

August 28, 2019

Chief Justice Mary Fairhurst
Washington State Supreme Court
Temple of Justice
Olympia, WA

Re: Washington Supreme Court
Bar Structure Work Group - Minority Report

Dear Chief Justice Fairhurst:

Thank you for the opportunity to serve on the Washington Supreme Court Bar Structure Work Group (“Work Group”). It was an honor to serve with you and other Work Group members to address important questions about the structure of the Washington State Bar Association (“WSBA”) raised by recent United States Supreme Court cases.

The Majority Report accurately summarizes the Work Group’s process and the information it reviewed. We feel, however, that the Majority Report does not fully capture the strong disquiet felt by some members about the recommendation to maintain, without further discussion, the current WSBA structure. Consequently, we submit this Minority Report for your consideration. The comments below are solely those of the signatories acting in their individual capacities, and do not reflect the opinions of any other outside organizations or entities.

The Court should seriously evaluate whether a voluntary bar association would be more vibrant and engage more members than the existing mandatory association. The information presented by WSBA staff and comments sent by WSBA members raise significant questions about the WSBA’s member engagement, finances, and calculation of the licensing fee deduction for WSBA political activity (“*Keller* deduction”). Each issue is addressed below. Additionally, at minimum, we recommend the Court also address the concerns raised in the June 2014 Governance Task Force Report.

1-Member Engagement.

Emily Chiang, Legal Director for ACLU-Washington, advised the Work Group that the United States Supreme Court decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. ____ (2018) did not require bifurcating the WSBA. This is only part of the analysis. The other part, and the question for the Court, is whether the WSBA should be bifurcated. Past WSBA President Anthony Gipe notes that

less than 20% of WSBA members vote in elections for the Board of Governors (“BOG”). (Comment 11, Anthony Gipe, Past WSBA President April 30, 2019 Letter). Of the 34 Comments submitted to the Work Group, at least one-third said they wanted the WSBA to become a voluntary bar association. Reasons for this ranged from the amount of bar licensing fees to complaints that the WSBA is too “Seattle-centric” and irrelevant to much of the rest of the State, particularly eastern Washington. This latter opinion reflects the geographic distribution of active lawyers throughout the state. In 2018, of the 26,313 active Washington lawyers, slightly more than 80% were in the seven counties that border I-5. Fewer than 19% of active lawyers are found in the remaining 32 counties. (See Mandatory Insurance Task Force Report, Exhibit B.) If the WSBA cannot meaningfully engage with a majority of its members and develop and maintain the trust necessary to secure broader member support, the Court should consider whether a voluntary association might be more vibrant and responsive.

2-Financial Stability.

In 2014 WSBA’s General Fund was “in the red” \$1.57million; in 2015 \$2.7 million; in 2016 \$1.84 million; and in 2017 \$554,000. In 2018 the WSBA General Fund had net positive revenue of \$430,000 but the 2019 adopted budget assumed a General Fund loss of \$101,600, and the proposed 2020 budget assumed a General Fund loss of \$560,000.

The WSBA accumulated these deficits even as revenue increased from \$14.56 million in 2014 to \$16.9 million in 2017 and a projected \$20.8 million in 2020. This is not a sustainable path.

3-Keller Deduction.

Ms. Chiang advised the Work Group that *Janus* did not require splitting the WSBA, but reminded members that *Keller v. State Bar of California*, 496 U.S.1 (1990), requires bar associations to allow members to deduct from mandatory dues money spent on activities not related to regulation of the profession and improvement of the quality of legal services.

In 2019 the WSBA *Keller* deduction was \$1.25 for lawyers admitted before 2017, and \$.63 for lawyers admitted in 2017 or later. To many members, this is not credible, particularly in light of *Keller* deductions in other states and the WSBA’s wide-ranging activities. The *Keller* deduction is calculated by bar staff who, while honorable, well intentioned, and experienced, are placed in the untenable position of calculating a *Keller* deduction that may reduce funding of various WSBA activities directed by the Board of Governors and the Court, and employing their colleagues.

The Work Group agreed that the formula used to calculate the deduction needs to be more transparent. Governor P.J. Grabicki, who was not a member of the Work Group but regularly attended the meetings, recommended that an outside accounting firm review the deduction. (Comment 23, P.J. Grabicki, District 5 Board of Governors representative). He noted that, while the deduction survived a challenge brought by a Washington attorney, that attorney did not have the assistance of an accounting expert. Governor Grabicki advised the Work Group that if the Goldwater Institute, which is challenging at least three other mandatory state bar associations, challenges the WSBA's *Keller* deduction, it could bring in significant accounting "firepower."

The Work Group ultimately rejected, by a vote of 6-4, a motion to recommend that an outside accounting firm review the *Keller* deduction. Instead, Work Group members agreed they would offer to review the deduction themselves. Chief Justice Fairhurst reported at a subsequent meeting that members of the Supreme Court were not supportive of this idea. As such, the Majority Report defaults to a recommendation that the Board of Governors and staff "adopt and execute a thorough *Keller* interpretation" when calculating the deduction. *See* Majority Report, at 15. To promote transparency and considering litigation around the country challenging mandatory bar associations, the *Keller* deduction should be examined by an outside expert like the one proposed by Governor Grabicki.

4-Current Board Governance.

In the first eight months of 2019, the WSBA Board of Governors has been sued by a WSBA employee, one of its own members, and by two attorneys alleging that the WSBA must comply with public disclosure requests. The attorneys prosecuting the public records litigation prevailed at the trial level, and WSBA has been ordered to provide Board communications relating to the firing of the former Executive Director. Should the trial court ruling be affirmed, it is probable that the resulting release of emails and other WSBA communications will provoke another uproar from WSBA membership, further undermining institutional trust and stability.

Insisting that there be no changes to the WSBA structure and its relationship to the Court will not re-engage members, resolve financial issues, or provide a transparent and credible explanation of the *Keller* deduction. Instead, it merely postpones important structural reforms that can and should happen now.

One of us has been a member of WSBA for 40 years. It is painful to recommend that the Court consider whether the WSBA should continue in its current form. However, the issues raised during the Work Group and the recommendations of the

2014 Governance Report demonstrate the need for serious consideration of a voluntary bar or other changes to the current structure.

Very truly yours,

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