, this is not credible, particularly in light of *Keller* deductions in other states and the WSBA’s wide-ranging activities. The *Keller* deduction is calculated by bar staff who, while honorable, well intentioned, and experienced, are placed in the untenable position of calculating a *Keller* deduction that may reduce funding of various WSBA activities directed by the Board of Governors and the Court, and employing their colleagues.



The Work Group agreed that the formula used to calculate the deduction needs to be more transparent. Governor P.J. Grabicki, who was not a member of the Work Group but regularly attended the meetings, recommended that an outside accounting firm review the deduction. (Comment 23, P.J. Grabicki, District 5 Board of Governors representative). He noted that, while the deduction survived a challenge brought by a Washington attorney, that attorney did not have the assistance of an accounting expert. Governor Grabicki advised the Work Group that if the Goldwater Institute, which is challenging at least three other mandatory state bar associations, challenges the WSBA's *Keller* deduction, it could bring in significant accounting "firepower."

The Work Group ultimately rejected, by a vote of 6-4, a motion to recommend that an outside accounting firm review the *Keller* deduction. Instead, Work Group members agreed they would offer to review the deduction themselves. Chief Justice Fairhurst reported at a subsequent meeting that members of the Supreme Court were not supportive of this idea. As such, the Majority Report defaults to a recommendation that the Board of Governors and staff "adopt and execute a thorough *Keller* interpretation" when calculating the deduction. *See* Majority Report, at 15. To promote transparency and considering litigation around the country challenging mandatory bar associations, the *Keller* deduction should be examined by an outside expert like the one proposed by Governor Grabicki.

#### 4-Current Board Governance.

In the first eight months of 2019, the WSBA Board of Governors has been sued by a WSBA employee, one of its own members, and by two attorneys alleging that the WSBA must comply with public disclosure requests. The attorneys prosecuting the public records litigation prevailed at the trial level, and WSBA has been ordered to provide Board communications relating to the firing of the former Executive Director. Should the trial court ruling be affirmed, it is probable that the resulting release of emails and other WSBA communications will provoke another uproar from WSBA membership, further undermining institutional trust and stability.

Insisting that there be no changes to the WSBA structure and its relationship to the Court will not re-engage members, resolve financial issues, or provide a transparent and credible explanation of the *Keller* deduction. Instead, it merely postpones important structural reforms that can and should happen now.

One of us has been a member of WSBA for 40 years. It is painful to recommend that the Court consider whether the WSBA should continue in its current form. However, the issues raised during the Work Group and the recommendations of the

2014 Governance Report demonstrate the need for serious consideration of a voluntary bar or other changes to the current structure.

Very truly yours,

Eileen Farley  
[Efarley-mtvb@outlook.com](mailto:Efarley-mtvb@outlook.com)

Hunter Abell  
[habell@williamskastner.com](mailto:habell@williamskastner.com)

