

# MEMORANDUM

To: State Bar of Michigan Board of Commissioners and Representative Assembly  
Cc: Janet Welch  
From: Bruce A. Courtade  
Date: July 9, 2014  
Re: Review of and Proposed Response to the Michigan Supreme Court Task Force on the Role of the State Bar of Michigan

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## INTRODUCTION

I am preparing this Memo having been asked to sign a letter to the Board of Commissioners and the Representative Assembly in my capacity as a past president of the Bar. That letter was prepared by attorneys for whom I have the utmost respect, but with whom I disagree about how the Bar should respond to the Supreme Court's request for feedback on the Task Force's report ("the Report").

Make no mistake: I do not agree with everything in the Report, and have serious reservations regarding a few of the proposed recommendations. And I am angry that what I believe was a clearly Keller-permissible request concerning judicial campaign financing has been twisted by those who oppose such measures for purely political motives has been used to seek to silence the Bar from advocacy on issues of vital importance to our profession, the public and the justice system.

However, I believe that any response from the Bar that voices primarily emotion, distrust and indignation (righteous or not) rather than logical and detached analysis will be seen as petulant, presumptive and not worthy of serious consideration; akin to a toddler's tantrum in the cereal aisle when that tot is told that one box of Froot Loops is sufficient and he or she does not also need Pop Tarts. Rather than focus on the reality that the Froot Loops are sweet and have a toy surprise inside, the tot's tantrum embarrasses and eventually angers its parents so much that the Froot Loops are put back on the shelf and the family leaves the store empty-handed.

Thus, I urge the Board and Assembly to undertake a dispassionate and (as much as possible) objective review of the Task Force's Report, which I have stated publicly and privately is neither as good as I had hoped nor as bad as I had feared, and to give the Supreme Court that which it has asked for: an analysis of whether the 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. BRIEF HISTORICAL OVERVIEW**

#### **A. THE STATE BAR OF MICHIGAN IS GOVERNED BY AND SUBJECT TO RULES ADOPTED AND ENFORCED BY THE MICHIGAN SUPREME COURT**

Any discussion or analysis of the Task Force, its Report or any response thereto must begin with a review of the origins of the integrated/compulsory/mandatory Bar and of the statutes and rules from which the Bar derives its authority.

In this regard, the statute that created the Bar in 1935 is instructive.<sup>1</sup> Its preamble states that it is “AN ACT to create the State Bar of Michigan; and to authorize the Supreme Court to provide for the organization, regulation and rules of government thereof.” The statute itself provides that the “Supreme Court is hereby authorized to provide for the organization and regulation of the State Bar of Michigan; [and] to provide rules and regulations concerning the conduct and activities of the association and its members.”

The initial Act creating the Bar was repealed in 1961<sup>2</sup>, effective January 1, 1963, and replaced by Chapter 9 of the Revised Judicature Act of 1961, MCL 600.901 *et. seq.*. Section 901 of that statute is well-known to members of the Board of Commissioners, as it provides that the Bar “is a public body corporate” and that “[n]o person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto.” MCL 600.901. As it relates to the role of the Supreme Court *vis a vis* the State Bar of Michigan, though, one must look at MCL 600.904, which states:

The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members ...

Over the years, the Supreme Court has adopted a number of Rules and Administrative Orders regulating the State Bar and its activities. Those rules and regulations germane to the issues presented were included in Appendix IV of the Report and will not be restated here.

For purposes of this discussion, it suffices to state that which should be obvious to anyone considering the Court’s right to adopt rules that might change the way in which the State Bar conducts its business: the State Bar is subject to and bound by rules adopted by the Court, which can change those rules and regulations as it deems necessary and appropriate.

## **B. THE BAR’S PRIMARY – BUT NOT ONLY – OBJECT IS THE PROTECTION OF THE PUBLIC**

The first president of the State Bar, Roberts P. Hudson, famously wrote the words preserved on the wall of the conference room bearing his name in the State Bar Building: “No organization of lawyers shall long prevail which has not as its *primary* object the protection of the public.” (Emphasis added). However, Mr. Hudson never asserted that the sole focus of the integrated Bar ought be limited to protecting only the public. Rather, in that famous article he wrote:

The motivating cause for the organization of compulsory bars is ***not found solely in the desire of any group of lawyers to devote their time and energy for the benefit of the profession***. It arises rather primarily from the protests of the public and press against the relatively small percentage of unethical lawyers who bring discredit upon the profession at large and ***from a real desire to render a material service to those members of the profession who have not as yet reached the heights***; to assist and guide, if possible, the younger lawyers who must as time goes on take the place of their successful elders who must in time surrender the torch of leadership. ***Another cause is to assist in the correction of abuses resulting from attempts by laymen to advise the public on***

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<sup>1</sup> A copy of the statute is found in Appendix I of the Report.

<sup>2</sup> Act No. 236 of the Public Acts of 1961.

**matters which require legal education and experience**, thereby jeopardizing both personal rights and the rights of property.

For thirty years or more lawyers of Michigan, through a voluntary and selective organization, have labored unselfishly to raise the standards of their profession and have devoted their time and talents without hope or expectation of reward, **not only to improve their own profession but to protect the public against those who, through ignorance or by design, would prey upon it.** Their labors and idealism have made your organization possible, and the Bar of Michigan owes a tribute of gratitude to those unnamed and unrewarded lawyers who have given so much and so unselfishly for the ultimate benefit of the public.

No organization of lawyers can long survive which has not for its primary object the protection of the public. Laws are not made for the benefit of the few. They should be those rules of conduct prescribed by the people themselves, through their properly constituted representatives, for the equal protection of the rights of society in the aggregate. They should apply with equal force to the rich and poor alike, and to the protection of those rights the legal profession must apply itself with integrity, industry and faith.

**Your organization** is designed not only for the benefit and betterment of its members, but primarily for the public at large who require the services of the profession. It **must never be subservient to political dictation or intimidation, nor control from outside its membership. It cannot represent the interests of any group or political faith.** It must not draw distinctions of color, race or creed. It must not submit to politically minded leadership. It must not stand aloof from its membership. It must purge itself of the unfit. It must not recognize geographic boundaries. **It is now and must remain democratic, independent and representative of the best ideals of citizenship.** (Emphasis added).

Thus, although President Hudson famously noted that the integrated Bar's primary purpose was to protect the public, he also noted that it was formed to: 1) benefit the profession; 2) increase professionalism; and 3) guard against the unauthorized practice of law.

President Hudson was not alone in this understanding. Michigan Supreme Court Justice William W. Potter wrote a "Foreword" to the April 1936 *Michigan Bar Journal* – the same Bar Journal from which the foregoing Hudson quotes originate. Justice Potter's column summarized his thoughts regarding the statute creating the integrated Bar. In pertinent part, he wrote:

Approximately 100 years after the creation of the Supreme Court of the State, Act No. 58, Pub. Acts of 1935, was passed. This act, it is hoped, marks a step in the advance of the legal profession in Michigan. If it fails and is repealed, the profession will be relegated to the position it has heretofore held. No member of the profession is unmindful of the criticisms, flippant and otherwise, that have been aimed at the members of the bar. American legal institutions ... aim at government by law and not by individual will or caprice. When criticisms apparently well founded have been aimed at the profession and its members, **it has been frequently said that if the bar had the power to regulate**

***itself, it could advance the interests of the profession, maintain higher ethical standards and render better service to clients and to the public.***

The aim and object of Act No. 58, Pub. Acts 1935, to a large extent was to give to the legal profession of this State the power to govern itself. Under this act, rules have been framed and adopted by the Supreme Court for the organization of the State Bar, and additional rules have been framed by the State Bar for the government of the profession. ***It is hoped these rules in their operation will be for the benefit of the profession and of the public.*** If mistakes have been made in them, the profession may suggest amendments thereto. At least a start has been made. If the organization of the State Bar under the provisions of this act does not prove of benefit and advantage to the bar and to the public, the scheme should and will be discontinued. It is not claimed this legislation and the action taken by the court in pursuance thereof is a cure-all. It deals with the members of a great profession. Those members are human, subject to all the frailties inherent in human nature. No great reform was ever accomplished suddenly. But if the act and the proceedings had thereunder shall in the long run make for success, then it will have accomplished all that can be reasonably expected.

The act and the rules adopted under it aim to elevate the standing of the profession. In England, in Canada, and in many of the states of the American union, a similar organization of the bar has proved successful. There is no reason why it cannot prove successful in Michigan. It has had the approval of the legislative and executive departments of government. ***The court has sought to cooperate with the bar in making the organization a working force for good.*** It remains for the members of the profession to give to the State Bar their earnest and hearty cooperation. ***If this is done as it is confidently expected will be done, the Integrated Bar cannot help but be successful in counteracting unmerited criticisms, maintaining higher ideals by the members of the profession resulting in better service to clients and to the public, and in maintaining the influence and importance of the lawyers of Michigan in society and in government.*** (Emphasis added).

Therefore, one of the authors of the first rules regulating the integrated bar recognized that the integrated bar's purpose is to "benefit ... the profession and ... the public," to make the organization "a working force for good," and to maintain "the influence and importance of the lawyers of Michigan in society and in government."

### **C. ADMINISTRATIVE ORDER NO. 2004-01 AND THE STATE BAR'S EFFORTS TO ASSURE COMPLIANCE THEREWITH**

Often cited but rarely read by those focusing attention on the Bar's public advocacy is the United States Supreme Court decision in *Keller v State Bar of California*, 496 U.S. 1 (1990). In *Keller*, the plaintiff successfully argued that the use of his compulsory dues to lobby on issues such as gun control, abortion and public prayer – issues that were not related to the mandatory bar's purpose – was an unconstitutional abridgment of his individual rights. The United States Supreme Court agreed,

Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar

may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.

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Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are 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.

(496 U.S. 13-14; 15-16).

The State Bar of Michigan had been wrestling with its role in public advocacy for years before the *Keller* decision came out, primarily the result of two lawsuits filed against it by SBM member Allen Falk.<sup>3</sup> Eventually, the Supreme Court issued Administrative Order 2004-01, which until now represents the latest iteration of regulations concerning the Bar's ability to advocate on issues of "an ideological nature."

AO 2004-01 (which is often colloquially and incorrectly referred to as "the Keller rule") prohibits the State Bar from using compulsory dues to fund "activities of an ideological nature" unless those activities are reasonably related to five specific areas:

- (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.

Upon issuance of AO 2004-01, the State Bar adopted a series of practices and procedures to assure that it only considered and offered comment on issues that fell safely within the confines of the Order. Among these practices and procedures were the following:

- State Bar staff (primarily its Director of Governmental Relations), in consultation with the Bar's paid lobbyist, reviews all proposed legislation to determine which might be of

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<sup>3</sup> See, Appendix IV to the Report at p. xxxv.

import to Bar membership. Among these pieces of proposed legislation, only those that Staff feel might fall within the five categories authorized under AO 2004-01 are brought before the State Bar's Public Policy Committee.

- Prior to bringing any legislation to the Public Policy Committee, Bar staff sends all proposed legislation to appropriate Bar committees and sections seeking their comment. Each committee or section offering comment is required to state if it felt that the legislation fell within the five categories set forth in AO 2004-1, and if so, how.
- All pending legislation, as well as all comments received from Sections or Committees, are then presented by Staff to the Board's Public Policy Committee, usually the week before any meeting at which they are asked to take a position on that proposed legislation. Individual members of the Committee are tasked with studying the proposed legislation and reporting back to the Committee with a recommendation as to whether the Committee should support or oppose the proposed legislation.
- When the Public Policy Committee conducts its in-person meeting, usually on the morning of the Board of Commissioners' meeting, each piece of proposed legislation is reviewed by the Committee as a whole. Before the Committee can consider whether to support or oppose any piece of legislation, the individual assigned to report on the legislation must say whether it is "Keller-permissible" (meaning that it falls within the five categories set forth in AO 2004-01) or not. If so, the Committee would consider and debate it; if not, the Committee would neither consider it nor take any position on it.
- With sensitivity to the confines of AO 2004-01, for the past several years the Public Policy Committee has included non-Board members whose familiarity with and adherence to that Administrative Order are well-known: Court of Appeals Judge Cynthia D. Stephens and Richard McLelland – both former Commissioners who represent different political backgrounds but whose insistence on compliance with AO 2004 -01 is legendary.
- If any member of the Committee believes the proposed legislation does not fall within the "Keller-permissible" standards set forth in AO 2004-01, he or she has the ability to put the question to a vote of the Committee.
- After the Public Policy Committee concludes its deliberations, its Chair reports the Committee's recommendations to the Board as a whole. (Every Commissioner is provided a copy of the complete packet of proposed legislation with their meeting materials, agenda, etc.). Again, any Commissioner may raise the issue of whether a piece of proposed legislation is "Keller-permissible" before the Board votes on any action.

Thus, by the time the State Bar offers its opinion on or begins any lobbying efforts on any piece of proposed legislation, that legislation is subjected to at least five different reviews to see whether the legislation falls within the five specific categories to which the State Bar's advocacy efforts are restricted: 1) by Staff and the Bar's outside lobbyist; 2) by each Section and Committee asked to review the proposed

legislation; 3) by the individual Public Policy Committee member assigned to the legislation; 4) by the Committee as a whole – including the two “Keller experts” who sit on the Committee despite not being members of the Board in recognition of their expertise on the Keller issues; and 5) by the Board of Commissioners as a whole.

#### **D. THE BAR’S EFFORTS REGARDING JUDICIAL ELECTION CAMPAIGN TRANSPARENCY**

The single issue that generated the proposed legislation to make the Bar voluntary – which in turn led the State Bar to ask the Court to create the Task Force – is the letter that Executive Director Janet Welch and I submitted to Michigan Secretary of State Ruth Johnson on September 11, 2013, which sought a ruling that the source of funding for so-called “issue ads” in judicial campaign must be disclosed. This letter was consistent with the unanimous vote of the Representative Assembly favoring transparency of funding in judicial campaigns and with the unanimous vote of the Board of Commissioners’ Presidential Work Group that I appointed to study the issue of campaign finance issues reported in light of the Oakland County Circuit Court elections. That Work Group unanimously recommended that the Board of Commissioners more aggressively pursue transparency in judicial elections as set forth in the Representative Assembly policy, a recommendation that was unanimously adopted by the Board of Commissioners.

#### **E. CREATION OF THE TASK FORCE**

Reaction to the letter to the Secretary of State was swift and (in my opinion) ill-conceived. The vast majority of lawyers with whom I have spoken and from whom I have heard – including lawyers from across the political spectrum – applauded the efforts and recognized the State Bar’s unique qualifications and duty to speak to an issue that clearly falls within sections (II)(B) and (E) of AO 2004-01: improving the functioning of the courts and the education, ethics, competency, and integrity of the profession. In addition, there is no doubt that the request was based on an attempt to protect the public and the profession (at a minimum, by assuring that litigants would know whether, for instance, the judge assigned to hear their case had received a multi-million dollar donation from their opponent – something that would be obvious grounds for a recusal motion).

Acting within its powers, the Michigan legislature quickly adopted legislation, signed by the Governor, which specifically exempted issue ads from campaign disclosure laws. A few months later, in an act reeking of political retribution, a single legislator proposed a bill that would make the Bar voluntary.

In response, on February 6, 2014 the State Bar sent a letter asking the Supreme Court “to initiate a review of how the State Bar operates within the framework of *Keller* ...” AO 2014-07 was issued a week later, on February 13, 2014. That Order provided, in pertinent part:

The question having been raised about the appropriateness of the mandatory nature of the State Bar of Michigan, and the State Bar having requested that the Michigan Supreme Court facilitate this important discussion, pursuant to its exclusive constitutional authority to establish “practice and procedure,” Const 1963, art 6, § 5, the Court establishes the Task Force on the Role of the State Bar of Michigan to address whether the State Bar’s current programs and activities support its status as a mandatory bar.

The task force is charged with determining whether the State Bar’s duties and functions “can [] be accomplished by means less intrusive upon the First Amendment rights of objecting

individual attorneys” (*Falk*, 411 Mich at 112 [opinion of RYAN, J.]) under the First Amendment principles articulated in *Keller* and *Falk*. At the same time, the task force should keep in mind the importance of protecting the public through regulating the legal profession, and how this goal can be balanced with attorneys’ First Amendment rights.

The task force shall examine existing State Bar programs and activities that are germane to the compelling state interests recognized in *Falk* and *Keller* to justify a mandatory bar. In addition, the task force shall examine what other programs the State Bar of Michigan ought to undertake to enhance its constitutionally-compelled mission. The task force is invited to examine how other mandatory bars satisfy their constitutionally-permitted mission and shall make its report and recommendations to the Court by June 2, 2014. The task force’s report may also include proposed revisions of administrative orders and court rules governing the State Bar of Michigan in order to improve the governance and operation of the State Bar.

Thus, the Board of Commissioners asked the Supreme Court to review how the Bar operates within the confines of the *Keller* decision and the Administrative Orders adopted in response thereto. The Supreme Court accepted that request, and issued an order creating a task force assigned to:

1. address whether the Bar’s programs and activities support its status as a mandatory bar;
2. determine if the Bar’s duties and functions can be accomplished by means less intrusive upon individual objecting attorneys’ First Amendment rights;
3. remember the importance of protecting the public by regulating the profession, and how this goal can be balanced with attorneys’ First Amendment rights;
4. examine existing State Bar programs and activities that are germane to the compelling state interests recognized in *Falk* and *Keller* to justify a mandatory bar<sup>4</sup>; and
5. examine what other programs the State Bar of Michigan ought to undertake to enhance its constitutionally-compelled mission.

Given this charge, the Task Force – which included distinguished members of the bar and bench, including two former presidents of this organization, a legal educator of international repute, five current members of the Board of Commissioners and the Bar’s Executive Director, among others – spent countless hours between February 13 and June 2 compiling, reading and digesting information from a variety of sources – only some of which were included in the Task Force’s final report. Based on information provided by Task Force Chair (and former State Bar president Al Butzbaugh) in a teleconference among past presidents of the Bar, the Task Force had one teleconference and 10 in-person meetings in 74 days – a herculean effort and evidence that they did not treat this matter lightly or simply “rubber stamp” anyone’s pre-conceived

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<sup>4</sup> I respectfully submit that, depending on how one reads this particular assignment, it may be based upon a false premise, namely, that *Keller* and/or *Falk* ever suggested “compelling state interests ... to justify a mandatory bar.” Rather, I read *Keller* and *Falk* to address the issue of what limits could be placed upon lobbying efforts utilizing the dues of individuals compelled to be members of a mandatory bar. In other words, the issue of whether mandatory bars were “justified” was not before those courts – the fact that the bars were integrated was a given, and the issue before those courts was how to handle the members’ dues collected by the integrated bar.

agenda. (I also do not know whether Judge Butzbaugh's numbers include the all-day public hearing at which I and more than two dozen other interested parties spoke to the members of the Task Force).

As explained in the "Outreach" portion of the Report (p. 2 of the Report):

The Task Force solicited input from members of the State Bar through an email to each member of the State Bar who has an email address on file with the State Bar: 515 members responded with written comments. State Bar members were also advised by individual email of a public hearing on the issues, and notice to the public was posted. During an all-day hearing at the Hall of Justice on May 2, the Task Force heard testimony from 27 speakers. Of the written and public hearing comments, a clear majority supported the continuation of the mandatory state bar. The Task Force also received unsolicited comments from State Bar Sections and local and affinity bar associations, all supporting continuation of the mandatory State Bar.

[Footnote 4 to the Report identifies the local and affinity bars who submitted public comments as follows: Calhoun County Bar Association, Grand Rapids Bar Association, Grand Traverse-Leelanau-Antrim Bar Association, Michigan Retired Judges Association, Oakland County Bar Association, Women Lawyers Association. Sections: Alternate Dispute Resolution Section, Criminal Law Section, Health Care Law Section, Masters Law Section, and Negligence Law Section].

The Task Force then submitted a 17-page report, bolstered by roughly 130 pages of appendices, which attempted to respond to each of the issues submitted to it by the Court in response to the Board's request.

As mentioned above and explained more fully below, I do not agree with all of the Task Force's comments or conclusions, and I believe that its Report may have wandered into areas that it did not need to go. However, I do not question the integrity, hard work or dedication of those who served as members of this Task Force, and believe that any member of the Board who does so should not only be embarrassed, but any such rash and ill-conceived personal attacks ought to call into question the attacker's credibility as it relates to analysis of the Report and its recommendations.

## **II. THE TASK FORCE REPORT AND RECOMMENDATIONS (WITH COMMENTARY)**

As stated in the Introduction to this memo, my personal belief is that the Task Force Report is neither as good as I had hoped nor as bad as I had feared it might be. In this regard, it is much like the results of just about every facilitative mediation in which I have represented clients over the past 26 years: I am extremely confident that none of the Task Force members "got" everything that he or she wanted to be included in the Report, and equally confident that every Task Force member would change one or more of the items if he or she had the ability to do so.

I think that some of the ideas proposed by the Task Force are outstanding. In particular, I think that the Bar should provide its members with an opportunity to dissent from any public policy advocacy that the Bar takes. Indeed, I believe that this opportunity to dissent should go a long way toward addressing all First Amendment concerns that arise from our integrated Bar. I am also very pleased with the strong vote in favor of retaining the mandatory/integrated Bar.

I have some concerns regarding other portions of the Report – but none significant enough that I would feel compelled to reject the Report in its entirety, which is what I understand some are suggesting. This, I feel, would be counter-productive.

To avoid a shotgun analysis, jumping from point to point in a haphazard fashion, and also to avoid ignoring the points of agreement by focusing in the few (but significant) points of disagreement, I will proceed through each of the recommendations in order.

#### **A. RECOMMENDATION 1: THE STATE BAR SHOULD REMAIN A MANDATORY BAR**

The Task Force's first recommendation is that the State Bar should remain mandatory. I wholeheartedly agree.

Buried in the recommendation, though, is a provision that I find highly problematic: the recommendation that language concerning the Bar's role "in promoting the interests of the legal profession in this state" be removed from Rule 1 of the Supreme Court Rules for the State Bar. Couched in language reflective of Roberts P. Hudson's quote, the Report urges the Court to "send a clear signal to Michigan attorneys that the State Bar cannot advocate for issues primarily devoted to attorneys' own economic self-interest."<sup>5</sup>

From the start, the founding members of the State Bar (and of the Supreme Court that authored the Rules governing that new organization) recognized that while protection of the public was the "primary object" of the integrated bar, the group also had as vital elements of its organizational charge the "benefit the profession" (as stated in the Roberts P. Hudson article quoted above) and "advance[ing] the interests of the profession" (as explained by Justice Potter in the same Bar Journal).

Further, the language that it is recommended be removed from the current Rule is not restricted to the **economic** interests of the profession. Rather the current Rule emphasizes that the Bar must seek to "promote the interests of the legal profession in this state." Striking from the Rule language that permits the State Bar from promoting its members interests based on the unsubstantiated fear that the Bar might try to take action that benefits its members' economic interests is unwarranted, for at least three significant reasons.

First, I am unaware of any instance in which the Bar has engaged in advocacy on any issue "primarily devoted to attorneys' own economic self-interest." When the Bar opposed an income tax on legal services, its opposition was not based on the economic impact on lawyers: it was based on concerns about potential breaches of attorney-client privilege via the compelled forced disclosure of client lists to show who paid how much in tax; concerns that the additional administrative costs required by firms to collect taxes would exacerbate the problems of too few in our society being able to afford legal services and its impact on access to justice issues; and it was based on the loss of jobs (not just attorney jobs but of all the support industries and personnel serving the legal industry) that would result if our State enacted a tax on legal services while our neighboring states had no such tax.

Second, there is nothing wrong with the State Bar seeking to advance its members' economic interests. That is, after all, one of the reasons that the organized Bar was founded: to benefit the profession and

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<sup>5</sup> Report, p. 6.

promote its interests. The Bar does this through a myriad of ways that have nothing to do with public advocacy: by offering programs about how to use software programs to complete work more efficiently; by coordinating mentoring programs to (as suggested by President Hudson “render a material service to those members of the profession who have not as yet reached the heights”); by offering training programs to teach members about developments in the law to fulfill what Justice Potter identified would “maintain higher ethical standards and render better service to clients and to the public.”

Indeed, one might wonder what the purpose of any organization that does not at least in part seek to promote its members would be? Even a purely charitable, benevolent association seeks to promote the interests of its membership in giving charity and providing benevolent service.

This leads to the third issue – the proverbial elephant in the room – the issue of whether public advocacy that some might say violates individual members’ 1<sup>st</sup> Amendment rights is the only way in which the mandatory Bar promotes the interests of the legal profession in this state. As the foregoing hopefully makes clear, the answer to this question is a resounding “no.”

Therefore, the request to strike from the Rule governing the State Bar’s foundational purposes any reference to promoting the interests of the profession should and must be rejected. If the Task Force believes that the Administrative Order governing advocacy on pending legislation must be changed (and that will be addressed below), then that is the place to make such a change.

But given the historical significance of the Bar’s focus on advancing the interests of the profession, and the numerous programs and activities that accomplish that goal without involving anyone’s 1<sup>st</sup> Amendment rights, the recommendation to strike “promoting the interests of the legal profession in this state” from the Bar’s essential duties is akin to using a sledge hammer to kill a fly: far too crude a tool, with far too many unintended consequences.

## **B. RECOMMENDATION 2: RESTRICTIONS ON ADVOCACY**

The Task Force’s second recommendation is that which promotes the most consternation among its readers. In seeking to protect dissenting members’ 1<sup>st</sup> Amendment rights when their compelled dues are used to support the Bar’s lobbying efforts on issues of public policy, the Task Force probed a series of changes to the way in which the Bar engages in public policy advocacy.<sup>6</sup>

Specifically, the Task Force Report proposes:

1. All State Bar advocacy outside the judicial branch should be subject to a new, rigorous *Keller* process and the State Bar should emphasize a strict interpretation of *Keller*;
2. State Bar Sections that engage in external advocacy should do so only through separate entities not identified with the State Bar; and

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<sup>6</sup> On a personal note, I purposely use “public policy advocacy” in lieu of the term “ideological activity” because I believe that literally every issue imaginable can arguably be ideological in some way, shape or form. Further, since nothing in the Task Force Report would prevent the Bar from offering its opinion regarding proposed Court Rule changes, I limit my discussion in this Memo to those activities that seem to be the reason for this endeavor: the State Bar’s ability to offer comment and propose action concerning proposed legislation and matters of public policy that fall within the five categories set forth in AO 2004-01.

3. The funding of Justice Initiatives activities should be subject to a formal *Keller* review.<sup>7</sup>

I will address each of these recommendations in order.

### **1. The New *Keller* Review Process**

The Report specifically recognizes that “A substantial percentage of the work of the Governmental Relations Program does not implicate State Bar members’ First Amendment rights,”<sup>8</sup> and therefore does not alter the Bar’s ability to “review, analyze, and disseminate content-neutral information about pending legislation and court rules, and 2) advocate within the judicial branch on court rules and other issues affecting the legal profession.” This is correct and appropriate.

As it relates to “non-judicial branch advocacy by the State Bar,” the Report makes several suggestions that merit attention.

#### **(a) Protecting The Right To Dissent**

When I spoke at the Task Force’s public hearing, I quoted Mr. Spock’s “dying” speech to Captain Kirk, when he explained his choice to expose himself to lethal doses of radiation in order to save the Starship Enterprise and her crew: “The needs of the many outweigh the needs of the few – or the one.” I did so to support my position that the benefits of having the State Bar weigh in on issues of tremendous import to the public and the profession outweigh the burden on those who might disagree with a particular position (especially in light of the existing ability to initiate a *Keller* challenge if one is truly offended by a State Bar action).

However, this is not to suggest that I believe that individual members’ 1<sup>st</sup> Amendment rights are not significant or worthy of protection. To the contrary, I believe that they are vitally important – but simply outweighed by the compelling need for the Bar to be able to provide its independent voice and expertise.

Nevertheless, while sitting in that hearing after I had testified, I heard another speaker suggest that it would be a simple matter to allow any member of the Bar who dissents with a position of the Bar to file his or her written dissent and thereby protect his or her fundamental 1<sup>st</sup> Amendment rights – and I was persuaded that this would, indeed, be a good idea.

Indeed, I would respectfully suggest that providing this opportunity to dissent, coupled with the already-existing right to file a *Keller* challenge, should provide adequate protection to our membership and render many of the more restrictive proposals found in the Report duplicative and unnecessary.

#### **(b) The *Keller* Review Panel**

The Report recommends creation of an independent *Keller* review panel, consisting of seven members – two appointed by the Board of Commissioners, two appointed by the Representative Assembly, two appointed by the Supreme Court, and one appointed jointly by the Supreme Court and the Board of Commissioners.<sup>9</sup> This panel would have “exclusive responsibility” for determining whether the State Bar

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<sup>7</sup> Report, p. 7.

<sup>8</sup> *Id.*

<sup>9</sup> One wonders what happens if the Court and the Board cannot agree on who should be selected.

could advocate on any particular issues, and would require a super-majority vote of 5 of the 7 members of the panel before any advocacy would be allowed.

In theory, I am not opposed to the idea of a “Keller review panel.” I believe that the Bar should (and has) carefully considered whether any action that it takes falls within the confines of AO 2004-01 and the *Keller* decision.

However, as a signatory to the letter to Secretary of State Johnson which led to this review of the Bar’s operations and the author of one of the policy issues cited as an example of where the Bar might have overstepped its authority,<sup>10</sup> I am convinced that the Bar can and should tweak its procedures to insure that *Keller*/AO 2004-01 concerns are more transparently addressed.<sup>11</sup>

My reasoning for this conclusion is two-fold. First, other than those who have had the privilege of serving on the Board of Commissioners, I am quite certain that very few members of the Bar understand the intense levels of scrutiny that are currently given to assure that the Bar stays within the confines of *Keller* and AO 2004-01. By way of example, until I actually sat down to write this Memo, I did not realize that there are at least five different *Keller* reviews currently in place to prevent the Bar from overstepping its bounds. If I, the immediate past president of this organization and a former Chair of the Representative Assembly, did not fully understand the protections that the Bar has in place, how can we expect our individual members to know about, let alone have confidence in, the procedures in place to protect their 1<sup>st</sup> Amendment rights? Which brings me to the second reason for concluding that the rules must be tweaked: because we are dealing with members’ fundamental Constitutional rights. Under the circumstances, I agree wholeheartedly with the Task Force’s unanimous belief that “**any** infringement on constitutional rights, even unasserted, is a concern.”<sup>12</sup>

I have three significant concerns regarding this panel, though. First, as explained above, there are currently a minimum of five separate *Keller* reviews in place before the State Bar can advocate on any non-judicial branch issue. I fail to see how replacing the five separate reviews by as many as a few hundred attorneys, any one of whom can raise the issue of whether a particular item is *Keller*-permissible, can be improved by having a panel of seven people conduct a single review.

Second, if I am misunderstanding the proposal and the new panel is intended to be in addition to the existing procedure, I am concerned that adding another layer might result in delays and the Bar’s inability to respond in a timely fashion when legislation is on a fast track. Therefore, I would suggest that certain time limits be put into place, specifying that the review panel must convene, consider and issue its report within a very short time (perhaps five business days) after receipt of any piece of legislation, and that if it failed to do so would permit the Board to conduct its own *Keller* analysis and proceed accordingly.

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<sup>10</sup> I was the author of the policy statement adopted by the State Bar opposing Proposition 2 (the proposal banning the use of affirmative action in college and law school admissions).

<sup>11</sup> Having said this, I reject the notion that the Bar has experienced significant “mission creep” with regard to its *Keller*-restricted activities, as (with the possible exception of the Civil Rights Initiative policy statement) even the Report fails to provide any significant examples of any actions that are not fully *Keller*-permissible and justifiable. In this regard, I do respectfully suggest that the extreme partisan response – from a member of the party to which I belong – may have clouded certain Task Force members’ ability to distinguish the forest from the trees, asserting without basis that each of the very few examples of allegedly impermissible activity by the Bar were in fact based upon the economic self-interest of the membership.

<sup>12</sup> Report, pp. 6-7. (Emphasis in original).

Third, I am somewhat concerned that the proposed composition of the panel, combined with the “super majority vote” requirement, appears to give the Supreme Court a pre-emptive veto ability to prevent the Bar from speaking out on issues with which the Court might disagree (or on which it might prefer that the Bar not take a position for whatever reason). This is troublesome to me from an appearance standpoint, since it threatens the Bar’s ability to act as the “working force for good” espoused by Justice Stevens, and prevent it from “maintaining the influence and importance of the lawyers of Michigan in society and in government” that he espoused at its founding.

Respectfully, I submit that a simple majority vote of new *Keller* panel would not only alleviate the concerns among those who are convinced that this proposal would place too much power in the hands of the Court and thereby emasculate the Bar, while at the same time preserve the integrity of the review process, since all of the seven panel members would be charged with understanding and faithfully adhering to whatever administrative rule the Court might adopt regarding *Keller* permissibility.

### **(c) Adoption Of A Narrow *Keller* Interpretation**

The Report’s next recommendation is that the Bar should be limited to “a narrow interpretation of *Keller*, bounded within the two purposes endorsed by *Keller* – regulating the legal profession and improving the quality of legal services.”<sup>13</sup> I respectfully disagree with this recommendation, for two reasons.

First, the *Keller* Court found that the California bar was “justified by the State’s interest in regulating the legal profession and improving the quality of legal services.” The *Keller* Court did not address whether there might be other interests, specifically identified by president Hudson and Michigan Supreme Court Justice Potter to include (among other things): advancing the interests of the profession and of the public; making the organization a working force for good; and in maintaining the influence and importance of the lawyers of Michigan in society and in government. Thus, I believe that the Report takes too restrictive a reading of *Keller* – an opinion bolstered by that Court’s explicit recognition that there it was not adopting anything like the “bright line test” seemingly called for by the Report:

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are 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.

(496 U.S. 13-14; 15-16).

Given the checks and balances currently in place to protect Bar members’ individual rights (including but not limited to the multi-layered *Keller* reviews discussed above, perhaps supplemented by the addition of the new *Keller* panel, along with the existing but seldom-used right to challenge actions by the Bar), I do not

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<sup>13</sup> Report, p. 8.

agree that there is any need for Michigan to adopt what would be the strictest interpretation of *Keller* among those unified bars engaged in non-judicial branch advocacy.

## 2. Section Advocacy

I will confess that I do not understand much of the concern expressed about the Report's recommendation regarding Section advocacy, because my reading of the Report leads me to believe that the changes suggested therein are minimal in effect.

The recommendations are as follows:

1. Sections should be allowed to engage in ideological, but not partisan, activities using voluntary dues money. This is a clarification of but does not change the status quo.
2. Sections should be free to engage in legislative or executive branch advocacy, but must do so by creating a separate entity not identified in any way with State Bar. This seems to be the source of much consternation. As written the recommendation could be seen to require every section to separately file article of incorporation establishing itself as a separate and distinct corporate entity from the State Bar. If that is what the Report suggests, then I would oppose that as unduly burdensome and expensive, and far more than what is required to achieve that which I believe the Task Force intended.

However, unless I am mistaken, it appears that the Task Force's goal is to assure that there is no confusion about the source of any non-judicial advocacy – that such advocacy is not being undertaken by the State Bar using compelled dues, but instead is from a group of attorneys who (by nature of the mandatory Bar) are members of the State Bar, but who are advocating in their role as a member of the voluntary section. To that end, I read the proposal to require that all sections of the Bar would have to essentially change their names, deleting any reference to “State Bar of Michigan” from how they are known.

In other words, under the current system, the Family Law Section of the State Bar can lobby on any issue that it wishes – even those that are not Keller-permissible – with the only restriction being that it is not allowed to take a position contrary to any position adopted by the Bar as a whole, whether through the Representative Assembly or the Board of Commissioners, without first seeking permission from the Bar.

The Report, as I understand it, would require that the Family Law Section would have to remove any reference to “State Bar of Michigan” from its name, stationery, websites, etc. to avoid any confusion as to what entity is lobbying on any particular issue. So the same people could lobby on the same issue, but would have to refer to themselves as “The Family Law Section” or perhaps “The Family Law Council” or “Family Lawyers of Michigan” or something similar.

As long as my understanding of the recommendation is correct, I do not see any reason to oppose this recommendation.

3. Legislative advocacy done by the Section's separate entity should not be subject to the current elaborate reporting requirements of AO 2004-1, but the separate entity must still

report its positions to the State Bar, to ensure compliance with the requirements of the Supreme Court rules and orders and the State Bar bylaws. I do not see this as any major imposition, and in my mind is what the State Bar gets in return for providing backroom administrative support for the Sections.

4. The State Bar should not subsidize any non-Keller-permissible activities of Sections. I do not see a problem with this.
5. The State Bar may collect voluntary dues for Sections' legislative or executive branch activities as long as the Sections pay the cost of collection activities. I do not see a problem with this in theory; in practice I wonder how feasible it will be for the Sections to determine how much of the activities are attributable to Keller-permissible vs. Keller-proscribed activities.
6. Section advocacy information hosted on Section webpages on the State Bar website should be accessible only to Section members. I would think that the Section members would want this in order to protect the investment that their members make in joining the section. If access to the Section websites were not restricted, I would anticipate that Sections would face a number of "freeloaders" trying to take advantage of section membership without paying for it.
7. Sections should be allowed to use the State Bar building and facilities on the same terms as all other lawyer groups, but should reimburse the State Bar for special services that may support non-Keller-permissible activities provided by the State Bar. I think this clarifies that Sections are entitled to use the facilities without paying any additional fees for them. I do not see a problem with this provision.
8. The State Bar should conduct annual mandatory training for Section officers on compliance with these requirements. This is already done on a voluntary basis through the Section Orientation and Bar Leadership Forum; I see no problem making it mandatory. (Indeed, it may provide a source of non-dues revenue for the Bar).

### **3. Justice Initiatives Funding**

The Report next recommends there should be heightened Keller scrutiny and review during the annual budget process for Justice Initiatives programs and services.

I spoke briefly with Janet Welch about this, and have been advised that the State Bar's history of budget approval strongly suggests that this would not be a burdensome requirement. I trust Janet's assessment.

### **C. RECOMMENDATION 3: CHANGES TO DISCIPLINARY SYSTEMS**

Very little of the hue and cry responding to the Report has focused on the proposed changes to the disciplinary system, which are found at pages 15-16 of the Report. Accordingly, I will not spend a great deal of time responding to these changes, other than to say:

1. I do not recall when the Bar was in charge of all disciplinary matters, and what led to the decision to remove those responsibilities from the Bar. I have heard that there were some legitimate

concerns in having the disciplinary arms housed within the State Bar, but I do not know what those concerns were. I would therefore defer to those who have knowledge of those issues to say whether the proposed changes would alleviate those concerns which led to “spinning off” the disciplinary system in the first place.

2. As a general rule, I am leery to create any new “standing committees” of the Bar lest we resort to the days when there were seemingly more committees of the Bar than there were members of the Bar. (Forgive my slight exaggeration). Seriously, though, I question what the “advisory committee” would offer advice on and to whom it would offer that advice. This is an area that I would hope would be fleshed out by the Court before any formal Rule was adopted creating an entity with no guidance or purpose other than to advise someone about something to do with the attorney discipline system.
3. There has been concern expressed concerning the provision that the selection, evaluation, and retention of the Executive Director of the State Bar should continue to be under the authority of the Board of Commissioners, but the appointment of the Executive Director should be subject to confidential review and approval of the Supreme Court. I understand some of the concern (i.e., that the Supreme Court could “veto” a candidate selected by the Board and in so doing impose its own choice). However, I believe that these concerns are overstated, for a few reasons:
  - a. The Board retains the authority to evaluate and retain the Executive Director. Therefore, if the Court ever did “force” a candidate on the Bar, the Board could vote to remove that Executive Director.
  - b. As a practical matter, an Executive Director who does not have the support or trust of the Supreme Court will not be able to perform his or her job. Anyone who believes anything to the contrary is unrealistic.
  - c. As set forth at the start of this Memo, the Supreme Court has ultimate authority over the Bar. I cannot imagine someone agreeing to serve as Executive Director of the State Bar who did not know upon undertaking that role that he or she was supported by a majority of the Justices to whom the Bar is accountable under the Rules governing the Bar’s operations.

#### **D. RECOMMENDATION 4: MODIFICATIONS TO BAR GOVERNANCE**

I am sympathetic to those who chafe at the thought of removing the Representative Assembly’s designation as the “final policy-making body of the State Bar.” I understand that there are significant reasons to favor keeping that power within the larger, more diverse body, and I have been proud of many of the policy initiatives that have sprung from the Assembly through the years.

However, the ambiguity surrounding the Assembly’s proper role has plagued the bar since before I joined the Assembly’s ranks roughly two decades ago. Further, although the Assembly’s activities have ebbed and flowed through the years, it is now the rule and not the exception that the Assembly meets only three times a year – and one of those meetings is during the State Bar’s Annual Meeting, when the vast majority of the Assembly’s agenda consists of presenting awards, honoring outgoing members, voting on the new Clerk and welcoming the new Chair.

For this reason, I also question the wisdom of the proposal that “both the Board of Commissioners and the Representative Assembly must approve all other policy positions” (meaning policy positions other than those concerning court rule changes and proposed legislation). First, I am not sure what other policy statements there might be; second, with the Assembly meeting only three times per year, I question whether it is wise to vest that authority in a body that might not be meeting for another four or more months. (This is not a major concern, since the Board could always adopt “interim” policies pending Assembly ratification in the event something needed to be addressed in a more timely manner).

**E. RECOMMENDATION 5: MISCELLANEOUS PROVISIONS RE: INACTIVE MEMBERS, REINSTATEMENT, ETC.**

I do not see any reason for concern about either of the recommendations in this section of the Report (i.e., reducing dues for inactive members and convening a commission to study the issues of active versus inactive licensing, *pro hac vice* admissions and to study the interrelationship and standards applicable to the admissions, certification and licensing processes.

**CONCLUSION**

Some of my fellow past Bar presidents are so vexed by this Report that they use terms such as “extreme,” “hamstring,” “highly questionable” and similar language to describe it. They submit that, primarily but not exclusively based on their objection to the restrictions on non-judicial branch advocacy, that the “Task Force Report is deeply flawed ... [and] should be rejected by the Court in favor of an approach that both honors First Amendment rights of members and preserves the profession’s important voice in public discourse.”

I do not share this belief.

I believe that the Report, which is the product of tremendous effort by a distinguished group of attorneys to whom we all owe a debt of gratitude for their service to our Bar, represents a good faith and honest attempt to address an issue that the Board asked the Supreme Court to consider. The Report – as mentioned above – is akin to the result of a facilitative mediation in which no party is going to get everything that it wants, but the end result is (hopefully) one that they can live with.

This is not to suggest that the Board and Assembly should rubber stamp the Report. As should be clear from the foregoing, I believe that there are serious issues with a few of the recommendations, and I have tried to suggest alternatives to the perceived problems when I was able to do so. I would encourage the Board and Assembly to likewise point out the difficulties that they identify within the Report and to come up with alternatives, rather than simply reject the Report outright.

A box of Froot Loops with a toy surprise is still not a bad way to start the morning, even if you can’t also have a Pop Tart to go along with it. I urge the Board and Assembly to exercise moderation and avoid simply thumbing their noses at the Report that they received simply because it did not come back exactly as the Board and/or Assembly had hoped.