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Court of Appeals
Division III
State of Washington

No. 34345-6-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STEPHEN KERR EUGSTER,

Appellant,

vs.

WASHINGTON STATE BAR ASSOCIATION, *ET AL.*

Respondents.

REPLY OF APPELLANT

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I. STATEMENT OF THE CASE

Here is what has happened, here is the history of what has happened thus far in Eugster's efforts to get the attention of the court, a court, to conduct a trial regarding Eugster's allegations of law and fact that the WSBA defendants are violating Eugster's rights under the Civil Rights Act, 42 U.S.C. §1983 and Declaratory Judgment under the Declaratory Judgments Act, RCW Ch.7.24.¹

Eugster went through a painful and disputed WSBA Washington Lawyer Discipline Action. **Eugster I.**² It lasted from a grievance circa late 2004, early 2005, to the Washington Supreme Court Decision in June of 2009, and to the end of Eugster's suspension in December 2010 when Eugster was reinstated.

Eugster was suspended for a year and a half, paid several tens of thousands of fees (exclusive of his own fees) and costs. *Id.*

A few weeks after the discipline decision (**Eugster I**),

¹ Hereinafter, the action including the claims may be referred as Eugster's "Civil Rights Action."

² *Disciplinary Proceeding of Stephen K. Eugster*, 166 Wash. 2d 293, 209 P.3d 435 (2009).

Eugster found out that Jonathan Burke, the WSBA disciplinary counsel who had brought the discipline action against Eugster, was investigating a grievance against Eugster which had been filed approximately circa end of 2005.

Eugster, from his experience with the WSBA Discipline System and his study of the system and related discipline system cases, learned that the System did not accord the “lawyer in the dock” with procedural due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and the Washington Constitution Art. I, Section 3, “No person shall be deprived of life, liberty, or property, without due process of law.”

Now, it appeared that the WSBA again, through Mr. Burke, was going to bring another action against Eugster.

Discipline actions are frightful, punishing, and almost emotionally debilitating. And, they cost a fortune if one loses. Not only does a convicted lawyer pay fees and costs to the WSBA, every month he does not practice law, he loses what he could generate from his services - \$7,000 - \$10,000 in fees per month.

Facing the strong possibility of another bar action, Eugster determined that because the impending nature of the action against him, he had standing to bring a Civil Rights Action in U.S. District Court – one has to show standing under U.S. Const. Art. III, and in this instance, standing existed because of the threat against Eugster regarding the grievance, the investigation and the fact that the same WSBA Office of Disciplinary Counsel lawyer was involved. It was also necessary to bring the action before the WSBA began the second discipline action, otherwise the District Court would dismiss the action under the Younger Abstention Doctrine.

Eugster filed a Civil Rights Action in the District Court for the Eastern District of Washington in Spokane on December 2, 2009. **Eugster II.**³

Shortly thereafter on December 21, 2009, Mr. Burke dismissed the grievance telling the grievant he was doing so and also admonishing Eugster about what Mr. Burke had thought Eugster had done. Eugster was not given a chance to respond

³ Eugster II: *Eugster v. Washington State Bar Association*, No. CV 09-357-SMM (E.D Wash. 2010), *affirmed*, Memorandum July 17, 2012 (9th Cir. 2012).

and the record of the dismissal and the included admonition became a part of Eugster's record with the WSBA.

The dismissal of the grievance made the case moot as far as the action was concerned. Eugster amended his complaint, asserting he still had standing because he should have been given an opportunity to respond to the admonition. Amended and Restated Complaint filed on January 21, 2010. Eugster harkened to the case of *Miller v. Washington State Bar Association*, 679 F.2d 1313, 691 F.2d 430 (Supplemental Opinion) (9th Cir. 1982). The court did not see it that way and dismissed the case. The 9th Circuit affirmed the decision on grounds of lack of standing, the claims not being ripe. *See* footnote 3, and see the court's memorandum decision at Appendix 111.

In June of 2014, the Supreme Court issued its decision in *Harris v. Quinn*, 134 S. Ct. 2618 (June 31, 2014). In it, Justice Alito for the majority wrote about *Lathrop v. Donohue*, 367 U.S. 820 (1961), a plurality decision said to stand for the rule that it was not a violation of the constitution to compel lawyers to be members of an integrated bar. Justice Alito criticized the

decision and suggested, were the issue to come up again, it may not be decided the same way. *Harris v. Quinn*, 134 S. Ct. at 2629.

On September 11, 2014, Eugster was hired by Verdelle G. O'Neill, Spokane Valley, Washington, to provide her with legal services regarding her estate planning and affairs and services as her attorney in fact under a durable power of attorney.

Within a few days, on September 23, 2014, Cheryl Rampley, the niece of Mrs. O'Neill's deceased husband, Thomas O'Neill, filed a grievance with the WSBA against Eugster.

Eugster responded to the grievance and continued to respond when asked or given the opportunity. The last response was on December 25, 2014. Eugster heard nothing further from the WSBA.

On March 13, 2015, **Eugster III**⁴ was filed. Within a few days of service, an investigator for the WSBA called Eugster and arranged a meeting. The meeting took place on April 13, 2015. On April 21, 2015, Francesca D'Angelo, WSBA discipline counsel, notified Eugster that the Rampley Grievance had been

⁴ **Eugster III**: *Eugster v. Washington State Bar Association*, Case No. C15-0375JLR (W.D. Wash. 2015), on appeal to the 9th Circuit.

assigned to her.

Eugster III is now on appeal to the 9th Circuit. Briefs have been filed. A hearing date has yet been set.⁵

Eugster IV (this action) seeks to have an independent judicial body determine whether the WSBA Washington Lawyer Discipline System violates procedural due process of law under the Fifth and Fourteenth Amendments to the U. S. Constitution.

Eugster IV⁶ was filed in Spokane County Superior Court. Eugster's research confirmed the Superior Court had original jurisdiction. Wash. Const. art. IV, § 6.

Once the WSBA made it clear it was going to bring an action against Eugster, Eugster filed an action in District Court. **Eugster V.**⁷ At this juncture, it was clear the Court had Art. III jurisdiction.

⁵ *Id.*

⁶ **Eugster IV:** *Eugster v. Washington State Bar Association*, No. 15-2-04614-9, Superior Court of the State of Washington for Spokane County. Constitutionality of WSBA Washington Lawyer Discipline System: Procedural Due Process and Strict Scrutiny Analysis. Dismissed, on appeal to the Washington Court of Appeals Division III.

⁷ **Eugster V:** *Eugster v. Paula Littlewood* [WSBA Executive Director], Case No. 2:15-cv-00352-TOR (E.D. Wash. 2015). Case dismissed, on appeal to the 9th Circuit Court of Appeals.

The Superior Court dismissed the action with prejudice. The dismissal was based solely on the court's view that the Supreme Court and the WSBA Discipline System had exclusive jurisdiction over lawyer discipline and that Eugster would be able to bring his Civil Rights Action in discipline proceedings against Eugster were they to be brought. *See* Part II below.

Fearing what the Superior Court might do, (that is do what it has done), Eugster filed an action in District Court of the Eastern District of Washington. **Eugster V.**

Now, after **Eugster V** was dismissed and is now on appeal to the 9th Circuit, the WSBA has commenced another discipline action against Eugster. **Eugster VI.**⁸

II. WSBA DISCIPLINARY PROCEEDINGS FOLLOWING SUPERIOR COURT DECISION

After this case was dismissed and after **Eugster V** was dismissed, and while on its way to appeal before this Court, the WSBA filed on June 16, 2016 and served a Formal Complaint against Eugster. Appendix 1. On July 9, 2016, Eugster filed his Response which included the Civil Rights Action. Appendix 9.

⁸ **Eugster VI.**: *WSBA v. Eugster* Formal complaint filed in June 2016, Response, Affirmative Defenses and Counter and Third Party Claims filed in July, 2016. *See* Part II below.

The WSBA immediately filed a motion to strike the Civil Rights Action Judge Cozza said must be brought in this discipline proceeding. Appendix 83. The motion to strike is now pending before the WSBA Chief Hearing Officer of the Discipline System.

In response, Eugster filed a motion to dismiss the discipline proceeding on the grounds that the proceeding violated Eugster's fundamental right to procedural due process of law, and as a result the proceedings were void. Appendix 90.

It is clear the WSBA Discipline System will not undertake jurisdiction to decide Eugster's Civil Rights Action. Eugster is left with no court which will hear his Civil Rights Action.

III. REPLY: COUNTER-STATEMENT OF ISSUES

WSBA defendants say the issue is whether Eugster's due process challenge must be dismissed because the Washington Supreme Court has jurisdiction over lawyer discipline. Response 3. But, the case is not about some generalized notions of due process, rather it is a Civil Rights and Declaratory Judgment Action.

IV. REPLY TO RESPONDENTS' ARGUMENT

This Reply is broken down into three parts: First, Eugster will address the WSBA defendants' assertion the trial court "properly dismissed" Eugster's case, **Eugster IV**.

Second, the Reply will address the *res judicata* issues raised by WSBA defendants. Response at 23, 25 and 31.

Third, it will reply to the "other reasons" why defendants think the case was properly dismissed.

A. First, the Superior Court Should Not Have Dismissed the Case: the Superior Court has Jurisdiction.

The only reason why Superior Court dismissed **Eugster IV** was that the trial court judge thought the court did not have jurisdiction because "exclusive jurisdiction over matters of lawyer discipline rests with the Washington Supreme Court." CP 226, ¶ 5. *See also*, Response at 11. The court's Dismissal can be found at CP 225. The effect of the dismissal is to say that the Supreme Court may act arbitrarily. But this violates separation of powers. It also contradicts that the constitution is the law of the land under the Supremacy Clause. Article VI, Clause 2.⁹

⁹ Article VI, Clause 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

The defendants are arguing that the WSBA Lawyer Discipline System is immune from constitutional overview because it has the power to decide what is or is not constitutional. But, the System cannot be a judge in its own case; Eugster is entitled to an independent and impartial hearing process – the System obviously not independent and impartial. See Eugster motion to dismiss in **Eugster VI**, the discipline action. Appendix 90.

Defendants cite ELC 2.1 as the basis for saying the Supreme Court has exclusive authority in the state to administer the lawyer discipline system. Response at 12. But saying this does not mean the Supreme Court has the right to administer the system regardless of the constitutional rights of a lawyer.

WSBA defendants say lawyer discipline proceedings are “*sui generis*” or “one of a kind.” Response 12. But a description of the proceedings does not lead to the conclusion that the Supreme Court has exclusive jurisdiction over Eugster’s Civil

Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing [sic] in the Constitution or Laws of any State to the Contrary notwithstanding.”

Rights Action and Declaratory Judgment Action. The term *sui generis* only means the proceedings are unusual. It does not mean that in such “one of a kind” actions a party does not have the benefit of federal and state law or that the Supremacy Clause is not applicable. See BLACK’S LAW DICTIONARY 1448 (7th ed. 1999).

The Washington Superior Courts have jurisdiction in actions brought under 42 U.S.C. § 1983. *Robinson v. City of Seattle*, 119 Wash. 2d 34, 57, 830 P.2d 318, (1992) (“State courts have concurrent jurisdiction in actions brought under 42 U.S.C. § 1983”).

The superior court has jurisdiction over this action under Article IV, § 6 of the Washington State Constitution and RCW 2.08.010 because exclusive jurisdiction over this matter has not been vested in some other court.

Also, the superior court has jurisdiction over this action under the Uniform Declaratory Judgments Act. RCW 7.24.010.

The WSBA provides no support for the superior court’s decision to deny its original jurisdiction over Eugster’ Civil Rights Action against the WSBA and the other defendants.

The WSBA defendants do not establish any authority by which a lawyer's Civil Rights Action against the WSBA defendants "have been by law vested exclusively in some other court." *Id.*

The WSBA defendants ignore the state constitution which governs the matter. They assert that the supreme court has inherent exclusive authority over all matters relating to lawyers in discipline actions. That is, defendants say that Eugster's Civil Rights Action must be pursued in the WSBA Washington Lawyer Discipline System.

There is no doubt the Supreme Court has exclusive jurisdiction over attorney discipline matters, but there is no case, no argument that exclusive jurisdiction makes the Discipline System into a superior court for the purpose of a lawyer's Civil Rights Action in which it is claimed that the System in and of itself violates a lawyer's Fifth and Fourteenth Amendment rights of procedural due process of law.

Defendants claim this plenary authority can be found in a number of Washington cases. Response 12. They cite *In re Disciplinary Proceeding against Burtch*, 162 Wash. 2d 873, 887,

175 P.3d 1070 (2008), but they misquote the case. The court said “This court has plenary authority to determine the nature of lawyer discipline, but it has delegated specific responsibilities to the Board.” Nowhere in *Burtch* can it be found that the Supreme Court reasoned or said the court had plenary authority to ignore the constitution for its own purposes of lawyer discipline.

Defendants cite *State ex rel. Schwab v. WSBA*, 80 Wash. 2d 266, 269, 493 P.2d 1237 (1972) and they include this quote (lawyer discipline "exists under the aegis of one authority, the Supreme Court"). The quote is meaningless as far as this case is concerned – lawyer discipline does exist under the aegis of the Supreme Court, the court has inherent discipline power over lawyers, after all, it is to the bar of the Supreme Court to which lawyers are admitted. But, this does not mean the court has power unrestricted by the Washington Constitution to arbitrarily control who is to remain admitted to the bar of the court. The lawyer has constitutional rights regarding his license to practice law; the rights are fundamental under the Fifth and Fourteenth Amendments to the United States Constitution.

For example, power of legislation exists under one authority, the state legislature. The power of legislation is subject to the constitution. The legislature cannot enact laws which violate the constitution.

The defendants rely on *In re Sanai*, 177 Wash. 2d 743, 767-68, 302 P.3d 864 (2013) (reasoning that a superior court's authority in relation to lawyer discipline system is limited to powers expressly delegated in court rules). This does not say the superior court does not have jurisdiction over a Civil Rights Action under the Civil Rights Act. What the court was saying in the quoted language is that the superior court has the power of contempt under the ELC. *Id.* at 177 Wash. 2d at 768.

Defendants cite *Hahn v. Boeing*, 95 Wash. 2d 28 at 34, but matters referred to on that page have nothing to do with any power the Supreme Court has which is superior to the constitution. *Id.*

Defendants cite three cases from other jurisdictions which they say support the “plenary authority” argument. Response at 16 and following.

First they cite, *Smith v. Mullarkey*, 121 P.3d 890, 891-93

(Colo. 2005) and say ("[T]he Colorado Supreme Court['s] jurisdiction to regulate and control the practice of law . . . is exclusive. . . . It is therefore evident that the district courts do not have jurisdiction over claims that question the constitutionality of the Bar admissions process.")

The constitutionality of the Washington Supreme Court bar admissions rules or process is not at issue in the case at hand.

WSBA defendants cite *Barnard v. Sutliff*, 846 P.2d 1229, 1237 (Utah 1992), but the case has no application to a situation like that of the situation in **Eugster IV**. Here is what is said on page 1237 in the case opinion:

Under the Rules of Integration and Management of the Utah State Bar, actions against lawyers grounded on allegations of unethical conduct must be pursued according to the procedures set forth in the Procedures of Discipline. See R.Int. & Mngmt. (C)12. These procedures plainly indicate that the Bar and its committees are the first and exclusive forum for investigative actions of alleged unethical conduct by an attorney. Procedures of Discipline, rules VIII, IX, XI, XII. Appeals from these lawyer discipline proceedings are to this court only. Utah Const. art. VIII, § 4; Utah Code Ann. § 78-2-2(3)©; Procedures of Discipline, rule XIV; see also Utah Code Ann. § 78-51-19. Section 78-2-2(3)© also grants this court exclusive appellate jurisdiction over interlocutory appeals in lawyer discipline matters.

Defendants cite *Jacobs v. State Bar of Cal.*, 20 Cal. 3d 191,

196-98 (1977), but again, the case has no application to **Eugster IV**. The case only addressed whether the superior court with power to supervise discipline investigation discovery could do so only if the state bar sought to enforce its subpoena.

Even if it could be contended the court's inherent authority included some sort of plenary authority over lawyer discipline, the constitution and the United States Constitution would still apply. The reason, the constitution is the supreme law of the land. The court is part of the constitution; for it to say it has power regardless of the constitution would in fact violate the constitution.¹⁰

B. Second, *Res Judicata* Does not Apply.

1. Standards Applicable to Res Judicata.

a. Claim Preclusion.

“Res judicata, or claim preclusion, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wash. 2d 759, 763, 887 P.2d 898 (1995); *Pederson v. Potter*, 103

¹⁰ U.S. Const. art. VI, Clause 2, *supra* fn 9; *see also*, Wash. Const. art. I, § 2 “The Constitution of the United States is the supreme law of the land.”

Wash. App. 62, 67, 11 P.3d 833 (2000).

b. Burden of Proof.

“The party asserting the defense of res judicata bears the burden of proof.” *Ensley v. Pitcher*, 152 Wash. App. 891, 222 P.3d 99, 105, (2009); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash. 2d 853, 865, 93 P.3d 108 (2004).

c. Requirement of a Decision on the Merits.

The threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit. *Hisle*, 151 Wash. 2d at 865.

“Res judicata also requires a final judgment on the merits.” *Pederson v. Potter*, 103 Wash. App. 62, 11 P.3d 833, 835 (2000) citing *Schoeman v. New York Life Ins. Co.*, 106 Wash. 2d 855, 860, 726 P.2d 1 (1986); *State v. Drake*, 16 Wash. App. 559, 563-64, 558 P.2d 828 (1976).

“The long-settled general rule is that a judgment of dismissal for want of jurisdiction is not res judicata as a final decision upon the merits, and consequently does not operate as a bar to a subsequent action before some appropriate tribunal.” *Peacock v. Piper*, 81 Wash. 2d 731, 734, 504 P.2d 1124, 1127

(1973).

d. The Elements of *Res Judicata*.

Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. *Id.*; *Pederson v. Potter*, 103 Wash. App. 62, 11 P.3d 833 (2000).

2. *Eugster III and Res Judicata*.

Defendants say “Eugster's due process claim should have been brought, if at all, in *Eugster III*. In that prior lawsuit, Eugster challenged mandatory membership in the WSBA, in part based on his objections to the lawyer discipline system – the very same objections he raises here.” Response 24.

Defendants misunderstand what **Eugster III** was about. As far as an explanation of some of the things Eugster objected to as a mandatory member of the WSBA, Eugster explained he was troubled by the WSBA Lawyer Discipline System. **Eugster III** Appendix 113, Complaint pages 9 - 11. This was again explained in Eugster's Amended and Restated Complaint, Appendix 131, pgs. 12 - 14. *See also*, Judge Robart's

Memorandum decision, Appendix 153 at page 9 (Appendix at 155).

Eugster III was not based upon “objections to the discipline system.” Eugster made it clear that the action was not being brought on objections to the discipline system.

Furthermore, such objections could not have been raised by Eugster in **Eugster III** because he did not have standing to raise such issues at the time. This is so because Eugster was not then under any imminent threat of discipline action by the bar. See **Eugster II** regarding the standing requirement of imminence of threat. Appendix 111, Memorandum Decision of the 9th Circuit, July 17, 2012.

3. Eugster I and Res Judicata.

Eugster I is the *Disciplinary Proceeding of Stephen K. Eugster*, 166 Wash. 2d 293, 209 P. 3d 435 (2009). This case began with a grievance against Eugster in 2005. The WSBA defendants say “Eugster's due process claim also could and should have been raised even earlier, in **Eugster I.**” Response at 25. This statement is erroneous. The source for this argument is “CP at 226.” Response 25.

CP 226 is a page in the Order of Dismissal of the trial court judge. Judge Cozza said:

7. The Washington Supreme Court has set up a system of lawyer discipline in which the ultimate step is review before the Washington Supreme Court. Title 12 ELC.

8. Constitutional claims and objections ~~such as those raised by Plaintiff in this case~~ have previously been heard within discipline cases. *See, e.g., In re Discipline of Blanchard*, 158 Wash. 2d 317 (2006); *In re Discipline of Scannell*, 69 Wash. 2d 723 (2010). [The strikeout is in the original.]

9. Plaintiff had the opportunity to raise his constitutional concerns with the Washington Supreme Court in his prior discipline case.

The statements are meaningless. Findings of fact and conclusions of law are unnecessary in Orders of Dismissal. CR

52 (a)(5)(B) – (5):

(5) When Unnecessary. Findings of fact and conclusions of law are not necessary: . . . (B) Decision on motions. On decisions of motions under rules 12 or 56 or any other motion, except as provided in rules 41(b)(3) and 55(b)(2).

“These findings are unnecessary, CR 52(a)(5)(B), and we do not consider them on appeal.” *Altabet v. Monroe Methodist Church*, 54 Wash. App. 695 fn. 1, 777 P.2d 544 (1989) citing *Duckworth v. City of Bonney Lake*, 91 Wash. 2d 19, 586 P.2d 860

(1978).

The defendants' argument is simply insupportable in fact and law. It is not supported by the standards required for purposes of *res judicata*.

Also, there is another reason why *res judicata* does not apply. Eugster's claims are under the Civil Rights Act, 42 U.S.C. § 1983. One is not talking about generalized due process claims. One is talking about procedural due process and the fact that the entire WSBA Lawyer Discipline System violates procedural due process.

Below, the trial court said Eugster's claims are to be made in the Discipline System process. Eugster did bring those claims in his defense and counterclaims in response to the Formal Complaint (Appendix 1). *See Eugster's Answer, Affirmative Defenses, Counterclaims and Third-Party Claims. Appendix 9.* But see what has happened – the WSBA has moved to strike. *See Part II, supra at 7.*

Eugster filed a motion to dismiss the discipline system proceedings against him because the proceedings violated procedural due process. The WSBA and defendant D'Angelo are

saying the motion cannot be brought because the rules do not apply to it.

Lastly, there is no proof that Eugster did not bring due process claims in the disciplinary proceedings against him. To assert *res judicata*, the WSBA defendants would have to show Eugster did not assert due process claims in discipline proceedings. There is no such showing.

4. Eugster's Retaliation Claim and Res Judicata.

Here, the WSBA defendants assert Eugster was bound to assert the damages claim in WSBA, **Eugster III**. Response at 31.

They assert first that the retaliation claim could have been asserted because the case was filed “long after the investigation had continued to develop.” Response 31. But this is untrue. There was no further investigation of the grievance after Eugster provided his last response to the WSBA on December 25, 2014. The WSBA’s efforts to investigate and later file a formal complaint against Eugster did not take place until November 2015.

Eugster was not afforded an opportunity to amend **Eugster**

III in order to raise the claim. The opportunity to amend given by the court in **Eugster III** was not for the purpose of anything other than an opportunity to set forth the activities the bar was engaging in with Eugster's dues were the activities Eugster claimed not to be germane to the WSBA's purposes as an integrated bar association. Appendix 161, p. 11 of Judge Robart's decision.

Eugster did not amend the complaint because it was not necessary to do so. Under the terms of the so-called Keller Deduction, all of the actions of the bar because of the deduction became permitted activities.

Under *Keller v. State Bar of California*, the WSBA cannot use the compulsory membership fees of objecting WSBA members for political or ideological activities that are not reasonably related to the regulation of the legal profession or improving the quality of legal services. These activities are considered "nonchargeable." The WSBA may use compulsory membership fees for all other activities. [Emphasis added.]

Keller Deduction, WSBA Website, <http://www.wsba.org/-Licensing-and-Lawyer-Conduct/Annual-License-Renewal/Keller-Deduction>.

In sum, the retaliation claim did not exist until the time of **Eugster IV** when it was filed in November 2015. The

retaliation claim came about after the WSBA went to the Review Committee seeking to have the committee order the grievance to hearing. This was long after the court's decision in **Eugster III** was rendered and long after the case was appealed to the 9th Circuit.

C. Third, Other Arguments That the Case Was Properly Dismissed.

WSBA defendants also argue that Eugster's claims are justiciable. Response at 17. And, they argue that Eugster has failed to state a due process claim. Response at 19. Both of these arguments fail on the basis of the extensive allegations in Eugster's Complaint which show that Eugster's claims are justiciable and the claims made, perhaps again and again, show that Eugster has by obvious facts shown a claim or claims for violation of procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution.

But there is another point, Eugster's case is a Civil Rights Action under 42 U.S.C. § 1983 and a Declaratory Judgment action under RCW Ch. 7.24. Under these claims, Eugster has established justiciability. Also Eugster has established sufficient pleadings to establish his claims.

V. CONCLUSION

The Superior Court has original jurisdiction over Eugster's Civil Rights Action claims under the specific provisions of Wash. Const. art. IV, § 6. There has been no vesting of this jurisdiction in the Supreme Court or the WSBA Lawyer Discipline System. Not only has there been no vesting, there can be no vesting because the WSBA Disciplinary Board is not a "court" for purposes of exercising a court original jurisdiction. Eugster must be accorded an independent and impartial legal process to consider and act on his claims of unconstitutionality.

Respectfully submitted this 17th day of August, 2016.

EUGSTER LAW OFFICE PSC



Stephen Kerr Eugster, WSBA # 2003
2418 W Pacific Avenue
Spokane, Washington 99201-6422
(509) 624-5566
eugster@eugsterlaw.com

PROOF OF SERVICE

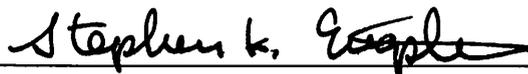
I hereby certify that on August 17, 2016, by previous agreement of counsel, I emailed, the foregoing document including its appendix to counsel listed below at their respective e-mail addresses:

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August 17, 2016.



Stephen K. Eugster, WSBA # 2003

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FILED

JUN 16 2016

DISCIPLINARY
BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

STEPHEN KERR EUGSTER,

Lawyer (Bar No. 2003).

Proceeding No. 16#00017

FORMAL COMPLAINT

Under Rule 10.3 of the Rules for Enforcement of Lawyer Conduct (ELC), the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association charges the above-named lawyer with acts of misconduct under the Rules of Professional Conduct (RPC) as set forth below.

ADMISSION TO PRACTICE

1. Respondent Stephen Kerr Eugster was admitted to the practice of law in the State of Washington on January 2, 1970.

FACTS REGARDING COUNTS 1 – 3

2. In September 2014, Verdelle O'Neill (Ms. O'Neill) was 88 years old, legally blind, and hard of hearing.

1 3. Ms. O'Neill resided in Spokane, Washington.

2 4. Kevin Carbury and Michelle Carbury (the Carburys) were Ms. O'Neill's neighbors.

3 5. The Carburys had borrowed a substantial amount of money from Ms. O'Neill.

4 6. In September 2014, Ms. O'Neill moved temporarily to Sullivan Park Care Center
5 (Sullivan Park) after suffering from congestive heart failure.

6 7. Mr. Carbury told Respondent that Ms. O'Neill was in need of a lawyer.

7 8. Mr. Carbury had previously consulted with Respondent about filing a bankruptcy
8 petition on his behalf.

9 9. On or about September 11, 2014, Respondent met with Ms. O'Neill at Sullivan Park.

10 10. During the meeting, Ms. O'Neill expressed concern to Respondent that the Carburys
11 owed her money.

12 11. Respondent knew that Ms. O'Neill would be a potential creditor if the Carburys filed
13 for bankruptcy.

14 12. On or about September 12, 2014, Ms. O'Neill signed a fee agreement (agreement)
15 with Respondent for "Estate Planning; Power of Attorney, and other estate planning
16 documents."

17 13. The agreement stated that Respondent's fee for legal and other work would be \$75
18 per hour.

19 14. On or about September 12, 2014, Ms. O'Neill also signed a power of attorney
20 appointing Respondent as her attorney-in-fact.

21 15. The power of attorney gave Respondent full power to administer Ms. O'Neill's
22 personal and business affairs and granted him power to take action for the recovery of debts
23 owed to her.

1 16. The power of attorney also allowed Respondent to be reimbursed for reasonable
2 expenses incurred but did not provide for other compensation.

3 17. On or about September 12, 2014, Respondent drafted a letter addressed to Ms.
4 O'Neill and Kevin and Michelle Carbury.

5 18. The letter stated:

6 I write this letter to you in light of the fact that Mrs. O'Neill has asked me to
7 undertake legal work for her and, because Kevin and Michelle Carbury have
8 asked or soon will ask me to provide them with legal representation concerning a
chapter seven straight bankruptcy (liquidation).

9 ...
10 Kevin and Michelle, I understand are indebted to Mrs. O'Neill, in the amount of
11 \$20,000. If Kevin and Michelle go through a chapter 7 bankruptcy the amount
12 owing to Mrs. O'Neill will be listed as a debt in the bankruptcy proceeding. If
the bankruptcy results in a discharge of Kevin and Michelle, that is a discharge
of all of their debts including the \$20,000 owed to Mrs. O'Neill, Mrs. O'Neill
will not gain anything from Kevin and Michelle, unless Kevin and Michelle were
to agree to reaffirm the debt in the course of the bankruptcy or thereafter. They
would have no obligation to reaffirm the debt.

13 ...
14 The representation of each of you does not involve the assertion of a claim by
15 one of you against the other represented by me in the same litigation or a
16 proceeding before a tribunal. Mrs. O'Neill [sic], if a bankruptcy is filed by
17 Kevin and Michelle will be represented of [sic] other counsel if necessary for
18 purposes of filing her bankruptcy claim.

19 19. Ms. O'Neill signed the letter.

20 20. Prior to signing the letter, Ms. Carbury revised the letter to reflect a dispute over the
21 amount of money that the Carburys owed to Ms. O'Neill as follows:

22 *may be .1110*
Kevin and Michelle, I understand, ~~are~~ indebted to Mrs. O'Neill, in the amount of approximately
23 *1110* \$20,000. If Kevin and Michelle go through a chapter 7 bankruptcy the amount owing to Mrs.
O'Neill will be listed as a debt in the bankruptcy proceeding. If the bankruptcy results in a
discharge of Kevin and Michelle, that is a discharge of all of their debts including ~~the \$20,000~~ *any money*
owed to Mrs. O'Neill, Mrs. O'Neill will not gain anything from Kevin and Michelle, unless
Kevin and Michelle were to agree to reaffirm the debt in the course of the bankruptcy or
thereafter. They would have no obligation to reaffirm the debt.

21. Ms. O'Neill did not initial the changes made by Ms. Carbury.

1 22. On or about September 17, 2014, Adult Protective Services (APS), received a
2 complaint by a member of the community that Ms. O'Neill was being financially exploited by
3 Mr. Carbury.

4 23. Around that same time, APS received a separate complaint against Respondent that
5 Ms. O'Neill was being financially exploited by Respondent. APS began an investigation into
6 both complaints.

7 24. On or about September 23, 2014, Respondent drafted and presented Ms. O'Neill
8 with a new power of attorney.

9 25. The new power of attorney added a provision that allowed Respondent to pay
10 himself compensation for his services as attorney-in-fact at the rate of \$75 per hour.

11 26. Ms. O'Neill signed the new power of attorney on or about September 23, 2014, the
12 same day that Respondent presented it to her.

13 27. The terms of the new power of attorney were not fair or reasonable to Ms. O'Neill.

14 28. Respondent did not advise Ms. O'Neill in writing about the desirability of seeking
15 the advice of independent counsel before she signed the new power of attorney.

16 29. Respondent did not give Ms. O'Neill a reasonable opportunity to seek the advice of
17 independent counsel before she signed the new power of attorney.

18 30. Ms. O'Neill did not give her informed consent in writing to the essential terms of the
19 transaction and/or Respondent's role in the transaction, including whether Respondent was
20 representing Ms. O'Neill in the transaction.

21 31. On or about October 7, 2014, Ms. O'Neill left Sullivan Park and returned to her
22 residence.

23 32. On or about October 8, 2014, Respondent gave Ms. O'Neill a \$4,925.92 invoice for

1 his professional services.

2 33. Respondent's invoice included multiple duplicate entries.

3 34. Respondent's invoice included time spent speaking to and meeting with the APS
4 investigator regarding APS's investigation of Respondent.

5 35. Respondent's invoice billed \$75 per hour for non-legal services such as picking up
6 Ms. O'Neill's prescriptions, delivering a letter to the post office, and making a hair appointment
7 for Ms. O'Neill.

8 36. One or more of the charges on the October 8, 2014 invoice were unreasonable.

9 37. Ms. O'Neill paid the October 8, 2014 invoice in full.

10 38. On or about December 4, 2014, Respondent gave Ms. O'Neill a \$1,681.36 invoice
11 for his professional services.

12 39. The invoice billed charges at \$75 per hour for non-legal services such as research
13 and purchasing household items and delivering the items to Ms. O'Neill.

14 40. One or more of the charges on the December 4, 2014 invoice were unreasonable.

15 41. Ms. O'Neill paid December 4, 2014 invoice in full.

16 42. On or about January 11, 2015, Respondent gave Ms. O'Neill a \$2,277.75 invoice for
17 his professional services.

18 43. Respondent's invoice included time spent speaking to and meeting with the APS
19 investigator regarding APS's investigation of Respondent.

20 44. The invoice billed charges at \$75 per hour for non-legal services such as cleaning
21 Ms. O'Neill's living room, kitchen, and bathroom, and starting a load of laundry.

22 45. One or more of the charges on the January 11, 2015 invoice were unreasonable.

23 46. Ms. O'Neill paid the January 11, 2015 invoice in full.

1 47. On or about February 22, 2015, Respondent gave Ms. O'Neill a \$1,911.73 invoice
2 for his professional services.

3 48. Respondent's invoice included time spent corresponding by email with the APS
4 investigator regarding APS's investigation of Respondent.

5 49. The invoice billed charges at \$75 per hour for non-legal services such as checking on
6 Ms. O'Neill's house, turning the heat down, and unplugging the heaters.

7 50. One or more of the charges on the February 22, 2015 invoice were unreasonable.

8 51. Ms. O'Neill paid the February 22, 2015 invoice in full.

9 52. On or about March 31, 2015, Respondent gave Ms. O'Neill a \$2,887.20 invoice for
10 his professional services.

11 53. The invoice billed charges at \$75 per hour for non-legal services such as shopping
12 for groceries, "dealing with" a lock change at Ms. O'Neill's house, getting cash for Ms. O'Neill
13 from her bank, and bringing her food.

14 54. One or more of the charges on the March 31, 2015 invoice were unreasonable.

15 55. Ms. O'Neill paid the March 31, 2015 invoice in full.

16 56. On or about June 9, 2015, Respondent gave Ms. O'Neill a \$4,783.13 invoice for his
17 professional services.

18 57. The invoice billed charges at \$65 per hour for non-legal services such as telling Ms.
19 O'Neill about an upcoming Mariner's game, reminding her of her doctor's appointment,
20 cleaning her commode and toilet, washing dishes, and taking out her garbage.

21 58. One or more of the charges on the June 9, 2015 invoice were unreasonable.

22 59. Ms. O'Neill paid the June 9, 2015 invoice in full.

23 60. On or about January 13, 2015, Respondent filed a bankruptcy petition on behalf of

1 the Carburys which listed Ms. O'Neill as a creditor. The petition listed the amount of debt owed
2 to Ms. O'Neill as "unknown."

3 61. Respondent's representation of Ms. O'Neill was directly adverse to the Carburys.

4 62. Respondent's representation of the Carburys was directly adverse to Ms. O'Neill.

5 63. There was a significant risk that Respondent's representation of Ms. O'Neill would
6 be materially limited by Respondent's responsibilities to the Carburys.

7 64. There was a significant risk that Respondent's representation of the Carburys would
8 be materially limited by Respondent's responsibilities to Ms. O'Neill.

9 65. Respondent did not reasonably believe that he could provide competent and diligent
10 representation to the Carburys and/or Ms. O'Neill under the circumstances.

11 66. Respondent did not advise Ms. O'Neill to seek other counsel or assist her in
12 obtaining alternate representation for the purposes of filing a claim in the Carburys' bankruptcy.

13 67. On or about February 24, 2015, a meeting of creditors was held in the Carburys'
14 bankruptcy.

15 68. Ms. O'Neill did not appear for the meeting and was not represented by counsel.

16 69. In April 2015, APS closed its investigation of Respondent and Mr. Carbury. APS
17 recommended that the attorney general file a petition for guardianship based in part on concerns
18 about Ms. O'Neill's mental capacity.

19 70. On or about April 8, 2015, the attorney general filed a petition for guardianship
20 alleging that Ms. O'Neill had moderate to severe cognitive, visual, and hearing deficits. A
21 guardian ad litem was appointed to investigate the matter.

22 71. On or about May 27, 2015, the Carburys' debts to Ms. O'Neill were discharged.

23 72. On August 18, 2015, Ms. O'Neill died. The Guardianship action was dismissed.

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COUNT 1

73. By representing Ms. O'Neill and the Carburys, where one or both representations involved a concurrent conflict of interest, Respondent violated RPC 1.7.

COUNT 2

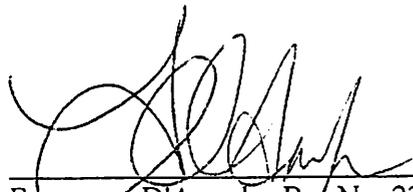
74. By having Ms. O'Neill execute the second power of attorney, without meeting the requirements of RPC 1.8(a)(1) and/or RPC 1.8(a)(2) and/or RPC 1.8(a)(3), Respondent violated RPC 1.8(a) and/or RPC 1.4(b).

COUNT 3

75. By charging and/or collecting unreasonable fees, Respondent violated RPC 1.5(a).

THEREFORE, Disciplinary Counsel requests that a hearing be held under the Rules for Enforcement of Lawyer Conduct. Possible dispositions include disciplinary action, probation, restitution, and assessment of the costs and expenses of these proceedings.

Dated this 16 day of June, 2016.



Francesca D'Angelo, Bar No. 22979
Disciplinary Counsel

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BEFORE THE DISCIPLINARY BOARD OF
THE WASHINGTON STATE BAR ASSOCIATION

In re

STEPHEN KERR EUGSTER
Lawyer (Bar No. 2003)

Proceeding No. 16#00017

ANSWER, AFFIRMATIVE DEFENSES,
COUNTERCLAIMS AND THIRD - PARTY
CLAIMS

STEPHEN KERR EUGSTER,
Plaintiff,
vs.
WASHINGTON STATE BAR ASSOCIATION, a
legislatively created Washington
association (WSBA); and PAULA LITTLE-
WOOD, Executive Director, WSBA, in her
official capacity;
and
DOUGLAS J. ENDE, Director of the WSBA
Office of Disciplinary Counsel, in his
official capacity; FRANCESCA D'ANGELO,
Disciplinary Counsel, WSBA Office of
Disciplinary Counsel, in her official
capacity;
and
DOES 1 - 10,
Defendants.

COUNTER COMPLAINT AND THIRD -
PARTY COMPLAINT FOR
DECLARATORY JUDGMENTS,
INJUNCTION, AND DAMAGES (42
U.S.C. §1983)

ANSWER, AFFIRMATIVE DEFENSES,
COUNTERCLAIMS AND THIRD - PARTY CLAIMS - 1

Eugster Law Office PSC
2418 West Pacific Avenue
Spokane, Washington 99201-6422

1 Court of Appeals Division III.

2 **Case V:** *Eugster v. Paula Littlewood* [WSBA Executive Director], Case
3 No. 2:15-cv-00352-TOR (Dist. Court, ED Wash. 2015), Case
4 dismissed, on appeal to the 9th Circuit Court of Appeals.

5 1.3 **Case I.** Case I, was *In the Matter of Disciplinary Proceeding Against Eugster*, 166
6 Wash.2d 293, 209 P. 3d 435 (2009). This case began with a grievance against Eugster in
7 2005 and ended with orders suspending Eugster from the practice of law for eighteen
8 months and orders of costs and reimbursements totaling several tens of thousands of
9 dollars. From grievance to the end of Eugster's suspension in December 2010 spanned
10 about six years.

11
12 Going into the discipline proceeding Eugster had some faith or hope the system
13 would give him a fair shake, would be impartial and reasonable. Instead, Eugster
14 gradually learned that the system was predictable because it was not impartial and
15 reasonable, that the system violated procedural due process of law. This discovery was a
16 result of Eugster's experience in the discipline action and his study and reflection in the
17 months following the decisions of the hearing officer, WSBA Disciplinary Board appeal
18 and appeal to the Washington Supreme Court.

19
20 For example, Eugster learned that if a formal complaint is ever filed against a lawyer
21 the lawyer can be assured that she will be found guilty of wrong doing. The system is
22 totally biased against the lawyer. The bias is so great a lawyer must take a settlement if
23 she can get it, because the settlement result will be less severe than whatever result
24 from contesting the complaint in would come to. Not only will the lawyer lose, the result
25 will be considerably more severe, costly and debilitating and for some debilitating to the
26

1 point of despair.

2 1.4 Case II. Several months prior to the end of Eugster's suspension in 2010,
3 Eugster learned the WSBA prosecutor in the Case I, Jonathan Burke, WSBA Office of
4 Discipline Counsel (ODC) had begun investigating a grievance which had been sitting on
5 his desk since it was filed back sometime in 2005. This news was deeply troubling to
6 Eugster, in light of what he had learned about the system. Eugster filed Case II, an action
7 in United States District Court for the Eastern District of Washington. *Eugster v.*
8 *Washington State Bar Association*, No. CV 09-357-SMM (Dist. Court, ED Wash. 2019)
9 *affirmed*, 9th Circuit (2012). This was a Civil Rights Act action contesting the
10 constitutionality of the WSBA Discipline System from the standpoint of procedural due
11 process under the Fifth and Fourteenth Amendments to the United States Constitution.
12

13 Within a few days of the filing the complaint, the WSBA prosecutor, Mr. Burke,
14 dismissed the grievance with an improper admonition because the admonition did not fit
15 within the Rules for Enforcement of Lawyer Conduct (ELC). The admonition provision
16 which would have allowed the admonition to be questioned by Eugster. ELC 13.5.
17

18 At that point Eugster amended the complaint to allege he had a right to object to the
19 admonition but that no process had been provided, as there would have been if the bar
20 issued an admonition regarding the grievance. Eugster argued that though some of the
21 case was mooted by Mr. Burke's dismissal, he still had U.S. Const. Article III standing
22 because he had a right to respond to the admonition.
23

24 The court disagreed and dismissed the case. The 9th Circuit upheld the dismissal on
25 the basis of the lack of Article III standing. Case II, *supra*.
26

1 **1.5 Verdelle G. O'Neill.** In September, 2014, Eugster became the lawyer and
2 attorney-in-fact for Verdelle G. O'Neill. Mrs. O'Neill had some explicit requests and had
3 come to the point where she wanted to live in her home as long as possible but knew she
4 needed someone to provide such care services and to coordinate care by others. Eugster
5 provided his legal services and attorney-in-fact services until Mrs. O'Neill's death at
6 Deaconess Hospital in Spokane on August 18, 2015.

7
8 Almost immediately Eugster received a call from APS (Adult Protective Service)
9 saying a compliant had been brought against him and she (APS worker) wanted to talk,
10 arrangements were made. In addition, the WSBA received a grievance against Eugster by
11 Cheryl Rampley, a niece of Mrs. O'Neill's deceased husband, Thomas (Tommy) a railroad
12 man.

13
14 Eugster responded to the grievance and continued to provide further responses to
15 the Felice Congalton and later, Kevin Bank. Eugster's last response to Mr. Bank was on
16 December 25, 2015.

17 Eugster heard nothing more from the WSBA until a call from Vanessa Norman, an
18 investigator in the Discipline System on April 3, 2015. Within a few days, Eugster was told
19 that Francesca D'Angelo, Office of Disciplinary Counsel (ODC) had taken over the matter
20 for the WSBA.

21
22 **1.6 Rampley Grievance.** The Rampley Grievance was resurrected within days of
23 Eugster's filing of Case III - *Eugster v. Washington State Bar Association*, Case No.
24 C15-0375JLR (Dist. Court, WD Wash. 2015) (now on appeal to the 9th Circuit).

25 **1.7 Case III.** On March 13, 2015, Eugster filed a case against the WSBA and others
26

1 including the justices of the Washington Supreme Court. The case is a Civil Rights Act, 42
2 U.S.C. § 1983 case which claims that the WSBA Washington Lawyer Discipline System
3 violates Eugster's right of non-association and freedom of speech under the First and
4 Fourteenth Amendments to the United States Constitution.

5 **1.8 Case IV.** When Eugster learned that Ms. D'Angelo was about to ask a Review
6 Committee of the for an order ordering the Ramley Grievance "matter" to hearing,
7 Eugster filed an action in Spokane County Superior Court, Case IV, *Eugster v. WSBA*, No.
8 15-2-04614-9. The action is a Civil Rights Action under 42 U.S.C. § 1983. It contests the
9 constitutionality of WSBA Washington Lawyer Discipline System.
10

11 **1.9 Case V.** When the Review Committee of the Disciplinary Board ordered the
12 matter to hearing, Eugster filed Case V. *Eugster v. Littlewood, et al.* No. C15-0375JLR
13 (Dist. Court, ED Wash. 2015). Again, as he had done in Case II, Eugster sought the
14 authority of the United States District Court to review and consider whether the WSBA
15 Lawyer Discipline System violated a lawyer's fundamental constitutional right to
16 procedural due process of law.
17

18 The District Court dismissed the case with prejudice on the basis of the res judicata
19 effect of the discision in the the superior court case, Case IV. The court is in error
20 because there was no res judicata because the Superior Court did not decide the case on
21 its merits, it dismissed the case because it said only the Washington Supreme Court and
22 the Washington Discipline System had jurisdiction. Case V has been appealed to the 9th
23 Circuit Court of Appeals.
24

25 **1.10 The Decision in Case IV.** Going back to Case IV, the Superior Court Action, the
26
27

1 WSBA and the other defendants in the action moved to have the court dismiss the case
2 on the basis of CR 12(b)(1)(lack of jurisdiction); and CR 12(b)(6) (failure to state a claim).

3 Judge Cozza entered an order of dismissal on April 1, 2016 which provides in part as
4 follows:

5 Based on the foregoing conclusions, the Court hereby ORDERS that
6 Defendants' Motion to Dismiss Complaint is GRANTED and that this action
7 is dismissed with prejudice, with each party to bear its own attorney fees
8 and costs.

9 Conclusions and Order Granting Defendants' Motion to Dismiss Complaint, April 1, 2015
10 attached as Appendix 1 -4.

11 The "foregoing conclusions" referred to by the judge are primarily these:

12 7. The Washington Supreme Court has set up a system of lawyer
13 discipline in which the ultimate step is review before the Washington
14 Supreme Court. Title 12 ELC.

15 11. Plaintiffs claims under 42 U.S.C. § 1983 and under the Washington
16 Constitution against Defendants are within the exclusive jurisdiction of the
17 Washington Supreme Court and must also be dismissed with prejudice.

18 12. Based on the foregoing, Defendants are entitled to dismissal of
19 Plaintiff's claims with prejudice under CR 12(b)(1) and CR 12(b)(6).

20 Id.

21 **1.11 Case IV Appeal.** Eugster has appealed the trial court decision to Division III of
22 the Court of Appeals. All briefs have been filed. The case is awaiting argument setting.

23 **1.12 Eugster's Response in this Proceeding.** As matters stand now, the WSBA
24 Washington Lawyer Discipline System has the jurisdiction of the Superior Court of
25 Eugster's – "claims under 42 U.S.C. § 1983 and under the Washington Constitution
26 against Defendants are within the exclusive jurisdiction of the Washington Supreme
27

1 Court and must also be dismissed with prejudice.” In light of Judge Cozza’s decision,
2 Eugster’s Response in this matter, will consist of the following:

- 3 1. Answer to the WSBA’s Formal Complaint.
- 4 2. Affirmative Defenses which will include Eugster’s Civil Rights Action Claims.
- 5 3. Counter and Third-Party Claims
- 6 (A) Claims against the WSBA, Paula Littlewood, Douglas Ende and Francesca
- 7 D’Angelo.
- 8 (B) Third Party Claims against WSBA, Paula Littlewood, Douglas Ende and
- 9 Francesca D’Angelo and perhaps others who may be determined.
- 10 4. Demand for Jury Trial. Eugster demands a jury as to claims triable by a jury.

11 2 FORMAL COMPLAINT: ANSWERS

12 Admission to Practice

- 13 1. Admitted.

14 Facts Regarding Counts 1 -3

- 15 2. Admitted, except Ms. O’Neill (Verdelle, “Dell” liked to be referred to as Mrs.
- 16 O’Neill) may not have been “legally” blind, she could see but not very well.
- 17 3. Mrs. O’Neill resided in the Spokane Valley, Washington 99206.
- 18 4. Admitted.
- 19 5. Mrs. O’Neill also considered the money to be a gift.
- 20 6. Admitted.
- 21 7. Denied for lack of information.
- 22 8. Admitted.
- 23 9. Admitted.

1 10. Denied.

2 11. Mrs. O'Neill was aware she could be a creditor in the bankruptcy if she desired
3 to treat the money as a loan.

4 12. Admitted.

5 13. Admitted.

6 14. Admitted.

7 15. Denied, the power of attorney did not grant full power to Respondent.

8 16. Denied.

9 17. Admitted.

10 18. Admitted.

11 19. Admitted.

12 20. Denied, the letter speaks for itself.

13 21. Mrs. O'Neill was aware of the inter-lineation made by Mrs. Carbury questioning
14 the amount.

15 22. Denied for lack of information.

16 23. Denied for lack of information.

17 24. Denied.

18 25. The amended power of attorney provided that hourly charges of the attorney in
19 fact were \$75 per hour. This was the same amount provided for in the fee agreement.

20 26. Denied, Mrs. O'Neill and Respondent had discussed the amended power of
21 attorney, she specifically understood that Respondent wanted to delete the gift provision
22 authority in the power of attorney.

1 27. Apart from the deletion of the gift provision the amended power of attorney
2 was the same as the previous power of attorney and the fee agreement.

3 28. Denied.

4 29. Denied.

5 30. Denied.

6 31. Admitted.

7 32. Admitted.

8 33. Admitted, but the duplicate entries were mistakes and Respondent credited
9 Mrs. O'Neill's personal representative in the amount of the duplicate entries.
10

11 34. Admitted, but this was corrected and Mrs. O'Neill was reimbursed for the
12 amounts related to such entries.

13 35. As her attorney in fact Respondent performed a number of services which were
14 personal in nature. The amount per hour for such "other services" under the fee
15 agreement was \$75 per hour. Respondent also contributed substantial hours of services
16 for no charge at all. The WSBA is well aware of this as the "no charges" were reflected in
17 the invoices given to Mrs. O'Neill.
18

19 36. Denied.

20 37. Admitted.

21 38. Admitted.

22 39. Admitted.

23 40. Denied.

24 41. Admitted.
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27

- 1 42. Admitted.
- 2 43. Adjustments were made for time related to the APS investigation.
- 3 44. Admitted.
- 4 45. Denied.
- 5 46. Admitted.
- 6 47. Admitted.
- 7 48. Admitted but Respondent made an adjustment, reimbursement for such time.
- 8 49. Admitted.
- 9 50. Denied.
- 10 51. Admitted.
- 11 52. Admitted.
- 12 53. Admitted.
- 13 54. Denied.
- 14 55. Admitted.
- 15 56. Admitted.
- 16 57. Admitted.
- 17 58. Denied.
- 18 59. Admitted.
- 19 60. Admitted.
- 20 61. Denied.
- 21 62. Denied.
- 22 63. Denied.

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- 64. Denied.
- 65. Denied.
- 66. Denied.
- 67. Admitted.
- 68. Admitted, however, Respondent was at the creditor's meeting.
- 69. Denied for lack of information.
- 70. Admitted, however, the guardian ad litem never finished or filed any report.
- 71. The Carbury's received a discharge of their debts in the bankruptcy proceeding.
- 72. Admitted, but Respondent does know of the date of the dismissal of the guardianship proceeding.

Count 1

73. Denied.

Count 2

74. Denied.

Count 3

75. Denied.

Relief Requested

Denied.

3 AFFIRMATIVE DEFENSES

Respondent hereinafter sets forth and alleges his affirmative defenses to the WSBA's

Formal Complaint:

3.1 **Violation of Fundamental Rights.** WSBA Lawyer Discipline System violates

1 Respondent's fundamental constitutional rights to procedural due process of law under
2 the Fifth and Fourteenth Amendments to the United States Constitution and the
3 Washington Constitution Art. I, Section 3.

4 **3.2 Violation of Fundamental Rights: Strict - Exacting Scrutiny.** The WSBA Discipline
5 System Violates the fundamental rights of Respondent because it fails to meet the
6 requirements of strict - exacting scrutiny under the constitutions of the United States as
7 amended and the Washington Constitution.
8

9 **3.3 Vital Steps of Discipline System Are Unconstitutional.** There are numerous
10 discrete aspects of the Discipline System are unconstitutional. These discrete aspects fail
11 the due process test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

12 **3.4 Failure to state a claim.** The WSBA fails to state a claim.

13 **3.4.1 Formal Complaint in its entirety fails to state a claim.** The action is based
14 on the grievance of Cheryl Rampley, Mrs. O'Neill's niece in law. Early on, the WSBA
15 knew the Rampley grievance was not true. The grievance should have been [closed]
16 at that time.
17

18 **3.4.2 A disciplinary action cannot be brought against a lawyer if the grievance**
19 **against the lawyer is shown to be false.** The Rampley grievance was shown to be
20 false.
21

22 **3.4.3 The disciplinary action cannot be brought if the WSBA is simply conspiring**
23 **with a grievant to assuage the animosity of grievant toward Eugster.** That is what is
24 happening in this matter.

25 **3.4.4 All of the matters complained of by the WSBA in its Formal Complaint**
26

1 were matters which were known to the WSBA counsel as a result of materials where
2 had been delivered by Eugster to the Kevin Bank, WSBA ODC on or before December
3 25, 2014.

4 3.4.5 Eugster heard nothing further from the WSBA until a few days after he
5 had filed a complaint against the WSBA in U.S. District Court, Eastern District
6 Washington, at Seattle, on March 13, 2015.

7
8 3.4.6 The Formal Complaint was filed and is being pursued for purposes other
9 than the discipline of Respondent. The WSBA and attorney D'Angelo are pursuing the
10 Formal Complaint to injure Respondent personally and to damage his reputation. Such
11 purposes are contrary to law and not with the power of the WSBA.

12 **3.5 The Counts fail to state claims.**

13 3.5.1 **Count One.** Respondent's conduct did not involve a conflict of interest;
14 furthermore, Mrs. O'Neill and the Carburys signed an informed consent to the
15 representation as provided and allowed by RPC 1.7 (b).

16
17 3.5.2 **Count Two.** Mrs. O'Neill did not sign a second power of attorney, she
18 signed an amendment or revised power of attorney which deleted a paragraph
19 regarding gifting by the principal by the attorney in fact.

20 3.5.3 **Count Three.** The alleged "unreasonable fees" in the Formal Complaint all
21 relate to Respondent's efforts for Mrs. O'Neill while acting as her attorney in fact
22 under the Power of Attorney. The charges were not for legal services. The WSBA
23 not have the power to regulate fees for non-legal services. The WSBA illegally using
24 the Discipline System to extend its monopoly power over activities beyond the
25
26

1 jurisdiction of the WSBA monopoly.

2 **3.6 The Death of Verdell G. O'Neill.** The WSBA and ODC Francesca D'Angelo
3 purposely delayed the bringing the Formal Complaint until after the death of Mrs. O'Neill.
4 In so doing, WSBA and ODC Francesca D'Angelo prevented Respondent from being able
5 to call Mrs. O'Neill as a witness in these proceedings.
6

7 **3.7 Prior pending actions.** This action is the subject of two prior pending actions
8 both of which address the constitutionality of the WSBA Washington Lawyer Discipline
9 System: (a) *Eugster v. Washington State Bar Association*, No. 15-2-04614-9, Superior
10 Court of the State of Washington for Spokane County. Constitutionality of WSBA
11 Washington Lawyer Discipline System: Procedural Due Process and Strict Scrutiny
12 Analysis, (b) *Eugster v. Paula Littlewood* [WSBA Executive Director], District Court Eastern
13 District of Washington, Constitutionality of WSBA Washington Lawyer Discipline System:
14 Procedural Due Process and Strict Scrutiny Analysis. As previously indicated, these
15 actions are now on appeal to the appropriate court of appeals, the 9th Circuit as to the
16 district court action and the Washington Court of Appeal Division III as to the Superior
17 Court action.
18

19 **3.8 Formal Complaint, Illegal Purpose.** The formal complaint has an illegal purpose.
20 The purpose is to intimidate and punish Respondent for bringing an action to contest the
21 constitutionality whether the WSBA is a legal entity, whether it violates Respondent's
22 constitutional rights.
23

24 **3.9 WSBA is an illegal entity.**

25 3.9.1 The WSBA is an illegal entity because it is in direct violation of Wash.
26
27

1 Const. Art. Wash. Const. Art I, Section 12 (Special Privileges and Immunities
2 Prohibited).

3 3.9.2 The WSBA is an illegal entity because it is in direct violation of Wash.
4 Const. Art. Wash. Const. Art II, Section 28 (Special Legislation).

5 3.10 **Illegal Regulation.** WSBA is illegally regulating activities which are not the
6 practice of law - acting as an attorney-in-fact under a power of attorney is not the
7 practice of law.
8

9 3.11 **Reservation.** Respondent reserves the right to add further affirmative
10 defenses.

11 **4 COUNTER AND THIRD - PARTY CLAIMS**

12 4.1 The WSBA has taken the position that all of Respondents Civil Rights Actions
13 claims are under the exclusive jurisdiction of the WSBA Washington Lawyer Discipline
14 System and the Washington Supreme Court. *Eugster v. WSBA et al.*, Superior Court of the
15 State of Washington in Spokane County, Case No. 15-2-04614-9, Dismissed. A notice of
16 appeal has been filed, the case is on appeal before Washington Court of Appeals, Division
17 III, Case No. 343456. Appellant's Opening Brief was filed on June 17, 2016.
18

19 4.2 As and for Eugster's Counter and Third- Party Claims Eugster alleges and hereby
20 incorporates the Amended and Restated Complaint which was filed in *Eugster v. WSBA et*
21 *al.*, Superior Court of the State of Washington in Spokane County, Case No. 15-2-04614-9,
22 attached hereto and incorporated herein by this reference in Appendix at 5 and following
23 pages.
24
25
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27

1 **5 REQUEST FOR RELIEF**

2 WHEREFORE, Eugster respectfully seeks the following relief:

3 **5.1 Dismissal of Complaint.** That the Formal Complaint be dismissed with prejudice.

4 **5.2 Declaratory Judgment.** Entry of judgment declaring that the WSBA Washington
5 Lawyer Discipline System is unconstitutional, in violation of Plaintiff's rights, privileges,
6 and/or immunities secured to him by the Fifth and Fourteenth Amendment and under
7 42 U.S.C. § 1983.
8

9 **5.3 Declaratory Judgment.** Entry of judgment declaring that the WSBA Washington
10 Lawyer Discipline System is unconstitutional, in violation of Eugster's rights, privileges,
11 and/or immunities secured to him by Washington Constitution Art. I, Section 3.
12

13 **5.4 Declaratory Judgments: Further Relief.** This should grant such "further relief
14 based on the judgments herein as necessary and/or proper to enforce its declaratory
15 judgments and determinations;

16 **5.5 Injunctions.** Entry of preliminary and permanent injunctions against Defendants
17 prohibiting the use of the WSBA Washington Lawyer Discipline System against Eugster;

18 **5.6 Monetary Damages.** Award damages against Defendants jointly and severally in
19 the sum to be determined by these proceedings for injuries suffered by Eugster;

20 **5.7 Costs and Fees.** Award Eugster his costs, expenses, and statutory attorneys'
21 fees.
22

23 **5.8 Punitive Damages.** Award Eugster Punitive Damages against Defendants and
24 each of them as allowed by under 42 U.S.C. § 1983; and,

25 **5.9 Just and Equitable Concerns.** Award Eugster such further relief as is just and
26

1 equitable.

2 **Demand for Jury Trial**

3 Eugster demands a jury as to claims triable by a jury.

4 July 8, 2016

5
6 EUGSTER LAW OFFICE PSC

7
8 

9 Stephen Kerr Eugster, WSBA # 2003
10 Attorney for Stephen Kerr Eugster

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12 Spokane, Washington 99201-6422
13 (509) 624-5566
14 eugster@eugsterlaw.com

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PROOF OF SERVICE

I hereby certify that on July 9, 2016, I mailed, U.S. Postage First Class prepaid, and e-mailed, the foregoing document and appendix (the appendix follows this proof) to the attorneys for the WSBA and Defendants in these proceedings at their mailing addresses and e-mail addresses below.

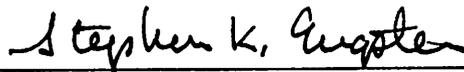
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francescad@wsba.org
Attorney for Washington State Bar Association

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Attorney for Counter and Third-Party Defendants

July 9, 2016



Stephen K. Eugster, WSBA # 2003

C:\Wip\A_A_Cases_WSBA\Case_VI\Pleadings_Drafts\2016_07_09_Answer Affirmative Defenses Counterclaims

HONORABLE SALVATORE F. COZZA

FILED

APR 01 2016

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STEPHEN KERR EUGSTER,

Plaintiff,

v.

WASHINGTON STATE BAR
ASSOCIATION, a legislatively created
Washington association (WSBA); and
PAULA LITTLEWOOD, Executive
Director, WSBA, in her official capacity;

and

DOUGLAS J. ENDE, Director of the
WSBA Office of Disciplinary Counsel, in
his official capacity; FRANCESCA
D'ANGELO, Disciplinary Counsel,
WSBA Office of Disciplinary Counsel, in
her official capacity,

Defendants.

No. 15204614-9

CONCLUSIONS AND ORDER
GRANTING DEFENDANTS'
MOTION TO DISMISS
COMPLAINT

~~PROPOSED~~

THIS MATTER came before the Court on Defendants' Motion to Dismiss Complaint.

The Court has heard the argument of counsel and has considered the following:

1. Defendants' Motion to Dismiss Complaint;
2. Defendants' Memorandum of Authorities in Support of Motion to Dismiss and the Appendix thereto;

~~PROPOSED~~ CONCLUSIONS AND ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS COMPLAINT - 1

1 5. Such other provisions support the conclusion that exclusive jurisdiction over
2 matters of lawyer discipline rests with the Washington Supreme Court. *See* Const. art. IV; RCW
3 2.48.060 (the State Bar Act); Rule for Enforcement of Lawyer Conduct ("ELC") 2.1; *State ex rel*
4 *Schwab v. State Bar Ass'n*, 80 Wn.2d 266 (1972); *In re Discipline of Sanai*, 177 Wn.2d 743
5 (2013).

6
7 6. ELC 2.1 provides:

8 The Washington Supreme Court has exclusive responsibility in the state to
9 administer the lawyer discipline and disability system and has inherent power to
10 maintain appropriate standards of professional conduct and to dispose of
11 individual cases of lawyer discipline and disability. Persons carrying out the
12 functions set forth in these rules act under the Supreme Court's authority.

13 7. The Washington Supreme Court has set up a system of lawyer discipline in which
14 the ultimate step is review before the Washington Supreme Court. Title 12 ELC.

15 8. Constitutional claims and objections ~~such as those raised by Plaintiff in this case~~ SFC
16 have previously been heard within discipline cases. *See, e.g., In re Discipline of Blanchard*, 158
17 Wn.2d 317 (2006); *In re Discipline of Scannell*, 169 Wn.2d 723 (2010).

18 9. Plaintiff had the opportunity to raise his constitutional concerns with the
19 Washington Supreme Court in his prior discipline case.

20 10. Collateral attack of lawyer discipline procedures in this Court is not available
21 under current law.

22 11. Plaintiff's claims under 42 U.S.C. § 1983 and under the Washington Constitution
23 against Defendants are within the exclusive jurisdiction of the Washington Supreme Court and
24 must also be dismissed with prejudice.

25 12. Based on the foregoing, Defendants are entitled to dismissal of Plaintiff's claims
26 with prejudice under CR 12(b)(1) and CR 12(b)(6). Dismissal with prejudice is appropriate
27

**[PROPOSED] CONCLUSIONS AND ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS COMPLAINT - 3**

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1 because no further amendment to Plaintiff's complaint could cure the legal deficiencies upon
2 which dismissal is based.

3 13. Because the foregoing resolves this matter, the Court need not decide Defendants'
4 other grounds for dismissal of Plaintiff's claims.

5
6 **ORDER**

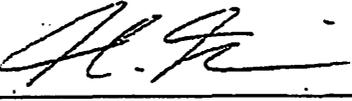
7 Based on the foregoing conclusions, the Court hereby ORDERS that Defendants' Motion
8 to Dismiss Complaint is GRANTED and that this action is dismissed with prejudice, with each
9 party to bear its own attorney fees and costs.

10 SO ORDERED this 1 day of ^{April} ~~March~~, 2016.

11
12 
13 Honorable Salvatore F. Cozza
14 Spokane Superior Court Presiding Judge

15 Presented by:

16 PACIFICA LAW GROUP LLP

17
18 By: 

19 Paul J. Lawrence, WSBA #13557

20 Jessica A. Skelton, WSBA #36748

21 Taki V. Flevaris, WSBA #42555

22 Attorneys for Defendants
23
24
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**[PROPOSED] CONCLUSIONS AND ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS COMPLAINT - 4**

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1 Const. Art. Wash. Const. Art I, Section 12 (Special Privileges and Immunities
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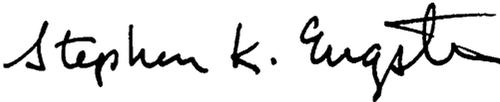
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3 Eugster demands a jury as to claims triable by a jury.

4 July 8, 2016

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6 EUGSTER LAW OFFICE PSC

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9 Attorney for Stephen Kerr Eugster

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PROOF OF SERVICE

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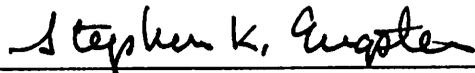
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July 9, 2016



Stephen K. Eugster, WSBA # 2003

C:\Wip\A_A_Cases_WSBA\Case_VI\Pleadings_Drafts\2016_07_09_Answer Affirmative Defenses Counterclaims

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Superior Court of the State of Washington
In and for the County of Spokane

STEPHEN KERR EUGSTER,)
)
 Plaintiff,)
)
 vs.)
)
 WASHINGTON STATE BAR ASSOCIATION, a)
 legislatively created Washington association)
 (WSBA); and PAULA LITTLEWOOD, Executive)
 Director, WSBA, in her official capacity;)
)
 and)
)
 DOUGLAS J. ENDE, Director of the WSBA)
 Office of Disciplinary Counsel, in his official)
 capacity; FRANCESCA D'ANGELO, Disciplinary)
 Counsel, WSBA Office of Disciplinary)
 Counsel, in her official capacity,)
)
 Defendants.)
)

No. 15-2-04614-9

AMENDED AND RESTATED
COMPLAINT FOR DECLARATORY
JUDGMENTS, INJUNCTION, AND
DAMAGES (42 U.S.C. §1983)

Plaintiff, Stephen Kerr Eugster,¹ amends and restates his complaint herein,² and alleges:

¹ Sometimes referred to as "Eugster."

² CR 15(a): "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served is served. . . ."

1 **INTRODUCTION**

2 This case concerns the civil rights of Plaintiff protected by 42 U.S.C. § 1983, the First and
3 Fifth Amendments to the United States Constitution, and Washington State Constitution Art. I,
4 Section 1 and Section 2. Plaintiff seeks declaratory judgments by the court declaring the WSBA
5 Washington Lawyer Discipline System unconstitutional because (1) the Discipline System does
6 not pass strict scrutiny and because (2) the Discipline System violates a lawyer's right to due
7 process of law.

8 Eugster seeks an injunction enjoining the Defendants or some of them, from application
9 of the WSBA Washington Lawyer Discipline System to him, and in furtherance of the court's
10 determinations that the Discipline System is unconstitutional.

11 As to the foregoing, Eugster does not seek damages, or monetary relief from Defendants
12 or any of them.

13 However, Plaintiff does seek damages from some or all of the Defendants for
14 compensatory or nominal damages under 42 U.S.C. § 1983 for injuries to Plaintiff as a result of
15 violations of Plaintiff's rights by Defendants or some of them under 42 U.S.C. § 1983
16 concerning the use by Defendants or some of them of the Discipline System to intimidate,
17 harass and retaliate against Plaintiff for bringing an action in United States District Court,
18 Western District of Washington in which Plaintiff asserts that under First and Fourteenth
19 Amendments and 42 U.S.C. § 1983 his fundamental right not to associate with the WSBA is
20 violated.

21 This complaint is made up of a number of claims, or counts, all incident to the foregoing
22 description of the Plaintiff's case:

23 *COUNT ONE, Declaratory Judgments.*

24 *COUNT TWO, WSBA Lawyer Discipline System Does Not Pass Strict Scrutiny.*

25 *COUNT THREE, WSBA Lawyer Discipline System Violates Eugster Rights Under 42*
26 *U.S.C. § 1983.*
27

1 I., Section 4.

2 5. **Damages.** This civil rights action seeks compensatory damages from Defendants as a
3 result of Defendants use of the WSBA Washington Lawyer Discipline System in retaliation
4 against Eugster for Plaintiff for bringing an action in Federal Court asserting that Plaintiff's
5 compelled membership in the violates his rights under the First and Fourteenth Amendments
6 to the United States Constitution, and Washington State Constitution Art. I., Section 3.

7 6. **Damages II.** This action seeks nominal damages from Defendants under 42 U.S. C. §
8 1983 a result of Defendants use of the Washington Lawyer Discipline System as applied to
9 Plaintiff as retaliation against Plaintiff for bringing an action in Federal Court to asserting that
10 Plaintiff's compelled membership in the violates his rights under the First and Fourteenth
11 Amendments to the United States Constitution which violates Plaintiff's right to petition the
12 government for a redress of grievances under the First and Fourteenth Amendment Rights to
13 the United States Constitution and Washington State Constitution Art. I, Section 4

14 **JURISDICTION AND VENUE**

15 7. **Jurisdiction.** The court has jurisdiction over this action under 42 U.S.C. § 1983
16 because this is an action for deprivation of rights, privileges, and immunities secured by the
17 United States Constitution. *See Robinson v. City of Seattle*, 119 Wn.2d 34, 57-63, 830 P.2d 318
18 (1992) (noting state courts have jurisdiction in actions brought under 42 U.S.C. § 1983).

19 8. **Washington Constitution.** The court has jurisdiction over this action under Wash.
20 Const. Art. IV, Section 6 of the Washington State Constitution ("Superior courts and district
21 courts have concurrent jurisdiction in cases in equity.")

22 9. The court has jurisdiction over this action under Wash. Const. Art. IV, Section 6 of the
23 Washington State Constitution because "[t]he superior court shall also have original jurisdiction
24 in all cases and of all proceedings in which jurisdiction shall not have been by law vested
25 exclusively in some other court. . .").

26 10. The court has jurisdiction under Wash. Const. Art. IV, Section 6 because the
27
28

1 b. As a member of the bar of the Washington State Supreme Court, Plaintiff
2 was "admitted by the Court to all of the privileges of an Attorney and Counselor at
3 Law in all the Courts this State." Certificate of Admission to the Bar of the
4 [Washington Supreme] Court of Stephen Kerr Eugster January 31st 1970, signed
5 William W. Lowry, Clerk.

6 c. Plaintiff is also a duly licensed attorney under the laws of the state of
7 Washington and, as required by RCW 2.48.170, is a member in good standing of the
8 Washington State Bar Association (WSBA).

9 15. **Defendant WSBA**, is an association created by the Washington State Bar Act, RCW
10 Ch. 2.48.

11 a. Defendant WSBA is headquartered in Seattle, Washington, and conducts
12 its business and operations including the WSBA Discipline System throughout the
13 State of Washington including Spokane County from its offices in Seattle.

14 b. Defendant WSBA is a "mandatory" or "integrated" bar association as
15 described in *Keller v. State Bar of California*, 496 U.S. 1, 5 (1990). That is, all
16 attorneys must join the WSBA and pay mandatory bar dues as a condition of
17 practicing law in the state of Washington.

18 c. Defendant WSBA is currently enforcing the unconstitutional practices and
19 policies complained of in this action.

20 d. Defendant WSBA is currently acting in violation of the unconstitutional
21 practices and policies complained of in this action.

22 e. Defendant WSBA is sued in its official capacity.

23 16. **Defendant Paula Littlewood**, is the Executive Director of the WSBA.

24 a. Defendant Littlewood is currently implementing and enforcing the
25 unconstitutional practices and policies complained of in this action.
26
27
28

1 b. Defendant Littlewood is currently acting in violation of the
2 unconstitutional practices and policies complained of in this action.

3 c. Defendant Littlewood is a lawyer and member of the WSBA, WSBA #
4 28726.

5 d. Defendant Littlewood is sued in her official capacity.

6
7 **17. Defendant Douglas Ende, is the Chief Disciplinary WSBA Office of Discipline.**

8 a. Defendant Ende is currently implementing and enforcing the
9 unconstitutional practices and policies complained of in this action.

10 b. Defendant Ende is currently acting in violation of the unconstitutional
11 practices and policies complained of in this action.

12 c. Defendant Ende is a lawyer and member of the WSBA, WSBA # 17141.

13 d. Defendant Ende is sued in his official capacity.

14
15 **18. Defendant Francesca D'Angelo, is a Disciplinary Counsel of the WSBA Office of**
16 **Disciplinary Counsel.**

17 a. Defendant D'Angelo is currently implementing and enforcing the
18 unconstitutional practices and policies complained of in this action.

19 b. Defendant D'Angelo is currently acting in violation of the unconstitutional
20 practices and policies complained of in this action.

21 c. Defendant D'Angelo is a lawyer and member of the WSBA, WSBA # 22979.

22 d. Defendant D'Angelo is sued in her official capacity.

23
24 **FACTUAL ALLEGATIONS**

25
26 **19. The Image of the WSBA.** The regulation and discipline of Washington lawyers by
27 the WSBA is to preserve and protect the image the public has of lawyers by allowing the WSBA

1 to claim that it has the interests of the public as its primary interest.

2 20. That is to say, a major motivation of the WSBA, of the Defendants, is the image of
3 the WSBA.

4 21. It is this concern for image, which causes the WSBA and other Defendants to pursue
5 and operate the Discipline System.

6 22. **Disciplinary Authority.** Plaintiff, as a "lawyer admitted to practice in this jurisdiction
7 is subject to the disciplinary authority of this jurisdiction and these Rules for Enforcement of
8 Lawyer Conduct" (ELC). 1.2.

9 20. The term "disciplinary authority" is used and described in ELC 1.2:

10 Except as provided in RPC 8.5(c), any lawyer admitted to practice in this jurisdiction
11 is subject to the disciplinary authority of this jurisdiction and these Rules for
12 Enforcement of Lawyer Conduct, regardless of where the lawyer's conduct occurs. A
13 lawyer not admitted to practice in this jurisdiction is also subject to the disciplinary
14 authority of this jurisdiction and these rules if the lawyer provides or offers to provide
15 any legal services in this jurisdiction. Disciplinary authority exists regardless of the
16 lawyer's residency or authority to practice law in this state. A lawyer may be subject
17 to the disciplinary authority of both this jurisdiction and another jurisdiction for the
18 same conduct.

19 21. The WSBA is a single entity; a state created association.

20 22. "Because the Washington Constitution prohibits creation of corporations by special act,
21 the committee proposed that the Bar Association be created as an agency of the state. The
22 proposed act would create "a complete integrated (i.e., mandatory membership) Bar which is
23 officially organized, self-governed and all inclusive." Robert D. Welden, History of the Washington
24 State Bar Association, WSBA Website – <http://www.wsba.org/-About-WSBA/History>. Robert D.
25 Welden is a former general counsel to the WSBA.
26

1 23. The WSBA does not receive funds from the State of Washington or any branch of state
2 government (including the Washington Supreme Court).

3 24. The WSBA generates revenue from compelled fees by the lawyers it compels to be
4 members of the WSBA including Plaintiff.

5 25. The WSBA describes itself as follows:

6
7 The WSBA both regulates lawyers under the authority of the Court and serves its
8 members as a professional association — all without public funding. As a regulatory
9 agency, the WSBA administers the bar admission process, including the bar exam;
10 provides record-keeping and licensing functions; and administers the lawyer discipline
11 system. As a professional association, the WSBA provides continuing legal education
12 for attorneys, in addition to numerous other educational and member-service
13 activities. <http://www.wsba.org/About-WSBA>.

14 **WSBA Discipline System - Operates from within the Offices of the WSBA**

15 26. The WSBA engages in these two functions described above from its offices in
16 Seattle, Washington at 1325 Fourth Ave., Suite 600, Seattle, WA 98101-2539.

17 27. The **WSBA Office of Disciplinary Counsel** operates from within the offices of the
18 WSBA in Downtown Seattle, King County, Washington.

19 28. The WSBA Washington Lawyer Discipline System may not even be physically separate
20 from the WSBA.

21 29. It also may be the case that employees of the WSBA are shared with Discipline
22 System.

23 30. The Washington Lawyer Discipline System persons, in sharing space and staff at the
24 offices of the WSBA, are in constant contact with officers and employees of the WSBA who do
25 not perform disciplinary functions.

26 31. The primary purpose of the **WSBA Executive Director** is to regulate and discipline
27
28

1 member lawyers and others.

2 **32. WSBA Executive Director** has her offices and staff in the offices of the WSBA at 1325
3 Fourth Ave., Suite 600, Seattle, Washington.

4 **33. Hearings. Discipline System Hearings** by Hearing Officers take place in the Offices of
5 the WSBA.

6 **34. Disciplinary Board and the Review Committees.** The Disciplinary Board conducts its
7 hearings in the Offices of the WSBA. The Review Committees conduct meetings in the Offices
8 of the WSBA.

9 **35.** The staffing and space for the Disciplinary Board and the Review Committees is
10 provided by the WSBA at and within the Offices of the WSBA.

11 **36.** Staff supposedly relegated to the Washington Lawyer Discipline System mix on a
12 daily basis or whenever both are present at the offices of the WSBA with other staff of the
13 WSBA, its officers and the Board of Governors and its members.

14
15 **Functional Parts of the WSBA Washington Lawyer Discipline System**

16 **37.** In the paragraphs which follow, the functional parts of the Discipline System will be
17 described.

18 **38. Grievance Procedure.** Under ELC³ 5.1 (a) "Any person or entity may file a grievance
19 against a lawyer who is subject to the disciplinary authority of this jurisdiction." That is to say,
20 if you are member of the WSBA, any person can file a grievance against you.

21 **39.** And the grievant is not limited in what he or she can grieve.

22 **40. Investigation.** Under ELC 5.3 (a) "[d]isciplinary counsel must review and may
23 investigate any alleged or apparent misconduct by a lawyer and any alleged or apparent
24 incapacity of a lawyer to practice law, whether disciplinary counsel learns of the misconduct by
25

26 _____
27 ³ Rules for Enforcement of Lawyer Conduct, [http://www.courts.wa.gov/court_rules-
28 /?fa=court_rules.list&group=ga&set=ELC](http://www.courts.wa.gov/court_rules-/?fa=court_rules.list&group=ga&set=ELC).

1 grievance or otherwise. If there is no grievant, disciplinary counsel may open a grievance in the
2 name of the Office of Disciplinary Counsel."

3
4 41. The WSBA takes the position that its investigation either as the recipient of a
5 grievance or a grievance filed by disciplinary counsel is not limited to "any alleged or apparent
6 misconduct of a lawyer."

7
8 42. **Report to A Review Committee.** Disciplinary counsel must report to a Review
9 Committee (ELC 2.4) the results of investigations except those dismissed or diverted. The
10 report may include a recommendation that the committee order a hearing or issue an advisory
11 letter or admonition. ELC 5.7 (d).

12
13 a. The members of the Review Committees are members of the Disciplinary
14 Board (ELC 2.3) and represent the Disciplinary Board. ELC 2.4 (b).

15
16 43. **Hearing.** If the matter against a lawyer is ordered to hearing, a hearing officer for
17 the hearing of the case against the accused lawyer is selected by the Chief Hearing Officer.

18
19 44. **Hearing Officer Hearing** regarding the complaint against the lawyer will take place.

20
21 45. **Post Hearing.** The hearing officer will complete the case by entering into the case
22 record Findings of Fact, Conclusions of Law and Recommendation as to discipline of the lawyer.

23
24 46. **Disciplinary Board.** The lawyer has a right to appeal the decision of the Hearing
25 Officer to the Disciplinary Board. ELC 11.2 (b).

26
27 47. **Disciplinary Board Decision.** ELC 11.12 (d) provides:

28
29 (d) **Action by Board.** On review, the Board may adopt, modify, or reverse the findings,
30 conclusions, or recommendation of the hearing officer. The Board may also direct that
31 the hearing officer or panel hold an additional hearing on any issue, on its own
32 motion, or on either party's request.

33
34 48. **Disciplinary Board not bound by Hearing Officer Decision.** The Disciplinary Board is
35 not bound by the decision of the Hearing Officer. It has the power to come up with its own

1 **Office of Disciplinary Counsel**

2 **52. Office of Disciplinary Counsel.** The WSBA, through its control of the Executive
3 Director, has control over the Office of Disciplinary Counsel.

4 **53. Disciplinary counsel acts as counsel on all matters under these rules, and performs**
5 **other duties as required by these rules or the Chief Disciplinary Counsel.**

6 **54. Chief Disciplinary Counsel.** ELC 2.8 (b) provides:

7
8 **(b) Appointment.** The Executive Director of the Association, under the direction of
9 the Board of Governors, employs a suitable member of the Association as Chief
10 Disciplinary Counsel, and in consultation with the Chief Disciplinary Counsel, selects
11 and employs suitable members of the association as disciplinary counsel, in a
12 number to be determined by the executive director. Special disciplinary counsel
13 may be appointed by the Executive Director whenever necessary to conduct an
14 individual investigation or proceeding.

15 **55. Chief Disciplinary Counsel is the Director of the Office of Disciplinary Counsel.**

16 **56. Defendant Douglas Ende is the WSBA Chief Disciplinary Counsel.** As such he "acts as
17 counsel on the Association's behalf on all matters under these rules (ELC rules), and performs
18 other duties as required by these rules, the Executive Director, or the Board of Governors." ELC
19 2.8(a).

20 **57. Chief Hearing Officer.** The appointment of Chief Hearing Officer is governed by ELC
21 2.8 (b):

22
23 **(b) Appointment.** The Executive Director of the Association, under the direction of the
24 Board of Governors, employs a suitable member of the Association as Chief
25 Disciplinary Counsel, and in consultation with the Chief Disciplinary Counsel, selects
26 and employs suitable members of the association as disciplinary counsel, in a number
27 to be determined by the executive director. Special disciplinary counsel may be

1 appointed by the Executive Director whenever necessary to conduct an individual
2 investigation or proceeding.

3 **58. Additional Disciplinary Counsel.** The Executive Director under the direction of the
4 Board of Governors "and in consultation with the Chief Disciplinary Counsel, selects and
5 employs suitable members of the association as disciplinary counsel, in a number to be
6 determined by the executive director. ELC 2.8(b).

7 **59. Special Disciplinary Counsel.** ELC 2.8.

8
9 a. **Appointment of Special Disciplinary Counsel.** The Executive Director also
10 has the power to appoint special disciplinary counsel "whenever necessary to
11 conduct an individual investigation or proceeding." ELC 2.8(b).

12 **60. Adjunct Disciplinary Counsel.** ELC 2.9.

13 a. **Function.** "Adjunct disciplinary counsel performs the functions set forth
14 in these rules as directed by disciplinary counsel. ELC 2.9 (a).

15 b. **Appointment and Term of Office.** The Board of Governors upon
16 recommendation of the Chief Disciplinary Counsel appoints adjunct disciplinary
17 counsel. ELC 2.9 (b) provides:

18 The Board of Governors, upon the recommendation of the Chief Disciplinary Counsel,
19 appoints adjunct disciplinary counsel from among the active members of the
20 Association, who have been active or judicial Association members for at least seven
21 years and have no record of disciplinary action as defined in these rules. Each adjunct
22 disciplinary counsel is appointed for a five year term on a staggered basis and may be
23 reappointed.

24
25 **61. Additional Disciplinary Counsel.** "The Executive Director of the Association, under
26 the direction of the Board of Governors, and in consultation with the Chief Disciplinary
27 Counsel, selects and employs suitable members of the association as disciplinary counsel, in a

1 number to be determined by the executive director." ELC 2.8 (b).

2 **62. Special Disciplinary Counsel.** "Special disciplinary counsel may be appointed by the
3 Executive Director whenever necessary to conduct an individual investigation or proceeding."
4 ELC 2.8(b).

5 **63. Adjunct Disciplinary Counsel.** ELC 2.9.

6
7 **a. Function.** Adjunct disciplinary counsel performs the functions set forth in
8 these rules as directed by disciplinary counsel. ELC 2.9 (a).

9 **b. Appointment and Term of Office.** "The Board of Governors, upon the
10 recommendation of the Chief Disciplinary Counsel, appoints adjunct disciplinary
11 counsel from among the active members of the Association, who have been active
12 or judicial Association members for at least seven years and have no record of
13 disciplinary action as defined in these rules." ELC 2.9 (b).

14 **64. Removal of Appointees.** The power to appoint is also the power to remove. ELC
15 2.10 provides:

16 The power granted by these rules to any person, committee, or board to make any
17 appointment includes the power to remove the person appointed whenever that
18 person appears unwilling or unable to perform his or her duties, or for any other
19 cause, and to fill the resulting vacancy.

20 **65. Disciplinary Selection Panel.**

21 **a. Function.** ELC 2.2 (e) Disciplinary Selection Panel. "The Disciplinary
22 Selection Panel makes recommendations to the Board of Governors for
23 appointment, reappointment, and removal of Disciplinary Board members, hearing
24 officers, chief hearing officer, and Conflicts Review Officers."

25 **b. Appointment.** "The Panel is appointed by the Supreme Court, upon the
26 recommendation of the Board of Governors, shall include a Board of Governors
27

1 member who serves as its chair, and should include, without limitation, one or
2 more former Chairs of the Disciplinary Board, one or more current or former
3 hearing officers, and one or more former nonlawyer members of the Disciplinary
4 Board." ELC 2.2 (e).

5 **Hearing Officers**

6 **66. Hearing Officers.** Hearing officers for the WSBA Disciplinary Process are selected
7 under ELC 2.5.

8
9 **67. Function of Hearing Officers.** " Function. A hearing officer to whom a case has been
10 assigned for hearing conducts the hearing and performs other functions as provided under
11 these rules.

12 **68. Appointment.** "The panel the Supreme Court, upon recommendation of the Board of
13 Governors in consultation with the Disciplinary Selection Panel, appoints hearing officers to the
14 hearing officer list. The list should include as many lawyers as necessary to carry out the
15 provisions of these rules effectively and efficiently." ELC 2.2 (e).

16 **69. Hearing Officer List.** The hearing officer selection panel makes recommendations to
17 the Board of Governors for appointment, reappointment, and removal of hearing officers. The
18 panel is appointed by the Board of Governors and includes, but is not limited to, a Board of
19 Governors member who serves as its chair, one or more former Chairs of the Disciplinary
20 Board, and one or more former nonlawyer members of the Disciplinary Board.

21 **70. Payment.** Hearing Officers serve without pay, except for the Chief Hearing Officer.

22 **71. Hearing Officers and the provisions of ELC 2.5.** ELC 2.5 provides:

23
24 (a) Function. A hearing officer to whom a case has been assigned for hearing
25 conducts the hearing and performs other functions as provided under these rules.

26 (b) Qualifications. A hearing officer must be an active member of the Association,
27 have been an active or judicial member of the Association for at least seven years,
28

1 have no record of public discipline, and have experience as an adjudicator or as an
2 advocate in contested adjudicative hearings.

3 (c) Appointment. The Supreme Court, upon recommendation of the Board of
4 Governors in consultation with the Disciplinary Selection Panel, appoints hearing
5 officers to the hearing officer list. The list should include as many lawyers as
6 necessary to carry out the provisions of these rules effectively and efficiently.

7 (d) Terms of Appointment. Appointment to the hearing officer list is for an initial
8 period of two years, followed by periods of four years. Reappointment is in the
9 discretion of the Supreme Court upon recommendation of the Board of Governors
10 in consultation with the Disciplinary Selection Panel. A hearing officer may continue
11 to act in any matter assigned before his or her term expires. On the
12 recommendation of the Board of Governors in consultation with the Disciplinary
13 Selection Panel, the Supreme Court may remove a person from the list of hearing
14 officers.

15 **Chief Hearing Officer**

16
17 **72. Chief Hearing Officer Appointment.** The Supreme Court, upon recommendation of
18 the Board of Governors in consultation with the Disciplinary Selection Panel appoints a chief
19 hearing officer for a renewable term of two years person recommended by the Board of
20 Governors appointed by the Board of Governors. ELC 2.5(f).

21 **Disciplinary Board ELC 2.3**

22 **73. ELC 2.3** pertains to the Disciplinary Board.

23 (a) Function. The Board performs the functions provided under these rules,
24 delegated by the Supreme Court, or necessary and proper to carry out its duties.

25 (b) Membership.

26 (1) Composition. The Board consists of not fewer than four nonlawyer members,
27
28

1 appointed by the Court, and not fewer than ten lawyers, appointed by the Court,
2 upon the recommendation of the Board of Governors in consultation with the
3 Disciplinary Selection Panel.

4 (2) Qualifications. A lawyer Board member must be an Active member of the
5 Association, have been an Active or Judicial member of the Association for at least
6 five years, and have no record of public discipline.

7 74. **Make up of the Disciplinary Board.** The Disciplinary Board is made up of fourteen
8 members, ten lawyers appointed by the Board of Governors and four non-lawyers appointed
9 by the Supreme Court. Two of the lawyers serve as chair and vice-chair, respectively, of the
10 Disciplinary Board; the other twelve members break into four Review Committees, each
11 consisting of two lawyers and one non-lawyer. ELC 2.3 (b)(1).

12 75. On review, the Board may adopt, modify, or reverse the findings, conclusions, or
13 recommendation of the hearing officer or panel.

14 76. The Board instead comes up with its own findings and conclusions so as to sustain
15 the recommendation or decision of the hearing officer.

16 77. The Review Board and Disciplinary Counsel breach what procedural protections
17 there are within the context of the Washington Lawyer Discipline System Rules by using the
18 Disciplinary Board to correct the work and decisions of the Hearing Officers and so as to ensure
19 that the Supreme Court has a record which will sustain appellate review.

20 78. The Disciplinary Board is assisted by WSBA staff (independent from the staff that
21 supports the Office of Disciplinary Counsel), including Assistant General Counsel.

22 79. Such Assistant General Counsel also "serves as Counsel to the Disciplinary Board and
23 a Clerk to the Disciplinary Board."

24 80. The Disciplinary Board is supposed to serve as an appellate court in the lawyer
25 disciplinary system, hearing appeals of hearing officer decisions, reviewing all hearing officer
26
27
28

1 recommendations for suspension or disbarment, and approving or disapproving proposed
2 stipulations to resolve disciplinary proceedings by suspension or disbarment.

3 81. This conduct lacks impartiality.

4 82. The impartiality of the conduct is compounded by the fact that the Disciplinary Board
5 is a participant in each decision to prosecute an attorney.
6

7 83. If the Disciplinary Board determines a lawyer is to be suspended or disbarred, the
8 determination is automatically reviewed by the Washington Supreme Court; the Court may
9 also, in its discretion, accept review of other actions of the Disciplinary Board.

10 84. Washington Lawyer Discipline System “ ‘actions’ include both disciplinary ‘sanctions’
11 (which result in a permanent public disciplinary record) and admonitions (which result in a
12 temporary public disciplinary record generally retained for only five years).”

13 85. Disciplinary sanctions are, in order of increasing severity, reprimands, suspensions,
14 and disbarments.

15 86. **Persons Appointed to WSBA Discipline System Positions.** The WSBA controls the
16 selection of people who are selected to the various positions in the Washington Lawyer
17 Discipline System. See the spreadsheet below:
18

Person or Group	Authority to Appoint	
Board of Governors (BOG)	WSBA Members	
Executive Director	BOG	

<p>1 Disciplinary Selection 2 Panel</p>	<p>Recommendation of the Board of Governors</p>	<p>The Panel is appointed by the Supreme Court, upon the recommendation of the Board of Governors, shall include a Board of Governors member who serves as its chair, and should include, without limitation, one or more former Chairs of the Disciplinary Board, one or more current or former hearing officers, and one or more former nonlawyer members of the Disciplinary Board.</p>
<p>14 Chief Disciplinary 15 Counsel 16 ELC 2.8 (b)</p>	<p>Executive Director</p>	<p>"under the direction of the Board of Governors"</p>
<p>17 Disciplinary Counsel</p>	<p>Executive Director</p>	<p>in consultation with the Chief Disciplinary Counsel, selects and employs suitable members of the association as disciplinary counsel, in a number to be determined by the executive director. Special disciplinary counsel may be appointed by the Executive Director whenever necessary to conduct an individual investigation or proceeding</p>

<p>1 Special Disciplinary 2 Counsel</p>	<p>Executive Director</p>	
<p>3 Chief Hearing Officer 4 ELC 2.5 (e)(1)</p>	<p>Recommendation of the Board of Governors</p>	<p>The Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel appoints a chief hearing officer for a renewable term of two years.</p>
<p>9 Hearing Officers 10 ELC 2.5</p>	<p>Recommendation of the Board of Governors</p>	<p>The Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel, appoints hearing officers to the hearing officer list. The list should include as many lawyers as necessary to carry out the provisions of these rules effectively and efficiently.</p>
<p>19 Disciplinary Board</p>	<p>Recommendation of the Board of Governors</p>	<p>appointed by the Court, upon the recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel. (2) Qualifications. A lawyer Board member must be an Active member</p>

<p>1 Review Committees</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p>	<p>Chair of Disciplinary Board</p>	<p>The Chair appoints three or more review committees of three members each from among the Board members. Each review committee consists of two lawyers and one nonlawyer. The Chair may reassign members among the several committees on an interim or permanent basis. The Chair does not serve on a review committee.</p>
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11 87. In light of the above and in light of other factual statements made in this complaint,
 12 there can be no question that the WSBA Washington Discipline System violates procedural due
 13 process of law.

14 88. In addition, Discipline System in several of its discrete aspects violated procedural
 15 due process Discrete Violations of procedural due process.

16 89. **Prosecutorial Discretion.** Prosecutorial discretion is only exercised in relation to a
 17 grievance filed by a private party. "Any person or entity may file a grievance against a lawyer
 18 who is subject to the disciplinary authority of this jurisdiction. ELC 5.1 (a).

19 90. Under ELC 5.3 (a) "[d]isciplinary counsel must review and may investigate any alleged
 20 or apparent misconduct by a lawyer and any alleged or apparent incapacity of a lawyer to
 21 practice law, whether disciplinary counsel learns of the misconduct by grievance or otherwise.
 22 If there is no grievant, disciplinary counsel may open a grievance in the name of the Office of
 23 Disciplinary Counsel."

24 91. ELC 5.3 (a) limits the scope of discipline counsel investigation.

25 92. Discipline Counsel does not limit itself to the grievance but at times uses the
 26 grievance as an excuse to monitor the conduct of a respondent so as to find a violation beyond
 27

1 that described or related to the perimeters of the grievance.

2 **93. Disciplinary Counsel and the Review Committees.** ELC 5.7 (c) and (d) provide:

3 (c) Report in Other Cases. Disciplinary counsel must report to a review committee
4 the results of investigations except those dismissed or diverted. The report may
5 include a recommendation that the committee order a hearing or issue an advisory
6 letter or admonition.

7 (d) Authority on Review. In reviewing grievances under this rule, a review
8 committee may:

9 (1) dismiss the grievance;

10 (2) affirm the dismissal;

11 (3) dismiss the grievance and issue an advisory letter under rule 5.8;

12 (4) issue an admonition under rule 13.5;

13 (5) order a hearing on the alleged misconduct; or

14 (6) order further investigation as may appear appropriate.

15 **94. Review Committees decide whether a matter is to go to hearing. Thus, the Review**
16 **Committees and their members are part of the prosecution.**

17 **95. Not only are committee members part of the prosecution, they are members of the**
18 **Disciplinary Board. The work the Disciplinary Board is thus tainted.**

19 **96. This unfairness is made worse by the fact that the Disciplinary Board is allowed to**
20 **amend or rewrite findings of fact, conclusions of law and hearing officer recommendation.**

21 **97. This amending and or rewriting is assisted by a Disciplinary Counsel. ELC**

22 **98. Three Review Committees.** Three are several review committees. The members of
23 each review committee are members of the Disciplinary Board. As a result each member of the
24

1 Disciplinary Board is inclined to support the prosecution decisions of other Disciplinary Board
2 members.

3 99. **Hearing Officers.** There are vast differences among hearing officers as to
4 competence, experience, judicial temperament, etc. For example, individuals on the hearing
5 officer list may have vast litigation and experience whereas other individuals have no more
6 experience that of a lawyer working in a county prosecuting attorney's office doing nothing
7 much more that child support enforcement.

8 100. Hearing officers are inadequately trained to act as fair and impartial hearing
9 officers.

10 101. Not all hearing officers understand the trial process and the rules of evidence.

11 102. Hearing officers allow hearsay testimony and do not understand the rules of
12 evidence as to hearsay testimony.

13 103. Hearing officers do not understand that accused attorneys have a right to confront
14 witnesses.

15 104. Hearing officers engage in improper conduct during hearings subjecting themselves
16 to threats by disciplinary counsel that counsel might seek a new hearing and a new hearing
17 officer. Hearing officers overcome such threats by ruling in favor of the WSBA and disciplinary
18 counsel.

19 105. Hearing officers do not understand the meaning of standards of proof and how
20 they are to be applied.

21 106. Hearing officers do not know how to prepare proper Findings of Fact and
22 Conclusions of Law with respect of their decisions.

23 107. Hearing officers impose penalties such as restitution even though the WSBA and its
24 disciplinary counsel have not sought such penalties.

25 108. Hearing officers rely on the Disciplinary Board to correct their mistakes and
26
27
28

1 shortcomings.

2 109. Hearing officers are supervised by a Chief Hearing Officer, who assigns cases to the
3 hearing officers, provides training for the hearing officers, and monitors their performance. An
4 Assistant General Counsel provides staff support to the Hearing Officer Panel.

5 110. Hearing officers may seek the advice of the Chief Hearing Officer regarding cases
6 before a hearing officer.

7 111. Hearing officers are allowed to serve in violation of the Washington Canons of
8 Judicial Conduct.

9 112. The Washington Lawyer Discipline System does not require hearing officers to
10 comply with the Washington Code of Judicial Conduct when in fact the Code does apply by a
11 reading of its own terms and the provisions of ELC 2.6(c).

12 113. Hearing officer conduct and decisions are sometimes reviewed by the Chief Hearing
13 Officer. Because the hearing officer was selected by the Chief Hearing Officer there is a conflict
14 of interest, appearance of fairness, disqualification rules.

15 114. Hearing officers have no experience or knowledge if any as to what combinations of
16 fact and law precipitate conclusions of law as to ethical violations.

17 115. **Standard of Proof.** Under the circumstances of the Washington Lawyer Discipline
18 System, the standard of proof should be at least "clear and convincing evidence" the standard
19 applied in physician discipline. *Bang D. Nguyen v. Dep't of Health*, 144 Wn.2d 516, 518, 29 P.3d
20 689 (2001); *Hardee v. DSHS*, 172 Wn.2d 1, 9 256 P.3d 339 (2011).

21 116. **Expert Witnesses.** Under *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), it
22 was held that that whether an attorney's conduct violated the rules of professional conduct is a
23 question of law. Thus, no expert testimony need be allowed. Thus, the question of whether in
24 law, an accused lawyer's conduct violated a rule of professional conduct is in the hands of the
25 WSBA discipline counsel prosecuting the case, the hearing officer, and a Review Committee.
26
27

1 117. **Due Process Vagueness.** The Rules of Professional Conduct violate procedural due
2 process because in many instances they do not define what is permitted and not permitted.
3 The Discipline System does not concern itself with this problem of notice for incomprehensible
4 explanation that violations may be found because the duty of the system is to "protect the
5 public and to preserve confidence in the legal system."

6 118. Washington Supreme Court has imposed certain rules and practices regarding the
7 appeals of discipline cases against lawyers which, in essence, direct the attorney discipline
8 decisions of the Supreme Court.

9 119. The court gives great weight to the hearing officer's evaluation of the credibility and
10 veracity of witnesses. Yet, the Disciplinary Board has the power to amend, and, from time to
11 time does amend, hearing officer findings.

12 120. Nevertheless, "we give considerable weight to the hearing officer's findings of
13 fact." *Discipline Marshall*, 160 Wn.2d 317, 329-30, 157 P.3d 859 (2007).

14 121. Disciplinary Board. The court defers to the experience and perspective of the
15 Disciplinary Board.

16 122. In essence, decisions of the court in Discipline Actions, are in effect decided in
17 advance because of what has happened before the hearing officer and what has happened
18 before the Disciplinary Board.

19 123. **Sanctions.** Sanctions in attorney discipline matters are determined by the court
20 provided in the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 &
21 Supp. 1992). *Discipline of Hall*, 180 Wn.2d 821, 834, 329 P.3d 870 (2014). Again, the court has
22 deferred to others for the decision the court should make, is required to make. Again, a fair
23 hearing is denied.
24

25 **COUNT ONE**

26 **Declaratory Judgments**

27 **Uniform Declaratory Judgments Act (UDJA)**

1 124. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them
2 herein by reference as though fully set forth.

3 125. The Uniform Declaratory Judgments Act (UDJA), RCW Ch. 7.24, grants Eugster the
4 right to seek declaratory judgments in these proceedings as to the matters raised by the facts
5 in these proceedings.

6 126. RCW 7.24.010

7
8 Courts of record within their respective jurisdictions shall have power to declare
9 rights, status and other legal relations whether or not further relief is or could be
10 claimed. An action or proceeding shall not be open to objection on the ground that
11 a declaratory judgment or decree is prayed for. The declaration may be either
12 affirmative or negative in form and effect; and such declarations shall have the
13 force and effect of a final judgment or decree.

14 127. RCW 7.24.020(a) provides:

15 A person . . . whose rights, status or other legal relations are affected by a statute,
16 municipal ordinance, contract or franchise, may have determined any question of
17 construction or validity arising under the instrument, statute, ordinance, contract
18 or franchise and obtain a declaration of rights, status or other legal relations
19 thereunder.

20 128. RCW 7.24.050 provides:

21 The enumeration in RCW 7.24.020 and 7.24.030 does not limit or restrict the
22 exercise of the general powers conferred in RCW 7.24.010, in any proceeding
23 where declaratory relief is sought, in which a judgment or decree will terminate the
24 controversy or remove an uncertainty.

25 129. **UDJA Justiciable Controversy Requirement.**

26 a. In order to have a justiciable controversy under the UDJA, the following
27

1 elements are required:"(1) . . . an actual, present and existing dispute, or the
2 mature seeds of one, as distinguished from a possible, dormant, hypothetical,
3 speculative, or moot disagreement, (2) between parties have genuine and opposing
4 interests, (3) which involves interests that must be direct and substantial, rather
5 than potential, theoretical, abstract or academic, and (4) a judicial determination of
6 which will be final and conclusive."Id. at 411 (quoting *Diversified Indus. Dev. Corp.*
7 *v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)).

8 b. "Inherent in these four requirements are the traditional limiting doctrines
9 of standing, mootness, and ripeness, as well as the federal case-or-controversy
10 requirement." Id. Specifically, the "direct, substantial interest" element
11 "encompasses the doctrine of standing." Id. at 414.

12 130. **UDJA Standing Requirement.** Under the UDJA standing requirement, a party must
13 (1) be within the zone of interests protected or regulated by a statute, and (2) have suffered an
14 injury in fact.

15 131. To put it most succinctly, "[t]he doctrine of standing requires that a claimant must
16 have a personal stake in the outcome of a case in order to bring suit." *Kleven v. City of Des*
17 *Moinis*, 111 Wn. App. 284, 290, 44 P.3d 887 (2002); *Nelson v. Appleway Chevrolet, Inc.*, 157
18 P.3d 847, 160 Wn.2d 173 (2007).

19 132. **Eugster has standing to seek declaratory judgments.**

20 a. Eugster is within the zones of interest protected by the constitutional
21 rights which are the grounds for this complaint.

22 b. Eugster has a personal outcome in the case and the issues presented in
23 the case.

24 c. Eugster has suffered injuries in fact economic or otherwise as a result of
25 Defendants actions in violation of Eugster's constitutional rights. Such injuries as
26 set forth below in the Count Five.
27

1 133. There are true and ripe conflicts between Plaintiff and Defendants as to the matters
2 set forth in this proceeding including the facts and the law applicable to the circumstances of
3 the case.

4 134. The court should render declaratory judgments concerning the essential matters
5 set forth in these proceedings.

6 135. In addition, the court should take further action as necessary to enforce its
7 decisions and bring them to fruition. RCW 7.24.080.
8

9
10 **COUNT TWO**

11 **WSBA Discipline System Does Not Pass Strict Scrutiny**

12 136. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them
13 herein by reference as though fully set forth.

14 137. **Strict Scrutiny.** "The words 'strict judicial scrutiny' appear nowhere in the U.S.
15 Constitution. Neither is there any textual basis, nor any foundation in the Constitution's
16 original understanding, for the modern test under which legislation will be upheld against
17 constitutional challenge only if 'necessary' or 'narrowly tailored' to promote a 'compelling'
18 governmental interest. Nonetheless, strict scrutiny-a judicially crafted formula for
19 implementing constitutional values -ranks among the most important doctrinal elements in
20 constitutional law." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268
21 (2007).

22 138. The exacting scrutiny test (similar to strict scrutiny) was described not long ago in
23 *Knox v. Service Employees Intern. Union*, 132 S. Ct. 2277 (2012), and *In re Petition for a Rule*
24 *Change*, 286 Neb. 1018, 841 N.W.2d 167, 177 (Neb. 2013) as follows:⁴

25 We made it clear that compulsory subsidies for private speech are subject to
26

27 ⁴ The quoted paragraph is broken into parts for purposes of this discussion.
28

1 exacting First Amendment scrutiny and cannot be sustained unless two criteria are
2 met.

3 First, there must be a comprehensive regulatory scheme involving a "mandated
4 association" among those who are required to pay the subsidy. . . . Such situations
5 are exceedingly rare because, as we have stated elsewhere, mandatory
6 associations are permissible only when they serve a "compelling state interes[t] . . .
7 that cannot be achieved through means significantly less restrictive of associational
8 freedoms." . . .

9 Second, even in the rare case where a mandatory association can be justified,
10 compulsory fees can be levied only insofar as they are a "necessary incident" of the
11 "larger regulatory purpose which justified the required association."

12 139. The strict or exacting scrutiny test can be rephrased as follows:

13 (1) There must be a "comprehensive regulatory scheme."
14

15 (2) The comprehensive scheme must involve a "mandated association"
16 among those required to be a focus of the "comprehensive regulatory
17 scheme."
18

19 (3) The comprehensive scheme must serve a compelling state interest.

20 (4) The compelling state interest cannot be achieved through means
21 significantly less restrictive of fundamental rights.

22 140. **Strict Scrutiny.** Compelled participation of a lawyer in an integrated bar disciplinary
23 system fails to meet the test of strict scrutiny - exacting scrutiny.

24 141. **Fundamental Right.** Eugster, like all Washington lawyers, has a fundamental right
25 to a discipline system which will not infringe on Eugster's procedural due process rights.

26 142. **A Mandatory Regulatory Scheme.** What if the regulatory scheme does not exist?
27 The infringement will not pass muster. Here, there is a mandatory regulatory scheme which is
28

1 primarily set out in the Washington Rules for the Enforcement of Lawyer Conduct (E.C.).

2 143. One would presume that the regulatory scheme would be a proper scheme. For
3 instance, that the scheme would apply to all Washington lawyers. It does not. Only certain
4 categories of lawyers are regularly subject to discipline.

5 144. The scheme cannot be said to be a "regulatory scheme" because such a scheme
6 would have to regulate all Washington lawyers. There many reasons why it cannot be said that
7 the Discipline System regulates all Washington lawyers.

8 145. The WSBA discipline system is not focused on discipline of the whole of its
9 membership, on the whole of the lawyers who practice law in the state of Washington. The
10 scheme is focused on a very few, about 2,000 lawyers out of a 33,000 bar association
11 membership.

12 a. The avowed purpose of the integrated bar was to force every lawyer into
13 the membership of the bar, charge dues to the lawyers, and to operate a system of
14 discipline to get rid of the "bad guys."⁵

15 b. The WSBA has about 35,000 members, 24,000 or so are active.⁶ In 2013,
16 the WSBA conducted 8,331 Consumer Affairs Phone Calls and Interviews. It
17 received 2,229 New Disciplinary Grievances (written). Former clients, clients and
18 Opposing clients made up 27%, 25% and 22% respectively, of the total of
19 grievances filed in the year. Thus, clients in general, one way or the other, were
20 responsible for 74% of the bar's discipline grievance activities. The bar itself was
21

22
23 ⁵ *Integrated Bar Forecast in Nation; Ransom, Head of American Bar Association, Says*
24 *Lawyers Will Be Forced to Join. Movement Held Gaining, New York Times, October 24, 1935:*

25 William L. Ransom, president of the American Bar Association, forecast in a
26 speech here yesterday, that all lawyers would be compelled eventually by the
27 Legislature or the ruling court in each State, to become members of their State
28 bar association, "whether they liked it or not."

⁶ <http://www.wsba.org/About-WSBA>.

1 responsible for 8%. Year 2013 Statistical Summary.⁷

2 c. These facts tell a sad story, a troublesome story. The facts show that a
3 small percentage of lawyers are subject to grievances and of that percentage, 74%
4 have some sort of "one-on-one" relationship with a grievant. Thousands of lawyers
5 each year escape the discipline system because they do not have that intimate
6 relationship with their clients and their clients' antagonists.

7 d. Thus, the lawyers who are subjected to discipline are those who have
8 direct contact with clients. They are the "county seat lawyers" of the past. The
9 practice areas of grievances for 2013 were: Criminal Law 30%, Family Law 20%,
10 Torts 11%, and Estates/Probates/Wills 5% – 66%.

11 e. The lawyers practicing in these areas are often single or small firm
12 practitioners. Thus, it can be concluded that of the 35,000 WSBA lawyers, only
13 1,560 (2,229 times 0.74) were subjected to a grievance by a person who had
14 contact with a lawyer. And, in the end result, then only 95 lawyers were
15 disciplined.

16 f. What must be concluded from this is that if there are 35,000 lawyers and
17 only 1,560 were subject to grievances by clients– current, former and opposing
18 clients, one must wonder just how free from unethical behavior the 33,000 lawyers
19 are.

20 **146. The Infringement Must Serve a Compelling State Interest.** Here, there is no reason
21 why the WSBA should be tasked with the "regulation of the [Washington] legal profession."
22 There is no necessity that the WSBA provide this function. Many states without integrated bar
23 associations have effective operative attorney discipline systems.

24 a. Many states with integrated bar associations have independent lawyer
25

26 ⁷ 2013 Statistical Summary, [http://www.wsba.org/~media/-](http://www.wsba.org/~media/-Files/LicensingLawyer%20Conduct/Discipline/2013%20Statistical%20Summary%20UPDATED.aspx)
27 [Files/LicensingLawyer%20Conduct/Discipline/2013%20Statistical%20Summary%20UPDATED.as](http://www.wsba.org/~media/-Files/LicensingLawyer%20Conduct/Discipline/2013%20Statistical%20Summary%20UPDATED.aspx)
28 [hx](http://www.wsba.org/~media/-Files/LicensingLawyer%20Conduct/Discipline/2013%20Statistical%20Summary%20UPDATED.aspx).

1 regulatory systems. The Lawyer Discipline System in Washington could be an
2 independant bar court arrangement like that of the state of California.

3 b. Even some of the integrated bar associations do not perform the state's
4 function of "regulation of the legal profession." The Washington Supreme Court,
5 like the California Supreme Court,⁸ can establish an independent bar court.
6 California also has an integrated bar.⁹

7 c. The state of Washington has comprehensive discipline schemes for other
8 professions. RCW Chs. 18.04 - 18.380. There is no reason why lawyers should be
9 given "their own" association for the purpose of discipline.

10 d. The regulatory scheme serves a state interest but it also serves the
11 interests of the bar association. The scheme is not a compelling state interest
12 because it is not necessary to have the bar operate the scheme. It can just as well
13 be operated by some other state device which "regulates the legal profession."
14 Over 19 states operate their own lawyer regulatory schemes.¹⁰ Indeed, in
15 approximately nine integrated bar association states, the regulatory system is
16 independent of the integrated bar association.¹¹

17 **147. Infringement Can Be Achieved Through Means Significantly Less Restrictive of**
18 **Associational Freedoms.** Regarding this element of strict scrutiny, the question is this – is it
19 possible to serve the purposes of regulation of the legal profession and improvement of the
20 quality of legal services without infringing on a lawyer's first amendment right of speech and
21 association as much as the WSBA Washington Lawyer Discipline System infringes? Of course it
22 is. Forcing Washington lawyer to submit to a discipline system which violates a lawyers
23 fundamental rights is unnecessary."

24
25 ⁸ California Bar Court, <http://www.statebarcourt.ca.gov/>.

26 ⁹ <http://www.calbar.ca.gov/AboutUs/StateBarOverview.aspx>.

27 ¹⁰ *Directory of Lawyer Disciplinary Agencies, supra* at note 11.

28 ¹¹ *Id.*

1 148. The state of Washington can regulate lawyers just as it regulates other professions.

2 149. The Washington Supreme Court can set up a truly independent discipline system
3 similar to many other states in the United States.
4

5
6 **COUNT THREE**

7 **Declaratory Judgment**

8 **WSBA Lawyer Discipline System Violates Eugster Rights Under 42 U.S.C. § 1983**

9 150. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them
10 herein by reference as though fully set forth.

11 **Due Process**

12
13 151. The Fifth and Fourteenth Amendment to the United States Constitution provides
14 that "no State shall ... deprive any person of life, liberty, or property, without due process of
15 law."

16 152. The Supreme Court has interpreted [this] . . . clause[] of the Constitution as giving
17 rise to a couple of doctrines, substantive due process and procedural due process.

18 a. Substantive due process concerns whether the government has an
19 adequate reason for taking away a person's life, liberty or property.

20 b. Procedural due process, which is my focus, concerns whether the
21 government has followed adequate procedures in taking away a person's life,
22 liberty or property.

23 153. **Procedural Due Process.** The essence of Procedural Due Process is found in the
24 history of law and the history of the well known maxim that "no person can be a judge in his
25 own case." John V. Orth, DUE PROCESS OF LAW: A BRIEF HISTORY 2-32 (2003).

26 154. The Fifth and Fourteenth Amendment to the United States Constitution provides
27

1 that "no State shall ... deprive any person of life, liberty, or property, without due process of
2 law."

3 155. The Supreme Court has interpreted [this] . . . clause[] of the Constitution as giving
4 rise to a couple of doctrines, substantive due process and procedural due process.

5 156. Substantive due process concerns whether the government has an adequate reason
6 for taking away a person's life, liberty or property.

7 157. Procedural due process, which is my focus, concerns whether the government has
8 followed adequate procedures in taking away a person's life, liberty or property.

9 158. Procedural Due Process is defined in the following ways:

10 The phrase "procedural due process" refers to the aspects of the Due Process
11 Clause that apply to the procedure of arresting and trying persons who have been
12 accused of crimes and to any other government action that deprives an individual
13 of life, liberty, or property. Procedural due process limits the exercise of power by
14 the state and federal governments by requiring that they follow certain procedures
15 in criminal and civil matters. In cases where an individual has claimed a violation of
16 due process rights, courts must determine whether a citizen is being deprived of
17 "life, liberty, or property," and what procedural protections are "due" to that
18 individual. <http://legal-dictionary.thefreedictionary.com/Due+Process+of+Law>.

19 159. **The System Violates Procedural Due Process.** The WSBA Washington Lawyer
20 Discipline System violates Procedural Due Process.

21 a. The Discipline System overall, in and of itself, is a violation of procedural
22 due process.

23 b. The WSBA controls all aspects of the Discipline System.

24 c. Any one selected to perform a function in the WSBA Washington Lawyer
25 Discipline System must be a member in good standing of the WSBA.
26
27

1 d. The positions include a great deal of latitude in the exercise of authority.
2 This latitude is not restrained, for the most part is discretionary.

3 e. WSBA controls the individuals selected to perform the functions of the
4 System. The bar association has the power to choose every person. This power is
5 found in the power to directly appoint persons to offices. This power is also found
6 in the power to control the pool of people from which the Supreme Court makes
7 selection of persons to hold offices. That is to say, the power of the Supreme Court
8 to appoint is constrained by the power of the WSBA Board of Governors which
9 recommends appointments to the Supreme Court in consultation of the
10 Disciplinary Panel, involved in the system has its selection of people in every
11 position.

12 f. **WSBA Conflicts** .The WSBA has conflicts of interest in matters of lawyer
13 discipline including suspension and disbarment of the lawyer together with costs
14 and sometimes restitution.

15 g. The WSBA has a conflict of interest with respect of its functions and with
16 respect of its actions against Plaintiff. RPC 1.7.

17 h. The WSBA has a conflict of interest with respect of the Plaintiff - on the
18 one hand it has an obligation to advance the interests of member lawyers and on
19 the other the obligation to regulate including suspension and disbarment of its
20 members.

21 160. As shown by the facts of this case as related above, the Washington Lawyer
22 Discipline System does not provide a neutral, impartial discipline system.

23 a. There are those whom the WSBA selects directly. And there are who are
24 put on lists and then selected by the Supreme Court, but, the Supreme Court does
25 not have control who is selected to go onto the group from which the court makes
26 its selections. Everyone who is selected is vetted by the WSBA
27

1 b. Defendants in their individual capacities are responsible for the WSBA
2 Washington Lawyer Discipline System, and acting under the color of state law
3 violate the constitutional rights of Plaintiff in violation of the due process clause of
4 the Fourteenth Amendment to the United States Constitution.

5 161. As shown by the facts of this case as related above, the Washington Lawyer
6 Discipline System does not provide adequate procedures for the deprivation of Plaintiff's right
7 to practice law which Defendants acting in their official capacities seek to impose on Plaintiff.

8 a. There are those whom the WSBA selects directly. And there are who are
9 put on lists and then selected by the Supreme Court, but, the supreme court does
10 not have control who is selected to go onto the group from which the court makes
11 its selections. Everyone who is selected is vetted by the WSBA

12 b. Defendants in their individual capacities are responsible for the WSBA
13 Washington Lawyer Discipline System, and acting under the color of state law
14 violate the constitutional rights of Plaintiff in violation of the due process clause of
15 the Fourteenth Amendment to the United States Constitution.

16 162. As a result of Defendants conduct, Plaintiff has been injured in the past and will be
17 injured in the future.

18 163. The Fifth and Fourteenth Amendment to the United States Constitution provides
19 that "no State shall ... deprive any person of life, liberty, or property, without due process of
20 law."

21 164. The Supreme Court has interpreted [this] . . . clause[] of the Constitution as giving
22 rise to a couple of doctrines, substantive due process and procedural due process.

23 165. Substantive due process concerns whether the government has an adequate reason
24 for taking away a person's life, liberty or property.

25 166. As shown by the facts of this case as related above, the Washington Lawyer
26 Discipline System does not provide the degree of procedural due process necessary in
27

1 situations like the Discipline System impose on Plaintiff

2 167. The system should be independent, it should be impartial, it should also appear
3 impartial. But instead the system is controlled in every aspect by the WSBA.

4 a. There are those whom the WSBA selects directly. And there are who are
5 put on lists and then selected by the Supreme Court, but, the supreme court does
6 not have control who is selected to go onto the group from which the court makes
7 its selections. Everyone who is selected is vetted by the WSBA

8 b. Defendants in their individual capacities are responsible for the WSBA
9 Washington Lawyer Discipline System, and acting under the color of state law
10 violate the constitutional rights of Plaintiff in violation of the due process clause of
11 the Fourteenth Amendment to the United States Constitution.

12 168. As a result of Defendants conduct, Plaintiff has been injured in the past and will be
13 injured in the future.

14 169. There are a number of discrete aspects of the system and how the system is applied
15 which fail to meet the requirements of due process.

16 170. These discrete aspects include but are not limited to those set out in the following
17 paragraphs.

18 171. **Procedural Due Process.** The essence of Procedural Due Process is found in the
19 history of law and the history of the well known maxim that "no person can be a judge in his
20 own case."

21 172. The WSBA Washington Lawyer Discipline System is in violation of Plaintiff's rights of
22 Procedural Due Process of Law under the Fifth and Fourteenth Amendments to the United
23 States Constitution.

24 173. The WSBA Washington Lawyer Discipline System is in violation of Plaintiff's rights of
25 Procedural Due Process under the Washington Constitution Art. I, Section 3.
26
27
28

1 **174. The System Violates Procedural Due Process.** The WSBA Washington Lawyer
2 Discipline System violates Procedural Due Process.

3 a. The Discipline System overall, in and of itself, is a violation of procedural
4 due process.

5 b. The WSBA controls all aspects of the Discipline System. This violates
6 Eugster's right t procedural due process.

7 c. Any one selected to perform a function in the WSBA Washington Lawyer
8 Discipline System must be a member in good standing of the WSBA.

9 d. The positions include a great deal of latitude in the exercise of authority.
10 This latitude is not restrained, for the most part is discretionary.

11 e. WSBA controls the individuals selected to perform the functions of the
12 System. The bar association has the power to choose every person. This power is
13 found in the power to directly appoint persons to offices. This power is also found
14 in the power to control the pool of people from which the Supreme Court makes
15 selection of persons to hold offices. That is to say, the power of the Supreme Court
16 to appoint is constrained by the power of the BOG which recommends
17 appointments to the Supreme Court in consultation of the Disciplinary Panel,
18 involved in the system has its selection of people in every position.

19 f. **WSBA Conflicts** .The WSBA has conflicts of interest in matters of lawyer
20 discipline including suspension and disbarment of the lawyer together with costs
21 and sometimes restitution.

22 g. The WSBA has a conflict of interest with respect of its functions and with
23 respect of its actions against Plaintiff. RPC 1.7.

24 h. The WSBA has a conflict of interest with respect of the Plaintiff - on the
25 one hand it has an obligation to advance the interests of member lawyers and on
26 the other the obligation to regulate including suspension and disbarment of its
27

1 members.

2 175. Plaintiff asks the court to make decisions regarding the facts and the law and
3 determine and declare that Plaintiff's constitutional rights are being violated.
4

5
6 **COUNT FOUR**

7 **Injunction**

8 **That Defendants Be Enjoined from Using the WSBA Lawyer Discipline System**

9 176. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them
10 herein by reference as though fully set forth.

11 177. Using the authority of 42 U.S.C. § 1983 and RCW 7.24.080 the court can and should
12 issue restraining orders against all Defendants including the WSBA.
13

14 **COUNT FIVE**

15 **Damages**

16 **Award Eugster Compensatory Damages for**
17 **Defendants Violation of Eugster's Rights under 42 U.S.C. § 1983**

18 178. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them
19 herein by reference as though fully set forth.

20 179. Compensatory damages "are intended to redress the concrete loss that the plaintiff
21 has suffered by reason of the defendant's wrongful conduct."
22

23 180. "Disbarment, designed to protect the public, is a punishment or penalty imposed
24 on the lawyer. He is accordingly entitled to procedural due process" *In re Ruffalo*, 390 U.S.
25 544, 550 (1968), *modified on other grounds*, 392 U.S. 919 (1968); *In re Kramer*, 193 F.3d 1131,
26 1132 (9th Cir. 1999).

27 181. Plaintiff has a First Amendment right to petition the court in *Eugster v. WSBA et al.*
28

1 182. Plaintiffs right to petition is guaranteed by the First Amendment to the United
2 States Constitution, which specifically prohibits Congress from abridging "the right of the
3 people...to petition the Government for a redress of grievances."

4 183. First Amendment right to petition is a "fundamental right" under the First, Fifth and
5 Fourteenth Amendments to the United States Constitution.

6 184. Plaintiff's First Amendment rights are being violated by Defendants efforts to
7 retaliate against Plaintiff because he brought *Eugster v. WSBA et al.*

8
9 **Verdelle G. O'Neill**

10 185. Plaintiff, on September 11, 2014, was retained by Verdelle G. O'Neill, a resident of
11 Spokane Valley, Washington.

12 186. On September 23, 2014, Cheryl Rampley, a niece-in-law of Verdelle G. O'Neill, filed
13 a grievance with the WSBA against Plaintiff.

14 187. WSBA prepared an "Acknowledgment that We Have Received a Grievance" on
15 September 29, 2014.

16 188. Plaintiff received the C. Rampley grievance along with the "Acknowledgment that
17 We Have Received a Grievance" from the WSBA on October 1, 2014.

18 189. On October 27, 2014. Plaintiff responded to the grievance.

19
20 190. On November 21, 2014, Plaintiff received a letter dated November 18, 2014 from
21 Kevin Bank, Managing Disciplinary Counsel, that he had "been assigned to complete this
22 investigation."

23 191. That same day, November 21, 2014, Plaintiff received a copy of Ms. Rampley's
24 response to Plaintiff's response of October 27, 2014.

25 192. Plaintiff responded to the Rampley response on November 23, 2014.

26 193. By letter dated December 18, 2014, Kevin Bank, Managing Disciplinary Counsel,
27 forwarded correspondence dated December 8, 2014 from Ms. Rampley.

1 194. On December 25, 2014, Plaintiff responded to the Rampley correspondence of
2 December 8, 2014.

3 195. The Defendants complaints about Eugster's conduct related to matters which all
4 related to the materials previously furnished to the WSBA and materials provided to the WSBA
5 in Eugster's letter of December 25, 2015.

6 196. In addition, Eugster in his letter of December 25, 2015, asked Kevin Bank to tell him
7 what he was doing wrong so that matters could be corrected.

8 197. On March 12, 2015, Plaintiff commenced an action in United States District Court
9 for the Western District of Washington against WSBA and various officers and the justices of
10 the Washington Supreme Court, Cause No. 2:15-cv-00375-JLR. (*Eugster v. WSBA*).

11 198. The subject of the action is the constitutionality of the Integrated Bar, the WSBA,
12 under the First and Fourteenth Amendments to the United States Constitution or, stated
13 another way, whether Eugster's fundamental right not to associate was being violated by his
14 compelled membership in the WSBA and the Eugster's freedom of speech rights were being
15 violated by his compelled dues to the WSBA.

16 199. The complaint and summons in *Eugster v. WSBA* were immediately sent to
17 Defendants in the action.

18 200. Defendants accepted service and lawyers appeared for the various defendants on
19 or about April 2, 2015.

20 201. WSBA Discipline Counsel who are Defendants in this action were and are aware of
21 *Eugster v. WSBA*.

22 202. The WSBA Executive Director, Paula Littlewood, was aware of the commencement
23 of the case.

24 203. Shortly after the filing of the complaint, on April 3, 2015, Vanessa Norman, an
25 investigator for the WSBA, informed Plaintiff that she had been assigned to investigate the
26
27

1 complaint.

2 204. Plaintiff recalls meeting with Ms. Norman at his office on or about April 13, 2015.

3 205. By letter dated April 21, 2015, Francesca D'Angelo, Disciplinary Counsel, advised
4 Plaintiff that she had been assigned to complete the investigation.

5 206. On April 22, 2015, Plaintiff, via email, provided materials concerning Plaintiff's
6 representation of Verdelle g. O'Neill.

7 207. On July 22, 2015, Plaintiff responded to a letter dated July 14, 2015 from Ms.
8 D'Angelo requesting more information regarding Plaintiff's services to Mrs. O'Neill.

9 208. On September 25, 2015, Plaintiff responded to a letter dated September 22, 2015
10 requesting further information from Plaintiff.

11 209. By letter dated October 20, 2015 from Ms. D'Angelo asked for more information.

12 210. Plaintiff answered the letter by his letter dated October 22, 2015.

13 211. Plaintiff provided Kevin Bank with considerable material concerning Plaintiff's
14 efforts for Mrs. O'Neill on December 25, 2014.

15 212. It was not until after the filing Plaintiff's complaint against the WSBA, its officers
16 and the justices of the Washington Supreme Court in March 2015 that Plaintiff was told by
17 Vanessa Norman that an investigation had been started against Plaintiff.

18 213. Plaintiff believes that the investigation launched when Ms. Norman advised of the
19 investigation was the beginning of a process by which the WSBA acted in retaliation of Plaintiff
20 for having brought *Eugster v. WSBA* in March, 2015.

21 214. The WSBA's change of heart regarding the grievance by Ms. Rampley only came
22 about as a result of the complaint by Plaintiff in *Eugster v. WSBA*.

23 215. Verdelle G. O'Neill died in Spokane, Washington on August 18, 2015.

24 216. The actions of the WSBA regarding the Rampley grievance have caused Plaintiff
25
26
27
28

1 injury.

2 217. On November 5, 2015 , by letter dated November 3, 2015, Plaintiff was notified by
3 Defendant D'Angelo that she was going to ask a Review Committee to order the matter
4 (Rampley grievance) to hearing.

5 218. The bar letter of Defendant D'Angelo to the Review Committee includes false
6 statements as to Plaintiff's conduct and fails to inform the Review Committee of conflicting
7 material statements.

8 219. Defendant D'Angelo has asked the Review Committee to order the matter to
9 hearing asserting various RPC violations by Eugster. The violations all had to do with matters
10 which the WSBA and Kevin Bank knew about as a result of Eugster's grievance responses
11 provided before December 25, 2014, as a result of materials sent that day which also covered the
12 time before December 25, 2104.

13 220. Defendant D'Angelo's claims of ethics violations by Eugster relate to matters the
14 WSBA and Defendant D'Angelo were aware of by the time of Eugster's response to Kevin Bank
15 on December 25, 2014.

16 221. As a result of Defendants conduct, Plaintiff suffered injury and damages including
17 pain and suffering and emotional distress."

18 222. Plaintiff is entitled to compensatory damages.
19

20
21 **COUNT SIX**

22 **Damages**

23 **Award Eugster Nominal Damages for**
24 **Defendants' Violation of Eugster's Rights under 42 U.S.C. § 1983**

25 223. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them
26 herein by reference as though fully set forth.

27 224. Nominal damages, as the term implies, are in name only and customarily are
28

1 defined as a mere token or "trifling." Although the amount of damages awarded is not limited
2 to one dollar, the nature of the award compels that the amount be minimal.. Nominal damages
3 serve one other function, to clarify the identity of the prevailing party for the purposes of
4 awarding attorney's fees and costs in appropriate cases.

5 225. Eugster has been injured and has had his fundamental rights violated by
6 Defendants acting under color of state law in violation of 42 U.S.C. § 1983, he should be
7 awarded at least nominal damages.

8
9 **REQUEST FOR RELIEF**

10 WHEREFORE, Plaintiff, respectfully seeks the following relief:

11
12 1. **Declaratory Judgment.** Entry of judgment declaring that the WSBA Washington
13 Lawyer Discipline System is unconstitutional, in violation of Plaintiff's rights, privileges, and/or
14 immunities secured to him by the Fifth and Fourteenth Amendment and under 42 U.S.C. §
15 1983;

16 2. **Declaratory Judgment.** Entry of judgment declaring that the WSBA Washington
17 Lawyer Discipline System is unconstitutional, in violation of Plaintiff's rights, privileges, and/or
18 immunities secured to him by Washington Constitution Art. I, Section 3.

19 3. **Declaratory Judgments: Further Relief.** This should grant such "further relief based
20 on the judgments herein as necessary and/or proper to enforce its declaratory judgments and
21 determinations;

22 4. **Injunctions.** Entry of preliminary and permanent injunctions against Defendants
23 prohibiting the use of the WSBA Washington Lawyer Discipline System against Plaintiff;

24 5. **Monetary Damages.** Award damages against Defendants jointly and severally in the
25 sum to be determined by these proceedings for injuries suffered by Plaintiff;

26 6. **Costs and Fees.** Award Plaintiff Eugster his costs, expenses, and attorneys' fees in
27

1 accordance with law, including 42 U.S.C. § 1988;

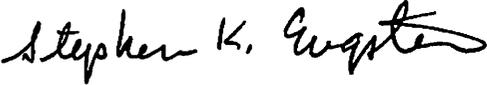
2 7. **Punitive Damages.** Award Plaintiff Punitive Damages against Defendants and each of
3 them as allowed by under 42 U.S.C. § 1983; and,

4 8. **Just and Equitable Concerns.** Award Plaintiff such further relief as is just and
5 equitable.

6
7 February 3, 2016.

8
9 Respectfully submitted,

10 EUGSTER LAW OFFICE PSC

11 

12
13 Stephen K. Eugster, WSBA # 2003
14 2418 West Pacific Avenue
15 Spokane, Washington 99201-6422
16 (509) 624-5566 / Facsimile (866) 565-2341
17 eugster@eugsterlaw.com

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PROOF OF SERVICE

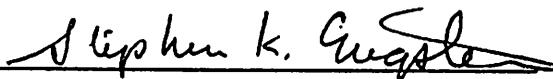
I hereby certify that on February 3, 2016, I emailed the foregoing document to the attorneys for the Defendants in these proceedings at their email addresses below.

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February 3, 2016.



Stephen K. Eugster, WSBA # 2003

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6 BEFORE THE
7 DISCIPLINARY BOARD
8 OF THE
9 WASHINGTON STATE BAR ASSOCIATION

10 In re

11 STEPHEN KERR EUGSTER,
12 Lawyer (Bar No. 2003).

Proceeding No. 16#00017

ODC'S MOTION TO STRIKE
COUNTERCLAIMS, THIRD-PARTY
CLAIMS, COUNTER COMPLAINT,
THIRD- PARTY COMPLAINT, AND
AFFIRMATIVE RELIEF (ELC 10.1(c))

13 I. INTRODUCTION AND RELIEF REQUESTED

14 The Office of Disciplinary Counsel (ODC) moves to strike the counterclaims, third-
15 party claims, counter complaint, third-party complaint, and requests for affirmative relief raised
16 in Respondent Stephen Kerr Eugster's answer to the formal complaint. BF 7 (attached as
17 Appendix A). Although Respondent is entitled to present defenses that raise constitutional or
18 other issues in this disciplinary proceeding as they apply to him, the Rules for Enforcement of
19 Lawyer Conduct (ELC) do not allow for counterclaims, third-party claims, counter complaints,
20 or third-party complaints, or the affirmative relief Respondent purports to seek. The Chief
21 Hearing Officer should strike them. See ELC 10.1(c) (hearing officer "may make any ruling
22 that appears necessary and appropriate to insure a fair and orderly proceeding").
23
24

1 **II. BACKGROUND**

2 In the years since his 2009 disciplinary suspension, BF 7 ¶ 1.3, Respondent has sued the
3 Washington State Bar Association (Association) and others involved in the disciplinary process
4 in multiple venues. Id. ¶¶ 1.2-1.4, 1.7-1.11. Most recently, after he learned that ODC was
5 investigating the charges that led to the instant proceeding, he filed lawsuits in Spokane County
6 Superior Court and two different Federal District Courts raising myriad constitutional
7 challenges to the lawyer discipline system. Id. ¶¶ 1.5-1.11, and Appendix 5-50. All current
8 lawsuits have been dismissed and appeals are pending in the Washington State Court of Appeals
9 and Ninth Circuit. Id. ¶¶ 1.6, 1.9, 1.11, and Appendix 1-4.

10 On June 16, 2016, ODC filed a formal complaint charging Respondent with misconduct
11 based on his representation of Verdelle O’Neill. BF 2 (attached as Appendix B). In response to
12 the Formal Complaint, on July 12, 2016, Respondent filed an “Answer, Affirmative Defenses,
13 Counterclaims, and Third-Party Claims” and “Counter Complaint and Third Party Complaint
14 for Declaratory Judgments, Injunction, and Damages (42 U.S.C. § 1983)” in which he seeks to
15 incorporate into the pending disciplinary proceeding the claims he brought and relief he sought
16 in his Spokane County Superior Court lawsuit against the Association, the Association’s
17 Executive Director Paula Littlewood, ODC Director Douglas J. Ende, and Disciplinary Counsel
18 Francesca D’Angelo. BF 7 at 1, 2, 8, 16-18, and Appendix 5-50.

19 **III. ARGUMENT**

20 The purpose of lawyer discipline is to protect the public and the administration of
21 justice. In re Disciplinary Proceeding Against McKean, 148 Wn.2d 849, 874, 64 P.3d 1226
22 (2003). The discipline system is governed by the ELC, which are comprehensive rules
23 promulgated by the Washington Supreme Court. The scope of the rules and of disciplinary
24

1 authority is set forth in ELC 1.1, which provides, "These rules govern the procedure by which a
2 lawyer may be subjected to disciplinary sanctions or actions for violation of the Rules of
3 Professional Conduct adopted by the Washington Supreme Court." Under the ELC,
4 disciplinary hearings "are neither civil nor criminal but are sui generis hearings to determine if a
5 lawyer's conduct should have an impact on his or her license to practice law." ELC 10.14(a); In
6 re Simmons, 65 Wn.2d 88, 94, 395 P.2d 1013 (1964). It is for the Washington Supreme Court
7 to determine, through rulemaking, the purpose of the disciplinary forum and whether a
8 respondent lawyer is entitled to seek affirmative relief. It has not provided for the relief
9 Respondent seeks.

10 ELC Title 10 sets forth the rules for disciplinary proceedings. Many of the procedural
11 rules for disciplinary hearings differ from those in civil trials. See, e.g., ELC 10.1(a) and ELC
12 10.10 (limitations on prehearing motions), ELC 10.11 (limitations on discovery); ELC 10.14(b)
13 (burden of proof); ELC 10.14(d) (rules of evidence). With respect to pleadings, the lawyer must
14 respond to the allegations in the formal complaint within 20 days by filing an answer that
15 contains:

- 16 (1) a specific denial or admission of each fact or claim asserted in the formal
complaint in accordance with CR 8(b);
- 17 (2) a statement of any matter or facts constituting a defense, affirmative defense,
or justification, in ordinary and concise language without repetition; and
- 18 (3) an address at which all further pleadings, notices, and other documents in the
proceeding may be served on the respondent.

19 ELC 10.5(b). Unlike the Civil Rules (CR),¹ the ELC do not contemplate counterclaims, cross
20 claims, or third-party complaints, and do not give hearing officers the authority to hear or
21

22 ¹ CR 7(a) provides: "Pleadings. There shall be a complaint and an answer; a reply to a counterclaim
denominated as such; an answer to a cross claim, if the answer contains a cross claim; a third party
23 complaint, if a person who was not an original party is summoned under the provisions of rule 14; and a
third party answer, if a third party complaint is served. No other pleading shall be allowed, except that
24 the court may order a reply to an answer or a third party answer."

1 resolve them. The ELC has no provision for a respondent lawyer to obtain injunctive or
2 monetary damages, not even costs. See ELC 13.9(a). And, under the ELC, disciplinary matters
3 are adjudicated by hearing officers, see ELC 2.5, 10.2, not through jury trials.

4 For these reasons, ODC asks the Chief Hearing Officer to strike those portions of
5 Respondent's answer that purport to raise counterclaims, third-party claims, counter complaints,
6 and third-party complaints, and that seek affirmative relief. ODC does not, however, seek to
7 strike those portions of Respondent's answer that raise affirmative defenses, including those that
8 assert constitutional challenges to the disciplinary system. ODC recognizes that nothing in the
9 ELC precludes a respondent lawyer from raising defenses based on the constitution or other
10 grounds related to his or her disciplinary procedures. The lawyer may litigate such defenses in
11 the context of the current disciplinary case, where they are subject to the same proof
12 requirements as any other defense. The defenses would be reviewed by the Washington
13 Supreme Court if the case were appealed to the Court under ELC Title 12. The Court often
14 addresses constitutional challenges to disciplinary procedures in its published decisions. See
15 e.g., In re Disciplinary Proceeding Against Smith, 170 Wn.2d 721, 728-29, 246 P.3d 1224
16 (2011) (due process challenge to ELC 10.14(c) procedure); In re Disciplinary Proceeding
17 Against Scannell, 169 Wn.2d 723, 742-43, 239 P.3d 332 (2010) (due process challenge based
18 on hearing officer bias and structure of discipline system and unconstitutional malicious
19 prosecution); In re Disciplinary Proceeding Against Marshall, 167 Wn.2d 51, 68-71, 217 P.3d
20 291 (2009) (due process challenges based on lack of notice and hearing officer bias).

21 ELC 10.1(c) allows a hearing officer to "make any ruling that appears necessary and
22 appropriate to insure a fair and orderly proceeding." Here, without any legal basis, Respondent
23 seeks to convert the disciplinary proceeding into a civil lawsuit by incorporating by reference
24

1 the complaint he filed in Spokane County Superior Court. Although Respondent has a right to
2 raise defenses of his choosing in this proceeding, ELC 10.5(b)(5), he cannot do so in a manner
3 contrary to the ELC.² Accordingly, the Chief Hearing Officer should strike those portions of
4 Respondent's answer that (1) incorporate his civil lawsuit, (2) purport to raise affirmative civil
5 claims against the Washington State Bar Association, Paula Littlewood, Douglas J. Ende, and
6 Francesca D'Angelo, and (3) seek affirmative relief unavailable under the ELC. Specifically,
7 the following should be stricken:

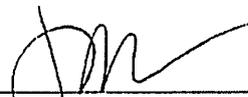
- 8 • page 1, lines 10-25 (all portions of the caption after "Answer, Affirmative
9 Defenses");
- 9 • page 2 lines 2-3 (reference to "Counter and Third-Party Claims" in the heading);
- 10 • page 2, line 4 (reference to "Counterclaims, and Third-Party Claims");
- 11 • page 8, lines 5-10 (references to "Counter and Third-Party Claims" and "Demand for
12 Jury Trial");
- 12 • page 16, lines 11-24 (heading referencing "'Counter and Third-Party Claims" and ¶¶
13 4.1 and 4.2), and Appendix 5-50 (the civil lawsuit that Respondent purports to
14 incorporate by reference at lines 21-22); and
- 15 • pages 17-18 (everything after ¶ 5.1 through and including Demand for Jury Trial).

16 A proposed order is included with this motion.

17 IV. CONCLUSION

18 Lawyer discipline is not civil litigation. The ELC do not allow respondent lawyers to
19 bring affirmative claims and requests for relief against third parties in the context of defending a
20 disciplinary proceeding. The Chief Hearing Officer should strike Respondent's unauthorized
21 claims and requests for relief.

22 Dated this 27th day of July, 2016.

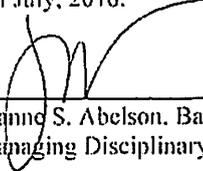
23 
24 _____
Joanne S. Abelson, Bar No. 24877
Managing Disciplinary Counsel

² To be clear, ODC does not concede that Respondent's defenses have merit, only that he may raise them.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Motion to Strike (ELC 10.1(c)) to be sent via first class mail to Respondent Stephen Kerr Eugster, Eugster Law Office PSC, 2418 W Pacific Ave., Spokane, WA 99201-6422, and via email to eugster@eugsterlaw.com, on the 27th day of July, 2016.



Joanne S. Abelson, Bar No. 24877
Managing Disciplinary Counsel

See Complaints attached to
Eugene Response

SKE

1 to pursue this proceeding. The proceeding is void because it violates Eugster's
2 fundamental constitutional procedural due process right to a fair and impartial
3 hearing.

4 The proceeding against Eugster violates Eugster's rights under the Civil Rights
5 Act, 42 U.S.C. § 1983. The proceedings violate Eugster's right to procedural due
6 process of law guaranteed to him under the Fifth and Fourteenth Amendments to
7 the United States Constitution and Washington Constitution Art. I, Section 3.
8

9 The constitutional right is violated for many reasons. However, first, is
10 Eugster's procedural due process right to an independent, impartial proceeding.

11 The proceeding herein is decidedly partial and is hardly independent. WSBA
12 and the Supreme Court cannot be judges in their own case. More certainly they
13 cannot be judges in their own case where they are also parties to the litigation.

14 Instead of striking Eugster's Counter and Third Party Claims, the proper thing
15 to do is to dismiss the entire action against Eugster with prejudice.

16 II. FACTS RELEVANT TO MOTION

17 This action is a disciplinary action in which Eugster is charged with three
18 violations of the Rules of Professional Conduct. Formal Complaint.

19 The action is before the Disciplinary Board of the Washington State Bar
20 Association. ELC 2.3. The prosecutor is the WSBA Office of Disciplinary Counsel.
21 ELC 2. 8. The charges will be tried by a Hearing Officer. ELC 2.5. The decision
22 of the Hearing Officer may be appealed to the Disciplinary Board. ELC Title 11,
23

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25 Eugster Motion To Dismiss
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1 ELC 11.2. If the Disciplinary Board seeks Eugster’s suspension from the practice of
2 law or Eugster’s disbarment, the matter will be heard by the Washington State
3 Supreme Court. ELC Title 12.

4 The WSBA is an integrated bar association. RCW 2.48.010. Every Washington
5 lawyer is required to be a member of the association. RCW 2.48.021. Every member
6 must pay dues to the WSBA. RCW 2.48.130. Failure to pay dues will result in
7 suspension. RCW 2.48.160.

8 The Supreme Court is said to have “ultimate authority” if not “plenary
9 authority” over the (1) the regulation of the Bar, (2) the practice of law, and (3) the
10 WSBA itself. The Board of Governors of the WSBA agree as follows:
11

12 But the Supreme Court has made it clear, based on separation of
13 powers, that it holds ultimate authority over the regulation of the
14 Bar, the practice of law, and the WSBA itself—notwithstanding
15 conflicting statutes. *State ex rel. Schwab v. Wash. State Bar Ass’n*,
16 80 Wn.2d 266, 272, 493 P.2d 1237 (1972); *Graham v. State Bar*
17 *Association*, 86 Wn.2d 624 (1976); *WSBA v. State of Washington*, 125
18 Wn.2d 901 (1995). For example, in *Schwab*, the Court held that
19 “membership in the state bar association and authorization to
20 continue in the practice of law coexist under the aegis of one
21 authority, the Supreme Court.” 80 Wn.2d at 269. The Court has also
22 enacted a number of rules governing admission to practice,
23 discipline of attorneys, and related matters. Importantly, the Court
24 enacted GR 12.1 which outlines permissible, required, and
25 impermissible activities of the WSBA.

20 REPORT AND RECOMMENDATIONS BY WASHINGTON STATE BAR ASSOCIATION

21 GOVERNANCE TASK FORCE dated June 25, 2014 at 39 (emphasis added). See also
22 the Minutes Public Session, Washington State Bar Association, Board of Governors
23

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1 Seattle, WA, September 17-18, 2015.¹ The meeting considered the following report -
2 THE LEADERSHIP FOR TODAY AND TOMORROW, REPORT OF THE BOARD OF GOVERNORS
3 OF THE WASHINGTON STATE BAR ASSOCIATION ON GOVERNANCE, SEPTEMBER 17,
4 2015. The WSBA's understanding of the Supreme Court's "ultimate" and "plenary
5 authority" over the WSBA can be found in the following appearing in the September
6 17, 2015 report.²

7
8 **Task Force Recommendation:**

9 The Dismissal of the WSBA Executive Director or the Chief
10 Disciplinary Counsel should be subject to veto by the Supreme
11 Court.

12 **BOG Response to the Recommendation:**

13 The BOG acknowledges the Court's plenary authority to take any
14 action it wishes with regard to the Executive Director and the Chief
15 Disciplinary Counsel. The BOG has no objection to this
16 recommendation.

17 Page 7.

18 **Task Force Recommendation:**

19 Repeal most provisions of the State Bar Act, with that statute then
20 serving simply to create the WSBA as an agency "within the judicial
21 branch" under the Supreme Court's control.

22 ¹ <http://www.wsba.org/~media/Files/About%20WSBA/Governance-BOG%20Minutes/2014%202015/Public%20Session%20Minutes%20%20September%201718%202015%20FINAL.ashx>.

23 ² <http://www.wsba.org/~media/Files/About%20WSBA/Governance-BOG%20Minutes/2014%202015/Public%20Session%20Minutes%20%20September%201718%202015%20FINAL.ashx>.

24 Response to WSBA Motion to Strike
25 Eugster Motion To Dismiss
and Brief in Support Thereof - 4

1 **BOG Response to the Recommendation:**

2 As stated above, the Supreme Court has plenary authority
3 concerning the state bar and the regulation of the practice of law.
4 The BOG appreciates the Task Force recommendations, but believes
5 that it is unnecessary to take action regarding the State Bar Act at
6 this time.

7 Page 13.

8 In conjunction with the foregoing, the Washington Supreme Court has said
9 many times that it has “plenary authority over attorney discipline.” This plenary
10 authority includes the power to “in essence” ignore what the hearing officer has
11 done, what the Disciplinary Board has done, and to do what whatever it decides to
12 do. The court has said the following:

13 By virtue of our plenary authority over attorney discipline matters,
14 we retain ultimate authority for determining the appropriate
15 sanction for an attorney's misconduct. Id. [*In re Discipline of*
16 *Haskell*, 136 Wash.2d 300, 317, 962 P.2d 813 (1998)] (*citing In re*
17 *Discipline of Espedal*, 82 Wash.2d 834, 838, 514 P.2d 518 (1973)).

18 *Matter of Disciplinary Proceeding Against Anshchell*, 141 Wash.2d 593, 9 P.3d 193,
19 199 (2000).

20 All of the positions in the Discipline System, except those held by the justices of
21 the Supreme Court, are filled by WSBA members without discipline record by the
22 WSBA Board of Governors or by the Supreme Court as recommended by the
23 WSBA BOG in consultation with the Disciplinary Panel. ELC. More on this below.

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25 Eugster Motion To Dismiss
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1 III. GROUNDS FOR MOTION TO DISMISS

2 A. The decision by a court which violates one’s due process rights is a
3 void decision.

4 “When a court disregards a person's due process rights, the resulting judgment
5 is void.” *Tatham v. Rogers*, 170 Wash. App. 76, ¶23, 283 P. 3d 583, 592 (2012)
6 citing *In re Marriage of Ebbighausen*, 42 Wash.App. 99, 102, 708 P.2d 1220 (1985).

7 “Article 1, section 3 of the Washington Constitution provides that no person
8 shall be deprived of life, liberty or property without due process of law. Judgments
9 entered in a proceeding failing to comply with the procedural due process
10 requirements are void.” *Id.*, citing *In re Sumey*, 94 Wash.2d 757, 762, 621 P.2d 108
11 (1980); *Baxter v. Jones*, 34 Wash.App. 1, 3, 658 P.2d 1274 (1983); *Halsted v.*
12 *Sallee*, 31 Wash.App. 193, 195, 639 P.2d 877 (1982); *In re Clark*, 26 Wash.App.
13 832, 837, 611 P.2d 1343 (1980); *Esmieu v. Schrag*, 15 Wash.App. 260, 265, 548
14 P.2d 581 (1976).
15

16 Eugster asserts that his fundamental right to procedural due process of law (see
17 Fifth and Fourteenth Amendments to the United States Constitution and Wash.
18 Const. Art I, Section 3) is violated by the WSBA Lawyer Discipline System.
19 Eugster asserts that the Discipline System (in and of itself; that is, the institution
20 of the Discipline System itself), violates his right to procedural due process of law.

21 B. The primary requirement of procedural due process is an
22 independent impartial decision maker.

23 The primary requirement of procedural due process requires an “independent”

1 "impartial decision maker." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("an
2 impartial decision maker is essential").

3 Washington cases support the procedural due process requirement of "an
4 independent and impartial decision maker." *State ex rel. Burleigh v. Johnson*, 31
5 Wash.App. 704, 708, 644 P.2d 732 (1982); *Rogoski v. Hammond*, 9 Wash.App. 500,
6 506, 513 P.2d 285 (1973).

7
8 Procedural due process requires a number of procedural safeguards or perhaps
9 steps – notice, hearing, right to counsel, and so on. These are important. But
10 overall, the most important element of procedural due process is a "fair hearing" an
11 "impartial decision maker." *Goldberg v. Kelly, supra*, 397 U.S. at 271

12 In an oft cited article "*Some Kind of Hearing*," Judge Henry J. Friendly of the
13 Second Circuit lists the elements of a fair hearing, the first and most basic is the
14 right of an impartial decision maker. Henry J. Friendly, *Some Kind of Hearing*, 123
15 U. PA. L. REV. 1267, 1279 (1975).

16 C. The essence of procedural due process.

17 The essence and meaning of procedural due process is to be found in the history
18 of a legal maxim that "no one can be a judge in his own case."³ This core principal
19 is included in James Madison, FEDERALIST NO. 10 (November 23, 1787) in the
20 following manner:
21

22
23 ³ John V. Orth, DUE PROCESS OF LAW, A BRIEF HISTORY, 13-32 (University
Press of Kansas, 2003).

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1 No man is allowed to be a judge in his own cause, because his
2 interest would certainly bias his judgment, and, not improbably,
3 corrupt his integrity.

3 With equal, nay with greater reason, a body of men are unfit to be
4 both judges and parties at the same time.

5 Professor Martin H. Redish and (now professor) Lawrence C. Marshall discuss
6 this basic requirement in *Adjudicatory Independence and the Values of Procedural*
7 *Due Process*, 95 YALE L.J. 455, 504-05 (1985-1986). In their conclusion, they tell
8 what they have learned:

9 We have been unable to envision even one situation in which the
10 values of due process can be achieved without the participation of an
11 independent adjudicator. . . . Once such an adjudicator is given power
12 to implement procedures that she finds necessary, the Court can rest
13 a bit more assured that the values of procedural due process will be
14 protected. *Id.* at 504.

13 . . . amidst all of the debate about what interests trigger due process,
14 courts and commentators have ignored the fact that without
15 prophylactic protection of adjudicatory independence, the
16 Constitution's majestic guarantee of due process of law may in reality
17 be no more than a deceptive facade. *Id.* at 505. [Emphasis added.]

16 In *Girard v. Klopfenstein*, 930 F.2d 738 (9th Cir. 1991), the court addressed
17 concerns about persons facing certain ASCS [Agricultural Stabilization and
18 Conservation Service] debarment proceedings. The court said: "The concept of
19 fundamental fairness includes the right to an impartial decision maker." *See*
20 *Goldberg v. Kelly*, 397 U.S. 254, 271, [] (1970) ("an impartial decision maker is
21 essential"); *In re Murchison*, 349 U.S. 133, 136 (1955) ("no man can be a judge in
22 his own case and no man is permitted to try cases where he has an interest in the
23

24 Response to WSBA Motion to Strike
25 Eugster Motion To Dismiss
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1 outcome')." The court concluded that "[t]he requirement of fundamental fairness
2 guarantees a fair hearing before an impartial trier of fact to persons facing . . .
3 debarment proceedings." *Girard v. Klopfenstein*, 930 F.2d at 743.

4 Defendants claim that "Washington's lawyer discipline system includes
5 numerous robust procedural protections." Claiming that the Discipline System
6 includes "robust procedures" proves nothing if the System itself is not neutral. The
7 very essence of procedural due process is independent, impartial decision making.
8

9 *See also*, John E. Nowak and Ronald D. Rotunda, CONSTITUTIONAL LAW § 13.8,
10 at 538 (4th ed. 1991) who explain that although different cases require different
11 procedures, courts consistently require an impartial and fair process, including a
12 neutral judge.

13 **D. The Discipline System does not provide independent and impartial**
14 **decision making.**

15 **1. Relationship between the WSBA and the Supreme Court.**

16 Before explaining why the Discipline System violates procedural due process
17 because it does not provide an impartial system, the character of the relationship
18 between the Washington Supreme Court and the WSBA and lawyer discipline must
19 be understood. The WSBA believes and the Supreme Court agrees, the WSBA has
20 ultimate, plenary authority over the Bar, the practice of law and the WSBA. *Supra*
21 at 3.

22 "[T]he Supreme Court has plenary authority concerning the state bar and the
23

1 regulation of the practice of law.” LEADERSHIP FOR TODAY AND TOMORROW
2 REPORT OF THE BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION
3 ON GOVERNANCE, September 17, 2015 at page 13.

4 **2. System does not provide an independent and impartial decision**
5 **making process.**

6 With these thoughts in mind about the ultimate or plenary authority of the
7 Supreme Court over regulation and the WSBA, is time to determine whether the
8 Discipline System violates the procedural due process requirement of the system
9 which presents an independent impartial decision maker process.

10 The prosecutor in every discipline case is the WSBA. The WSBA executive
11 director and who is a member of the WSBA #28726, who is herself controlled by the
12 WSBA Board of Governors, selects the Chief Disciplinary Counsel. ELC 2.8 (b). In
13 consultation with the Chief Disciplinary Counsel Executive Director employs
14 suitable members of the WSBA as disciplinary counsel in a number determined by
15 her. *Id.* The executive director has the power to appoint special counsel. *Id.*

17 The power of the WSBA extends to the selection of the Chief Hearing Officer
18 and the persons put on the Hearing Officer Panel. The Supreme Court appoints the
19 chief hearing officer “upon recommendation of the Board of Governors.” ELC 2.5
20 (e)(1). The Supreme Court also appoints hearing officers to the hearing officer list.
21 The court’s appointments here come from those who are recommended by the BOG
22 in connection with Disciplinary Selection Panel. ELC 2.5 (c).

24 Response to WSBA Motion to Strike
25 Eugster Motion To Dismiss
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1 The Disciplinary Selection Panel is provided for by ELC 2.2 (e). Its members
2 are appointed by the Supreme Court “upon the recommendation of the [BOG]. *Id.*⁴

3 The Disciplinary Board plays an appellate role with regard to he Disciplinary
4 Board of the WSBA (ELC 2.3). The Board is appointed by the Supreme Court “upon
5 recommendation of the BOG “in consultation” with the Disciplinary Selection Panel.
6 ELC 2.3 (b)(1).

7
8 Review Committees play an important role. It is one of these committees which
9 directs disciplinary counsel to take grievances to hearings. The Review Committees
10 play a prosecutor role. ELC 2.4.

11 The prosecutorial function is played by the WSBA though it Office of Discipline
12 Counsel. The Chief Disciplinary Officer is selected by the Executive Director of the
13 WSBA, who is selected by the Board of Governors and apparently controlled to a
14 certain extent by the Supreme Court which has the power to veto any decision to
15 terminate the Executive Director by action of the BOG. See discussion above at 11.

16 Every position in the system is filed by a member of the WSBA except for some
17 citizen positions. Some of the positions are filled by the Executive Director. Not
18

19 ⁴ ELC 2.2 (e) provides”

20 The Panel is appointed by the Supreme Court, upon the
21 recommendation of the Board of Governors, shall include a Board of
22 Governors member who serves as its chair, and should include,
23 without limitation, one or more former Chairs of the Disciplinary
Board, one or more current or former hearing officers, and one or more
former nonlawyer members of the Disciplinary Board.”

1 one person can be said to be independent of the Bar Association nor independent of
 2 the Supreme Court.

3
 4 **WSBA appoints or recommends who shall be appointed: Discipline**
 5 **Prosecutors, Hearing Officers, and Disciplinary Review Board and Review**
 6 **Committees.**

Person or Group	Authority to Appoint	Explanation
Board of Governors (BOG) ELC 2.2 (a) (1-3)	WSBA Members	
Executive Director ELC 2.2 (a) (1)	Board of Governors	
(a) Function. The Board of Governors of the Association: (1) through the Executive Director, provides administrative and managerial support to enable the Office of Disciplinary Counsel, the Disciplinary Board, review committees, and other Association staff and appointees to perform the functions specified by these rules;		Board of Governors of the Association: (1) through the Executive Director
Disciplinary Selection Panel ELC 2.2 (e)	Recommendation of the Board of Governors	The Panel is appointed by the Supreme Court, upon the recommendation of the Board of Governors, shall include a Board of Governors member who serves as its chair, and should include, without limitation, one or more former Chairs of the Disciplinary Board, one or more current or former hearing officers, and one or more former non lawyer members of the Disciplinary Board.

23
 24 Response to WSBA Motion to Strike
 25 Eugster Motion To Dismiss
 and Brief in Support Thereof - 12

1 2	Chief Disciplinary Counsel ELC 2.8 (b)	Executive Director	"under the direction of the Board of Governors"
3 4 5 6 7 8 9	Disciplinary Counsel ELC 2.8 (b)	Executive Director	In consultation with the Chief Disciplinary Counsel, selects and employs suitable members of the association as disciplinary counsel, in a number to be determined by the executive director. Special disciplinary counsel may be appointed by the Executive Director whenever necessary to conduct an individual investigation or proceeding
10 11	Special Disciplinary Counsel ELC 2.8 (b)	Executive Director	Executive Director
12 13 14 15	Chief Hearing Officer ELC 2.5 (e) (1)	Recommendation of the Board of Governors	The Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel appoints a chief hearing officer for a renewable term of two years.
16 17 18 19 20 21 22	Hearing Officers ELC 2.5 (c)	Recommendation of the Board of Governors	The Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel, appoints hearing officers to the hearing officer list. The list should include as many lawyers as necessary to carry out the provisions of these rules effectively and efficiently.

24 Response to WSBA Motion to Strike
25 Eugster Motion To Dismiss
and Brief in Support Thereof - 13

1 2 3	Staff of Chief Hearing Officer and Hearing Officers ELC 2.5 (h)	Executive Director	
4	Disciplinary Board ELC 2.3		
5 6	4 nonlawyer members	Court	Court
7 8 9 10 11	not less than 10 lawyer members	Recommendation of the Board of Governors	Appointed by the Court, upon the recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel. (2) Qualifications. A lawyer Board member must be an Active member
12 13	Disciplinary Board Counsel and Clerk ELC 2.3 (j)	Executive Director	
14 15 16 17 18 19 20 21	Review Committees ELC 2.4 (b)	Chair of Disciplinary Board from Board Members	The Chair appoints three or more review committees of three members each from among the Board members. Each review committee consists of two lawyers and one nonlawyer. The Chair may reassign members among the several committees on an interim or permanent basis. The Chair does not serve on a review committee.

24 Response to WSBA Motion to Strike
25 Eugster Motion To Dismiss
and Brief in Support Thereof - 14

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IV. CONCLUSION

This proceeding is in violation of Eugster's fundamental right to procedural due process of law under Fifth and Fourteenth Amendment to the United States Constitution and Washington Constitution Art. I, Section 3. As such, the proceeding is void and any decision other than dismissal of the proceeding with prejudice will also be void.

The Chief Hearing Officer must dismiss In re Stephen Kerr Eugster, Lawyer #2003 and do so with prejudice.

August 5, 2016.

Respectfully submitted,

EUGSTER LAW OFFICE PSC



Stephen Kerr Eugster, WSBA # 2003
Attorney for Lawyer

1 **PROOF OF SERVICE**

2 I hereby certify that on August 5, 2016, I mailed, U.S. Postage First Class
3 prepaid, and e-mailed, the foregoing document including its appendix to the people
4 listed below at their mailing addresses and email addresses below.

5 Allison Sato, Clerk
6 Disciplinary Board of the WSBA
7 Washington State Bar Association
8 1325 4th Avenue, Ste 600
9 Seattle, WA 98101-2539
10 Allisons@wsba.org

11 James E. Horne
12 Chief Hearing Officer
13 One Union Square, 600 University St, #2100,
14 Seattle, WA 98101
15 jhorne@gth-law.com

16 Francesca D' Angelo
17 Office of Disciplinary Counsel
18 Washington State Bar Association
19 1325 4th Avenue, Ste 600
20 Seattle, WA 98101-2539
21 francescad@wsba.org
22 Attorney for WSBA

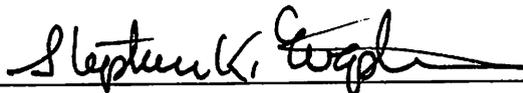
23 Joanne S. Abelson
24 Office of Disciplinary Counsel
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August 5, 2016.



Stephen K. Eugster, WSBA # 2003

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Response to WSBA Motion to Strike
Eugster Motion To Dismiss
and Brief in Support Thereof - 16

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6 BEFORE THE
7 DISCIPLINARY BOARD
8 OF THE
9 WASHINGTON STATE BAR ASSOCIATION

10 In re

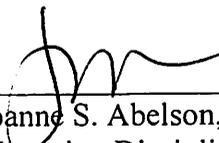
11 **STEPHEN KERR EUGSTER,**
12 Lawyer (Bar No. 2003).

13 Proceeding No. 16#00017

14 ODC'S REPLY RE MOTION TO STRIKE

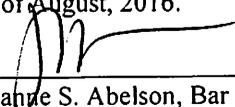
15 Rather than respond to ODC's motion to strike, Respondent brought a motion to dismiss.
16 He failed to acknowledge or address the substance of the motion to strike at all. For the reasons
17 set forth in ODC's motion, the Chief Hearing Officer should grant it and strike Respondent's
18 unauthorized claims and requests for relief.

19 Dated this 10th day of August, 2016.

20 
21 Joanne S. Abelson, Bar No. 24877
22 Managing Disciplinary Counsel

23 **CERTIFICATE OF SERVICE**

24 I certify that I caused a copy of the foregoing Reply re Motion to Strike to be sent via first class mail to Respondent Stephen Kerr Eugster, Eugster Law Office PSC, 2418 W Pacific Ave., Spokane, WA 99201-6422, and via email to eugster@eugsterlaw.com, on the 10th day of August, 2016.


Joanne S. Abelson, Bar No. 24877
Managing Disciplinary Counsel

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6 BEFORE THE
7 DISCIPLINARY BOARD
8 OF THE
9 WASHINGTON STATE BAR ASSOCIATION

9 In re
10 **STEPHEN KERR EUGSTER,**
11 Lawyer (Bar No. 2003).

Proceeding No. 16#00017
ODC'S RESPONSE TO MOTION TO
DISMISS

12 **I. INTRODUCTION**

13 In response to ODC's motion to strike, Respondent filed a motion to dismiss based on
14 alleged violations of his due process rights. Essentially, he is asking the Chief Hearing Officer
15 to declare that the disciplinary system established by the Supreme Court is unconstitutional.
16 The motion is procedurally barred and substantively meritless. The Chief Hearing Officer
17 should deny it.

18 **II. ARGUMENT**

19 **A. Respondent's motion to dismiss is not permitted by the ELC**

20 The Rules for Enforcement of Lawyer Conduct (ELC) are promulgated by Washington
21 Supreme Court and govern these proceedings. ELC 1.1. The ELC allow for prehearing
22 dispositive motions in very limited circumstances. Unlike the Civil Rules (CR), which permit
23
24

1 parties to bring motions to dismiss on myriad grounds,¹ under ELC 10.10(a) “[a] respondent
2 lawyer may move for dismissal of all or any portion of one or more counts of a formal
3 complaint for failure to state a claim upon which relief can be granted.” This is the only ground
4 available. ELC 10.1(a) (“[m]otions for judgment on the pleadings and motions to dismiss based
5 upon the pleadings are available only to the extent permitted in rule 10.10”). Thus, unlike the
6 CR,² motions for summary judgment are also prohibited. Id. Plainly, the ELC reflect a policy
7 preference for adjudicating RPC violations through a hearing on the merits.

8 Here, Respondent’s motion is not based on failure to state a claim. Instead, he argues
9 that the Washington State Bar Association (Association) “does not have jurisdiction to pursue
10 this proceeding,” Motion at 1-2, which he claims is “void” because it violates his procedural due
11 process right to an independent, impartial proceeding. Id. at 2. Further, to the extent
12 Respondent’s motion would require consideration of facts outside the pleadings, it would be
13 considered a motion for summary judgment, which is not permitted. The Chief Hearing Officer
14 must deny Respondent’s motion because the ELC do not permit him to bring a motion to
15 dismiss on the grounds he asserts.

16 **B. Respondent’s speculative due process claim lacks merit**

17 Respondent claims that the disciplinary system violates due process because the hearing
18 officers, Chief Hearing Officer, members of the Disciplinary Board, Chief Disciplinary Counsel
19 and disciplinary counsel are appointed either by the Association or by the Supreme Court with
20

21 _____
22 ¹ CR 12(b) provides that a party may bring a motion to dismiss on the basis of (1) lack of jurisdiction
23 over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of
24 process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief can be
granted; or (7) failure to join a party under rule 19.

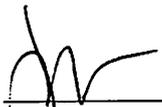
² See CR 56.

1 input from the Association,³ and most of those positions are filled by members of the
2 Association. Although Respondent discusses the process of appointments at length, he fails to
3 specify how this process leads to unconstitutional conflicts of interests or biased decision
4 makers. Instead, he simply asserts it. But, if Respondent were correct, the entire federal
5 judicial system would violate due process, for the President appoints and the Senate confirms
6 federal judges and U.S. Attorneys, yet federal judges routinely hear cases brought by the U.S.
7 Attorney's offices and occasionally hear cases where the President or the Senate is a party. The
8 notion is absurd.

9 III. CONCLUSION

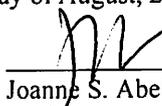
10 Respondent again attempts to apply civil litigation procedures to his disciplinary
11 proceeding. His motion to dismiss is based on grounds unavailable under the ELC and should
12 be rejected on that basis alone. Moreover, his unspecified and speculative claims of biased
13 decision making are meritless. The motion should be denied.

14 Dated this 10th day of August, 2016.

15 
16 _____
17 Joanne S. Abelson, Bar No. 24877
18 Managing Disciplinary Counsel

18 CERTIFICATE OF SERVICE

19 I certify that I caused a copy of the foregoing ODC'S Response to Motion to Dismiss to be sent via first class mail
20 to Respondent Stephen Kerr Eugster, Eugster Law Office PSC, 2418 W Pacific Ave., Spokane, WA 99201-6422,
and via email to eugster@eugsterlaw.com, on the 10th day of August, 2016.

21 
22 _____
23 Joanne S. Abelson, Bar No. 24877
24 Managing Disciplinary Counsel

23 ³All the adjudicators (i.e., the hearing officers, the Chief Hearing officer, and the Disciplinary Board
24 members) are appointed by the Supreme Court. See ELC 2.3(b)(1), 2.5 (c), 2.5 (e)(1).

STEPHEN KERR EUGSTER, Plaintiff - Appellant,
v.
WASHINGTON STATE BAR ASSOCIATION; SALVADOR A. MUNGIA, President, Washinton State Bar Association Officers and Board of Governors; STEVEN G. TOOLE, President-elect, Washington State Bar Association Officers and Board of Governors; MARK A. JOHNSON, Immediate Past-president, Washington State Bar Association Officers and Board of Governors; G. GEOFFREY GIBBS, Washington State Bar Association Officers and Board of Governors; BRIAN L. COMSTOCK, Washington State Bar Association Officers and Board of Governors; LOREN SCOTT ETENGOFF, Washington State Bar Association Officers and Board Governors; ANTHONY DAVID GIPE, Washington State Bar Association Officers and Board Governors; LORI S. HASKELL, Washington State Bar Association Officers and Board of Governors; DAVID S. HELLER, Washington State Bar Association Officers and Board of Governors; NANCY L. ISSERLIS, Washington State Bar Association Officers and Board of Governors; LELAND B. KERR, Washington State Bar Association Officers and Board of Governors; CARLA C. LEE, Washington State Bar Association Officers and Board of Governors; ROGER A. LEISHMAN, Washington State Bar Association Officers and Board of Governors; CATHERINE L. MOORE, Washington State Bar Association Officers and Board of Governors; PATRICK A. PALACE, Washington State Bar Association Officers and Board of Governors; MARC L. SILVERMAN; BRENDA WILLIAMS, Washington State Bar Association Officers and Board of Governors; WASHINGTON STATE SUPREME COURT; BARBARA A. MADSEN, Chief Justice, Washington State Supreme Court; CHARLES W. JOHNSON, Justice, Washington State Supreme Court; GERRY L. ALEXANDER; RICHARD B. SANDERS; TOM CHAMBERS, Justice, Washington State Supreme Court; SUSAN J. OWENS, Justice, Washington State Supreme Court; MARY E. FAIRHURST, Administrative Law Judge, Justice, Washington State Supreme Court; JAMES M. JOHNSON, Administrative Law Judge, Justice, Washington State Supreme Court; DEBRA L. STEPHENS, Justice, Washington State Supreme Court, Defendants - Appellees.

No. 10-35694

D.C. No. 2:09-cv-00357-SMM

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT



Argued and Submitted July 10, 2012

Date: July 17, 2012

NOT FOR PUBLICATION

MEMORANDUM*

Page 2

Appeal from the United States District Court
for the Eastern District of Washington
Stephen M. McNamee, Senior District Judge, Presiding

Seattle, Washington

Before: SCHROEDER, REINHARDT, and M. SMITH, Circuit Judges.

Plaintiff-Appellant Stephen Eugster (Eugster) appeals from the district court's dismissal of his lawsuit on standing and ripeness grounds. Because the parties are familiar with the factual and procedural history of this case, we repeat only those facts necessary to resolve the issues raised on appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Eugster's complaint does not allege that he will ever again be subject to disciplinary proceedings. Because Eugster has not presented any allegations about what he will do in the future that might subject him to the allegedly unconstitutional attorney disciplinary process again, we hold that Eugster lacks standing to pursue his claims for declaratory and injunctive relief. *See Partington v. Gedan*, 961 F.2d 852, 862 (9th Cir. 1992). For the same reason, we hold that Eugster's claims rest on contingent future events that may not occur. Thus,

Page 3

Eugster's claims are not ripe. *See Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) (citation omitted).

In light of our conclusions, we decline to reach the remaining issues raised by the parties. For the foregoing reasons, we affirm the district court's dismissal of Eugster's complaint.

AFFIRMED.

Notes:

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.





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4 2418 West Pacific Avenue
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6 Telephone: +1.509.624.5566
7 Facsimile: +1.866.565.2341
8 Attorney for Plaintiff
9

10 Filed March 12, 2015
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15

16
17 UNITED STATES DISTRICT COURT
18 WESTERN DISTRICT OF WASHINGTON
19

20 STEPHEN KERR EUGSTER,)
21)
22 Plaintiff,)
23 vs.)
24)
25 WASHINGTON STATE BAR)
26 ASSOCIATION, a Washington association)
27 (WSBA); ANTHONY GIPE, President,)
28 WSBA, in his official capacity; WILLIAM D.)
29 HYSLOP, President-elect, WSBA, in his)
30 official capacity; PATRICK A. PALACE,)
31 Immediate Past President, WSBA, in his)
32 official capacity; and PAULA)
33 LITTLEWOOD, Executive Director, WSBA,)
34 in her official capacity;)
35 and)

No. 2:15-cv-00375

COMPLAINT FOR
DECLARATORY RELIEF

1 WASHINGTON SUPREME COURT;)
 2 BARBARA MADSEN, Chief Justice, in her)
 3 official capacity; CHARLES JOHNSON,)
 4 Associate Chief Justice, in his official)
 5 capacity; SHERYL GORDON MCCLOUD,)
 6 Justice, in her official capacity; CHARLES)
 7 WIGGINS, Justice, in his official capacity;)
 8 STEVEN GONZÁLEZ, Justice, in his official)
 9 capacity; MARY YU, Justice, in her official)
 10 capacity; MARY FAIRHURST, Justice, in)
 11 her official capacity; SUSAN OWENS,)
 12 Justice, in her official capacity; and DEBRA)
 13 STEPHENS, Justice, in her official capacity,)
 14 Defendants.)
)

15
 16 Stephen Kerr Eugster, Plaintiff, alleges as follows:

17 **NATURE OF THE CLAIMS**

18 1. This civil rights action seeks injunctive and declaratory relief to redress and prevent
 19 the deprivation of Plaintiff's rights against compelled association and compelled speech
 20 protected by the First and Fourteenth Amendments to the United States Constitution by
 21 practices and policies of Defendants acting under color of state law.

22 2. Specifically, those rights have been violated by Plaintiff's compelled membership in
 23 the Washington State Bar Association ("WSBA"), which is a prerequisite to the ability to
 24 practice law in the state of Washington. Specifically, those rights have been violated by
 25 Defendants because the imposition of mandatory dues as a condition of membership to the

26 WSBA violates Plaintiff's right not to associate with the WSBA and Plaintiff's right of freedom

1 of speech.

2 3. Specifically, those rights have been violated by Plaintiff's compelled support of
3 activities of WSBA, which are not germane to the purposes of the WSBA.

4 JURISDICTION AND VENUE

5 4. Plaintiff brings this civil rights lawsuit pursuant to the First and Fourteenth
6 Amendments to the United States Constitution. Because this action arises under the
7 Constitution and laws of the United States, this Court has jurisdiction pursuant to 28 U.S.C. §
8 1331.

9 5. This is also an action under the Civil Rights Act of 1871, specifically 42 U.S.C. § 1983,
10 to redress the deprivation, under color of state law, of rights, privileges, and immunities secured
11 to Plaintiff by the Constitution of the United States, particularly the First and Fourteenth
12 Amendments thereto. The jurisdiction of this Court, therefore, is also invoked under 28 U.S.C. §
13 1343(a)(3), (4).

14 6. This is also a case of actual controversy because Plaintiff seeks a declaration of his
15 rights under the Constitution of the United States. Under 28 U.S.C. §§ 2201 and 2202, this
16 Court may declare the rights of Plaintiff and grant further necessary and proper relief, including
17 injunctive relief, pursuant to Fed. R. Civ. P. 65.

18 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because it is the judicial
19 district where Defendants reside, and "in which a substantial part of the events or omissions

1 giving rise to the claim occurred.” 28 U.S.C. §§ 1391(b), 124(d)(1).

2 **PARTIES**

3 8. Plaintiff Stephen K. Eugster, is a citizen of the United States and a resident of the state
4 of Washington. Plaintiff is also a duly licensed attorney under the laws of Washington and, as
5 required by RCW 2.48.170, is a member of the WSBA, which is a mandatory prerequisite to the
6 ability to practice law in the State of Washington.

7 9. Plaintiff made his attorney’s oath and was sworn in to the bar of Washington Supreme
8 Court by Associate Justice William O. Douglas at the United States Supreme Court in
9 Washington, D.C., January of 1970.

10 10. As an active member of the WSBA, Plaintiff has paid required mandatory dues to the
11 WSBA since he was admitted to practice law in 1970.

12 11. Defendant WSBA is an association created by the Washington State Bar Act, RCW
13 Ch. 2.48.

14 12. Defendant WSBA is headquartered in Seattle, Washington, and conducts its business
15 and operations throughout the State of Washington.

16 13. Defendant WSBA is a “mandatory” or “integrated” bar association as described in
17 *Keller v. State Bar of California*, 496 U.S. 1, 5 (1990). That is, all attorneys must join the WSBA
18 and pay mandatory bar dues as a condition of practicing law in the state of Washington.

19 14. Defendant WSBA is currently enforcing the unconstitutional practices and policies

1 complained of in this action.

2 15. Defendant, Anthony Gipe, is a resident of the state of Washington and is President of
3 the WSBA.

4 16. Defendant Gipe is currently implementing and enforcing the unconstitutional
5 practices and policies complained of in this action. Defendant Gipe is sued in his official capacity.

6 17. Defendant William D. Hyslop, is the President-elect, WSBA;

7 18. Defendant William D. Hyslop is currently implementing and enforcing the
8 unconstitutional practices and policies complained of in this action. Defendant Hyslop is sued in
9 his official capacity is sued in his official capacity.

10 19. Defendant Patrick A. Palace, is the Immediate Past President, WSBA;

11 20. Defendant Palace is currently implementing and enforcing the unconstitutional
12 practices and policies complained of in this action. Defendant Palace is sued in his official
13 capacity.

14 21. Defendant Paula Littlewood, is the Executive Director, WSBA.

15 22. Defendant Littlewood is currently implementing and enforcing the unconstitutional
16 practices and policies complained of in this action. Defendant Littlewood is sued in her official
17 capacity.

18 23. Defendant Washington State Supreme Court is the Supreme Court of the State of
19 Washington created as such by Wash. Const. Art. IV, § 1.

1 24. Defendant Supreme Court is headquartered in Olympia, Washington, and conducts
2 its business and operations throughout the State of Washington

3 25. Each of the Defendant Justices are justices of the Washington Supreme Court. Each
4 such Defendant Justice is currently implementing and enforcing the unconstitutional practices
5 and policies complained of in this action. Each such Defendant Justice is sued in his or her
6 official capacity.

7 CONSTITUTIONAL STANDARDS

8 26. Under 42 U.S.C. § 1983, every person who, under color of state law, subjects any
9 citizen of the United States to the deprivation of “rights, privileges, or immunities secured by the
10 Constitution and laws,” shall be liable to the injured party.

11 27. The First Amendment protects not only the freedom to associate, but the freedom
12 not to associate; and it protects not only the freedom of speech, but the freedom to avoid
13 subsidizing group speech with which an individual disagrees. *Knox v. Service Employees Intern.
14 Union*, 132 S. Ct. 2277, 2288–89 (2012) citing *Roberts v. United States Jaycees*, 468 U. S. 609, 623
15 (1984) (“Freedom of association therefore plainly presupposes a freedom not to associate.”);
16 *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 712– 13 (7th Cir. 2010).

17 28. Unless specific procedural protections are in place, an individual’s rights against
18 compelled speech and compelled association are violated when a mandatory bar uses mandatory
19 member dues for purposes not germane to regulating the legal profession or improving the

1 quality of legal services. *Keller v. State Bar of California*, 496 U.S. 1, 13–14 (1990); *Kingstad*, 622
2 F.3d at 712–13; *see also Knox*, 132 S. Ct. at 2295–96; *Abood v. Detroit Board of Education*, 431 U.S.
3 209, 235 (1977).

4 29. Any activities that are not “germane” to the bar association’s purposes of regulating
5 the legal profession and improving the quality of legal services, including political and ideological
6 activities, are “non-chargeable activities.” *Keller*, 496 U.S. at 14; *see also Kingstad*, 622 F.3d at
7 718–19; *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 302–03 (1st Cir. 2000).

8 FACTUAL ALLEGATIONS

9 30. The WSBA is a mandatory bar. WSBA, RCW Ch. 2.48. As such, it is unlawful for a
10 person to practice law in the State of Washington unless such person is a member of the WSBA.
11 RCW 2.48.170. The WSBA thus acts under color of state law to collect mandatory dues from
12 WSBA members. *Id.*

13 31. Defendant Washington State Supreme Court regards Defendant WSBA as its agent.
14 The Supreme Court has determined that “the bar association . . . is an association that “is sui
15 generis, many of whose important functions are directly related to and in aid of the judicial
16 branch of government. [citation omitted].” *Graham v. State Bar Association*, 86 Wn.2d 624, 632,
17 548 P.2d 310 (1976). “The power to accomplish the integration of the bar, its supervision and
18 regulation is found first in this court, not the legislature.” *Id.*

19 32. Defendant Washington State Supreme Court under General Rule (GR) 12.2 has

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

9 33. Defendant Washington State Supreme Court under General Rule (GR) 12.1 has
10 designated the purposes of the WSBA and the limitations on purposes of the WSBA.

11 **FIRST CLAIM FOR RELIEF**
12 **The Right of Non-association**

13
14 34. Plaintiff realleges and incorporates by reference each and every allegation set forth
15 above.

16 35. Plaintiff is compelled to be a member of the WSBA and to pay the dues levied by the
17 WSBA in order to practice law in the state of Washington and to appear in the courts of the state
18 of Washington.

19 36. Such compulsions constitute compelled speech and association in violation of
20 Plaintiff's rights under the First and Fourteenth Amendments.

1 37. The issue of whether mandatory membership in an integrated bar association violates
2 a lawyer's First and Fourteenth Amendments rights has yet to be determined. In *Harris v. Quinn*,
3 573 US ___, 134 S. Ct. 2618, 2629 (2014), Justice Samuel Alito, writing for the majority, said
4 "[T]he Court [has] never previously held that compulsory membership in and the payment of
5 dues to an integrated bar was constitutional, and the constitutionality of such a requirement was
6 hardly a foregone conclusion." (Emphasis added.) The case of *Lathrop v. Donohue*, 367 U.S. 820
7 (1961) (a plurality decision) did not reach the question whether mandatory membership in an
8 integrated bar association was a violation of an attorney's First and Fourteenth Amendments
9 rights.

10 38. Mandatory association is permissible under the First and Fourteenth Amendments
11 only if it serves a compelling state interest that cannot be achieved through means significantly
12 less restrictive of associational freedoms. *Knox v. Service Employees International Union*, at 10, 132
13 S.Ct. 2277 (2012), citing *Roberts v. United States Jaycees*, 468 U. S. 609, 623 (1984) ("Freedom
14 of association therefore plainly presupposes a freedom not to associate.")

15 39. Plaintiff does not wish to associate with the WSBA because its primary purpose is the
16 WSBA Washington Lawyer Discipline System (Discipline System or System). The WSBA's
17 major attention, its major use of bar membership resources – more than 48% – is to the WSBA
18 Washington Lawyer Discipline System.

19 40. There are significant problems with the System, some of which are described as

1 follows:

2 a. It is questionable that an association which exists to assist its members in their
3 efforts to practice law has as its primary function the object of member discipline, suspension and
4 disbarment. This, to Plaintiff, is an obvious conflict of interest on the part of the WSBA and the
5 Supreme Court.

6 b. Plaintiff also contends that WSBA Washington Lawyer Discipline System
7 does not comply with substantive due process of law guaranteed to members of the WSBA
8 because the system is controlled entirely by the WSBA – from discipline counsel prosecutors to
9 the hearing officers and discipline board members.

10 c. The Washington Supreme Court has the final say on matters of suspension
11 and disbarment, however, given the presumptions and deference given by the Court to System
12 hearing officers and the members of the Disciplinary Board, it is highly unlikely that a lawyer
13 suspended or disbarred by the System will have his case overturned.

14 d. Plaintiff does not want to associate with the WSBA and the Court regarding
15 the present System because it devotes nearly all of its disciplinary efforts on single or very small
16 firm lawyers. This is decidedly unfair.

17 e. Plaintiff does not want to be a member of the WSBA because it has combined
18 the prosecutorial and judicial function under the authority of the WSBA.

19 f. There is no way a lawyer can have the Washington Lawyer Discipline System

1 reviewed by a federal court. The likelihood that a petition for writ of certiorari being granted is
2 almost zero. And, there is no real opportunity to have a United States District Court review the
3 System due the impacts of the Younger Abstention Doctrine (*Younger v. Harris*, 401 U.S. 37
4 (1971)), and the Rooker Feldman Doctrine (*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and
5 *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

6 41. The attorney regulatory function could be performed by entities which do not require
7 a lawyer's mandatory membership. Resources for such functions could be imposed by order of
8 the Supreme Court.

9 42. Accordingly, Defendants currently maintain and actively enforce a set of laws,
10 customs, practices, and policies under color of state law that deprive Plaintiff of rights, privileges
11 and/or immunities secured by the First and Fourteenth Amendments, and, therefore,
12 Defendants are liable to Plaintiff under 42 U.S.C. § 1983.

13 43. Plaintiff has no adequate legal remedy by which to prevent or minimize the
14 continuing irreparable harm to his constitutional rights.

15 44. Plaintiff is therefore entitled to declaratory and permanent injunctive relief. 28
16 U.S.C. §§ 2201, 2202.

17 **SECOND CLAIM FOR RELIEF**
18 **Compelled Dues for Non-Chargeable Activities**
19 **First and Fourteenth Amendments**

20
21 45. Plaintiff realleges and incorporates by reference each and every allegation set forth

1 above.

2 46. Plaintiff asserts that his dues may only be used for chargeable activities, that is,
3 activities must (1) be "germane" to the purposes of the institution; (2) be justified by a vital policy
4 of the government which cannot be fulfilled other than by forced membership; and (3) not
5 significantly add to the burdening of free speech that is inherent government compelled speech
6 and association.

7 47. Defendants may contend that Plaintiff cannot bring this claim because the matter is
8 resolved by the "WSBA Keller Deduction."

9 48. The Keller Deduction is described as follows:

10 In a U.S. Supreme Court case, *Keller v. State Bar of California*, the Court ruled
11 that a bar association may not use mandatory member fees to support political or
12 ideological activities that are not reasonably related to the regulation of the legal
13 profession or improving the quality of legal services. The bar is required to
14 identify that portion of mandatory license fees that go to such "nonchargeable"
15 activities and establish a system whereby objecting members may either deduct
16 that portion of their fees or receive a refund. This year (2015), objecting members
17 may deduct up to \$4.40 if paying \$325; \$2.20 if paying \$162.50; \$2.71 if paying
18 \$200; \$1.10 if paying \$81.25; or \$0.68 if paying \$50.¹

19
20 49. The Keller Deduction applies only to "fees to support political or ideological
21 activities that are not reasonably related to the regulation of the legal profession or improving the
22 quality of legal services." It does not apply to other non-chargeable activities. The Keller

¹ WSBA Website <http://www.wsba.org/Licensing-and-Lawyer-Conduct/-Annual-License-Renewal/Keller-Deduction>.

1 Deduction was limited to “those activities having political or ideological coloration which are not
2 reasonably related to the advancement” [of the] “the regulation of the legal profession.” *Keller*,
3 496 U.S. at 16. Justice Samuel Alito, writing for the majority in said this about the impact of
4 *Harris v. Quinn* on the holding in *Keller*:

5 In *Keller*, we considered the constitutionality of a rule applicable to all members
6 of an “integrated” bar, i.e., “an association of attorneys in which membership and
7 dues are required as a condition of practicing law.” 496 U. S., at 5. We held that
8 members of this bar could not be required to pay the portion of bar dues used for
9 political or ideological purposes but that they could be required to pay the portion
10 of the dues used for activities connected with proposing ethical codes and
11 disciplining bar members. *Id.*, at 14.

12 *Harris V. Quinn*, 134 U.S. ___ at ___ 134 S.Ct. 2618, at 2644 ___ (2014).

13 50. *Keller* used *Abood* to reach the foregoing rule. *Abood* cannot be used in this case
14 because it is necessary to determine exactly what falls into the category of non-chargeable
15 activities.

16 51. Furthermore, even if *Abood* is used, the non-chargeable activities can be only for
17 those activities which, as Justice Samuel Alito said are the “ activities connected with proposing
18 ethical codes and disciplining bar members.”

19 52. Dues relating to “improving the quality of legal services” have not been tested or
20 described at the present time.

21 53. As to these, *Abood* should not apply. In *Harris* the court examined and criticized the
22 use of *Abood*. One of the strongest criticisms was this:

1 *Abood* does not seem to have anticipated the magnitude of the practical
2 administrative problems that would result in attempting to classify public-sector
3 union expenditures as either "chargeable" (in *Abood's* terms, expenditures for
4 "collective-bargaining, contract administration, and grievance-adjustment
5 purposes," *id.*, at 232) or nonchargeable (i.e., expenditures for political or
6 ideological purposes, *Id.*, at 236). In the years since *Abood*, the Court has struggled
7 repeatedly with this issue. *See Ellis v. Railway Clerks*, 466 U. S. 435 (1984);
8 *Teachers v. Hudson*, 475 U. S. 292 (1986); *Lehnert v. Ferris Faculty Assn.*, 500 U. S.
9 507 (1991); *Locke v. Karass*, 555 U. S. 207 (2009). In *Lehnert*, the Court held that
10 "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2)
11 be justified by the government's vital policy interest in labor peace and avoiding
12 'free riders'; and (3) not significantly add to the burdening of free speech that is
13 inherent in the allowance of an agency or union shop." 500 U. S., at 519. But as
14 noted in JUSTICE SCALIA's dissent in that case, "each one of the three 'prongs'
15 of the test involves a substantial judgment call (What is 'germane'? What is
16 'justified'? What is a 'significant' additional burden)." *Id.*, at 551 (opinion
17 concurring in judgment in part and dissenting in part).

18
19 *Harris V. Quinn*, 134 U.S. ___ at ___ 134 S.Ct. 2618, at 2632 - 2633 (2014).

20
21 54. The First Amendment protects not only the freedom to associate, but the freedom
22 not to associate; and it protects not only the freedom of speech, but the freedom to avoid
23 subsidizing group speech with which an individual disagrees. *Knox v. Service Employees Intern.*

24 *Union*, 132 U.S. ____, 132 S. Ct. 2277, 2288-89 (2012); *Kingstad v. State Bar of Wisconsin*, 622
25 F.3d 708, 712- 13 (7th Cir. 2010).

26 55. Unless specific procedural protections are in place, an individual's rights against
27 compelled speech and compelled association are violated when a mandatory bar uses mandatory
28 member dues for purposes not germane to regulating the legal profession or improving the

1 quality of legal services. *Keller*, 496 U.S. at 13-14; *Kingstad*, 622 F.3d at 712-13; *see also Knox*, 132
2 S. Ct. at 2295-96; *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977).

3 56. The failure to provide such procedural protections in the first instance violates bar
4 members' Fourteenth Amendment right to procedural due process. *Hudson v. Chicago Teachers*
5 *Union Local No. 1*, 743 F.2d 1187, 1192-93 (7th Cir. 1984) *aff'd sub nom. Chicago Teachers Union,*
6 *Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

7 57. Any activities that are not "germane" to the bar association's dual purposes of
8 regulating the legal profession and improving the quality of legal services, including political and
9 ideological activities, are "non-chargeable activities." *Keller*, 496 U.S. at 14; *see also Kingstad*,
10 622 F.3d at 718-19; *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 302-03 (1st
11 4:12-cv-03214-RGK Doc # 1 Filed: 10/10/12 Page 6 of 22 - Page ID # 6 Cir. 2000);

12 58. In the past, *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977) has been
13 used to determine what a non-consenting member should be rebated by the WSBA for political or
14 ideological speech.

15 59. *Abood* does not apply in this case as to the determination of what are the non-
16 chargeable activities of the WSBA which use dues compelled by WSBA against Plaintiff's
17 interests.

18 60. When mandatory member dues are used for non-chargeable activities, the bar
19 association is required to establish procedures that satisfy three requirements: (a) proper notice

1 to members, including an adequate explanation of the calculations of all non-chargeable activities;
2 (b) a reasonably prompt decision by an impartial decision maker once a member makes an
3 objection to the manner in which his or her mandatory member dues are being spent; and (c) an
4 escrow for the amounts reasonably in dispute while such challenges are pending. *Keller*, 496 U.S.
5 at 14; *Hudson*, 475 U.S. at 306-08.

6 61. Defendants bear the burden of proving that expenditures are germane and chargeable.
7 *Hudson*, 475 U.S. at 306; *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991)
8 (emphasizing that, "as always, the union bears the burden of proving the proportion of chargeable
9 expenses to total expenses").

10 62. Chargeable activities must (1) be "germane" to purposes of the WSBA; (2) be
11 justified by the government's vital policy interest in regulating attorneys; and (3) not significantly
12 add to the burdening of free speech. *In re Petition for Rule to Create Vol. State Bar Assn.*, 286 Neb.
13 1018, 1032 - 1033, 841 N.W.2d 167 (2013).

14 63. Accordingly, Defendants currently maintain and actively enforce a set of laws,
15 customs, practices, and policies under color of state law that deprive Plaintiff of rights, privileges
16 and/or immunities secured by the First and Fourteenth Amendments, and, therefore,
17 Defendants are liable to Plaintiff under 42 U.S.C. § 1983.

18 64. Plaintiff has no adequate legal remedy by which to prevent or minimize the
19 continuing irreparable harm to his constitutional rights.

1 65. Plaintiff is therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C.
2 §§ 2201, 2202.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff, Stephen K. Eugster, respectfully requests the following relief:

5 1. Entry of judgment declaring that Plaintiff has First Amendment right against
6 compelled speech and compelled association, and therefore has a constitutional right to not to be
7 a member of the WSBA in order to practice law in the state of Washington;

8 2. Entry of judgment declaring that Plaintiff has First Amendment rights against
9 compelled speech and compelled association, and therefore has a constitutional right to prevent
10 Defendants from using his member dues on non- chargeable activities of the WSBA;

11 3. Entry of judgment declaring that the Washington State Bar Association is
12 unconstitutional in violation fo the First and Fourteenth Amendments because it compels its
13 members to pay dues for purposes which are not germane to the ethics and regulatory purposes
14 of a integrated bar association.

15 4. Award Plaintiff his costs, expenses, and attorneys' fees in accordance with law,
16 including 42 U.S.C. § 1988; and

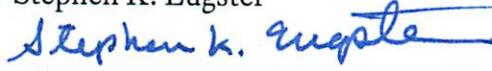
17 5. Award Plaintiff such further relief as is just and equitable.

18 DATED March 12, 2015.
19
20

1
2 Respectfully submitted,

3 EUGSTER LAW OFFICE PSC
4

5 s/ Stephen K. Eugster

6 

7 Stephen Kerr Eugster, WSBA # 2003

8 2418 West Pacific Avenue

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9 Attorney for Plaintiff

Hon. James L. Robart

10
11
12
13 **UNITED STATES DISTRICT COURT**
14 **WESTERN DISTRICT OF WASHINGTON**
15 **AT SEATTLE**
16

17 STEPHEN KERR EUGSTER,)
18)
19 Plaintiff,)
20 vs.)
21)
22 WASHINGTON STATE BAR)
23 ASSOCIATION, a Washington association)
24 (WSBA); ANTHONY GIPE, President,)
25 WSBA, in his official capacity; WILLIAM D.)
26 HYSLOP, President-elect, WSBA, in his)
27 official capacity; PATRICK A. PALACE,)
28 Immediate Past President, WSBA, in his official)
29 capacity; and PAULA LITTLEWOOD,)
30 Executive Director, WSBA, in her official)
31 capacity;)
32)
33 and)

No. 2:15-cv-00375-JLR

AMENDED AND RESTATED
COMPLAINT FOR
DECLARATORY RELIEF -
(Fed. R. Civ. P. 15(a)(1)(B))

1 JUSTICES OF THE WASHINGTON)
2 SUPREME COURT, NAMELY; BARBARA)
3 MADSEN, Chief Justice, in her official)
4 capacity; CHARLES JOHNSON, Associate)
5 Chief Justice, in his official capacity; SHERYL)
6 GORDON McCLOUD, Justice, in her official)
7 capacity; CHARLES WIGGINS, Justice, in his)
8 official capacity; STEVEN GONZÁLEZ,)
9 Justice, in his official capacity; MARY YU,)
10 Justice, in her official capacity; MARY)
11 FAIRHURST, Justice, in her official capacity;)
12 SUSAN OWENS, Justice, in her official)
13 capacity; and DEBRA STEPHENS, Justice, in)
14 her official capacity,)
15)
16 Defendants.)

17
18 Stephen Kerr Eugster, Plaintiff, hereby amends and restates his complaint herein and, in
19 doing so, alleges as follows:

20 **AMENDMENT OF COMPLAINT**

21 1. This amended and restated complaint is made under the provisions of Fed. R. Civ. P.
22 15(a)(1)(B). Defendants have not answered Plaintiff's complaint. Furthermore, less than 21 days
23 have elapsed since, May 7, 2015, the time Defendants filed their motions to dismiss under Fed.
24 R. Civ. P. 12(b).

25 **NATURE OF THE CLAIMS**

26 2. This civil rights action seeks injunctive and declaratory relief to redress and prevent
27 the deprivation of Plaintiff's rights against compelled association and compelled speech,

1 protected by the First and Fourteenth Amendments to the United States Constitution by
2 practices and policies of Defendants acting under color of state law.

3 3. Specifically, those rights have been violated by Plaintiff's compelled membership in
4 the Washington State Bar Association ("WSBA"), which is a prerequisite to the ability to
5 practice law in the State of Washington.

6 4. Specifically, those rights protected by First and Fourteenth Amendments to the
7 United States Constitution have been violated by Defendants because the imposition of
8 mandatory dues to the WSBA and compulsory membership in the WSBA violates Plaintiff's
9 right to associate and not to associate.

10 5. Specifically, those rights protected by First and Fourteenth Amendments to the
11 United States Constitution have been violated by Plaintiff's compelled support of activities of
12 WSBA, which are not germane to the purposes of the WSBA in violation of Plaintiffs' rights of
13 association and non-association rights of speech.

14 JURISDICTION AND VENUE

15 6. Plaintiff brings this civil rights lawsuit pursuant to the First and Fourteenth
16 Amendments to the United States Constitution. Because this action arises under the
17 Constitution and laws of the United States, this Court has jurisdiction pursuant to 28 U.S.C. §
18 1331.

19 7. This is also an action under the Civil Rights Act of 1871, specifically 42 U.S.C. § 1983,

1 to redress the deprivation, under color of state law, of rights, privileges, and immunities secured
2 to Plaintiff by the Constitution of the United States, particularly the First and Fourteenth
3 Amendments thereto. The jurisdiction of this Court, therefore, is also invoked under 28 U.S.C. §
4 1343(a)(3), (4).

5 8. This is also a case of actual controversy because Plaintiff seeks a declaration of his
6 rights under the Constitution of the United States. Under 28 U.S.C. §§ 2201 and 2202, this
7 Court may declare the rights of Plaintiff and grant further necessary and proper relief, including
8 injunctive relief, pursuant to Fed. R. Civ. P. 65.

9 9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because it is the judicial
10 district where Defendants reside, and “in which a substantial part of the events or omissions
11 giving rise to the claim occurred.” 28 U.S.C. §§ 1391(b), 124(d)(1).

12 **PARTIES**

13 **Stephen Kerr Eugster**

14 10. Plaintiff, Stephen K. Eugster, is a citizen of the United States and a resident of the
15 State of Washington.

16 11. Plaintiff is a duly licensed attorney under the laws of Washington and, as required by
17 RCW 2.48.170, is a member of the WSBA, which is a mandatory prerequisite to Eugster’s
18 permission and ability to practice law in the State of Washington.

19 12. Plaintiff made his attorney’s oath and was sworn in to the bar of Washington

1 Supreme Court by Associate Justice William O. Douglas at the United States Supreme Court in
2 Washington, D.C., January of 1970.

3 13. As an active member of the WSBA, Plaintiff has paid required mandatory dues to the
4 WSBA since he was admitted to practice law in 1970.

5 **Washington State Bar Association Defendants**

6 14. Defendant WSBA is an association created by the Washington State Bar Act, RCW
7 Ch. 2.48.

8 15. Defendant WSBA is headquartered in Seattle, Washington, and conducts its business
9 and operations throughout the State of Washington.

10 16. Defendant WSBA does not have immunity under the Eleventh Amendment to the
11 United States Constitution for reasons including, but not limited to, the following:

12 a. The WSBA is not an agency of the State of Washington.

13 b. The State of Washington does not consider the WSBA to be an agency of the
14 State of Washington and will reject all pre-filing of claims for tortious conduct by the WSBA
15 made to the Washington Office of Enterprise Services Risk Management Division under RCW
16 4.92.110.

17 c. The WSBA is an association.

18 d. The WSBA is not controlled by the State of Washington; it is controlled by
19 private attorneys who are members of the WSBA by virtue of their authority to control the

1 makeup of the WSBA governing body, the WSBA Board of Governors pursuant to the bylaws of
2 the Association.

3 e. The State of Washington does not have authority to control the WSBA Board
4 of Governors.

5 f. The WSBA receives no funds from the State of Washington.

6 g. The WSBA is not subject to audit by the Washington State Auditor. *Graham v.*
7 *State Bar Association*, 86 Wn.2d 624, 632, 548 P.2d 310 (1976).

8 h. The WSBA does not have to have its offices at the seat of government in
9 Olympia, Washington as required Wash. Const. Art. III, § 24. *State ex rel. Schwab v. State Bar*
10 *Ass'n*, 80 Wn.2d 266, 269, 493 P.2d 1237 (1972).

11 i. WSBA is not subject to the authority of the Legislature. It is a sui generis
12 organization, important functions of which are "directly related to and in aid of the judicial
13 branch of government." *Graham v. State Bar Association*, 86 Wn.2d at 632, 548 P.2d 310.

14 j. The WSBA is not subject to collective bargaining of the State of Washington.
15 *State Bar Association v. State*, 125 Wn.2d 901, 909-910, 890 P.2d 1047 (1995).

16 k. Any judgment against the WSBA herein will not be satisfied with funds in the
17 State of Washington treasury.

18 l. The relief sought herein is prospective only.

19 m. The state government exercises no control over WSBA decisions and actions.

1 n. The state executive branch or legislature does not appoint the WSBA's
2 policymakers.

3 o. State law and judicial opinion do not characterize the WSBA as a state agency.

4 17. Defendant WSBA is a "mandatory" or "integrated" bar association as described in
5 *Keller v. State Bar of California*, 496 U.S. 1, 5 (1990). That is, all attorneys must join the WSBA
6 and pay mandatory bar dues as a condition of practicing law in the state of Washington.

7 18. Defendant WSBA is currently enforcing the unconstitutional practices and policies
8 complained of in this action.

9 19. Defendant, Anthony Gipe, is a resident of the state of Washington and is President of
10 the WSBA.

11 20. Defendant Gipe is currently implementing and enforcing the unconstitutional
12 practices and policies complained of in this action. Defendant Gipe is sued in his official capacity.

13 21. Defendant William D. Hyslop, is the President-elect, WSBA;

14 22. Defendant William D. Hyslop is currently implementing and enforcing the
15 unconstitutional practices and policies complained of in this action. Defendant Hyslop is sued in
16 his official capacity is sued in his official capacity.

17 23. Defendant Patrick A. Palace, is the Immediate Past President, WSBA;

18 24. Defendant Palace is currently implementing and enforcing the unconstitutional
19 practices and policies complained of in this action. Defendant Palace is sued in his official

1 capacity.

2 25. Defendant Paula Littlewood, is the Executive Director, WSBA.

3 26. Defendant Littlewood is currently implementing and enforcing the unconstitutional
4 practices and policies complained of in this action. Defendant Littlewood is sued in her official
5 capacity.

6 **Defendant Justices of the Washington Supreme Court**

7 27. The Washington State Supreme Court is the Supreme Court of the State of
8 Washington created as such by Wash. Const. Art. IV, § 1.

9 28. Each of the Defendant Justices are justices of the Washington Supreme Court. Each
10 such Defendant Justice is currently implementing and enforcing the unconstitutional practices
11 and policies complained of in this action. Each such Defendant Justice is sued in his or her
12 official capacity.

13 **CONSTITUTIONAL STANDARDS**

14 29. Under 42 U.S.C. § 1983, every person who, under color of state law, subjects any
15 citizen of the United States to the deprivation of “rights, privileges, or immunities secured by the
16 Constitution and laws,” shall be liable to the injured party.

17 30. The First Amendment protects not only the freedom to associate, but the freedom
18 not to associate; and it protects not only the freedom of speech, but the freedom to avoid
19 subsidizing group speech with which an individual disagrees. *Knox v. Service Employees Intern.*

1 *Union*, 132 S. Ct. 2277, 2288–89 (2012) citing *Roberts v. United States Jaycees*, 468 U. S. 609, 623
2 (1984) (“Freedom of association therefore plainly presupposes a freedom not to associate.”);
3 *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 712–13 (7th Cir. 2010).

4 31. Unless specific procedural protections are in place, an individual’s rights against
5 compelled speech and compelled association are violated when a mandatory bar uses mandatory
6 member dues for purposes not germane to regulating the legal profession or improving the
7 quality of legal services. *Keller v. State Bar of California*, 496 U.S. 1, 13–14 (1990); *Kingstad*, 622
8 F.3d at 712–13; *see also Knox*, 132 S. Ct. at 2295–96; *Abood v. Detroit Board of Education*, 431 U.S.
9 209, 235 (1977).

10 32. Any activities that are not “germane” to the bar association’s purposes of regulating
11 the legal profession and improving the quality of legal services, including political and ideological
12 activities, are “non-chargeable activities.” *Keller*, 496 U.S. at 14; *see also Kingstad*, 622 F.3d at
13 718–19; *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 302–03 (1st Cir. 2000).

14 **FACTUAL ALLEGATIONS**

15 33. The WSBA is a mandatory bar. WSBA, RCW Ch. 2.48. As such, it is unlawful for a
16 person to practice law in the State of Washington unless such person is a member of the WSBA.
17 RCW 2.48.170. The WSBA thus acts under color of state law to collect mandatory dues from
18 WSBA members. *Id.*

19 34. Defendant Washington State Supreme Court regards Defendant WSBA as its agent.

1 The Supreme Court has determined that “the bar association . . . is an association that “is sui
2 generis, many of whose important functions are directly related to and in aid of the judicial
3 branch of government. [citation omitted].” *Graham v. State Bar Association*, 86 Wn.2d 624, 632,
4 548 P.2d 310 (1976). “The power to accomplish the integration of the bar, its supervision and
5 regulation is found first in this court, not the legislature.” *Id.*

6 35. Defendant Washington State Supreme Court under General Rule (GR) 12.2 has
7 delegated to the Washington State Bar Association the authority and responsibility to administer
8 certain boards and committees established by court rule or order. This delegation of authority
9 includes providing and managing staff, overseeing the boards and committees to monitor their
10 compliance with the rules and orders that authorize and regulate them, paying expenses
11 reasonably and necessarily incurred pursuant to a budget approved by the Board of Governors,
12 performing other functions and taking other actions as provided in court rule or order or
13 delegated by the Supreme Court, or taking other actions as are necessary and proper to enable the
14 board or committee to carry out its duties or functions.

15 36. Defendant Washington State Supreme Court under General Rule (GR) 12.1 has
16 designated the purposes of the WSBA and the limitations on purposes of the WSBA.

17 37. The foregoing purposes and boards (¶¶ 35 and 36 above) are not such that the WSBA
18 has undertaken them as part of its purposes to of regulation of the legal profession or improving
19 the quality of legal services. These are programs and undertakings of the Washington Supreme

1 Court by action of the Defendant Justices of the Supreme Court.

2 **FIRST CLAIM FOR RELIEF**

3 **The Right of Non-association**

4 38. Plaintiff realleges and incorporates by reference each and every allegation set forth
5 above.

6 39. Plaintiff is compelled to be a member of the WSBA and to pay the dues levied by the
7 WSBA in order to practice law in the state of Washington and to appear in the courts of the State
8 of Washington.

9 40. Such compulsions constitute compelled speech and association in violation of
10 Plaintiff's rights under the First and Fourteenth Amendments.

11 41. The issue of whether mandatory membership in an integrated bar association violates
12 a lawyer's First and Fourteenth Amendments rights has yet to be determined. In *Harris v. Quinn*,
13 573 US ___, 134 S. Ct. 2618, 2629 (2014), Justice Samuel Alito, writing for the majority, said,
14 "[T]he Court [has] never previously held that compulsory membership in and the payment of
15 dues to an integrated bar was constitutional, and the constitutionality of such a requirement was
16 hardly a foregone conclusion" (Emphasis added.). The case of *Lathrop v. Donohue*, 367 U.S. 820
17 (1961) (a plurality decision) did not reach the question whether mandatory membership in an
18 integrated bar association was a violation of an attorney's First and Fourteenth Amendments
19 rights.

1 42. Mandatory association is permissible under the First and Fourteenth Amendments
2 only if it serves a compelling state interest that cannot be achieved through means significantly
3 less restrictive of associational freedoms. *Knox v. Service Employees International Union*, at 10, 132
4 S.Ct. 2277 (2012), citing *Roberts v. United States Jaycees*, 468 U. S. 609, 623 (1984) (“Freedom
5 of association therefore plainly presupposes a freedom not to associate.”)

6 43. Plaintiff does not wish to associate with the WSBA for many reasons.

7 44. One of those reasons has to do with the fact that the primary purpose of the WSBA is
8 the WSBA Washington Lawyer Discipline System (Discipline System or System). [Notice: The
9 concerns raised by Plaintiff concerning the System are not an attempt to get the court to make
10 decisions regarding the constitutionality of the System. The concerns are expressed to merely
11 show some reasons why Plaintiff does not wish to be compelled to me a member the WSBA.]
12 The WSBA’s major attention, its major use of bar membership resources – more than 48% – is for
13 the WSBA Washington Lawyer Discipline System. In the opinion of Plaintiff, there are
14 significant problems with the System, some of which are described as follows:

15 a. It is questionable that an association which exists to assist its members in their
16 efforts to practice law has as its primary function the object of member discipline, suspension and
17 disbarment. This, to Plaintiff, is an obvious conflict of interest on the part of the WSBA and the
18 Supreme Court.

19 b. Plaintiff also contends that WSBA Washington Lawyer Discipline System does

1 not comply with substantive due process of law guaranteed to members of the WSBA because the
2 system is controlled entirely by the WSBA – from discipline counsel prosecutors to the hearing
3 officers and discipline board members.

4 c. The Washington Supreme Court has the final say on matters of suspension and
5 disbarment, however, given the presumptions and deference given by the Court to System
6 hearing officers and the members of the Disciplinary Board, it is highly unlikely that a lawyer
7 suspended or disbarred by the System will have his case overturned.

8 d. Plaintiff does not want to associate with the WSBA and the Court regarding the
9 present System because it devotes nearly all of its disciplinary efforts on single or very small-firm
10 lawyers. This is decidedly unfair.

11 e. Plaintiff does not want to be a member of the WSBA because it has combined
12 the prosecutorial and judicial function under the authority of the WSBA.

13 f. There is no way a lawyer can have the Washington Lawyer Discipline System
14 reviewed by a federal court. The likelihood that a petition for writ of certiorari being granted is
15 almost zero. And, there is no real opportunity to have a United States District Court review the
16 System due to the impacts of the Younger Abstention Doctrine (*Younger v. Harris*, 401 U.S. 37
17 (1971)), and the Rooker Feldman Doctrine (*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and
18 *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

19 45. The attorney regulatory function could be performed by entities, which do not

1 require a lawyer's mandatory membership. Resources for such functions could be imposed by
2 order of the Supreme Court.

3 46. Accordingly, Defendants currently maintain and actively enforce a set of laws,
4 customs, practices, and policies under color of state law that deprive Plaintiff of rights secured
5 by the First and Fourteenth Amendments, and, therefore, Defendants are liable to Plaintiff
6 under 42 U.S.C. § 1983.

7 47. Plaintiff has no adequate legal remedy by which to prevent or minimize the
8 continuing irreparable harm to his constitutional rights.

9 48. Plaintiff is therefore entitled to declaratory and permanent injunctive relief. 28
10 U.S.C. §§ 2201, 2202.

11 **SECOND CLAIM FOR RELIEF**

12 **Compelled Dues for Non-Chargeable Activities**

13 **First and Fourteenth Amendments**

14 49. Plaintiff realleges and incorporates by reference each and every allegation set forth
15 above.

16 50. Plaintiff asserts that his dues may only be used for chargeable activities, that is,
17 activities must (1) be "germane" to the purposes of the institution to wit the regulation of the
18 legal profession or improving the quality of legal services ;(2) be justified by a vital policy of the
19 government which cannot be fulfilled other than by forced membership; and (3) not significantly

1 add to the burdening of free speech that is inherent government compelled speech and
2 association.

3 **The Keller Deduction**

4 51. Defendants may contend that Plaintiff cannot bring this claim because the matter is
5 resolved by the "WSBA Keller Deduction."

6 52. The Keller Deduction is described as follows:

7 In a U.S. Supreme Court case, *Keller v. State Bar of California*, the
8 Court ruled that a bar association may not use mandatory member
9 fees to support political or ideological activities that are not
10 reasonably related to the regulation of the legal profession or
11 improving the quality of legal services. The bar is required to
12 identify that portion of mandatory license fees that go to such
13 "nonchargeable" activities and establish a system whereby
14 objecting members may either deduct that portion of their fees or
15 receive a refund. This year (2015), objecting members may deduct
16 up to \$4.40 if paying \$325; \$2.20 if paying \$162.50; \$2.71 if paying
17 \$200; \$1.10 if paying \$81.25; or \$0.68 if paying \$50.

18 53. The Keller Deduction applies only to "fees to support political or ideological
19 activities that are not reasonably related to the regulation of the legal profession or improving the
20 quality of legal services."

21 54. Under *Keller v. State Bar of California*, the WSBA cannot use the compulsory
22 membership fees of objecting WSBA members for political or ideological activities that are not
23 reasonably related to the regulation of the legal profession or improving the quality of legal
24 services. These activities are considered "nonchargeable." The WSBA may use compulsory

1 membership fees for all other activities.

2 55. The Keller Deduction was limited to “those activities having political or ideological
3 coloration which are not reasonably related to the advancement” [of the] “the regulation of the
4 legal profession.” *Keller*, 496 U.S. at 16. Justice Samuel Alito, writing for the majority in said
5 this about the impact of *Harris v. Quinn* on the holding in Keller:

6 In *Keller*, we considered the constitutionality of a rule applicable to all members of an
7 “integrated” bar, i.e., “an association of attorneys in which membership and
8 dues are required as a condition of practicing law.” *Id.* 496 U. S., at 5. We held that members of
9 this bar could not be required to pay the portion of bar dues used for political or ideological
10 purposes but that they could be required to pay the portion of the dues used for activities
11 connected with proposing ethical codes and disciplining bar members. *Id.*, at 14.

12
13 *Harris v. Quinn*, 134 U.S. ___ at ___ 134 S.Ct. 2618, at 2644 ___ (2014).

14 56. *Keller* used *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977) to reach the
15 foregoing rule. *Abood* cannot be used in this case because it is necessary to determine exactly
16 what falls into the category of non-chargeable activities.

17 57. Furthermore, even if *Abood* is used, the non-chargeable activities can be only for
18 those activities which, as Justice Samuel Alito said are the “ activities connected with proposing
19 ethical codes and disciplining bar members.”

20 58. Dues relating to “improving the quality of legal services” have not been tested or
21 described at the present time.

22 59. As to these, *Abood* should not apply. In *Harris* the court examined and criticized the

1 use of *Abood*. One of the strongest criticisms was this:

2 *Abood* does not seem to have anticipated the magnitude of the practical
3 administrative problems that would result in attempting to classify public-sector
4 union expenditures as either "chargeable" (in *Abood's* terms, expenditures
5 for "collective-bargaining, contract administration, and grievance-adjustment
6 purposes," *id.*, at 232) or nonchargeable (i.e., expenditures for political or
7 ideological purposes, *Id.*, at 236). In the years since *Abood*, the Court has
8 struggled repeatedly with this issue. See *Ellis v. Railway Clerks*, 466 U. S. 435
9 (1984); *Teachers v. Hudson*, 475 U. S. 292 (1986); *Lehnert v. Ferris Faculty Assn.*,
10 500 U. S. 507 (1991); *Locke v. Karass*, 555 U. S. 207 (2009). In *Lehnert*, the Court
11 held that "chargeable activities must (1) be 'germane' to collective-bargaining
12 activity; (2) be justified by the government's vital policy interest in labor peace
13 and avoiding 'free riders'; and (3) not significantly add to the burdening of free
14 speech that is inherent in the allowance of an agency or union shop." 500 U. S., at
15 519. But as noted in JUSTICE SCALIA's dissent in that case, "each one of the
16 three 'prongs' of the test involves a substantial judgment call (What is 'germane'?
17 What is 'justified'? What is a 'significant' additional burden)." *Id.*, at 551 (opinion
18 concurring in judgment in part and dissenting in part).

19
20 *Harris V. Quinn*, 134 S.Ct. at 2632-33 (2014).

21 60. The First Amendment protects not only the freedom to associate, but the freedom
22 not to associate; and it protects not only the freedom of speech, but the freedom to avoid
23 subsidizing group speech with which an individual disagrees. *Knox v. Service Employees Intern.*
24 *Union*, 132 U.S. _____, 132 S. Ct. 2277, 2288-89 (2012); *Kingstad v. State Bar of Wisconsin*, 622
25 F.3d 708, 712- 13 (7th Cir. 2010).

26 61. Unless specific procedural protections are in place, an individual's rights against
27 compelled speech and compelled association are violated when a mandatory bar uses mandatory
28 member dues for purposes not germane to regulating the legal profession or improving the

1 quality of legal services. *Keller*, 496 U.S. at 13-14; *Kingstad*, 622 F.3d at 712-13; *see also Knox*, 132
2 S. Ct. at 2295-96; *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977).

3 62. The failure to provide such procedural protections in the first instance violates bar
4 members' Fourteenth Amendment right to procedural due process. *Hudson v. Chicago Teachers*
5 *Union Local No. 1*, 743 F.2d 1187, 1192-93 (7th Cir. 1984) *aff'd sub nom. Chicago Teachers Union,*
6 *Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

7 63. Any activities that are not "germane" to the bar association's dual purposes of
8 regulating the legal profession and improving the quality of legal services, including political and
9 ideological activities, are "non-chargeable activities." *Keller*, 496 U.S. at 14; *see also Kingstad*, 622
10 F.3d at 718-19; *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 302-03 (1st
11 4:12-cv-03214-RGK Doc # 1 Filed: 10/10/12 Page 6 of 22 - Page ID # 6 Cir. 2000).

12 64. For the WSBA to cause dues to be paid for its activities the activities must be
13 chargeable activities and must (1) be "germane" to purposes of the WSBA; (2) be justified by the
14 government's vital policy interest in regulating attorneys; and (3) not significantly add to the
15 burdening of free speech. *In re Petition for Rule to Create Vol. State Bar Assn.*, 286 Neb. 1018, 1032
16 - 1033, 841 N.W.2d 167 (2013).

17 65. In the past, *Abood v. Detroit Board of Education*, *supra*, has been used to determine
18 what a non-consenting member should be rebated by the WSBA for political or ideological
19 speech.

1 66. *Aboud* does not apply in this case as to the determination of what are the
2 non-chargeable activities of the WSBA which use dues compelled by WSBA against Plaintiff's
3 interests.

4 67. When mandatory member dues are used for non-chargeable activities, the bar
5 association is required to establish procedures that satisfy three requirements: (a) proper notice
6 to members, including an adequate explanation of the calculations of all non-chargeable activities;
7 (b) a reasonably prompt decision by an impartial decision maker once a member makes an
8 objection to the manner in which his or her mandatory member dues are being spent; and (c) an
9 escrow for the amounts reasonably in dispute while such challenges are pending. *Keller*, 496 U.S.
10 at 14; *Hudson*, 475 U.S. at 306-08.

11 68. Defendants bear the burden of proving that expenditures are germane and chargeable.
12 *Hudson*, 475 U.S. at 306; *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991)
13 (emphasizing that, "as always, the union bears the burden of proving the proportion of chargeable
14 expenses to total expenses").

15 69. The WSBA Defendants use membership dues to pay for a number of activities which
16 are not for purposes of the WSBA's regulating the legal profession and improving the quality of
17 legal services. These non-germane activities include, but are not limited to, the following:

18 a. Supreme Court mandated activities and boards for which the Supreme Court
19 sets the mission of these activities and boards, but provides no funding or staffing for them.

1 Instead, the Court expects funding and staffing to be provided by the WSBA. These boards are
2 as follows:

- 3 i. Disciplinary Board;
- 4 ii. Mandatory Continuing Legal Education (MCLE) Board;
- 5 iii. Limited Practice Board;
- 6 iv. Access to Justice (ATJ) Board;
- 7 v. Practice of Law Board; and
- 8 vi. Limited License Legal Technician (LLLT) Board.

9 b. In *Keller v. State Bar of California*, the Court ruled that a bar association may
10 not use mandatory member fees to support political or ideological activities that are not
11 reasonably related to the regulation of the legal profession or improving the quality of legal
12 services. The bar is required to identify that portion of mandatory license fees that go to such
13 "nonchargeable" activities and establish a system whereby objecting members may either deduct
14 that portion of their fees or receive a refund. This year (2015), objecting members may deduct up
15 to \$4.40 if paying \$325; \$2.20 if paying \$162.50; \$2.71 if paying \$200; \$1.10 if paying \$81.25; or
16 \$0.68 if paying \$50.

- 17 c. Mindfulness programs.
- 18 d. The WSBA NWLawyer.
- 19 e. Conventions.

1 f. Other programs and activities which will become known and understood after
2 the Plaintiff has had the opportunity to audit the various line item budget expenditures to
3 determine whether and to what extent the funds allocated to a line item actually germane to
4 regulating the legal profession or improving the quality of legal services.

5 70. Accordingly, Defendants currently maintain and actively enforce a set of laws,
6 customs, practices, and policies under color of state law that deprive Plaintiff of rights, privileges
7 and/or immunities secured by the First and Fourteenth Amendments, and, therefore,
8 Defendants are liable to Plaintiff under 42 U.S.C. § 1983.

9 71. Plaintiff has no adequate legal remedy by which to prevent or minimize the continuing
10 irreparable harm to his constitutional rights.

11 72. Plaintiff is therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C.
12 §§ 2201, 2202.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff, Stephen K. Eugster, respectfully requests, against the
15 Defendants, the following relief:

16 1. Entry of judgment declaring that Plaintiff has First Amendment right against
17 compelled speech and compelled association, and therefore has a constitutional right to not to be
18 a member of the WSBA in order to practice law in the State of Washington;

19 2. Entry of judgment declaring that Plaintiff has First Amendment rights against

1 compelled speech and compelled association, and therefore has a constitutional right to prevent
2 Defendants from using his member dues on non-chargeable activities of the WSBA;

3 3. Entry of judgment declaring that the Washington State Bar Association is
4 unconstitutional in violation of the First and Fourteenth Amendments because it compels its
5 members to pay dues for purposes which are not germane to the ethics and regulatory purposes
6 of an integrated bar association;

7 4. Award Plaintiff his costs, expenses, and attorneys' fees in accordance with law,
8 including 42 U.S.C. § 1988; and

9 5. Award Plaintiff such further relief as just and equitable.

10 DATED May 18, 2015.

11 Respectfully submitted,

12 EUGSTER LAW OFFICE PSC
13

14 s/ Stephen K. Eugster
15

16 Stephen Kerr Eugster, WSBA # 2003
17 2418 West Pacific Avenue
18 Spokane, Washington 99201-6422
19
20

21

22

STEPHEN KERR EUGSTER, Plaintiff,
v.
WASHINGTON STATE BAR ASSOCIATION (WSBA), et al., Defendants.

CASE NO. C15-0375JLR

**UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

September 2, 2015

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO
DISMISS AND STRIKING PLAINTIFF'S SURREPLY**

I. INTRODUCTION

Before the court is a motion for judgment on the pleadings (Jud. Mot. (Dkt. # 9)) by Defendants Chief Justice Barbara Madsen, Associate Chief Justice Charles Johnson, and Justices Sheryl Gordon McCloud, Charles Wiggins, Steven Gonzalez, Mary Yu, Mary Fairhurst, Susan Owens, and Debra Stephens, all of whom are of the Supreme Court of the State of Washington (collectively, "Judicial Defendants"). Also before the court is a motion to dismiss (WSBA Mot. (Dkt. # 10)) by Defendants Washington State

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Bar Association ("WSBA"), President Anthony Gipe, President-elect William D. Hyslop, Immediate Past President Patrick A. Palace, and Executive Director Paula Littlewood, all of whom are of the WSBA (collectively, "WSBA Defendants"). Mr. Eugster opposes both motions. (Resp. (Dkt. # 14).)¹

Having reviewed the submissions of the parties, the relevant portions of the record, and the applicable law,² the court GRANTS in part and DENIES in part both motions. The court dismisses with prejudice Mr. Eugster's claim regarding compulsory membership in the WSBA, without leave to amend. The court also dismisses Mr. Eugster's claim regarding misuse of compulsory bar dues but grants him leave to file an amended complaint with respect to that claim, except that the WSBA is dismissed with prejudice as a defendant to that claim. Mr. Eugster has the court's leave to amend his complaint in a manner that cures the deficiencies identified herein within ten (10) days of the entry of this order. Failure to do so will result in dismissal with prejudice of that claim as well.

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II. BACKGROUND

Plaintiff Stephen K. Eugster is a licensed attorney and a member of the WSBA. (Am. Compl. (Dkt. # 13) ¶ 11). The WSBA is an "integrated" bar association, meaning membership



Under Rule 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). However, because Judicial Defendants had not yet filed an answer in the case, the pleadings were not closed and filing a motion for judgment on the pleadings was premature. *See Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005). Viewing Judicial Defendants' Rule 12(c) motion as such, the court would have no choice but to deny the motion. *Id.*

The court instead construes the Rule 12(c) motion as a Rule 12(b)(6) motion. District courts in this circuit can construe improperly filed motions to dismiss as motions for judgment on the pleadings. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). In this case the opposite occurred—Judicial Defendants improperly filed a motion for judgment on the pleadings—but the court sees no reason not to construe Judicial Defendants' motion as one to dismiss under Rule 12(b)(6). Although it is rarer, this court and others in the Ninth Circuit have recast improper Rule 12(c) motions as Rule 12(b)(6) motions. *See Young v. Washington*, No. Co6-1687JCC, 2008 WL 2705587, at *3 (W.D. Wash. July 8, 2008) ("Because the standard applied to decide a Rule 12(c) motion is the same as the standard used in a Rule 12(b)(6) motion, no prejudice to any party results from treating a Rule 12(c) motion as a 12(b)(6) motion.") (internal citations omitted), *aff'd in part, vacated in part*, 374 Fed. App'x 746 (9th Cir. 2010) (vacating only that the

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case was dismissed with prejudice); *Young v. Spokane Cty.*, No. 14-cv-98-RMP, 2014 WL 2893260, at *1 (E.D. Wash. June 25, 2014); *Skinner v. Mountain Lion Acquisitions, Inc.*, No. 13-cv-00704 NC, 2014 WL 3853424, at *3 (N.D. Cal. Aug. 1, 2014); *Spring Telephony PCS, L.P. v. Cty. of San Diego*, 311 F. Supp. 2d 898, 902-03 (S.D. Cal. 2004). The thrust of Judicial Defendants' motion is that Mr. Eugster has failed to state a claim under which relief can be granted. (*See* Jud. Mot.) Moreover, the same standard governs a Rule 12(c) motion and a Rule 12(b)(6) motion. *See Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). In sum, no party suffers prejudice from recasting the mislabeled Judicial Defendants' motion. Thus, because it is procedurally defective as a Rule 12(c) motion, the court construes Judicial Defendants' motion for judgment on the pleadings as a Rule 12(b)(6) motion to dismiss for failure to state a claim.

Motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) test the legal sufficiency of a claim. *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Dismissal for failure to state a claim "is proper if there is a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Conservation Force*, 646 F.3d at 1242. In considering a motion to dismiss, a court must accept all well-pleaded allegations of material fact as true and draw all reasonable inferences in favor of the plaintiff. *See Wyler Summit P'ship v.*

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Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998). A court, however, need not accept as true a legal conclusion presented as a factual allegation. *Iqbal*, 556 U.S. at 678. A court may consider only the pleadings, documents attached to or incorporated by reference in the pleadings, and matters of judicial notice. *Ritchie*, 342 F.3d at 908.

B. Standing

Article III standing is a prerequisite to this court's capacity to make a substantive determination in this case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998). Accordingly, the court first analyzes Judicial Defendants' motion to dismiss for lack of standing under Rule 12(b)(1). To demonstrate that he has standing to sue for declaratory and injunctive relief, Mr. Eugster must demonstrate probability of future injury, causation, and redressability. *Lujan*, 504 U.S. at 560-61; *San Diego Cty.*, 98 F.3d at 1126.

Judicial Defendants argue that Mr. Eugster lacks standing to challenge the constitutionality of Washington's attorney disciplinary system because there is no "imminent prospect of harm to Eugster" from that system. (Jud. Mot. at 9-11.) This may be accurate—indeed, Mr. Eugster's direct challenges to the WSBA's attorney disciplinary system have previously been dismissed for lack of standing, *Eugster v. Wash. State Bar Ass'n*, Case No. 09-CV-0357SMM, 2010 WL 2926237, at *11 (E.D. Wash. July 23, 2010)—but it is irrelevant. Mr. Eugster does not challenge the attorney disciplinary system in this case; rather, he argues that compulsory WSBA membership and dues violate his constitutional freedoms of association and speech. (*See generally* Am. Compl.) As Mr. Eugster clarifies in his amended complaint, disdain for the structure

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of the disciplinary system is merely an example of the harm Mr. Eugster alleges is caused by compelled membership in the WSBA. (*Id.* ¶ 44.)

Mr. Eugster successfully demonstrates a genuine threat of imminent future harm. *See San Diego Cty.*, 98 F.3d at 1126. The WSBA uncontrovertibly assesses compulsory bar dues and requires membership in order to practice law in Washington. RCW 2.48.130, .170. These restrict and compel speech and association in ways that Mr. Eugster alleges are unconstitutional. He has thus alleged concrete and particularized harm. *Lujan*, 504 U.S. at 560. Moreover, these alleged constitutional violations are sure to persist unless the law is changed or enforcement is enjoined. *San Diego Cty.*, 98 F.3d at 1126. This satisfies the injury element of standing.

The parties do not dispute that enforcement of the State Bar Act causes the alleged burden on Mr. Eugster's constitutional rights, and that enjoining its enforcement would redress those alleged constitutional harms. This establishes causation and redressability, the final two elements of standing. *Massachusetts v. E.P.A.*, 549 U.S. at 540. Accordingly, the

court finds that Mr. Eugster has standing to sue in this case, and denies that grounds for dismissal.

C. Failure to State a Claim

Judicial Defendants and WSBA Defendants (collectively, "Defendants") move to dismiss for failure to state a claim. (See Jud. Mot.; WSBA Mot.) Defendants contend that compelled state bar membership is constitutional under binding case law in the Ninth Circuit and that Mr. Eugster has failed to point to any fact supporting his allegation that

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the WSBA misuses mandatory dues; thus, Defendants contend, they are entitled to dismissal on both of the purported constitutional violations. The court agrees.

1. Compulsory Membership

Mr. Eugster claims that mandatory membership in the WSBA "constitute[s] compelled speech and association" in violation of his First and Fourteenth Amendment rights. (Am. Compl. ¶ 40.) Acknowledging that this matter has long been considered settled under Supreme Court and Ninth Circuit precedent, Mr. Eugster argues that *Harris v. Quinn*, --- U.S. ---, 134 S. Ct. 2618 (2014), upended more than a half-century of that law. (Am. Compl. ¶ 41.) Specifically, Mr. Eugster references a passage written by the *Harris* majority, which he includes in his amended complaint as follows:

Justice Samuel Alito, writing for the majority, said, "[T]he Court [has] never previously held that compulsory membership in and the payment of dues to an integrated bar was constitutional, and the constitutionality of such a requirement was hardly a foregone conclusion" (Emphasis added.).

(*Id.* ¶ 41 (alterations, emphasis, and errors in original).) This quotation grossly misstates the Supreme Court's language and meaning. Justice Alito's actual language is, "[T]he Court *had* never previously held" as much. *Harris*, 134 S. Ct. at 2629 (emphasis added). In the context of the opinion, the meaning of this is: "[When *Hanson* was decided in 1956,] the Court had never previously held [as much.]" *Harris*, 134 S. Ct. at 2629 (citing *Railway Emps.' Dept. v. Hanson*, 351 U.S. 225, 238 (1956)). In the almost sixty years that have passed since the *Hanson* decision, however, the Supreme Court and Ninth Circuit have held as much several times, and in no uncertain terms. In other words, by substituting "has" for "had," Mr. Eugster misconstrued the clear meaning of the opinion.

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Notwithstanding Mr. Eugster's mischaracterization of case law, several binding decisions govern his case. In *Lathrop v. Donohue*, the Supreme Court upheld Wisconsin's integrated state bar on the bases that (1) the only "compelled association" was the payment of dues, which was insufficient on its own to comprise a constitutional violation, and (2) the

purpose of integrating the bar was to "promote high standards of practice and the economical and speedy enforcement of legal rights." 367 U.S. 820, 827-28, 832-33 (1961) (quoting *In re: Integration of the Bar*, 77 N.W.2d 602, 603 (Wis. 1956)). Although *Lathrop* was a plurality opinion, *Keller v. State Bar of California* clarified that "lawyers admitted to practice in the State may be required to join and pay dues to the State Bar." 496 U.S. 1, 4 (1990). "[T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13. Accordingly, the Ninth Circuit has held that "a state may constitutionally condition the right of its attorneys to practice law upon the payment of membership dues to an integrated bar." *O'Connor v. State of Nev.*, 27 F.3d 357, 361 (9th Cir. 1994) (citing *Lathrop*, 367 U.S. at 843; *Keller*, 496 U.S. at 4); see also *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042 (9th Cir. 2002) (treating it as a given that integrated bars can charge mandatory dues), *Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1177 (9th Cir. 1999) (treating *Lathrop* as holding that "the regulatory function of the bar justified compelled membership").

Mr. Eugster argues, however, that the plurality decision in *Lathrop*, the subsequent clarification in *Keller*, and those cases' Ninth Circuit progeny are all misunderstood. (Resp. at 6-17.) He contends that *Keller's* declaration that "the compelled association

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and integrated bar are justified by the State's interest" is "wrong" because "earlier in the opinion the court made it clear that *Lathrop* was a plurality decision." (Resp. at 10.) The conclusion one must reach, according to Mr. Eugster, is that "the Court in *Keller* did not decide the issue of compulsory membership in a bar association." (*Id.*) This argument is nonsensical. To the extent the holding of the split *Lathrop* court was unclear, the unanimous Supreme Court in *Keller* had every right to clarify it in manner that binds this court and the Ninth Circuit. Put differently, even if *Lathrop* had never been decided, *Keller* binds this court to the determination that "lawyers admitted to practice in the State may be required to join and pay dues to the State Bar." *Keller*, 496 U.S. at 4. Thus, absent a state bar that differs appreciably from those at issue in *Lathrop* and *Keller*, compelled membership in a state bar association is constitutional. *Morrow*, 188 F.3d at 1177. Mr. Eugster has provided no such differentiation of the WSBA. *Lathrop* and *Keller* control his claim.

The court therefore determines Mr. Eugster has failed to state a claim under which he is entitled to relief. The court accordingly dismisses his claim regarding compulsory membership in the WSBA.

2. Compulsory Dues

Mr. Eugster also contends that the WSBA infringes upon his First and Fourteenth Amendment rights by spending compulsory dues on improper activities without providing adequate procedure to evaluate and challenge that spending. (Am. Compl. ¶¶ 49-72.) Compulsory membership in a state bar association is justified by the state's interest in "regulating the legal profession and improving the quality of legal services."

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Keller, 496 U.S. at 13. A state bar association is accordingly only constitutionally entitled to use such dues to fund activities "germane to those goals." *Id.* at 14. Conversely, state bar associations cannot use such mandatory dues to fund "those activities having political or ideological coloration which are not reasonably related to the advancement of such goals." *Keller*, 496 U.S. at 15. The Supreme Court concedes that differentiating between proper spending and "political or ideological" spending will be difficult at times. *Id.*

The WSBA has established a procedure called the "Keller Deduction," by which members choose whether to allow their bar dues to be used for "nonchargeable"—in other words, political or ideological—activities. *Keller Compliance Website*. The procedure for calculation and objection employed by the WSBA is based on the procedures for labor unions that the Supreme Court approved in *Chicago Teacher's Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986). In that case, the Court required a labor union's agency fees to include "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310. The WSBA provides its members annual notice of the fee, a description of how it is calculated, and the ability to receive either a refund or a deduction for the portion of dues used for nonchargeable purposes. *Keller Compliance Website*. A neutral arbitrator, appointed by the Chief Justice of the Washington Supreme Court, hears timely challenges to that amount. *Id.* In the

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meantime, parties retain disputed funds. *Id.* Parties can present evidence and argument at the arbitration hearing, after which the arbitrator issues a written, binding ruling. *Id.*

All newly admitted members are provided notice of this procedure, and it is easily accessed and prevalently displayed on the WSBA's website. *Id.* The WSBA uses the prior year's legislative budget as a proxy to calculate what is "not reasonably related to the regulation of the legal profession or improving the quality of legal services," and thus subject to exemption. *Id.* This amount becomes the current year deduction for WSBA members that choose not to pay nonchargeable moneys. *Id.* The Supreme Court has validated this prior-year calculation process in the union dues context. *See Hudson*, 475 U.S. at 307 n.18. In other words, the WSBA provides robust procedural safeguards to ensure compliance with *Keller*, many of them responding directly to Supreme Court precedent.

Aside from procedure, Mr. Eugster identifies several activities that the WSBA funds without reimbursement, which he contends should be classified as nonchargeable under *Keller*. (Am. Compl. ¶ 69.) Importantly, his bare assertion that the activities are nonchargeable is legally conclusory and thus insufficient; he must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. Applying that standard to this case, Mr.

Eugster must plead facts that give rise to a reasonable inference that the unreimbursed activities paid for with mandatory dues are unrelated to "regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13. He fails to do so in his amended complaint.

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The first activity he specifies is "Supreme Court mandated activities and boards [with] funding and staffing to be provided by the WSBA," including the disciplinary board, the mandatory continuing legal education board, the limited practice board, the access to justice board, the practice of law board, and the limited license legal technician board. (*Id.* ¶ 69(a).) All of these boards appear geared toward regulating the profession and improving the quality of legal services, and there is no suggestion that their names are misleading. Nowhere does Mr. Eugster provide a description of these boards or a rationale as to why they should be deemed nonchargeable. (*See generally id.*) The other specific activities Mr. Eugster lists,⁵ again without any explanation as to why they should be nonchargeable, are "mindfulness programs, the WSBA NWLawyer, and conventions." (*Id.* ¶ 69(c)-(e).) It strains credulity to argue that these undertakings are not geared toward regulating the legal profession or improving the quality of legal services. *See Keller*, 496 U.S. at 13. Of course, with factual allegations that these names are misleading as to the programs' true purpose, Mr. Eugster could overcome dismissal. *Iqbal*, 556 U.S. at 678. Instead, Mr. Eugster makes no argument that any of the underlying activities are nonchargeable, nor can the court reasonably infer anything of the sort from the mere mention of these three WSBA activities. This is insufficient to avoid dismissal. *See Iqbal*, 556 U.S. at 678. Finally, Mr. Eugster lists as nonchargeable

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"[o]ther programs and activities which will become known and understood" after he has the chance to audit a WSBA budget. (Am. Compl. ¶ 69(f).) Given that he has failed to specify facts that give rise to a plausible inference that any of the WSBA activities he lists are nonchargeable, this final catchall amounts to an aspirational assertion. The "absence of sufficient facts alleged under a cognizable legal theory" leads the court to conclude that Mr. Eugster's claim fails as a matter of law. *Conservation Force*, 646 F.3d at 1242.

In sum, Mr. Eugster alleges no facts supporting an inference that the WSBA's procedural safeguards and substantive definition of chargeable dues infringes on his constitutional rights to free association and speech. The court therefore determines Mr. Eugster has failed to state a claim under which he is entitled to relief.

D. Leave to Amend

As a general rule, when a court grants a motion to dismiss, the court should dismiss the complaint with leave to amend. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52 (9th Cir. 2003) (citing Fed. R. Civ. P. 15(a)). "Dismissal with prejudice and without

leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Id.* at 1052. In determining whether dismissal without leave to amend is appropriate, courts consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of

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amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Of these factors, "prejudice to the opposing party . . . carries the greatest weight."⁶ *Eminence Capital*, 316 F.3d at 1052.

The court concludes that amendment of Mr. Eugster's complaint regarding mandatory bar membership would be futile, and thus dismisses that claim with prejudice. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."). Defendants' motions put Mr. Eugster on notice of the legal deficiencies in his initial complaint, and in response he filed the operative, amended complaint that the court now considers. (*Compare* Compl. with Am. Compl.) With respect to his claim regarding compelled membership in the Washington bar, Mr. Eugster's amended complaint suffers the same deficiencies that Defendants identified—it misinterprets and misconstrues binding precedent that governs the court's decision in this case. *See supra* Part III.C.1. This continued reliance on a flawed understanding of case law illustrates the futility of the claim and Mr. Eugster's inability to cure it. Put simply, mandatory membership in a state bar association is constitutional. *See Keller*, 496 U.S. at 4. Unequivocal precedent makes it "clear . . . that the [claim] could not be saved by amendment." *Eminence Capital*, 316 F.3d at 1052.

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Accordingly, the court dismisses with prejudice Mr. Eugster's claim that Washington's integrated bar is unconstitutional. *See Bonin*, 59 F.3d at 845.

On the other hand, the court grants Mr. Eugster leave to amend his claim regarding nonchargeable bar dues. His initial complaint included no factual allegations about mis-categorized nonchargeable activities. (*See* Compl.) Both Judicial Defendants (Jud. Mot at 9), and WSBA Defendants (WSBA Mot. at 10), indicate this lack of factual specificity in their motions to dismiss. In response, Mr. Eugster amended his complaint to include a section purporting to designate specific unreimbursed WSBA spending that violates *Keller*. (*See* Am. Compl. ¶ 69.) These allegations attempt to address the lack of specificity in his original complaint, as identified in Defendants' motions. (*See id.*) Although the court determines these allegations in the amended complaint are insufficient, *see supra* Part III.C.2., the factual development since the original complaint leads the court to conclude that it is conceivable that Mr. Eugster could re-amend the amended complaint to contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Thus, the court does not find amendment

futile, nor does it see any undue delay, bad faith, or undue prejudice present. *See Foman*, 371 U.S. at 182. Accordingly, the court dismisses Mr. Schreib's constitutional claim regarding compulsory bar dues but grants him leave to amend.

E. Immunity

Even if Mr. Eugster had succeeded in stating a claim under which relief could be granted, or succeeds in doing so upon re-amendment of his complaint, the WSBA is

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immune from suit. The Eleventh Amendment bars suits against a state and its agencies. *See Lake Cty. Est, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400-01 (1979). The Ninth Circuit treats state bar associations as an "arm of the state" and thus immune from suit. *Ginter v. State Bar of Nev.*, 625 F.2d 829, 830 (9th Cir. 1980); *see also Hirsh v. Justices of the Supreme Court of the State of Cal.*, 67 F.3d 708, 715 (9th Cir. 1995); *Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985). The Ninth Circuit's reason for treating bar associations as state agencies is that they operate as the "investigative arm" of the state high court. *O'Connor*, 686 F.2d at 750. There is nothing on the record to meaningfully differentiate Washington's bar association from those that the Ninth Circuit has expressly declared immune under the Eleventh Amendment. *See, e.g., id.* (Nevada); *Hirsh*, 67 F.3d at 715 (California). Indeed, its power to regulate and punish lawyers makes clear that the WSBA does operate as the "investigative arm" of the Washington Supreme Court. *See O'Connor*, 686 F.2d at 750. Thus, as a federal court in this state has already apprised Mr. Eugster, the WSBA is a state agency immunized from suit by the Eleventh Amendment. *See Eugster*, 2010 WL 2926237, at *8. Accordingly, Mr. Eugster's claims against the WSBA are dismissed with prejudice.⁷

IV. CONCLUSION

For the foregoing reasons, the court GRANTS in part Judicial Defendants' motion to dismiss (Dkt. # 9) and WSBA Defendants' motion to dismiss (Dkt. # 10). Mr. Eugster's claim regarding mandatory bar membership is DISMISSED WITH

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PREJUDICE with respect to all defendants. His claim regarding mandatory bar dues is DISMISSED WITH PREJUDICE with respect to the WSBA and DISMISSED WITHOUT PREJUDICE with respect to all other defendants. The court GRANTS Mr. Eugster leave to amend his complaint regarding mandatory bar dues within 10 (ten) days of this order. Failure to amend in that time will result in dismissal with prejudice. The court STRIKES Mr. Eugster's surreply (Dkt. # 18).

Dated this 2nd day of September, 2015.

/s/ _____

JAMES

L.

ROBART

United States District Judge

Footnotes:

¹ Mr. Eugster has also filed a surreply (Dkt. # 18-1). A surreply "must be filed within five days of the filing of the reply brief," "shall be strictly limited to" a request to strike material in the reply brief, and "shall not exceed three pages." Local Rules W.D. Wash. LCR 7(g)(2)-(3). Mr. Eugster filed his surreply 11 days after Defendants' reply briefs. (*See* Surreply.) It contains argument only about the substantive merits of the case and totals 15 pages. (*See id.*) Mr. Eugster's surreply is thus in complete contravention of the local rules, and the court STRIKES it. The court hereby warns Mr. Eugster that further disregard for the local rules may result in sanctions.

² Mr. Eugster requests oral argument. (Resp. at 1.) The court deems oral argument to be unnecessary for the disposition of these motions. *See* Local Rules W.D. Wash. LCR 7(b)(4).

³ At the motion to dismiss stage, the court may properly treat a website quoted and cited in the complaint as incorporated by reference. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). In his first complaint, Mr. Eugster cites to and quotes extensively from the Keller Compliance Website to make the argument that the WSBA uses mandatory fees in contravention of the Constitution. (*See* Compl. (Dkt. # 1) ¶ 48.) In the operative complaint, Mr. Eugster retains the quoted language from the Keller Compliance Website but removes the citation. (*See* Am. Compl. ¶ 52.) Even if the court were inclined to let this omission of citation dictate what it can reference at this stage, any webpages from which Mr. Eugster "directly quoted" can be treated as incorporated. *Daniels-Hall*, 629 F.3d at 998. Because the direct quote from the Keller Compliance Website remains in the amended complaint—citation or not—the court deems the Keller Compliance Website incorporated by reference in the amended complaint, and can therefore consider it at this stage. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

⁴ Although Judicial Defendants and WSBA Defendants filed their motions before Mr. Eugster filed his amended complaint, the court can properly consider the motions as applied to his amended complaint because Mr. Eugster's "claims, factual allegations, and legal arguments did not change in any material way" from his first complaint to his amended complaint. *McQuiston v. City of L.A.*, 564 Fed. App'x 303, 305 (9th Cir. 2014). It would be a mere formality, and a waste of resources, to require re-filing of both motions simply to change reference to Mr. Eugster's amended complaint. *See id.*

⁵ In Mr. Eugster's amended complaint, the second item in the list of allegedly nonchargeable activities provides the language from the WSBA's website regarding the Keller Deduction. (Am. Compl. ¶ 69(b).) Because Mr. Eugster cites this information earlier (*id.* ¶

52), and it is a complete nonsequitur, the court takes this to be a typographical error and proceeds to analyze the rest of the purported nonchargeable programs.

⁶ The Ninth Circuit has further instructed that a district court should not dismiss a pro se complaint without leave to amend unless "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (quoting *Schucker v. Rockwood*, 846 F.2d 1202, 1203 (9th Cir. 1988)). However, "a pro se lawyer is entitled to no special consideration." *Godlove v. Bamberger, Foreman, Oswald, & Hahn*, 903 F.2d 1145, 1148 (7th Cir. 1990). The court accordingly treats Mr. Eugster's pleadings with no special solicitousness.

⁷ This means that although Mr. Eugster has the court's leave to amend his complaint as it relates to nonchargeable bar dues, the WSBA is dismissed with prejudice as a party to that claim.

STEPHEN KERR EUGSTER, Plaintiff,
v.
PAULA LITTLEWOOD, Executive Director, Washington State Bar Association
(WSBA),
in her official capacity; DOUGLAS J. ENDE, Director of the WSBA Office of
Disciplinary Counsel, in his official capacity; Francesca D'Angelo,
Disciplinary Counsel, WSBA Office of Disciplinary Counsel,
in her official capacity, Defendants.

NO: 2:15-CV-0352-TOR

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WASHINGTON

June 29, 2016

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

BEFORE THE COURT is Defendants' Motion to Dismiss (ECF No. 16). This matter was submitted for consideration without oral argument. Plaintiff, a licensed attorney in the state of Washington, is proceeding *pro se*. Defendants are represented by Paul J. Lawrence, Jessica A. Skelton, and Taki V. Flevaris. The

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Court—having reviewed the briefing, the record, and files therein—is fully informed.

BACKGROUND

On December 22, 2015, Plaintiff filed suit against Defendants, officials of the Washington State Bar Association ("WSBA"), alleging violation of his constitutional rights. ECF No. 1; *see* ECF No. 8 (amended complaint). Plaintiff's "Amended and Restated Complaint for Declaratory Relief and Injunction" asserts violations of his civil rights as "protected by 42 U.S.C. § 1983, the First and Fifth Amendments to the United States Constitution, and Washington State Constitution Art. I, Section 1 and Section 2." ECF No. 8 at 2. Specifically, Counts One and Two of the amended complaint seek a declaratory judgment that the WSBA Washington Lawyer System is unconstitutional because the Discipline System (1) "Does Not Pass Strict Scrutiny;" *see id.* at ¶¶ 160-73, and (2) "violates procedural due process," *see id.* at ¶¶ 174-89. Additionally, Count Three seeks to enjoin Defendants "from using the WSBA Lawyer Discipline System" against Plaintiff. *See id.* at ¶¶ 190-91.

Defendants' motion asserts Plaintiff's claims should be dismissed (1) due to a lack of standing; (2) pursuant to the doctrine of res judicata; and (3) for failure to state a claim upon which relief can be granted. ECF No. 16 at 2. Defendants further argue that the Court should dismiss Plaintiff's entire complaint under the

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Younger abstention doctrine to avoid interference with ongoing bar proceedings against Plaintiff. *See id.* at 17-20.

FACTS¹

Plaintiff is a licensed attorney and has been a member of the WSBA since 1970. ECF No. 8 at ¶ 17. Defendants are employed by the WSBA. *Id.* at ¶ 12. Specifically, Paula Littlewood is the Executive Director; Douglas Ende is Chief Disciplinary Counsel; and Francesca D'Angelo is Disciplinary Counsel. *Id.* at ¶¶ 13-15.

There are a number of prior cases between Plaintiff and the WSBA and its officers. The first appears to have occurred in 2005 when the WSBA charged Plaintiff with numerous counts of attorney misconduct. *See In re Disciplinary Proceeding Against Eugster*, 166 Wash.2d 293, 307 (2009). The WSBA Disciplinary Board unanimously recommended Plaintiff be disbarred, *id.* at 311,

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but, in June 2009, five justices of the Washington Supreme Court decided instead to suspend Plaintiff from the practice of law for 18 months. *Id.* at 327-28.

In May 2006, in an unrelated matter, another WSBA grievance was filed against Plaintiff. *See* E.D. Wash, Case No. 2:09-CV-0357-SMM, ECF No. 30 at 2. After the Washington Supreme Court entered its June 2009 decision in the other matter described above, the WSBA conducted an investigation and on December 21, 2009, dismissed the May 2006 grievance. *Id.*

In the meantime, on December 2, 2009, Plaintiff filed suit against the WSBA, WSBA Board of Governors, and Washington Supreme Court Justices, alleging that the WSBA's attorney discipline system as it stands, and as applied, violates Plaintiff's due process rights under the Fifth and Fourteenth Amendments. E.D. Wash, Case No. 2:09-CV-0357-SMM, ECF No. 1. The district court dismissed the matter after finding Plaintiff lacked Article III standing. *Id.*, ECF No. 30 at 18. The Ninth Circuit affirmed. *Eugster v. Washington State Bar Ass'n*, 474 Fed. App'x 624 (9th Cir. 2012).

On September 23, 2014, another WSBA grievance was filed against Plaintiff. ECF No. 8 at ¶ 123. This grievance was filed by Cheryl Rampley, the niece-in-law of a client who retained Plaintiff two weeks prior. *Id.* at ¶¶ 122-23.

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On November 21, 2014, Plaintiff alleges he received a letter from Kevin Bank, Managing Disciplinary Counsel, stating he had "been assigned to complete this investigation," regarding the Rampley grievance. *Id.* at ¶ 127.

On March 12, 2015, Plaintiff filed another lawsuit against the WSBA, various officers, and the justices of the Washington Supreme Court, this time in the Western District of Washington. *See* W.D. Wash., Case No. 2:15-CV-0375-JLR, ECF No. 1. Plaintiff claims the subject of this action concerned whether his "fundamental right not to associate was being violated by his compelled membership in the WSBA and [his] freedom of speech rights were being violated by his compelled dues to the WSBA." ECF No. 8 at ¶ 135.

Plaintiff alleges Defendants were aware of the commencement of this lawsuit. *Id.* at ¶¶ 138-39. Plaintiff further alleges that "[s]hortly after the filing of the complaint, on April 3, 2015, Vanessa Norman, an investigator for the WSBA, informed Plaintiff that she had been assigned to investigate the [Rampley] complaint." *Id.* at ¶ 40. Subsequently, Plaintiff received correspondence from Defendant D'Angelo that advised she too had been assigned to the investigation concerning the Rampley grievance. *Id.* at ¶¶ 142-44. Plaintiff alleges that it was not until after the filing of his lawsuit in the Western District that Plaintiff was told by Vanessa Norman that an investigation had been started against him regarding

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the Rampley grievance, and argues that the WSBA acted in retaliation when it initiated its Rampley investigation. *Id.* at ¶149-50.

In September 2015, the district court in the Western District of Washington dismissed Plaintiff's complaint with prejudice. *See* W.D. Wash., Case No. 2:15-CV-0375-JLR, ECF Nos. 23, 24. Plaintiff appealed to the Ninth Circuit, *id.* at ECF No. 27, and that appeal remains pending.

On November 5, 2015, Plaintiff received a letter from Defendant D'Angelo stating she planned to ask a Review Committee to order the Rampley grievance to hearing. ECF No. 8 at ¶ 154.

Just four days later, on November 9, 2015, Plaintiff filed another lawsuit against the WSBA and its employees, this time in Spokane County Superior Court. *See Eugster v. WSBA*, No. 15204514-9 (Spok. Cnty. Super. Ct. 2015). Plaintiff sought a judgment "declaring the WSBA Washington Lawyer Discipline System unconstitutional because (1) the Discipline System does not pass strict scrutiny and because (2) the Discipline System violates a lawyer's right to due process of law." *See* ECF No. 16-2 at 2, 26-45. Plaintiff also sought damages. *Id.* at 44. The superior court ultimately dismissed the suit with prejudice after concluding that exclusive jurisdiction over matters of lawyer discipline rests with the Washington Supreme Court, that Plaintiff already had been afforded an opportunity to raise his constitutional concerns with the Washington Supreme Court in his prior

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disciplinary proceedings, and that the WSBA officials were immune from Plaintiff's damages claims. *See* ECF No. 16-3. Plaintiff appealed that decision to Division III of the Washington Court of Appeals where it remains pending. *See* ECF Nos. 16 at 6; 17 at 3.

On January 29, 2016, the Review Committee ordered a public hearing concerning the Rampley grievance. ECF Nos. 8 at ¶ 158; 17-1 at 160. The WSBA Office of Disciplinary Counsel has not yet served a complaint on Plaintiff. ECF Nos. 8 at ¶ 159; 17 at 16-19. Defendants claim "the complaint is being prepared and a hearing is forthcoming." ECF No. 18 at 8.

DISCUSSION

A. Standards of Review

A motion to dismiss for failure to state a claim tests the legal sufficiency of the plaintiff's claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To withstand dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Naked assertion[s]," "labels and conclusions," or "formulaic recitation of the elements of a cause of action will not do." *Id.* at 555, 557. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While a plaintiff need not establish a

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probability of success on the merits, he or she must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

A complaint must also contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This standard "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). In assessing whether Rule 8(a)(2) has been satisfied, a court must first identify the elements of the plaintiff's claim(s) and then determine whether those elements could be proven on the facts pled. *See id.* at 675. The court should generally draw all reasonable inferences in the plaintiff's favor, *see Sheppard v. David Evans & Assocs.*, 694 F.3d 1045, 1051 (9th Cir. 2012), but it need not accept "naked assertions devoid of further factual enhancement," *Iqbal*, 556 U.S. at 678 (internal quotations and citation omitted). Generally, in ruling upon a motion to dismiss, a court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the party opposing the motion. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

In contrast, when addressing a motion to dismiss for lack of subject matter jurisdiction, the court is not bound by the plaintiff's factual allegations. Pursuant to Rule 12(b)(1), the Court "may 'hear evidence regarding jurisdiction' and

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'resolv[e] factual disputes where necessary.'" *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983)). A Rule 12(b)(1) motion may be either facial, where the court's inquiry is limited to the allegations in the complaint; or factual, where the court may look beyond the complaint to consider extrinsic evidence. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Accordingly, in deciding jurisdictional issues, the court is not bound by the factual allegations within the complaint. *Augustine*, 704 F.2d at 1077.

B. Analysis

As a preliminary matter, Defendants set forth multiple arguments asserting that the Court lacks subject matter jurisdiction over Plaintiff's claims. Because such arguments concern the scope of the Court's jurisdiction, the Court will address these defenses first in order to determine if it can reach the remaining defenses raised by Defendants.

Defendants argue Plaintiff's claims should be dismissed because they were already adjudicated in prior litigation, and, consequently, are now barred by the doctrine of res judicata. ECF No. 16 at 14-16. Specifically, Defendants refer to the September 2015 dismissal of the federal lawsuit Plaintiff filed in the Western District of Washington (W.D. Wash., Case No. 2:15-CV-0375-JLR) and the June 2009 decision in Plaintiff's prior disciplinary proceedings before the Washington

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Supreme Court (*In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 307 (2009)). *Id.*

The Court agrees that res judicata bars Plaintiff's claims, but finds that it is the most recent judgment, the April 2016 dismissal by the state court, see ECF No. 16-3, that now precludes the instant action. See *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529-30 (9th Cir. 1985) (holding courts should give res judicata effect to the last previous judgment entered if the same claim or issue has been litigated in multiple courts).

Here, in late 2015, Plaintiff filed both the instant action and the state court action. However, a plaintiff does not have the right to actively pursue parallel state and federal actions both to judgment simultaneously. See *Ollie v. Riffin*, 848 F.2d 1016, 1017 (9th Cir. 1988) (noting that plaintiff's section 1983 action would be precluded if there had been a final state judgment on the merits upon which res judicata could have been applied when simultaneous actions were filed). When simultaneous actions are filed, as here, each case proceeds on its own course, and then there is a race to judgment. *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1151 (9th Cir. 2007). In this case, the state court issued judgment first.

Importantly, federal courts are required by statute to give res judicata effect to the judgments of state courts. *See* 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Indeed, "[i]t is now settled that a federal court must give to a state-

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court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *see also ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 760 (9th Cir. 2014) (explaining federal courts "...determine the preclusive effect of a state court judgment by applying that state's preclusion principles."). Accordingly, this Court will apply Washington law to analyze the preclusive effect of the state court's judgment.

In Washington, res judicata, also known as claim preclusion, "refers to the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action." *Loveridge v. Fred Meyer, Inc.*, 125 Wash.2d 759, 763 (1995) (quotation and citation omitted). The purpose of the doctrine is "to prevent piecemeal litigation and ensure the finality of judgments." *Spokane Research & Def. Fund v. City of Spokane*, 155 Wash.2d 89, 99 (2005) (citation omitted). A second action must be dismissed on res judicata grounds if it is "identical with the first action in the following respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made." *Id.* "Res judicata also requires a final judgment on the merits." *Karlberg v. Otten*, 167 Wash. App. 522, 536 (2012) (citation omitted).

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Here, as a threshold matter, the state court action was dismissed with prejudice, *see* ECF No. 16-3 at 4, which constitutes a final judgment on the merits, *see Hisle v. Todd Pacific Shipyards Corp.*, 151 Wash.2d 853, 865 n.10 (2004) (citation omitted).² Moreover, the first element is satisfied as both suits involve the same parties, with the only difference being the inclusion of the WSBA itself as a named defendant in the state court action. Likewise, the quality of persons is identical because the parties in this action are bound by the judgment in the first suit, satisfying the fourth element. *See Ensley v. Pitcher*, 152 Wash. App. 891, 905 (2009) (the "identity and quality of parties" requirement is better understood as a determination of who is bound by the first judgment—all parties to the litigation plus all persons in privity with such parties).

As for the third element, the Court finds that the subject matter between the two cases is identical. While Washington courts have not articulated a precise test

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to determine whether subject matter is identical, "[t]he critical factors seem to be the nature of the claim or cause of action and the nature of the parties." *Marshall v. Thurston Cty.*, 165 Wash. App. 346, 353 (2011) (quoting *Hayes v. City of Seattle*, 131 Wash.2d 706, 712 (1997)). As a result, Washington courts "generally focus on the asserted theory of recovery rather than simply the facts underlying the dispute." *Id.*

Here, both actions arose out of Plaintiff's involvement with and objections to the WSBA's lawyer discipline system, and involve the same parties. Moreover, in each lawsuit Plaintiff seeks a declaration by the court that the WSBA discipline system is unconstitutional and also seeks to enjoin Defendants from disciplining Plaintiff.³ The Court concludes that the subject matter element is satisfied.

Finally, with regard to the second element, to determine whether the causes of action are identical, the Court considers the following four criteria:

- (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- (2) whether substantially the same evidence is presented in the two actions;
- (3) whether the two suits involve infringement of the same right; and
- (4) whether the two suits arise out of the same transactional nucleus of facts.

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Rains v. State, 100 Wash.2d 660, 664 (1983) (citations omitted). "It is not necessary that all four factors favor preclusion to bar the claim." *Feminist Women's Health Ctr. v. Codispoti*, 63 F.3d 863, 867 (9th Cir. 1995) (citation omitted) (applying Washington law). The most important factor is whether the two suits arise from the same transactional nucleus of facts. *Id.* (citation omitted).

Here, a side-by-side comparison of the two complaints filed in both cases reveals that the factual allegations in each are nearly identical. Compare ECF No. 8 at ¶¶ 16-159 (amended complaint in the instant action), with ECF No. 16-2 at ¶¶ 19-123, 185-222 (amended complaint in the state court action). Similarly, the three causes of actions in this case are nearly identical to counts two, three, and four in the state court action, and allege violation of the same rights, namely Plaintiff's procedural due process and freedom of association rights. The Court concludes that the cause of action element is also fully satisfied.

Accordingly, because Plaintiff's claims were already adjudicated in state court, Plaintiff is foreclosed under the doctrine of res judicata from relitigating those claims here in federal court. Consequently, Defendants' motion to dismiss is **GRANTED**.

Because res judicata precludes this action, the Court will not address Defendants' remaining arguments for dismissal.

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ACCORDINGLY, IT IS ORDERED:

1. Defendants' Motion to Dismiss (ECF No. 16) is **GRANTED**.
2. Plaintiff's claims are **DISMISSED with prejudice**.

The District Court Executive is directed to enter this Order, enter Judgment for Defendants, provide copies to the parties, and **CLOSE** this case.

DATED June 29, 2016.

/s/

THOMAS

Chief United States District Judge

O.

RICE

Footnotes:

¹ The following facts are principally drawn from Plaintiff's amended complaint (ECF No. 8), as well as the matters of judicial notice and materials incorporated by reference and attached for this Court's review by Defendants, and are accepted as true for the instant motion. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *United States v. Ritchie*, 342 F.3d 903, 907-908 (9th Cir. 2003).

² While Plaintiff appealed this judgment, Washington law dictates that the pendency of an appeal does not suspend or negate the res judicata effect. *See Lejeune v. Clallam Cnty.*, 64 Wash. App. 257, 265-66 (1992) (explaining a judgment becomes final for res judicata purposes at the beginning, not the end, of the appellate process, although res judicata can still be defeated by later rulings on appeal).

³ In the state court action, Plaintiff also sought damages. Plaintiff originally sought damages in the instant case, *see* ECF No. 1, but his amended complaint (ECF No. 8) abandoned this request.
