

July 30, 2014

Office of Administrative Counsel  
Michigan Supreme Court

Re: Comments on the Task Force Report per Supreme Court Order 2014-5

PUBLIC  
INTEREST  
LAWYERS

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I appreciate the opportunity to comment on the Report of the Task Force on the Role of the State Bar of Michigan. I believe the context of my comments originate from a perspective of having served on the Representative Assembly, the Board of Commissioners and as the Bar's 59<sup>th</sup> President generally during the era that produced decisions in *Falk*, *Falk2* and *Keller* (citations omitted). I do not think it unreasonable to say that these cases attempted (and succeeded) in further limiting decisions such as *Lathrop v Donohue*, 367 U.S. 820 (1961) and *Abood v Detroit Bd of Educ.*, 431 U.S. 209, (1977) as applied to the State Bar of Michigan (the Bar's) constitutional, public and rule of law role and obligations versus its individual member's First Amendment beliefs and right of objection when common monetary dues were involved in public advocacy. I was a contrarian then and I remain unconvinced that the *Abood*, *Keller*, and most recently, *Harris v Quinn*, No. 11-681 (June 30, 2014) decisions were correctly applied to institutions such as mandatory Bar associations, whose advocacy efforts regarding its statutory, rule of law and fiduciary obligations are (or should be) primarily focused on the protection of the public including its efforts as a check and balance to the powers of the judicial branch of government.

First, I recognize the able work of our legal colleagues and Task Force members in their attempt to address the court's Administrative Order No. 2014-5. Given its main but narrow mandate which focused on addressing the mandatory Bar's "ideological activities" versus an individual member's First Amendment rights to forgo any portion of dues used in furtherance of such activities, the Task Force's conclusions, in their most narrow sense were necessarily pre-ordained. I read their primary conclusion as the mandatory Bar or any sub-entity speaking for the bar, can take no collective "ideological" position which, within the realm of an individual member's political speculation, and in their initial sole determination, infringes on that member's First Amendment rights. The primary question asked by this court and the Task Force response assume *Keller* at its nadir in terms of the advocacy responsibilities of a mandatory Bar to speak for the public it serves. It assumes *Keller* trumps all other professional and ethical rights and responsibilities. It should not.

Respectfully, the reasoned question should be, should the *Lathrop / Keller* line of cases be re-examined in light of the ethical and rule of law responsibilities owed by the State Bar of Michigan as a unified Bar, to the citizens of the State of Michigan? If so, how and when should it be allowed to spend dues monies of dissenting members in furtherance of its statutory mandate, its mission statement, its strategic plan and most importantly, in light of the Rules of Professional Conduct as mandated by this court?

If this court agrees with the Task Force report, it should dismantle the mandatory Bar as regards to those functions unrelated to its Disciplinary and Client Protection Fund. Having said that, I strongly disagree that should be your conclusion. I believe the mandatory Bar should remain but not in the model suggested by the Task Force. I would respectfully urge you to re-examine the entire line of decisions from *Lathrop* through *Keller* through *Harris* in regards to balancing a mandatory Bar's obligations to the public versus its individual member's constitutional right to protest partial payment of dues contributing to the Bar's protection of the public. I suggest you reconsider the *Lathrop/Keller* path the courts have directed us, as a legal profession, to take over the last fifty years. But I suggest it be done through properly filed litigation, involving a valid case and controversy versus closed door administrative rule making speculation of what *Keller* means in terms of the First Amendment rights of the competing parties- the Bar versus its dissenting member.

If you were to take this challenge, I would urge you to examine what we are not. We are not a collective bargaining unit as articulated in *Abood* and *Harris* and their historic line of cases. Our ideological speech is intended for the betterment of the people we serve, the public. Our ideological speech is intended as a check and balance on government, in whatever form or branch addressed. Historically as a Bar, our ideological speech is and has been properly tempered and reasoned by a self-imposed democratic process including an independently elected and geographically diverse Representative Assembly and Board of Commissioners and its numerous committees and sections. This court should recognize the Bar's collective and rational wisdom be balanced in the Bar's favor against the ideological First Amendment demands of any one of its 40,000 plus members. Each of us as a mandatory member gives up no personal constitution right to speak or express our ideological views. But, each of us should recognize that under our sworn fiduciary roles as Public Citizens and Officers of the Court, we also defer to our collective body, the Bar, to speak to issues impacting the rule of law, the administration of justice and any such matter that post *Keller*, has been restricted by this court's administrative orders from 1992-4 through 2004-01.

Further we are not public employees. Though subject to the court's administrative rules as how we meet our professional and fiduciary client obligations, we are not subject to any uniform obligations as regards to wages, benefits, hours of employment or any such regulation as found in the mandatory fee organizations addressed in *Abood* and *Harris*. The Bar is not an employment body, is not subject to the likes of the Michigan Public Services Commission, it is a body statutorily mandated (PA 1935-58, as amended) whose members are obligated to

mandatory membership as “officers of the courts of this state,....”. Its original Rule, Section 1 reads in part:

..... The Association *shall*, under these rules aid in the promotion of improvements in the administration of justice and the advancement of the science of jurisprudence, in the improvement of the relations between the profession and the public and in the promotion of the interests of the legal profession in this State.

This statutory mandate is far removed from the court’s imposed restrictions found in its present Administrative Order 2004-01. Our collective obligations as Officers of the Court and Public Citizens are fully compromised by the court’s unilateral attempts to regulate the Bar’s compliance with *Keller*. I have never understood how an individual Bar member or this court could speak to supposed *Keller* violations or imposition of an administrative rule supposedly regulating *Keller* activity without the necessity of an appropriate case and controversy. Without case and controversy, the court’s unilateral imposition of successive narrowing *Keller* Administrative Orders is simply chilling in First Amendment jargon.

I would urge you to re-read and reexamine the basic tenants as why we, as lawyers organize as a mandatory body collective. Besides the PA 1935-58, among the relevant documents I would urge you to consider:

1. The Mission Statement of the State Bar of Michigan:

“The State Bar shall aid in promoting improvements in the administration of justice **and advancements in jurisprudence**, ....”

2. The Strategic Plan of the State Bar of Michigan:

“...the strategic plan is built and positions the State Bar of Michigan ... **(to) advocate for an open, fair and accessible justice system....**”

“Public Policy Goals:

2. The State Bar of Michigan **Will Aggressively Advocate for Issues That Support its Statement of Purpose,....**

2.1 Support judicial integrity by promoting a fair, impartial, independent judiciary, ....

2.3 Maintain timely and ongoing communication with the state legislature and Michigan Supreme Court on policy issues affecting the legal system, centered around the knowledge and expertise of the State Bar’s membership....”

### 3. State Bar Rules of Michigan:

#### Rule 1 State Bar of Michigan

“.... The State Bar of Michigan *shall*, under these rules, aid in promoting improvements in the administration of justice **and advancements in jurisprudence, ....**”

4. Importantly, The Preamble to the Michigan Rules of Professional Conduct. These mandated court rules essentially order lawyers to abide by certain fiduciary obligations.

A few relevant extracts clearly state our duties as lawyers and as a collective body of lawyers:

**“A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.**

**As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession.**

and most relevant,

**An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”**

Respectfully, that fiduciary duty and obligation includes the Bar’s recognition that the Michigan Supreme Court is “government” regardless of the court’s imposed limitation under Administrative Order 2004-1 (B), which essentially limits the Bar’s role to the “improvement of the functioning of the courts”. A nebulous mandate, ambiguous and devoid of what may be defined as in the public’s interest. The enabling statute and the rules of self-regulation that maintain the the Bar’s independence from government domination is built on this assumption: that those sworn to uphold the law will also seek laws worthy of upholding. The historic line of *Keller* Administrative Orders and the Task Force Report’s recommendations will result in an-Order not worthy of upholding within the mandates of a mandatory Bar.

Our duty to the public, our responsibility as Public Citizens and as Officers of the Court, is not only our individual responsibility but our duty as a collective organization of lawyers, democratically run and bound by upholding our obligations through a mandatory Bar association. Logic and plain meaning dictate that where a court adopts the ethical and regulatory rules each of the member lawyers are mandated to abide by and each lawyer is mandated to be a member of the Bar, the Bar itself, as an organization of lawyers, must reflect and conform to the reality of the four corners of our

ethical obligations. Our collective ethical responsibilities are no less than our individual ethical responsibilities. Our collective First Amendment voice, democratically determined, outweighs an individual member's right of dictating and negating this collective expression.

A reading of the Taskforce Report can only lead to the conclusion that if adopted by the Court, our duties as Public Citizens and Officers of the Court will be diminished to the point of ethical and fiduciary abdication. Therefore, I would ask you consider caution in both acceptance of the conclusions of this report or the issuance of an amended *Keller* Administrative Order. I would urge you to re-examine *Keller* and its pre and post line of decisions, in light of the profession's obligations as Public Citizens and Officers of the Court and our collective role in the preservation of the rule of law. If after consideration, you truly believe the court has a statutory right or obligation to impose even more restrictive *Keller* directives on the mandatory bar, please consider abstaining by imposing another unworkable Administrative Order and deferring until an appropriate constitutional controversy is raised in an actual case brought before the court. If you are truly concerned about constitutional protections, the First and Fourteenth Amendments would demand no less.

Sincerely,

A handwritten signature in black ink, appearing to read "MHD", with a long horizontal line extending to the right.

Michael Hayes Dettmer (P12709)  
59<sup>th</sup> President, State Bar of Michigan  
Former United States Attorney, WDM.