

Limitations on the Use of Mandatory Dues

Often during BOG meetings reference is made to “Keller,” generally in the context of whether an action under consideration is or would be “a violation of Keller.” “Keller” refers to a decision of the US Supreme Court that limits the use of mandatory dues.

The Keller Decision

In *Keller v. State Bar of California*, 499 US 1,111 SCt 2228 (1990), the US Supreme Court held that an integrated bar's use of compulsory dues to finance political and ideological activities violates the 1st Amendment rights of dissenting members when such expenditures are not "necessarily or reasonably incurred" for the purpose of regulating the legal profession or improving the quality of legal services.

The activities complained of by the petitioners (21 members of the bar) included lobbying for or against state legislation,¹ filing amicus briefs in various cases,² holding an annual conference of delegates at which resolutions were approved,³ and engaging in a variety of educational programs. The California Supreme Court had rejected the petitioners' challenge, holding that the State Bar was a state agency and, as such, could use the dues for any purpose within its broad authority.

The Supreme Court reversed, holding that the State Court's determination as to the bar's status was not binding when the determination was essential to the decision of a federal question. The Supreme Court found that the bar's role in governance of the legal profession was essentially advisory in nature, since final authority to establish rules of conduct and discipline lawyers for violating them rested with the State Court. The Supreme Court concluded that the relationship between a state bar and its members was analogous to that of a union and its members. The Court pointed to its decision in *Abood v. Detroit Bd. Of Education*, 431 US 209,97 SCt 1782 (1977), holding that the use of compulsory union dues to express political views or advance ideological causes not germane to the union's collective-bargaining duties infringed on the dissenting members' constitutional rights.

Applying the *Abood* analysis to the California State Bar, and finding that the "compelled association and integrated bar are justified by the State's interest in regulating the legal

¹ The legislation for or against which the bar lobbied covered such topics as compelling state employees to take polygraph tests; prohibiting possession of armor-piercing ammunition; criminalizing the sale or display of drug paraphernalia to minors; imposing life without parole on minors tried as adults and convicted of murder; and creating an unlimited right of action to sue anyone causing air pollution.

² The cases involved the constitutionality of a victim's bill of rights; the power of the worker's compensation board to discipline attorneys; and a requirement that attorney-public officials disclose the names of clients.

³ The resolutions endorsed gun control; disapproved the statements of a senatorial candidate regarding court review of a victim's bill of rights; endorsed a nuclear weapons freeze initiative; and opposed federal legislation limiting federal court jurisdiction over abortions, school prayer and busing.

profession and improving the quality of legal services,⁴ the Supreme Court held that the California State Bar could therefore constitutionally fund activities germane to those goals, but could not fund activities of an ideological nature that fall outside of those areas. The Court recognized that it was not drawing bright lines:

The difficult question, of course, is to define the latter class of activities....Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. 499 US 1 at 14.

However, the Court suggested that the extreme ends of the spectrum are clear. Compulsory dues may not be spent to endorse a gun control or nuclear freeze initiative, but there is no basis to object to the use of dues for activities connected with lawyer discipline or the development of ethical codes for the profession.⁵

The Purposes of the Oregon State Bar

ORS 9.080(1) charges the Board of Governors to "direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice."⁶ Article 1.2 of the OSB Bylaws describes the purposes of the OSB as:

(A) We are a professional organization, promoting high standards of honor, integrity, professional conduct, professional competence, learning and public service among the members of the legal profession.

(B) We are a provider of assistance to the public seeking to ensure the fair administration of justice for all and the advancement of the science of jurisprudence, and promoting respect for the law among the general public.

(C) We are a partner with the judicial system, seeking to ensure a spirit of cooperation between the bench and the Bar.

(D) We are a regulatory agency providing protection to the public, promoting the competence and enforcing the ethical standards of lawyers.

(E) We are leaders helping lawyers serve a diverse community.

⁴ The State Bar of California's statutory mission is to promote "the improvement of the administration of justice."

⁵ The case was remanded with instructions that the State Bar could remedy its problem by developing procedures for dissenting members to challenge expenditures.

⁶ Webster's Dictionary defines jurisprudence as the "philosophy of law or the formal science of law." "The administration of justice" has been defined in case law variously as the "systematic operation of the courts," the "orderly resolution of cases," the existence of a "fair and impartial tribunal," and "the procedural functioning and substantive interest of a party in a proceeding."

(F) We are advocates for access to justice.

Pursuant to OSB Bylaw 12.1 the bar's legislative and policy activities must be reasonably related to any of the following:

1. Regulating and disciplining lawyers;
2. Improving the functioning of the courts, including issues of judicial independence, fairness, efficacy and efficiency;
3. Making legal services available to society;
4. Regulating lawyer trust accounts;
5. The education, ethics, competence, integrity and regulation of the legal profession;
6. Providing law improvement assistance to elected and appointed government officials;
7. Issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or
8. Issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.⁷

Post-Keller Developments

Most of the cases involving the use of mandatory dues since Keller relate to the challenge procedures established by state bars in the wake of Keller. There are a few cases, however, that offer some guidance in determining what are proper expenditures.⁸

A. Schnieder v. Colegio de Abogados de Puerto Rico, 917 F2d 620 (1st Cir. 1990).

This case was brought by five members of the Colegio (the bar organization) who objected to the use of their dues to espouse views and support causes which they contended were controversial and far removed from the concerns of lawyers, including supporting the Sandinista Front for National Liberation in Nicaragua, opposing the draft, and amending Puerto Rico's election laws. The Colegio argued that these activities were permissible under its articulated purposes, which included "the creation of a strongly pluralistic society" and "contributing to the betterment of the administration of justice."

The 1st Circuit rejected this as too broad a definition of the Colegio's purposes to justify mandatory financial support. Instead, it endorsed the district court's list of permissible purposes for which financial support may be compelled: monitoring attorney discipline, ensuring attorney competence, increasing the availability of legal services and improving court operations. Activities that promote one or more of those purposes could include continuing

⁷ Prior to 2003, numbers 1-5 were articulated in *former* BOG Policy 11.800(A). A sixth category was "other activities where the issue is recognized as being of great public interest, lawyers are especially suited by their training and experience to evaluate and explain the issue; and the subject matter affects the rights of those likely to come in contact with the judicial system."

⁸ Last updated 2009

legal education, legal aid services, public education on substantive areas of law, and public commentary on such matters as rules of evidence and attorney advertising. The 1st Circuit recognized that these purposes revolve around the "role of the lawyer as lawyer, rather than relying on the lawyer's more generic role as an informed and perhaps influential member of a complex society."

The 1st Circuit then went further, finding that the district court's list fell at the extreme end of the spectrum of permissible activities and that neither *Keller* nor any of the union cases that begot *Keller* required such a narrow interpretation of "germane" activities that could be funded with mandatory dues. Lobbying is permissible on "target issues...narrowly limited to regulating the legal profession or improving the quality of legal service" such as appropriations for new judicial positions, increased salaries for government attorneys, certification of legal specialists, or restrictions on lawyer advertising. Participation in efforts to amend technical, non-ideological aspects of the substantive law is also a permissible use of mandatory dues. By contrast, mandatory dues could not be used to lobby upon "partisan political views rather than on lawyerly concerns" such as the legal status of Puerto Rico, promotion of no-fault insurance, endorsement of pro-life amendments to the constitution or support for the death penalty.⁹

The court also cautioned against mixing permissible and impermissible activities:

[W]here the permissible and impermissible are intertwined beyond separation, the objector should be entitled to a full rebate for the cost of the function.

B. The Florida Bar v. Frankel, 581 So2d 1294 (Fla. 1991).

In 1989, in *The Florida Bar v. Schwarz*, 552 So2d 1094 (Fla. 1989), the Florida Supreme Court adopted guidelines for the Florida bar's lobbying. The guidelines were essentially identical to those in former OSB Policy 11.800(A).¹⁰ The first five subject areas (regulation of attorneys, improving the functioning of the courts, increasing the availability of legal services, regulating attorney trust accounts, and education and competence of the legal profession), were determined to fall clearly within the bar's mission relating to the administration of justice and the advancement of the science of jurisprudence. Florida's sixth category (other issues of great public interest about which lawyer are especially suited to evaluate and explain, and which affect the rights of those likely to come into contact with the judicial system) was justified as consistent with the purposes of an integrated bar.¹¹ When the guidelines were adopted, the court commented:

⁹ Looking to the specific complaints of the plaintiffs, the court found that the Colegio's involvement in the following activities was outside the narrow categories for which financial support could be compelled: studying the constitutional development of Puerto Rico and issuing a report on procedures for decolonization; developing a code of ethics to regulate public debate by political candidates; and nuclear disarmament.

¹⁰ See fn. 7.

¹¹ At the time *Schwarz* was decided, *Keller* was pending before the United States Supreme Court. The Florida court noted the position taken by the California Supreme Court in *Keller* and concluded it was not authorizing such broad legislative authority (as was eventually limited by the US Supreme Court).

It appears that the bar has an obligation, grounded upon the mandate of the integration rule setting forth the Bar's very purpose for existence, to speak out on appropriate issues concerning the court and the administration of justice and advise the legislative and executive branches of government of its collective wisdom with respect to these matters.

Two years later, in *Frankel*, the Florida court was called upon to apply the guidelines it adopted in *Schwarz*. A bar member challenged the bar's adoption of a lobbying position supporting various legislative measures involving children including expansion of the WIC program, extending Medicaid coverage for pregnant women, development of sex education I and teen pregnancy prevention programs, increasing AFDC payments and enhancing child care funding and standards.¹² The court held that the challenged lobbying positions did not fall within the first five areas "which clearly justify bar lobbying activities."

At the same time, the court rejected Frankel's claim that the additional *Schwarz* criteria were inconsistent with the US Supreme Court's decision in *Keller*, holding that the additional criteria were relevant to the bar's purpose of improving the administration of justice and advancing the science of jurisprudence. The court concluded there is no measurable difference between allowing lobbying for the purpose of regulating the profession or improving the quality of legal services, and allowing lobbying for the purpose of improving the administration of justice or advancing the science of jurisprudence.

Applying The Florida Bar's lobbying criteria for "other issues" the court agreed that children's issues are of great public interest, but disagreed that lawyers are especially suited to evaluate and explain the issues. "The merit of the position or the unanimity in its support is not the standard by which to determine the propriety of bar lobbying activities on that position."

C. Popejoy v. New Mexico Bd. of Bar Comm'rs, 887 FSupp 1422 (D. N.M. 1995).

New Mexico bar members objected to certain expenditures for construction of the State Bar Center, creation of a task force to assist Gulf War military personnel and their families, and lobbying.¹³ The court upheld the bar's expenditures in each area. The Bar Center construction did not infringe the 1st Amendment rights of the dissenters beyond that already countenanced by permitting a mandatory bar. It had no communicative value and expressed no ideological or political viewpoint and did not "implicate the core 1st Amendment principle of preventing compelled ideological conformity." Providing educational information to members and pro bono legal services to military personnel in relation to deployment for Operation Desert Storm enabled lawyers to better serve their affected clients and improved the quality of legal services available to a segment of the public. All of the lobbying activities were found to either improve

¹² The bar also supported the following lobbying positions to which no objection was made: creation of family court divisions, termination of parental rights when infants are exposed to cocaine, appointment of guardians ad litem in divorce and custody cases, and development of juvenile offender rehabilitation and treatment programs.

¹³ The lobbying activities at issue included support of the following: funding for three new appellate judges and judicial staff salary increases, changing the compensation packages for state-employed lawyers and their staff, and increased funding for court-appointed representation in child abuse and neglect cases.

the courts of New Mexico, the lawyers who served them, or the people served by them, thus improving the delivery of legal services.

In reviewing the criteria used to determine if challenged activities are permissible, the court cautioned:

All other things being equal, an expenditure with a strong political or ideological coloration is less likely to be germane to the practice of law, less likely to be related to or justified by the state's interest in regulating the legal profession or improving the quality of legal services, and more likely to add to the existing burden of First Amendment rights.

However, the court agreed that even activities possessing communicative content of a political or ideological nature may be reasonably related to the practice of law, to the regulation of the legal system, or to the improvement of legal services:

It is impossible to allow mandatory state bars to pursue such broad objectives as regulating the legal profession or improving the delivery of legal services (or to permit activities that are 'germane to the practice of law'), without at the same time approving of activities that will inevitably carry some ideological or political baggage. . . . [C]ompulsory financial support of some activities with at least a modicum of ideological content is inevitable.

Summary

The "rule" of *Keller* is quite simple: mandatory dues cannot be used to advance political or ideological positions that are not germane to the bar's purposes. *Keller* identifies the purposes of the integrated bar as regulating the legal profession and improving the quality of legal services; other decisions describe the purposes of a mandatory bar to include advancing the science of jurisprudence and improving the administration of justice.

The challenge is in applying the *Keller* standard to specific activities and issues. Existing case law doesn't provide perfect or complete guidance. Some things are clear, however:

- *Keller* is not a rule of prohibition. It does not prohibit the advocacy of purely political or ideological positions that are not germane to the bar's purposes.
- *Keller* requires that members who disagree with non-germane activities must have a process for challenging the use of their dues for those activities and are entitled to demand a refund of the portion of their dues expended on those activities.
- The use of mandatory dues for activities that have a political or ideological element or nature is not a *per se* violation of *Keller* if the activities are reasonably related to the bar's purposes.