

**PROPOSED AMENDMENT TO THE REPRESENTATIVE ASSEMBLY  
PERMANENT RULES OF PROCEDURE OF 5.1 VOTING – *Keller***

**Issue**

Should the Representative Assembly support an amendment to the Permanent Rules of Procedure of the Representative Assembly Section 5.1 Voting that would require the Representative Assembly to implement a *Keller* voting process?

RESOLVED, that the Representative Assembly of the State Bar of Michigan supports amendment of the Permanent Rules of Procedure of the Representative Assembly Section 5.1 Voting to require that the Representative Assembly implement a voting process to ensure that actions conform to *Keller v. State Bar of California* and subsequent governing and/or authoritative law on the constitutional standard for mandatory bar advocacy; and

FURTHER RESOLVED, that the Representative Assembly proposes its amendment to the Permanent Rules of Procedure of the Representative Assembly Section 5.1 Voting as follows:

**5.1 Voting.** Voting shall be by voice vote, unless a written ballot is required or the members stand and are counted when the chair is in doubt or a division is requested provided however, that a roll call vote shall be taken and a record kept thereof any time a request for such vote is made and supported by at least twenty (20) members of the Representative Assembly, or when a position is to be taken on proposed legislation and the position of the Assembly is not unanimous.

5.1.1 *Keller* Vote. Any proposal to be submitted for a vote, where applicable, shall first be submitted to counsel and/or bar staff, as applicable, who is not a member of the Representative Assembly, for an independent opinion as to the permissibility of vote by the Representative Assembly on the merits of such proposal under *Keller v. State Bar of California* and subsequent governing and/or authoritative law on the constitutional standard for mandatory bar advocacy (collectively, "*Keller*"). The opinion of counsel and/or bar staff, as applicable, should articulate the reasoning behind the determination and accompany the applicable proposal at the time of publication pursuant to Section 2.5 of these Rules. A "*Keller* Vote" shall be taken prior to the Representative Assembly taking a position on proposals, where applicable, to determine the permissibility of the vote under *Keller*. A two-thirds vote of the members of the Representative Assembly present is required to support a determination that a vote on the proposal is permissible.

**Synopsis**

The amendment is intended to establish a voting procedure to determine the permissibility of the Representative Assembly taking a position on proposals governed under *Keller v. State Bar of California* and subsequent governing and/or authoritative law on the constitutional standard for mandatory bar advocacy.

## Background

On April 26, 2014, the Representative Assembly adopted the following proposal:

“Should the Representative Assembly make recommendations and/or provide comments to the Task Force created by Administrative Order 2014-5 or directly to the Supreme Court (i) on whether the role and functions of the Assembly support the State Bar’s status as a mandatory bar; and (ii) on any proposed revisions of the administrative orders and court rules governing the State Bar as they relate to the Assembly in order to improve the governance and operation of the State Bar, through the following two steps:

- a. Commission the Special Committee, recently established by the Assembly Chairperson, with the responsibility to summarize the comments and recommendations made at this April 26th meeting and incorporate them as part of an Assembly report responsive to Administrative Order 2014-5, and submit such report to the Task Force or the Supreme Court directly, or after a future review by the Assembly, as soon as practicable, and
- b. Open the floor of the April 26<sup>th</sup> Assembly Meeting for member comments on the two matters as provided in (i)-(ii) above.”

Pursuant to the April 26, 2014 proposal, an appointed Special Committee of the Representative Assembly authored the Representative Assembly's Position on Administrative Order 2014-05 and published it to the Task Force (the “Report”), which is attached. This Report sets forth a position of the Representative Assembly, based on the discussions held at our April 26, 2014 meeting, regarding challenges to the Bar's mandatory status and procedural changes that may assist the Representative Assembly in compliance with *Keller* when considering policy proposals put before the body. The procedural changes suggested in the Report include a process where the body conducts a *Keller* vote, that would require a supermajority to be successful, prior to voting on proposals that would involve bar advocacy.

On November 21, 2014, the State Bar of Michigan’s Board of Commissioners adopted a *Keller* vote process to occur prior to any vote taken on a position of support or opposition to legislation. The *Keller* vote process implemented the Board’s response on this issue to the Task Force on the Role of the State Bar report to the Michigan Supreme Court. The Board of Commissioners articulated a process that requires a vote of the Board be taken prior to taking a position on the merits of legislation “to determine *Keller* permissibility and to articulate the reasoning behind the *Keller* determination.” The Board of Commissioners implemented a requirement that two-thirds of the Board support a determination that an action is permissible to allow a Board vote on a position on the merits of legislation.

The Board relied on an independent staff memo, prepared and disseminated to the Board, addressing the permissibility of the State Bar of Michigan taking a position on specific legislation.

The Representative Assembly should also support and adopt a rigorous decision-making process to determine if proposed State Bar advocacy outside the judicial branch conforms to *Keller v. State Bar of California* and/or subsequent prevailing law on the constitutional standard for mandatory bar advocacy. As articulated by the Board of Commissioners, this process would “further safeguard [State Bar] members’ First Amendment rights and expand opportunities for dissenting members to communicate their opposing views.”

**Opposition**

None known.

**Prior Action by Representative Assembly**

None known.

**Fiscal and Staffing Impact on State Bar of Michigan**

None known.

**STATE BAR OF MICHIGAN POSITION  
By vote of the Representative Assembly on April 25, 2015**

Should the Representative Assembly adopt the above resolution to amend the Permanent Rules of Procedure of the Representative Assembly Section 5.1 Voting to require the Representative Assembly to implement a voting process to ensure that the Assembly’s votes conform to *Keller v. State Bar of California* and subsequent governing and/or authoritative law on the constitutional standard for mandatory bar advocacy?

(a) Yes

or

(b) No