

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: June 25, 2013

TO: Cornele A. Overstreet, Regional Director  
Region 28

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: State Bar of Arizona  
Case 28-CA-100147

177-1683-5000  
280-9200

The Region submitted this case for Advice as to whether the State Bar of Arizona is an employer under § 2(2) of the Act. We conclude that the Arizona Bar is a political subdivision of the State of Arizona under *State Bar of New Mexico*<sup>1</sup> and is therefore not subject to the jurisdiction of the Board.

**FACTS**

The Arizona State Bar is an “integrated” bar association,<sup>2</sup> requiring membership as a condition of practicing law in the state.<sup>3</sup> Although the Arizona legislature initially created the State Bar by statute in 1933, the Arizona Supreme Court in 1973 promulgated a rule “perpetuat[ing], creat[ing] and continu[ing] under the direction and control of this court an organization known as the State Bar of Arizona . . . .”<sup>4</sup> According to the State Bar’s website, the state legislature and supreme court maintained joint oversight over the State Bar between 1973 and 1985, when the legislature “sunsetting” the 1933 enabling statute and left the Bar under the sole supervision of the supreme court.<sup>5</sup> Today the state supreme court retains control of the State Bar as an entity designed “to advance the administration of justice according to law; to aid the courts in

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<sup>1</sup> 346 NLRB 674 (2006).

<sup>2</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 354 n.3 (1977).

<sup>3</sup> Organization of State Bar of Arizona, Rule 32(a)(1) Ariz.R.Sup.Ct. (“[A]ll persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this court”).

<sup>4</sup> *Id.*

<sup>5</sup> See <http://www.azbar.org/AboutUs/History>.

carrying on the administration of justice; [and] to provide for the regulation and discipline of persons engaged in the practice of law . . . .”<sup>6</sup>

The State Bar is governed by a Board of Governors exercising powers and duties prescribed by the state supreme court, including: the examination, admission, and discipline of members of the State Bar; the collection of membership fees, as approved by the court; and the implementation of mandatory continuing legal education in accordance with the court’s rules.<sup>7</sup> The court’s rules prescribe the number of governors and officers and the composition of the board, as well as the manner and timing of their selection.<sup>8</sup> The Board of Governors must submit to the state supreme court an annual statement of receipts and expenditures, certified by its treasurer and a certified public accountant.<sup>9</sup> In sum, the state bar wields only that authority delegated by the state supreme court.

### ACTION

Under Section 2(2) of the Act, an “employer” over which the Board may exert jurisdiction does not include “any State or political subdivision thereof.” An entity is exempt from the Board’s jurisdiction as a political subdivision if it is either (1) created directly by the State so as to constitute a department or administrative arm of the State government, or (2) administered by individuals who are responsible to public officials or to the general electorate.<sup>10</sup> The key inquiries to determine if an entity is a political subdivision under the first prong of the *Hawkins County* test are: (1) whether the entity was created pursuant to a state-level authority, such as by statute,<sup>11</sup> and (2) whether the state intended to create an arm of government.<sup>12</sup>

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<sup>6</sup> Organization of State Bar of Arizona, Rule 32(a)(1) Ariz.R.Sup.Ct.

<sup>7</sup> Organization of State Bar of Arizona, Rule 32 Ariz.R.Sup.Ct.

<sup>8</sup> Organization of State Bar of Arizona, Rule 32 (e), (f) Ariz.R.Sup.Ct.

<sup>9</sup> Organization of State Bar of Arizona, Rule 32(d)(7) Ariz.R.Sup.Ct.

<sup>10</sup> *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–05 (1971).

<sup>11</sup> *Compare Chicago Mathematics & Science Academy Charter School*, 359 NLRB No. 41, slip op. at 7 (2012) (determining a charter school was not exempt under the first *Hawkins County* prong because it was not created pursuant to state statute, but rather by private individuals as a nonprofit corporation) *with University of Vermont*, 297 NLRB 291, 295 (1989) (finding the university exempt under the first prong of *Hawkins County* where the university was created by a special act of the state legislature).

<sup>12</sup> *See Hinds County Human Resource Agency*, 331 NLRB 1404, 1404 (2000) (finding employer created by statute to administer programs for low income people was created as an administrative arm of government).

In *State Bar of New Mexico*, the Board found that the New Mexico State Bar was an exempt political subdivision of the state under the first prong of the *Hawkins County* test.<sup>13</sup> The New Mexico State Bar was initially created by state statute to operate as an agency of the state supreme court. In 1978, the state legislature revoked the enabling statute and the state supreme court simultaneously enacted a rule “creating and continuing” the state bar to “aid the courts in improving the administration of justice.”<sup>14</sup> The Board found, on the face of the bar’s enabling documents, that the court created the state bar as an administrative arm of the state judiciary, tasked with administering and regulating the legal profession within New Mexico.<sup>15</sup> The Board also noted that the state supreme court maintained a degree of control over the bar by mandating its governing structure, including the composition of its governing board and the manner in which the board is elected,<sup>16</sup> and by retaining some control over the state bar’s budget, through the right of review over member dues and a requirement that the bar undergo an annual audit and submit a copy to the court.<sup>17</sup> Ultimately, the Board described the state bar as an agency that “exists to fulfill a State purpose: ‘[t]he regulation of the activities of the bar is at the core of the state’s power to protect the public.’”<sup>18</sup>

The Arizona State Bar shares most of the characteristics that the Board found dispositive in *State Bar of New Mexico*. As in that case, the State Bar was initially created by statute and was subsequently governed by state supreme court rule. As in New Mexico, Arizona relies upon the state bar to assist its judiciary in regulating the legal profession. And the Arizona Supreme Court maintains a similar degree of control over the State Bar of Arizona as that described in *State Bar of New Mexico* by reviewing all expenditures and receipts annually, controlling the composition and election of the

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<sup>13</sup> 346 NLRB 674, 674 (2006).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 676.

<sup>16</sup> *Id.* at 677.

<sup>17</sup> *Id.* at 678.

<sup>18</sup> *Id.*, quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977). In the Decision and Direction of Election at issue in *State Bar of New Mexico*, the Regional Director had exerted jurisdiction over the State Bar by relying in part on the Supreme Court’s decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990), holding that the California State Bar is not a governmental entity for purposes of First Amendment immunity. *Id.* at 689. Although the Board did not expressly distinguish *Keller*, it implicitly found it inapposite. *Cf. Konig v. State Bar of California*, 2004 WL 2091990 at\*3 (N.D. Cal. Sept. 16, 2004) (noting that *Keller*, as a First Amendment case, is inapposite when it comes to the state bar’s immunity under the Eleventh Amendment).

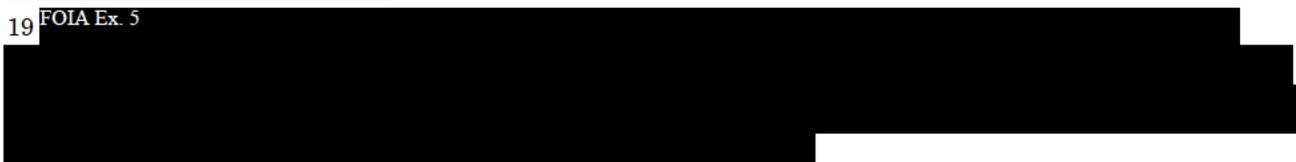
governing body, and reserving the ultimate authority over the state bar.<sup>19</sup> Because there are no meaningful differences between the state bar found to be a political subdivision in *State Bar of New Mexico* and the state bar at issue here, we conclude that the State Bar of Arizona is a political subdivision exempt from the coverage of the Act.<sup>20</sup>

Accordingly, the State Bar of Arizona is not an employer under the Act and the Region should dismiss this charge for lack of jurisdiction.

/s/  
B.J.K.

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<sup>19</sup> FOIA Ex. 5



<sup>20</sup> FOIA Ex. 5

