98249-0

Case No. 53325

SUPREME COURT OF THE
STATE OF WASHINGTON

STEPHEN KERR EUGSTER,

Appellant/Cross-Respondent,

v.

WASHINGTON STATE BAR ASSOCIATION, a legislatively created Washington association (WSBA); PAULA LITTLEWOOD, WSBA Executive Director; PACIFICA LAW GROUP LLP, a Washington limited liability partnership, PAUL J. LAWRENCE; JESSICA A. SKELTON; and TAKI V. FLEVARIS,

Respondents/Cross-Appellants.

PETITION FOR REVIEW

Stephen Kerr Eugster # 2003
Appellant Pro Se

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I. IDENTITY OF PETITIONER

Petitioner Stephen Kerr Eugster (Eugster) asks this court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner wants the Court of Appeals to review the court's Conclusions and Order Granting Defendants' Motion to Dismiss filed July 11, 2018 and dated July 12, 2018. A copy of the decision is in the Clerk's Papers (CP) 266-270. A copy of the order denying Petitioners Motion to Publish was made on February 7, 2020, it is in the Appendix at page 118.

III. ISSUES PRESENTED FOR REVIEW

A. Are the judges disqualified?

B. Must the court use Wash. Const. Art. IV, § 2(a)?

C. Can the decision in the case be based on argumentum ad hominem?

D. Can the court base its decision on statements the court of appeals said were protected by lawyer immunity?

E. Besides being irrelevant, does the argumentum ad hominem include false statements of fact, fact and law? and law?

F. Whether the court's understanding of RCW 4.84.185 is a proper application of RCW 4.84.185 and the standards included therein

and in the cases interpreting the implementation of the statute?

IV. STATEMENT OF THE CASE

In late 2016 early 2017, Plaintiff was retained by Robert E. Caruso and Sandra L. Ferguson to represent them in action against the Washington State Bar Association and others. CP 5. Action on their behalf was filed by Plaintiff, as the lawyer for Mr. Caruso and Ms.Ferguson. iD.

Defendant Washington State Bar Association, when the action was commenced, was, despite its name, an association of legal services providers which consisted of lawyers admitted to the bar of the Supreme Court of Washington, limited practice officers, and limited license legal technicians. CP 17. On February 23, 2017, Plaintiff, as the lawyer for Mr. Caruso and Ms. Ferguson, conferred by telephone to discuss the case with the attorneys for Ms. Littlewood and the to the others.

Henceforth the paragraphs will be numbered: The paragraphs may be found at CP 6 and following.

18. During the conference call, Plaintiff explained the case, which had then been amended, to Mr. Lawrence, Ms. Skelton, and Mr. Flevaris and made it a point to WSBA of the case was an association of lawyers, limited practice officers, and limited license legal technicians.

19. In response, Mr. Lawrence told Plaintiff, in the presence of Ms. Skelton, and Mr.Flevaris, that if he proceeded with the action they would

seek fees from personally from him.

22. On behalf of the WSBA, Ms. Littlewood and others, attorneys Lawrence, Skelton, and Flevaris filed a "Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction (herein "Motion to Dismiss and Opposition to Motions.").

23. At the beginning ("Introduction") of the Motion to Dismiss and Opposition to Motions the WSBA attorneys, Mr. Lawrence, Ms, Skelton, and Mr. Flevaris said this:

> In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless crusade against Washington's bar system. Within the past two years alone~ Plaintiffs' counsel Stephen K. Eugster ("Eugster") has filed four prior pro se lawsuits against Defendant the Washington State Bar Association ("'WSBA") and its officials; each such lawsuit was meritless and dismissed at the pleadings stage.1 This lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs. in the effort to obtain yet another roundof judicial review of his frivolous arguments. Many of the arguments Plaintiffs make here are exactly the same arguments that this Court already rejected as meritless when Eugster brought them on his own behalf.2 These arguments have no more merit when brought on behalf of others. This Court should reject Eugster·s attempt to file another lawsuit alleging the same baseless claims. [Footnotes omitted.] Motion to Dismiss and Opposition to Motions at 1.

24. In the Conclusion of the Motion to Dismiss and Opposition to Motions, the WSBA lawyers said this:

> This case is one in a long line of frivolous attempts by Plaintiffs' counsel to upend Washington's bar system, including the Washington Supreme Court's disciplinary system. Enlisting other

> lawyers to serve as named plaintiffs does not change the outcome. As with counsel's prior suits. the claims presented are meritless and should be dismissed with prejudice. Motion to Dismiss and Opposition to Motions at 24

25. Plaintiff, as the lawyer for Mr. Caruso The Order of Dismissal of Mr. Caruso's case and the Order for Fees against Stephen Kerr Eugster were procured by Executive Director Littlewood and her attorneys, Lawrence, Skelton, and Flevaris on what they said in the Motion to Dismiss and Opposition to Motions.

33. The statements included much of what was false.

34. If the statements were not false, they were misleading.

35. The statements did not include further statements to explain matters which were subject to interpretation.

37. After the "Introduction" described above in paragraph 23, the WSBA lawyers included a section entitled "Prior Lawsuits Involving Eugster." The section begins with this:

> This case is the latest in a number of proceedings involving both Eugster and the WSBA. The prior disputes provide context for Plaintiffs' arguments and issues presented in this case. This Court may take judicial notice of the public filings in these prior relevant cases. *See MGIC Indem Corp. v. W'eisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings."). The Court also may consider the decisions made in each case as persuasive authority.
>
> Defendants' Motion to Dismiss Plaintiffs" Claims and Opposition to

Plaintiffs' Motions for Summary Judgment and Preliminary Injunction can be found at Appendix 18

38. This section or something like it is a significant part of each of the motions for dismissal filed by the WSBA lawyers in the other cases in which the WSBA lawyers are representing the WSBA and other defendants against Plaintiff.

39. Despite what the WSBA lawyers say they are going to provide -- "context" for "arguments and issues presented in this case" -- the essence of what the lawyers said consisted of on-going ad hominem toward Plaintiff.

40. This on-going ad hominem toward Plaintiff is found in each one of the motions made by the lawyers for the WSBA in previous cases.

41. This on-going ad hominem toward Plaintiff is found in a motion by the WSBA lawyers in a recent subsequent case.

42. This section was part of a plan of the lawyers for the WSBA to gain decisions in their favor.

The argumentum ad hominem is on pages 1 -8 of the motion or Appendix 18 -26. Defendants' Motion to Dismiss Plaintiffs" Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. None of the material is bases on anything in the record. The WSBA lawyers did not file any affidavits to support what they were saying

about Steve Eugster.

The purpose of the WSBA and its lawyers was to make me the scapegoat of the proceedings. They were willing to sacrifice me to win the case for the the WSBA.

V. ARGUMENT REVIEW SHOULD BE ACCEPTED

A. Each Justice is Disqualified:

First Things First: In this matter I have sought to vindicate my constitutional rights. The executive director of the Washington State Bar associate and the individual members of the board of governors of the WSBA have been opponents many of my efforts have involved the individual justices of the supreme court. It would be unfair if the decisions made by the court here in were to be made by the present justices of the court.

The Washington bar association is controlled by the Washington supreme. On September 1, 2017 adopted 12.2.

The justices of court are conflicted. They must, under the code of judicial conduct recuse themselves. CJC Canon provides:

> RULE 2.11. Disqualification
>
> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or

> a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.
>
> (2) The judge knows* that the judge, . . . is: (a) a party to the proceeding, and (c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or (d) likely to be a material witness in the proceeding.

Simply put, the judges cannot not be the judges in their own case.

Public Util. Dist. v. Wash. Water Power Co., 20 Wash. 2d 384, 404, 147 P.2d 923 (1944) (""No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that `even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for jura naturae sunt immutabilia, and they are leges legum.' "This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause.") See also, *In re Borchert*, 57 Wash. 2d 719, 736, 359 P.2d 789 (1961). Foster, J. (dissenting)

Beyond question, Court of Appeals is monumentally biased against Steve Eugster. So much so, the court mimics the falsehood, misstatements the disparagement of Stephen Eugster, see below.

B. The Court Must Invoke Washington Constitution Art. IV, Section 2(a).

In order to decide this case the justices of the court must utilize the provisions of Wash. Const. Art. IV, Section 2(a).

> When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court, and to authorize any superior court judge to perform judicial duties in any superior court of this state.[1]

Sanders v. State, 166 Wash. 2d 164 (2009).

C. Lawyer Immunity Statements Cannot Be Used By The Court.

The primary issue before the court of appeals was whether statements made by the WSBA and its attorneys for subject to immunity. The trial court said they were thus - immune– not be used as a basis for liability. Yet the Court of Appeals judges use all of that which could possibly be claimed to be in the category of immunity. Surely the court is using the material for the improper purpose of scapegoating Steve Eugster. Also, because of what it is being used is material which is argumentum ad hominem.

D. Foundation of the Court of Appeals Decision is based on Argumentum Ad Hominem: It is not evidence.

Ad hominem [Latin "to the person"] means “appealing to personal

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[1] [AMENDMENT 38, 1961 House Joint Resolution No. 6, p 2757. Approved November, 1962.]

prejudices rather than to reason; attacking an opponent's character rather than the opponent's assertions <the brief was replete with ad hominem attacks against opposing counsel>." BLACK'S LAW DICTIONARY 41, 7th Edition 1999.

Argumentum Ad Hominem [Latin] is "an argument based need disparagement praise of another in a way that obscures the real issue." BLACK'S LAW DICTIONARY 102, 7th Edition 1999.

Steve Eugster I was not a party to the Caruso case. He was retained by the plaintiffs.

The WSBA and its lawyers filed a motion to dismiss. There were no facts in the motion. What was said was entirely ad hominem. Look at the Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction, Appendix 18.

1. The Argumentum Ad Hominem is Based False Statements.

The court of appeals *Eugster v. Wash. State Bar Ass'n,* No. 53325-1-II, at *3 n. 1 (Wash. Ct. App. Jan. 7, 2020) refers to a number of Eugster cases:

"See *Eugster v. Wash. State Bar Ass'n,* No. CV 09-357-SMM, 2010 WL 2926237 (E.D. Wash. July 23, 2010) ("Eugster II") (discipline system);

Eugster v. Wash. State Bar Ass'n, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("Eugster III") (membership/fees), aff'd, No. 15-35743, Docket #18-1 (9th Cir. Mar. 21, 2017);

Eugster v. Wash. State Bar Ass'n, No. 15204514-9 (Spokane County

Super. Ct. 2015) ("Eugster IV") (discipline system); https://www.youtube.com/watch?v=vvaiQFMdqVM&list=UUeIMdiBTNTpeA84wmSRPDPg&index=58.

Eugster v. Littlewood, No. 2:15-CV-0352-TOR, 2016 WL 3632711 (E.D. Wash. June 29, 2016) ("Eugster V") (discipline system);

Eugster v. Wash. State Bar Ass'n, No. 2:16-cv-01765 (W.D. Wash. 2016) ("Eugster VI") (membership/fees and discipline system).

At the end of the cases the court says that the cases were dismissed at the pleadings stage. Clearly what the WSBA wanted the court to understand was that these cases were all decided on the merits; that they were dismissed on the merits.

First, only one case was dismissed on the merits and that was Eugster III. Another case was dismissed because Eugster took a nonsuit. A nonsuit is not a decision on the merits. A nonsuit allows a person to raise the issue of the case at another time. The nonsuit is not res judicata.

Another false understanding created is that the cases addressed issues that were being addressed in the *Caruso* case. They were not. The Caruso case was an entirely different case on the facts there was no rest you toccata because the facts were different. The cases had nothing to do with the issues to be decided in the Caruso case because the issues in this decided in the Caruso case were dependent upon the fact that the WSBA was no longer an integrated Bar Association but was in fact an association

of lawyers, limited practice officers, limited license need legal technicians.

Eugster IV and Eugster V must be properly understood.

Eugster IV came about because the Bar Association was about to commence another round of disciplinary proceedings against Eugster. Eugster sought to prevent that from happening by asserting that the disciplinary system violated procedural due process of law under the Fifth Amendment. The trial court judge, Superior Judge S. Cozza dismissed the case for lack of jurisdiction. A dismissal for lack of jurisdiction is not a dismissal based upon the merits.

In Eugster V, the District Court judge T. Rice a motion to dismiss by the Bar Association decided that the best way to dismiss the case was to utilize the dismissal which Judge Cozza had entered in the case before him. That dismissal was not obviously a dismissal on the merits. Thus, Judge Rice should never had used it as basis for dismissa.

When the Eugster V came to hearing before the 9th Cicuit issues came up as to the impact of the decision on appeal of IV. to the Ninth Circuit an issue came up as to the impact of the decision. Eugster was asserting that the Court of Appeals did not have jurisdiction because it was acting in excess of its revisionary jurisdiction under the Washington state constitution and the state statutes applicable to the Court of Appeals. The judges on the Ninth Circuit panel when Eugster five was being considered

found a way to go outside of the record and dismiss the case. A recording of that hearing is attached above. And, it is https://www.youtube.com/watch?v=vvaiQFMdq-VM&list=UUeIMdiBTNTpeA84wmSRPDPg&index.

Also see and consider Eugster motion in federal court to have the Caruso decisions vacated. Appendix 94, Motions Under Federal Rule Civil Procedure Rule 60(b)(3), 60(d))3), and 60(b)(6), WAWD No. 2:17 – CV – 00003-RSM

E. Absolute Immunity? Not So.

Defendants' in their Motion to Dismiss a lawyer's litigation privilege say:

> The statements Eugster identifies as the basis for all his claims are attorney statements in legal briefing submitted to the district court in *Caruso*. Such statements cannot form the basis of a subsequent, separate action because attorney statements in court filings that are "pertinent" to the lawsuit are absolutely privileged. *E.g., McNeal v. Allen*, 95 Wash. 2d 265, 267, 621 P.2d 1285 (1980).

"The fact that statements made in pleadings are absolutely privileged does not mean that an attorney may abuse the privilege with impunity." *McNeal v. Allen,* 95 Wash. 2d 265, 267 621 P.2d 1285 (1980). There are limitations on the concept of immunity. *Gold Seal Chinchillas, Inc. v. State*, 69 Wash. 2d 828, 420 P.2d 698 (1966). ("[They], are absolutely privileged <u>if they are pertinent or material to the redress or relief sought</u>, whether or not the statements are legally sufficient to obtain

that relief.") [Emphasis added.]

Whether immunity applies is a question of law that is reviewed under the de novo standard. *See Wynn v. Earin*, 163 Wash. 2d 361, 369, 181 P.3d 806 (2008) (reviewing witness immunity issue de novo).")

"Generally, some compelling public policy justification must be demonstrated to justify the extraordinary breadth of an absolute privilege." *Bender v. Seattle*, 99 Wash. 2d 582, 600, 664 P.2d 492 (1983).

In *Demopolis v. Peoples Nat'l Bank of Wash*., 59 Wash. App. 105, 110, 796 P.2d 426 (1990) (the court said, "allegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief. *McNeal,* 95 Wash. 2d at 267." "A statement is pertinent if it has some relation to the judicial proceedings in which it was used, and has any bearing upon the subject matter of the litigation.")

The court went on to say: "The absolute privilege, while broad in scope, has been applied sparingly. 'Absolute privilege is usually confined to cases in which the public service and administration of justice require complete immunity.' "*Herron v. Tribune Pub'g Co.*, 108 Wash. 2d 162, 177, 736 P.2d 249 (1987)(quoting *Bender v. Seattle*, 99 Wash. 2d 582, 600, 664 P.2d 492 (1983)). The privilege

does not extend to statements made in situations for which there are no safeguards against abuse. Thus, an absolute privilege is allowed only in "situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct." *Twelker v. Shannon & Wilson, Inc*., 88 Wash. 2d 473, 476, 564 P.2d 1131 (1977). In matter, the WSBA will not discipline.

Moreover, in the particular circumstances of this case, there are no safeguards to protect against an abuse of the absolute privilege. Here, there could be no protection because the trial judge was taken in by the deceptive statements of Defendants. And, because the case is still subject to being overturned because of fraud on the court. Rule 60(d)(3).

Demopolis v. Peoples Nat'l Bank, 59 Wash. App. 105, 112 (1990) (“The absolute privilege, while broad in scope, has been applied sparingly. `Absolute privilege is usually confined to cases in which the public service and administration of justice require complete immunity.'" *Herron v. Tribune Pub'g* Co., 108 Wash. 2d 162, 177, 736 P.2d 249 (1987) (quoting *Bender v. Seattle*, 99 Wash. 2d 582, 600, 664 P.2d 492 (1983)).”)

Demopolis v. Peoples Nat'l Bank, 59 Wash. App. 105, 112

(1990) (“We are convinced that it would not advance public service and the administration of justice to extend an absolute privilege to Hermsen's statement. An Arizona case is instructive:

> As an immunity which focuses on the status of the actor, the privilege immunizes an attorney for statements made "while performing his function as such." Restatement (Second) of Torts § 586, Comment c. We agree that "special emphasis must be laid on the requirement that it [statement] be made in furtherance of the litigation and to promote the interest of justice." Bradley v. *Hartford Accident Indemnity Co.*, 30 Cal. App. 3d 818, 826, 106 Cal. Rptr. 718, 723 (1973) (emphasis in original). Without that nexus, the defamation only serves to injure reputation.

A good article about lawyer immunity with discussion of its limits is that of T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 935 (2004).

She writes: “In contrast, a plaintiff may defeat a qualified privilege by proving that the defendant acted maliciously, thus abusing the privileged occasion.” Citing *DeLong v. Yu Enters*., 47 P.3d 8, 10 (Or. 2002) (citing *Wallulis v. Dymowski*, 918 P.2d 755 (Or. 1996)); *Demopolis v. Peoples Nat'l Bank of Wash*., 796 P.2d 426, 431 (1990). *Id.*

Of *Demopolis,* the professor says this: “A Washington court of

appeals also refused to insulate an attorney by absolute immunity against a suit based on statements regarding a witness's credibility because doing so would greatly extend the privilege's scope since credibility is frequently an issue in litigation." *Id.*

Here, the lawyers for the WSBA acted clearly outside of their authority. They acted to intentionally bring harm to the lawyer representing other lawyers in an effort to protect them from a discipline system which violated the lawyers' right to procedural due process of law Fifth and Fourteenth Amendments, and the lawyers' right to freedom of associations and freedom of speech and expression under the First and Fourteenth Amendments.

F. Eugster's Action Was Not Frivolous Under RCW 4.84.185: The *Kearney v. Kearney* Slight of Hand

1. Standards that Apply to RCW 4.84.185.

The standards pertaining to RCW 4.84.185 have been well known and understood for a long time. The standards have history. In a law review article in 2010 titled When Counsel Screws Up: The Imposition and Calculation of Attorneys Fees as Sanctions, the authors summarized the standards of RCW 4.84.185:

> CR 11's goal of deterring vexatious litigation is reinforced by RCW 4.84.185.105 In enacting the statute,106 the legislature expressed concern about the baseless claims and defenses confronting the

> courts.107 It designed the statute to discourage frivolous lawsuits and to compensate victims forced to litigate meritless cases. 108 Unlike CR 11, the action must be frivolous in its entirety for the statute to apply. 109 If any claim has merit, then the action is not frivolous under RCW 4.84.185.110 While the concept of "frivolity" may be amorphous, it is neither vague nor unconstitutional.111 By contrast, CR 11 may apply to a single issue. 112 [Footnotes omitted.]
>
> The substantive standard for a frivolous action under the statute largely mirrors the standard articulated in CR 11.113 But unlike most CR 11 sanctions, the client, not the attorney, pays the sanctions imposed under RCW 4.84.185.114 If the issue in the case is "debatable" and there is a rational argument under the law and the facts to support it, fees must be denied." 115 Similarly, issues of first impression are not frivolous.' 116 The decision whether to award attorney fees for a frivolous lawsuit is within the trial court's discretion and will not be disturbed absent a clear showing of abuse.117 [Footnotes omitted.]

Philip Talmadge, Emmelyn Hart-Biberfeld & Peter Lohnes, *When Counsel Screws Up: The Imposition and Calculation of Attorneys Fees as Sanctions*, 33 SEATTLE U. L. REV. 437, 449-450 (2010).

Yet there is more to know. "Generally, a party may initiate a lawsuit to vindicate reasonably perceived legal rights without fear of adverse consequences under RCW 4.84.185. *See, State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 906-07, 969 P.2d 64 (1998) ("litigants should not fear adverse consequences for

reasonably seeking to judicially vindicate their perceived legal entitlements. . . . Just because underlying claims are weak is not to say they are frivolous."). *Archdale v. O'Danne*, No. 71905-0-I, at *11 (Wash. Ct. App. July 6, 2015) [not published].

Bill of Rights Legal Foundation v. Evergreen State College, 44 Wn. App. 690, 696-97 (Wash. Ct. App. 1986) ("A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts. *Bennett v. Passic,* 545 F.2d 1260, 1261 (10th Cir. 1976). However, allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, frivolous. *Hughes v. Rowe*, 449 U.S. 5, 66 L.Ed.2d 163, 101 S.Ct. 173, 178 (1980).")

Escude v. King Cty. Public Hosp. #2, 117 Wn. App. 183, 193 (Wash. Ct. App. 2003) ("The statute also requires written findings by the judge indicating that the action was frivolous and advanced without reasonable cause.")

Bowlby v. Williams, No. 43723-6-II, at *13-14 (Wash. Ct. App. Jan. 28, 2014) ("RCW 4.84.185 authorizes the trial court to award the prevailing party reasonable expenses, including attorney fees, for opposing a frivolous "action, counterclaim, cross-claim, third party claim, or defense." *See Biggs v. Vail*, 119 Wn.2d 129, 133, 830 P.2d

350 (1992). But under RCW 4.84.185, an attorney fee award is appropriate only when an action or a defense is frivolous when viewed as a whole. *Biggs*, 119 Wn.2d at 137. In other words, all claims asserted must be frivolous to support an attorney fee award. "In order for the court to award attorney fees under RCW 4.84.185, the lawsuit must be frivolous in its entirety and 'advanced without reasonable cause.'" *Alexander v. Sanford*, 181 Wn. App. 135, 184, 325 P.3d 341 (2014) (quoting *N. Coast Elec. Co. v. Selig,* 136 Wn. App. 636, 650, 151 P.3d 211 (2007)). Sanctions imposed under CR 11 or RCW 4.84.185 are reviewed for an abuse of discretion. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998) (CR 11); *Zink v. County of Mesa*, 137 Wn. App. 271, 275, 152 P.3d 1044 (2007) (RCW 4.84.185).

2. Defendants' Improper Use of Kearney v. Kearney.

The Defendants assert "An award is warranted under RCW 4.84.185 when a "reasonable inquiry" would have revealed that the plaintiff's position was untenable. *Kearney v. Kearney*, 95 Wn. App. 405, 416-17, 974 P.2d 872 (1999)." "Had Joseph reasonably inquired into the legal basis for his claim, he should have concluded that advancing such a position was untenable based on existing law." 12 *Kearney v. Kearney*, 95 Wn. App. 405, 416-17 (Wash. Ct. App.

1999)

> 12 First, a plain reading of RCW 9.73.030 demonstrates that only recording or intercepting conversation is prohibited. Second, RCW 9.73.050 plainly prohibits admitting such conversations into evidence; it clearly does not prohibit filing such information. Third, Joseph argued the legislative purpose to the trial court in his response to the 12(b)(6) motions, but a reasonable inquiry into the legislative history should have illuminated the matter for him.

And, so he should. The claim in question was a single claim and it was his.

Kearney v. Kearney, 95 Wn. App. 405, 417 n. 12 (Wash. Ct. App. 1999).

VI. CONCLUSION

The court should grant the petition. Each one of reasons for doing so RAP 13.4 (b) is applicable.

March 9, 2020

Respectfully submitted,

s/Stephen Kerr Eugster
Stephen Kerr Eugster, Pro Se
Petitioner
WSBA # 2003

APPENDIX

See the Appendix to the this brief.

CERTIFICATION OF SERVICE

I certify that on March 9, 2020, I emailed the foregoing to counsel at their designated email addresses in the online Washington State Bar Association lawyer directory and that the JIS system will also notify Defendants by email upon filing.

March 9, 2020

s/Stephen Kerr Eugster
Stephen Kerr Eugster, Pro Se
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PETITION FOR REVIEW

APPENDIX

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No. 53325-1-II
COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

Eugster v. Wash. State Bar Ass'n

Decided Jan 7, 2020

No. 53325-1-II

01-07-2020

STEPHEN KERR EUGSTER, Appellant/Cross-Respondent, v. WASHINGTON STATE BAR ASSOCIATION, a legislatively created Washington association (WSBA); PAULA LITTLEWOOD, WSBA Executive Director; PACIFICA LAW GROUP LLP, a Washington limited liability partnership, PAUL J. LAWRENCE; JESSICA A. SKELTON; and TAKI V. FLEVARIS, Respondents/Cross-Appellants.

SUTTON, J

UNPUBLISHED OPINION

— Stephen K. Eugster, a Washington attorney, appeals the superior court's order dismissing his claims that the Washington State Bar Association (WSBA) and its lawyers had defamed him during the course of earlier litigation. He argues that the court erred in ruling that (1) the WSBA's lawyers' statements about Eugster during prior litigation, in which Eugster acted as opposing counsel, were subject to absolute privilege, (2) collateral estoppel applied to bar Eugster's claims, and (3) Eugster failed to state a claim upon which relief can be granted. On cross-appeal, the WSBA argues that the superior court erred by denying its motion for an award of
2 attorney fees under RCW 4.84.185 because Eugster's claims are frivolous. *2

We hold that the superior court did not err by dismissing Eugster's claims with prejudice and affirm that order on the basis of absolute immunity. We do not reach the alternative bases for dismissal. As to the WSBA's cross-appeal, we hold that because Eugster's claims against the WSBA are frivolous, the superior court erred in not awarding the WSBA its attorney fees. Accordingly, we affirm the superior court's dismissal of Eugster's claims, reverse the superior court's order denying the WSBA an award of attorney fees under RCW 4.84.185, and remand this matter to the superior court to determine an appropriate attorney fee award.

FACTS

I. *CARUSO* LITIGATION

Eugster has filed a number of cases against the WSBA in state and federal court in both his personal and representative capacities. The most recent case, prior to the case presently before this court on appeal, is *Caruso v. Wash. State Bar Ass'n*, No. C17-003 RSM, 2017 WL 1957077 (W.D. Wash. May 11, 2017) (court order). Eugster previously filed several lawsuits on his own behalf against the WSBA challenging the constitutionality of mandatory bar membership, license fees, and the validity of the WSBA's discipline system,
3 which he claimed violate due process and freedom of association.[1] *3

[1] *See Eugster v. Wash. State Bar Ass'n*, No. CV 09-357-SMM, 2010 WL 2926237 (E.D. Wash. July 23, 2010) ("Eugster II") (discipline system); *Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("Eugster III") (membership/fees), *aff'd*, No. 15-35743, Docket #18-1 (9th Cir. Mar. 21, 2017); *Eugster v. Wash. State Bar Ass'n*, No. 15204514-9 (Spokane County Super. Ct. 2015) ("Eugster IV") (discipline system); *Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711 (E.D. Wash. June 29, 2016) ("Eugster V") (discipline system); *Eugster v. Wash. State Bar Ass'n*, No. 2:16-cv-01765 (W.D. Wash. 2016) ("Eugster VI") (membership/fees and discipline system). Each of these lawsuits was dismissed at the pleadings stage. *Caruso v. Wash. State Bar Ass'n*, No. C17-00003 RSM, 2017 WL 2256782, at *1 (W.D. Wash. May 23, 2017) (court order).

Eugster initially filed the *Caruso* complaint, in his capacity as an attorney, as a putative class action on behalf of all WSBA members, naming plaintiffs Robert Caruso and Sandra Ferguson as class representatives. *Caruso*, 2017 WL 1957077 at *1. He later amended the complaint and dropped the class action allegations. *Caruso*, 2017 WL 1957077 at *1. In the *Caruso* complaint, Eugster asserted the same challenges to mandatory bar membership, license fees, and the disciplinary system for Washington attorneys alleging violations of the First, Fifth, and Fourteenth amendments. *Caruso*, 2017 WL 1957077 at *1. He also filed a civil rights action under 42 U.S.C. § 1983 against the WSBA and the WSBA's then Executive Director Paula Littlewood. *Caruso*, 2017 WL 1957077 at *1.

In the *Caruso* litigation, the WSBA argued that Eugster had raised the same systemic challenges on his own behalf in multiple prior lawsuits which are briefly summarized in footnote one above. The WSBA argued that the decisions in Eugster's prior cases were persuasive precedent and established numerous grounds for disposing of the claims asserted in *Caruso*. Because Eugster began filing these suits after being suspended by the WSBA for attorney misconduct,[2] having repeatedly alleged his dissatisfaction with the WSBA's structure and rules, and having ignored repeated dismissals of these claims, the WSBA described him as a "disgruntled lawyer" in the pleadings filed in *Caruso* in response to Eugster's allegations. Clerk's Papers (CP) at 8.

[2] *In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 209 P.3d 435 (2009).

The district court granted the WSBA's motion to dismiss and dismissed the complaint with prejudice for failure
4 to state a claim upon which relief can be granted, holding that (1) substantial *4 authority holds that compelled bar membership and license fees are constitutional, (2) the WSBA remains the same entity and has retained its regulatory authority notwithstanding its recent bylaw amendments, and (3) the lawyer discipline system meets due process requirements. *Caruso*, 2017 WL 1957077 at *3-*4.

Following the district court's order dismissing the complaint in *Caruso*, the WSBA moved for an award of attorney fees and sanctions under Federal Rule of Civil Procedure (FRCP) 11; 28 U.S.C. § 1927; and the district court's inherent power. *Caruso v. Wash. State Bar Ass'n*, No. C17-00003 RSM, 2017 WL 2256782, at *2 (W.D. Wash. May 23, 2017) (court order). The district court found that sanctions were warranted under FRCP 11, but not under 28 U.S.C. § 1927. *Caruso*, 2017 WL 2256782 at *4. The court explained that FRCP 11 sanctions against Eugster were appropriate because,

> Mr. Eugster has continually harassed the WSBA with swiftly-dismissed lawsuits, including this one. . . . [T]he Court finds that Plaintiffs' Amended Complaint is legally and factually baseless from an objective perspective. . . . The Court had no difficulty identifying the legal errors in Mr. Eugster's pleading. The Court further finds that Mr. Eugster could not have conducted a reasonable and competent inquiry before signing and filing the Amended Complaint. Mr. Eugster has long been on notice of the flaws in his constitutional claims against WSBA membership and dues after his personal lawsuits were dismissed. Although Mr. Eugster has brought new claims in this case, the presence of the same previously dismissed membership and fees claims in this case was unreasonable and did a disservice to his clients. Because Mr. Eugster's pleading in this case is both baseless and made without a reasonable and competent inquiry, the term "frivolous" is applicable.

Caruso, 2017 WL 2256782 at *4. The court declined to award Eugster FRCP 11 sanctions against the WSBA. *Caruso*, 2017 WL 2256782 at *5.

Eugster appealed the dismissal and the order denying sanctions to the Ninth Circuit. *Eugster v. Wash. State Bar*
5 *Ass'n 1933*, 716 F. Appx. 645 (9th Cir. 2018); *Caruso v. Wash. State* *5 *Bar Ass'n 1933*, 716 F. Appx. 650 (9th Cir. 2018). In both appeals, Eugster argued that the WSBA defamed him and defrauded the district court. In his opening brief on the merits, Eugster argued that "the lawyers for the WSBA have been successful in getting the [c]ourt to act favorably toward the WSBA and dismiss the case against it on the basis of their defamations and other fraudulent conduct." CP at 152-53. Similarly, in his opening brief on the sanction award against him, Eugster listed as the first issue on appeal, "Whether the WSBA and its lawyers perpetrated a fraud on the court and defamed [p]ro se Eugster." CP at 181. To support his claims of fraud and defamation, Eugster relied on the same statements in the WSBA's briefing that he had disputed before the district court. Based on these allegedly false and defamatory statements, Eugster again sought sanctions.

The Ninth Circuit affirmed the district court's orders and expressly rejected both of Eugster's allegations of fraud and his request for sanctions ruling that his claims against the WSBA are meritless and unsupported. *Eugster*, 716 F. Appx. at 646 ("We reject as without merit and unsupported by the record Eugster's contentions that he is entitled to sanctions, [and] that defendants committed fraud on the court"); *Caruso*, 716 F. Appx. at 651 ("We reject as without merit Caruso's contentions of fraud upon the district court").

II. PROCEDURAL FACTS

Following the conclusion of *Caruso*, Eugster filed the present case in Spokane County Superior Court against the WSBA, its then Executive Director Paula Littlewood, and the lawyers who represented the WSBA in *Caruso*. Eugster asserted five claims: (1) defamation, (2) false light invasion of privacy, (3) intentional abuse of process by false statements, (4) civil conspiracy, and (5) civil rights damages under 42 U.S.C. § 1983. These
6 claims are substantially the same claims *6 as those claims that he alleged in the *Caruso* federal district court action which were dismissed by the district court and affirmed by the Ninth Circuit.

Eugster alleged that the WSBA's statements—that he was a disgruntled lawyer and on a meritless crusade against the WSBA—defamed him, abused the judicial process, resulted from an unlawful conspiracy, violated his constitutional rights under the First, Fifth, and Fourteenth amendments, and amounted to civil rights violations under 42 U.S.C. § 1983. The only other facts alleged in the complaint are that early in the *Caruso* litigation, the WSBA's lawyer explained to him during a telephone conference call that the WSBA would seek an award of attorney fees as a sanction against him if he proceeded with the *Caruso* lawsuit.

The WSBA and its lawyers moved to dismiss the complaint under CR 12(b)(6). The superior court dismissed Eugster's claims with prejudice based on three alternative grounds. First, the court concluded that the statements made by the WSBA's attorney during litigation are "privileged under absolute immunity." CP at 268. Noting that statements in litigation having "any bearing upon the subject matter of the litigation" are privileged, the court reasoned that the statements at issue here "were used to provide the court in *Caruso* with historical context and to describe the WSBA's perception of the issues and conduct pertinent to the case," and thus, were privileged. CP at 267. Second, the court concluded that collateral estoppel barred Eugster's claims because the Ninth Circuit already decided that his accusations of fraud and defamation were meritless and unsupported. Third, the court ruled that because the Ninth Circuit concluded that Eugster failed "to allege any facts supporting" his assertions of "unlawful conduct," he failed to state a claim upon which relief can be
7 granted. CP at 268. *7

Following entry of the superior court's order dismissing Eugster's claims with prejudice, the WSBA and its attorneys filed a motion for an award of attorney fees against Eugster under RCW 4.84.185, arguing that Eugster's claims were frivolous. The superior court denied the WSBA's request for fees and explained that it was "debatable" whether the WSBA's statements in *Caruso* were pertinent to that litigation. Verbatim Report of Proceedings (VRP) at 27-28.

Eugster appeals the superior court's order dismissing the case with prejudice. The WSBA cross-appeals the superior court's order denying an award of attorney fees under RCW 4.84.185.

ANALYSIS

I. DISMISSAL OF EUGSTER'S CLAIMS

Dismissal is appropriate under CR 12(b)(6) when, assuming all factual allegations are true, the complaint fails to state a valid claim for relief. *Trujillo v. NW. Tr. Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). We review a superior court's dismissal of a complaint under CR 12(b)(6) de novo. *Trujillo*, 183 Wn.2d at 830. The superior court has the discretion to dismiss a complaint with prejudice when "amendment would be futile," including when the plaintiff cannot "identify any additional facts" to support his claims. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 730, 189 P.3d 168 (2008).

The WSBA argues that the superior court did not err by dismissing Eugster's claims based on absolute immunity because the statements that formed the basis of his claims were made by the WSBA's lawyer during the *Caruso* litigation and are absolutely privileged. We agree.

We review a claim of absolute immunity de novo. *Mock v. Dep't of Corr.*, 200 Wn. App. 667, 673, 403 P.3d 102 (2017). "Allegedly libelous statements, spoken or written by a party or counsel in the course of a judicial
8 proceeding, are absolutely privileged if they are pertinent or *8 material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief." *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980). "The privilege of attorneys is based upon a public policy of securing to them as officers of the court the utmost freedom in their efforts to secure justice for their clients." *McNeal*, 95 Wn.2d at 267.

For a statement to be pertinent to the lawsuit in which it was made, it need only have some relation to the proceedings and any bearing upon the subject matter of the litigation. *Demopolis v. Peoples Nat'l Bank of Wash.*, 59 Wn. App. 105, 110, 796 P.2d 426 (1990) (citing *Johnston v. Schlarb*, 7 Wn.2d 528, 540, 110 P.2d 190 (1941)). The truth or falsity of the statement and the motives of the speaker are irrelevant and any doubts are resolved in favor of the speaker. *Liberty Bank of Seattle, Inc. v. Henderson*, 75 Wn. App. 546, 562, 878 P.2d 1259 (1994) (citing W. Page Keeton, et al., *Prosser and Keeton on Torts* § 114, at 816 (5th ed. 1984)).

Here, Eugster's claims are based on the statements made by the WSBA lawyers during the *Caruso* litigation. The statements made by the WSBA's lawyer all concerned claims asserted in *Caruso*, including the following: the duplicative and frivolous nature of the claims, Eugster's motives for filing the claims, Eugster's enlisting other attorneys to pursue the claim as named plaintiffs, and the WSBA's express intent to seek fees against him if the case proceeded. These statements by the WSBA's lawyer in *Caruso* are related to the *Caruso* proceedings, bear on the subject matter of that litigation, and are pertinent to that litigation. Eugster's disagreement with the lawyer's statements in *Caruso* does not negate the privileged nature of the statements. Because each of the statements Eugster takes issue with pertained to the substance and procedural framework
9 of the *Caruso* litigation, these statements are undoubtedly "pertinent or material to the *9 redress or relief sought." *McNeal*, 95 Wn.2d at 267. Thus, these statements are absolutely privileged.

We hold that the superior court did not abuse its discretion when it dismissed Eugster's claims. Because we are affirming on this ground, we do not reach the alternative bases for dismissal.

II. FRIVOLOUS CLAIMS

On cross-appeal, the WSBA argues that the superior court abused its discretion by denying it attorney fees against Eugster under RCW 4.84.185 because Eugster's claims are frivolous. We agree.

When an action is frivolous and advanced without reasonable cause, RCW 4.84.185 [3] authorizes the superior court to award the prevailing party reasonable expenses, including attorney fees. *Bldg. Indus. Ass'n v. McCarthy*, 152 Wn. App. 720, 745, 218 P.3d 196 (2009). "A lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law." *Dave Johnson Ins. v. Wright*, 167 Wn. App. 758, 785, 275 P.3d 339, 275 P.3d 339 (2012). An award is warranted under RCW 4.84.185 when a "reasonable inquiry" would have revealed that the plaintiff's position was untenable. *Kearney*
10 *v. Kearney*, 95 *10 Wn. App. 405, 416-17, 974 P.2d 872 (1999). The purpose of such as award is to "'discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases.'" *Kearney*, 95 Wn. App. at 416 (quoting *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992)). A finding of bad faith or bad motivation is not required. *Highland v, Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 311-312, 202 P.2d 1024 (2009).

> [3] "In any civil action, the court having jurisdiction may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action . . . . This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal . . . terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order." RCW 4.84.185. --------

A superior court's ruling on a motion for an award of attorney fees is reviewed for an abuse of discretion. *Kearney*, 95 Wn. App. at 416. A superior court abuses its discretion in denying fees when governing law clearly demonstrates the plaintiff's claims were invalid. *Kearney*, 95 Wn. App. at 416. If the court abused its discretion in denying an award of attorney fees, the proper remedy is reversal of the fee decision. *See Kearney*, 95 Wn. App. at 417.

Here, as discussed above, we hold that the statements made by the WSBA's lawyers were pertinent to the *Caruso* litigation and therefore are subject to absolute immunity. We conclude that Eugster's claims to the contrary are not supported by rational argument and therefore are frivolous. This is particularly true because the

Ninth Circuit expressly rejected Eugster's claims that the WSBA's lawyers had made fraudulent statements. Accordingly, we hold that the superior court erred by denying the WSBA's request for an award of attorney fees. We reverse the order and remand this matter to the superior court to determine an appropriate fee award.

CONCLUSION

We hold that the superior court did not err by dismissing Eugster's claims with prejudice and affirm that order on the basis of absolute immunity. As to the WSBA's cross-appeal, we hold that because Eugster's claims
11 against the WSBA are frivolous, the superior court erred. We *11 reverse the superior court's order denying the WSBA an award of attorney fees under RCW 4.84.185 and remand this matter to the superior court to determine an appropriate fee award.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

/s/_____

SUTTON, J. We concur: /s/_____
MAXA, C.J. /s/_____
GLASGOW, J.

Cour 27

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Original Filed

FEB 12 2018

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

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); PAULA LITTLEWOOD, WSBA Executive Director; PACIFICA LAW GROUP LLP, a Washington limited liability partnership, PAUL J. LAWRENCE; JESSICA A. SKELTON; and TAKI V. FLEVARIS, Defendants.	Case No.: 18200542-1 COMPLAINT FOR DAMAGES

Plaintiff alleges:

JURISDICTION

1. The Superior of the State of Washington in and for Spokane County has original jurisdiction over this action under Wash. Const. Art. IV, Section 6.

VENUE

2. Venue in Spokane County is proper under RCW 4.12.020 (3) ("For the recovery of damages for injuries to the person or for injury to personal property, the plaintiff shall have the option of suing either in the county in which the cause of action or some part thereof arose.").

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PARTIES

3. Plaintiff, Stephen Kerr Eugster, (Eugster) is a resident of Spokane, Spokane County, Washington; he became admitted to the bar of theSupreme Court of Washington on January 30, 1970 and has practiced law in the state of Washington ever since.

4. Washington State Bar Association (WSBA) has offices in King County, Washington; it does business throughout Washington including especially Spokane County.

5. Defendant Paula Charis Littlewood (Littlewood), is a resident of King County, Washington. Defendant Littlewood is and has been implementing and enforcing the unconstitutional practices and policies complained of in this action. Defendant Littlewood is sued in her official capacity.

6. Defendant, Paul J. Lawrence (Lawrence), is a resident of King County, Washington, and a lawyer representing WSBA defendants. Defendant Lawrence is and has been implementing and enforcing the unconstitutional practices and policies complained of in this action. Defendant Lawrence is sued in his official capacity.

7. Defendant, Jessica Anne Skelton (Skelton), is a resident of King County, Washington, and a lawyer representing WSBA defendants. Defendant Skelton is has been implementing and enforcing the unconstitutional practices and policies complained of in this action. Defendant Skelton is sued in her official capacity.

8. Defendant, Taki V. Flevaris (Flevaris), is a resident of King County, Washington, and a lawyer representing WSBA defendants. Defendant Flevaris is and has been implementing and enforcing the unconstitutional practices and policies complained of in this action. Defendant Flevaris is sued in his official capacity.

9. Defendant Pacifica Law Group LLP is a Washington limited liability partnership of which defendants Lawrence, Skelton, and Flevaris are partners.

COMMON FACTS

10. In late 2016 early 2017, Plaintiff was retained by Robert E. Caruso and Sandra L. Ferguson to represent them in action against the Washington State Bar Association and others.

11. Action on their behalf was filed by Plaintiff, as the lawyer for Mr. Caruso and Ms. Ferguson.

12. Defendant Washington State Bar Association, when the action was commenced, was, despite its name an association of legal services providers which consisted of lawyers admitted to the bar of the Supreme Court of Washington, limited practice officers, and limited license legal technicians.

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13. Mr. Caruso and Ms. Ferguson claims were made under the Civil Rights Act for violation of their rights of freedom of association and non-association under the First and Fourteenth Amendments to the United States Constitution.

14. Mr. Caruso and Ms. Ferguson also made claims under the Civil Rights Act for violation of their rights of rights of procedural due process of law under the under the Fifth and Fourteenth Amendments to the United States Constitution.

15. Defendants to the action were the Executive Director of the WSBA, Paula C. Littlewood and others.

16. Ms. Littlewood, and the other Defendants were represented by Paul J. Lawrence, Jessica A. Skelton, and Taki V. Flevaris, partners in Pacifica Law Group LLC.

17. On February 23, 2017, Plaintiff, as the lawyer for Mr. Caruso and Ms. Ferguson, conferred by telephone to discuss the case with the attorneys for Ms. Littlewood and the to the others.

18. During the conference call, Plaintiff explained the case, which had then been amended, to Mr. Lawrence, Ms. Skelton, and Mr. Flevaris and made it a point to emphasize that the WSBA of the case was an association of lawyers, limited practice officers, and limited license legal technicians.

19. In response, Mr. Lawrence told Plaintiff, in the presence of Ms. Skelton, and Mr. Flevaris, that if he proceeded with the action they would seek fees from personally from him.

20. The lawyers in a day or two of the telephone conference agreed to a schedule for dispositive motions in the case.

21. Motions for Mr. Caruso and Ms. Ferguson were filed first as agreed. They consisted of a motion for summary judgment and a motion for preliminary injunction.

22. On behalf of the WSBA, Ms. Littlewood and others, attorneys Lawrence, Skelton, and Flevaris filed a "Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction (herein "Motion to Dismiss and Opposition to Motions.").

23. At the beginning ("Introduction") of the Motion to Dismiss and Opposition to Motions the WSBA attorneys, Mr. Lawrence, Ms, Skelton, and Mr. Flevaris said this:

> In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless crusade against Washington's bar system. Within the past two years alone, Plaintiffs' counsel Stephen K. Eugster ("Eugster") has filed four prior pro se lawsuits against Defendant the Washington State Bar Association ("WSBA") and its officials; each such lawsuit was meritless and dismissed at the pleadings stage.1 This lawsuit is no different, even though this time Eugster has enlisted two other

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disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments. Many of the arguments Plaintiffs make here are exactly the same arguments that this Court already rejected as meritless when Eugster brought them on his own behalf.2 These arguments have no more merit when brought on behalf of others. This Court should reject Eugster's attempt to file another lawsuit alleging the same baseless claims. [Footnotes omitted.] Motion to Dismiss and Opposition to Motions at 1.

24. In the Conclusion of the Motion to Dismiss and Opposition to Motions, the WSBA lawyers said this:

> This case is one in a long line of frivolous attempts by Plaintiffs' counsel to upend Washington's bar system, including the Washington Supreme Court's disciplinary system. Enlisting other lawyers to serve as named plaintiffs does not change the outcome. As with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice. Motion to Dismiss and Opposition to Motions at 24

25. Plaintiff, as the lawyer for Mr. Caruso and Ms. Ferguson, filed their Response to Defendants' Motion to Dismiss.

26. About 21 days after the Response to Defendants' Motion to Dismiss, the WSBA and its attorneys filed a motion seeking fees from Plaintiff Stephen Kerr Eugster.

27. The results of the preceding motions by the WSBA and their attorneys were a dismissal of the claims of Mr. Caruso and Ms. Ferguson and an award of fees more than $28,000.00 against Stephen Kerr Eugster, personally.

28. Plaintiff attorney for Mr. Caruso and Ms. Ferguson filed a notice of appeal to the 9th Circuit Court of Appeals. The appeal is pending.

29. Ms. Ferguson withdrew from the appeal at the outset.

30. Mr. Caruso proceeds with the appeal. Plaintiff is his attorney.

31. Stephen Kerr Eugster, pro se, filed an appeal regarding the fees order against him. The appeal is pending. This appeal is separate from the Caruso appeal.

FRAUD ON THE COURT

32. The Order of Dismissal of Mr. Caruso's case and the Order for Fees against Stephen Kerr Eugster were procured by Executive Director Littlewood and her attorneys, Lawrence, Skelton, and Flevaris on what they said in the Motion to Dismiss and Opposition to Motions.

33. The statements included much of what was false.

34. If the statements were not false, they were misleading.

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35. The statements did not include further statements to explain matters which were subject to interpretation.

36. Littlewood and her lawyers failed to disclose facts which were directly contrary to the facts needed to support their statements or failures to make statements.

WSBA Lawyers View of Eugster Cases

37. After the "Introduction" described above in paragraph 23, the WSBA lawyers included a section entitled "Prior Lawsuits Involving Eugster." The section begins with this:

> This case is the latest in a number of proceedings involving both Eugster and the WSBA. The prior disputes provide context for Plaintiffs' arguments and issues presented in this case. This Court may take judicial notice of the public filings in these prior relevant cases. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings."). The Court also may consider the decisions made in each case as persuasive authority.
>
> Defendants' Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction 2-3

38. This section or something like it is a significant part of each of the motions for dismissal filed by the WSBA lawyers in the other cases in which the WSBA lawyers are representing the WSBA and other defendants against Plaintiff.

39. Despite what the WSBA lawyers say they are going to provide -- "context" for "arguments and issues presented in this case" -- the essence of what the lawyers said consisted of on-going ad hominem toward Plaintiff.

40. This on-going ad hominem toward Plaintiff is found in each one of the motions made by the lawyers for the WSBA in previous cases.

41. This on-going ad hominem toward Plaintiff is found in a motion by the WSBA lawyers in a recent subsequent case.

42. This section was part of a plan of the lawyers for the WSBA to gain decisions in their favor.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Intentional Defamation by Libel and Libel Per Se

43. Plaintiff hereby incorporates all preceding paragraphs as though fully incorporated.

44. Defendants have intentionally defamed Plaintiff.

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45. Going to what the Defendants said in the "Introduction" quoted above at paragraph 23.

    a. Plaintiff is not "disgruntled lawyer.

    b. " Plaintiff is not "on a meritless crusade" against Washington's bar system. The lawyers say "[w]ithin the past two years alone, Stephen K. Eugster ("Eugster") has not "filed four prior pro se lawsuits against Defendant the Washington State Bar Association ("WSBA") and its officials: each such lawsuit was meritless and dismissed at the pleadings stage." This is false.

    c. "This lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments." These are lies; Plaintiff did not enlist Mr. Caruso and Ms. Ferguson, they retained Plaintiff; Mr. Caruso and Ms. Ferguson were not nominal plaintiffs for Plaintiff.

    d. They say "[m]any of the arguments [Mr. Caruso and Ms. Ferguson] make here are exactly the same arguments that this Court already rejected as meritless when Eugster brought them on his own behalf." This is statement is untrue and decidedly so. The arguments were not the same, the facts cases brought by Plaintiff on his own behalf were completely different in a basic and decisive way – the WSBA at the time those suits were brought was a typical integrated bar association made up of lawyers only.

46. Going to what the Defendants said in the "Conclusion" quoted above at paragraph 24.

    a. They say: "This case is one in a long line of frivolous attempts by Plaintiffs' counsel to upend Washington's bar system, including the Washington Supreme Court's disciplinary system." Not one of Eugster's cases was frivolous.

    b. They say: "Enlisting other lawyers to serve as named plaintiffs does not change the outcome." Plaintiff did not enlist other lawyers to serve as nominal plaintiffs for him.

    c. They say: "As with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice." The prior suits and claims were not meritless. Also, the prior suits were based on facts concerning the WSBA which were decidedly different than the facts in the case before the court.

47. Not only were the statements false they were purposefully misleading because Ms. Littlewood and her lawyers failed to disclose that the WSBA of the action brought by Mr. Caruso and Ms. Ferguson was against a WSBA which was (and is still) an association of lawyers, limited practice officers, and limited license legal technicians.

48. The statements were purposely misleading in that because Ms. Littlewood and her lawyers whenever they said things like "each such lawsuit was meritless and

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dismissed at the pleadings stage" gave the impression that they were saying each lawsuit was meritless."

49. Each lawsuit was not dismissed because the lawsuit was meritless, that was a false impression, but one they did not want to disclose to the trial judge.

50. Defendants engaged in, instigated, and directed a course of extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, emotional distress to Plaintiff.

51. As a proximate result of the acts alleged herein, Plaintiff suffered severe or extreme emotional distress, entitling him to damages in an amount to be proven at trial.

SECOND CAUSE OF ACTION
False Light Invasion of Privacy

52. Plaintiff hereby incorporates all preceding paragraphs as though fully incorporated.

53. Defendants publicized matters which place Plaintiff in a false light.

54. The false light is highly offensive reasonable persons.

55. The Defendants knew of or recklessly disregarded the falsity of the publications and the false light in which Plaintiff would be placed.

56. As a proximate result of the acts alleged herein, Plaintiff suffered general damages in an amount to be determined at trial.

THIRD CAUSE OF ACTION
Intentional Abuse of Process: False Statements

57. Plaintiff hereby incorporates all preceding paragraphs as though fully incorporated.

58. Defendants' purpose with regard to the ad hominem and false statements about Plaintiff had the ulterior purpose of causing the trial judges in the cases involving Eugster to take sides with the lawyers for the defendants in the cases to accomplish something they were not entitled – animosity toward Plaintiff by the judges of the courts and use of orders which were not on the merits as res judicata.

59. Defendants not only lied, failed to tell the whole truth of matters, failed to disclose facts which they were aware of which were not in their interest but were necessary for the trial judge to make a correct decision.

60. Defendants' actions or nonactions were intentional.

61. Defendants were also intentional violations of the Washington Rules of Professional Conduct

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62. The lawyers have intentionally violated several Washington Rules of Professional Conduct:

RPC 3.3(a)(1). Candor Toward the Tribunal.

> A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

RPC 3.4. Fairness to Opposing Party

> A lawyer shall not:
>
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

RPC 3.5 Impartiality of the Tribunal.

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (d) engage in conduct intended to disrupt a tribunal.

RPC 8.4 Misconduct

> RPC 8.4 "Misconduct" in applicable part, provides:
>
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (f) knowingly (1) assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law,
>
> (n) engage in conduct demonstrating unfitness to practice law.

63. As a proximate result of the acts alleged herein, Plaintiff suffered damages in an amount to be proven at trial.

FOURTH CAUSE OF ACTION
Civil Conspiracy

64. Plaintiff restates and re-alleges the preceding paragraphs as if a part of this Count.

65. Defendants combined to accomplish an unlawful purpose,

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66. Defendants combined to accomplish a lawful purpose by unlawful means;

67. The Defendants agreed to accomplish the conspiracy

68. As a result of the preceding conduct of the Defendants, Plaintiff has suffered injury.

69. As a proximate result of Plaintiff injury, he is entitled to damages in an amount to be proven at trial.

FIFTH CAUSE OF ACTION
Civil Rights Damages

70. Plaintiff restates and re-alleges the preceding paragraphs as if a part of this Count.

71. The Civil Rights Act, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

72. Plaintiff' has the right, guaranteed by the First Amendment to the United States Constitution, which specifically prohibits Defendants from abridging "the right of the people ... to petition the Government for a redress of grievances."

73. Because of Defendants' conduct, Plaintiff has been denied or thwarted in his constitutional right of petition under the First Amendment to the United States Constitution.

74. At the time of Defendants' conduct, each was acting their official capacity under color of the law of the state of Washington

75. As the result of Defendants conduct, Plaintiff has been injured.

76. As a proximate result of the acts alleged herein by Defendants, Plaintiff has suffered damages in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE Plaintiff prays for judgment against Defendants, and each of them, jointly and severally, as follows:

1. General damages in an amount to be proven at trial;

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2. For other and further general and special damages in a sum according to proof at the time of trial;

3. For attorneys' fees under 42 U.S.C. § 1988;

4. For costs of suit incurred herein; and

5. For such other and further relief as this Court deems just and proper.

February 12, 2018.

Respectfully,

EUGSTER LAW OFFICE PSC

Stephen Kerr Eugster
WSBA # 2003
2418 W Pacific Ave.
Spokane, WA 99201

VERIFICATION

I, Stephen Kerr Eugster, declare under penalty of perjury under the law of the state of Washington that he is over the age of 18, competent to be a witniss in proceedings such as this, and that the statements made above are true and correct.

Signed at Spokane, Washington on February 12, 2018.

Stephen Kerr Eugster

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Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT E. CARUSO and SANDRA L. FERGUSON,

Plaintiffs,

v.

WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933); WASHINGTON STATE BAR ASSOCIATION after September 30, 2016 (WSBBA 2017): PAULA LITTLEWOOD, Executive Director, WSBA 1933 and WSBA 2017, in her official capacity; ROBIN LYNN HAYNES is the President of the WSBA 1933 and WSBA 2017, in her official capacity; DOUGLAS J. ENDE, Director of the WSBA 1933 and WSBA 2017 Office of Disciplinary Counsel, in his official capacity; WSBA 1933/WSBA 2017 BOARD OF GOVERNORS, namely: BRADFORD E. FURLONG-President-elect (2016-2017), *et al.*,

Defendants.

No. 2:17-cv-00003 RSM

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIMS AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR: APRIL 21, 2017

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I. INTRODUCTION

In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless crusade against Washington's bar system. Within the past two years alone, Plaintiffs' counsel Stephen K. Eugster ("Eugster") has filed four prior *pro se* lawsuits against Defendant the Washington State Bar Association ("WSBA") and its officials; each such lawsuit was meritless and dismissed at the pleadings stage.[1] This lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments. Many of the arguments Plaintiffs make here are exactly the same arguments that this Court already rejected as meritless when Eugster brought them on his own behalf.[2] These arguments have no more merit when brought on behalf of others. This Court should reject Eugster's attempt to file another lawsuit alleging the same baseless claims.

Eugster tries, but fails, to distinguish this case from prior ones by arguing that the WSBA has been transformed into an entirely new organization, the "WSBA 2017," as a result of straightforward bylaws amendments relating to membership in the WSBA. Contrary to these assertions, Washington law expressly authorizes the WSBA to adopt rules relating to the practice of law in the state, including rules relating to bar membership and limited-license practices. The WSBA remains the same organization Eugster repeatedly has sued over the past two years. Accordingly, cutting through the irrelevant rhetoric, the First Amended Complaint raises only three core claims: first, that requiring bar membership and payment of license fees to practice

---

[1] In addition to this lawsuit, Eugster also recently filed yet another lawsuit against the WSBA and its officials in Thurston County Superior Court. *Eugster v. Supreme Court of the State of Wash., et al.*, Case No. 17-2-00228-34 (Thurston Cnty. Super. Ct. 2017).

[2] *See Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722, at *2, 5-8 (W.D. Wash. Sept. 3, 2015) (dismissing objections to mandatory bar membership and fees and rejecting misreading of case law).

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law in Washington violates plaintiffs' constitutional rights of speech and association; second, that the WSBA lacks authority to discipline lawyers as a result of the bylaws amendments regarding membership in the WSBA; and third, that the WSBA's discipline system fails to provide adequate procedures to satisfy constitutional due process requirements. These claims are meritless and should be dismissed, for five independent reasons.

First, Plaintiffs' claims fail as a matter of law because (a) compulsory bar membership and fees have been repeatedly upheld as constitutional requirements to practice law; (b) the bylaws amendments do not eliminate the WSBA's authority to administer the Washington Supreme Court's lawyer discipline system, and (c) the numerous protections provided under the discipline system have been recognized as sufficient to satisfy due process. Second, any of Plaintiffs' claims related to lawyer discipline are barred under the *Younger* doctrine, given that each Plaintiff is subject to ongoing state discipline proceedings. Plaintiffs' objections must be brought within those proceedings, not in a collateral attack in federal court. Third, Plaintiffs' discipline-related claims are barred under the res judicata doctrine, because those claims already should have been brought, if at all, in Plaintiffs' prior disciplinary proceedings. Fourth, Plaintiffs' due process claim is generic, nebulous, and thus unripe. Fifth and finally, the WSBA is immune from suit.

Accordingly, Plaintiffs' claims should be dismissed with prejudice. For the same reasons, Plaintiffs' request for a preliminary injunction and summary judgment should be denied.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Prior Lawsuits Involving Eugster

This case is the latest in a number of proceedings involving both Eugster and the WSBA. The prior disputes provide context for Plaintiffs' arguments and issues presented in this case.

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This Court may take judicial notice of the public filings in these prior relevant cases. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings."). The Court also may consider the decisions made in each case as persuasive authority.

***In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293 (2009) ("*Eugster* I"):** In 2005, the WSBA charged Eugster with numerous counts of attorney misconduct. *Id.* at 307. Among other issues, Eugster had filed a "baseless" petition, ignored his client's direction, and refused to acknowledge that his client had discharged him. *Id.* at 317-18. A hearing officer found Eugster had violated numerous rules of professional conduct. *Id.* at 307. The WSBA Disciplinary Board then recommended that Eugster be disbarred. *Id.* at 311. In 2009, five justices of the Washington Supreme Court decided instead to suspend Eugster for 18 months, while the remaining four justices agreed with the Disciplinary Board's conclusion that he should be disbarred. *Id.* at 327-28.

***Eugster v. Wash. State Bar Ass'n*, No. CV 09-357-SMM, 2010 WL 2926237 (E.D. Wash. July 23, 2010) ("*Eugster* II"):** In the meantime, the WSBA was investigating another complaint it had received against Eugster based on other conduct. *Id.* at *1. This investigation culminated in a letter from the WSBA to Eugster in December of 2009 warning Eugster "to more carefully analyze the law before filing lawsuits" but otherwise dismissing the matter. *Id.* In January 2010, Eugster filed a complaint in the United States District Court for the Eastern District of Washington against the WSBA and its officials, alleging that Washington's attorney discipline system violated his due process rights. *Id.* at *2. The district court dismissed the case. *Id.* at *11. Specifically, the court determined that Eugster lacked standing to assert his claims because he was not seeking "redress for an actual or imminent injury." *Id.* at *8 (internal

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quotations omitted). The district court also noted that "the Ninth Circuit has recognized bar associations as state agencies for purposes of Eleventh Amendment immunity" and dismissed Eugster's claims against the WSBA for that additional reason. *Id.* at *9. In an unpublished memorandum opinion, the Ninth Circuit affirmed on standing grounds and did not reach the immunity issue. 474 Fed. App'x 624 (9th Cir. 2012).

***Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("*Eugster* III"):** In September 2014, another grievance was filed against Eugster. *See Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711, at *2 (E.D. Wash. June 29, 2016) ("*Eugster* V") (discussing disciplinary history). The WSBA notified Eugster that it was conducting an investigation of the grievance. *See id.* Eugster eventually was informed that the investigation had been assigned to Managing Disciplinary Counsel. *See id.* On March 12, 2015, Eugster filed another lawsuit against the WSBA and its officials, before this Court. *See Eugster* III. In *Eugster* III, Eugster complained that his constitutional rights of association and speech were violated by the requirements of state bar membership and payment of license fees in order to practice law. 2015 WL 5175722, at *2. In September 2015, this Court dismissed the complaint. *Id.* at *1. Specifically, this Court determined Eugster had "grossly misstate[d]" and "misconstrued" governing precedent, which authorizes mandatory bar membership and fees. *Id.* at *5. This Court also observed that the WSBA is immune from suit in federal court as an "investigative arm" of the State of Washington. *Id.* at *9.

Eugster appealed to the Ninth Circuit. Today, on March 21, 2017, the Ninth Circuit affirmed in an unpublished memorandum opinion, upholding "compulsory membership in the WSBA" and rejecting Eugster's lawsuit because "an attorney's mandatory membership with a state bar association is constitutional." *Eugster* III, No. 15-35743, Dkt. # 18-1 (9th Cir. Mar. 21,

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2017). The Ninth Circuit also noted that "[c]ontrary to Eugster's contention," it could not "overrule binding authority . . . ." *Id.* For the Court's convenience, a copy of the memorandum opinion is attached to this brief as Exhibit A.

***Eugster v. Wash. State Bar Ass'n*, No. 15204514-9 (Spok. Cnty. Super. Ct. 2015) ("*Eugster* IV"):** While *Eugster* III was progressing in this Court, the bar disciplinary process moved forward and the latest grievance against Eugster continued to be investigated. On November 5, 2015, Eugster was notified that Disciplinary Counsel would be recommending a formal hearing on the pending grievance against him. On November 9, 2015—four days after Eugster received notice of the hearing recommendation—Eugster filed another lawsuit against the WSBA and its officials, this time in Spokane County Superior Court. Eugster's complaint alleged that the lawyer discipline system violates his procedural due process rights. *See Eugster* V, 2016 WL 3632711, at *2 (discussing *Eugster* IV). The complaint also sought damages. *See id.* The superior court in *Eugster* IV ultimately dismissed the complaint with prejudice, concluding that the Washington Supreme Court has exclusive jurisdiction over lawyer discipline in Washington, that Eugster already had been afforded an opportunity to raise his objections within his prior disciplinary proceedings, and that the WSBA's officials were immune from Eugster's damages claims. *See id.* Eugster appealed to Division III of the Washington Court of Appeals, and that appeal remains pending. *See Eugster* IV, No. 34345-6-III (Wash. Ct. App.).

***Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711 (E.D. Wash. June 29, 2016) ("*Eugster* V"):** On December 22, 2015, soon after Eugster filed his lawsuit in Spokane County Superior Court (*Eugster* IV), Eugster filed yet another lawsuit against the WSBA's officials, this one another federal suit in the Eastern District of Washington. *Id.* Eugster's complaint sounded in due process, with allegations largely identical to those made in

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Eugster IV. *Id.* at *5. On June 29, 2016, the district court dismissed the complaint with prejudice, determining that Eugster's claims were barred under the res judicata doctrine. *Id.* at *4-6. Eugster appealed the decision to the Ninth Circuit Court of Appeals, and that appeal remains pending. *See Eugster* V, No. 16-35542 (9th Cir.).

***Eugster v. Wash. State Bar Ass'n*, No. 2:16-cv-01765 (W.D. Wash.) ("*Eugster* VI"):** On November 15, 2016, Eugster filed yet another lawsuit in this Court. *Id.* As in the present case, the complaint objected to compulsory bar membership and fees, asserted that the recent amendments to the WSBA's bylaws resulted in a new organization without disciplinary authority, and alleged that Washington's discipline system failed to meet procedural due process requirements. *See id.*, Dkt. # 1. Eugster filed a voluntary dismissal of the case on January 4, 2017—one day after he filed the present lawsuit on behalf of Plaintiffs. *See id.*, Dkt. # 3.

B. The Current Lawsuit

The current lawsuit was filed on January 3, 2017. *See* Dkt. # 1. Initially, the case was filed as a putative class action on behalf of all WSBA members, naming Plaintiffs Robert E. Caruso ("Caruso") and Sandra L. Ferguson ("Ferguson") as class representatives. *See id.* at 11. On February 21, Plaintiffs filed a First Amended Complaint, which asserts individual claims on behalf of Plaintiffs Caruso and Ferguson, abandoning all class claims. *See* Dkt. # 4. Caruso and Ferguson are practicing lawyers and active members of the WSBA. *See id.* at 5.

The First Amended Complaint raises three claims: First, it asserts that requiring bar membership and payment of license fees in order to practice law violates Plaintiffs' constitutional rights of association and speech. *See* Dkt. # 4 at 32-34. Second, it asserts that as a result of recent amendments to the WSBA's bylaws, the WSBA is a new organization that no longer has authority to discipline lawyers in Washington. *See id.* at 34-35. Third, it asserts that

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Washington's lawyer discipline system violates procedural due process requirements. *See id.* at 35-36. The Amended Complaint also alleges claims for declaratory relief and failure to meet "constitutional scrutiny," which are derivative arguments that are subsumed under the three claims identified above. *See id.* at 31-32, 36-38.

C. Prior and Current Disciplinary Matters Against Plaintiffs

Each Plaintiff in this case has previously been subject to disciplinary action for professional misconduct and is also currently subject to an ongoing disciplinary matter. The Court may take judicial notice of state bar records from disciplinary matters. *See White v. Martel*, 601 F.3d 882, 885 (9th Cir. 2010) (noting that "state bar records reflecting disciplinary proceedings" were "appropriate for judicial notice"); *Jackson v. Med. Bd. of Cal.*, 424 Fed. App'x 670, 670 (9th Cir. 2011) (granting "request to take judicial notice of . . . State Bar Association records"). Copies of relevant bar documents are attached to this motion as Exhibits for the Court's convenience.

Plaintiff Caruso previously received an admonition in 2015 for ordering a supervised junior lawyer to withdraw immediately from a case without ensuring proper notice or steps to protect his client's interests. *See* Ex. B. More recently, Caruso had a grievance filed against him. *See* Ex. C. Upon review after an investigation by the Office of Disciplinary Counsel, a Review Committee has ordered a public hearing on the alleged misconduct. *See id.*

Plaintiff Ferguson previously was suspended from the practice of law for appearing ex parte without notice to opposing counsel, failing to disclose all relevant facts at an ex parte hearing, and obtaining relief through misrepresentation and deceit. *In re Ferguson*, 170 Wn.2d 916, 921 (2011). More recently, Ferguson had a grievance filed against her that is currently under investigation by the Office of Disciplinary Counsel. Dkt. # 15 at 4; Dkt. # 11 at 1.

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D. Procedural History

The Court has set a briefing schedule for dispositive motions in this case pursuant to a stipulation between the parties. *See* Dkt. # 14 at 3. On March 1, 2017, Plaintiffs filed their Motion for Summary Judgment. *See* Dkt. # 8. On March 3, 2017, Plaintiffs inexplicably also filed a Motion for Preliminary Injunction, making largely the same arguments in support of Plaintiffs' claims in this case. *See* Dkt. # 15. The motion for a preliminary injunction also requests that the Court "stay the discipline endeavors of [the WSBA] until the issues in this case can be decided." *Id.* at 3. The WSBA now requests that the Court deny Plaintiffs' motions and dismiss their claims with prejudice, as set forth below.

III. STATEMENT OF ISSUES

1. Whether requiring bar membership and payment of license fees in order to practice law is constitutional.

2. Whether the WSBA remains authorized to administer the Washington Supreme Court's lawyer discipline system notwithstanding recent amendments to its bylaws designating certain classes of limited-license practitioners as members.

3. Whether Washington's lawyer discipline system—which provides notice, the right to a hearing, the ability to call and cross-examine witnesses, a "clear preponderance" evidentiary burden on the WSBA, and procedures for independent review by the Washington Supreme Court—meets constitutional due process requirements.

4. Whether the *Younger* abstention doctrine bars Plaintiffs from asserting their discipline-related claims in federal court rather than within the discipline proceedings that are currently underway to resolve pending charges against them.

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5. Whether the res judicata doctrine bars Plaintiffs' discipline-related claims because their objections should have been asserted, if at all, within the prior disciplinary proceedings against them.

6. Whether Plaintiffs' due process claim is unripe because it lacks any specific allegation of a deprivation of due process.

7. Whether the WSBA is immune from suit in federal court as an arm of the Washington Supreme Court.

IV. STANDARDS OF REVIEW

A complaint must be dismissed under Federal Rule of Civil Procedure ("Rule") 12(b)(6) if it "lacks a cognizable legal theory" or "fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). A complaint "that offers labels and conclusions, a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement will not suffice." *Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 641 (9th Cir. 2014) (internal marks omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). Instead, the complaint must allege "specific facts" establishing the plausibility of a legally valid claim. *Eclectic Props. E., LLC v. Marcus & Millichapt Co.*, 751 F.3d 990, 999 (9th Cir. 2014). Otherwise, the complaint must be dismissed.

Additionally, where an action against an entity is barred by sovereign immunity, the claims against that entity must be dismissed pursuant to Rule 12(b)(1). *Proctor v. United States*, 781 F.2d 752, 753 (9th Cir. 1986).

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V. ARGUMENT

A. Plaintiffs' Claims Regarding Mandatory Bar Membership, License Fees, and Lawyer Discipline Fail as a Matter of Law.

Plaintiffs' Amended Complaint should be dismissed because it fails to state a valid claim for entitlement to relief. Plaintiffs object to requirements that have been repeatedly upheld as constitutional, make unsupported and convoluted allegations about the WSBA's organizational status without any basis in law, and complain about a system that offers robust procedural protections that are more than sufficient to satisfy due process requirements. In sum, none of Plaintiffs' three claims has any merit.

1. Requiring bar membership and license fees to practice law is constitutional.

Plaintiffs' first claim is that requiring bar membership and license fees to practice law violates their constitutional rights of association and speech. Plaintiffs acknowledge that this claim has nothing to do with the WSBA's recent bylaws amendments. *See* Dkt. # 4 at 32 ("Plaintiff[s] cannot be compelled to be [] members of WSBA 1933 or WSBA 2017."). Instead, Plaintiffs more broadly question whether Washington can "impose a mandatory fee on lawyers" to "subsidize efforts" intended to "improve the quality of legal services." *Id.* at 17.

Plaintiffs' question already has been answered by several prior courts. As this Court explained in *Eugster* III, "[n]otwithstanding Mr. Eugster's mischaracterization of case law, several binding decisions" establish that such requirements are indeed constitutional. 2015 WL 5175722, at *5 (citing *Lathrop v. Donohue*, 367 U.S. 820, 827-28, 832-33 (1961); *Keller v. State Bar of Cal.*, 496 U.S. 1, 4 (1990); *O'Connor v. State of Nev.*, 27 F.3d 357, 361 (9th Cir. 1994); *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042 (9th Cir. 2002); and *Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1177 (9th Cir. 1999)); *see also* Ex. A. Although Plaintiffs call into question

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the Supreme Court's longstanding decision in *Lathrop*, *see* Dkt. # 8 at 16-17, they fail to explain their reasons for doing so and ignore the numerous subsequent cases that place this issue beyond any doubt. In *Keller*, for example, the Supreme Court reaffirmed that lawyers "may be required to join and pay dues to the State Bar," noting that this form of mandatory association and payment is "justified by the State's interest in regulating the legal profession and improving the quality of legal services." 496 U.S. at 4, 13.

The established law on mandatory bar membership and fees is not only clear, it is also consistent with basic First Amendment principles. Mandatory bar membership does not materially limit the freedom of attorneys such as Plaintiffs to associate and speak. Plaintiffs remain "free to attend or not attend [bar] meetings or vote in [bar] elections," and they are not forced "to associate with anyone." *Lathrop*, 367 U.S. at 828. Likewise, Plaintiffs are not required "to express any particular ideas or make any particular utterances of any kind," and they remain able "to express their own views or to disagree with the positions of the Bar." *Morrow*, 188 F.3d at 1176. Although Plaintiffs are required to pay mandatory license fees, those mandatory fees are warranted by the state's strong interest in regulating the practice of law and improving legal services in the state.

Ignoring this binding precedent, Plaintiffs repeatedly cite to *Knox v. Serv. Emp'ees Int'l Union*, 132 S. Ct. 2277 (2012) and *In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 286 Neb. 1018 (2013) ("*In re Petition for Rule Change*"). *See* Dkt. # 4 at 37-38; Dkt. # 8 at 19-20; Dkt. # 15 at 16. Both cases are distinguishable and irrelevant. *Knox* discussed the evolving standards governing "compulsory subsidies for private speech" in the context of commercial enterprises and unions—rather than compelled payment of licensing fees to a mandatory bar association. 132 S. Ct. at 2289; *see also Rosenthal v. Justices of the Supreme*

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Ct. of Cal., 910 F.2d 561, 566 (9th Cir. 1990) (noting that the "'substantial analogy'" between unions and bar associations "does not establish that [a] bar association *is* a labor union" and "substantial differences remain" (quoting *Keller*)). More recently, the Supreme Court specifically confirmed that mandatory bars are distinguishable from the union context, serve strong state interests, and still withstand constitutional scrutiny. *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014).

Likewise, *In re Petition for Rule Change* involved the Nebraska Supreme Court opting to limit the use of mandatory bar fees to regulation purposes, rather than improvement of the legal profession. Plaintiffs fail to acknowledge, however, that the Nebraska Supreme Court's decision was made as a policy decision in response to a petition for a rule change, not a change necessitated for constitutional reasons. *See* 286 Neb. at 1018-19, 1034. Accordingly, Plaintiffs' Second and Third Claims for Relief, which challenge mandatory bar membership and fees, lack merit and should be dismissed as a matter of law.

2. The WSBA remains the same association authorized to administer the Washington Supreme Court's lawyer discipline system.

Plaintiffs' second claim is that the WSBA "came to an end" due to certain bylaws amendments, and that as a result, the WSBA is no longer authorized to administer the Washington Supreme Court's lawyer discipline system. Dkt. # 4 at 9. At issue are amendments the WSBA made to bylaws provisions relating to bar "membership" to include limited-license practitioners whom the WSBA already regulated (namely "Limited Practice Officers," or "LPOs," and "Limited License Legal Technicians," or "LLLTs"). *See, e.g.*, Dkt. # 15 at 5-6, 11. Plaintiffs' assertions that these bylaws amendments terminated the WSBA's existence, created a

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new entity, and nullified the WSBA's authority to administer lawyer discipline in Washington are meritless and should be rejected.

Without citation to authority, Plaintiffs assert that the bylaws amendments somehow remove the WSBA from the purview of the State Bar Act, chapter 2.48 RCW. *See, e.g.,* Dkt. # 8 at 10. To the contrary, the State Bar Act establishes the WSBA as an "agency of the state," RCW 2.48.010, and gives the WSBA Board of Governors the power to adopt rules governing bar membership and discipline:

> The said board of governors shall [] have power, in its discretion, from time to time to adopt rules, subject to the approval of the supreme court, fixing the qualifications, requirements and procedure for admission to the practice of law; . . . to appoint boards or committees to examine applicants for admission; and, to investigate, prosecute and hear all causes involving discipline, disbarment, suspension or reinstatement, and make recommendations thereon to the supreme court; and, with such approval, to prescribe rules establishing the procedure for the investigation and hearing of such matters . . . .

RCW 2.48.060. Pursuant to and consistent with the State Bar Act and other Washington law, the WSBA regularly amends its bylaws regarding any number of matters relevant to the practice of law in Washington, including bar membership and limited-license practices. *See also* RCW 2.48.050 (noting WSBA board has discretion to adopt rules "from time to time" concerning "membership" and "all other matters" affecting "the organization and functioning of the state bar"); WSBA Bylaws at 72-73 (providing that the Bylaws may be amended by the Board of Governors at a regular meeting).[3] Such amendments do not render the WSBA a new organization or entity. *See* RCW 2.48.050; WSBA Bylaws at 72-73; *cf.* Fletcher Cyclopedia of the Law of Corps. §§ 6, 4176 (2016) (noting a corporate entity's existence "presumptively

[3] *Available at* http://www.wsba.org/~/media/Files/About%20WSBA/Governance/WSBA%20Bylaws/Current%20Bylaws.ashx (last visited Mar. 17, 2017).

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continues . . . irrespective of . . . its component members" and "a person who becomes . . . a member . . . does so with . . . implied assent that its bylaws may be amended").

As Plaintiffs point out, the State Bar Act also states that "all persons who are admitted to practice in accordance with the provisions of RCW 2.48.010 through 2.48.180 . . . shall become by that fact active members of the state bar." RCW 2.48.021. But Plaintiffs never specify how this requirement has been violated. Plaintiffs also ignore that the statutes referenced within and incorporated into RCW 2.48.021—including RCW 2.48.050 and .060—empower the WSBA Board of Governors to set rules for membership and for admission to practice law, and do not preclude the WSBA from establishing membership for limited-license practitioners.

Furthermore, the recent bylaws amendments are consistent with Washington General Rule 12.1, the Washington Supreme Court's statement of the purposes and authorized activities of the WSBA. Nothing in the amendments changes the WSBA into something beyond what the Washington Supreme Court has authorized, in its inherent authority over the practice of law. *See, e.g., State ex rel. Schwab v. Wash. State Bar Ass'n*, 80 Wn.2d 266, 269, 493 P.2d 1237 (1972) ("In short, membership in the state bar association and authorization to continue in the practice of law coexist under the aegis of one authority, the Supreme Court."); *Hahn v. Boeing Co.*, 95 Wn.2d 28, 34, 621 P.2d 1263 (1980) (noting Washington Supreme Court is "assisted" by the WSBA acting as its "agent").

Moreover, limited-license practitioners are nothing new. As an example, for decades certain "qualified law students" have been licensed to practice in limited circumstances. *State v. Cook*, 84 Wn.2d 342, 346, 525 P.2d 761 (1974) (discussing Washington Admission and Practice Rule (APR) 9 (adopted effective June 4, 1970)). LPOs have been licensed by the Washington Supreme Court since 1983 and regulated by the WSBA since 2002. *See* APR 12 (adopted

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effective January 21, 1983 and amended July 1, 2002). The rule creating LLLTs and delegating regulation to the WSBA was adopted in 2012, well before the recent bylaws amendments. *See* APR 28 (adopted effective September 1, 2012). Indeed, Plaintiffs' counsel already specifically complained about the LPO and LLLT Boards in one of his prior lawsuits. *See Eugster* III, 2015 WL 5175722, at *7. Thus, prior to the recent bylaws amendments, LPOs and LLLTs were already licensed by the Washington Supreme Court and regulated by the WSBA, but were not defined as members of the bar under the WSBA Bylaws; now they are. These bylaws amendments do not in any way alter the existence of the WSBA or its authority to administer the Washington Supreme Court's lawyer discipline system.

In sum, the WSBA remains the "agent" of the Washington Supreme Court tasked with administering its lawyer discipline system. *Hahn*, 95 Wn.2d at 34; *see also* Wash. Rules for Enf't of Lawyer Conduct ("ELC") 1.3(a). Accordingly, Plaintiffs' Fourth Claim for Relief, which asserts that the WSBA lacks the authority to administer the lawyer discipline system, fails as a matter of law and should be dismissed with prejudice.

3. Washington's lawyer discipline system provides protections that satisfy procedural due process requirements.

Plaintiffs' third claim is that the Washington Supreme Court's lawyer discipline system fails to provide adequate procedures to satisfy due process requirements. Plaintiffs make vague allegations that the structure and operation of the lawyer discipline system as a whole is not "fair." *See* Dkt. # 4 at 15-31; Dkt. # 8 at 22; Dkt. # 15 at 18-20. Again, Plaintiffs ignore governing precedent regarding the operation of lawyer discipline systems.

In the context of lawyer discipline, the Ninth Circuit has recognized that due process consists primarily of "notice and an opportunity to be heard." *Rosenthal v. Justices of the*

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Supreme Ct. of Cal., 910 F.2d 561, 564 (9th Cir. 1990). Under Washington's system, lawyers are afforded these protections. *See* ELC 4.1, 5.7, 10.3. Thus, Washington's system comports with minimum due process requirements.

In fact, the Ninth Circuit already has reviewed a lawyer discipline system identical to Washington's in all relevant respects, and held that such a system is more than adequate. In *Rosenthal*, the court concluded that California's bar system provides disciplined lawyers "with more than constitutionally sufficient procedural due process." 910 F.2d at 565. The court reached this conclusion because disciplined lawyers were afforded (1) the right to a hearing, (2) the ability "to call witnesses and cross-examine," (3) the burden being on the state "to establish culpability by convincing proof," and (4) ultimate, independent review by the state's supreme court. *See id.* at 564-65. Washington's system provides each of these protections. *See* ELC Title 10 (hearings); ELC 10.1, 10.11, 10.12, 10.13 (ability to call and cross-examine witnesses); ELC 10.14(b) (burden on state to prove misconduct "by a clear preponderance"); ELC Title 12 (supreme court review). As with the system considered in *Rosenthal*, Washington's discipline system provides more than adequate process.

Plaintiffs complain mostly about impartiality, but this objection is especially groundless. *See* Dkt. # 15 at 17-20. Plaintiffs overlook that independent review by the Washington Supreme Court ensures the requisite neutrality. *See Rosenthal*, 910 F.2d at 564-65; *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1435-36 (9th Cir. 1995) ("So long as the judges hearing the [lawyer] misconduct charges are not biased . . . there is no legitimate cause for concern over the composition and partiality of the [initial disciplinary committee]."). Further, the Ninth Circuit has "specifically rejected" the notion that a state supreme court has "an inherent conflict of interest" in reviewing "state bar disciplinary proceedings." *Canatella v. California*, 404 F.3d

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1106, 1112 (9th Cir. 2005). The Ninth Circuit has also rejected the notion that a bar association having "both investigative and adjudicative functions" creates an "unacceptable risk of bias." *Hirsh v. Justices of the Supreme Court of Cal.*, 67 F.3d 708, 714 (9th Cir. 1995). In other words, Plaintiffs would need to allege and present "actual evidence" of bias specific to a given adjudicator to overcome the "presumption of honesty and integrity in those serving as adjudicators." *Canatella*, 404 F.3d at 1112 (internal quotes omitted); *see also Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995). Plaintiffs have not done so, and their claim is thus meritless.

Washington's lawyer discipline system unquestionably comports with due process requirements. Accordingly, Plaintiffs' Fifth Claim for Relief should be dismissed with prejudice. Moreover, because Plaintiffs' First and Sixth Claims for Relief rely entirely on their other failed claims, those claims also fail as a matter of law and should be dismissed with prejudice.

B. Plaintiffs' Discipline-Related Claims Are Barred Under the *Younger* Doctrine and Must Be Raised Within Their Disciplinary Proceedings.

Plaintiffs' Fourth and Fifth Claims for Relief, which concern the lawyer discipline system, also should be dismissed under the *Younger* abstention doctrine, because Plaintiffs are prohibited from using these proceedings as a way of interfering with ongoing state bar disciplinary actions. Under the *Younger* doctrine, abstention is required "to avoid interference in a state-court civil action" when there are "ongoing state proceedings" that "implicate important state interests" and the federal plaintiff's claims may be litigated "in the state proceedings." *M&A Gabaee v. Comm'y Redev't Agency*, 419 F.3d 1036, 1039 (9th Cir. 2005). The U.S. Supreme Court previously has determined that lawyer disciplinary proceedings qualify as proceedings that implicate important state interests. *See, e.g., Middlesex Cnty. Ethics Comm. v.*

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Garden State Bar Ass'n, 457 U.S. 423, 434-35 (1982). Additionally, constitutional and other objections may be litigated within such disciplinary proceedings. *See, e.g.*, ELC 10.1, 10.8.

Here, pending disciplinary matters against each Plaintiff are ongoing and merit abstention. A formal hearing already has been ordered against Caruso. *See* Ex. C. Under Washington's rules, once "a matter is ordered to hearing," as here, a formal complaint must be filed as a matter of course. ELC 10.3(a)(1). Likewise, the ongoing investigation of Ferguson is governed by detailed Washington rules and also constitutes a substantive part of the disciplinary process. *See* ELC Title 5; *cf. Alsager v. Bd. of Osteopathic Medicine and Surgery*, 945 F. Supp. 2d 1190, 1195 (W.D. Wash. 2013) ("The Board's investigation of Plaintiff's conduct constitutes a state initiated 'ongoing proceeding' for the purpose of *Younger* abstention." (citing cases)); *In re Scannell*, 169 Wn.2d 723, 740 (2010) (holding that lawsuit filed during initial bar investigation "was not preexisting" and did not warrant disqualification of hearing officers named as defendants in lawsuit).

In light of the formal disciplinary proceedings ongoing against both Plaintiffs, this case presents a substantial risk of precisely the type of interference that the *Younger* doctrine is intended to prevent. Indeed, Plaintiffs have specifically asked this Court to "stay the discipline endeavors" against them. Dkt. # 15 at 3. To avoid any such interference, this Court should abstain from litigating Plaintiffs' collateral attack on the Washington disciplinary process.

This case stands in contrast to the circumstances in which the Ninth Circuit has allowed bar discipline challenges to proceed in federal court. In *Canatella v. State of California*, 304 F.3d 843 (9th Cir. 2002), for example, the court allowed a lawyer's challenge to proceed because "no affirmative action had been taken by the State Bar" and the only relevant state rule provided that bar proceedings commenced with "the filing of an initial pleading," which had not occurred.

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304 F.3d at 850-51. Washington has a similar rule regarding the formal commencement of a disciplinary proceeding, *see* ELC 10.3(b), but this case is very different than *Canatella*.

Here, the WSBA has taken a number of affirmative steps within the discipline system, *see* Ex. C; Dkt. # 15 at 4; Dkt. # 11 at 1, whereas in *Canatella* there was no ongoing disciplinary investigation, 304 F.3d at 851 (noting that the "only procedural step that had occurred" was "Canatella's act of self-reporting").[4] In this case, an investigative report and recommendation already has been completed regarding the grievance against Caruso, *see* ELC 5.7(c); an order for a public hearing already has been issued, *see* Ex. C; and a formal complaint is forthcoming, *see* ELC 10.3(a)(1). Likewise, a grievance against Ferguson already has been processed and an investigation is underway. Dkt. # 15 at 4; Dkt. # 11 at 1. Moreover, the Washington Supreme Court has ruled, in a case where a lawyer under investigation sought to disqualify bar officials by filing a separate lawsuit against them, that the disciplinary investigations were "pending ELC proceedings" that preexisted his lawsuit. *Scannell*, 169 Wn.2d at 740. In sum, the potential for interference with ongoing state proceedings against Plaintiffs is both clear and substantial. Thus, this Court should dismiss Plaintiffs' Fourth and Fifth Claims for Relief regarding the WSBA's disciplinary authority and procedural due process.

C. Plaintiffs' Discipline-Related Claims Also Should Have Been Raised in Their Prior Disciplinary Proceedings and Are Thus Barred Under the Res Judicata Doctrine.

Plaintiffs' Fourth and Fifth Claims for Relief also should be dismissed under the doctrine of res judicata; their discipline-related claims should have been raised, if at all, in their prior disciplinary proceedings. Res judicata is intended to "avoid[] repetitive litigation, conserv[e]

[4] Although the holding of *Canatella* is inapplicable here, Defendants believe the Ninth Circuit's decision in *Canatella* is inconsistent with Supreme Court precedent, allows for too much interference with state disciplinary proceedings, and ultimately should be overruled.

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judicial resources, and prevent[] the moral force of court judgments from being undermined." *Int'l Union of Operating Eng'rs-Emp'rs Constr. Indus. Pension v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993) (internal quotations omitted). Federal courts give state court judgments the same preclusive effect as they would receive in the courts of the originating state. *See, e.g., Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

Under Washington law, res judicata bars a matter from being "relitigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised, in [a] prior proceeding." *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997). There is "no simple all-inclusive test" for determining whether specific claims should have been asserted in a prior proceeding. *Id.* at 330. "Instead, it is necessary to consider a variety of factors," including, for example, whether "there were valid reasons" not to assert the claims earlier. *Id.* at 331.

Here, Plaintiffs should have raised their objections related to the discipline system in their prior discipline proceedings. Caruso was disciplined in 2015 and Ferguson in 2011. As noted above, limited-license practitioners had already begun to be licensed and regulated by the WSBA at the time. Further, the discipline system generally had the same structure and provided lawyers with the same procedural protections that it does now. Plaintiffs could have raised their objections in those proceedings, and should now be precluded from wasting scarce judicial resources on their belated arguments. Accordingly, this Court also should dismiss Plaintiffs' Fourth and Fifth Claims for Relief regarding the WSBA's disciplinary authority and procedural due process on res judicata grounds.

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D. Plaintiffs' Due Process Objections Are Unripe.

Plaintiffs' Fifth Claim for Relief, their due process claim, also should be dismissed because it is not ripe for adjudication. The ripeness doctrine requires a claimant to present "concrete legal issues" rather than mere "abstractions." *Mont. Env't'l Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1188 (9th Cir. 2014) (internal quotations omitted). Further, a claimant must allege injury that "is sufficiently direct and immediate" to warrant judicial review. *Pence v. Andrus*, 586 F.2d 733, 737 (9th Cir. 1978) (internal quotations omitted). These requirements "sharpen[] the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 738 (internal quotations omitted).

Here, Plaintiffs complain about the lawyer discipline system only in the abstract, without alleging any particular deprivation of due process that they have suffered or are likely to suffer. *See* Dkt. # 4 at 15-31. They describe various components of the discipline system, but without stating how those components have been or will be used to violate their due process rights. *See id.* As a result, Plaintiffs have failed to present concrete legal issues or any "direct and immediate" injury and their claim is unripe. *See Pence*, 586 F.2d at 737-38.

Plaintiffs' vague allegations are especially deficient in the context of a procedural due process challenge. None of their objections arise from the application of the discipline system to them—instead, they are objections to the system in theory. But as the Ninth Circuit has observed, "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Pence*, 586 F.2d at 737 (internal quotations omitted). In other words, it is generally impossible to evaluate the sufficiency of procedures in a vacuum, without application to a particular case and without consideration of context and details. As the Ninth Circuit made clear in *Pence*, a procedural due process

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challenge "requires factual development, and should not be decided in the abstract." *Id.* at 736-37 (dismissing as unripe a challenge to regulations that had "not yet been applied to [the] plaintiffs").

Here, all of Plaintiffs' objections to the discipline system are abstract and premature. They complain about "vast differences among hearing officers" and allege that "[n]ot all hearing officers understand the trial process and the rules of evidence." Dkt. # 4 at 28. Given that a hearing officer has not yet been assigned to either of their cases, however, these complaints are entirely speculative. *See Hirsh*, 67 F.3d at 714 (noting bar officers are "entitled to a presumption of honesty and integrity"). Moreover, the system provides due process protections relating to the assignment of hearing officers. *See, e.g.*, ELC 10.2(b) (providing procedures for disqualification of hearing officers).

Plaintiffs also complain about the deference the Washington Supreme Court allegedly affords to the WSBA Disciplinary Board. *See* Dkt. # 4 at 30. But again, without allegations of an actual instance of improper deference in either of their cases, this issue cannot be evaluated or adjudicated. As *Eugster* I demonstrates, the Washington Supreme Court departs from hearing officer and/or Disciplinary Board recommendations when it sees fit to do so. *See Eugster* I, 166 Wn.2d at 299 (deviating from unanimous Board recommendation of disbarment to impose 18-month suspension); *see also, e.g.*, *In re Blanchard*, 158 Wn.2d 317, 330 (2006) ("[W]hile we do not lightly depart from the Board's recommendation, we are not bound by it." (internal marks omitted)).[5]

[5] Plaintiffs also ignore that the Ninth Circuit upheld such a framework of deference in *Rosenthal*. *See* 910 F.2d at 564 (upholding system in which state supreme court gave "great weight" to board's findings but was "not bound by them").

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In sum, Plaintiffs' objections to the discipline system are too vague and abstract to be adjudicated. This Court should dismiss Plaintiffs' Fifth Claim for Relief because it is not ripe, as in previous related cases. *See Eugster* II, 2010 WL 2926237, at *8 (rejecting prior challenge as too abstract), *aff'd*, 474 Fed. App'x at 625.

E. The WSBA Is Immune from Suit.

Finally, the WSBA should be dismissed from this case because it is immune from suit. In the context of challenges to bar requirements or regulation, the Ninth Circuit has recognized unified bar associations such as the WSBA are state agencies for the purposes of Eleventh Amendment immunity. *See Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985) (affirming dismissal of state bar association from case seeking to enjoin enforcement of bar rule); *Ginter v. State Bar of Nev.*, 625 F.2d 829, 830 (9th Cir. 1980) ("[T]he Nevada State Bar Association, as an arm of the state, is not subject to suit under the Eleventh Amendment."). Indeed, this issue has been previously adjudicated multiple times between Plaintiffs' counsel and the WSBA in federal court, against Plaintiffs' counsel. *See Eugster* II, 2010 WL 2926237, at *9 (noting that "the Ninth Circuit has recognized bar associations as state agencies for the purposes of Eleventh Amendment immunity" and dismissing claims against the WSBA for that added reason), *aff'd on other grounds*, 474 Fed. App'x 624 (9th Cir. 2012); *Eugster* III, 2015 WL 5175722, at *9 ("[A]s a federal court in this state has already apprised Mr. Eugster, the WSBA is a state agency immunized from suit by the Eleventh Amendment."). In sum, under well-settled Ninth Circuit law, the WSBA is immune from suit and the claims against it should be dismissed.

F. The Amended Complaint Should Be Dismissed with Prejudice.

This Court should dismiss Plaintiffs' claims with prejudice. Plaintiffs already have amended their complaint once and their allegations are so deficient and speculative, as well as

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barred by the *Younger*, res judicata, and immunity doctrines, that they do not warrant an opportunity for further amendment. *See, e.g., In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 990 (9th Cir. 2008) (affirming dismissal without leave to amend because plaintiff was unable to propose any amendments that would save complaint).

G. Plaintiffs Have Failed to Make the Showings Necessary for Summary Judgment or a Preliminary Injunction.

By asserting flawed claims subject to dismissal, Plaintiffs have also failed to demonstrate entitlement to summary judgment or a preliminary injunction. As explained above, Plaintiffs' Amended Complaint lacks any legal merit and should be dismissed with prejudice. Accordingly, Plaintiffs are not entitled to judgment "as a matter of law" on summary judgment. Fed. R. Civ. Pro. 56(a). Nor have Plaintiffs demonstrated a likelihood of success "on the merits" as required for a preliminary injunction. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2009). Moreover, Plaintiffs fail to specify any potential irreparable harm that would result if a preliminary injunction is not issued. *See* Dkt. # 15 at 20. Indeed, as Plaintiffs' disciplinary history demonstrates, irreparable harm is far more likely to result if Plaintiffs are no longer subject to regulatory oversight in the practice of law. For the same reason, the balance of equities and public interest tip sharply in favor of denying Plaintiffs' unsupported requests.

VI. CONCLUSION

This case is one in a long line of frivolous attempts by Plaintiffs' counsel to upend Washington's bar system, including the Washington Supreme Court's disciplinary system. Enlisting other lawyers to serve as named plaintiffs does not change the outcome. As with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice.

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DATED this 21st day of March, 2017.

PACIFICA LAW GROUP LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2017, I electronically filed the foregoing document with the Clerk of the United States District Court using the CM/ECF system which will send notification of such filing to the following:

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Hon Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ROBERT E. CARUSO and SANDRA L. FERGUSON,

Plaintiffs,

vs

WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933); WASHINGTON STATE BAR ASSOCIATION after September 30, 2016 (WSBA 2017): PAULA LITTLEWOOD, Executive Director, WSBA 1933 and WSBA 2017, in her official capacity; ROBIN LYNN HAYNES is the President of the WSBA 1933 and WSBA 2017, in her official capacity; DOUGLAS J. ENDE, Director of the WSBA 1933 and WSBA 2017 Office of Disciplinary Counsel, in his official capacity; WSBA 1933/WSBA 2017 BOARD OF GOVERNORS, namely: BRADFORD E. FURLONG, President-elect, *et al.*,

Defendants.

No. 2:17-cv-00003-RSM

RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

WSBA Defendants' primary argument concerns Plaintiffs' counsel, Stephen Kerr Eugster. Their argument begins in the first paragraph of the Introduction to their Motion to Dismiss.

Introduction, First Paragraph:

> In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless crusade against Washington's bar system. Within the past two years alone, Plaintiffs' counsel Stephen K. Eugster ("Eugster")[' has filed four prior pro se lawsuits against Defendant the Washington State Bar Association ("WSBA") and its officials; each such lawsuit was meritless and dismissed at the pleadings stage.This lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments. [Footnotes omitted].

Motion to Dismiss 1.

Their argument is given significant attention the Motion to Dismiss. The discussion of the argument and facts alleged regarding the argument proceeds from page 1 to page 9 of the 24 page Motion to Dismiss, Dkt # 16. After a rather desultory discussion of other arguments, WSBA Defendants restate the argument in the Conclusion to the Motion to Dismiss. They say:

> This case is one in a long line of frivolous attempts by Plaintiffs' counsel to upend Washington's bar system, including the Washington Supreme Court's disciplinary system. Enlisting other lawyers to serve as named plaintiffs does not change the outcome. As with counsel's

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[1] BA, 1966, University of Denver; JD, 1969, University of Washington School of Law; Washington Law Review1967-69, Member and Managing Editor 1968-69; Order of the Coif; Safeco Scholar 1967-68, 1968-69; Member Washington State Bar Association since 1970. Delcaration of Stephen Kerr Eugster, April 6, 2017.

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> prior suits, the claims presented are meritless and should be dismissed with prejudice.

Motion to Dismiss 24.

The argument is extraordinarily improper. Doubly so because of who is making it, the WSBA Defendants and their three lawyers at Pacifica Law Group, Seattle. The individual WSBA Defendants are state of Washington lawyers, members of the bar of the Washington Supreme Court.

The argument is unethical and contrary to justice, equity, and law. Moreover, it based on false facts. With the argument, WSBA Defendants and their lawyers are engaging in conduct, which is antithetical to purposes of the organization and the ethical responsibilities of Washington lawyers. Further concerns about the argument and each one of WSBA Defendants' other assertions, will be discussed below starting at page 5.

II. STATEMENT OF UNDISPUTED FACTS

Plaintiffs have included a Statement of Undisputed Fact in their Motion for Summary Judgment and Memorandum in Support, Dkt # 8, 6-11, in their Motion for Preliminary Injunction, Dkt # 15, 4-7, and Declaration of Stephen Kerr Eugster, Dkt # 9 all pages, including its Appendix. WSBA Defendants have not controverted the facts stated.

The WSBA was created in 1933 by the Bar Act. Wash. Sess. 1933, c 94. It is an integrated bar association having the main characteristics of integrated bar associations in other states: It is limited to lawyers who are admitted to the bar of

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the Supreme Court. The lawyers are compelled to be members of and pay dues to the WSBA in order practice law in Washington. The lawyers are regulated and disciplined by the Association.

On September 30, 2016, the Bylaws of the WSBA 1933 were amended. The amended bylaws took effect on January 1, 2017 ("New WSBA 2017" or "WSBA 2017").

The New WSBA 2017 is not an integrated bar association. It is a purported integrated association of licensed legal professionals. Bylaws Article III (A) (1) "a. Lawyers admitted to the Bar and licensed to practice law pursuant to APR 3 and APR 5; b. Limited License Legal Technicians; and c. Limited Practice Officers." Id.

III. ISSUES PRESENTED

1. Whether the New WSBA 2017 violates Plaintiffs' rights under the First and Fourteenth Amendments to freedom of non-association and speech and expression.

2. Whether the New WSBA 2017 is, or can be, the disciplinary authority of the Rules for Enforcement of Lawyer Conduct.

3. Whether the discipline system sought to be used by the New WSBA 2017 violates Plaintiffs' rights of procedural due process of law under the Fifth and Fourteenth Amendments.

IV. STANDARDS OF REVIEW

A. Motion to Dismiss.

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"The general rule for 12(b)(6) motions is that allegations of material fact made in the complaint should be taken as true and construed in the light most favorable to the plaintiff. *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir.2000). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts that would entitle him or her to relief. *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir.2000)." *Nursing Home Pension v. Oracle Corp.*, 380 F.3d 1226, 1229 (9th Cir., 2004).

B. Motion for Summary Judgment.

"In a federal court, summary judgment is required under Fed. R. Civ. P. 56(c) when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact. *See Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). That burden may be met by ' 'showing' -that is, pointing out to the district court -that there is an absence of evidence to support the nonmoving party's case.' *Id.* at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify facts which show a genuine issue for trial. *See id.* at 323-24; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)." *Fairbank v. Wunderman Cato*, 212 F.3d 528, 552 (9th Cir., 2000).

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V. ARGUMENT IN RESPONSE AND REPLY

A. WSBA Defendants Attack on Plaintiffs' Counsel

1. Response to Defendants' Statements about Plaintiffs' Lawyer

WSBA Defendants make a number of derogatory and false statements about Plaintiffs' lawyer. They say he is "a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct." This is false, in fact the opposite is true. Declaration of Stephen Kerr Eugster dated April 6, 2017. (Eugster Declaration.)

Eugster is not engaging in a "meritless crusade against Washington's bar system."

WSBA Defendants say, "[t]his lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments." But, the facts, the truth, establish this case is not the same as Eugster's pro se actions. This case is not about the constitutionality of the WSBA 1933. It is about the constitutionality of the New WSBA 2017.

It is not about the WSBA Washington Lawyer Discipline System of the WSBA 1933; it is about some sort of discipline system for the New WSBA 2017 which has yet to be created. The New WSBA 2017, is not the WSBA referred to in the Washington Rules for Enforcement of Lawyer Conduct. That WSBA is the WSBA of the Bar Act (WSBA 1933). It is about the constitutionality of the New

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WSBA 2017 being in possession of the power discipline of lawyers.

WSBA Defendants say, "Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments." Counsel has not "enlisted" the Plaintiffs. These statements are false. Eugster Declaration.

2. Rules of Professional Conduct.

The WSBA Defendants' argument and false factual assertions violate the Washington Rules of Professional Conduct, RPC. Defendants and their counsel violate several RPC rules:

a. RPC 3.1 Meritorious Claims and Contentions

("A lawyer shall not . . . defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); There is no "basis in law or fact" for what WSBA Defendants and their lawyers are doing in making the argument regarding Plaintiffs' lawyer. And, the argument is frivolous and it is irrelevant.

b. RPC 3.3 Candor Toward the Tribunal

("(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.") (" (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly

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adverse to the position of the client and not disclosed by the opposing party;") The WSBA Defendants and their lawyers are making "false statement[s] of material fact" in support of their argument against Plaintiffs' lawyer. Presumably, they are aware of the Rules of Professional Conduct which they are violating.

c. RPC 3.5 Impartiality and Decorum of the Tribunal

("A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law.") The argument against Plaintiffs' lawyer is a bold attempt to influence the judge in this case. The argument is an ad hominem argument which is not a proper part of reason or logic. Such arguments are intent on having the judge join with the WSBA Defendants and their lawyer in their personal opinions of the Plaintiffs's lawyer. Furthermore, such arguments are an invitation to the court to have the judge taint the argument and character of the Plaintiffs by reason of the lawyer they have hired to defend them.

d. RPC 3.4 Fairness to Opposing Party

("A lawyer shall not: (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.") WSBA Defendants and their lawyers violate RPC 3.4 because the facts as to Plaintiffs' lawyer they assert are not relevant and are not supported by admissible

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evidence. Furthermore, they violate RPC 3.4 because they are stating, "personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant." In fact, it is this – their opinion of justness of Plaintiffs' cause and their lawyer – with which they seek to impress the court.

2. The Eugster Cases.

WSBA Defendants attempt to conflate Eugster's personal efforts with this case. They do this so as to claim "[a]s with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice." Dkt # 16, Motion at 25.

WSBA Defendants and their lawyers tell the court it "may take judicial notice of the public filings in these prior relevant cases. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ('On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings.')."

Next and "quite out of the blue" they say, "[t]he Court also may consider the decisions made in each case as persuasive authority." They are trying to say the court can look to the Eugster Cases as "persuasive authority" that Plaintiffs' action must be dismissed. But, as will be shown, the cases are irrelevant and completely apposite.

a. ***In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293 (2009) ("Eugster I")**

Defendants want the court to know of Eugster's previous discipline. Their purpose is to gain favor with the court as to their ideas of Eugster's character. They

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imply; Eugster is a bad man and Plaintiffs's are too because they have retained him to represent them.

In 2004-5, the WSBA 1933 began a disciplinary action against Eugster. At this time, Eugster had been practicing law in Washington since the fall of 1970. In his 33 years of active practice of law, Eugster had never had a discipline action brought against him. Eugster had never been involved WSBA Washington Lawyer Discipline System. Not only had he not experienced it, he had the impression the System was fair and that the representatives of the system would be fair. Eugster learned otherwise from his six-year first-hand experience of the System

b. ***Eugster v. Washington State Bar Association*, No. CV 09-357-SMM (Dist. Court, ED Wash. 2010) (Eugster II).**

At page 23 of their Motion to Dismiss, WSBA Defendants use this case in this way:

> In sum, Plaintiffs' objections to the discipline system are too vague and abstract to be adjudicated. This Court should dismiss Plaintiffs' Fifth Claim for Relief because it is not ripe, as in previous related cases. *See Eugster* II, 2010 WL 2926237, at *8 (rejecting prior challenge as too abstract), *aff'd*, 474 Fed. App'x at 625.

But the (9th Circuit did not say that case should be dismissed because the claims about the system were too abstract. The case was dismissed because the injury claimed was not imminent.

This case is discussed in greater detail in the Eugster Declaration of April 6, 2017. *See* Case II, *Eugster v. Washington State Bar Association*, No. CV 09-357-SMM (Dist. Court, ED Wash. 2010), *affirmed* (9th Cir. 2012).

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c. ***Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("Eugster III"), affirmed, 9th Circuit Court of Appeals, Petition for Writ of Certiorari in process.**

WSBA Defendants say this about Eugster III.

> In September 2014, another grievance was filed against Eugster. *See Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711, at *2 (E.D. Wash. June 29, 2016) ("*Eugster* V") (discussing disciplinary history). The WSBA notified Eugster that it was conducting an investigation of the grievance. *See id.* Eugster eventually was informed that the investigation had been assigned to Managing Disciplinary Counsel. *See id.* On March 12, 2015, Eugster filed another lawsuit against the WSBA and its officials, before this Court. *See Eugster* III.

Dkt # 16, Motion 4.

Within days of filing and serving the action, Case III, WSBA disciplinary counsel reactivated an investigation of a false grievance against Eugster that had been filed on September 23, 2014. Eugster began doing legal and other work for Verdelle G. O'Neill on September 11, 2014. Within a few days, Cheryl Rampley, a niece of Mrs. O'Neill's deceased husband, began making claims about Eugster, which were false.

Eugster provided extensive information and documents to Kevin Banks, WSBA disciplinary counsel assigned to the grievance. On December 25, 2014, Eugster provided more information. To Eugster, it looked as though the grievance would be dismissed. However, apparently prompted by the action Eugster filed against the WSBA on March 12, 2015, Francesca D'Angelo, a WSBA disciplinary counsel, informed Eugster that the grievance would be investigated, and that she was taking over from Mr. Banks.

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The bar investigator talked with Eugster and others commencing the first part of April 2015. Eugster was asked for more information, and he promptly complied. Id. On August 18, 2015, Eugster's client Verdelle G. O'Neill died. Id. at 49. In November 2015, Ms. D'Angelo indicated that she was going to seek to have the grievance filed against Eugster be ordered to hearing by the Review Committee of the WSBA Disciplinary Board. Id. Eugster, believed that under 9th Circuit case authority and his experience that he might not have standing at that time to commence an action against the Bar Association contesting the constitutionality of the WSBA discipline system in Federal Court.

d. Eugster v. WSBA, No. 15-2-04614-9, Superior Court of the State of Washington for Spokane County. Case IV

Eugster brought an action in the Superior Court for the state of Washington in Spokane County. Eugster v. WSBA, No. 15-2-04614-9, Superior Court of the State of Washington for Spokane County. Case IV. Eugster contended that the Superior Court had original jurisdiction over the civil rights action by virtue of prior Washington case law and by Washington State Constitution Art. IV, § 6 which provides that the superior court has original jurisdiction in equity and law. Wash. Const. Art IV, § 6:

> Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law . . . . The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.

The superior court refused to exercise its jurisdiction under the constitution and dismissed the case with prejudice. The court "reasoned" the Washington Supreme Court and the Washington Discipline System "had exclusive authority" over Eugster's Civil

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Rights Action. Conclusions and Order Granting Defendants' Motion to Dismiss.

e. *Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711, at *2 (E.D. Wash. June 29, 2016) ("Eugster V"), on appeal, 9th Circuit.

The trial court wrongfully dismissed the case on the basis of res judicata using the Order of Dismissal in Case IV. This was error because the Order was not an order on the merits of the case, it was an order saying the Superior Court did not have jurisdiction. Declaration of Eugster, April 6, 2017.

B. Forced Membership In and Dues to the New WSBA 2017

WSBA Defendants say there is no new WSBA 2017: that the WSBA is the same today as it was before January 1, 2017. Next they say *Lathrop v. Donohue*, 367 U.S. 820 (1961), approves of the New WSBA 2017.

WSBA Defendants ignore the facts about the character or nature of the New WSBA of 2017. The WSBA was created in 1933 by the Bar Act. The WSBA, as an integrated association created by the Bar Act, operated until January 1, 2017.

Defendants assert the New WSBA 2017 is permitted under *Lathrop v. Donohue.* The *Lathrop Case* and the cases Defendants have cited have no application to constitutionality of the New WSBA 2017.

Another point, the new WSBA came into being, not by any action on the part of the Supreme Court, but by action of the WSBA 1933 Board of Governors. The authority of the state has not be passed on to the WSBA by the state legislature or the Supreme Court.

C. The New WSBA 2017 Is Not the Disciplinary Authority under the Rules for Enforcement of Lawyer Conduct

The New WSBA 2017 has no authority under the Rules for Enforcement of Lawyer

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Conduct. The ELC authority is that of the WSBA 1933. ELC 2.2 (a)(1), last amended on September 1, 2015, provides that the ELC is under the control of the "Association." Under the ELC, Association "means the Washington State Bar Association." ELC 1.3 (a). At the time of the last amendment to the ELC and these rules, the "WSBA" was the WSBA of the Bar Act, WSBA 1933. This is so because the rules have not been changed. They have no application to the new WSBA 2017.

There is another reason why the new WSBA 2017 is not the disciplinary authority for lawyers. Integrated bar associations like that of WSBA 1933 and the integrated association in Lathrop have specific characteristics.

The state's delegation of the power to discipline lawyers was delegated as a critical aspect of the integrated bar. Bar Act c. 94,

D. WSBA 1933 Washington Attorney Discipline System Violates Procedural Due Process of Law

Of this claim, WSBA Defendants and counsel say "Plaintiffs' third claim is that the Washington Supreme Court's lawyer discipline system fails to provide adequate procedures to satisfy due process requirements." Dkt # 16, Motion at 15. Plaintiffs do not say this. They do say that system violates procedural due process of law because the system does not provide for or allow a fair hearing.

Plaintiffs also say there are numerous discrete aspects of the system which violation procedural due process.

But all the procedures in the world will provide no protection if the entire system is biased. Further, the conduct of WSBA Defendants and their attorneys in these proceedings in making and their primary argument and then relying on it in their

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conclusion is evidence of the lack of awareness and respect for truth and justice.

E. *Younger* Doctrine Has No Application

WSBA Defendants say the Court should dismiss the this case on the basis of the *Younger* abstention doctrine. Defendants make two arguments. First, that there was an ongoing WSBA proceeding against Eugster when this case was filed on December 22, 2015. Second, they argue that Eugster's "objections may be litigated in his disciplinary proceeding." Appellee's Brief at 19. There is no basis for either of these arguments.

The *Younger* abstention doctrine is described as follows: "*Younger* abstention is appropriate only when the state proceedings: (1) are ongoing, (2) are quasi-criminal enforcement actions or involve a state's interest in enforcing the orders and judgments of its courts, (3) implicate an important state interest, and (4) allow litigants to raise federal challenges." *Readylink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir., 2014) (citations omitted).

Defendants' "ongoing" proceedings argument fails completely because there were no ongoing proceedings filed against Eugster when this case was filed. Additionally, there were no "ongoing" proceedings filed when Eugster's Amended and Restated Complaint was filed on March 3, 2016.

Each element must be satisfied and the date for determining whether *Younger* applies "is the date the federal action is filed." *Gilbertson v. Albright*, 381 F.3d 965, 969 n. 4 (9th Cir. 2004)

The ongoing state proceedings requirement is not met. This rule is tested at the time the action is brought. A proceeding is not ongoing, if was not going on at the time of the filing. Further, there is no authority which indicates that a court can claim its

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jurisdiction is lost because the state started a proceeding after the filing. In this regard, no proceeding had been commenced against Eugster at the time of the filing. Indeed, the proceeding began when a Formal Complaint was served on Eugster. The Formal Complaint was not filed until June 16, 2016.

Defendants contend that because an investigation was taking place at the time the complaint herein was filed, the "ongoing" proceeding requirement was met. However, an investigation is not a proceeding. This was addressed in *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811 (7th Cir., 2014). There, the court said:

> The possibility that a state proceeding may lead to a future prosecution of the federal plaintiff is not enough to trigger *Younger* abstention; a federal court need not decline to hear a constitutional case within its jurisdiction merely because a state investigation has begun. *See Steffel v. Thompson*, 415 U.S. 452, 454, 472, 94 S. Ct. 1209, 39 L. Ed.2d 505 (1974) (*Younger* does not prevent federal declaratory relief "when a state prosecution has been threatened, but is not pending").

Id. at 817.

Second, contrary to what WSBA Defendants and there lawyers say, that the constitutional claims " litigated in his disciplinary proceeding" Eugster is not allowed to raise his federal challenges in the Discipline Proceeding against him. As the records in the WSBA discipline action show, Eugster was not able to raise his Civil Rights claims in the discipline proceeding. Declaration of Eugster at 10. Plaintiffs will have the same problem.

F. Plaintiffs' Discipline-related Claims Also Should Have Been Raised in Their Prior Disciplinary Proceedings and Are Thus Barred under the Res Judicata Doctrine

Are the Defendants saying the system is obviously questionable and plaintiffs should therefore have brought that up in a disciplinary proceeding? Unless they mean this, their assertion is meaningless.

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The plaintiffs would not have known there was anything wrong with the system without first learning from experience. Declaration of Eugster at 5.

G. Plaintiffs' Due Process Objections Are Ripe

"In sum, Plaintiffs' objections to the discipline system are too vague and abstract to be adjudicated." This is absurd.

"This Court should dismiss Plaintiffs' Fifth Claim for Relief because it is not ripe, *as in previous related cases. See Eugster II, 2010 WL 2926237, at *8 (rejecting prior challenge as too abstract), aff'd, 474 Fed. App'x at 625.*" This is not true.

H. The New WSBA 2017 Is Not Immune from Suit

"Although sovereign immunity bars money damages and other retrospective relief against a state or instrumentality of a state, it does not bar claims seeking prospective injunctive relief against state officials to remedy a state's ongoing violation of federal law." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents,* 824 F.3d 858, 865 (9th Cir., 2016) (citations omitted).

"The *Young* doctrine allows individuals to pursue claims against a state for prospective equitable relief, including any measures ancillary to that relief." *Id.* Citing *Green v. Mansour* , 474 U.S. 64, 68 (1985) ("*Young* also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law" (citations omitted).

Finally, even if, the new WSBA 2017 is said to be protected by the Eleventh Amendment, the remaining Defendants are not so immune. They are state actors

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under the provisions of the Civil Rights Act, 42 U.S.C. § 1983.

II. CONCLUSION

The court should deny Defendants' Motion to Dismiss and grant Plaintiffs' Motion for Summary Judgment. Or at least, the court should issue the Preliminary Injunction sought by Plaintiffs.

April 6, 2017

Respectfully submitted,

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II. CONCLUSION

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April 6, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court Western District of Washington trial court CM/ECF system on date below. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the trial court CM/ECF system.

I further certify that on the date below, 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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April 6, 2017

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ROBERT E. CARUSO and SANDRA L. FERGUSON, Plaintiffs, vs WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933); WASHINGTON STATE BAR ASSOCIATION after September 30, 2016 (WSBA 2017): PAULA LITTLEWOOD, Executive Director, WSBA 1933 and WSBA 2017, in her official capacity; ROBIN LYNN HAYNES is the President of the WSBA 1933 and WSBA 2017, in her official capacity; DOUGLAS J. ENDE, Director of the WSBA 1933 and WSBA 2017 Office of Disciplinary Counsel, in his official capacity; WSBA 1933/WSBA 2017 BOARD OF GOVERNORS, namely: BRADFORD E. FURLONG, President-elect, *et al.*, Defendants.	No. 2:17-cv-00003-RSM DECLARATION OF STEPHEN KERR EUGSTER, APRIL 6, 2017

Stephen Kerr Eugster, under penalty of perjury under the law of the state of Washington declares as follows:

1. This declaration is made upon the basis of Declarant's personal knowledge.

2. Declarant is competent to be a witness in these proceedings.

3. Declarant's curricula vitae is as follows: BA, 1966, University of Denver; JD, 1969, University of Washington School of Law; Washington Law Review1967-69, Member and Managing Editor 1968-69; Order of the Coif (Class Rank 5); Safeco Scholarship 1967-68, 1968-69; Member Washington State Bar Association since 1970. Practicing attorney in Spokane, Washington.

The WSBA of the Bar Act (WSBA 1933)

4. In 1933, the Washington State Legislature created a legal entity named the Washington State Bar Association. It is an integrated bar association. Lawyers have to be members and pay dues in order to practice law. Lawyers are subject to regulation and discipline of the integrated association.

The New WSBA January 1, 2017 (WSBA 2017)

5. The new Washington State Bar Association came into being on January 1, 2017 when amendments to the Bylaws of WSBA 1933 went into effect. The new WSBA 2017 purports to be an integrated association of lawyers, Limited Practice Officers and Limited License Legal Technicians. The members of the association are compelled to be members and are compelled to pay dues to the association. The members are subject to regulation and discipline of the New WSBA 2017.

False and Improper Statements of about Declarant

1. WSBA Defendants' attorneys make a number of statements about Declarant, which are improper and false. Dkt #16, Motion to Dismiss, Introduction, first paragraph. They say:

a. **"In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct. . . ."** I am not disgruntled and to say I have been disciplined on multiple occasions is not accurate. I have been disciplined once, and may be disciplined again as a result of Defendants' retaliation toward me because I filed a case contesting the constitutionality of being compelled to be a member of the WSBA, at that time the WSBA of the Bar Act of 1933. The case is *Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("Eugster III"). See below.

To be disgruntled means "having a feeling that one has been wronged or thwarted in one's ambitions", "aggrieved, discontent, discontented, displeased, dissatisfied, malcontent." MERRIAM WEBSTER.[1] I do not have such feelings. I am merely a lawyer who has experienced and is experiencing unconstitutional conduct by the WSBA 1933. And, I am taking steps to have the law correct the situations of such conduct.

b. They say declarant "continues his meritless crusade against

[1] https://www.merriam-webster.com/thesaurus/disgruntled.

Washington's bar system." My efforts are not meritless, and they are not part of a crusade. That "each such lawsuit was meritless and dismissed at the pleadings stage." Apart from Case III, which is hardly meritless, each of the cases were dismissed on the basis of jurisdiction (improperly so) not merit. (It is axiomatic, there is no res judicata arising from orders dismissing cases on the basis of jurisdiction.).

c. That "[t]his lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments." This action is decidedly different from the cases I have brought. First and foremost this action involves a New Washington State Bar Association which came into existence on January 1, 2017, which has multiple members who are compelled to be members and pay dues to the association. It is also an association which purports to discipline all members. Furthermore, the New Association has not been created by action of the Washington State Legislature or Supreme Court.

This case is not about the WSBA 1933. It is about the New WSBA 2017. In this case, lawyers are forced to be members and pay dues to the New WSBA 2017, an association of lawyers, limited practice officers, and limited license legal technicians. In this case, the New WSBA 2017 does not have the constitutional authority to conduct disciplinary actions against lawyers.

Eugster Cases

2. In this action, the WSBA Defendants make statements about "Eugster" actions, which are false or incorrect, or misleading. I will explain in the paragraphs which follow.

3. ***In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293 (2009) ("Eugster I").** In 2004 -5 the WSBA 1933 began a disciplinary action against Eugster. At this time, Eugster had been practicing law in Washington since the fall of 1970. In his 33 years of practice, Eugster had never had a discipline action brought against him. Eugster had never been involved WSBA Washington Lawyer Discipline System. Not only had he not experienced the system he had the impression the System was fair and that the representatives of the system would be fair. Eugster learned otherwise from his six-year first-hand experience with the WSBA 1933. Eugster had no knowledge or awareness of the constitutional infirmities of the Discipline System. He had no previous experience with the System.

4. ***Eugster v. Washington State Bar Association*, No. CV 09-357-SMM (Dist. Court, ED Wash. 2010) (Eugster II).**

While Eugster was serving out his suspension in *In re Disciplinary Proceeding Eugster*, 166 Wn.2d 293, 209 P.3d 435 (2009), he became aware the WSBA prosecutor who brought the discipline action, Jonathan Henry Burke, was beginning another investigation against him. Eugster believed Mr. Burke would commence another discipline action against him.

In light of the threat, on December 2, 2009, Eugster started an action in United States District Court, Eastern District of Washington. *Eugster v. Washington State Bar Association*, No. CV 09-357-SMM (Dist. Court, ED Wash. 2010) (Eugster II). The case was a Civil Rights Action asserting that the WSBA Washington Lawyer Discipline System violated Eugster's constitutional rights of procedural due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. Eugster asserted that the court had U.S. Art. III jurisdiction because the circumstances placed Eugster in imminent threat of having his constitutional rights denied him.

Mr. Burke thereupon dismissed the grievance he was pursuing on. Knowing that the dismissal would make his case moot, Eugster amended his complaint January 21, 2010. In it, Eugster alleged that the District Court had jurisdiction over the case because Eugster had been admonished by the Mr. Burke and WSBA in the dismissal letter sent to the grievant. Eugster contended that this admonishment was not appropriate because, under the Washington Rules of Enforcement of Lawyer Conduct (ELC), Eugster was to have a right to challenge the admonishment. As a basis for this, Eugster cited *Miller v. Washington State Bar Association*, 679 F.2d 1313 (9th Cir. 1982).

The District Court did not agree with Eugster's assertion of standing under Miller. The court dismissed the case for lack of Article III standing. Eugster then appealed to 9th Circuit Court of Appeals. The Court affirmed the lower court decision on the basis that

Eugster did not have standing. The court did not address Eugster's argument regarding the *Miller* case. *Id.*

5. ***Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015), *affirmed*, 9th Circuit 15-35743 ("Eugster III").**

On March 12, 2015, Eugster commenced an action in US District Court for the Western District of Washington (Eugster III) in which he asserted that the Washington State Bar Association could not compel him to be a member because to do so was a violation of his First and Fourteenth Amendment rights. Eugster asserted the plurality opinion in *Lathrop v. Donohue*, 367 U.S. 820 (1961) (that such compelled membership was constitutional) must be reconsidered in light of present circumstances. The District Court dismissed the case.

On appeal, Eugster contended the plurality decision of *Lathrop v. Donahue*, under principles of due process and stare decisis, should be overruled -- that the Washington State Bar Association cannot compel Eugster to be a member of the organization under the First and Fourteenth Amendments. The 9th Circuit dismissed the appeal saying it did not have authority to rule and that only the United States Supreme Court could overturn *Lathrop v. Donohue*. Memorandum, March 21, 2017, attached as **Exhibit A.**

6. ***Eugster v. Wash. State Bar Ass'n*, No. 15204514-9 (Spok. Cnty. Super. Ct. 2015) ("*Eugster* IV"), on appeal to Washington Court of Appeals Division III, Case #343456.**

Within days of filing and serving ***Eugster v. Wash. State Bar Ass'n,*** **No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("Eugster III"),** WSBA disciplinary counsel reactivated an investigation of a false grievance against Eugster that had been filed on September 23, 2014.

Eugster began doing legal and other work for Verdelle G. O'Neill on September 11, 2014. *Id.* Within a few days, Cheryl Rampley, a niece of Mrs. O'Neill's deceased husband, began making claims about Eugster which were false. Eugster provided extensive information and documents to Kevin Banks, WSBA disciplinary counsel assigned to the grievance. On December 25, 2014, Eugster provided more information. To Eugster, it looked as though the grievance would be dismissed. However, apparently prompted by the action Eugster filed against the WSBA on March 12, 2015, Francesca D'Angelo, a WSBA disciplinary counsel, informed Eugster that the grievance would be investigated and that she was taking over from Mr. Banks.

The bar investigator talked with Eugster and others commencing the first part of April 2015. Eugster was asked for more information, and he promptly complied. *Id.* On August 18, 2015, Eugster's client Verdelle G. O'Neill died. *Id.* at 49. In November 2015, Ms. D'Angelo indicated that she was going to seek to have the grievance filed against Eugster be ordered to hearing by the Review Committee of the WSBA Disciplinary Board. *Id.* Eugster, believed that under 9th Circuit case authority and his experience that he might not have standing at that time to

commence an action against the Bar Association contesting the constitutionality of the WSBA discipline system in Federal Court.

Eugster brought an action in the Superior Court for the state of Washington in Spokane County. ***Eugster v. Wash. State Bar Ass'n*, No. 15204514-9 (Spok. Cnty. Super. Ct. 2015) ("*Eugster* IV").** Eugster contended that the Superior Court had original jurisdiction over the civil rights action by virtue of prior Washington case law and by Washington State Constitution Art. IV, § 6 which provides that the superior court has original jurisdiction in equity and law. Wash. Const. Art IV, § 6:

> Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law . . . . The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.

The superior court refused to exercise its jurisdiction under the constitution and dismissed the case with prejudice. The court "reasoned" the Washington Supreme Court and the Washington Discipline System "had exclusive authority" over Eugster's Civil Rights Action. Conclusions and Order Granting Defendants' Motion to Dismiss. The order dismissing the case was not an order on the merits, it was an order saying the court did not have jurisdiction. Such orders do not serve as bases for res judicata purposes.

7. *Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711 (E.D. Wash. June 29, 2016) ("Eugster V"), *on appeal to the 9th Circuit* # 16, 35542.

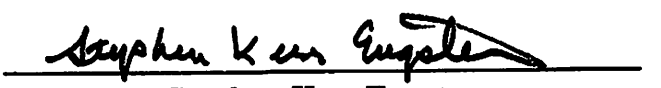
On December 22, 2015, Eugster filed his civil rights action in the District Court

for the Eastern District of Washington. The Complaint was amended and restated. Case V, *Eugster v. Paula Littlewood [WSBA Executive Director]*, District Court Eastern District of Washington. Eugster did so because just before that time, the Review Committee of the Washington State Bar Association Disciplinary Board had ordered that the Rampley grievance go to a hearing. Of course, in light of that, Eugster had a small window of opportunity to hopefully gain the jurisdiction of the District Court because Eugster faced an imminent threat of prosecution by the Washington State Bar Association.

In this case, the District Court used the Order of Dismissal in Eugster IV as a basis for res judicata purposes and dismissed Eugster V, The dismissal did not does not meet the primary requirement of res judicata, which is a decision on the merits. Eugster V is on appeal to the 9th Circuit.

8. WSBA Defendants assert Eugster can bring his constitutional claims under the Civil Rights Act, 42 U.S.C. § 1983 in the discipline proceedings. This is not true; the Washington Lawyer Discipline System does not allow it. Eugster has recently tried to get the System to deal with his Civil Rights Act concerns about the System but has been thwarted in every effort to have the proceedings recognize and address such claims..

Signed at Spokane, Washington on April 6, 2017.



Stephen Kerr Eugster

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court Western District of Washington trial court CM/ECF system on date below I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the trial court CM/ECF system.

I further certify that on the date below, 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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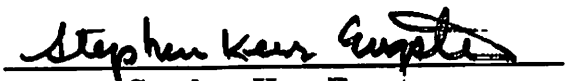

Stephen Kerr Eugster

NOT FOR PUBLICATION

FILED

MAR 21 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN KERR EUGSTER, Plaintiff-Appellant, v. WASHINGTON STATE BAR ASSOCIATION, a Washington association; et al. Defendants-Appellees.	No. 15-35743 D.C. No. 2:15-cv-00375-JLR MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Submitted March 8, 2017**

Before: LEAVY, W. FLETCHER, and OWENS, Circuit Judges.

Stephen Kerr Eugster, an attorney and member of the Washington State Bar Association ("WSBA"), appeals pro se the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging freedom of speech and association claims under

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

EXHIBIT A

the First and Fourteenth Amendments. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6), *Lacey v. Maricopa County*, 693 F.3d 896, 911 (9th Cir. 2012) (en banc), and we affirm.

The district court properly dismissed Eugster's claims relating to his compulsory membership in the WSBA because an attorney's mandatory membership with a state bar association is constitutional. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 13 (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."); *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (Brennan, J., plurality opinion) (state bar association may constitutionally require compulsory membership and payment of dues without impinging on protected rights of association). Contrary to Eugster's contentions, this court cannot overrule binding authority because "[a] decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

The district court properly dismissed Eugster's claim that the WSBA improperly funds certain activities because Eugster failed to allege facts sufficient to show an improper use of his mandatory annual WSBA bar dues. *See Keller*, 496 U.S. at 14 (state bar may spend its members' dues "for the purpose of regulating

the legal profession or improving the quality of the legal service available to the people of the State" (citation and internal quotation marks omitted)).

AFFIRMED.

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT E. CARUSO and SANDRA L. FERGUSON,

Plaintiffs,

v.

WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933); WASHINGTON STATE BAR ASSOCIATION after September 30, 2016 (WSBBA 2017): PAULA LITTLEWOOD, Executive Director, WSBA 1933 and WSBA 2017, in her official capacity; ROBIN LYNN HAYNES is the President of the WSBA 1933 and WSBA 2017, in her official capacity; DOUGLAS J. ENDE, Director of the WSBA 1933 and WSBA 2017 Office of Disciplinary Counsel, in his official capacity; WSBA 1933/WSBA 2017 BOARD OF GOVERNORS, namely: BRADFORD E. FURLONG-President-elect (2016-2017), *et al.*,

Defendants.

No. 2:17-cv-00003

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs' claims against Defendant the Washington State Bar Association ("WSBA") and its officials have been rejected in prior lawsuits and likewise should be rejected here. As explained in the WSBA's Motion to Dismiss ("Motion"), Plaintiffs' counsel Stephen K. Eugster ("Eugster") has brought the same challenges to bar requirements and to the lawyer discipline system in prior suits, without success. In the effort to seek yet another round of judicial review, Eugster now brings his claims on behalf of the named Plaintiffs and asserts that the Court should decide the claims because the WSBA is a new organization due to recent bylaws amendments. But Plaintiffs' claims fail as a matter of law. Regardless of the bylaws amendments, mandatory bar membership and fees remain constitutional, the WSBA still has disciplinary authority, and Washington's lawyer discipline system continues to satisfy due process. Additionally, this Court should abstain from deciding Plaintiffs' claims due to ongoing discipline proceedings against the named Plaintiffs, who also should have raised their discipline-related claims in prior proceedings. Plaintiffs' due process claim also should be dismissed because it is overly abstract and unripe. Finally, the WSBA should be dismissed from this case because it is immune from suit.

Rather than address these numerous deficiencies, Plaintiffs devote the bulk of their Response to the Motion rehashing Eugster's history of bar discipline and litigation and questioning the accuracy of certain characterizations made about that history and this suit. In doing so, Plaintiffs ignore the relevance of Eugster's prior cases as persuasive authority. Regardless, although the WSBA's statements in the Motion are accurate, the Court need not resolve that quarrel to adjudicate Plaintiffs' claims. Plaintiffs' claims fail as a matter of law and this Court should dismiss them with prejudice.

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II. ARGUMENT

A. The Recent WSBA Bylaws Amendments Are Irrelevant to the Continuing Legality of Mandatory Bar Membership and License Fees.

As explained in the WSBA's Motion, numerous courts have confirmed that bar membership and license fees are constitutional requirements to practice law. *See* Dkt. # 16 at 10-11. In fact, Judge Robart of the United States District Court for the Western District of Washington dismissed similar claims brought by Eugster in September 2015 based on these precedents. *See Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("*Eugster* III"). Plaintiffs insist that these precedents do not apply to the "new" WSBA, which now includes limited-license practitioners as members. Dkt. # 18 at 13. But Plaintiffs do not explain why including limited-license practitioners would make a difference to the constitutionality of mandatory bar membership and license fees. In fact, Plaintiffs' Complaint does not allege that the bylaws amendments affect the constitutionality of mandatory membership or license fees in any way. *See* Dkt. # 4 at 32-34 (alleging that "Plaintiff [sic] cannot be compelled to be a [sic] members of WSBA 1933 or WSBA 2017").

As a matter of law, the WSBA's inclusion of limited-license practitioners does not affect the constitutionality of bar membership and fees. Membership and fee requirements further the same purposes and impose the same minimal burdens regardless of whether limited-licensed practitioners are included within the mandatory association in addition to full-fledged lawyers. *See, e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1, 7-9, 15-16 (1990) (acknowledging "'limit[ed]'" burden of bar requirements and "'legitimate'" state interests in regulating and improving the legal profession (quoting *Lathrop v. Donohue*, 367 U.S. 820, 842-43 (1961)). Moreover, courts have emphasized that bar associations may use mandatory fees to improve the quality of legal services in the state, and administering limited-practice licenses furthers that very purpose. *See,*

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e.g., *Eugster* III, 2015 WL 5175722, at *7 (noting that Washington's limited license boards appeared properly "geared toward regulating the profession and improving the quality of legal services").

Plaintiffs' only other argument regarding these claims is that the WSBA's Board, rather than the Washington Legislature or Supreme Court, adopted the recent bylaws amendments. *See* Dkt. # 18 at 13. But again, Plaintiffs never explain how this relates to the constitutionality of bar membership and fees. Instead, Plaintiffs merely assert that necessary authority for the bylaws amendments "has not be[en] passed on to the WSBA . . . ." *Id.* In addition to being irrelevant, this assertion is false. As the WSBA detailed in its Motion, the State Bar Act expressly authorizes the WSBA Board to adopt rules regarding any matter affecting "the organization and functioning of the state bar," including "admission to the practice of law" and "membership" in particular. RCW 2.48.050, .060; *see* Dkt. # 16 at 13. The Washington Supreme Court's rules governing the WSBA are consistent with this underlying authority. *See* GR 12.1(a), (c). Accordingly, the WSBA's recent bylaws amendments were authorized. Plaintiffs' challenges to mandatory bar membership and fees remains meritless and their second and third claims for relief should be dismissed with prejudice.

B. The WSBA Still Has Disciplinary Authority Over the Practice of Law in Washington.

Plaintiffs' challenge to the WSBA's disciplinary authority also fails as a matter of law. As explained in the WSBA's Motion, the WSBA retains its authority over the lawyer discipline system notwithstanding the recent bylaws amendments. *See* Dkt. # 16 at 12-15. In response, Plaintiffs simply restate their belief that the "New WSBA 2017 has no authority," Dkt. # 18 at 13, without addressing the WSBA's detailed explanation of its continuing existence, authority to

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amend its bylaws, and the long history of limited-license practice in Washington, *see* Dkt. # 16 at 12-15. Plaintiffs have failed to offer any defense to the deficiencies of this claim.

Plaintiffs' only other argument is that "[i]ntegrated bar associations . . . have specific characteristics." Dkt. # 18 at 14. Plaintiffs fail to explain the meaning or significance of this statement. In addition to being irrelevant to the WSBA's disciplinary authority, the suggestion that the WSBA is no longer an integrated bar association is false. The reason that the WSBA is "an 'integrated' bar association" is because "membership and payment of dues are mandatory in order to practice law in the State of Washington." *Eugster* III, 2015 WL 5175722, at *1. This remains true after the bylaws amendments, given that limited-licensed practitioners are engaged in the practice of law. *See, e.g.*, *State v. Hunt*, 75 Wn. App. 795, 802 (1994) (noting "preparing legal forms is practicing law"). And anyone practicing law in this state must pay license fees to the WSBA, which continues to exercise disciplinary authority over any such practice on behalf of the Washington Supreme Court. *See* Dkt. # 16 at 14. In sum, the WSBA's disciplinary authority remains intact and Plaintiffs' fourth claim for relief should be dismissed with prejudice.

C. Washington's Lawyer Discipline System Satisfies Due Process Requirements.

Plaintiffs' challenges to the constitutionality of the lawyer discipline system also fail as a matter of law. As detailed in the WSBA's Motion, Washington's lawyer discipline system includes more than adequate procedural protections. *See* Dkt. # 16 at 15-17. Plaintiffs' only response is to restate their view that "the entire system is biased," without further explanation. Dkt. # 18 at 14. Plaintiffs ignore the authorities cited in the Motion demonstrating that the roles of the WSBA, its officials, and the Washington Supreme Court are proper, and that any claim of bias requires actual bias specific to a given adjudicator, which Plaintiffs have not alleged here. *See* Dkt. # 16 at 16-17. Thus, Plaintiffs' fifth and sixth claims for relief fail to state a cognizable

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legal claim and should be dismissed with prejudice. Finally, because Plaintiffs' first claim for declaratory relief is entirely dependent on Plaintiffs' other claims for relief, that claim also fails as a matter of law and should be dismissed.

D. This Court Should Abstain Under *Younger* Because of Ongoing Disciplinary Proceedings Involving Plaintiffs Caruso and Ferguson.

In addition to being facially invalid, Plaintiffs' claims also require abstention under the *Younger* doctrine to avoid interference with ongoing state discipline proceedings against each Plaintiff. *See* Dkt. # 16 at 17-19. To address this issue, Plaintiffs copy and paste argument from briefing in one of Eugster's prior cases, regarding ongoing proceedings against Eugster. *See* Dkt. # 18 at 15-16. The discussion is outdated and does not discuss whether there are ongoing proceedings against *Plaintiffs*. Each of the underlying arguments is also contrary to law.

First, Plaintiffs suggest that "the date for determining whether *Younger* applies 'is the date the federal action is filed.'" Dkt. # 18 at 15 (quoting *Gilbertson v. Albright*, 381 F.3d 965, 969 n.4 (9th Cir. 2004)). But as the Ninth Circuit has clarified, "*Younger* abstention applies . . . as long as [the state action is initiated] before proceedings of substance on the merits occur in federal court." *M&A Gabaee v. Cmty. Redev. Agency*, 419 F.3d 1036, 1040 (9th Cir. 2005). No proceedings of substance have taken place in this case. *See Polykoff v. Collins*, 816 F.2d 1326, 1332 (9th Cir. 1987) (noting "extensive hearings" or a preliminary injunction qualify as proceedings of substance). Accordingly, now is the proper time for this Court to dismiss Plaintiffs' claims under the *Younger* doctrine.

Second, Plaintiffs argue that "an investigation is not a proceeding," citing *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811 (7th Cir. 2014). This argument does not apply to Caruso, against whom a formal hearing has been ordered. *See* Dkt. # 16, Ex. C. It also ignores the nature of a formal WSBA investigation, relevant Washington law, and the underlying

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purpose of *Younger* abstention, which is to avoid undue interference in state proceedings. *See* Dkt. # 16 at 18. The *Mulholland* case is distinguishable from the Ferguson proceedings on numerous grounds. In *Mulholland*, a potential "Election Board" meeting was insufficient to trigger *Younger* abstention, largely because that body's "authority to sanction" was "extremely limited" and the "purpose" of the planned meeting was "vague" and speculative. 746 F.3d at 816-17. The court contrasted this to situations in which investigations could qualify as ongoing proceedings, such as when a formal investigation has commenced with a direct potential for sanctions. *See id.* at 817 (citing cases). That is the case with the ongoing investigation of Ferguson, which is governed by detailed Washington rules and constitutes a substantive part of the disciplinary process. *See* Dkt. # 16 at 18.

Finally, Plaintiffs suggest that they might not be able to raise their discipline-related objections in the ongoing state proceedings. *See* Dkt. # 18 at 16. The only argument they offer in support of this contention is a conclusory statement by Eugster that he "has been thwarted" in his efforts. *See id.*; Dkt. #19 at 10. Without question, however, the rules governing disciplinary proceedings allow individuals to raise discipline-related objections in those proceedings. *See, e.g.*, Wash. Rules for Enf't of Lawyer Conduct ("ELC") 10.1(a), 10.5(b)(2), 10.8. Further, public bar records from Eugster's prior proceeding, attached to this reply for the Court's convenience, reveal that he was in fact allowed to raise his objections, albeit as defenses rather than counterclaims. *See* Ex. A.

In sum, Plaintiffs' arguments against *Younger* abstention are meritless. There are ongoing state proceedings against each of the Plaintiffs and to avoid undue interference, this Court should abstain from adjudicating Plaintiffs' claims.

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E. Plaintiffs' Discipline-Related Claims Should Have Been Raised Already and Are Barred Under the Res Judicata Doctrine.

As the WSBA explained in its Motion, Plaintiffs' discipline-related claims are also barred under the res judicata doctrine, because they should have been raised in Plaintiffs' prior disciplinary proceedings. *See* Dkt. # 16 at 19-20. Plaintiffs' only response is that they "would not have known there was anything wrong with the system without first learning from experience." Dkt. # 18 at 17. Plaintiffs do not explain, however, why they could not have raised their objections at some point during the prior proceedings when the alleged violations of their rights occurred. Moreover, as demonstrated by Plaintiffs' Complaint, the overall structure of Washington's lawyer discipline system, including the roles of the Washington Supreme Court, the WSBA, and its officials, is publicly known information memorialized in court rules and case law. *See* Dkt. # 4 at 15-31. Plaintiffs could have, but did not, raise their challenges to the lawyer discipline system within their discipline proceedings. Accordingly, their claims that the discipline system violates their constitutional rights are barred by the doctrine of res judicata.

F. Plaintiffs' Due Process Claim Is Abstract and Not Ripe.

As the WSBA has explained, Plaintiffs' due process claim is invalid for the additional reason that it is unripe. *See* Dkt. # 16 at 21-23. Plaintiffs' response is to call this argument "absurd," Dkt. # 18 at 17, without addressing the need for factual allegations, the burden of alleging bias with particularity, or the vague and generic nature of Plaintiffs' procedural objections, *see* Dkt. # 16 at 21-23 (citing cases). Plaintiffs' Complaint wholly fails to allege how they have been deprived of due process or how their constitutional rights have been violated.

Plaintiffs also dispute whether a similar claim was found unripe in one of Eugster's prior lawsuits, *Eugster v. Wash. State Bar Ass'n*, No. CV 09-357-SMM, 2010 WL 2926237 (E.D. Wash. July 23, 2010) ("*Eugster* II"). *See* Dkt. # 18 at 17. There can be no genuine dispute. In

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Eugster II, the district court expressly held that Eugster's due process challenge was "unripe as Plaintiff [did] not present concrete legal issues to [the] Court, but rather, abstractions." 2010 WL 2926237, at *8 (internal quotations omitted). On appeal, the Ninth Circuit similarly held that Eugster's challenge rested on "contingent future events that may not occur" and thus was "not ripe." 474 Fed. Appx. 624, 625 (9th Cir. 2012) (unpublished). In other words, there was no indication any particular deprivation of due process would actually occur. The same is true here and Plaintiffs' constitutional challenges to the lawyer discipline system should be dismissed as a result.

G. The WSBA Is Immune from Suit.

As numerous courts already have determined in Eugster's prior lawsuits, the WSBA is immune from suit. *See* Dkt. # 16 at 23. Plaintiffs argue that immunity does not "bar claims seeking prospective injunctive relief against *state officials*," Dkt. # 18 at 17 (emphasis added), without explaining how that justifies naming the WSBA itself as a defendant in this case. The WSBA is immune and should never have been named as a defendant in this case.

H. Plaintiffs' Various Assertions of Professional Misconduct Are Equally Meritless.

Rather than address the multiple grounds the WSBA has presented for dismissing this case with prejudice, Plaintiffs spend the bulk of their Response arguing about Eugster's prior disciplinary history and lawsuits against the WSBA. Plaintiffs question the relevance of Eugster's prior suits, dispute certain characterizations made in the WSBA's Motion, and go so far as to accuse the WSBA's counsel of ethics violations. *See* Dkt. # 18 at 2-3, 6-13. These assertions are not merely distractions from the extent to which Plaintiffs' claims lack merit, they are also incorrect in substance.

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First, Plaintiffs urge that Eugster's prior lawsuits are "irrelevant" to this one. Dkt. # 18 at 9. But in addition to providing context for the claims being made here, Eugster's prior suits serve as persuasive authority on the issues of mandatory bar membership and fees, res judicata, ripeness, and immunity. For example, Eugster's original discipline case is discussed not to show that Eugster is a "bad man" as Plaintiffs suggest, Dkt. # 18 at 10, but to give background to the subsequent finding made in state court that Eugster "already had been afforded an opportunity to raise his constitutional concerns . . . in his prior disciplinary proceedings," *Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711, at *2 (E.D. Wash. June 29, 2016) (discussing prior state court lawsuit), which informs the res judicata issue in this case. As another district court in this circuit recently stated in similar circumstances, it is appropriate for a party to reference such prior, related lawsuits as persuasive authority:

> Plaintiff objects to Defendants' . . . references to a similar action filed by Plaintiff . . . as irrelevant and improper. . . . The Court finds Plaintiff's objections frivolous and overrules them as such. The [other] case is not irrelevant as Plaintiff contends; rather, it is persuasive authority because it is an opinion issued by a district court in this district analyzing issues similar to those at play in this action.

Alaei v. Rockstar, Inc., No. 15-cv-2959-JAH, 2016 WL 7210378, at *1 n.2 (S.D. Cal. Dec. 13, 2016) (citations omitted). The WSBA should not be required to relitigate these issues anew in each and every one of Eugster's lawsuits without reference to prior decisions.[1]

Second, Plaintiffs object to various characterizations made in the WSBA's Motion. But each characterization is justified under the circumstances. Plaintiffs insist that Eugster is neither "disgruntled" nor on a "meritless crusade against Washington's bar system." Dkt. # 18 at 6. Yet at the same time, Plaintiffs relay Eugster's beliefs that the discipline system treated him unfairly

[1] The history of litigation between Eugster and the WSBA also demonstrates that this lawsuit is part of a pattern of harassment. As Eugster is aware, the WSBA intends to file a motion for sanctions against him for the first time, as counsel in this lawsuit. In the meantime, the Court could order sanctions on its own motion. *See* Fed. R. Civ. Pro. 11(c)(3). Eugster's litigation history is relevant for this additional reason.

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and that false claims were made against him. *See id.* at 10, 11. These beliefs, along with the unending string of failed lawsuits Eugster has brought against the WSBA, show Eugster is dissatisfied with Washington's bar system and relentlessly attacking that system in court.

Plaintiffs further object that Eugster "has not 'enlisted' the Plaintiffs" in this lawsuit. *Id.* at 7. Yet Eugster named the Plaintiffs in this suit, which he filed against the WSBA, repeating claims and arguments that he previously pursued on his own behalf without success, many nearly verbatim. Under these circumstances, and given Eugster's history of litigation against the WSBA, it is clear that Eugster is continuing his campaign against the WSBA in this lawsuit, even if he is doing so on behalf of the named Plaintiffs.

Plaintiffs also question whether Eugster has been "disciplined on multiple occasions for professional misconduct." Dkt # 18 at 6. But Eugster was formally sanctioned in 2009 with an 18-month suspension. *In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 327-28 (2009) ("*Eugster* I"). And this year, Eugster stipulated to a 60-day suspension to resolve the most recent disciplinary proceeding against him. *See* Ex. B (copy of public record attached for Court's convenience). The Disciplinary Board approved the stipulation on March 10, 2017. *Id.* That decision now awaits the Washington Supreme Court's approval. Moreover, although not rising to the level of "disciplinary action" as defined in the ELCs, in 2009, Eugster was given an informal warning to take greater care in filing lawsuits as a result of the WSBA's investigation of a separate grievance against him. *Eugster* II, 2010 WL 2926237, at *1.

In any case, Plaintiffs' quarrel regarding the appropriate characterizations for Eugster's disciplinary history and litigation history need not be resolved in order to adjudicate Plaintiffs' claims in this lawsuit. Plaintiffs' arguments do not alter the underlying facts, the decisions made

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in Eugster's prior lawsuits, or the lack of merit in each of Plaintiffs' claims. This Court should dismiss Plaintiffs' case with prejudice. *See* Dkt. # 16 at 23-24.

III. CONCLUSION

Plaintiffs' claims against the WSBA fail as a matter of law. Mandatory bar membership and fees are constitutional, the WSBA has disciplinary authority over the practice of law, and Washington's lawyer discipline system includes adequate procedural protections to satisfy due process. Further, Plaintiffs must raise any objections within their ongoing disciplinary proceedings, and in fact should have already raised their claims in prior proceedings. Their due process claim is also unripe and the WSBA should be dismissed because it is immune from suit. In response, Plaintiffs fail to address any of these deficiencies in substance. Accordingly, their claims should be dismissed with prejudice.

DATED this 18th day of April, 2017.

PACIFICA LAW GROUP, LLP

By /s/ Paul J. Lawrence
Paul J. Lawrence, WSBA #13557
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2017, I electronically filed the foregoing document with the United States District Court ECF system, which will send notification of such filing to the following:

Stephen Kerr Eugster
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2418 West Pacific Avenue
Spokane, WA 99201-6422
Phone: 509.624.5566
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Plaintiff

Signed at Seattle, Washington this 18th day of April, 2017.

Dawn M. Taylor

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Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STEPHEN KERR EUGSTER, Applicant,	) Case No.: 2:18-mc-66 RSM)) APPLICATION FOR LEAVE OF COURT)) Hearing: October 25, 2019

The amended prefiling order herein, Dkt. # 86, provides: "In the future, if Mr. Eugster wishes to obtain leave of this court to file such a lawsuit [one described in the order] he must first file a separate motion under case No: 2:18-mc-66 RSM.." This application is made in compliance with the prefiling order.

1. On behalf of Robert E. Caruso and Stephen Kerr Eugster, Applicant Eugster seeks to file Motions under Fed. R. Civ. P. 60(b)(3), Fed. R. Civ. P. 60(d)(3), and Fed. R. Civ. P. 60(b)(6), and Supporting Memorandum of Plaintiff Caruso and Stephen Kerr Eugster, *Sub Nom,* seeking the vacation of decisions and orders of the

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court in in Case No. 2:17-cv-0003-RSM.

2. The contemplated motions are distinguished from all of Mr. Eugster's prior suits. They are distinguished because they seek to have trial court in Case 2:17-cv-0003-RSM, vacate decisions and orders of the court under Rule 60(b)(3) and Rule (60)(d)(3), and if necessary Rule (60)(b)(6).

3. The proposed Motions and Memorandum are filed herewith.

4. The legal basis for each claim pursued, with brief citation to legal authorities in support may be found in detail in the Memorandum portion of the Motions.

5. Applicant requests leave of this Court to file the Motions and Memorandum.

October 25, 2019.

s/ Stephen Kerr Eugster

Stephen Kerr Eugster, WSBA #2003

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Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT E. CARUSO and SANDRA L. FERGUSON, STEPHEN KERR EUGSTER, *sub nom,* Plaintiffs, v. WASHINGTON STATE BAR ASSOCIATION, *et al.,* Defendants.	Case No.: 2:17-cv-003-RSM MOTIONS UNDER FED. R. CIV. P. 60(b)(3), FED. R. CIV. P. 60(d)(3), and FED. R. CIV. P. 60(b)(6), and SUPPORTING MEMORANDUM of PLAINTIFF CARUSO and STEPHEN KERR EUGSTER, *sub nom,* Hearing Date:

MOTIONS

Plaintiff Robert E. Caruso (herein "Caruso") and Stephen Kerr Eugster, *sub nom* (herein "Eugster") move the court under Fed. R. Civ. P. 60(b)(3), Fed. R. Civ. P. 60(d)(3), and Fed. R. Civ. P. 12(b)(6) to vacate the decisions and orders of the trial court including those which were affirmed, and thus allowed,

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by the (9th the Circuit) to award attorney fees against Eugster personally and per se.

ARGUMENT IN SUPPORT OF MOTIONS

I. Introduction.

The truth behind the decisions of the trial court in this matter is that they are based on a strategy of defense which is strictly "argumentum of ad hominem." The subject of the statement (the argumentum of ad hominem) is Stephen Kerr Eugster (herein "Stephen Eugster" or "Eugster").

Stephen Eugster is not a party to the action: He is the attorney for plaintiffs Robert E. Caruso and Sandra L. Ferguson.[1] The statement makes Eugster into the scapegoat of the action.

The argumentum ad hominem is found in the Bar Association's Motion to Dismiss and Opposition to Plaintiff's Motions for Summary Judgment and Preliminary in Junction. Dkt. # 16. It begins on page 1 and continues to page 7. It is followed up in the "Conclusion" to the motion. The argumentum ad hominem begins:

> **INTRODUCTION**
>
> In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless crusade against Washington's bar system. Within the past two years alone, Plaintiffs' counsel Stephen K. Eugster ("Eugster") has filed four prior pro se lawsuits against Defendant the Washington State Bar Association ("WSBA") and its officials; each such lawsuit was meritless and dismissed at the pleadings stage.[1] This lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet

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[1] Stephen Kerr Eugster no longer represents Ms. Ferguson. Dkt. # 49

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> another round of judicial review of his frivolous arguments. Many of the arguments Plaintiffs make here are exactly the same arguments that this Court already rejected as meritless when Eugster brought them on his own behalf.[2] These arguments have no more merit when brought on behalf of others. This Court should reject Eugster's attempt to file another lawsuit alleging the same baseless claims. [Footnotes omitted.]
>
> . . .

There followed several pages under the heading "Background and Procedural History" under the subheading "Prior Lawsuits Involving Eugster."

See the entire Statement along with comment by Eugster commencing at page 5 under heading III.

At the Conclusion of the Motion to Dismiss, WSBA and its attorneys said this:

> **Conclusion**
>
> This case is one in a long line of frivolous attempts by Plaintiffs' counsel to up end Washington's bar system, including the Washington Supreme Court's disciplinary system. Enlisting other lawyers to serve as named plaintiffs does not change the outcome. As with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice.

As one sees, these statements are not tied to anything in the record.

The first fiction is that Eugster enlisted Caruso and Ferguson to act as plaintiffs. This is not true, see the Declarations of Eugster, Caruso and Ferguson at Dkt. ## 24, 25, and 27.

The second fiction is that the Bar Association is still the Bar Association created by the state bar act in 1933. It is true that the legal entity of the

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Association is still the Washington State Bar Association. RCW 2.48.010. However, certain characteristics of the Bar Association have changed. As a result of the efforts of the WSBA Board of Governors "governance task force," the Bar Association became a WSBA association of lawyers, limited practice officers, and limited license legal technicians. The Bar Association today, plaintiffs assert, is subject to strict constitutional scrutiny.

II. Statement of the Case.

The Complaint of Robert E. Caruso and Sandra L. Ferguson was filed on January 3, 2017, Dkt. # 1. Stephen Kerr Eugster was the attorney for the plaintiffs. On February 21, 2017, plaintiff's Complaint was amended. Dkt. # 4. The Amended Complaint was the same as the original Complaint, but for the class action allegations contained therein. On March 1, 2017, plaintiffs filed their Motion for Summary Judgment. Dkt. # 8. The motion and the later Motion for Preliminary Injunction (Dkt. # 15) was supported by Declarations of Stephen Kerr Eugster, Robert E. Caruso, Sandra L. Ferguson, all of which declarations were filed on March 1, 2017; Dkt. # 9, Dkt. # 10, and Dkt. # 11, respectively.

On March 2, 2017, the court entered a Stipulation and Order based upon a proposed stipulation and order of the parties on March 1, 2017 (Dkt. # 12 and Dkt. # 14) – the order set forth a motions scheduling time table.

Defendants filed their Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction on March 21, 2017. Dkt. # 16. Under Dkt. # 18, plaintiffs filed a Response to Defendants Motion to Dismiss. A Declaration of Stephen Kerr Eugster in support of the response to

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Motion (Dkt. # 18) was filed under Dkt. # 21. Defendants replied to the response to Motion, Dkt. # 16. On May 11, 2017 under Dkt. # 28, the court entered an order denying plaintiff's motion for summary judgment as moot and motion for preliminary injunction, and granting defendants motion to dismiss with defendant's motion for Attorney fees remaining pending before the court under Dkt. # 22 dated April 27, 2017. On May 11, 2017, plaintiffs filed their Notice of Appeal with the Ninth Circuit. On May 12, 2017 under Dkt. # 31, defendants filed their Reply to Plaintiffs Response to Motion Dkt. # 22. On May 23, 2017, the court filed its order on Motion for Attorney's fees under Dkt. # 33. On June 14, 2017, Eugster filed his response to the Motion for Attorney's Fees. Dkt. # 44. On June 16, 2017, Eugster filed his declaration in support of his response to the motion. Dkt. # 45.

The WSBA and its attorneys filed a Motion to Dismiss and Opposition to Plaintiff's Motions for Summary Judgment and Preliminary Injunction. Dkt. # 16.

III. The Argumentum Ad Hominem.

The entire statement, the entire argumentum ad hominem, is set forth below. From time to time comment will be provided. Initial comments are these:The entire argumentum ad hominem (sometimes referred to as "statement" is entirely ad hominem in that its entire focus is Stephen Eugster. Therefore, the entire statement in all of its parts must be considered ad hominem and therefore must not be, cannot be, considered evidence in the preceding.

Secondly, the entire statement must be considered ad hominem because several parts make up a single purpose. That is to make Stephen Eugster a

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scapegoat. Further it is to bind together statements that purport accomplish a certain object. That object is to confuse the facts of the case. These points will be discussed below.

Introduction

> [1] In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless crusade against Washington's bar system. Within the past two years alone, Plaintiffs' counsel Stephen K. Eugster ("Eugster") has filed four prior pro se lawsuits against Defendant the Washington State Bar Association ("WSBA") and its officials; each such lawsuit was meritless and dismissed at the pleadings stage.1 This lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments. Many of the arguments Plaintiffs make here are exactly the same arguments that this Court already rejected as meritless when Eugster brought them on his own behalf.2 These arguments have no more merit when brought on behalf of others. This Court should reject Eugster's attempt to file another lawsuit alleging the same baseless claims.
>
> 1 In addition to this lawsuit, Eugster also recently filed yet another lawsuit against the WSBA and its officials in Thurston County Superior Court. *Eugster v. Supreme Court of the State of Wash., et al.*, Case No. 17-2-00228-34 (Thurston Cnty. Super. Ct. 2017).
>
> 2 *See Eugster v. Wash. State Bar Ass 'n*, No. C15-0375JLR, 2015 WL 5175722, at *2, 5-8 (W.D. Wash. Sept. 3, 2015) (dismissing objections to mandatory 18Case: 17-35410, 09/20/2017, ID: 10587967, Dkt # 18 Page 26 of 48 bar membership and fees and rejecting misreading of case law).

The Bar Association says that Eugster has enlisted the plaintiffs as named plaintiffs. The facts are that Eugster did not enlist the plaintiffs to be named

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plaintiffs or to be plaintiffs at all. Eugster was retained by the plaintiffs as shown by the declarations herein.

This nothing but an effort to lead the court into thinking that Eugster is in privity with the plaintiffs and that because of such privity the plaintiffs must be subjected to the previous efforts of Eugster. They do this because they want to use Eugster's previous efforts as res judicata in this case.

> [2] Eugster tries, but fails, to distinguish this case from prior ones by arguing that the WSBA has been transformed into an entirely new organization, the "WSBA 2017," as a result of straightforward bylaws amendments relating to membership in the WSBA. Contrary to these assertions, Washington law expressly authorizes the WSBA to adopt rules relating to the practice of law in the state, including rules relating to bar membership and limited-license practices. The WSBA remains the same organization Eugster repeatedly has sued over the past two years. Accordingly, cutting through the irrelevant rhetoric, the First Amended Complaint raises only three core claims: first, that requiring bar membership and payment of license fees to practice law in Washington violates plaintiffs' constitutional rights of speech and association; second, that the WSBA lacks authority to discipline lawyers as a result of the bylaws amendments regarding membership in the WSBA; and third, that the WSBA's discipline system fails to provide adequate procedures to satisfy constitutional due process requirements. These claims are meritless and should be dismissed, for five independent reasons.

There are three parts to the foregoing which deserve comment: First, plaintiffs in their complaint did not assert that there was an entirely new WSBA. They did assert that the WSBA today, that is subsequent to December 31, 2016, a WSBA Association of lawyers, limited practice officers and limited license legal technicians. This mixture raises serious concerns regarding whether a lawyer can be compelled under the First Amendment to be a member of the WSBA as an

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association of lawyers, limited practice officers and limited license legal technicians.

Second, the Bar Association attempts to lead one to think that WSBA could do what he did because it had a right to amend its bylaws. The WSBA did have the right to amend its bylaws and what happened was that when the amended bylaws went into effect on January 1, 2017 the WSBA was an association not limited to lawyers but including lawyers, limited practice officers and limited license legal technicians.

Third, the concern about the discipline system was this. The fact that the WSBA prior to January 1, 2017, had operated the WSBA Washington lawyer discipline system was due to the fact that when state bar act was passed it gave the WSBA the lawyer disciplinary function. That grant was part of the elements making up the original integrated Bar Association system advanced by the Judicature Society beginning in 1914.

> [3] First, Plaintiffs' claims fail as a matter of law because (a) compulsory bar membership and fees have been repeatedly upheld as constitutional requirements to practice law; (b) the bylaws amendments do not eliminate the WSBA's authority to administer the Washington Supreme Court's lawyer discipline system, and (c) the numerous protections provided under the discipline system have been recognized as sufficient to satisfy due process. Second, any of Plaintiffs' claims related to lawyer discipline are barred under the Younger doctrine, given that each Plaintiff is subject to ongoing state discipline proceedings. Plaintiffs' objections must be brought within those proceedings, not in a collateral attack in federal court. Third, Plaintiffs' discipline-related claims are barred under the res judicata doctrine, because those claims already should have been brought, if at all, in Plaintiffs' prior disciplinary proceedings. Fourth, Plaintiffs' due process claim is generic, nebulous, and thus unripe. Fifth and finally, the WSBA is immune from suit.

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> [4] Accordingly, Plaintiffs' claims should be dismissed with prejudice. For the same reasons, Plaintiffs' request for a preliminary injunction and summary judgment should be denied.

Paragraphs 3 and four above seek to cause the reader to be greatly confused and to think that the statements are true. But, they are not true. They cannot be true. The reason is that the nexus of facts in the previous cases are not the same as the nexus of facts in this case. The previous cases were integrated Bar Association cases. This case integrated association of lawyers, limited practice officers, and limited license legal technicians. The issues presented by the latter are not the same issues presented by the former.

BACKGROUND AND PROCEDURAL HISTORY

A. Prior Lawsuits Involving Eugster

> [5] This case is the latest in a number of proceedings involving both Eugster and the WSBA. The prior disputes provide context for Plaintiffs' arguments and issues presented in this case. This Court may take judicial notice of the public filings in these prior relevant cases. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings."). The Court also may consider the decisions made in each case as persuasive authority.

In this paragraph the Bar Association would like to think that the cases which they discuss below are merely context. The cases are not context. They are a part of the effort to make Steve Eugster into a scapegoat. Their efforts are not innocent. They are intended to show to the court what a bad person Steve Eugster is. In addition they go on to say that the decisions in each case can be considered "perverts waste of authority" that is to say the results Steve Eugster obtained in the contextual cases are results which can obtain in the present case. This is truly

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false. The Bar Association confuses evidentiary relevance with what they call context. The statements are not relevant, they are ad hominem.

> [6] *In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293 (2009) ("**Eugster I**"): In 2005, the WSBA charged Eugster with numerous counts of attorney misconduct. Id. at 307. Among other issues, Eugster had filed a "baseless" petition, ignored his client's direction, and refused to acknowledge that his client had discharged him. Id. at 317-18. A hearing officer found Eugster had violated numerous rules of professional conduct. Id. at 307. The WSBA Disciplinary Board then recommended that Eugster be disbarred. Id. at 311. In 2009, five justices of the Washington Supreme Court decided instead to suspend Eugster for 18 months, while the remaining four justices agreed with the Disciplinary Board's conclusion that he should be disbarred. Id. at 327-28.

The foregoing statement is nothing but ad hominem. The whole point of it is to make Eugster into a bad person.

> [7] *Eugster v. Wash. State Bar Ass'n*, No. CV 09-357-SMM, 2010 WL 2926237 (E.D. Wash. July 23, 2010) ("**Eugster II**"): In the meantime, the WSBA was investigating another complaint it had received against Eugster based on other conduct. Id. at *1. This investigation culminated in a letter from the WSBA to Eugster in December of 2009 warning Eugster "to more carefully analyze the law before filing lawsuits" but otherwise dismissing the matter. Id. In January 2010, Eugster filed a complaint in the United States District Court for the Eastern District of Washington against the WSBA and its officials, alleging that Washington's attorney discipline system violated his due process rights. Id. at *2. The district court dismissed the case. Id. at *11. Specifically, the court determined that Eugster lacked standing to assert his claims because he was not seeking "redress for an actual or imminent injury." Id. at *8 (internal quotations omitted). The district court also noted that "the Ninth Circuit has recognized bar associations as state agencies for purposes of Eleventh Amendment immunity" and dismissed Eugster's claims against the WSBA for that additional reason. Id. at *9. In an unpublished memorandum opinion, the Ninth Circuit affirmed on standing

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grounds and did not reach the immunity issue. 474 Fed. App'x 624 (9th Cir. 2012).

The foregoing statement is completely inaccurate.

[8] *Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("**Eugster III**"): In September 2014, another grievance was filed against Eugster. *See Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711, at *2 (E.D. Wash. June 29, 2016) ("**Eugster V**") (discussing disciplinary history). The WSBA notified Eugster that it was conducting an investigation of the grievance. See id. Eugster eventually was informed that the investigation had been assigned to Managing Disciplinary Counsel. See id. On March 12, 2015, Eugster filed another lawsuit against the WSBA and its officials, before this Court. *See Eugster III.* In **Eugster III**, Eugster complained that his constitutional rights of association and speech were violated by the requirements of state bar membership and payment of license fees in order to practice law. 2015 WL 5175722, at *2. In September 2015, this Court dismissed the complaint. Id. at *1. Specifically, this Court determined Eugster had "grossly misstate[d]" and "misconstrued" governing precedent, which authorizes mandatory bar membership and fees. Id. at *5. This Court also observed that the WSBA is immune from suit in federal court as an "investigative arm" of the State of Washington. Id. at *9.

[9] Eugster appealed to the Ninth Circuit. Today, on March 21, 2017, the Ninth Circuit affirmed in an unpublished memorandum opinion, upholding "compulsory membership in the WSBA" and rejecting Eugster's lawsuit because "an attorney's mandatory membership with a state bar association is constitutional."

Eugster III, No. 15-35743, Dkt. # 18-1 (9th Cir. Mar. 21, 2017). The Ninth Circuit also noted that "[c]ontrary to Eugster's contention," it could not "overrule binding authority . . . ." Id. For the Court's convenience, a copy of the memorandum opinion is attached to this brief as Exhibit A.

Regarding above paragraphs starting with [8]: Eugster III was an effort to have the court overturn *Lathrop v. Donohue,* 367 US 820 (1961) . Eugster appealed the

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decision to the Ninth Circuit and the decision was affirmed. The court made the statement that it could not "overrule binding authority" but the whole point of the effort was to be in a position to file a petition for writ of certiorari to the United States Supreme Court to see if the court was inclined to address, at this time, the constitutionality of forcing a lawyer to be a member of a bar association in order to practice law. The court declined to issue a writ.

> [10] Eugster v. Wash. State Bar Ass'n, No. 15204514-9 (Spok. Cnty. Super. Ct. 2015) ("**Eugster** IV"): While **Eugster III** was progressing in this Court, the bar disciplinary process moved forward and the latest grievance against Eugster continued to be investigated. On November 5, 2015, Eugster was notified that Disciplinary Counsel would be recommending a formal hearing on the pending grievance against him. On November 9, 2015-four days after Eugster received notice of the hearing recommendation-Eugster filed another lawsuit against the WSBA and its officials, this time in Spokane County Superior Court. Eugster's complaint alleged that the lawyer discipline system violates his procedural due process rights. *See* **Eugster V**, 2016 WL 3632711, at *2 (discussing Eugster IV). The complaint also sought damages. See id. The superior court in Eugster IV ultimately dismissed the complaint with prejudice, concluding that the Washington Supreme Court has exclusive jurisdiction over lawyer discipline in Washington, that Eugster already had been afforded an opportunity to raise his objections within his prior disciplinary proceedings, and that the WSBA's officials were immune from Eugster's damages claims. See id. Eugster appealed to Division III of the Washington Court of Appeals, and that appeal remains pending. *See* **Eugster IV**, No. 34345-6-III (Wash. Ct. App.).

The Bar Association fails to tell the reader that **Eugster IV** was appealed. The decision on appeal held that the Superior Court did in fact have jurisdiction to decide the case. Once the Court of Appeals made that decision it proceeded to exercise original jurisdiction to determine whether Eugster was bound by res judicata because he should have raised the issue in the case in the discipline action

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against him. The Court of Appeals did not have jurisdiction to make that decision. The jurisdiction of the Court of Appeals is revisory only. It does not have original jurisdiction nor can it provide itself with original jurisdiction. RCW 2.06.030.

> [11] *Eugster v. Littlewood,* No. 2:15-CV-0352-TOR, 2016 WL 3632711 (E.D. Wash. June 29, 2016) ("Eugster V"): On December 22, 2015, soon after Eugster filed his lawsuit in Spokane County Superior Court (**Eugster IV**), Eugster filed yet another lawsuit against the WSBA's officials, this one another federal suit in the Eastern District of Washington. Id. Eugster's complaint sounded in due process, with allegations largely identical to those made in **Eugster IV.** Id. at *5. On June 29, 2016, the district court dismissed the complaint with prejudice, determining that Eugster's claims were barred under the res judicata doctrine. Id. at *4-6. Eugster appealed the decision to the Ninth Circuit Court of Appeals, and that appeal remains pending. *See* **Eugster V**, No. 16-35542 (9th Cir.).

The Bar Association fails to tell the reader that the District Court in **Eugster IV** were dismissed with prejudice and could be used for purposes of res judicata. The dismissal in **Eugster IV** was not with prejudice. It was on the basis that the court did not have jurisdiction. It is axiomatic that in order which is not based on the merits cannot have res judicata effect.

> [12] *Eugster v. Wash. State Bar Ass'n,* No. 2:16-cv-01765 (W.D. Wash.) ("**Eugster VI**"): On November 15, 2016, Eugster filed yet another lawsuit in this Court. Id. As in the present case, the complaint objected to compulsory bar membership and fees, asserted that the recent amendments to the WSBA's bylaws resulted in a new organization without disciplinary authority, and alleged that Washington's discipline system failed to meet procedural due process requirements. See id., Dkt. # 1. Eugster filed a voluntary dismissal of the case on January 4, 2017-one day after he filed the present lawsuit on behalf of Plaintiffs. See id., Dkt. # 3.

The Bar Association's explanation of the foregoing case in which Eugster took a

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voluntary dismissal is inaccurate. The association completely fails to disclose that the action was an action specifically filed addressing the issues raised in the context of the WSBA as an integrated association of lawyers, limited practice officers and limited license legal technicians.

B. The Current Lawsuit

> [13] The current lawsuit was filed on January 3, 2017. See Dkt. # 1. Initially, the case was filed as a putative class action on behalf of all WSBA members, naming Plaintiffs Robert E. Caruso ("Caruso") and Sandra L. Ferguson ("Ferguson") as class representatives. See id. at 11. On February 21, Plaintiffs filed a First Amended Complaint, which asserts individual claims on behalf of Plaintiffs Caruso and Ferguson, abandoning all class claims. See Dkt. # 4. Caruso and Ferguson are practicing lawyers and active members of the WSBA. See id. at 5.
>
> [14] The First Amended Complaint raises three claims: First, it asserts that requiring bar membership and payment of license fees in order to practice law violates Plaintiffs' constitutional rights of association and speech. See Dkt. # 4 at 32-34. Second, it asserts that as a result of recent amendments to the WSBA's bylaws, the WSBA is a new organization that no longer has authority to discipline lawyers in Washington. See id. at 34-35. Third, it asserts that Washington's lawyer discipline system violates procedural due process requirements. See id. at 35-36. The Amended Complaint also alleges claims for declaratory relief and failure to meet "constitutional scrutiny," which are derivative arguments that are subsumed under the three claims identified above. See id. at 31-32, 36-38.

IV. The Statement is Argumentum Ad Hominem.

The first question to be answered is whether the statement is "argumentum ad hominem." The statement as an entirety is ad hominem about and toward Stephen Eugster. Further, the statement in its discrete parts is ad

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hominem toward Eugster. The parts are interconnected in their overall object of ad hominem toward Eugster.

The statement is an "argumentum ad hominem" concerning Stephen K. Eugster. The Bar Association and its lawyers present the court with a strategy, an attack, an "argumentum ad hominem" – a fallacy of logic wherein Eugster pro se is the targeted subject.

"Argumentum ad hominem (from the Latin, "argument to the person") is an informal logical fallacy that occurs when someone attempts to refute an argument by attacking the claim-maker, rather than engaging in an argument or factual refutation of the claim. There are many subsets of ad hominem, all of them attacking the source of the claim rather than attacking the claim or attempting to counter-arguments. RATIONALWIKI.ORG.[2]

"Ad hominem" is a Latin word meaning "to the person." It means appealing to personal considerations rather than to logic or reason, attacking an opponent's character rather than the opponent's assertions. At present this phrase is chiefly used to describe an argument based on the failings of an adversary rather than on the merits of the case. For example, ad hominem attacks on one's opponent are a tried-and-true strategy for people who have a case that is weak https://definitions.uslegal.com/a/ad-hominem/.

V. Argumentum Ad Hominem Cannot be Used.

A. The Argumentum Ad Hominem Violates Federal Rules of Evidence.

The primary evidentiary tests or standards for evidential relevance are

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[2] https://rationalwiki.org/wiki/Argumentum_ad_hominem.

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found in the following Federal Rules of Evidence: **Rule 401** - Test for Relevant Evidence: ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action"); **Rule 402.** General Admissibility of Relevant Evidence provides: ("Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible"); and **Rule 403.** Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons. (" The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.")

B. Defendants' Argumentum Ad Hominem Violates the Considerable Law of the Ninth Circuit and Multiple District Courts within the Circuit.

Forte v. Cnty. of Merced, Case No. 1:11-cv-00318-AWI-BAM, at *16-17 (E.D. Cal. Sep. 23, 2014) ("Lastly, the Court would also be acting within its considerable discretion to dismiss Forte's claims pursuant to its inherent authority to combat conduct abusive of the judicial process. Forte's name calling, mudslinging, scandalous pleadings, and hostility towards opposing counsel undermine the integrity of judicial proceedings. *See also, Sokolsky v. Rostron*, 2009 WL 2705881 (E.D. Cal. 2009) ("plaintiff engages in name-calling and hyperbole, which the court does not tolerate"); *Alvarado Morales v. Digital Equipment Corporation*, 669 F. Supp. 1173, 1187 (D.Puerto Rico 1987) ("The federal courts do not provide a forum for mudslinging, name calling and

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'privileged' defamation.");

Adams v. Nankervis, 902 F.2d 1578 (9th Cir. 1990) ("Although dismissal was a drastic sanction, it was clearly appropriate . . . . [N]o court need tolerate the use of obscene, indecent, and scandalous pleadings"); *Wilkerson v. Butler*, 229 F.R.D. 166, 170 (E.D. Cal. 2005) (allegation is "impertinent" if it is not responsive or relevant to the issues; **it is "scandalous" if it improperly casts a derogatory light on someone**)." (Emphasis added.)

United States v. Ruiz, 710 F.3d 1077, 1087 (9th Cir. 2013) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. **But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one** . *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) (Sutherland, J.). " [Emphasis added.]

Plise v. Krohn (*In re Plise*), No. 15-15786, at *7 (9th Cir. Mar. 1, 2018) ("Plise has filed a number of other motions in this appeal (Dkt Nos. 45, 51, 52) which we feel compelled to comment upon. Therein, counsel makes several ad hominem attacks alleging unethical behavior on the part of opposing counsel,

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former co-counsel, the prior judges who have heard this matter, and the trustee. We are, in short, hugely unimpressed with counsel's efforts, which we find both improper and unprofessional. These motions are denied.")

Suffice it to say, argumentum ad hominem and what is said within, does not constitute relevant facts. Of course, it cannot, because the person who is the subject or target is not the issue before the court. Think of it – it is just name-calling.

VI. Argumentum Ad Hominem.

The statement ad hominem cannot be used as evidence in this case. That is to say, in and of itself, the statement is a violation Fed. R. Civ. P. 60(b)(3), Fed. R. Civ. P. 60(d)(3), and Fed. R. Civ. P. 60(b)(6).

The matters contained in the statement argumentum ad hominem cannot be carved out of the statement because they are a part of the statement.

VII. Fed. R. Civ. P. 60(b)(3).

Rule 60(b)(3) of the Federal Rules of Civil Procedure provides that: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding . . . [due to] (3) fraud . . . , misrepresentation, or other misconduct of an adverse party . . ." Fed. R. Civ. P. 60(b)(3).

Standards **Fed. R. Civ. P. 60(b)(3)**

A "Rule 60(b)(3) motion must be made within one year of entry of judgment." *Nevitt v. United States,* 886 F.2d 1187, 1188 (9th Cir. 1989) the motion is timely brought. Rule 60(b)(3) permits a losing party to move for relief

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from judgment on the basis of "fraud, . . . misrepresentation, or other misconduct of an adverse party." FED. R. CIV. P. 60(b)(3). To prevail, the moving party must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense. *See Lafarge Conseils et Etudes, S.A. v. Kaiser Cement Gypsum Corp.*,791 F.2d 1334, 1338 (9th Cir. 1986); *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878-79 (9th Cir. 1990). Rule 60(b)(3) "is aimed at judgments which were unfairly obtained, not at those which are factually incorrect." *In re M/V Peacock,* 809 F.2d 1403, 1405 (9th Cir. 1987). The district court denied defendants' Rule 60(b)(3) motion because it found that the plaintiffs did not engage in misconduct and the judgment was not unfairly procured. We review the district court's denial of a Rule 60(b) motion for an abuse of discretion and will reverse "only upon a clear showing of abuse of discretion." *Molloy v. Wilson,*878 F.2d 313 (9th Cir. 1989); *see also, Wilson v. San Jose,*111 F.3d 688, 691 (9th Cir. 1997); *In re M/V Peacock,* 809 F.2d at 1404. *De Saracho v. Custom Food Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir. 2000).

U.S. v. Chapman, 642 F.3d 1236, 1240 (9th Cir. 2011) ("Rule 60(b)(3) allows a court, "on motion and just terms," to relieve a party . . . from a final judgment . . . for the following reasons: "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Independent actions under Rule 60(b) are available "only to prevent grave miscarriages of justice."*United States v. Beggerly*,524 U.S. 38, 47,118 S. Ct. 1862,141 L. Ed. 2d 32 (1998). "Courts possess the inherent power to vacate

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or amend a judgment obtained by fraud on the court." *Dixon v. Comm'r*, 316 F.3d 1041, 1046 (9th Cir. 2003) (citing *Toscano v. Comm'r*, 441 F.2d 930, 933 (9th Cir. 1971)). "[T]hat power is narrowly construed, applying only to fraud that defiles the court or is perpetrated by officers of the court. When we conclude that the integrity of the judicial process has been harmed, however, and the fraud rises to the level of `an unconscionable plan or scheme which is designed to improperly influence the court in its decision,' we not only can act, we should." *Id.* (quoting *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960)). We review a district court's denial of a Rule 60(b)(3) motion for abuse of discretion. *De Saracho v. Custom Food Machinery, Inc.*, 06 F.3d 874, 880 (9th Cir. 2000).")

Argument

The statement as argumentum ad hominem violated **Fed. R. Civ. P. 60(b)(3).**

The statement as argumentum ad hominem and in and of itself is drafted so that it contains the elements of fraud on plaintiff Robert E. Caruso violated **Fed. R. Civ. P. 60(b)(3).**

The statement as argumentum ad hominem and in and of itself is drafted so that it contains the elements of fraud on Stephen Kerr Eugster pro se violated **Fed. R. Civ. P. 60(b)(3)**. Moreover, the conduct of the Bar Association evidences "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party."

VIII. Fed. R. Civ. P. 60(d)(3) "fraud on the court."

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Standards of **Fed. R. Civ. P. 60(d)(3)**.

McGary v. Inslee, CASE NO. C15-5840 RBL-DWC, at *4-5 (W.D. Wash. May. 10, 2017) ("Under Rule 60(d)(3), a court has the authority to "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3). "Because fraud on the court concerns the integrity of the judicial process itself, a judgment may be set aside for fraud on the court at any time." *See* 12-60 MOORE'S FED. PRAC.-CIV. § 60.21[4][g].

'Fraud upon the court' ... embrace[s] only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Id.* The burden is on the moving party to establish fraud by clear and convincing evidence. *See Atchison, Topeka & Santa Fe Ry. Co. v. Barrett*, 246 F.2d 846 (9th Cir. 1957). Rule 60(d)(3) only preserves the Court's power to "set aside a judgment for fraud on the court" - which must be shown by clear and convincing evidence and typically does not arise from "[m]ere nondisclosure of evidence," "perjury by a party or witness," or other mere fraud "connected with the presentation of a case to a court." *United States v. Estate of Stonehill*, 660 F.3d 415, 443-44 (9th Cir. 2011).")

" [F]raud on the court entails misconduct that 'harms the integrity of the judicial process.'" *In re Levander*, 180 F.3d 1114, 1119 (9th Cir. 1999). Fraud on the court "embraces only that species of fraud which does[,] or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of

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adjudging cases that are presented for adjudication." *Id.*

Fraud on the court consists of "conduct" which has the following elements: 1) [Conduct] on the part of an officer of the court; that 2) is directed to the judicial machinery itself; 3) is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; 4) is a positive averment or a concealment when one is under a duty to disclose; and 5) deceives the court. [Citations omitted.] *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010). *See also, Williamson v. Recovery Ltd. P'ship*, 826 F.3d 297, 302 (6th Cir. 2016).

One who seeks to establish fraud on the court has the burden of proving existence of fraud on the court by clear and convincing evidence. *Id.*

Argument

The facts are clear and convincing: (1) there was conduct on the part of officers of the court, the lawyers for sure but also on the part of the WSBA and its executive director – all officers of the court and advocates and protectors of the ethics of the profession, ; that (2) was directed to the judicial machinery itself; (3) was intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; (4) was positive averment and concealment when there was is under a duty to disclose; and 5) deceived the court.

And, making matters much worse, the entire effort was bound up in a single statement consisting of argumentum ad hominem and which was not relevant evidence at all.

IX. Fed. R. Civ. P. 60(b)(6).

McLaughlin v. Felker, NO. CV-08-831-RHW, at *3 (E.D. Cal. Jun. 9,

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2014) ("A court may relieve a party from a final judgment or order for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6).

The Ninth Circuit has dubbed this Rule as a "catchall provision that allows a court to vacate a judgment for 'any other reason justifying relief from the operation of the judgment,'" and "'has been used sparingly as an equitable remedy to prevent manifest injustice.'" *Lehman v. United States,* 154 F.3d 1010, 1017 (9th Cir. 1998) (citation omitted); *see also Greenawalt v. Stewart,* 105 F.3d 1268, 1273 (9th Cir. 1997) (explaining that Rule 60(b)(6) should only be used where "extraordinary circumstances prevented a party from taking action"), abrogated on other grounds as recognized by *Jackson v. Roe,* 425 F.3d 654, 658-61 (9th Cir. 2005).

Lafarge Conseils et Etudes, v. Kaiser Cement, 791 F.2d 1334, 1338 (9th Cir. 1986) ("A motion brought under 60(b)(6) must be based on grounds other than those listed in the preceding clauses. *Corex Corp. v. United States,* 638 F.2d 119, 121 (9th Cir. 1981). Clause 60(b)(6) is residual and "must be read as being exclusive of the preceding clauses." In addition, the clause is reserved for "extraordinary circumstances." *Id.*; *Martella v. Marine Cooks Stewards Union,* 448 F.2d 729, 730 (9th Cir. 1971), *cert. denied,* 405 U.S. 974, 92 S. Ct. 1191, 31 L. Ed. 2d 248 (1972). Because Kaiser failed to allege "extraordinary circumstances" and relied exclusively upon its fraud and newly discovered evidence arguments, the district court held that Rule 60(b)(6) was not applicable.") *Casey v. Albertson's Inc.,* 362 F.3d 1254, 1260 (9th Cir. 2004) protect its interests" to obtain relief. *United States v. Alpine Land & Reservoir Co.,* 984 F.2d 1047, 1049 (9th Cir. 1993).")

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Hallmark Care Servs., Inc. v. Superior Court of Wash., NO. 2:17-CV-00129-JLQ, at *4 (E.D. Wash. Apr. 16, 2019) ("Fed. R. Civ. P. 60(b)(6) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding [for] . . . Any other reason that justifies relief."." *Greenawalt v. Stewart*, 105 F.3d 1268, 1273 (9thCir. 1997) (citations omitted).")

Argument

If the court does not act pursuant to Fed. R. Civ. P. 60(b)(3), Fed. R. Civ. P. 60(d)(3), it must, of necessity, act on the basis of Fed. R. Civ. P. 60(b)(6), What the Bar Association and its lawyers have done is extraordinary, and cynical.

CONCLUSION

In light of the foregoing, the court should grant the motions under Fed. R. Civ. P. 60(b)(3) and Fed. R. Civ. P. 60(d)(3), and, if necessary, Fed. R. Civ. P. 60(b)(6). The decisions and orders of the trial court should be vacated.

October 25, 2019

Respectfully,

s/ Stephen Kerr Eugster

Stephen Kerr Eugster, WSBA # 2003

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Filed
Washington State
Court of Appeals
Division Two

February 7, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEPHEN KERR EUGSTER, Appellant/Cross-Respondent, v. WASHINGTON STATE BAR ASSOCIATION, et al., Respondent/Cross-Appellant.	No. 53325-1-II ORDER DENYING MOTION TO PUBLISH OPINION

Appellant, cross-respondent moves for publication of the court's January 7, 2020 opinion in this matter. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. MAXA, SUTTON, GLASGOW

FOR THE COURT:

Sutton, J.
SUTTON, JUDGE

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March 09, 2020 - 4:27 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53325-1
Appellate Court Case Title:	Stephen Kerr Eugster, App/Cross-Res v. Washington State Bar Association, et al, Res/Cross-App
Superior Court Case Number:	18-2-00542-1

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Appendix to Petition for Review

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