

HOUSE BILL REPORT

ESHB 1788

As Amended by the Senate

Title: An act relating to the Washington state bar association.

Brief Description: Concerning the Washington state bar association.

Sponsors: House Committee on Civil Rights & Judiciary (originally sponsored by Representative Stokesbary).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/19/19, 2/22/19 [DPS].

Floor Activity:

Passed House: 3/7/19, 96-1.

Senate Amended.

Passed Senate: 4/10/19, 26-18.

Brief Summary of Engrossed Substitute Bill

- Recognizes the inherent plenary authority of the Washington Supreme Court to regulate court-related functions, including the practice of law and administration of justice.
- Repeals most of the State Bar Act.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 15 members: Representatives Jinkins, Chair; Thai, Vice Chair; Irwin, Ranking Minority Member; Dufault, Assistant Ranking Minority Member; Goodman, Graham, Hansen, Kilduff, Kirby, Klippert, Orwall, Shea, Valdez, Walen and Ybarra.

Staff: Cece Clynch (786-7195).

Background:

Bar Associations, Generally.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Across the country, the structure of bar associations varies. Some, like Washington, have what is known as an "integrated bar," which means that the WSBA administers regulatory functions as well as professional association services. Other states have voluntary bar associations and members choose to join for professional services while the state's Supreme Court oversees all regulatory functions. In still others, membership is mandatory but the mandatory bar association may or may not administer regulatory functions.

Washington State Bar Association.

Washington's Constitution, Article II, vests the legislative power of the State in the Legislature, consisting of the House of Representatives and the Senate. Article IV vests the judicial power of the State in the Judiciary.

Between 1888 and 1933, the bar association was a voluntary professional association. The Washington Supreme Court (Court) and a board of state bar examiners administered the admission and discipline of attorneys. In 1933 the Legislature enacted the Washington State Bar Act (Act) which created an association known as the Washington State Bar Association (WSBA) to be governed by a board of governors charged with the executive functions and the enforcement of many of the provisions of the Act. Among other things, the board was empowered to adopt rules concerning membership, classification of membership, privileges of membership, and the collection, deposit, and disbursement of membership and admission fees, penalties, and all other funds.

The Act provides that in order to practice law in Washington a person has to be a member of the WSBA. It also includes provisions relating to: admission and disbarment; qualifications on admission; the oath on admission; admission of veterans; membership fees for active and inactive members; suspension for nonpayment; the effect of noncompliance with a child support order; the unlawful practice of law; restrictions on practice by certain officers such as judges, sheriffs, coroners, clerks of court, and prosecutors; grounds for disbarment; and the code of ethics.

The Court has held that as a separate, independent branch of government, it has inherent constitutional powers to control the WSBA and its functions. Court rules known as General Rules (GR) provide that the Court has inherent and plenary authority to regulate the practice of law, and that the Court ensures the integrity of the legal profession and protects the public by adopting rules for the regulation of the practice of law and actively supervising persons acting under the its authority. The rules further provide that the Court authorizes and supervises the WSBA, which carries out the administrative responsibilities and functions expressly delegated by the Court (GR 12.2).

The Admission and Practice Rules (APR) provide that the Court has the exclusive responsibility and the inherent power to establish the qualifications for admission to practice law. Pursuant to APR 1(b), a person shall not appear as an attorney or counsel in any of the courts or practice law in Washington unless that person has passed an examination for admission, has complied with the APRs, and is an active member of the WSBA. A person is admitted to the practice of law and becomes an active member only by order of the Court.

In order to remain active, a member must pay an annual fee. For 2019 the WSBA license fee for lawyers admitted to any bar before 2017 was \$453. A mandatory client protection fund

fee of \$30 was also required. Lawyers admitted to any bar before 2017 were allowed a Keller deduction of \$1.25 if they so chose. (In a United States Supreme Court case, *Keller v. State Bar of California*, the Supreme Court ruled that a bar association may not use mandatory member fees to support political or ideological activities that are not reasonably related to the regulation of the legal profession or improving the quality of legal services. A bar association is required to identify that portion of mandatory license fees that go to such activities and establish a system whereby objecting members may either deduct that portion of their fees or receive a refund.)

The WSBA also administers professional association services. Among these are voluntary, topical sections which members may choose to join, and for which a separate fee is paid.

In September 2018 the Court announced that it would undertake a review of the structure of the WSBA to determine whether it is compliant with recent United States Supreme Court opinions regarding anti-trust law (*North Carolina State Board of Dental Examiners v. Federal Trade Commission*) and the First Amendment (*Janus v. American Federation of State, County, and Municipal Employees*).

Summary of Engrossed Substitute Bill:

The Legislature recognizes the inherent plenary authority of the Washington Supreme Court (Supreme Court) to regulate court-related functions, including the practice of law and the administration of justice, and therefore the Legislature is repealing the State Bar Act.

All but two sections of the State Bar Act are repealed. The two sections remaining concern the unlawful practice of law and certain restrictions on the practice of law applicable to judges, sheriffs, coroners, clerks of court, and prosecuting attorneys in cases in which there may be a conflict of interest. These are recodified in a chapter pertaining to attorneys. In the section concerning the unlawful practice of law, references to the state bar are stricken and reference is made to the authority of the Supreme Court.

EFFECT OF SENATE AMENDMENT(S):

The Senate striking amendment:

- amends the intent section to recognize that the Washington State Supreme Court (Court) has commissioned a work group to undertake a review of the structure of the Washington State Bar Association (WSBA), and that because the Court may conclude that it is necessary or desirable to make changes that may be inconsistent with the provisions of the 1933 State Bar Act (Act), the Legislature intends to preserve the existing WSBA but repeal provisions of the Act that may be interpreted as limiting the Court's authority to make structural or governance changes that the Court determines to be necessary or desirable;
- recodifies, rather than repeals, the section of the Act that creates the WSBA. Amends the section to: provide that the WSBA is an agency within the judicial branch; acknowledge that the Court may designate that the agency be known by another name; recognize the Court's authority to provide for the powers, governance, and operation of the association, including the establishment of fees, the practice of law, and the administration of justice; and, provide that if the Court delegates

- responsibilities for governance to a board, committee, or other group, a majority of the members must be subject to election by the membership;
- extends the effective date from January 31, 2020 to July 1, 2020; and
 - mirrors the engrossed substitute House bill insofar as it:
 - amends and recodifies one section (concerning the unlawful practice of law);
 - recodifies another section (concerning restrictions on practice in the event of particular conflicts of interest); and
 - repeals the 22 remaining sections of the Act.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on January 31, 2020.

Staff Summary of Public Testimony:

(In support) The dues charged to lawyers are close to \$500, which is far higher than for most professions, and the majority of lawyers do not take advantage of the programs offered by the Washington State Bar Association (WSBA). Contrary to popular myth, not all lawyers are well paid. There are some lawyers in large firms who are very successful, but then there are many lawyers in solo practice or who work for nonprofits or in the public sector who are not earning much money. The latter may still have student loans to repay, and for those in solo practice they have to pay the dues out-of-pocket. The bill is modelled after a New York law, which bifurcates the licensing piece, which rests with the court, and the voluntary programs which are handled by voluntary bar associations. There should be mandatory membership, but it should be bifurcated from things like group insurance and discounted continuing legal education classes, which can be handled by voluntary associations. This is long overdue. The majority of states' bar associations are under state control. As it is now, there is a perception that the foxes are in charge of the henhouse with respect to lawyer discipline. With this bill, discipline would be regular and certain. This bill would end egregious behavior such as that exhibited by one lawyer who sued on behalf of a dead woman and was ultimately fined \$40,000. Two recent United States Supreme Court decisions, regarding anti-trust law and the First Amendment, establish that the WSBA should be under Washington Supreme Court control.

(Opposed) None.

Persons Testifying: Representative Stokesbary, prime sponsor; and Arthur West.

Persons Signed In To Testify But Not Testifying: None.