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Re: The Report of the Task Force on the Role of the State Bar

My name is Josh Ard. My comments are primarily addressed to recommendations about sections. I have served on the councils of four different sections in addition to various State Bar committees. However, in the spirit of the recommendations, which seem to feel that comments on important topics are best made anonymously, perhaps I should hide my name.

One of the major rationales of the Task Force report is protection, protection against deception and protection of constitutional rights. In fact, the recommendations have the opposite effect: more deception and violation of constitutional rights. This is especially true with regard to recommendations about sections.

Michigan has arguably the least protection against deception of any state¹. The major law protecting against deception in the marketplace, the Consumer Protection Act, has been interpreted in a manner that makes it inapplicable to any entity that can plausibly claim to be regulated. Other decisions have made it clear that persons have a duty to read all contracts, no matter what they were told or what their reasonable expectations may have been. It doesn't matter if the passage they are to read is in fine print and they have failing eyesight. It doesn't matter if the passage has a reading level requiring over twenty years of formal education and they left school before graduating from high school over fifty years ago and have no books in their home. It doesn't matter if they are in early stages of cognitive decline (but not yet at a level that would warrant appointment of a guardian). These vulnerable adults apparently deserve no protection, yet there is one class of persons who must be protected—legislators and regulators who might be deceived into thinking that a State Bar section speaks for the State Bar itself. Do our leaders have any less duty to read than the citizens they represent?

The solution to this deception is—further deception. State Bar sections can still advocate but have to use an assumed name that is not identified in any way with the State Bar. This is arguably both unconstitutional and a violation of the Michigan Rules of Professional Conduct. A state government cannot tell an organization that it may engage in political speech only if it refuses to say who they are. Both the majority and the dissent in *Citizens United* extolled the value of transparency in political discourse. Under the recommendations, an excellent form of advocacy would be for convicted abusers to form the Coalition for Traditional

¹ Cf. "Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes," Carolyn Carter, National Consumer Law Center, Feb. 2009.

Values and lobby for repeal of all laws prohibiting child, domestic, and elder abuse. That is not the epitome of ethical advocacy in my mind.

The recommendation is self-contradictory. The separate entity must be not identified in any way with the State Bar but must report its action to the State Bar. The reporting itself indicates identification. Imaginative writers such as Philip K. Dick in *A Scanner Darkly* could describe a world where a narcotics agent and his suspect were really the same person but didn't realize it, but such a situation is unlikely to arise outside of science fiction.

One may further wonder why the State Bar and its sections are held to such standards. Corporations can express political positions without requiring the unanimous consent of all shareholders or employees. Labor unions may take positions without requiring unanimous consent of all members. Even political parties take positions that are not unanimously supported by all persons registered with the party. Rules of governance solve such problems. Shareholders, union members, and party members could elect other leaders. So could lawyers, including lawyers who join voluntary sections. What is the rationale or basis for the differential treatment of lawyer entities?

Some of the distinctions raised in the report are difficult to apply to real facts. For example, it says that sections may engage in ideological but not partisan advocacy. Merriam-Webster defines partisan as "a firm adherent to a party, faction, cause, or person; especially one exhibiting blind, prejudiced, and unreasoning allegiance." Presumably, one would hope that State Bar sections are not prejudiced and unreasoning, but lawyers may commendably be firm adherents to a cause, such as having fair and efficient laws. The first definition of *ideological* from the same source is "relating to or concerned with ideas." Nothing wrong with that. The second refers to *ideology*, which is further defined as

1.: visionary theorizing

2

a : a systematic body of concepts especially about human life or culture

b : a manner or the content of thinking characteristic of an individual, group, or culture

c : the integrated assertions, theories and aims that constitute a sociopolitical program

Using these definitions, it is not easy to distinguish the unacceptable partisan from the acceptable ideological.

Even if *partisan* were to be interpreted as associated with a political party, there would be problems. It would be foolish and counterproductive for a section to seek support from only one party. On the other hand, it is in the interests of parties to associate opposing parties with unpopular ideas. A current bugaboo is Sharia law. Numerous sections would oppose any move to replace current laws with traditional Sharia concepts, such as unequal inheritances for males and females. Advocacy should not be conditioned on whether one party is largely successful in associating the proposal with its opponents.

I cannot say how these recommendations would have affected efforts such as the many hours the Probate and Estate Planning Council spent over the past decades in establishing the Estates and Protected Individuals Code and the Michigan Trust Code. These laws have been beneficial to our citizens and our economy. Many other groups played a role, such as probate judges, bankers, and so forth. Part of the presentation to the legislature was the expertise of proponents. Would the Task Force recommendations have preventing telling legislators about the expertise of probate and estate experts who examined the proposed laws in great detail?

It is difficult to see how these recommendations are designed to protect the public, whether from deception or from improper administration of justice. The words of the first president of the State Bar of Michigan, Roberts P. Hudson, are prominently displayed in the Bar headquarters: “No organization of lawyers can long survive which has not for its primary purpose the protection of the public.” If the Task Force recommendations are adopted, that prediction will be subjected to an empirical test.

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