

August 18, 2022

To: WSBA ADR Section ExComm

From: Paula Emery, WSBA ADR section liaison to ETHOS Bar Structure Study

ETHOS Bar Structure Study report

Legal Background (provided by the WSBA Board of Governors):

In 2018, a U.S. Supreme Court decision — *Janus v. American Federation of State, County, and Municipal Employees, Council 31* — undercut the foundation of a key case — *Keller v. State Bar of California* — that supports the constitutionality of the integrated bar structure. As a result, several lawsuits have cropped up throughout the country to challenge different integrated bar associations.

The main legal question under scrutiny is: Does it violate bar members' First Amendment rights when they are required to be part of an integrated bar to practice law? Integrated bars, like the WSBA, perform both regulatory and professional-association functions. Concerns arise when an integrated bar engages in speech or activity that seems to stray from the bar's primary duty of regulating the practice of law, and some members contend they should not be compelled to be associated with such speech/activity.

In the wake of *Janus* and associated lawsuits, in late 2018 the Washington Supreme Court convened the Washington Supreme Court Work Group on Bar Structure, which evaluated federal law developments, as well as the WSBA's historical and existing structure and practices. In September 2019, the Work Group issued a final report with the recommendation to retain an integrated bar structure "for now." [Here is more information about the work and recommendation from that group.](#)

WSBA ADR section participation:

Only the Board of Governors are voting members of the study, and the work was supported by membership survey conducted by a third party, employee survey feedback, public comment, and a review of the legal landscape and the pros and cons of different bar structures in other jurisdictions (e.g., California, Nebraska).

WSBA Sections were invited to send liaisons to participate in the study, and the WSBA ADR section added me to this work in late March. I thank the ExComm for this opportunity.

Timing:

The WSBA [ETHOS Bar Structure Study](#) ran 8 meetings between January and August 2022. The study's final Board of Governors meeting was held Saturday, August 13th, 2022 and the objective is to complete their report to the Washington Supreme Court in September, in order to complete the ETHOS Bar Structure Study before the beginning of the new term year for governors.

Questions presented:

The WSBA Board of Governors was tasked by the Washington Supreme Court to answer three questions:

1. Does current federal litigation regarding the constitutionality of integrated bars require the WSBA to make a structure change?

Answer to Question 1:

In April 2022, question number 1 was answered "No" because the US Supreme Court denied cert. in the three cases that had been pending that might have required immediate action regarding WSBA's structure. The U.S. Supreme Court on April 4, 2022, denied certiorari for three cases challenging the integrated-bar structure: [Taylor v. Heath](#) (Michigan), [Schell v. Darby](#) (Oklahoma), and [McDonald v. Borunda Firth](#) (Texas).

2. Even if the WSBA does not have to alter its structure now, what is the contingency plan if the U.S. Supreme Court does issue a ruling that forces a change? (unanswered at this time; please see below)
3. Litigation aside, what is the ideal structure for the WSBA to accomplish its mission?

Answer to Question 3:

The Board of Governors voted 10-2 to recommend Proposal/Option 1: status quo (No Change to Structure) to the Washington Supreme Court.

Question 3 consumed most of the time and energy at the August meeting, with [three proposals](#) enjoying a robust discussion. The proposals were:

Proposal/Option 1: status quo (No Change to Structure)

Proposal/Option 2: Create a separate entity (Political Arm of Washington Lawyers, or PAWL) to support law improvement work by sections

[Proposal/Option 3](#): bifurcation, with regulatory functions moving under the Washington Supreme Court and a voluntary bar association performing trade association-like services and programs.

Rationale for Proposal/Option 1: maintaining the status quo (quoted directly [8/11/22 memo from WSBA ED to the Board of Governors](#)):

Favored by Some of Our Most Invested Members¹

Almost all of the sections who have weighed in and voiced their opinions have expressed a desire to stay integrated, as have many of our Supreme Court Boards and Committees.

No sections have affirmatively advocated for bifurcation.

Staying Integrated Ensures the Most Effective Provision of Resources and is the Fiscally Responsible Thing to Do

The fiscal analysis of the various scenarios has shown that any scenario involving bifurcation will result in an increase in the licensing fee itself (i.e. the CA Model) or an increase in the overall costs for those members who rely on the non-regulatory services of the Bar.

The current structure allows for economies of scale because all of the organizational support resources and infrastructure necessary to support an organization are leveraged by the same organization.

In a bifurcated model, the support resources and infrastructure would need to be established and maintained by two separate organizations. A large segment of members who rely most heavily on the non-regulatory services are small firm or solo practitioners who would be less able to afford the increased costs of services by paying two fees under a bifurcated model (i.e. a solo practitioner that relies on the Fastcase legal research tool would now have to pay fees to two organizations at a greater cost in order to receive the benefit of that resource).

Maintenance of the current structure ensures that all legal professionals have access to the critical services necessary to assure their ability to practice competently and effectively in service to the public.

Proposal/Option 2: no specific analysis or detailed discussion at the meeting, but was considered briefly in whether and how to address Question 2.

¹ Membership Survey results:

Response Rate

o 479 members

o 97.75 confidence level / 5% sampling error (exceeding NBRI's 95/5 goal for statistically valid data)

Which of the following options best describes your preferred structure for the WSBA?

o 45%: WSBA should remain integrated (performing regulatory and professional o association-like services) as it currently is

o 38%: WSBA should bifurcate so regulatory services are performed by a WA Supreme Court agent and other services are performed by a voluntary bar association

o 3%: An alternative structure

o 14%: I have no opinion on the structure of the state bar

Rationale for the Proposal/Option 2 (quoted directly [8/11/22 memo from WSBA ED to the Board of Governors](#)):

PAWL is the ideal structure for WSBA for two primary reasons: (1) It reduces potential future risk and (2) It increases the potential effectiveness of collective legislative advocacy by Washington legal professionals.

Reduces Potential Future Risk

Although Keller is still good law in Washington State, the Fifth Circuit has already held that it is unconstitutional to require membership in an integrated bar association that engages in non-germane activity and a case involving similar issues is pending in the Ninth Circuit. Legislative activity is one of the expressive activities that was at issue in the McDonald case. In my view, it would be preferable for WSBA to be as close to “Keller pure” as possible. Moving the majority of legislative activity out of WSBA would be a significant step in accomplishing that goal.

[Proposal/Option 3: Bifurcation](#): Rationale for Option/Proposal 3 (quoted directly from the [meeting materials](#) and Governor Abell’s proposal):

1. Avoid the Constitutional issue: Dissenting lawyers who sincerely disagree with decisions made and positions taken by the professional association are no longer involuntarily forced to be members of that professional association, which they do not want to belong to.
2. Bifurcation does away with the intrinsic and frequently incompatible tension between a membership organization (which advocates for the profession and serves the best interests of its professional members) and a regulatory entity (which protects the public and serves the public interest).
3. There is no evidence that states with bifurcated structures are doing a less effective job at (separately) serving lawyers and protecting the public. About 20 states, including those that are arguably peer states of Washington in terms of bar membership and attributes, use a mandatory/voluntary model with success.
4. A bifurcated model promotes the Court’s direct control and authority over regulatory matters.
5. A voluntary state bar association would allow members to be as legislatively active as their membership desires.

Answer to Question 2:

The Board of Governors did not reach a decision on this question. The Board passed a motion to: “As an answer to Question 2, there are currently cases pending in the 9th Circuit and the Supreme Court and the Board will continue to follow the cases and will work to develop a plan as necessary and needed and that the process the board has engaged in has gathered information from different parts of the state that can be drawn upon to inform an approach and a plan.”

For background information on an approach to Question 2 supported by Governor [Hunter Abell](#), I recommend reviewing pages 8 - 10 of [these materials](#), along with whatever supplemental materials following those pages your curiosity warrants. Governor Abell’s memo opens:

Question No. 2: Even if the WSBA does not have to alter its structure now, what is the contingency plan if the U.S. Supreme Court does issue a ruling that forces a change?

If a change is required, the BOG will generally adopt, revise, and implement the two-part process recently utilized to transition the structure of the State Bar of California. Specifically, the BOG will create a voluntary nonprofit entity while retaining mandatory regulatory functions under the direct purview of the Washington Supreme Court, with the specific revisions referenced below.

The first prong entails creation of a voluntary nonprofit entity that adopts the membership and activities of current WSBA sections. In California, the voluntary entity became known as the “California Lawyers Association.” Similarly, in Washington, such an organization may be known as the “Washington Lawyers Association.”¹

The second prong entails revising the current mandatory WSBA structure to continue executing core regulatory functions, including discipline and licensing, under the direct purview of the Washington Supreme Court. In California, the mandatory entity became known as the “California State Bar.” Similarly, in Washington, the mandatory entity may simply become known as the “Washington State Bar.”² The Washington State Bar would continue to operate the current functions of the Office of Disciplinary Council and the Regulatory Services Department, as well as other departments described below.

The Board of Governors discussed whether it would be a good idea to have a “Plan B” in the likelihood that legal challenges to a single integrated mandatory bar association will continue. There were thoughts that suggest striving to achieve a Plan B is a good idea, but that the good idea is in tension with the lack of clarity as to what type of legal decision impacting a single integrated mandatory bar association may come about, and low confidence in an ability to pre-determine what that future landscape may look like.

Paula’s perceptions and feedback:

Governor [Jordan Couch](#) championed Option 1, supported by Governor [Francis Adewale](#). Governors [Hunter Abell](#) and [Brent Williams-Ruth](#) championed Option 3, supported by Governor [Carla Higginson](#).

As this is the second time the Board of Governors has been asked to consider the structure of the Washington State Bar Association, and as legal challenges to the mandatory bar structure continue, it is likely the Board of Governors will be tasked with doing further work on this topic.

The topic concerns us all, as members of the bar and practitioners. It appears that the litigation arguing for a further extension of the Keller amendment up to and including reducing mandatory bar to licensing and discipline is being pressed, at least in significant part in response to the efforts of mandatory bar associations to improve in areas of diversity, equity and inclusion.

Conclusion and Recommendations:

The Board of Governors will work with the Executive Director to prepare a report to the Washington Supreme Court in September that reflects the decisions of the board. It is likely this issue will continue to be of interest to WSBA ADR section members, and that the Board of Governors will be tasked with taking up this matter further, as further judicial decisions impacting WSBA from the 9th Circuit and US Supreme Court warrant.

I recommend the WSBA ADR Section continue to have an ETHOS liaison, in whatever continued form it may take. Future work to gather specific insights, such as an independent section survey that the Elder Law section conducted, may be considered.

Kindly submitted,



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