Structures Work Group Meeting

November 1, 2018
Voluntary – Mandatory – Integrated
What Does the Terminology Mean?

Voluntary Bar Associations
- Members can choose to join the bar
- There are no regulatory functions; focus is on professional association services.

Mandatory Bar Associations
- Members are required to join the bar, however, the bar may or may not administer regulatory functions. For example:
  - WI and ND are mandatory, but do not administer any regulatory functions.
  - WV, NC, and VA are mandatory and only administer regulatory functions.

Integrated/Unified Bar Associations
- Members are required to join the bar, and the bar administers regulatory functions as well as professional association services.
- Among integrated bars, there are varying levels of how many regulatory functions are administered. For example:
  - WA and OR administer all regulatory functions on behalf of the Supreme Court.
  - In MT, however, discipline reports directly to the Supreme Court but the MT bar administers all other regulatory functions on behalf of the Court.
U. S. Supreme Court Decisions

N.C. Dental Case (2015)
Anti-trust Immunity
- If action delivered through active market participants, then
- Active State Supervision needed for “state action” immunity from anti-trust enforcement

Janus (2018)
First Amendment
- Non members of public sector unions cannot be compelled to pay a percentage of full union dues
Janus
Keller?
Abood
Non-members of public sector union may be assessed agency fees to recover the costs of "collective bargaining, contract administration, and grievance adjustment purposes," however, objectors to union membership or policy may not have their dues used for other ideological or political purposes.

Public sector employees cannot be required to be members of the union, but they can be required to pay the documented costs of contract administration and negotiation.
Under Lathrop v. Donahue (1961), free association rights are not violated by requiring paid membership in a state bar association because of the governmental interest in “regulating the legal profession” and “improving the quality of legal services” available to the people of the state.

A state bar may use mandatory membership payments to fund activities without violating free speech rights if those activities are necessarily or reasonably incurred to serve those governmental purposes.

A state bar may not constitutionally fund “non-germane” activities, i.e., activities of a political or ideological nature that do not advance the state’s interest in regulating the legal profession or improving the quality of legal services.
Janus

Keller

Abood
What Next?
Review all functions through both lenses

Anti-trust Immunity (North Carolina):
- Active State Supervision where market participants are involved

First Amendment (Janus):
- The U.S. Supreme Court might apply exacting or strict scrutiny to review a law that restricts a fundamental personal liberty, like freedom of expression.
  - Under strict scrutiny, such a law will stand only when the law serves a compelling government interest.
    - Regulating the legal profession (Keller)
    - Improving the quality of legal service available to the people of the state (Keller)

AND

- The law must be the least restrictive means to effectively achieve the interest; that is, narrowly tailored.

Do the GR 12.1 Regulatory Objectives identify compelling state interests? And, if so, are we achieving them in the least restrictive means?