

1 Stephen Kerr Eugster  
WSBA # 2003  
2 Eugster Law Office PSC  
2418 West Pacific Avenue  
3 Spokane, Washington 99201-6422  
(509) 624-5566  
4 eugster@eugsterlaw.com

5  
6 **UNITED STATES DISTRICT COURT**  
7 **WESTERN DISTRICT OF WASHINGTON**  
(AT SEATTLE)

8 ROBERT E. CARUSO and SANDRA L. )  
9 FERGUSON, )  
10 Plaintiffs, )

No. 2:17-cv-00003-RSM

11 vs )

12 WASHINGTON STATE BAR )  
13 ASSOCIATION 1933, a legislatively created )  
Washington association, State Bar Act (WSBA )  
1933); )

FIRST AMENDED  
COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

14 WASHINGTON STATE BAR )  
15 ASSOCIATION after September 30, 2016 )  
(WSBA 2017); )

16 PAULA LITTLEWOOD, Executive Director, )  
17 WSBA 1933 and WSBA 2017, in her )  
official capacity; )

18 ROBIN LYNN HAYNES is the President of )  
19 the WSBA 1933 and WSBA 2017, in her )  
official capacity; )

20 DOUGLAS J. ENDE, Director of the WSBA )  
21 1933 and WSBA 2017 Office of )  
22 Disciplinary Counsel, in his official )  
capacity; )

23 continued . . . . )

1 WSBA 1933 / WSBA 2017 BOARD OF )  
2 GOVERNORS, namely: )  
3 BRADFORD E. FURLONG - President-elect )  
4 (2016-2017); )  
5 WILLIAM D. HYSLOP - Immediate past )  
6 President (2016-2017); )  
7 G. KIM RISENMAY - Governor, District 1 )  
8 (2015-2018); )  
9 RAJEEV MAJUMDAR - Governor, District 2 )  
10 (2016-2019); )  
11 JILL A. KARMY - Governor, District 3 and )  
12 Treasurer (2014-2017); )  
13 WILLIAM D. PICKETT - Governor, District )  
14 4 (2015-2018); )  
15 ANGELA M. HAYES - Governor, District 5 )  
16 (2015-2018); )  
17 KEITH M. BLACK - Governor, District 6 )  
18 (2014-2017), )  
19 ANN DANIELI - Governor, District 7-north )  
20 (2014-2017); )  
21 JAMES K. DOANE - Governor, District 7- )  
22 south (2015-2018); )  
23 ANDREA S. JARMON - Governor, District 8 )  
24 (2014-2017); )  
25 DAN BRIDGES - Governor, District 9 (2016- )  
26 2019); )  
CHRISTINA MESERVE - Governor, District )  
10 (2016-2019); )  
ATHANASIOS P. PAPAILIOU - Governor, )  
At-large (2016-2019); )  
MARIO M. CAVA - Governor, At-large (2014- )  
2017); )  
SEAN DAVIS - Governor, At-large (2015- )  
2018), )  
Defendants. )

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1 **FIRST AMENDED COMPLAINT**  
2 **FOR DECLARATORY AND**  
3 **INJUNCTIVE RELIEF**

4 Plaintiff, Robert E. Caruso and Plaintiff, Sandra L. Ferguson, by and through their  
5 undersigned attorneys, hereby file this Complaint against the Defendants named herein and allege  
6 as follows:

7 **TERMINOLOGY**

8 1. **Washington State Bar Association 1933 (WSBA 1933)**. As used herein, WSBA 1933  
9 shall refer to the Washington State Bar Association created by the State Bar Act, Wash. Sess. ch.  
10 94, 1933 and prior to the amendments made to its Bylaws by the WSBA 1933 Board of  
11 Governors the afternoon of September 30, 2016.

12 2. **Washington State Bar Association 2017 (WSBA 2017)**. As used herein, WSBA 2017  
13 shall refer to the Washington State Bar Association created by amendments made to Bylaws of  
14 the WSBA 1933 by the WSBA 1933 Board of Governors on September 30, 2016.

15 3. **Washington Lawyer Discipline System (Discipline System)**. As used herein,  
16 **Washington Lawyer Discipline System (Discipline System)** means the discipline system  
17 being implemented by the WSBA 1933 as set out in the Rules for Enforcement of Lawyer  
18 Conduct (ELC) effective until September 30, 2016, when WSBA 2017 came into being.

19 **NATURE OF THE CLAIMS**

20 4. This action seeks injunctive and declaratory relief to redress and prevent the deprivation  
21 of Plaintiffs' rights against compelled association and compelled speech protected by the First  
22 and Fourteenth Amendments to the United States Constitution by practices and policies of  
23 Defendants acting under color of state law.

24 5. Defendants are violating Plaintiffs' rights because of Plaintiffs' compelled membership in  
25

1 the WSBA 2017 under bylaws amended on September 30, 2016, which is a prerequisite to the  
2 ability to practice law in the state of Washington.

3 6. Plaintiffs' rights are being violated by Defendants' compulsion of Plaintiffs to pay dues  
4 as a condition of membership and which also operates as a prerequisite to the ability to practice  
5 law in the state of Washington.

6 7. Plaintiffs' fundamental constitutional rights are violated by the WSBA 2017 because the  
7 discipline system, which is applied to lawyer members of the Association, fails to comply with  
8 procedural due process of law under the Fifth and Fourteenth Amendments to the United States  
9 Constitution.

10 8. Plaintiffs' fundamental constitutional rights are violated by the WSBA 2017 because the  
11 discipline system, which is applied to lawyer members of the Association, fails the test of  
12 constitutional scrutiny under the First, Fifth and Fourteenth Amendments to the United States  
13 Constitution.

14 9. Plaintiffs, therefore, seeks declaratory and injunctive relief to abate and correct  
15 Defendants' unconstitutional actions.

16 **JURISDICTION AND VENUE**

17 10. Plaintiffs bring this civil rights lawsuit pursuant to the First, Fifth and Fourteenth  
18 Amendments to the United States Constitution. Because this action arises under the Constitution  
19 and laws of the United States, this Court has jurisdiction pursuant to 28 U.S.C. § 1331.

20 11. This is also an action under the Civil Rights Act of 1871, specifically, 42 U.S.C § 1983,  
21 to redress the deprivation, under color of state law, of rights, privileges, and immunities secured  
22 to Plaintiffs by the Constitution of the United States, particularly the First, Fifth and Fourteenth  
23 Amendments thereto. The jurisdiction of this Court, therefore, is also invoked under 28 U.S.C. §  
24 1343(a)(3), (4).  
25

1 12. This is also a case of actual controversy because Plaintiffs are seeking a declaration of  
2 their rights under the Constitution of the United States. Under 28 U.S.C. §§ 2201 and 2202, this  
3 Court may declare the rights of Plaintiffs and grant further necessary and proper relief, including  
4 preliminary and permanent injunctive relief, pursuant to Fed. R. Civ. P. 65.

5 13. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because it is the judicial  
6 district where Defendants reside, and "in which a substantial part of the events or omissions  
7 giving rise to the claim occurred." 28 U.S.C. §§ 1391(b), 124(d)(1).

8 **PARTIES**

9 14. Plaintiff, Robert E. Caruso, is a citizen of the United States and a resident of the state  
10 of Washington.

11 a. Plaintiff Caruso is a duly-licensed attorney under the laws of Washington and, as  
12 required by RCW 2.48.170, is a member of the WSBA, which membership is a mandatory  
13 prerequisite to the ability to practice law in the State of Washington.

14 b. As an active member of the WSBA, Plaintiff Caruso has paid required mandatory  
15 dues to the WSBA since his admission in 1991.

16 c. Plaintiff Caruso is a member in good standing of the WSBA.

17 15. Plaintiff, Sandra L. Ferguson, is a citizen of the United States and a resident of the state  
18 of Washington.

19 a. Plaintiff Ferguson is a duly-licensed attorney under the laws of Washington and, as  
20 required by RCW 2.48.170, is a member of the WSBA, which membership is a mandatory  
21 prerequisite to the ability to practice law in the State of Washington.

22 b. As an active member of the WSBA, Plaintiff Ferguson has paid required  
23 mandatory dues to the WSBA since her admission in 1997.

24 c. Plaintiff Ferguson is a member in good standing of the WSBA.

1 16. Defendant WSBA 1933 is an integrated bar association created by the Washington State  
2 Bar Act, Wash. Sess. 1933 ch. 94.

3 17. Defendant WSBA 2017 is an association created by amendments to the bylaws of the  
4 WSBA 1933, on September 30, 2016.

5 18. Defendants WSBA 1933 and WSBA 2017 are headquartered in Seattle, Washington,  
6 and conduct business and operations throughout the State of Washington.

7 19. Defendant WSBA 1933 and WSBA 2017 is currently enforcing the unconstitutional  
8 practices and policies complained of in this action.

9 20. Defendant Paula C. Littlewood is the Executive Director of the WSBA 1933 and  
10 WSBA 2017. Defendant Littlewood is currently implementing and enforcing the  
11 unconstitutional practices and policies complained of in this action. Defendant Littlewood is sued  
12 in her official capacity.

13 21. Defendant Douglas J. Ende is the Chief Disciplinary Counsel of the WSBA 1933 and  
14 WSBA 2017. Defendant Ende is currently implementing and enforcing the unconstitutional  
15 practices and policies complained of in this action. Defendant Ende is sued in his official  
16 capacity.

17 22. Defendant Robin Lynn Haynes is the President of the WSBA 2017. Defendant Haynes  
18 is currently implementing and enforcing the unconstitutional practices and policies complained of  
19 in this action. Defendant Haynes is sued in her official capacity.

20 23. Defendant Board of Governors is made up of the following Defendant individuals:  
21 Robin Lynn Haynes - President (2016-2017), Bradford E. Furlong - President-elect (2016-2017),  
22 William D. Hyslop - Immediate past President (2016-2017), G. Kim Risenmay - Governor,  
23 District 1 (2015-2018), Rajeev Majumdar - Governor, District 2 (2016-2019), Jill A. Karmy -  
24 Governor, District 3 and Treasurer (2014-2017), William D. Pickett - Governor, District 4 (2015-

1 2018), Angela M. Hayes - Governor, District 5 (2015-2018), Keith M. Black - Governor, District  
2 6 (2014-2017), Ann Danieli - Governor, District 7-north (2014-2017), James K. Doane -  
3 Governor, District 7-south (2015-2018), Andrea S. Jarmon - Governor, District 8 (2014-2017),  
4 Dan Bridges - Governor, District 9 (2016-2019), Christina Meserve - Governor, District 10  
5 (2016-2019), Athanasios P. Papailiou - Governor, At-large (2016-2019), Mario M. Cava -  
6 Governor, At-large (2014-2017), and Sean Davis - Governor, At-large (2015-2018).

7 24. The Board of Governors Defendants are currently implementing and enforcing the  
8 unconstitutional practices and policies complained of in this action. Each such Defendant is sued  
9 in his official capacity or her official capacity, as the case may be.

10 **CONSTITUTIONAL STANDARDS**

11 25. Under 42 U.S.C. § 1983, every person who, under color of state law, subjects any  
12 citizen of the United States to the deprivation of "rights, privileges, or immunities secured by the  
13 Constitution and laws," shall be liable to the injured party.

14 26. The First Amendment protects not only the freedom to associate, but the freedom not  
15 to associate; and it protects not only the freedom of speech, but the freedom to avoid subsidizing  
16 group speech with which an individual disagrees.

17 27. The Fifth Amendment protects the right of procedural due process of law.

18 28. The constitutional construct of strict or exacting scrutiny (or other scrutiny) ensures  
19 that the fundamental rights of Plaintiffs may only be infringed under certain circumstances.

20 29. Such circumstances are not extant.

21 **STANDING**

22 30. Plaintiff Caruso is under imminent threat that the WSBA 1933 or WSBA 2017 will  
23 bring a formal complaint against him and commence a discipline proceeding against him.

24 31. Plaintiff Caruso is being subjected to a genuine threat of imminent future harm by the

1 WSBA 1933 or WSBA 2017.

2 32. Plaintiff Ferguson is under imminent threat that the WSBA 1933 or WSBA 2017 will  
3 bring a formal complaint against him and commence a discipline proceeding against her.

4 33. Plaintiff Ferguson is being subjected to a genuine threat of imminent future harm by  
5 the WSBA 1933 or WSBA 2017.

6 34. The WSBA incontrovertibly assesses compulsory bar dues and requires membership in  
7 order to practice law in Washington. RCW 6 2.48. 130, .170. These restrict and compel speech  
8 and association in ways that Plaintiffs, assert are unconstitutional.

9 35. These constitutional violations will persist unless the law is changed or enforcement is  
10 enjoined.

11 36. It cannot be disputed that compelled association, compelled speech and subjection of  
12 the Washington Lawyer Discipline System causes alleged burdens on Plaintiffs violate their  
13 constitutional rights, and that enjoining its enforcement would redress those alleged  
14 constitutional harms.

15  
16 **FACTUAL ALLEGATIONS**

17 **The Washington State Bar Association of 1933**

18 37. The WSBA 1933 came into being by the passage of the State Bar Act in 1933 (Bar Act).

19 38. The Bar Act was an early part of the “integrated bar movement.”

20 39. The integrated bar movement came about in the first decades of the 20th century.

21 40. The purposes of the integrated bar of the Bar Act are “regulation of the legal  
22 profession and ‘improvement of the quality of legal services.’” *Lathrop v. Donohue*, 367 U.S. 820,  
23 843 (1961) and *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990).

24 41. At the time of the Bar Act, there were three approaches to the creation of the



1 integrated bar in a state: (1) legislation, (2) legislation allowing the state supreme court to create  
2 an integrated bar by court rule, and simply, (3) court rule.

3 42. Washington followed the legislative path by the adoption of the Bar Act, which act was  
4 patterned on other acts of bar integration and discipline.

5 43. The Bar Act had four main features:

6 a. It chartered the Washington State Bar Association.

7 b. All state of Washington lawyers admitted to the bar of the Washington State  
8 Supreme Court were compelled to be members and to pay dues to the Association.

9 c. The Association was governed by a Board of Governors.

10 d. The Association was given the power create a discipline system for Washington  
11 lawyers which was approved by the Supreme Court.

12 44. These general features or characteristics were the same for every other integrated bar  
13 association created in a state.

14 45. The WSBA is “an agency of the state” in the form of “an association” “to be known as  
15 the Washington State Bar Association.” RCW 2.48.020.

### 16 **Washington State Bar Association 2017**

17 46. WSBA 1933 came to an end on September 30, 2016.

18 47. On that date, the WSBA 1933 Board of Governors created a new Washington State Bar  
19 Association (WSBA 2017).

20 48. WSBA 1933 Board of Governors and Executive Director of the Association have taken  
21 the entity of the Washington State Bar Association of 1933 (WSBA – 1933) and have turned it  
22 into a new and different association renamed “Washington State Bar Association” (WSBA 2017).

23 49. The reused name is a misnomer: The name, more appropriate to what has happened,  
24 should be something like this – “Washington State Bar and Legal Services Providers  
25

1 Association.”

2 50. The WSBA 2017 is an “access to justice” model which encompasses integrated legal  
3 services in an association.

4 51. The Executive Director of the WSBA, now the WSBA 2017, is a proponent of the  
5 access to justice association model. *See, e.g.*, Stephen R. Crossland and Paula C. Littlewood, *The*  
6 *Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the*  
7 *Integrity of the Legal Profession Essay*, 65 S. C. L. REV. 611 (2014).

8 52. The WSBA 2017 is an integrated association of lawyers and certain legal services  
9 providers who are compelled to be members and pay dues, and who are subject to the discipline  
10 systems of the association.

11 53. The members of the WSBA 2017 consist of lawyers, Limited Practice Officers, and  
12 Limited License Legal Technicians.

13 54. The members are compelled to be members in order to practice law, in the case of  
14 lawyers, practice a certain defined and limited practice of law in the case of Limited Practice  
15 Officers and Limited License Legal Technicians.

16 55. The WSBA 2017 has the power to discipline these three groups of members. Each  
17 group has its own discipline system, regulations and ethical requirements. The system of each  
18 group is run by the WSBA 2017.

19 56. The Washington State Bar Association, the integrated bar association of the  
20 Washington State Bar Act of 1933, has come to an end.

21 57. WSBA Board of Governors and Executive Director of the Association have taken the  
22 entity of the Washington State Bar Association of 1933 (WSBA 1933) and have turned it into a  
23 new and different association renamed “Washington State Bar Association” (WSBA 2017).  
24

**WSBA 2017**  
**An Access to Justice Association**

1  
2  
3 58. The WSBA 2017 has its beginnings in two Admission and Practice Rules (APR) of the  
4 Washington Supreme Court.

5 a. The first was Admission and Practice Rules (APR) 12, Limited Practice Rule for  
6 Limited Practice Officers [Adopted effective January 21, 1983; amended effective October  
7 28, 1983; September 13, 1985; December 9, 1995; July 1, 2002; January 1, 2009; March 1,  
8 2016].

9 b. The second was APR 28, Limited Practice Rule for Limited License Legal  
10 Technicians [Adopted effective August 20, 2013; amended effective September 3, 2013;  
11 February 3, 2015; June 21, 2016].

12 59. The actions the Board of Governors took on September 30, 2016, which created the  
13 WSBA 2017, are primarily as follows as described by WSBA 2017 at the WSBA website: *Recap of*  
14 *September 29-30, 2016 Board of Governors Meeting.*<sup>1</sup>

15 a. Limited License Legal Technician Resolution

16 To further acknowledge its support and advancement of the LLLT  
17 program, the Board unanimously adopted a resolution that reinforces the  
18 importance of the program and its alignment with the mission of the  
19 organization. The resolution acknowledges the exemplary job of the LLLT  
20 Board in implementing APR 28 enacted by the Supreme Court. It also  
21 expresses support for the Board's efforts to explore a possible increase in  
22 the number of LLLT practice areas recognized in the rule, as well as  
23 changes to allow LLLTs to appear in court in a limited fashion, but the  
24 Board did not take a position on those matters. The resolution can be  
25 found on page 131 of the public materials.

22 b. Suggested GR 12 Amendments

23 The Board took action on suggested amendments to GR 12.1 through GR

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24  
25 <sup>1</sup> [http://www.wsba.org/~media/Files/About%20WSBA/Governance-  
BOGMeetingUdpate\\_9-29-30.ashx](http://www.wsba.org/~media/Files/About%20WSBA/Governance-BOGMeetingUdpate_9-29-30.ashx). 2017\_01\_01.

1 12.4, rearranging the order of the rules to accommodate a new section on  
2 regulatory objectives of the Supreme Court, that are based on the ABA  
3 Model Regulatory Objectives for the Provision of Legal Services. The  
4 Board adopted the suggested amendments as presented with two  
5 amendments. First, the Board voted to maintain the word "Association" in  
6 GR 12 and in the proposed Bylaw amendments to ensure consistency  
7 between GR 12 and the Bylaws. Second, the Board voted to amend the  
8 language in GR 12 and GR 12.2 to read "The Washington Supreme Court  
9 has inherent and plenary authority to regulate the practice of law," thus  
10 replacing the word "exclusive" with the word "plenary."

11 c. Proposed WSBA Bylaw Amendments

12 The Bylaws Work Group - created in August 2015 to incorporate Board-  
13 adopted recommendations of the Governance Task Force that implicated  
14 the WSBA Bylaws - presented proposed amendments to the WSBA  
15 Bylaws. Below is a summary of the major amendments considered and/or  
16 adopted by the BOG, but not an exhaustive list of all proposed  
17 amendments that were adopted:

18 Article I - Functions - The proposed amendment included adding the  
19 words "legal profession" and "public" to ensure LPOs and LLLTs are  
20 included in Functions and to emphasize service to the public. Additionally,  
21 this section is to conform to the new suggested amended GR 12.2.  
22 ACTION: ADOPTED

23 PROPOSALS CONSIDERED BUT NOT ADOPTED: Based on  
24 feedback from members, the BOG voted not to delete "Association" from  
25 the WSBA's name, and this decision will be reflected throughout the  
26 amended Bylaws.

Article II - Definitions and General Provisions - Additions were made to  
the definitions, and section F (Parliamentary Procedure) was stricken, to  
remove the requirement that Roberts' Rules of Order govern parliamentary  
procedure at BOG meetings. ACTION: ADOPTED

Article III - Membership - The amendments add LLLTs and LPOs as  
members of the WSBA and incorporate those license types into provisions  
regarding member statuses, identify types of lawyers who are not WSBA  
members (e.g., lawyers licensed to appear pro hac vice) and make other  
conforming changes. One amendment makes explicit that lawyers who  
have been inactive (and not practicing law in any U.S. jurisdiction) for 10  
years or more are required to retake the Bar exam.  
ACTION: ADOPTED

NOTE: Based on member feedback, the BOG voted not to delete the  
language related to member referenda on license fees from this section,

1 even though it is redundant in light of later Bylaws provisions relating to  
2 member referenda.

3 Article IV - Governance - The proposed amendment changes the  
4 composition of the BOG to include six at-large governors elected by the  
5 BOG in the manner established in the Bylaws. At the meeting, the BOG  
6 proposed an amendment to require that only lawyer members may hold an  
7 officer position on the BOG, and an amendment intended to clarify the  
8 role and responsibilities of Governors with respect to the Congressional  
9 Districts.

10 ACTION: ADOPTED AS AMENDED

11 Article V - Appropriations and Expenses - No substantive changes  
12 proposed; conforming amendments only.

13 ACTION: ADOPTED

14 Article VI - Elections - Proposed amendments identify that there will be a  
15 LLLT/LPO governor position on the BOG as well as two community  
16 representative positions, and that these governors will be elected by the  
17 BOG. One amendment to the proposal approved at the meeting was to  
18 require that governors elected from congressional districts must be lawyers.

19 ACTION: ADOPTED

20 NOTE: Based on member feedback previously received and considered by  
21 the BOG, the provisions relating to member recall of Governors  
22 (inadvertently included in the draft amendments in the BOG materials)  
23 remain unchanged from their current form.

24 Article VII - Open Meetings - These proposed amendments clarify  
25 provisions and requirements around the WSBA's open meeting policy and  
26 the use of executive session meetings.

ACTION: ADOPTED

Article VIII - Member Referenda and BOG Referrals to Membership -  
Proposed amendments to this article were withdrawn from consideration.

ACTION: NOT ADOPTED. NO BOARD ACTION WAS TAKEN.

Articles IX and X - Committees, Councils and Other Bar Entities (Art.  
IX), and Regulatory Boards (Art. X)- Amendments were proposed to  
clarify the responsibilities for all Bar entities, however named, and clarify  
the roles and responsibilities of BOG members with respect to those  
entities, along with various conforming amendments.

ACTION TAKEN: ADOPTED

Article XI - Section Policy Workgroup Recommendations - The proposed  
changes create minimum governance standards and clarify that Sections are  
entities of the bar and are obligated to comply with the Bar's Bylaws and

1 policies. Based on member feedback, the Board agreed that more time is  
2 needed for discussion and to gather comments.

ACTION: TABLED UNTIL THE NOVEMBER BOG MEETING

3 Articles XII, XIII, XV, XVI- There was limited BOG discussion.  
4 Conforming changes only.

ACTION: ADOPTED

5 60. A most significant amendment regards the Executive Director and the power of the  
6 Supreme Court to veto Board of Governor dismissal of the Executive Director.

7 IV. GOVERNANCE, B. OFFICERS OF THE BAR, 7. Vacancy, b:

8 The Executive Director is appointed by the BOG, serves at the direction  
9 of the BOG, and may be dismissed at any time by the BOG without cause  
10 by a majority vote of the entire BOG. If dismissed by the BOG, the  
11 Executive Director may, within 14 days of receipt of a notice terminating  
12 employment, file with the Supreme Court and serve on the President, a  
13 written request for review of the dismissal. If the Supreme Court finds that  
the dismissal of the Executive Director is based on the Executive  
Director's refusal to accede to a BOG directive to disregard or violate a  
Court order or rule, the Court may veto the dismissal and the Executive  
Director will be retained. [Emphasis added.]

14 61. WSBA 2017 has the following characteristics:

15 a. The membership of the WSBA 2017 now includes lawyers admitted to the bar of  
16 the Washington Supreme Court, Limited Practice Officers (LPOs) (licensed by the Supreme  
17 Court, under Admission and Practice Rule (APR) 12, and, Limited License Legal  
18 Technicians (LLLTs), licensed by the Supreme Court under APR 28.

19 b. Additionally and in the future, the integrated membership of the association will  
20 include additional categories of Limited License Legal Technicians - at present the only  
21 LLLTs are domestic relations technicians.

22 c. To practice their profession, members of the bar and the limited practice members  
23 (LPO's and LLLT's) must be members of the WSBA 2017.

24 d. To practice the members of the bar and the limited practical professions (LPO's  
25

1 and LLLT's) must pay dues in such amounts determined from time to time.

2 e. WSBA 2017 assumes it is in charge of discipline systems of lawyers, LPOs and  
3 LLLTs.

4 f. The WSBA 2017 assumes it has authority to discipline lawyers who practice law in  
5 the state of Washington, which discipline includes disciplinary action of members of the bar  
6 of the Washington Supreme Court and the courts of the State of Washington, including  
7 suspension from the practice of law to disbarment; however, the WSBA 2017 does not have  
8 authority to operate the Washington Lawyer Discipline System.

9 62. The Supreme Court has created of six boards that it has assigned to the WSBA for  
10 operations, staffing, and funding (1) Disciplinary Board, (2) Mandatory Continuing Legal  
11 Education (MCLE) Board, (3) Access to Justice (ATJ) Board, (4) Practice of Law Board, (5)  
12 Limited License Officers Board, and (6) Limited License Legal Technician (LLLT) Board.

13 63. While the Court sets the mission of these boards, it provides no funding or staffing for  
14 them. Instead, the Court expects funding and staffing to be provided by the WSBA.

15 64. The dues paid by lawyer members of the WSBA 2017 which do not relate to matters  
16 pertaining to lawyer members of the WSBA, are used to subsidize the boards and the other  
17 activities imposed by the Court, including staffing of the LPO membership and the LLLT  
18 membership.

19  
20 **Washington Lawyer Discipline System**

21 65. The Washington Lawyer Discipline System is found in the Rules for Enforcement of  
22 Lawyer Conduct (ELC).

23 66. Plaintiffs, as "lawyer[s] admitted to practice in this jurisdiction [are] subject to the  
24 disciplinary authority of this jurisdiction and these Rules for Enforcement of Lawyer Conduct."

25 (ELC) 1.2.



1 67. The term “**disciplinary authority**” is used and described in ELC 1.2:

2 Except as provided in RPC 8.5(c), any lawyer admitted to practice in this  
3 jurisdiction is subject to the disciplinary authority of this jurisdiction and  
4 these Rules for Enforcement of Lawyer Conduct, regardless of where the  
5 lawyer's conduct occurs. A lawyer not admitted to practice in this  
6 jurisdiction is also subject to the disciplinary authority of this jurisdiction  
7 and these rules if the lawyer provides or offers to provide any legal services  
8 in this jurisdiction. Disciplinary authority exists regardless of the lawyer's  
9 residency or authority to practice law in this state. A lawyer may be subject  
10 to the disciplinary authority of both this jurisdiction and another  
11 jurisdiction for the same conduct.

8 68. The WSBA describes itself as follows:

9 The WSBA both regulates lawyers under the authority of the Court and  
10 serves its members as a professional association — all without public  
11 funding. As a regulatory agency, the WSBA administers the bar admission  
12 process, including the bar exam; provides record-keeping and licensing  
13 functions; and administers the lawyer discipline system. As a professional  
14 association, the WSBA provides continuing legal education for attorneys,  
15 in addition to numerous other educational and member-service activities.  
16 <http://www.wsba.org/About-WSBA>.

13 **WSBA Discipline System - Operates From Within the Offices of the WSBA 2017**

14 69. The WSBA 2017 engages in these two functions described above from its offices in  
15 Seattle, Washington at 1325 Fourth Ave., Suite 600, Seattle, WA 98101-2539.

16 70. **The WSBA 2017 Office of Disciplinary Counsel** operates from within the offices of  
17 the WSBA in Downtown Seattle, King County, Washington.

18 71. The Washington Lawyer Discipline System may not even be physically separate from  
19 the WSBA 2017.

20 72. It also may be the case that employees of the WSBA 2017 are shared with the  
21 Discipline System.

22 73. The Washington Lawyer Discipline System persons, in sharing space and staff at the  
23 offices of the WSBA, are in constant contact with officers and employees of the WSBA who do  
24 not perform disciplinary functions.  
25



1 74. The primary purpose of the **WSBA Executive Director** is to regulate and discipline  
2 member lawyers and others.

3 75. **WSBA Executive Director** has her offices and staff in the offices of the WSBA at  
4 1325 Fourth Ave., Suite 600, Seattle, Washington.

5 76. **Hearings.** Discipline System Hearings by Hearing Officers take place in the Offices  
6 of the WSBA.

7 77. **Disciplinary Board** and the **Review Committees.** The Disciplinary Board conducts  
8 its hearings in the Offices of the WSBA. The Review Committees conduct meetings in the  
9 Offices of the WSBA.

10 78. The staffing and space for the Disciplinary Board and the Review Committees is  
11 provided by the WSBA at and within the Offices of the WSBA.

12 79. Staff supposedly relegated to the Washington Lawyer Discipline System mix on a daily  
13 basis or whenever both are present at the offices of the WSBA with other staff of the WSBA, its  
14 officers and the Board of Governors and its members.

15 **The WSBA Controls the Selection of WSBA Lawyers**  
16 **Who Perform Functions of the System**

17 80. **WSBA Board of Governors.** The Board of Governors has overall authority regarding  
18 the Discipline System. ELC 2.2 (a) provides:

19 (a) Function. The Board of Governors of the Association:

20 (1) through the Executive Director, provides administrative and managerial  
21 support to enable the Office of Disciplinary Counsel, the Disciplinary  
22 Board, review committees, and other Association staff and appointees to  
23 perform the functions specified by these rules;

24 (2) makes appointments, removes those appointed, and fills vacancies as  
25 provided in these rules; and (3) performs other functions and takes other  
26 actions provided in these rules, delegated by the Supreme Court, or  
necessary and proper to carry out its duties.

27 81. **WSBA Executive Director.** The WSBA Board of Governors is empowered with the  
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1 selection of the WSBA Executive Director.

2 a. The Executive Director serves at the pleasure of the Board of the Board of  
3 Governors.

4 b. The Executive Director has hire/fire authority over all WSBA staff, including the  
5 Chief Disciplinary Counsel, Disciplinary Counsel, counsel (from Disciplinary Counsel), to  
6 the Disciplinary Board, and other disciplinary staff.

7 c. The Executive Director evaluates the performance of WSBA staff and sets their  
8 salaries.

9 **Office of Disciplinary Counsel**

10 82. **Office of Disciplinary Counsel.** The WSBA, through its control of the Executive  
11 Director, has control over the Office of Disciplinary Counsel.

12 83. Disciplinary counsel acts as counsel on all matters under these rules, and performs  
13 other duties as required by these rules or the Chief Disciplinary Counsel.

14 84. **Chief Disciplinary Counsel.** ELC 2.8 (b) provides:

15 (b) **Appointment.** The Executive Director of the Association, under the  
16 direction of the Board of Governors, employs a suitable member of the  
17 Association as Chief Disciplinary Counsel, and in consultation with the  
18 Chief Disciplinary Counsel, selects and employs suitable members of the  
19 association as disciplinary counsel, in a number to be determined by the  
Executive Director whenever necessary to conduct an individual  
investigation or proceeding.

20 85. Chief Disciplinary Counsel is the **Director of the Office of Disciplinary Counsel.**

21 86. Defendant Douglas Ende is the WSBA Chief Disciplinary Counsel. As such, he “acts  
22 as counsel on the Association’s behalf on all matters under these rules (ELC rules), and performs  
23 other duties as required by these rules, the Executive Director, or the Board of Governors.” ELC  
24 2.8(a).

1 87. **Chief Hearing Officer.** The appointment of Chief Hearing Officer is governed by  
2 ELC 2.8 (b):

3 (b) Appointment. The Executive Director of the Association, under the  
4 direction of the Board of Governors, employs a suitable member of the  
5 Association as Chief Disciplinary Counsel, and in consultation with the Chief  
6 Disciplinary Counsel, selects and employs suitable members of the association  
7 as disciplinary counsel, in a number to be determined by the executive  
8 director. Special disciplinary counsel may be appointed by the Executive  
9 Director whenever necessary to conduct an individual investigation or  
10 proceeding.

11 88. **Additional Disciplinary Counsel.** The Executive Director under the direction of the  
12 Board of Governors "and in consultation with the Chief Disciplinary Counsel, selects and  
13 employs suitable members of the association as disciplinary counsel, in a number to be  
14 determined by the executive director. ELC 2.8(b).

15 89. **Special Disciplinary Counsel.** ELC 2.8.

16 a. **Appointment of Special Disciplinary Counsel.** The Executive Director also has  
17 the power to appoint special disciplinary counsel "whenever necessary to conduct an  
18 individual investigation or proceeding." ELC 2.8(b).

19 90. **Adjunct Disciplinary Counsel.** ELC 2.9.

20 a. **Function.** "Adjunct disciplinary counsel performs the functions set forth in these  
21 rules as directed by disciplinary counsel." ELC 2.9 (a).

22 b. **Appointment and Term of Office.** The Board of Governors, upon  
23 recommendation of the Chief Disciplinary Counsel, appoints adjunct disciplinary counsel.

24 ELC 2.9 (b) provides:

25 The Board of Governors, upon the recommendation of the Chief  
26 Disciplinary Counsel, appoints adjunct disciplinary counsel from among the  
active members of the Association, who have been active or judicial  
Association members for at least seven years and have no record of  
disciplinary action as defined in these rules. Each adjunct disciplinary counsel  
is appointed for a five year term on a staggered basis and may be reappointed.

1           91. **Additional Disciplinary Counsel.** "The Executive Director of the Association, under  
2 the direction of the Board of Governors, and in consultation with the Chief Disciplinary Counsel,  
3 selects and employs suitable members of the association as disciplinary counsel, in a number to  
4 be determined by the executive director." ELC 2.8 (b).

5           92. **Special Disciplinary Counsel.** "Special disciplinary counsel may be appointed by the  
6 Executive Director whenever necessary to conduct an individual investigation or proceeding."  
7 ELC 2.8(b).

8           93. **Adjunct Disciplinary Counsel.** ELC 2.9.

9           a. **Function.** Adjunct disciplinary counsel performs the functions set forth in these  
10 rules as directed by disciplinary counsel. ELC 2.9 (a).

11           b. **Appointment and Term of Office.** "The Board of Governors, upon the  
12 recommendation of the Chief Disciplinary Counsel, appoints adjunct disciplinary counsel  
13 from among the active members of the Association, who have been active or judicial  
14 Association members for at least seven years and have no record of disciplinary action as  
15 defined in these rules." ELC 2.9 (b).

16           94. **Removal of Appointees.** The power to appoint is also the power to remove. ELC  
17 2.10 provides:

18           The power granted by these rules to any person, committee, or board to make  
19 any appointment includes the power to remove the person appointed  
20 whenever that person appears unwilling or unable to perform his or her  
21 duties, or for any other cause, and to fill the resulting vacancy.

22           95. **Disciplinary Selection Panel.**

23           a. **Function.** ELC 2.2 (e) Disciplinary Selection Panel. "The Disciplinary Selection  
24 Panel makes recommendations to the Board of Governors for appointment,  
25 reappointment, and removal of Disciplinary Board members, hearing officers, chief hearing

1 officer, and Conflicts Review Officers."

2 b. **Appointment.** "The Panel is appointed by the Supreme Court, upon the  
3 recommendation of the Board of Governors, shall include a Board of Governors member  
4 who serves as its chair, and should include, without limitation, one or more former Chairs  
5 of the Disciplinary Board, one or more current or former hearing officers, and one or more  
6 former nonlawyer members of the Disciplinary Board." ELC 2.2 (e).

7 **Hearing Officers**

8 96. **Hearing Officers.** Hearing officers for the WSBA Disciplinary Process are selected  
9 under ELC 2.5.

10 97. **Function of Hearing Officers.** A hearing officer to whom a case has been assigned  
11 for hearing conducts the hearing and performs other functions as provided under these rules.

12 98. **Appointment.** "The panel the Supreme Court, upon recommendation of the Board of  
13 Governors in consultation with the Disciplinary Selection Panel, appoints hearing officers to the  
14 hearing officer list. The list should include as many lawyers as necessary to carry out the  
15 provisions of these rules effectively and efficiently." ELC 2.2 (e).

16 99. **Hearing Officer List.** The hearing officer selection panel makes recommendations to  
17 the Board of Governors for appointment, reappointment, and removal of hearing officers. The  
18 panel is appointed by the Board of Governors and includes, but is not limited to, a Board of  
19 Governors member who serves as its chair, one or more former Chairs of the Disciplinary Board,  
20 and one or more former nonlawyer members of the Disciplinary Board.

21 100. **Payment.** Hearing Officers serve without pay, except for the Chief Hearing Officer.

22 101. **Hearing Officers and the provisions of ELC 2.5.** ELC 2.5 provides:

23 (a) Function. A hearing officer to whom a case has been assigned for  
24 hearing conducts the hearing and performs other functions as provided  
25 under these rules.

1 (b) Qualifications. A hearing officer must be an active member of the  
2 Association, have been an active or judicial member of the Association for  
3 at least seven years, have no record of public discipline, and have  
4 experience as an adjudicator or as an advocate in contested adjudicative  
5 hearings.

6 (c) Appointment. The Supreme Court, upon recommendation of the Board  
7 of Governors in consultation with the Disciplinary Selection Panel,  
8 appoints hearing officers to the hearing officer list. The list should include  
9 as many lawyers as necessary to carry out the provisions of these rules  
10 effectively and efficiently.

11 (d) Terms of Appointment. Appointment to the hearing officer list is for  
12 an initial period of two years, followed by periods of four years.  
13 Reappointment is in the discretion of the Supreme Court upon  
14 recommendation of the Board of Governors in consultation with the  
15 Disciplinary Selection Panel. A hearing officer may continue to act in any  
16 matter assigned before his or her term expires. On the recommendation of  
17 the Board of Governors in consultation with the Disciplinary Selection  
18 Panel, the Supreme Court may remove a person from the list of hearing  
19 officers.

### Chief Hearing Officer

20 102. **Chief Hearing Officer Appointment.** The Supreme Court, upon recommendation  
21 of the Board of Governors in consultation with the Disciplinary Selection Panel, appoints a chief  
22 hearing officer for a renewable term of two years person recommended by the Board of  
23 Governors appointed by the Board of Governors. ELC 2.5(f).

### Disciplinary Board ELC 2.3

24 103. **ELC 2.3** pertains to the Disciplinary Board.

25 (a) Function. The Board performs the functions provided under these  
26 rules, delegated by the Supreme Court, or necessary and proper to carry  
out its duties.

(b) Membership.

(1) Composition. The Board consists of not fewer than four nonlawyer  
members, appointed by the Court, and not fewer than ten lawyers,  
appointed by the Court, upon the recommendation of the Board of  
Governors in consultation with the Disciplinary Selection Panel.

1 (2) Qualifications. A lawyer Board member must be an Active member of  
2 the Association, have been an Active or Judicial member of the  
3 Association for at least five years, and have no record of public discipline.

4 104. **Make up of the Disciplinary Board.** The Disciplinary Board is made up of fourteen  
5 members, ten lawyers appointed by the Board of Governors and four non-lawyers appointed by  
6 the Supreme Court. Two of the lawyers serve as chair and vice-chair, respectively, of the  
7 Disciplinary Board; the other twelve members break into four Review Committees, each  
8 consisting of two lawyers and one non-lawyer. ELC 2.3 (b)(1).

9 105. On review, the Disciplinary Board may adopt, modify, or reverse the findings,  
10 conclusions, or recommendation of the hearing officer or panel.

11 106. The Disciplinary Board instead comes up with its own findings and conclusions so as  
12 to sustain the recommendation or decision of the hearing officer.

13 107. The Disciplinary Board and Disciplinary Counsel breach what procedural protections  
14 there are within the context of the Washington Lawyer Discipline System Rules by using the  
15 Disciplinary Board to correct the work and decisions of the Hearing Officers, and so as to ensure  
16 that the Supreme Court has a record which will sustain appellate review.

17 108. The Disciplinary Board is assisted by WSBA staff (independent from the staff that  
18 supports the Office of Disciplinary Counsel), including Assistant General Counsel.

19 109. Such Assistant General Counsel also “serves as Counsel to the Disciplinary Board and  
20 a Clerk to the Disciplinary Board.”

21 110. The Disciplinary Board is supposed to serve as an appellate court in the lawyer  
22 disciplinary system, hearing appeals of hearing officer decisions, reviewing all hearing officer  
23 recommendations for suspension or disbarment, and approving or disapproving proposed  
24 stipulations to resolve disciplinary proceedings by suspension or disbarment.

25 111. This conduct lacks impartiality.



1 112. The impartiality of the conduct is compounded by the fact that the Disciplinary Board  
 2 is a participant in each decision to prosecute an attorney.

3 113. If the Disciplinary Board determines a lawyer is to be suspended or disbarred, the  
 4 determination is automatically reviewed by the Washington Supreme Court; the Court may also,  
 5 in its discretion, accept review of other actions of the Disciplinary Board.

6 114. Washington Lawyer Discipline System “ ‘actions’ include both disciplinary ‘sanctions’  
 7 (which result in a permanent public disciplinary record) and admonitions (which result in a  
 8 temporary public disciplinary record generally retained for only five years).”

9 115. Disciplinary sanctions are, in order of increasing severity, reprimands, suspensions,  
 10 and disbarments.

11 116. **Persons Appointed to WSBA Discipline System Positions.** The WSBA controls  
 12 the selection of people who are selected to the various positions in the Washington Lawyer  
 13 Discipline System. See the spreadsheet below:

Person or Group	Authority to Appoint	
Board of Governors (BOG)	WSBA Members	
Executive Director	Board of Governors	
Disciplinary Selection Panel	Recommendation of the Board of Governors	The Panel is appointed by the Supreme Court, upon the recommendation of the Board of Governors, shall include a Board of Governors member who serves as its chair, and should include, without limitation, one or more former Chairs of the Disciplinary Board, one or more current or former hearing officers, and one or more former nonlawyer members of the Disciplinary Board.



1 2	Chief Disciplinary Counsel ELC 2.8 (b)	Executive Director	"under the direction of the Board of Governors"
3 4 5 6 7 8	Disciplinary Counsel	Executive Director	in consultation with the Chief Disciplinary Counsel, selects and employs suitable members of the association as disciplinary counsel, in a number to be determined by the executive director. Special disciplinary counsel may be appointed by the Executive Director whenever necessary to conduct an individual investigation or proceeding
9	Special Disciplinary Counsel	Executive Director	
10 11 12 13	Chief Hearing Officer ELC 2.5 (e)(1)	Recommendation of the Board of Governors	The Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel appoints a chief hearing officer for a renewable term of two years.
14 15 16 17 18	Hearing Officers ELC 2.5	Recommendation of the Board of Governors	The Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel, appoints hearing officers to the hearing officer list. The list should include as many lawyers as necessary to carry out the provisions of these rules effectively and efficiently.
19 20 21	Disciplinary Board	Recommendation of the Board of Governors	appointed by the Court, upon the recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel. (2) Qualifications. A lawyer Board member must be an Active member

1 2 3 4 5 6	Review Committees	Chair of Disciplinary Board  The Chair appoints three or more review committees of three members each from among the Board members. Each review committee consists of two lawyers and one nonlawyer. The Chair may reassign members among the several committees on an interim or permanent basis. The Chair does not serve on a review committee.
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7 117. In light of the above and in light of other factual statements made in this Complaint,  
8 there can be no question that the WSBA Washington Discipline System violates procedural due  
9 process of law by virtue of the fact that the WSBA controls the appointment of all persons  
10 involved in the Discipline System.

#### 11 **Discrete Violations of Procedural Due Process**

12 118. Besides the facts showing that the Discipline System lacks impartiality making it  
13 unconstitutional, there are several discrete aspects of the Discipline System which violate  
14 procedural due process. Some of these discrete aspects, but certainly not all of them, are  
15 described in the paragraphs which immediately follow:

16 119. **Prosecutorial Discretion.** Prosecutorial discretion is only exercised in relation to a  
17 grievance filed by a private party. "Any person or entity may file a grievance against a lawyer who  
18 is subject to the disciplinary authority of this jurisdiction." ELC 5.1 (a).

19 120. Under ELC 5.3 (a) "[d]isciplinary counsel must review and may investigate any alleged  
20 or apparent misconduct by a lawyer and any alleged or apparent incapacity of a lawyer to practice  
21 law, whether disciplinary counsel learns of the misconduct by grievance or otherwise. If there is  
22 no grievant, disciplinary counsel may open a grievance in the name of the Office of Disciplinary  
23 Counsel."

24 121. ELC 5.3 (a) limits the scope of discipline counsel investigation.

1 122. Discipline Counsel does not limit itself to the grievance, but at times uses the  
2 grievance as an excuse to monitor the conduct of a respondent so as to find a violation beyond  
3 that described or related to the perimeters of the grievance.

4 123. **Disciplinary Counsel and the Review Committees.** ELC 5.7 (c) and (d) provide:

5 (c) Report in Other Cases. Disciplinary counsel must report to a review  
6 committee the results of investigations except those dismissed or diverted.  
7 The report may include a recommendation that the committee order a  
hearing or issue an advisory letter or admonition.

8 (d) Authority on Review. In reviewing grievances under this rule, a  
review committee may:

- 9 (1) dismiss the grievance;  
10 (2) affirm the dismissal;  
11 (3) dismiss the grievance and issue an advisory letter under rule 5.8;  
12 (4) issue an admonition under rule 13.5;  
13 (5) order a hearing on the alleged misconduct; or  
14 (6) order further investigation as may appear appropriate.

15 124. Review Committees decide whether a matter is to go to hearing. Thus, the Review  
16 Committees and their members are part of the prosecution.

17 125. Not only are committee members part of the prosecution, they are members of the  
18 Disciplinary Board. The work the Disciplinary Board is thus tainted.

19 126. This unfairness is made even more worse by the fact that the Disciplinary Board is  
20 allowed to amend or rewrite Findings of Fact, Conclusions of Law and hearing officer  
21 recommendations. That is, the Disciplinary Board is able to and does ensure that the record of  
22 the discipline matter will stand up before the Supreme Court.

23 127. The lawyer in question does not have an opportunity to play a part in the work of the  
24 Disciplinary Board.

1 128. This amending and or rewriting is assisted by a Disciplinary Counsel.

2 129. **Three Review Committees.** Three are several review committees. The members of  
3 each review committee are members of the Disciplinary Board. As a result, each member of the  
4 Disciplinary Board is inclined to support the prosecution decisions of other Disciplinary Board  
5 members.

6 130. **Hearing Officers.** There are vast differences among hearing officers as to  
7 competence, experience, judicial temperament, etc. For example, individuals on the hearing  
8 officer list may have vast litigation and experience whereas other individuals have no more  
9 experience than that of a lawyer working in a county prosecuting attorney's office doing nothing  
10 much more that child support enforcement.

11 131. Hearing officers are inadequately trained to act as fair and impartial hearing officers.

12 132. Not all hearing officers understand the trial process and the rules of evidence.

13 133. Hearing officers allow hearsay testimony and do not understand the rules of evidence  
14 as to hearsay testimony.

15 134. Hearing officers do not understand that accused attorneys have a right to confront  
16 witnesses.

17 135. Hearing officers engage in improper conduct during hearings subjecting themselves to  
18 threats by disciplinary counsel that counsel might seek a new hearing and a new hearing officer.  
19 Hearing officers overcome such threats by ruling in favor of the WSBA and disciplinary counsel.

20 136. Hearing officers do not understand the meaning of standards of proof and how they  
21 are to be applied.

22 137. Hearing officers do not know how to prepare proper Findings of Fact and  
23 Conclusions of Law with respect of their decisions.

24 138. Hearing officers impose penalties such as restitution even though the WSBA and its

1 disciplinary counsel have not sought such penalties.

2 139. Hearing officers rely on the Disciplinary Board to correct their mistakes and  
3 shortcomings.

4 140. Hearing officers are supervised by a Chief Hearing Officer who assigns cases to the  
5 hearing officers, provides training for the hearing officers, and monitors their performance. An  
6 Assistant General Counsel provides staff support to the Hearing Officer Panel.

7 141. Hearing officers may seek the advice of the Chief Hearing Officer regarding cases  
8 before a hearing officer.

9 142. Hearing officers are allowed to serve in violation of the Washington Canons of  
10 Judicial Conduct.

11 143. The Washington Lawyer Discipline System does not require hearing officers to  
12 comply with the Washington Code of Judicial Conduct when in fact, the Code does apply by a  
13 reading of its own terms and the provisions of ELC 2.6(c).

14 144. Hearing officer conduct and decisions are sometimes reviewed by the Chief Hearing  
15 Officer. Because the hearing officer was selected by the Chief Hearing Officer, there is a conflict  
16 of interest, violation of appearance of fairness, and violation of disqualification rules.

17 145. Hearing officers have no experience or knowledge if any as to what combinations of  
18 fact and law precipitate conclusions of law as to ethical violations.

19 146. **Standard of Proof.** Under the circumstances of the Washington Lawyer Discipline  
20 System, the standard of proof should be at least "clear and convincing evidence" the standard  
21 applied in physician discipline. *Bang D. Nguyen v. Dep't of Health*, 144 Wash. 2d 516, 518, 29 P.3d  
22 689 (2001); *Hardee v. DSHS*, 172 Wash. 2d 1, 9, 256 P.3d 339 (2011).

23 147. **Expert Witnesses.** Under *Eriks v. Denver*, 118 Wash. 2d 451, 824 P.2d 1207 (1992),  
24 it was held that whether an attorney's conduct violated the rules of professional conduct is a  
25

1 question of law. Thus, no expert testimony need be allowed. Thus, the question of whether in  
2 law, an accused lawyer's conduct violated a rule of professional conduct is in the hands of the  
3 WSBA discipline counsel prosecuting the case, the hearing officer, and a Review Committee.

4 148. **Due Process Vagueness.** The Rules of Professional Conduct violate procedural due  
5 process because in many instances they do not define what is permitted and not permitted. The  
6 Discipline System does not concern itself with this problem of notice for incomprehensible  
7 explanation that violations may be found because the duty of the system is to "protect the public  
8 and to preserve confidence in the legal system."

9 149. The Washington Supreme Court has imposed certain rules and practices regarding the  
10 appeals of discipline cases against lawyers which, in essence, direct the attorney discipline  
11 decisions of the Supreme Court.

12 a. The court gives great weight to the hearing officer's evaluation of the credibility  
13 and veracity of witnesses. Yet, the Disciplinary Board has the power to amend, and, from  
14 time to time, does amend hearing officer findings.

15 b. Nevertheless, "we give considerable weight to the hearing officer's findings of  
16 fact." *Discipline Marshall*, 160 Wash. 2d 317, 329-30, 157 P.3d 859 (2007).

17 c. **Disciplinary Board.** The court defers to the experience and perspective of the  
18 Disciplinary Board.

19 d. In essence, decisions of the court in Discipline Actions, are in effect decided in  
20 advance because of what has happened before the hearing officer and what has happened  
21 before the Disciplinary Board.

22 150. **Sanctions.** Sanctions in attorney discipline matters are determined by the court  
23 provided in the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 &  
24 Supp. 1992). *Discipline of Hall*, 180 Wash. 2d 821, 834, 329 P.3d 870 (2014). Again, the court has

1 deferred to others for the decision the court should make, is required to make. Again, a fair  
2 hearing is denied.

3 151. The standard of proof in the ELC for Hearing Officer hears is “clear  
4 preponderance of the evidence.” ELC 10.14(b).

5 The ABA Standards for imposing lawyer discipline provide:

6 These standards are designed for use in imposing a sanction or sanctions  
7 following a determination by clear and convincing evidence that a member  
8 of the legal profession has violated a provision of the Model Rules of  
Professional Conduct (or applicable standard under the laws of the  
jurisdiction where the proceeding is brought).

9 STANDARDS FOR IMPOSING LAWYER SANCTIONS as approved, February 1986, and as  
10 amended, February 1992, 1.3.

11 Surely is unfair to not to apply a clear and convincing burden, what conceivable reason would  
12 there be for lowering a standard.

13 **FIRST CLAIM FOR RELIEF**  
14 **Declaratory Judgment**

15 152. Plaintiff Caruso and Plaintiff Ferguson and restate and reallege the preceding  
16 paragraphs and incorporate them herein by reference as though fully set forth.

17 153. Defendants currently maintain and actively enforce a set of laws, customs, practices,  
18 and policies under color of state law that deprive Plaintiffs of their rights, privileges and/or  
19 immunities secured by the First, Fifth and Fourteenth Amendments to the United States  
20 Constitution, and, therefore, Defendants are liable to Plaintiffs under 42 U.S.C. § 1983.

21 154. The parties do not agree with each other as to matters about the application of the  
22 law and understandings of certain facts in this proceeding.

23 155. The differences are real and may only be resolved by declaratory judgments as to the  
24 differences.

25 156. A true “case or controversy” exists between the parties as to these matters.

1 157. Plaintiffs have no adequate legal remedy by which to prevent or minimize the  
2 continuing irreparable harm to their constitutional rights.

3 158. Declaratory relief will clarify the rights and obligations of the parties and is,  
4 therefore, appropriate to resolve this controversy.

5 159. Plaintiffs will be irreparably harmed if an injunction does not issue enjoining  
6 Defendants from compelling Plaintiffs to be a members of the WSBA 2017 and from compelling  
7 Plaintiffs to pay dues to the WSBA 2017.

8 160. Plaintiffs no plain, speedy, or adequate remedy at law.

9 161. If not enjoined by this Court, Plaintiffs allege on information and belief that  
10 Defendants will continue to violate the law as described herein.

11 162. Plaintiff Caruso and Plaintiff Ferguson are therefore entitled to declaratory and  
12 permanent injunctive relief. 28 U.S.C. §§ 2201, 2202.

13 **SECOND CLAIM FOR RELIEF**  
14 **Right of Non-Association**  
15 **First and Fourteenth Amendments**

16 163. Plaintiff Caruso and Plaintiff Ferguson restate and reallege the preceding paragraphs  
17 and incorporate them herein by reference as though fully set forth.

18 164. The Plaintiff cannot be compelled to be a members of WSBA 1933 or WSBA 2017.

19 165. Compelled membership violates Plaintiffs' under the First and Fourteenth  
20 Amendments to the United States Constitution.

21 166. A person has a right not to associate as well as to associate.

22 167. Defendants are depriving Plaintiffs from the right not to associate by compelling  
23 association, by compelled membership in WSBA 1933 or WSBA 2017.

24 168. Accordingly, Defendants currently maintain and actively enforce a set of laws,  
25 customs, practices, and policies under color of state law that deprive of rights, privileges and/or



1 immunities secured by the First and Fourteenth Amendments, and, therefore, Defendants are  
2 liable to Plaintiffs under 42 U.S.C. § 1983.

3 169. Plaintiff Caruso and Plaintiff Ferguson have no adequate legal remedy by which to  
4 prevent or minimize the continuing irreparable harm to his constitutional rights.

5 170. Plaintiff Caruso and Plaintiff Ferguson are therefore entitled to declaratory and  
6 permanent injunctive relief. 28 U.S.C. §§ 2201, 2202.

7 **THIRD CLAIM FOR RELIEF**  
8 **Freedom of Speech**  
9 **First and Fourteenth Amendments**

10 171. Plaintiff Caruso and Plaintiff Ferguson restate and reallege the preceding paragraphs  
11 and incorporate them herein by reference as though fully set forth.

12 172. The Plaintiffs cannot be compelled to pay dues to the WSBA 2017: Compulsory  
13 dues violate Plaintiffs' right of freedom of speech, including the freedom not to speak and to not  
14 be forced to finance speech, Plaintiffs do not consent to finance in the exercise of their rights  
15 under the First and Fourteenth Amendments to the United States Constitution.

16 173. This civil rights action seeks immediate injunctive and declaratory relief to redress  
17 and prevent the deprivation of Plaintiffs' right against compelled speech and compelled  
18 association protected by the First and Fourteenth Amendments to the United States Constitution  
19 by practices and policies of Defendants acting under color of state law.

20 174. Specifically, those rights have been violated by Defendants' imposition of  
21 mandatory dues as a condition of membership to the Washington State Bar Association (WSBA),  
22 which is a prerequisite to the ability to practice law in the State of Washington.

23 175. Accordingly, Defendants currently maintain and actively enforce a set of laws,  
24 customs, practices, and policies under color of state law that deprive Plaintiffs of rights, privileges  
25 and/or immunities secured by the First and Fourteenth Amendments, and, therefore, Defendants

1 are liable to Plaintiffs under 42 U.S.C. § 1983.

2 176. Plaintiffs have no adequate legal remedy by which to prevent or minimize the  
3 continuing irreparable harm to their constitutional rights.

4 177. Plaintiff Caruso and Plaintiff Ferguson are therefore entitled to declaratory and  
5 permanent injunctive relief. 28 U.S.C. §§ 2201, 2202.

6 **FOURTH CLAIM FOR RELIEF**  
7 **WSBA Discipline System No Longer Exists**

8 178. Plaintiff Caruso and Plaintiff Ferguson restate and reallege the preceding paragraphs  
9 and incorporate them herein by reference as though fully set forth.

10 179. The WSBA 2017 cannot subject Plaintiffs to the Washington Lawyer Discipline  
11 System found in ELC (Rules for Enforcement of Lawyer Conduct):

12 a. The ELC designates the WSBA of 1933. ELC 2.2.

13 b. The ELC does not does not designate the WSBA 2017.

14 c. Indeed, the ELC cannot designate the WSBA 2017 because it is a mandatory  
15 association of lawyers and others.

16 180. The power of discipline of the WSBA 1933 is contained in the Bar Act. RCW  
17 2.48.060.

18 181. This power of discipline described and permitted in RCW 2.48.060 is tied to the fact  
19 that the WSBA is a compelled member organization consisting only of Washington lawyers.  
20 RCW 2.48.010, RCW 2.48.021.

21 182. The ELC does not contemplate that the WSBA 2017 has the power to discipline.

22 183. Subjecting a lawyer to a discipline system affects a lawyer's fundamental rights of  
23 speech and association or non-association.

24 184. In addition, a lawyer's fundamental right to procedural due process of law will be  
25

1 affected by a lawyer being compelled to submit to a discipline system of a the WSBA 2017  
2 because the placement of the system in such organization fails constitutional scrutiny.

3 185. Lawyer discipline can be better provided by a system independent of WSBA 1933 or  
4 WSBA 2017.

5 186. Accordingly, Defendants currently maintain and actively enforce a set of laws,  
6 customs, practices, and policies under color of state law that deprive Plaintiffs of rights, privileges  
7 and/or immunities secured by the First and Fourteenth Amendments, and, therefore, Defendants  
8 are liable to Plaintiffs under 42 U.S.C. § 1983.

9 187. Plaintiffs have no adequate legal remedy by which to prevent or minimize the  
10 continuing irreparable harm to their constitutional rights.

11 171. Plaintiff Caruso and Plaintiff Ferguson are therefore entitled to declaratory and  
12 permanent injunctive relief. 28 U.S.C. §§ 2201, 2202.

13 **FIFTH CLAIM FOR RELIEF**  
14 **Washington Lawyer Discipline System Violates**  
15 **Due Process of Law under Fifth and Fourteenth Amendments**

16 188. Plaintiff Caruso and Plaintiff Ferguson restate and reallege the preceding paragraphs  
17 and incorporate them herein by reference as though fully set forth.

18 189. The Fifth and Fourteenth Amendments guarantee to Plaintiffs procedural due  
19 process of law.

20 190. The Discipline System violates procedural due process of law because the system is  
21 not fair and it is not impartial as the facts set forth above show.

22 191. The Discipline System violates procedural due process of law there are several  
23 discrete aspects of the system which violate due process of law as the facts show and will show.

24 192. Accordingly, Defendants currently maintain and actively enforce a set of laws,  
25 customs, practices, and policies under color of state law that deprive Plaintiffs of rights, privileges

1 and/or immunities secured by the First and Fourteenth Amendments, and, therefore, Defendants  
2 are liable to Plaintiffs under 42 U.S.C. § 1983.

3 193. Plaintiffs have no adequate legal remedy by which to prevent or minimize the  
4 continuing irreparable harm to their constitutional rights.

5 194. Plaintiff Caruso and Plaintiff Ferguson are therefore entitled to declaratory and  
6 permanent injunctive relief. 28 U.S.C. §§ 2201, 2202.

7 **SIXTH CLAIM FOR RELIEF**  
8 **Washington Lawyer Discipline System Does Not**  
9 **Meet Constitutional Scrutiny**

10 195. Plaintiff Caruso and Plaintiff Ferguson restate and reallege the preceding paragraphs  
11 and incorporate them herein by reference as though fully set forth.

12 196. The Doctrine of Constitutional Scrutiny (includes various levels of scrutiny): Strict  
13 scrutiny is described in the following:

14 The words 'strict judicial scrutiny' appear nowhere in the U.S.  
15 Constitution. Neither is there any textual basis, nor any foundation in the  
16 Constitution's original understanding, for the modern test under which  
17 legislation will be upheld against constitutional challenge only if 'necessary'  
or 'narrowly tailored' to promote a 'compelling' governmental interest.  
Nonetheless, strict scrutiny - a judicially crafted formula for implementing  
constitutional values - ranks among the most important doctrinal elements  
in constitutional law.

18 Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007).

19 197. There are certain facts which establish that the infringements of Plaintiffs'  
20 fundamental constitutional rights under the doctrine of constitutional scrutiny cannot be  
21 permitted.

22 198. The infringements of the discipline system to Plaintiffs' ' fundamental rights cannot  
23 be supported under constitutional scrutiny - whether strict or exacting scrutiny.

24 199. Plaintiffs' ' fundamental rights of procedural due process under the Fifth and  
25

1 Fourteenth Amendments to the United States Constitution are also affected by forcing Plaintiffs'  
2 to subject themselves to the jurisdiction of the ELC and also violate constitutional scrutiny.

3 200. Such rights are fundamental, (a) the legislature must have passed the ELC to further  
4 a "compelling governmental interest," and must have be narrowly tailored to achieve that interest.

5 201. Ever since *NAACP v. Alabama*, 357 U.S. 449 (1958), freedom of association has  
6 been a fundamental right deserving of First and Fourteenth Amendment protection.

7 Correspondingly, "[f]reedom of association . . . plainly presupposes a freedom not to associate."  
8 *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

9 202. Freedom of speech is also a fundamental right deserving the scrutiny protection  
10 under the First and Fourteenth Amendments. *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

11 203. We also know that the *Lathrop* plurality did not apply constitutional scrutiny to its  
12 analysis and that the doctrine did begin to be refined into a constitutional mainstay until after  
13 *Lathrop*. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J.  
14 LEGAL HIST. 355, 390 (2006).

15 204. Exacting scrutiny was described not long ago in *Knox v. Service Employees Intern. Union*,  
16 132 S. Ct. 2277 (2012). The Nebraska Supreme Court *In Re Petition for a Rule Change*, 286 Neb.  
17 1018, 841 N.W.2d 167, 177 (Neb. 2013) discussed the scrutiny test follows:

18 We made it clear that compulsory subsidies for private speech are  
19 subject to exacting First Amendment scrutiny and cannot be  
20 sustained unless two criteria are met.

21 First, there must be a comprehensive regulatory scheme involving  
22 a "mandated association" among those who are required to pay  
23 the subsidy. . . . Such situations are exceedingly rare because, as we  
24 have stated elsewhere, mandatory associations are permissible only  
25 when they serve a "compelling state interes[t] . . . that cannot be  
26 achieved through means significantly less restrictive of  
27 associational freedoms." . . .

28 Second, even in the rare case where a mandatory association can

1 be justified, compulsory fees can be levied only insofar as they are  
2 a "necessary incident" of the "larger regulatory purpose which  
justified the required association."

3 205. The *Knox* exacting scrutiny test can be rephrased as follows:

4 a. There must be a "comprehensive regulatory scheme."

5 b. The comprehensive scheme must involve a "mandated association" among  
6 those required to pay the subsidy.

7 c. The comprehensive scheme must serve a compelling state interest.

8 d. The compelling state interest cannot be achieved through means significantly  
9 less restrictive of associational freedoms.

10 e. The compulsory fees can only be levied if they are "necessary incident" of the  
11 "larger regulatory purpose which justified the required association."

12 206. Plaintiff Caruso and Plaintiff Ferguson are therefore entitled to declaratory and  
13 permanent injunctive relief. 28 U.S.C. §§ 2201, 2202.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff Caruso and Plaintiff Ferguson respectfully request the following  
16 relief:

17 1. Entry of judgment declaring that Plaintiffs have First Amendment rights of  
18 non-association, and therefore cannot be compelled to be a member of either to WSBA 1933 or  
19 WSBA 2017;

20 2. Entry of judgment declaring that Plaintiffs have First Amendment rights of freedom  
21 of speech, and therefore cannot be compelled to pay dues to the WSBA 1933 or WSBA 2017;

22 3. Entry of a judgment declaring that Plaintiffs' Fifth and Fourteenth Amendment rights  
23 to procedural due process of law and that the Washington Lawyer Discipline System violates  
24 such rights;

1 4. Declare that WSBA 2017 does not have the power to discipline lawyers unless it is  
2 under RCW 2.48.060, which section only applies to members of the state bar, which membership  
3 is limited to lawyers admitted to the bar of the Washington State Supreme Court;

4 5. Declare because the WSBA 2017 includes Limited Practice Officers and Limited  
5 License Legal Technicians besides lawyers, it is no longer an integrated bar association and as  
6 such, no longer has authority to discipline Washington lawyers;

7 6. Declare that the WSBA 2017 cannot function as a regulatory and disciplinary body and  
8 act under the Rules for the Enforcement of Lawyer Conduct because such authority does not  
9 conform to constitutional scrutiny;

10 7. Issue injunctions against Defendants to effectuate the previous declarations;

11 8. Award Plaintiffs their costs, expenses, and attorneys' fees by law, including 42 U.S.C.  
12 §1988; and

13 9. Award Plaintiffs such further relief as is just and equitable.

14 February 21, 2017

15 Respectfully submitted,

16 EUGSTER LAW OFFICE PSC

17 s/ Stephen Kerr Eugster

18 Stephen Kerr Eugster WSBA # 2003  
19 Attorneys for Plaintiffs

20 2418 West Pacific Avenue  
21 Spokane, Washington 99201-6422  
22 (509) 624-5566

[eugster@eugsterlaw.com](mailto:eugster@eugsterlaw.com)

**PROOF OF SERVICE**

1 I hereby certify that on February 21, 2017, by previous agreement of  
2 counsel, I emailed, the foregoing document including its appendix to counsel  
3 listed below at their respective e-mail addresses:

4 Paul J. Lawrence

5 Pacifica Law Group LLP

6 1191 2nd Ave Ste 20:0

7 Seattle, WA 98101-3404

8 [paul.lawrence@pacificalaw-group.com](mailto:paul.lawrence@pacificalaw-group.com)

9 Attorney for Defendants

10 Taki V. Flevaris

11 Pacifica Law Group LLP

12 1191 2nd Ave Ste 2000

13 Seattle, WA 98101-3404

14 [taki.flevaris@pacificalawgroup.com](mailto:taki.flevaris@pacificalawgroup.com)

15 Attorney Defendants

Jessica Anne Skelton

Pacifica Law Group LLP

1191 2nd Ave Ste 2000

Seattle, WA 98101-3404

[jessica.skelton@pacificalaw-group.com](mailto:jessica.skelton@pacificalaw-group.com)

Attorney for Defendants

February 21, 2017

s/ Stephen Kerr Eugster

Stephen Kerr Eugster, WSBA # 2003