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

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

12 vs)

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

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

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

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

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

24 continued)
25)

No.

CLASS ACTION COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

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

ABSTRACT OF COMPLAINT

On September 30, 2016, the Board of Governors of the Washington State Bar Association amended several WSBA Bylaws. After the amendments, the WSBA of the State Bar Act (WSBA 1933) became a new WSBA (WSBA 2017) with members consisting of lawyers, Limited Practice Officers, and Limited License Legal Technicians.

A lawyer cannot be compelled to be a member of the WSBA 2017 in order to practice law in Washington. Right of non-association: First and Fourteenth Amendments to the US Constitution.

A lawyer cannot be compelled to pay dues to the WSBA 2017 to practice law In Washington or for any other reason. First and Fourteenth Amendments to the US Constitution.

The Washington Lawyer Discipline System be declared unconstitutional because it violates procedural due process of law protected under the Fifth and Fourteenth Amendment to the US Constitution.

And, the Washington Lawyer Discipline System be declared unconstitutional on it being in the hands of WSBA 1933 or WSBA 2017.

FUTURE IMPACT -

If the case is successful, Washington lawyers and the regulation and discipline of Washington lawyers, might look like this:

- The WSBA 1933 and WSBA 2017 will become voluntary associations.
- Neither association will be able to compel a lawyer to pay dues to it.
- The Washington Lawyer Discipline System will become a system created by the Legislature of the state of Washington or the Washington Supreme Court.
- Neither WSBA 1933 nor WSBA 2017 will have a role in the newly created Washington Lawyer Discipline System.

Stephen Kerr Eugster, WSBA No. 2003
Eugster Law Office PSC

**CLASS ACTION COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiff, Robert E. Caruso and Plaintiff, Sandra L. Ferguson, by and through their undersigned attorneys, hereby file this Complaint against the Defendants named herein, on behalf of themselves and the class they seek to represent and allege as follows:

TERMINOLOGY

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

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

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

1
2 NATURE OF THE CLAIMS

3 4. This action seeks injunctive and declaratory relief to redress and prevent the
4 deprivation of Plaintiffs' rights against compelled association and compelled speech
5 protected by the First and Fourteenth Amendments to the United States Constitution
6 by practices and policies of Defendants acting under color of state law.
7

8 5. Defendants are violating Plaintiffs' rights because of Plaintiffs' compelled
9 membership in the WSBA 2017 under bylaws amended on September 30, 2016,
10 which is a prerequisite to the ability to practice law in the state of Washington.

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

14 7. Plaintiffs' fundamental constitutional rights are violated by the WSBA 2017
15 because the discipline system, which is applied to lawyer members of the Association,
16 fails to comply with procedural due process of law under the Fifth and Fourteenth
17 Amendments to the United States Constitution.
18

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

23 9. Plaintiffs, therefore, seeks declaratory and injunctive relief to abate and
24 correct Defendants' unconstitutional actions.
25

JURISDICTION AND VENUE

10. Plaintiffs and other class members bring this civil rights lawsuit pursuant to the First, Fifth and Fourteenth Amendments to the United States Constitution.

Because this action arises under the Constitution and laws of the United States, this Court has jurisdiction pursuant to 28 U.S.C. § 1331.

11. This is also an action under the Civil Rights Act of 1871, specifically, 42 U.S.C § 1983, to redress the deprivation, under color of state law, of rights, privileges, and immunities secured to Plaintiffs and other class members by the Constitution of the United States, particularly the First, Fifth and Fourteenth Amendments thereto.

The jurisdiction of this Court, therefore, is also invoked under 28 U.S.C. § 1343(a)(3), (4).

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

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

PARTIES

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

1 the state of Washington.

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

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

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

9
10 15. Plaintiff, Sandra L. Ferguson, is a citizen of the United States and a resident
11 of the state of Washington.

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

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

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

19
20 16. Defendant WSBA 1933 is an integrated bar association created by the
21 Washington State Bar Act, Wash. Sess. 1933 ch. 94.

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

24 18. Defendants WSBA 1933 and WSBA 2017 are headquartered in Seattle,
25

1 Washington, and conduct business and operations throughout the State of
2 Washington.

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

5 20. Defendant Paula C. Littlewood is the Executive Director of the WSBA 1933
6 and WSBA 2017. Defendant Littlewood is currently implementing and enforcing the
7 unconstitutional practices and policies complained of in this action. Defendant
8 Littlewood is sued in her official capacity.

9 21. Defendant Douglas J. Ende is the Chief Disciplinary Counsel of the WSBA
10 1933 and WSBA 2017. Defendant Ende is currently implementing and enforcing the
11 unconstitutional practices and policies complained of in this action. Defendant Ende is
12 sued in his official capacity.

13 22. Defendant Robin Lynn Haynes is the President of the WSBA 2017.
14 Defendant Haynes is currently implementing and enforcing the unconstitutional
15 practices and policies complained of in this action. Defendant Haynes is sued in her
16 official capacity.

17 23. Defendant Board of Governors is made up of the following Defendant
18 individuals: Robin Lynn Haynes - President (2016-2017), Bradford E. Furlong -
19 President-elect (2016-2017), William D. Hyslop - Immediate past President (2016-
20 2017), G. Kim Risenmay - Governor, District 1 (2015-2018), Rajeev Majumdar -
21 Governor, District 2 (2016-2019), Jill A. Karmy - Governor, District 3 and Treasurer
22 (2014-2017), William D. Pickett - Governor, District 4 (2015-2018), Angela M. Hayes
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1 - Governor, District 5 (2015-2018), Keith M. Black - Governor, District 6 (2014-2017),
2 Ann Danieli - Governor, District 7-north (2014-2017), James K. Doane - Governor,
3 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
5 10 (2016-2019), Athanasios P. Papailiou - Governor, At-large (2016-2019), Mario M.
6 Cava - Governor, At-large (2014-2017), and Sean Davis - Governor, At-large (2015-
7 2018).

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

13 **CONSTITUTIONAL STANDARDS**

14 25. Under 42 U.S.C. § 1983, every person who, under color of state law, subjects
15 any citizen of the United States to the deprivation of "rights, privileges, or immunities
16 secured by the Constitution and laws," shall be liable to the injured party.
17

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

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

22 28. The constitutional construct of strict or exacting scrutiny (or other scrutiny)
23 ensures that the fundamental rights of Plaintiff Caruso and the class members he
24 seeks to represent may only be infringed under certain circumstances.
25

1 29. Such circumstances are not extant.

2 **STANDING**

3 30. Plaintiff Caruso is under imminent threat that the WSBA 1933 or WSBA
4 2017 will bring a formal complaint against him and commence a discipline
5 proceeding against him.

6 31. Plaintiff Caruso is being subjected to a genuine threat of imminent future
7 harm by the WSBA 1933 or WSBA 2017.

8 32. Plaintiff Ferguson is under imminent threat that the WSBA 1933 or WSBA
9 2017 will bring a formal complaint against him and commence a discipline
10 proceeding against her.

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

13 34. The WSBA incontrovertibly assesses compulsory bar dues and requires
14 membership in order to practice law in Washington. RCW 6 2.48. 130, .170. These
15 restrict and compel speech and association in ways that Plaintiffs, assert for
16 themselves and the members of the class they seek to represent, are unconstitutional.
17

18 35. These constitutional violations will persist unless the law is changed or
19 enforcement is enjoined.

20 36. It cannot be disputed that compelled association, compelled speech and
21 subsection of the Washington Lawyer Discipline System causes alleged burdens on
22 Plaintiffs and the class they represent violate their constitutional rights, and that
23 enjoining its enforcement would redress those alleged constitutional harms.
24

CLASS ACTION ALLEGATIONS

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2 37. This is a class action brought by Plaintiffs on their own behalf and on behalf
3 of others similarly situated, pursuant to Rule 23(b)(2) of the Federal Rules of Civil
4 Procedure.

5
6 38. The class that Plaintiffs seek to represent consists of all current WSBA active
7 members. The members of the class include those members who are experiencing an
8 imminent threat the bar association will or may commence disciplinary action against
9 a member; all members with regard to compulsion by the bar association to members
10 of the association in order practice law, all members with regard to compulsion to pay
11 dues to the association, all members with regard to whether the Discipline System
12 meets requirements of proper constitutional scrutiny.

13
14 39. The number of persons in this class is approximately 38,000.¹ The class is
15 therefore so numerous that joinder of all members of the class is clearly impracticable.
16 See Fed. R. Civ. P. 23(a)(1).

17
18 40. There are questions of law and fact common to all members of the class; to
19 wit, First, Fifth and Fourteenth Amendments to the United States Constitution. See
20 Fed. R. Civ. P. 23(a)(2).

21
22 41. Plaintiffs' claims are typical of other members of the class, who have been
23 subject to the same deprivations of their First, Fifth and Fourteenth Amendment rights
24 by the WSBA 1933 and WSBA 2017. See Fed. R. Civ. P. 23(a)(3).

25
26 42. Plaintiffs can adequately represent the interests of other members of the

¹ <http://www.wsba.org/About-WSBA/Legislative-Affairs>. 2017/01/01.

1 class. See Fed. R. Civ. P. 23(a)(4). Plaintiffs have no interests antagonistic to other
2 members of the class related to the subject matter of this lawsuit, since all members of
3 the class are similarly situated.

4 43. Plaintiffs' attorneys are experienced in representing litigants in federal court.
5 These attorneys are experienced in representing parties in constitutional rights
6 litigation. Plaintiffs' attorneys are therefore well qualified to serve as class counsel.
7

8 44. Defendants have acted or refused to act on grounds generally applicable to
9 the class. See Fed. R. Civ. P. 23(b)(2). Specifically, Defendants have failed to comply
10 with the constitutional requirements. The declaratory and injunctive relief requested
11 herein is therefore appropriate with respect to the class as a whole. *Id.*

12 FACTUAL ALLEGATIONS

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

14 45. The WSBA 1933 came into being by the passage of the State Bar Act in 1933
15 (Bar Act).

16 46. The Bar Act was an early part of the "integrated bar movement."

17 47. The integrated bar movement came about in the first decades of the 20th
18 century.
19

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

23 49. At the time of the Bar Act, there were three approaches to the creation of the
24 integrated bar in a state: (1) legislation, (2) legislation allowing the state supreme
25

1 court to create an integrated bar by court rule, and simply, (3) court rule.

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

4 51. The Bar Act had four main features:

5 a. It chartered the Washington State Bar Association.

6 b. All state of Washington lawyers admitted to the bar of the Washington
7 State Supreme Court were compelled to be members and to pay dues to the
8 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
11 Washington lawyers which was approved by the Supreme Court.

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

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

16 **WASHINGTON STATE BAR ASSOCIATION 2017**

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

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

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

2 57. The reused name is a misnomer: The name, more appropriate to what has
3 happened, should be something like this – “Washington State Bar and Legal Services
4 Providers Association.”

5 58. The WSBA 2017 is an “access to justice” model which encompasses
6 integrated legal services in an association.

7
8 59. The Executive Director of the WSBA, now the WSBA 2017, is a proponent of
9 the access to justice association model. *See, e.g.,* Stephen R. Crossland and Paula C.
10 Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing*
11 *Access to Justice and Ensuring the Integrity of the Legal Profession Essay*, 65 S. C. L. REV.
12 611 (2014).

13 60. The WSBA 2017 is an integrated association of lawyers and certain legal
14 services providers who are compelled to be members and pay dues, and who are
15 subject to the discipline systems of the association.

16
17 61. The members of the WSBA 2017 consist of lawyers, Limited Practice
18 Officers, and Limited License Legal Technicians.

19 62. The members are compelled to be members in order to practice law, in the
20 case of lawyers, practice a certain defined and limited practice of law in the case of
21 Limited Practice Officers and Limited License Legal Technicians.

22 63. The WSBA 2017 has the power to discipline these three groups of members.
23 Each group has its own discipline system, regulations and ethical requirements. The
24 system of each group is run by the WSBA 2017.

1 64. The Washington State Bar Association, the integrated bar association of the
2 Washington State Bar Act of 1933, has come to an end.

3 65. WSBA Board of Governors and Executive Director of the Association have
4 taken the entity of the Washington State Bar Association of 1933 (WSBA 1933) and
5 have turned it into a new and different association renamed “Washington State Bar
6 Association” (WSBA 2017).
7

8 **WSBA 2017**
9 **AN ACCESS TO JUSTICE ASSOCIATION**

10 66. The WSBA 2017 has its beginnings in two Admission and Practice Rules
11 (APR) of the Washington Supreme Court.

12 a. The first was Admission and Practice Rules (APR) 12, Limited Practice
13 Rule for Limited Practice Officers [Adopted effective January 21, 1983; amended
14 effective October 28, 1983; September 13, 1985; December 9, 1995; July 1,
15 2002; January 1, 2009; March 1, 2016].

16 b. The second was APR 28, Limited Practice Rule for Limited License Legal
17 Technicians [Adopted effective August 20, 2013; amended effective September
18 3, 2013; February 3, 2015; June 21, 2016].

19 67. The actions the Board of Governors took on September 30, 2016, which
20 created the WSBA 2017, are primarily as follows as described by WSBA 2017 at the
21 WSBA website: *Recap of September 29-30, 2016 Board of Governors Meeting.* ²
22

23 a. Limited License Legal Technician Resolution

24 _____
25 ² [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 To further acknowledge its support and advancement of the LLLT
2 program, the Board unanimously adopted a resolution that
3 reinforces the importance of the program and its alignment with
4 the mission of the organization. The resolution acknowledges the
5 exemplary job of the LLLT Board in implementing APR 28
6 enacted by the Supreme Court. It also expresses support for the
7 Board's efforts to explore a possible increase in the number of
8 LLLT practice areas recognized in the rule, as well as changes to
9 allow LLLTs to appear in court in a limited fashion, but the Board
10 did not take a position on those matters. The resolution can be
11 found on page 131 of the public materials.

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b. Suggested GR 12 Amendments

The Board took action on suggested amendments to GR 12.1 through GR 12.4, rearranging the order of the rules to accommodate a new section on regulatory objectives of the Supreme Court, that are based on the ABA Model Regulatory Objectives for the Provision of Legal Services. The Board adopted the suggested amendments as presented with two amendments. First, the Board voted to maintain the word "Association" in GR 12 and in the proposed Bylaw amendments to ensure consistency between GR 12 and the Bylaws. Second, the Board voted to amend the language in GR 12 and GR 12.2 to read "The Washington Supreme Court has inherent and plenary authority to regulate the practice of law," thus replacing the word "exclusive" with the word "plenary."

c. Proposed WSBA Bylaw Amendments

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

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

1 ACTION: ADOPTED

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

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

8 ACTION: ADOPTED

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

17 ACTION: ADOPTED

18 NOTE: Based on member feedback, the BOG voted not to delete
19 the language related to member referenda on license fees from
20 this section, even though it is redundant in light of later Bylaws
21 provisions relating to member referenda.

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

27 ACTION: ADOPTED AS AMENDED

28 Article V - Appropriations and Expenses - No substantive changes
29 proposed; conforming amendments only.

30 ACTION: ADOPTED

31 Article VI - Elections - Proposed amendments identify that there
32 will be a LLLT/LPO governor position on the BOG as well as two

1 community representative positions, and that these governors will
2 be elected by the BOG. One amendment to the proposal approved
3 at the meeting was to require that governors elected from
4 congressional districts must be lawyers.

ACTION: ADOPTED

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

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

ACTION: ADOPTED

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

ACTION: NOT ADOPTED. NO BOARD ACTION WAS TAKEN.

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

ACTION TAKEN: ADOPTED

21 Article XI - Section Policy Workgroup Recommendations - The
22 proposed changes create minimum governance standards and
23 clarify that Sections are entities of the bar and are obligated to
24 comply with the Bar's Bylaws and policies. Based on member
25 feedback, the Board agreed that more time is needed for
26 discussion and to gather comments.

ACTION: TABLED UNTIL THE NOVEMBER BOG MEETING

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

ACTION: ADOPTED

68. A most significant amendment regards the Executive Director and the power

1 of the Supreme Court to veto Board of Governor dismissal of the Executive Director.

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

3 The Executive Director is appointed by the BOG, serves at the
4 direction of the BOG, and may be dismissed at any time by the
5 BOG without cause by a majority vote of the entire BOG. If
6 dismissed by the BOG, the Executive Director may, within 14 days
7 of receipt of a notice terminating employment, file with the
8 Supreme Court and serve on the President, a written request for
9 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.]

10 69. WSBA 2017 has the following characteristics:

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

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

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

21 d. To practice the members of the bar and the limited practical professions
22 (LPO's and LLLT's) must pay dues in such amounts determined from time to
23 time.
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1 e. WSBA 2017 assumes it is in charge of discipline systems of lawyers, LPOs
2 and LLLTs.

3 f. The WSBA 2017 assumes it has authority to discipline lawyers who
4 practice law in the state of Washington, which discipline includes disciplinary
5 action of members of the bar of the Washington Supreme Court and the courts
6 of the State of Washington, including suspension from the practice of law to
7 disbarment; however, the WSBA 2017 does not have authority to operate the
8 Washington Lawyer Discipline System.
9

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

15 71. While the Court sets the mission of these boards, it provides no funding or
16 staffing for them. Instead, the Court expects funding and staffing to be provided by
17 the WSBA.
18

19 72. The dues paid by lawyer members of the WSBA 2017 which do not relate to
20 matters pertaining to lawyer members of the WSBA, are used to subsidize the boards
21 and the other activities imposed by the Court, including staffing of the LPO
22 membership and the LLLT membership.

23 **Washington Lawyer Discipline System**

24 73. The Washington Lawyer Discipline System is found in the Rules for
25

1 Enforcement of Lawyer Conduct (ELC).

2 74. Plaintiffs, as “lawyer[s] admitted to practice in this jurisdiction [are] subject
3 to the disciplinary authority of this jurisdiction and these Rules for Enforcement of
4 Lawyer Conduct.” (ELC) 1.2.

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

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

18 76. The WSBA describes itself as follows:

19
20 The WSBA both regulates lawyers under the authority of the
21 Court and serves its members as a professional association — all
22 without public funding. As a regulatory agency, the WSBA
23 administers the bar admission process, including the bar exam;
24 provides record-keeping and licensing functions; and administers
25 the lawyer discipline system. As a professional association, the
26 WSBA provides continuing legal education for attorneys, in
addition to numerous other educational and member-service
activities. <http://www.wsba.org/About-WSBA>.

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

27 77. The WSBA 2017 engages in these two functions described above from its
28 offices in Seattle, Washington at 1325 Fourth Ave., Suite 600, Seattle, WA
29 98101-2539.

30 78. **The WSBA 2017 Office of Disciplinary Counsel** operates from within the

1 offices of the WSBA in Downtown Seattle, King County, Washington.

2 79. The Washington Lawyer Discipline System may not even be physically
3 separate from the WSBA 2017.

4 80. It also may be the case that employees of the WSBA 2017 are shared with
5 the Discipline System.

6 81. The Washington Lawyer Discipline System persons, in sharing space and
7 staff at the offices of the WSBA, are in constant contact with officers and employees of
8 the WSBA who do not perform disciplinary functions.

9 82. The primary purpose of the **WSBA Executive Director** is to regulate and
10 discipline member lawyers and others.

11 83. **WSBA Executive Director** has her offices and staff in the offices of the
12 WSBA at 1325 Fourth Ave., Suite 600, Seattle, Washington.

13 84. **Hearings.** Discipline System Hearings by Hearing Officers take place in the
14 Offices of the WSBA.

15 85. **Disciplinary Board** and the **Review Committees.** The Disciplinary Board
16 conducts its hearings in the Offices of the WSBA. The Review Committees conduct
17 meetings in the Offices of the WSBA.

18 86. The staffing and space for the Disciplinary Board and the Review
19 Committees is provided by the WSBA at and within the Offices of the WSBA.

20 87. Staff supposedly relegated to the Washington Lawyer Discipline System mix
21 on a daily basis or whenever both are present at the offices of the WSBA with other
22 staff of the WSBA, its officers and the Board of Governors and its members.
23
24
25

1 **The WSBA Controls the Selection of WSBA Lawyers**
2 **Who Perform Functions of the System**

3 **88. WSBA Board of Governors.** The Board of Governors has overall authority
4 regarding the Discipline System. ELC 2.2 (a) provides:

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

6 (1) through the Executive Director, provides administrative and
7 managerial support to enable the Office of Disciplinary Counsel,
8 the Disciplinary Board, review committees, and other Association
9 staff and appointees to perform the functions specified by these
10 rules;

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

16 **89. WSBA Executive Director.** The WSBA Board of Governors is empowered
17 with the selection of the WSBA Executive Director.

18 a. The Executive Director serves at the pleasure of the Board of the Board
19 of Governors.

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

23 c. The Executive Director evaluates the performance of WSBA staff and sets
24 their salaries.

25 **Office of Disciplinary Counsel**

26 **90. Office of Disciplinary Counsel.** The WSBA, through its control of the
Executive Director, has control over the Office of Disciplinary Counsel.

1 91. Disciplinary counsel acts as counsel on all matters under these rules, and
2 performs other duties as required by these rules or the Chief Disciplinary Counsel.

3 92. **Chief Disciplinary Counsel.** ELC 2.8 (b) provides:

4 (b) **Appointment.** The Executive Director of the Association,
5 under the direction of the Board of Governors, employs a suitable
6 member of the Association as Chief Disciplinary Counsel, and in
7 consultation with the Chief Disciplinary Counsel, selects and
8 employs suitable members of the association as disciplinary
9 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.

10 93. Chief Disciplinary Counsel is the **Director of the Office of Disciplinary**
11 **Counsel.**

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

16 95. **Chief Hearing Officer.** The appointment of Chief Hearing Officer is
17 governed by ELC 2.8 (b):

18 (b) **Appointment.** The Executive Director of the Association, under
19 the direction of the Board of Governors, employs a suitable member
20 of the Association as Chief Disciplinary Counsel, and in consultation
21 with the Chief Disciplinary Counsel, selects and employs suitable
22 members of the association as disciplinary counsel, in a number to
23 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.

24 96. **Additional Disciplinary Counsel.** The Executive Director under the
25

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

4 **97. Special Disciplinary Counsel.** ELC 2.8.

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

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

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

11 b. **Appointment and Term of Office.** The Board of Governors, upon
12 recommendation of the Chief Disciplinary Counsel, appoints adjunct disciplinary
13 counsel. ELC 2.9 (b) provides:

14
15 The Board of Governors, upon the recommendation of the Chief
16 Disciplinary Counsel, appoints adjunct disciplinary counsel from
17 among the active members of the Association, who have been active
18 or judicial Association members for at least seven years and have no
19 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.

20 **99. Additional Disciplinary Counsel.** "The Executive Director of the
21 Association, under the direction of the Board of Governors, and in consultation with
22 the Chief Disciplinary Counsel, selects and employs suitable members of the
23 association as disciplinary counsel, in a number to be determined by the executive
24 director." ELC 2.8 (b).

1 100. **Special Disciplinary Counsel.** "Special disciplinary counsel may be
2 appointed by the Executive Director whenever necessary to conduct an individual
3 investigation or proceeding." ELC 2.8(b).

4 101. **Adjunct Disciplinary Counsel.** ELC 2.9.

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

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

12 102. **Removal of Appointees.** The power to appoint is also the power to
13 remove. ELC 2.10 provides:
14

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

20 103. **Disciplinary Selection Panel.**

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

25 b. **Appointment.** "The Panel is appointed by the Supreme Court, upon the

1 recommendation of the Board of Governors, shall include a Board of Governors
2 member who serves as its chair, and should include, without limitation, one or
3 more former Chairs of the Disciplinary Board, one or more current or former
4 hearing officers, and one or more former nonlawyer members of the Disciplinary
5 Board." ELC 2.2 (e).

7 **Hearing Officers**

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

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

13 106. **Appointment.** "The panel the Supreme Court, upon recommendation of
14 the Board of Governors in consultation with the Disciplinary Selection Panel, appoints
15 hearing officers to the hearing officer list. The list should include as many lawyers as
16 necessary to carry out the provisions of these rules effectively and efficiently." ELC
17 2.2 (e).

18 107. **Hearing Officer List.** The hearing officer selection panel makes
19 recommendations to the Board of Governors for appointment, reappointment, and
20 removal of hearing officers. The panel is appointed by the Board of Governors and
21 includes, but is not limited to, a Board of Governors member who serves as its chair,
22 one or more former Chairs of the Disciplinary Board, and one or more former
23 nonlawyer members of the Disciplinary Board.
24
25

1 108. **Payment.** Hearing Officers serve without pay, except for the Chief Hearing
2 Officer.

3 109. **Hearing Officers and the provisions of ELC 2.5.** ELC 2.5 provides:

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

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

10 (c) Appointment. The Supreme Court, upon recommendation of
11 the Board of Governors in consultation with the Disciplinary
12 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.

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

19 **Chief Hearing Officer**

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

Disciplinary Board ELC 2.3

111. **ELC 2.3** pertains to the Disciplinary Board.

(a) **Function.** The Board performs the functions provided under these 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.

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

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

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

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

115. The Disciplinary Board and Disciplinary Counsel breach what procedural

1 protections there are within the context of the Washington Lawyer Discipline System
2 Rules by using the Disciplinary Board to correct the work and decisions of the Hearing
3 Officers, and so as to ensure that the Supreme Court has a record which will sustain
4 appellate review.

5 116. The Disciplinary Board is assisted by WSBA staff (independent from the
6 staff that supports the Office of Disciplinary Counsel), including Assistant General
7 Counsel.
8

9 117. Such Assistant General Counsel also “serves as Counsel to the Disciplinary
10 Board and a Clerk to the Disciplinary Board.”

11 118. The Disciplinary Board is supposed to serve as an appellate court in the
12 lawyer disciplinary system, hearing appeals of hearing officer decisions, reviewing all
13 hearing officer recommendations for suspension or disbarment, and approving or
14 disapproving proposed stipulations to resolve disciplinary proceedings by suspension
15 or disbarment.
16

17 119. This conduct lacks impartiality.

18 120. The impartiality of the conduct is compounded by the fact that the
19 Disciplinary Board is a participant in each decision to prosecute an attorney.

20 121. If the Disciplinary Board determines a lawyer is to be suspended or
21 disbarred, the determination is automatically reviewed by the Washington Supreme
22 Court; the Court may also, in its discretion, accept review of other actions of the
23 Disciplinary Board.
24

25 122. Washington Lawyer Discipline System “ ‘actions’ include both disciplinary
26

1 ‘sanctions’ (which result in a permanent public disciplinary record) and admonitions
 2 (which result in a temporary public disciplinary record generally retained for only five
 3 years).”

4 123. Disciplinary sanctions are, in order of increasing severity, reprimands,
 5 suspensions, and disbarments.

6 124. **Persons Appointed to WSBA Discipline System Positions.** The WSBA
 7 controls the selection of people who are selected to the various positions in the
 8 Washington Lawyer Discipline System. See the spreadsheet below:
 9

| 10 Person or Group | 11 Authority to Appoint | |
|---|---|--|
| 12 Board of Governors (BOG) | 13 WSBA Members | |
| 14 Executive Director | 15 Board of Governors | |
| 16 Disciplinary Selection Panel | 17 Recommendation of the Board of Governors | 18 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. |
| 19 Chief Disciplinary Counsel 20 ELC 2.8 (b) | 21 Executive Director | 22 "under the direction of the Board of Governors" |

| | | | |
|----------------------------------|---|--|---|
| 1 2 3 4 5 6 7 | 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 |
| 8 | Special Disciplinary Counsel | Executive Director | |
| 9 10 11 12 | 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. |
| 13 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 22 | 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 7 | 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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125. In light of the above and in light of other factual statements made in this Complaint, there can be no question that the WSBA Washington Discipline System violates procedural due process of law by virtue of the fact that the WSBA controls the appointment of all persons involved in the Discipline System.

13 14

Discrete Violations of Procedural Due Process

15
16
17

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

18
19
20
21
22

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

23
24
25

128. Under ELC 5.3 (a) "[d]isciplinary counsel must review and may investigate any alleged or apparent misconduct by a lawyer and any alleged or apparent incapacity of a lawyer to practice law, whether disciplinary counsel learns of the

1 misconduct by grievance or otherwise. If there is no grievant, disciplinary counsel
2 may open a grievance in the name of the Office of Disciplinary Counsel."

3 129. ELC 5.3 (a) limits the scope of discipline counsel investigation.

4 130. Discipline Counsel does not limit itself to the grievance, but at times uses
5 the grievance as an excuse to monitor the conduct of a respondent so as to find a
6 violation beyond that described or related to the perimeters of the grievance.
7

8 **131. Disciplinary Counsel and the Review Committees.** ELC 5.7 (c) and (d)
9 provide:

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

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

17 (1) dismiss the grievance;

18 (2) affirm the dismissal;

19 (3) dismiss the grievance and issue an advisory letter under
20 rule 5.8;

21 (4) issue an admonition under rule 13.5;

22 (5) order a hearing on the alleged misconduct; or

23 (6) order further investigation as may appear appropriate.

24 132. Review Committees decide whether a matter is to go to hearing. Thus, the
25 Review Committees and their members are part of the prosecution.

26 133. Not only are committee members part of the prosecution, they are

1 members of the Disciplinary Board. The work the Disciplinary Board is thus tainted.

2 134. This unfairness is made even more worse by the fact that the Disciplinary
3 Board is allowed to amend or rewrite Findings of Fact, Conclusions of Law and
4 hearing officer recommendations. That is, the Disciplinary Board is able to and does
5 ensure that the record of the discipline matter will stand up before the Supreme
6 Court.

7
8 135. The lawyer in question does not have an opportunity to play a part in the
9 work of the Disciplinary Board.

10 136. This amending and or rewriting is assisted by a Disciplinary Counsel.

11 137. **Three Review Committees.** Three are several review committees. The
12 members of each review committee are members of the Disciplinary Board. As a
13 result, each member of the Disciplinary Board is inclined to support the prosecution
14 decisions of other Disciplinary Board members.

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

20
21 139. Hearing officers are inadequately trained to act as fair and impartial
22 hearing officers.

23 140. Not all hearing officers understand the trial process and the rules of
24 evidence.

1 141. Hearing officers allow hearsay testimony and do not understand the rules
2 of evidence as to hearsay testimony.

3 142. Hearing officers do not understand that accused attorneys have a right to
4 confront witnesses.

5 143. Hearing officers engage in improper conduct during hearings subjecting
6 themselves to threats by disciplinary counsel that counsel might seek a new hearing
7 and a new hearing officer. Hearing officers overcome such threats by ruling in favor
8 of the WSBA and disciplinary counsel.
9

10 144. Hearing officers do not understand the meaning of standards of proof and
11 how they are to be applied.

12 145. Hearing officers do not know how to prepare proper Findings of Fact and
13 Conclusions of Law with respect of their decisions.

14 146. Hearing officers impose penalties such as restitution even though the
15 WSBA and its disciplinary counsel have not sought such penalties.
16

17 147. Hearing officers rely on the Disciplinary Board to correct their mistakes and
18 shortcomings.

19 148. Hearing officers are supervised by a Chief Hearing Officer who assigns
20 cases to the hearing officers, provides training for the hearing officers, and monitors
21 their performance. An Assistant General Counsel provides staff support to the Hearing
22 Officer Panel.

23 149. Hearing officers may seek the advice of the Chief Hearing Officer regarding
24 cases before a hearing officer.
25

1 150. Hearing officers are allowed to serve in violation of the Washington Canons
2 of Judicial Conduct.

3 151. The Washington Lawyer Discipline System does not require hearing officers
4 to comply with the Washington Code of Judicial Conduct when in fact, the Code does
5 apply by a reading of its own terms and the provisions of ELC 2.6(c).
6

7 152. Hearing officer conduct and decisions are sometimes reviewed by the Chief
8 Hearing Officer. Because the hearing officer was selected by the Chief Hearing
9 Officer, there is a conflict of interest, violation of appearance of fairness, and violation
10 of disqualification rules.

11 153. Hearing officers have no experience or knowledge if any as to what
12 combinations of fact and law precipitate conclusions of law as to ethical violations.

13 154. **Standard of Proof.** Under the circumstances of the Washington Lawyer
14 Discipline System, the standard of proof should be at least "clear and convincing
15 evidence" the standard applied in physician discipline. *Bang D. Nguyen v. Dep't of*
16 *Health*, 144 Wash. 2d 516, 518, 29 P.3d 689 (2001); *Hardee v. DSHS*, 172 Wash. 2d
17 1, 9, 256 P.3d 339 (2011).
18

19 155. **Expert Witnesses.** Under *Eriks v. Denver*, 118 Wash. 2d 451, 824 P.2d
20 1207 (1992), it was held that whether an attorney's conduct violated the rules of
21 professional conduct is a question of law. Thus, no expert testimony need be allowed.
22 Thus, the question of whether in law, an accused lawyer's conduct violated a rule of
23 professional conduct is in the hands of the WSBA discipline counsel prosecuting the
24 case, the hearing officer, and a Review Committee.
25

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

7
8 157. The Washington Supreme Court has imposed certain rules and practices
9 regarding the appeals of discipline cases against lawyers which, in essence, direct the
10 attorney discipline decisions of the Supreme Court.

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

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

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

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

23 158. **Sanctions.** Sanctions in attorney discipline matters are determined by the
24 court provided in the American Bar Association's Standards for Imposing Lawyer
25

1 Sanctions (1991 & Supp. 1992). *Discipline of Hall*, 180 Wash. 2d 821, 834, 329 P.3d
2 870 (2014). Again, the court has deferred to others for the decision the court should
3 make, is required to make. Again, a fair hearing is denied.

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

6
7 The ABA Standards for imposing lawyer discipline provide:

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

12 STANDARDS FOR IMPOSING LAWYER SANCTIONS as approved, February 1986, and as
13 amended, February 1992, 1.3.

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

16 **FIRST CLAIM FOR RELIEF**
17 **Declaratory Judgment**

18 160. Plaintiff Caruso and Plaintiff Ferguson and other class members restate
19 and reallege the preceding paragraphs and incorporate them herein by reference as
20 though fully set forth.

21 161. Defendants currently maintain and actively enforce a set of laws,
22 customs, practices, and policies under color of state law that deprive Plaintiffs and
23 class members of their rights, privileges and/or immunities secured by the First, Fifth
24 and Fourteenth Amendments to the United States Constitution, and, therefore,

1 Defendants are liable to Plaintiffs and class members under 42 U.S.C. § 1983.

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

4 163. The differences are real and may only be resolved by declaratory
5 judgments as to the differences.

6 164. A true “case or controversy” exists between the parties as to these
7 matters.

8 165. Plaintiffs and class members have no adequate legal remedy by which to
9 prevent or minimize the continuing irreparable harm to their constitutional rights.

10 166. Declaratory relief will clarify the rights and obligations of the parties and
11 is, therefore, appropriate to resolve this controversy.

12 167. Plaintiffs and the class they seek to represent, will be irreparably harmed
13 if an injunction does not issue enjoining Defendants from compelling Plaintiffs and
14 class members to be a members of the WSBA 2017 and from compelling Plaintiffs to
15 pay dues to the WSBA 2017.

16 168. Plaintiffs and the class they seek to represent, have no plain, speedy, or
17 adequate remedy at law.

18 169. If not enjoined by this Court, Plaintiffs on behalf of themselves and the
19 class they represent, allege on information and belief that Defendants will continue to
20 violate the law as described herein.

21 170. Plaintiff Caruso and Plaintiff Ferguson and other class members are
22 therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C. §§ 2201,
23

1 2202.

2 **SECOND CLAIM FOR RELIEF**
3 **Right of Non-Association**
4 **First and Fourteenth Amendments**

5 171. Plaintiff Caruso and Plaintiff Ferguson and other class members restate
6 and reallege the preceding paragraphs and incorporate them herein by reference as
7 though fully set forth.

8 172. The Plaintiff and class members cannot be compelled to be a members of
9 WSBA 1933 or WSBA 2017.

10 173. Compelled membership violates Plaintiffs' and class members' rights
11 under the First and Fourteenth Amendments to the United States Constitution.

12 174. A person has a right not to associate as well as to associate.

13 175. Defendants are depriving Plaintiffs and the class they represent from the
14 right not to associate by compelling association, by compelled membership in WSBA
15 1933 or WSBA 2017.

16 176. Accordingly, Defendants currently maintain and actively enforce a set of
17 laws, customs, practices, and policies under color of state law that deprive Plaintiffs
18 and other class members of rights, privileges and/or immunities secured by the First
19 and Fourteenth Amendments, and, therefore, Defendants are liable to Plaintiffs and
20 other class members under 42 U.S.C. § 1983.

21 177. Plaintiff Caruso and Plaintiff Ferguson and other class members have no
22 adequate legal remedy by which to prevent or minimize the continuing irreparable
23 harm to his constitutional rights.
24

1 178. Plaintiff Caruso and Plaintiff Ferguson and other class members are
2 therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C. §§ 2201,
3 2202.

4 **THIRD CLAIM FOR RELIEF**
5 **Freedom of Speech**
6 **First and Fourteenth Amendments**

7 179. Plaintiff Caruso and Plaintiff Ferguson and other class members restate
8 and reallege the preceding paragraphs and incorporate them herein by reference as
9 though fully set forth.

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

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

21 182. Specifically, those rights have been violated by Defendants' imposition of
22 mandatory dues as a condition of membership to the Washington State Bar
23 Association (WSBA), which is a prerequisite to the ability to practice law in the State
24

1 of Washington.

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

8 184. Plaintiffs and other class members have no adequate legal remedy by
9 which to prevent or minimize the continuing irreparable harm to their constitutional
10 rights.

11 185. Plaintiff Caruso and Plaintiff Ferguson and other class members are
12 therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C. §§ 2201,
13 2202.
14

15 **FOURTH CLAIM FOR RELIEF**
WSBA Discipline System No Longer Exists

16 186. Plaintiff Caruso and Plaintiff Ferguson and other class members restate
17 and reallege the preceding paragraphs and incorporate them herein by reference as
18 though fully set forth.

19 187. The WSBA 2017 cannot subject Plaintiffs to the Washington Lawyer
20 Discipline System found in ELC (Rules for Enforcement of Lawyer Conduct):
21

- 22 a. The ELC designates the WSBA of 1933. ELC 2.2.
23 b. The ELC does not does not designate the WSBA 2017.
24 c. Indeed, the ELC cannot designate the WSBA 2017 because it is a
25

1 mandatory association of lawyers and others.

2 188. The power of discipline of the WSBA 1933 is contained in the Bar Act.
3 RCW 2.48.060.

4 189. This power of discipline described and permitted in RCW 2.48.060 is tied
5 to the fact that the WSBA is a compelled member organization consisting only of
6 Washington lawyers. RCW 2.48.010, RCW 2.48.021.

7
8 190. The ELC does not contemplate that the WSBA 2017 has the power to
9 discipline.

10 191. Subjecting a lawyer to a discipline system affects a lawyer's fundamental
11 rights of speech and association or non-association.

12 192. In addition, a lawyer's fundamental right to procedural due process of
13 law will be affected by a lawyer being compelled to submit to a discipline system of a
14 the WSBA 2017 because the placement of the system in such organization fails
15 constitutional scrutiny.

16 193. Lawyer discipline can be better provided by a system independent of
17 WSBA 1933 or WSBA 2017.

18
19 194. Accordingly, Defendants currently maintain and actively enforce a set of
20 laws, customs, practices, and policies under color of state law that deprive Plaintiffs
21 and other class members of rights, privileges and/or immunities secured by the First
22 and Fourteenth Amendments, and, therefore, Defendants are liable to Plaintiffs and
23 other class members under 42 U.S.C. § 1983.

24 195. Plaintiffs and other class members have no adequate legal remedy by
25

1 which to prevent or minimize the continuing irreparable harm to their constitutional
2 rights.

3 171. Plaintiff Caruso and Plaintiff Ferguson and other class members are
4 therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C. §§ 2201,
5 2202.

6
7 **FIFTH CLAIM FOR RELIEF**
8 **Washington Lawyer Discipline System Violates**
9 **Due Process of Law under Fifth and Fourteenth Amendments**

10 196. Plaintiff Caruso and Plaintiff Ferguson and other class members restate
11 and reallege the preceding paragraphs and incorporate them herein by reference as
12 though fully set forth.

13 197. The Fifth and Fourteenth Amendments guarantee to Plaintiffs and the
14 class members procedural due process of law.

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

17 199. The Discipline System violates procedural due process of law there are
18 several discrete aspects of the system which violate due process of law as the facts
19 show and will show.

20 200. Accordingly, Defendants currently maintain and actively enforce a set of
21 laws, customs, practices, and policies under color of state law that deprive Plaintiffs
22 and other class members of rights, privileges and/or immunities secured by the First
23 and Fourteenth Amendments, and, therefore, Defendants are liable to Plaintiffs and
24 other class members under 42 U.S.C. § 1983.

1 201. Plaintiffs and other class members have no adequate legal remedy by
2 which to prevent or minimize the continuing irreparable harm to their constitutional
3 rights.

4 202. Plaintiff Caruso and Plaintiff Ferguson and other class members are
5 therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C. §§ 2201,
6 2202.

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

11 203. Plaintiff Caruso and Plaintiff Ferguson and other class members restate
12 and reallege the preceding paragraphs and incorporate them herein by reference as
13 though fully set forth.

14 204. The Doctrine of Constitutional Scrutiny includes various levels of
15 scrutiny): Strict scrutiny is described in the following:

16 The words 'strict judicial scrutiny' appear nowhere in the U.S.
17 Constitution. Neither is there any textual basis, nor any
18 foundation in the Constitution's original understanding, for the
19 modern test under which legislation will be upheld against
20 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.

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

22 205. There are certain facts which establish that the infringements of Plaintiffs'
23 and class members' fundamental constitutional rights under the doctrine of
24 constitutional scrutiny cannot be permitted.
25

1 206. The infringements of the discipline system to Plaintiffs' and other class
2 members' fundamental rights cannot be supported under constitutional scrutiny -
3 whether strict or exacting scrutiny.

4 207. Plaintiffs' and other class members' fundamental rights of procedural due
5 process under the Fifth and Fourteenth Amendments to the United States Constitution
6 are also affected by forcing Plaintiffs' to subject themselves to the jurisdiction of the
7 ELC and also violate constitutional scrutiny.

8 208. Such rights are fundamental, (a) the legislature must have passed the
9 ELC to further a "compelling governmental interest," and must have be narrowly
10 tailored to achieve that interest.

11 209. Ever since *NAACP v. Alabama*, 357 U.S. 449 (1958), freedom of
12 association has been a fundamental right deserving of First and Fourteenth
13 Amendment protection. Correspondingly, "[f]reedom of association . . . plainly
14 presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S.
15 609, 623 (1984).

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

19 211. We also know that the *Lathrop* plurality did not apply constitutional
20 scrutiny to its analysis and that the doctrine did begin to be refined into a
21 constitutional mainstay until after *Lathrop*. Stephen A. Siegel, *The Origin of the*
22 *Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 390
23
24
25

1 (2006).

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

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

9 First, there must be a comprehensive regulatory scheme
10 involving a “mandated association” among those who are
11 required to pay the subsidy. . . . Such situations are
12 exceedingly rare because, as we have stated elsewhere,
13 mandatory associations are permissible only when they
14 serve a “compelling state interes[t] . . . that cannot be
15 achieved through means significantly less restrictive of
16 associational freedoms.” . . .

17 Second, even in the rare case where a mandatory
18 association can be justified, compulsory fees can be levied
19 only insofar as they are a “necessary incident” of the
20 “larger regulatory purpose which justified the required
21 association.”

22 213. The *Knox* exacting scrutiny test can be rephrased as follows:

- 23 a. There must be a "comprehensive regulatory scheme."
24 b. The comprehensive scheme must involve a "mandated association"
25 among those required to pay the subsidy.
26 c. The comprehensive scheme must serve a compelling state interest.
27 d. The compelling state interest cannot be achieved through means
28 significantly less restrictive of associational freedoms.

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

4 214. Plaintiff Caruso and Plaintiff Ferguson and other class members are
5 therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C. §§ 2201,
6 2202.
7

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiff Caruso and Plaintiff Ferguson on behalf of themselves
10 and the class they seek to represent, respectfully request the following relief:

11 1. Entry of judgment declaring that Plaintiffs and other class members have
12 First Amendment rights of non-association, and therefore cannot be compelled to be a
13 member of either to WSBA 1933 or WSBA 2017;

14 2. Entry of judgment declaring that Plaintiffs and other class members have
15 First Amendment rights of freedom of speech, and therefore cannot be compelled to
16 pay dues to the WSBA 1933 or WSBA 2017;

17 3. Entry of a judgment declaring that Plaintiffs and other class members' Fifth
18 and Fourteenth Amendment rights to procedural due process of law and that the
19 Washington Lawyer Discipline System violates such rights;

20 4. Declare that WSBA 2017 does not have the power to discipline lawyers
21 unless it is under RCW 2.48.060, which section only applies to members of the state
22 bar, which membership is limited to lawyers admitted to the bar of the Washington
23 State Supreme Court;
24
25

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

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

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

9 8. Award Plaintiffs and other class members their costs, expenses, and
10 attorneys' fees by law, including 42 U.S.C. §1988; and

11 9. Award Plaintiffs and other class members such further relief as is just and
12 equitable.

13 January 3, 2017.

14 Respectfully submitted,

15 EUGSTER LAW OFFICE PSCs

16
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