

PUBLIC CORPORATION LAW SECTION

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August 1, 2014

MICHIGAN SUPREME COURT

Michigan Hall of Justice
925 W. Ottawa St.
Lansing, MI 48913

**RE: Report to the Michigan Supreme Court by the Task
Force on the Role of the State Bar of Michigan –
Section Advocacy Recommendations**

Dear Chief Justice Young and Justices of the Michigan Supreme Court:

For how long has the State Bar Public Corporation Law Section been appearing as *amicus curiae* in cases pending in the Michigan Supreme Court? Longer than the collective memory of all living members of the Section Council – a considerable length of time.

It is believed that *amicus* appearances of the several Bar Sections serve the public interest, a belief that is reinforced by the Court's frequent invitations for such appearances, extended by section name. Bar Sections have numerous members with expertise within the scope of respective section subject matter. Particularly considering that the Court determines to grant leave to appeal, and ultimately decides cases, in order to advance the jurisprudence of the State, and not simply to correct errors in particular cases, *amicus* briefs can be of assistance to the Court in achieving an understanding of the broader context of cases, and the longer-term implications of ruling in a particular manner.

The Public Corporation Law Section Council interprets the Section Advocacy Recommendations of the *Report to the Michigan Supreme Court by the Task Force on the Role of the State Bar of Michigan* as fundamentally embracing the importance of Bar Section advocacy. In relation to the very limited scope of advocacy permitted under *Keller* for the mandatory State Bar Association, the Task Force confirms that Bar Section memberships are voluntary and activities are funded by the voluntary payment of section dues, and thus *Keller* should not stand in the way of a liberal authorization for Bar Section advocacy with respect to *Amicus* appearances in particular, as well as participation in the legislative process. Indeed, the spirit of the Report appears to promote the facilitation of Bar Section advocacy. However, in its design of a process to ensure conformance with *Keller*, the Report leaps well beyond what is needed for *Keller* compliance, and neglects a methodology that would permit a continuation of efficient and effective Bar Section advocacy while achieving the goal of *Keller* compliance. Specifically, permitting Bar Sections to engage in advocacy only by *forming separate entities* not identified in any way with the State Bar represents both an unnecessary complication and restriction that would seriously jeopardize the effectiveness and ability of timely Bar Section *amicus* and legislative advocacy.

The fact that the Court invites Bar Sections *by name* to file *amicus curiae* briefs is not a matter of happenstance. Rather, it is believed that the Court has recognized that Bar Sections contribute significant value to a thorough deliberation of cases. A necessary ingredient to such value is the identity of the particular *amicus* advocate, an ingredient that provides at least the following important insights to the Court: the perspective from which positions are offered; the ability to judge the long-term efficacy of the positions advanced in the past by such advocate; and the particular interest of the advocate in the outcome of the case. This concept of knowing the identity of the “speaker” within an advocacy context was recognized in the majority opinion in *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994), a case that reviewed the constitutionality of a city sign regulation for compliance with the First Amendment:

Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the “speaker.” As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade. A sign advocating “Peace in the Gulf” in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

Moreover, *amicus curiae* briefs must be filed within the framework of the Court's docket management schedule. To be effective and useful to the Court, briefs must be timely filed within the deadlines established by court rule. This point gives rise to inescapable logistics issues for Bar Sections. In the *amicus* process, section councils must be provided with information concerning the existence and importance of a case pending before the Court. They must then deliberate on the merits of seeking to appear as *amicus*, select and secure a willing and capable author to prepare a brief (generally at below market compensation), allow adequate time for brief preparation, budget time for the opportunity to review the brief, and inform the State Bar of the filing. All of these steps must be taken within the confines of the time schedule established by the Court. In many instances, meeting the time schedule is challenging. Yet, the Task Force Report would require an *amicus* filing (or involvement in the legislative process) to be made by creating an entity “not identified in any way with the State Bar.” To qualify for such separation from the State Bar, more than a superficial distinction would presumably be required, including some independence of decision making. If Bar Section *amicus* or legislative advocacy required the additional involvement of such a meaningfully separate entity, as appears to be recommended by the Task Force, it is likely that the opportunity of a Bar Section to properly and effectively advocate would be jeopardized, and the ability to make important filings in a timely and helpful manner would be in serious question.

It is essential to clarify that the Public Corporation Law Section Council concurs with the Task Force with regard to the need to effectively inform members of the public that State Bar dues, paid on an involuntary basis, are not utilized for Bar Section *amicus* advocacy.¹ The most efficient and effective means of achieving this imperative, without jeopardizing the ability to effectively and timely advocate, is to prominently announce in each *amicus* filing by a Bar Section that all *amicus* advocacy in the case has been undertaken solely with the use of voluntary section dues, and that no dues paid on an involuntary basis to the State Bar have been used.

There are many issues presented in the Task Force Report. The Public Corporation Law Section Council recognizes that it will be necessary for the Court to examine all of the issues, but has concluded that it is most important for the Section to ask the Court to include in its deliberations a focus on the Report's Section Advocacy Recommendations. On this subject, by authority granted in the attached resolution duly adopted by the Section Council of the Public Corporation Law Section, the Court is respectfully requested to:

- Accept the spirit of the Task Force Report with respect to the recommendation to continue permitting Bar sections to engage in ideological and other non-partisan advocacy, but also to,
- Determine that Bar Sections may utilize their voluntary dues to advocate as *amicus curiae* or in the legislative arena in the names of their respective Bar Sections, recognizing the need to prominently announce that such advocacy is financed exclusively with funds provided by voluntary Section dues.

Respectfully submitted,

PUBLIC CORPORATION LAW SECTION
OF THE STATE BAR OF MICHIGAN

By: _____

Michael J. Watza, Chair
on behalf of the Section Council

C: State Bar, Board of Commissioners
State Bar, Representative Assembly
State Bar, Executive Director

¹ While we agree that it must be clear that Bar Sections do not use involuntary dues to fund its advocacy, we are unaware of any specific examples suggesting there is currently confusion between the Sections themselves and the State Bar that would require that each Section form a separate entity – either in the court or judicial setting or in the legislature – in order to reduce or eliminate the potential for confusion.

STATE BAR OF MICHIGAN

PUBLIC CORPORATION LAW SECTION

**RESOLUTION OF SECTION COUNCIL AUTHORIZING LETTER TO THE
MICHIGAN SUPREME COURT ON THE SUBJECT OF THE REPORT TO THE
MICHIGAN SUPREME COURT BY THE TASK FORCE ON THE ROLE OF THE STATE
BAR OF MICHIGAN –SECTION ADVOCACY RECOMMENDATIONS**

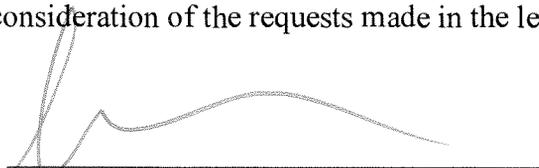
In response to a State Bar request to the Michigan Supreme Court to review Bar operations in connection with the requirements of *Keller v State Bar of California*, the Court entered Administrative Order 2014-5, establishing the Task Force on the Role of the State Bar of Michigan.

On June 2, 2014, the Task Force released its recommendations to the Court in the form of a *Report to the Michigan Supreme Court by the Task Force on the Role of the State Bar of Michigan*.

The Report provides the Court with several recommendations, including Section Advocacy Recommendations.

The Court has permitted responses to the Task Force Report, and the Section Council of the Public Corporation Law Section has concluded that it is most important for the Section to ask the Court to include in its deliberations a focus on the Report's Section Advocacy Recommendations, and has approved the attached letter for the Court's consideration.

NOW, THEREFORE, IT IS RESOLVED that the Section Council of the Public Corporation Law Section approves that attached letter for submission to the Michigan Supreme Court and respectfully requests the Court's consideration of the requests made in the letter.



Michael J. Watza
Chair, Public Corporation Law Section

Unanimously adopted July 30, 2014



PUBLIC CORPORATION 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 Public Corporation 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 Public Corporation Law 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 Public Corporation Law Section is 628.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 20. The number who voted in favor to this position was 13. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of Section:

Public Corporation Law Section

Contact person:

Mary J. Fales

E-Mail:

mfales@a2gov.org

Regarding:

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

Date position was adopted:

July 30, 2014

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

20

Number who voted in favor and opposed to the position:

13 Voted for position

0 Voted against position

0 Abstained from vote

7 Did not vote

Position:

See attached letter.

Explanation of the position, including any recommended amendments:

It is the position of the Section Council of PCLS that permitting Bar Sections to engage in advocacy only by forming separate entities not identified in any way with the State Bar represents an unnecessary complication and restriction that would seriously jeopardize the effectiveness and ability of timely Bar Section amicus and legislative advocacy.

Section Council of the Public Corporation Law Section respectfully requested the Court to:

- Accept the spirit of the Task Force Report with respect to the recommendation to continue permitting Bar sections to engage in ideological and other non-partisan advocacy, but also to,
- Determine that Bar Sections may utilize their voluntary dues to advocate as amicus curiae or in the legislative arena in the names of their respective Bar Sections, recognizing the need to prominently announce that such advocacy is financed exclusively with funds provided by voluntary Section dues.