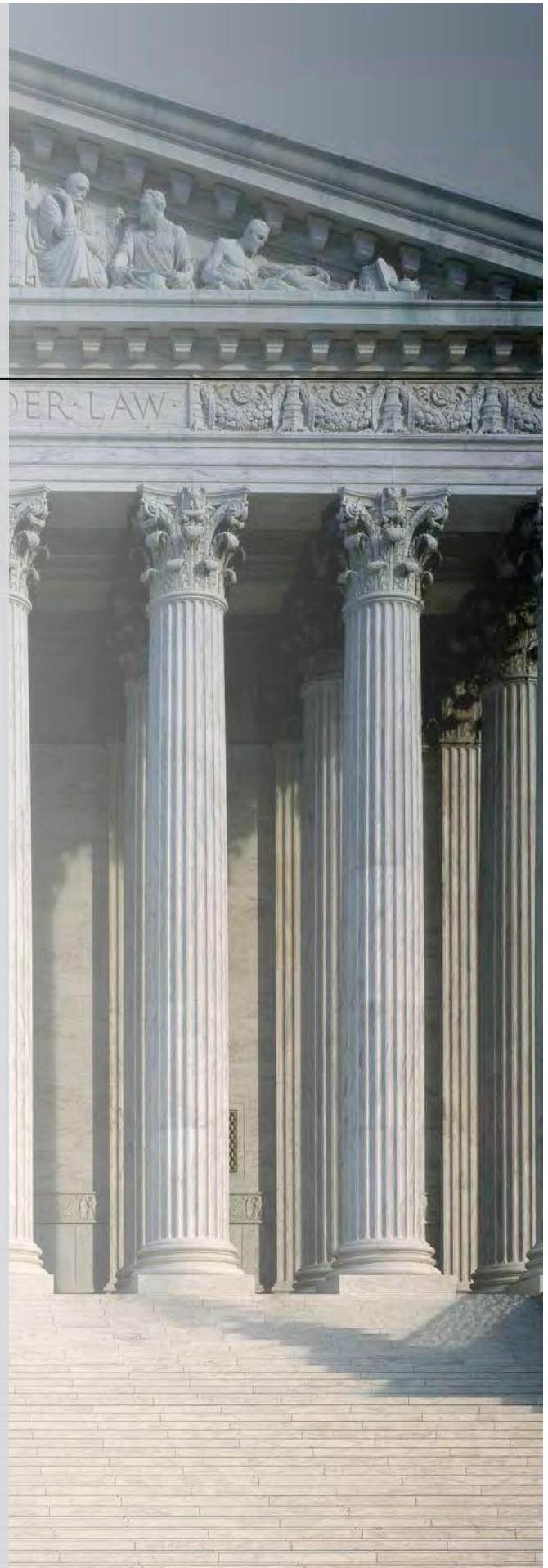


Mandatory State Bar Associations

Managing Keller

The following information regarding mandatory bars and how they manage Keller related activities was compiled by State Bar of Michigan between February 2014 and May 2014. This was a significant research initiative to support the Michigan Supreme Court Task Force on the Role of the State Bar of Michigan. As information was gathered, executive directors from several state bars expressed an interest in receiving this compilation of material. We are pleased to share this information with those who find it useful. Please note that the State Bar of Michigan does not update this compilation as policies and statutes change in various states. Users are encouraged to check with the state bars directly to learn of any relevant changes.

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Mission and Goals

Mission Statement

The State Bar of Arizona serves the public and enhances the legal profession by promoting the competency, ethics and professionalism of its members and enhancing the administration of and access to justice.

Long-Term Vision

The State Bar of Arizona (SBA) has a vision of the future that guides our work as an organization. We are committed to create a future Arizona where:

- All Arizona lawyers are part of a supportive and collegial community of professionals exhibiting the highest standards of ethical conduct and technical skill, and sharing a passion for excellence in the practice of law.
- Arizona courts are honored as forums for the fair and prompt handling of legal proceedings by judicial officers of the highest caliber.
- All Arizona residents have equal access to legal services of the highest quality and to a system of justice that affords them prompt resolution of their legal issues.
- The judiciary and the members of the SBA stand ready at all times to anticipate the emerging legal needs of Arizona citizens and to continuously improve the system of justice to meet those needs.

Core Values

There are key values that guide our work. These values are important to everything we do. We use these values to shape our work and ensure that our approaches are consistent with our results. We list them without reference to priority, because they are of equal value to how we live our professional and personal lives.

Integrity: This value represents our commitment to truth in all of its forms and in all of our actions. It is adherence to the spirit as well as to the letter of the law. It is consistency, transparency, and accountability for what we say and what we do, as individuals, as professionals, and as an organization.

Service to Clients and the Public: This value represents our commitment to advocate the causes of others with all of our strength, as we would advocate for ourselves in the most important of personal concerns. It is embracing the responsibility to give back to society the knowledge and skills that we acquired with the help of others.

Diversity: This value represents our commitment to ensuring that the legal profession and the justice system reflect the community it serves in all of its social, economic, and geographical diversity. It is seeking out members of underrepresented groups to add their strength to the legal profession and to the advancement of justice in all areas of society.

Professionalism: This value represents our commitment to each other and to all whom we encounter to act with highest level of sensitivity to the feelings of others. It transcends common courtesy and requires treating all persons within the sphere of our influence with dignity, respect, and unqualified civility.

Promoting Justice: This value represents our commitment to ensuring at every risk to ourselves that others have access to the system of justice in which we serve as officers of the court. It is living in our daily lives the oath of allegiance to the Constitutions of the United States and of the State of Arizona by which we are privileged to practice our profession.

Important Issues

While the State Bar of Arizona can take up causes that directly relate to the administration of justice, its ability to take a stand on other issues is severely limited. Because we are a mandatory bar, the courts have decided a number of cases that state bar dues cannot be used to support certain types of causes.

The areas in which the State Bar can be engaged include:

- Questions concerning the regulation and discipline of attorneys
- Matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency
- Increasing the availability of legal services to society
- Regulation of attorneys' clients trust accounts
- Education, ethics, competence, integrity and regulation as a body, of the legal profession

Additionally, the following criteria are to be used to determine the type of legislative matters that a mandatory bar may become actively involved with when an issue appears to fall outside of the specifically identified areas listed above:

- That the issue be recognized as being of great public interest
- That lawyers are especially suited by their training and experience to evaluate and explain the issues
- The subject matter affects the rights of those likely to come into contact with the judicial system

The State Bar of Arizona identified issues of greatest importance to the legal community in its Strategic Priorities 2010. Among those issues are competency, ethics, professionalism and the administration of justice.

Challenges to these themes have resurfaced many times during the State Bar's history. When the need arises, task forces are charged with researching how other bar associations across the country are dealing with similar concerns.

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ARIZONA

OFFICE OF THE STATE BAR

12.01. The office of the State Bar of Arizona shall be maintained in the City of Phoenix, Arizona.

ARTICLE XIII

POLITICAL AND IDEOLOGICAL ACTIVITIES

13.01. Political and Ideological Activities. The State Bar shall not, except as provided herein, use the dues of its members to fund activities of a political or ideological nature that are not reasonably related to:

- (A) the regulation and discipline of attorneys;
- (B) matters relating to the improvement of the functioning of the justice system;
- (C) increasing the availability of legal services to the public;
- (D) regulation of attorney trust accounts;
- (E) the education, ethics, competence, integrity, and regulation of the legal profession; and
- (F) any other activity authorized by law.

13.02. Activities Intended to Influence the Legislature.

- (A) The State Bar may use the mandatory dues of all members to review and analyze pending legislation.
- (B) The State Bar may use the mandatory dues of all members to provide content-neutral assistance to legislators, provided that:
 - (1) a legislator requests the assistance;
 - (2) the Board or its designee approves the request in a letter to the legislator stating that providing technical assistance does not imply either support for or opposition to the legislation; and
 - (3) the Board or its designee annually prepares and publishes a report summarizing all technical assistance provided during the preceding year.

- (C) No other activities intended to influence legislation may be funded with members' mandatory dues, unless the legislation in question is limited to matters within the scope of permissible activities as described in 13.01.

13.03. Challenges Regarding State Bar Activities

- (A) A member who claims that the State Bar is funding political or ideological activities in violation of this article may submit a written challenge to the CEO/Executive Director of the State Bar.
 - (1) A written challenge must be made individually and shall include the challenger's name, address, telephone number, email address and Bar number. It must also identify the challenged activity and be signed by the member.
 - (2) Written challenges must be received at the State Bar office in Phoenix, Arizona, on or before February 1 of the year immediately following the calendar year in which the challenged activity occurred.
 - (3) Failure to submit a written challenge by the deadline shall constitute a waiver.
 - (4) Submission of a challenge does not relieve a member from timely paying his or her dues in full.
- (B) After a written challenge has been received, the Board or its designee shall promptly determine the pro rata amount of the member's dues used to fund the challenged activity and shall place that amount in an escrow account pending determination of the merits of the challenge.
- (C) Upon the expiration of the deadline for receipt of written challenges to the same activity, the Board or its designee shall decide whether to give a pro rata refund to the challengers or to refer the challenge to arbitration. The Board may elect to have all challenges consolidated in a single arbitration proceeding.
- (D) Whenever the Board elects to refer a challenge to arbitration, an impartial arbitrator shall be selected by mutual agreement of all parties within twenty (20) days after the Board gives notice of its election to arbitrate. If all parties cannot agree upon the selection of an arbitrator, the President of the State Bar shall apply to the Chief Judge of the United States District Court for the District of Arizona, who shall select an impartial arbitrator as soon as practicable. Absent a challenge for cause, the selection of an arbitrator by the Chief Judge shall be final. The impartial arbitrator shall determine whether the funding of a challenged activity complies with the limitations of this article. If not, the arbitrator shall determine the pro rata

share of dues that is to be refunded, plus the actual interest rate earned in the escrow account from the date of payment of those dues to the State Bar.

- (E) The State Bar has the burden of proving by a preponderance of the evidence that the challenged activity is permitted by this article.
- (F) The necessary cost of the arbitration shall be paid by the State Bar and may be paid from mandatory dues.
- (G) The decision of the arbitrator shall be final on the question whether the challenged activity violates the limitations on the State Bar's political and ideological activities as set forth in this article and any pro rata share of dues to be refunded.

ARTICLE XIV AMENDMENTS

14.01. These bylaws may be amended by the Board of Governors at any regular meeting thereof. No amendment shall be proposed or considered except after thirty (30) days advance written notice of the proposed amendment by mail or electronic means to each Board member. Amendments to these bylaws may only be adopted by the affirmative vote of a quorum of the Board of Governors.

Comments

Amended 12/16/94: Article 6.04. Resignation in Lieu of Disbarment. (deleted); Article 8.04. Removal of an Officer. (amended to reference "majority vote"); New Article 13. Political and Ideological Activities.

Amended 09/15/95: Article 8.03. Election of Officers. (ballot tabulation process amended).

Amended 04/19/02: Article 8.03. Election of Officers. (automatic ascension of First Vice President to President-Elect position; process for ballot tabulation); Article 11.04. Quorum. (Board quorum defined as "40 percent of those entitled to vote").

Amended 11/30/07: Article 3.01. Known Place of Business (required an address change as a result of the move from the downtown location on Monroe Street to the current 24th Street address); Article 8.02. Secretary/Treasurer (added new duties of this officer as result of the June 14, 2006 Finance Policy manual, which made the Secretary/Treasurer the Vice Chairman of both the Finance and Audit committees); Article 11.01. (reduces the minimum number of meetings from 11 to 9 and allows the Board to set its last regular meeting at a time and place to be designated by the Board).

Amended 10/24-25/13: Article 1.01 and 1.05. Definitions (Rule number changed 12/01/03); Article 3.01 Known Place of Business (suite number changed when 1st floor occupied); Article 4.02 Standing State Bar Committees (clarification regarding type of committees, i.e., member volunteers versus Board); Article 8.02(C) First Vice President (deleted Board officer's probable cause panelist duty; Rule change effective 01/01/11); Article 8.02(D) Second Vice President (name of "Long-Range Planning Committee" changed to "Strategic Planning Committee"); Article 8.05 Scope and Operations Committee and Finance Committee and 8.05(B) (name of "Finance and Investment Committee" changed to "Finance Committee"); Article 10.02 Notice of Annual Meeting, Article 10.04 Notice of Special Meetings, Article 11.07 Action By Governors Without A Meeting, and Article 14.01 Bylaw Amendments (add that any required notification can be done "by electronic means"); Article 11.01 Regular Board Meetings (President sets meeting schedule; Board meets a minimum of six times per year); Article 13.01 Political and Ideological Activities (deleted "Generally" in title); Article 13.02(3) Activities Intended to Influence the Legislature (deleted "in the Arizona Attorney"; report "published" through electronic or other means as determined by staff).

Government Relations

The State Bar of Arizona's Government Relations Department interacts with and is a resource to state and federal governmental entities, as well as members of the Bar. Please feel free to contact the Government Relations Department if you have questions about these processes, specific legislation or rule changes, or the Bar's position on particular issues.

Annual Report

Legislative Advocacy

The Government Relations Department monitors the legislative priorities of the State Bar of Arizona based on the directive of the Board of Governors, and as set forth in Rule 32(a)(1), Arizona Rules of the Supreme Court.

Any State Bar section or committee may initiate new legislation. Their proposal may be vetted among other relevant sections or committees for their review in advance of the Board of Governor's consideration.

Proposals are then submitted to the Board during the fall preceding the beginning of the legislative session in January. If the Board endorses the proposal, the State Bar Lobbyist will guide the bill through the legislative process.

The basic public positions the Bar may take are: support or opposition, or no position if a bill is not sufficiently relevant to the Bar's mission to warrant taking a public position. The support or oppose position is limited to a relatively small number of bills in order to preserve the Bar's lobbying effectiveness and is reserved for bills which are seen as central to the interests of the Bar and which appear to have some viability in the Legislature.

If the Board does not endorse the proposed legislation, their action in no way diminishes the right of every member to express, in his or her individual capacity, support or opposition to any legislation. Individuals in a section or committee are free to advocate their own position as long as they clearly indicate that they are not speaking on behalf of the State Bar of Arizona.

Keller v. State Bar of California 496 U.S. 1 (1990) requires that the State Bar's legislative positions must be narrowly limited to specific issues. The Bar's credibility is related to the expertise, which the Bar is able to bear on any given issue, and the extent to which our views are not seen as being self-serving, but as promoting the interests of the legal profession, the public in improving the administration of justice and in promoting advancements in Arizona jurisprudence. The Bar does not take positions that are divisive among its membership. You can learn more about the State Bar of Arizona's policy regarding political activities and challenges here.

The State Bar's ability to maintain an effective legislative program is directly dependent upon its members continuing to devote their time and efforts to legislative analysis, and their active involvement in the legislative process.

Other Legislative Resources:

[How to Find Your Legislator](#)

[Member Roster - Arizona House of Representatives](#)

[Member Roster - Arizona Senate](#)

Contact Information:

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MEMO

TO: Pamela Treadwell-Rubin, President State Bar of Arizona
CC: Sections and Committees
FROM: John Furlong, General Counsel
DATE: March 31, 2004

RE: Understanding *Keller*, Its Progeny and the SBA's Approach to *Keller* Including the *Keller*-Related Bylaws.

I. UNDERSTANDING KELLER

A. Introduction

The first step in understanding *Keller v. The State Bar of California*, 110 S.Ct. 2228 (1990), is to realize that this case applies only to "integrated bars," i.e. an association of attorneys in which membership and dues are required as a condition of practicing law, created under state law to regulate the state's legal profession¹.

B. The Keller Holding

The U.S. Supreme Court ultimately held that:

The State Bar's use of petitioners' compulsory dues to finance political and ideological activities with which petitioners disagree violates their First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services.

C. The Keller Facts

In *Keller*, Eddie Keller and twenty other members of the State Bar of California sued the State Bar of California claiming that certain of its activities -- activities to which they would not normally subscribe -- were being financed with members' dues in violation of their First and Fourteenth Amendment rights to freedom of speech and association. Specifically, they were primarily concerned with the use of their dues to lobby the legislature and other governmental agencies, to file amicus curiae briefs in pending cases, to hold annual delegate conferences for

¹ The constitutionality of the integrated bar was first upheld over forty years ago in *Lathrop v. Donahue*, 367 US 820 (1961).

the debate of current issues and approval of resolutions, and to engage in other educational programs².

These twenty-one members sought relief in the form of an injunction restraining the State Bar of California from using mandatory dues to fund or advance certain political and ideological causes or beliefs.

D. The Lower Courts' Decisions

The trial court granted summary judgment to the State Bar of California on the grounds that the bar was a "governmental agency" and, therefore, it was permitted under the First Amendment to engage in these types of activities.

The California Court of Appeals, however, reversed and instead determined that while the State Bar's regulatory activities were similar to those of a governmental agency's, its "administration-of-justice" functions were more akin to the activities of a labor union. The appellate court then relied on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which prohibited the use of union dues to support political or ideological union causes that were unrelated to collective bargaining activities. The appellate court specifically held that the "Bar's activities could be financed from mandatory dues, only if the particular action in question served a State interest important enough to overcome the interference with the dissenter's First Amendment rights." [Emphasis added.]

The Supreme Court of California reversed the Court of Appeals by a divided vote. The court reasoned that the State Bar of California was, in fact, a "governmental agency" and, therefore, could use its dues for any purpose within the scope of its statutory authority. The court also felt that subjecting the State Bar activities to First Amendment scrutiny placed an extraordinary burden on its statutory mission to promote the administration of justice.

The United States Supreme Court granted certiorari to consider the members' First Amendment claims.

E. The U. S. Supreme Court's Reasoning

The Supreme Court reasoned that the State Bar of California was not a typical governmental agency but rather it was created to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Because of certain key differences between the State Bar and other typical governmental agencies, the U.S. Supreme Court rejected the argument that the State Bar was not subject to the same constitutional rules with respect to

² The detailed list included lobbying for or against state legislation (1) prohibiting state and local agency employers from requiring employees to take polygraph tests; (2) prohibiting possession of armor-piercing handgun ammunition; (3) creating an unlimited right of action to sue anybody causing air pollution; and (4) requesting Congress to refrain from enacting a guest worker program or from permitting the importation of workers from other countries. Petitioners' complaint also alleges that the Conference of Delegates funded and sponsored by the State Bar of California endorsed a gun control initiative, disapproved statements of a United States 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, public school prayer and busing.

the use of compulsory dues as were labor unions. Basically, the Supreme Court felt much more comfortable in concluding that the State Bar was more like a union.

The Supreme Court then went on to apply the holding in *Abood* that a union could not expend a dissenting member's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. In applying *Abood* to the *Keller* facts, the Supreme Court said that "the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services." The court then held that the State Bar may constitutionally fund activities germane to those goals out of the mandatory dues of all members, but that "...it may **not** fund activities of an ideological nature, which fall outside of those areas of activity."

[As an aside, it is very important to note, at this juncture, that the United States Supreme Court recognized "the difficult question...is to define the latter class of activities."]

The Supreme Court then looked at the Railway Labor Act in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), in an attempt to develop a test and guidelines for determining permissible expenditures. Thus, the U.S. Supreme Court came up with the test that the guiding standard for the State Bar of California must be "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'"

When the Supreme Court analyzed the actual complaints of Eddie Keller and the other State Bar members, it specifically acknowledged the difficult decisions to be made and it only commented or ruled on those clear activities on the extreme ends of the spectrum:

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the 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. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.

496 U.S. at 15, 16.

The U.S. Supreme Court also rejected the California Supreme Court's determination that an application of *Abood* would entail "an extraordinary burden" on the State Bar. Rather, the U.S. Supreme Court felt that applying *Abood* might result in some extra administrative burden but that the additional burden or inconvenience was hardly sufficient to justify contravention of the constitutional mandate. The U.S. Supreme Court pointed out that unions representing

governmental employees have developed and operated successfully within the parameters of the *Abood* procedures for over a decade.

Finally, the U. S. Supreme Court felt that an integrated bar could meet its *Abood* obligations by adopting procedures similar to those described in *Teachers v. Hudson*, 475 U.S. 292 (1986). [Basically, *Hudson* outlined a minimum set of procedures by which a union and an agency shop relationship could meet its requirements under *Abood*.]

The U.S. Supreme Court reversed the California Supreme Court and remanded the case.

II. ADDITIONAL GUIDANCE PROVIDED BY POST-KELLER CASES

Having a *Keller*-compliant bar association also entails an understanding of those cases that have come down since *Keller*. Some of the more relevant cases are:

- A. *Gibson v. The Florida State Bar*, 906 F.2d 624 (11th Circuit 1990);
- B. *The Florida Bar re: Frankel*, 581 So. 2d 1294 (Fla. 1991);
- C. *Schneider v. Colegio*, 917 F.2d 620 (1st Cir. 1990);
- D. *Lehnert v Ferris Faculty Association*, 500 U.S. 507 (1991);
- E. *Carole v. Blinkin*, 957 F.2d 991 (2nd Cir. 1992) cert. Den. 121 L.Ed. 2d 224; and
- F. *Smith v. Board of Regents*, 4 Cal. 4th 843, 15 Cal. Rptr.2d 181, 844 P.2d 500 (1993).

A. *Gibson v The Florida Bar*

Gibson was decided six weeks after *Keller*. The question before the *Gibson* court was whether the First and Fourteenth Amendments were violated due to (1) political lobbying by the Florida Bar and (2) the system put in place by the Florida Bar to give voice to dissenting members regarding objections to the expenditure of mandatory bar dues. In its defense, the Florida Bar took the position that it was "*Keller*-pure," meaning that they decided to adjust the constitutional concerns set forth in the *Keller* decision by not being involved in any political or ideological activities that related to its core functions. The Florida Bar argued if a state bar decides to be "*Keller*-pure" and then offers its members a constitutional procedure for objecting to the expenditure of their mandatory dues, then the court need not concern itself of any specific activity engaged in by the bar.

Specifically, *Gibson*, a Florida Bar member, claimed that the objection resolution procedure was inadequate because the Florida Bar must provide an advance deduction, and not simply a rebate or refund a portion of the dues that might subsequently be determined to be non-*Keller*-supported activities. He also challenged the requirement that he had to make or object to specific expenditures rather than just make a general objection, as well as the State Bar's provisions for

an arbitration panel to ultimately decide whether the activity was related to the core purpose of the bar.

The *Gibson* court refused the arguments and held that a rebate procedure was acceptable and an advance deduction procedure was not required. It also determined that requiring a dissenting member to object to specific activities rather than allowing him to make a general objection was constitutionally acceptable. Finally, the *Gibson* court determined that a three-member arbitration panel (as the procedure for handling objecting members' dissents) was constitutionally acceptable.

B. *Schneider v Colegio*

In *Schneider v Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), cert. den., 502 U. S. 1029 (1992), the First Circuit provided direction regarding what activities an integrated bar association could be involved in and still be "Keller-pure." Looking to the *Hudson* and *Ellis* cases, on which *Keller* was based, the First Circuit came up with a list of acceptable activities for a unified bar that could be charged even to dissenting members:

- (A) Lobbying regarding issues related to the core purpose of the bar association, e.g. lobbying in favor of budget "in favor of budget appropriations for new judicial positions or increased salaries for government attorneys, or against statutory limitations on attorney advertising or requirements for the certification of legal specialists";
- (B) Attorney discipline;
- (C) Continuing legal education;
- (D) Admission of new attorneys to the bar;
- (E) Supervising law schools;
- (F) Increasing availability of legal services by way of legal aid programs;
- (G) Public education regarding the availability of legal services and substantive issues; and
- (H) Commentary on the functioning of the court system, including:
 - i. Efficiency;
 - ii. Evidentiary rule-making; and
 - iii. Procedural rule-making.

Colegio, 917 F.2d at 631-632.

C. *Florida Bar re Frankel*

In this case, the Florida Supreme Court reviewed its prior guidelines as to which subjects or issues its integrated State Bar could lobby or spend members' dues on in light of *Keller* decision, and held that the Florida Bar could not (consistent with the First Amendment rights of any objecting members) lobby for various children's rights, welfare and benefits legislation. The Florida Supreme Court held, however, that there were six permissible areas for action by the Florida Bar:

- (A) Questions concerning the regulation and discipline of attorneys;
- (B) Matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
- (C) Increasing the availability of legal services to society;
- (D) Regulation of attorneys' client trust accounts;
- (E) The education, ethics, competence, integrity and regulation as a body, of the legal profession; and
- (F) Issues (a) which are recognized as being of great public interest, (b) that lawyers are especially suited by their training and experience to evaluate and explain, and (c) where the subject matter effects the rights of those likely to come into contact with the judicial system.

581 So.2d at 1296.

D. *Lehnert v Ferris Faculty*

In *Lehnert*, the U. S. Supreme Court addressed the question of what activities may be charged to dissenting members in a union, rather than a bar association. The *Lehnert* court concluded that chargeable activities must have three traits: (1) be germane to the core activity of the union; (2) be justified by the government's vital policy interest supported by mandatory membership in the union; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of mandatory membership in the union. *Lehnert*, 500 U.S. at 519.

E. *Carroll v Blinken*

This was an action by students at the State University of New York at Albany, which required all students to pay a mandatory student activity fee. The University in turn gave a portion to the student government, which in turn gave a portion to the New York Public Interest Research Group (NYPIRG). NYPIRG used its funds for both (1) on-campus activities such as student research projects, debates, and symposiums on issues of public interest, which were held not to violate dissenting students' First Amendment rights and (2) off-campus lobbying, political and

ideological activities, which were held to violate the First Amendment rights of dissenting students.

The Second Circuit was thus faced with a situation in which the state forced students to pay dues to and join the student government, which then gave some of the dues money to an organization that in turn used the money for activities which, in some cases, violated students' First Amendment rights. The Second Circuit held that where funds ultimately go to an organization (such as NYPIRG) that uses them for both constitutionally valid and invalid purposes, the donation of all such funds to the organization will be prohibited, to avoid infringing on the First Amendment rights of those who would object to the expenditures for unlawful (off-campus in this case) activities.

F. *Smith v Board of Regents*

The facts and holding in this decision are indistinguishable from *Carroll, supra*, which the California Supreme Court relied on. In *Smith*, the court held that students' First Amendment rights were violated when the student government used university collected monies to both fund on-campus political and ideological groups, and lobby before state and local governments. As the court described it, the First Amendment principle at stake was:

[T]hat the government may not compel a person to contribute money to support political or ideological causes (See, e.g., *Keller v State Bar of California supra*, 496 U.S. at pp. 9-10, 110 S.Ct. at p. 2234 (*Keller*); *Abood v Detroit Board of Education* (1977) 431 U.S. 209, 234-235, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261 (*Abood*). Such contributions are a form of speech, and compelled speech offends the First Amendment, just as restrictions on speech. (E.g., *Keller, supra*, 496 U.S. at pp. 9-10, 110 S.Ct. at p. 2234; *Abood, supra*, 431 U.S. at pp. 234-235, & 235, fn. 31, 97 S.Ct. at p. 1799, & 1799, fn. 31; *Miami Herald Publishing Co. v Tornillo* (1974) 418 U.S. 241, 247-258, 94 S.Ct. 2831, 2834-2840, 41 L.Ed.2d 730 [state may not compel a newspaper to print a political candidate's reply to an editorial]; *Torcaso v Watkins* (1961) 367 U.S. 488, 489-496, 81 S.Ct. 1680, 1681-1684, 6 L.Ed.2d 982 [state may not compel civil servants to affirm a belief in God]; *Board of Education v Barnett* (1943) 319 U.S. 624, 630-642, 63 S.Ct. 1178, 1181-1187, 87 L.Ed. 1628 [state may not compel students to salute the flag].) Courts have often stressed this principle by repeating Thomas Jefferson's view that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'

844 P.2d at 506

G. Synopsis

Thus, the above cases decided after *Keller* have expanded the discussion of chargeable and non-chargeable activities. We know from these cases that mandatory dues can be expended to lobby for such things as budget appropriations for judicial positions and increased salaries for public lawyers, but not for issues grounded on partisan politics. We also know that mandatory state

bars can spend dues money on the regulation of attorney trust accounts and programs designed to promote the integrity of the legal profession. Thus, a knowledge of all subsequent activities is important.

III. THE STATE BAR OF ARIZONA'S APPROACH TO KELLER AND ITS KELLER COMPLIANT BYLAWS

The State Bar of Arizona has also decided to address the constitutional concern set forth in the *Keller* decision by not being involved in any political or ideological activities not related to its core function. It is important to note that like *Gibson, supra*, the State Bar also has taken the position that if it offers its members a constitutional procedure for objecting to the expenditure of their mandatory dues, then whether any specific bar activity is improperly ideological is not at issue in the instant action, but rather is to be decided by way of the prescribed procedure.

Thus, an activity-specific analysis only would be appropriate in the event the court finds that the State Bar has not implemented an acceptable procedure for challenges by its members.

Article XIII of the State Bar of Arizona's bylaws outlines its "*Keller-pure*" policy. Section 13.01 provides that the State Bar:

Shall not, except as provided herein, use the dues of its members to fund activities of a political or ideological nature that are not reasonably related to:

- (A) The regulation and discipline of attorneys;
- (B) Matters relating to the improvement of the functioning of the justice system;
- (C) Increasing the availability of legal services to the public;
- (D) Regulation of attorney trust accounts;
- (E) The education, ethics, competence, integrity and regulation of the legal profession; and
- (F) Any other activity authorized by law.

Bylaw Section 13.02 addresses activities intended to influence legislation:

- (A) The State Bar may use the mandatory dues of all members to review and analyze pending legislation, and provide content-neutral technical assistance to legislators and their staffs.
- (B) The State Bar may use the mandatory dues of all members to influence legislation provided that it prepares and publishes a report distributed to

the entire membership summarizing all legislative positions taken during the preceding year.

- (C) No activities intended to influence legislation may be funded with members' mandatory dues, unless the legislation in question is limited to matters within the scope of permissible activities as described in 13.01.

To further understand the constitutionality of these bylaws, below is a comparison of the State Bar's policy with the chargeable activities in *Colegio* and *Frankel*. This comparison shows that the State Bar is indeed "*Keller-pure*."

<u>State Bar/Frankel Categories</u>	<u>Colegio Categories</u>
(A) regulation/discipline of attorneys	(B) attorney discipline
(B) improvement of justice system	(H) functioning of court system
(C) availability of legal services	(F)(G) availability of legal services
(D) regulation of attorney trust accounts	(B) discipline (general requirements)
(E) ethics/competency of profession	(C) CLE
	(B) discipline
State Bar Political Categories	(A) lobbying
	(G) public education

The list of activities in Section 13.01 matches the list provided in *Frankel*, and follows the list set forth in *Colegio*. (See this memorandum at pp. 5-6.) Additionally, the list is based on the enumerated activities being germane to the Bar's core activity, and are justified by the government's policy interest supported by mandatory bar membership – "regulating the legal profession and improving the quality of legal services" – and do not significantly add to the free speech burden inherent in an integrated bar. *Keller*, 496 U.S. at 13.

Therefore, the State Bar is "*Keller-pure*," and the State Bar's "*Keller-pure*" policy, along with the challenge procedure provided in Bylaws Section 13.03, is constitutional.

IV. THE RECENT ATTACK ON THE STATE BAR OF ARIZONA

In March 2002, a member of the State Bar of Arizona filed a complaint against the State Bar of Arizona in the United States District Court for the District of Arizona, case no. CV-02-164-TUC-RCC. The member alleged, among other things, that the State Bar of Arizona failed to reform its non-regulatory activities in accordance with *Keller*.

He complained about the way in which the State Bar spends mandatory dues on non-regulatory functions and its procedures for addressing objections to its spending. The portion of the plaintiff's challenge concerning the Bar's spending on non-regulatory programs went before U.S. District Judge Raner Collins, who considered this a claim arising under federal law, which would allow him to adjudicate state law claims that might be transactionally related to the federal claim.

Judge Collins ultimately granted the State Bar summary judgment. His reasoning and explanation show the State Bar's compliance with *Keller* and its progeny.

Judge Collins determined that the main issue before him was whether the State Bar's procedures for addressing disputes to its spending practices were in compliance with the requirement set out in *Keller*. The Bar argued to Judge Collins that it had chosen to be "*Keller*-pure," meaning it only spends dues that are directly related to its core purpose. The State Bar then argued that as long as it offers its members a constitutional procedure for objecting to the expenditure of mandatory dues, the court need not consider whether specific activities of the State Bar are improperly ideological. As part of the "*Keller*-pure" policy, the State Bar explained to Judge Collins that it had adopted bylaws that prohibit it from using membership dues to fund activities of a political ideological nature, not reasonably related to its core functions.

The judge agreed that he need only consider whether the State Bar had in place constitutionally appropriate procedures for members to challenge expenditures for mandatory dues. He then turned to whether the procedures for challenging expenditures were sufficient to protect a member's First Amendment interest. The following is his understanding of the bylaws:

The Arizona Bar has developed the following procedure for members to challenge the State Bar's spending on activities. The member must first submit a written challenge to the Executive Director of the State Bar which identifies the member, provides information on how to contact the member, and specifies the challenged activity. Challenges must be received by February 1 of the year immediately following the calendar year in which the challenged activity occurred. After the written challenge is received, the Board (or its designee) is required to determine the pro rata share of the member's dues used to fund the challenged activity and to place the amount in an escrow account pending determination of the merits of the challenge. The Board may then decide whether to give a pro rata refund to the challenger or to refer the challenge to arbitration. If the challenge proceeds to arbitration, the challenger and the State Bar are to select, by mutual agreement, an arbitrator to determine whether the challenged activity complies with the limitations of the State Bar's bylaws. If the parties cannot agree on an arbitrator, the President of the Bar is to apply to the Chief U.S. District Court Judge for the District of Arizona for appointment of an arbitrator. If the arbitrator finds that the challenged activity violates the Bar's prohibition of spending on political or ideological activities, the arbitrator is to determine the pro rata share of dues to be refunded plus the actual interest rate earned in the escrow account from the date of payment of those dues to the State Bar.

In Plaintiff's case, the State Bar determined that the plaintiff's challenge to the expenditure of the Bar dues was meritless but it also determined that, given the small amount in dispute, the State Bar was not willing to engage in costly arbitration. The Bar accordingly refunded Plaintiff \$0.40, which it determined to be plaintiff's pro rata share of dues corresponding to activities to which he objected.

Judge Collins' Order, May 20, 2003 at p. 11, 12.

The court also ruled that (1) the State Bar may require a member to make a specific identification of the objectionable activity, (citing *Colegio*); and (2) that plaintiff's First Amendment rights were not violated because "the State Bar is not required to refer plaintiff's challenge to arbitration either by its own bylaws or by the relevant case law on the State Bar's spending procedures. The State Bar has the option of refunding plaintiff his dues, plus interest, or referring the case to arbitration." (The court cited Bylaw Section 13.03 and *Gibson*.)

Judge Collins finally found that the State Bar's refund of the plaintiff's prorated share of dues and also providing the plaintiff with a copy of its budget summary was appropriate. Because of all of the above, the court granted the State Bar summary judgment, ending the case in May 2003.





**BOARD OF GOVERNORS
Reporting Form**

Please begin typing in the shaded box.

NAME: _____ PHONE: _____

EMAIL ADDRESS: _____

REPRESENTING: _____

BOARD MEETING DATE: _____

WISH TO APPEAR BEFORE THE BOARD? _____ YES _____ NO

SUBJECT: _____

BACKGROUND OF ISSUE:

ISSUE(S) *(please be specific)*:

DISCUSSION/ANALYSIS:

RECOMMENDED BOARD ACTION:

VOTE OF THE COMMITTEE/SECTION (if applicable):

WAS A QUORUM PRESENT FOR THE VOTE? _____ YES _____ NO
VOTE WAS: _____ UNANIMOUS _____ TO _____

IF YOUR COMMITTEE OR SECTION HAS A BREAKDOWN AMONG MEMBERS OF DEFENSE/PROSECUTION OR PLAINTIFF/DEFENSE COUNSEL, OR IF ANY OTHER SPLIT EXISTS, HOW WAS THE VOTE SPLIT AMONG THOSE GROUPS?

WAS THE ISSUE VETTED TO COMMITTEES/SECTION/STAKEHOLDERS?

_____ YES _____ NO

IF SO, WHAT COMMITTEE/SECTION/STAKEHOLDERS?

HOW WILL THIS PROPOSAL IMPACT THE STATE BAR'S BUDGET? STATE BAR STAFF?

IS THE RECOMMENDED ACTION CONSISTENT WITH THE KELLER DECISION?

_____ YES _____ NO

DOES THIS ISSUE RELATE TO (check any that apply):

_____ REGULATING THE PROFESSION

_____ IMPROVING THE QUALITY OF LEGAL SERVICES

_____ IMPROVING THE FUNCTIONING OF THE SYSTEM OF JUSTICE

_____ INCREASING THE AVAILABILITY OF LEGAL SERVICES TO THE PUBLIC

_____ REGULATION OF TRUST ACCOUNTS

_____ EDUCATION, ETHICS, COMPETENCY, AND INTEGRITY OF THE LEGAL PROFESSION

(Note that *Keller v. State Bar of California*, 496 U.S. 1 (1990), prohibits the expenditure of mandatory bar dues on political or ideological matters unrelated to these objectives.)

WHICH GOAL/OBJECTIVE OF THE STATE BAR'S STRATEGIC PLAN IS ADVANCED BY THE RECOMMENDED ACTION?

IF NONE, WHY SHOULD THE BOARD OF GOVERNORS FOLLOW THE
RECOMMENDATION?

IS THERE A CURRENT BOARD POLICY THAT RELATES TO THE MATTER BEING
PRESENTED? _____ YES _____ NO

THERE IS A POLICY AND IT STATES THE FOLLOWING:



AN EXECUTIVE SUMMARY OF KELLER AND RELATED CASE LAW

Several important court decisions have been issued since 1990, limiting the types of activities to which the State Bar of Arizona can be engaged. These cases, known as *Keller* and its progeny, address the appropriate use of mandatory bar dues for all State Bar activities and address appropriate procedures for addressing dissenting members' objections. This summary highlights the most important points that the courts have made in the development of the *Keller* doctrine.

I. *KELLER v STATE BAR OF CALIFORNIA*, 496 U.S. 1 (1990)

The *Keller* doctrine originated from a U.S. Supreme Court opinion issued in 1990, which stated that the compelled association within a unified bar is justified by the State's interest in the following areas: (1) regulating the legal profession, and (2) improving the quality of legal services.

Essentially, *Keller* held that "[t]he State Bar may therefore constitutionally fund activities germane to these goals out of mandatory fees of all members." Furthermore, the court added that the State Bar "may not, however, in such manner, fund activities of an ideological nature which fall outside of these areas of activity."

The *Keller* court also provided the following test in order to assist bar associations when determining permissible expenditures – "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the state.'"

II. *GIBSON v THE FLORIDA BAR*, 906 F.2d 624 (11th Cir. 1990)

Gibson was one of the first courts to accept the strategy that if a state bar decides to be "*Keller*-pure" and offer its members a constitutional procedure for objecting to expenditures of their mandatory dues, then the court need not concern itself of any specific activity engaged in by the bar. In *Gibson*, the 11th Circuit has stated that when considering the constitutionality of a bar associations' objection resolution procedure, rebate procedures will be acceptable in lieu of an advanced deduction procedure. It is also okay for a bar association to require a dissenting member to object to specific activities. Finally, the *Gibson* court determined that a three-member arbitration panel (as the procedure for handling an objecting member's dissent) is constitutionally acceptable.

III. *THE FLORIDA BAR RE FRANKEL*, 581 So.2d 1294 (Fla., 1991)

The Florida Supreme Court found that the following six areas were permissible areas for actions by the Florida Bar: (1) Questions re disciplining attorneys; (2) Matters re improvement of court functioning; (3) Increasing legal services to society; (4) Regulating Trust accounts; (5) Education, ethics and integrity of the legal profession; and (6) Issues of: (a) great public interest; (b) that lawyers are trained to evaluate; (c) where the subject matter effects the rights of those involved in the judicial system.

The Court also found the following three areas were not permissible areas for lobbying by the Florida Bar: Various children's rights; Welfare reform; and Benefits Legislation.

IV. *SCHNEIDER v COLEGIO*, 917 F.2d 620 (1st Cir. 1990), cert. den. 502 U.S. 1029 (1992)

In this case, the First Circuit held that it is not permissible for the Bar to take a position that rests upon partisan views rather than lawyerly concerns. Consequently, the Bar cannot use mandatory dues for lobbying on controversial bills to change the law in ways not directly linked to the legal profession or the judicial system.

Colegio also provides a list of acceptable activities that are chargeable even to dissenting members: (1) Lobbying regarding issues related to the core purpose of the Bar Association (budget appropriations for judges, increased salaries for government lawyers, positions against statutory limits on attorney advertising); (2) Attorney discipline; (3) Continuing Legal Education; (4) Admission of new attorneys; (5) Supervising law schools; (6) Increasing availability of legal services through Legal Aid; (7) Public education regarding legal services; and (8) Commentary on the function of the court system.

V. *LEHNERT v FERRIS FACULTY ASSOCIATION*, 500 U.S. at 519

In *Lehnert*, the U. S. Supreme Court addressed the question of what activities may be charged to dissenting members in a union, rather than a bar association. The *Lehnert* court concluded that chargeable activities must have three traits: (1) be germane to the core activity of the union; (2) be justified by the government's vital policy interest supported by mandatory membership in the union; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of mandatory membership in the union. *Lehnert*, 500 U.S. at 519.

VI. *ROMERO v COLEGIO ABOGADOS PUERTO RICO*, 204 F.3d 291 (1st Cir. 2000)

This case reaffirms two principles: (1) a unified bar can give financial support to core related bar activities and (2) members cannot be compelled to contribute to "ideological activities not 'germane' to the purpose for which the compelled association is justified." This case also raises a third issue as to whether compelled bar association dues may be used to fund non-ideological and non-germane activities. The big issue presented was whether the Association of lawyers, the *Colegio*, could compel members to purchase group life insurance. The court felt the mandate violated the Keller doctrine but rather than declare the requirement to be unconstitutional, the Court remanded the issue back to the Puerto Rico Supreme Court to certify the following question: "Is the *Colegio* [the association] . . . authorized to compel members to purchase life insurance coverage through the *Colegio* as a condition of membership in the Bar of Puerto Rico?"

The court also approved and reaffirmed the activity of charging members for social activities expenses because they are often diminimus, but also germane.

SUMMARY OF CHARGEABLE ACTIVITIES “PERMISSIBLE” EXPENDITURES FOR MANDATORY BARS PURSUANT TO *KELLER* AND ITS PROGENY

Chargeable or Permissible Activities

- (1) Activities connected with disciplining members of the bar (*Keller, Schneider, Frankel*).
- (2) Acting as professional advisors to those charged with regulating the legal profession (*Keller*).
- (3) Proposing ethical codes or regulations for lawyers (*Keller, Schneider, Frankel*).
- (4) Ensuring Attorney competence (*Schneider, Frankel*).
- (5) The education, ethics, competence, integrity and regulation as a body of the legal profession (*Frankel*).
- (6) Increasing the availability of legal services (*Schneider, Frankel*).
- (7) Improving court operations, efficiency and efficacy (*Schneider, Frankel*).
- (8) Expenditures without expressive content that benefit all members equally, such as offering free life insurance (*Schneider*).
- (9) Social events for the members (*Schneider, Romero*).
- (10) A Periodical for members which is “devoted to educational articles about the legal profession or the quality of legal services available,” and which does not publish “markedly political and ideological material” (*Schneider*).
- (11) Political activities, including lobbying, may be funded as long as the target issues are narrowly limited to issues of regulation of the legal profession and improving the quality of legal services, such as court budgets, salaries for government attorneys, attorney advertising and legal specialization (*Schneider*).
- (12) Regulation of attorneys’ client trust accounts (*Frankel*).
- (13) Issues (a) of great public interest; (b) that lawyers are especially suited for by their training to evaluate and explain; and (c) where the subject matter affects the rights of those likely to come in connect with the judicial system (*Frankel*).
- (14) Lobbying to allow either a seal or a stamp on notarized documents (*Schneider*)

Non-chargeable or Impermissible Activities

- (1) Endorsement or advancement of gun control initiatives (*Keller*).
- (2) Endorsement or advancement of nuclear weapons freeze initiatives (*Keller*).
- (3) Lobbying for various children’s rights (*Frankel*).
- (4) Lobbying for welfare and benefits legislation (*Frankel*).
- (5) Mandating that all members purchase life insurance. Still in question (*Romero*).
- (6) Mandatory fees that are used for both activities that are germane to core purposes that are mixed with other activities that would be prohibited generally result in being prohibited or chargeable (*Carole, Smith, Colegio, Schneider v Colegio*).
- (7) Issues of family planning, abortion, no fault insurance, and the death penalty (*Schneider*)

- (8) In *Schneider*, the legal status (statehood) of Puerto Rico. (*Schneider*)
- (9) Committees on nuclear armament and the nuclear ban treaty in Latin America were both found to be outside the narrow category for which financial support could be compelled. (*Schneider*)



13.02. Activities Intended to Influence the Legislature.

- (A) The State Bar may use the mandatory dues of all members to review and analyze pending legislation.
- (B) The State Bar may use the mandatory dues of all members to provide content-neutral assistance to legislators, provided that:
 - (1) a legislator requests the assistance;
 - (2) the Board or its designee approves the request in a letter to the legislator stating that providing technical assistance does not imply either support for or opposition to the legislation; and
 - (3) the Board or its designee annually prepares and publishes in the Arizona Attorney a report summarizing all technical assistance provided during the preceding year.
- (C) No other activities intended to influence legislation may be funded with members' mandatory dues, unless the legislation in question is limited to matters within the scope of permissible activities as described in 13.01.

Keller also requires that a mandatory bar association have procedures under which members may challenge expenditures. This is the State Bar's policy on expenditure challenges:

13.03. Challenges Regarding State Bar Activities

- (A) A member who claims that the State Bar is funding political or ideological activities in violation of this article may submit a written challenge to the Executive Director of the State Bar.
 - (1) A written challenge must be made individually and shall include the challenger's name, address, telephone number and bar number. It must also identify the challenged activity and be signed by the member.
 - (2) Written challenges must be received at the State Bar office in Phoenix on or before February 1 of the year immediately following the calendar year in which the challenged activity occurred.

- (3) Failure to submit a written challenge by the deadline shall constitute a waiver.
- (4) Submission of a challenge does not relieve a member from timely paying his or her dues in full.
- (B) After a written challenge has been received, the Board or its designee shall promptly determine the pro rata amount of the member's dues used to fund the challenged activity and shall place that amount in an escrow account pending determination of the merits of the challenge.
- (C) Upon the expiration of the deadline for receipt of written challenges to the same activity, the Board or its designee shall decide whether to give a pro rata refund to the challengers or to refer the challenge to arbitration. The Board may elect to have all challenges consolidated in a single arbitration proceeding.
- (D) Whenever the Board elects to refer a challenge to arbitration, an impartial arbitrator shall be selected by mutual agreement of all parties within 20 days after the Board gives notice of its election to arbitrate. If all parties cannot agree upon the selection of an arbitrator, the President of the State Bar shall apply to the Chief Judge of the United States District Court for the District of Arizona, who shall select an impartial arbitrator as soon as practicable. Absent a challenge for cause, the selection of an arbitrator by the Chief Judge shall be final. The impartial arbitrator shall determine whether the funding of a challenged activity complies with the limitations of this article. If not, the arbitrator shall determine the pro rata share of dues that is to be refunded, plus the actual interest rate earned in the escrow account from the date of payment of those dues to the State Bar.
- (E) The State Bar has the burden of proving by a preponderance of the evidence that the challenged activity is permitted by this article.
- (F) The necessary cost of the arbitration shall be paid by the State Bar and may be paid from mandatory dues.
- (G) The decision of the arbitrator shall be final on the question whether the challenged activity violates the limitations on the State Bar's political and ideological activities as set forth in this article and any pro rata share of dues to be refunded.

In 2002, a State Bar member unsuccessfully challenged the State Bar's approach to *Keller*, complaining in a federal lawsuit about the way in which the State Bar spends mandatory dues on non-regulatory functions and its procedures for

addressing objections to its spending. The State Bar successfully contended that because it had chosen to be “*Keller* pure” and offered its members a constitutional procedure for objecting to the expenditure of mandatory dues, the court did not need to consider whether specific activities were improperly ideological. By following the procedure for objecting, the State Bar had refunded the member 40 cents – the member’s pro rata share of dues corresponding to activities to which he objected. The court ultimately granted the State Bar summary judgment.