

CRIMINAL LAW 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 Criminal Law 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 Criminal Law Section only and is not the position of the State Bar of Michigan.

The State Bar of Michigan has submitted a position on the Report of the Task Force on the Role of the State Bar of Michigan.

The total membership of the Criminal Law Section is 2,650.

These positions were adopted after an electronic discussion and vote. The number of members in the decision-making body is 26.

The number who voted in favor to the position to oppose the Report of the Task Force on the Role of the State Bar of Michigan was 23. The number who voted opposed to this position was 0.

The number who voted in favor to the position to support the letter sent to the Board of Commissioners on July 15, 2014 was 23. The number who voted opposed to this position was 0.

The number who voted in favor to the position to support the Recommendations of the State Bar Sections – Task Force Review Committee was 23. The number who voted opposed to this position was 0.



Report on Public Policy Position

Name of Section:

Criminal Law Section

Contact person:

Charles H. Marr

E-Mail:

marrlaw@msn.com

Regarding:

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

Date position was adopted:

July 16 – 23, 2014

Process used to take the ideological position:

Position adopted after an electronic discussion and vote.

Number of members in the decision-making body:

26

Number who voted in favor and opposed to the position:

23 Voted for position

0 Voted against position

0 Abstained from vote

3 Did not vote

Position:

The Section unanimously opposed the Report of the Task Force on the Role of the State Bar of Michigan.

July 29, 2014

The Honorable Robert P. Young, Jr., Chief Justice
And Justices of the Michigan Supreme Court
Office of Administrative Counsel
P.O. Box 30052
Lansing, Michigan 48909

**RE: Task Force Recommendations and
Voluntary Section Advocacy**

Dear Justice:

Thank you for allowing us the opportunity to voice our position on the legislation recommending a voluntary Bar (SB 743), and our response to the recommendations of the Supreme Court Task Force appointed by this Honorable body to address First Amendment Issues and Bar Advocacy in light of *Keller v State Bar of California*, 496 US 1 (1990) under AO 2014-5.

I am writing not only in my personal capacity, but also as the Chair-Elect of the 2100 member Criminal Law Section of the State Bar, a completely voluntary self-funded section of the Bar. Our membership consists of Prosecuting Attorneys, Defense Attorneys, Judges and Academics. As such, we represent an extremely diverse section of the Bar. Our financial support comes solely from the voluntary dues of our members. We receive no financial support from the Bar itself. Any member of the Bar in good standing may join our Section. Members of our governing Council are elected at the State Bar annual meeting each year. We provide several seminars per year at little or no cost to those in attendance, a policy conference every other year dealing with a legislative topic or an area of the criminal justice system that we believe needs improvement, interaction with Section members in a non-adversarial setting, and we provide this Court with amicus briefs upon request. We contribute to continuing legal education, and assist in the distribution and sale of a legal publication. Additionally, we perform advocacy on behalf of our members in accordance with AO 2004-01.

Not a single member of our 2100 plus members voiced support for the proposed legislation, which thankfully appears to have been withdrawn. We are, however, fully aware of the task force recommendations made to this Court, and respectfully disagree with portions of it. Our Council carefully reviewed the recommendations of the task force, and unanimously voiced opposition to those areas of the recommendation dealing with Section advocacy. The lack of a formal statement or position on the other areas should not be viewed as either support or opposition; our concern and formal position is limited only to the areas of the task force report involving Section advocacy in light of *Keller*. Of additional significance is the fact that neither the restrictions set forth in AO 2004-01 or *Keller* apply to our section, as we are completely voluntary and completely funded by voluntary dues. Yet the recommendations of the task force would so severely limit our ability to advocate in the future that the First Amendment Rights of Section members would be effectively eliminated.

Our Section has been in existence for well over thirty years (if my memory is correct). The By-Laws of our section have consistently been approved by the Bar, and specifically allow advocacy on behalf of the Section on issues of importance to our members. (Article I Section 2). None of our members believed that opposition to SB 743 would result in the forfeiture of their First Amendment Right to advocate their beliefs on issues of concern to our members, our Section and the Bar itself, nor that such opposition would so drastically effect the manner in which we have historically conducted business.

I had the privilege of serving on the Steering Committee which also addressed these very issues with you, and our Council stands fully behind the Steering Committee report submitted to you. We unanimously adopted the Core Principles of Advocacy upon which the Steering Committee report was based.

As part of the decision making process, I reviewed the testimony taken at the task force public hearing, and note that there was not a single word in opposition to voluntary Section advocacy. In fact, even Alan Falk, (See *Falk I and Falk II* at 411 Mich 63 (1981) and 418 Mich 270 (1983)), perhaps the most vocal opponent of State Bar advocacy was in favor of *voluntary Section* advocacy. Because our membership is strictly voluntary, members have the opportunity to challenge a position with which they disagree, to vote for new leadership with a viewpoint closer to their own, or to resign from the Section in opposition to a particular position. We have not seen significant reductions in membership, or significant numbers of individuals challenging our council as a result of advocacy positions we have taken. In recent memory, there has been no vocal opposition to any

position taken by our Section, or advocated on our behalf. In short, our Section strongly but respectfully disagrees with the task force recommendations on Section advocacy, believing that there are numerous less intrusive measures available to address any First Amendment or *Keller* concerns that the Court may have.

We believe that we, as a Section and as individual members have a First Amendment Right, although not absolute (and subject to AO 2004-01), to advocate on behalf of our members as a voluntary Section of the Bar. We have not seen significant confusion of our identity within the Bar or the Legislature, nor have we witnessed any of the other scenarios or areas of concern voiced by the task force. We believe there are less intrusive means of addressing these issues, if necessary, while still preserving the First Amendment Rights of our voluntary membership. Over the years, we have developed credibility and a reputation as a voluntary Section of the Bar, and wish to continue reaping the benefits of our credibility and our well deserved reputation as members in good standing of the Michigan Bar. We obtained that reputation through years of hard work, and do not want its prominence reduced in any way.

We urge the adoption of the Steering Committee Recommendations, and respectfully ask this Court to reject those portions of the task force report limiting or eliminating voluntary Section advocacy as it currently exists. If necessary, AO 2004-01 could be modified or rewritten, still preserving the First Amendment Rights of our members as set forth in the Appendices to the Steering Committee report.

Respectfully Submitted,

CHARLES H. MARR
CHAIR-ELECT of the
CRIMINAL LAW SECTION
STATE BAR OF MICHIGAN
Law Offices of
CHARLES H. MARR, P.L.L.C.

Report on Public Policy Position

Name of Section:

Criminal Law Section

Contact person:

Charles H. Marr

E-Mail:

marrlaw@msn.com

Regarding:

The Letter sent to the Board of Commissioners on July 15, 2014

Date position was adopted:

July 16 – 23, 2014

Process used to take the ideological position:

Position adopted after an electronic discussion and vote.

Number of members in the decision-making body:

26

Number who voted in favor and opposed to the position:

23 Voted for position

0 Voted against position

0 Abstained from vote

3 Did not vote

Position:

The Section unanimously adopted the Core Principles upon which the Steering Committee Report was based.

FAMILY LAW SECTION

COUNCIL OFFICERS

CHAIR

James J. Harrington, III
Law Offices of James J. Harrington III, P.L.C.
23875 Novi Rd., Novi, MI 48375
jjh@jjharringtonlaw.com

CHAIR-ELECT

Rebecca Shiemke, Ann Arbor
rshiemke@lsscm.org

TREASURER

Carol Breitmeyer, Detroit
breitmeyer@bcfamlaw.com

CORRESPONDING SECRETARY

Hon. Richard B. Halloran, Detroit
richard.halloran@3rdcc.org

RECORDING SECRETARY

Kent Weichmann, Ann Arbor
weichmannk@att.net

COUNCIL MEMBERS

Daniel B. Bates, Bloomfield Hills
dan@danbateslaw.com
Elizabeth K. Bransdorfer, Grand Rapids
ebransdorfer@mmbjlaw.com
J. Matthew Catchick, Southfield
mattcat606@gmail.com
Christopher J. Harrington, Novi
cjh@jjharringtonlaw.com
Sahera Housey, Pontiac
houseys@oakgov.com
Tina Yost Johnson, Battle Creek
tyost@calhouncountymtmi.gov
Mathew Kobliska, Farmington Hills
mkobliska@dpkzlaw.com
Peter Kulas, Grand Rapids
pmkulas@kulaslawoffice.com
Colleen Markou, Kalamazoo
colleenmarkou@stancati-assoc.com
Anthea Papista, Detroit
aep@papistalaw.com
Steven D. Reinheimer, Bloomfield Hills
steven@stevenreinheimer.com
Kristen L. Robinson, Troy
kristen@mellinrobinson.com
Allison E. Sleight, Grand Rapids
ASleight@KreisEnderle.com
Ross F. Stancati, Kalamazoo
rossstancati@stancati-assoc.com
Gail M. Towne, Kalamazoo
gtowne@lennonmiller.com
Robert Charles Treat, Jr., Taylor
bob.treat@qdroexpressllc.com
Randall L. Velzen, Grand Rapids
rvelzen@westmichigandivorce.com

EX OFFICIO

Traci Rink, Pontiac
rinkt@oakgov.com

COMMISSIONER LIAISON

Maureen McGinnis, Troy
mmcginnis@dmcginnis.com

Brian D. Einhorn, Esq.
President - State Bar of Michigan
Collins, Einhorn & Farrell
4000 Town Center #909
Southfield, MI 48075

July 15, 2014

Re: Sections Task Force Review & Recommendations

Dear Mr. Einhorn:

Kindly accept the Sections Task Force Review and Recommendations for consideration by the State Bar Board of Commissioners. This Review and Recommendations arises 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 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, ADM 2014-5. Thereafter a Public Hearing was conducted on 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 of attorneys, exclusively 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 oversight of the State Bar of Michigan and the Michigan Supreme Court.

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. 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 involving their membership and the public interest.

Section membership and advocacy represent a democratic process. Any State Bar member in good standing may join any Section of the State Bar of Michigan. All Section members are free to furnish input regarding legislative, court rule, or public policy issues involving their section. All Section members are free to run for an elected position on their Section Council. All Section members are free to attend any monthly Council meeting, or their annual Section meeting. 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 Supreme Court Administrative Order 2004-1¹. The Sections are specifically exempted from the limitations set forth in Section I of 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

¹. Administrative Order 2004-1 was enacted February 3, 2004 and is also identified as ADM 2003-15.

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, then 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. This Committee is unaware of any enforcement action ever having been taken against a section for having violated either AO §2004-1, or (1), (2), or (3) above.

This Committee recognizes that a primary focus of the Task Force was directed to activities of the State Bar of Michigan, in consideration of the directives of *Keller v State Bar of California*, 496 U.S. 1, 110 S.Ct.2228 (1990). The *Keller* decision did not involve advocacy of voluntary sections. The *Keller* decision was exclusively focused upon the use of “compulsory dues to finance political and ideological activities.”

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 an issue that had become a significant 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.

Moreover, the testimony of Mr. Alan Falk in the Public Hearing is noteworthy. Clearly, he was one of the most vocal critics of State Bar advocacy. However, he eloquently affirmed the underlying rights of voluntary Sections to engage in advocacy and the fact that the rights of “dissenting members” are preserved through their ability to leave the Section:

“So let me start by saying that when it comes to sections of the Bar, those are in effect voluntary. To belong to a section, you choose to belong and you pay extra dues. So the current structure is that a section can’t take a position on something in the Legislature without getting the approval of the Board of Commissioners,² I think, and usually the Board of Commissioners takes a position for the whole Bar and everybody has to toe the line.

². Mr. Falk is technically incorrect, but his endorsement of expanding advocacy of Sections is most interesting. The Sections are not required to “clear” their positions in advance with the State Bar. The State Bar solicits and carefully considers that positions of the Sections on issues prior to taking its own position. It is only after the State Bar has taken a position that Sections cannot publicly oppose the State Bar position.

It would be more sensible to let the sections speak. They are essentially voluntary groups, so if a section says something with which I disagree, I can stop belonging to the section. That's my way of saying, You guys aren't doing a good job, and either they will do a better job if enough members follow my example, or I am the only guy that has a problem and they won't miss my \$15 or \$25, whatever it is."

Notwithstanding, the Task Force Recommendations submitted for consideration to the Michigan Supreme Court will bar advocacy by the Sections. Further, these recommendations would make First Amendment Advocacy by State Bar Sections either illegal, or sanctionable through the overall 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 are 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. In this case, the Task Force Report & Recommendations 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 there were good and sufficient reasons for the secrecy surrounding the Task Force deliberations, drafting, and submission process. The Sections spoke out loud and clear 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 the forfeit of Section First Amendment 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 11, 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 submit their recommendations on behalf of their Sections to the 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:

Childrens Law Section - Chair Christine Piatowski
Consumer Law Section - Chair Terry Adler
Criminal Law Section - Chair Elect Charles H. Marr
Family Law Section - Chair, James J. Harrington III
Negligence Law Section - Chair Steve Galbraith
Real Property Law Section - Chair Elect David E. Pierson

The Steering Committee members are in unanimous agreement with the following *Core Principles of Section Advocacy*. To the extent that these *Core Principles of Section Advocacy* conflict with the Task Force Recommendations, then this Committee respectfully challenges the Recommendations of the Task Force.

The Sections represented herein 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 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.**

VI. RECOMMENDATIONS

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

For the convenience of the Sections and the State Bar Commissioners, the Core Principles are set forth included as Attachment A.

For the convenience of the Sections and the State Bar Commissioners, a edited version of the proposed revisions to AO 2004-1 are included as Attachment B.

For the convenience of the Sections and the State Bar Commissioners, AO 2004-1, ADM 2003-15, including Section F dealing with Section Advocacy, are included as Attachment C.

VII. CONCLUSION

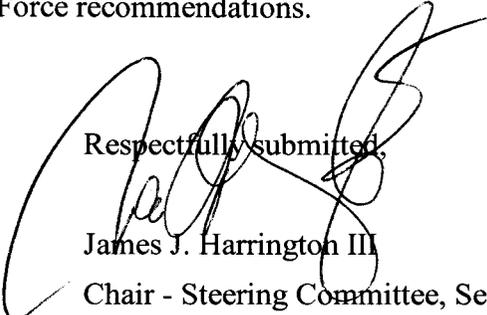
The Committee discussed a variety of “options” for effectively dealing with problems or issues raised in the Task Force Report, which are far less intrusive than severing the advocacy rights of the Sections. For example, in response to what appears to be anecdotal, hearsay upon hearsay evidence of some members being “confused” as to difference between the State Bar of Michigan and the Sections, multiple suggestions were considered.

To the extent that State Bar of Michigan “branding” contributes to the confusion over who the Sections represent, there was discussion regarding (1) removal of the State Bar of Michigan Logo from Section Letterhead; (2) leave the Logo intact, but have a written disclaimer consistent with AO 2004-1 on every page of every written page of materials submitted to the Legislature; (3) including the written disclaimer on each page of Section websites that involves advocacy.

The consensus was that while any or all of the above might substantially impact the “confusion” issues, it is not the duty of the Sections to micro-manage the use of State Bar of Michigan “branding” and these initiatives should properly flow from the State Bar of Michigan.

Finally, this Report & Recommendations have dealt solely with issues impacting Section Advocacy. Limiting our comment, opinions, and recommendations to these specific issues does not imply or assume agreement or endorsement of other recommendations arising out of the Task Force Report.

The Board of Commissioners and members of the Representative Assembly are both tasked with and capable of detailed response, and constructive suggestions regarding other issues arising out of the Task Force recommendations.



Respectfully submitted,

James J. Harrington III

Chair - Steering Committee, Sections Task Force Review Committee

Chair - Family Law Section State Bar of Michigan

Law Offices of James J. Harrington III, PLC

23875 Novi Rd., Novi MI 48375

jih@jjharringtonlaw.com

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

Sections Task Force Review & Recommendations

**Attachment B - Adm Order 2004-1 Revisions
Example of Proposed Disclaimer**

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

Sections Task Force Review & Recommendations

**Attachment B - Adm Order 2004-1 Revisions
Example of Proposed Disclaimer**

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.

Sections Task Force Review & Recommendations

**Attachment C - Adm Order 2004-1
ADM 2003-15 ---February 3, 2004**

- (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.

Sections Task Force Review & Recommendations

**Attachment C - Adm Order 2004-1
ADM 2003-15 --February 3, 2004**

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;

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- (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.



Report on Public Policy Position

Name of Section:

Criminal Law Section

Contact person:

Charles H. Marr

E-Mail:

marrlaw@msn.com

Regarding:

Recommendations of the State Bar Sections – Task Force Review Committee

Date position was adopted:

July 16 – 23, 2014

Process used to take the ideological position:

Position adopted after an electronic discussion and vote.

Number of members in the decision-making body:

26

Number who voted in favor and opposed to the position:

23 Voted for position

0 Voted against position

0 Abstained from vote

3 Did not vote

Position:

The Section unanimously adopted the Steering Committee report on the role of the SBM.

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

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,

JAMES J. HARRINGTON, III
Chair of the Steering Committee
Law Offices of James J. Harrington III, PLC
23875 Novi Rd., Novi MI 48375
Office: (248) 347-9620 Fax: (248) 347-9634
jjh@jjharringtonlaw.com

CHRISTINE A. PIATKOWSKI
Chair of the Children's Law Section
Christine Piatkowski PLC
PO Box 1054
Brighton, MI 48116
Office: (810) 231-2628 Fax: (810) 231-6967
piatkowski.law@chartermi.net

TERRY J. ADLER
Chair of the Consumer Law Section
Terry J. Adler, PLLC
10751 S Saginaw St., Suite G
Grand Blanc, MI 48439
Office: (810) 695-0100 Fax: (810) 695-6727
lemonade1@sbcglobal.net

CHARLES H. MARR
Chair Elect of the Criminal Law Section
Law Offices of Charles H. Marr PLLC
302 W Main St
Northville, MI 48167
Office: (248) 596-1599 Fax: (248) 596-1578
marrlaw@msn.com

STEVEN B. GALBRAITH
Chair of the Negligence Law Section
Galbraith Delie & James PC
660 Woodward Ave Ste 1975
First National Bldg
Detroit, MI 48226
Office: (248) 357-3910 Fax: (248) 357-2665
sgalbraith@galbraithpc.com

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.**
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- 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

Sections Task Force Review & Recommendations

**Attachment B - Adm Order 2004-1 Revisions
Example of Proposed Disclaimer**

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

Sections Task Force Review & Recommendations

**Attachment B - Adm Order 2004-1 Revisions
Example of Proposed Disclaimer**

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.

Sections Task Force Review & Recommendations

**Attachment C - Adm Order 2004-1
ADM 2003-15 —February 3, 2004**

- (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.

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Sections Task Force Review & Recommendations

**Attachment C - Adm Order 2004-1
ADM 2003-15 —February 3, 2004**

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Sections Task Force Review & Recommendations

**Attachment C - Adm Order 2004-1
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- (4) arrange for reimbursement to the challenger of a pro rata share of the cost of the challenged activity; and
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- (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.
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