August 12, 2014

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Re: WSBA Board of Governors Meeting September 25, 2014 |  
WSBA Conference Center, Seattle  
Action on Governance Task Force Report and Recommendations

Officers and Board of Governors of the Washington State Bar Association and Honorable Justices of the Washington Supreme Court:

I write this letter to bring to your attention two concerns, both of which I believe should have a bearing on the actions the Board of Governors may take at its September 25, 2014 meeting concerning the WSBA Governance Task Force Report and Recommendations dated June 24, 2014.

The first is a proper understanding of the actual scope of the Washington Supreme Court’s judicial power pertaining to the WSBA.

The second has to do with legal developments concerning integrated bar associations
and forced payments of dues by bar association members which go beyond amounts germane to admission and lawyer discipline functions. See the bar association deunification matter of In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska, 286 Neb. 1018, 841 N.W.2d 167 (2013) discussed below at page 6.

**Supreme Court Judicial Power and the WSBA**

The Task Force Report, and many of its recommendations, is based on the proposition that the Supreme Court “has the power to supervise and regulate the WSBA” and that “[t]he Court has the right of control of the WSBA and its functions as a separate, independent branch of government.” *Graham v. State Bar Association*, 86 Wn. 2d 624, 632, 548 P.2d 310 (1976) is cited for these statements.

The Task Force Report says:

Notwithstanding its origins, the WSBA is not subject to the authority of the Legislature. It is a *sui generis* organization, important functions of which are “directly related to and in aid of the judicial branch of government.” *Graham v. State Bar Association*, 86 Wn.2d 624, 632, 548 P.2d 310 (1976). The power to supervise and regulate the WSBA resides with the judiciary. Id. The Supreme Court has the right of control of the WSBA and its functions as a separate, independent branch of government.

Task Force Report at 6, second paragraph (emphasis added).

But the Supreme Court has made it clear, based on separation of powers, that it holds ultimate authority over the regulation of the Bar, the practice of law, and the WSBA itself—notwithstanding conflicting statutes. *State ex rel. Schwab v. Wash. State Bar Ass’n*, 80 Wn.2d 266, 272, 493 P.2d 1237 (1972); *Graham v. State Bar Association*, 86 Wn.2d 624 (1976); *WSBA v. State of Washington*, 125 Wn.2d 901 (1995). For example, in Schwab, the Court held that “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.” 80 Wn.2d at 269. The Court has also enacted a number of rules governing admission to practice, discipline of attorneys, and related matters. Importantly, the Court enacted GR 12.1 which outlines permissible, required, and impermissible activities of the WSBA.

Task Force Report at 23, third paragraph [emphasis added].

RCW 2.48.010 should remain and be simplified: it would create the WSBA as “an agency of the state within the judicial branch” and would acknowledge that the Supreme Court has “full control over the powers, governance and operation of the
Washington State Bar Association and over the practice of law.” Id. [sic].

Task Force Report at 23, third paragraph.

Graham v. State Bar Association

Graham v. State Bar Association does not stand for what the Task Force Report says it stands for. The holding in Graham is narrow. The issue was whether the Washington state auditor had authority to audit the books of the WSBA. The statute in question was RCW 43.09.330, in effect in 1974.

As to application of this section as it existed in 1974, the Court held: “We believe the legislature did not intend to extend its audit functions to the Washington State Bar Association and that the Auditor has mistaken his legislative mandate.” Graham, 86 Wn.2d at 633.”

The decision, the holding, was an interpretation of the intent of the legislature regarding the objects of the auditor’s power to audit the WSBA under the provisions of RCW 43.09.330. At the time (1974), RCW 43.09.330 provided:

43.09.330 Authority of officials in making audits—Action by attorney general.

The state auditor, the chief examiner, and every state examiner of the division of departmental audits, for the purpose of making post-audits, may issue subpoenas and compulsory process and direct the service thereof by any constable or sheriff to compel the attendance of witnesses and the production of books and papers before him at any designated time and place, and may administer oaths.

If any person summoned neglects or refuses to appear, or neglects or refuses to answer any question that may be put to him touching any matter under audit, or to produce any books or papers required, the person making such audit shall apply to a superior court judge of the county where the hearing arose to issue a subpoena for the appearance of such person before him; and the judge shall order the issuance of a subpoena for the appearance of such person forthwith before him to give testimony; and if any person so summoned fails to appear, or appearing refuses to testify or to produce any books or papers required, he shall be subject to like proceedings and penalties for contempt as witnesses in the superior court. Wilful false swearing in any such examination shall be perjury and punishable as such.

If any audit discloses malfeasance, misfeasance, or nonfeasance in office on the part of any public officer or employee, within thirty days from the receipt
of his copy of the report, the attorney general shall institute and prosecute in the proper county, appropriate legal action to carry into effect the findings of such postaudit. It shall be unlawful for any state department or the responsible head thereof, to make a settlement or compromise of any claim arising out of such malfeasance, misfeasance, or nonfeasance, or any action commenced therefor, or for any court to enter upon any compromise or settlement of such action without the written approval and consent of the attorney general and the state auditor.


Today (as amended by 1995 c 301 § 23), RCW 43.09.330 provides as follows (underlining means a change from the 1965 wording; strikethrough of words means a deletion from the 1965 wording):

If any audit of a state agency discloses malfeasance, misfeasance, or nonfeasance in office on the part of any public officer or employee, within thirty days from the receipt of his or her copy of the report, the attorney general shall institute and prosecute in the proper county, appropriate legal action to carry into effect the findings of such post-audit. It shall be unlawful for any state (department) agency or the responsible head thereof, to make a settlement or compromise of any claim arising out of such malfeasance, misfeasance, or nonfeasance, or any action commenced therefor, or for any court to enter upon any compromise or settlement of such action without the written approval and consent of the attorney general and the state auditor.


Grant of Judicial Power and the Washington Constitution

The Washington Supreme Court derives its “judicial power” from Wash. Const. art. IV, § 1.

The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Wash. Const. art. IV, § 30 extends judicial power to the Court of Appeals.

(1) Authorization. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be
established by statute. . . .

The term “judicial power” must be understood based on how the term was used or had meaning when the constitution was enacted. The term judicial power means the power to decide. But there was also an understanding that the term also meant that the court had authority to determine who was eligible to practice before the bar of the court. Early Supreme Court decisions reflect this.

In *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992) the court said the “Supreme Court has the inherent power and sole jurisdiction to regulate the practice of law.” It cited *Graham v. State Bar Ass’n*, 86 Wn.2d 624, 631, 548 P.2d 310 (1976). Note, there is nothing in *Graham*, which would substantiate that the Court was also saying or could say that, in addition to regulating the practice of law, the Court has control over the WSBA beyond the regulation to practice law.

Regarding judicial power the following is of interest:


The legislature recognized this power in RCW 2.04.190 and RCW 2.04.200.

In RCW 2.04.180 the legislature said the “supreme court may from time to time institute such rules of practice and prescribe such forms of process to be used in such court and in the court en banc and each of its departments, and for the keeping of the dockets, records and proceedings, and for the regulation of such court, including the court en banc and in departments, as may be deemed most conducive to the due administration of justice.” This is interesting because the Supreme Court has been instituting such rules from its inception. Also, the Court has been regulating the admission of lawyers to the bar of the Court from its inception.

The Supreme Court has inherent contempt authority has the inherent contempt power to punish misconduct committed in its presence, to enforce orders or judgments in aid of its jurisdiction, and to punish violations of its orders or judgments. *State v. Ralph Williams*, 87 Wn.2d 327, 335, 553 P.2d 442 (1976).


Nowhere can I find a clear determination that judicial authority includes the power to direct the WSBA to cause it to undertake this or that action. For example, nowhere can it be
found where there has been a decision that authorizes the Supreme Court to require the WSBA to undertake the operation and work of various boards the Court it has assigned to the WSBA for operations, staffing, and funding. To wit: “[The] Disciplinary Board, the Mandatory Continuing Legal Education (MCLE) Board, the Limited Practice Board, the Access to Justice (ATJ) Board, the Practice of Law Board, and the Limited License Legal Technician (LLLT) Board.” Task Force Report at 9.

WSBA Dues: Only for Germece Regulatory Purposes

In 2013 the Nebraska Supreme Court responded favorably, but not completely, to a petition for a rule change to allow for the creation of a voluntary state bar of Nebraska. In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska, 286 Neb. 1018, 841 N.W.2d 167 (2013) (Petition for a Rule Change).

The core of the petition grievance arose “out of the 1990 holding of the Supreme Court in Keller v. State Bar of California,[fn2][496 U.S. 1, 14, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990)] where it took up the question of "permissible expenditures" of mandatory bar dues. Relying on Abood v. Detroit Board of Education,[fn3][431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977)] a governmental employee union case, the Court delineated the First Amendment boundaries of a bar association's expenditures of compulsory dues. Petition for a Rule Change, 286 Neb. at 1020.


The Nebraska court considering the import of Kingstad said:

the Kingstad analysis and its reliance on United Foods, Inc. appear to be reinforced by the U.S. Supreme Court's recent Knox opinion. The Knox Court explained its decision in United Foods, Inc. as follows:

We made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met. First, there must be a comprehensive regulatory scheme involving a "mandated association" among those who are required to pay the subsidy.... Such situations are exceedingly rare because, as we have stated elsewhere, mandatory associations are permissible only when
they serve a "compelling state interest ... that cannot be achieved through means significantly less restrictive of associational freedoms."... Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a "necessary incident" of the "larger regulatory purpose which justified the required association." [Knox v. Service Employees Intern. Union, ___ U.S. ___, 132 S. Ct. 2277, 2289, 183 L.Ed. 2d 281 (2012)].

That second criterion set forth in Knox reinforces the Kingstad "germaneness" analysis and the significance of that factor in protecting "associational freedoms." The two-part Knox test focuses directly on the United Foods, Inc. characterization of Keller despite the "mundane commercial nature of [the] speech." Id.

Thus, there appears to be ample support for the view expressed in Kingstad that germaneness is central to a modern view of Keller.

Petition for a Rule Change, 286 Neb. at 1033.

The court concluded with it decision:

Although we reject petitioner's request for complete deunification of the Bar Association, we sustain the petition to the extent that we amend this court's rules to limit the use of mandatory bar dues, now to be referred to as "mandatory membership assessments," to the regulation of the legal profession. The Bar Association may collect voluntary dues to finance nonregulatory activities which may benefit the legal profession as a whole.

Petition for a Rule Change, 286 Neb. at 103 (emphasis added).

**Conclusion**

In addressing the Governance Task Force Report and the recommendations included therein, a proper understanding of the actual scope of the Washington Supreme Court’s judicial power pertaining to the WSBA. The Court is properly concerned with the admission and regulation of attorneys admitted to practicing before the bar of the Court. The Court does not have judicial power to control the WSBA.

In addition, a process of deunification of integrated bar associations is now taking place nationally. This process and the reasons for it, is clearly described in the recent unanimous deunification decision of the Nebraska Supreme Court discussed in detail above. In the consideration of the Governance Task Force Report and the recommendations, the
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WSBA and the Supreme Court should be aware that in the future, the WSBA and the Supreme Court may not be able to force Washington lawyers to pay dues to the WSBA or make payments to the Supreme Court for anything more than the support of the lawyer regulatory functions of the WSBA approved by the Supreme Court.

Respectfully,

EUGSTER LAW OFFICE PSC

/s/

Stephen K. Eugster, WSBA No.2003