

COMMITTEE ON JUSTICE INITIATIVES
Respectfully submits the following position on:

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The Report of the Task Force on the
Role of the State Bar of Michigan

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The position expressed is that of the Committee on Justice Initiatives only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan.

The State Bar has authorized the Committee on Justice Initiatives to submit its response.

The total membership of the Committee on Justice Initiatives is eleven.

The position was adopted after several teleconferences and an electronic vote. The number of members in the decision-making body is 11. The number who voted in favor to this position was 11. The number who voted opposed to this position was 0.

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July 30, 2014

Office of Administrative Counsel
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RE: The Report of the Task Force on the Role of the State Bar of Michigan

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Michael Franck Building

Lansing, MI

48933-2012

To Whom It May Concern:

At its July 25, 2014 meeting, the State Bar of Michigan Board of Commissioners authorized the Committee on Justice Initiatives (CJI) to submit comments on the report of the Task Force on the Role of the State Bar of Michigan (afterwards, “the Report”). The comments expressed in this letter are from this committee only and are not an official position of the State Bar of Michigan. These comments were written after a June 23, 2014 phone meeting to which all CJI members¹ were invited to discuss the Report. All eleven members of CJI support this response.

CJI determined to target its comments on those aspects of the Report most relevant to CJI’s work in assisting access to justice:² Recommendations 1 (mandatory bar) and 2 (advocacy).

Summary of CJI’s Key Points

The State Bar of Michigan should remain a mandatory state bar association because the legal profession’s unique role in facilitating access to justice for the public is greatly aided by a mandatory bar:

1. Any guidelines or processes concerning budgets and policies should apply to all State Bar departments equally and consistently. CJI should not be singled out for special review but should be held to the same Keller and budgetary standards as any other State Bar of Michigan unit.

¹ Co-chairs Erika Davis and Terri Stangl, Jennifer Belveal, Michael Blau, Lorry Brown, Aaron Burrell, Heather Garretson, Robert Gillett, Valerie R. Newman, Linda K. Rexer, and Maya Watson. They lead four initiatives that include another 70 members.

² CJI’s SBM Jurisdictional Statement: Develop and recommend proposals for the effective delivery of high quality legal services in Michigan, equal and fair to all. This committee consists of several initiatives whose activities include: analyzing and making recommendations for positions on proposed legislation, court rules, and other policies relevant to the committee’s jurisdiction; developing policies and programs to benefit underserved populations including juveniles and those with special needs; encouraging and coordinating free or discounted civil legal services; working to increase resources for civil legal aid programs; and examining collateral civil consequences of criminal convictions and issues of adequate representation in the criminal justice system.

2. CJI supports having clear Keller standards, including guidance to assure consistency and adequacy of the Keller review for all State Bar positions, including requiring that proposed positions fully explain how they meet such standards.
3. Current structures within the State Bar already provide multiple levels of review and adequately assure compliance without need of additional review by an outside commission. Any concerns about discrepancies can be addressed through standards and guidance, rather than new structures.
4. Eliminating Administrative Order (AO) 2004-01's permissible advocacy purpose to "improve the functioning of the courts" could unnecessarily limit the Bar's ability to take policy positions on legislation affecting access to justice and functioning of the courts.
5. As long as all proposals are subject to a thorough and consistent Keller process, it is unnecessary to identify and carve out particular impermissible areas for any SBM advocacy as described in Recommendation 2, 4(b). The term "perceived" in 4(b) IV and VI (Report, Page 9) creates a standard which is subjective and prone to inconsistencies, both as to its definition and in determining whose perception is at issue.

Discussion

Recommendation 1

Michigan's organized and unified bar has historically been its most visible leader on access to justice efforts to assure fundamental issues of fairness in the justice system and to increase overall public confidence in that system. The justice system is strengthened when the public knows – from an authorized spokesperson for the entire profession – that it is the priority of the profession to serve the public good and to help make sure no citizen who needs legal help falls through the cracks.

The State Bar of Michigan's role as the leader of and convener of all members of the legal profession allows development of more centralized resources and better coordinated efforts to advance access to justice for all. The State Bar of Michigan's mandatory status allows it to bring leadership to access to justice and maintain a capacity which permits having skilled staff who can bring their expertise and that of bar committee and section volunteers to this work. This in-house capacity helps the State Bar identify emerging issues, elicit any differing views, and convene stakeholders to craft consensus positions and avoid misinformation. Professional staff expertise in governmental relations, communications, ethics and funding create both efficiencies and effectiveness in engaging a range of stakeholders in dialogue or activities, assessing positions for Keller permissible policy, and providing programs and education that facilitate access to justice. These efforts fall squarely within the State Bar's mission to protect the public, a central focus of any State Bar advocacy work.

Many examples of CJI's work illustrate how working through a mandatory statewide bar with staff support has strengthened access to justice for all. By coordinating pro bono efforts around the state, the State Bar has avoided duplication of efforts in training, recognition and support for pro bono lawyers who voluntarily provide pro bono assistance to low-income persons or make financial donations to support legal aid for the poor. Additional examples can be seen in the State Bar of Michigan's visionary Judicial Crossroads report³ in areas ranging from building appropriate legal self-help programs for those who cannot afford lawyers to protecting child welfare to language access, the State Bar of Michigan has provided leadership and worked with the courts and others on such topics. Selected others are noted in Endnote 1 to this letter.

Because of these and other efforts of the State Bar of Michigan, more people in Michigan receive legal help and have access to the courts; more lawyers can provide legal services and assure fairness; and the overall role of the legal profession in the justice system is reinforced and strengthened among lawyers and the public. The State Bar's Justice Initiatives accomplishments show that Michigan has been well served in providing access to justice for its citizens through a unified bar whose activities and voice are consistent, respected and valued. CJI supports Recommendation 1 regarding a mandatory bar.

Recommendation 2

It is not clear why the Task Force sees a need for an additional and separate Keller review panel with some members appointed by entities outside of Bar governance. The Board of Commissioners is already a diverse and representative body that includes elected members and members appointed by the Supreme Court. It already requires various levels of Keller review and includes a range of voices that should be capable of applying clear Keller guidance in a fair and thorough manner. Several CJI members have expressed concern about adding an additional process in which a minority (three out of seven people) on an outside panel can veto policy positions that already have been through all the State Bar's multiple review levels. Concerns include whether such a process would cause delay in the bar taking timely positions, and whether such a panel could foster distrust or the perception – both within and outside the bar – that review panel decisions on Keller permissibility are motivated by political considerations as opposed to the State Bar's system of including many representative voices.

CJI notes that much of its current work will continue to fit within Recommendation 2, Governmental Relations Program Recommendations, 4. A. ii:

positions on legislation, policies, or initiatives that improve or diminish the quality of legal services, such as by 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.

³ <http://www.michbar.org/judicialcrossroads/>

It is unclear whether these provisions include some CJI areas previously encompassed by AO 2004-01, allowing speech on matters to “improve the functioning of the courts.” If not included, the recommendations may unnecessarily limit important work regarding access to justice. Does eliminating the AO 2004-01 purpose impede knowledgeable advocacy on matters like fee waivers or transcript fees which affect access to the courts by the poor and disadvantaged? If so, it would be better to retain that provision from AO 2004-01.

Some areas in which individual issues might be Keller permissible but which the Report lists as prohibited (Report, Page 9) are vague and open to constructions that could eliminate Justice Initiatives work clearly Keller permissible in the past. Specifically, items IV and VI reference issues that are (respectively) “perceived” to be associated with one party or candidate or to be divisive within the bar membership. What “perceived” entails and whose perception is at issue is unclear. It may be that legislation affecting access to justice may be initially offered by someone or a group from one party; is that enough to prohibit comment? Or would the strident voice that lectured against a bill involving language access be enough to qualify as a perception of divisiveness on matters that fall within even the narrowest of Keller interpretations?

It is not clear why the report singles out funding for the Justice Initiatives (JI) program for additional Keller review and a three-fourths supermajority budget vote of the Board of Commissioners. The Report itself notes that the JI 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.

It does not seem reasonable to laud the work of JI for embodying the primary purpose of the bar to serve the public good, and then select it for different treatment than any other department or entity within the bar. CJI’s primary efforts are to plan educational events to promote dialogue, to present community education about current law, to convene stakeholders and support access to justice projects such as pro bono. Policy advocacy has been a secondary role, with a long history of operating within Keller guidelines, and only as authorized by the State Bar leadership. CJI staff may take no external action on policy positions unless such position is authorized by Keller and approved by the appropriate State Bar leadership. A clear and consistent application of the Keller guidelines should be made for all State Bar entities, not just JI.

Conclusion

CJI has served the profession, the public and the courts well through its robust, inclusive and award-winning JI programs. CJI continues to respect the need for clear Keller parameters as a safeguard to sustaining an effective mandatory bar and underscoring the credibility of JI activities. With clear standards consistently applied across all State Bar work,

CJI can continue to assist improvements in the administration of justice and access to justice for all. This work has been and will continue to be best served through a mandatory bar that brings leadership, professional expertise, centralized resources and a knowledgeable voice to these important issues.

If we can provide any additional information or assistance, please contact us at your convenience.

Sincerely,



Terri L. Stangl
Co-chair, Committee on Justice Initiatives



Erika Lorraine Davis
Co-chair, Committee on Justice Initiatives

ⁱ A partial listing of recent CJI activities include:

Pro Bono Efforts: The Pro Bono Initiative (PBI) organizes and presents an annual pro bono coordinator's workshop where best practices are identified for implementation. It leads the annual October Pro Bono Month showcasing pro bono opportunities and successes around the state. PBI sponsors the annual John W. Cummiskey Award. It helps identify legal aid programs that are eligible to be listed on the Access to Justice Fund fundraising materials. It publishes the annual Circle of Excellence showcasing those law firms that, in the aggregate, have 100% participation in the Voluntary Pro Bono Standard. PBI recently had the Standard amended to encourage a higher annual donation (\$500) from those lawyers whose income so allows. PBI presents an online Pro Bono Reference Manual that includes, among other things, a way to find legal aid help in the state, and a way for lawyers to find pro bono opportunities. For many years, PBI has conducted the Michigan Litigation Assistance Partnership Program (MI-LAPP) that refers complex pro bono cases to large law firms, and refers Qualified Domestic Relations Orders to a pro bono panel of QDRO experts. In a recent development, the MI-LAPP program was expanded to include referrals from law school low-income taxpayer clinics to pro bono lawyers in the State Bar Taxation Section. A similar project is about to be launched with the Intellectual Property Law Section. The MI-LAPP program also provided malpractice insurance coverage for pro bono lawyers who would not otherwise have that coverage. PBI, in partnership with the Michigan State Bar Foundation (MSBF) and the legal aid providers, commissioned an "Assessment of Pro Bono in Michigan" study that produced a Report released in February 2013. That report shows what legal aid providers in Michigan can do differently to improve their work with pro bono lawyers. Its major focus is on systems, coordination of resources, leadership and support, including institutional and structural support. It identified projects and strategies that have proven successful in Michigan and nationally in engaging private attorneys in meaningful work. The report notes the very strong system of "intentional and conscious support for pro bono at the state level, at the core of which are the State Bar of Michigan and the Michigan State Bar Foundation." It notes that "[t]he system's strength also derives from a culture of collaboration and coordination that infuses the relationship of these two central institutions, as well as their relationship with the leadership of the legal aid community." A work plan to implement the recommendations in the report is directing current efforts to improve pro bono.

Improving Delivery of Legal Services and Access to Justice (ATJ): A Legal Services Advocacy Steering Committee provided for e-mail linking all legal services programs statewide. The Michigan Plan was developed by the State Bar, the Bar Foundation, and the Legal Services Association of Michigan – with input from more than 80 experts in nine working groups. The first meeting of the Access to Justice For All Task Force was

convened by Victoria Roberts in December 1995; four subcommittees worked on pro bono, technology, resource development, and service delivery. The Michigan Supreme Court created the Task Force on Gender Issues in the Courts and the Task Force on Racial/Ethnic Issues in the Courts in 1987. Their missions were to examine the courts and to recommend changes to assure equal treatment for men and women, free from race or gender bias. The two task forces issued their reports in 1989. Those reports concluded that a substantial number of citizens and lawyers believe bias affects justice and this perception of bias is based in reality. The reports contained 167 recommendations to improve the quality of justice and to eliminate both bias and discrimination. The Task Force Service Delivery Hotline study group recommended hotline projects to expand access for poor people to legal services programs; three hotline pilot projects were funded by the MSBF. A new state support office was created in early 1997 by two legal services programs and the University of Michigan Law School. The State Bar helped lead an examination of the possible integration and merger of federally funded legal aid programs. The State Bar received the ABA Harrison Tweed Award in June 1998 for its exceptional ATJ work. In March 2009, the Diversity Project held dual symposia on diversity in the legal profession at two law school locations. “We Can, We Will, We Must” program focused on the retention of underrepresented attorneys in the legal profession.

In June 2010, two Colloquia were held to promote the creation of a statement of commitment to diversity. This culminated in the development of a document that was subsequently adopted unanimously by the Board of Commissioners. *The Pledge to Improve Diversity and Inclusion in the Legal Profession in Michigan* was created and unveiled at a signing event at the State Bar of Michigan Annual Meeting in September 2010. Currently, the document has been signed by nearly 800 individuals and entities within the profession.

Education and Convening: The October 1999 *Michigan Bar Journal* (MBJ) was devoted to Access to Justice; the May 2006 MBJ was dedicated to Justice Initiatives and Access to Justice; the November 2008 MBJ was dedicated to CJI; the August 2010 MBJ was dedicated to Disabilities and the Law; the October 2011 MBJ was dedicated to Pro Bono; the January 2012 MBJ was dedicated to Diversity and Inclusion in the Legal Profession. “Educating for Everyday Democracy: The Jury Process” was developed to encourage participation and diversity in the jury process. A series of “Know Your Rights” brochures is widely distributed to help the public understand more about the justice system and were recently updated. The first Disabilities e-newsletter was issued in 2004 and quarterly publications continue today. Currently, CJI hosts annual summits of key bar leaders with differing perspectives to discuss emerging access to justice issues. Topics have included the challenge of the self-represented in courts, engaging the next generation of justice leadership, implicit bias, and the development of Michigan Legal Help, including a session on the *Turner v Rogers* case. The 2014 summit focused on best practice for language access in Michigan courts. Educational programs are frequently presented by JI at the State Bar of Michigan Annual Meeting, including *Padilla v Kentucky*, the collateral consequences of criminal convictions, mental health courts, indigent defense, and language access.

Improving Funding for Services to the Indigent: The Legal Service Corporation Advocacy Steering Committee joined national leaders in May 1996 to lobby for federal funding for civil legal aid. An Access to Justice Director was hired by the State Bar and a resource development subcommittee of the ATJTJF began studying the feasibility of a State Bar-led statewide fundraising campaign for access to justice. The Board of Commissioners approved creation of the ATJ Fundraising campaign as a partnership between the Bar, the MSBF, and the legal aid programs; a development director and two other staff were hired; over \$13 million has been raised. Concerted efforts to address the indigent defense structure in Michigan are underway. The State Bar of Michigan was awarded the ABA’s 2012 Advocacy Award for its leadership in continued lobbying for federal funding for civil legal aid.