

Interoffice Memo

Date: April 5, 2022
To: Section Executive Committees
From: OSB General Counsel
Re: *Keller* and Bar Programming

With the continued litigation surrounding the Oregon State Bar (“OSB” or “Bar”) and other unified bars across the United States, there has been substantial focus on the Oregon State Bar’s application of the decision in *Keller v. State Bar of California*, 499 U.S. 1 (1990). This memorandum provides context to the Bar’s application of *Keller* along with General Counsel’s Office (“GCO”) process for conducting *Keller* review on programming.

The *Keller* Decision

The Oregon State Bar is an integrated/unified bar, meaning that attorneys are statutorily required to join the organization to practice law. The compelled membership and dues imposed by a unified bar risk violation of an attorney’s First Amendment rights.

Keller addresses these First Amendment issues. The Supreme Court in *Keller* deemed that the state’s interest in regulating the legal profession and in improving the quality of legal services justified the compelled association and dues that an integrated bar imposed. 499 U.S. at 13. *Keller* did impose certain limitations to this compelled association and speech, noting that an integrated bar may not use compulsory dues to express political or ideological causes not germane to regulating the legal profession or improving the quality of legal services. *Id.*

Application of *Keller*

The Court in *Keller* did not provide a bright line test for determining whether an activity was consider germane. *Id.* at 14. 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) and the more recent *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021). The Bar, in evaluating *Keller* and its progeny, has established four frameworks to evaluate a program for compliance. The framework is set out below.

In addition to section member fees, the Bar provides approximately 50 percent of section funds from its general fund. Sections funded by the bar in addition to section dues, and also carry the imprimatur of the entire bar in their programming and activities (see *McDonald*, 4 F.4th at 239). Thus, bar programming must comply with *Keller*.

Committees and sections should evaluate programs for *Keller* compliance. Bar liasons may recommend bar groups contact GCO if a program raises *Keller* concerns. Bar groups with *Keller* concerns should contact GCO as soon as the issue is identified. Requesting a *Keller* review with GCO at the initial planning phases of an event can help to ensure no unforeseen compliance hurdles.

The bar may elect to delay, remove sponsorship, or otherwise cancel programming that the bar deems not compliant with *Keller*.

Diversity and Inclusion Bar Programming

Programs related to Diversity and Inclusion (D&I) efforts in relation to *Keller* can be germane to the mission of the bar in that they seek to create a fair and equal legal professions for minorities, women, and LGBTQIA+ attorneys. *See McDonald*, 4 F.4d at 249. However, they are also highly ideological, and draw sharply divided public debate and widespread contentious litigation. *Id.* The Fifth Circuit characterized D&I programming as "a "sensitive political topic[]" that is "undoubtedly [a] matter[] of profound value and concern to the public." *Id. quoting Janus v. AFSCME*, 555 U.S. ___, 138 S. Ct. 2448, 2476 (2018) (cleaned up). It also warned about the potential for Diversity and Inclusion Programming to drift toward non-germane speech.

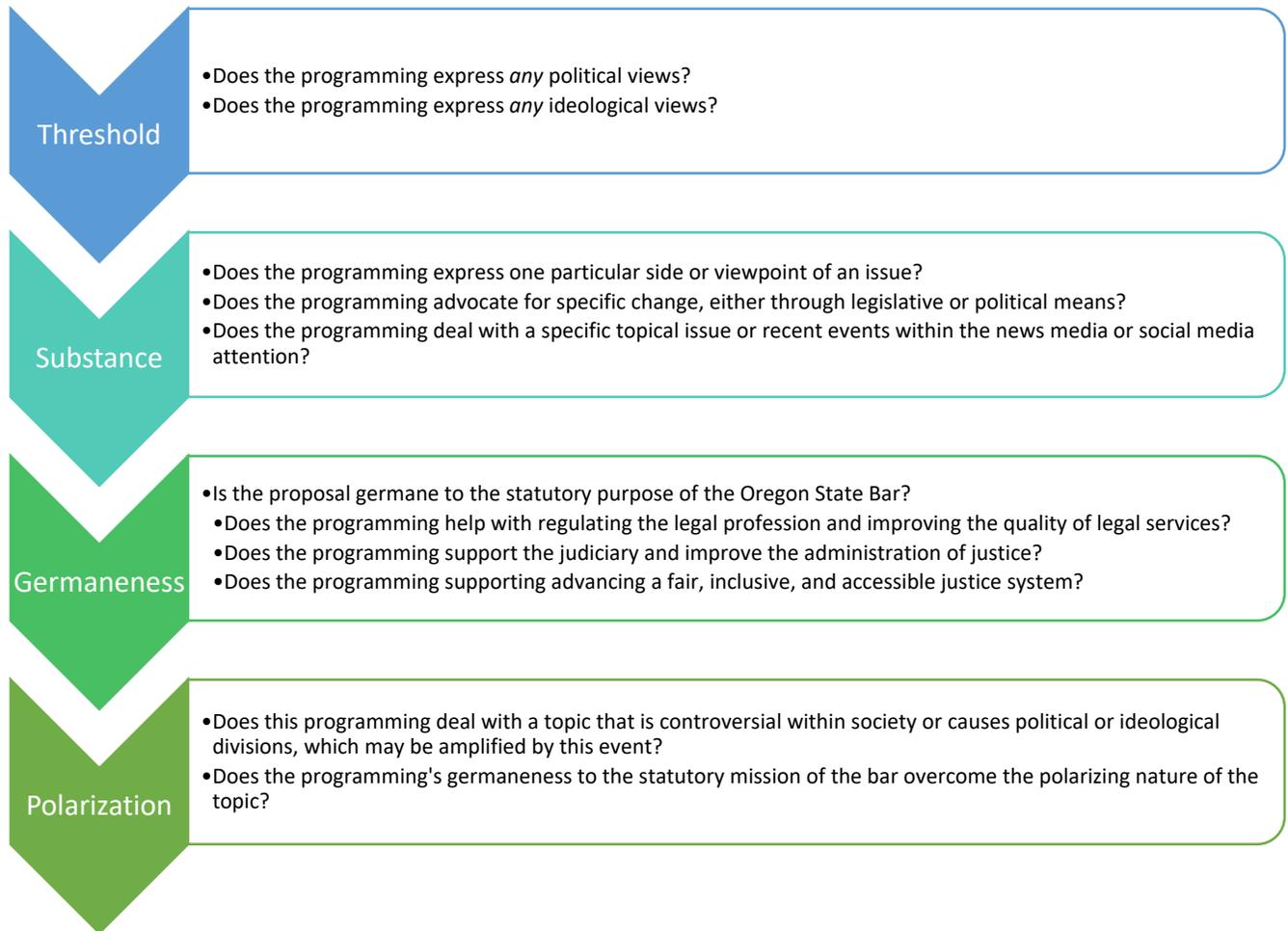
In holding that the diversity initiatives are germane, we do not give the Bar carte blanche to engage in any ideological activities so long as they have some sophistic argument the activities are germane. We just identify that the diversity initiatives are not so tenuously connected to the purposes identified in *Keller*, and that therefore their ideologically charged nature does not defeat their germaneness.

McDonald, 4 F.4d at 249 n. 3.

Inherently, diversity and inclusion programming skirts close to the ideological and germane divide between *Keller* compliant and non-compliant speech. Because of these highly ideological concerns, the Bar reviews Diversity and Inclusion Bar programming carefully to avoid non-germane programming.

General Counsel's Office Review Process

In reviewing programming, General Counsel's Office (GCO) considers multiple factors. The outline below sets forth the process through which General Counsel's Office evaluates a program for *Keller* compliance.



Framework Specifics

Threshold

As a threshold matter, for *Keller* to apply, bar programming must express some political or ideological idea or cause. Events that do not express a political or ideological position and are purely social for the bar membership are compliant with *Keller*. *Schneider*, 917 F.2d at 632, see also *Popejoy v. New Mexico Bd. Of Bar Com'rs*, 887 F. Supp. 1422, 1429 (D. N. M. 1995) (purchase of a building for the bar does not express a political or ideological position).

In the context of Keller, political activity is generally seen as any activity with “[an] attempt to influence governmental policymaking . . .” *Schneider v. Colegio De Abogados De Puerto Rico*, 565 F. Supp. 963, 966 n.5a (D.P.R. 1983) quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977). Activities that promote or relegate to a particular political party’s view more than on lawyerly concerns are not compliant with Keller. *Id.* Programming that focuses on political parties, or topics related to the positions of political parties would likely be considered to be political activity.

Ideological activities are harder to ascertain, with one court ascribing a definition of “any kind of action-oriented theory or any attempt to approach politics in the light of a system of ideas.” *Schneider*, 565 F. Supp. at 966 n.5a. Generally, ideological activities are those that may express views that are polarizing within the current political or societal climate.

If an activity expresses a political or ideological view or cause, then the substance and germaneness of the activity must be reviewed.

Substance

The substance framework reviews the programming to determine if the program contains viewpoints that advocate for a particular position or advances a particular political or ideological view or cause.

Germaneness

The Oregon State Bar is a “Keller pure” bar, which means it does not expend mandatory dues on matters that are not germane to the bar’s mission. Under Keller, political and ideological activities that utilize member dues must be germane to the statutory purpose of the Oregon State Bar. ORS 9.080 establishes that the bar serves 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.

In planning events, sections and committees should be able to establish the event’s contribution to promoting the bar’s statutory purpose. Purposes that would be germane under Keller include the education of lawyers, increasing the public’s access to justice, making legal services available to the public, improving the functioning of the courts, and creating a fair and equitable legal profession.

Polarization

Establishing germaneness alone does not make an event Keller complaint. Even if an activity is germane to the mission of the bar, the activity may be so politically or ideologically charged as to run afoul of the First Amendment and Keller. For instance, providing *pro bono* support to certain

political or ideological organizations (such as the ACLU, Planned Parenthood, or the National Rifle Association) have such strong political or ideological overtones that they override any germane interest that the Bar has. *Popejoy*, 887 F. Supp. at 1428.

Even with activities that may be germane, the political or ideological divisiveness of an activity may override the germaneness of the activity. To evaluate a program for *Keller* compliance, it is important to examine the nature of the political or ideological activity and the extent to which it causes partisanship or divisiveness within a group.

General Counsel's Office supports the Bar providing as much variety of programming possible under *Keller*. To that end, members are encouraged to discuss *Keller* issues with GCO and revise programming to be compliant under the *Keller* framework.

For instance, controversial viewpoints can be balanced by countering viewpoints, to present an overall viewpoint neutral program. Additionally, content of a program can be revised to take a more historical approach instead of a specific viewpoint or advocating a certain position. General Counsel's Office is available to discuss programming and potential solutions to comply with *Keller*.