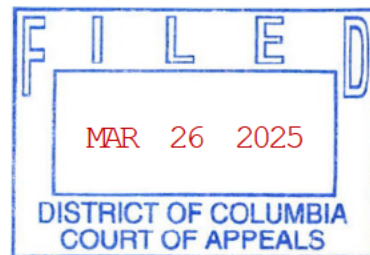


**District of Columbia
Court of Appeals**

No. M289-25



BEFORE: Blackburne-Rigsby, Chief Judge, and Beckwith, Easterly, McLeese, Deahl, Howard, and Shanker, Associate Judges.

NOTICE

(FILED – March 26, 2024)

In February 2025, the D.C. Bar sent this court a letter proposing an amendment to Rule II, Section 4 of the Rules Governing the D.C. Bar, to clarify the standard applicable to the Bar’s expenditure of mandatory license fees. The Bar’s letter, which includes the text of the proposed amendment, is attached to this notice.

The court is now considering whether to adopt the Bar’s proposal. This notice is published to afford interested parties an opportunity to submit written comments concerning the Bar’s proposal. Comments must be submitted by Monday May 26, 2025. Comments received after the deadline will be considered only at the discretion of the court. Comments may be submitted electronically to rules@dcappeals.gov, or in writing, addressed to the Clerk, D.C. Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001. All comments submitted pursuant to this notice will be available to the public.

PER CURIAM



MEMORANDUM

TO: The Honorable Chief Judge Anna Blackburne-Rigsby
District of Columbia Court of Appeals

FROM: Shaun M. Snyder, President
D.C. Bar Board of Governors

DATE: February 11, 2025

RE: Proposed Revised Rule II, Section 4 of the District of Columbia Court of Appeals
Rules Governing the Bar

I. Introduction

The D.C. Bar Board of Governors (“Board”) seeks to amend the District of Columbia Court of Appeals Rules Governing the Bar (“Rules”) regarding the appropriate use of member license fees. Specifically, the Board proposes the addition of clarifying language to Rule II (Membership), Section 4 (License Fees) to codify the United States Supreme Court’s 1990 standard for determining which activities integrated bars may fund with mandatory license fees. The Board believes that the amendment will make the use of license fees by the District of Columbia Bar (“D.C. Bar”) clearer for both D.C. Bar members and staff by aligning the language of the Rule with the well-established constitutional standard.

II. Background and Discussion

The Rules and D.C. Bar Bylaws (“Bylaws”), along with two D.C. Bar member referenda, currently govern the D.C. Bar’s use of mandatory license fees for its programs and activities. Additionally, the United States Supreme Court has identified how mandatory, integrated bars may properly use license fees.

A. Rules Governing the D.C. Bar

The D.C. Bar was established by the District of Columbia Court of Appeals (“D.C. Court of Appeals”) in 1972 as a mandatory “association of members of the Bar of the District of Columbia.” Rule I, Preamble. The purposes of the D.C. Bar are enumerated in Rule I, Section 2:

- (a) to assist the legal profession in maintaining high standards of the practice of law in the District of Columbia;
- (b) to aid the courts of the District of Columbia in carrying out and improving the administration of justice;
- (c) to promote access to justice and enhance the delivery of legal services to those in need;
- (d) to foster and maintain high ideals of integrity, learning, competence in public service, and high ethical standards;
- (e) to safeguard the proper professional interests of the members of the Bar;
- (f) to encourage the formation and support the activities of voluntary bar associations;
- (g) to provide a forum for and publish information about the practice of law, the science of jurisprudence and law reform and the relationship of the Bar to the public; and
- (h) to carry on a continuing program of legal research and education in the technical fields of substantive law, practice, and procedure, and make reports and recommendations thereon; to the end that the public responsibility of the legal profession may be more effectively discharged.

Thus, the D.C. Bar is mandated by the D.C. Court of Appeals to support its members and the voluntary bars, provide continuing legal education, conduct research and offer thought leadership, aid the courts, and support access to justice.

The Rules direct the D.C. Bar to collect license fees from its members which “shall constitute a fund for the payment of the expenses of the Bar.” Rule II, Section 4. The Board of Governors is further directed in the Rules to make “necessary appropriations for disbursements from the funds in the treasury to pay all necessary expenses of the Bar...” Rule VIII. However, the Rules are silent as to what D.C. Bar programs, activities, or services may be funded by mandatory license fees.

B. D.C. Bar Bylaws

The D.C. Bar Bylaws, which were amended by the Board in 2023, acknowledge that the D.C. Bar is “responsible for the management and regulation of all persons admitted to practice law in the District of Columbia and is governed by the [Rules]...” Bylaws Art. II, Sec. 2.01. The Bylaws reflect and repeat the purposes of the Bar as set forth in the Rules. *See*, Bylaws Art. II, Sec. 2.02.

In addition, the Bylaws provide that the Board “shall have general charge of the affairs and activities of the Bar [and it] shall have the authority:

- (a) To evaluate whether the needs of the organization’s members are being met;
- (b) To develop a long-range strategic plan for the organization and measure its progress;
- (c) To request, receive, consider and take action on reports and recommendations;

- (d) To ensure the organization accurately reports its finances, approve the annual budget, monitor the organization's financial condition, and review the outside audit;
- (e) To fix the time and place of the annual meeting of members of the Bar;
- (f) To arrange for publication of an official Bar bulletin or journal;
- (g) To conduct investigations of matters affecting the Bar;
- (h) To authorize, when appropriate, public statements on major issues of public interest or concern, or of major importance to Bar members;
- (i) To adopt Bylaws and regulations, not inconsistent with the Rules, for the orderly administration of the Bar's affairs and activities; and
- (j) To appoint, actively support, and work in partnership with the Chief Executive Officer, providing information and clear direction and evaluating the Chief Executive Officer's performance in carrying out the Board's directives and goals to best serve the membership and the public." Bylaws Art. IV, Sec. 4.03.

Thus, in addition to the purposes set forth in the Rules, the Bylaws require the D.C. Bar – through its Board of Governors – to hold an annual meeting, publish a Bar bulletin or journal, issue appropriate public statements, and carry out other Board directives to serve the members and the public.

Consistent with the Rules, the Bylaws require all Bar members to pay annual license fees, and empower the Board to appoint a Chief Executive Officer to have “general and active control over the Bar's operations and personnel, be responsible for the administration of the Bar's finances, and perform other duties incident to a chief executive officer of an organization that are not inconsistent with applicable law, the Rules, or these Bylaws.” Bylaws, Art. III, Sec. 3.05; Art. VIII, Sec. 8.01. Like the Rules, the Bylaws do not expressly delineate which specific programs and services are properly funded by mandatory license fees.

C. D.C. Bar Member Referenda

Shortly after the D.C. Bar was established, several members initiated referenda to define the scope and authority of the new “mandatory” bar and its use of license fees. There was a concern among the members that license fees (or dues) would be used for programs and services, and to support lobbying and advocacy, that did not have the support of the membership. At the time, it was unclear what programs and services would be offered by the new D.C. Bar and there was yet no judicial guidance on what programs or activities a mandatory bar could properly fund without running afoul of the members' First Amendment rights. The referenda were an attempt to define such parameters.

Ultimately, there were two referenda – in 1980 and 1988 – that sought to define the proper use of license fees.

1. The 1980 Referendum

In 1980, members petitioned the D.C. Bar to submit to the membership a referendum that asked whether they were in favor of the following proposal:

Mandatory dues and assessments of the District of Columbia Bar shall be used only for the following purposes: admission of attorneys; their continued registration; discipline of attorneys; and client security fund. Any other activities shall be funded by other means, included but not necessarily limited to, voluntary contributions.

These purposes corresponded generally with the four principal committees which functioned as direct arms of the Court: Disciplinary Board, Committee on Admissions, Committee on Unauthorized Practice, and Client Security Trust Fund. *On Petition to Amend Rule 1 of the Rules Governing the Bar*, 431 A.2d 521, 523 (D.C. 1981). The functions specified in the referendum were distinct from and excluded many of the enumerated purposes and functions of the Bar and the Board in the original Rules. The members adopted the proposal by a vote of 6,721 to 5,189.

Following the referendum, there was a petition before the D.C. Court of Appeals to amend the Rules to reflect the limitations contained in the 1980 referenda. The Court denied that petition, clarifying that “a referendum may not impinge on the constitutional rights of the members of our Bar, nor may a referendum effect a per se amendment of our Rules Governing the Bar.” *Id.* at 528. Instead, the referendum had the effect of determining the policy of the Board, as long as it did not conflict with the Rules. The Court noted:

If Referendum No. 2 were to be construed literally, it might be viewed as preventing the performance of some of the basic functions of the Bar. For example, the propriety of holding an annual meeting could be cast in doubt and communications with the members might cease – including even preventing the holding of a future referendum.... Hence, while Referendum 2 [limiting the use of mandatory dues to four categories] is entitled to be implemented, the result is to occur only to the extent that it does not deprive the Board of Governors of its ability to perform the operational functions specifically set forth in Section 3 of Rule IV.

Id. at 528-29.

Thus began the difficult process of trying to determine what may properly be funded by license fees to give effect to both the referendum and the mandated purposes set out in the Rules.

2. The 1988 Referendum

As the Bar grew in numbers and complexity, it began to offer its members more programs and services to support their professional growth and development, including creating practice sections (now known as Communities), continuing legal education courses, the *Washington Lawyer* magazine, a legal ethics program, a lawyers assistance program, and a practice management advisory service. The members attempted to revisit the 1980 referendum in 1988 by seeking authorization to use license fees for these growing programs and services. A new referendum, which was poorly designed and further clouded the issue, was submitted to the members.

The 1988 referendum asked the members to choose one of three options:

- A. In addition to currently limited authorized use of membership dues, the Bar should have the authority to use membership dues not in excess of 20 percent of the total dues to carry out the other purposes of the Bar as specified in Rule I, Section 2.
- B. In addition to the currently limited authorized uses of membership dues, the Bar should be authorized to use membership dues to support the following activities: assistance to the courts; lawyer referral service; legal education; special projects (manuals and publications); other services to members (e.g., support work of committees and sections, member benefits program); pay the cost of office space and centralized administrative services for all Bar activities.
- C. There should be no change in the purposes for which membership dues may be used.

There was a split vote as follows: Proposal A – 3,749; Proposal B – 2,298; Proposal C – 5,918. Although a majority of the members voting in the referendum approved expanded use of license fees (6,047), because of the trifurcated nature of the referendum, it was determined that Proposal C (no change) prevailed.

This left the Bar in the same position as it was following the 1980 referendum – trying to implement both the 1980 referendum and carry out its core purposes set out in the Rules. Over the course of decades, it was determined that license fees could, in fact, be used for building and administrative purposes, and to fund core services such as a legal ethics hotline, lawyer assistance program, attorney-client arbitration board, the annual meeting, the mandatory course, a membership call center, and others with license fees despite the narrow language of the 1980 referendum.

D. The United States Constitution

The D.C. Bar was not alone in its struggle to define the proper use of mandatory license fees. Approximately 30 states have integrated bars, and several of them faced challenges from their members claiming that the bar's use of license fees violated their First Amendment rights to both free speech and free association. The issue eventually made its way to the United States Supreme Court in 1990.

In *Keller v. State Bar of California*, 496 U.S. 1 (1990) the Supreme Court held “the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State bar may . . . constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.” *Id.* at 14.

In sum, *Keller* made plain that mandatory bars may constitutionally use license fees for activities that are germane to regulating the legal profession or improving legal services.

Since *Keller*, other courts have considered what constitutes ‘germane’ activities in the context of First Amendment challenges to state bars. Indeed, in recent years six United States Circuit Courts of Appeal have reaffirmed that *Keller* controls the use of mandatory bar license fees and considered which bar activities can be considered germane, such as legal education, bar publications and communications with its members, annual meetings, and wellness and diversity initiatives. Although some bar members sought to overturn *Keller*, the Supreme Court repeatedly denied certiorari in these cases.

E. Impact on the D.C. Bar

Since 1980, the D.C. Bar has tread conservatively and narrowly restricted its use of license fees to the four purposes approved in the 1980 referenda (attorney admission, discipline, and continued registration and the client security fund) along with the core operational functions of the Bar noted by the D.C. Court of Appeals in 1981. For example, license fees are not currently used for CLE, Communities, the Pro Bono Center, or *MyDCLawyer*TM (the D.C. Bar's new lawyer referral service). License fees are used, however, to support the building, the administrative staff, and core programs including legal ethics, attorney-client arbitration board, membership services, the annual meeting, the judicial and bar conference, and *Washington Lawyer*. All these functions would be considered ‘germane’ under *Keller*.

Thus, the 1980 referendum constrains the D.C. Bar more stringently – and limits its use of license fees to a much smaller universe of activities – than what is constitutionally permissible under

Keller. Arguably, the referendum also conflicts with many of the core operational functions of the D.C. Bar in the Rules (now codified in the Bylaws) that the D.C. Court Appeals recognizes should be supported with license fees.

It is time to align the use of D.C. Bar license fees with the well-established constitutional standard to be transparent with our members and enhance D.C. Bar staff’s administration of member-facing programs and services by more clearly articulating the limits on the use of such fees. Notably, other mandatory bars are taking this important step by aligning their governing documents with *Keller*.¹

III. Alignment with the Constitutional Standard

Without a clear, consistent, and singular standard to define which activities may be appropriately funded by license fees, there is a risk of inefficient, inconsistent, and impractical decision-making and confusion about the use of license fees. The Board therefore proposes that Rule II, Membership, Section 4, License Fees, be reorganized for clarity and amended to align with *Keller*. The proposed new language appears in red, and the reorganized existing text appears in blue, below:

The District of Columbia Court of Appeals shall set a ceiling for annual license fees payable by any member. ~~The Board of Governors shall determine the amount of license fees to be paid annually by members in the various classes of membership.~~ The Board of Governors may make recommendations to the Court concerning the amount of the ceiling on license fees. If such a recommendation is made, it shall be published by the Court, and the members of the Bar shall have 60 days, or such other period as the Court may direct, in which to comment. Recommendations by the Board of Governors for an increase in the license fees ceiling shall not be subject to referendum under Rule VII.

¹ See, e.g., Oregon State Bar Bylaws, Art. X, Sec. 10.01 “Communications of the Bar and its constituent groups and entities, including printed material and electronic communications, should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education and the Bar in its role as a mandatory membership organization.”; and Louisiana State Bar Association Bylaws, Art. XII “A member of the Louisiana State Bar Association who objects to the use of any portion of the member’s bar dues for activities he or she considers promotes or opposes political or ideological causes, including activities that are not constitutionally germane to the LSBA’s purpose, may request the Board to review the member’s concerns to determine if the Board agrees with the member’s objections.”

~~The Board of Governors shall determine the amount of license fees to be paid annually by members in the various classes of membership. All license fees shall be paid to the Bar and shall constitute a fund for the payment of the expenses of the Bar. License fees may be used by the D.C. Bar in furtherance of the Purposes set forth in Rule I, Section 2, provided that the activities are germane to regulating the legal profession or improving the quality of legal services. The Board of Governors may make recommendations to the Court concerning the amount of the ceiling on license fees. If such a recommendation is made, it shall be published by the Court, and the members of the Bar shall have 60 days, or such other period as the Court may direct, in which to comment. Recommendations by the Board of Governors for an increase in the license fees ceiling shall not be subject to referendum under Rule VII.~~

Non-payment of license fees may result in suspension and the inability to practice law in the District of Columbia.

The revised Rule would therefore read as follows:

The District of Columbia Court of Appeals shall set a ceiling for annual license fees payable by any member. The Board of Governors may make recommendations to the Court concerning the amount of the ceiling on license fees. If such a recommendation is made, it shall be published by the Court, and the members of the Bar shall have 60 days, or such other period as the Court may direct, in which to comment. Recommendations by the Board of Governors for an increase in the license fees ceiling shall not be subject to referendum under Rule VII.

The Board of Governors shall determine the amount of license fees to be paid annually by members in the various classes of membership. All license fees shall be paid to the Bar and shall constitute a fund for the payment of the expenses of the Bar. License fees may be used by the D.C. Bar in furtherance of the Purposes set forth in Rule I, Section 2, provided that the activities are germane to regulating the legal profession or improving the quality of legal services.

Non-payment of license fees may result in suspension and the inability to practice law in the District of Columbia.

If this change is adopted by the Court, the 1980 referendum, the amended Rule would subsume the 1980 referendum because the original four categories are germane under *Keller*.

IV. Financial Impact on Member License Fees

The D.C. Bar's Chief Financial Officer, in consultation with the D.C. Bar's Chief Executive Officer and Chief Operating Officer, determined that there will be little to no financial impact on the D.C. Bar or its members as a result of the proposed amendment. Should the amendment be approved by the D.C. Court of Appeals, it will not result in a decrease in revenue or an increase in expenses. It will not result in an increase in member license fees.

However, the amendment will result in a significant positive impact on the accounting and internal processes related to the current segregation of license fee and non-license fee activities. It will alleviate the administrative burden of "charging" non-license fee cost centers like CLE and Communities for services provided by the D.C. Bar such as IT, Finance, Human Resources, and occupancy, all of which are appropriately funded by license fees. These administrative allocations do not affect the consolidated financial results but are extremely burdensome and time-consuming. In addition, the D.C. Bar spends significant time and resources trying to determine whether any particular activity or service is properly funded by license fees while trying to adhere to the 1980 referendum, the 1981 Opinion, the Rules, the Bylaws, and the *Keller* standard. By fully aligning the D.C. Bar with the well-established constitutional standard, the amendment saves resources, reduces risk, and provides our members with transparency.

V. Conclusion

Based on the foregoing, the Board recommends that the Court of Appeals amend Rule II, Section 4, in accordance with the recommendation set forth above.