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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:) Supreme Court No.
)
PETITION TO) PETITION TO AMEND RULE
) 32(c)(9), ARIZ. R. SUP. CT.;
1) AMEND RULE 32(c)(9), ARIZ. R.)
SUP. CT.; AND) PETITION TO FORM A TASK
) FORCE, EXAMINING STATE BAR'S
2) CREATE A TASK FORCE TO) COMPLIANCE WITH <i>KELLER</i> ,
EXAMINE STATE BAR'S <i>KELLER</i>) REDEFINING MANDATORY
COMPLIANCE) EXPENSES, MAKE
) DISCRETIONARY EXPENSES
) VOLUNTARY

Pursuant to Rule 28, Rules of the Supreme Court, Peter J. Stutsman, an inactive member of the State Bar of Arizona ("State Bar"), respectfully petitions this Court to adopt amendments to Rule 32(c)(9), Ariz. R. Sup. Ct. governing the accounting of fees collected by the State Bar, as proposed herein. In this connection, Petitioner respectfully asks this Court to appoint an independent task force for the express purpose of conducting a thorough review of the State Bar to determine whether or not the State Bar's function can be performed without intruding on the Constitutionally-protected rights of individual members. Similar studies have recently been conducted by the Nebraska Supreme Court and a task force created by the Michigan Supreme Court. In both states, the findings led to redefinitions of mandatory state bar functions in accord with the rule of *Keller v. State Bar of Calif.*, 496 U.S. 1

1 (1990) hereinafter *Keller*.

2 **STATE BAR’S OBLIGATION TO PROVIDE**
3 **FINANCIAL INFORMATION REGARDING DUES**

4 Consistent with a settled line of cases, mandatory state bars have a
5 Constitutionally-mandated obligation to adhere to First Amendment protections
6 that ensure not only the freedom to associate, but the freedom not to associate.
7 Those protections include not only the freedom of speech, but the freedom to avoid
8 subsidizing group speech with which an individual disagrees. *Knox v. Service*
9 *Employees Intern. Union*, 132 S. Ct. 2277, 2288–89 (2012); *Kingstad v. State Bar*
10 *of Wisconsin*, 622 F.3d 708, 712-13 (7th Cir. 2010).

11 Unless specific procedural protections are in place, an individual’s rights
12 against compelled speech and compelled association are violated when a
13 mandatory bar uses mandatory member dues for purposes not germane to
14 regulating the legal profession or improving the quality of legal services. *Keller*,
15 496 U.S. at 13-14; *Kingstad*, 622 F.3d at 712-13; *see also Knox*, 132 S. Ct. at 2295-
16 96; *Aboud v. Detroit Board of Education*, 431 U.S. 209, 235 (1977).

17 Likewise, the failure to provide procedural protections in the first instance
18 violates bar members’ Fourteenth Amendment right to procedural due process.
19 *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192-93 (7th Cir. 1984) *aff.’d*
20 *sub nom. Chicago Teachers Union*, 475 U.S. 292 (1986).

21 Any activities that are not “germane” to the bar association’s dual purposes
22 of regulating the legal profession and improving the quality of legal services,
23 including political and ideological activities, are “non-chargeable activities.”
24 *Keller*, 496 U.S. at 14; *see also Kingstad*, 622 F.3d at 718-19; *Romero v. Colegio*
25 *de Abogados de Puerto Rico*, 204 F.3d 291, 302-03 (1st Cir. 2000).

26 When mandatory member dues are used for non-chargeable activities, the
27 bar association is required to establish procedures that satisfy three requirements:
28 (a) proper notice to members, including an adequate explanation of the calculations

1 of all non-chargeable activities; (b) a reasonably prompt decision by an impartial
2 decision maker once a member makes an objection to the manner in which his or
3 her mandatory member dues are being spent; and (c) an escrow for the amounts
4 reasonably in dispute while such challenges are pending. *Keller*, 496 U.S. at 14;
5 *Hudson*, 475 U.S. at 306-08.

6 All mandatory bar associations bear the burden of proving that expenditures
7 are germane and chargeable. *Hudson*, 475 U.S. at 306; *see also Lehnert v. Ferris*
8 *Faculty Ass’n*, 500 U.S. 507, 524 (1991) (emphasizing that, “as always, the union
9 bears the burden of proving the proportion of chargeable expenses to total
10 expenses.”).

11 ***A. Keller v. State Bar of California***

12 In *Keller*, members of the State Bar of California asserted that the Bar used
13 its membership dues for self-regulatory functions, such as formulating rules of
14 professional conduct and disciplining members for misconduct. The dues were also
15 used to lobby the legislature and other governmental agencies, file *amicus curiae*
16 briefs in pending cases, hold an annual delegates conference for the debate of
17 current issues and the approval of resolutions, and engage in educational programs.
18 *Keller* and other State Bar members brought suit in state court claiming that
19 through these latter activities the Bar expends mandatory dues payments to
20 advance political and ideological causes to which they do not subscribe, in
21 violation of their First and Fourteenth Amendment rights to freedom of speech and
22 association. The Court granted certiorari to consider the First Amendment claims
23 stating that the

24 Petitioners here present[ed] this very claim for decision, contending that
25 the use of their compulsory dues to finance political and ideological
26 activities of the State Bar with which they disagree violates their rights of
27 free speech guaranteed by the First Amendment. (*Keller* at 9)

28 Citing *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52
L.Ed.2d 261 (1977), as a leading example in *Keller* when addressing dues being

1 applied to non-mandatory functions, the unanimous decision of the Court held that
2 the

3 ... State Bar may therefore constitutionally fund activities germane to
4 those goals out of the mandatory dues of all members. It may not,
5 however, in such manner fund activities of an ideological nature which
6 fall outside of those areas of activity. (*Keller* at 14)

7 The State Bar of California alleged that it

8 .. was authorized to" 'aid in all matters pertaining to the advancement of
9 the science of jurisprudence or to the improvement of the administration
10 of justice.' " 47 Cal.3d, at 1169, 255 Cal.Rptr., at 552, 767 P.2d, at 1030.
11 Simply putting this language alongside our previous discussion of the
12 extent to which the activities of the State Bar may be financed from
13 compulsory dues might suggest that there is little difference between the
14 two. But there is a difference, and that difference is illustrated by the
15 allegations in petitioners' complaint as to the kinds of State Bar activities
16 which the Supreme Court of California has now decided may be funded
17 with compulsory dues. (*Keller* at 14-15)

18 Looking at the positions taken by the State Bar of California, the Court ruled
19 that

20 [c]ompulsory dues may not be expended to endorse or advance a gun
21 control or nuclear weapons freeze initiative; at the other end of the
22 spectrum petitioners have no valid constitutional objection to their
23 compulsory dues being spent for activities connected with disciplining
24 members of the Bar or proposing ethical codes for the profession. (*Id.* at
25 16)

26 The Court continued to say

27 ... according to [*Teachers v.] Hudson*, [475 U.S. 292, 106 S.Ct. 1066, 89
28 L.Ed.2d 232 (1986)] 'the constitutional requirements for the
[association's] collection of . . . fees include an adequate explanation of
the basis for the fee, a reasonably prompt opportunity to challenge the
amount of the fee before an impartial decision maker, and an escrow for
the amounts reasonably in dispute while such challenges are pending.'
(*Id.*, at 310 [106 S.Ct., at 1077]). (*Keller* at 16)

1 When dealing with the fees charged by the bar association and its basis
2 for such fees, the Court stated

3 We believe an integrated bar could certainly meet its *Abood* obligation by
4 adopting the sort of procedures described in *Hudson*. (*Keller at 17*)

5 The fact that the State Bar of Arizona has failed to do so is an indication that
6 this Court needs to grant the petitions raised herein.

7 ***B. Chicago Teachers Union, Local No. Aft. v. Hudson***

8 In *Chicago Teachers Union v. Hudson* (475 U.S. 292, 106 S.Ct. 1066, 89
9 L.Ed.2d 232 (1986)) (hereinafter "*Hudson*"), four individuals brought suit against
10 the teacher union alleging that part of the fees collected from non-union members
11 were being used for something other than the collective bargaining and contract
12 administration. The Court agreed. The Court then stated that a

13 ... forced exaction followed by a rebate equal to the amount improperly
14 expended is thus not a permissible response to the nonunion employees'
15 objections.

16 Second, the "advance reduction of dues" was inadequate because it
17 provided nonmembers with inadequate information about the basis for the
18 proportionate share. In *Abood*, we reiterated that the nonunion employee
19 has the burden of raising an objection, but that the union retains the
20 burden of proof: " 'Since the unions possess the facts and records from
21 which the proportion of political to total union expenditures can
22 reasonably be calculated, basic considerations of fairness compel that
23 they, not the individual employees, bear the burden of proving such
24 proportion.' " *Abood*, 431 U.S., at 239-240, n. 40, 97 S.Ct., at 1801-1802,
25 n. 40, quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122, 83 S.Ct. 1158,
26 1164, 10 L.Ed.2d 235 (1963). Basic considerations of fairness, as well as
27 concern for the First Amendment rights at stake, also dictate that the
28 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*. (*Hudson at 305-306*) (footnotes omitted)

The Court continued:

1 An acknowledgment that nonmembers would not be required to pay any
2 part of 5% of the Union's total annual expenditures was not an adequate
3 disclosure of the reasons why they were required to pay their share of
4 95%. (*Id.* at 307)

5 ...
6 We hold today that the constitutional requirements for the Union's
7 collection of agency fees include an adequate explanation of the basis for
8 the fee, a reasonably prompt opportunity to challenge the amount of the
9 fee before an impartial decisionmaker, and an escrow for the amounts
10 reasonably in dispute while such challenges are pending. (*Id.*, at 310)

11 Thus, under *Hudson*, and later reiterated by *Keller*, the bar association would
12 have to provide an adequate explanation of the basis of the fees charged its
13 membership, a reasonably prompt opportunity for its members to challenge the
14 fees before an impartial decision maker, and the placement of the fees in escrow
15 until such time as a final decision is made.

16 **C. Request for Financial Information – Arizona’s Response**

17 The State Bar has failed to comply substantively with both *Keller* and
18 *Hudson*. Moreover, pursuant to *Keller*, it has repeatedly failed to provide any
19 accounting to Petitioner. In May 2011, citing *Keller* as the basis for his request, the
20 Petitioner wrote to Mr. John F. Phelps, CEO/Executive Director of the State Bar of
21 Arizona, requesting an accounting of the inactive fees charged by the State Bar.
22 Petitioner also advised Mr. Phelps that he objected to his fees being used for
23 politically motivated issues. Petitioner also advised Mr. Phelps that he was entitled
24 to an adequate explanation of the basis for the fee, as well as a reasonably prompt
25 opportunity to challenge the amount of the fee before an impartial decision maker.

26 Mr. Phelps responded in June 2011, that the fees were established by a
27 process whereby a Committee made a recommendation to the Arizona Supreme
28 Court, which either rejected or accepted the recommendation. Mr. Phelps did not
disclose how any portion of Petitioner’s fees are set. Mr. Phelps made no reference
to the *Keller* decision, or how the State Bar was implementing it regarding the
State Bar’s lobbying efforts. Moreover, without even advising Petitioner if his

1 organization's purported government relations policy regarding "political activities
2 and challenges" at <http://www.azbar.org/AboutUs/GovernmentRelations> and
3 specifically, Article XIII, which provides a mechanism for "Challenges Regarding
4 State Bar Activities." Mr. Phelps chose to be non-responsive to Petitioner's queries
5 concerning the nature and extent of any expenses justifying Petitioner's fees.

6 In June 2011, Petitioner responded to Mr. Phelps' letter restating his request
7 for some accounting of the bar fees, once again citing the *Keller* decision. Mr.
8 Phelps choose not to respond to this letter.

9 In December 2011, an employee of the State Bar told Mr. Phelps that
10 Petitioner had complained about an executive of the State Bar's failure to respond
11 to correspondence sent by Petitioner. Mr. Phelps sent Petitioner the following e-
12 mail:

13 Mr. Stutsman: Your most recent complaint below has been brought to my
14 attention. I regret that you apparently feel your concerns have not been
15 adequately addressed. As you may know, the fees for the various
16 categories of membership are set by the Arizona Supreme Court. The
17 Board of Governors of the State Bar has not recommended a change in
18 fees since 2005. Although one cannot predict the future, I expect no
19 change in membership fees, including inactive members, through 2014. I
20 understand you are challenging the current costs and benefits of inactive
21 membership, and I also appreciate how our Bar compares to the other
22 states you've identified. Given your well-articulated and repeated
23 position on both issues, I don't believe there is anything more I can say or
24 do that would be constructive in your ongoing exchange with me or our
25 staff.

26 I will again share your concerns with our Board, but would respectfully
27 ask that you refrain from continuing to complain to our staff about issues
28 over which they and I have no ability to control or change. Given the tone
and tenor of your communications, I would also remind you of your
responsibilities under our Rules of Professional Conduct to act and
communicate in a courteous and civil manner.

Petitioner took the e-mail to mean that the State Bar of Arizona would no
longer respond to Petitioner's *Keller*-based inquiries. Petitioner also understood by

1 the e-mail that he could no longer inquire about that portion of his fees consisting
2 of lobbying expenses, and that if he continued to make inquiries, the veiled
3 implication was that he would be running afoul of the Rules of Professional
4 Conduct.

5 In the September 2012 edition of the Arizona Attorney (p. 6), then-President
6 Whitney Cunningham wrote an editorial “*Hey, You Can't Talk About My Bar That*
7 *Way!*” urging members to contact their state legislators and object to two
8 legislative bills. The first bill proposed that membership of any organization would
9 not be required for attorneys to become or to remain licensed attorneys in Arizona.
10 The second bill would have permitted admission to the practice of law without
11 requiring law school graduation so long as the candidate passed the state bar exam
12 and met the requirements of the committee on character and fitness.

13 That same month Petitioner wrote to Mr. Cunningham and advised him that
14 he objected to the State Bar lobbying against these bills. In this letter, Petitioner
15 restated his prior communication with Mr. Phelps and requested information
16 regarding a break down of fees charged inactive members in light of *Keller*, and
17 cited the *Hudson* requirement that “objectors to the fees were entitled to an
18 adequate explanation of the basis for the fee, as well as a reasonably prompt
19 opportunity to challenge the amount of the fee before an impartial decision maker.”
20 Mr. Cunningham's response was that the lobbying costs are the same for both
21 active and inactive membership, but failed to divulge the amount charged either
22 group or how much the State Bar was spending for its lobbying efforts. Despite
23 being told that Petitioner objected to specific lobbying efforts by the State Bar, at
24 no time did Mr. Cunningham disclose how Petitioner could file a complaint with
25 the State Bar regarding its lobbying activities against the pending legislation in
26 order to seek a refund of fees spent on such efforts. Mr. Cunningham also failed to
27 provide any breakdown of the fees charged Petitioner as requested.

28 Petitioner sent a response to Mr. Cunningham’s letter, but Mr. Cunningham

1 failed to respond to this letter.

2 In January 2014, Mr. Rick DeBruhl, Chief Communications Officer for the
3 State Bar, wrote in an e-mail to Petitioner:

4 The Keller decision did not restrict the Bar’s ability to use fees to pay for
5 permissible activities. Nor did it restrict the use of inactive fees to regulate
6 inactive attorneys. It simply made clear that bar dues may only be used for
7 costs “necessarily or reasonably incurred for the purpose of regulating the
8 legal profession or improving the quality of legal services.” Our
9 accounting process does not make a distinction nor does it segment
10 “active” from “inactive” fees.

11 This statement was the first response Petitioner received from the State Bar
12 regarding the impact of the *Keller* decision – years after Petitioner initially
13 requested a break down of fees relating to lobbying costs.

14 As for the accounting and expenditure regarding the lobbying efforts of the
15 State Bar, Mr. DeBruhl wrote in an another e-mail to Petitioner in January 2014
16 the following:

17 “As for the amount of money we spend on legislative issues, we contract
18 with an outside lobbying firm for which we pay \$50,000 per year, plus
19 expenses which are less than \$5,000. Additionally, about \$30,000 of my
20 salary is designated for managing legislative issues (although not
21 specifically lobbying). There are no additional costs associated with
22 lobbying.”

23 Although this might be the total amount spent by the State Bar, Mr. DeBruhl
24 did not provide the necessary information that both *Hudson* and *Keller* require.
25 Under the requirements set forth in *Hudson*, the State Bar fails to provide its
26 membership with an adequate explanation of non-chargeable activities, including
27 “the major categories of expenses, as well as verification by an independent
28 auditor” so that bar members may “gauge the propriety” of the charges. *Id.* at 306,
307 n.18. There is no grievance procedure nor is there a provision for an escrow
account for amounts in dispute while pending challenges are considered. Indeed,
by conferring upon itself as sole arbiter of the use the funds collected, the State Bar

1 violates the *Hudson* requirement since the State Bar provide little or no
2 accountability on how its spends its money. The State Bar violated Petitioner's
3 First Amendment and Fourteenth Amendment rights.

4 In January 2014, the State Bar implemented the BarTracks e-mail alert,
5 whereby it lists the lobbying activities undertaken by the State Bar. *Keller* is
6 specifically cited in the e-mail alert. There is no link or reference to any *Keller*
7 analysis conducted for each specific lobbying activity. In fact, the State Bar stated
8 that they were willing to take on specific lobbying efforts for section groups if they
9 met certain criteria. In essence, the State Bar was willing to expand its lobbying
10 efforts for specialized lobbying efforts which may benefit only a limited number of
11 attorneys.

12 **D. Inactive Membership Forced To Pay Discretionary Expenses**
13 **Designed To Subsidize Expenses Utilized For The Active**
14 **Membership**

15 In the notes of the Board of Governors December 2013 meeting, it was
16 disclosed that a portion of the fees charged the active membership go "to
17 discretionary programs (FastCase, Ethics Hotline, Member Directory, etc.)".
18 (Arizona Attorney, March 2014, at 63). Petitioner questions that the inactive
19 membership be required to pay for and subsidize programs that are generally
20 utilized by the active membership.

21 The Membership Directory is printed and mailed to all active members at no
22 additional expense. However, if an inactive member wants a directory, he or she
23 have to purchase one for \$20. Is it fair that an inactive member pay into a program
24 which he or she is specifically excluded?

25 Regarding FastCase, the State Bar's own web page states that FastCase is
26 available to State Bar of Arizona "members (active, judicial and over-70)"
27 (<http://www.azbar.org/MemberTools>). Once again, the inactive membership is
28 specifically excluded from participation. Why are the inactive members expected
to pay for such "discretionary" expense of the Bar when inactive members are

1 expressly excluded?

2 Does “etc.” meet the requirements of both *Hudson* and *Keller* for disclosure?
3 Once again, the State Bar disregards the findings of both the *Hudson* and *Keller* by
4 its failure to provide adequate financial information (including the identification of
5 programs funded with discretionary funds) as part of the basis for determining the
6 fees charged its membership. It also fails to provide sufficient information for the
7 members to file a protest if they have a *Keller* issue.

8 The members are also forced to pay for activities of the State Bar outside the
9 normal scope of a state bar association. The State Bar purchased a building with
10 more office space than the State Bar could use. How is the State Bar’s excess
11 office space deemed “necessary and reasonable” for the purposes of regulating or
12 improving the quality of the State Bar?

13 The fact that the State Bar refused to answer questions regarding its finances
14 or provide a breakdown of the dues charged its membership is an indicator that the
15 State Bar is ignoring not only *Keller*, but also *Hudson*. Our State Bar may believe
16 it is in compliance with *Keller* and *Hudson*, but it somehow failed to put into place
17 any of safeguards required to protect the rights of its own membership (whether
18 active or inactive). In order to fully comply with these court decisions, the Arizona
19 State Bar will have to implement changes in its accounting records and reporting to
20 its membership, and provide more information in a timely manner than it has.

21 In an e-mail to Petitioner in October 2014, Mr. DeBruhl wrote:

22 There is no distinction between active or inactive. They all go into our
23 general fund. We’ve calculated that about 75% of an active member’s fee
24 is used for court mandated functions. The rest goes to discretionary
25 programs.

26 It was this very same statement that the Supreme Court ruled to be
27 **unacceptable** in *Hudson* as justification for the fees charged. The Court ruled

28 [a]n acknowledgment that nonmembers would not be required to pay any
part of 5% of the Union's total annual expenditures was not an adequate
disclosure of the reasons why they were required to pay their share of

1 95%. (*Hudson* at 307)

2 The State Bar failed to meet the minimum obligation of disclosure required
3 by *Hudson*. Thus, the 75% that the State Bar alleges it is justified charging must be
4 disclosed to its membership. The remaining 25% must not only be identified, but
5 undergo the additional Constitutional test of *Keller*.

6 The fact that the Board of Governors for the State Bar, in the March 2014
7 issue of the Arizona Attorney categorized that it was allocating a portion of the
8 mandatory bar dues to discretionary spending shows that this Court must take
9 matters into its hands and correct this injustice, enforce *Keller* and *Hudson*, and
10 eliminate the mandatory payment of discretionary expenses, and require the State
11 Bar to comply with *Keller* and *Hudson*.

12 **E. IMPACT OF STATE BAR’S REFUSAL TO COMPLY WITH**
13 ***KELLER* AND *HUDSON* DECISIONS**

14 The failure of the State Bar to implement, or give notice of such
15 implementation, of a process in compliance with the *Keller* decision violates
16 Petitioner's Fourteenth Amendment right to procedural due process. Under 42
17 U.S.C. §1983, every person who, under color of state law, subjects any citizen of
18 the United States to the deprivation of “rights, privileges, or immunities secured by
19 the Constitution and laws” shall be liable to the injured party.
20

21 Once Petitioner objected to lobbying efforts on the State Bar regarding
22 legislation cited by Mr. Cunningham, Mr. Cunningham had a duty to provide
23 Petitioner with the process whereby Petitioner could object and present his case
24 against the State Bar continuing its lobbying effort at Petitioner’s expense.
25 Additionally all lobbying activity should also have been identified and a copy of
26 the *Keller* review conducted by the State Bar for each lobbying effort should have
27 been readily available.

28 The State Bar should have given a breakdown of the mandatory and
discretionary portion of Petitioner’s fees when he initially requested an accounting.

1 Pursuant to *Hudson*, the State Bar should have presented sufficient information
2 regarding the mandatory and discretionary portion such that he could have made an
3 informed decision as whether or not to file a protest against the use of such funds.
4 The failure to do so was a violation of Petitioner's First and Fourteenth
5 Amendment rights. At no time did the State Bar attempt to provide any of that
6 information. That is why Petitioner is filing this petition, to require the Arizona
7 State Bar to comply with these court decisions.

8 **IMPACT OF KELLER** 9 **ON CALIFORNIA**

10 The State Bar of California has been impacted by the *Keller* decision.
11 Petitioner is an inactive member of the State Bar of California, and is
12 consequently able to knowledgeably address the California Bar's fee
13 statement, which statement has a number of mandatory and discretionary
14 expenses itemized as a result of the State's implementation of *Keller*. The
15 California fee statement recommends that its members pay \$100 for the
16 Access to Justice fund; \$75 for the California Bar Foundation; \$35 for the
17 Conference of California Bar Association; \$25 for the California Supreme
18 Court Historical Society. Additionally, the California fees statement allows
19 members to deduct from their fee statement \$5 for Legislative Activity; \$5
20 Bar Relations & Elimination of Bias; and \$40 for Legal Service Assistance.
21 Thus, if an inactive member were to make no contributions and deduct the
22 allowable expenses from his bar fees, the fee is reduced from \$155 per year
23 to \$105.

24 The State Bar of California also published the audited statement for the
25 2013 fiscal year allowing its members an opportunity to challenge the amount
26 to be paid in 2015. This is done via a *Keller* challenge, and a member may
27 object and challenge his 2015 fees.

28 (http://www.calbar.ca.gov/Portals/0/documents/reports/2014_StatementofExp)

1 endit ureso fMembe rship Dues2013_R.pdf). In essence, the State Bar of
2 California allow s its member ship to revie w the actual detai led audited
3 state ments for the mandator y expen ses and to challenge any expen ses they
4 have an objection to payin g.

5 **NEBRASKA STATE BAR**
6 **LITIGATION AND COURT DECISION**

7 The Nebraska Supreme Court reaffirmed mandatory membership in the state
8 bar association as a condition of practicing law in that state, but limited the
9 expenditure of compulsory bar dues to specific categories of activities germane to
10 regulation of the legal profession, and made dues for all other bar activities
11 voluntary (*In re Petition for a Rule Change to Create a Voluntary State Bar of*
12 *Neb.*, Neb., No. S-36-120001, 12/6/13). This was the result of a class action suit
13 filed by Scott Lautenbaugh against the Nebraska State Bar. He alleged that his
14 First and Fourteenth Amendment rights, and those of the class, had been violated
15 by the state bar association. Reviewing the First Amendment compelled-speech
16 jurisprudence after *Keller*, the Nebraska Supreme Court found that the legal
17 landscape was altered by *Knox v. Service Employees*, 2012 BL 153979, 80
18 U.S.L.W. 4512 (U.S. 2012), which involved a challenge to certain fees that a
19 public sector union imposed on employees.

20 In particular, the court found signals in *Knox* supporting the view that the
21 constitutional validity of a bar's use of compulsory dues for a particular activity
22 turns on whether the activity is germane to the bar's regulatory purposes, not
23 whether the activity is ideological or political in nature. Moreover, *Knox* casts
24 doubt on the constitutional validity of an “opt-out” system for dealing with
25 members who object to a bar's expenditures.

26 The court decided that the mandatory bar should be preserved for the same
27 reasons it was created: to regulate the profession, ensure that ethics rules are
28 enforced, combat the unauthorized practice of law and maintain the public's

1 favorable view of the practicing bar. However, the court concluded that the
2 Nebraska rules relating to the bar should be modified to limit the use of mandatory
3 dues to the regulation of the legal profession. For the other programs and services
4 provided by the bar (e.g., discretionary expenditures), the court said the bar must
5 look instead to separate sources such as voluntary dues, grants and gifts.

6 **TASK FORCE REVIEW OF THE** 7 **STATE BAR OF MICHIGAN**

8 As stated herein, the real issue is that the mandatory and discretionary
9 portion of the inactive fees charged by our State Bar are not in compliance with the
10 *Keller* decision. In the *REPORT TO THE MICHIGAN SUPREME COURT*
11 *TASK FORCE ON THE ROLE OF THE STATE BAR OF MICHIGAN*,
12 ([http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-
15 Force%20Report.pdf](http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-
13 matters/Comments%20new%202013/2014-07_2014-06-03_SBM%20Task%20
14 Force%20Report.pdf)) (the “Report”) the task force did a thorough review of
16 the Michigan State Bar in light of the *Keller* decision. The Task Force wrote:

17 After some twelve weeks of research and debate, three things became
18 clear: (1) how mandatory state bars should apply the constitutional
19 standard of *Keller* is unsettled throughout the country, (2) the only way to
20 be absolutely certain that a mandatory state bar will never violate
21 members’ First Amendment rights is to have no advocacy program
22 whatsoever, and (3) if the State Bar of Michigan is to continue to engage
23 in advocacy, the Supreme Court must provide clearer and more rigorous
24 standards under which it may do so.

25 Although the Supreme Court’s procedure for challenging the State Bar’s
26 activities as a violation of members’ First Amendment rights under *Keller*
27 has been invoked by only two members since *Keller* was decided in
28 1990, the Task Force unanimously believes that *any* infringement on
constitutional rights, even unasserted, is a concern. (Page 6-7 of the
Report)

Following the extensive research conducted by the Task Force, it was
determined that

1 2. Michigan should adopt a narrow interpretation of *Keller*, bounded
2 within the two purposes endorsed by *Keller*—regulating the legal
3 profession and improving the quality of legal services. (Page 8 of the
4 Report)

5 In its Report, the Task force stated:

6 As a mandatory bar, the State Bar is neither a trade association nor a
7 union, and it is not free to act solely, or even primarily, in the self-interest
8 of its members.

9 We urge the Court to use this moment of heightened attention to clarify
10 the role of the State Bar by emphasizing that its primary role is to serve
11 the public good. To underscore this role, we recommend that the Supreme
12 Court amend Rule 1 of the Supreme Court Rules for the State Bar to
13 remove language that could be construed to authorize a broader role for
14 the State Bar than is compatible with *Keller*:

15 “The State Bar of Michigan is the association of the members of the bar
16 of this state, organized and existing as a public body corporate pursuant
17 to powers of the Supreme Court over the bar of the state. Under these
18 rules and administrative orders of the Supreme Court, the State Bar of
19 Michigan shall aid in promoting improvements in the administration of
20 justice and advancements in jurisprudence, within constitutional
21 limitations on a mandatory bar, and in improving relations between the
22 legal profession and the public ~~and in promoting the interests of the~~
23 ~~legal profession~~ in this state.”

24 This change, accompanied by a new *Keller* administrative order explaining
25 the State Bar’s duties and constraints, will send a clear signal to Michigan
26 attorneys that the State Bar cannot advocate for issues primarily devoted
27 to attorneys’ own economic self-interest. Instead, on those specific issues,
28 attorneys must use existing voluntary entities, including the voluntary
Sections of the State Bar, or create new ones. (Page 6 of the Report).

The Task Force also made recommendations regarding the lobbying
activities of the Michigan State Bar and made several recommendations, which
include

3. The State Bar should not be permitted to advocate a public policy
position outside the judicial branch unless:

- 1 a) the independent *Keller* panel has approved the position for
2 consideration
3 b) a formal *Keller* analysis has been published on the State Bar website
4 c) the State Bar has provided notice of the published *Keller* analysis to
5 any member who requests notice on that issue or specific legislation the
6 State Bar publishes the dissent of any member who so requests as soon
7 as practicable after receiving the dissent. (Page 8 of the Report)

8 The Task Report also defined what are permissible and impermissible
9 lobbying activities (Pages 8-9 of the Report)

10 Recommendation 5 was that “Membership dues for inactive State Bar
11 members should be reduced, inactive member reinstatement should be made more
12 accessible and rational”. (Page 1 of the Report, essentially repeated at Page 17).
13 The end result was that the State Bar of Michigan gave consideration to the *Keller*
14 decision and its impact on its state bar. The State Bar of Michigan 2014-2105
15 inactive fees are a base of \$90 with a \$7.50 payment for the client protection fund
16 and \$90 for discipline. Additionally, attorneys can choose whether or not to
17 contribute to two funds: Hall of Justice Learning Center; and /or Access to Justice
18 Fund – Michigan (<http://www.michbar.org/generalinfo/pdfs/duesinstructions.pdf>).

19 **CONCLUSION:**
20 **ARIZONA’S FAILURE TO ACCEPT *KELLER***
21 **AND/OR COMPLY WITH *HUDSON***

22 A portion of the fees charged by the State Bar of Arizona for the inactive
23 membership includes a number of groups and functions that the Arizona State Bar
24 supports. Members are not told what portion of their fees support such group, nor
25 the amount of their fees the State Bar contributes on their behalf. There is no
26 *Keller* analysis conducted by the Arizona State Bar as that which was done in
27 Michigan.

28 The Arizona State Bar’s audited statements are not as detailed as that
provided by the auditors for the California State Bar. For example, while
nonetheless noting total expenses in excess of \$14M, the Arizona State Bar's

1 most recent published online financial statement is bereft of any meaningful
2 detail beyond the broad category headings, "Program Services" and "Support
3 Services" and the two equally nondescript sub headed categories below each.
4 Worse yet, Arizona does not allow its membership to challenge its
5 expenditures. Once again, Arizona makes decisions on how its funds are
6 spent without any *Keller* review and forces its membership to contribute to
7 those activities and organizations outside the scope of the mandatory function
8 of the State Bar.

9 Despite various request by Petitioner for detail regarding the components
10 comprising the inactive bar fees charged Petitioner, the Arizona State Bar refused
11 to provide such details. Instead, the answer given was a generic answer -- that the
12 bar fees are recommended by a Committee which presented them to the Arizona
13 Supreme Court for approval or rejection. Although technically correct, the answer
14 was designed to mislead and delay until such time as the Arizona State Bar decided
15 to adequately address, if ever, the *Keller* decision as it specifically pertains to
16 activities "not germane to the bar association's dual purposes of regulating the legal
17 profession and improving the quality of legal services." *Keller*, 496 U.S. at 14. By
18 all indications the State Bar of Arizona has yet to conduct the review *Keller*
19 requires. Moreover, the current mechanism to challenge state bar activities on the
20 basis of *Keller* is almost undetectable. What's more, it is woefully inadequate being
21 too narrow in scope by focusing solely on the "political" or "ideological" and not
22 on what is "germane" to lawyer regulation.

23 **A. PETITION TO FORM AND APPOINT AN INDEPENDENT TASK**
24 **FORCE BY THIS COURT TO CONDUCT A REVIEW OF THE**
25 **STATE BAR OF ARIZONA, IN LIGHT OF THE *KELLER***
26 **DECISION, REDEFINING THE UNDERLYING CHARTER,**
27 **DEFINING MANDATORY FUNCTIONS, AND ELIMINATION OF**
28 **THE MANDATORY PAYMENT OF DISCRETIONARY EXPENSES**

Petitioner hereby requests that this Court make a determination that the
State Bar has failed to address fully the issues of the *Keller* court and that this

1 Court appoint an independent Task Force, with the express purpose of conducting
2 a review of the State Bar, using as a guide the report issued by the Michigan Task
3 Force cited above.

4 Petitioner readily acknowledges that by Administrative Order 2014-79 (eff.
5 July 29, 2014), this Court created a task force to “examine the Rules of the
6 Supreme Court on the mission and governance structure” of the State Bar.
7 However, unlike the Michigan Task Force, the Arizona Task Force does not have
8 as its exclusive mandate, the thorough examination of the State Bar's mission
9 within the constitutional boundaries defined by *Keller*.

10 The Arizona Task Force proposed herein would be required to review
11 and possibly redefine the underlying charter for the State Bar, determine
12 what expenses are appropriate to be apportioned to the re-defined mandatory
13 functions. The Arizona Task Force would be required to define all other
14 funds as discretionary funds, and determines whether they are also to be
15 voluntary payments as now being done in Nebraska and Michigan.

16 Because of the State Bar's failure to satisfactorily, substantively and
17 systematically address *Keller*, as well as its willful abrogation of existing albeit
18 inadequate mechanisms to substantively respond to Petitioner's written request for
19 detail regarding the mandatory fee charged Petitioner, Petitioner requests that this
20 Court, with limited input from the State Bar, create and empower a truly
21 independent Task Force. Petitioner requests that the Task Force be comprised of
22 individuals from all diverse membership groups of the State Bar and not be
23 limited by the State Bar's own committee rules restricting membership solely to
24 those in the active membership groups or disproportionately weighted like the
25 current task force with members having past service on the Board of Governors.

26 **B. PETITION TO AMEND RULE 32(c)(9), ARIZ. ARIZ. R. SUP. CT.**

27 In the interim while the independent Task Force is mobilized and conducts
28 its review of the State Bar in light of the *Keller* decision, Petitioner hereby asks

1 that: 1) the State Bar be compelled to itemize each and every expenses incurred
2 that are deemed a part of the mandatory function of the State Bar; 2) the State Bar
3 be required to itemize all expenses incurred deemed discretionary expenditures; 3)
4 the inactive members of the State Bar be allowed to choose whether or not to make
5 payment toward the discretionary expenses of the State Bar as part of their annual
6 fee payment; and 4) the members of the State Bar be allowed to choose whether or
7 not to make payments toward the mandatory expense itemized as lobbying
8 expenses. Said detailed accounting is to be utilized to determine the actual fees to
9 be charged each membership group going into the future.

10 Petitioner requests that the Court have the State Bar set aside the
11 discretionary funds collected during fiscal year 2015 as part of the compulsory fee.
12 The Task Force can determine whether or not a credit or refund shall be made
13 available to members who object to the collection and use of discretionary funds
14 for services provided by the State Bar for which specific groups are excluded (e.g.,
15 Member Directory, FastCase, etc.). If a credit, Petitioner ask that such credit be
16 applied toward the mandatory fees collected in 2016.

17 Petitioner hereby requests that this Court modify rule 32(c) 9 as set forth in
18 Addendum A.

19
20 RESPECTFULLY SUBMITTED THIS 6th day of January, 2015.

21
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ADDENDUM A
RULE 32(c)(9), ARIZ. R. SUP. CT

9. *Allocation of fee.* Upon payment of the membership fee, each member shall receive a bar card issued by the board evidencing payment. All fees shall be paid into the treasury of the state bar and, when so paid, shall become part of its funds, except that portion of the fees representing the amount for the funding of the Client Protection Fund shall be paid into the trust established for the administration of the Client Protection Fund.

A. The state bar shall maintain two separate funds after paying the court-mandated amount into the Client Protection Fund.

(1) The first fund shall be the repository for fees applied to the mandatory functions of the state bar identified by the Supreme Court. Expenditures for each function shall be independently accounted for, with all variable and fixed costs associated with each expense and reported in detail as part of the audited financial statements. At no time shall mandatory fees be applied by the state bar toward expenses of any nature except for the mandatory functions identified by this Court.

(2) The second fund shall be the repository for all other monies collected by the state bar. This includes fees authorized by the Supreme Court for collection as part of the compulsory fees for non-mandatory functions (discretionary expenses) as well as contributions made by individuals or groups on a voluntary basis.

(i) For income received by the state bar as part of mandatory fees, but not identified for use for the court mandated function of the state bar,

1 the state bar will list those groups or individuals who receive any
2 payments from this fund, along with any activities utilized by the
3 group receiving such funds. The state bar is to update the information
4 regarding its donations and the activities support on a monthly basis.
5 Individual shall have 90 days in order to file a *Keller* protest
6 regarding the use of the mandatory funds supporting such group
7 and/or function to have their portion of contribution refunded in
8 accordance with the procedure set in place by this Court. The annual
9 audited statements shall include details regarding the use of the funds
10 utilized by the state bar for discretionary payments. The state bar
11 shall not utilize such funds unless specific written approval is
12 received from the Board of Governors and this Court.

13
14 (ii) For voluntary payments received by the bar and identified for
15 specific use, the state bar can make payments for such specific use
16 within its own discretion. The state bar shall report such contributions
17 and payments in accordance with generally accepted accounting
18 principals and provide a detail report thereof as part of the audited
19 financial statement. Said funds and payment hereunder shall be
20 separately reported than the funds in 32(c)(9)(A)(2)(i).

21
22 (3) A detailed audited statement shall be provided no later than the end of
23 the second financial quarter, and those individuals who have a valid
24 objection utilizing the *Keller* decision for the use of their fees toward
25 payment of the court mandated functions of the state bar, shall be able to
26 appeal such expenses no more than 90 days after the state bar publishes the
27 audited statement on its web side. An e-mail notice shall be provided to all
28 members once the audited statement is made available. This Court shall

1 develop the process whereby the members of the state bar can file and have
2 a hearing regarding expenses which they believe violate their personal rights
3 in accordance with the *Keller* decision. An escrow account shall be created
4 and upon notice of a *Keller* objection, funds attributed to the objected
5 activity shall be placed into this escrow account and shall remain there until
6 final determination in accordance with the rules established by this Court.
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