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Justices, Michigan Supreme Court  
ADMcomment@courts.mi.gov

June 6, 2014

**Re:** *Comments on Report of the Task Force on the Role of the State Bar of Michigan*

Rivaling Calvin Coolidge for lack of surprise ending<sup>1</sup>, a Task Force lopsidedly stacked with State Bar of Michigan (SBM) aficionados<sup>2</sup>—the SBM President-Elect, 2 former SBM presidents, 4 present or past SBM commissioners, the State Bar Foundation President, the SBM Executive Director, the Vice-Chair of the SBM Representative Assembly, a law school professor for whom the SBM named an award, and a state legislator<sup>3</sup>—has concluded that a mandatory bar should be preserved, that the SBM provides laudable programs and services that could not be duplicated by a voluntary bar, and that minor tweaking of current SBM practices is all that is necessary to reform a history of constitutional abuses. Sadly, even a cursory review of the Task Force’s “analysis” reveals the glaring flaws in its reasoning and recommendations.

### **Task Force Recommendation 1: Continue the State Bar as a Mandatory Bar**

The Task Force predicates its recommendation to continue the mandatory nature of State Bar membership with this justification:

\* \* \* An examination of the State Bar’s programs and cost to members compared to other state bars, mandatory and voluntary, shows that the State Bar supports compelling state interests (“regulating the legal profession and improving the quality of legal services”<sup>11</sup>) cost-effectively. In Michigan, the cost of regulating the legal profession is born entirely by attorneys licensed to practice law, at a cost below the national average. Through a long-established infrastructure of volunteer-attorney driven programs, the State Bar delivers a variety of services to the public at no cost to taxpayers<sup>12</sup> and provides benefits

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<sup>1</sup> Coolidge [in]famously said, “When large numbers of men are unable to find work, unemployment results.”

<sup>2</sup> The Task Force’s process was similarly deficient in conception and practice. In the single public session, the Task Force allowed every speaker 5 minutes. Undersigned, with 37 years of opposition to the mandatory bar, was given the same 5 minutes to summarize his views as those supporting the preconceived notions of the Task Force members. Whether the Task Force, as a body, or individual members, recruited speakers to favor their institutional viewpoint is unknown to the undersigned, but nothing was done to assuage suspicion that the speaker list was manipulated.

<sup>3</sup> And even with that start, 3 members of the Task Force, to their credit, were persuaded by the SBM’s abominable track record to support a total ban on advocacy [TF footnote 15].

to its members that would not be available on the same scale or quality, if at all, through a voluntary bar<sup>13</sup>

State Bar member input suggests that the most valued intangible benefit to the members is a voice in their own professional regulation. This is a privilege justified by attorneys' unique governmental responsibilities as officers of the court. \* \* \*

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<sup>11</sup> *Keller*, 496 US 13-14, quoted in AO 2014-5.

<sup>12</sup> Examples include programming to enhance ethics and professionalism, civic education, pro bono services, assistance to lawyers and judges dealing with alcohol and drug problems, administration of the client protection fund, investigation of the unauthorized practice of law, and promotion of improvements in the justice system and the practice of law.

<sup>13</sup> Examples include free or low-cost practice aids and practice management resources such as the e- Journal, Casemaker, the Practice Management Resource Center, and the ethics helpline. The inclusive nature of a mandatory bar also provides the benefit of leadership opportunities for all lawyers, and a forum for the exchange of all points of view.

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The errors in the foregoing are manifest. Every state and territory regulates its legal profession; and in each place, lawyers pay 100% of the cost. A central registry of attorneys maintained by the state's highest court suffices for the administrative purpose of collecting regulatory fees and policing the profession through whatever disciplinary agencies are established by the same court.

In states where there are voluntary bar associations, such as Iowa, the disciplinary agencies administer attorney specialization certification programs. For example, Iowa Court Rule 32: 7.4 says that an Iowa lawyer may claim certification as a specialist in an area of law if the Iowa Supreme Court Attorney Disciplinary Board approves the certification organization. An attorney operating as a specialist must devote 100 hours or 10 percent of his or her practice time to that field. Certification in the following fields of practice is recognized in Iowa:

- Administrative Law
- Adoption Law
- Agricultural Law
- Alternate Dispute Resolution
- Antitrust & Trade Regulation
- Appellate Practice
- Aviation & Aerospace
- Banking Law
- Bankruptcy
- Business Law
- Civil Rights & Discrimination
- Collections Law
- Commercial Law
- Communications Law

- Constitutional Law
- Construction Law
- Contracts
- Corporate Law
- Criminal Law
- Debtor and Creditor
- Education Law
- Elder Law
- Election, Campaign & Political
- Eminent Domain
- Employee Benefits
- Employment Law
- Energy
- Entertainment & Sports
- Environmental Law
- Family Law
- Finance
- Franchise Law
- Government
- Government Contracts
- Health Care
- Immigration
- Indians & Native Populations
- Information Technology Law
- Insurance
- Intellectual Property
- International Law
- International Trade
- Investments
- Juvenile Law
- Labor Law
- Legal Malpractice
- Litigation
- Media Law
- Medical Malpractice
- Mergers & Acquisitions
- Military Law
- Municipal Law
- Natural Resources
- Nonprofit Law
- Occupational Safety & Health
- Pension & Profit Sharing Law
- Personal Injury
- Product Liability
- Professional Liability
- Public Utility Law

- Real Estate
- Securities
- Social Security Law
- Taxation
- Tax Returns
- Technology and Science
- Toxic Torts
- Trademarks & Copyright Law
- Transportation
- Trial Law
- Veterans Law
- Wills, Trusts, Estate Planning & Probate Law
- Workers' Compensation
- Zoning, Planning & Land Use

Compare this well-regulated system to the consummately idiotic proposal made by the SBM and rejected by the Michigan Supreme Court in the late 1970s. After years of “study”, the SBM proudly advanced a rule to allow lawyers to self-certify themselves as specialists, with no apprenticeship, no oversight by disciplinary authorities, an academic institution, or even a group of established experts (such as a college of physicians administering board certification of specialties), and no protection for the public.

The Iowa Supreme Court administers its own IOLTA regulations, and, again showing the Land Between Two Rivers surpasses the Great Lakes State, Iowa lawyers can access their IOLTA accounts online, saving lawyers much time and effort tracking client deposits (in Michigan, lawyers must either go to a bank branch personally, or call a bank’s toll free number and submit to endless account protection security questions to obtain the same information).

So any claim made by the Task Force that the SBM “provides benefits to its members that would not be available on the same scale or quality, if at all, through a voluntary bar” is patent hogwash. Note that the Task Force does not even claim to have made a good faith effort to ascertain the scope or quality of activities conducted by voluntary bars—it’s summary of “Materials Review” on pp. 2-3 indicates it reviewed “primary source material” from “the 31 other mandatory bars” but nothing whatsoever concerning voluntary bars (of which there must be at least 21, 18 in other states, 1 each for District of Columbia, Puerto Rico and the Virgin Islands). Indeed, inasmuch as the Task Force had a single public hearing, in which only Michigan attorneys participated, there was no evidentiary basis for proclaiming the SBM unique, efficient in comparison to voluntary bars, or for comparing either the scale or quality of programs administered by voluntary versus mandatory bars.

The Iowa State Bar Association, a voluntary organization, recently (December, 2013) approved, and passed to the Iowa Supreme Court, the recommendation of the ISBA’s Blue Ribbon Committee on Legal Education and Licensure to drop the multi-state bar exam and replace it with the Uniform Bar Exam. The ISBA, meanwhile, has the following sections:

Administrative Law  
Agricultural Law

Alternative Dispute Resolution  
Business Law  
Commercial and Bankruptcy Law  
Construction Law  
Corporate Counsel Law  
Criminal Law  
eCommerce  
Elder Law  
Environmental and Natural Resources Law  
Family and Juvenile Law  
General Practice  
Government Practice  
Health Law  
Intellectual Property Law  
International Law  
Labor and Employment Law  
Litigation  
Probate, Trust & Estate Planning  
Real Estate and Title Law  
Taxation  
Trade Regulation  
Workers' Compensation

The ISBA also sponsors the following committees:

Access to Justice  
Administrative  
American Citizenship  
Annual Meeting  
Appellate Practice  
Bar Insurance  
Bench Bar Conference  
Award of Merit  
Continuing Legal Education  
Diversity and Inclusiveness  
Economic Development  
Ethics Practice & Guidelines  
Federal Practice  
Independence of the Judiciary  
Iowa Jury Instructions  
Judicial Administration  
Legal Forms  
Lawyers Helping Lawyers  
Law Practice Management  
Membership  
Military Affairs  
Professionalism

Public Relations  
Rural Practice  
Scope and Correlation  
Ways and Means

The ISBA also provides a Young Lawyers Section, a Law Student Section, an Iowa State Bar Foundation and an Iowa Lawyers Assistance Program, a comprehensive CLE program, seminars, and a Tax School. Publications include the monthly Iowa Lawyer magazine (which always includes a chart detailing the ISBA's lobbying program), Iowa Lawyer Weekly, and Iowa Caselaw Update (free e-mail service providing copies of decisions of the Iowa Supreme Court and Court of Appeals), with summaries by topic and links to full opinions, and practice manuals. The ISBA provides an ethics advice and opinion service, links to workers' compensation decisions, title standards, jury instructions, a CLE index, legal research tools, a referral service, list service, section forums, mailing lists, online conference rooms, and a career center, among other services. The public can gain access to legal forms, judicial evaluations, and advice on starting a business, all at no charge.

Membership in the ISBA is free the first year a lawyer is licensed to practice law, then it is \$60 in years 2-3, \$125 in years 4-5, and \$260 thereafter. Dues are waived for fifty year members as well as those actively serving with the armed forces (\$35 per year for those employed by the US Defense Department). Law students may join for free. Retired members pay dues of \$50 annually, while those residing and practicing out of state pay \$125.

An objective comparison of the programs and services of the ISBA not only compares favorably with those offered by the SBM at a similar (but lower) price, but actually exceeds the SBM's menu in scope and variety, while matching all those programs the SBM considers essential—ethics services, a lawyers and judges assistance program, jury instruction development, multiple publications with up to the minute news on caselaw and rules, and forums for the exchange of ideas. And the ISBA manages to surpass the SBM with a population base less than one-third that of Michigan, all without a metropolitan statistical area bigger than half that of Grand Rapids.

Comparing ISBA dues with SBM dues, the Task Force claim that SBM operates at a cost "below the national average" is seen as pure puffery. But comparing costs nationally is always misleading, as anyone familiar with government per diems can attest—when government employees travel to New York<sup>4</sup>, San Francisco, Los Angeles, Chicago, etc., their per diems for food and hotel are triple, even quadruple what they receive for travel to Detroit, Des Moines, Indianapolis, Lansing, etc. So when one lumps New York, California, Illinois, and other states where the cost of living far exceeds the rest of the nation with Michigan, Iowa, Montana, etc., to calculate a median, the latter will always appear "below average". But that proves nothing and is wholly uninformative as to the value provided per dollar of dues. Such a calculation by the Task

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<sup>4</sup> For example, according to the GSA website, <http://www.gsa.gov/portal/category/100120>, the per diem for New York City and the surrounding five counties was \$303 plus taxes for lodging and \$71 for meals, compared to \$100 and \$50 for Detroit and Wayne County and \$86 and \$51 for Lansing/East Lansing.

Force is designed to mislead and support preconceived notions, not to inform or to address real economic issues dispassionately and objectively.

Nor is it true that lawyers have a unique role in self-regulation of the profession. *Every* profession in Michigan is governed by an agency, a majority of whose members must be practitioners of that profession. Const 1963, art 5, §5. The members of the Attorney Grievance Commission, the Grievance Administrator and Chief Deputy, and the Attorney Discipline Board are all appointed by the Michigan Supreme Court, MCR 9.108(B), 9.109(A), and 9.110(B). Even the chair and vice-chair of the ADB are appointed by the Supreme Court. MCR 9.110(C). Hearing panels are in turn appointed by the ADB. MCR 9.111(A). This means lawyers have the same level of “self-regulation” as every other profession, although other professions have their governing bodies appointed by the Governor. If that is a “voice”, it cannot be heard over the background noise.

Meanwhile, the Task Force assertion a mandatory bar provides “a forum for the exchange of all points of view” is a flat out falsehood, as vividly demonstrated by the recent publication of the undersigned’s letter to the editor of the State Bar Journal concerning the current SBM President’s column touting the supposed advantages of a mandatory bar. In publishing undersigned’s letter, the editor allowed the President greater space for rebuttal—something that has been a consistent practice of a series of editors going back 37 years with stunning regularity when undersigned submits a letter to the editor. The SBM provides a forum only if participants who espouse views contrary to those of management are willing to submit to the humiliation of being juxtaposed with an opposing argument to which no reply is ever allowed. To hold up the SBM as worthy of emulation for these tyrannical processes reflects as badly on the Task Force as on the SBM itself.

Last but not least, the Task Force touts “the inclusive nature of a mandatory bar” as providing “the benefit of leadership opportunities for all lawyers.” Leadership of what? A mandatory bar? If anyone wishes to debate the merits of that viewpoint, undersigned will detail, chapter and verse, the manifold foolish positions and antithetical to common sense lobbying perpetrated by the SBM both recently and historically. The Task Force statement is reminiscent of Lt. Scheisskopf from Joseph Heller’s *Catch-22*: “His platoon won ‘Best in Parade’ every Saturday, proving that he was the best in the world *at something of absolutely no value to anyone.*”

And the notion that voluntary bars are not inclusive, or do not provide equal “leadership opportunities” (whatever those may be, and of whatever value to anyone) to those found in mandatory bars, is not only insulting to organizations like the ISBA, but so blatantly lacking in empirical supporting evidence as to make the Task Force claim a self-mockery. As when Big Brother announced an “increase” in the chocolate ration to 50 grams (from last week’s 100 grams<sup>5</sup>), or mandated the motto “War is peace”, the Task Force thinks that, like Humpty Dumpty, it can assign whatever meaning to words it desires, fabricate facts, and ignore inconvenient truths, in order to advocate the conclusion it desired before it ever convened. Shame on anyone taken in by such propaganda.

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<sup>5</sup> George Orwell, *1984*.

## First Amendment Issues

The Task Force begins with the unwavering belief—entirely expected given the composition of the group—that SBM lobbying is a good thing, and so should be preserved and protected. The Task Force takes this approach, notwithstanding its recognition that “(2) the only way to be absolutely certain that a mandatory state bar will never violate members’ First Amendment rights is to have no advocacy program whatsoever”. So the Task Force opts to recommend inevitably violating members’ First Amendment rights, which says to any objective reader everything one needs to know—the Task Force values the State Bar’s institutional interests (and concomitant aggrandizement of the personal power of Commissioners) over everything, including the Constitution every lawyer has sworn to uphold, State Bar Rule 15.3. Such unspeakable fealty to wrong principles should generate only obloquy, scorn and contempt.

The Task Force next makes a grotesque misrepresentation, that only 2 lawyers have sought *Keller* relief under administrative orders since 1990. When this Court first made provision for lawyers to divert a portion of their SBM dues to the State Bar Foundation (an equally unconstitutional remedy for the constitutional violation of SBM lobbying), the approximately \$5 amounts (based on improper SBM accounting methods never subjected to critical scrutiny) aggregated to form, according to N. Otto Stockmeyer, Jr., then a member of the governing board of the Foundation, the largest pool of revenue received by the Foundation until the diversions were discontinued by subsequent administrative orders. Undersigned personally knows of more than 20 lawyers who diverted their dues portion annually, and the actual number had to be in the hundreds at least. In recent years the administrative orders have erected insuperable procedural barriers to effectively opposing SBM lobbying<sup>6</sup>, but constitutional

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<sup>6</sup> The Michigan Supreme Court website currently provides access to only select administrative orders, none of which establish a process for *Keller* objections, so to even ascertain that there is a process for objecting to the SBM’s lobbying, currently set forth in Admin Order 2004-1, Part III, is a non-trivial exercise. Neither the website nor a Google search locates any current or past administrative order addressing State Bar activities. So even if “only two lawyers have sought *Keller* relief under administrative orders since 1990”, the fact that the ability to do so is a well-kept secret says more about the ability to suppress dissent through concealment and artifice than it does about opposition to SBM lobbying. Yet Part III of AO 2004-1 requires members to monitor the SBM website for lobbying activity in order to meet the 60-day (or shorter) deadline for objecting to ideological activity, so, if successful, they can be reimbursed pennies for their efforts.

Meanwhile, the SBM’s deleterious penchant for secrecy has, unfortunately, been fostered instead of barred by the Supreme Court. In Admin Order 2005-41, SBRule 19.2 was promulgated, allowing complete secrecy as to persons who have applied for redress to the Client Security Fund as well as those lawyers whose malfeasance, misfeasance, and nonfeasance generated claims. So not only is the CSF a handy slush fund from which SBM commissioners may reward their friends with collective monies ostensibly held in trust (given the total lack of judicial review or oversight, people with seemingly identical situations receive different outcomes, some receiving maximum CSF reimbursement and others receiving nothing, all with no rhyme or reason that can be scrutinized forensically), while the miscreants who cause reductions in the Fund continue to practice law unimpeded by public knowledge of their disreputability, negligence, dishonesty, or other unworthy traits.

violations are never *de minimis* and cannot be justified on the basis that the rights of only “a few” are trampled. The very notion bespeaks complete disregard by the SBM for its principles, and that this Court would tolerate such anti-constitutional policies and practices, after having sworn to uphold the federal and state constitutions, Const 1963, art 11, §1, cannot be contemplated by anyone who believes in justice.

The notion that there is some kind of public benefit, or positive contribution to the public weal, by SBM lobbying, represents a belief to which Task Force members, who in their various SBM offices have caused the SBM to engage in ideological support on a panoply of issues and cannot face having acting discredibly, firmly adhere. Rather like those who consider evolution and climate change mere theories to be rejected based on political or religious principles, the Task Force does not wish to allow facts to get in the way of belief. But we lawyers operate in an evidence-based adversary system, where facts matter, or at least are supposed to matter.

At the outset, it is useful to look at the *Keller* decision to determine what kind of SBM lobbying is arguably consistent with the First Amendment. In a unanimous decision delivered by Chief Justice William Rehnquist, the Court held that attorneys may be compelled to belong to the State Bar, but that their mandatory dues **could be used only to regulate the legal profession or improve the quality of legal services available to the people of the state.** Reasoning that membership in the State Bar was analogous to membership in a labor union, the Court held that the Bar would have to implement the procedures established in *Chicago Teachers Union v Hudson*,] that is, the objectors were entitled to an adequate **explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker**, and an escrow for the amounts reasonably in dispute while such challenges are pending. *Keller*, 496 U.S. at 16, citing *Hudson*, 475 U.S. at 310. The SBM has never limited its lobbying efforts by adherence, even lip service, to these criteria, and Admin Order 2004-1, Part III, does not provide either an impartial decisionmaker or for escrow of the disputed dues pending adjudication.

Even a cursory review of SBM lobbying shows that, for 40 years, the effort has been ill-conceived, ill-performed, and ill-executed, with the SBM advocating positions that no reasonable person would consider anything short of evil, deleterious to the public interest, and downright stupid, insane, and antithetical to common sense and common decency, and with utter disregard for the First Amendment. Going back to the record in *Falk v State Bar of Michigan*, in the second round of hearings before Special Master James H. Lincoln, Dennis Kolenda (later chief circuit judge of Kent County), proudly testified to the work of his Criminal Law Committee over several years in drafting a new Michigan Penal Code. Kolenda testified that his Committee devoted itself to not only creating the draft Penal Code, but to going over every jot and tittle with a fine tooth comb to assure its consistency, rationality, and value to the public. The SBM Board of Commissioners then took two more years to likewise examine every word, every punctuation mark, and every provision substantively, syntactically, grammatically, and lexicographically, before finally declaring the work finished and instructing the SBM’s paid lobbyist to persuade the State Legislature to enact it. Luckily for all of us, the Legislature for once proved smart enough to recognize an abysmal idea when it saw it, and the SBM Penal Code never saw the light of day even in committee.

On cross-examination, Kolenda was asked to explain the wisdom underlying a section of the proposed Penal Code chosen at random; that turned out to be the deadly force provision. The deadly force section had three basic subsections: (1) would prohibit any use of deadly force in defense of property; (2) provided that deadly force could be used in defense of a person only if the defender had a legal duty to assure the safety of the person defended; and (3) authorized the use of deadly force to prevent an escape from lawful custody. Kolenda at first insisted, under oath no less, that each aspect of the deadly force policy was well-conceived, and assured the audience that he personally supported all of it. But when it was pointed out that:

(1) a person in an iron lung could not use deadly force to prevent a thief from stealing the machine;

(2) a lawyer whose employee was viciously assaulted could not use deadly force against the assailant, unless the employee happened to be the lawyer's child;

(3) a truant officer could use deadly force against a student playing hooky who attempted to flee, Kolenda could only insist "that's not what we meant", while Judge Lincoln, presiding, *sua sponte* fulminated that this was one of the most bizarre ideas he ever encountered, noting that, in over three decades of dealing with juvenile offenders he had never seen one who deserved to be shot.

Fast forward to the present. Undersigned addressed the Task Force to review the SBM's current lobbying effort, which includes:

HB 4025 SBM opposes legislation to more specifically govern processing of landlord-tenant cases, preferring to leave it to local judges. Missing: an explanation for why there is benefit to treating people differently because they live a block apart separated by a district line, and what this has to do with regulating the legal profession or improving the quality of legal services;

HB 4083 SBM opposes bill to require persons convicted of crimes to pay a fee (\$5 for a misdemeanor, \$10 for a felony per case) to support crime stopper activity—reporting crimes and paying rewards for information that leads to criminal prosecutions—on grounds it will be privately administered. Missing: an explanation as to why the SBM used members dues to promote the funding of LAW PAC over 20+ years, which was a privately administered fund, and what this has to do with regulating the legal profession or improving the quality of legal services;

HB 4120 SBM opposes bill creating presumption that joint custody is in best interests of children unless a parent is unfit, unwilling or unable to care for child, on the theory such a presumption endangers battered women. Missing: an explanation as to why the best interests of children should be totally subordinated to an otherwise laudable need to protect battered women (or men), instead of perhaps carving out a domestic violence exception, as well as an explanation as to what this has to do with regulating the legal profession or improving the quality of legal services;

HB 4186 SBM supports bill to expand the power of the judiciary to expunge criminal convictions. Missing: an explanation as to why legislation which usurps the governor's exclusive prerogative to grant pardons, Const 1963, art 5, §14, and doles out executive power to the judicial branch contrary to Const 1963, art 3, §2, represents good public policy in lieu of amending the Constitution to reallocate power among the 3 branches of government (preserving

rather than circumventing the Constitution), and an explanation regarding what this has to do with regulating the legal profession or improving the quality of legal services;

HB 4583 and 4584 SBM opposes bill which would permit a court sentencing an offender for CSC or assaultive crimes to terminate grandparent visitation or parental rights where the offense involved abuse of the child or a sibling. The SBM argues that the judge dealing directly with custody issues, rather than the judge armed with a presentence report and knowing details of the offense and offender, should make such rulings. Missing: an explanation for why family members at risk must resort to additional judicial proceedings and convince another judge of that which the sentencing judge fully appreciates and understands, unless to enhance the opportunity for lawyers to earn more fees and waste scarce judicial resources, and an explanation what this has to do with regulating the legal profession or improving the quality of legal services;

Any hypothesis that SBM lobbying has worthwhile aspects that outweigh the drawbacks and warrant ignoring the First Amendment flies in the face of the evidence and the SBM's deplorable track record of picking the wrong issues for the wrong reasons, leading to the expenditure of mandatory dues in support of wrong-headed policies.

Having based its recommendations on the erroneous assumption that SBM lobbying is a good thing, the First Amendment and the SBM's dismal history to the contrary notwithstanding, the Task Force proposes an admitted improvement, "All State Bar advocacy outside the judicial branch should be subject to a new, rigorous *Keller* process and the State Bar should emphasize a strict interpretation of *Keller*." As far as it goes, even the undersigned regards that as a long overdue improvement. But why this should be limited to "advocacy outside the judicial branch" is neither explained nor justified. Certainly, there is nothing magical about SBM advocacy within the judicial branch that insulates it from First Amendment strictures. So, if advocacy is not to be entirely prohibited, then the first change should be: (1) "All State Bar advocacy, in any form and whether targeted at government or the public, should be subject to a new, rigorous *Keller* process and the State Bar should emphasize a strict interpretation of *Keller*."

The next recommendation is "2. State Bar Sections that engage in external advocacy should do so only through separate entities not identified with the State Bar." Again, even the undersigned regards that as an improvement; otherwise, as was the case with LAW PAC, sections get to trade on the good name of State Bar members who neither belong to the section nor support its positions. *State Bar of Michigan Solicitation for Political Action Committees*, 462 Mich cxlii, cxliii-cxliv (2000). But that addresses only half the problem; whenever the State Bar itself engages in advocacy, it is purloining the professional reputations and private rights of dissenting members for whom it purports to speak. Undersigned speaks from experience that there is nothing quite so galling as laboring with another organization (in the particular instance, Common Cause of Michigan) to obtain passage of what became the Open Meetings Act, MCL 15.261 *et seq.*, and Freedom of Information Act, MCL 15.231 *et seq.*, only to find that one's mandatory dues are being spent by the SBM to oppose those efforts, making achievement of undersigned's original goal more difficult. Because the SBM when engaged in advocacy can NEVER with assurance claim to represent the views of all of its members, the very use of the name "State Bar of Michigan" to flog a position constitutes a theft of dissenting members' rights to exploit their own names and professional reputations as they see fit, and to correlatively

prelude anyone from claiming to speak for them or profit from use of their names or images without prior permission. See *Pallas v Crowley-Milner & Co*, 334 Mich 282, 285; 54 NW2d 595 (1952). And, by associating dissenting members with views they consider anathematic to the public good, the State Bar puts its dissenters in a false light, which is yet another breach of the right of privacy. The elements of a claim for false light invasion of privacy were stated in *Duran v Detroit News, Inc*, 200 Mich App 622, 631–632; 504 NW2d 715 (1993):

In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position.

Recently, the State Bar, for the first time since undersigned became a member in 1972, solicited member input as to whether the SBM should engage in advocacy concerning SB 743, a bill to repeal MCL 600.901 and thereby replace SBM with a voluntary organization, leaving attorney regulation and discipline to the Supreme Court. Undersigned was one who opposed SBM advocacy and support SB 743, but undersigned and others were ignored. SBM proceeded to advocate against SB 743 and to represent to the Legislature that lawyers in Michigan, as a group, oppose a voluntary bar and support a mandatory bar. But whatever responses were given to the SBM e-mail, there was no debate among members, where those open to reason were exposed to any views except those of the SBM Commissioners and Executive Director. The process was thus an indulgence to provide camouflage making it appear that members had an actual voice when the Commissioners had already made up their minds and gave not a shrift of attention to opposing views.

Moreover, in taking that position, the SBM Commissioners fell back on the discredited claim that the SBM was made mandatory by virtue of the Michigan Supreme Court's exercise of its inherent power to establish practice and procedure. This shibboleth was exposed as a complete falsehood during the dedication of the then "new" wing of the SBM building, when the SBM President reflected that the SBM was created by 1935 PA 58, prior to which the voluntary bar had unsuccessfully lobbied the Supreme Court to do so by administrative order. Meanwhile, the authority to establish rules of practice and procedure, Const 1963, art 6, §5, has nothing to do with lawyer regulation. Opposing SB 743 on grounds the Supreme Court can, or should, use some inherent power to reconstitute a mandatory bar is nonsensical—if the Supreme Court wanted to do so, nothing has stopped it from taking such action for 80 years. Should SB 743 become law, it would do nothing to inhibit the Supreme Court from doing anything, so the entire basis of SBM opposition is founded on gossamer.

Meanwhile, SBM took advantage of the opportunity it exploited to announce its anti-SB 743 campaign to lobby its own members, offering the following false assertions:

**Frequently Asked Questions About Mandatory Versus Voluntary Bar Status**

- Do lawyers in voluntary bar states pay anything to practice law? [YES](#)
- Does a mandatory bar deliver value to its members that a voluntary bar can't? [YES](#)
- Are the State Bar of Michigan's public service and access to justice programs better than what voluntary bar states can provide? [YES](#)

Each “YES” was a hyperlink that took interested readers to this bumf:

**Do lawyers in voluntary bar states pay anything to practice law? YES**

Lawyers in voluntary bar states pay licensing fees rather than mandatory bar dues. The annual licensing fees can be more than the annual dues in mandatory bar states. In fact the most expensive state in which to maintain a law license is a voluntary bar state, where licensing fees and special assessments are more than double State Bar of Michigan dues. The licensing fees finance the regulatory system only. Joining the voluntary state bar or a local bar for the benefits of association membership is an additional expense.

**Does a mandatory bar deliver value to its members that a voluntary bar can't? YES**

The larger mandatory bar has buying power for member benefits that a voluntary bar does not have. Because of our size, the State Bar of Michigan is able to offer a variety of [cost-saving and practice aid benefits](#) that would not be matched in a voluntary bar. For some State Bar of Michigan members, a single benefit like the [eJournal](#) or [Casemaker](#) alone delivers more in value than the cost of annual dues.

Beyond that, there is an intrinsic but unquantifiable value in the type of self-regulation that the mandatory bar represents. In mandatory bar states, lawyers have a unique institutional voice in determining the conditions and cost of their licensing and regulation. In exchange for this privilege, the mandatory bar assumes responsibility for programs designed to [protect the public](#) and promote [access to justice](#). In voluntary states, the practice of law essentially is treated the same as all other professions and trades. In contrast to a voluntary state bar, a mandatory state bar offers a forum for the exchange of all points of view within the profession. Some of the most notable achievements of the State Bar are unlikely to have been produced by a voluntary bar -- the drafting of the [Revised Judicature Act](#) itself, the [Estates and Protected Individuals Code](#), [indigent criminal defense reform](#), the [Judicial Crossroads Task Force Report](#).

Finally, as a mandatory bar, the State Bar provides a stable foundation for a well-established and dynamic network of [sections](#), each of which delivers specific, practice-focused value to its members and the public.

**Are the State Bar of Michigan's public service and access to justice programs better than what voluntary bar states can provide? YES**

Although voluntary state bars can and do offer admirable public service programs, the quality and range of the programs in mandatory bar states typically is more comprehensive and more stable. To replicate the State Bar of Michigan's programs on [access to justice](#), protection from [unlicensed or unethical legal service providers](#), [ethics](#), [lawyers and judges assistance](#), and [lawyer expertise in improvements on court rules and the laws affecting the system of justice](#) likely would require taxpayer expenditures or special assessments on lawyers imposed through legislation.

Every single statement therein, aside from the assertion that lawyers in voluntary bar states pay licensing fees, is false or deliberately misleading. For example, the claim that in one voluntary bar state the licensing fee is more than double fails to describe what quality of regulatory services are provided there compared to Michigan. As detailed to only a modest degree in the Complaint in *Falk v Attorney Grievance Comm'n*, Mich S Ct No 149308, the competency and quality of attorney regulation in Michigan is abhorrently horrific; if elsewhere a

semblance of competent regulation can be obtained for double the price, that is a bargain. Contrariwise, when we in Michigan get zero value for our dollar of regulatory fees (separately billed), a low price does not represent bragging rights among sentient creatures.

All the claims about “buying power” are blatant lies. As shown earlier, the ISBA, a voluntary organization about 1/3 the size of the SBM delivers every one of those things to its members at a lower price. Meanwhile, how SBM calculated that the value of E-Journal or Casemaker “delivers more in value than the cost of annual dues”, using Generally Accepted Accounting Principles, is a mystery Eleusinian in its lack of proof and sinister in its design to misrepresent and mislead. Once again, self-interested braggadocio and puffery trumps the total absence of supportive evidence.

Claims concerning the supposed value of “self regulation” have been shown to be grounded in sheer fantasy (above). Likewise the claim that the mandatory bar provides a forum “for the exchange of all points of view within the profession.” (*Id.*) But aside from that forum coming with an unacceptably elevated price tag—members expressing views not shared by the SBM President, Commissioners, or Editor must submit to being rebutted, without right of reply—it is clear that voluntary bars provide at least equivalent, likely superior *fora* (superior because they do not insist on rebutting opposing viewpoints). And, most importantly, inasmuch as voluntary bars suffer consequences from advocating atrocious ideological positions—a vulnerability whose complete absence has encouraged the SBM to strive for, and often achieve, ever greater heights of institutional idiocy—they necessarily cater to a broader cross-section of views, because their survival depends upon it. Mandatory bars are immune from member dissatisfaction, and thus can, and do, cater to and cultivate only the approval of chosen elites, leaving the hoi polloi to fend for themselves.

Finally, the SBM claims about the comparative quality and merits of its own public service and access to justice programs as opposed to those of voluntary bars is risibly self-congratulatory and facially untrue. As noted earlier, the ISBA, for one, equals or exceeds the SBM in every category.

The third recommendation by the Task Force is that “3. Funding of Justice Initiatives activities should be subject to a formal *Keller* review.” There is a barely more comprehensible statement on p. 14 of the report that similarly sheds no light on exactly what activities or programs this involves, but the accompanying proposal to protect First Amendment rights by requiring a  $\frac{3}{4}$  majority of the Board of Commissioners is both insulting and woefully inadequate to the task. First and foremost, whether  $\frac{3}{4}$  or  $\frac{7}{8}$  or  $\frac{19}{20}$  of the Commissioners are willing to violate my First Amendment rights does not make it proper that they proceed with their nefarious plans. Second, as noted with respect to SBM opposition to SB 743, which was the product of unanimous action by the Commissioners, there is no basis whatsoever in the record to believe that a  $\frac{3}{4}$  majority of the Commissioners is more probative of underlying wisdom than zero Commissioners, since all of them get it wrong with depressing regularity, of which SB 743 is merely one case in point. Given the admission that such initiatives, whatever they have been in the past, are often ideological, an absolute prohibition is the preferable, and constitutional, alternative.

## Governmental Relations Program Recommendations

The Task Force opens with the proposition that “a substantial portion of the work of the Governmental Relations Program does not implicate State Bar members’ First Amendment rights.” That is an admission that at least some of the work does trample members’ First Amendment rights. The proposal to create a *Keller* review panel, with a majority of panelists appointed by the SBM, the very organization that has been suborning the First Amendment for over 40 years, manifests yet another exemplar of putting lipstick on a pig and calling it a beauty queen. If the SBM believes that it can justify this program to skeptical neutrals, then zero members of such a panel should be appointed by one of the advocates seeking its imprimatur and approval, and a majority should be appointed by the undersigned, or the ACLU, or some person or group with an unblemished record of vindicating First Amendment values. Stacking the deck once again ought to violate what former Chief Justice Taylor called the “smell test”, and only a Task Force shamelessly adopting the biased predilections of a biased organization would table such a proposal without seeming embarrassment.

Granting that some court rule advocacy is related to improving the system of justice or public access to justice, court rule advocacy can conceal or simply directly implicate ideological principles driven by monied interests or other groups with selfish motivations. A case in point played out in *McDougall v Schanz*, 461 Mich 15, 29; 597 NW2d 148 (1999). But more importantly *McDougall* expressly recognized that court rules can “encompass important policies involving commerce or legal rights”, *id.* at 31 n. 16, which can surely have ideological dimensions. When court rule advocacy before the judicial branch may merely operate as a substitute for equivalent advocacy in the legislative or executive branch, insulting such activity from the same *Keller*-mandated restrictions and considerations applicable to other forms of ideological activity is neither logical nor appropriate.

Next, the Task Force proposes that “Michigan should adopt a narrow interpretation of *Keller*, bounded within the two purposes endorsed by *Keller*—regulating the legal profession and improving the quality of legal services.” At last, a sensible and inarguably meritorious suggestion escapes the suction of the SBM’s eternal First Amendment quagmire. But one more thing is necessary to make this concept the vehicle for constitutionalism it ought to become: those *Keller* criteria must be understood according to the verbal formulation here quoted from the Task Force report. The SBM habitual past practice of deeming everything it does as in some sense coming within that ambit can no longer be tolerated.

And two additional caveats are also warranted: some activity that might clearly appear to be regulation of the legal profession violates the First Amendment even when pursued by voluntary bars or disciplinary authorities. *In re Primus*, 436 US 412; 98 S Ct 1893; 56 L Ed 2d 417 (1978); *Shapero v Kentucky Bar Ass’n*, 486 US 466, 476-477; 108 S Ct 1916; 100 L Ed 2d 475 (1988); *Gentile v State Bar of Nevada*, 501 US 1030, 1048-1049; 111 S Ct 2720; 115 L Ed 2d 888 (1991); *Zauderer v Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 US 626, 637; 105 S Ct 2265; 85 L Ed 2d 652 (1985); *Ohralik v Ohio State Bar Ass’n.*, 436 US 447, 457; 98 S Ct 1912; 56 L Ed 2d 444 (1978). And irrespective of First Amendment considerations, some attorney regulatory activity may violate the antitrust laws. *Goldfarb v Virginia State Bar*,

421 US 773; 95 S Ct 2004; 44 L Ed 2d 572 (1975). In the latter regard (as well as the former), economic or ideological interests of various substrata of the legal profession may be using the SBM as a cats' paw to advocate naked private interest under the guise of attorney regulation, so a flat prohibition on SBM advocacy best insures that the public interests that permit formation of a mandatory bar in the first instance are not perverted or misapplied to improper ends and purposes.

Task Force recommendations 3 and 4 under this heading are rehashes of similar or equivalent proposal under prior headings, and replete with the same fatal constitutional and logical flaws. Moreover, under #4, the Task Force immediately shows how quickly *Keller* can be twisted by assuming that advocacy that relates to “providing or impeding legal services for the poor or disadvantaged, or by affecting the delivery of legal services by lawyers, other legal service providers, or the courts” represents something that improves or diminishes the quality of legal services. But what is here being described concerns the quantity, not the quality, of legal services<sup>7</sup>. Quality would involve something such as regulation of specialization, such as that maintained by the ISBA under the auspices of the Iowa Supreme Court, or continuing legal education requirements (were it ever shown that CLE actually had an empirical relationship to improving the quality of legal services; in Michigan, sadly, the evidence tends strongly to the opposite conclusion, the utter disaster that was the SBM-administered mandatory CLE for attorneys admitted less than 5 years being Exhibit Number 1 for the prosecution). If the Task Force, after being sensitized by its labors and the information it collected, as well as the dissenting voices within it, so miserably fails to comprehend “quality”, there is zero hope that the SBM will actually reform its practices or respect any reformulation of *Keller* limitations, and only an absolute prohibition against advocacy as to any issue in any forum can insure compliance with the First Amendment.

### **Section Advocacy Recommendations**

Most of the Task Force's recommendations are sound and a step forward toward putting SBM into compliance with the First Amendment.

That said, some of the recommendations are nonetheless problematic. For example, “5. The State Bar may collect voluntary dues for Sections' legislative or executive branch activities as long as the Sections pay the cost of collection activities”, again, as with LAW PAC, puts SBM in the position of subsidizing political and ideological activity. Just as with LAW PAC, SBM administrative support of section activity of this nature

- 1) \* \* \* involves the bar in appearing to endorse or promote partisan candidates and political positions that may be opposed by individual members of the Bar.
- 2) No attorney should be required to join an organization that engages, through the conferring of direct or indirect benefit or assistance, in the promotion of partisan or political activities. Lawyers who disfavor the positions of a political committee or who disfavor the political candidates supported by a committee should not, as a condition of engaging in their profession, be required to join an organization providing benefits to such a political committee.

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<sup>7</sup> The Task Force also iterates

3) The [use of State Bar personnel and resources to collect monies for independent Section entities to expend in pursuit of political and ideological activity] confers a benefit upon the [independent Section entities].

462 Mich at cxliii-cxliv<sup>8</sup>.

To like effect, but even worse in terms of conveying to the public SBM support for the extraneous political and ideological activity of independent Section entities are recommendations 6 and 7:

6. Section advocacy information hosted on Section webpages on the State Bar website should be accessible only to Section members.
7. Sections should be allowed to use the State Bar building and facilities on the same terms as all other lawyer groups, but should reimburse the State Bar for special services that may support non-*Keller*-permissible activities provided by the State Bar.

The only possible message an objective observer could obtain from visiting the SBM website and finding links to political or ideological activity is that SBM has chosen to associate itself with whatever views are being flogged at the hyperlinked sites. And any non-reimbursed use of SBM facilities, whether building, personnel, member lists of information, computer resources, space on the dues notice, or mention in the *Bar Journal* or E-journal is a subsidy by SBM, plain and simple. SBM cannot do indirectly, by subsidizing others, what it is prohibited from doing directly; if it could, the limits on SBM activity would be imaginary and easily circumvented.

Absolute prohibition of any form of subsidy, subvention, or assistance, whether monetary, monetary-equivalent, or even the mere poaching of the SBM name, logo, or reputation (or that of members who have not given express permission for anyone to associate the member with a political or ideological activity), must be the order of the day. It is constitutionally permissible to flatly bar such subsidization, *Ysursa v Pocatello Ed Ass'n*, 555 US 353, 359 ff; 129 S Ct 1093; 172 L Ed 2d 770 (2009), and no compelling reason to do otherwise has been put forward.

Nor should independent Section entities (ISEs), formed for political and ideological purposes, be recognized as “lawyer groups” given preferential terms for use of SBM facilities of any kind; if SBM facilities are made available to the public on some terms, ISEs should get the same terms that a political convention would obtain, no better, no worse. By intention, design and inherent characteristics, ISEs are essentially political or ideological organizations, not “lawyer groups”; any law-related aspect of an ISE is subservient to the dominant political or ideological purpose.

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<sup>8</sup> Bear in mind the further lesson furnished by the closing chapter of the LAW PAC impropriety. As soon as SBM ceased providing subsidies to LAW PAC, LAW PAC quickly died, demonstrating that it was the SBM subsidies that both brought LAW PAC into existence and then sustained it. Left to fend for itself in the marketplace of ideas, LAW PAC rapidly went the way of the dodo bird, which is true poetic justice.

The further comment by the Task Force, that “Sections of the State Bar enhance the quality of legal services in Michigan by providing members with educational and networking opportunities in specific practice areas”, appears to be an assumption rather than a conclusion predicated on objective empirical study. Like the SBM’s ill-conceived and mismanaged CLE program, the hypothesis that educational or networking opportunities will enhance the quality of legal services is entirely unproved (and, in the case of CLE, was affirmatively disproved by painful experience, leading to the abandonment of mandatory CLE). Indeed, given the Task Force admission that SBM subsidizes section activity, the Supreme Court should insist on an objective study designed to determine whether sections do enhance the quality of legal services (there may be different answers for different sections<sup>9</sup>) before allowing existing SBM subsidization of section activity to continue.

### **Justice Initiatives Program Recommendation**

The Task Force recommends continuing the program, but with “heightened *Keller* scrutiny”. It proffers the rationale that

The Justice Initiatives program is grounded in the ethical obligation of attorneys to promote improvement of the law, the administration of justice, and the quality of legal services, and to render public interest legal service. Accordingly, this program is germane to the compelling state interests recognized in *Falk* and *Keller*.

Once again, the Task Force has indulged a hypothesis that is erroneous; with a flawed major premise, its syllogism leads to an insupportable conclusion, all the worse because it also forgot the holding of *Keller* and so perverted its essential meaning.

While perhaps most would agree that lawyers should promote improvement of the law, the administration of justice, and the quality of legal services, and render public interest legal service, there simply is no ethical *obligation* to do any of those things. Indeed, the only one of those four things even mentioned in the Michigan Rules of Professional Conduct is *pro bono publico* service, MRPC 6.1, and even that is merely a “should”, not a “must” or a “shall”. “Should” is purely precatory, not mandatory, and therefore not obligatory—particularly when, elsewhere in the MRPCs, the word “shall” appears repeatedly, including in the same subchapter, MRPC 6.2 and 6.3(d) and (e), 6.4, 6.5(a) and (b). *People v Fosnaugh*, 248 Mich App 444, 455; 639 NW2d 587 (2001); *Branham v Thomas Cooley Law School*, 689 F3d 558, 562 (CA 6, 2012) (“should” denotes a suggestion but not a requirement).

Not only is the major premise of ethical obligation completely wide of the mark, but *Keller* limits the use of mandatory dues to regulating the legal profession or improving the

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<sup>9</sup> Undersigned found himself an involuntary member of the Young Lawyers Section, which did nothing to enhance the quality of legal services in the relevant years (1972-1983), and equally sees no such value, or any other value, in the Master Lawyers Section for which he is eligible but whose siren song he has so far withstood. Many of the most xylocephalic lobbying positions of SBM have originated with sections, so any quality enhancement has to be weighed against the detriments before pronouncing any particular section a positive contributor to legal service quality.

quality of legal services available to the people of the state. Improvement of the law or of the administration of justice and the rendition of *pro bono* services addresses neither of the two prongs of *Keller*-sanctioned activity. Obviously, “improving the quality of legal services” tautologously comes within *Keller*’s permissive ambit, BUT nowhere has the Task Force addressed, still less demonstrated with persuasive, probative evidence, that the Justice Initiatives Programs actually contributes anything to that end.

Meanwhile the Task Force concedes that the Justice Initiatives Program can and does “involve ideological content.” The Task Force solution—allow such unconstitutional activity of ¾ of the SBM commissioners vote to violate the First Amendment—is a repetition of an embarrassing and entirely unacceptable sentiment earlier invoked in another context, with equal impropriety. Although the tactic of repeating a Big Lie often enough is supposed to contribute to its acceptance, surely the Supreme Court is too astute to be fooled in this way. Ideological content is unconstitutional, and the only proper action when faced with unconstitutional activity is to prohibit it entirely.

### **Regulatory Role of the State Bar**

The Task Force recommends better integration of the scattered functions of various attorney regulatory agencies; with that concept generally, undersigned has no particular quibble.

But the Task Force immediately goes off the rails by proposing to enhance the role of SBM in the regulatory process, which is exactly the wrong thing to do. SBM is designed to operate as a membership organization, but attorney regulation and discipline cannot be subjected to processes involving popularity contests. Prisoners might be allowed to have a newsletter or organize sports contests, but no rational person would allow prisoners to choose the prosecuting attorney or the presiding judge.

The better thing to do is put all the regulatory machinery, whether character and fitness or grievance intake, directly under the auspices of personnel appointed by the Supreme Court and subject to the Supreme Court’s immediate and continuing oversight. That may be the AGC, the ADB, or the Board of Law Examiners, all of which should report regularly and in detail to an ombudsman/czar who in turn reports to the Chief Justice and the Associate Justices. History has proved, more than once, that the more “hands off” the Supreme Court is to the disciplinary and regulatory authorities, the worse the performance of its appointed agents, as detailed in the Complaint in *Falk v Attorney Grievance Comm’n et al*, Mich S Ct No 149308 and exemplified by the recent dismissal of the Attorney Grievance Administrator (a laudable but insufficient first step). This inexorably lead to rejection of Task Force recommendations 6, 7 and 9 as predicated on assumptions of continued SBM involvement in regulatory and disciplinary matters that is inappropriate and wrong-headed.

Given that the SBM should be extracted totally from any connection to attorney admission or discipline, the Task Force’s related recommendations, *viz.*

3. The State Bar should have a formal consultation role in the selection process for appointments to the Attorney Grievance Commission and the Attorney Discipline Board.

4. The State Bar should have a formal consultation role in the selection process for the grievance administrator and deputy, and for the executive director of the Attorney Discipline Board.
5. The State Bar should have a formal role in the budgeting process for both the Attorney Grievance Commission and the Attorney Discipline Board, and should assist both agencies in preparation of their budgets. The budgets should be presented for approval to the Supreme Court as a single attorney discipline system budget, noting ancillary State Bar functions.

must likewise be rejected as putting the fox in the henhouse, when a fox-proof fence must be the order of the day. All three of these proposals represent quintessentially bad ideas that should never see the light of day. Again, among sentient beings, prisoners do not review or approve the prosecuting attorney's budget.

Recommendation number 8 (“The State Bar should undertake an examination of services offered in other states to determine whether they would enhance the effectiveness of the Michigan discipline system: mandatory arbitration of fee disputes, voluntary arbitration of attorney malpractice claims and other grievance-related disputes, and mediation of disputes.”), although misdirected in terms of SBM involvement in evaluating or reorganizing disciplinary procedures, where SBM has neither expertise nor competence, contains other impolitic or unlawful ideas within its lines. The very notion that a group of lawyers, all of whom have sworn to uphold the Michigan Constitution, would even consider the possibility of “mandatory arbitration” of anything should cause any self-respecting Michigan lawyer to recoil in abject horror. Under Const 1963, art 1, §14 and art 6, §§1 and 13 *inter alia*, arbitration of any civil dispute can never conceivably be mandated by a [quasi[ ]governmental agency, nor could a group of lawyers agree to include binding arbitration in all their retainer agreements, or impose such a requirement on others (that would violate the Sherman Act as well as common decency).

As for studying voluntary arbitration of attorney malpractice claims and mediation of disputes, one supposes SBM can study anything, although unless it can persuasively demonstrate that the study is designed to enhance the quality of legal services (which seems off topic, at best; mostly this appears to be furthering the interest of a trade association in protecting its members from legal liability and judicial scrutiny regarding their wrongdoing), *Keller* precludes using mandatory dues to conduct such inquiries.

Task Force recommendation #10 regarding the hiring and review of the SBM Executive Director appears to fall into a category of issues which having nothing much to do with *Keller*, although the fact that the current ED has signed on to the Task Force Report suggests she may be too far gone ideologically to continue in her position if *Keller* is properly honored and implemented.

The Task Force's remaining recommendation, that “The status of attorney discipline employees as State Bar employees should be clarified, and the State Bar should be the central provider of personnel services.” is just absurd. There is no reason whatever that the Grievance Administrator or his or her subordinates, or BLE or AGC employees should look to the SBM for personnel services or as their employer. All such personnel should be placed under the authority

of the SCAO or the Supreme Court itself for all such purposes; certainly, there is no constitutional impediment to such unified organization of the disciplinary authorities and the adjudicative function when the actual activities are kept properly separated and independent. *FTC v Cement Institute*, 333 US 683, 701; 68 S Ct 793; 92 L Ed 1010 (1948). Given that the Supreme Court has long declared the AGC the “prosecution arm of the Supreme Court” *vis à vis* supervision and discipline of Michigan attorneys, MCR 9.108(A), while the ADB is the corresponding “adjudicative arm”, MCR 9.110(A), continuation of that relationship on a basis that facilitates addressing all relevant personnel issues within the Supreme Court is the preferred solution to any shortcomings in current arrangements.

### **State Bar Governance Issues**

These recommendations seem to involve a power struggle between two different SBM elites, each of which sees itself as the font of all wisdom. Undersigned has no dog in this fight and proffers a pox on both houses.

### **Dues and Licensing, *Pro Hac Vice* and Recertification Issues**

Again, the proper level of dues for inactive members of SBM is not a *Keller*-related issue, and undersigned therefore has no substantive comment.

As for licensing, *pro hac vice* and recertification issues, the SBM should not be part of the internal discussion, and especially should not be part of the decision-making group, for reasons previously adduced in relation to disciplinary and regulatory functions. If further study of such matters is warranted, one or more of the BLE, AGC, or ADB is the agency to conduct them and formulate recommendations on which the public, including SBM, may then comment if published for that purpose by the Supreme Court.

Respectfully submitted,

/s/ *Allan Falk*

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