

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ROBERT E. CARUSO and SANDRA
L. FERGUSON,

Plaintiffs-Appellants,

v.

WASHINGTON STATE BAR
ASSOCIATION 1933, a legislatively
created Washington association, State
Bar Act (WSBA 1933; et al.,

Defendants - Appellees.

No. 17-35410 (**Lead**)

No. 17-35529

D.C. No. 2:17-cv-00003-RSM
U.S. District Court for Western
Washington, Seattle

**MOTION TO CONSOLIDATE
APPEALS**

I. INTRODUCTION & REQUESTED RELIEF

In the interests of judicial and party economy, this Court should consolidate the appeals of the United States District Court for the Western District of Washington’s (“District Court’s”) decision on the merits and subsequent attorney fee award arising from the same lawsuit. *See* Case No. 17-35410 (“Merits Appeal”); Case No. 17-35529 (“Fee Appeal”). The issues raised in both appeals will involve the same facts and substantially overlapping legal arguments. Thus, briefing and hearing the appeals separately would involve unnecessary duplication for the parties and for the Court. Appellees the Washington State Bar Association

MOTION TO CONSOLIDATE APPEALS - 1

and its officials (collectively, the “WSBA”) respectfully request that the Court consolidate the Fee Appeal (Case No. 17-35529) into the previously filed Merits Appeal (Case No. 17-35410).

II. BACKGROUND AND PROCEDURAL HISTORY

A. The Parties and Claims in the Underlying Case.

This case was filed on January 3, 2017, initially as a putative class action on behalf of all WSBA members, naming Robert E. Caruso (“Caruso”) and Sandra L. Ferguson (“Ferguson”) as Plaintiffs and proposed class representatives. *Caruso v. Wash. State Bar Ass’n*, No. 2:17-cv-00003-RSM (W.D. Wash. Jan. 3, 2017), Class Action Compl., ECF No. 1 at 3. On February 21, 2017, Plaintiffs filed an amended complaint abandoning the class claims. First Am. Compl. at 3, ECF No. 4. The amended complaint challenged mandatory bar membership, license fees, and the lawyer discipline system in Washington as unconstitutional. *See id.* at 32-35. On March 21, 2017, the WSBA filed a Motion to Dismiss arguing that bar membership and license fees have repeatedly been upheld as constitutional and that the disciplinary system affords attorneys proper due process protections. Defs.’ Mot. to Dismiss at 3, 16-17, ECF No. 16.

On April 27, 2017, the WSBA filed a Motion for Attorneys’ Fees and Expenses as sanctions against Plaintiffs’ counsel, Stephen K. Eugster (“Eugster”), for filing the baseless amended complaint on Caruso’s and Ferguson’s behalf.

Defs.’ Mot. for Att’y Fees, ECF No. 22. The WSBA did so in part because this lawsuit followed five other frivolous lawsuits Eugster filed *pro se* against the WSBA within the last three years, all challenging the constitutionality of WSBA systems. *Id.* at 3. At that time, three of those lawsuits had been dismissed at the pleadings stage, the fourth was dismissed by Eugster, and the fifth was later dismissed on Eugster’s motion. *See id.*; *Eugster v. Supreme Court of the State of Wash., et al.*, Case No. 17-2-00228-34 (Thurston Cnty. Super. Ct. 2017), Order of Dismissal entered June 6, 2017. Thus, the WSBA sought sanctions to deter Eugster from continuing to file meritless lawsuits against the WSBA, and to stem the waste of judicial and WSBA resources spent on repeated review of and defense against duplicative arguments. ECF No. 22 at 3.

B. The District Court Grants the WSBA’s Motion to Dismiss.

On May 11, 2017, the District Court dismissed Caruso’s and Ferguson’s claims with prejudice for failure to state a claim. Order Granting Mot. to Dismiss, ECF No. 28. In its order, the District Court noted that it had previously rebuked Eugster in one of his prior lawsuits for “mischaracterization of case law” and making “nonsensical arguments” similar to those he advanced here. *Id.* at 6 (citing *Eugster v. Washington State Bar Ass’n*, No. C15-0375JLR, 2015 WL 5175722, at *5-6 (W.D. Wash. Sept. 3, 2015), *aff’d*, No. 15-35743, 2017 WL 1055620 (9th Cir. Mar. 21, 2017)). The District Court concluded that dismissal with prejudice was

warranted because “Plaintiffs have given the Court no reason to believe they are capable of alleging facts sufficient under the law, given that Plaintiffs have previously amended their Complaint and given their counsel’s familiarity with the law surrounding this issue.” *Id.* at 8. Caruso and Ferguson appealed, with Eugster as their appellate counsel. Notice of Appeal, ECF No. 30.¹

C. The District Court Awards the WSBA Attorney Fees.

On May 23, 2017, the District Court further concluded that sanctions against Eugster were warranted. Order Granting Mot. for Att’y Fees in Part, ECF No. 33. In doing so, the District Court noted that prior to filing this case, Eugster had filed several lawsuits on his own behalf against the WSBA challenging the constitutionality of bar membership, license fees, and the discipline system. *Id.* at 1-2 (citing past cases). The District Court concluded that because of these past suits, Eugster was on notice as to the flaws in his arguments and it was unreasonable for him to have advanced such arguments on behalf of his clients. *Id.* at 7. The District Court thus concluded that an award of fees to the WSBA was appropriate because the pleadings were baseless and made without a reasonable and competent inquiry, and therefore frivolous. *Id.* at 8. Eugster appealed. Notice of Appeal, ECF No. 47.

¹ Ferguson subsequently sought and was granted a voluntarily dismissal from the appeal. Order, ECF No. 36.

D. Appellants Refuse to Consent to Consolidation of the Appeals.

On June 30, 2017, the WSBA contacted Eugster to request that Appellants move to consolidate the Merits Appeal and Fee Appeal due to the overlapping facts and legal issues. Although he initially stated that he planned to seek consolidation, Eugster subsequently informed the WSBA that he would not do so. Accordingly, there are now two pending appeals that arise out of the same case, which are based on the same facts, and which necessarily will repeat many of the same issues and arguments. Accordingly, the WSBA now files this motion to consolidate the Merits Appeal and the Fee Appeal.

III. ARGUMENT

This Court should grant consolidation of these appeals in the interest of efficiency. The Fee and Merits Appeals will inevitably require review of the same facts and constitutional claims such that it will be more efficient for the parties to brief the matters together and to submit their briefs to one panel of the Court rather than two. Further, consolidation will not prejudice the Appellants—Eugster serves as the attorney for both appeals, no briefs have been filed in either appeal,² and the briefing can be conducted expeditiously and efficiently if the cases are consolidated.

² Eugster recently sought and obtained an extension of time to file the opening briefs in both appeals, such that his first brief is not due until September 20, 2017. *See* No. 17-35410 (Opening Brief due September 20, 2017); No. 17-35529 (Opening Brief due November 1, 2017).

A. Consolidation Is Appropriate to Promote Efficiency and to Conserve Judicial Resources Where Both Appeals Address the Same Facts and Legal Issues.

Pursuant to Federal Rule of Appellate Procedure 3(b)(2), separate timely appeals “may be joined or consolidated by the court of appeals.” The Court has great discretion to decide whether matters should be consolidated. *See United States v. Washington*, 573 F.2d 1121, 1123 (9th Cir. 1978) (consolidation may be ordered where the court in its discretion deems it appropriate and in the interest of justice); *Medlin v. Palmer*, 874 F.2d 1085, 1088 (5th Cir. 1989) (court consolidated appeals on its own motion where three separate appeals arose from the same set of operative facts). Consolidation is encouraged whenever feasible. Advisory Committee Note to Rule 3(b), 1967 Adoption.

Consolidating a merits appeal and fee appeal arising from the same case is favored and done to promote efficiency rather than piecemeal appeals. *See Metcalf v. Borba*, 681 F.2d 1183, 1188 (9th Cir. 1982). As this Court has observed, “[p]iecemeal appellate review is not only inimical to the will of Congress but also undermines the efficient use of judicial resources by exposing appellate panels to the costs of repeated familiarization with the same case.” *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 747 (9th Cir. 2008) (internal marks omitted). As a result, “disputes on appeal over the merits, as well as disputes regarding the allowance of attorney’s fees to a prevailing party should ordinarily

be considered and decided by this court in either a single or consolidated appellate proceeding.”” *Metcalf*, 681 F.2d at 1188 (quoting *Obin v. International Association of Machinists and Aerospace Workers*, 651 F.2d 574, 583 (8th Cir.1981)).

Here, the Merits Appeal and the Fee Appeal arise from the same facts and necessarily will repeat many of the same arguments. Without consolidation, two appellate panels will be required to familiarize themselves with a complicated record—including the history of Eugster’s numerous challenges to Washington’s bar system. In contrast, consolidation would allow streamlined briefing and a single panel to review the case.

Moreover, review of the attorney fee award will inevitably require the Court to consider the relative merit, or in this case lack thereof, of the substantive claims. *See, e.g., Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (determining entitlement to attorneys’ fees under Lanham Act necessarily involved consideration of “the substantive strength of a party’s litigating position”). The District Court’s order imposing attorney fees as sanctions is based entirely on the conclusion that the constitutional claims against the WSBA that Eugster advanced on behalf of Caruso were legally and factually baseless. ECF No. 33 at 7. This Court’ review of the Fee Appeal will therefore inevitably require review of the constitutional claims also at issue in the Merits

Order. ECF No. 28 at 3-8. Consolidation will save time and resources by bringing these overlapping issues before a single panel at one time.

B. Eugster and Caruso Will Not Be Prejudiced By Consolidating the Appeals.

Consolidation of the appeals will not prejudice Caruso or Eugster. Although Eugster represents Caruso in the Merits Appeal and represents his own interests in the Fee Appeal, Caruso's and Eugster's interests are completely aligned. That is, Eugster will need to defend the validity of Caruso's claims against the WSBA for the purposes of both the Merits Appeal and the Fee Appeal. Additionally, briefing has not yet been submitted in either appeal and thus consolidation will not delay the briefing schedule. Indeed, consolidation would minimize the cost and inconvenience of briefing the two appeals separately. The current briefing schedule on the Merits Appeal should offer sufficient time to address the Fee Appeal as well, although the WSBA is amenable to altering the briefing schedule as needed in the event this Court grants consolidation.

IV. CONCLUSION

Consolidation of these two pending appeals arising from the same District Court case is consistent with this Court's precedent and will preserve judicial and party resources without prejudice to any party. This Court should grant the WSBA's Motion to Consolidate the Fee Appeal (Case No. 17-35529) into the

Merits Appeal (Case No. 17-35410) and issue a new briefing schedule to allow the parties to file consolidated briefs.

RESPECTFULLY SUBMITTED this 25th day of July, 2017.

PACIFICA LAW GROUP LLP

By s/ Jessica A. Skelton

Paul J. Lawrence, WSBA #13557

Jessica A. Skelton, WSBA #36748

Taki V. Flevaris, WSBA #42555

Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I certify that on July 25, 2017, I electronically filed the foregoing Motion to Consolidate Appeals with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system by sending notification of such filing to the following:

Stephen Kerr Eugster
Eugster Law Office PSC
2418 West Pacific Avenue
Spokane, WA 99201-6422
eugster@eugsterlaw.com

Attorney for Robert E. Caruso

Sandra L. Ferguson
The Ferguson Firm, PLLC
600 First Avenue
Seattle, WA 98104
Sandra@slfergusonlaw.com

Pro Se

DATED this 25th day of July, 2017.

s/ Jessica A. Skelton
Jessica A. Skelton