

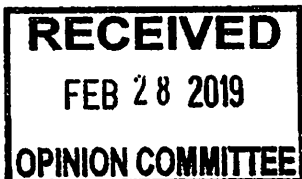


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February 28, 2019

Via Email: opinion-committee@texasattorneygeneral.gov

Virginia K. Hoelscher
Chair, Opinion Committee
Texas Attorney General
P.O. Box 12548
Austin, TX 78711-2548

FILE # RQ-0265-KP
I.D. # 48511

Re: **Request for Opinion No. RQ-0265-KP**

Dear Ms. Hoelscher:

This firm represents Texas RioGrande Legal Aid, Lone Star Legal Aid, Legal Aid of Northwest Texas, and Texas Legal Services Center (collectively, Texas Legal Services Organizations). On their behalf, we submit the following comments on Request for Opinion No. RQ-0265-KP.

All four Texas Legal Services Organizations are nonprofits that provide free legal services to clients in Texas that cannot afford to pay for an attorney. Texas RioGrande Legal Aid, Lone Star Legal Aid, and Legal Aid of Northwest Texas are the three primary recipients of legal-aid funding from government and private sources, and collectively, the service area of the three organizations covers the entire State. Texas Legal Services Center (TLSC) is a non-profit that provides assistance and training to poverty law advocates and their clients in the areas of litigation support, education and communication. TLSC sponsors projects that assist low-income individuals in specific areas of need and also manages Texas Law Help, which is a statewide web initiative to increase access to justice.

The President of the State Bar has asked your office to issue an opinion on six specific questions. The Texas Legal Services Organizations take no position on the questions related to the State Bar's election procedures and the Texas Young Lawyers Association. But the Texas Legal Services Organizations do wish to weigh in on the President's second question about the constitutionality of the requirement that members of the State Bar pay dues:

Is it constitutional to require Bar members to pay compulsory Bar dues, including to support Bar programs (e.g., TYLA programs and Texas Opportunity & Justice Incubator (TOJI)) that Bar members object to on First Amendment grounds (e.g., free speech, freedom of association), including programs that are not within the regulatory functions of the State Bar?

Although not specifically named in this question, several State Bar programs that support legal assistance to the poor provide direct support to the Texas Legal Services Organizations. This support includes financial assistance with malpractice insurance, loan forgiveness programs for legal services attorneys, and on-line legal research services:

- **State Bar Malpractice Insurance Network** The State Bar provides legal malpractice insurance not only to legal aid organizations, but also to private attorneys who volunteer to take cases through pro bono programs administered by these organizations. Legal aid organizations accept clients and cases that private attorneys won't for placement with their own staff or pro bono volunteers, and that often means cases with a greater degree of risk. The State Bar's provision of malpractice insurance provides essential protection to Texas Legal Services Organizations and encourages attorney volunteers to accept pro bono cases.
- **Texas Student Loan Repayment Program.** Attorney salaries at legal aid organizations are far lower than those at private law firms. In order to attract high-quality legal talent, legal aid organizations offer assistance with student loan payments through a program funded by the State Bar.
- **Legal research and training.** The State Bar subsidizes subscriptions to on-line legal research services for Texas Legal Service Organizations and provides free access to the State Bar's on-line CLE programs for attorneys employed at Texas Legal Services Organizations.

The Bar's support in these areas increases the quantity and improves the quality of the legal services delivered to clients who cannot afford an attorney. The Bar President's broad question about the constitutionality of the State Bar's mandatory dues requirements necessarily implicate the State Bar's continuing ability to fund these programs that provide critical assistance to the Texas Legal Services Organizations. We therefore write to make your office aware of these potential, unintended consequences of the Bar President's request and urge your office to opine that the State Bar's mandatory due requirement is constitutional, as it clearly is under binding U.S. Supreme Court precedent.

In *Lathrop v. Donohue*, 367 U.S. 820 (1961) and *Keller v. State Bar of California*, the U.S. Supreme Court expressly upheld the constitutionality of the collection of mandatory bar dues. The Supreme Court's recent decision in *Janus v. Am. Fed'n of State, County, & Mun. Employees*, 138 S. Ct. 2448 (2018) cited in the President's letter, overruled *Abood*

v. Detroit Bd. of Educ., 431 U.S. 209 (1977), a decision that had allowed a public employer to compel its employees to pay an “agency fee” to the union acting as the employee’s exclusive bargaining agent. But *Janus* did not overrule *Lathrop* and *Keller*, which remain good law. And *Fleck v. Welch* (the other case cited by the President on this question), is currently pending in the Eighth Circuit without decision, and thus can have no impact on the controlling authority of *Lathrop* and *Keller* on the issue of the constitutionality of an integrated bar’s collection of membership dues.

In *Lathrop*, decided over 15 years before *Abood*, the Supreme Court first upheld the constitutionality of an integrated bar, such as our State’s. In the face of a challenge by a lawyer complaining of the bar’s use of his dues for legislative activity with which he disagreed, a plurality of justices ruled that Wisconsin’s integrated bar—and specifically the mandatory requirement that all attorneys join and pay dues to the bar—did not violate the freedom of association secured by the First Amendment. “[I]n order to further the State’s legitimate interests in raising the quality of professional services,” a State could “constitutionally require that the costs of improving the profession . . . should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.” 367 U.S. at 843 (plurality op.). In a concurring opinion, two members of the Court also expressed the opinion that the mandatory bar dues requirement did not violate the Free Speech Clause. *Id.* at 848 (Harlan, J., concurring).

In *Keller*, the U.S. Supreme Court again considered the constitutionality of mandatory bar dues. Members of California’s integrated bar argued that the bar’s use of their dues “to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment.” 496 U.S. at 4. And again, the Supreme Court held the Bar’s mandatory dues requirement was constitutional: “[T]he compelled association and integrated bar are justified by the State’s interest in regulating the legal profession and improving the quality of legal services.” *Id.* at 13. Analogizing to *Abood*, the Court held that the bar could use mandatory membership dues to “fund activities germane to those goals,” but could not use mandatory dues to fund ideological activities. *Id.* at 14. As examples, the Court stated that funds from mandatory dues could be spent on “activities connected with disciplining members” or “proposing ethical codes for the profession,” but not “to endorse or advance a gun control or nuclear weapons freeze initiative.” *Id.* at 16. Under Texas law, and consistent with *Keller*, the State Bar may not use membership dues or any other funds “for influencing the passage or defeat of any legislative measure unless the measure relates to the regulation of the legal profession, improving the quality of legal services, or the administration of justice and the amount of the expenditure is reasonable and necessary.” TEX. GOV’T CODE § 81.034.

In *Janus*, the Court overruled *Abood*. 138 S. Ct. at 2478. But the majority opinion in *Janus* does not even mention, much less overrule, *Keller* or *Lathrop*, the prior decisions upholding the constitutionality of integrated bar associations. The dissent cites *Keller*

only to emphasize that *Keller* is still good law after *Abood*'s overruling. *Id.* at 2495 (Kagan, J., dissenting).

Further, an earlier opinion by the Supreme Court makes clear that *Keller*'s core holding does not depend on the continued viability of *Abood*. In *Harris v. Quinn*, 134 S. Ct. 2618 (2014) the Court refused to extend *Abood*'s holding to unions of private employees, and instead expressly confined the scope of *Abood* to "full-fledged state employees." In response to arguments that limiting *Abood* in this way would call into question the viability of *Keller*, the Court remarked that these arguments were "mistaken." *Id.* at 2643. Specifically, the Court noted that independent of *Abood*, the important State interests at stake in regulating the legal profession supported the result in *Keller*:

Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services." States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices.

Id. at 2655 (quoting *Keller*, 496 U.S. at 14). The collection of mandatory dues by the Texas State Bar serves this identified interest in "regulating the legal profession and improving the quality of legal services." The State Bar's programs directed to the Texas Legal Services Organizations are activities not just "germane to those goals," *Keller* 496 U.S. at 15, but critically important to improving the quality of legal services in this State by ensuring that persons unable to afford legal services have access to the legal system. The Texas Supreme Court has, for decades, emphasized the importance of expanding access to legal services for low- and moderate-income persons. The State Bar's programs, funded in part by mandatory membership dues, are essential to that effort.

Fleck v. Welch, the other case cited by the President in his Request, does nothing to change the analysis. The Supreme Court vacated the Eighth Circuit's judgment in *Fleck* and remanded the case for consideration in light of *Janus*. The Court has made clear that such a remand alone is no determination on the merits of the case. *Tyler v. Cain*, 533 U.S. 656, 657 n.6 (2001). And the court of appeals has not yet issued any new opinion on remand; the mere pendency of the *Fleck* case offers no legitimate basis for questioning the viability of *Lathrop*, *Keller*, or the State Bar's mandatory dues requirement.

In sum, there are no federal cases holding that mandatory bar fees are unconstitutional. All cases — including cases from the U.S. Supreme Court — have ruled mandatory state bar fees constitutional. The State Bar uses those fees to fund programs such as the ones supporting the Texas Legal Services Organizations that further the legitimate goals of regulating the legal profession and improving the quality of legal services in this State. For these reasons, the Texas Legal Services Organizations respectfully request that in

Ms. Hoelscher
February 28, 2019
Page 5

response to the President's Question No. 2, your office provide an opinion that the State Bar's collection of mandatory dues is constitutional.

Sincerely,

GRAVES, DOUGHERTY, HEARON & MOODY
A Professional Corporation

By: /s/William Christian
William Christian

WGC/nmm

cc: Mr. Joe K. Longley (*via* email:)
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