

**THE REPRESENTATIVE ASSEMBLY'S RECOMMENDATIONS AND/OR
COMMENTS TO MICHIGAN SUPREME COURT ADMINISTRATIVE ORDER NO.
2014-5**

Issue

Should the Representative Assembly make recommendations and/or provide comments to the Task Force created by Administrative Order 2014-5 or directly to the Supreme Court (*i*) on whether the role and functions of the Assembly support the State Bar's status as a mandatory bar; and (*ii*) on any proposed revisions of the administrative orders and court rules governing the State Bar as they relate to the Assembly in order to improve the governance and operation of the State Bar, through the following two steps:

- a. Commission the Special Committee, recently established by the Assembly Chairperson, with the responsibility to summarize the comments and recommendations made at this April 26th meeting and incorporate them as part of an Assembly report responsive to Administrative Order 2014-5, and submit such report to the Task Force or the Supreme Court directly, or after a future review by the Assembly, as soon as practicable, and
- b. Open the floor of the April 26th Assembly Meeting for member comments on the two matters as provided in (i)-(ii) above.

Synopsis

On February 13, 2014, the Michigan Supreme Court, by Administrative Order No. 2014-5, created a task force to address whether "the State Bar's current programs and activities support its status as a mandatory bar." Administrative Order 2014-5 provides: that "[t]he 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 [v State Bar of Michigan]*, 411 Mich [63] at 112." Further, the Order also provides that 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 governance and operation of the State Bar."

In response to the creation of the Task Force, the President of the State Bar appointed a work group to examine the Supreme Court Rules concerning the State Bar of Michigan for the purpose of providing input to the Task Force. The work group's focus includes attention to Rule 6 pertaining to the Representative Assembly.

The purpose of this proposal is to provide the opportunity for the Representative Assembly to make recommendations and/or comments that will be submitted to the Task Force and/or the Supreme Court and/or further review by the Representative Assembly as soon as practicable.

Background

Senate Bill 743, introduced January 23, 2014, proposes to eliminate the mandatory bar status of the State Bar of Michigan. The State Bar Board of Commissioners took the position to oppose this legislation in a special meeting and, in a letter addressed to the Michigan Supreme Court, dated February 6, 2014, the State Bar asked the Supreme Court to review how "the State Bar operates within the framework of *Keller v State Bar of California*, 496 US 1 (1990)," as follows:

Dear Chief Justice Young,

Today the State Bar's Board of Commissioners voted unanimously to oppose SB 743, a bill to make membership in the State Bar of Michigan voluntary. The bill raises questions about the operation of the State Bar as a mandatory organization that are most appropriately addressed within the judicial branch pursuant to the Supreme Court's exclusive constitutional authority to establish practice and procedure, Const Art VI, Sec 5. For that reason, we write to request that the Supreme Court initiate a review of how the State Bar operates within the framework of *Keller v State Bar of California*, 496 US 1 (1990).

The rules of the Supreme Court direct the State Bar to aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in Michigan. We value the reputation the State Bar has established as a national leader in pursuing these purposes for nearly eight decades. We know that our continued effectiveness depends on the confidence of this Court and our membership in our adherence to our core mission and to the constitutional boundaries defined by *Keller* and this Court. Our decision making in carrying out our duties to our members and the public is grounded in such adherence, and we believe that a structured conversation on this subject undertaken under the auspices of the Supreme Court will fully address the questions raised by SB 743. At the same time, such a review has the potential to strengthen and clarify the capacity of the State Bar to fulfill its mission in the coming decades.

We offer the State Bar's full resources and cooperation toward a meaningful review, and thank you for your consideration of our request.

On February 13, 2014, the Michigan Supreme Court, by Administrative Order No. 2014-5, created a task force to address whether "the State Bar's current programs and activities support its status as a mandatory bar." Administrative Order 2014-5 provides: that "[t]he 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 [v State Bar of Michigan]*, 411 Mich [63] at 112". Further, the Order also provides that 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." The Order reads as follows:

February 13, 2014

ADM File No. 2014-07

Administrative Order No. 2014-5

Order Creating the Task Force on the
Role of the State Bar of Michigan

[T]he regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public are, in the context of the present challenge, purposes in which the State of Michigan has a compelling interest. . . . [*Falk v State Bar of Michigan*, 411 Mich 63, 114; 305 NW2d 201 (1981) (opinion of RYAN, J).]

[T]he 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. [*Keller v State Bar of California*, 496 US 1, 13-14; 110 S Ct 2228; 110 L Ed 2d 1 (1990).]

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.

The members appointed to the task force are as follows:

Danielle Michelle Brown

Hon. Alfred M. Butzbaugh (Ret.)

Thomas W. Cranmer

Peter H. Ellsworth

John E. McSorley

Colleen A. Pero

John W. Reed

Hon. Michael J. Riordan

Thomas C. Rombach

Hon. John J. Walsh

Janet K. Welch

Vanessa Peterson Williams

Hon. Alfred M. Butzbaugh is appointed as chairperson of the task force.

Nelson Leavitt shall serve as the reporter of the task force.

Justice McCormack shall serve as the Court's liaison to the task force.

On February 14, the State Bar released a Member Advisory to all State Bar members, informing them of the creation of the Task Force, and offering the following short talking points supporting the State Bar's position on a mandatory bar:

Advantages of a Mandatory State Bar to Members

- Self-regulation and oversight through the judicial branch rather than the executive and legislative branches.
- Economies of scale provide better member benefits, including many that reduce the cost of practice. Michigan's bar dues are below the national average and less than half that of the licensing fees in the most expensive state to practice law—a voluntary bar state.
- Member benefits that reduce the cost of practice and enhance quality of the profession.
- A more cost-effective organizational structure than a voluntary bar.
- "Big tent" inclusiveness enhances the status of the bar, allows more effective exchange of opposing viewpoints, prevents the profession from being identified with a single political ideology.

- Affirms the unique professional status of lawyers as officers of the court, distinguishing them from other professions and trades.

Advantages of a Mandatory State Bar to the Public

- Avoids adding the cost of attorney licensure and regulation to the state tax burden.
- Less bureaucracy.
- Serves the public more fully and effectively in enhancing public protection, pro bono service, and expertise in court improvements.
- Examples of public services provided by the State Bar beyond regular licensing and disciplinary function: programming to enhance ethics and professionalism, civic education, pro bono services, assistance to lawyers and judges dealing with alcohol and drug dependency, administration of the client protection fund, investigation of the unauthorized practice of law, promotion of improvements in the justice system and practice of law. In a state-bureaucratic model, these services and others would likely be discontinued, added to the taxpayer burden, or funded by lawyer assessments higher than the current dues structure.

Frequently Asked Questions About Mandatory Versus Voluntary Bar Status

- Do lawyers in voluntary bar states pay anything to practice law? **YES**
- Does a mandatory bar deliver value to its members that a voluntary bar can't? **YES**
- Are the State Bar of Michigan's public service and access to justice programs better than what voluntary bar states can provide? **YES**

[SBM Member Advisory, dated 2/14/2014,
<http://www.michbar.org/eBlasts/advisory2-14-14.cfm>]

The Task Force Chairperson, the Honorable Alfred M. Butzbaugh, has asked every State Bar member, including every individual Representative Assembly member, for "input on the issues raised by the Supreme Court".

In response to the creation of the Task Force, the President of the State Bar appointed a work group to examine the Supreme Court Rules concerning the State Bar of Michigan for the purpose of providing input to the Task Force. The work group's focus includes attention to Rule 6 pertaining to the Representative Assembly.

Opposition

None known.

Prior Action by the Representative Assembly

None.

Fiscal and Staffing Impact on the State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 26, 2014**

Should the Representative Assembly make recommendations and/or provide comments to the Task Force created by Administrative Order 2014-5 or directly to the Supreme Court (*i*) on whether the role and functions of the Assembly support the State Bar's status as a mandatory bar; and (*ii*) on any proposed revisions of the administrative orders and court rules governing the State Bar as they relate to the Assembly in order to improve the governance and operation of the State Bar, through the following two steps:

- a. Commission the Special Committee, recently established by the Assembly Chairperson, with the responsibility to summarize the comments and recommendations made at this April 26th meeting and incorporate them as part of an Assembly report responsive to Administrative Order 2014-5, and submit such report to the Task Force or the Supreme Court directly, or after a future review by the Assembly, as soon as practicable, and
- b. Open the floor of the April 26th Assembly Meeting for member comments on the two matters as provided in (i)-(ii) above.

(a) Yes

or

(b) No