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[Home](#) |
 [Bar Calendar](#) |
 [Admission to the Bar](#) |
 [Technology](#) |
 [CIE](#) |
 [Legal Resources](#) |
 [Ethics Opinions](#) |
 [About the Bar](#) |
 [Contact Us](#)

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Lawyers & the 2003 Legislature

What allows a bar association to lobby?

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State Bar of Montana

The positions the State Bar can and cannot take in a representative capacity are in large part the result of the U.S. Supreme Court's decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990).

In *Keller*, the Supreme Court held that the California Bar's use of mandatory membership dues to finance political and ideological activities with which their members disagreed violated the members' First Amendment right of free speech. Although the complaint in *Keller* involved lobbying, the proscription runs to any political or ideological activity. The test applied was whether the expenditures were necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services. In an earlier case, *Lathrop v. Donahue*, 367 U.S. 820 (1961), the Court attempted to delineate that standard:

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. The extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

Progenitor litigation that is identified as acceptable under *Keller* include the regulation and discipline of attorneys; matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency; increasing the availability of legal services to society; regulation of client trust accounts; and the education, ethics, competence, integrity and regulation of the legal profession.

In *Popejoy v. New Mexico Board of Bar Commissioners*, 887 F. Supp 1422 (DC NM 1995), the federal district court found permissible expenditures from mandatory bar dues for lobbying for funding of new judges, salary increases for judicial staff, changes to compensation packages of state-employed lawyers, a judicial information system, court-appointed representation for child abuse and neglect cases and pro bono legal services for Gulf War military reservists and their family members. In addition, the court found both germane and appropriately funded by mandatory dues: expenses incurred for construction of a new state bar center, publications, social activities, an annual meeting, attendance by bar officers at various meetings, and the bar's direct expenses in defense of the objecting members' litigation. The only expenses at issue found non-chargeable were those related to a bar-sponsored golf tournament.

The First Circuit Court of Appeals ruled in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), cert.denied, 520 U.S. 1029 (1992), that activities "incidental to the operation of a [a unified bar] association—such as social events and the provision of insurance to members—may be financed with mandatory fees." *Id.* at 632. *Schneider* also provided that certain political 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 services. The court cited examples of appropriate funding that included lobbying in favor of budget appropriations for new judicial positions or increased salaries for government attorneys, or against statutory limitations on attorney advertising or requirements for certification of legal specialists.

Another permissible area of activity noted by the First Circuit is increasing the availability of legal services to society, including legal aid programs, public information regarding availability of legal services, and public education on substantive areas of the law.

When interpreting what is germane, or what mandatory Bars can and cannot do, the courts typically examine the unification language. Worth knowing is the Montana Supreme Court's charge to the State Bar of Montana in the 1974 Order unifying the Montana Bar:

The purposes of the Unified Bar of Montana shall be to aid the courts in maintaining and improving the

administration of justice; to foster and maintain on the part of those engaged in the practice of law high standards of integrity, learning, competence, public service, and conduct; to safeguard proper professional interests of members of the bar; to encourage the formation, maintenance, and activities of local bar associations; to provide a forum for the discussion of and effective action concerning subjects pertaining to the practice of law, the science of jurisprudence and law reform and relations of the bar to the public; and to ensure that the responsibilities of the legal profession to the public are more effectively discharged.

Application of Montana Bar Association President, 163, Mont. 523, 518 P.2d 32 (1974). This language is repeated in Article III of the Constitution of the State Bar of Montana.

Montana has a mechanism to respond to challenges by members who object to legislative activities and public positions apart from the Legislature (such as the filing of an amicus brief), but our by-law provision pre-dates *Keller*. *Keller* does not restrict its application to legislative activities; its application is to all bar activities.

The Montana State Bar's current by-law provision states:

Section 4(b): To the extent State Bar funds derived from members' dues are employed to the furtherance of the Bar's mandate in Article III of the Constitution of the State Bar, which includes among other things the duty to participate in "improving the administration of justice and law reform," by lobbying in the State Legislature, dues-paying members may, upon application, be refunded an aliquot portion of their dues in the manner prescribed by the Board of Trustees pursuant to this subsection. The amounts of money pertinent to each piece of legislation upon which the State Bar of Montana has lobbied shall be announced by publication in the June issue of *The Montana Lawyer* following the regular session of the Legislature, with the position, if any, taken by the State Bar of Montana stated therein. Refund applications shall refer to bill or resolution numbers and a claim for refund made accordingly. Claims must be made by July 10, and payments will be made by August 1 of each legislative year. If the State Bar expends dues funds in connection with public positions apart from the Legislature, such as filing an amicus brief, the Board of Trustees shall establish a refund procedure similar to the procedure for lobbying, including notice in *The Montana Lawyer* of the position taken, the amount expended, and the right of members to an aliquot refund of dues.

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