



To: Members of the Representative Assembly

From: Janet Welch, Executive Director
Peter Cunningham, Director of Governmental Relations
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Date: August 27, 2018

Re: Resolution of Marijuana Legalization

Background

Under federal law, possession and use of marijuana is illegal for both recreational and medical purposes. In 2008, Michigan voters approved a ballot initiative to legalize the medical use of marijuana. The State Bar of Michigan did not take a position on the 2008 ballot proposal.

The Resolution of Marijuana Legalization seeks the Representative Assembly’s support for a [ballot proposal](#)¹ that would change substantive criminal law to legalize the recreational possession and use of marijuana in Michigan for adults 21 years of age and older. As set forth in Section 2 of the ballot proposal:

The intent [of this act] is to prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age or older; remove the commercial production and distribution of marihuana from the illicit market; prevent revenue generated from commerce in marihuana from going to criminal enterprises or gangs; prevent the distribution of marihuana to persons under 21 years of age; prevent the diversion of marihuana to illicit markets; ensure the safety of marihuana and marihuana-infused products; and ensure security of marihuana establishments.

Specifically, the ballot proposal would legalize the possession and sale of up to 2.5 ounces of marijuana for personal use for individuals 21 years of age or older and allow individuals to keep up to 10 ounces of marijuana at home. In addition, individuals would be allowed to cultivate up to 12 marijuana plants at home for personal use. The proposal would impose a 10% excise tax on marijuana sales at retailers. The revenue for this tax would be allocated to local governments, education, and road and bridge maintenance. Local governments would be able to decide whether to allow recreational marijuana businesses in their community.

***Keller* Considerations**

The ballot proposal is not *Keller*-permissible. The ballot proposal is not related to either “regulating the legal profession [or] improving the quality of legal services.” *Keller v State Bar of California*, 496 US

¹ The ballot proposal language can be found here: <https://www.regulatemi.org/initiative/>

1, 13 (1990). Instead, the ballot proposal amends substantive criminal law to legalize the possession and use of marijuana for recreational purposes, which is precisely the type of ideological activity that the United States Supreme Court determined that state bars could not use mandatory dues to advance on First Amendment grounds. See *id.* at 16 (explaining that it is clear that “compulsory dues may not be expended to endorse or advance a gun control or nuclear freeze initiative”).

The State Bar has consistently determined that changes to substantive criminal law are outside the permissible bounds of *Keller*, and has rejected *Keller* arguments that assert that hypothetical decreases in court activity constitute improvements in the functioning of the courts. A primary purpose of the courts is to adjudicate criminal prosecutions; a decrease in the number of prosecutions cannot in and of itself be considered an improvement in the functioning of the courts. Indeed, the criminalization or decriminalization of any activity will result in shifts in the utilization of such resources. Which activities to criminalize or not is inherently an ideological decision beyond the scope of the State Bar’s authority.

The proponent has indicated that he believes the proposal is permissible under *Keller* because the legalization of marijuana in other states has resulted in a decreased number of arrests for marijuana-related crimes and an increase in clearance rates for other crimes, including violent crimes and property crimes. The fact that legalization of marijuana for recreational purposes might have an impact, positive or negative, on the level of activity of the courts and justice system does not make the subject matter *Keller*-permissible. If it did, virtually any legislative proposal that impacted social behavior subject to prosecution or even civil dispute would be *Keller*-permissible. The *Keller* decision used gun control as an example of a subject-matter that would be constitutionally out-of-bounds. By the proponent’s reasoning (projected impact on justice system activity), mandatory state bar positions on gun control would not have been interdicted under *Keller*.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER <i>KELLER</i>:		
	Regulation of Legal Profession	Improvement in Quality of Legal Services
As interpreted by AO 2004-1	<ul style="list-style-type: none"> • Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts 	<ul style="list-style-type: none"> • Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation

The ballot proposal is not permissible under *Keller*.

RESOLUTION ON MARIJUANA LEGALIZATION

WHEREAS, like the prohibition of alcohol, the prohibition of marijuana has failed to stop marijuana use, enriched criminal organizations, and made criminals out of otherwise law-abiding citizens; and

WHEREAS, marijuana has proven medicinal value and is used to treat a wide variety of medical conditions including cancer, glaucoma, arthritis, chronic pain, Parkinson's disease, Crohn's disease and post-traumatic stress disorder; and

WHEREAS, the enforcement of marijuana prohibition disproportionately impacts minorities, with African American men found to be three times more likely to be arrested for marijuana than white men; and

WHEREAS, more than 20,000 people are arrested for marijuana in Michigan every year which wastes millions in tax dollars that otherwise could be spent on more important law enforcement priorities like stopping violent crime and combating the opiate epidemic; and

WHEREAS, the Coalition to Regulate Marijuana Like Alcohol has placed a question on the November ballot that proposes to legalize marijuana possession and consumption for adults 21 years and older; and

WHEREAS, the ballot initiative proposes to authorize the Michigan Department of Licensing and Regulatory Affairs to license and regulate the commercial production and distribution of marijuana similar to the Michigan Medical Facilities Licensing Act that was passed in 2016 with bipartisan support; and

WHEREAS, the ballot initiative proposes to impose a 10 percent retail tax on marijuana sales that would be dedicated to fund Michigan roads and infrastructure, public schools and local governments; and

WHEREAS, it is estimated that Michigan could generate between \$100 and \$200 million in new tax revenue each year from retail marijuana sales; and

WHEREAS, the ballot initiative would authorize Michigan cities, townships and villages to regulate the operation of marijuana businesses within their jurisdictions or to ban them entirely:

NOW, THEREFORE, BE IT RESOLVED, the State Bar of Michigan Representative Assembly supports the Coalition to Regulate Marijuana Like Alcohol's ballot proposal to legalize, regulate and tax marijuana for cultivation and consumption for adults 21 years of age and older.

AND, BE IT FURTHER RESOLVED we encourage voters in the state of Michigan to support this initiative on Election Day, [Nov. 7, 2018](#).