

## 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 *Keller v. State Bar of California*, 499 U.S. 1 (1990), a decision of the US Supreme Court that limits the use of mandatory dues.

### Unified Bars

Oregon statutory law requires lawyers to be members of the Oregon State Bar to practice law. This model of regulation, known as a unified bar, integrated bar, or mandatory bar, exists in 31 jurisdictions within the United States. Unified bars are different from voluntary bar associations, where members can choose to join the bar. Additionally, many unified bars also conduct regulatory functions within the profession.

Mandatory bars require membership by lawyers seeking to practice within the jurisdiction, and generally require the payment of a fee. Depending on the bar, this fee can be used for regulation, membership programming, access to justice, or other programs. As statute mandates membership and fees to the Oregon bar, there are certain First Amendment limitations on the bar’s speech and use of fees. The primary limitation is set forth in *Keller*.

### The *Keller* Decision

In *Keller v. State Bar of California*, the U.S. Supreme Court held that an integrated bar’s use of compulsory dues to finance political and ideological activities violates the 1<sup>st</sup> 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 petitioners (21 members of the State Bar of California) alleged the State Bar of California violated their First Amendment rights by using compelled fees for purposes they opposed, including lobbying for or against state legislation,<sup>1</sup> filing amicus briefs in various cases,<sup>2</sup> holding an annual conference of delegates that approved several political resolutions,<sup>3</sup> and engaging in a variety of educational programs. The California Supreme Court rejected the petitioners’ challenge, holding the State Bar of California was a state agency and could use the dues for any purpose within its broad authority.

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<sup>1</sup> 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.

<sup>2</sup> 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.

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

The U.S. Supreme Court reversed the decision. The Supreme Court found that the bar's role in governance of the legal profession was essentially advisory to the California Supreme Court, since final authority to establish rules of conduct and discipline lawyers rested with the state courts. The Court analogized the relationship between a state bar and its members to that of a union and its members. Based on that analogy, the Court relied on *Abood v. Detroit Bd. Of Education*, 431 U.S. 209 (1977), holding that the use of compulsory public 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, the Court found that the compelled association of the unified bar is justified by the state's interest in "regulating the legal profession and improving the quality of legal services."<sup>4</sup> Thus, the Supreme Court held that the State Bar of California could constitutionally fund activities germane to the state's interest, but could not fund speech or 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.

*Keller*, 499 U.S. 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.<sup>5</sup>

### **The Purposes of the Oregon State Bar**

ORS 9.080(1) charges the Board of Governors to "at all times direct its power to serve the public interest by:

- (a) Regulating the legal profession and improving the quality of legal services;
- (b) Supporting the judiciary and improving the administration of justice; and
- (c) Advancing a fair, inclusive and accessible justice system."

OSB Bylaw 1.2 similarly describes the mission of the OSB "to serve the public interest by:

- (a) Regulating the legal profession and improving the quality of legal services;

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

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

(b) Supporting the judiciary and improving the administration of justice;  
and

(c) Advancing a fair, inclusive and accessible justice system.”

Pursuant to OSB Bylaw 11.1, the bar’s legislative and policy activities must be reasonably related to the following subjects:

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.

### ***Keller* Application**

The Court in *Keller* did not provide a bright line rule for determining whether an activity was consider germane. Subsequent jurisprudence defined the extreme positions, but most cases have focused on legislative advocacy. The most detailed analysis regarding bar programming can be found in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990); *Popejoy v. New Mexico Bd. of Bar Comm’rs*, 887 F. Supp. 1422 (D. N.M. 1995) and the more recent *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).

#### ***A. Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 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. The 1<sup>st</sup> Circuit held that monitoring attorney discipline, ensuring attorney competence, increasing the availability of legal services and improving court operations were germane activities under *Keller*. Activities that promote one or more of those purposes could include continuing 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.

It further noted that 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.<sup>6</sup>

*B. Popejoy v. New Mexico Bd. of Bar Comm'rs, 887 F. Supp. 1422 (D. N.M. 1995).*

In *Popejoy*, New Mexico bar members objected to expenditures for construction of the State Bar Center, creation of a task force to assist Gulf War military personnel and their families, and lobbying.<sup>7</sup> The district court upheld the bar's expenditures in each area. The Bar Center construction did not infringe the 1<sup>st</sup> 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 1<sup>st</sup> 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 the lobbying activities were found to either improve the courts of New Mexico, the lawyers who served them, or the people served by them, thus improving the delivery of legal services.

*C. McDonald v. Longley, 4 F.4th 229 (5th Cir. 2021)*

This case was one of multiple challenges to *Keller* based on the overruling of *Abood*. In 2018, the U.S. Supreme Court overruled *Abood* in *Janus v. AFSCME*, 585 U.S. 924 (2018). As *Abood* was the foundational case for *Keller*, it being overturned resulted in substantial litigation about the status of *Keller* under the new precedent in *Janus*.

*McDonald* involved a challenge by members of the Texas State Bar against a number of programs the state bar supported, including legislative activity on behalf of its sections,<sup>8</sup> diversity and inclusion initiatives, continuing legal education programs, the Texas Bar Journal, and activities to further access to justice.<sup>9</sup> The plaintiffs requested the court overrule *Keller* on the basis that *Abood* is no longer good law. The 5<sup>th</sup> Circuit declined to do so.

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<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> The Bar lobbied for forty-seven bills, and the court specifically called out five: 10 to amend the Texas Constitution's definition of marriage; 20 create civil unions "as an alternative to marriage"; alter the procedures that grandparents must use to obtain visitation rights of their grandchildren; amend Texas trust law; and impose new notification requirements in child custody matters.

<sup>9</sup> Access to justice programming included a variety of activities in support of pro bono efforts, funding of the Texas Supreme Court Access to Justice Commission, and funding legal services for the indigent.

The 5th Circuit did provide additional guidance about the interpretation of *Keller*. It noted that actions on behalf of a section of the bar carried the imprimatur of the bar and therefore was subject to *Keller* considerations as well. It also further clarified that legislative advocacy related to the function of state courts at large and the appointment of pro-bono lawyers in cases are compliant with *Keller*. *McDonald*, 4 F.4th at 248. Advocating changes to a state’s substantive law, however, was determined to be non-germane. *Id.*

Importantly, *McDonald* noted that programs related to diversity and inclusion (D&I) can be germane to the mission of the bar if they seek to create a fair and equal legal professions for minorities, women, and LGBTQIA+ attorneys. See *McDonald*, 4 F.4th at 249. *McDonald* did warn that they also drew sharply divided public debate and widespread contentious litigation, and therefore should be reviewed carefully. *Id.* at 249 n. 3. Access to justice programs were also found to be germane, so long as those programs were aimed at helping low-income Texans access legal services. *Id.* at 270.

### **Current Litigation**

As of January 2024, the Oregon State Bar is currently engaged in litigation related to *Keller* and *Janus* as well. The Oregon State Bar is currently defending an appeal at the 9<sup>th</sup> Circuit.

Additionally, two other cases related to this matter are still undergoing litigation. The 5<sup>th</sup> Circuit recently released an opinion in *Boudreaux v. Louisiana State Bar*, \_\_\_ F.4<sup>th</sup> \_\_\_, No. 22-30564, (5<sup>th</sup> Cir. Nov. 13, 2023).<sup>10</sup> *Boudreaux* provided additional detail on what constituted germane speech in the 5<sup>th</sup> Circuit. Either party may still seek a petition for a writ of certiorari to the U.S. Supreme Court in this case. A second case, *Pomeroy v. Utah State Bar*, is currently underway in the federal district court in Utah.

### **Summary**

The "rule" of *Keller* is 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.

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.

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<sup>10</sup>*Boudreaux* found that certain communication activities, such as “Wellness Wednesday tweets”, technology and safety announcements, tweets promoting community-engagement opportunities such as the “Red Mass”, holiday charity drives for Christmas and Halloween, a link to a Reuters article discussing the effects of student loan debt on young lawyers, and a link to a History.com article about gay rights during Pride Month were not germane.

- 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.
- Programming, legislative activities, and communications should have an explicit and direct correlation to regulating the legal profession and improving the quality of legal services.