

Keller Deduction Overview, Calculation and Arbitration

Overview

Under *Keller v. State Bar of California*, the WSBA cannot use the compulsory membership and licensing fees of objecting WSBA members for political or ideological activities that are not reasonably related to the regulation of the legal profession or improving the quality of legal services. These activities are considered "nonchargeable." The WSBA may use compulsory membership fees for all other activities.

WSBA members may deduct a specified amount from their license fee payment that represents each member's pro rata portion of fees devoted to nonchargeable activities. The method used to calculate the fee reduction is based on the method approved by the U.S. Supreme Court in *Chicago Teachers Union v. Hudson*. In that case, the Court indicated that it was appropriate to use the year for which the most recent audit report is available as the base line period for determining chargeable and nonchargeable activities and for calculating the cost of the nonchargeable activities. To calculate the 2021 fee reduction, the WSBA used its fiscal year 2020 budget and activities.

Based on the decision of the Impartial Decision maker in *Popejoy v. New Mexico Board of Bar Commissioners*, the Board of Governors of the WSBA has concluded that the largest portion of the activities in the WSBA budget that are "political or ideological" are a portion of those activities funded as legislative activities. To calculate the 2021 fee reduction for the nonchargeable portion of legislative activities, the WSBA used its fiscal year 2020 legislative budget.

Deadline for Arbitration Requests

Any member who wishes to call for arbitration of the amount of the fee reduction permitted for 2021 should deliver a request in writing to the Executive Director of the WSBA by Feb. 1, 2021. For details of the arbitration process, see "Arbitration Process" below.

Detailed Calculation of the Fee Reduction

The General Counsel and Executive Director reviewed all of the fiscal year 2020 activities in accordance with the opinion of the Impartial Decision maker in *Popejoy v. New Mexico Board of Bar Commissioners*, a case where all of the activities of the State Bar of New Mexico were challenged, and determined the activities that would include political or ideological activities not reasonably related to the regulation of the legal profession or improving the quality of legal services.

The fiscal 2021 budget for the WSBA's legislative activities is divided by the total number of license fee paying members of the WSBA at the time this notice was prepared to arrive at the amount of each member's fee attributable to legislative activities. That amount is then apportioned by the percentage of time spent by WSBA staff on specific legislative activities in the most recent legislative session, plus a proportionate share of the legislative general administrative activity. Based on records from the 2020 legislative session, we estimate that 90.24% of staff legislative time was spent on nonchargeable activities.

The WSBA has used an extremely "conservative" test for determining whether individual issues would be included in the deduction, i.e., the WSBA has erred on the side of considering issues nonchargeable even when a reasonable argument could be made that such issues were reasonably related to regulating the legal profession or improving the quality of legal services.

Arbitration Process

A license fee paying member of the WSBA who contends that the WSBA has incorrectly set the amount of fee that can be deducted may demand arbitration by delivering a written demand for arbitration on or before Feb. 1, 2021. Delivery may be made in person or by first-class mail, and mailed demands will be deemed delivered upon mailing. Demands shall include the name and address of the member or members demanding arbitration, a brief statement of the claim or objection, and the signature of each objecting member.

Within 14 days of receipt of a timely demand for arbitration, the WSBA shall submit the matter forthwith to the Chief Justice of the Washington Supreme Court for appointment of an arbitrator. All timely demands for arbitration shall be

consolidated for hearing.

A member demanding arbitration is required to pay his or her WSBA fee, excepting the amount in dispute, on a timely basis as otherwise required by the WSBA Bylaws. Failure to pay the fee by the requisite date may result in suspension as provided by the WSBA Bylaws.

Unless the parties agree to a different schedule, a hearing shall be held within 30 days of the appointment of the arbitrator. The arbitrator shall determine the date, time, and location of the arbitration hearing(s) and shall so notify the parties at least 15 days prior to said hearing(s). The arbitrator will hold hearings in which the parties will be permitted to participate personally or through counsel admitted to practice in the state of Washington.

The burden is on the member(s), as a condition of arbitration, to identify each challenged activity with such specificity as to allow the Bar to respond. The burden is on the Bar to establish the accuracy of the determination of the Keller calculation. Members demanding arbitration shall have access to the financial records upon which the Bar based the determination of the amount of fee that can be withheld. These records shall be available for inspection and copying during normal business hours. Copying shall be at the member's expense.

All parties will be given the opportunity to present evidence and to present arguments in support of their positions. The following rules shall apply to the arbitration proceedings:

- a. There will be no transcripts or post-hearing briefs; except, however, post-arbitration motions for reconsideration or clarification are permitted.
- b. The arbitrator will issue a written opinion, stating the reasons for the decision, within 14 days of the close of the hearing. The opinion will be brief and will be based on the evidence and arguments presented.
- c. The arbitrator shall be compensated at an hourly rate established pursuant to BOG policy for the hearing, preparation, and study time, and shall be reimbursed for all necessary expenses of the arbitration. The WSBA will pay for the arbitrator's services.
- d. The arbitration is not a judicial proceeding but is sui generis. Except for production of documents as set forth in Paragraph 5 above, or as may be stipulated to by the parties, there is no discovery, and the civil rules, arbitration rules, rules of evidence, and other court rules shall not apply.
- e. The arbitrator shall have no authority to add, subtract, set aside, or delete from any Supreme Court Rule or WSBA Bylaw.
- f. The arbitrator shall have no authority to add, subtract, set aside, or delete from any Supreme Court Rule or WSBA Bylaw.
- g. The scope of the arbitration is limited to reviewing the challenged activities specified for the purpose of determining whether the Bar has correctly calculated the Keller deduction, and the sole relief potentially available through arbitration is a change in the amount of the named parties' Keller deduction for that licensing year.
- h. The arbitration shall be binding and the decision of the arbitrator final, with no right of trial de novo or appeal.

Members admitted to the WSBA during the course of a year shall be advised of this notice with their initial fee statements. Such members may demand arbitration within 30 days following receipt of the notification. If arbitration is pending at the date of delivery of a demand for arbitration, the newly admitted member's demand shall be consolidated with the pending arbitration. All of the provisions of this section shall otherwise apply to demands for arbitration filed by newly admitted members.