

The Winds of Change are Definitely (Probably, Possibly) Blowing – Pending First Amendment Challenges to Mandatory Bar Association Membership and Attorney Professional Licensing Fees

By Mark Johnson © 2019

Abstract and Issues

Given the important role that lawyers play in our democracy's justice system, the practice of law is by necessity a highly regulated profession. States have an imperative interest in ensuring high quality legal services by admitting, and permitting, to practice law only those who have demonstrated, and who maintain, competence and commitment sufficient to comply with both our representational responsibilities and our professional ethical prescriptions.

Over thirty states, including Washington, require lawyers to be members of the state's bar association as a condition of practicing law. These "mandatory" bar associations require lawyers to pay an annual professional licensing fee to fund both core regulatory functions, such as admissions and discipline, and discretionary programs found by the regulatory authority to be reasonably or necessarily incurred for the purpose of regulating the legal profession or improving the quality of legal services.

To the extent that there had been tension between mandatory bar membership and the constitutionally protected rights of free speech and association, which include the rights not to associate and not to be forced to speak through the compelled funding of activities perceived by some to be ideologically motivated, the issue, until recently, was thought to have been resolved.

This article addresses recent First Amendment constitutional challenges to the requirement that lawyers pay professional licensing fees to bar associations for activities which they contend constitute ideological and political activities and challenges to the requirement of compulsory bar association membership as a condition of practicing law. These challenges arise largely from the United States Supreme Court's decision in *Janus v. AFSCME, Council 31* – U.S. ___, 138 S. Ct. 2448 (2018), discussed *infra*.

The WSBA Structures Work Group

At the beginning of 2019, the Washington Supreme Court created the WSBA Structures Work Group. It is chaired by Chief Justice Mary Fairhurst, and I am one of the members of the Work Group.

The Work Group's charter describes its mission as follows:

To review and assess WSBA structure in light of (1) recent case law with First Amendment and antitrust implications; (2) recent reorganizations by other state bar associations and/or groups and their reasoning; (3) the additional responsibilities of the WSBA due to its administration of Supreme Court appointed Boards.

As a member of the Work Group I have been given access to a great deal of material about the WSBA and its structure and programs, prepared by: WSBA staff; Dory Nicpon, the Assistant Director of Judicial and Legislative Relations with the Administrative Office of the

Courts; and Felicia Craick and David Moon, Chief Justice Fairhurst's law clerks. Their work has made mine, both with respect to Work Group work and writing this article, infinitely easier. Props and thanks to you.

The WSBA

A warning to the nine or so people who are reading this article- this section is a bit ponderous. Given, however, that all of the pending First Amendment challenges to mandatory bar association membership and to the compelled funding of the associations focus in part on the nature of the programs funded and the contention by the challengers that the relationship between many of those programs and the states' interests in regulating the practice of law is too attenuated or ideologically motivated to be constitutionally permissible, it is necessary to have a understanding of the Supreme Court's authority over the WSBA and the Bar's many boards, committees, programs, and commissions.

The Washington State Bar Association was founded in 1933 by an act of the legislature (Chapter 2.48 RCW). Washington is a mandatory bar association, defined as a bar association in which membership is required as a condition to practicing law in the state. RCW 2.48.170 and APR 1(b). Because the WSBA also administers "discretionary" programs in conjunction with its regulatory responsibilities, it is also referred to as an integrated bar association. (Some states have purely voluntary bar associations, although lawyers in those states are still regulated with respect to admissions, discipline, and other foundational professional functions.)

Although the WSBA was created by the legislature, the Washington Supreme Court has made it clear in multiple decisions, and in GR 12, that it has plenary authority over the practice of law, grounded in Article 4 section 1 of the Washington Constitution and protected by the separation of powers doctrine. The Court has made it clear that its control is not only limited to admission and discipline but extends "... to ancillary administrative functions as well." *The Washington State Bar Association v. The State of Washington*, 125 Wn.2d 901, 907-908 (1995).

GR 12 provides:

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

GR 12 was extensively amended in 2017 and now consists of GR 12 and five subparts, GR 12.1-12.5. GR 12.2 has three sections. 12.2(a) declares the purposes of the Bar: "In General." 12.2(b) sets out actions which the WSBA is authorized to take. 12.2(c) sets out actions that the Bar Association is prohibited from taking, including taking "...positions on political or social issues which do not relate to or affect the practice of law or the administration of justice." 12.2(c)(2).

In addition to administering the regulatory functions of admission, discipline, membership licensing, and record keeping, the WSBA also funds and administers multiple other programs, boards, commissions, and committees mandated by the Supreme Court through court rules or court orders. Some examples of these are: the Client Protection Fund and Board (APR 15); the Access to Justice Board (reauthorized by Supreme Court order dated March 4, 2016); the Character and Fitness Board (APR 23); the MCLE Board (APR11); the Limited Licensed Legal Technician Board (APR 12); the Limited Practice Board (APR 12); the Practice of Law Board (GR 25); the Certified Professional Guardian Board (GR 23); the Court Rules and Legislative Committees; the Committee on Professional Ethics; and the WSBA Diversity Committee. The bar also administers and partially funds 29 practice sections.

Finally, the WSBA funds and administers Supreme Court authorized programs. These programs include diversity outreach and education programs and professional responsibility related programs, such as the ethics line, member wellness, and practice assistance programs (APR 19). It also includes member benefits, such as *Northwest Lawyer* magazine, the Legal Lunchbox CLE series, and the legal research tool Casemaker.

Most of the WSBA funding comes from “general fund revenue”. The vast majority of that fund is generated by our professional licensing fees. The WSBA has approximately 40,000 active members. For 2019, the professional licensing fee for lawyers admitted before 2017 is \$453.

For 2019, the general fund is expected to be approximately 20.2 million dollars. *See*, WSBA Budget for the Fiscal Year ending September 30, 2019. [https://www.wsba.org/docs/default-source/about-wsba/finance/fy-2019-budget-\(10-8-18\)-final.pdf?sfvrsn=a03901f1_0](https://www.wsba.org/docs/default-source/about-wsba/finance/fy-2019-budget-(10-8-18)-final.pdf?sfvrsn=a03901f1_0). The first 14 pages of the document provides a concise breakdown of the Bar’s 30 General Fund cost centers.

The Constitutional Backdrop

Even those of us... I mean those of you... who learned constitutional law solely by reading *Gilbert’s Constitutional Law Summary*, know that our rights of free speech and free association, protected by the First Amendment to the United States Constitution and made applicable to the states by the Fourteenth Amendment, include the corollary rights to be free from compelled speech and forced association. *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428 (1977); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S. Ct. 2402 (2000).

Compelled speech includes a requirement to pay money to support political and ideological causes to which the payee objects. “[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.” *Harris v. Quinn*, 573 U.S. 616, 659, 134 S. Ct. 2618 (2014).

In *Aboud v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S. Ct. 1782 (1977), the Court held that it was constitutionally permissible for a teachers’ union, as the authorized and sole collective bargaining representative for Detroit’s teachers, to charge dues (referred to as agency fees) to non-union teachers, although those charges could not include assessments for political and

ideological causes and activities not germane to the union's collective bargaining responsibilities. *Id.*, 235.

In *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228 (1990), the Court held that the State Bar Association of California (SBAC), which at the time mandated membership in and payment of licensing fees to the organization as a condition to practicing law, did not violate its members First Amendment rights of compelled speech and association, so long as the money was used to fund activities germane to the association's mission of regulating the practice of law and improving the quality of legal services. *Id.*, 13-14. The *Keller* Court also held, consistent with *Abood*, that the SBAC could not require objecting members to finance the political and ideological activities of the Association. *Id.* Many years earlier, the Court held that mandatory bar membership was not an unconstitutional impairment of the right to free association in *Lathrop v. Donohue*, 367 U.S. 820, 81 S. Ct. 1826 (1961).

As to the standard for proper expenditures, the *Keller* Court stated: "Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal service available to people of the state. *Id.*, 14. (Emphasis added.)

The *Keller* decision led to the eponymous "Keller deduction", a process whereby mandatory bar associations construct and apply a formula to determine the percentage of professional licensing fees that are not germane to the association's mission, so that objecting lawyers may decline to pay.

On its website, the Washington State Bar Association explains the Keller deduction as follows:

In a U.S. Supreme Court case *Keller v. State Bar of California*, the Court ruled that a bar association may not use mandatory member fees to support political or ideological activities that are not reasonably related to the regulation of the legal profession or improving the quality of legal services. The bar is required to identify that portion of mandatory license fees that go to such "nonchargeable" activities and establish a system whereby objecting members may either deduct that portion of their fees or receive a refund.

<https://www.wsba.org/for-legal-professionals/license-renewal/keller-deduction>. For the WSBA's 2019 license period, the Keller deduction for Washington lawyers admitted before 2017 is \$1.25. *Id.*

The WSBA's process for determining the amount of the Keller deduction and procedure for challenging the deduction can be found at: https://www.wsba.org/docs/default-source/licensing/keller-deduction-overview.pdf?sfvrsn=9f3538f1_8.

Given that *Abood* had been settled law since 1977 and *Keller* since 1990, everything seemed...well...settled.

Then Along Came Arnold Fleck and Mark Janus

North Dakota attorney Arnold Fleck was not happy with the State Bar Association of North Dakota (SBAND).

Illinois Department of Healthcare and Family Services Child Support Specialist Mark Janus was not happy with the American Federation of State, County, and Municipal Employees Council 31 (AFSCME 31).

Counselor Fleck had donated time and money to a North Dakota State ballot initiative seeking to establish a presumption that both parents of a child would be entitled to equal parental rights. He was upset when he learned that the SBAND opposed the initiative. *Fleck v. Wetch*, 868 F.3d 652, 652-653. (8th Cir. 2017).

Family Services Child Support Specialist Mark Janus was not a member, as was his right, of AFSCME 31. Because of the holding in *Abood*, however, he was required to pay a portion of his union dues as agency fees based on *Abood's* rationale that he benefitted from the union's collective bargaining activities (that there should be no "free riders"). Mr. Janus did not believe that he should be required to pay anything.

Counselor Fleck sued the SBAND. After losing in federal district court, Fleck appealed to the 8th Circuit Court of Appeals. He contended that the SBAND's *Keller* objection process failed to meet the standards established in *Keller* and in *Chicago Teacher's Union Local No. 1. v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066 (1996). The parties settled that issue by agreeing to changes to SBAND's license fees statement. *Fleck v. Wetch*, 868 F.3d 653.

Fleck also contended that mandatory membership in an integrated bar association violated his First Amendment right of association and his First Amendment right not to subsidize ideological speech with which he disagreed. Finally, he contended that the SBAND's *Keller* opt-out procedure violated his First Amendment right to affirmatively consent before subsidizing "non-germane" expenditures. *Id.* Based on *Abood* and *Keller*, the 8th Circuit affirmed. *Id.*

Child Support Specialist Janus sued AFSCME 31, asserting that, as a non-union member, he should not be required to pay any agency fees. After losing in federal district court, Janus appealed to the 7th Circuit Court of Appeals which, based on *Abood*, affirmed. *Janus v. AFSCME Council 31*, 851 F.3d 746, 749 (7th Cir. 2017).

Child Support Specialist Janus and Counselor Fleck each filed a Petition for Certiorari. The U.S. Supreme Court granted Janus's Petition on September 28, 2017. *Janus v. AFSCME, Council 31*, 138 S. Ct. 54 (2017).

In June of 2018 in *Janus v. AFSCME, Council 31* _ U.S. _ 138 S. Ct. 2448 (2018), the Court emphatically overruled *Abood*, describing it as "poorly reasoned". *Id.*, 2460. The court held that the practice of public sector unions charging non-union members a percentage of union dues violated the First and Fourteenth Amendments to the U.S. Constitution. *Id.*, 2478. The Court held the practice to be constitutionally defective compelled speech even though the non-union members were not required to pay for activities related to the union's political and ideological mission. *Id.*, 2478.

On December 3, 2018, the United States Supreme Court granted Counselor Fleck's Petition for Certiorari, vacated the judgment and remanded the case to the 8th Circuit in light of *Janus. Fleck v. Wetch, U.S.*, 139 S. Ct. 590 (2018). The case is scheduled to be argued there on June 13, 2019.

Post-*Janus* and *Fleck* Bar Association First Amendment Litigation

After *Janus* overruled *Abood*, and *Fleck* was remanded, several lawsuits challenging the requirement of mandatory bar association membership as a condition to practicing law, and the expenditures related thereto, have been filed based on the position that in overruling *Abood*, the Court impliedly overruled *Keller*. In addition to *Fleck* there are currently five cases pending, one in Texas, one in Oklahoma, one in Wisconsin, and two in Oregon.

The Complaint in the challenge to the constitutionality of the State Bar of Wisconsin, *Jarchow and Dean v. State Bar of Wisconsin et. al.*, filed in the United States District Court for the Western District of Wisconsin on April 8, 2019, Civil Case No. 19-CV-266, is illustrative of the claims in the five cases. It directly challenges both the requirement of mandatory bar membership as a condition to practicing law and the requirement to fund certain programs with "dues". The Complaint provides at paragraph 1:

This civil-rights action challenges Wisconsin's unconstitutional requirements that attorneys licensed to practice law in Wisconsin must join and pay membership dues to the State Bar of Wisconsin. The State Bar of Wisconsin regularly engages in advocacy and other speech on matters of intense public interest and concern, and it funds that advocacy through mandatory dues payments. Accordingly, those requirements compel Plaintiffs' speech and compel them into an unwanted expressive association with the State Bar, in violation of Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs therefore ask that this Court declare unconstitutional Wisconsin's requirements that attorneys join and fund the State Bar of Wisconsin, order Defendants to desist in enforcement of those requirements, and refund to Plaintiffs the dues that they have been unconstitutionally compelled to pay to the State Bar of Wisconsin.

The Texas case, *McDonald, et.al. v. Longley, et. al.*, Civil Action No. 1:19-cv-00219-LY, is venued in the United States District Court for the Western District of Texas, Austin Division. On May 31, 2019, the *McDonald* Plaintiffs filed an Amended Complaint which asserts that the following programs funded by the State Bar of Texas are unconstitutional infringements on the free speech of Texas lawyers: a \$65 legal services fee to assist in funding indigent civil legal aid and criminal defense; the Bar's "Office of Minority Affairs" which supports programs dedicated to the Bar's "diversity efforts"; the Governmental Relations Department; and the "Legal Access Division" which supports access to justice and pro bono legal services.

Paragraph 42 of the Amended Complaint in *McDonald* summarizes the Plaintiffs' position with respect to the programs as follows:

The programs discussed above are inherently political and ideological. The Bar's "diversity initiatives are premised on the assumption that it is appropriate to offer certain services to targeted at individuals of particular race, gender, or sexual orientation. The Bar's legislative program is self-evidently political, as it is directly proposing and supporting the passage of legislation. And the Bar's pro bono and "access to justice" are effectively mandatory charitable contributions that are extracted from attorneys as a condition of engaging in their chose profession.

The Texas Attorney General has filed an amicus brief on behalf of the Plaintiffs in *McDonald*. In several of the cases the Goldwater Institute either represents, or has appeared amicus for the plaintiffs, including in the United States District Court for the District of Oregon, in *Crowe et. al. v. Oregon State Bar, et. al.* Case No. 3:18-cv-02139. On its website, the Goldwater Institute describes its position on mandatory bar membership and professional licensing fees as follows:

In addition, there is no good reason why Oregon attorneys should be forced to join and pay a bar association at all. Making attorneys join a bar association violates their right to freedom of association, and, even with better procedures in place, it's virtually impossible to protect attorneys from having their dues used for political speech. The Supreme Court should therefore end mandatory bar association fees, just as it recently ended mandatory public-sector union fees, which violated government workers' rights for the same reasons, in *Janus v. AFSCME*.

See, <https://goldwaterinstitute.org/standing-up-for-attorneys-free-speech-rightscrowe-v-oregon-state-bar/>.

There have also been two lawsuits filed in Washington in which attorneys have attempted to raise First Amendment issues; however, both have been dismissed. In one, former attorney John Scannell (disbarred on 9/9/10) filed a lawsuit, one of several that he has filed against the WSBA, in the USDC for the Western District of Washington, Cause No. 18-cv-05654-BHS. Mr. Scannell filed the case after his name was stricken from the ballot for the November 2018 Washington Supreme Court election. Mr. Scannell's name was stricken based on a ruling by a Thurston County Superior Court judge that only attorneys licensed to practice law in Washington are qualified to sit on the Washington State Supreme Court.

After Mr. Scannell's lawsuit in the USDC was dismissed, he raised the issue of the constitutionality of mandatory bar membership in an emergency motion for a restraining order to the 9th Circuit Court of Appeals, Cause No. 18-3-35808. The 9th Circuit affirmed the dismissal.

Spokane Attorney Stephen Eugster, who has also sued the WSBA on multiple occasions, raised First Amendment issues in a case he filed in the USDC for the Eastern District of Washington, Cause Number 2:17-cv-00392-TOR. On May 11, 2018 (pre-*Janus*) the USDC case was dismissed, based primarily on the Court's finding that res judicata applied to Mr. Eugster's claims. Mr. Eugster appealed to the 9th Circuit Court of Appeals, Cause No. 18-35421. His case

was dismissed, post-*Janus*, by the 9th Circuit by a memorandum order, without oral argument on March 19, 2019.

Conclusion

Given the important state interests at stake, it is difficult to imagine that if the United States Supreme Court accepts *Fleck* (again), or one of the other pending cases challenging lawyer regulation, that the Court will demolish the regulatory schemes of the over 30 mandatory bar associations.

There may, however, be significant changes and, if so, expect those changes to most likely impact programs such as diversity and inclusion, and access to justice and legislative advocacy. In addition, if the Court does require separation of the regulatory functions of mandatory bars from their discretionary activities, the process of untangling the two components would be a nightmare.

There are, of course, significant differences between labor unions and integrated bar associations. Lawyers are an integral component of the justice system. We are officers of the court who serve the interests of our clients, the public and the justice system. Bar associations assist in actualizing those obligations by regulating our profession. Unions, in bargaining on behalf of their members do not have an obligation to protect the public interest or the justice system. Unions advocate solely for their members' interests.

What the Court does will depend on the standard of review the Court applies to the freedom of speech and association claims, its perception of whether the activities and programs are necessary or reasonable to regulating the legal profession or improving the quality of legal services and, perhaps most importantly, the deference which the Court pays to the judgment of state supreme courts as to what programs and activities they believe improve the quality of legal services in the state.

With respect to the latter, two examples from our state supreme court are illustrative:

In the Washington Supreme Court's March 4, 2016 Order reauthorizing the Access to Justice Board the Court stated: "Whereas the Washington judicial system is founded on the fundamental principle that the judicial system is accessible to all persons, which advancement is of fundamental interest to the members of the Washington State Bar Association."

The WSBA's Diversity and Inclusion Plan, adopted by the Board of Governors in 2013 provides in part:

The business interests of attorneys, employers and clients call for more diverse legal representation across the state. WSBA recognizes the need to enhance opportunity in the legal profession and the public's experience with lawyers by demonstrating to its members and the public at large a genuine commitment to supporting and advancing diversity and inclusion. This plan reflects the unique roles for which WSBA is positioned, as a unified bar, to create and help nurture the conditions that will encourage diverse lawyers to

enter, remain, thrive and ultimately lead the profession and inspire others to follow in their footsteps.

In adopting GR 12.2(a), setting out the purposes of the bar, the Court tells us that two of the purposes are to:

“(2) Promote an effective legal system, accessible to all.”

“(6) Promote diversity and equality in the courts and the legal profession.”

So, based on its collective judgment, our Court has concluded that a more diverse legal profession improves the quality of legal services and that one of the conditions of the privilege to be officers of the court, is to work to ensure access to justice for all.

Benjamin Cardozo may agree: “Membership in the bar is a privilege burdened with conditions.” *In re Rouss*, 221 N.Y. 81, 84 (N.Y. 1917).

BIO

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