



# HOW IS THE WSBA FUNDED?

ETHOS Meeting

March 5, 2022

# AGENDA

- I. THE BASICS
- II. GENERAL FUND
- III. CLIENT PROTECTION FUND

# I. THE BASICS



Status

The WSBA operates under delegated authority of the Supreme Court



Fiscal Year

October 1 through September 30



Budget

FY22 expense budget: \$24.8 million for all funds

General Fund: \$21.5million (over 30 cost centers)

Client Protection Fund: \$668,210 (1 cost center)

Sections Fund: \$899,652 (29 cost centers)

CLE Fund: \$1.7 million (3 cost centers)

## II. GENERAL FUND



Purpose

Support regulatory functions and most services to members and the public



Revenue & Expenses

Revenue includes but it is not limited to license fees; interest income; fees from admissions, MCLE; advertising and sponsorships; recovery of discipline costs, and section reimbursements

Direct and indirect expenses



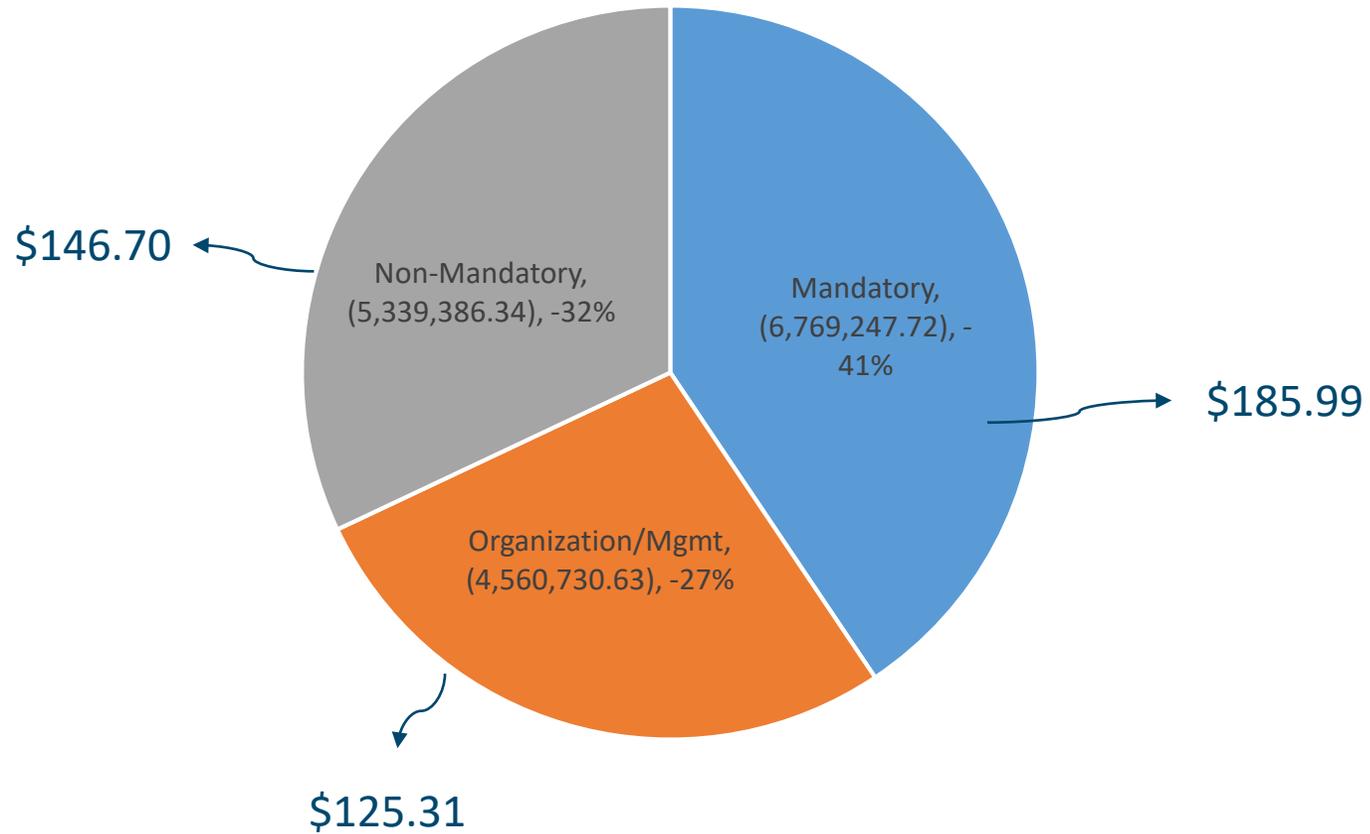
FY22 Budget

Revenue	\$21,437,297
Expense	<u>\$21,526,859</u>
Net	(\$89,563)

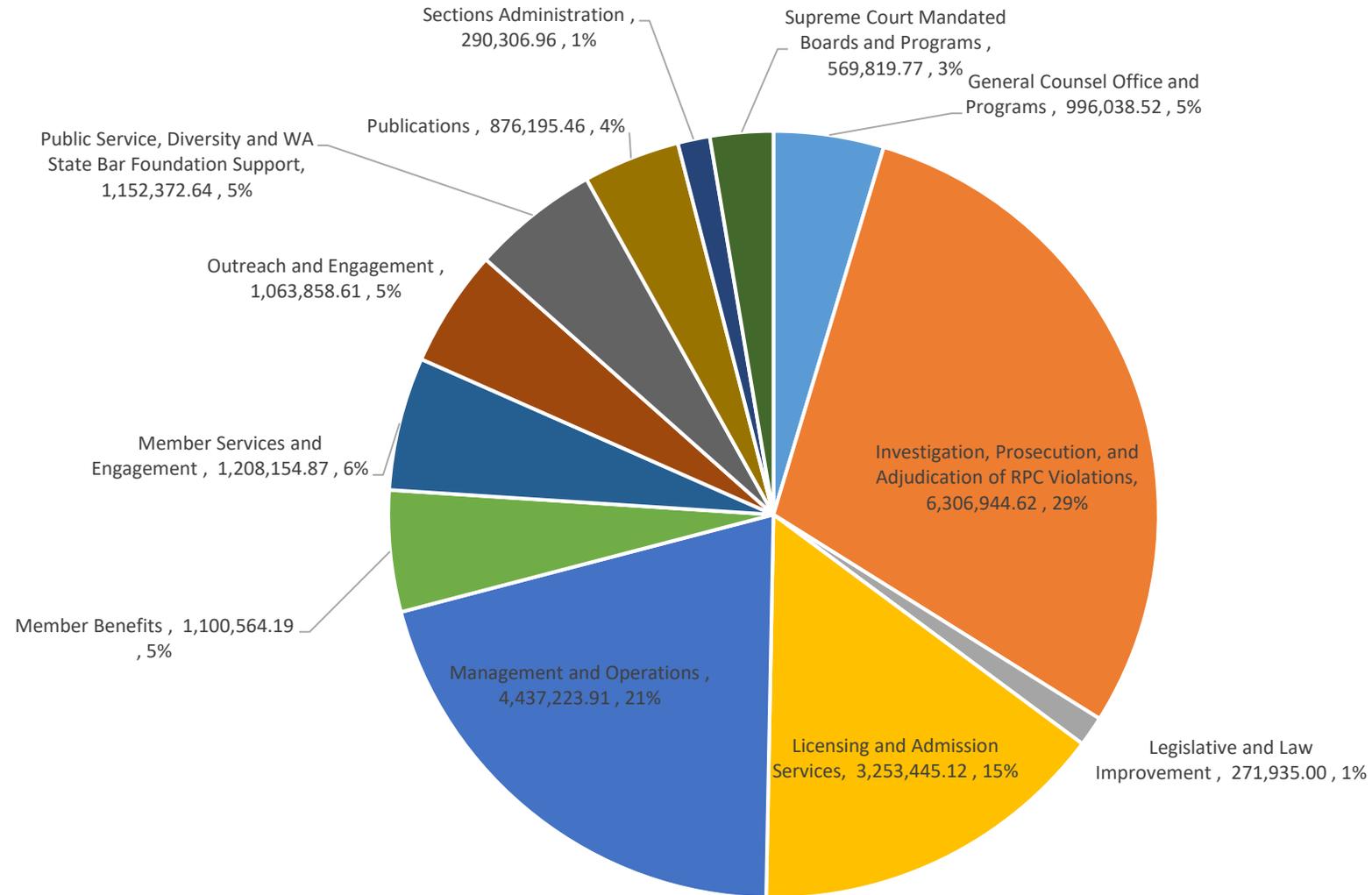
### LAWYER LICENSE FEES: 2002-2022



# LICENSE FEE REVENUE BY CATEGORY (FY22 BUDGET)



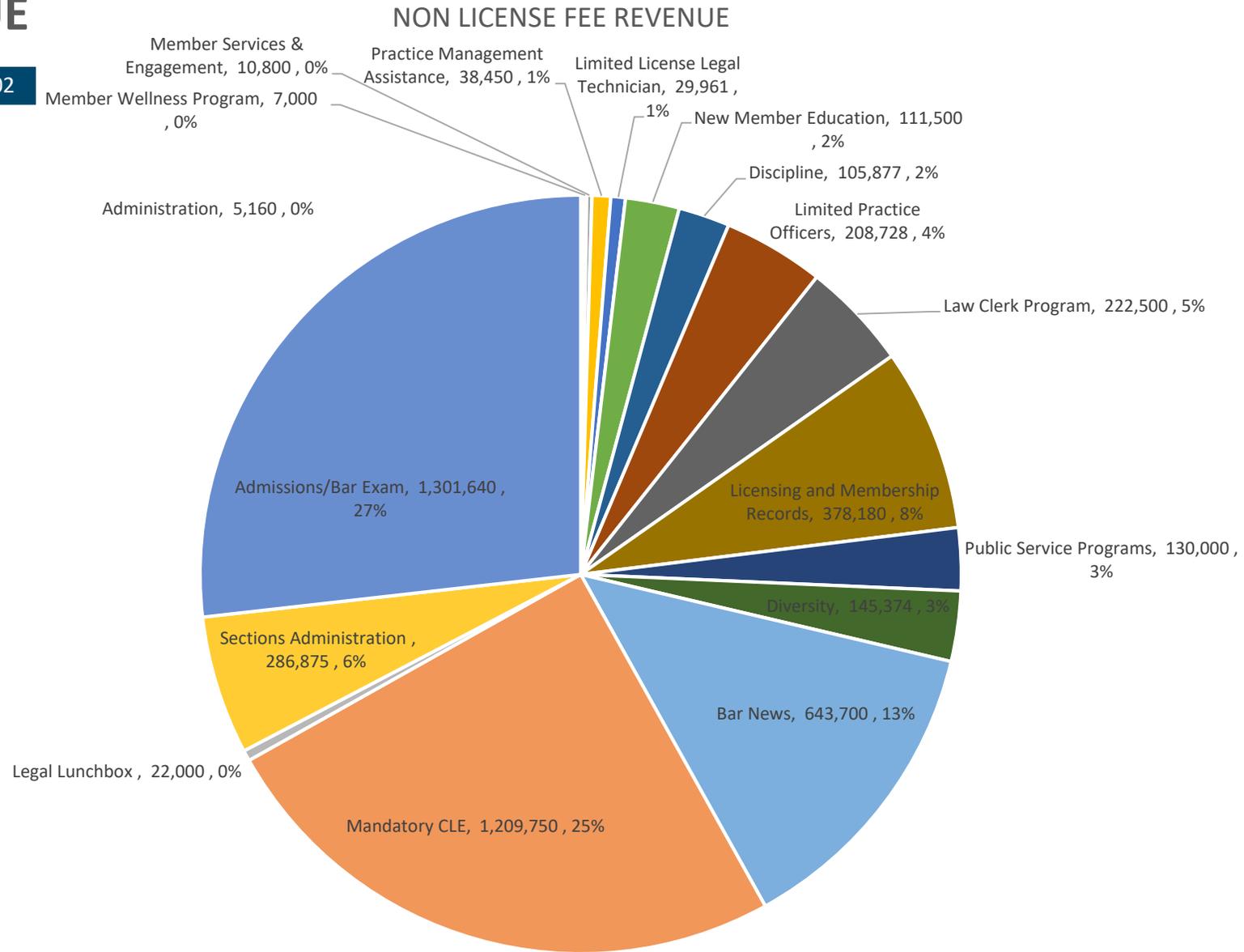
# HOW THE FY22 GENERAL FUND EXPENSE BUDGET SUPPORTS WSBA PROGRAMS AND SERVICES



# FY22 REVENUE

License fees { **•\$16,579,802**

Other { **•\$4,857,495**



# GENERAL FUND REVENUE AND EXPENSES 2012-2022



### III. CLIENT PROTECTION FUND (CPF)



Purpose

Make gifts to relieve or mitigate a pecuniary loss sustained as a result of a lawyer, LLLT or LPO's dishonesty or failure to account for client funds/property



Assessment & Gifts

Funded from \$20 annual assessment as required by the Supreme Court

All payments are discretionary; in 2017, Board increased maximum gift from \$75,000 to \$150,000



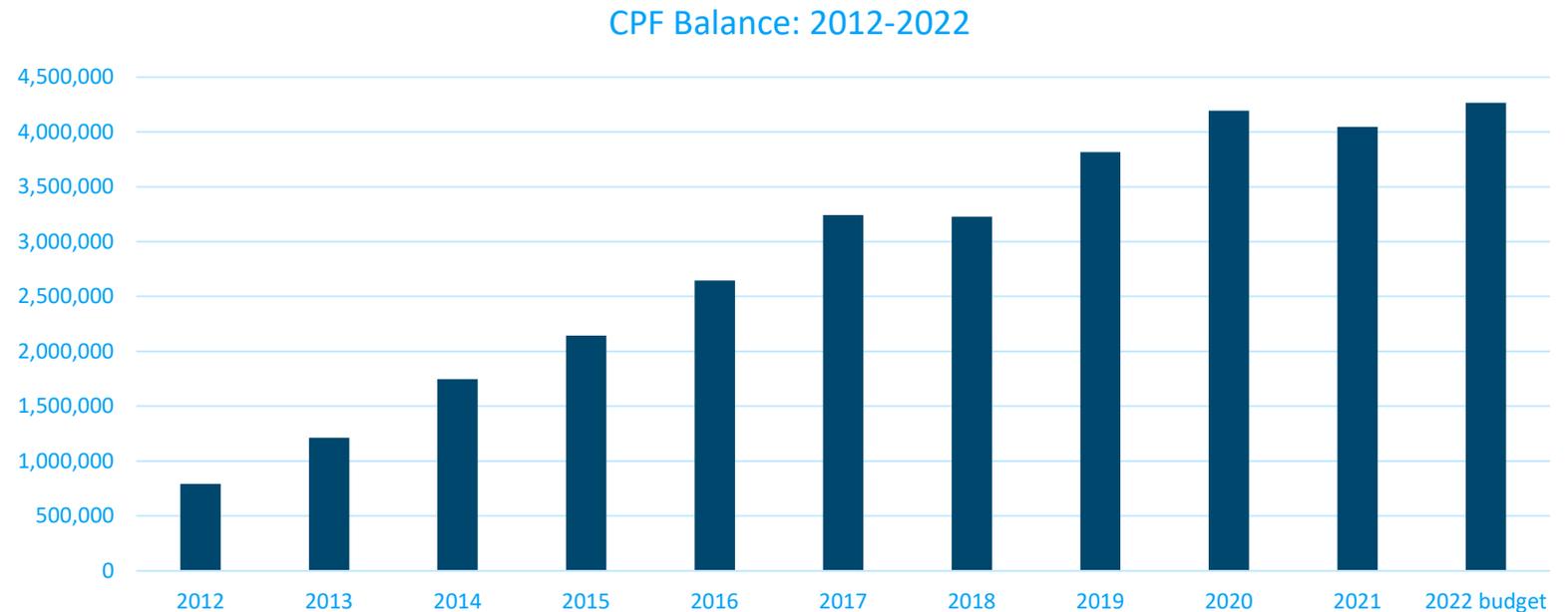
FY22 Budget

Revenue	\$ 830,253
Expense	<u>\$ 660,675</u>
Net	\$ 169,578

### III. CPF BALANCE

Net assets from CPF assessments carried over from year to year restricted to fund future CPF gifts

\$4.2M



# QUESTIONS?





## **KELLER DEDUCTION AND DETERMINING ACTIVITIES GERMANE TO THE PURPOSES JUSTIFYING THE INTEGRATED BAR STRUCTURE**

# 1990 U.S. SUPREME COURT KELLER V. STATE BAR OF CALIFORNIA

## May require membership and may use compelled fees to fund germane activities

- “We agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar but disagree as to the scope of permissible dues-financed activities in which the State Bar may engage.” *Keller* at 4.
- “*Aboud* held that a union could not expend a dissenting individual’s dues for ideological activities not ‘germane’ to the purpose for which compelled association was justified: collective bargaining. **Here the compelled association and integrated bar are justified by the State’s interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals [regulating the legal profession and improving the quality of legal services] 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.”** *Keller* at 13-14.
- “The difficult question, of course, is to define the latter class of activities.” *Keller* at 14

# 1990 U.S. SUPREME COURT KELLER V. STATE BAR OF CALIFORNIA

## Keller Procedural Safeguard Requirements

- Constitutional requirement for association's collection of fees includes:
  - Adequate explanation of basis for fee
  - Reasonably prompt opportunity to challenge amount of fee before impartial decisionmaker
  - Escrow for amounts reasonably in dispute while challenge pending

# WSBA BYLAWS ARTICLE XV KELLER DEDUCTION PROCEDURAL SAFEGUARDS

## NOTICE, CALCULATION DETAILS

- Notice of amount with license fees
- Calculation details on website

## ARBITRATION PROCESS

- Chief Justice appoints impartial arbitrator
- Hearing in 30 days
- Timely pay license fee except disputed amount

## ARBITRATION SCOPE

- Limited to review challenged activities to determine whether calculation correct
- Relief limited to change in named parties' deduction
- Decision binding

# WSBA BYLAWS ARTICLE XV KELLER DEDUCTION CALCULATION

## Conservative Test –Favor Members

- When calculating the Keller deduction, the Bar shall use a conservative test for determining whether an individual activity is chargeable or nonchargeable.
- When in doubt, the Bar will err in favor of the membership by considering activities to be nonchargeable even when a reasonable argument could be made that such activities were chargeable.

# WSBA KELLER DEDUCTION CALCULATION

## SUM OF THREE NUMBERS

### Actual Costs of Legislative Activities

- Determine pro rata share of next year's Legislative activity budget
- Review detailed list of last year's staff Leg activity and determine percentage members could view as nongermane
- Apply percentage to next year's budget amount
- Includes direct, indirect, staff salary, benefits, overhead, meeting time, etc.

### ABA Delegate Budget (Whole)

### Actual Costs of Other Nonchargeable Activities

- Review detailed list of last year's other expressive activity and determine percentage members could view as nongermane (nonchargeable)
- Includes direct, indirect, staff salary, benefits, overhead, meeting time, etc.

# KELLER ARBITRATION RESULTS

## 2009

- WSBA support of same sex marriage legislation not reasonably related to regulation of legal profession or improving the quality of legal services (not germane)
- WSBA amicus brief supporting creation of task force to examine capital punishment in Washington and supporting stay of Stenson execution until determination whether death penalty statutes unconstitutional are germane

## 2018

- “Decoding the Law” series -germane
- Access to Justice Board -germane
- NWLawyer magazine -germane

# GERMANE CONCEPT HISTORY

## Germaneness Test Originated in Union Cases (1956)

- [t]he germaneness requirement in cases not involving ideological issues has its origin in the Supreme Court's 1956 opinion in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956).
- *Romero v. Colegio De Abogados De Puerto Rico*, 204 F.3d 291, 298 (1<sup>st</sup> Cir. 2000)

## Applied to Virgin Islands Bar Association Before Keller (1988)

- Integrated bar association can, even over dissent, constitutionally spend funds and express opinions to advance causes germane to the purpose underlying its integration, i.e., the furtherance of the administration of justice.
- Expect bar association to use collective expertise in the law to evaluate the workings of the legal system, and to advocate appropriate legislation in areas that may reasonably be in furtherance of the association's mission.
- *Hollar v. Gov't of the Virgin Islands*, 857 F.2d 163, 169-170 (3d Cir. 1988)

# GERMANENESS TEST KELLER

The State Bar may therefore constitutionally fund activities germane to those goals [regulating the legal profession and improving the quality of legal services] 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.” *Keller* at 13-14.

“Precisely where the line falls between . . . Bar activities. . . acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession. . . and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals. . . will not always be easy to discern.” *Keller* at 14

# MEANING OF ADMINISTRATION OF JUSTICE

Application of germaneness rule would be of little assistance when one of the purposes of the Bar was the amorphous improving the administration of Justice.

Gibson v. Florida Bar, 798 F.2d 1564 (11<sup>th</sup> Cir. 1986), cert. dismissed 502 U.S. 104, 112 S.Ct. 633, 116 L.Ed. 2d 432 (1991)

Improving the administration of justice should be interpreted as pertaining to the role of the lawyer in the judicial system and in society.

Gibson v. Florida Bar, 798 F.2d 1564 (11<sup>th</sup> Cir. 1986), cert. dismissed 502 U.S. 104, 112 S.Ct. 633, 116 L.Ed. 2d 432 (1991)

# GERMANE ACTIVITIES REVOLVE AROUND ROLE OF LAWYER AS LAWYER

Activities that may be funded with compulsory dues. . . generally must “revolve around the role of lawyer as lawyer, rather than relying on the lawyer’s more generic role as an informed and perhaps influential member of a complex society...”

The use of compulsory dues may fund only those activities directly related to the lawyering profession and the operation of the judicial system. However, Keller does envision purposes “extending far beyond a “professional advisory’ role”

*Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 640 (1<sup>st</sup> Cir. 1990), cert. denied, 502 U.S. 1029 (1992)

# ANALYSIS FOCUSED ON GERMANE TEST AND SOME “POLITICAL COLORATION” EXPECTED

“[E]ven if a given activity possesses communicative content of a political or ideological nature, it may . . . be reasonably related to the practice of law, to the regulation of the legal system, or to the improvement of legal services.”

Popejoy v. New Mexico Bd. of Bar Comm’rs, 887 F.Supp. 1422, 1428 (1995)

“It is impossible to allow mandatory state bars to pursue such broad objectives as regulating the legal profession or improving the delivery of legal services (or to permit activities that are ‘germane to the practice of law’), without at the same time approving of activities that will inevitably carry some ideological baggage. Unless the Supreme Court is willing to overrule Keller and recast a mandatory bar’s permissible pursuits, compulsory financial support of some activities with at least a modicum of ideological content is inevitable.”

Popejoy v. New Mexico Bd. of Bar Comm’rs, 887 F.Supp. 1422, 1428 (1995)

## 2001 U.S. SUPREME COURT U.S. V. UNITED FOODS, INC.

# Court's statement of Keller's holding

- The central holding in Keller. . . was that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justifies the required association.”
- United States v. U.S. Foods, Inc., 533 U.S. 405 (2001)

## FOCUS IS ON PURPOSES JUSTIFYING STATE BAR

“Undoubtedly every effort to persuade public opinion is political in the broad sense of that term. However, what *Keller* found objectionable was not political activity but partisan political activity as well as ideological campaigns unrelated to the bar’s purpose. What the Supreme Court held objectionable in *Lehnert* was education about the teaching profession unconnected to the collective bargaining function of the union. In contrast, the activity here is highly germane to the purposes for which the State Bar exists.”

*Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1042-1043 (9<sup>th</sup> Cir. 2002)

2018 U.S. SUPREME COURT  
JANUS V. AMERICAN FEDERATION OF STATE, COUNTY, AND  
MUNICIPAL EMPLOYEES, COUNCIL 31, ET. AL.

## Germane Test Overruled In Public Employee Union Context-No mention of Keller

- “*Abood’s* line between chargeable [germane] and nonchargeable [nongermane] union expenditures has proved to be impossible to draw with precision” and even union speech germane to collective bargaining “is overwhelmingly of substantive public concern.” *Janus* at 2477, 2481.

# GERMANENESS TEST QUESTIONED BY JUSTICES THOMAS AND GORSUCH

## U.S. Supreme Court Justices Thomas and Gorsuch Signal interest in Keller Germaneness Test

- Overruling *Abood* casts significant doubt on *Keller*.
- *Keller* rests almost entirely on *Abood* framework- no support left.
- If *Keller* survives-new reasoning consistent with *Janus*.
- *Jarchow v. State Bar of Wisconsin* \_\_\_ U.S. \_\_\_, 140 S.Ct 1720, 207 L.Ed2d 166 (2020) Thomas and Gorsuch

# ***KELLER GERMANENESS TEST SCOPE QUESTIONED***

## ***KELLER GERMANENESS TEST SCOPE QUESTIONED BY NINTH CIRCUIT***

- Given that we have never addressed such a broad free association claim, the district court will also likely need to determine whether Keller's instruction with regard to germaneness and procedurally adequate safeguards are even relevant to the free association inquiry.
- *Crowe v. Oregon State Bar*, 989 F.3d 714 (9<sup>th</sup> Cir. 2021)

# TENTH CIRCUIT GERMANE ANALYSIS

## KELLER STATUS

- Keller binding, but vulnerable to reversal
- Keller Germaneness test for compelled fees not replaced by exacting scrutiny\*

## GERMANE ANALYSIS SPECIFICS

- Articles on court structure germane
- Big money in Judicial Elections and Increasing Ability of Prisoners to Sue Prisons-may not be germane
- *Schell v. Chief Just. & Justs. of Oklahoma Sup. Ct.*, 11 F.4th 1178 (10th Cir. 2021)

# 5<sup>TH</sup> CIRCUIT LOBBYING GERMANESS TEST AND ANALYSIS

Test to determine when lobbying is germane:

## Germane Legislative Topics

- Function of state courts
- Function of legal system writ large
- Regulation of lawyers qua lawyers

## Non-Germane Legislative Topics

- Advocating changes to a state's substantive law other than those listed above
  - Efforts directed at change the law governing cases, disputes or transactions in which attorneys might be involved
  - Efforts seeking to amend or repeal unconstitutional laws or clean up legal texts not related to substantive areas listed above
- 
- *McDonald v. Longley*, 4 F.4<sup>th</sup> 229 (5<sup>th</sup> Cir. 2021)

# 5<sup>TH</sup> CIRCUIT GERMANENESS ANALYSIS-OTHER EXPRESSIVE ACTIVITIES

## CLE

- Large, varied catalogue of CLE presentations; Disclaimers – Bar not endorsing any expressed views

## DIVERSITY

- Germane-regulate the profession by creating a fair and equitable legal profession for historically under-represented groups
- Unanimity isn't required; ideological nature can be germane under *Keller* test; questionable under *Janus*

## ACCESS TO JUSTICE

- Aiding access to legal services-germane
- Advocating substantive law changes to assist low-income people-not germane
- *McDonald v. Longley*, 4 F.4<sup>th</sup> 229 (5<sup>th</sup> Cir. 2021)

# ***POST JANUS DECISIONS RELATING TO KELLER GERMANENESS TEST***

Court declares that lobbying and legislative activities seeking substantive changes to the law unrelated to regulating the legal profession or improving the quality of legal services are non-germane activities under Keller.

Texas State Bar Board approved Bar and Access to Justice Commission legislative activity and Bar amicus activities limited to addressing:

- **State Bar**
- **Regulation of Lawyers**
- **Functioning of State or Federal Courts**
- **Functioning of the Legal System**
  
- **McDonald v. Longley District Court Final Judgment and Changes to Texas Bar Operating Procedures**

# **UNDERSTANDING SUPREME COURT BOARDS ADMINISTERED BY WSBA**

Terra Nevitt, Executive Director

Presentation to the Board of Governors

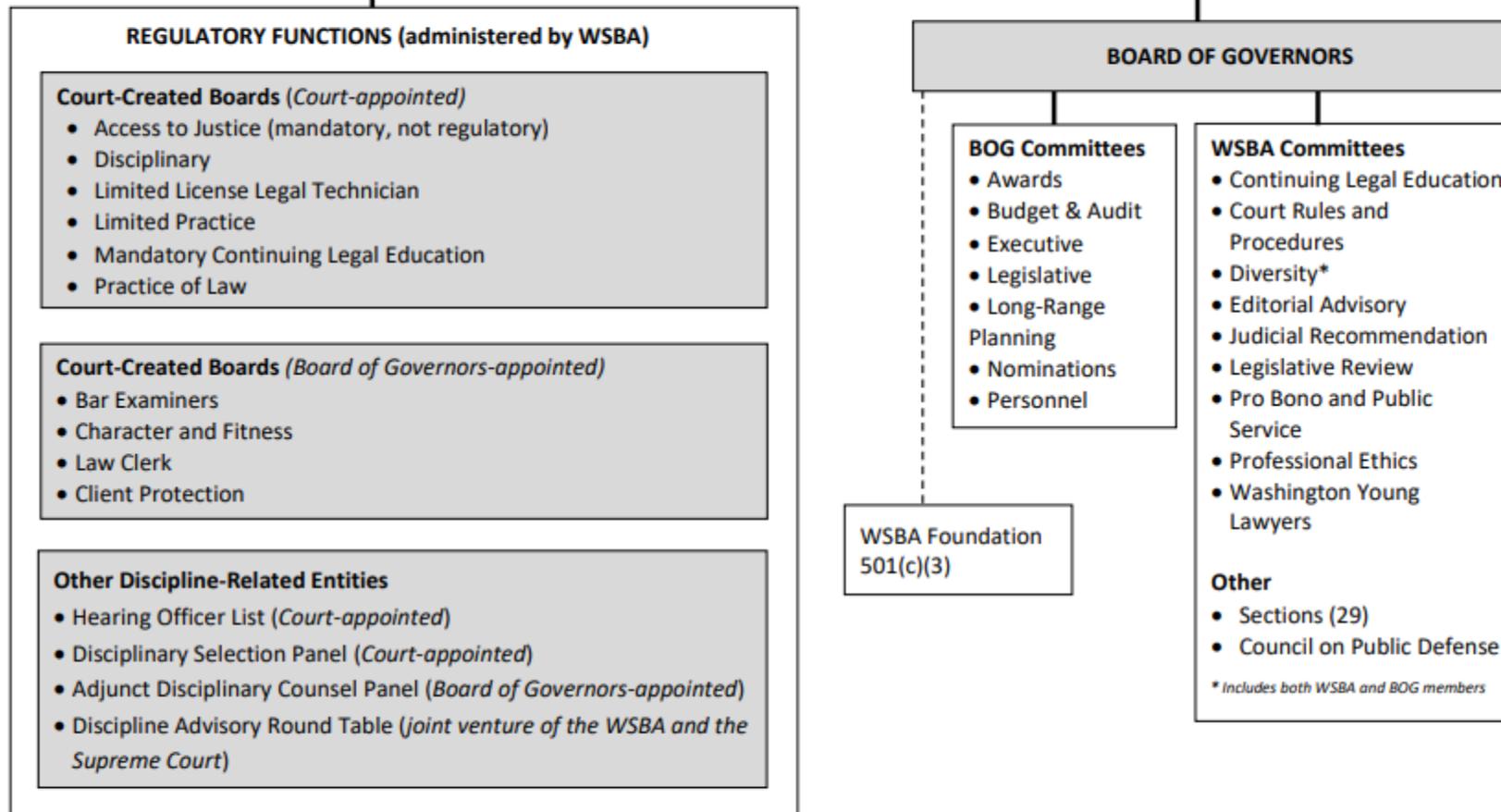
March 5, 2022



## GENERAL RULE 12.3 - WSBA ADMINISTRATION OF SUPREME-COURT-CREATED BOARDS AND COMMITTEES

The Supreme Court has delegated to the Washington State Bar Association the authority and responsibility **to administer certain boards and committees established by court rule or order**. This delegation of authority includes **providing and managing staff**, overseeing the boards and committees to **monitor their compliance with the rules and orders that authorize and regulate them**, **paying expenses reasonably and necessarily incurred pursuant to a budget approved by the Board of Governors**, performing other functions and taking other actions as provided in court rule or order or delegated by the Supreme Court, or taking other actions as are necessary and proper to enable the board or committee to carry out its duties or functions.

# WASHINGTON SUPREME COURT



**WASHINGTON STATE**  
BAR ASSOCIATION

## Entity Chart

WSBA operates under the delegated authority of the Washington Supreme Court to license the state's nearly 40,000 legal professionals

10-25-19



# ENGAGED IN REGULATORY WORK?

	YES	NO
Access to Justice		X
Bar Examiners	X	
Character & Fitness	X	
Client Protection		X*
Discipline	X	
Law Clerk	X	
LLLT	X	
Limited Practice	X	
MCLE	X	
Practice of Law		X



# ENGAGED IN POLICY WORK?

	YES	NO
Access to Justice	X	
Bar Examiners		X
Character & Fitness		X
Client Protection		X
Discipline		X
Law Clerk	X	
LLLT	X	
Limited Practice	X	
MCLE	X	
Practice of Law	X	



# WHO APPOINTS THE MEMBERS?

	Court	BOG
Access to Justice	X	
Bar Examiners		X
Character & Fitness	X	X
Client Protection		X
Discipline	X	
Law Clerk		X
LLLT	X	
Limited Practice	X	
MCLE	X	
Practice of Law	X	



# WHO APPOINTS THE CHAIR?

	Court	BOG	Board
Access to Justice			X
Bar Examiners		X	
Character & Fitness		X	
Client Protection		X	
Discipline	X		
Law Clerk		X	
LLLT	X		
Limited Practice	X		
MCLE	X		
Practice of Law	X		



## HAS PUBLIC MEMBERS?

	YES	NO
Access to Justice	X	
Bar Examiners		X
Character & Fitness	X	
Client Protection	X	
Discipline	X	
Law Clerk		X
LLLT	X	
Limited Practice	X*	
MCLE	X	
Practice of Law	X	



# ANNUAL MEETING WITH THE COURT?

	YES	NO
Access to Justice	X	
Bar Examiners		X
Character & Fitness		X
Client Protection		X
Discipline		X
Law Clerk		X
LLLT	X	
Limited Practice		X
MCLE	X	
Practice of Law	X	

# TASK FORCE T E A M A D M I N I S T R I N G E R I N V O L V E M E N T W I T H C O U R T A P P O I N T E D B O A R D S

- 6 Meetings Since March 2021
- Comprised of Board Members and representatives of 6 Supreme Court *Appointed* Boards
  - ATJ
  - Discipline
  - LLLT
  - Limited Practice
  - MCLE
  - Practice of Law
- Goal: ensure that WSBA's administration of court appointed boards is consistent with the Court's intent and to share information that will enable court appointed boards to better serve their missions

# QUESTIONS FOR ETHOS

- To what extent are the Boards independent of WSBA? Are they a part of WSBA?
- What is the significance of Board Members being appointed by the Court? What is the significance of the funding source?
- Does General Rule 12.2 and its prohibitions apply to Supreme Court Boards engaged in speech?
- What implications does the litigation hold for Supreme Court Boards?

# UNDERSTANDING WSBA'S REGULATORY FUNCTIONS

Chief Regulatory Counsel Renata de  
Carvalho Garcia

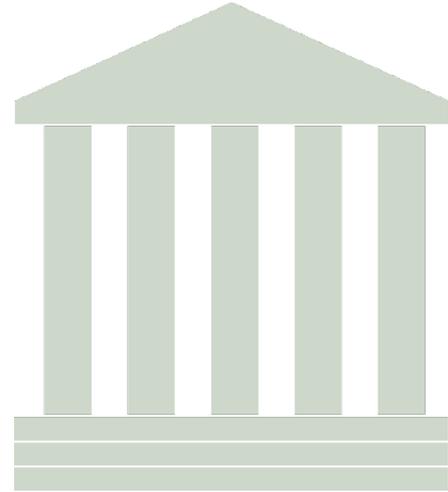


# REGULATION OF THE PRACTICE OF LAW

## **GR 12 REGULATION OF THE PRACTICE OF LAW**

The Washington Supreme Court has inherent and plenary authority to regulate the practice of law in Washington. The legal profession serves clients, courts, and the public, and has special responsibilities for the quality of justice administered in our legal system. The Court ensures the integrity of the legal profession and protects the public by adopting rules for the regulation of the practice of law and actively supervising persons and entities acting under the Supreme Court's authority.

[Adopted effective September 1, 2017.]



# REGULATORY OBJECTIVES

## GR 12.1 REGULATORY OBJECTIVES

Legal services providers must be regulated in the public interest. In regulating the practice of law in Washington, the Washington Supreme Court's objectives include:

- (a) protection of the public;
- (b) advancement of the administration of justice and the rule of law;
- (c) meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems;
- (d) transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections;
- (e) delivery of affordable and accessible legal services;
- (f) efficient, competent, and ethical delivery of legal services;
- (g) protection of privileged and confidential information;
- (h) independence of professional judgment;
- (i) accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs;
- (j) diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system.

[Adopted effective September 1, 2017.]

# REGULATORY PROGRAMS AND FUNCTIONS



## Admissions

Licensing exam development,  
administration and grading  
Board of Bar Examiners  
Character and Fitness reviews  
Law Clerk Program and  
Board  
Preadmission and  
Readmission courses



## MCLE

Compliance tracking  
Course and sponsor  
accreditation  
MCLE Board



## Licensing and Membership Records

Licensing and status changes  
Member records



## Discipline

Intake, investigation and  
prosecution  
Adjudication, hearing officers,  
Disciplinary Board,  
Disciplinary Selection Panel  
Diversion  
Ethics School

# REGULATORY VS. MANDATORY



# EXAMPLES OF OTHER PROGRAMS AND FUNCTIONS REQUIRED BY COURT RULE OR ORDER



## Client Protection

*Client Protection Fund*



## Other Supreme Court Mandated Boards

*Access to Justice Board  
Practice of Law Board  
Limited License Legal  
Technician Board  
Limited Practice Board*

# WASHINGTON SUPREME COURT

## REGULATORY FUNCTIONS (administered by WSBA)

### Court-Created Boards (*Court-appointed*)

- Access to Justice (mandatory, not regulatory)
- Disciplinary
- Limited License Legal Technician
- Limited Practice
- Mandatory Continuing Legal Education
- Practice of Law

### Court-Created Boards (*Board of Governors-appointed*)

- Bar Examiners
- Character and Fitness
- Law Clerk
- Client Protection

### Other Discipline-Related Entities

- Hearing Officer List (*Court-appointed*)
- Disciplinary Selection Panel (*Court-appointed*)
- Adjunct Disciplinary Counsel Panel (*Board of Governors-appointed*)
- Discipline Advisory Round Table (*joint venture of the WSBA and the Supreme Court*)

## BOARD OF GOVERNORS

### BOG Committees

- Awards
- Budget & Audit
- Executive
- Legislative
- Long-Range Planning
- Nominations
- Personnel

### WSBA Committees

- Continuing Legal Education
- Court Rules and Procedures
- Diversity\*
- Editorial Advisory
- Judicial Recommendation
- Legislative Review
- Pro Bono and Public Service
- Professional Ethics
- Washington Young Lawyers

### Other

- Sections (29)
- Council on Public Defense

\*Includes both WSBA and BOG members

WSBA Foundation  
501(c)(3)

Regulatory Functions		WSBA	BOG	Court Created Boards	Supreme Court
<b>DISCIPLINE</b>	GR 12, RPC, ELC, LLLTRPC, ELLLTC, LPORPC, ELPOC	Administers functions specified by and incident to disciplinary procedural rules enacted by Supreme Court, including receipt and review of grievances, disposition and adjudication of alleged ethical misconduct by licensed legal practitioners, and administration of disability/incapacity matters.	<b>*Through the Executive Director, provides administrative and managerial support to enable discipline-system staff and volunteers to perform functions specified by rule; appoints and recommends Supreme-Court appointment of discipline-system volunteers</b>	Disciplinary Board; LLLT Board; LP Board  Other discipline related entities: Hearing Officer List, Disciplinary Selection Panel, Adjunct Disciplinary Counsel Panel, Discipline Advisory Round Table	Final appellate review in contested proceedings; review of stipulations and non-appealed dispositions; orders suspensions, disbarments, interim suspensions, and reciprocal discipline
<b>ADMISSIONS</b>	GR 12; APR 1-8, 9, 14, 20-25	Reviews applications for admission; administers licensure exams and assists with development and grading of exams; administers the Law Clerk Program	<b>*and</b>  Adopts admissions policies, including fees and deadlines; oversees the Law Clerk Program	Character and Fitness Board, Board of Bar Examiners, Law Clerk Board, LLLT Board and Limited Practice Board	Admits and licenses
<b>MCLE</b>	GR 12; APR 11	Administers MCLE requirements set by the Supreme Court, including course accreditation and member compliance	<b>*and</b>  Approves MCLE fees set by the MCLE Board	MCLE Board	Orders administrative suspensions, reinstatement to active; final appellate review from MCLE Board denial
<b>LICENSING AND MEMBERSHIP RECORDS</b>	GR 12; APR 17	Administers the annual license renewal process; processes status change requests; maintains membership records	<b>*and</b>  Sets the license fees, defines status change requirements, and adopts policies.	N/A	Orders administrative suspensions and reinstatement to active

