

# WASHINGTON STATE BAR ASSOCIATION

## BOARD OF GOVERNORS SPECIAL MEETING - ETHOS

### Minutes

WSBA Offices, Seattle, WA

February 5, 2022

Call to Order and Welcome ([link](#))

The special meeting of the Board of Governors of the Washington State Bar Association (WSBA) was called to order by President Brian Tollefson on Saturday, February 5, 2022 at 9:08 AM. Governors in attendance were:

Hunter Abell  
Francis Adewale  
Sunitha Anjilvel  
Lauren Boyd  
Pres. Elect Daniel D. Clark  
Jordan Couch  
Carla Higginson  
Tom McBride  
Treas. Bryn Peterson  
Brett Purtzer  
Alec Stephens

Also in attendance were Executive Administrator Shelly Bynum, Michael Cherry (Practice of Law Board), Chief Disciplinary Counsel Doug Ende, Kevin Fay, Chief Regulatory Counsel Renata Garcia, Geoff Gibbs, Nancy Hawkins (Family Law Section), Chief of Staff Ana LaNasa-Selvidge, Rajeev Majumdar, Executive Director Terra Nevitt, Chief Communications & Outreach Officer Sara Niegowski, Broadcast Services Manager Rex Nolte, Webcast Specialist Clayburn Peters, Kari Petrasek, Director of Advancement Kevin Plachy, Parliamentarian G. Kim Risenmay, Immediate Past Pres. Kyle Sciuchetti, General Counsel Julie Shankland, Chief Equity & Justice Officer Diana Singleton, Member Services & Engagement Manager Julianne Unite, and Barnaby Zall.

Pres. Tollefson made opening remarks, including outlining the three questions set forth by Chief Justice Steven González for the Board of Governors to answer through this process: (1) have any changes in the law dictated a change in the structure of the WSBA; (2) even if there are not any changes that need to be made, if relief were granted in the pending cases, what would the new structure look like; and (3) regardless of how questions one and two are answered, are there any

changes that the WSBA thinks should be made for the betterment of the Bar, in the interests of justice. He noted the Court asked that WSBA seek broad input. Pres. Tollefson reviewed the meeting schedule, noted decorum expectations, and reviewed the charter approved by the Board on January 13, 2022. He noted that the charter calls upon the Board to consider the cost and effect of any structural changes, including specifically its impact on diversity, equity and inclusion, and any impact on marginalized communities. Pres. Tollefson noted that no executive sessions are planned, though they may be needed if the Board needs to receive legal advice.

Discussion followed, including perspectives that the most interesting question is what is the ideal structure of the bar; that the plan includes updating some of the topics explored by the last workgroup, as well as robust stakeholder engagement; and a perspective that the Board should not feel limited by the three questions set forth by the Court.

#### Brief History of the WSBA ([link](#))

Chief Disciplinary Counsel Doug Ende presented on the history of the WSBA. He described the two primary bar models – the unified model and the agency model – noting the prevalence of the unified model in the western part of the United States.

He described the formation of the Washington Bar Association as a voluntary association in 1888 and its renaming to the Washington State Bar Association in 1890 as a result of Washington becoming a state. He explained the history of the Supreme Court enacting rules regulating the practice of law in Washington, noting that the profession was regulated directly by the Court and not by the, still voluntary, WSBA. He also noted that, despite some legislative underpinnings for regulation of the practice of law, it was acknowledged that the Supreme Court had the regulatory power. In 1909 a Board of Law Examiners was legislatively created and authorized by the Court to support the bar application and examination process. Chief Ende noted that this is the first instance in Washington of an entity being created for the express purpose of supporting the Court with a regulatory process. The 1909 legislation was substantially expanded in 1917 to include disciplinary authority.

Chief Ende explained that in 1921, the State Bar Association for North Dakota became the first legislatively created unified bar and nine other states followed suit between 1921 and 1932. He reviewed the history of the State Bar Act in Washington, noting that one of the promoted benefits of the unified bar was the promise that the regulation of the practice of law would be self-funded, rather than by the state's general fund. The Act was adopted in 1933, making membership in the WSBA mandatory in order to engage in the practice of law. The Act also made clear that the regulatory functions were assigned to WSBA, subject to approval of the Washington Supreme Court.

Chief Ende briefly reviewed litigation related to separation of powers that reached an initial apex around 1976, highlighting *Graham v. Washington State Bar Association* and *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.* The former found that separation of powers prohibited the legislature from authorizing auditing of the WSBA. In the latter case, the Court held that the legislature cannot regulate the practice of law because only the Supreme Court has that authority. Following that case, the Court adopted the Limited Practice Officer Rule in 1983.

General Rule 12 was adopted by the Washington Supreme Court in 1987, setting forth the purposes of the WSBA, as well as specific activities that are authorized and prohibited. Chief Ende speculated that this rule was enacted as a result of litigation leading up to the *Keller v. State Bar of California* decision by the US Supreme Court in 1990.

Chief Ende walked through more recent history. In 2001, the Washington Supreme Court adopted a definition of the practice of law and created the Practice of Law Board. In 2007, GR 12 was amended to deal with the creation of Supreme Court Created Boards administered by the WSBA. In 2009, the Board of Governors voted 7-6 not to recommend separating the lawyer discipline system from the WSBA, following review and recommendations by the ABA, which had long held that discipline systems should be administered directly by state supreme courts. In 2012, the LLLT Rule was adopted and then sunsetted in 2020. In 2013, GR 12 is amended to clarify that the license fee is subject to review by the Supreme Court for reasonableness. That same year, the Nebraska State Bar Association is ordered to semi-deunify following a member's petition. Although the Court rejected total deunification, it did amend its rules to require a mandatory membership assessment to be used exclusively for regulation of the practice of law, with voluntary fees for other activities. The State Bar of California was deunified by the legislature in 2017. In 2014, GR 12 was amended again to include an open records provision because the WSBA is not subject to the Public Records Act as a result of separation of powers issues.

Chief Ende explained that from 2014-15 the Board engaged in a broad review of the WSBA governance structure, noting that the 2014 Task Force recommended that the majority of the State Bar Act be repealed given that it has largely been or could be superseded by court rule. The Board of Governors decided that this was not urgent or necessary, however other recommendations that were adopted, include the creation of an Executive Committee. Others were not, including the proposal to change the name to the State Bar of Washington.

In 2017 GR 12 was amended again, of particular significance is the adopting of introductory language stating the Court's inherent and plenary authority to regulate the practice of law. Chief Ende noted that this was prompted, at least in part, by anti-trust litigation that highlighted the

importance of the actual governmental regulator being engaged in the active supervision of the regulatory activities. The Court also adopted the ABA model regulatory objectives verbatim.

Chief Ende finally noted that, in 2019, a Bar Structure Work Group was convened by the Washington Supreme Court. The purpose was to make recommendations to the Court regarding the structure of the WSBA in light of recent constitutional and antitrust cases. The majority recommended no significant changes.

#### Case Law Concerning Mandatory Bar Associations, 1961 to 2014 ([link](#))

General Counsel Julie Shankland presented an overview of litigation concerning mandatory bar associations from 1961 to 2014, beginning with an overview of the terminology describing bar associations. She started with *Railway Empl. Dept. v Hanson*, a union case in which members alleged that their dues were being used for political and economic issues they didn't support in violation of state law. She noted that the Supreme Court did not decide the case on constitutional grounds, but did construe the statute to be constitutional.

In *Lathrop v. Donohue* members challenged dues to the State Bar of Wisconsin, alleging that they were being coerced to support political activities. The Supreme Court held in a plurality opinion that compulsory membership in a state bar is constitutional. The court did not take up the freedom of speech question and did not apply a specific level of scrutiny in deciding the case.

In *Keller v. State Bar of CA* the Court unanimously held that lawyers may be required to join the bar and pay dues, but did not agree that they should pay dues that support political or ideological activities. The Court found that compelled association and the integrated bar are justified by the state's interest in regulating the legal profession and improving the quality of legal services. Counsel Shankland noted that the Court used a standard from the union case – *Abood*.

Counsel Shankland also reviewed a Ninth Circuit case from 1999, *Morrow v. State Bar of CA*. She noted that in this case members argue that their first amendment rights are violated by compulsory membership in a state bar association that conducts political activities beyond those for which mandatory support is justified and that *Keller* left this question unanswered. General Counsel noted that the Ninth Circuit disagreed with this argument, finding that *Lathrop* controlled.

Counsel Shankland walked through two union cases – *US v. United Foods Inc* (2001) and *Knox v. Service Employees Intern. Union, Local 1000* (2012) – where the Supreme Court applied exacting scrutiny to the question of compelled fees.

In the final case, *Harris v. Quinn*, decided by the Supreme Court in 2014, General Counsel highlighted the Court upholding and reaffirming its decision in *Keller*.

#### Case Law Post 1990 ([link](#))

In the second part of her presentation, Counsel Shankland walked through the landmark Supreme Court case, *Janus v. American Federal of State, County, and Municipal Employees* (2018), and the litigation that has followed. She explained that in 2018 the Court explicitly overruled the *Abood* decision finding that the line between germane and non-germane expenditures is an impossible one to draw with precision; and, even germane speech is overwhelmingly of substantive public concern. Counsel Shankland noted that the Court did not decide whether exacting scrutiny was the correct standard. She also noted that the Court did not mention *Keller* in the ruling, a case that rested on *Abood*. Counsel Shankland noted that following this decision, cases have been filed against integrated bar associations in the Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits and that some bar associations have taken steps to change their structure.

In *Fleck v. Wetch*, a member complained that compelled fees were being used to support legislation that he personally opposed. The Supreme Court granted cert in the case and remanded it to the Eighth Circuit in light of the *Janus* decision. Counsel Shankland noted that the Eighth Circuit found that the Michigan Bar's *Keller* deduction procedures were adequate and the Supreme Court denied cert on appeal in 2020. Similarly, in *Jarchow v. State Bar of Wisconsin* (2019) the Seventh Circuit upheld a federal district court ruling which upheld compulsory fees based on *Keller*. Counsel Shankland walked through the Ninth Circuit case, *Crowe v. Oregon State Bar* (2021), in which members alleged that statements addressing violence related to white nationalism were not germane to the purposes of the state bar association and violated their rights to freedom of association. Counsel Shankland noted that the Ninth Circuit found that *Keller* has not been overruled, but remanded the case on freedom of association claim. The petition for cert was also denied in this case in October 2021. In *Schell v. Chief Justice of the OK Supreme Court* (2021), the Tenth Circuit found that *Keller* is binding, but noted it is unclear how much non-germane activity is tolerated. Counsel Shankland noted that a cert petition in *Schell* is pending before the Court.

In *McDonald v. Longley* (2021), the Fifth Circuit found that compelled membership in bar engaged in any non-germane activity fails exacting scrutiny, noting that less restrictive models exist. Counsel Shankland walked through specific bar activities, noting how the Fifth Circuit addressed them, including continuing legal education, diversity, and access to justice. She noted that the cert petition is pending before the Supreme Court. She also noted the Fifth Circuit's ruling in *Boudreaux v. Louisiana State Bar Assoc.* (2021) that Hudson procedures are a constitutional prerequisite to the Bar's collection of mandatory dues.

Finally, Counsel Shankland noted the decision of the Sixth Circuit in *Taylor v. Buchanan* (2021), which held that *Lathrop* and *Keller* are still binding decisions. She noted that in the petition for cert, the Court is asked to overrule those two cases because they did not use the exacting scrutiny standard.

#### Discussion of Case Law Concerning Mandatory Bar Associations ([link](#))

Questions and discussion followed Counsel Shankland's presentation, including a suggestion to review Justice Barret's record to see if we can determine her likely position on these issues; clarification of the standard used in *Keller*, which is being referred to as rational basis, and whether there would be a different standard for integrated bar associations; a perspective that one of the challenges is to predict whether *Keller* will be overruled, including on the basis of the standard used; whether a bar association could oppose a move to repeal the Washington Law Against Discrimination, as an example, under the Fifth Circuit's standard; the concept of being 'Keller pure', which is when a bar association does not engage in activities that would implicate the need for a Keller refund; whether having a Keller pure approach would satisfy the Fifth Circuit, which seems to be a question about the remedy for making a mistake in determining what is germane to the purposes of a bar association; whether the case law will impact WSBA's activities under GR 12 beyond any changes to the structure; that there is a potential for the Supreme Court to change the definition of what is germane, which could require changes to GR 12; the potential impact on the speech of members; clarification that WSBA does not engage in any direct political work; whether it would be more appropriate to have a statement on white supremacy behavior that was directly impacting a sense of safety at the courthouse; and the current procedural posture of the relevant cases, which likely puts any decision out about a year.

#### Supreme Court Workgroup on WSBA Structure/House Bill 1788 ([link](#))

Past Pres. Sciuchetti provided an overview of the work of the prior work group, including his perspective that that process perhaps did not include sufficient opportunity for discussion at the end.

Gov. Abell who also served on the prior work group highlighted the participation and solicitation of feedback from a vast stakeholder group. He encouraged the Board to be disciplined in responding to the three questions posed by the Court to ensure there is sufficient time to fully discuss and make recommendations to them.

Discussion followed, including how the Washington Supreme Court's position may have changed, what the dissenting viewpoints on the Court may have been, and whether having the work group chaired by the Chief Justice may have impacted the ability to have frank discussions; an emphasis on the Court's recommendation to keep the structure "for now"; an inquiry as to whether it would be possible to get additional information from the Court in terms of their areas of interest

or concern; a perspective that there isn't much urgency to the process given that the US Supreme Court will not make any decisions this year; a perspective that the Court has asked the Board to come to its own conclusions without being persuaded by the Court and therefore further inquiries of the Court are not necessary; a perspective that now is the time to move forward and make recommendations with a plan for the future; and question as to whether HB 1788 could be revived.

#### Member & Public Comments ([link](#), [link](#))

The Board engaged in discussion with members, including a perspective that the benefit of the voluntary bar would allowing sections and entities to amplify attorney voices to be heard more fully; a perspective that even as a voluntary organization there can still be a challenge in determining whether you speak on behalf of the whole group; the importance of getting information out about these meetings and engaging the public; and a perspective that it was surprising to learn about the extent to which we've engaged in these questions previously.

Discussion followed about the opportunity for public comment and the outreach efforts and how Supreme Court created boards factor into these issues.

#### Future Agenda Items and Action Item Review ([link](#))

Pres. Tollefson reviewed the upcoming meeting schedule and agenda items, noting that the next meeting will be Saturday, March 5. Gov. Couch shared information about an upcoming CLE put on by ABA and suggestion that Janet Welch of Michigan be invited to present. Suggestion to develop some questions and employ other strategies to engage members for the feedback meetings. Suggestion that we bring in folks who would be proponents of a change to the structure. Pres. Tollefson noted that we are planning to reach out to California regarding their decision to bifurcate and suggested we might also invite in some folks from states that do not have an integrated model.

#### **ADJOURNMENT**

Gov. Higginson moved to adjourn. Motion passed unanimously. Meeting adjourned at 3:11 PM.

Respectfully submitted,

*Terra Nevitt*

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Terra Nevitt  
WSBA Executive Director & Secretary