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GIVING TEXAS LAWYERS THEIR DUES: THE STATE BAR'S LIABILITY UNDER *HUDSON* AND *KELLER* FOR POLITICAL AND IDEOLOGICAL ACTIVITIES

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I. INTRODUCTION

The State Bar of Texas[1] is a unified bar,[2] as are the bars of thirty-six other states and territories and the District of Columbia.[3]

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1. Throughout this Article, the term "State Bar" (capitalized) refers to the State Bar of Texas. References to other state bar associations are identified as such or are clear from the context.

2. *See* TEX. GOV'T CODE ANN. § 81.051 (Vernon 1988) (requiring each attorney licensed to practice law in Texas to register with State Bar).

3. *See* ALA. CODE §§ 34-3-4, 34-3-5 (1991), § 40-12-49(a) (1993); ALASKA STAT. §§ 08.08.010, 08.08.020 (Michie 1994); ARIZ. REV. STAT. §§ 31(a)1, 31(c)1 (1988); CAL. BUS. & PROF. CODE §§ 6001-6002 (Deering 1993); D.C. CODE ANN. § 11-2501 (1995); GA. CODE ANN. § 15-19-30 (1994); 7 GUAM CODE ANN. § 9102 (1993); HAW. REV. STAT. ANN. § 17.(a), (c) (Michie 1996); IDAHO CODE § 3-405 (1990); LA. REV. STAT. ANN. § 37:211 and ch. 4 app. art. IV, § 1 (West 1988); MICH. STAT. ANN. § 27A.901 (Callaghan 1986); MISS. CODE ANN. §§ 73-3-101 to -103 (1995); MONT. CODE ANN. §§ 37-61-101, -204 to -206 (1995); NEB. REV. STAT. § 7-101 (1991); NEV. REV. STAT. § 7.285 (1991); N.C. GEN. STAT. §§ 84-15, -16 (1995); N.D. CENT. CODE §§ 27-12-01, -12-02 (1991); 1 N. MAR. I. CODE §§ 3601-3603 (1984); OKLA. STAT. ANN. tit. 5, § 12 (West 1996); OR. REV. STAT. § 9.160 (1995); P.R. LAWS ANN. tit. 4, § 771 (1994); S.D. CODIFIED LAWS §§ 16-17-1, -4 (Michie 1995); TEX. GOV'T CODE ANN. §§ 81.051-.053 (Vernon 1988); UTAH CODE ANN. §§ 78-51-1, -21 (1992); V.I. CODE ANN. tit. 4, § 443 (Supp. 1996) and V.I. TERR. CT. R. 305(b) (1996); VA. CODE ANN. § 54.1-3910 (Michie 1994); WASH. REV. CODE ANN. §§ 2.48.020, -.021 (West 1988); W. VA. CODE § 51-1-4a(d) (1994); WYO. STAT. ANN. § 5-2-118(a) (1992); KY. SUP. CT. R. 3.030(1); MO. RULES ANN. 6.01 (Vernon 1995); N.H. SUP. CT. R. 42A; N.M. SUP. CT. R. 24-101; R.I. SUP. CT. R. art. IV, 1; S.C. APP. CT. R. 410 (a), (d); WIS. SUP. CT. R. 10.02(1), 10.03(1); PETITION OF FLA. STATE BAR ASS'N, 40 So. 2d 902 (Fla. 1949). *See also* JEFFREY A. PARNESS, AMERICAN JUDICATURE SOCIETY, CITATIONS AND BIBLIOGRAPHY ON THE UNIFIED BAR IN THE UNITED STATES 3-4 (1973) (reporting that, as of 1972, 29 states, Virgin Islands, Puerto Rico and District of Columbia had unified bars). Four nonunified states, Arkansas, Indiana, Minnesota, and Pennsylvania, have established systems for supervising, registering and disciplining attorneys. *Id.*

Under a unified bar system, attorneys must join the state's bar and pay membership dues as a condition of practicing law in the state.[4] Although a majority of the states have unified bars, historically there has been a steady drumbeat of opposition to compulsory bar membership.[5] This opposition has arisen, in large part, from the

4. *See* Keller v. State Bar of Cal., 496 U.S. 1, 5 (1990) (identifying integrated bar as "an association of attorneys in which membership and dues are required as a condition of practicing law in a State"). Although courts usually refer to these associations as integrated bars, the terms "integrated" and "unified" are used interchangeably to refer to state bars that are created by state statute or court rules and to which dues-paying membership is required to practice law in the state. Peter A. Martin, Comment, *A Reassessment of Mandatory State Bar Membership in Light of* Levine v. Heffernan, 73 MARQ. L. REV. 144, 144 n.1 (1989); *e.g.*, Crosetto v. Heffernan, 810 F. Supp. 966, 971 (N.D. Ill. 1992); Levine v. Supreme Court of Wis., 679 F. Supp. 1478, 1486 (W.D. Wis. 1988); Virgin Islands Bar Ass'n v. Government of the V.I., 648 F. Supp. 170, 172 (D.V.I. 1986).

5. *See* DAYTON DAVID MCKEAN, THE INTEGRATED BAR 21–29 (1963) (comparing integrated bar to medieval guild with purpose of creating monopoly); Steven Camp, Arrow v. Dow: *The Legacy of* Lathrop—*State Bars Under Attack*, 8 OKLA. CITY U. L. REV. 89, 114 (1983) (analogizing compulsory bar membership to labor unions and concluding that compulsory association will be target of future litigation); Leroy Jeffers, *Government of the Legal Profession: An Inherent Judicial Power Approach*, 9 ST. MARY'S L.J. 385, 403 (1978) (arguing that Supreme Court of Texas should use its inherent judicial power to both unify and govern legal profession); Steven Levine, *Time to Move to a Voluntary Bar*, 1990 WIS. L. REV. 213, 217–18 (1990) (arguing for replacement of mandatory bar with voluntary bar); Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 6 (concluding that unified bar is ungovernable at acceptable cost); Charles W. Sorenson, Jr., *The Integrated Bar and the Freedom of Nonassociation—Continuing Siege*, 63 NEB. L. REV. 30, 82 (1983) (arguing that compulsory bar dues may be spent only on activities which maintain quality, competency, and ethics of legal professional); Cheryl A. Cardelli, Note, Faulk v. State Bar of Michigan: *First Amendment Challenges to Bar Expenditures*, 1982 DET. C.L. REV. 737, 757 (observing conflict between attorneys' First Amendment interests and states' interest in integrated bar); Peter A. Martin, Comment, *A Reassessment of Mandatory State Bar Membership in Light of* Levine v. Heffernan, 73 MARQ. L. REV. 144, 180 (1989) (asserting that voluntary bar is better suited to promoting attorney's individual freedom than integrated bar); Jeffrey R. Parker, Note, *First Amendment Proscriptions on the Integrated Bar:* Lathrop v. Donohue *Re-Examined*, 22 ARIZ. L. REV. 939, 971 (1980) (arguing that First Amendment prohibits compulsory bar association); Larry J. Rector, Note, *Compelled Financial Support for a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis*, 66 NEB. L. REV. 762, 765 (1987) (suggesting integrated bar may engage only in activities which are strictly necessary for proper functioning of judicial process); Jim Reynolds, Comment, *Compulsory Bar Dues in Montana: Two (and a Half) Challenges*, 39 MONT. L. REV. 268, 268 (1978) (noting challenges to compulsory bar); Christopher Yost, Comment, *Belly Up to the Bar: Your Bar Tab Is Compelled Membership and Mandatory Fees*, 20 PAC. L.J. 1281, 1290–93 (1989) (analyzing conflict between lawyer's First Amendment rights and mandatory bar membership). *But see* Joseph D. Robertson & John W. Buehler, *The Separation of Powers and the Regulation of the Practice of Law in Oregon*, 13 WILLAMETTE L. REV. 273, 276–77 (1977) (questioning legislature's power to regulate judicial branch). However, lawyers in two states, California and Washington, have recently voted to retain

use of compulsory membership dues by the unified bars to lobby state legislatures in favor of positions that some members may oppose.[6]

Despite the opposition, the United States Supreme Court has upheld the constitutionality of compulsory membership in unified bar associations.[7] However, the Court has placed limits on the use of mandatory dues for some lobbying and other ideological activities.[8] In *Keller v. State Bar of California*,[9] the Court held that while a unified bar association could constitutionally engage in such lobbying activities, the bar must establish a procedure to ensure that dues from dissenting members are not used for political or ideological activities unrelated to the purpose for which the unified bar was established.[10] In *Keller*, the Court concluded that the rights of members of a unified bar were analogous to the rights of agency-shop labor union members,[11] which it had protected in *Chicago Teachers Union v. Hudson*.[12] The *Hudson* Court established that nonunion employees required to pay "fair share" fees to a labor union have a right to an adequate explanation of the basis for the amount of their mandatory dues, a reasonably prompt opportunity to challenge the amount of the dues before an impartial decisionmaker, and an escrow for amounts reasonably in dispute while

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their unified bars. Richard C. Reuben, *Mandatory by Choice: California Bar Survives Membership Vote*, A.B.A. J., Sept. 1996, at 24, 24.

6. *See, e.g.*, *Keller*, 496 U.S. at 5 & n.2 (noting plaintiff's objections to use of compulsory dues to support proposed legislation, file amicus curiae briefs, and adopt resolutions on issues of public interest); Lathrop v. Donohue, 367 U.S. 820, 822 (1961) (challenging use of mandatory dues for political and propaganda activities which included opposing legislation supported by plaintiff); Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 623–24 (1990) (protesting use of compulsory dues "to publicly espouse views and support causes, with which [plaintiffs] disagree, on controversial issues far removed from the immediate concerns of lawyers").

7. *Keller*, 496 U.S. at 14–15.

8. *See id.* at 14 (providing that mandatory bar may not use compulsory dues to fund ideological activities not germane to its goals).

9. 496 U.S. 1 (1990).

10. *Keller*, 496 U.S. at 13.

11. *See Keller*, 496 U.S. at 16–17 (indicating unified bar could satisfy constitutional requirements by using procedures established in *Hudson*). "Agency-shop" agreements allow a union acting as an exclusive bargaining representative with an employer to charge a fee, for acting as their representative, to employees who have not joined the union or paid dues. Chicago Teachers Union v. Hudson, 475 U.S. 292, 303 n.10 (1986).

12. 475 U.S. 292 (1986).

such challenges are pending.[13] In *Keller*, the Supreme Court held that these same procedural protections must be afforded unified bar members.[14]

Not unlike the California State Bar challenged in *Keller*, the State Bar of Texas engages in legislative lobbying and other ideological activities and it is governed by this precedent. Each biennium the State Bar of Texas sponsors a package of proposed legislation, either in its own name or through its various sections, for introduction to the Texas Legislature.[15] The scope of the proposed legislation ranges from mundane housekeeping matters[16] to controversial changes in substantive areas of the law.[17] To facilitate its legislative program, the State Bar maintains a Governmental Relations Department to manage the State Bar's legislative program.[18] This department serves as the lobbying arm of the

13. *Hudson*, 475 U.S. at 294-95, 310.

14. *Keller*, 496 U.S. at 16–17.

15. *See, e.g., 74th Legislative Session State Bar Legislation,* 57 TEX. B.J. 1168 (1994) (reporting State Bar's 1995 legislative program); *State Bar of Texas Legislative Package Update,* 56 TEX. B.J. 948 (1993) (updating status of Bar-sponsored legislation); *State Bar of Texas Legislative Package,* 56 TEX. B.J. 80 (1993) (announcing bills for introduction to state legislature); *Overview of State Bar and State Bar Section Sponsored Legislation—Final Disposition by the 72nd Legislature,* 54 TEX. B.J. 706 (1991) (summarizing status of bills sponsored by State Bar during 1991 legislative session).

16. In 1991, for example, the State Bar supported legislation to clarify that an indigent juvenile offender has a right to appointed counsel. *See* Thomas Morgan, *Family Code Amendments Proposed by Juvenile Law Section*, 54 TEX. B.J. 64, 64 (1991) (discussing proposed changes to Texas Family Code and indicating that two of five proposed bills were sponsored by State Bar).

17. In 1995, the State Bar supported several family law bills, including a bill to establish statutes of repose for paternity suits, a bill to eliminate the right to enforce a divorce decree as a contract, and a bill to permit courts in child visitation enforcement proceedings to order extra visitation to make up for missed visits. *74th Legislative Session State Bar Legislation,* 57 TEX. B.J. 1168, 1168 (1994).

18. *See* STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 11 (1995–96) (specifying duties of State Bar's Government Relations Manager).

State Bar,[19] although individual sections within the State Bar take responsibility for lobbying for the particular bills they sponsor.[20]

In addition to its legislative program, the State Bar engages in other activities that may be objectionable to some of its members. For example, in 1993, the Board of Directors authorized its delegates to introduce a resolution in the American Bar Association (ABA) House of Delegates seeking to change the ABA's policy on the controversial issue of abortion.[21] The Board also permits a prayer breakfast to be held at its annual meeting.[22]

The State Bar of Texas purports to comply with *Keller* by limiting its legislative activity to matters consistent with the express or implied purposes of the State Bar as provided in the State Bar Act[23] and to proposed legislation that "does not present the prospect of substantial division within the bar."[24] According to the Executive

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19. The State Bar's Governmental Relations Manager is not required to register as a lobbyist; members of the State Bar Board of Directors and employees of the State Bar are considered members of the judicial branch of state government for purposes of TEX. GOV'T CODE ANN. § 305.003(b) (Vernon Supp. 1996), which exempts members of the judicial, legislative and executive branches of state government from registering as lobbyists. Tex. Ethics Comm'n, Op. No. 96 (1992).

Previously, an unused provision in the State Bar's Legislative Policy authorized the State Bar to contract with an independent legislative advisor "to advise the State Bar on legislative matters and to represent the State Bar in communicating the State Bar's legislative position to committees and individual members of the legislative or administrative body." *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL, Part XV Legislative Policy, annotated to indicate changes approved by Board of Directors on Jan. 19, 1996, provided by Patricia H. Hiller, Executive Assistant to the Board, State Bar of Texas, to *St. Mary's Law Journal* (on file with the *St. Mary's Law Journal*) (indicating deletion of provision allowing employment of legislative advisor). That provision was repealed in 1996 by the Board of Directors. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL §§ 15.01–15.13 (Apr. 12, 1996) (containing no provision allowing employment of legislative advisor).

20. *See 74th Legislative Session State Bar Legislation*, 57 TEX. B.J. 1168, 1168 (1994) (indicating that individual State Bar sections lobby for particular legislation).

21. *See* Dan Malone, *Abortion and the ABA*, 56 TEX. B.J. 709, 709 (1993) (reporting that State Bar would present resolution to ABA calling for referendum of members on whether ABA should take position on issue of abortion). The State Bar maintains a resolution-making process in conjunction with its annual meeting. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL §§ 2.02, 2.03 (Apr. 12, 1996).

22. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 2.01.02 (Apr. 12, 1996) (providing, however, that prayer breakfast shall not be sponsored or funded by State Bar).

23. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.01.03 A (Apr. 12, 1996) (specifying scope of State Bar legislative activities).

24. *Id.* § 15.01.03 C. The State Bar Board of Directors makes the sole determination, by majority vote, whether a legislative proposal complies with the purposes of the State

Director of the State Bar, the "bottom line [for compliance with *Keller*] is that dues money cannot be and is not used to advocate positions that are politically divisive and not related to State Bar purposes."[25] However, it is not enough that the State Bar claims that it does not engage in political or ideological activities unrelated to the bar's purpose; compliance with *Keller* requires much more. The State Bar must provide adequate information for members to assess the propriety of their mandatory dues, and it must establish a procedure for dissenting members to challenge allegedly improper expenditures.[26] The State Bar provides no such procedure.

Keller and *Hudson* are the culmination of a series of labor union and unified bar cases that uphold compulsory membership but establish constitutional limits on the uses of mandatory dues. Part II of this Article reviews those cases to identify bar activities that may be funded with mandatory dues and discusses the procedures available to dissenting members who object to the use of their dues for political or ideological purposes. Part III addresses the functions of the State Bar of Texas, examines its legislative policy and activities, and demonstrates how the State Bar has failed to provide a mechanism to protect the interests of dissenting members as required by *Hudson* and *Keller*. Part IV suggests that the State Bar can protect the rights of dissenters while maintaining a viable legislative program by adopting procedures, similar to those imposed by courts on the unified bars of other states, that comply with the requirements of *Keller*. In this way, the State Bar can prevent the historical drumbeat of opposition to the unified bar from becoming the crescendo of litigation that has plagued other state unified bars that have failed to protect the rights of dissenters.

Bar Act. *Id.* § 15.03.01 E (1). If the Directors determine by majority vote that a legislative proposal is consistent with § 15.01.03 of the State Bar's policy manual, they take a second vote to determine whether to support, oppose, or take a neutral position on the legislation. *Id.* § 15.03.01 E (2).

25. Tony Alvarado, *Holiday Message*, 58 TEX. B.J. 1113, 1113 (1995). Tony Alvarado, Executive Director of the State Bar, explained that "As a mandatory bar, the State Bar of Texas is subject to the limitations of the *Keller* [v. State Bar of Cal.]-*Gibson* [v. Florida Bar, 798 F.2d 1564 (11th Cir. 1986)] line of U.S. Supreme Court cases which require[s] that activities of the bar be consistent with regulatory functions and with improving the quality of legal services to the public." *Id.*

26. *See Keller*, 496 U.S. at 17 (adopting *Hudson* procedures to protect rights of unified bar members).

II. A PARADIGM FOR COMPLIANCE

A. *The Labor Union Analogy*

Because compulsory bar dues are used by unified bar associations for legislative lobbying that some members may oppose, courts have drawn an analogy to agency-shop labor union cases in which nonunion employees object to the uses made of compulsory union dues. The United States Supreme Court first made this analogy in *Railway Employees' Department v. Hanson*.[27] In *Hanson*, nonunion railroad employees sought to enjoin enforcement of a labor union agreement, authorized by the Railway Labor Act of 1951,[28] that required all railway employees to become union members as a condition of their continued employment.[29] The employees argued that the agreement "force[d] men into ideological and political associations which violate[d] their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights."[30] The Supreme Court of Nebraska affirmed the trial court's injunction in favor of the employees, and held that the Railway Labor Act violated the First[31] and Fifth Amendments[32] of the United States Constitution in that it "deprive[d] the employees of their freedom of association" and "require[d] the members to pay for many things besides the cost of collective bargaining."[33] Justice Douglas, writing for a unanimous Court, rejected the First Amendment argument, stating that "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is

27. 351 U.S. 225 (1956).

28. 45 U.S.C. § 152 (1994). This Act provides that, regardless of any state law to the contrary, all employees of a union carrier must join the union within sixty days of employment. *Id.* § 153(e).

29. Railway Employees' Dep't v. Hanson, 351 U.S. 225, 228 (1956).

30. *Id.* at 236.

31. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

32. U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty of property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.").

33. *Hanson*, 351 U.S. at 230. The Nebraska Supreme Court also ruled that the union shop infringed upon the plaintiffs' freedoms because the union advocated political positions and economic concepts that some employees did not support. *Id.*; *see also* International Ass'n of Machinists v. Street, 367 U.S. 740, 747 (1961) (summarizing *Hanson*).

required to be a member of an integrated bar."[34] Based on this analogy, the United States Supreme Court reversed the holding of the Nebraska Supreme Court and held that the Railway Labor Act was constitutional insofar as it required employees who benefitted from the work of a collective bargaining agency to pay dues to support the agency's work.[35] The Court noted, however, that while the requirement of financial support did not, on its face, violate First Amendment rights, other conditions of compulsory membership might do so.[36] The Court refused to express an opinion on the use of other membership conditions because the issue was not presented on the record.[37]

The question whether compulsory membership violated the First Amendment was next presented in two cases decided on the same day in 1961: *Lathrop v. Donohue*[38] and *International Association of Machinists v. Street*.[39] In each of these cases, members asserted that use of compulsory dues to support objectional political or ideological views violated their First Amendment rights.[40] In *Lathrop*, a Wisconsin lawyer sued for the refund of membership dues paid to the Wisconsin state bar.[41] Plaintiff Lathrop contended that the requirement that he be a member of and pay dues to the state bar as a condition of his right to practice law violated free association and free speech rights protected by the First and Fourteenth Amendments of the United States Constitution.[42] The lawyer maintained

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34. *Hanson*, 351 U.S. at 238.

35. *Id.* The Court found that the Railway Labor Act prohibited the Union from imposing any membership requirement other than the payment of dues. *Id.*

36. *Id.* The Court contrasted the requirement of the Railway Labor Act, which merely requires the members to pay dues, with other restrictions imposed by some unions which, for example, deny membership to persons based on their political views or prohibit members from individually lobbying against the interest of the union. *Id.* at 236 n.8. Significantly, the Court suggested that the use of compulsory dues to pay for insurance and death benefit plans for members might violate dissenting members' constitutional rights. *Id.*

37. *Id.* at 238.

38. 367 U.S. 820 (1961).

39. 367 U.S. 740 (1961).

40. *See Lathrop*, 367 U.S. at 827 & n.4 (claiming compulsory membership in unified bar that engages in legislative lobbying is violation of freedom of association, freedom of speech, and due process); *Street*, 367 U.S. at 745 n.3 (claiming compulsory membership in union that uses dues to support political candidates and propagate political and economic views is violation of freedom of association, freedom of speech, and freedom to work).

41. *Lathrop*, 367 U.S. at 822.

42. *Id.* at 827 n.4.

that a major portion of the activities of the State Bar of Wisconsin was "of a political and propaganda nature,"[43] and that he "[did] not like to be coerced" to support such an organization.[44] Justice Brennan, writing for a plurality of the Court, observed that the "core" of Lathrop's argument was that he could not constitutionally be compelled to join and support an organization that maintained an active legislative agenda.[45]

After examining the origins[46] and functions[47] of the Wisconsin bar and the public interest sought to be served by the integration of the bar,[48] Justice Brennan concluded that "the case presents a claim of impingement upon freedom of association no different from that which we decided in [*Hanson*]."[49] Just as Congress could constitutionally require all railway workers who benefitted from collective bargaining activities to bear their share of the costs of those activities,[50] so too the Wisconsin Supreme Court could constitutionally require lawyers to share the costs of elevating the educational and ethical standards of the state bar, even though the organization also engaged in some legislative activity.[51] Because

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43. *Id.* at 822.

44. *Id.*

45. *Lathrop*, 367 U.S. at 827.

46. *Id.* at 825–27. The Wisconsin Legislature created the State Bar of Wisconsin in 1943 and authorized the Wisconsin Supreme Court to provide for the organization and government of the association "to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice." *Id.* at 825. However, the Wisconsin Supreme Court rejected this mandate twice, declaring instead that it held the inherent power to integrate the bar. *Id.* (quoting Integration of Bar Case, 11 N.W.2d 604, 619 (Wis. 1943)). The court finally acted by issuing an order creating the State Bar of Wisconsin as an integrated bar, effective January 1, 1957. *Id.* at 821.

47. *Id.* at 828–31. Although the Wisconsin bar did engage in some legislative activity—it adopted rules of policy and procedure for legislative activity; its executive director was registered as a lobbyist; it took formal positions with respect to a number of questions of legislative policy; its various standing and special committees studied legislation, made recommendations, and supported various proposals; and the *Wisconsin Bar Bulletin* published articles recommending changes in state and federal law—the Court concluded that legislative activity was not the major activity of the state bar. *Id.* at 839. The most extensive activities were postgraduate education of lawyers, handling grievances, the work of the Committee on Unauthorized Practice of Law, and the Legal Aid Committee. *Id.* at 839–42.

48. *Id.* at 831–32.

49. *Lathrop*, 367 U.S. at 842.

50. *See id.* at 843 (indicating that unions engaged in some legislative activities).

51. *Id.*

the Supreme Court of Wisconsin had held that the bar integration order did not compel a member of the bar to associate with other members, Justice Brennan reasoned that, like the Railway Labor Act at issue in *Hanson*, the only question was "compelled financial support of group activities, not . . . involuntary membership in any other aspect."[52] Thus, the order did not violate the plaintiff's freedom of association rights.[53]

Lathrop also raised a free speech issue, asserting that his rights were violated through the use of his mandatory dues by the Wisconsin bar for political activity which he opposed.[54] Because the record did not reflect precisely what legislative or political activities Lathrop opposed, Justice Brennan found no sound basis for deciding Lathrop's claim that his free speech rights had been violated.[55]

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52. *Id.* at 828.

53. *Lathrop*, 367 U.S. at 843.

54. *Id.* at 845. The Court characterized this as "more a claim of the right to be free from compelled financial support of the organization because of its political activities, than a challenge by [Lathrop] to the use of his dues money for particular political causes of which he disapproved." *Id.* at 847.

55. *Id.* at 844–45. In contrast to Justice Brennan's position, five justices thought that both the associational issue and the free speech issue were properly before the Court, but they were sharply divided about whether the political use of compulsory bar dues violated First Amendment rights. *Lathrop*, 367 U.S. at 866 (Black, J., dissenting). Justice Harlan, joined by Justice Frankfurter, would have sustained the use of mandatory dues for political activities because using compulsory dues to disperse views a member opposes does not necessarily limit the member's right to speak and be heard. *See id.* at 856 (Harlan, J., concurring) (stating that lawyers retain freedom to speak out on causes they oppose even when membership is compulsory). Moreover, Justice Harlan found that the state's interest in having the views of lawyers on "measures directly affecting the administration of justice and the practice of law" outweighed Lathrop's "chimerical" individual freedom claims. *Id.*

Justice Black agreed that the First Amendment issues were raised, but otherwise disagreed, explaining "I can think of few plainer, more direct abridgements of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against." *Id.* at 873 (Black, J., dissenting). The question, in Justice Black's view, was not the power of the state to require all lawyers to support a bar which engages in nonpolitical and noncontroversial activities, but whether the state can compel a lawyer to pay money to further legislation or political causes he opposes. *Id.* at 877 (Black, J., dissenting). Justice Black dismissed the notion that lawyers could be required to give up some of their freedoms under the Bill of Rights in exchange for the high privilege of practicing law as antithetical to the independence of lawyers. *Id.* at 875–77 (Black, J., dissenting).

In a separate dissenting opinion, Justice Douglas rejected his own analogy between labor unions and the integrated bar in *Hanson*. *Id.* at 879 (Douglas, J., dissenting). Freedom of association, he wrote, "[t]he right to belong—or not to belong"—is an important incident of First Amendment rights and should not be curtailed except in exceptional circum-

On the same day the Court in *Lathrop* refused to decide whether the Constitution prohibited the use of mandatory bar dues for political and legislative purposes, it held in *Street* that statutory law prohibited the use of railway workers' compulsory union dues for such purposes.[56] Like *Hanson*, *Street* arose from enforcement of a labor union agreement that conditioned employment on union membership.[57] The *Street* plaintiffs objected to using compulsory dues to finance state and federal election campaigns for candidates they opposed, and to promote "political and economic doctrines, concepts and ideologies with which [they] disagreed."[58] Writing for a plurality of four, Justice Brennan avoided the First Amendment issues and held that the statute which permitted union shop agreements did not, by its silence on the issue, permit the mandatory dues to be spent on causes that employees oppose.[59]

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stances. *Id.* at 881–82 (Douglas, J., dissenting). For Justice Douglas, the limitation imposed on freedom of association in *Hanson* was justified in the narrow context of collective bargaining by the problem of free riders, but he saw no similar evil that justified the ideological regimentation of lawyers in an integrated bar. *Id.* at 879–82 (Douglas, J., dissenting).

56. *See Street*, 367 U.S. at 768–69 (prohibiting use of dissenting employees' union dues for political purposes when employee objects). In contrast to *Lathrop*, the record of employee objections to political and ideological expenditures was fully developed in *Street*. *Id.* at 749.

57. *Id.* at 742–44.

58. *Id.* at 744.

59. *Id.* at 764. Justice Brennan based this statutory construction on Congress's failure to legislate otherwise. *Id.* He observed that while Congress had emphasized the cost of collective bargaining, the union's status as exclusive bargaining representative, the union's concomitant duty to represent all employees of the craft or class fairly and equitably, and the union's desire to eliminate the free riders, *id.* at 761, there was no suggestion "that Congress also meant in Section 2, Eleventh [of the Railway Labor Act], to provide the unions with a means for forcing employees, over their objection, to support political causes which they opposed." *Id.* at 764.

Justice Frankfurter, joined by Justice Harlan, dissented to the holding of the case. *Id.* at 796 (Frankfurter, J., dissenting). Not convinced that Congress's silence on the use of union dues for political purposes indicated a statutory prohibition, they would have decided the case on the constitutional grounds asserted by the plaintiffs. *Id.* at 799–800 (Frankfurter, J., dissenting). Consistent with their opinion in *Lathrop*, Justices Frankfurter and Harlan found no First Amendment violation. *See id.* at 806, 819 (Frankfurter, J., dissenting) (describing gist of plaintiff's complaint as concerning expenditure of mandatory dues for political objectives, but noting that member could still speak freely). And consistent with his dissent in *Lathrop*, Justice Black found the use of any person's mandatory union dues to advocate views the employee is against violates the First Amendment. *Id.* at 790–91 (Black, J., dissenting). Justice Black feared that the plurality's refusal to decide the constitutional issue in the union shop case laid the foundation for allowing an integrated bar to

It was not until 1977 that the Supreme Court finally addressed the First Amendment issues it avoided in *Hanson*, *Street*, and *Lathrop*.[60] In *Abood v. Detroit Board of Education*,[61] several nonunion teachers filed suit in Michigan state court challenging the agency-shop clause of an agreement between the Detroit Board of Education and a teachers' union.[62] The clause was authorized under a Michigan law that permitted local government employers to enter into agency-shop agreements with employee unions to require, as a condition of employment, that all nonunion employees pay a service fee to the union equal to the amount of union dues.[63] The teachers contended that the union was using compulsory dues collected under such an agreement for political activities that were objectionable to them and that were unrelated to collective bargaining.[64] As a consequence, the teachers argued, the agreement deprived them of their right to freedom of association under the First and Fourteenth Amendments.[65] Ultimately, the teachers' claim was heard by the United States Supreme Court.[66]

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use compulsory dues for political and ideological purposes. *Id.* at 785 (Black, J., dissenting).

60. *See Lathrop*, 367 U.S. at 844–48 (reserving judgment on First Amendment issues due to failure of record to indicate plaintiff's objections to bar's activities); *Street*, 367 U.S. at 749–50 (declining to reach First Amendment issues by holding that statute did not allow use of dissenter's union dues for political purposes); *Hanson*, 351 U.S. at 235 (finding no First Amendment violation when dues are used for collective bargaining but reserving judgment in cases where they are used for other purposes).

61. 431 U.S. 209 (1977).

62. *Abood*, 431 U.S. at 212–13.

63. *Id.* at 211. Nothing in the collective bargaining agreement actually required any employee to "join the Union, espouse the cause of unionism, or participate in any other way in Union affairs." *Id.* at 212. Although the Court did not say so, the obvious purpose of the Michigan law, like the union shop provision of Railway Labor Act considered in *Hanson*, was to prevent "free riders" from enjoying the benefits of collective bargaining agreements without paying their share of the cost of obtaining those benefits. *Cf. Hanson*, 351 U.S. at 231 (reviewing legislative history of union shop provision).

64. *Abood*, 431 U.S. at 212–15. The Michigan Court of Appeals upheld the facial validity of the agency-shop clause under the authority of *Hanson*, but noted that Michigan law permitted union expenditures for lobbying and in support of political activities. *Id.* at 215. Although the court recognized the implications on the employees' First and Fourteenth Amendment rights, it denied the employees a refund because they had not specified the particular causes and candidates to which they objected. *Id.*

65. *Id.* at 213.

66. *Id.* at 214. The Supreme Court of Michigan denied review of the state court of appeals decision, and the employees appealed to the United States Supreme Court. *Id.* at 216.

Building on its earlier holding that justified compulsory dues by the importance Congress placed on collective bargaining,[67] the Court addressed the question, left undecided in *Hanson, Street*, and *Lathrop*, whether the use of compulsory union dues for political and ideological purposes violated an employee's First Amendment rights.[68] The Court said that the same principles that prevent a state from conditioning continued employment upon affirmation of a belief in God or association with a particular political party similarly prohibit unions from requiring employees to financially support an ideological cause the employees may oppose as a condition of employment.[69] However, the Court declined to prohibit a union from spending funds for the expression of political opinions, in support of political candidates, or to promote other ideological causes unrelated to its collective-bargaining responsibilities.[70] Rather, the Court clarified, the Constitution simply requires that such activities be financed *only* by those employees who voluntarily and without coercion offer their support for those causes.[71] Moreover, it was not necessary for the employee to object to specific expenditures; an objection to any ideological expenditure would suffice.[72] Thus,

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67. *Id.* at 222. Relying on *Street*, the Court opined that as long as the union acted "to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 223. Since the Michigan agency-shop provision advanced the same government interests recognized in *Hanson* and *Street*, the Michigan provision was valid insofar as compulsory dues were used to finance collective bargaining activities. *Id.* at 225. The Court considered several arguments that public employment was somehow different and concluded that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232.

68. *Abood*, 431 U.S. at 232–233.

69. *Id.* at 235.

70. *Id.* at 235. *But see Street*, 367 U.S. at 800–01 (Frankfurter, J., dissenting) (arguing that in enacting Railway Labor Act, Congress did not intend to limit political activities of unions).

71. *Abood*, 431 U.S. at 236–37. Justice Stevens, in a lengthy concurring opinion, discerned a fundamental distinction between a private sector and a public sector union. *Id.* at 250 (Stevens, J., concurring). Under the First Amendment, Justice Stevens said, the government has the authority to permit private parties to enter into agreements containing terms that the government itself cannot adopt. *Id.* He also objected to shifting the burden to the employees to show that compulsory fees were being used for "ideological activities unrelated to collective bargaining" by noting that "[b]efore today it had been well established that when state law intrudes upon protected speech, the State itself must shoulder the burden of proving that its action is justified by overriding state interests." *Id.* at 263–64.

72. *Id.* at 241. Explaining its holding, the Court wrote:

the Court decided that employees cannot be compelled to contribute to "ideological activities unrelated to collective bargaining."[73] This decided, the next question was how to determine what activities constitute collective bargaining.

B. *Protecting Individual Rights When Membership Is Compulsory*

The Court answered this question in *Ellis v. Railway Clerks*.[74] In *Ellis*, dissenting railroad employees objected to six union expenses—the union's national convention, litigation unrelated to collective bargaining, union publications, social activities, employee death benefits, and general organizing expenses—contending essentially that these expenditures were unrelated to the collective bargaining process.[75] The Court explained that whether the challenged expenditures were allowable depended on whether

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> To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the [u]nion that are unrelated to its duties as exclusive bargaining representatives.

Id. (footnote omitted).

This position was a significant reversal from *Lathrop*, where the Court avoided the constitutional issue because Lathrop did not apprise the Court of his views on any particular legislative issues on which the state bar had taken a position, "or as to the way in which and the degree to which funds compulsorily exacted from its members . . . [were] used to support the organization's political activities." *Lathrop*, 367 U.S. at 846. *Cf. id.* at 870 (Black, J., dissenting) (writing that it was "nothing more than the emptiest formalism to suggest that the case cannot be decided because the appellant failed to allege, as precisely as four members of this Court think he should, what it is that the Bar does with which he disagrees"). Since the union in *Abood* had already instituted a voluntary plan that allowed dissenting employees to obtain a pro rata refund of their compulsory dues, the Court suggested deferring further proceedings on remand to permit the parties to settle the case under the voluntary plan. *Abood*, 431 U.S. at 242. According to the union's brief, the voluntary plan permitted a dissenting employee to protest the use of compulsory dues for "activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment." *Id.* at 240 n.41. The union would then make a pro rata refund, based on the union's calculation of what portion of the compulsory fees were spent on those purposes. *Id.* The calculation was subject to review by an impartial board. *Id.*

73. *Abood*, 431 U.S. at 236.

74. 466 U.S. 435 (1984).

75. *Ellis*, 466 U.S. at 440.

they were reasonably incurred for the purpose of collective bargaining.[76]

Here, the Court found that expenses for participation in the national convention, for union social activities, and for the union magazine fell within the statutory purpose of mandating union membership.[77] The Court further concluded that those expenditures were germane to collective bargaining and that they added little or no infringement of First Amendment interests of objecting employees beyond that already justified by the governmental interest in industrial peace.[78] The Court rejected the remaining expenses as not reasonably necessary or related to collective bargaining.[79]

The Court returned to the question of what activities a union may constitutionally charge to dissenting employees in *Lehnert v. Ferris Faculty Association*.[80] In *Lehnert*, the Court concluded that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."[81] In addition, mandatory agency-shop fees could include the "pro rata share of the costs associated with otherwise chargeable activities of the state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employee's bargaining unit."[82] The fees are chargeable, the Court explained, because the parent organization presumably confers considerable economic, political, and informational resources on the local union in its time of need.[83]

Ensuring that a union does not unconstitutionally charge activities to dissenting employees requires, according to the Supreme

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76. *Id.* at 440.
77. *Id.* at 448–51.
78. *Id.* at 455–56.
79. *Ellis*, 466 U.S. at 451–54.
80. 500 U.S. 507 (1991).
81. *Lehnert*, 500 U.S. at 519.
82. *Id.* at 524.
83. *Id.* at 523. "And, as always," the Court added, "the union bears the burden of proving the proportion of chargeable expenses to total expenses." *Id.* at 524. Interestingly, the Court stated that expenses incident to preparation for an illegal strike are chargeable expenses because they aid in collective-bargaining negotiations "and enure to the direct benefit of members of the dissenters' unit." *Id.* at 532.

Court, certain procedural safeguards. The Court discussed which procedural safeguards are needed to protect the First Amendment rights of nonunion employees who were required to support a collective-bargaining agency in *Chicago Teachers Union v. Hudson.*[84] The *Hudson* Court announced a three-part test to determine whether a union's collection of an agency fee is constitutional.[85] First, the union must give potential objectors adequate information to assess the propriety of the union's fee.[86] Second, the union must give employees a reasonable opportunity to challenge the amount of the fee before an impartial decisionmaker.[87] Finally, the union must maintain an escrow for amounts reasonably in dispute while a challenge is pending.[88] Although the Court developed these procedures in the context of agency-shop labor union cases, the holdings had clear implications for unified bars.

C. *Compulsory Dues in the Context of Unified State Bars*

When the Supreme Court finally addressed the question whether a unified state bar could use a dissenting member's dues for political or ideological purposes, the result was clearly ordained. The Supreme Court decided the issue in *Keller v. State Bar of California.*[89] In *Keller*, the plaintiffs attacked the use of mandatory state bar dues to finance lobbying, amicus curiae briefs, election campaign contributions, and other activities that they found politically or ideologically objectionable.[90] The Supreme Court of California sought to avoid the union shop analogy drawn in *Lathrop* by con-

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84. 475 U.S. 292 (1986).

85. *Hudson*, 475 U.S. at 310.

86. *Id.* at 306.

87. *Id.* at 307. "The nonunion employee," the Court stated, "whose First Amendment rights are affected by the agency-shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner." *Id.* (footnote omitted).

88. *Id.* at 310. The union voluntarily escrowed all of the dissenting nonunion employees' contributions, but the Court stated that this did not cure the failure to provide an adequate explanation of the use of the funds, nor the failure to provide a reasonably prompt decision by an impartial decisionmaker. *Id.* at 309–10. The Court held that "[t]he appropriately justified advance reduction and the prompt, impartial decisionmaker are necessary to minimize both the impingement [on the employees' First Amendment rights] and the burden" of objecting borne by the employees. *Id.* at 309.

89. 496 U.S. 1 (1990).

90. Keller v. State Bar of Cal., 767 P.2d 1020, 1021 (Cal. 1989), *rev'd*, 496 U.S. 1 (1990).

cluding that, because the California State Bar rested upon a constitutional and statutory structure that involved an extensive degree of legislative involvement and regulation, the unified bar was more appropriately analogized to a governmental agency.[91] As a governmental agency, the California Supreme Court reasoned, "the distinction between revenue derived from mandatory dues and revenue from other sources [was] . . . immaterial. A governmental agency . . . [could] use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purpose within its authority."[92]

The United States Supreme Court, however, rejected the governmental-agency analogy.[93] The Court determined that governmental-agency status was inconsistent with the bar's membership, functions, and, most notably, its principal source of funding, which came not from legislative appropriations, but from membership dues.[94] Accordingly, the Court concluded that the union shop analogy applied to the unified California bar.[95] While recognizing that the analogy was not perfect, the Court found that because of the bar's contribution to the self-regulation of the profession, it was

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91. *Id.* at 1029. The California Supreme Court candidly recognized that most of the cases from other jurisdictions that had addressed the subject of unified bar dues *did* apply the labor union analogy to the bar. *Id.* at 1028.

92. *Id.* The only restriction the California Supreme Court placed on the state bar was a prohibition against election campaigning. *Id.* at 1031.

93. *Keller*, 496 U.S. at 10–11. The Court stated that even though the Supreme Court of California was the final authority on the governmental status of the state bar for purposes of state law, that determination did not bind the United States Supreme Court where such a determination was essential to deciding a federal question. *Id.* at 11. *But see* Lathrop v. Donohue, 367 U.S. 820, 827–28 (1961) (announcing that Wisconsin Supreme Court's interpretation of its order integrating bar was binding on United States Supreme Court). In *Lathrop*, the Supreme Court's acceptance of the state court's interpretation of the effect of compulsory membership in the state bar enabled the Court to avoid the issue of whether compulsory membership in the state bar violated Lathrop's First Amendment right of association and free speech. *See id.* at 827–28, 845 (accepting Wisconsin Supreme Court's interpretation of compulsory membership as imposing duty to pay dues, but not compelling association with others).

94. *Keller*, 496 U.S. at 11. Other factors opposing governmental agency status mentioned by the Court included: 1) only lawyers admitted to practice in California are members of the state bar, 2) all lawyers admitted to practice in California must be members, and 3) the services performed by the state bar were essentially advisory in nature. *Id.* In actuality, the Court concluded, it was the California Supreme Court, not the California State Bar, that was responsible for admitting attorneys to practice law, disciplining attorneys, and establishing ethical codes of conduct. *Id.*

95. *Id.* at 12.

"entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort."[96] Thus, state bar dues could be used for expenditures "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of legal service available to the people of the State.'"[97]

In *Abood*, the Court held that a union may constitutionally spend funds for political or ideological purposes as long as such expenditures are financed by employees who do not object to those purposes.[98] While *Keller* appears to suggest that a state bar may never use mandatory dues to fund activities of an ideological nature that fall outside the state's interest in regulating the legal profession and improving the quality of legal services,[99] this is an overly broad reading of the case. *Keller*, which relies heavily on *Abood* in its analysis, does not prohibit a unified bar from funding ideological activities outside its purpose; it only prohibits funding these activities with nonconsenting members' dues, and insists on procedural safeguards to prevent this from occurring.[100] The *Keller* Court suggested that a unified bar could meet its obligations under *Abood* if it adopted a *Hudson*-like mechanism to accommodate the objections of dissenting members: a fee collection system that included "an adequate explanation of the basis of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."[101]

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96. *Id.*

97. *Id.* at 14 (quoting Lathrop v. Donohue, 367 U.S. 820, 843 (1961)).

98. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977).

99. *Keller*, 496 U.S. at 13–14.

100. *See id.* at 17 (stating that *Abood* requirement may be met by adoption of procedural safeguards). The *Abood* Court required only that the union not collect fees for political or ideological activities from dissenting members. *Abood*, 431 U.S. at 235–36.

101. *Id.* at 16 (quoting *Keller*, 767 P.2d at 1046 (Kaufman, J., concurring and dissenting)). The Court suggested this procedure in *Chicago Teachers Union v. Hudson* as a means by which a union in an agency-shop relationship could meet its requirement under *Abood*. *Hudson*, 475 U.S. at 310. Justice Kaufman, concurring and dissenting in the California Supreme Court opinion, quoted the passage from *Hudson* and noted that "unions representing government employees have developed, and have operated successfully within the parameters of *Abood* for over a decade." *Keller*, 767 P.2d at 1046 (Kaufman, J., concurring and dissenting). The Supreme Court quoted Justice Kaufman's opinion at

D. *Drawing the Line Between Chargeable and Nonchargeable Activities*

Aside from the abstract holding that an objecting bar member's mandatory dues may not be used for political or ideological purposes, the United States Supreme Court has left it to the lower courts to determine what specific uses are prohibited.[102] Whether challenged expenditures are necessarily or reasonably incurred in the regulation of the legal profession or the improvement of state legal services has been addressed by the courts in terms of chargeable versus nonchargeable activities.[103]

1. Chargeable Activities

The most comprehensive analysis to date of what bar activities may and may not be funded with mandatory dues is provided in

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length with approval of his assessment that the *Hudson* procedure would meet the *Abood* requirement. *Keller*, 496 U.S. at 16–17.

The plaintiffs also challenged their compelled association "with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." *Keller*, 496 U.S. at 17. The Supreme Court characterized this as "a much broader freedom of association claim than was at issue in *Lathrop*." *Id.* Since the California Supreme Court had not addressed this claim, the Supreme Court refused to do so. *Id.*

102. *See* Keller v. State Bar of Cal., 496 U.S. 1, 17 (1990) (remanding to state court issue whether specific activities objected to by plaintiffs were germane to bar goals). Although the *Keller* Court did not detail the specific uses for which compulsory dues could be used, it did delineate the extremes. *Id.* at 16. As an example, the court indicated that compulsory dues may not be spent to endorse or advance a nuclear weapons freeze initiative or gun control legislation, but they may be used for activities involving discipline of members of the bar or ethical code proposals for the profession. *Id.* at 16.

In *Lehnert v. Ferris Faculty Ass'n*, in the context of an agency-shop case, the Court split in several directions when it tried to determine whether various fees were properly chargeable. *See* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 511 (1991) (identifying portions of opinion with majority and plurality support). The Court's only general agreement was that mandatory dues could be used for funding various activities of a national organization, *id.* at 527, 529, 530, and for preparations for an illegal strike, *id.* at 530–31.

103. *Keller*, 496 U.S. at 14 (*quoting* Lathrop v Donohue, 367 U.S. 820, 843 (1961)). This test was a synthesis of language describing the purpose of the California Bar (to regulate the State's legal profession and to promote the improvement of the administration of justice), *id.* at 4–5, and language from *Ellis*, allowing the use of mandatory union dues not only for the direct costs of negotiating and administering a collective-bargaining contract and for settling grievances and disputes, "but also [for] the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit," *id.* at 14 (quoting Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435, 448 (1984)).

Schneider v. Colegio de Abogados de Puerto Rico.[104] Relying on the Supreme Court's conclusion in *Ellis v. Railway Clerks* that union social activities could be financed with compulsory union dues,[105] the United States Court of Appeals for the First Circuit concluded in *Schneider* that activities "incidental to the operation of an association—such as social events and the provision of insurance to members—may be financed with mandatory fees."[106] Under *Schneider*, "[p]olitical activities, including lobbying, may be funded from compulsory dues so long as the target issues are narrowly limited to regulating the legal profession or improving the quality of legal service."[107] The court cited, as examples of appropriate funding, lobbying in favor of budget appropriations for new judicial positions or increased salaries for government attorneys, and lobbying against statutory limitations on attorney advertising or requirements for the certification of legal specialists.[108]

The First Circuit also approved a list of activities sanctioned by the district court "for which there would be little dispute that compulsory financing would be appropriate."[109] For example, attorney discipline was clearly an area of acceptable bar activity.[110] Another

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104. 917 F.2d 620 (1st Cir. 1990). The Colegio de Abogados de Puerto Rico is the unified bar association of the Commonwealth of Puerto Rico. *Id.* at 623.

105. *Ellis*, 466 U.S. at 449–50; *see Schneider*, 917 F.2d at 632 (concluding that social events may be funded with mandatory dues). The *Ellis* Court also held that the expenses of the union's national convention and its monthly magazine could be financed with mandatory fees. *Ellis*, 466 U.S. at 456.

106. *Schneider*, 917 F.2d at 632. Since there is already a First Amendment infringement resulting from the compelled contribution to the union, as the Supreme Court had explained earlier, forcing the employee to contribute to union social activities does not increase the infringement. *Ellis*, 466 U.S. at 456. Not only is the First Amendment not a factor, the First Circuit reasoned, but "'the very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds.'" *Schneider*, 917 F.2d at 632 (quoting Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435, 456 (1984)); *see also* Hollar v. Government of the Virgin Islands, 857 F.2d 163, 170 (3d Cir. 1988) (holding that bar-sponsored social events are not ultra vires).

107. *See Schneider*, 917 F.2d at 632 (relying on *Keller* Court's earlier pronouncement of permissible and impermissible extremes); *see also Keller*, 496 U.S. at 15–16 (delineating extremes of permissibility for expenditures of compulsory bar dues).

108. *Schneider*, 917 F.2d at 632–33 (offering examples of permissible and impermissible use of compulsory dues).

109. *Id.* at 631. *See also* Schneider v. Colegio de Abogados de Puerto Rico, 682 F. Supp. 674, 684–86 (D.P.R. 1988) (discussing permissible expenditures of state bar dues).

110. *Schneider*, 682 F. Supp. at 684. The district court did note, however, as one commentator has observed, that since approximately 20 of the 50 states administer attorney

acceptable activity was maintaining the competence of the members of the profession.[111] The court held that the bar could accomplish this goal by implementing continuing legal education requirements, establishing bar admission standards, and supervising law schools.[112] Increasing the availability of legal services to society by providing legal aid programs, public information regarding the availability of legal services, and public education on substantive areas of the law was also permitted.[113] In addition, the court said that the bar could lobby regarding attorney advertising.[114] Finally, the court determined that lawyers possess special knowledge in areas relating to the improvement of the functioning of the courts that justifies the bar's public commentary on matters concerning judicial efficacy and efficiency, including evidentiary and procedural rule-making, and docketing matters.[115]

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discipline by means of legislative regulation and judicial rulemaking, without an integrated state bar, it cannot be said that an integrated bar is the least restrictive method of achieving any goals. *Id.* at 685 n.10 (*citing* Charles W. Sorenson, *The Integrated Bar and the Freedom of Nonassociation—Continuing Siege*, 63 NEB. L. REV. 30, 69 (1984)).

111. *Schneider*, 682 F. Supp. at 685.

112. *Id.*

113. *Id.* At the same time, the district court warned, educating the public on substantive areas of the law (such as landlord-tenant law) should not be turned into a lobbying effort for new consumer legislation. *Id.* at 685 n.11.

114. *Schneider*, 917 F.2d at 633.

115. *Schneider*, 682 F. Supp. at 685. Several other courts have also discussed what bar activities may permissibly be funded with mandatory dues. In Gibson v. Florida Bar, a pre-*Keller* case, the United States Court of Appeals for the Eleventh Circuit adopted the labor union analogy from *Lathrop* to hold that bar lobbying to improve the administration of justice must pertain to the role of the lawyer in the judicial system and in society. Gibson v. Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986). The *Gibson* court stated that lobbying activities should relate directly to the collective expertise of lawyers that is grounded in their long-standing relationship with the courts. *Id.* Acceptable areas for bar lobbying include: "(1) the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client trust accounts; and (5) law school and Bar admission standards." *Id.* at 1569 n.4. *See also* Petition of Rhode Island Bar Association, 650 A.2d 1235, 1237 (R.I. 1994) (holding that lobbying to advance legislation proposing changes in selection of judges is legitimate bar concern and not in violation of *Keller*); Falk v. State Bar of Mich., 342 N.W.2d 504, 505–06 (Mich. 1983) (rejecting dues-based challenges to bar's lawyer referral service, public education on legal services and client security fund). In *Falk*, the court also rejected First Amendment challenges to volunteer legal assistance rendered by a section of the bar, to lawyer placement services offered by the bar, to the bar's promotion of prepaid legal services, and to certain social functions conducted by the bar and its sections. *Falk*, 342 N.W.2d at 511–13. The plaintiff in *Falk* contended that certain food and drink served at social functions of the bar violated his religious beliefs. *Id.* at 512. *But cf.* TEX. GOV'T CODE ANN. § 81.0221 (Vernon Supp. 1996) (prohibiting use of mandatory State Bar dues for

2. Nonchargeable Activities

The list of prohibited uses of mandatory dues is much longer. In *Gibson v. Florida Bar*,[116] the United States Court of Appeals for the Eleventh Circuit denounced a unified bar's promulgation of political and ideological positions through bar publications and speeches made by bar officials.[117] The First Circuit echoed the *Gibson* holding in *Schneider*, maintaining that 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.[118] For example, while the bar could lobby generally regarding attorney advertising, it could not lobby for restrictions on advertising for controversial legal services such as aid to family planning agencies or abortion clinics.[119]

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purchase of alcoholic beverages). In *Popejoy v. New Mexico Bd. of Bar Comm'rs*, the court approved expenditures for the construction of a bar center, lobbying for improvements in the delivery of legal services, funding of pro bono legal services to military reservists and family members in conjunction with deployment of personnel during a military operation, and the cost of defending a lawsuit challenging the bar's expenditures, including an award of attorney's fees to the prevailing plaintiffs. Popejoy v. New Mexico Bd. of Bar Comm'rs, 887 F. Supp. 1422, 1429–32 (D.N.M. 1995). Finally, the *Popejoy* court approved the legislative lobbying activities of the various bar sections funded by voluntary dues, reasoning that members who objected need not contribute. *Id.* at 1430.

116. 798 F.2d 1564 (11th Cir. 1986).

117. *See Gibson*, 798 F.2d at 1565 n.1 (denouncing lobbying activities which opposed tort reform, limitation of damages in medical malpractice actions, changes in state sales tax, changes in state's taxation and venue powers, and which advocated regulation of child care centers).

118. *Schneider*, 917 F.2d at 633. As examples, the court stated that the bar could not use dissenting members' funds to promote a system of no-fault insurance, endorse a pro-life amendment to the state constitution, or generate support for a death penalty. *Id.*; *cf. Gibson*, 798 F.2d at 1569 (holding bar cannot use compulsory dues to lobby on issues not germane to its stated purpose). *But see Falk*, 342 N.W.2d at 514 (rejecting labor union analogy for bar lobbying activities because lawyers were so involved with all aspects of law that substantial benefit was received from input from bar on proposed legislation).

119. *Schneider*, 917 F.2d at 632–33. The *Schneider* court also noted the activities of several Puerto Rican bar committees whose activities fell outside the narrow categories for which financial support could be compelled. *Id.* These activities included publishing a report on the "Procedural Requirements for Decolonization of the United Nations Organization," working "to enhance the level of political debate in our country, to enforce compliance with the laws governing the voting process and to frame a code of ethics to regulate public debate among political candidates," studying nuclear armament and the Nuclear Arms Ban Treaty in Latin America, and a proposed demarcation of the San Juan and Rio Piedras Delegations. *Id. See also Hollar*, 857 F.2d at 170 (concluding that taking public position regarding potential United States Attorney is outside permissible bar activity).

Likewise, the *Schneider* court indicated, while a bar publication devoted to educational articles about the legal profession or the quality of legal services available in the state may be funded with mandatory dues, a publication that carries "markedly political and ideological material" may not be so funded "unless, perhaps, the magazine publishes a broad spectrum of counterbalancing views."[120] Further, the court opined that when "permissible and impermissible [activities] are intertwined beyond separation, the objector should be entitled to a full rebate for the cost of the [entire] function."[121]

Similarly, in *Florida Bar re Frankel*, the Supreme Court of Florida denounced eight lobbying positions recommended by the Florida Bar Commission for Children and published in the *Florida Bar News*.[122] Although the Florida Supreme Court commended the Florida Bar for being concerned about children's issues, it nevertheless concluded that the issues were outside the scope of permissible lobbying activities because they were not matters that lawyers were especially suited by their training and experience to evaluate and explain.[123]

E. *Remedies for Noncompliance*

As the courts defined the constitutional limits to the uses of mandatory union dues and bar membership fees, they struggled to develop remedies to be applied when those limits were exceeded.

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120. *Schneider*, 917 F.2d at 634. The court noted the district court's observation that "[e]ach publication stands or falls . . . as an indivisible entity, depending on its editorial policy." *Id.* (quoting Schneider v. Colegio de Abogados de Puerto Rico, 682 F. Supp. 674, 686 (D.P.R. 1988)).

121. *Id.* As an example, the court described a hypothetical annual meeting, otherwise permissible, where the chaplain prays for the health of Fidel Castro and a prominent Sandanista is the featured speaker. Here, the court opined that the atmosphere would be so partisan that objectors should not have to pay any cost for the entire meeting. *Id.* at 633–34.

122. *See* Florida Bar *re* Frankel, 581 So. 2d 1294, 1296–98 (Fla. 1991) (concluding that lobbying positions were outside scope of permissible bar activities). The eight positions involved the expansion of the women, infants and children program; extension of Medicaid coverage for pregnant women; childhood immunization; the establishment of children's services councils; programs relating to family life, sex education and pregnancy prevention for teenagers; increased funding for Aid to Families with Dependent Children; child-care funds and standards; and creation of a conference to find consensus on matters involving children's needs. *Id.* at 1296.

123. *Id.* at 1298.

This struggle began in the union shop cases, where the Supreme Court considered an appropriate remedy for a dissenting employee when compulsory union dues were used for noncollective bargaining purposes.[124] In *International Association of Machinists v. Street*, the plurality rejected both the use of an injunction against enforcement of the union shop agreement itself[125] and an injunction against all expenditures of funds for the disputed purposes.[126] The Court averred that these options would violate the legislative policy against enjoining union activities and "would work a restraint on the expression of political ideas which might be offensive to the First Amendment."[127] The *Street* plurality suggested two possible remedies, both premised on the dissenting employee's affirmative duty to object to the use of compulsory dues for political causes.[128] First, the complaining employee could seek an injunction against expending the employee's compulsory dues for political purposes in proportion to the ratio of dues spent for political purposes to the total dues collected by the union.[129] Second, the dissenting employee could receive restitution based on the same ratio.[130]

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124. *See* Chicago Teachers Union v. Hudson, 475 U.S. 292, 310 (1986) (establishing as requirements for mandatory fees "adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute"); Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 118 (1963) (reducing burden of proof on dissenting employee so that he or she has only to notify union of objection to any political activity); International Ass'n of Machinists v. Street, 367 U.S. 740, 772–75 (1961) (rejecting injunction against enforcement of union shop agreement and injunction against expenditure of all funds for disputed purposes by union and suggesting either of two remedies would be adequate to protect dissenting members' rights: 1) injunction against spending that proportion of dissenting members' dues which would fund objectionable purposes, or 2) return that portion of dues which funds objectionable purposes to dissenter).

125. *See Street*, 367 U.S. at 772 (ruling out injunction as remedy because it would defeat congressional plan for all employees to share in cost of collective bargaining).

126. *Id.* at 772–73.

127. *Id.* at 773.

128. *Id.* at 774.

129. *Street*, 367 U.S. at 774–75. The union could not make up this reduction from money paid by a nonobjecting member because this would have the same effect as using the dissenter's money to support the objectionable activities. *Id.* at 775.

130. *Id.* at 775. Justice Douglas "concluded dubitante to agree" to the suggestion to give proportional relief to the dissenting employee because of the "practical problem" of mustering five justices for a judgment in the case. *Id.* at 778–79 (Douglas, J., concurring). Justice Black thought that after courts and lawyers "with sufficient skill in accounting, algebra, geometry, trigonometry and calculus" had "extract[ed] the proper microscopic answer," the employees' claims might still be dismissed as *de minimis* "when measured only in dollars and cents." *Id.* at 795 (Black, J., dissenting). Justice Whittaker was concerned

In *Brotherhood of Railway and Steamship Clerks v. Allen*,[131] the Court generally endorsed the *Street* remedies, but modified the burden of proof on the dissenting employee. Instead of requiring the employee to allege and prove each separate objectionable expenditure, the *Allen* Court held that it was enough for the employee to "manifest . . . opposition to *any* political expenditures by the union."[132] The Court also modified the relief available to the employee. In addition to a proportionate refund of past dues, the Court indicated that there should also be a reduction of future compulsory dues in the same proportion.[133] The Court recognized, however, the practical difficulty faced by unions in establishing a fixed rebate for dissenting employees when unions expend different amounts for political activities each year. The Court suggested that unions could avoid prolonged and expensive litigation by voluntarily developing a formula for determining the proportion of political expenditures in their budgets and adopting a procedure to exempt a dissenter from paying this proportion.[134]

The Court elaborated on the requirements of an exemption procedure in *Chicago Teachers Union v. Hudson*.[135] In *Hudson*, the Court articulated three requirements for a union that collects fees from a dissenting employee under an agency-shop agreement: "an

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not only with the calculation difficulties, but also with determining what was a "proscribed activity." *Id.* at 780 (Whittaker, J., concurring in part and dissenting in part).

131. 373 U.S. 113 (1963).

132. *Allen*, 373 U.S. at 118. Justice Harlan viewed this as a drastic departure from the requirements of *Street* and *Lathrop* in which, he noted, the Court had required the employee or bar association member to object to specific political activity. *Id.* at 129–31 (Harlan, J., concurring in part and dissenting in part). *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 239 (1977) (reiterating that objection to *any* political expenditure was sufficient).

133. *Allen*, 373 U.S. at 122.

134. *Id.* at 123. In *Abood*, the union had voluntarily adopted an objection procedure while the litigation was pending. *Abood*, 431 U.S. at 239–42. The procedure permitted the employee to protest the expenditure of any portion of the compulsory dues for political activities or causes, or those involving controversial issues only marginally related to employment matters. *Id.* at 240 n.41. Under this provision, the protesting employee was entitled to a pro rata fee refund based on the union's calculation of the proportion of total union expenditures for the objectionable purposes. *Id.* The Court, without expressing any opinion of the constitutional sufficiency of the union's plan, remanded the case with the suggestion that further judicial proceedings be deferred to allow the parties to try to settle the dispute under the voluntary procedure. *Id.* at 242 n.45.

135. 475 U.S. 292 (1986).

adequate explanation of the basis for the fee,[136] a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker,[137] and an escrow for the amounts reasonably in dispute while challenges are pending."[138]

Ultimately, this remedy was applied to members of unified bars who object to expenditures of compulsory dues.[139] In *Keller*, the Court opined that like a union, "an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*."[140] The Court left open, however, the question whether alternative procedures could also satisfy that obligation.[141]

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136. *Hudson*, 475 U.S. at 310. The Court noted that in *Abood* it placed the burden on the employee to raise an objection, but the union retained the burden of proving the proportion of political to total union expenditures because only the union has the information necessary for the calculation. *Id.* at 306. Likewise, the *Hudson* Court said:

> Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*.

Id. (footnote omitted).

137. *Id.* at 310. The *Hudson* Court added this requirement because a "nonunion employee, whose First Amendment rights are affected by the agency-shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner." *Id.* at 307 (footnote omitted).

Observing that the union plans provided no impartial decisionmaker, the Court noted that "the most conspicuous feature of the procedure, is that from start to finish it is entirely controlled by the union." *Id.* at 308 (quoting Chicago Teachers Union v. Hudson, 743 F.2d 1187, 1194–95 (7th Cir. 1984)).

138. *Id.* at 310. The union argued that its new procedure, escrow of 100% of dissenting members dues, eliminated any constitutional objection and provided an adequate remedy. *Id.* at 309. This was insufficient, the Court stated, because it failed the first two requirements for a constitutional remedy: an adequate explanation and a timely impartial decision. *Id.* "[T]hese characteristics are required because the agency-shop itself impinges on the nonunion employees' First Amendment interests, and because the nonunion employee has the burden of objection." *Id.* Furthermore, the 100% escrow "has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain." *Id.* at 310. The Court remanded to the district court the question of a special remedy to be fashioned under its revised requirements. *Id.* at 310–11. Justice White concurred, noting, however, that if the union provides arbitration and complies with all requirements specified in the opinion, "it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." *Id.* at 311 (White, J., concurring).

139. Keller v. State Bar of Cal., 496 U.S. 1, 17 (1990) (applying agency-shop exemption procedures to unified bar).

140. *Keller*, 496 U.S. at 17.

141. *Id.* The Court noted that it decided *Hudson* from a well-developed record regarding various methods used by unions to handle "free rider" problems in organized labor

Although there is the possibility that other procedures might pass constitutional muster,[142] the blessing bestowed by the *Keller* Court

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settings. *Id.* Because *Keller* was a summary judgment case, there was no such record before the Court. *See id.* at 6 (describing procedural history). The Court stated that whether alternative procedures would satisfy the *Abood* requirements was best left for consideration upon a more fully developed record. *Id.* at 17.

142. Some bar associations calculate the pro rata cost of nonchargeable activities and allow members to deduct that amount from the dues they pay. *See, e.g.*, CAL. ST. BAR R. & REG., art. IA, § 2 (Deering Supp. 1996) (allowing member who chooses not to support nonchargeable activities to deduct in advance from annual fee amount fixed by bar and requiring bar to provide explanation for fee, basis for advance reduction, and independent audit); WIS. SUP. CT. R. 10.03(5)(b) (West 1995) (establishing dues reduction process for activities that cannot be funded with mandatory dues); Notice from Washington State Bar Association to Members 1 (1995) (on file with the *St. Mary's Law Journal*) (announcing change from "rebate" to "dues reduction" system). Other bar associations require members to request a refund of the pro rata cost of nonchargeable activities. *See, e.g.*, Idaho State Bar, *Idaho Bar Commission Rules*, R. 307 (on file with the *St. Mary's Law Journal*); State Bar of Montana, *Bylaws of the State Bar of Montana*, art. I, § 4(b) (on file with the *St. Mary's Law Journal*); South Carolina Bar, *Constitution*, § 6.6 (on file with the *St. Mary's Law Journal*); Utah State Bar, RULES OF INTEGRATION AND MANAGEMENT C(15)(d) (Nov. 1, 1989) (on file with the *St. Mary's Law Journal*); Letter from Thomas C. Barnett, Jr., Secretary-Treasurer, State Bar of South Dakota, to Ralph H. Brock 1 (Dec. 27, 1995) (on file with the *St. Mary's Law Journal*).

Most unified bar associations do not categorize their chargeable and nonchargeable activities, but still require members to object to specific expenditures. *See, e.g.*, State Bar of Arizona, *Bylaws*, art. XIII, § 13.03 (on file with the *St. Mary's Law Journal*); *Rules Regulating The Florida Bar* § 2–9.3 FLA. R. CT. (West 1996); State Bar of Georgia, *Standing Board Policy 200* (1994–95) (on file with the *St. Mary's Law Journal*); Hawaii State Bar Association, *Constitution and Bylaws of the Hawaii State Bar Association*, art. VI, § 2 (on file with the *St. Mary's Law Journal*); State Bar of Michigan, *Administrative Order 1993–5* (on file with the *St. Mary's Law Journal*); Alaska Bar Association, *Proposed New Section 5 to Article III of the Bylaws of the Alaska Bar Association Relating to Compliance with* Keller v. State Bar of California, ALASKA BAR RAG, Sept.-Oct. 1995, at 9; Mississippi State Bar, *Protest and Dues Refund Procedure* (on file with the *St. Mary's Law Journal*); Missouri Bar, *Missouri Bar Protest and Refund Procedure* (Nov. 1, 1990) (on file with the *St. Mary's Law Journal*); State Bar of New Mexico, *1996 Budget Disclosure*, BAR BULLETIN, Sept. 8, 1995, Special Insert, at 1; State Bar Association of North Dakota, *Legislative Policy* (on file with the *St. Mary's Law Journal*); Oregon State Bar, *Oregon State Bar Board of Governors' Policies*, Policy 11.900 (on file with the *St. Mary's Law Journal*); Rhode Island Bar Association, *Notice*, 1995 R.I.B.J., June-July, 1995, at 39; West Virginia State Bar, *Membership Fee Guidelines* (on file with the *St. Mary's Law Journal*); Wyoming State Bar, *Protest and Dues Refund Procedure* (on file with the *St. Mary's Law Journal*).

The Nebraska State Bar Association offers members two options. Members may file a dues grievance with the state bar president, who refers the grievance to the grievance committee. The committee reviews the grievance and makes a recommendation to the Executive Council, which makes a final determination. *Rules Creating, Controlling and Regulating the Nebraska State Bar Association*, art. VIII, § 1.a.(6) (on file with the *St. Mary's Law Journal*). Obviously, this procedure does not comply with any of the *Hudson* requirements. Alternatively, pursuant to an order of the Nebraska Supreme Court, a

on the *Hudson* model seems to have ordained it a paradigm for compliance for unified bar associations. Despite this clear mandate, the State Bar of Texas has neither established procedures to comply with *Keller*, nor has it adopted any alternative measures likely to comply with the Court's requirements to protect the constitutional rights of dissenting bar members. As the following description of the State Bar's activities and conduct will show, the Bar is at risk for a suit challenging the constitutionality of its use of mandatory membership dues.

III. THE TEXAS RESPONSE

The first state-wide organization of lawyers, the Texas Bar Association, was a voluntary association created at Galveston in 1882 to "advance the science of jurisprudence, promote the uniformity of legislation in the administration of justice throughout the state, uphold the honor of the profession of the law, and to encourage cordial intercourse among its members."[143] It was not until 1919 that the Texas Legislature first authorized the Supreme Court of Texas to license lawyers to practice law and to promulgate rules concerning the eligibility and examination of candidates for this license.[144]

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member may request that the stated amount of dues intended for lobbying activities be placed in a restricted account used for activities that promote the administration of justice or improvement of the legal system, and the established budget for lobbying activities is reduced by the amount that is directed to the restricted account. Letter from Jim Sajevic, Executive Director, Nebraska State Bar Association, to Ralph H. Brock 1 (Dec. 19, 1995) (on file with the *St. Mary's Law Journal*).

Finally, a few unified state bars insist that because they engage in no political or ideological activity, no *Hudson/Keller* procedure is required. *See, e.g.*, Letter from Loretta L. Topey, Executive Director, Louisiana State Bar Association, to Ralph H. Brock 1 (Dec. 27, 1995) (explaining that because bar engages in no political or ideological activity, it does not have *Keller* deduction mechanism) (on file with the *St. Mary's Law Journal*); Letter from Marvin C. Emerson, Executive Director, Oklahoma Bar Association, to Ralph H. Brock 1 (Dec. 6, 1995) (indicating bar has adopted no formal *Keller* rules or procedures) (on file with the *St. Mary's Law Journal*); Letters from Carolin D. Bakewell, Assistant Director, Office of Counsel, North Carolina State Bar, to Ralph H. Brock 1 (Dec. 5, 1995 & July 10, 1996) (responding that bar has no formal procedures for dealing with *Keller*) (on file with the *St. Mary's Law Journal*); Letter from Thomas A. Edmonds, Executive Director and Chief Operating Officer, Virginia State Bar, to Ralph H. Brock 1 (Dec. 8, 1995) (reporting that bar does not lobby or promote political or ideological causes and therefore has no procedure for member to seek refund of dues) (on file with the *St. Mary's Law Journal*).

143. *The State Bar Takes Over*, 3 TEX. B.J. 276, 276 (1940).

144. James H. Hart, *Texas Tests Her Future Lawyers*, 1 TEX. B.J. 327, 327 (1939). From 1846 until 1903, a committee of lawyers appointed by a district judge administered oral examinations to candidates in open court. *Id.* In 1891, graduates from the University

That same Legislature also created the Board of Law Examiners to determine the moral character of candidates and to administer the bar examination.[145]

Aware that the profession suffered a low reputation stemming from lack of regulation,[146] the Texas State Bar worked for sixteen years to establish a unified bar.[147] Finally, in April, 1939, the Texas Legislature created the State Bar of Texas and established membership as a condition for practicing law in Texas.[148] In less than a

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of Texas School of Law were exempted from examination. *Id.* In 1903, the Legislature authorized the courts of civil appeals to appoint boards of three members to examine non-exempt applicants on subjects chosen by the Supreme Court of Texas. *Id.* The exemption from examination was extended to graduates of other law schools in 1919. *Id.* That same year, the Legislature abolished the appellate district boards and created the Board of Law Examiners. *See generally* Ralph W. Yarborough, *A History of Law Licensing in Texas* (discussing history of legal licensing in Texas from 1700's to 1980's), *in* COMMITTEE ON HISTORY AND TRADITION OF THE STATE BAR OF TEXAS, CENTENNIAL HISTORY OF THE TEXAS BAR 1882–1982, at 181, 181–93 (1981).

145. Act of Mar. 7, 1919, 36th Leg., R.S., ch. 38, §§ 1, 2, 1919 Tex. Gen. Laws 63, *amended by* Act of May 13, 1977, 65th Leg., R.S., ch. 153, 1977 Tex. Gen. Laws 321, *amended by* Act of June 13, 1979, 66th Leg., R.S., ch. 594, 1979 Tex. Gen. Laws 1253 (current version at TEX. GOV'T CODE ANN. §§ 82.001, 82.004 (Vernon 1988 & Supp. 1996)). The rules to be promulgated were to ensure:

> (a). Good moral character on the part of each candidate for license.
> (b). Adequate pre-legal study and attainment.
> (c). Adequate study of the Law for a period of at least two years, covering the course of study prescribed by the Supreme Court, or the equivalent of such course . . . .
> (d). The legal topics to be covered by such study and by the examination given.
> (e). The time and place for holding the examinations, the manner of conducting same and the grades to be made by the candidates to entitle them to be licensed. . . .

Act of Mar. 7, 1919, 36th Leg. R.S., ch. 38, § 3, 1919 Tex. Gen. Laws 63, 63 (amended 1977, 1979).

146. William B. Carssow, *Organization and Activity of the Texas Bar Association* (explaining that period of cynicism following Great Depression led to discussions about creating integrated bar), *in* COMMITTEE ON HISTORY AND TRADITION OF THE STATE BAR OF TEXAS, CENTENNIAL HISTORY OF THE TEXAS BAR 1882–1982, at 1 (1981); *see Integration Comes to Texas*, 2 TEX. B.J. 129, 129 (1939) (proposing that integrated bar would free citizens of Texas from disregard of law stemming from false and fraudulent attorney practices).

147. *See* William B. Carssow, *Organization and Activity of the Texas Bar Association* (commenting that movement initiated in 1923 for strong unified bar culminated with passage of Texas State Bar Act in 1939), *in* COMMITTEE ON HISTORY AND TRADITION OF THE STATE BAR OF TEXAS, CENTENNIAL HISTORY OF THE TEXAS BAR 1882–1982, at 1, 6–7 (1981); *see generally* Herbert Harley, *Does $5 a Year Mean Regimentation?*, 1 TEX. B.J. 325, 325 (1938) (reporting that 20 states and Puerto Rico had unified bars in 1938); *Integration Comes to Texas*, 2 TEX. B.J. 129, 130 (1939) (discussing Herbert Harley's national movement towards integration of bar associations).

148. Act of Apr. 19, 1939, 46th Leg., R.S., ch. 1, 1939 Tex. Gen. Laws 64, 65 (current version at TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1988) (STATE BAR

month, the Supreme Court promulgated its first order under the State Bar Act, establishing an annual membership fee of four dollars.[149] Since that time, membership in the State Bar of Texas, including the payment of annual dues, has been compulsory for all lawyers licensed to practice in Texas.[150]

A. *The State Bar of Texas*

Because the Texas Bar is unified, it must comply with the requirements of *Hudson* and *Keller* by categorizing activities as chargeable or nonchargeable and providing a mechanism for members to challenge the categorization. In order to evaluate these requirements, it is necessary to describe the State Bar's structure and activities.

The State Bar, as it is presently constituted, regulates almost every aspect of the practice of law in Texas.[151] The State Bar Act articulates seven purposes regarding the discharge of the State Bar's public responsibilities. Even prior to the Supreme Court's decision in *Keller*, the Texas Legislature limited the State Bar's use

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RULES art. II, art. III § 2). Prior to adoption of the State Bar Act, approximately 3,500 of an estimated 7,000 lawyers in the state were members of the Texas State Bar. *Integration Comes to Texas*, 2 TEX. B.J. 129, 130 (1939). Slightly more than a year after the State Bar Act became effective, in July 1940, the voluntary Texas Bar Association merged with the unified State Bar of Texas. *The State Bar Takes Over*, 3 TEX. B.J., 276, 276 (1940).

149. *$4 Statutory Bar Fee Is Now Payable*, 2 TEX. B.J. 158, 158 (1939).

150. *See* TEX. GOV'T CODE ANN. § 81.051 (Vernon 1988) (requiring bar membership for all persons licensed to practice law); *id.* § 81.054 (establishing fees for members of State Bar). The amount of annual dues is based on a graduated scale. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL, app. A (Apr. 12, 1996). Presently, lawyers licensed less than three years pay $68.00; those licensed from three to five years pay $148.00; and lawyers licensed more than five years pay $235.00. Lawyers over the age of 70 years are exempt from payment of dues. TEX. GOV'T CODE ANN. § 81.054(b) (Vernon 1988); STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL, app. A (Apr. 12, 1996). Lawyers who are not engaged in the practice of law may pay $50.00 per year and elect inactive status. TEX. GOV'T CODE ANN. § 81.052(c) (Vernon 1988). An inactive member of the Bar may not practice law in Texas, vote in elections regulated by the State Bar, or occupy an office in the State Bar. *Id.* § 81.053(a).

151. *See* TEX. GOV'T CODE ANN. § 81.012 (Vernon Supp. 1996) (listing duties and purposes of State Bar). A separate body, the Board of Law Examiners, operating under rules promulgated by the Supreme Court of Texas, passes on the eligibility and qualifications of candidates for admission to the Bar and administers the Bar Examination. TEX. GOV'T CODE ANN. § 82.004 (Vernon 1988). The Supreme Court, however, retains the exclusive power to license lawyers. *Id.* § 82.021.

of compulsory dues to administering the following public purposes provided by the Act:[152]

> (1) to aid the courts in carrying on and improving the administration of justice;
> (2) to advance the quality of legal services to the public and to foster the role of the legal profession in serving the public;
> (3) to foster and maintain on the part of those engaged in the practice of law high ideals and integrity, learning, competence in public service, and high standards of conduct;
> (4) to provide proper professional services to the members of the state bar;
> (5) to encourage the formation of and activities of local bar associations;
> (6) to provide forums for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relationship of the state bar to the public; and
> (7) to publish information relating to the subjects listed in Subdivision (6) [above].[153]

The State Bar performs a variety of functions, including maintaining the Professional Development Program to provide continuing legal education for lawyers,[154] maintaining a disciplinary and grievance system,[155] publishing a monthly journal devoted to legal

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152. TEX. GOV'T CODE ANN. § 81.012 (Vernon Supp. 1996).

153. *Id.*

154. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL §§ 16.01–.09 (Apr. 12, 1996).

155. TEX. R. DISCIPLINARY P. *Preamble* (1992) (delegating role of supervising lawyer discipline to Board of Directors), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1996); STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 8.01.01–8.01.07 (describing attorney disciplinary system). Pursuant to an October 9, 1990 order of the Supreme Court of Texas, the proposed Texas Rules of Disciplinary Procedure were submitted to the State Bar membership under the name "Referendum 90." Order for Referendum, 833–34 S.W.2d [Texas Cases ed.] at XL–XLI (1993); *see Court Order: Order for Referendum*, 53 TEX. B.J. 1231, 1231 (1990) (proposing Texas Rules of Disciplinary Procedure); *State Bar Referendum 90 Proposals are Adopted: Attorneys Approve Dues, Grievance Procedure Changes*, 54 TEX. B.J. 42, 42 (1991) (reporting results of referendum). The referendum passed, and by order dated February 26, 1991, the Supreme Court of Texas implemented those parts of the referendum creating the Commission for Lawyer Discipline, the Chief Disciplinary Counsel, and the Board of Disciplinary Appeals. Amended Order for Implementation of the Texas Rules of Disciplinary Procedure, 833–34 S.W.2d [Texas Cases ed.] at XXXVIII–XXXIX (1993). By order of October 9, 1991, the entire Texas Rules of Disciplinary Procedure were made effective May 1, 1992. *Id.* at XXXVII–XXXVIII.

matters and the affairs of the State Bar and its members,[156] preventing the unauthorized practice of law,[157] providing a judicial poll of the Bar membership concerning races for appellate judgeships,[158] maintaining a Lawyer Referral Service and programs to provide legal services to the poor,[159] monitoring the State Bar Act to determine the necessity for suggested revisions,[160] and reviewing and proposing appropriate revisions to the rules and statutes relating to practice and procedure in civil and criminal actions.[161] Key departments of the Texas State Bar include: the Member Services Division,[162] the Texas Board of Legal Specialization,[163] the Texas

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"The Supreme Court of Texas has the constitutional and statutory responsibility within the State for the lawyer discipline and disability system and has inherent power to maintain appropriate standards of professional conduct." *Id.* at XLI. Subject to that inherent power, the Supreme Court delegated the responsibility for administering and overseeing attorney discipline and disability to the Board of Directors of the State Bar, and authorized the Board to adopt rules of procedure and administration. *See* TEX. R. DISCIPLINARY P. *Preamble*, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1996) (delegating responsibility for supervising lawyer discipline to State Bar of Texas).

The General Counsel of the State Bar serves as the Chief Disciplinary Counsel under the Rules of Disciplinary Procedure. TEX. R. DISCIPLINARY P. 5.01 (1992), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon Supp. 1996). The State Bar also employs additional lawyers, stationed in regional offices, to handle grievance matters. STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 12–13 (1995–96) (explaining duties of grievance committee members).

156. TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1988) (STATE BAR RULES art. IX) (granting authority to publish *Texas Bar Journal*); STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL §§ 26.01–26.08 (Apr. 12, 1996) (establishing publication procedures of *Texas Bar Journal*). The *Texas Bar Journal* maintains the name of the Texas Bar Association's *Journal* published prior to its integration and merger with the State Bar of Texas.

157. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 31.01 (Apr. 12, 1996) (directing State Bar to prevent unauthorized practice of law). The Supreme Court appoints the Unauthorized Practice of Law Committee. TEX. GOV'T CODE ANN. § 81.103(a) (Vernon Supp. 1996). Committee expenses are funded by the State Bar budget. *Id.* § 81.103(f) (Vernon 1988).

158. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 13.01 (Apr. 12, 1996) (providing for judicial poll of Bar members).

159. *Id.* § 14.01–14.01.07; STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 15 (1995-96).

160. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 21.01 (Apr. 12, 1996).

161. *Id.* § 28.01.

162. The State Bar's Member Services Division publishes books and practice manuals for lawyers and judges. STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 17–18 (1995-96). Its Professional Development Program presents live and video legal education seminars throughout the state; publishes coursebooks, the *Texas Lawyers' Civil Digest*, and the *Texas Lawyers' Criminal Digest*; and

Lawyers Assistance Program,[164] the Law Office Management Program,[165] and the Professional Enhancement Program.[166] Additionally, the State Bar provides mentoring[167] and continuing legal education for lawyers,[168] and a wide range of public service programs, like the Law Related Education Program,[169] the Texas Equal Access to Justice Program,[170] and Texas Lawyers Care.[171]

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maintains Bar*Link*, the State Bar's online computer service. *Id.* The State Bar maintains a print shop, *id.* at 15, and a research and analysis department to provide marketing research, conduct surveys and develop data bases on the legal profession for all State Bar departments, committees, and the Board of Directors, *id.* at 17.

163. The Texas Board of Legal Specialization certifies attorneys of special competence in several specialty fields. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL §§ 19.01–19.03 (Apr. 12, 1996). The Supreme Court created the Texas Board of Legal Specialization to establish a plan for conferring certificates of special competence in particular areas of law. *Id.* § 19.01. The President of the State Bar is authorized to appoint board members subject to the approval of the State Bar Board of Directors. *Id.* The employees of the Texas Board of Legal Specialization are considered to be State Bar employees solely for insurance and retirement purposes. *Id.* § 19.03.

164. The Texas Lawyers Assistance Program administers a counseling and rehabilitation program for lawyers whose performance is impaired due to physical or mental illness or substance abuse. STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 18 (1995–96).

165. The Law Office Management Program was created in December 1991 to provide information and advice to lawyers, solo practitioners and law firms regarding office management and computer technology issues. *The Back Page: Director Hired for New Program*, 59 TEX. B.J. 98, 98 (1996).

166. The Professionalism Enhancement Program is designed to address the professionalism problems of members. STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 18 (1995–96).

167. The Mentor Program for Lawyers provides lawyers with mentoring opportunities from more experienced lawyers. *See id.* at 18 (describing State Bar mentoring program).

168. State Bar members are required to complete fifteen hours of continuing legal education, including three hours of legal ethics/professional responsibility, each year. TEX. GOV'T CODE ANN., tit. 2, subtit. G. app. A (Vernon 1988) (STATE BAR RULES art. XII, § 6; State Bar of Texas; TEX. MCLE REGULATIONS § 3.2 (on file with the *St. Mary's Law Journal*). Through its MCLE Department, the State Bar administers the minimum continuing legal education program, and the State Bar College recognizes members of the Bar who earn continuing legal education credits beyond the basic MCLE requirements. STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 15 (1956-96).

169. The Law Related Education program "helps educators, students and citizens understand and appreciate the legal system." STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 19 (1995–96).

170. The Texas Equal Access to Justice Foundation administers the non-profit corporation that coordinates the Interest on Lawyer Trust Account (IOLTA) program. *See* Texas Equal Access to Justice Program §§ 1–4 (adopted May 9, 1984) (authorizing nonprofit organization to generate funds for legal services), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1988) (STATE BAR RULES art. XI, §§ 1–9). The

B. *The Structure of the State Bar*

The State Bar is governed by a board composed of the presidents, presidents-elect, and immediate past presidents of the State Bar[172] and the Texas Young Lawyers Association, thirty members of the State Bar elected from districts determined by the Board, six nonlawyer public directors appointed by the Texas Supreme Court, and four minority member directors appointed by the State Bar president.[173]

IOLTA program requires lawyers who maintain client trust accounts to deposit nominal amounts, or amounts to be held for a short period of time, in an interest-bearing demand account. *Id.* § 5. The Texas Equal Access to Justice Foundation receives the interest on such client trust accounts and dispenses grants to those organizations that provide legal services in civil disputes to low-income Texans. STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 19 (1995–96). The Fifth Circuit sustained a constitutional challenge to the Texas IOLTA program, at least to the extent of holding that an attorney's clients have a cognizable property interest in the proceeds earned on their deposits in IOLTA accounts. *See* Washington Legal Found. v. Texas Equal Access to Justice Found., No. 95–50160, 1996 WL 486644, at *7–8 (5th Cir. Sept. 12, 1996) (vacating summary judgment in favor of Texas IOLTA program and remanding to district court for trial on issue of whether alleged Fifth Amendment "taking" of interest was against will of client).

171. Texas Lawyers Care helps groups develop and expand their pro bono projects. The Pro Bono College of the State Bar recognizes lawyers who dedicate more than 75 hours per year of pro bono legal services to impoverished Texans. STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 19–20 (1995–96).

Other Bar-related organizations include the State Bar of Texas Insurance Trust, which administers personal life insurance plans for State Bar members and their employees and dependents, *id.* at 282, the Texas Lawyers' Insurance Exchange, which provides professional liability insurance to attorneys, *id.* at 291, the Texas Legal Protection Plan, which provides policyholders with affordable legal services, *id.* at 292, the Texas Center for Legal Ethics and Professionalism, which was created to improve the state of legal ethics and enhance professionalism in the practice of law, *id.* at 287, and the Texas Bar Foundation, *id.* at 283. The Texas Bar Foundation is dedicated to providing legal aid facilities for the disadvantaged and supporting educational and charitable endeavors which serve the ends of justice. *Id.* Finally, the Texas Young Lawyers Association, which is composed of all licensed Texas lawyers under age 36 or those licensed fewer than three years, dedicates itself to public and professional service projects. *Id.* at 19.

172. TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1988) (STATE BAR RULES art. IV, § 10). The officers of the State Bar are the president, the president-elect and the immediate past president. *Id.*

173. TEX. GOV'T CODE ANN. § 81.020 (Vernon Supp. 1996); TEXAS GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1988) (STATE BAR RULES art. IV, §§ 1, 2) (discussing duties and meetings of Board). There is no representation on the Board for nonresident Texas licensees. *See Letters to the Editor: A Texas Tea Party?*, 57 TEX. B.J. 591, 591 (1994) (printing letter from Steven D. Peterson of Harahan, Louisiana, who argues for full representation of nonresident Texas licensees).

Much of the State Bar's work is done by its committees and sections.[174] The State Bar has thirty-six standing committees,[175] thirteen special committees,[176] and forty-three sections and divisions.[177] A section is made up of lawyers practicing in specialized areas of law or otherwise having common professional inter-

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174. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL §§ 6.01–6.04 (Apr. 12, 1996) (outlining committee structure of State Bar).

175. *See id.* § 6.01.01 (listing standing committees of State Bar). The Standing Committees are: Administration of Rules of Evidence, Agricultural Law, *Bar Journal*, Child Abuse and Neglect, Commission for Lawyer Discipline, Continuing Legal Education, Coordination with Other Professional Groups, Court Rules, Crime Victims, Disability Issues, Disaster Response, Federal Judiciary Relations, History and Traditions of the Bar and Historical Preservation, Jury Service, Law Focused Education, Law Office Management, Laws Relating to Immigration and Nationality, Lawyer Referral and Information Services, Lawyers' Assistance Program, Lawyers Mentoring Children, Legal Aspects of the Arts, Legal Assistants, Legal Representation of Those on Death Row, Legal Services to the Poor in Civil Matters, Legal Services to the Poor in Criminal Matters, Local Bar Services, Mentor Program for Lawyers, Minimum Continuing Legal Education, Opportunities for Minorities in the Profession, Professionalism, Public Affairs, Real Estate Forms, State Bar College Board, State Judiciary Relations, Texas Disciplinary Rules of Professional Conduct, and Women in the Profession. *Id.* § 6.01.01 C; STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 55-111 (1995-96) (discussing each State Bar committee individually).

176. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 6.01.02 (Apr. 12, 1996) (describing special committees of State Bar). The Special Committees are: Annual Meeting, International Law, Long Range Strategic Planning, Malpractice Prevention, Pattern Jury Charges (six committees), Penal Code and Criminal Procedure, Plain Language, and Zero Base. *Id.* § 6.01.02c; STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 55-111 (1995–96) (addressing each special committee separately).

177. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 6.02 (Apr. 12, 1996) (establishing policy for maintaining sections in State Bar). The Sections and Divisions are: Administrative and Public Law; African-American Lawyers; Alternative Dispute Resolution; American Indian Law; Animal Law; Antitrust and Business Litigation; Appellate Practice and Advocacy; Asian-Pacific Islander Interest Section; Aviation Law; Business Law; Computer; Construction Law; Consumer Law; Corporate Counsel; Criminal Justice; Entertainment and Sports Law; Environment and Natural Resources; Family Law; General Practice; Government Lawyers; Health Law; Hispanic Issues; Individual Rights and Responsibilities; Intellectual Property Law; International Law; James C. Watson Inn; Judicial; Justice of the Peace; Juvenile Law; Labor and Employment; Law Student Division; Legal Administrators Division; Legal Assistants Division; Litigation; Military Law; Municipal Judges; Oil, Gas and Mineral Law; Public Utility Law; Real Estate; Probate and Trust; School Law; Taxation Law; and Women and the Law. *See* STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 114–57 (1995-96) (listing sections of State Bar); *Animal Law Aficionados*, 59 TEX. B.J. 598, 598 (1996) (presenting new Animal Law section of State Bar); *The Back Page: New State Bar Section Created*, 58 TEX. B.J. 1078, 1078 (1995) (announcing creation of new Asian-Pacific Islander Interest section of State Bar). The Board of Directors denied an application to create a Gay and Lesbian Issues section. Letter from Patricia H. Hiller, Executive Assis-

ests.[178] Committees not only perform much of the State Bar's work, but they also influence policy on critical issues and legislation.[179] Committees may not, however, make direct recommendations to the Legislative Committee of the State Bar Board;[180] rather, committees are encouraged to make their recommendations through a section "cognizant of the type of legislation recommended by the committee."[181]

The primary goal of a section is to inform and transmit information in its particular field of law or area of interest to its members.[182] Sections may propose legislation to be included in the State Bar's legislative program,[183] and, with the approval of the State Bar Board of Directors or its Executive Committee, a section may support, endorse, or oppose proposed legislation.[184] Many sections sponsor seminars in conjunction with the State Bar's Professional Development Program.[185]

C. *The State Bar's Legislative Activity*

While legislative activity is not the major focus of the State Bar, it is the activity that is most likely to be challenged as nonchargeable. The State Bar has sponsored a legislative package in each of

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tant to the Board, State Bar of Texas, to Mitchell Katine (Oct. 7, 1996) (on file with the *St. Mary's Law Journal*).

178. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 6.02.01 B (Apr. 12, 1996); *see also* STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 114 (1995-96) (discussing membership in State Bar sections and divisions).

179. STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 55 (1995-96)

180. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.06.02 (Apr. 12, 1996) (prohibiting State Bar committees from making recommendations on proposed legislation to Board Legislative Committee).

181. *Id.*

182. STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 114 (1995–96).

183. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.06.01 (Apr. 12, 1996) (authorizing State Bar sections to make recommendations to Board Legislative Committee of State Bar).

184. *See id.* §§ 15.06, 15.07 (detailing procedures to be used for establishing State Bar legislative program).

185. STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 114 (1995–96) (outlining activities of State Bar sections).

the three legislative sessions since *Keller* was decided.[186] In 1991, the legislative policy centered on passage of the new State Bar Act.[187] Aside from that, the State Bar's package consisted of only three measures.[188] Sections, however, sponsored fourteen other pieces of legislation.[189] In 1993, the State Bar sponsored fourteen separate bills, eight of which were passed,[190] while sections sponsored only four bills, three of which passed.[191] In 1995, the State Bar sponsored nineteen pieces of legislation, most of them involving amendments to the Family Code,[192] while the sections sponsored only three bills.[193]

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186. Logically, only members of a legislative body may sponsor legislation. The January 19, 1996 revision of the Board's Legislative Policy substituted the term "support" for the term "sponsor." *Compare* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.01.02 (Apr. 12, 1996) (indicating State Bar will "neither support nor oppose any proposed legislation" without board approval), *with* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.01.02 (Apr. 3, 1992) (indicating State Bar will "neither sponsor nor oppose any proposed legislation" without board approval).

187. The State Bar is subject to the Sunset Act, chapter 325 of the Texas Government Code. TEX. GOV'T CODE ANN. § 81.003 (Vernon Supp. 1996). The State Bar Act will expire September 1, 2003, unless the legislature extends the Act. *Id.*

188. This small number was attributed by one Section chair "to limitations imposed by the recent United States Supreme Court case of *Keller v. State Bar of California.*" Thomas S. Morgan, *Family Code Amendments Proposed by Juvenile Law Section*, 54 TEX. B.J. 64, 64 (1991) (announcing State Bar legislative program for 1991).

189. *See* Maria Luisa Flores, *Overview of State Bar and State Bar Section Sponsored Legislation—Final Disposition by the 72nd Legislature*, 54 TEX. B.J. 706, 706 (1991) (recapping disposition of State Bar sponsored legislation). Two of the three State Bar proposals, relating to court-appointed counsel and transcripts of juvenile proceedings, were enacted. *Id.* A bill relating to compensation of counsel appointed to defend indigents on appeal died in committee. *Id.*

190. *See State Bar of Texas Legislative Package Update*, 56 TEX. B.J. 948, 948–49 (1993) (summarizing 1993 State Bar legislative program). Five bills involved changes in family law; four dealt with legal services to indigents; two concerned landlords' remedies and Property Code amendments; and three others involved the Insurance Code, regulation of lawyer referral services, and immunity for alternate dispute resolution neutrals. *Id.*

191. *Id.*

192. *See 74th Legislative Session State Bar Legislation*, 57 TEX. B.J. 1168, 1168–69 (1994) (announcing 1995 State Bar legislative program). In addition to proposed amendments to the Family Code, five other State Bar bills involved amendments to the Code of Criminal Procedure, three concerned amendments to the Government Code, and two others dealt with amendments to the Property Code and the Human Resources Code. *Id.* at 1169.

193. *Id.*; *see also* Beatrice Mladenka-Fowler, *Legislative Update*, THE WOMEN'S ADVOCATE (State Bar of Texas, Women and the Law Section, Austin, Tex.), Apr. 1995, at 2 (reporting progress of Family Law Bills proposed for 1995).

The procedure for approving the Bar's legislative activity provides for input from Bar sections and committees and for screening to ensure the activity conforms to Bar policy. However, nothing in the procedure provides the safeguards for members required by *Keller*. The procedure contemplates that proposed legislation will have its origin with the sections,[194] although there is nothing in the State Bar's Legislative Policy to prevent individuals from proposing legislation to the State Bar.[195]

Proposed legislation may be submitted by a section to the State Bar's Executive Director[196] with copies to all other sections and committees.[197] Notice of proposed legislation and Legislative Committee meetings is published in the *Texas Bar Journal*.[198] Section councils have an opportunity to review all legislative proposals and make written objections to legislation they oppose.[199] The Executive Director then circulates copies of all legislative proposals to the Board Legislative Committee.[200] The Board Legislative Committee determines, by majority vote,[201] whether the proposed legis-

194. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.06.01 (Apr. 12, 1996) (authorizing State Bar sections to recommend proposed legislation to Board Legislative committee).

195. *See id.* §§ 15.01–15.03 (providing guidance on State Bar legislative programs). Legislative Policy is Part XV of the Board of Directors Policy Manual. *Id.* Section 15.09 provides that "[n]othing herein shall preclude individual members of the State Bar from presenting their individual, personal views on any legislative proposal." *Id.* § 15.09.

196. *Id.* § 15.03.01 A.

197. *Id.* § 15.03.03 C. The requirement to submit proposed legislation to the Committees was added at the January 19, 1996 Board meeting. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL, Part XV Legislative Policy § 15.03.03 C, annotated to indicate changes approved by Board of Directors on Jan. 19, 1996, provided by Patricia H. Hiller, Executive Assistant to the Board, State Bar of Texas, to *St. Mary's Law Journal* (on file with *St. Mary's Law Journal*). The expense of complying with the notification requirement, which now must be evidenced by return receipts, *id.* § 15.03.03 C, along with the addition of the rule that proposed legislation may not "present the prospect of substantial division within the bar," *id.* § 15.01.03 A, will probably result in much less section participation in the State Bar's legislative program.

198. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.05.02 (Apr. 12, 1996) (directing State Bar Executive Director to publish legislative proposals in *Texas Bar Journal*).

199. *Id.* § 15.03.04.

200. *Id.* § 15.03.01 B. The Board Legislative Committee is composed of nine members of the Board of Directors, including at least three public members. *Id.* § 15.02.01. The Board has authority to draft and recommend proposed legislation to be a part of the State Bar's legislative package. *Id.* § 15.02.04.

201. *Id.* § 15.02.03 A.

lation conforms to the Legislative Policy "and applicable law,"[202] and what legislative position the Board should adopt or initiate.[203] If the Legislative Committee votes to recommend that the Board of Directors adopt a legislative position, or if a member of the Board moves that the Board adopt such a position,[204] the Board then decides, by majority vote, whether the proposed legislation conforms to the State Bar Legislative Policy.[205] Finally, the Board

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202. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.01.01 (Apr. 12, 1996). The reference to "applicable law" was added in the January 19, 1996, version of the Legislative Policy to incorporate *Keller* and any subsequent case law developments. Telephone Interview with Kaylyn Laney, Governmental Relations Manager, State Bar of Texas (Jan. 25, 1996). Specifically, the Legislative Committee votes to determine whether the proposed legislation or legislative action conforms to the requirements of section 15.01.03. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.02.03 (Apr. 12, 1996). These requirements are:

> A. The proposed legislation or legislative action falls within the purposes, expressed or implied, of the State Bar as provided in the State Bar Act. [The purposes of the State Bar are set forth in TEX. GOV'T CODE ANN. § 81.012 (Vernon Supp. 1996)].
>
> B. Adequate notice and opportunity has been afforded for the presentation of opposing opinions and views.
>
> C. The proposed legislation or legislative action does not present the prospect of substantial division within the bar.
>
> D. The proposed legislation or legislative action is in the public interest.
>
> E. The primary purpose of the proposed legislation or legislative action is not to provide economic benefit to the members of the State Bar.
>
> F. The proposed legislation or legislative action is not designed to promote or impede the political candidacy of any person or party or to promote a partisan political purpose.
>
> Nothing herein shall prohibit the State Bar's support of or opposition to legislation relating to the selection, tenure, compensation, staffing, equipping, and housing of the federal or state judiciary.

Id. § 15.01.03.

203. *Id.* § 15.02.03 B.

204. *Id.* § 15.03.01 D (1)–(2).

205. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.03.01 E (1) (Apr. 12, 1996). An anecdote from the September, 1994, Directors' meeting illustrates the subjective nature of this procedure. *See* Letter from Michael J. Crowley, Chair of the Board, State Bar of Texas to the President, Officers and Council Members of the Women and the Law Section of the State Bar of Texas (Feb. 6, 1995) (on file with the *St. Mary's Law Journal*) (indicating that chair ruled that Board members were not bound by General Counsel's opinion that proposed legislation violated *Keller*, and that members could vote that bill was appropriate for consideration under State Bar policy). Initially, the Board adopted the General Counsel's opinion and voted that the proposed legislation violated *Keller*. *Id.* at 2. After the proponent of the proposed legislation appealed the decision to the Executive Committee and the committee remanded for reconsideration, the Board voted that the proposed legislation did not violate *Keller*. That vote was contrary to the advice of the Board's General Counsel. *Id.* at 2–3. As a result, the Board amended § 15.05.07 of its legislative policy to require that the State Bar's General Counsel render a

determines what legislative position the Board should adopt or initiate.[206] A similar procedure is followed when the Board's Executive Committee[207] adopts a legislation position for the State Bar.[208]

State Bar sections, which are funded entirely by voluntary dues,[209] may assert their own independent legislative positions only with the approval of the Board of Directors.[210] If no objection is raised after a section circulates notice of a proposed legislative position, "the position shall be cleared by the Executive Director and

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written opinion regarding any proposed legislation prior to its submission to the Board Legislative Committee. Telephone Interview with Kaylyn Laney, Governmental Relations Manager, State Bar of Texas (Jan. 25, 1996).

206. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.03.01 E (2) (Apr. 12, 1996). The Board, by majority vote, may determine to support, oppose, or take a neutral position on the legislation. *Id.*; *see also id.* § 15.03.06 (indicating that failure of Board majority to support or remain neutral is not to be construed as opposition to proposed resolution).

207. *See id.* § 4.06.01 (establishing membership of Executive Committee and stating that majority vote of Board of Directors is necessary to change or withdraw legislative positions).

The Executive Committee consists of:

> the President, President-elect, Immediate Past President, Chair of the Board, Immediate Past Chair of the Board, five or six elected members of the Board of Directors, a director who is selected as a minority, a nonlawyer director and the President, President-elect, and Immediate Past President of the Texas Young Lawyers Association. The Executive Director, General Counsel of the State Bar of Texas, and the Supreme Court liaison . . . [are] nonvoting members of the Executive Committee.

Id. § 4.06.01. The elected members, minority director, and nonlawyer director are appointed by the President. *Id.*

208. *See id.* § 15.04.01 (specifying special circumstances in which Board Executives Committee may act without vote by Board of Directors). The Executive Committee may act when "[t]he proposed legislative action could not reasonably have been submitted for consideration by the Board Legislative Committee and the Board of Directors," *id.* § 15.04.01 A, or when legislative action by the State Bar is necessary to respond to material changes regarding legislative matters previously sanctioned by the Board of Directors, *id.* § 15.04.01 B, or when a prompt response to a pending legislative proposal is necessary, *id.* § 15.04.01 C, *see id.* § 15.04.02 (outlining requirements for Executive Committee action on proposed legislation).

209. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 6.02.06 (Apr. 12, 1996) (providing that each section, except Judicial Section and Texas Young Lawyer Association (TYLA), may collect membership dues); STATE BAR OF TEXAS AND TEXAS YOUNG LAWYERS ASSOCIATION, DESK REFERENCE AND DIRECTORY 114 (1995–96) (providing that all sections except Judicial, Municipal Judges, James C. Watson, and TYLA are open to all State Bar members and members may join section by paying dues of that section).

210. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.07.01 (Apr. 12, 1996) (requiring majority vote of Board of Directors before any section of State Bar asserts its own position on legislation).

shall then be presented to the Board or Executive Committee."[211] While the Board of Directors Policy Manual directs that "[c]onsideration should first be given to the traditional methods for approval and presentation of a legislative position of a section," there are "several situations in which it might be more appropriate for a section to state its own legislative position."[212] Significantly, a provision that permitted the voluntary sections to act when the State Bar itself could not—in a situation in which the subject matter "is outside those areas in which the State Bar may present a legislative position before a public, judicial, executive, or legislative body"—was deleted in the January 19, 1996, revision of the Board's Legislative Policy.[213]

While the Board's Legislative Policy is somewhat ambiguous, it appears that the traditional methods for approval and presentation of a section's legislative position involve the same procedure as that prescribed for a section submitting proposed legislation to be included in the State Bar's legislative package.[214] Even before the

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211. *Id.* § 15.07.05 C. "In order to present its own views, a Section must send a completed application form and a notice form to the President of the State Bar, the Chair of the Board of Directors, the President of the TYLA, the Executive Director of the State Bar, the General Counsel of the State Bar, and the chair of all Sections and Committees of the State Bar." *Id.* § 15.07.06. Any objection to an application must be sent to the executive director before the deadline established on the application form. *Id.* § 15.07.08.

212. *Id.* § 15.07.05 D. These situations involve: (1) technical matters clearly within the section's special expertise, such that review by the appropriate bar committee authorities would be merely a formality, and other State Bar entities would not be interested or affected; (2) supplementing a State Bar legislative position to update it or accommodate changed circumstances; or (3) using an amicus curiae brief to express a position on the substance of pending litigation. *Id.*

213. *Compare* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.07.05 D (1) (Apr. 3, 1992) (indicating that it might be appropriate for section to assert its own legislative position in cases in which State Bar could not due to subject matter), *with* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.07.05 D (1)-(3) (Apr. 12, 1996) (omitting § 15.07.05 D (1) of Apr. 3, 1992, Manual).

214. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 15.06 (Apr. 12, 1996) (detailing procedure for presenting legislative proposals for inclusion in Bar's program). Section 15.07.01 of the BOARD OF DIRECTORS POLICY MANUAL requires sections to comply with the applicable requirements of § 15.03, including the provisions requiring action by the Legislative Committee, the Executive Director or the Board of Directors, before asserting an independent position regarding legislative, judicial or executive action. *Id.* § 15.07.01. Succeeding provisions permit a section to assert its own position during the legislative session "subject to the requirements of this policy," after a majority vote by the Executive Committee, and allows a section to expend its own funds in its legislative efforts. *Id.* §§ 15.07.02, 15.07.03. Any statement of a legislative position, as well as any statement of position to a public, judicial or executive body, taken by a section must

Board deleted the policy statement that allowed a section to take a legislative position that the State Bar could not,[215] the Board of Directors would not permit a section to assert a legislative position that, in the Board's judgment, the State Bar itself could not take under the Board's Legislative Policy.[216]

D. *Other Ideological Activity*

While legislative activity is the State Bar's most visible political activity, it is not the Bar's only political or ideological activity. The State Bar encourages sections to sponsor resolutions, which are then published in the *Texas Bar Journal* and presented to the Resolutions Committee at the State Bar's Annual Meeting.[217] If the Resolutions Committee approves a resolution, it is then submitted to the general assembly at the annual State Bar meeting for consideration.[218] A resolution adopted by the general assembly is considered the policy of the general assembly, not the policy of the State Bar, unless subsequently adopted by the Board of Directors or submitted to all State Bar members in a referendum.[219] In practice, few resolutions are approved by the Resolutions Committee; there-

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contain a prescribed disclaimer. *Id.* § 15.07.04. The disclaimer should clearly state that the position taken is that of the section, and does not represent the position of the Board of Directors, the Executive Committee, or the general membership of the State Bar. *Id.*

215. *See supra* note 213 and accompanying text.

216. *See SBOT Board Plays Calvinball with W&L Legislative Package*, THE WOMEN'S ADVOCATE (State Bar of Texas Women and the Law Section, Austin, Tex.), Oct. 1994, at 3, 4 (describing State Bar Board of Director's meeting where Board voted that Women and the Law section's proposed legislation on alimony was in violation of *Keller* after Bar's associate general counsel expressed opinion that voluntary section could not support any proposed legislation that Bar could not support under *Keller*).

217. TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1988) (STATE BAR RULES art. XII, § 3); STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL §§ 2.02, 2.03 (Apr. 12, 1996). Members of the Resolutions Committee include delegates from local bar associations, local young lawyers associations, and sections, as well as current and incoming officers and voting directors of the Texas Young Lawyers Association. All past and present officers and voting directors of the State Bar, including incoming officers and directors are included as well. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 2.03.01 A (Apr. 12, 1996). The inclusion of past State Bar officers and directors permits State Bar authorities to pack the committee meeting in support of or in opposition to a resolution in which the Bar has a special interest.

218. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 2.03.08 A (Apr. 12, 1996).

219. *Id.* § 2.02.02 B, § 2.03.08 B-C.

fore, most meetings are nothing more than a forum to air lost causes.[220]

In addition to the resolutions process, the State Bar engages in other activities that members may object to as nonchargeable under *Keller*. For example, the Bar has reverted to a pre-*Keller* practice of inviting controversial speakers to address the Annual Meeting's general session;[221] the keynote speaker at the 1996 general session was Kenneth W. Starr, a former Solicitor General of the United States and then Independent Counsel for the highly political Madison Guaranty Savings and Loan ("Whitewater") case.[222] In addition, a Christian prayer breakfast is held at each

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220. In 1996, for example, the Criminal Justice Section sponsored a resolution to increase qualifications for service in the state judiciary. *See State Bar Sections Propose Resolutions*, 59 TEX. B.J. 548, 548 (1996) (reporting resolutions supported by State Bar in 1996). The General Practice Section sponsored resolutions supporting the continued existence of the State Bar Convention and opposing mandatory pro bono activities (while supporting voluntary legal services to the poor). *Id.* The Women and the Law Section sponsored a resolution to implement the recommendations of the Texas Supreme Court's Gender Bias Task Force. *Id.* at 549. In 1995, the Women and the Law Section sponsored resolutions in favor of alimony, civil commitment for sexually-violent predators, prohibiting discrimination by private clubs, and opposing denial of certain welfare benefits. *Women and the Law Section Proposes Resolutions for Consideration at the Annual Meeting*, 58 TEX. B.J. 507, 507–08 (1995). No resolutions were submitted in 1994. In 1993, the Hispanic Issues Section, the Committee on Opportunities for Minorities in the Profession, and the Section on Concerns of African-American Lawyers, sponsored three identical resolutions concerning the institutionalization of the election of minority candidates for President-Elect. *Resolutions to be Considered*, 56 TEX. B.J. 516, 516–17 (1993). The Houston Northwest Bar Association sponsored a resolution in 1992 opposing mandatory pro bono activities in civil matters, and the Appellate Practice and Advocacy Section and the Family Law Section jointly sponsored a resolution to establish the Professional Development Program as a separate, dedicated fund. *Resolutions to Be Considered*, 55 TEX. B.J. 477, 477–78 (1992).

221. *See, e.g.*, Melinda Smith, *Judge Robert H. Bork Addresses Politics and the Law During General Assembly of the Annual Meeting*, 53 TEX. B.J. 914, 914 (1990) (observing that "[w]hen making a political address . . . speakers may attempt to veil—or at least somewhat soften—their own political feelings in order to accommodate their listeners. . . . Judge Bork, however, is not given to those types of speeches."); *A Controversial Speaker: Maj. Gen. Secord*, 50 TEX. B.J. 897, 897 (1987) (calling Secord "a controversial figure and key participant in the Iran/Contra deals").

222. *Special Attraction: General Session Luncheon, Thursday, June 20*, 59 TEX. B.J., pullout between pages 450 and 451, at 2 (1996). Almost as soon as the announcement for the Annual Meeting appeared, Starr's invitation to address the general session was criticized as a "blatant use of the bar association to enhance [Republican presidential candidate Bob] Dole's sagging political future." *Ethics, Smethics*, TEX. LAW., June 3, 1996, at 3 (quoting letter from Arthur Mitchell of Bastrop, Texas, to State Bar President David Beck). Mr. Mitchell also complained about the choice of Christopher Darden as a speaker at the ethics symposium sponsored at the Annual Meeting by the Texas Center for Legal Ethics and Professionalism. *Letters to the Editor: More from Mr. Mitchell . . .*, 59 TEX. B.J.

annual meeting, although the rules prohibit it from being sponsored or financed by the State Bar.[223] Nevertheless, the prayer breakfasts were mentioned prominently several times in the annual meeting registration brochures published at State Bar expense.[224] Presumably, arrangements for the meeting room were made by State Bar staff, and if a member chose to attend, the cost of the prayer breakfast was collected by the State Bar as part of the annual meeting registration fee.[225] Further, the *Bar Journal* devoted one-fourth of a page to a story about the 1995 prayer breakfast,[226] and more than half a page, with a photograph of the speaker, to a story about the 1994 prayer breakfast.[227] Although the funds spent by the Bar to support and publicize the prayer breakfast are insignificant, they may be sufficient to support a lawsuit by a member who objects to the activity. The cases relying on *Hudson* and *Keller* do not provide a *de minimis* exception; an objecting member cannot be forced to pay for a nonchargeable activity, no matter how small the cost.[228] Another example of ideological activities that

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728, 728 (1996) (writing "I honestly believe that our bar association lost its moral compass."). Some members, on the other hand, supported the selection of Starr. *Letters to the Editor: Starr - From a Different Perspective*, 59 TEX. B.J. 727, 727–28 (1996) (printing letters from Clyde W. Howard, III of Nacogdoches and Howard A. Moum of Little Rock in support of choice of Kenneth Starr for keynote speaker).

223. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 2.01.02 (Apr. 12, 1996).

224. *E.g.*, *State Bar of Texas Annual Meeting*, 59 TEX. B.J., pull-out between pages 450 and 451, at 6, 14 (1996); *State Bar of Texas 1995 Annual Meeting*, 58 TEX. B.J., pull-out between pages 358 and 359, at 6, 11, 15 (1995); 57 TEX. B.J., pull-out between pages 390 and 391, at 5, 10, 12 (1994); 56 TEX. B.J., pull-out between pages 374 and 375, at 2 (1993).

225. The Policy Manual provides that all registrations shall be processed through State Bar headquarters. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 2.01.04 (Apr. 12, 1996). *See State Bar of Texas Annual Meeting*, 59 TEX. B.J., pull-out between pages 450 and 451, at 14 (1996) (distributing registration form); *State Bar of Texas 1995 Annual Meeting*, 58 TEX. B.J., pull-out between pages 358 and 359, at 6 (1995) (listing State Bar of Texas annual meeting as entity releasing registration forms). The cost of the prayer breakfast was $15. *Id.*

226. *Prayer Breakfast*, 58 TEX. B.J. 701, 701 (1995). Meadowlark Lemon, former member of the Harlem Globetrotters basketball team, was the featured speaker. *Id.*

227. *Christian Legal Society Prayer Breakfast*, 57 TEX. B.J. 883, 883 (1994). Tom Landry, former coach of the Dallas Cowboys professional football team, was the guest speaker. *Id.*

228. *See* Popejoy v. New Mexico Bd. of Bar Comm'rs, 887 F. Supp. 1422, 1433 (D. N.M. 1995) (affirming impartial decisionmaker's judgment that only nonchargeable activity engaged in by New Mexico Bar was charity golf tournament costing $698.00 and ordering refund of approximately 13 cents per member); Frank X. Gordon, Jr., *In Re: Challenges to the New Mexico State Bar Budgets for the Years 1991–1994: Decision and Order of Impar-*

some members of the Bar might find objectionable occurred in 1993, when the State Bar Board of Directors authorized the Texas delegation to the American Bar Association (ABA) House of Delegates[229] to introduce a resolution that would have required the ABA to conduct a referendum of its members to determine whether the Association should maintain its 1992 policy supporting a woman's right to choose to have an abortion, or re-adopt its "neutral" 1990 position of not supporting a particular viewpoint.[230]

E. *The State Bar's Budgetary Procedure Is Constitutionally Inadequate*

Despite the State Bar's well-developed legislative policy, the *Lathrop* Court's observation about the Wisconsin bar, that "it seems plain that legislative activity is not the major activity of the State Bar,"[231] could apply equally well here. But, as *Keller* makes clear, a unified bar may not use a dissenting member's compulsory dues to fund any political or ideological activities that fall outside the areas of regulating the legal profession and improving the quality of legal services.[232] Or, to paraphrase the rule in *Abood*, it is constitutional for a unified bar to spend funds for ideological pur-

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tial Decisionmaker, N.M. BAR BULL., July 6, 1994, at 1, 17 (notifying New Mexico Bar members that bar will refund charity golf tournament expense of less than 20 cents per member by credit to following year's dues).

229. Delegates from Texas are chosen by a special nine-person nominating committee. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 1.01.01 (Apr. 12, 1996). The President and the President-elect hold two of the delegate slots. *Id.* § 1.01.05. Before each American Bar Association meeting, the Texas delegates convene to discuss positions taken by the State Bar. *Id.* § 1.01.07.

230. *See* Dan Malone, *Abortion and the ABA*, 56 TEX. B.J. 709, 709 (1993) (supporting resolution for referendum of ABA members on issue of whether ABA should have policy on abortion); *Report in Support of Membership Referendum*, THE WOMEN'S ADVOCATE (State Bar of Texas Women and the Law Section, Austin, Tex.), Jan. 1994, at 6 (State Bar Director's report supporting referendum to determine membership's position on abortion). The resolution failed in the House of Delegates. James Podgers, *Just Say No: Two Key Initiatives Stall in House of Delegates Annual Meeting*, A.B.A. J., Oct. 1993, at 119, 119. Ironically, the State Bar Board took this action without complying with its own resolution process. *See* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1988) (STATE BAR RULES art. VII, § 3) (describing resolution procedure); STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL §§ 2.02, 2.03 (Apr. 12, 1996) (authorizing resolution procedures); *see also Resolutions to Be Considered*, 56 TEX. B.J. 516, 516–17 (1993). The Board also failed to poll its own membership. *Editor's Note*, THE WOMEN'S ADVOCATE (State Bar of Texas Women and the Law Section, Austin, Tex.), Jan. 1994, at 6.

231. Lathrop v. Donohue, 367 U.S. 820, 839 (1961).

232. Keller v. State Bar of Cal., 496 U.S. 1, 13–14 (1990).

poses not germane to its core purpose, but such expenditures must be financed from charges, dues, or assessments paid by members who do not object to advancing those ideas and who are not forced to do so because of their compulsory membership in a unified bar.[233] To ensure that a dissenting member's First Amendment interests are protected, the bar association must provide an adequate explanation of the purpose for the mandatory dues, a reasonably prompt opportunity for the dissenting member to contest the amount of the dues to an impartial decisionmaker, and an escrow for the disputed amounts while any challenges remain pending.[234]

Even prior to the Supreme Court's decision in *Keller*, the Texas Legislature limited the State Bar's use of compulsory dues to "administering the public purposes provided by [the State Bar Act]."[235] In 1991, the Legislature codified the rule of *Keller* to the extent that compulsory dues "and any other funds received by the state bar" may not be used for any legislative lobbying unless the measure "relates to the regulation of the legal profession, improving the quality of legal services, or the administration of justice."[236] Presumably, such political and ideological activities as the State Bar's substantive legislative programs, not to mention the resolution process, the prayer breakfast, abortion resolution, and other controversial activities, would draw some dissent from among the State Bar's nearly 61,000 members.[237] Nevertheless, the State Bar ignores the potential opposition by continuing to maintain that

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233. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977).

234. Chicago Teachers Union v. Hudson, 475 U.S. 292, 310 (1986); *see Keller*, 496 U.S. at 17 (citing *Hudson* procedures).

235. TEX. GOV'T CODE ANN. § 81.054(d) (Vernon 1988). *See supra* text accompanying note 152. As another example of the limitation on the use of dues, the policy manual provides that no funds collected from mandatory dues may be used for the purchase of alcoholic beverages. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 27.04.01 (Apr. 12, 1996).

236. TEX. GOV'T CODE ANN. § 81.034 (Vernon Supp. 1996).

237. *See, e.g., Letters to the Editor: A Different View*, 59 TEX. B.J. 4, 4 (1996) (printing letter from Michael C. Lynch of Amarillo, complaining of "current trends at the State Bar, fighting the good fight for the social good as they see it. They need to know that many of us out here within its mandatory membership do not choose to accept the same view and indeed take the contrary position."); *Letters to the Editor: A Question of Substance*, 57 TEX. B.J. 1157, 1157 (1994) (printing letter from John Mayer of Houston, arguing that "[i]n recent months, the *Texas Bar Journal* has degenerated into a forum for political activism"). *But cf. Letters to the Editor: Bankruptcy Balance*, 59 TEX. B.J. 511, 511 (1996) (printing letter from Peter S. Chamberlain of Greenville perceiving *Bar Journal* bias "supported by our compulsory dues in a closed shop which often seems devoted, directly or indirectly,

"dues money cannot be and is not used to advocate positions that are politically divisive and not related to State Bar purposes."[238] The *Popejoy* trilogy should amply illustrate the folly of such an oversimplified policy.[239]

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more to what the authors' wealthy and politically influential clients believe the law should be than to what it is.").

238. Tony Alvarado, *Executive Report: Holiday Message*, 58 TEX. B.J. 1113, 1113 (1995). Mr. Alvarado says that "Bar leadership, general counsel and management are keenly aware of the *Keller-Gibson* issues and examine bar activities in light of these considerations." Letter from Antonio Alvarado, Executive Director, State Bar of Texas, to Ralph H. Brock 1 (Jan. 18, 1996) (on file with the *St. Mary's Law Journal*); *see also* Jim Branton, *Taking a Stand for Unity*, 58 TEX. B.J. 314, 314 (1995) (writing that "[b]ecause our State Bar is a mandatory bar that all Texas lawyers are required to belong to, it is no surprise that our State Bar does not take a position on highly controversial issues").

Several other unified bar associations insist that *Keller* requires only that they refrain from engaging in political or ideological activity. The Louisiana State Bar Association, for example, asserts that it "does not engage in political or ideological activities and therefore . . . [has] no *Keller* deduction mechanism in place." Letter from Loretta L. Topey, Executive Director, Louisiana State Bar Association, to Ralph H. Brock 1 (Dec. 27, 1995) (on file with the *St. Mary's Law Journal*). The Oklahoma Bar Association also maintains that "no members' dues are used for political or ideological activities unrelated to the purpose for which the unified bar was established," and so it has not adopted formal rules or procedures. Letter from Marvin C. Emerson, Executive Director, Oklahoma Bar Association, to Ralph H. Brock 1 (Dec. 6, 1995) (on file with the *St. Mary's Law Journal*).

The State Bar of South Dakota calculates that its lobbying expenses "run about $1.50 per member per year," although a member has never requested a refund. A challenge on a particular issue may result in a refund of only a few pennies, so "[r]ather than creat[e] and maint[ain] a complex administrative process, any challenge will result in a refund of the entire pro-rated lobbying expense." Letter from Thomas C. Barnett, Jr., Secretary-Treasurer, State Bar of South Dakota, to Ralph H. Brock 1 (Dec. 27, 1995) (on file with the *St. Mary's Law Journal*). The Virginia State Bar has "taken the position that we simply do not and will not engage in activities for which mandatory member dues cannot be used under the *Keller* decision. We do not lobby or otherwise advance political or ideological causes. Our only appearances at the General Assembly relate to our regulatory mission and budget, and we do not employ a lobbyist." Letter from Thomas A. Edmonds, Executive Director and Chief Operation Officer, Virginia State Bar, to Ralph H. Brock 1 (Dec. 8, 1995) (on file with the *St. Mary's Law Journal*). Finally, the District of Columbia Bar has conducted several referenda to limit the use of dues to the admission of attorneys, registration of attorneys, attorney discipline, a client security fund, and additional administrative functions. "The referenda limitation on dues expenditures restricts the D.C. Bar beyond the restrictions in *Keller*. Accordingly, no dues paid to the D.C. Bar are used for purposes which would be prohibited under *Keller*." Letter from Katherine A. Mazzaferri, Executive Director, The District of Columbia Bar, to Ralph H. Brock 2 (Apr. 24, 1996) (on file with the *St. Mary's Law Journal*).

239. Popejoy v. New Mexico Bd. of Bar Comm'rs (*Popejoy III*), 887 F. Supp. 1422, 1425 (D. N.M. 1995); Popejoy v. New Mexico Bd. of Bar Comm'rs (*Popejoy II*), 847 F. Supp. 155, 157 (D. N.M. 1994); Popejoy v. New Mexico Bd. of Bar Comm'rs (*Popejoy I*), 831 F. Supp. 814, 817 (D. N.M. 1993).

In *Popejoy v. New Mexico Board of Bar Commissioners*, several members of the unified New Mexico Bar sued the Board of Bar Commissioners and the state bar, alleging that the Bar had failed to provide a disclosure and objection procedure that satisfied the minimum requirements articulated in *Hudson*.[240] In response, the Bar argued that it had fulfilled the minimum *Hudson* requirements by providing its members with a proposed budget, an audited financial statement, and *Bar Bulletin* articles that reported committee and task forces activities.[241] In a series of three published opinions, a federal district court held that the Bar's financial disclosure and procedure for objection violated the members' constitutional rights.[242] In order to remedy the problem, the court ordered the Bar to categorize expenditures according to the amount of money spent on each item, and allocate the expenditures into chargeable and nonchargeable categories.[243] Further, the court said that there must be an impartial decisionmaker to decide on any member's objection to the Bar's categorization of its activities.[244] Ultimately, the Bar was ordered to refund thirteen cents to each of its active members for an expense the Bar had categorized as *de minimis*.[245] The Texas Bar's failure to learn from *Popejoy* and to bring itself into compliance with the *Hudson* requirements—as applied to the unified bar through *Keller*[246]—exposes the State Bar

240. *Popejoy I*, 831 F. Supp. at 816–17.

241. *Id.* at 818.

242. *Id.* at 821. In particular, the court found that the bar's disclosure and objection procedure was insufficient in light of Supreme Court precedent. *See id.* at 820 (finding that bar's procedures failed to satisfy constitutional requirements set forth in *Hudson* and *Keller*). The court also found that the bar did not allocate enough time for members to lodge their objections to the proposed budget. *See id.* at 820–21 (concluding that 14 days after publication of proposed budget allowed for objection was insufficient when mailing time was considered).

243. *Id.* at 820. The court justified the requirements as necessary to ensure that a bar member, when deciding whether to object, possessed sufficient information. *Id.*

244. *See Popejoy I*, 831 F. Supp. at 821 (stating that impartial decisionmaker is required to consider those objections rejected by board of directors). The court made no decision regarding whether the New Mexico Supreme Court could serve as the impartial decisionmaker, but indicated that the choice of the decisionmaker could not be left to the bar's unbridled discretion. *Id.*

245. *Popejoy III*, 887 F. Supp. at 1426, 1433.

246. *See Keller*, 496 U.S. at 17 (announcing that integrated bar could certainly satisfy its *Abood* obligations by adopting procedures similar to those set out in *Hudson*).

to potential litigation, financial liability,[247] and additional judicial oversight of its budgetary operation.[248]

1. The State Bar Provides No Adequate Explanation for the Basis of the Annual Membership Fee

The State Bar of Texas has exposed itself to the threat of litigation by failing to provide its members with an adequate explanation for the basis of its compulsory membership dues. In *Hudson*, the Supreme Court reasoned that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee."[249] The Court observed that "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*."[250] The State Bar of Texas does not follow these *Hudson* guidelines.

According to current State Bar procedure, the Executive Director, after conferring with the President-elect and Budget Committee members, prepares a proposed budget and submits it to the Board of Directors for approval.[251] Once a proposed budget is approved by the Board of Directors, a summary is published in the

247. *See Popejoy III*, 887 F. Supp. at 1431 (finding that New Mexico Bar's litigation expenses were completely chargeable to bar membership). Not only did the New Mexico bar incur the expense of defending the lawsuit brought against it to force compliance with *Hudson* and *Keller*, but it also had to pay the plaintiffs' attorney's fees in the amount of $50,000. *Id.*

248. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 10.01.01 (Apr. 12, 1996) (providing that Supreme Court of Texas must approve each annual proposed budget submitted by State Bar). The district court in *Popejoy* questioned whether the Supreme Court of New Mexico could rise above "the spector of partiality" in resolving challenges to a State Bar budget that it had both developed and approved. *Popejoy II*, 847 F. Supp. at 159. *But see* Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 637 (1st Cir. 1990) (suggesting that Supreme Court of Puerto Rico might serve as independent panel to review expenditures of Bar dues). Ultimately, the New Mexico Supreme Court decided not to hear challenges to the budget, and avoided the partiality issue by naming the former chief justice of the Arizona Supreme Court as the independent decisionmaker. *Popejoy III*, 887 F. Supp. at 1434.

249. *Hudson*, 475 U.S. at 306.

250. *Id.*

251. TEX. GOV'T CODE ANN. § 81.022(d) (Vernon 1988); STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 10.01.01 (Apr. 12, 1996).

Texas Bar Journal.[252] After publication, the proposed budget is subject to a public hearing and then submitted to the Supreme Court of Texas for final review and approval.[253]

The State Bar's annual budget contains four main categories: the General Fund (the State Bar's operating fund), the Internal Services Fund (an in-house printing operation), the Enterprise Fund (an in-house producer of law and law-related books), and the Special Revenue Funds (independent funds that do not use membership dues or revenues from the general fund for operations).[254] The State Bar publishes a categorical listing of major expenses for each of the four funds,[255] along with a more detailed summary of the General Fund Budget[256] and the budget for the Special Revenue Funds.[257] Membership dues comprised nearly 55% of the 1996–97 General Fund, and 56% of the 1995–96 General Fund.[258]

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252. STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 10.01.01 (Apr. 12, 1996). Members can obtain a copy of the complete budget summary from the State Bar by placing a toll-free telephone call. *State Bar of Texas 1996–97 Proposed Combined Budget*, 59 TEX. B.J. 156, 156–58 (1996); *State Bar of Texas 1995–96 Proposed Combined Budget*, 58 TEX. B.J. 170, 170–72 (1995); *State Bar of Texas 1994–95 Proposed Budgets*, 57 TEX. B.J. 134, 134–36 (1994). The complete 1996–97 budget is 106 pages in length.

253. TEX. GOV'T CODE ANN. § 81.022 (b), (d) (Vernon 1988); STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 10.01.01 (Apr. 12, 1996).

254. *State Bar of Texas 1996–97 Proposed Combined Budget*, 59 TEX. B.J. 156, 156 (1996); *State Bar of Texas 1995–96 Proposed Combined Budget*, 58 TEX. B.J. 170, 170 (1995); *State Bar of Texas 1994–95 Proposed Budgets*, 57 TEX. B.J. 134, 134 (1994). "The budget process involves departments and entities that are not directly funded by annual dues, such as the Texas Board of Legal Specialization and special revenue funds, such as the Book Fund, as mandated by the Supreme Court and accounting requirements." Letter from Antonio Alvarado, Executive Director, State Bar of Texas, to Ralph H. Brock 1 (Feb. 8, 1996) (on file with the *St. Mary's Law Journal*).

255. *State Bar of Texas 1996–97 Proposed Combined Budget*, 59 TEX. B.J. 156, 156 (1996); *State Bar of Texas 1995–96 Proposed Combined Budget*, 58 TEX. B.J. 170, 170 (1995); *State Bar of Texas 1994–95 Proposed Budgets*, 57 TEX. B.J. 134, 134 (1994).

256. *1996–97 Proposed General Fund Budget*, 59 TEX. B.J. 157, 157 (1996); *1995–96 Proposed General Fund Budget*, 58 TEX. B.J. 172, 172 (1995); *1994–95 Proposed Budget—General Fund*, 57 TEX. B.J. 135, 135 (1994).

257. *1996–97 Combined Budget—Special Revenue Funds*, 59 TEX. B.J. 158, 158 (1996); *1995–96 Combined Budget—Special Revenue Funds*, 58 TEX. B.J. 171, 171 (1995); *1994–95 Combined Budget—Special Revenue Funds*, 57 TEX. B.J. 136, 136 (1994).

258. *State Bar of Texas 1996–97 Proposed General Fund Budget*, 59 TEX. B.J. 156, 157 (1996). The proposed 1996–97 General Fund budget projected membership dues in the amount of $12,253,300, and $22,796,134 in total income. *Id.* The proposed 1995–96 General Fund budget projected membership dues in the amount of $12,016,541, and $21,481,971 in total income. *State Bar of Texas 1995–96 Proposed General Fund Budget*, 58 TEX. B.J. 172, 172 (1995). The proposed 1994–95 General Fund budget projected member-

While *Hudson* does not require an exhaustive and detailed list of all expenditures, it does require a showing, with respect to each major item, that the expense is chargeable to members, or an explanation of the portion that is nonchargeable.[259] Only then will a member have sufficient information about the propriety of the fee to determine whether to object.[260] Moreover, without such a categorization, independent auditors cannot verify nonchargeable and chargeable expenditures.[261]

The State Bar budget-disclosure process does not provide an adequate explanation for the basis for the fee.[262] Specifically, it makes no distinction between chargeable and nonchargeable items.[263] Presumably, lobbying expenses are subsumed in the "governmental relations" item, but they are not categorized as

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ship dues in the amount of $11,499,196, and $20,122,544 in total income. *1994–95 Proposed Budget—General Fund*, 57 TEX. B.J. 135, 135 (1994).

259. *See Hudson*, 475 U.S. at 307 n.18 (requiring reasonable disclosure of expenditures, not detailed list). Expenses must include both direct and indirect costs, and should also include salary overhead. *Popejoy III*, 887 F. Supp. at 1433.

260. *See Hudson*, 475 U.S. at 302 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237 (1977).

261. *Popejoy I*, 831 F. Supp. at 820.

262. Requiring members to travel to Austin for the public budget hearing is not an adequate substitute for proper disclosure. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 10.01 (Apr. 12, 1996) (requiring State Bar budget be published in *Texas Bar Journal* and notice be given of hearing thereon). Even requiring a member to object in order to receive information is insufficient. *See Hudson*, 475 U.S. at 306 (concluding that requiring nonunion employees to object to receive information about basis of compulsory fees does not protect members' First Amendment rights); *Popejoy I*, 831 F. Supp. at 820 (rejecting defendants' argument that requirement of disclosing compulsory dues expenditures was satisfied by member calling or writing State Bar); Letter from Antonio Alvarado, Executive Director, State Bar of Texas, to Ralph H. Brock 1 (Feb. 8, 1996) (on file with the *St. Mary's Law Journal*) (explaining that any member may present objections to State Bar budget at public hearing). *But see* Regina Galindo, *State Bar Budget Hearing: Members Call for More Communication*, 56 TEX. B.J. 470, 470 (1993) (noting that most members left hearing with answers to their questions on expenditures of funds).

263. When questioned about the State Bar's procedures for categorizing Bar activities as chargeable or nonchargeable, the State Bar's Executive Director did not address the issue, suggesting that the State Bar does not categorize its activities. *Compare* Letter from Ralph H. Brock to Antonio Alvarado, Executive Director, State Bar of Texas 1 (Jan. 24, 1996) (asking whether State Bar has mechanism for categorizing activities as chargeable or nonchargeable) (on file with the *St. Mary's Law Journal*), *with* Letter from Antonio Alvarado, Executive Director, State Bar of Texas, to Ralph H. Brock 1 (Feb. 8, 1996) (failing to address categorization of State Bar activities) (on file with the *St. Mary's Law Journal*). Even an acknowledgement that a certain percentage of the budget would be nonchargeable, however, is an inadequate disclosure of reasons why members are required to pay their share of the remainder of the budget. *See Hudson*, 465 U.S. at 307 (stating that

chargeable or nonchargeable.[264] As the court stated in *Popejoy II*, "[t]his hidden expenditure is problematic because depending upon the nature of the bills under consideration by the legislature, lobbying is precisely the type of political activity to which a Bar member might want to object as nongermane to regulating the legal profession or improving the quality of legal services."[265]

2. The State Bar Provides No Reasonably Prompt Opportunity to Challenge the Amount of the Fee Before an Impartial Decisionmaker

The second shortcoming of the State Bar's budget process is its failure to provide a reasonably prompt opportunity for members to challenge the amount of the fee before an impartial decisionmaker.[266] The dissenting member, of course, has the initial burden of raising an objection to any item classified as chargeable.[267] Then the burden shifts to the State Bar to show that the expenditure is indeed properly categorized.[268]

The State Bar Act prohibits the use, not only of mandatory dues, but of other funds received by the State Bar "for influencing the passage or defeat of any legislative measure unless the measure

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acknowledgement that nonunion members did not have to pay share of union's budget did not adequately disclose why they were required to contribute to union budget at all).

264. *See Popejoy II*, 847 F. Supp. at 157 (expressing concern that lobbying was not listed as separate activity in State Bar's budget). Likewise, the cost of the resolution process which involves staff time, publication in the *Texas Bar Journal*, printing and mailing expenses, and room rental at the annual meetings, are not budget items. *See* STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL §§ 2.03.07, 2.03.09 (Apr. 12, 1996) (describing resolution process). The annual meeting prayer breakfast, which involves similar costs, as well as accounting for the admission fees collected, is also not a budget item. *See id.* § 2.01.02 (providing for annual prayer breakfast meeting, but specifying that meeting is not financial responsibility of State Bar).

265. *Popejoy II*, 847 F. Supp. at 157. For a summary of the State Bar's legislative activity since *Keller*, *see supra* notes 186–93 and accompanying text.

266. *See Hudson*, 475 U.S. at 310 (specifying constitutional requirements for collection of union agency fees); *see also Keller*, 496 U.S. at 16 (reiterating *Hudson* requirement of providing opportunity to challenge compulsory fees before impartial decisionmaker); *Popejoy I*, 831 F. Supp. at 819 (summarizing *Hudson* requirements for collection of union fees from nonunion members).

267. *See Hudson*, 475 U.S. at 306 (relying on *Abood* to state that nonunion employee has initial burden of objecting to union expenditure, but that burden remains with union to prove basis of fees).

268. *Id.*; *see also Popejoy II*, 847 F. Supp. at 158 (explaining that plaintiff's only burden is to make his objections known).

relates to the regulation of the legal profession, improving the quality of legal services, or the administration of justice,"[269] and "[t]he State Bar of Texas submits that its activities must and do comply with *Keller Gibson* considerations."[270] However, a member who disagrees and believes that the State Bar has engaged in improper lobbying or some other nonchargeable activity has no opportunity to present any objection to an impartial decisionmaker.[271] Instead, "[a]ny member may present objections, whether individually or through their [*sic*] respective elected representative on the Board, and at the scheduled public hearing which is usually held during the month of March each year."[272] Like the case of the teachers' union in *Hudson*, "the 'most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the [State Bar], which is an interested party, since it is

269. *See* TEX. GOV'T CODE ANN. § 81.034 (Vernon Supp. 1996) (restricting State Bar funds from being used to support legislative proposals except in limited circumstances).

270. Letter from Antonio Alvarado, Executive Director, State Bar of Texas, to Ralph H. Brock 1 (Feb. 8, 1996) (on file with the *St. Mary's Law Journal*). *Cf.* Popejoy II, 847 F. Supp. at 158 (noting that plaintiffs disagreed with New Mexico Board of Commissioners claim that all expenditures were for germane activities).

271. *See* Letter from Antonio Alvarado, Executive Director, State Bar of Texas, to Ralph H. Brock 1 (Feb. 8, 1996) (providing procedures by which State Bar members can object to annual budget) (on file with the *St. Mary's Law Journal*). Rather than providing an opportunity to present objections to an impartial decisionmaker, "the budget process allows the Budget Committee, then the Board and the public and finally, the Supreme Court to scrutinize any and all funds for compliance with the State Bar Act and applicable law." *Id.*

The Executive Director or a designee presides at the annual public budget hearing. *See* TEX. GOV'T CODE ANN. § 81.022(c) (Vernon 1988) (requiring Executive Director to preside at annual budget hearing but permitting director to appoint representative when unable to attend hearing); TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1988) (STATE BAR RULES, art. V, § 2) (requiring public hearing on annual budget). Most hearings last about 30 minutes, although the 1993 hearing, inspired by two critical letters published in the *Texas Bar Journal*, lasted three hours. *See* Freddie Baird, *State Bar Budget Hearing: Meeting the Commitment to Lawyers*, 57 TEX. B.J. 482, 482 (1994) (comparing 1992 public hearing on State Bar budget with 1993 meeting which lasted considerably longer); Regina Galindo, *State Bar Budget Hearing: Members Call for More Communication*, 56 TEX. B.J. 470, 470 (1993) (noting that 1994 public hearing on State Bar budget was short in comparison with lengthy 1993 hearing).

After the public hearing, the proposed budget is submitted to the Board of Directors for its consideration. TEX. GOV'T CODE ANN. § 81.022(d) (Vernon 1988). The budget adopted by the Board is then submitted to the Supreme Court of Texas for final review and approval. *Id.*

272. Letter from Antonio Alvarado, Executive Director, State Bar of Texas, to Ralph H. Brock 1 (Feb. 8, 1996) (on file with the *St. Mary's Law Journal*).

the recipient of the [mandatory dues] paid by the dissenting [members].'"[273]

3. The State Bar Provides No Escrow for the Amounts in Dispute While the Challenges Are Pending

The State Bar also fails to comply with the third element of the *Hudson* procedure. The third element requires that the amount in dispute be placed in an interest-bearing escrow account while challenges to the amount of expenditures classified as chargeable are pending.[274] It is not sufficient to offer members a rebate because of the risk that dissenting members' funds may be used, even temporarily, to finance ideological activities unrelated to the core purpose of the Bar.[275] Moreover, such an advance reduction of dues is inadequate because it does not provide members with any information about why the unrebated portion of their dues is considered chargeable.[276] Finally, an escrow account is not sufficient unless it bears interest from the date that payment of the member's bar dues is received; otherwise, the danger still exists that interest on the amount in escrow might be used for improper political or ideological purposes.[277] The requirement of an interest-bearing escrow account for disputed amounts is academic, though, since the State Bar does not even have a procedure for setting aside any dues allegedly used for nongermane purposes.

IV. How the State Bar Can Comply with *Hudson* and *Keller*

Even assuming the vast majority of the State Bar's expenditures are germane and chargeable, no *de minimis* rule is applicable. Although the *Popejoy* cases resulted in a determination that only thirteen cents per member was nonchargeable, that amount was ordered returned.[278] The Supreme Court made it clear in *Hudson*,

273. *Hudson*, 475 U.S. at 308 (quoting Hudson v. Chicago Teachers Union, 743 F.2d 1187, 1194–95 (7th Cir. 1984)).

274. *Id.* at 310.

275. *Id.* at 305.

276. *Id.* at 306.

277. Gibson v. Florida Bar, 906 F.2d 624, 632 (11th Cir. 1990).

278. Popejoy v. New Mexico Bd. of Bar Comm'rs (*Popejoy III*), 887 F. Supp. 1422, 1433 (D. N.M. 1995). The lawyer's share of the lobbying budget in Florida for 1986 was $1.50. Gibson v. Florida Bar, 798 F.2d 1567, 1570 n.5 (11th Cir. 1986). In 1995, the cost of

and reiterated in *Keller*, that the minimum constitutional requirements for the collection of mandatory dues include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.[279] Thus, if these requirements are not met, any expenditure, no matter how insignificant, is open to challenge.

"It is noteworthy," Justice Kaufman said, concurring and dissenting when *Keller* was before the California Supreme Court, "that unions representing government employees have developed, and have operated successfully within the parameters of, *Abood* procedures for over a decade."[280] In the same vein, most unified bars have now adopted some variation of the *Hudson* procedures and have published rules or procedures—some predating *Keller*—that provide at least an opportunity to challenge an expenditure as nonchargeable.[281] While such a procedure may result in some ad-

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all lobbying expenses in South Dakota was $1.50 per member. Letter from Thomas C. Barnett, Jr., Secretary-Treasurer, State Bar of South Dakota, to Ralph H. Brock 1 (Dec. 27, 1995) (on file with the *St. Mary's Law Journal*). Since 1992, the West Virginia State Bar has set its "*Keller* case deduction" in the annual amount of $1.90. A total of eight members have requested the deduction, and never more than four lawyers in any year. Letter from Thomas R. Tinder, Executive Director, the West Virginia State Bar, to Ralph H. Brock 1 (July 2, 1996) (on file with the *St. Mary's Law Journal*). The Board of the Kentucky Bar Association approved the amount of $2.00 per member for the fiscal year beginning July 1, 1996 to cover "expenses in the *Keller* 'gray' areas." Letter from Bruce K. Davis, Executive Director, Kentucky Bar Association, to Ralph H. Brock 1 (July 10, 1996) (on file with the *St. Mary's Law Journal*). The Washington State Bar Association allowed a $2.00 dues reduction for fiscal year 1995. *Notice from Washington State Bar Association to Members* 1 (1995) (on file with the *St. Mary's Law Journal*). In 1991, objectors in California were permitted to deduct $3.00 from their total dues. *See* Brosterhous v. State Bar of Cal., 906 P.2d 1242, 1245 (Cal. 1995) (discussing California State Bar's decisions to deduct $3.00 from dues of members who challenged expenditures for political and ideological activities of State Bar). The State Bar of Wisconsin allowed a dues reduction of $9.00 per member for fiscal year 1996, although "a strict calculation results in an available dues reduction of $8.52." *Notice from State Bar of Wisconsin to Members* 1 (no date) (on file with the *St. Mary's Law Journal*).

279. Keller v. State Bar of Cal., 496 U.S. 1, 17 (1990) (quoting Chicago Teachers Union v. Hudson, 475 U.S. 292, 310 (1986)).

280. Keller v. State Bar of Cal., 767 P.2d 1020, 1046 (Cal. 1989) (Kaufman, J., concurring and dissenting).

281. *See supra* note 142. Every unified bar that has advanced the argument that the labor union analogy somehow does not apply in its case has failed. *See Keller*, 496 U.S. at 11–12 (holding that State Bar of California is more like labor union than governmental agency); *Gibson*, 798 F.2d at 1569 (finding that state bar's administration-of-justice func-

ditional inconvenience or burden to the bar, it is "hardly sufficient to justify contravention of the constitutional mandate."[282]

Thus, the *Hudson* requirement to categorize all budgetary activities as chargeable or nonchargeable must be met by the Texas State Bar. Ordinarily, this would not pose any significant difficulty. The Supreme Court has never said that a unified bar association may not take a nongermane political or ideological position; only that it may not do so using a dissenter's mandatory dues.[283] Indeed, in the labor union context, the Court has implicitly sanctioned such activity, if it is financed with voluntary funds or funds from nonobjecting members.[284]

The State Bar, unfortunately, labors under unnecessarily strict statutory and internal policy prohibitions against spending money from any source for lobbying activities.[285] In addition, the Board

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tion could be supported by compulsory dues because program pertained to role of lawyer in judicial system and society); Popejoy v. New Mexico Bd. of Comm'rs (*Popejoy I*), 831 F. Supp. 814, 818 (D. N.M. 1993) (explaining New Mexico bar's argument that it uses "pre-collection" system in contrast to "post-collection" described in *Hudson*, and therefore, *Hudson* guidelines are not applicable to New Mexico bar's procedures).

Likewise, it is far too late in the day to argue that the application of the labor union analogy to the unified bar is flawed, or that a *de minimis* standard should be applied to nonchargeable expenditures. The law appears now to be quite well settled. *See Keller*, 496 U.S. at 17 (opining that integrated State Bar could satisfy *Abood* requirements by adopting *Hudson* procedures).

282. *Keller*, 496 U.S. at 16–17. This does not mean that the State Bar may not engage in nongermane political or ideological activities at all. In *Gibson*, the court said that "the *Abood* opinion suggests that the difficult task of discerning proper Bar position issues could be avoided by . . . a voluntary program in which lawyers would not be compelled to finance the Legislative Program." *Gibson*, 798 F.2d at 1570 n.5. Likewise, in *Popejoy III*, the court observed that "[s]ection lobbying for or against legislation is funded by voluntary dues only. . . . [i]f Plaintiffs object to lobbying by the section of which they are members, they need not contribute." *Popejoy III*, 887 F. Supp. at 1430.

283. Despite several opportunities to address whether a bar member's First Amendment rights are violated if the association takes a political or ideological position with which the member disagrees, the Supreme Court has never done so. *See Keller*, 496 U.S. at 17 (refusing to address First Amendment issue because lower court had not done so); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 238 (1977) (resting decision on mandatory nature of dues).

284. *See Abood*, 431 U.S. at 235 (holding that Constitution does not prohibit union from using voluntary fees to support political candidates or causes, or to advance ideological concerns). *But see* Florida Bar *re* Frankel, 581 So. 2d 1294, 1299–1300 (Fla. 1991) (awarding refund of objecting member's dues in amount proportionate to amount spent in contested lobbying activities plus interest and enjoining Florida Bar from lobbying on issues that fell outside guidelines for germane activities).

285. *See* TEX. GOV'T CODE ANN. § 81.054(d) (Vernon 1988) (limiting use of dues). *See supra* text accompanying note 152 and text accompanying notes 196–208.

of Directors recently repealed the only provision in its Legislative Policy that allowed voluntary sections, in theory if not in practice, to support legislation that the State Bar itself could not.[286] But the issue is not whether the State Bar does, in fact, engage in some nongermane political and ideological activities. The real issue under *Hudson* and *Keller* is whether the State Bar provides a mechanism for dissenting members to challenge the State Bar's determination that all of its activities are chargeable. Not surprisingly, it does not.

The recent experience of its counterpart in New Mexico should serve as a warning to the State Bar. The New Mexico Bar, while allowing members to object that any budget item was ideological or nongermane, did not categorize its expenses into chargeable and nonchargeable expenses.[287] The court held that the Bar's duty "to provide *Hudson/Keller* disclosures and procedures is an independent constitutional minimum requirement in and of itself."[288] The court required the Bar to provide a categorized accounting from 1991 forward, to allow Bar members an opportunity to challenge any prior or proposed expenditures, and to allow an impartial decisionmaker to address those objections the Bar refused to accept.[289] The litigation resulted in a refund of thirteen cents per member,[290] but at a cost to the Bar of tens of thousands of dollars in litigation expenses.[291]

Not only must the State Bar develop a system to categorize its activities as chargeable or nonchargeable, it must establish some mechanism to allow dissenting members to object to budget items that they deem miscategorized, to have their objections heard by a

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286. As noted in *supra* notes 209–16 and the accompanying text, the State Bar Legislative Policy previously provided that one of several situations in which it might be appropriate for a section to take its own legislative position was where it was not appropriate for the State Bar to do so. Several courts have suggested that voluntary sections might conduct their own legislative programs. *See, e.g.*, *Gibson*, 798 F.2d at 1570 n.4; *Popejoy III*, 887 F. Supp. at 1430. This, obviously, is not the State Bar's position.

287. *Popejoy I*, 831 F. Supp. at 820.

288. *Id.*

289. *Popejoy III*, 887 F. Supp. at 1425.

290. *Id.* at 1433.

291. *Id.* at 1431–32; *see* Frank X. Gordon, Jr., *In re: Challenges to the New Mexico State Bar Budgets for the Years 1991–1994: Decision and Order of Impartial Decisionmaker.*, N.M. BAR BULL., July 6, 1994, at 1, 7 (detailing costs of $216,067 expended or budgeted by bar for costs of *Popejoy* litigation through 1994).

disinterested factfinder, and to preserve the disputed amount in an interest-bearing escrow account while the challenge is pending. It is not necessary, of course, to reinvent the wheel. The unified bars of Puerto Rico, Wisconsin, California, Florida, and New Mexico have procedures that have been tested or established in litigation.[292] Four other integrated bars—in Georgia, Hawaii, Washing-

292. The procedure followed by the Puerto Rico bar was established in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990). In *Schneider*, the United States Court of Appeals for the First Circuit imposed a three-prong procedure on the Puerto Rican Bar Association to protect the constitutional rights of dissenting members. *See Schneider*, 917 F.2d at 636–37 (declaring that if Puerto Rican bar association did not adopt objection procedures, it must operate as voluntary association until all ideological activities not related to legal profession ceased). Under the *Schneider* procedure, the bar association or an independent agent performs a verified independent accounting to categorize activities either as suitable or unsuitable for mandatory funding and reports the cost for each activity. *See id.* (setting out steps Puerto Rico's bar association should take to protect members' First Amendment rights). This accounting forms the basis for calculating the amount of the dissenting members' dues reduction. *Id.* at 637. Next, an independent panel (such as the state's supreme court) reviews the categories of activities to determine whether all items to be funded with mandatory dues 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. *Id.* Finally, the objection procedure must eliminate any requirement that the dissenters file objections to specific activities in order to receive a refund. *Id.*

The rules used in Wisconsin developed following years of litigation. *See* Crosetto v. State Bar of Wis., 12 F.3d 1396, 1399 (7th Cir. 1993) (challenging Wisconsin bar's post-*Keller* dues reduction plan); Levine v. Heffernan, 864 F.2d 457, 463 (7th Cir. 1988) (reversing district court judgment that Wisconsin integrated bar violated First Amendment rights); Levine v. Supreme Court of Wis., 679 F. Supp. 1478, 1502 (W.D. Wis. 1988) (enjoining Wisconsin Supreme Court from enforcing its mandatory bar membership rule). Initially, dissenting lawyers in Wisconsin won an injunction in federal district court that prohibited the Wisconsin Supreme Court from enforcing the mandatory bar membership rule. *Levine*, 679 F. Supp. at 1502. The injunction, however, was dissolved on appeal. *Levine*, 864 F.2d at 463. After the Supreme Court's decision in *Keller*, the Wisconsin Supreme Court reestablished that state's integrated bar under a new set of court rules and by-laws. *Crosetto*, 12 F.3d at 1399; *see In re* State Bar of Wisconsin: Membership, 485 N.W.2d 225, 225–26 (Wis. 1992) (discussing effect of *Keller* on Wisconsin bar). In language adapted directly from *Keller*, the Wisconsin Supreme Court's rules provide that "[t]he state bar may use compulsory dues only for activities which are reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the state bar." *See Crosetto*, 12 F.3d at 1405 n.16 (comparing Wisconsin Supreme Court rules for spending compulsory bar dues with language of *Keller*).

The Wisconsin rules incorporate the *Hudson* procedural requirements by

> (1) requir[ing] that the Bar provide written notice to all members before the beginning of each fiscal year, describing those activities the Bar has determined are chargeable and those which are non-chargeable, informing members as to the cost of those activities and describing how those amounts were calculated; (2) . . . set[ting] up a procedure whereby those who contend that the calculation is incorrect may challenge the

> calculation and have their challenge promptly determined by an impartial arbitrator; [and] (3) . . . provid[ing] that a member demanding arbitration need not pay any dues until October 31 or 15 days following the arbitrator's decision, whichever is later.

Id. at 1405. The United States Court of Appeals for the Seventh Circuit upheld this plan as constitutional both on its face and as applied. *Id.*

Following *Keller*, the State Bar of California also adopted procedures based on the *Hudson* requirements. Under the California rules the state bar calculates the amount of each member's dues attributable to activities the state bar deems nonchargeable under *Keller*. *Brosterhous*, 906 P.2d at 1245. Once a challenger objects in writing, the state bar places the disputed amount in escrow. *Id.* The Board of Governors then decides either to refund the disputed amount or to submit the matter to arbitration. *Id.* The arbitration decision is binding on the challenger and the state bar, but it is subject to appropriate review as determined by the California Supreme Court. *Id.*

In contrast to the practices in Wisconsin and California, the Florida Bar Association requires an objecting member to first pay the assessment and then request a refund of the amount of dues used for objectionable purposes. *Gibson*, 906 F.2d at 628. Under the Florida plan, the bar publishes notice of any legislative position it adopts in its bi-monthly publication mailed to all members. *Id.* A member has forty-five days after publication to object to a particular position that the member believes is not sufficiently related to the bar's purposes to justify an expenditure of compulsory dues. *Id.* Once the objection is received, the executive director calculates the pro rata amount of the member's dues that is being used to finance the bar's political activity. *Id.* at 628–29. That amount is placed in escrow for forty-five days pending a determination of the objection's merits. *Id.* at 629. During that time the bar may refund the member's pro rata share or refer the issue to arbitration. *Id.* The arbitration panel then decides whether the political activity can constitutionally be funded by compulsory dues. *Id.* The panel's decision binds both the objecting member and the bar. *Id.* In the event of a refund, the objecting member is entitled to interest on the pro rata amount calculated from the date that payment of the members' bar dues was received. *Id.* at 632.

The New Mexico procedure was born in post-*Keller* litigation challenging the constitutionality of that state bar's procedures for collecting its annual fees and dues. *See Popejoy I*, 831 F. Supp. at 816 (addressing constitutionality of state bar's expenditures of annual fees). Initially, the New Mexico Bar procedures required lawyers to object to budgetary expenditures within 14 days after the budget was published, *id.*, and if a member required more information about an item, the member could "simply pick up the phone or put pen to paper and ask," *see id.* at 818 (summarizing defendant bar's arguments about why objection procedures were constitutionally adequate). However, this procedure did not give a reasonable time to object and did not provide for consideration by an impartial decisionmaker as required by *Hudson*. *Id.* at 820–21. Consequently, the bar was ordered to topically categorize expenditures by amount spent and to allocate the expenditures into chargeable and nonchargeable activities so as to provide a bar member with sufficient information to decide whether to object. *Id.* at 820. The bar categorized expenditures for 1991-94 and concluded that all expenditures were chargeable except an expense for a Muscular Dystrophy Association fund-raising golf tournament. *See Popejoy III*, 887 F. Supp. at 1425 (explaining history of case). However, the bar classified the golf tournament expense as *de minimis* and did not provide a refund. *Id.*

The bar designated about half of its annual expenditures to a single item designated "General Administration" which included expenses for legislative lobbying. Popejoy v. New Mexico Bd. of Bar Comm'rs (*Popejoy II*), 847 F. Supp. 155, 157 (D. N.M. 1994). When this categorization was challenged, a federal district court determined that not only

ton and West Virginia—have voluntarily adopted procedures modeled after procedures that have already been litigated.[293] Any of the procedures now used by those associations would be a logical starting point in the process of revising the State Bar budgetary process in Texas.

V. CONCLUSION

Given the State Bar's failure to comply with *Hudson* and *Keller*, it is remarkable that it has, so far, avoided the litigation that plagued the unified bars in Wisconsin, Florida, California, Puerto Rico and most recently, in the neighboring state of New Mexico. The State Bar's attempt to limit its political and ideological activity, and thereby comply with *Keller*, while commendable, is no substitute for the procedures required by *Hudson*.

None of the several unified bars have successfully defended a budgetary system without the *Hudson* safeguards. On the other hand, unified bars that have made an attempt to follow *Hudson* have apparently avoided litigation. The State Bar does itself and its membership a great disservice, then, by doggedly insisting it is in compliance with *Keller* while blindly ignoring the *Hudson* requirements. The New Mexico Bar made a similar mistake, at a cost to its members far greater than thirteen cents apiece in nonchargeable

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was the category "inherently incapable of being gauged as chargeable or nonchargeable by Bar members," it included the very expenses most likely to be opposed. *Id.* The court directed the bar to allocate expenses it classified as "Administrative Office Salaries" to specific program activities and to identify the specific expenses incurred in lobbying, public relations, and charitable activities. *Id.* at 159. The New Mexico Supreme Court appointed the former chief justice of the Arizona Supreme Court to act as the impartial decisionmaker who would hear and determine the validity of objections the bar would not accept. *Popejoy III*, 887 F. Supp. at 1425. The former chief justice received evidence, heard argument, *id.*, and concluded that all of the New Mexico Bar's expenditures were germane except the golf tournament expenses, for which he ordered a refund of approximately thirteen cents for each active member, *id.* at 1426, 1433.

Other unified bar plans, especially those that do not categorize the bar's activities, and instead place the onus on their members to make the initial objection, may not pass constitutional muster. *See supra* note 142. A constitutional analysis of those plans is beyond the scope of this article.

293. *See* State Bar of Georgia; *Standing Board Policy 200* (1994–95) (on file with the *St. Mary's Law Journal*); Hawaii State Bar Association, *Constitution and Bylaws of the Hawaii State Bar Association*, art. VI, § 2 (on file with the *St. Mary's Law Journal*); Washington State Bar Association, *Notice to WBSA Members:* Keller *Compliance Option* (on file with the *St. Mary's Law Journal*); West Virginia State Bar, *Membership Fee Guidelines* (on file with the *St. Mary's Law Journal*).

expenses, and it spent several years in a futile effort to defend that mistake. Surely, the State Bar of Texas does not want a similar experience.

As one of the few unified bars that makes no effort to comply with *Hudson*, the State Bar of Texas has left itself extraordinarily vulnerable to a lawsuit by its members. Before such a lawsuit is filed, though, the State Bar has a singular opportunity to avoid expensive and divisive litigation by simply adopting the sort of procedures described in *Hudson*: an adequate explanation of the basis of the membership fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while challenges are pending. The State Bar ignores that opportunity at its peril.