

ETHOS

Examining the Historical Organization
and Structure of the Bar

A process by the Washington State Bar Association's Board of Governors to study whether the State Bar must or should change structure and to make corresponding recommendations to the Washington Supreme Court



FINAL REPORT AND RECOMMENDATIONS

SEPTEMBER 2022

ETHOS* Final Report and Recommendations

September 2022

***ETHOS—Examining the Historical Organization and Structure of the Bar**

A process by the Washington State Bar Association’s Board of Governors to study whether the State Bar must or should change structure and to make corresponding recommendations to the Washington Supreme Court



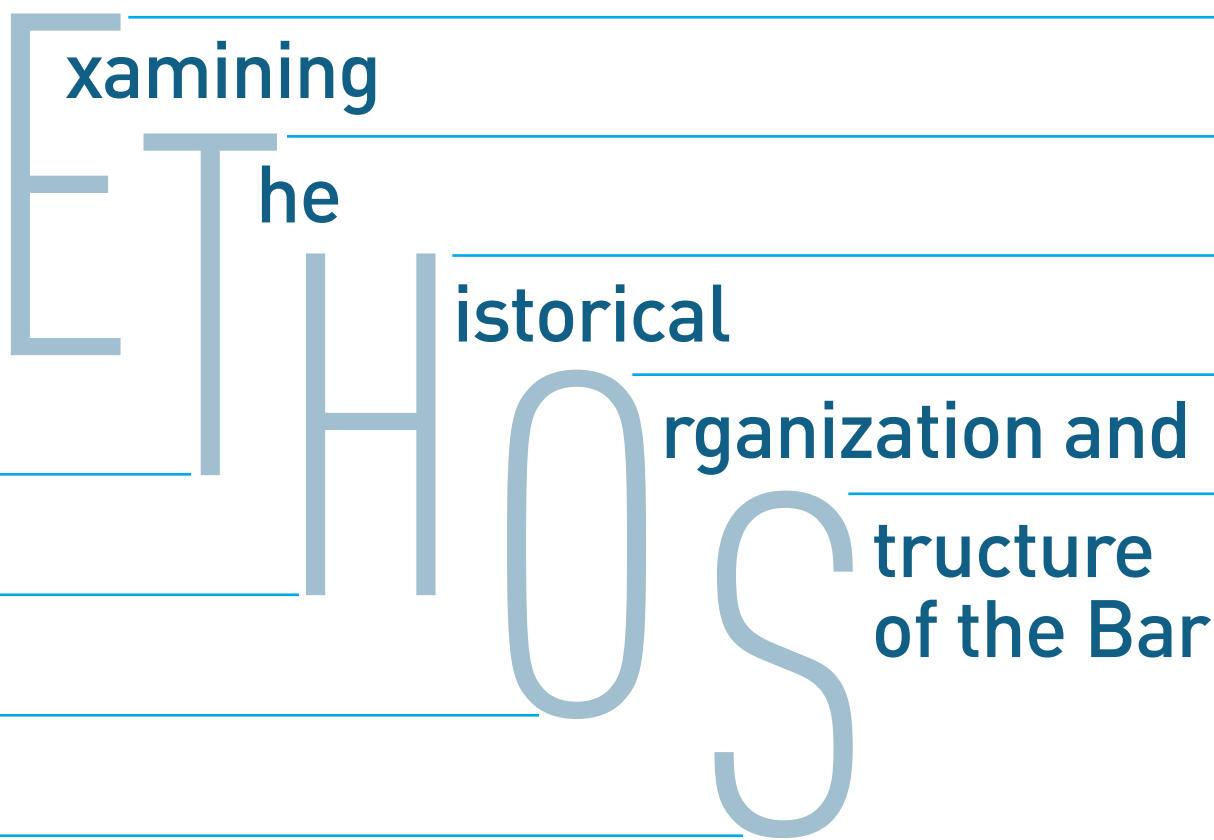
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Executive Summary

IN SEPTEMBER 2021, Chief Justice Steven González called then President of the Washington State Bar Association (WSBA) Kyle Sciuchetti and conveyed a request on behalf of the Washington Supreme Court (Court) for the Board of Governors (Board) of the WSBA to conduct a bar-structure study and report back with recommendations. The request’s impetus and urgency was recent case law with First Amendment implications for integrated bars, such as the WSBA, including several decisions from circuit courts with petitions for certiorari pending before the U.S. Supreme Court.

The Board responded by conducting a 7-month-long process, dubbed “ETHOS” (Examining the Historical Organization and Structure of the Bar), that included review of historical information, legal and fiscal analysis, member engagement and feedback, and debate about several possible bar-structure scenarios.



In concluding the ETHOS process, the Board makes the following responses and recommendations to the Court in answer to the three specific questions posed by Chief Justice González:

Question**1**

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

Response: No. This response is supported by the U.S. Supreme Court’s April 2022 denial of certiorari in cases involving the integrated-bar structure.

Question**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?

Response and recommendation: It will be more efficacious and efficient for WSBA and the Washington Supreme Court leaders to act upon the holding in a specific decision if there is a ruling that forces structural change, rather than developing a hypothetical contingency plan now. The documents and information gathered during ETHOS will inform the planning process at that time.

Question**3**

Litigation aside, what is the ideal structure for the WSBA to accomplish its mission?

Response and recommendation: The ideal structure is the current integrated model, which, in addition to professional regulation, provides critical programs and services that work together to support the public and the profession.

Background

State Bar Structures

U.S. JURISDICTIONS vary widely in their structure for regulating the practice of law, but there are two predominant models: The agency/voluntary model and the integrated/mandatory model. Under the agency model, the regulation of the practice of law is carried out by the state Supreme Court or an agency that reports directly to the court, and membership in any statewide bar association is typically voluntary. Under the integrated model, the statewide bar association administers at least some regulatory functions on behalf of the court and also provides at least some services associated with a professional association; membership is mandatory. Within each jurisdiction there can be considerable variation (for instance, some mandatory statewide bars do not perform regulatory services).

Washington operates under the integrated-bar structure. The WSBA administers all regulatory functions under the delegated authority of the Washington Supreme Court (e.g., admission to practice, license renewal, professional discipline, and mandatory continuing legal education) as well as professional association services focused on improving the quality of legal services offered to the public (e.g. sections, career assistance, professional development, and practice assistance).¹ Membership in the WSBA is mandatory to be licensed to practice law in Washington. This was not always the case; the organization was originally voluntary when started in 1888 by a group of lawyers in the Washington Territory. In 1933, the Washington State Legislature codified chapter 2.48 RCW,² known as the State Bar Act, which made membership mandatory for legal practitioners.

¹ The regulatory objectives of the WSBA are listed in Washington State Court Rules General Rule 12.1 with other purposes and authorized activities listed in GR12.2; see www.courts.wa.gov/court_rules/pdf/GR/GA_GR_12_01_00.pdf and www.courts.wa.gov/court_rules/pdf/GR/GA_GR_12_02_00.pdf, respectively.

² <https://app.leg.wa.gov/rcw/default.aspx?cite=2.48&full=true>.

Legal Developments Prompting the ETHOS Study

IN 2018, A U.S. SUPREME COURT DECISION—*Janus v. American Federation of State, County, and Municipal Employees, Council 31*³—threw into question the continued viability of a key case—*Keller v. State Bar of California*⁴—that provides the constitutional foundation of the integrated-bar structure. As a result, several lawsuits have been filed throughout the country challenging integrated-bar associations, most notably in Louisiana, Michigan, North Dakota, Oklahoma, Oregon, Texas, Utah, and Wisconsin.

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?

Constitutional challenges have been raised when an integrated bar is alleged to have engaged in speech or activity that strays from the bar's primary duty of regulating the practice of law; plaintiff bar members contend they should not be compelled to be associated with such speech or activity.

In the wake of *Janus* and subsequent lawsuits challenging integrated bars based on *Janus*, the Washington Supreme Court in late 2018 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."⁵

³ *Janus v. AFSCME*, 585 U.S. ___, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018).

⁴ *Keller v. State Bar of California*, 496 U.S. 1 (1990).

⁵ See www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/bar-structure-work-group.

Since that time, legal challenges to the integrated-bar structure have continued. By late 2021, these lawsuits resulted in several federal circuit court decisions, followed by petitions for review by the U.S. Supreme Court. With a potentially binding decision on the horizon, the Washington Supreme Court in December 2021 asked the WSBA Board of Governors to again evaluate the structure of the WSBA and to make a recommendation regarding three key questions. (Note: On April 4, 2022, while the ETHOS process was underway, the U.S. Supreme Court denied certiorari in these cases.⁶)

⁶ See *Taylor v. Heath*, 4 F.4th 406 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1441 (2022); *Schell v. Darby*, 11 F.4th 1178 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1440 (2022); *McDonald v. Firth*, 4 F.4th 229 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1442 (2022).

Purpose and Charter of ETHOS

ON DECEMBER 14, 2021, Chief Justice Steven González appeared at a Special Meeting of the Board and, on behalf of the Court, asked the Board to study and make recommendations in response to three questions:

- Does current federal litigation regarding the constitutionality of integrated bars require the WSBA to make a structure change?
- 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?
- Litigation aside, what is the ideal structure for the WSBA to accomplish its mission?

In response, the Board approved its ETHOS charter on Jan. 13, 2022.

THE ETHOS CHARTER

The Board of Governors will review and assess the current structure of the WSBA in light of recent case law implicating rights under the First Amendment (Freedom of Speech and Freedom of Association). The process will collect information regarding the experiences of other states that have either recently changed their organizational structure or are considering whether to do so. The process will also consider the cost of any structural change to its membership and what effect structural change, if any, will have on 1) diversity, equity and inclusion and any impact on marginalized communities, 2) the regulatory division of the bar; 2) WSBA Sections and 3) Washington State Supreme Court Boards, 4) the Access to Justice community, 5) the public, and 6) the membership of the WSBA.

The Board of Governors will invite presentations from those with subject matter expertise or [who] have relevant experience with mandatory or voluntary bar associations in other parts of the country.

The Board of Governors will solicit input and active participation from stakeholders including but not limited to WSBA leadership and staff, WSBA sections, committees, councils, the Access to Justice Community, Supreme Court Boards, minority bar associations and interested members of the public.

The Board of Governors will receive and share knowledge and have open, collaborative, and respectful conversations. The eight meetings will generally be open to the public, except in the rare circumstance in which the Board of Governors must meet in executive session in order to consider legal advice from its attorney.

The Board Governors will make a recommendation or recommendations to the Washington State Supreme Court as to the current or future structure of the Washington State Bar Association.

*Board of Governors
The Washington State Bar Association
January 13, 2022*

ETHOS Process

Meetings

BETWEEN FEBRUARY AND AUGUST 2022, the Board held seven 7-hour meetings to fulfill its charter. The meetings were held in various locations throughout the state, including Seattle, Spokane, and Tacoma. All agendas and materials were published for public participation, and Zoom access was provided for each meeting. Various experts and authorities presented information. Two meetings were entirely devoted to engagement and feedback.

Recordings of the full meetings can be viewed at www.youtube.com/user/WashingtonStateBar.

Resources and Materials

All resources, materials, and written feedback considered by the Board during the ETHOS process are published at www.wsba.org/structure-study. Here is the range of topics, presenters, and information at each meeting:

Meeting 1

Feb. 5, 2022

- A brief history of the structure of the WSBA, by Chief Disciplinary Counsel Doug Ende
- Case law concerning mandatory bar associations—1961 to 2014 and 2018 to present—by General Counsel Julie Shankland
- Information about and decisions from the Court’s 2018 work group on structure, by WSBA Governors who participated in that work group
- Comments from members and the public

Meeting 2**March 5, 2022**

- Information about how the WSBA is funded, by Chief Regulatory Counsel Renata Garcia and Director of Advancement Kevin Plachy
- An overview of the WSBA's regulatory functions, by Chief Regulatory Counsel Renata Garcia
- The history and activities of WSBA sections, by Director of Advancement Kevin Plachy
- Perspectives about the relationship between the WSBA and sections, by section leaders Nancy Hawkins (Family Law Section), Kari Petrasek (Solo and Small Practice Section), Kevin Fay (Corporate Counsel Section), and Randall Winn (World Peace Through Law Section)
- Information about Supreme Court boards administered by the WSBA, by Executive Director Terra Nevitt
- Perspectives about the relationship between the WSBA and Court-created boards, by Michael Cherry (Practice of Law Board Chair) and Emily Rose Mowrey (Law Clerk Board Chair)
- Information about the *Keller* deduction and what the WSBA includes in it, by General Counsel Julie Shankland
- Comments from members and the public

Meeting 3**April 23, 2022**

- Targeted feedback time for Minority Bar Associations
- Targeted feedback time for WSBA Sections
- Targeted feedback time for Supreme Court Boards
- Targeted feedback time for the Alliance for Equal Justice Community
- Targeted feedback time for WSBA Committees
- Targeted feedback time for the general membership and public

Meeting 4**May 21, 2022**

- Exploring the integrated bar model—Oregon and Idaho—with Helen Hirschbiel (CEO of Oregon State Bar) and Diane Minnich (Executive Director of the Idaho State Bar)
- Exploring the voluntary bar model—Colorado and Nebraska—with Amy Larson (Executive Director and CEO of the Colorado and Denver Bar Associations) and Liz Neely (Executive Director of the Nebraska State Bar Association)
- Exploring the hybrid model—California—with Leah Wilson (Executive Director of the State Bar of California) and Oyango Snell (Executive Director of the California Lawyers Association)
- Comments from members and the public

Meeting 5**June 18, 2022**

- Board of Governors discussion about question 1 (Is a change to the WSBA's integrated structure required by law at this time?) considering the U.S. Supreme Court's April 2022 denial of certiorari in pending, applicable cases
- Board of Governors discussion with Supreme Court Boards about the applicability of GR 12 and *Keller*
- Board of Governors discussion of question 3 (What is the ideal structure for the WSBA to achieve its mission, regardless of pending litigation?) In particular, the Board considered seven scenarios for different structures, including fiscal analyses
- Board of Governors discussion about whether a member referendum process would be helpful in decision making or, if not, what other ways are available to get a wide perspective from members
- Board of Governors discussion of question 2 (What is the contingency plan if the WSBA is forced by court decision to change its structure?)
- Comments from members and the public

Meeting 6**July 23, 2022**

- An agenda devoted to member and public feedback

Meeting 7**Aug. 13, 2022**

- Consideration and debate regarding question 3 (What is the ideal structure for the WSBA to achieve its mission, regardless of pending litigation?) with three scenarios considered: 1. Status quo (integrated bar); 2. An integrated bar but moving the WSBA legislative/political activity to an associated, voluntary non-profit entity; and 3. Bifurcation with regulatory services directly under the Court (or agency of the Court) and some/all professional association services moving to a voluntary bar association
- Consideration and discussion of membership and WSBA employee surveys

Engagement and Feedback

Ongoing

THE BOARD IDENTIFIED transparency, engagement, and feedback as its foremost values in the ETHOS process. Throughout the process, WSBA staff emphasized information and feedback opportunities in every Take Note newsletter (sent electronically twice a month to members), Board meeting recaps (sent electronically to all members after each Board meeting), and *Bar News* magazine (mailed almost monthly to all members). In addition, the ETHOS process occupied the most prominent banner at wsba.org with a link to a continuously updated information page; the NWSidebar blog published regular features and updates; and WSBA staff liaisons sent ongoing, targeted invitations to groups such as county bar leaders, section leaders, and minority bar association leaders.

To help general members of the WSBA and the public better understand the process and what was at stake, WSBA President Brian Tollefson and Executive Director Terra Nevitt created a short video,⁷ which was a useful resource and was shared widely, especially in advance of meetings at which specific stakeholders were invited to join the meeting and provide feedback.

In addition, the June issue of *Bar News*⁸ devoted its cover and a special section to the ETHOS process and invited member participation/feedback. The package included background information and perspective from University of Connecticut School of Law Professor Leslie Levin (an expert on the legal profession, ethical decision making, and lawyer discipline); two opinion pieces, one favoring the current structure (from section leaders) and one supporting bifurcation (from King County Bar Association leaders and the Office of Civil Legal Aid leaders); a timeline of the history of regulation of the practice of law in Washington state; and an update on the ETHOS process and how to get involved.

⁷ <https://youtu.be/mWbSEp0rsNM>.

⁸ <https://wabarnews.org/2022/06/09/all-about-bar-structure/>.

Surveys

In addition to the many open feedback opportunities summarized above, the Board decided it would be valuable to hear from a representative cross-section of members and WSBA employees to ensure that all voices—not just the most vocal—were heard and considered in accurate proportion. Toward that end, the ETHOS process relied on results from two surveys.

WSBA MEMBER SURVEY⁹

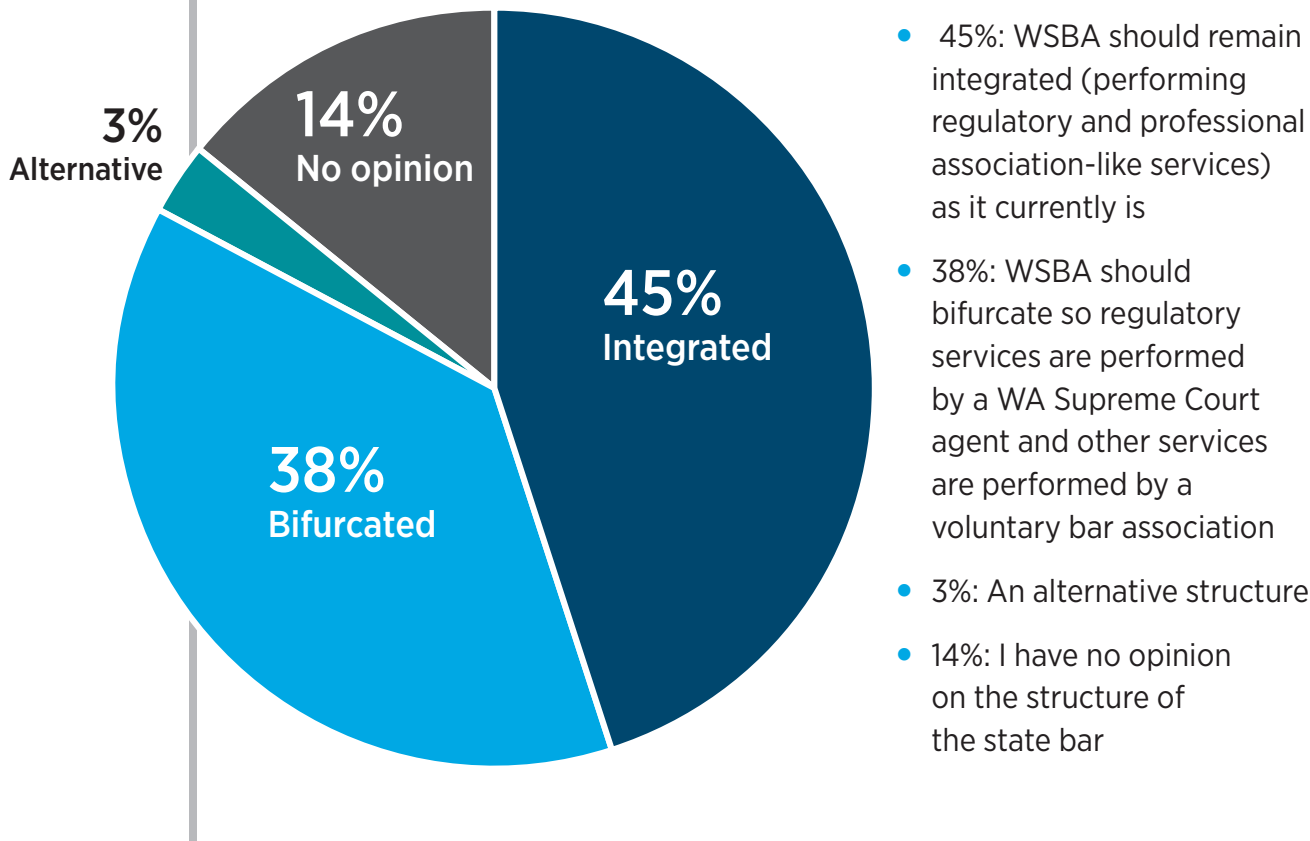
The Board engaged a professional research company—National Business Research Institute (NBRI), which also administers the WSBA’s ongoing member satisfaction survey—to help design and implement a survey to collect member sentiment about their preferred bar structure. The objectives were to ensure neutrality in the questions and a reliable cross-sampling of the membership. NBRI’s organizational psychologists consulted closely on both the questions and the methodology. NBRI advised against an all-member “opt-in” approach, which tends to collect extreme points of view—as those are the members motivated to respond—which points of view are unlikely to represent the entire membership. NBRI instead sent invitations to randomly selected members and recorded participation and answers anonymously. Overall, NBRI was very pleased with the response rate and validity of data.

⁹ See www.wsba.org/docs/default-source/legal-community/committees/bar-structure-work-group/2022-08-13.ethos-late-late-meeting-materials.pdf#page=6 for all comments.

MEMBER SURVEY SUMMARY:

■ Response Rate: 479 members = 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?



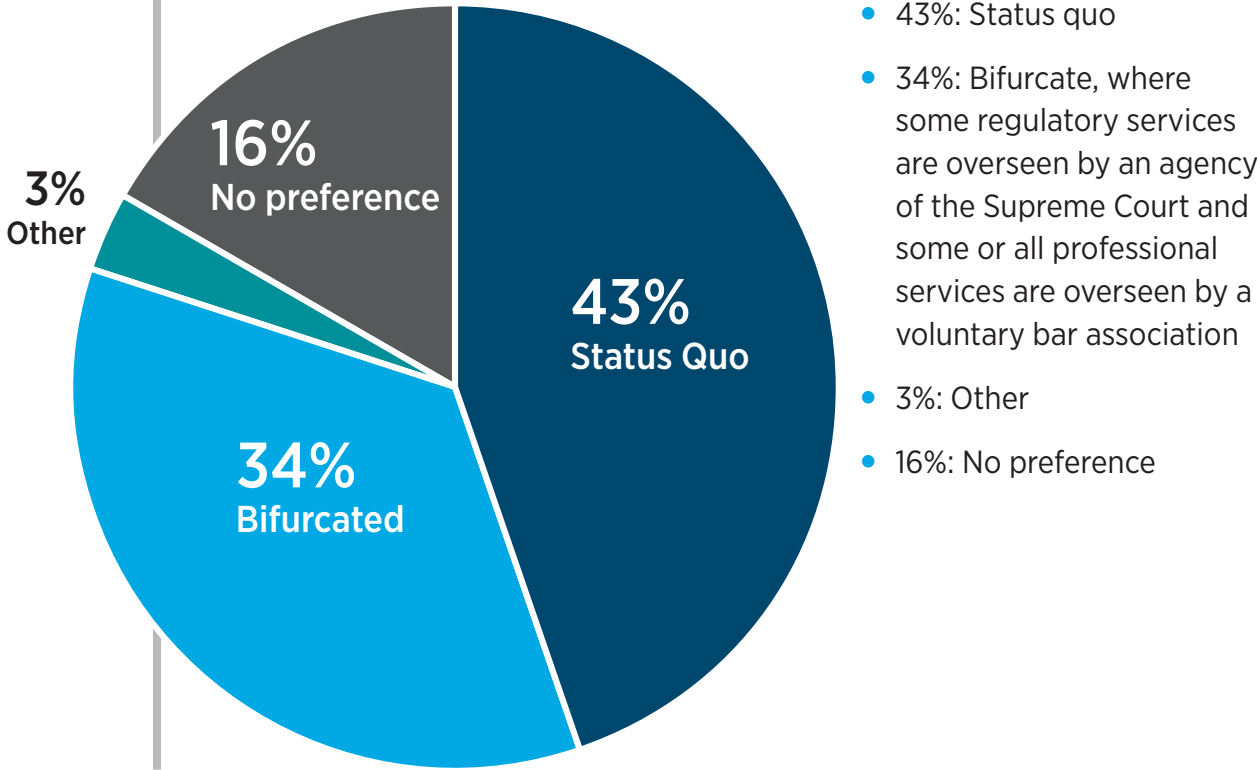
WSBA EMPLOYEE SURVEY¹⁰

The WSBA employees, more than any other group, understand the day-in and day-out opportunities and challenges of the current WSBA structure. Employees had many methods to give feedback, including in Board/staff listening sessions, but many said it would be helpful to have specific questions to respond to and an anonymous way to provide feedback. Thus, WSBA leaders created an online survey, open to all WSBA staff.

EMPLOYEE SURVEY SUMMARY:

■ Response Rate: 44 employees (about 31% of the workforce)

What is your preferred structure of the Washington State Bar Association?



¹⁰ www.wsba.org/docs/default-source/about-wsba/governance/bar-structure/2022-08-13.ethos-meeting-materials.pdf#page=35 for comment themes.

In-Depth Consideration of Three Structural Scenarios

AT THE CONCLUSION of its information- and feedback-gathering process in July, the Board felt confident in its response and recommendation to question 1 (Is a change to the WSBA's integrated structure required by law at this time?) and fairly certain of its approach to question 2 (What is the contingency plan for if the WSBA is forced to change structure?). The bulk of the decision-making heading into the final ETHOS meeting in August was therefore centered on question 3 (What is the ideal structure for the WSBA to achieve its mission, regardless of pending litigation?). Out of the trio, this third question inspired the most feedback, passion, and robust modeling and debate.

As board members considered the many possibilities, they homed in on three bar-structure scenarios for in-depth consideration. To prepare for the decision-making process, Board members who championed each scenario worked with WSBA staff to prepare materials, which included a description and fiscal and legal analyses for each. During the final ETHOS meeting, the champions presented their various scenarios for debate.

The three scenarios and their supporting positions are summarized below:

1. Integrated bar (status quo)¹¹

DESCRIPTION: The WSBA would continue as an integrated bar. The WSBA would continue legislative activities within the parameters of GR 12 and *Keller*. The WSBA would continue to utilize the *Keller* deduction to refund a portion of requesting members' license fees for potentially non-germane activities.

¹¹ www.wsba.org/docs/default-source/about-wsba/governance/bar-structure/2022-08-13.ethos-late-meeting-materials.pdf.

■ PROS:

- Mandatory, integrated state bars that engage in germane activity are constitutional and serve a compelling government interest. The case law across jurisdictions is consistent in this holding.
- This structure most effectively promotes the mission and regulatory objectives of GR 12.1.12. Almost all of the WSBA's regulatory and non-regulatory services would be considered germane, when viewed in light of emerging case law. Moreover, the full scope of current WSBA services and programs (including Member Wellness, section CLEs, and the Professional Responsibility Program) work side by side to ensure the integrity of the legal service and champion justice. Legal professionals serve the public best when they are provided readily accessible resources that promote and ensure the competence and integrity of their services to the public.
- This structure is favored by the majority of members, including the WSBA's most invested members. Almost all the sections weighed in during the process, and they expressed a desire to stay integrated. This is true of Supreme Court Boards and Committees. The scientifically valid member survey showed that only a minority of members prefer to change the current structure.
- Staying integrated ensures the most effective provision of resources and is the fiscally responsible thing to do. The fiscal analysis for any scenario involving bifurcation shows an increase in the licensing fee itself and/or an increase in the overall costs for members who rely on the non-regulatory services of the WSBA. That is because the current structure allows for economies of scale and centralized overhead. Because small firm and solo practitioners rely most heavily on the WSBA's professional services, the current bar structure ensures all legal professionals have access to critical services necessary to uphold a competitive, competent, ethical practice.

¹² www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=GAGR12.1.

- Self-regulation of the legal profession supports the independence of the judicial branch of government and the ongoing integrity of the rule of law. It also provides better protection to members of the public when they seek the services of a legal practitioner. The rationale for vesting authority over the legal profession in the courts is to maintain the legal profession's independence from government domination. Under the integrated-bar model, a legal practitioner who seeks to challenge an action or decision of the Bar is entitled to review by the Supreme Court. Losing the integrated bar structure in favor of a strictly regulatory agency, even if that agency is under the Washington Supreme Court, places the judicial branch of government at risk of losing its independence from the other two branches of government, because it will require legal practitioners to appeal to the legislative or executive branches for relief from a decision of a purely regulatory agency. Members of the public have a fundamental right to obtain legal advice from a lawyer whose duty is to the client, not to any other person and not to the government.
- Any changes based on potential litigation are premature and risk harm to the legal profession and public. There is no argument that *Keller* is not still good law in Washington. Making decisions based on hypothetical future holdings is premature. The Board has already recommended, in answer to ETHOS question 2 (what is the contingency plan if we are forced to change?), that the Board and the Court wait until there is a clear and binding judicial decision that requires change and craft a plan in response to the holding and direction contained in that decision.

2. Status quo, but move WSBA’s legislative/ law-improvement portfolio to a separate, voluntary non-profit organization¹³

DESCRIPTION: A separate legal entity would house all political work that addresses issues of substantive law not closely tied to the regulation of the legal profession or improving the quality of legal services provided to people in Washington. (Note: The WSBA would still maintain a portfolio of government relations and legislative work in areas “germane” to a mandatory bar.) A suggested name for the new entity would be the Political Arm of Washington Lawyers (PAWL). Like the Washington State Bar Foundation, PAWL would be legally separate from the WSBA, with its own Board of Trustees. Importantly, PAWL would be self-funded.

■ **PROS:**

- PAWL would reduce potential future risk. Legislative/political activity is expressly in the crosshairs as courts across the nation consider what actions/speech may violate members’ First Amendment rights as mandatory members of bar associations. By proactively moving all potentially “non-germane” legislative activities to a voluntary association, the WSBA would be “*Keller* pure” in its lobbying activities, hence significantly decreasing the risk of future litigation challenging these activities.

¹³ www.wsba.org/docs/default-source/about-wsba/governance/bar-structure/2022-08-13.ethos-late-meeting-materials.pdf?page=6.

- PAWL would increase the effectiveness of collective legislative advocacy by Washington legal professionals. WSBA sections and other entities often want to engage in legislative and political efforts beyond what is permitted by GR 12 or constitutional limits for mandatory bars. This is a source of frustration to them. By forming a separate, voluntary organization to house legislative/political work, sections and entities would be less fettered and better able to support the critical work of helping the Legislature craft and enact the best laws for the people of Washington.

3. Bifurcation¹⁴

DESCRIPTION: A bifurcated structure would transition regulatory services to an agency of the Washington Supreme Court; the Court would directly govern these functions. Professional-association services (those permitted but not mandatory for legal licensing by various court rules and regulations) would be performed by a new statewide voluntary bar association. This generally mirrors the two-part process recently used to transition the structure of the State Bar of California. As for which services would be categorized as regulatory, some are more easily decided (admissions, discipline, mandatory continuing legal education, license renewal, etc.). If the Board were to recommend bifurcation, the final categorization of services that are and are not regulatory would be part of the larger strategic and operational planning required to make the transition.

■ **PROS:**

- Avoid the constitutional issue: Dissenting lawyers who sincerely disagree with decisions made and positions taken by the professional association are no longer forced to be members of that professional association.

¹⁴ www.wsba.org/docs/default-source/legal-community/committees/bar-structure-work-group/2022-08-13.ethos-late-late-meeting-materials.pdf.

- Bifurcation does away with the intrinsic and chronic 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).
- 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.
- A bifurcated model promotes the Court's direct control and authority over regulatory matters.
- A voluntary state bar association would allow members to be as legislatively active as their membership desires.

Final Recommendations to the Court

To close the ETHOS process and answer the three questions posed by the Court, the WSBA Board of Governors responds and recommends as follows:

Question

1

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

Response: No. (Motioned passed unanimously.)

This response is supported by the U.S. Supreme Court's denial of certiorari in April 2022 in three cases directly related to the Constitutionality of the integrated bar structure.¹⁵ Following this decision, the urgency underlying the ETHOS process alleviated considerably.

Question

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?

Recommendation: There are currently cases pending in the 9th Circuit and U.S. Supreme Court. The Washington Supreme Court and Board leaders should continue to follow developments closely and develop a contingency plan as needed; but it will be important for the contingency plan to draw specifically from the holdings as opposed to try to alter the structure based on conjecture. (Motion passed 8 to 1.)

¹⁵ wSee *Taylor v. Heath*, 4 F.4th 406 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1441 (2022); *Schell v. Darby*, 11 F.4th 1178 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1440 (2022); *McDonald v. Firth*, 4 F.4th 229 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1442 (2022).

The Board notes that all the work done and materials/feedback gathered as part of the ETHOS process, including fiscal and legal analysis for various scenarios, should be called upon if contingency planning becomes necessary. Much of the work of ETHOS provides a roadmap for alternative structures.

Question**3**

Question: Litigation aside, what is the ideal structure for the WSBA to accomplish its mission?

Recommendation: Court and WSBA leaders should work to preserve the current unified structure of the bar. (Motion passed 9 to 3.)

For all of the reasons listed as “pros” in the integrated-bar scenario above, the majority of the Board believes the ideal structure is the current integrated model, which provides critical programs and services that work together to support the public and the profession.

Closing Remarks

THE ETHOS PROCESS marks a moment in time. Just as a previous work group on bar structure prefaced its recommendations with “for now,” so does the Board of Governors in this report. As the ETHOS process began, pending with the U.S. Supreme Court were three petitions for certiorari contesting the constitutionality of the integrated-bar structure. When those petitions were denied in April 2022, during the ETHOS process, the urgency of questions 1 and 2 (does the WSBA *have* to change structure, and, even if it doesn’t, what is the contingency plan for change?) yielded to the opportunity presented by question 3: *Should* the bar change structure to best achieve its mission? The conversations were robust, and the preference for an integrated structure carried the day; simply, the regulatory and professional services go hand-in-glove to support a competent, ethical legal profession in service to clients. It is also supported by WSBA’s most active members and the majority of members.

For now, the integrated structure conforms to the law. Someday—and that day may never come—the law could change, and the ETHOS process itself has provided a roadmap of information and resources if such a change becomes necessary. Further, the ETHOS process has underscored challenges in the integrated model, such as the tension between what can feel like differing missions—to serve the membership or to serve the public. Even if the Court accepts the Board’s recommendation to support the WSBA’s integrated structure, there is still much for the Board and WSBA leaders to follow up on to continue to fine-tune bar governance, responsiveness, and mission-focus.

In closing, ETHOS was a generative process for the Board of Governors and an occasion to thoroughly examine and learn about the history, context, and mission of bar associations in general and of the WSBA in particular. To emphasize: The Board’s ultimate decision to recommend the status quo is not a reflection of a lack of alternative ideas or significant study, but rather an informed and firm commitment to the integrated structure.

*Board of Governors
The Washington State Bar Association
September 2022*

Addendum

Minority Report

September 16, 2022

Chief Justice Steven C. González
Washington State Supreme Court
Temple of Justice
415 12th Ave. SW
Olympia, WA 98501

Re: Washington State Bar Association ETHOS Minority Report

Dear Chief Justice González:

As you know, the Washington State Bar Association (“WSBA”) recently embarked on a comprehensive process examining three questions posed by the Washington Supreme Court addressing the future of the WSBA. This process was entitled Examining the Historical Organization and Structure of the Bar (“ETHOS”). The three questions addressed as part of the ETHOS process are as follows:

- 1) Does current federal litigation regarding the constitutionality of integrated bars require the WSBA to make a structure change?
- 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?
- 3) Litigation aside, what is the ideal structure for the WSBA to accomplish its mission?

On August 13, 2022, the WSBA Board of Governors (“BOG”) approved draft answers to all three questions. The approved answer to the third question is as follows:

Litigation aside, the ideal structure is the current integrated model, which provides critical programs and services that work together to support the public and the profession.

The below members of the BOG respectfully offer this Minority Report addressing the answer to the third question.¹

As an initial matter, we are all dedicated servants of the WSBA and the profession we love. Moreover, we are committed to executing the decision of the BOG regarding the WSBA’s structure, including helping make the current integrated structure work as well as possible. In short, this Minority Report should be viewed solely as providing insight into the thought process behind an alternative answer to the third question, thereby aiding the Court in its consideration of the issue.

¹ The below-signed members of the BOG concur with the BOG’s proposed answers to the remaining questions.

A. Proposed Reform Model

The below members supported, or would have supported,² an alternative answer to the third question. Specifically, we support a reform of the current WSBA structure to adopt a bifurcated model, similar to that recently adopted by California, and utilized in numerous other states around the country. Under that model, the regulatory functions of the WSBA would be under the authority of the Washington Supreme Court,³ and the professional association functions would be under the authority of a new voluntary entity. Support for this reform arises for a variety of reasons. A non-comprehensive list of reasons include the following:

- 1) The proposed reform promotes mission focus by the regulators and avoids the “distracted regulator” problem inherent in the current integrated model;
- 2) The proposed reform avoids the constitutional questions arising under the First Amendment potentially present in the current model; and
- 3) The proposed reform permits the voluntary entity to engage in robust legislative and political activity, if its members and leaders so desire, without the current constraints of GR 12.2.

These policy reasons are further supported by an alarming lack of member involvement within the WSBA. For example, recent vacancies to serve on the BOG resulted in only one candidate applying for each position.⁴ Moreover, overall volunteer engagement within the organization remains an ongoing struggle.

The desires of WSBA members regarding the organization’s structure were discussed extensively during the ETHOS process. While varying reports were received, seeming ambivalence toward the current structure is reflected in the results of the National Business Research Institute (“NBRI”) survey conducted of a sample of WSBA members.⁵ The survey revealed that 38% of the members support a bifurcated model, as described herein, while 45% support the current integrated model, and another 3% support a different structure altogether.⁶ Taken together, fully 41% of the membership prefer a different structure to the status quo. This comprises a notably large percentage of the WSBA’s membership.

We believe it is important to note that the NBRI survey results come at a time of relative WSBA tranquility, and after multiple years of maintaining flat WSBA licensing fees. It is easy to envision different results if the survey were taken at another time or after a significant license fee increase.

² One below signatory was unable to attend the August 13, 2022 meeting. If that member had been able to attend, his position would have been in alignment with this Minority Report.

³ Either directly, or through the auspices of an intermediary organization, such as the Administrative Office of the Courts or other entity.

⁴ It is anticipated that those individuals will be outstanding members of the BOG. Nevertheless, it is disheartening that the vacancies resulted in such a modest number of applicants.

⁵ See ETHOS Final Report and Recommendations, at 13-14.

⁶ *Id.*

Moreover, the survey results, while informative, are also limited in nature. The NBRI survey was sent to 6,000 WSBA members.⁷ Of those, 479 were returned,⁸ with 214 supporting the current integrated structure (45%) and 200 supporting bifurcation or an alternative structure (41%). Further, 65 stated that they had no opinion regarding whether they supported an integrated bar or bifurcation (14%). We believe these survey results demonstrate how closely the WSBA membership is divided on this issue. Indeed, only 14 survey responses separate the 45% supporting retention of an integrated model from the 41% favoring a bifurcated model or another structure. We believe a better approach would have been to either survey the entire membership or conduct an advisory vote of the membership on this issue.

In sum, it is hoped that the reform model described above would lead to a variety of positive developments. These include increased mission focus, avoiding the First Amendment issues present in the current model, permitting increased legislative activity by a volunteer organization, and a potential renewal of member engagement and dedication to the organization.

B. Political Arm of Washington Lawyers

One specific variation of the above proposal was considered at the August 13, 2022 meeting. We believe that proposal merits further explanation here.⁹

The proposal addressed potential creation of an organization called the Political Arm of Washington Lawyers (“PAWL”). PAWL was intended to be enacted through a series of WSBA Bylaw revisions removing all legislative work from the purview of the WSBA and its affiliated entities and sections.

In our opinion, a central component of the structure debate stems from the complex and often convoluted analysis to determine whether the actions and speech in support of specific legislative actions are compliant with *Keller v. State Bar of California*, 496 U.S. 1 (1998) **and** GR 12.2. Specifically, the prohibition laid out in GR 12.2(c)(2) stating the WSBA is prohibited from taking “...positions on political or social issues which do not relate to or affect the practice of law or the administration of justice...” What is the “administration of justice”? That is a difficult question the BOG regularly confronts. For the proponents of PAWL, the administration of justice excludes any and all substantive areas of law, such as the Uniform Electronic Wills Act, statutes relating to the operation of homeowners associations, the Washington Profit (or Nonprofit) Corporations Act, etc.

The issue that arises, of course, is that attorneys are valued subject matter experts when addressing laws because they work with those laws on a regular basis. The proponents of PAWL look to create an entity - such as a 501(c)(6) - that would be a voluntary organization open to any

⁷ Comprising approximately 14.4% of WSBA members.

⁸ Comprising approximately 1.15% percent of WSBA members.

⁹ The PAWL proposal was introduced, but not debated extensively at the August 13, 2022 meeting. It is described here as a possible alternative structure for consideration.

and all licensed members of the WSBA, regardless of status, that engage elected officials and rulemakers on the substance of all legislative proposals without fear of liability or impropriety.

While there is already a WSBA policy in place designed to handle legislative engagement and comments, it is feared that the policy is ineffective. There are reports of legislators interacting with section members or leadership, and then explaining that they had worked with “the Section” or “the Bar” on the bill. This suggests the current WSBA policy is not working as intended.

The proposal to create PAWL is limited entirely to legislative work. Under PAWL, the WSBA and its sections would be limited to engaging in political/legislative activity that only addressed the Bar itself (i.e. Bar Act), Court rules, and legislation (including budget requests) directly impacting the operation of the Courts. All other work would be referred to PAWL. It should be noted that the BOG did not discuss the funding mechanism for PAWL. It was envisioned that creation of PAWL should reduce the WSBA budget by the amount currently funding legislative activities and, thus, reduce the dues charged by the WSBA to each member. PAWL would then charge separate dues to support its activities.

C. Conclusion

In conclusion, whether it is a California-style bifurcation, the PAWL proposal described above, or another proposal, we respectfully believe that there are better structures for the WSBA. We are committed to carrying out the decision of the overall BOG on this issue, and offer this Minority Report solely to further inform the Court’s deliberations on the subject.

Respectfully submitted,

Hunter Abell
Governor, At-Large

Carla J. Higginson
Governor, 2nd Congressional District

Tom McBride
Governor, 10th Congressional District

Brent Williams-Ruth
Governor, 8th Congressional District

Concurring in Part of Minority Report:

I voted to support the reform model identified above and, when that failed, voted to support the current unified bar structure of the WSBA. Given that the BOG has expressed its opinion on the ideal structure of the WSBA, I concur with this Minority Report to the extent that I believe that a survey of the bar structure should have been sent to the entire membership. I further strongly believe that an advisory vote should have been authorized and taken of all of our membership to hear directly from our members which bar structure they prefer for the organization.

Respectfully submitted,

Daniel D. Clark
Governor, 4th Congressional District
WSBA President-Elect

cc: Brian Tollefson
WSBA President

Terra Nevitt
WSBA Executive Director