



# COMMONWEALTH of VIRGINIA

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October 2, 2015

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The Honorable Jennifer T. Wexton  
Member, Senate of Virginia  
20 West Market Street  
Leesburg, Virginia 20176

Dear Senator Wexton:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You ask whether the activities of the Virginia State Bar's Diversity Conference may legally be funded by bar members' mandatory dues, as those dues are used to fund other Bar Conferences. A related question is whether the State Bar must create a procedure by which a member may challenge use of a portion of his or her dues for any expenditure to which the member objects.

## Background

The General Assembly created the Virginia State Bar (the "VSB") in 1938 as an administrative agency of the Supreme Court of Virginia (the "Supreme Court").<sup>1</sup> All attorneys licensed to practice law in the Commonwealth must be members of the VSB and are required by the Rules of the Supreme Court to pay annual membership dues.<sup>2</sup> Revenue from mandatory bar dues is used to fund a variety of VSB activities, including disciplining attorneys, making referrals, establishing professional standards, and providing continuing legal education.

In keeping with its founding, the VSB continues to be organized and governed by the Supreme Court.<sup>3</sup> Its mission statement is "(1) to regulate the legal profession of Virginia; (2) to advance the availability and quality of legal services provided to the people of Virginia; and (3) to assist in improving the legal profession and the judicial system."<sup>4</sup>

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<sup>1</sup> VA. CODE ANN. § 54.1-3910 (2013); *see also* *Green v. Va. State Bar*, 278 Va. 162, 175 (2009); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 789 (1975).

<sup>2</sup> Section 54.1-3910; VA. SUP. CT. R., Pt. 6, § IV at para. 11.

<sup>3</sup> *See* § 54.1-3910 ("The Supreme Court may promulgate rules and regulations organizing and governing the Virginia State Bar.").

<sup>4</sup> VSB, 2014-15 COMMITTEE, SECTION, AND CONFERENCE CHAIRS HANDBOOK 5 (updated Jan. 6, 2015), available at <http://www.vsb.org/docs/ch-operation.pdf>.

As part of its efforts to improve the legal profession and judicial system, VSB petitioned the Supreme Court for, and the Supreme Court established, four different “conferences,” or specialized subsets of the bar: the Senior Lawyers Conference, which focuses on “issues of interest to senior lawyers and promotion of the welfare of senior citizens”; the Young Lawyers Conference, which addresses “the special interests and concerns of young and new lawyers”; the Conference of Local Bar Associations, which maintains “a . . . beneficial relationship between the [State Bar] and local bar associations”; and the Diversity Conference, which focuses on “increasing diversity in the legal profession and . . . ensuring that Virginia meets the legal needs of an increasingly diverse population.”<sup>5</sup>

Revenue from mandatory bar dues is used to fund the Conference of Local Bar Associations, the Young Lawyers Conference, and the Senior Lawyers Conference. The Diversity Conference, however, receives no money from bar dues and must raise funds independently to support its activities.<sup>6</sup> In order for the VSB to fund Diversity Conference activities from mandatory dues, it must petition for, and receive approval from, the Supreme Court.<sup>7</sup> Thus, this Opinion addresses the question of whether a legal barrier exists to the approval of such a petition, should one be filed. It also addresses the question of whether the VSB must adopt a procedure by which members may challenge the expenditure of bar dues for activities to which they object.

### Applicable Law and Discussion

The governing legal standard is *germaneness*: bar dues may be used only for expenses necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the State.

The VSB is funded by mandatory dues.<sup>8</sup> An attorney may be required to join a mandatory bar association and pay reasonable dues, even if he objects to some of its activities.<sup>9</sup> Mandatory dues “to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group.”<sup>10</sup> However, there are constitutional limits to the activities that may be lawfully funded with mandatory dues.

In *Aboud v. Detroit Board of Education*,<sup>11</sup> the U.S. Supreme Court articulated the general constitutional principle that requiring a person to pay for political or ideological speech to which he

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<sup>5</sup> VSB, *Conferences*, <https://www.vsb.org/site/members/conferences> (last visited July 14, 2015).

<sup>6</sup> VSB, *About Diversity Conference*, <http://www.dcvsb.org/aboutconference.html> (last visited July 14, 2015).

<sup>7</sup> See § 54.1-3910; VA. SUP. CT. R., Pt. 6, § IV at para. 9(j) (VSB Council has the authority to “recommend to the Supreme Court the adoption of, modifications to, amendments to or the repeal of any rule of the Supreme Court of Virginia”).

<sup>8</sup> *Supra* note 2 and accompanying text.

<sup>9</sup> *Lathrop v. Donahue*, 367 U.S. 820, 843 (1961). The *Lathrop* Court explicitly abstained from ruling on whether certain bar activities could constitutionally be funded with mandatory dues. *Id.* at 847-48 (plurality opinion). As Justice Kennedy noted, speaking for the Supreme Court of the United States in *Board of Regents v. Southworth*, 529 U.S. 217, 231 (2000), “It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties.”

<sup>10</sup> *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 at 472-73 (1997).

<sup>11</sup> 431 U.S. 209 (1977).

objects violates his First Amendment right of free speech.<sup>12</sup> *Abood* involved teachers who were not members of a union being compelled to pay union service fees as a condition of public employment. Some of the fees were used to express the union's political views and to contribute to particular political candidates.<sup>13</sup> As the Court in *Abood* noted,

Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.<sup>14</sup>

The Court concluded that while the “agency shop” fees could legally be imposed on non-union members, a non-member could not be required to pay the portion of fees used to fund political candidates whom the non-member did not wish to support. As the Court stated,

The fact that the appellants are compelled to make . . . contributions for political purposes works . . . an infringement of their constitutional rights. . . . We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of . . . employment.<sup>15</sup>

*Abood* was followed by *Keller v. State Bar of California*,<sup>16</sup> which addressed the issue of First Amendment limits on the activities of a state bar association that may be funded by mandatory dues. *Keller* acknowledged that because it is legitimate state policy to “[elevate] the educational and ethical standards of the Bar to the end of improving the quality of . . . legal service available to the people of the State,”<sup>17</sup> a state may require attorneys to join and pay reasonable dues to a mandatory bar association.<sup>18</sup> However, the burden on speech imposed by compelled financial support for a professional organization such as a state bar is justified only by activities that promote a legitimate state interest in regulating the profession and improving the quality of legal services to the public.<sup>19</sup> Accordingly, bar dues may be used to support only activities germane to those goals.<sup>20</sup> A mandatory bar “may not . . . fund activities of an ideological nature which fall outside . . . those areas of activity.”<sup>21</sup> For that reason, the Court held that the California bar could not use mandatory dues revenue to fund ideological activities unrelated to regulating the practice of law or improving the quality of legal services. As the Court explained,

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<sup>12</sup> *But see* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005) (holding that individuals may constitutionally be compelled to pay for government speech advocating official policies and programs).

<sup>13</sup> *See Abood*, 431 U.S. at 234.

<sup>14</sup> *Id.* (citing multiple cases).

<sup>15</sup> *Id.* at 234-236.

<sup>16</sup> 496 U.S. 1 (1990).

<sup>17</sup> *Id.* at 8 (quoting *Lathrop*, 367 U.S. at 843).

<sup>18</sup> *Id.*

<sup>19</sup> *See id.* at 13. Notably, the *Keller* Court characterized bar association activities as private speech, rather than government speech, thereby effectively distinguishing it from the type of speech discussed in *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005). *See Keller*, 496 U.S. at 10-13; *see also supra* note 12.

<sup>20</sup> *Keller*, 496 U.S. at 14.

<sup>21</sup> *Id.*

Precisely where the line falls [between permissible and impermissible dues-financed activities] will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.<sup>[22]</sup>

Ultimately, “the guiding standard must be whether the [activities] are necessarily or reasonably incurred for the purpose of regulating the legal profession or ‘improving the quality of the legal service available to the people of the State.’”<sup>23</sup>

The activities funded by the State Bar of California that were at issue in *Keller* included a wide variety of controversial ideological issues not directly related to regulating the practice of law or improving the quality of legal services. They included, in part, lobbying efforts for or against laws to bar employer polygraph tests, to prohibit armor-piercing ammunition, to create an unlimited right of action to sue those causing air pollution, imposing criminal sanctions for exposing minors to drug paraphernalia, limiting the right of individualized education programs for students in need of special education, gift tax exclusion for gifts to pay education tuition or provide medical care, applying life imprisonment laws to certain minors, deleting voter approval for low-rent housing projects, and dealing with guest workers and importing workers from other countries.<sup>24</sup>

Since *Keller*, there have been several lower court decisions addressing what activities may legally be funded with mandatory bar dues and what activities may not. Permissible activities have been held to include lobbying for laws to create new judicial positions or for increased salaries for government attorneys, or against statutory restrictions on attorney advertising or requirements for the certification of legal specialists;<sup>25</sup> or sponsoring a pamphlet on the Bill of Rights, a survey on the economics of law practice, gavel awards, a program to assist alcoholic lawyers, and mock trial competitions.<sup>26</sup> Impermissible activities have been held to include supporting restrictions on lawyer advertising in aid of, or against, family planning agencies or abortion clinics; promoting no-fault auto insurance; endorsing a pro-life constitutional amendment; generating support for the death penalty;<sup>27</sup> and lobbying and advocating for expansion of Medicaid coverage, full child immunization, family sex education, teen pregnancy prevention, and increased aid to families with dependent children.<sup>28</sup>

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<sup>22</sup> *Id.* at 15-16.

<sup>23</sup> *Id.* at 14 (quoting *Lathrop*, 367 U.S. at 843).

<sup>24</sup> Other bar-funded activities that were at issue in *Keller* included filing *amicus* briefs “in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline attorneys; a requirement that attorney-public officials disclose names of clients; the disqualification of a law firm” and “The adoption of resolutions by the Conference of Delegates endorsing a gun control initiative; disapproving the statements of a United States senatorial candidate regarding court review of a victim's bill of rights; endorsing a nuclear weapons freeze initiative; opposing federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing.” *Id.* at 5, n.2.

<sup>25</sup> *Schneider v. Colegio Abogados de Puerto Rico*, 917 F.2d 620, 632 (1st Cir. 1990).

<sup>26</sup> *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 406 (7th Cir. 1996).

<sup>27</sup> *Schneider*, 917 F.2d at 632-33.

<sup>28</sup> *Florida Bar In re David Frankel*, 581 So. 2d 1294, 1298 (Fla. 1991).

Whether the purpose of the Diversity Conference meets the legal standard for being funded by mandatory bar dues.

Because the VSB may be funded by mandatory dues, which may constitutionally be used to fund any activities that are germane to regulating the practice of law or improving the quality of legal services to citizens, the ultimate question is whether the Diversity Conference exists and conducts activities for purposes that are germane to these legitimate state goals. If so, it may be funded by mandatory bar dues. If – and to the extent that – the Diversity Conference exists instead for a purpose of advocating political or ideological issues unrelated to regulating the practice of law and improving the quality of legal services to citizens, it may not be funded by mandatory bar dues.<sup>29</sup>

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Law is one of the least diverse professions in the United States.<sup>30</sup> According to recent national occupational figures of the U.S. Bureau of Labor Statistics, over 89.3% of lawyers are white, while 77.4% of the nation's total population is white. 4.2% of lawyers are African-American, as compared to 13.2% of total population. 5.1% of lawyers are Asian-American, as compared to 5.4% of total population. 5.1% of lawyers are Hispanic-American, as compared to 17.4% of total population.<sup>31</sup>

For Virginia, 89% of lawyers are white, as compared to 70.5% of the Commonwealth's total population. 4% of lawyers are African-American, as compared to 19.7% of population. 3% of lawyers are Asian-American, as compared to 6.3% of population. 1% of lawyers are Hispanic-American, as compared to 8.9% of population.<sup>32</sup>

The American Bar Association (“ABA”) reports that women, who make up 50.8% of the population, make up only 33% of the membership of the ABA, only 27% of federal and state judges, only 21% of law school deans, and only 17% of equity partners at private law firms.<sup>33</sup> According to a 2014 Membership Survey conducted by the VSB, only 36% of survey respondents were female, while

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<sup>29</sup> As to the question of whether the mission of the Diversity Conference is specific enough to determine its constitutionality, I note that its mission statement is at least as specific as the mission statement of the other three Conferences. Thus, if the mission statements of the other three conferences are specific enough to determine whether they are germane to the practice of law, then the mission statement of the Diversity Conference is also. Moreover, unlike the other conferences, its mission has been implicitly approved by Justice Powell, within constitutional limits, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>30</sup> Bourree Lam, *The Least Diverse Jobs in America*, THE ATLANTIC (June 29, 2015), <http://www.theatlantic.com/business/archive/2015/06/diversity-jobs-professions-america/396632/>.

<sup>31</sup> U.S. CENSUS BUREAU, *U.S.A. QuickFacts*, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated June 8, 2015); U.S. BUREAU OF LABOR STATISTICS, REPORT 1050, LABOR FORCE CHARACTERISTICS BY RACE & ETHNICITY, 2013 at 26 (Aug. 2014), available at <http://www.bls.gov/cps/cpsrace2013.pdf>.

<sup>32</sup> U.S. CENSUS BUREAU, *Virginia QuickFacts*, <http://quickfacts.census.gov/qfd/states/51000.html> (last updated May 28, 2015); VSB, 2014 Membership Survey (April, 2014) at 20, available at <http://www.vsb.org/docs/2014-member-survey.pdf>.

<sup>33</sup> U.S. CENSUS BUREAU, *U.S.A. QuickFacts*, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated June 8, 2015); ABA, A CURRENT GLANCE AT WOMEN IN THE LAW at 2-7 (July 2014), available at [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_july2014.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf).

Virginia's total population is 50.8% female.<sup>34</sup> Slightly over 1% of ABA attorneys self-identify as gay, lesbian, bisexual or transgender (LGBT),<sup>35</sup> compared to 3.4% of the total population.<sup>36</sup> Moreover, in a 2010 ABA survey, only 7% of ABA members reported having a disability.<sup>37</sup> By contrast, 16.6% of the total U.S. working-age population reports having a disability.<sup>38</sup>

It was against a similar demographic backdrop that the VSB petitioned the Supreme Court in 2009 to create the Diversity Conference to “centralize and make explicit the bar’s responsibilities to promote diversity in the legal profession and the judiciary.”<sup>39</sup> As the VSB explained in its petition to establish the Diversity Conference, “[f]or our legal profession and our judiciary to be properly responsive to the needs of society, we must be more reflective of the demographics of society.”<sup>40</sup> The VSB concluded that “an organized body of individuals . . . similar to that of the Young Lawyers Conference, the Senior Lawyers Conference and the Conference of Local Bars . . . would be best suited for carrying out” these goals.<sup>41</sup> Pursuant to that petition, the Supreme Court amended its rules to add to the authority of the VSB Council the responsibility to “encourage and promote diversity in the profession and the judiciary.”<sup>42</sup>

Today, the Diversity Conference’s mission is to foster and to encourage diversity in admission to the bar, as well as within the judiciary; to facilitate diversity in professional advancement and leadership opportunities; and to ensure that the changing legal needs of Virginia’s citizens are met.<sup>43</sup> Other responsibilities of the Diversity Conference are to “promote reforms in judicial procedure and the judicial system that are intended to improve the quality and fairness of the system” and to “improve the quality of the legal services made available to the people of Virginia.”<sup>44</sup>

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<sup>34</sup> VSB, 2014 MEMBERSHIP SURVEY (April 2014), *available at* <http://www.vsb.org/docs/2014-member-survey.pdf>; U.S. CENSUS BUREAU, *Virginia QuickFacts*, <http://quickfacts.census.gov/qfd/states/51000.html> (last updated May 28, 2015).

<sup>35</sup> ABA, COMM’N ON SEXUAL ORIENTATION & GEND. IDENTITY, GOAL III REPORT FOR 2014-2015, SEVENTH ANNUAL REVIEW OF THE STATUS OF LGBT PARTICIPATION AT THE ABA at 16 (2015), *available at* [http://www.americanbar.org/content/dam/aba/administrative/sexual\\_orientation/sogi\\_2015\\_goaliii.pdf.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/sogi_2015_goaliii.pdf.authcheckdam.pdf).

<sup>36</sup> Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT* (Oct. 18, 2012), <http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx>.

<sup>37</sup> ABA, ABA DISABILITY STATISTICS REPORT (2011), *available at* [http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314\\_aba\\_disability\\_statistics\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314_aba_disability_statistics_report.authcheckdam.pdf).

<sup>38</sup> See U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010, at 4 (July 25, 2012), *available at* <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html>.

<sup>39</sup> Petition of the Va. State Bar at 2, In re Rules of Va. Supreme Court Part 6, Section IV, Paragraphs 5 & 9(j) (Va. July 1, 2009), *available at* [http://www.vsb.org/docs/para5\\_9j-petition-2009-07-01.pdf](http://www.vsb.org/docs/para5_9j-petition-2009-07-01.pdf).

<sup>40</sup> *Id.* at 3 (quoting Manuel A. Capsalis via VA. LAWYER, Oct. 2008, at 13).

<sup>41</sup> *Id.*

<sup>42</sup> VA. SUP. CT. R., Pt. 6, § IV at para. 9(j).

<sup>43</sup> VSB, *About Diversity Conference*, <http://www.dcvsb.org/aboutconference.html> (last visited July 20, 2015).

<sup>44</sup> See Petition of the Va. State Bar at 7-8, In re Rules of Va. Supreme Court Part 6, Section IV, Paragraphs 5 & 9(j) (Va. July 1, 2009), *available at* [http://www.vsb.org/docs/para5\\_9j-petition-2009-07-01.pdf](http://www.vsb.org/docs/para5_9j-petition-2009-07-01.pdf); VA. SUP. CT. R., Pt. 6, § IV at para. 9(j).

A recent survey of bar members in the Commonwealth supports the proposition that creating a bar more responsive to the needs of society is directly related to the legitimate state goal of improving the quality of legal services available to Virginians.<sup>45</sup>

It is clear that the promotion of diversity is intended to ensure equal and fair opportunities for all demographic groups to be admitted to the practice of law and to advance within the profession and the judiciary. The goal of diversity relates directly to two elements of the VSB's mission statement, namely "to regulate the legal profession of Virginia" and "to assist in improving the legal profession and the judicial system."<sup>46</sup> Likewise, reasonable efforts to promote diversity within the bar help the profession better understand and serve the interests of the diverse demographic groups in Virginia, in keeping with a third element of the VSB's mission statement "to advance the availability and quality of legal services provided to the people of Virginia."<sup>47</sup>

Indeed, the actions of the VSB in seeking approval for the Diversity Conference to improve the practice of law, and the decision of the Supreme Court to approve it for that purpose, find implicit validation in a recent survey of bar members.<sup>48</sup> The purpose of the Diversity Conference, as well as the current needs of the legal profession, demonstrate that its purpose relates directly to legitimate regulation of the profession by helping to achieve fair and equal opportunities within the profession for all Virginia lawyers. Its purpose also relates directly to enhancing the availability and quality of legal services for all Virginia population groups.

In summary, the reasoning so ably set forth by the VSB in 2009 in petitioning to create the Diversity Conference demonstrates that the Conference meets the *Keller* standard of being germane to the legitimate state goals of improving legal services in Virginia and regulating the legal profession. Indeed, the Supreme Court's approval of the Diversity Conference, based on the VSB's petition, itself demonstrates that the Conference is reasonably related to regulating the practice of law. In addition, reasonable efforts to create diversity fall squarely within the three elements of the VSB Mission Statement.

For these reasons, it is my opinion that the stated mission of the Diversity Conference creates no constitutional barrier, as articulated by *Keller*, to being funded by revenue from mandatory dues.<sup>49</sup> Thus, should the VSB petition the Supreme Court to fund the Diversity Conference with revenue from mandatory dues, it is my opinion that such a petition may legally be approved. It is my further opinion that so long as the activities of the Diversity Conference are consistent with its stated goals, which reasonably relate to improving the delivery of legal services and improving the legal profession, rather than ideological or political goals, it may legally be funded by revenue from mandatory bar dues.

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<sup>45</sup> See VSB. 2014 MEMBERSHIP SURVEY (April 2014), available at <http://www.vsb.org/docs/2014-member-survey.pdf>.

<sup>46</sup> *Supra* note 4 and accompanying text.

<sup>47</sup> *Id.*

<sup>48</sup> See *supra* note 45 and accompanying text.

<sup>49</sup> In reaching this opinion, I consider only the stated purposes of the Diversity Conference, as articulated by the State Bar and the Supreme Court of Virginia. Those purposes do not include demographic quotas of the type disapproved by the Supreme Court of the United States in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

Whether the VSB must create a procedure by which members may challenge the legality under *Keller* of particular bar expenditures.

The final question to be addressed is whether funding the Diversity Conference with bar dues would require the VSB to create a procedure by which members who object to activities of the Diversity Conference could challenge the portion of their dues used to provide that funding.

The Bar Associations of some states engage in extensive “auxiliary” activities such as active legislative lobbying. The subjects of these lobbying efforts vary widely. As discussed above, some subjects have been held to be legitimately related to regulating the practice of law, such that they may be funded with mandatory bar dues, while others have been held to be unrelated to regulating the practice of law or improving the quality of legal services to citizens, and thus not fundable with mandatory bar dues under the *Keller* standard.<sup>50</sup>

The United States Supreme Court discussed procedures by which persons may challenge the use of mandatory fees or dues to support activities to which they object on First Amendment grounds in *Board of Regents v. Southworth*.<sup>51</sup> *Southworth* held that it may be constitutional for a public university to use mandatory student activity fees to partially fund student organizations that engage in political or ideological speech objectionable to some students so long as there is viewpoint neutrality in the allocation of funding support.

The Court noted. “[t]he standard of germane speech as applied to student speech at a university is unworkable . . . and gives insufficient protection both to the objecting students and to the University program itself.”<sup>52</sup> For that reason, the Court did not rule on the legality of funding any particular student activity with mandatory student fees, as it and other courts have done for various bar organizations. Instead, it noted that, in the particular context of a public university, a “viewpoint neutral” system should be created to allow students to seek refunds for portions of student fees used to support political speech to which they objected. Of particular importance, while *Southworth* held the *Keller* standard of germaneness to be inapplicable in the context of a public university, it reaffirmed that it remains fully applicable to mandatory bar and trade associations.<sup>53</sup>

In short, *Southworth* stands for the proposition that there must be viewpoint neutral funding for extracurricular activities at a public university. It does not require viewpoint neutral funding for activities of professional associations such as the VSB. Professional associations remain subject to the “germaneness” standard. Justice Kennedy’s opinion for the Court clearly limited *Southworth* to the context of student extracurricular activities at a public university, to which the “germaneness” standard of *Keller* does not apply, and reaffirmed that the “germaneness” standard continues to apply to mandatory bar organizations.

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<sup>50</sup> See *supra* notes 25-28 and accompanying text.

<sup>51</sup> 529 U.S. 217 (2000).

<sup>52</sup> *Id.* at 231.

<sup>53</sup> “We must begin by recognizing that the complaining students are being required to pay fees which are subsidies for speech they find objectionable, even offensive. The *Abood* and *Keller* cases, then provide the beginning point for our analysis. . . . While those precedents identify the interests of the protesting students, the means of implementing First Amendment protections adopted in those decisions are neither applicable nor workable in the context of extracurricular student speech at a university.” *Id.* at 230.

There is nothing unique about the Diversity Conference by which it alone, among all the numerous and varied activities of the VSB, would require opt-out or challenge procedures if funded by bar dues. Like the other three conferences, its purpose is germane to the practice of law, and its purpose is also to improve the quality of legal services to citizens. It may be that not every attorney approves of every activity by the VSB, but the legal standard is not whether an individual attorney objects to a particular bar activity or expenditure, it is whether the activity or expenditure is reasonably related to the regulatory purpose of the organization.<sup>54</sup>

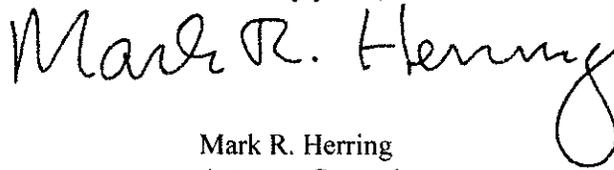
This analysis and conclusion are no different for the Diversity Conference than they are for any of the other three conferences, or for any other VSB activities.

### Conclusion

For the foregoing reasons, it is my opinion that the VSB's efforts to promote diversity in the legal profession represent a legitimate state interest, and that promoting diversity is reasonably related to regulating the legal profession and improving the quality of legal services to the public. Accordingly, it is my opinion that it would be constitutionally permissible for the Diversity Conference to be funded by mandatory state bar dues. It is my further opinion that the VSB is not required to create procedures through which members may challenge the use of dues for any bar activity to which they object, so long as its activities remain germane to the practice of law.

With kindest regards, I am

Sincerely yours,

A handwritten signature in cursive script that reads "Mark R. Herring". The signature is written in black ink and is positioned to the left of the typed name.

Mark R. Herring  
Attorney General

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<sup>54</sup> *Keller*, 496 U.S. at 14.