

Interoffice Memo

Date: March 9, 2022
To: Section Executive Committees
From: OSB General Counsel
Re: *Keller* and Bar Legislative Advocacy

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 summarizes *Keller*, its relation to legislative advocacy (“lobbying”), and provides a framework for Public Affairs to establish *Keller* compliance.

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 implicate an attorney’s First Amendment rights.

Keller addresses these First Amendment issues. The 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 compelled dues that an integrated bar imposed. 499 U.S. at 13. *Keller* did impose certain limitations to this compelled association, noting that an integrated bar may not use compulsory dues to express political or ideological views 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 considered germane. *Id.* at 14. Subsequent jurisprudence has now defined the extreme positions. 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.

The Law Improvement Program

Bar groups and committees occasionally spot flaws in the textual statutes that create practical problems in the interpretation of law. The Oregon State Bar, through its Law Improvement Program, allows sections to present proposals to clarify statutory ambiguities, to modify unforeseen “glitches” in major legislation passed in previous sessions, and to codify case law as necessary.

Bar section proposals carry the imprimatur of the entire bar when presented before the legislature (see *McDonald*, 4 F.4d at 249). Therefore, such proposals must be compliant with *Keller*. As a number of these proposals can broach changing substantive law, the bar scrutinizes its law improvement proposals for *Keller*

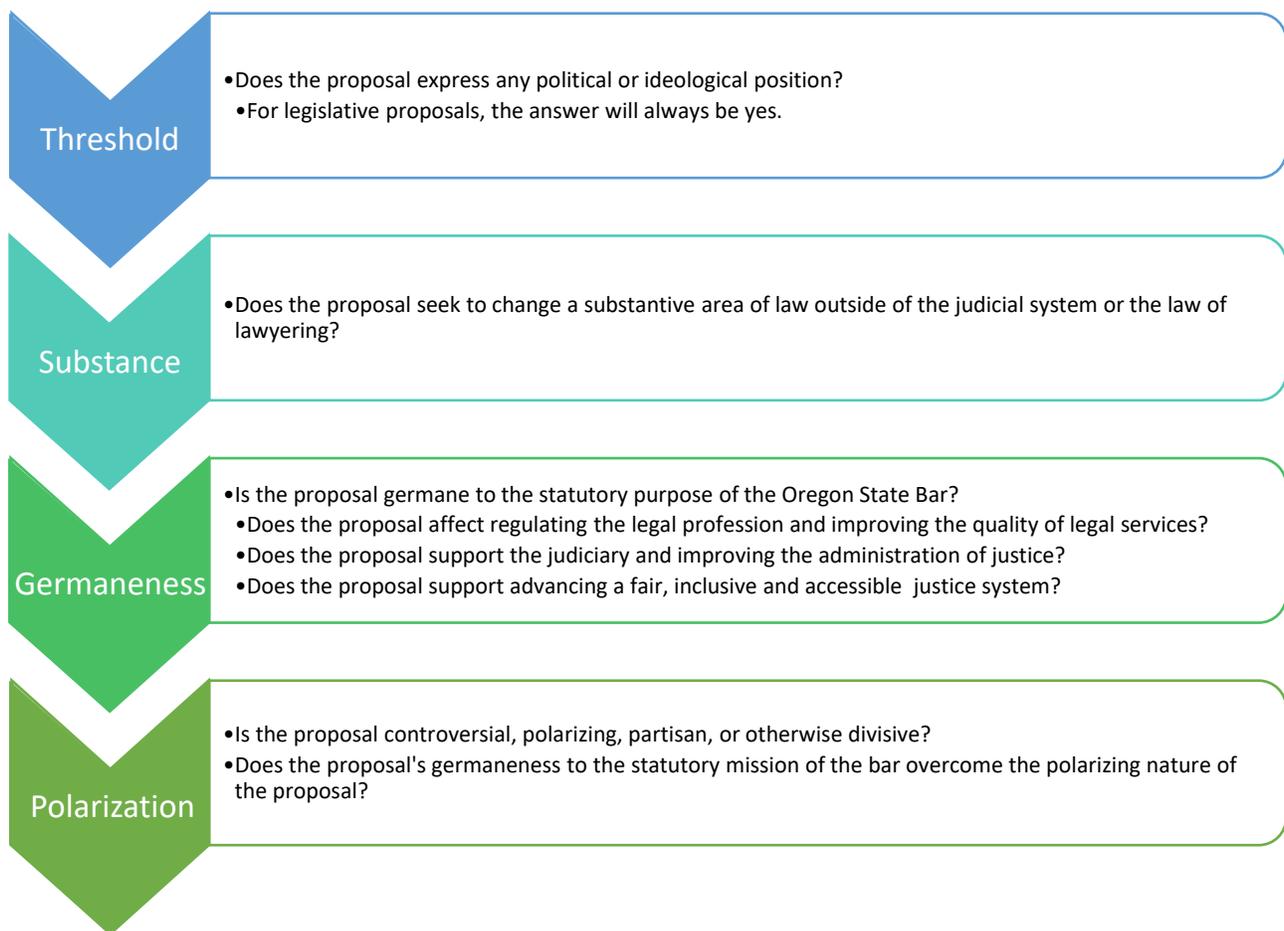
compliance. Even potentially trivial proposals can be politically or ideologically divisive and therefore not Keller compliant.

In order to be considered Keller compliant, a proposal must be germane by proposing legislation that affects the regulation of the legal system, the judicial system, or improving the quality of legal services. Proposals seeking changes in substantive areas of the law must either be germane by directly affecting lawyer responsibilities or the regulation of lawyers, or by directly affecting the quality of the legal system. For instance, changes to a lawyer's responsibilities as a trustee in Trusts and Estates statutes would be considered germane, but changes to a beneficiary designation would not be germane. *Id.*

Proposals that seek to modify the current substantive law for the purpose of correction or modification must especially consider whether the proposal would be a proposal seen as controversial, polarizing, or otherwise divisive. Such proposals are at a higher potential to be considered non-germane under Keller.

Sections should review the process noted below to determine whether their proposal may not be Keller compliant.

Legislative Framework



Framework Specifics

Political and Ideological Cause

As a threshold matter, virtually all legislative advocacy is considered a political activity. 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 express a political or ideological view or cause such as governmental advocacy does not automatically create a *Keller* concern. The substance and germaneness of the activity must be reviewed.

Substance

The substance framework reviews the proposal to determine if the program contains advocates for a particular position or advances a particular political or ideological view or cause. The Bar may regularly inform the legislature of its capabilities or ability to implement certain programs without advocating for or against a particular program or proposal. Providing such information does not raise *Keller* compliance issues.

Germaneness

Under *Keller*, political and ideological activities that utilize member fees 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.

For legislative advocacy to be germane, legislation must link *directly* to the statutory purpose of the Oregon State Bar, generally by showing that the legislation seeks to improve the legal system, improve access to justice, or to improve the quality of legal services.

Legislative advocacy that has been considered *Keller* compliant:

1. The functioning of state courts at large. *McDonald*, 4 F.4th at 248.
2. Appointment of *pro-bono* volunteers in cases. *Id.*
3. Budget appropriations for judicial positions and governmental attorney positions (increased salaries or new positions). *Schneider*, 917 F.2d at 632.
4. Statutory limitations on attorney advertising. *Id.*

5. Requirements for the certification of legal specialists. *Id.*
6. Funding for state employed lawyers and staff. *Popejoy v. New Mexico Bd. of Bar Com'rs.*, 887 F. Supp. 1422, 1430 (D.N.M. 1995).

Legislative advocacy seeking substantive law changes outside of the legal system and improving the quality of legal services will likely be considered non-germane and therefore not *Keller* compliant.

Polarization

Establishing germaneness alone does not make a proposal *Keller* compliant. Even if a proposal is germane, the proposal 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 may have. *Popejoy*, 887 F. Supp. at 1428. Therefore, it is important to evaluate the nature of the political or ideological activity and the extent to which it causes partisanship or divisiveness within a group to evaluate a program for *Keller* compliance.