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COMMENTS OF PROFESSOR ROBERT A. SEDLER ON THE REPORT  
OF THE TASK FORCE ON THE ROLE OF THE STATE BAR OF MICHIGAN

I am Distinguished Professor of Law at Wayne State University, where I teach the courses in Constitutional Law. I have published extensively in the area of the First Amendment, including a lengthy section on the First Amendment in my book, *CONSTITUTIONAL LAW IN THE UNITED STATES* (Walters Kluwer, 2d. ed. 2014), and numerous law review articles on the First Amendment, the latest of which is "Law of the First Amendment" Revisited, 58 *WAYNE LAW REVIEW* 1003 (2013), and as the title indicates, is a revisit of an earlier work, *The First Amendment in Litigation: The "Law of the First Amendment,"* 48 *WASHINGTON AND LEE LAW REVIEW* 457 (1991). I have also litigated a number of important First Amendment cases in Michigan, including *Doe v. University of Michigan*, 721 F.Supp. 852 (E.D.Mich.1989), which was the first case in the Nation in which a court declared violative of the First Amendment a campus speech code designed to promote "political correctness" on college campuses. As demonstrated by the title of my latest law review article, my academic writing is related to my litigation experience and focuses on the "law of the First Amendment," as set forth in the applicable decisions of the United States Supreme Court.

In these comments, I will discuss the "law of the First Amendment" applicable to what I have called "The First Amendment Right of Silence," specifically, the "Right Not to Be Associated with Particular Ideas." The "Right Not to Be Associated with Particular Ideas" was the basis of the United States Supreme Court's decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990), which limits the ability of a state integrated bar to use compulsory dues for ideological purposes, and which is the primary concern of the Task Force Report. In this context, I will discuss whether the Task Force report (1) "adequately assessed the First Amendment problems concerning required membership in a bar association," and (2) "provided a sufficient blueprint to ensure that the bar

association's ideological activities will not encroach on the First Amendment rights of its members."

I will begin by making some introductory points about the First Amendment and the relationship of the First Amendment to the advocacy role of the State Bar. While one of the purposes of the First Amendment is to protect the right of the speaker to express ideas and to convey information, more important than the right of the speaker to speak is the right of the public to receive ideas and information. In a democracy, we rely on the people to make informed choices on issues of public policy, so that the expression of ideas on issues of public policy, no matter how unpopular or controversial those ideas may be, is protected by the First Amendment. Thus, under the First Amendment principles of content neutrality and the protection of offensive speech, the government cannot prohibit the expression of unpopular or highly offensive ideas. The theory is that all ideas must compete in the "marketplace of ideas," and that only the people can decide what ideas they favor and what ideas they oppose. This is why "hate speech," which is prohibited in many other democratic countries and under international human rights norms, is protected under the First Amendment. See e.g., *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992). The First Amendment right of the people to receive information that they may consider relevant to their decisionmaking is the basis of the commercial speech doctrine, under which even product advertising is protected by the First Amendment, so that state restrictions on lawyer advertising are subject to First Amendment challenge. See e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

The right of the people to receive ideas and information is relevant to the public information and advocacy functions of the State Bar of Michigan. The Task Force Report identifies the categories of State Bar programs, some of which include the development of public policies concerning the legal profession, the provision of legal services, and the courts, and Justice Initiative Programs, including the development of proposals for effective delivery of high quality legal services and programs to benefit underserved populations, promote increased resources for civil legal aid programs, promote improved diversity and inclusion in the legal profession, and reviewing and making recommendations concerning proposed court rules and legislation affecting these matters. To the extent that the State Bar will be advocating for and supporting proposals in this area, it will be engaging in what the Report refers to as public policy advocacy. Whenever the State Bar takes positions on issues of public policy and advocates for specific public policy objectives, it is making ideological choices. For example, if the State Bar is advocating that public funds be used to provide attorneys for indigent persons engaged in civil litigation, the Bar is making what some would consider to be an "ideological choice" to favor indigency over wealth by putting indigent litigants on a par with wealthier litigants. Stated simply, if the State Bar is going to engage in public policy advocacy, there is no way that it can avoid ideological choices.

Moreover, lawyers are directly engaged in the administration of justice, and they are in a unique position to make policy recommendations to improve the administration of justice. To the extent that the State Bar refrains from making policy recommendations and from advocating changes relating to the administration of justice, the public is being

deprived of the unique perspective that lawyers are able to convey. It does not serve the values of the First Amendment well - here, the right of the people to have all the information necessary to make decisions on issues of public policy - for the State Bar to deny the public the unique perspective that the State Bar, as the representative of the legal profession in Michigan, can bring to the public policy debate. The primary role of the State Bar is to serve the public good, and as it performs this role, it should bring to the public the unique perspective that lawyers have with respect to issues of public policy affecting the administration of justice. Recognition of this salient point cautions against a too restrictive approach toward public policy advocacy on the part of the State Bar with respect to issues affecting the administration of justice.

Finally, any public policy advocacy in which the State Bar engages is government speech under the First Amendment. Whenever the government speaks, it may take a position in the same way as any private person, and it is not required to recognize opposing viewpoints. So, if the State Bar engages in public policy advocacy on issues relating to the administration of justice, it does not matter that some members of the State Bar may be opposed to the position that the State Bar is taking. The members of the Board of Commissioners and the Representative Assembly are elected by the members of the State Bar through a democratic process, and these organs have the authority to speak on behalf of the State Bar in accordance with the rules of the State Bar and the Administrative Orders of the Michigan Supreme Court.

I have thus far set forth what I believe are the First Amendment considerations justifying a robust public advocacy role for the State Bar with respect to issues respecting the administration of justice. But precisely because the Michigan State Bar is an integrated State Bar, supported by the compulsory dues of all its members, the First Amendment also imposes significant constitutional constraints on this public advocacy role. This brings us to the First Amendment right not to be associated with particular ideas, which is a part of the First Amendment right to silence. I have written about the First Amendment right to silence. Robert A. Sedler, *The First Amendment Right to Silence*, SOCIAL SCIENCE RESEARCH NETWORK 1031505, Nov. 9, 2007; *Self-Censorship and the First Amendment*, 25 NOTRE DAME JOURNAL OF LAW, ETHICS AND PUBLIC POLICY 13-14 (2012). The right not to be associated with particular ideas means that the government cannot force a person to express an idea with which that person disagrees, such as compelling public school children to participate in a salute to the American flag, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), or compelling a person to display an automobile license plate containing an ideological message with which that person disagrees, *Wooley v. Maynard*, 430 U.S. 705 (1977), or a state regulatory agency issuing a directive that a public utility include in its billing envelopes messages from a group that opposed the utility's position on utility rates, *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1980), or a requirement by a state civil rights commission that the sponsors of a parade include within the parade groups expressing ideas with which the sponsors disagree. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

Under the First Amendment, money is speech. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014). Because this is so, the First Amendment imposes very significant limitations on the power of Congress and the states to enact campaign finance regulation. And for the same reason, the First Amendment imposes very significant limitations on the power of Congress and the states to allow representative bodies, such as labor unions and an integrated bar, to use member dues to engage in ideological advocacy.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that the “right not to be associated with particular ideas” was violated when a labor union used agency shop fees, imposed by law on non-union members, to advance ideological purposes unrelated to the union’s function as collective bargaining representative. The union was required to separate its collective bargaining activity from its ideological-political activity, and could only charge the non-union members a fee for its collective bargaining activity. In *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986), the Court set forth constitutionally required procedures for separating the union’s collective bargaining activity from its ideological-political activity. First, it was necessary that the non-members’ agency shop fees not be used even temporarily for an ideological-political purpose. The Court held that a forced exaction followed by a rebate equal to the amount improperly expended was not a permissible response to non-members’ objections. Second, the union was required to clearly identify the expenditures for collective bargaining purposes and explain the basis for that identification to the non-members. Third, where a non-member objected to the union’s apportionment, the union had to provide for a reasonably prompt decision by an impartial decisionmaker. The union then adopted procedures that were found to be constitutionally adequate. *Hudson v. Chicago Teachers Union*, 922 F.2d 1306 (7th Cir. 1991). The Court has very recently held that there are constitutional problems in drawing the distinction between the use of union dues for collective bargaining purposes and the use of union dues for ideological-political purposes as regards public employees, as opposed to private sector employees, and refused to extend *Abood*’s permissibility of agency shop fees to personal home care assistants in a state-sponsored program, where the assistants were not full-fledged state employees. *Harris v. Quinn*, 2014 U.S.LEXIS 4504, 6/30/2014.

In *Keller*, the Court applied the First Amendment “right not to be associated with particular ideas” holding of *Abood* to the imposition of mandatory dues by the State Bar of California, which, like the State Bar of Michigan, is an integrated bar. In a unanimous opinion by Chief Justice Rehnquist, the Court began by rejecting the claim of the State Bar that as a regulated state agency, it could not be subject to any constraints on its use of lawyers’ dues. The Court noted that it was entirely appropriate that all of the lawyers in California, who derived benefit from the unique status of being among those admitted to practice before the courts, should be called upon to pay a fair share of the cost of the professional involvement in this effort. But just as *Abood* held that a union could not expend a dissenting individual’s dues for ideological activities not “germane” to the purpose for which compelled association was justified, neither could the State Bar. The

Court stated that the compelled association in an integrated bar was justified by the State's interest in regulating the legal profession and improving the quality of legal services, but that the State Bar could constitutionally fund out of the mandatory dues of all members only those activities that were "germane" to those goals. The State Bar could not constitutionally fund "activities of an ideological nature that fell outside of those areas of activity." 496 U.S. at 14-15.

The Court went on to say that it was not always easy to discern where the line falls between permissible and impermissible activities, but that the extreme ends of the spectrum were clear. "Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession." *Id.* at 16.

In my opinion, guidance toward discerning where the line falls can be obtained by an analysis of the concept of "germaneness" and the role of the Michigan State Bar in the administration of justice and the justice system of the state. I suggested earlier that lawyers are directly engaged in the administration of justice and thus they are in a unique position to make policy recommendations to improve the administration of justice. By becoming involved in matters relating to the administration of justice and in making policy recommendations with respect to the administration of justice, the State Bar provides to the public the unique perspective that lawyers are able to convey precisely because they are directly involved on a day to day basis in the administration of justice. But once the State Bar goes outside of matters relating to the administration of justice - as the State Bar of California did in *Keller* by lobbying for or against legislation relating to polygraph testing, armor-piercing handgun regulation, an unlimited right to sue anyone for air pollution, and the like, 496 U.S. at 15 - the State Bar is no longer functioning as the representative of the legal profession, but is acting like an ideological organization having nothing to do with its role in the administration of justice. The First Amendment prohibits the State Bar from using the dues of its members for any ideological matter not connected with the administration of justice. But so long as the State Bar limits its public advocacy to matters connected with the administration of justice, it may use the dues of its members to support that public advocacy, and in so doing it is not violating the First Amendment right of its members to avoid being associated with particular ideas that they may oppose.

I will now discuss whether the Task Report "adequately assessed the First Amendment problems concerning required membership in a bar association." This assessment is contained in Recommendation 2 of the Report. In my opinion, the Recommendation does so in large part, but goes somewhat too far in its identification of impermissible areas for State Bar advocacy under 4(b). I agree as a general proposition with 4(b)(v), identifying as an impermissible area for State Bar advocacy "matters that are primarily intended to personally benefit lawyers, law firms or judges." As I have discussed previously in connection with *Keller*, guidance toward discerning where the line for permissible advocacy falls can be obtained by an analysis of the concept of

“germaneness” and the role of the Michigan State Bar in the justice system of the state. Since lawyers are directly engaged in the administration of justice, they are in a unique position to make policy recommendations to improve the administration of justice. But matters that are primarily intended to personally benefit lawyers, law firms or judges have nothing to do with the administration of justice, and so are not a proper subject for advocacy by the State Bar under Keller. This being so, to use members’ dues to advocate for such matters violates the First Amendment rights of objecting members. C.f. United States Department of Agriculture v. United Foods, Inc., 533 U.S. 405 (2001), holding that a mushroom marketing scheme under which a federally established Mushroom Council could impose mandatory assessments on handlers of fresh mushrooms for generic advertising to promote mushroom sales was not germane to a purpose of the mushroom association independent of the speech itself, and so compelled speech, thereby violating the “right to refrain from speaking.”

However, there are some matters that may be perceived at first blush as “personally benefitting lawyers, law firms or judges,” but on reflection directly relate to the administration of justice, improving or diminishing the quality of legal services or affecting the delivery of legal services by lawyers. Let me use the example of a sales tax on legal services. With respect to this matter, the Task Force Report states as follows: “The following year, the State Bar waged a campaign in opposition to a proposed sales tax on services on the basis that imposing a sales tax on legal services would reduce the availability of legal services to society. Mandatory state bars have been divided on whether Keller permits advocacy on the issue of a sales tax on legal services. A revised Keller order directing a more restrictive application of Keller’s boundaries would put Michigan in the camp that does not allow advocacy on matters primarily based upon lawyers’ economic self-interest.”

In my opinion, Keller permits advocacy on the issue of a sales tax on legal services, because this matter is not primarily based upon lawyers’ economic self-interest. A sales tax is paid by the consumer, not the provider of goods or services, and the role of the provider of goods and services is limited to collecting the sales tax from the consumer and remitting the sales tax to the state. A sales tax on legal services could reduce the availability of legal services to society by discouraging some people from utilizing the services of a lawyer because of the increased cost. Moreover, the provision of legal services is not the same as the provision of groceries or other consumable goods. It demeans the value of legal services to society by putting legal services in the same category as consumable goods and making people pay a tax in order to utilize the benefits of a lawyer. It is for these reasons that I see a sales tax on legal services as having a negative effect on the administration of justice, and diminishing the quality of and affecting the delivery of legal services. The absence of a sales tax provides only an indirect economic benefit to lawyers by making it less expensive for people to engage a lawyer. But any policy that will improve the quality of legal services, such as by providing legal services for the poor or disadvantaged or providing for the appointment of counsel for indigent persons in civil cases, will also have the effect of providing an indirect economic benefit to lawyers. Thus, I would respectfully disagree with the position of the Task Force to the extent that it suggests that advocacy on the issue of a

sales tax on legal services would be precluded by Keller. As stated above, it is my opinion that advocacy on this issue is permitted by Keller. I would also suggest that it might be preferable for 4(b)(v) to read "matters that are solely intended to personally benefit lawyers, law firms or judges and do not affect the administration of justice, the quality of legal services or the delivery of legal services."

I strongly agree with the Keller-permissible activities set out in 4(a), since they are all fully germane to the role of the Michigan State Bar in the administration of justice and in the justice system of the state. Where I have a problem is with the impermissible areas for State Bar advocacy set out in (4)(b)(i)(ii)(iii) and (vi). I cannot think of any issue more directly related to the administration of justice than judicial selection. There have been numerous proposals over the years to move in whole or in part toward merit selection of judges, and it is with respect to this issue that lawyers, who are directly involved in the administration of justice, are in a unique position to make recommendations to the public. If the State Bar, through its representative organs, concludes that merit selection is preferable to the present system of electing judges, or conversely, concludes that merit selection or a particular proposal for merit selection, would be harmful to the administration of justice, the public will benefit immensely by knowing the position of the State Bar. I must confess that it is inexplicable to me why judicial selection would be considered an impermissible area for State Bar advocacy. Likewise, there are many issues that may be perceived to be "divisive within the bar membership," including issues that are permissible areas for State Bar advocacy under 4(a). Again, the members of the Board of Commissioners and the Representative Assembly are democratically elected by the membership, and the fact that they have been democratically elected justifies their taking advocacy positions on behalf of the State Bar on "divisive" issues.

Certain issues of election law and certain ballot issues may be germane to the role of the Michigan State Bar in the administration of justice and the justice system of the state. One of those issues is clearly campaign finance regulation of judicial elections. This is a highly controversial issue, but again lawyers are in a unique position to make recommendations to the public on this issue. While my own First Amendment view is generally opposed to restrictions on campaign expenditures, because they limit the information that may be provided to the public (I am thus a strong supporter of the Citizens United decision, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)), there are many First Amendment commentators who disagree with me on this issue, and there are many lawyers and judges who would like to see changes in the present method of financing judicial elections. So too, my First Amendment view favors broad disclosure of campaign contributions and expenditures, again because broad disclosure provides more information to the public, but there is a strong opposing view in opposition to disclosure. In any event, campaign finance regulation, like selection of judges, directly relates to the administration of justice, and the public will benefit by receiving the views of the State Bar on this issue. Finally, certain issues relating to the administration of justice, such as abolishing the integrated bar in Michigan, may be on the ballot, but the fact that an issue relating to the administration of justice is on the ballot should not preclude the State Bar from taking a position on that issue.

For the above reasons, I would eliminate (b)(i)(ii),(iii), and (vi) from the list of impermissible areas for State Bar advocacy. To the extent that these issues may relate to the administration of justice, they are germane to the role of the State Bar in the administration of justice and the justice system of the state, and the State Bar's advocacy of these issues is permissible under Keller. I would also note that by focusing on whether the issue is germane to the role of the State Bar in the administration of justice and the justice system, the State Bar avoids the matter of a "narrow" or "broad" interpretation of Keller. Adherence to this standard and limiting State Bar advocacy to matters relating to the administration of justice fully satisfies the constitutional requirements of Keller.

I now turn to the question of whether the Task Force Report has "provided a sufficient blueprint to ensure that the bar association's ideological activities will not encroach on the First Amendment rights of its members." Here I start off by noting that the Michigan Supreme Court's current procedure for challenging the State Bar's activities as a violation of members' First Amendment rights under Keller, as set forth in AO 2004-1, is constitutionally deficient. Under that procedure, a member may challenge the position taken by the State after the challenged position has been posted on the website. If the challenge is successful, the Bar is required to revoke the challenged position and publicize the revocation in the same manner and to the extent as the position was communicated, and arrange for reimbursement to the challenger and other requesting members of a pro rata share of the cost of the challenged activity.. In *Hudson v. Chicago Teachers Union*, supra, involving a union's use of compulsory agency shop dues for ideological-political purposes, the Court held that it was necessary that the non-members' agency shop fees not be used even temporarily for an ideological-political purpose. This being so, the Court held that a forced exaction followed by a rebate equal to the amount improperly expended was not a permissible response to non-members' objections. This is what is provided for under AO 2004-1, and it is constitutionally deficient.

Hudson makes it clear that the First Amendment is violated whenever legally-compelled exactions, such as the State Bar members' dues, are used for constitutionally-impermissible ideological purposes. In this context, as in others, the First Amendment requires that the government establish procedures that are designed to ensure that there will be no violation of First Amendment rights, and these procedures must be followed prior to the time that the government takes the action in question. Some examples of constitutionally required procedures designed to ensure that there will be no violation of First Amendment rights are that there can be no advance prohibition of the dissemination a work alleged to be "obscene" until there has been a judicial determination of obscenity in an adversary proceeding initiated by the government, *Freedman v. Maryland*, 380 U.S. 51 (1965), a court cannot issue an injunction against the media, prohibiting the publication of facts connected with a criminal prosecution, unless the court first makes a determination, supported by evidence in the record, that publication of the facts will present a clear and present danger to the accused's right to a fair trial, *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), and the government cannot require a license to engage in First Amendment activity except pursuant to a licensing law that is content neutral and that contains narrow, objective, and definite

standards controlling the discretion of the licensing official. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). As applied to positions taken by the Michigan State Bar on issues of public policy, *Hudson and Keller* require that the State Bar establish procedures that are designed to ensure that any position taken by the State Bar on issues of public policy be Keller-complaint prior to the time that the State Bar takes that position.

The Task Force Report proposes to comply with this constitutional requirement by establishing an independent Keller review panel that has "the exclusive responsibility for determining the Keller-permissibility of issues on which State Bar advocacy is proposed." While the independent review panel would comply with the constitutional requirement of advance determination of Keller-permissibility, it does so by taking the responsibility for the advance determination of Keller-permissibility out of the hands of the State Bar and placing it in the hands of the Keller-review panel. And it imposes a supermajority rule for an issue to be considered Keller-permissible.

In find this approach to be very troublesome, since it works an end run around the process that the State Bar itself has established to determine the Keller-permissibility on positions of public policy that are represented to the public as positions of the State Bar. The State Bar itself should have the responsibility to determine the Keller-permissibility of positions of public policy that are taken in the name of the State Bar. Again, the members of the Board of Commissioners and the Representative Assembly are elected by the members of the State Bar through a democratic process, and the very important function of determining the Keller-permissibility of positions taken by the State Bar should be performed in accordance with procedures established by the State Bar itself. It is my understanding that the State Bar currently has in place procedures designed to determine Keller-permissibility, and the State Bar should be directed to reconsider and possibly strengthen these procedures. The procedures should also include a requirement, as proposed by the Task Force report, that the State Bar publish the dissent of any member who so requests as soon as practicable after receiving the dissent. This requirement provides more information to the public on the matter in issue, and thus serves this important purpose of the First Amendment.

To the extent that the Task Force Report requires that any position taken by the State Bar on issues of public policy be Keller-complaint prior to the time that the State Bar takes that position, it has "provided a sufficient blueprint to ensure that the bar association's ideological activities will not encroach on the First Amendment rights of its members." But the responsibility for implementing this requirement should be imposed on the State Bar itself rather than on an independent Keller-review panel.

Finally, the purposes of the First Amendment are well-served by the Task Force recommendation that the Sections be allowed to engage in ideological, but not partisan, activities, using voluntary dues money. Again, the positions taken by the Sections will provide information to the public on important issues of public policy related to the work of the Sections, and as the Report recognizes, since the work of the Sections is

dependent on voluntary does money, Section advocacy does not cause any Keller problems.

I hope that these comments will be helpful to the Court. I will be pleased to provide any additional comments as the Report of the Task Force is considered by the Court.

  
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