

State Bar of Texas Board of Directors – September 24, 2021

Proposed Changes to State Bar Rules and Policies in Response to *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021)

Proposed Changes to the State Bar Rules

The State Bar Board would pass a resolution under Tex. Gov't Code Ann. § 81.024(b)(1) requesting that the Supreme Court of Texas adopt the following amendments to the State Bar Rules:

- Art. I, § 13: “‘**Member**’ means a person licensed to practice law in Texas ~~a member of the State Bar of Texas~~. See Tex. Gov't Code Ann. § 81.051(a).”
- Add a new § 14 to Art. I: “‘**Enrollment**’ means the act of registering with the Clerk as a person licensed to practice law in Texas. See Tex. Gov't Code Ann. § 81.051(b).”
- Add at the end of Art. II, § 13 (“Spokesman for the Bar”): “In no event shall a public representative of the State Bar or its sections or committees purport to speak on behalf of all State Bar members or to represent that all State Bar members support the message that the representative is conveying.”

Proposed Changes to the State Bar of Texas Board of Directors Policy Manual

Amendments to the State Bar of Texas Board of Directors Policy Manual:

- Section 3.02.01: The Executive Director, in consultation with the President-elect and other members of the Budget Committee of the Board, shall prepare ~~the following for submission to and approval by the Board at the regularly scheduled second quarterly meeting of the Board:~~ (a) a proposed budget for the next Fiscal Year of anticipated operating revenues and operating ~~capital~~ expenditures for the State Bar; ~~for submission to and approval by the Board at the regularly scheduled second quarterly meeting of the Board.~~ (b) a notice containing a breakdown of expenditures presented by major expense category; and (c) a notice estimating the amount of membership dues to be devoted to each major category of expenses. The budget shall have sufficient information for members to understand the composition of each of the budget categories. Additional budget category detail will be posted on the State Bar website. The Executive Director shall submit the proposed budget, ~~expenditure breakdown, and dues allocation~~, to each Board Member not less than seven days prior to the second quarterly Board meeting.
- Section 3.02.02: Upon approval by the Board at its second quarterly meeting, the ~~proposed budget, expenditure breakdown, and dues allocation shall be posted on the State Bar's website.~~ The proposed budget, as well as notice of the availability of the proposed budget, ~~expenditure breakdown, and dues allocation on the State Bar's website~~, shall be published in the next issue of the *Texas Bar Journal*, and notice shall be given of a public hearing on the ~~proposed budget to be held prior to the next meeting of the Board.~~ ~~Notice of the availability of the budget, expenditure breakdown, and dues allocation shall be provided to all members in conjunction with the State Bar's annual membership dues notice.~~
- Section 3.02.04(D): The Budget Committee shall have the duty to advise and assist the Executive Director in the preparation of the annual budget for the State Bar. As part of its

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review of the proposed budget, the Budget Committee shall review the programs, departments and projects to confirm that they further the State Bar’s purposes and goals as stated in the State Bar Act, the State Bar Rules and the State Bar Strategic Plan. **The Budget Committee shall also review the budgeted items to identify any expenditures that may be non-chargeable to members under *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021). If the Budget Committee determines that a certain item is non-chargeable to members, it shall remove the expenditure from the proposed budget.**

- Section 3.14.01: The purpose of the State Bar of Texas is to engage in those activities enumerated at §81.012 of the State Bar Act. The expenditure of funds by the State Bar of Texas is limited ~~both~~ as set forth at § 81.034 of the State Bar Act and in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021). If any member ~~feels~~ **has a reasonable belief** that any actual or proposed expenditure is not within such purposes of, or limitations on, the State Bar, it is the policy of the State Bar to provide a means by which the member may register his or her objection thereto ~~with the Executive Director of the State Bar~~ for resolution as described below.
- Section 3.14.02: A member may object to a proposed or actual expenditure of the State Bar as not within the purposes or limitations set out at Subsection 3.14.01, above, and seek refund of a *pro rata* portion of his or her dues expended, plus interest, by filing a written objection with the Executive Director. The objection must be made in writing, **on the official State Bar Fees Objection Form**, addressed to the Executive Director of the State Bar, P.O. Box 12487, Austin, TX 78711, **or by email to objections@texasbar.com**. ~~and postmarked no later than NINETY (90) days after the conclusion of the challenged activity.~~

A copy of the State Bar Fees Objection Form may be obtained by written or in person request to the Executive Director or from the State Bar website at [URL to be added]. A member must submit his or her fully completed State Bar Fees Objection Form in writing no later than ~~6090~~ **60** calendar days after the annual audit of the State Bar for the preceding year fiscal year in which the transaction objected to occurred is published on the State Bar website. Any objection submitted more than ~~6090~~ **60** calendar days after the annual audit of the State Bar is published on the State Bar website, is untimely and will be rejected without further review.

- Section 3.14.03(a): Upon receipt of a member’s objection, the Executive Director shall **within 60 calendar days promptly** review such objection together with the allocation of dues monies spent on the activity or action and, in consultation with the President, shall have the discretion to resolve the objection, including refunding a *pro rata* portion of the member’s dues, plus interest.
- New Section 3.14.03(b)(1): **The objecting member shall have 30 calendar days to accept or reject the Executive Director’s determination of the member’s objection. If the objecting member provides notice that he or she accepts the determination, or fails to respond to the determination of the Executive Director within 30 calendar days of notice of same, then the Executive Director’s determination shall be deemed final.**
- New Section 3.14.03(b)(2): **If the objecting member contests the Executive Director’s determination, either as to the refundability of a *pro rata* portion of dues or the calculation of the amount to be refunded, or both, then the member shall notify the Executive Director of**

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the member's disagreement where indicated on the State Bar Fees Objection Form (by email or mail) within 30 calendar days of notice of the Executive Director's decision.

- New Section 3.14.03(c): If the member timely notifies the Executive Director that the member contests the Executive Director's determination of the member's claim, under (b)(2) above, then the Executive Director shall submit the member's objection to the Presiding Judge of the administrative judicial region covering Travis County, who shall appoint a retired, senior, or former judge as the impartial decisionmaker to decide the objection, unless the Executive Director and the member agree to a different procedure for selecting the impartial decisionmaker. The Executive Director shall also determine the *pro rata* amount of the objecting member's dues reasonably at issue, and such amount shall be placed in an escrow account, in accordance with a procedure to be determined by the Executive Director, pending the resolution of the member's objection by the impartial decisionmaker. At the discretion of the Presiding Judge of the administrative judicial region covering Travis County or by agreement of the parties, similar or related objections may be consolidated into one proceeding.
- New Section 3.14.03(d): The impartial decisionmaker shall promptly and efficiently decide the matter, applying the standard set forth in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and its progeny, including *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), to the expenditure(s) to which the member objected. The proceedings before the decisionmaker shall be informal in nature and shall not be governed by the rules of evidence. In the event the decisionmaker determines that the objecting member is entitled to a refund, the State Bar shall promptly refund the *pro rata* portion of the member's dues that is attributable to the expenditure, plus interest, to the objecting member.
- New Section 3.14.03(e): The State Bar shall pay the impartial decisionmaker's fee and expenses, if any, unless the decisionmaker finds that the member's objection was frivolous, in whole or in part, in which case the objecting member shall bear the entire cost of the objection proceeding, including the decisionmaker's fee and expenses, if any. Each party shall bear its own attorney's fees and expenses incurred in connection with the objection proceeding before the impartial decisionmaker.
- Section 3.14.04: ~~Refund of a pro rata share of the member's dues shall be for the convenience of the Bar, and~~ Any refund of a *pro rata* share of the member's dues shall not be construed as an admission ~~by the State Bar~~ that the activity or action to which the member objected was **not** or would not have been within the purposes or limitations stated at Subsection ~~3.15.01~~ 3.14.01, above.
- Section 3.14.05: The following notice shall be published in conjunction with any publication or description of the State Bar's budget, legislative program, performance measures, amicus briefs, and any other similar policy positions adopted by the State Bar, **and shall be provided to all members in conjunction with the State Bar's annual membership dues notice:**

The purpose of the State Bar of Texas is to engage in those activities enumerated at §81.012 of the State Bar Act. The expenditure of funds by the State Bar of Texas is limited ~~both~~ as set forth at §81.034 of the State Bar Act and in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021). If any member ~~feels~~ has a **reasonable belief** that any actual or proposed expenditure is not within such purposes of, or limitations on, the State Bar, then such member may object thereto and seek a refund of a *pro*

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rata portion of his or her dues expended, plus interest, by filing a written objection with the Executive Director. The objection must be made in writing, on the official State Bar Fees Objection Form, addressed to the Executive Director of the State Bar, P.O. Box 12487, Austin, TX 78711, or by email to objections@texasbar.com. The objection must be submitted no later than ~~60~~⁹⁰ calendar days after the annual audit of the State Bar for the ~~preceding year~~^{fiscal year in which the transaction objected to occurred} is published on the State Bar website. A copy of the State Bar Fees Objection Form may be obtained by written or in person request to the Executive Director or from the State Bar website at [URL to be added]. ~~The objection must be made in writing, addressed to the Executive Director of the State Bar, P.O. Box 12487, Austin, TX 78711, and postmarked no later than NINETY (90) days after the conclusion of the challenged activity.~~

Upon receipt of a member's objection, the Executive Director shall ~~promptly~~^{promptly} within 60 calendar days review such objection together with the allocation of dues monies spent on the challenged activity and, in consultation with the President, shall have the discretion to resolve the objection, including refunding a *pro rata* portion of the member's dues, plus interest. ~~If the objecting member contests the Executive Director's determination of the member's claim, the objecting member may, within 30 calendar days of notice of the Executive Director's determination, invoke the objection procedures set forth in Section 3.14 of the State Bar of Texas Board of Directors Policy Manual, which include an opportunity for the objection to be decided by an impartial decisionmaker. Refund of a pro-rata share of the member's dues shall be for the convenience of the Bar, and~~ Any refund of a *pro rata* share of the member's dues shall not be construed as an admission by the State Bar that the challenged activity was **not** or would not have been within the purposes of or limitations on the State Bar.

- Section 4.04.15: “No Standing or Special Committee or member thereof **acting in the name of a Committee** may engage in any advocacy activities in violation of this Policy Manual, Tex. Govt. Code Section 81.034 or any other provision of the State Bar Act or other Texas statute, the rules of the Supreme Court of Texas or any Texas agency, or Texas or federal case law, including *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).”
- Section 5.01.03(B)(8): “A new section may be established by the Board upon written petition containing . . . a statement that the section shall not act as a political or social advocacy group and shall comply with all State Bar policies, the State Bar Act, and other applicable federal and state law, including *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).”
- Section 5.01.04(B)(4): “The section, section council, and section members acting in the name of a section may not act as a political or social advocacy group and shall comply with all State Bar policies, the State Bar Act, and other applicable federal and state law, including *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).”
- Section 5.01.06: “The Executive Director or designee shall conduct a mandatory orientation session for incoming section chairs and treasurers. The curriculum shall include written materials on State Bar policies, the State Bar Act, fiduciary management, public and

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legislative positions, and restrictions imposed by *Keller v. State Bar of California*, 496 U.S. 1 (1990) and its progeny, including *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).”

- Section 5.04.05(E): “No division, division board, or division member shall intentionally act in violation of state or federal law, including e.g., *Keller v. State Bar of California*, 495 U.S. 1 (1990) and its progeny, including *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).”
- New Section 7.02.04: *Legislative Activities*. The Access to Justice Commission’s legislative activities shall be subject to the State Bar’s review for compliance with *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).
- Section 8.01.03(G): “The proposed legislation addresses the State Bar, the regulation of lawyers, the functioning of state or federal courts, or the functioning of the legal system ~~cannot be construed to advocate political or ideological positions. See, e.g. Keller v. The State Bar of California, 496 U.S. 1 (1990).~~”
- New Section 8.01.06(C)(6) [The current subsection (C)(6) will become subsection (C)(7)]: “A detailed statement explaining how the proposed legislation addresses the State Bar, the regulation of lawyers, the functioning of state or federal courts, or the functioning of the legal system, such that the State Bar’s taking of a position regarding the proposed legislation will comply with *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).”
- Section 8.01.11: Nothing in this policy shall be construed to prevent a section from tracking specific legislation through the Legislature and informing its membership about any aspect of pending legislation. ~~A section or any of its~~ Any of a section’s members may, without complying with any of the provisions of this policy, advocate any position with respect to any legislative proposal to the membership of the section or any of its council members.
- New Section 8.02.02(A)(5) [The current subsection (A)(5) will become subsection (A)(6). Also, the word “and” at the end of subsection (A)(4) will be deleted.]: “No request [for amicus-brief approval] may be approved unless the position . . . addresses the State Bar, the regulation of lawyers, the functioning of state or federal courts, or the functioning of the legal system; and.”
- Delete Section 8.02.02(C), which currently provides: “Amicus curiae briefs may only be filed in matters involving substantive or procedural law on major issues of importance to the practice of law or the administration of justice.” [Sections 8.02.02(D)-(F) will need to be re-lettered to reflect the deletion of Section 8.02.02(C).]

Proposed Change to the State Bar of Texas’ Website

The State Bar would post prominently on the “About Texas Bar” page of its website language conveying substantially the following points:

- The State Bar of Texas is a public corporation and an administrative agency of the judicial department of the Texas government.
- The phrase “member of the Bar” means a person licensed to practice law in Texas.

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- The State Bar does not purport to speak on behalf of all persons licensed to practice law in Texas.