

PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

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

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The Probate & Estate Planning 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 Probate & Estate Planning 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 Probate & Estate Planning Section is 3,694.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 23. The number who voted in favor to this position was 21. The number who voted opposed to this position was 0. The number who abstained from voting was 2.

Report on Public Policy Position**Name of Section:**

Probate & Estate Planning Section

Contact person:

James B. Steward

E-Mail:jamessteward@stewardsheridan.com**Regarding:**

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

Date position was adopted:

July 17, 2014 and July 28, 2014

Process used to take the ideological position:

Position adopted after an electronic discussion and vote.

On February 13, 2014, the Supreme Court entered Administrative Order 2014-53 establishing the Task Force on the Role of the State Bar of Michigan. On June 2, 2014, that Task Force issued its "Report to the Michigan Supreme Court, Task Force on the Role of the State Bar of Michigan" (hereinafter referred to as the "Report"). John Nevin, Communications Director for the Michigan Supreme Court, has invited comments concerning that Report. A committee of the officers of the Probate & Estate Planning Section Council met to discuss the Report and subsequently developed a draft letter to respond and comment on the Report (hereinafter referred to as the "Probate Council Letter," which was submitted to the Council members electronically on July 10, 2014, and the vote completed on July 17, 2014. That Probate Council Letter, with revisions, was approved by electronic vote of the Council: 12 in favor, none against, no abstentions and 11 absent. Due to the number of Council members who were unavailable to vote regarding the Probate Council Letter during the earlier part of July 2014, the final form of the Probate Council Letter was again submitted to the Council members for a vote on July 27, 2014, and that vote was completed on July 28, 2014. The comment letter was then approved by a vote of the Council as follows: 21 in favor, none against, no abstentions and 2 absent. The entirety of that Probate Council Letter appears below.

Number of members in the decision-making body:

23

Number who voted in favor and opposed to the position:

21 Voted for position

0 Voted against position

0 Abstained from vote

2 Did not vote

Position:

Support in part and oppose in part.

Explanation of the position, including any recommended amendments:

July 18, 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 Probate and Estate Planning 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 chair-elect, and on behalf of the elected Council of the Probate & Estate Planning Section (“Section”) of the State Bar of Michigan (“SBM”), we appreciate the opportunity to respond with respect to two of the five major recommendations in the Report including:

- Recommendation 1: Continue the State Bar as a Mandatory Bar, and
- Recommendation 2: Section Advocacy recommendations 1 through 8.

With respect to Recommendation 1, our Council supports the continuation of the mandatory bar. On February 15, 2014, the Council approved a public policy statement opposing SB 0743 that would eliminate the mandatory bar.

With respect to the Section Advocacy recommendations numbered 1 through 8 under Recommendation 2, we believe the premise underlying recommendations 1 and 2 is faulty. While the Task Force acknowledges that the sections are “...voluntarily-funded entities...” and “...are not subject to the same constraints as the State Bar itself...”, it expresses a concern about section advocacy “...because of the risk that [s]ections’ advocacy will be mistaken for the advocacy of the State Bar itself...” First, the public policy statements reflecting the majority opinion of the 23-member Council are published on the Section’s website and clearly identified as Section statements only. Second, one of the two principal functions of this Section is to analyze and comment on issues unique to the Section’s expertise. There are less intrusive ways to make it abundantly clear that any published statement is not that of the SBM membership as a whole. Unfortunately, there are no recitations in the Report of occasions when section statements were misconstrued as SBM statements. It is difficult to address a speculative problem. Also, the assumption that section advocacy abridges a section member’s First Amendment right is flawed. As the Task Force acknowledges, sections are voluntary organizations under the umbrella of the State Bar. State Bar members are not compelled to join any particular section. Every section member receives notice and an opportunity to be heard at monthly Council meetings.

Clearly, the Council performs a valuable public service that is not available otherwise. The Section's mission statement is clear that the Section's purpose "...is to enhance and improve the practice and administration of law pertaining to probate and estate planning..." Therefore, in the last two years, the Section through its Council and its committees actively involved itself in the drafting, introduction and passage of nine separate bills. The Section retains a lobbyist to communicate with the Legislature. Five years ago, the Legislature approved a massive codification of Michigan trust law following six years of drafting by the Section involving thousands of hours of volunteer time. In addition to the foregoing efforts, each year the Council reviews numerous other bills related to probate and estate planning and often offers suggestions to the bill sponsors. The Council is also asked from time to time to file amicus curiae briefs by counsel or the appellate courts on important legal issues before the judiciary. The Council also regularly reviews and suggests changes to court rules and court forms to improve the administration of probate and estate planning law. Our advocacy puts our words into observable actions that enhance and improve the practice and administration of Michigan law. The voluntary dues of the Section members support our Section's mission statement that we will advocate for improvements in the laws, court rules and court forms that impact probate and estate planning in Michigan.

The Michigan Legislature does not have the time, expertise or focus to benefit Michigan probate and estate planning in the manner that we do. The Council calls upon attorneys in the Section, many of whom are highly experienced and have specialized knowledge to assist in its drafting and advocacy functions. These efforts serve a critical function for legislators who lack our specialized knowledge or experience. Our work is credible, reliable and informed. It is a valuable service to the public good.

Turning to Section Advocacy recommendation 2 under Recommendation 2, the Task Force proposes that sections create "...a separate entity not identified in any way with the State Bar." In fact, a separate entity would create greater confusion and misunderstanding about what such an entity is and whom it represents. Under recommendation 3 of Recommendation 2, the Task Force suggests treating such a separate entity as a quasi-SBM entity to ensure compliance with SBM rules and bylaws. However, compliance with SBM rules and regulations is the same role now filled by the sections. It is confusing as to what type of legal entity this quasi-SBM entity would be. What are the tax and regulatory reporting requirements of such an organization? The current identification of a public policy statement of a section is actually more transparent and less confusing than the proposed solution of using a quasi-SBM entity to make public policy statements for a section. For clarity reasons alone, we believe sections should retain the ability to advocate public policy positions as is presently done.

With respect to recommendations 3 through 8 of Recommendation 2 regarding Section Advocacy, we have the following comments:

We do not find the reporting requirement of AO 2004-1 burdensome, but do not oppose efforts to improve them as long as the sections can continue their legislative advocacy. (3)

We do not oppose any efforts to eliminate any subsidy for non-Keller permissible activities of sections. (4)

We do not oppose having the State Bar collect voluntary section dues and the charging of the sections for the cost of collecting such dues. (5)

We do not believe that access to advocacy-related information on section websites should be restricted to section members as long as there is a disclaimer that the advocacy is by the section and not the State Bar. (6)

We do not oppose reimbursing the State Bar for special services while using the State Bar building and facilities that may support non-Keller permissible activities. (7)

We do not oppose annual mandatory training for section officers on compliance with reasonable requirements implementing the concerns expressed in recommendations 3 through 8 above. (8)

We believe that the present advocacy practices of this Section are compliant with Keller, since our membership is voluntary, all members are free to attend our monthly meetings, our public policy statements are published on our website, are identified as issued by this Section, and are available to all Section members. We are supportive of public disclosure of our public policy statements and a disclaimer that those statements are not the position of the State Bar. Our efforts to improve the laws and administration of justice of probate and estate planning matters are an important public service and should be permitted to continue.

Respectfully submitted,

Thomas F. Sweeney, Chair

Amy N. Morrissey, Chair-Elect

“A problem well put is half solved.”
-- John Dewey

cc: Brian D. Einhorn, President, State Bar of Michigan
Council Members of the Probate and Estate Planning Section