ELDER LAW & DISABILITY RIGHTS SECTION
Respectfully submits the following position on:

*

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

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The Elder Law & Disability Rights Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Elder Law & Disability Rights Section only and is not the position of the State Bar of Michigan.

The State Bar of Michigan has submitted a position on this matter.

The total membership of the Elder Law & Disability Rights Section is 1,307.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 20. The number who voted in favor to this position was 15. The number who voted opposed to this position was 0.

August 2, 2014

Honorable Robert P. Young, Jr., Chief Justice
And Justices of the Michigan Supreme Court
Office of Administrative Counsel
P.O. Box 30052
Lansing, MI 48915

Submitted by email to ADMcomment@courts.mi.gov

Re: **Response of the Council of the Elder Law and Disability Rights Section** of the State Bar of Michigan to the Supreme Court Task Force Report on the Role of the State Bar of Michigan ("Report")

Dear Chief Justice and Justices of the Michigan Supreme Court:

As the current chair, and on behalf of the elected Council of the Elder Law and Disability Rights Section ("Section") of the State Bar of Michigan ("SBM"), we appreciate the opportunity to respond with respect to the *Report to the Michigan Supreme Court Task Force on the Role of the State Bar of Michigan* (the Report) that was submitted in response to Administrative Order No. 2014-5.

This Section is concerned about portions of the Report, particularly as in relates to our and other Sections. We are a voluntary organization and Section of the State Bar. The governing council (the "Council") is comprised of twenty (20) voting members (including the immediate past chairperson, who remains a voting member). Our public policy positions do not necessarily represent those of the SBM itself, and are adopted by the elected members of our Council, acting on behalf of this Section.

At our regularly scheduled monthly meeting held on August 2, 2014, this Council reviewed and discussed this matter. As a result of our review and discussion, we voted to support the position of the Section Steering Committee and its *Recommendation of the State Bar Sections - Task Force Review Committee,* which is attached hereto. The vote was 15 in favor, zero opposed, zero abstained, and 5 did not vote.

Therefore, we respectfully endorse and request that you accept the *Recommendation of the State Bar Sections - Task Force Review Committee* .

Very truly yours,

Rosemary H. Buhl
Chairperson,
Elder Law and Disability Rights Section

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p.s. I am out of town at present, so this letter is being sent by e-mail using another Section Council member's e-mail account.

RECOMMENDATIONS OF THE STATE BAR SECTIONS - TASK FORCE REVIEW COMMITTEE

Kindly accept these Recommendations of the State Bar Sections as it relates to the Task Force Review. This review and the Recommendations arise out of the legislative proposal regarding a "Voluntary Bar", Senate Bill 743, introduced January 23, 2014.

I. OVERVIEW OF "VOLUNTARY BAR" ISSUE

Almost immediately after introduction of SB 743, a significant portion of the Section Members of the State Bar of Michigan filed formal opposition to the "Voluntary Bar Legislation", SB 743, including:

Appellate Practice Section - 667 members
Criminal Law Section - 2,186 members
Elder Law & Disability Rights Section - 1771 members
Family Law Section - 2,481 members
Insurance & Indemnity Law Section - 597 members
Masters Law Section - 15,303 members
Negligence Law Section - 2,112 members
Probate & Estate Planning Section - 4,128 members

On February 13, 2014 the Michigan Supreme Court established a Task Force on the role of the State Bar of Michigan, AO 2014-5. Thereafter a Public Hearing was conducted May 2, 2014 in Lansing, Michigan. On June 3, 2014 "Recommendations" of the Task Force to the Michigan Supreme Court were released to the public. Significant portions of the June 3, 2014 Task Force Report Recommendations would cripple or eliminate historic advocacy activities by the voluntary Sections of the State Bar of Michigan.

The Sections of the State Bar of Michigan are voluntary associations, funded by the voluntary dues of their members, subject to the specific mandates of the By Laws of each particular Section, and ultimately subject to the governance of the State Bar of Michigan. The Sections of the State Bar of Michigan are governed by their duly elected "Councils". The elected Councils speak on behalf of and for their Section membership, and the Councils are directly or indirectly empowered by their By Laws to advocate on behalf of their Section membership on policy issues involved with Legislation, Court Rules, and other issues concerning their membership and the public interest.

Section membership and advocacy is a democratic process. Any State Bar member in good standing may join any voluntary Section of the State Bar of Michigan. All Section members are free to provide input regarding legislative, court rule, or policy issues involving their section. All Section members are free to run for an elected position on their particular Section Council. All Section members are free to attend any monthly or annual meeting of their Section Council. All Section members have unlimited discretion to express an opinion, comment upon, and advocate for any and all legislative initiatives or Court Rule proposals through their Section, or individually as they choose.

II. LIMITS ON SECTION ADVOCACY

Section advocacy falls specifically within the mandate of AO 2004-1. Sections are specifically exempted from the limitations set forth in Section I of AO 2004-1 as set forth in §II-F:

> *(F) Those sections of the State Bar of Michigan that are funded by the voluntary dues of their members are not subject to this Order, and may engage in ideological activities on their own behalf. Whenever a section engages in ideological activities, it must include on the first page of each submission, before the text begins and in print larger than the statement's text, a disclosure indicating*

(Section 1 through 6 contain mandatory disclosures that the Section are NOT the State Bar, the position is that of the Section only, the total membership of the Section, the process used to take the position, the number of members in the decision making body, and those voting for and against).

Section advocacy of voluntary organizations is protected speech under the United States and Michigan Constitutions; however, there are limits to Section advocacy. By way of example: (1) while Sections are permitted to advocate a position at any time, and are not subject to the 14 day limitation of the State Bar, the Sections cannot assert a position contrary to the State Bar of Michigan once such State Bar position has been established; (2) Sections cannot advocate for particular party candidates, judicial candidates, etc.; (3) If a Section wishes to advocate in opposition to a publicly established position of the State Bar of Michigan, special permission must be sought and granted.

AO 2004-1 also provides for a rigorous review of Section advocacy, and if AO §2004-1 is violated, the authority of the Section to advocate may be revoked by the State Bar of Michigan.

Of significance in the context of the Task Force Report, is that there is no body of evidence or record of the Sections having violated either (1), (2), or (3) above.

The transcript of the public Hearing that was held in Lansing, Michigan on May 2, 2014, fails to disclose any testimony or evidence that Section advocacy was even an issue, much less a problem. Review of the transcript of testimony fails to disclose any testimony, or suggestion that advocacy actions of the Sections were not protected by the First Amendment. The record and testimony at the

hearing is devoid of any evidence that Section advocacy had ever generated formal sanctions as provided in §II (F) of AO 2004-1.

Notwithstanding, the Task Force Recommendations submitted for consideration to the Michigan Supreme Court would make First Amendment advocacy by State Bar Sections either illegal, or sanctionable through the supervisory power of the Michigan Supreme Court and the State Bar of Michigan over all Michigan attorneys.

III. THE TASK FORCE & SECTION REPRESENTATION

The credentials of the Task Force Committee members speak for themselves. Notwithstanding, the absence of even a single Section Chair or Chair Elect from the Task Force Committee deprived the Sections input on what is regarded as a draconian elimination of Free Speech rights of voluntary Section Members.

Significant concern arises out of the "process" invoked by the Task Force. In contrast with the typical Legislative process, in which proposed Legislation is submitted in writing and in advance for public comment and advocacy, the Task Force Report followed the public hearing and testimony. The subsequent recommendations could not have been anticipated in advance of their public release, nor could any Section Leader have been expected to address as yet unknown free speech suppression.

We assume good and sufficient reasons for the secrecy surrounding the Task Force deliberations, drafting, and submission process. The Sections spoke out loudly and clearly in opposition to the Voluntary Bar proposal in SB 743. The fact that many attorneys belong to multiple sections does not dilute their opposition to SB 743 — it augments it! A total of 29,245 Section members were represented in the unequivocal opposition to SB 743.

At no time prior to the release of the Task Force Recommendations was it disclosed that the *quid pro quo* for continuing an integrated Bar would be forfeit of Section advocacy rights.

IV. THE SECTIONS REVIEW & RECOMMENDATIONS COMMITTEE

As a result of a conference call involving State Bar of Michigan administration, and Section leaders on June 17, 2014, a Steering Committee was selected to obtain input from their Section members, and Section leadership who would communicate and exchange views on the Task Force Report. Further, the recommendations of the various Sections, as obtained by the Steering Committee, would result in a Report submitted on behalf of their Sections to the Board of Commissioners, State Bar of Michigan, and ultimately the Michigan Supreme Court.

The recommendations of the Sections Task Force Review flow from review of the Task Force Report, the transcript of the testimony at the May 2, 2014 public hearing, and with due regard for the input and opinions interested Sections of the State Bar of Michigan. The Chair of the Steering Committee and Committee Members are:

Family Law Section - Steering Committee Chair, James J. Harrington III
Children's Law Section - Chair Christine Piatowski
Consumer Law Section - Chair Terry Adler
Criminal Law Section - Chair Elect Charles H. Marr
Negligence Law Section - Chair Steven B. Galbraith
Real Property Law Section - Chair Elect David E. Pierson

The Sections Committee recommendations are also supported by the ADR Section, Chair-Elect, Martin Weisman, Esq.

The Sections, above, represented through their Councils, are in agreement with the following *Core Principles of Section Advocacy.* To the extent these *Core Principles of Section Advocacy* conflict with the Task Force Recommendations, then with all due respect, the Sections disagree and contest the Recommendations of the Task Force.

The Sections are strongly committed to the continuation of the Integrated Bar in the State of Michigan. The Sections cannot and will not endorse or support or recommend the tradeoff of their First Amendment Rights as a *quid pro quo* for maintaining the existing integrated Bar in the State of Michigan.

V. CORE PRINCIPLES OF SECTION ADVOCACY

A. Voluntary members of a Bar Section have a First Amendment Right to advocate on behalf of their membership.

B. Voluntary members of a Bar Section should not be compelled to sacrifice their First Amendment advocacy rights and delegate them to a separate Committee having no affiliation with the Sections or the State Bar of Michigan.

C. Voluntary members of a Bar Section should be permitted to freely advocate in writing, by testimony, and through their website and other customary public media with the legislature, the Supreme Court, the Executive, and the public within the ambit of AO 2004-1.

D. Less intrusive measures, which will not violate Section Free Speech rights, which will clarify public perceptions, and avoid confusion in the legislature and the public can be implemented to deal with "confusion" over the relationship of the Sections and the State Bar of Michigan including (1) suggested revisions to AO 2004-1 and (2) expanded "identifications" of the Sections in written and oral communications.

E. Less intrusive measures, which will not violate Section Free Speech Rights, can be invoked to more promptly enforce the existing limitations set forth in AO 2004-1.

VI. RECOMMENDATIONS

The Sections request and recommend the Supreme Court approve, adopt, and endorse the foregoing Core Principles of Section Advocacy. The Sections request and recommend the Supreme Court support the First Amendment Advocacy rights of the Sections of the State Bar of Michigan.

For the convenience of the Sections and the Supreme Court, the Core Principles are set forth in Attachment A.

For the convenience of the Sections and the Supreme Court, the proposed revisions to AO 2004-1 are attached a "clean" version as Attachment B.

For the convenience of the Sections and the Supreme Court, a "redline/strikeout" version of the proposed revisions to AO 2004-1 is attached as Attachment C.

RESPECTFULLY,

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Excerpt from Sections Task Force Review & Recommendations

V. CORE PRINCIPLES OF SECTION ADVOCACY

A. **Voluntary members of a Bar Section have a First Amendment Right to Advocate on behalf of their membership.**

B. **Voluntary members of a Bar Section should not be compelled to sacrifice their First Amendment Advocacy rights and delegate them to a separate Committee having no affiliation with the Sections or the State Bar of Michigan.**

C. **Voluntary members of a Bar Section should be permitted to freely associate with and advocate in writing, by testimony, and through their website and other customary public media with the Legislature, the Supreme Court, the Executive, and the public within the ambit of AO 2004-1.**

D. **Less Intrusive Measures, which will not violate Section Free Speech rights, which will clarify public perceptions, and avoid confusion in the Legislature and the public can be implemented to deal with "confusion" over the relationship of the Sections and the State Bar of Michigan including (1) suggested revisions to AO 2004-1 and (2) expanded "identifications" of the Sections in written and oral communications.**

E. **Less Intrusive Measures, which will not violate Section Free Speech Rights, can be invoked to more promptly enforce the existing limitations set forth in AO 2004-1.**

Steering Committee proposal – A.O. 2004-1 revisions

(F) Those sections of the State Bar of Michigan that are funded by the voluntary dues of their members are not subject to this order, and may engage in ideological activities on their own behalf. Whenever a section engages in ideological activities, involving a person or entity outside the State Bar of Michigan it must include on the first page of each written submission, before the text begins, and in print larger than the statement's text, a disclosure indicating;

(1) that the section is not the State Bar of Michigan, but rather an independent, voluntary group whose membership is voluntary,

(2) that the position expressed is that of the section only, and that the Section does not represent or speak for the State Bar of Michigan;

(3) and that the State Bar has no position on the matter, or , if the State Bar has a position on the matter, what that position is,

(4) the total membership of the section,

(5) the process used by the section to take an ideological position,

(6) the number of members in the decision-making body, and

(7) the number who voted in favor and opposed to the position.

(8) each subsequent page of the communication, **must contain** a disclaimer identical to (2), above.

~~If an ideological communication is made orally, the same information must be effectively communicated to the audience receiving the communication.~~

Although the bylaws of the State Bar of Michigan may not generally prohibit sections from engaging ideological activity, for a violation of this Administrative Order or the State Bar of Michigan's bylaws, the State Bar of Michigan may revoke the authority of a section to engage in ideological activities, or to use State Bar facilities or personnel in any fashion, by a majority vote of the Board of Commissioners. If the Board determines a violation occurred, the section shall, at a minimum, withdraw its submission and communicate the withdrawal in the same manner as the original communication occurred to the extent possible. The communication shall be at the section's own cost and shall acknowledge that the position was unauthorized

Example of disclaimer at the bottom and on subsequent pages of any written submission

THE FAMILY LAW SECTION IS NOT THE STATE BAR OF MICHIGAN; IT IS A VOLUNTARY GROUP OF 2712 MEMBERS AND DOES NOT SPEAK FOR OR REPRESENT THE STATE BAR OF MICHIGAN

Order

Entered: February 3, 2004

ADM File No. 2003-15

Administrative Order No. 2004-01

State Bar of Michigan Activities

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, Administrative Order 2004-01 is adopted, effective immediately. Administrative Order 1993-5 is rescinded, effective immediately.

I. Ideological Activities Generally.

The State Bar of Michigan shall not, except as provided in this order, use the dues of its members to fund the activities of an ideological nature that are not reasonably related to:

(A) the regulation and discipline of attorneys;

(B) the improvement of the functioning of the courts;

(C) the availability of legal services to society;

(D) the regulation of attorney trust accounts; and

(E) the regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

The State Bar of Michigan shall permanently post on its website, and annually publish in the Michigan Bar Journal, a notice advising members of these limitations on the use of dues and the State Bar budget.

II. Activities Intended to Influence Legislation.

(A) The State Bar of Michigan may use the mandatory dues of all members to review and analyze pending legislation.

(B) The State Bar of Michigan may use the mandatory dues of all members to provide content-neutral technical assistance to legislators, provided that;

(1) a legislator requests the assistance;

(2) the executive director, in consultation with the president of the State Bar of Michigan, approves the request in a letter to the legislator stating that providing technical assistance does not imply either support for or opposition to the legislation; and

(3) the executive director of the State Bar of Michigan annually prepares and publishes in the Michigan Bar Journal a report summarizing all technical assistance provided during the preceding year.

(C) No other activities intended to influence legislation may be funded with members' mandatory dues, unless the legislation in question is limited to matters within the scope of the ideological-activities requirements in Section I.

(D) Neither the State Bar of Michigan nor any person acting as its representative shall take any action to support or oppose legislation unless the position has been approved by a two-thirds vote of the Board of Commissioners or Representative Assembly taken after all members were advised, by notice posted on the State Bar website at least 2 weeks prior to the Board or Assembly meeting, that the proposed legislation might be discussed at the meeting. The posted notice shall include a brief summary of the legislation, a link to the text and status of the pending legislation on the Michigan Legislature website, and a statement that members may express their opinion to the State Bar of Michigan at the meeting, electronically, or by written or telephonic communication. The webpage on which the notice is posted shall provide an opportunity for members to respond electronically, and the comments of members who wish to have their comments made public shall be accessible on the same webpage.

(E) The results of all Board and Assembly votes on proposals to support or oppose legislation shall be posted on the State Bar website as soon as possible after the vote, and published in the next Michigan Bar Journal. When either body adopts a position on proposed legislation by a less-than-unanimous vote, a roll call vote shall be taken, and each commissioner's or assembly-person's vote shall be included in the published notice.

(F) Those sections of the State Bar of Michigan that are funded by the voluntary dues of their members are not subject to this order, and may engage in ideological activities on their own behalf. Whenever a section engages in ideological activities, it must include on the first page of each submission, before the text begins and in print larger than the statement's text, a disclosure indicating

(1) that the section is not the State Bar of Michigan but rather a section whose membership is voluntary,

(2) that the position expressed is that of the section only, and that the State Bar has no position on the matter, or , if the State Bar has a position on the matter, what that position is,

(3) the total membership of the section,

(4) the process used by the section to take an ideological position,

(5) the number of members in the decision-making body, and

(6) the number who voted in favor and opposed to the position.

If an ideological communication is made orally, the same information must be effectively communicated to the audience receiving the communication.

Although the bylaws of the State Bar of Michigan may not generally prohibit sections from engaging ideological activity, for a violation of this Administrative Order or the State Bar of Michigan's bylaws, the State Bar of Michigan may revoke the authority of a section to engage in ideological activities, or to use State Bar facilities or personnel in any fashion, by a majority vote of the Board of Commissioners. If the Board determines a violation occurred, the section shall, at a minimum, withdraw its submission and communicate the withdrawal in the same manner as the original communication occurred to the extent possible. The communication shall be at the section's own cost and shall acknowledge that the position was unauthorized.

III. Challenges Regarding State Bar Activities.

(A) A member who claims that the State Bar of Michigan is funding ideological activity in violation of this order may file a challenge by giving written notice, by e-mail or regular mail, to the executive director.

(1) A challenge involving legislative advocacy must be filed with the State Bar by e-mail or regular mail within 60 days of the posting of notice of adoption of the challenged position on the State Bar of Michigan website; a challenge sent by regular mail must be postmarked on or before the last day of the month following the month in which notice of adoption of that legislative position is published in the Michigan Bar Journal pursuant to section II(E).

(2) A challenge involving ideological activity appearing in the annual budget of the State Bar of Michigan must be postmarked or e-mailed on or before October 20 following the publication of the budget funding the challenged activity.

(3) A challenge involving any other ideological activity must be postmarked or e-mailed on or before the last day of the month following the month in which disclosure of that ideological activity is published in the Michigan Bar Journal.

Failure to challenge within the time allotted shall constitute a waiver.

(B) After a written challenge has been received, the executive director shall place the item on the agenda of the next meeting of the Board of Commissioners, and shall make a report and recommendation to the Board concerning disposition of the challenge. In considering the challenge, the Board shall direct the executive director to take one or more of the following actions:

(1) dismiss the challenge, with explanation;

(2) discontinue the challenged activity;

(3) revoke the challenged position, and publicize the revocation in the same manner and to the same extent as the position was communicated;

(4) arrange for reimbursement to the challenger of a pro rata share of the cost of the challenged activity; and

(5) arrange for reimbursement of all members requesting a pro rata share of the cost of the challenged activity in the next dues billing.

(C) A challenger or the State Bar of Michigan may seek review by this Court as to whether the challenged activity violates the limitations on State Bar ideological activities set forth in this order, and as to the appropriate remedy for a violation.

(D) A summary of the challenges filed under this section during a legislative term and their disposition shall be posted on the State Bar's website.

IV. Other State Bar Activities.

The State Bar of Michigan shall:

(A) annually publish in the Michigan Bar Journal a notice informing members that, upon request, their names will be removed from the mailing list that is used for commercial mailings, and

(B) annually publish in the Michigan Bar Journal a notice informing members of the Young Lawyers Section that, upon request, their membership in that section will be terminated.