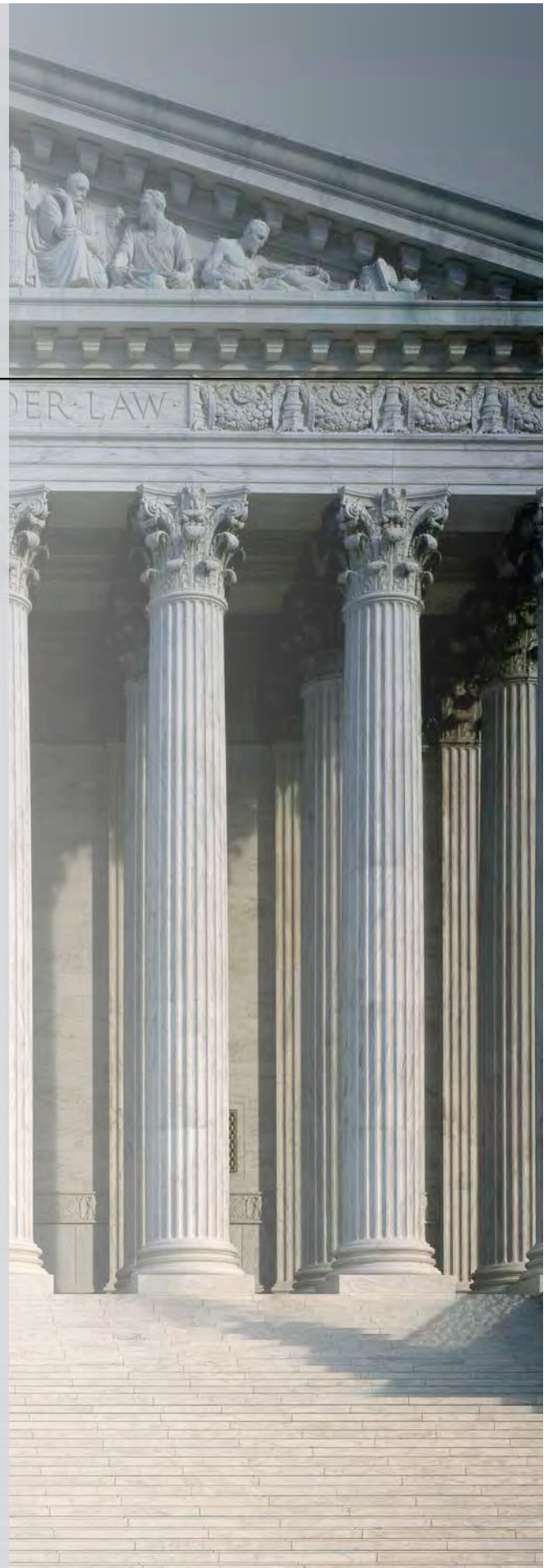


Mandatory State Bar Associations

# 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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  - State Bar Act
  - Bylaws
  - House of Delegates Rules of Procedure
  - Limitations on use of mandatory dues

## Oregon State Bar General Information

### Bar Center Information

**Our mailing address is:**

P.O. Box 231935  
Tigard, OR  
97281-1935

**Our building is located at:**

16037 SW Upper Boones Ferry Rd ([Directions](#))  
Tigard, OR  
97224

**Phone:**

(503) 620-0222 or Inside Oregon: 1 (800) 452-8260

**Facsimile:**

(503) 684-1366

**Email:**

General OSB Inquiries: [info@osbar.org](mailto:info@osbar.org)  
Website Content/Problem Inquiries: [webmaster@osbar.org](mailto:webmaster@osbar.org)  
Member Login/Fastcase/BarBooks Inquiries: [fastcase@osbar.org](mailto:fastcase@osbar.org)

The [Staff Directory](#) lists email and phone information for OSB staff.

View current [Board of Governors](#) members here.

Our [Sitemap](#) can aid you in locating information on the website.

[Download a PDF of the OSB Mission, Functions and Values Statement](#)

### Oregon State Bar Mission

The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice.

### Oregon State Bar Functions

- We are a regulatory agency providing protection to the public.
- We are a partner with the judicial system.
- We are a professional organization.
- We are leaders helping lawyers serve a diverse community.
- We are advocates for access to justice.

### Oregon State Bar Values

**Integrity**

Integrity is the measure of the bar's values through its actions. The bar adheres to the highest ethical and professional standards in all of its dealings

**Fairness**

The bar works to eliminate bias in the justice system and to ensure access to justice for all.

#### **Leadership**

The bar actively pursues its mission and promotes and encourages leadership among its members both to the legal profession and the community.

#### **Diversity**

The bar is committed to serving and valuing its diverse community, to advancing equality in the justice system, and to removing barriers to that system.

#### **Justice**

The bar promotes the rule of law as the best means to achieve justice and resolve conflict in a democratic society.

#### **Accountability**

The bar is accountable for its decisions and actions and will be transparent and open in communication with its various constituencies.

#### **Excellence**

Excellence is a fundamental goal in the delivery of bar programs and services. Since excellence has no boundary, the bar strives for continuous improvement.

#### **Sustainability**

The bar encourages education and dialogue on how law impacts the needs and interests of future generations relative to the advancement of the science of jurisprudence and improvement of the administration of justice.

## About the Oregon State Bar

The Oregon State Bar (OSB) was established in 1935 by the Oregon Legislative Assembly to license and discipline lawyers, regulate the practice of law and provide a variety of services to bar members and the public. The bar is a public corporation and an instrumentality of the Oregon Judicial Department, funded by membership and program fees. It is not a state agency and does not receive any financial support or taxpayer dollars from the state's general fund.

## Membership

The OSB has over 14,000 active members. Approximately half of our members engage in the private practice of law. The rest work primarily in government, corporate and business settings. More than 5,000 of our active members are women. More than 2,000 reside in a state other than Oregon.

## Governance

An eighteen-member volunteer Board of Governors oversees the activities of the OSB. Fourteen board members are lawyers, elected by the membership by geographic region. The other four board members are public (non-lawyer) members appointed based on their areas of interest and expertise. The Board of Governors has established numerous committees and interests group to advise and make recommendations to the board on matters involving the legal profession and justice system.

The OSB House of Delegates serves as the representative assembly of the membership, voting on proposed changes to rules, membership fees and other matters. It has more than 200 members, most of whom are elected by geographic region. Other delegates represent OSB Sections and local bar associations, and seven public members are appointed by the Board of Governors on a regional basis. The House of Delegates meets annually.

The Oregon Supreme Court has authority over appointments to the Disciplinary Board and the Board of Bar Examiners. Members of these boards are also volunteers, and receive staff and administrative support from the OSB.

The OSB Executive Director oversees bar operations, managing a staff of approximately 90 people and an \$11 million annual budget.

*Olga  
Tepikova*

#### **9.060 Officers; elections; vacancies; compensation.**

A president, president-elect and two vice presidents shall be elected by the governors each year immediately following the annual election of governors and before the newly elected governors have qualified. The president, president-elect and vice presidents shall be elected from among the attorney board members. All officers shall continue in office until their successors are elected and qualify. Vacancies in any of the offices shall be filled by the board by appointment for the remainder of the term. All officers shall take office as provided by the bar bylaws.

[Amended by 1985 c.512 §2; 1991 c.726 §1; 1995 c.302 §3]

#### **9.070 Duties of officers; security of secretary and treasurer; deposit and disbursement of fees.**

(1) The president shall preside at all meetings of the house of delegates and of the board of governors, and in the president's absence or inability to act, the president shall designate another officer to preside. Other duties of the president, president-elect and vice presidents shall be such as the board of governors may prescribe.

(2) All fees shall be paid into the treasury of the state bar, and when so paid shall become part of its funds and shall be disbursed only on order of the board of governors.

[Amended by 1981 c.193 §4; 1991 c.331 §1; 1995 c.302 §4]

#### **9.080 Duties of board; professional liability fund; quorum; status of employees of bar.**

(1) The state bar shall be governed by the board of governors, except as provided in sections 7 to 14 of this 1995 Act. The board is charged with the executive functions of the state bar and shall at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice. It shall have the authority to adopt, alter, amend and repeal bylaws and to adopt new bylaws containing provisions for the regulation and management of the affairs of the state bar not inconsistent with law.

(2)

(a) The board shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer's professional liability fund. This fund shall pay, on behalf of active members of the state bar engaged in the private practice of law whose principal offices are in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible. The board shall have the authority to assess each active member of the state bar engaged in the private practice of law whose principal office is in Oregon for contributions to such fund, to establish definitions of coverage to be provided by such fund and to retain or employ legal counsel to represent such fund and defend and control the defense against any covered claim made against such member. The board shall have the further authority to offer optional professional liability coverage on an underwritten basis above the minimum required coverage limits provided under such fund, either through such fund, through a separate fund or through any insurance organization authorized under the laws of the State of Oregon, and may do whatever is necessary and convenient to implement this provision. Any fund so established shall not be subject to the Insurance Code of the State of Oregon. Records of a claim against the fund are exempt from disclosure under ORS 192.410 to 192.505.

(b) For purposes of paragraph (a) of this subsection, an attorney is not engaged in the private practice of law if the attorney is a full-time employee of a corporation other than a corporation incorporated under ORS chapter 58, the state, an agency or department thereof, a county, city, special district or any other public or municipal corporation or any instrumentality thereof. However, an attorney who practices law outside of the attorney's full-time employment is engaged in the private practice of law.

(c) For the purposes of paragraph (a) of this subsection, the principal office of an attorney is considered to be the location where the attorney engages in the private practice of law more than 50 percent of the time engaged in that practice. In the case of an attorney in a branch office outside Oregon and the main office to which the

### **Section 11.5 Membership Surveys and Questionnaires**

- (A) Any survey or questionnaire to all members of the Bar from a section or non-bar person or group must have the prior approval of the Board regarding purpose and content.
- (B) A survey to specific groups of the membership from bar staff must have the prior approval of the President or President-elect. A survey to all members of the Bar must have the prior approval of the President or President-elect.
- (C) A section may survey its own membership without prior approval.

## **Article 12 Legislation and Public Policy**

### **Section 12.1 Guidelines**

Bar legislative or policy activities must be reasonably related to any of the following subjects: Regulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; 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 issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

### **Section 12.2 Initiation of Legislation**

#### ***Subsection 12.200 House of Delegates and Membership***

The Bar must sponsor legislative proposals approved by the House of Delegates or through a membership initiative to the Legislative Assembly directly following the House or membership action. Legislation not enacted may not be sponsored in the following session unless resubmitted by one of the methods set forth above or by action of the Board.

#### ***Subsection 12.201 Board of Governors***

The Board may sponsor legislative proposals to the Legislative Assembly on its own initiative. The Board and its Public Affairs Committee has the authority between meetings of the House of Delegates to act on legislative and public policy matters pursuant to the guidelines established.

### **Section 12.3 Legislative Process**

Because of the nature of the legislative process, the Board or its Public Affairs Committee retains the right to set priorities regarding the enactment of legislation, to propose amendments or consent to amendments to legislation and to sponsor or take positions on appropriate legislation. In so doing, the Board will make a reasonable effort to do the following:

Encourage as wide a participation of the membership as possible in formulating positions on legislative issues; inform members, especially sections and committees,

of the Bar's legislative positions; respect divergent opinions of subgroups within the legal profession; provide assistance to bar sections and committees; avoid committing bar funds to issues that are divisive or result in creating factions within the profession; present major issues to the House of Delegates for approval; ensure that the Public Affairs Committee encompasses a balance of interest within the Bar and ensure that the Public Affairs Committee consults frequently with the Board.

#### **Section 12.4 Committees and Sections**

Any committee or section wishing to sponsor legislation or take a position on any rule or public policy issue will inform the Public Affairs Program, and through that office, the Board, of the exact nature of the legislation proposed. A copy of the bill, proposed rule or policy will be presented for consideration and approval of the Board. A committee or section of the Bar may not represent to the legislature or any individual, committee or agency thereof, a position or proposal or any bill or act, as the position of that committee or section of the Bar without the majority approval of the members of that committee or, in the case of a section, the executive committee and the prior approval of the Board, except as follows. During a legislative session or during the interim, a bar committee or the executive committee of any section must contact the Bar's Public Affairs Program before taking any position on a bill, rule or public policy issue within its general subject area. The chair of the Board's Public Affairs Committee will determine, within 72 hours of notice of the issue, whether it is appropriate for the Bar to take an official position or to allow the section or committee to take a position as requested. The full Public Affairs Committee or the full Board may be consulted before a final decision is made. Bar staff and the Public Affairs Committee of the Board will make every effort to accommodate committees and sections that wish to express positions on relevant issues. The Public Affairs Program shall be kept informed about the status of such positions and related activities.

#### **Section 12.5 Professional Liability Fund Legislation**

The Professional Liability Fund ("PLF") may not present to the legislature or any individual, committee or agency thereof, a position or proposal or any bill or act, as the position of the PLF without the majority approval of the Board of Directors of the PLF and the prior approval of the Board of Governors, except as is provided in Section 12.4 of the Bar's Bylaws.

#### **Section 12.6 Objections to Use of Bar Dues**

##### ***Subsection 12.600 Submission***

A member of the Bar who objects to the use of any portion of the member's bar dues for activities he or she considers promotes or opposes political or ideological causes may request the Board to review the member's concerns to determine if the Board agrees with the member's objections. Member objections must be in writing and filed with the Executive Director of the Bar. The Board will review each written objection received by the Executive Director at its next scheduled board meeting following receipt of the objection. The Board will respond through the Executive Director in writing to each objection. The Board's response will include an explanation of the Board's reasoning in agreeing or disagreeing with each objection.

### ***Subsection 12.601 Refund***

If the Board agrees with the member's objection, it will immediately refund the portion of the member's dues that are attributable to the activity, with interest paid on that sum of money from the date that the member's fees were received to the date of the Bar's refund. The statutory rate of interest will be used. If the Board disagrees with the member's objection, it will immediately offer the member the opportunity to submit the matter to binding arbitration between the Bar and the objecting member. The Executive Director and the member must sign an arbitration agreement approved as to form by the Board.

### ***Subsection 12.602 Arbitration***

If an objecting member agrees to binding arbitration, the matter will be submitted to the Oregon Senior Judges Association ("OSJA") for the designation of three active-status retired judges who have previously indicated a willingness to serve as volunteer arbitrators in these matters. The Bar and the objecting member will have one peremptory challenge to the list of arbitrators. The Bar and the objecting member must notify one another of a peremptory challenge within seven days after receiving the list of proposed arbitrators. If there are no challenges or only one challenge, the OSJA will designate the arbitrator. The arbitrator will promptly arrange for an informal hearing on the objection, which may be held at the Oregon State Bar Center or at another location in Oregon that is acceptable to the parties and the arbitrator. The hearing will be limited to the presentation of written information and oral argument by the Bar and the objecting member. The arbitrator will not be bound by rules of evidence. The presentation of witnesses will not be a part of the hearing process, although the arbitrator may ask the state bar representative and the objecting member and his or her lawyer, if any, questions. The hearing may be reported, but the expense of reporting must be borne by the party requesting it. The Bar and the objecting member may submit written material and a legal memorandum to the arbitrator no later than seven days before the hearing date. The arbitrator may request additional written material or memoranda from the parties. The arbitrator will promptly decide the matter, applying the standard set forth in *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), to the expenditures to which the member objected. The scope of the arbitrator's review must solely be to determine whether the matters at issue are acceptable activities for which compulsory fees may be used under applicable constitutional law. In making his or her decision, the arbitrator must apply the substantive law of Oregon and of the United States Federal Courts. The arbitrator must file a written decision with the Executive Director within 14 days after the hearing. The arbitrator's decision is final and binding on the parties. If the arbitrator agrees with the member's objection, the Bar will immediately refund the portion of the member's dues that are reasonably attributable to the activity, with interest at the statutory rate paid on the amount from the date that the member's fees were received to the date of the Bar's refund. If the arbitrator agrees with the Bar, the member's objection is denied and the file in the matter closed. Similar or related objections, by agreement of the parties, may be consolidated for hearing before one arbitrator.



**Oregon State Bar House of Delegates  
Rules of Procedure**

*(As amended October 29, 2010)*

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### Rule 1-Meetings of the House

1.1 The House of Delegates shall meet at least annually at a time and place set by the Board of Governors. The President of the Oregon State Bar may call special meetings of the House and shall call a special meeting of the House if requested to do so in writing by twenty five (25) or more delegates. See ORS 9.142(1) and (2).

1.2 Notice of meetings of the House shall be given as required in the Bar Act and in the bylaws and policies of the State Bar.

### Rule 2-Presiding Officer

2.1. The President of the Oregon State Bar shall preside over meetings of the House of Delegates. In the President's absence or inability to act, the President shall designate another officer to preside. See ORS 9.070(1).

2.2 The presiding officer shall preserve order, require observance of the rules of procedure and decide all questions of order and procedure.

2.3. Proceedings of the House of Delegates shall be governed by the Bar Act, the bylaws and policies of the State Bar, these rules and the current edition of Robert's Rules of Order Newly Revised.

### Rule 3-Delegates and Delegations

3.1. Delegates shall be selected as provided in the Bar Act and the bylaws and policies of the State Bar. There shall be no alternate delegates, except that a section or local bar association may designate an alternate delegate, provided the alternate delegate is a person duly authorized in the organization's bylaws or otherwise to act in the section chair's or bar president's stead.

3.2 Delegates must register in person at House meetings. Delegates will be provided with special identification for voting.

### Rule 4-Record of Proceedings

4.1 Proceedings of the House of Delegates shall be recorded stenographically. Meeting transcripts shall be maintained at the OSB Center.

4.2 As soon as practicable after each meeting of the House of Delegates, the Executive Director shall prepare and publish to the Oregon State Bar membership a summary of the actions of the House.

### Rule 5-Agenda and Order of Business

5.1 Members of the Oregon State Bar, members of the House of Delegates, and the Board of Governors may submit questions or measures for placement on the agenda of House meetings as set forth in Rules 5.2 through 5.4.

5.2 At meetings of the House of Delegates the Board of Governors shall submit to the House reports of the proceedings by the Board since the last meeting of the House, reports of the officers and committees of the State Bar, and recommendations of the Board. See ORS 9.142(2).

5.3 Any active member of the Oregon State Bar, by petition signed by at least two percent (2%) of all active members of the State Bar, may submit a question or measure for the agenda of any House of Delegates meeting as provided in the Bar Act. See ORS 9.148(3). The petition must be filed with the Executive Director at least forty-five (45) days before the meeting at which it is to be presented.

5.4 A member of the House of Delegates may submit a question or measure for the agenda of any House of Delegates meeting by delivering a copy of the full text of the item to be presented, including a description of any financial impact, to the Executive Director at least forty-five (45) days in advance of the meeting at which it is to be presented.

5.5 In advance of any meeting of the House of Delegates, the Board of Governors of the Oregon State Bar shall review proposed agenda items for conformity with applicable law and bar policy and propose a preliminary agenda for the meeting. The preliminary agenda, along with notice of the questions or measures the Board determined should not be placed on the agenda, shall be published, with notice thereof, to the membership of the Oregon State Bar at least twenty (20) days prior to the meeting.

5.6 An agenda shall be adopted by the House of Delegates at the commencement of each meeting. Upon motion of a delegate, the House may add to the agenda, prior to its final adoption, any question or measure submitted pursuant to Rules 5.2 to 5.4 above and excluded from the agenda by the Board. The order of business at meetings of the House shall be as set forth in the agenda adopted by the House.

5.7 If the presenter of an agenda item is not available when the meeting has reached that point on the agenda, the item will be moved to the end of the agenda. If the presenter is unavailable when the item is subsequently called, it will be considered withdrawn.

#### Rule 6-Quorum

6.1 A majority of the total number of delegates shall constitute a quorum for the transaction of business by the House of Delegates. See ORS 9.142(1).

#### Rule 7-Debate

7.1 All active members of the State Bar may participate in the discussion of matters before the House. See ORS 9.148(1). Only delegates may invoke the House rules and parliamentary procedure during meetings of the House.

7.2 The presenter of an item on the agenda shall have five (5) minutes to open and one (1) minute to close. All other speakers shall have a maximum of three (3) minutes for their presentations. The presiding officer may, with the consent of the House, lengthen the time for a speaker's presentation.

7.3 The presiding officer will recognize "pro" and "con" speakers alternately. Those persons wishing to speak to "other" aspects of an issue will be recognized alternately with the "pro" and "con" speakers.

7.4 All speakers from the floor must state their full names and indicate whether they are delegates, and must state whether they are speaking "pro," "con," to a privileged motion or inquiry, or otherwise.

7.5 No person who has spoken "pro" or "con" on an issue will be recognized again until all other persons who wish to speak on that issue have been given the opportunity.

#### Rule 8-Voting

8.1 Only delegates may vote. Each delegate has only one vote. Cumulative voting and voting by proxy are not permitted. A delegate's vote will be counted only if the delegate is within the delegate voting area.

8.2 Votes shall be taken as determined by the presiding officer.

8.3 The presiding officer shall not vote except in the event of a tie.

#### Rule 9-Attendance

9.1 Meetings of the House of Delegates are open to all members of the Oregon State Bar, the media and the public, except as provided otherwise by the Public Meetings Law (ORS 192.610 et seq.).

#### Rule 10-Amendment of Rules

10.1 These rules may be amended by a vote of a majority of the delegates present and voting. Only delegates may propose amendments to these rules. Proposals for amending the rules must be submitted to the Executive director at least forty-five (45) days in advance of the meeting of the House at which the amendment is to be considered.

## 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 a decision of the US Supreme Court that limits the use of mandatory dues.

### The Keller Decision

In *Keller v. State Bar of California*, 499 US 1,111 SCt 2228 (1990), the US 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 activities complained of by the petitioners (21 members of the bar) included lobbying for or against state legislation,<sup>1</sup> filing amicus briefs in various cases,<sup>2</sup> holding an annual conference of delegates at which resolutions were approved,<sup>3</sup> and engaging in a variety of educational programs. The California Supreme Court had rejected the petitioners' challenge, holding that the State Bar was a state agency and, as such, could use the dues for any purpose within its broad authority.

The Supreme Court reversed, holding that the State Court's determination as to the bar's status was not binding when the determination was essential to the decision of a federal question. The Supreme Court found that the bar's role in governance of the legal profession was essentially advisory in nature, since final authority to establish rules of conduct and discipline lawyers for violating them rested with the State Court. The Supreme Court concluded that the relationship between a state bar and its members was analogous to that of a union and its members. The Court pointed to its decision in *Abood v. Detroit Bd. Of Education*, 431 US 209,97 SCt 1782 (1977), holding that the use of compulsory 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 to the California State Bar, and finding that the "compelled association and integrated bar are justified by the State's interest in regulating the legal

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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 a nuclear weapons freeze initiative; and opposed federal legislation limiting federal court jurisdiction over abortions, school prayer and busing.

profession and improving the quality of legal services,<sup>4</sup> the Supreme Court held that the California State Bar could therefore constitutionally fund activities germane to those goals, but could not fund 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. 499 US 1 at14.

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 "direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice."<sup>6</sup> Article 1.2 of the OSB Bylaws describes the purposes of the OSB as:

- (A) We are a professional organization, promoting high standards of honor, integrity, professional conduct, professional competence, learning and public service among the members of the legal profession.
- (B) We are a provider of assistance to the public seeking to ensure the fair administration of justice for all and the advancement of the science of jurisprudence, and promoting respect for the law among the general public.
- (C) We are a partner with the judicial system, seeking to ensure a spirit of cooperation between the bench and the Bar.
- (D) We are a regulatory agency providing protection to the public, promoting the competence and enforcing the ethical standards of lawyers.
- (E) We are leaders helping lawyers serve a diverse community.

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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.

<sup>6</sup> Webster's Dictionary defines jurisprudence as the "philosophy of law or the formal science of law." "The "administration of justice" has been defined in case law variously as the "systematic operation of the courts," the "orderly resolution of cases," the existence of a "fair and impartial tribunal," and "the procedural functioning and substantive interest of a party in a proceeding."

(F) We are advocates for access to justice.

Pursuant to OSB Bylaw 12.1 the bar's legislative and policy activities must be reasonably related to any of the following:

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.<sup>7</sup>

#### **Post-Keller Developments**

Most of the cases involving the use of mandatory dues since Keller relate to the challenge procedures established by state bars in the wake of Keller. There are a few cases, however, that offer some guidance in determining what are proper expenditures.<sup>8</sup>

*A. Schnieder v. Colegio de Abogados de Puerto Rico, 917 F2d 620 (1<sup>st</sup> 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, including supporting the Sandinista Front for National Liberation in Nicaragua, opposing the draft, and amending Puerto Rico's election laws. The Colegio argued that these activities were permissible under its articulated purposes, which included "the creation of a strongly pluralistic society" and "contributing to the betterment of the administration of justice."

The 1<sup>st</sup> Circuit rejected this as too broad a definition of the Colegio's purposes to justify mandatory financial support. Instead, it endorsed the district court's list of permissible purposes for which financial support may be compelled: monitoring attorney discipline, ensuring attorney competence, increasing the availability of legal services and improving court operations. Activities that promote one or more of those purposes could include continuing

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<sup>7</sup> Prior to 2003, numbers 1-5 were articulated in *former* BOG Policy 11.800(A). A sixth category was "other activities where the issue is recognized as being of great public interest, lawyers are especially suited by their training and experience to evaluate and explain the issue; and the subject matter affects the rights of those likely to come in contact with the judicial system."

<sup>8</sup> Last updated 2009

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. The 1<sup>st</sup> Circuit recognized that these purposes revolve around the "role of the lawyer as lawyer, rather than relying on the lawyer's more generic role as an informed and perhaps influential member of a complex society."

The 1<sup>st</sup> Circuit then went further, finding that the district court's list fell at the extreme end of the spectrum of permissible activities and that neither *Keller* nor any of the union cases that begot *Keller* required such a narrow interpretation of "germane" activities that could be funded with mandatory dues. 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>9</sup>

The court also cautioned against mixing permissible and impermissible activities:

[W]here the permissible and impermissible are intertwined beyond separation, the objector should be entitled to a full rebate for the cost of the function.

*B. The Florida Bar v. Frankel, 581 So2d 1294 (Fla. 1991).*

In 1989, in *The Florida Bar v. Schwarz*, 552 So2d 1094 (Fla. 1989), the Florida Supreme Court adopted guidelines for the Florida bar's lobbying. The guidelines were essentially identical to those in former OSB Policy 11.800(A).<sup>10</sup> The first five subject areas (regulation of attorneys, improving the functioning of the courts, increasing the availability of legal services, regulating attorney trust accounts, and education and competence of the legal profession), were determined to fall clearly within the bar's mission relating to the administration of justice and the advancement of the science of jurisprudence. Florida's sixth category (other issues of great public interest about which lawyer are especially suited to evaluate and explain, and which affect the rights of those likely to come into contact with the judicial system) was justified as consistent with the purposes of an integrated bar.<sup>11</sup> When the guidelines were adopted, the court commented:

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<sup>9</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>10</sup> See fn. 7.

<sup>11</sup> At the time *Schwarz* was decided, *Keller* was pending before the United States Supreme Court. The Florida court noted the position taken by the California Supreme Court in *Keller* and concluded it was not authorizing such broad legislative authority (as was eventually limited by the US Supreme Court).

It appears that the bar has an obligation, grounded upon the mandate of the integration rule setting forth the Bar's very purpose for existence, to speak out on appropriate issues concerning the court and the administration of justice and advise the legislative and executive branches of government of its collective wisdom with respect to these matters.

Two years later, in *Frankel*, the Florida court was called upon to apply the guidelines it adopted in *Schwarz*. A bar member challenged the bar's adoption of a lobbying position supporting various legislative measures involving children including expansion of the WIC program, extending Medicaid coverage for pregnant women, development of sex education and teen pregnancy prevention programs, increasing AFDC payments and enhancing child care funding and standards.<sup>12</sup> The court held that the challenged lobbying positions did not fall within the first five areas "which clearly justify bar lobbying activities."

At the same time, the court rejected Frankel's claim that the additional *Schwarz* criteria were inconsistent with the US Supreme Court's decision in *Keller*, holding that the additional criteria were relevant to the bar's purpose of improving the administration of justice and advancing the science of jurisprudence. The court concluded there is no measurable difference between allowing lobbying for the purpose of regulating the profession or improving the quality of legal services, and allowing lobbying for the purpose of improving the administration of justice or advancing the science of jurisprudence.

Applying The Florida Bar's lobbying criteria for "other issues" the court agreed that children's issues are of great public interest, but disagreed that lawyers are especially suited to evaluate and explain the issues. "The merit of the position or the unanimity in its support is not the standard by which to determine the propriety of bar lobbying activities on that position."

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

New Mexico bar members objected to certain 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>13</sup> The 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 of the lobbying activities were found to either improve

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<sup>12</sup> The bar also supported the following lobbying positions to which no objection was made: creation of family court divisions, termination of parental rights when infants are exposed to cocaine, appointment of guardians ad litem in divorce and custody cases, and development of juvenile offender rehabilitation and treatment programs.

<sup>13</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.



the courts of New Mexico, the lawyers who served them, or the people served by them, thus improving the delivery of legal services.

In reviewing the criteria used to determine if challenged activities are permissible, the court cautioned:

All other things being equal, an expenditure with a strong political or ideological coloration is less likely to be germane to the practice of law, less likely to be related to or justified by the state's interest in regulating the legal profession or improving the quality of legal services, and more likely to add to the existing burden of First Amendment rights.

However, the court agreed that even activities possessing communicative content of a political or ideological nature may be reasonably related to the practice of law, to the regulation of the legal system, or to the improvement of legal services:

It is impossible to allow mandatory state bars to pursue such broad objectives as regulating the legal profession or improving the delivery of legal services (or to permit activities that are 'germane to the practice of law'), without at the same time approving of activities that will inevitably carry some ideological or political baggage. . . . [C]ompulsory financial support of some activities with at least a modicum of ideological content is inevitable.

## Summary

The "rule" of *Keller* is quite 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; other decisions describe the purposes of a mandatory bar to include advancing the science of jurisprudence and improving the administration of justice.

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.
- *Keller* requires that members who disagree with non-germane activities must have a process for challenging the use of their dues for those activities and are entitled to demand a refund of the portion of their dues expended on those activities.
- 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.