State Bar of Michigan Comments on the Report of the Michigan Supreme Court Task Force on the Role of the State Bar of Michigan

July 31, 2014

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STATE BAR OF MICHIGAN

INTRODUCTION

At the request of the State Bar of Michigan (the State Bar), the Michigan Supreme Court (Supreme Court) established the Task Force on the Role of the State Bar of Michigan (the Task Force) "to address whether the State Bar's current programs and activities support its status as a mandatory State Bar."[1] The Supreme Court charged the Task Force 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 under the First Amendment principles articulated in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Falk v State Bar of Michigan*, 411 Mich. 63 (1981).

On June 3, 2014, the Task Force submitted its report to the Supreme Court (the Report). These comments are submitted by the State Bar Board of Commissioners upon the Supreme Court's invitation for public comment on whether the Report:

(1) adequately assessed the First Amendment problems concerning required membership in a State Bar association; and

(2) provided a sufficient blueprint to ensure that the State Bar association's ideological activities will not encroach on the First Amendment rights of its members.

The State Bar is grateful to the Supreme Court for undertaking a structured study and dialogue of this subject, and continues to hope this process clarifies and strengthens the ability of the State Bar to fulfill its several purposes in coming decades. The State Bar is also grateful to the Task Force for its efforts in drafting a report of such importance in such a relatively short period of time. Our comments were aided by the legal analysis of Constitutional Law Professor Robert A. Sedler, a First Amendment scholar.

Though the Supreme Court's invitation for public comment does not mention all five Task Force recommendations, the State Bar comments on all five to speak for its members, many

[1] Supreme Court Administrative Order 2014-5

of whom have told us what they think of the recommendations.[2] Our comments identify those recommendations supported by the State Bar and those with which the State Bar disagrees, for which we offer alternatives.

SUMMARY OF STATE BAR COMMENTS

Task Force Recommendation 1. The State Bar of Michigan should remain a mandatory State Bar.

State Bar Comment. The State Bar agrees with this recommendation.

Task Force Recommendation 2. To better protect State Bar members' First Amendment rights:

- All State Bar advocacy outside the judicial branch should be subject to a rigorous *Keller* process and the State Bar should emphasize a strict interpretation of *Keller*.

  State Bar Comment: The State Bar agrees State Bar advocacy outside the judicial branch should be subject to a rigorous *Keller* process and offers a functional if not more rigorous alternative that renders reference to a strict interpretation standard unnecessary.

- Funding of Justice Initiatives activities should be subject to a formal *Keller* review during the annual budget process.

  State Bar Comment: Funding of all State Bar activities should be subject to a formal *Keller* review during the annual budget process, not only Justice Initiative's programs.

[2] A Sections Task Force Review Steering Committee's comments regarding advocacy issues pertaining to Sections was endorsed by numerous Sections and the Committee on Justice Initiatives submitted a detailed analysis and recommendations. The State Bar also listened to comments from several of its past presidents, held a special Board of Commissioners meeting on June 26, 2014 and reviewed numerous e-mails from members.

- State Bar Sections that engage in legislative advocacy should do so only through separate entities not identified with the State Bar.

  State Bar Comment: The State Bar disagrees with the recommendation that State Bar Sections engaging in legislative advocacy should do so only through separate entities not identified with the State Bar and believes any concerns regarding the identification of Sections advocating on legislation can be addressed through means less drastic.

Task Force Recommendation 3. The State Bar's regulatory services should be better integrated with the activities of the other attorney regulatory agencies.

State Bar Comment. The State Bar agrees with this recommendation.

Task Force Recommendation 4. Modify State Bar Governance for Greater Clarity and Efficiency.

State Bar Comment. The State Bar agrees clarity and efficiency can be improved but does not agree with the recommendation that State Bar governance should be modified.

Task Force Recommendation 5. Reduce inactive dues and convene a special commission to examine active and inactive licensing, *pro hac vice* and recertification issues.

State Bar Comment. The State Bar supports convening a special commission to further study these issues.

COMMENTS

Recommendation 1: Membership should remain Mandatory

State Bar Comment. The State Bar of Michigan should remain a mandatory organization for all practicing Michigan attorneys. In *Keller v State Bar of California,* 496 U.S. 1 (1990), the Court stated that the compelled association in an integrated State Bar was justified by the State's interest in regulating the legal profession and improving the quality of legal services available to the public. 496 U.S. at 14-15[3]. The vast majority of State Bar members[4] enthusiastically support an integrated State Bar under *Keller*. As officers of the Court, we know, as a condition of the privilege to practice law in Michigan, we have a special responsibility to ensure the quality of justice administered.

> *As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients; employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence on their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.*
>
> Preamble, Michigan Rules of Professional Conduct

Dues generated by mandatory membership enable the State Bar to continue: educating and mentoring attorneys in the rules of ethics, on running a law office effectively, and on substantive law and upcoming changes in the law; promoting civic education on the rule of law and its practical implications; training law office personnel; screening law school

[3] *Harris et al v Quinn*, 573 U.S. ____ (2014); US S Ct No. 11-681 reaffirms *Keller* and recognizes the distinction between a trade union and a mandatory bar association regulating its profession and ensuring administration of justice.

[4] The following entities took the position to maintain a mandatory bar: the democratically elected members of the Board of Commissioners and Representative Assembly; the councils of Sections representing a collective membership of about 30,000 State Bar members; and about 85% of the speakers at the Public Hearing held by the Task Force on May 2, 2014.

graduates who seek to be licensed as Michigan attorneys for moral character and fitness; fostering professionalism; and policing and enjoining the unauthorized practice of law.[5]

Because the interests of the legal profession in many circumstances improves quality and availability of legal services to the public, the State Bar seeks an alternative to the Task Force suggestion to remove the last of the three prongs of Rule 1 of the Supreme Court Rules for the State Bar - - "and in promoting the interests of the legal profession in this state". While the State Bar agrees matters clearly intended to primarily benefit lawyers, law firms or judges personally have nothing to do with the administration of justice and are not a proper subject for State Bar advocacy under *Keller*, there are *Keller* permissible policies that improve the quality or availability of legal services that may have a benefit to some attorneys, such as supporting legal services to the poor or disadvantaged which has an ancillary benefit to the employment of paid staff attorneys providing the legal services. *See also* MRPC 6.1. The State Bar suggests instead of striking the third prong of Rule 1, it be modified to, "and in protecting and improving the quality of legal services in this state." Simply striking the language "promoting the interests of the legal profession" implies by contrast the State Bar may be prohibited from engaging in conduct that *Keller* permits or is required by rules of professional conduct. Many of our members, including past presidents of the State Bar, support preserving this language.

Recommendation 2: The State Bar should employ a more rigorous, formal explanation before deciding non-judicial issues are sufficiently germane to the state's interest to justify potential encroachment on the rights of dissenting members

State Bar Comment. AO 2014-5 charged the Task Force to determine whether the State Bar's functions can be accomplished by means less intrusive upon the First Amendment rights of objecting attorneys. The State Bar seeks to continue funding all activities out of mandatory dues that are germane to the State's interest in regulating the legal profession and

[5] The motivating causes for the organization of compulsory bars include "a real desire to render material service to those members of the profession who have not yet reached the heights…to assist in the correction of abuses resulting from attempts by laymen to advise the public on matters which require legal education and experience…not only to improve their own profession but to protect the public against who, through ignorance or by design, would prey upon it…Your organization is designed not only for the benefit and betterment of its members, but primarily for the public at large…" Roberts P. Hudson

improving the quality of legal services available to the public under *Keller, supra* at 14-15. At times, the State Bar has a responsibility to the public and its dues-paying members to take constitutionally permissible positions on public policy. In a democracy, we rely on the people to make informed choices on issues of public policy. The First Amendment protects the expression of opposing ideas on issues of public policy. The right of the people to hear the ideas of the legal profession and those of its dissenting members each require respect. Lawyers are directly engaged in the administration of justice, and are in a unique position to make policy recommendations to improve the administration of justice. The primary role of the State Bar is to serve the public good, and as it performs this role, it brings to the public the unique perspective that its diverse and democratically elected population of lawyers has with respect to issues of public policy affecting the administration of justice and self-discipline. Policies and procedures unduly shrinking the universe of germane positions on which the State Bar may voice an opinion would likely come at a cost to the public.

The State Bar has not funded from mandatory dues activities that are not germane to the administration of justice. The State Bar has in place a blueprint with multiple levels of scrutiny and a supermajority requirement for passage of legislative positions that has, almost without exception, been successful in ensuring the State Bar takes legislative positions on issues that are germane to the State's interest in regulating the legal profession and improving the quality of legal services available in Michigan. Upon issuance of AO 2004-01, the State Bar adopted practices and procedures to assure compliance, including: review of all proposed legislation germane to the administration of justice by the State Bar staff; review for *Keller* permissibility by the Public Policy, Image and Identity Committee; requirement that Sections and Committees taking positions on public policy issues indicate why they think it is *Keller* permissible and a final review by the Board of Commissioners. But we also offer improvements. *(See p. 11).*

The Task Force recommends a process "intended to go beyond the safeguards imposed on any other mandatory State Bar that engages in legislative advocacy" by recommending the adoption of a new administrative order specifically removing the State Bar's right to take a

position in six areas designated as "impermissible topics."[6] The report provides no explanation or evidentiary foundation for why each area is forbidden if germane to one of the State Bar's purposes. The State Bar strongly opposes the unconditional restrictions.

Comments Regarding Each of the Recommended Impermissible Areas

Issues that are perceived to be associated with one party or candidate, and endorsement of candidates. Any proposed bill could be *perceived* as primarily associated with one political party or candidate because perception is subjective, not based on objective fact. The State Bar is not in the business of endorsing candidates and has no objection to codifying this. But "issues perceived to be associated with a candidate" is an overbroad and unnecessary restriction that could certainly encompass topics the State Bar is permitted, even required, to monitor and respond to. For example, a legislator could propose a constitutional amendment declaring that any member of the legislature (attorney or not) qualifies to be a judge.[7] The State Bar would oppose such a bill, but the opposition would have nothing to do with the candidate, and would not be expressed in any terms associated with the candidate: our position would have everything to do with the protection of the public from the unauthorized practice of law. Since 2004, 240 of the 351 *Keller* permissible bills on which the State Bar has taken positions were sponsored at introduction by a member of only one political party. The State Bar should not be restricted from commenting on legislative issues solely for this reason.

Ballot issues. It is possible, though not likely, that a ballot issue would be *Keller* permissible. For example, a ballot proposal in South Dakota, known as the South Dakota Judicial Accountability Initiative Law (a/k/a "Jail4Judges") would have amended the state constitution to allow litigants to sue judges for, among other things, intentionally violating

[6] Some Commissioners are concerned over the possibility that a specific list of impermissible areas would preclude the State Bar from commenting on legislation denying due process rights involving jury selection, judicial assignments and alternative dispute resolution mechanisms as well as the separation of powers.

[7] "The 1963 constitution also provided that a person must be a lawyer to be a judge. Several probate judges were not lawyers at that time, and those judges were permitted to remain in office until retirement. With its requirement that judges all be lawyers, the 1963 constitution also marked the end of the Justice of the Peace Court, which heard minor matters in many Michigan communities." http://courts.mi.gov/education/learning-center/Pages/History-of-Michigan's-Judicial-System.aspx

people's due process rights, deliberately disregarding material facts or acting without jurisdiction. That ballot proposal was defeated largely due to the efforts of the South Dakota State Bar Association, a mandatory bar.

Election law. As a mandatory bar, the State Bar does not offer comments on campaigns or elections because of the political and partisan nature of elections. Election legislation is also generally not an area in which the State Bar offers comment because most election legislation does not affect the administration of justice. However, there are circumstances where election law may directly intersect with the administration of justice. For example, after the State Bar's Representative Assembly concluded that the anonymity of funding of third-party issue ads in Michigan judicial campaigns interfered with the operation of MCR 2.003, the State Bar advocated for greater transparency in judicial campaign funding. *See, Caperton v A.T. Massey Coal Co. 1*, 129 S Ct 2252 (2009). We believe the public benefitted from receiving the views of the State Bar on this issue, as well as from receiving the views of our dissenting members. The State Bar's voice is also valuable in offering technical expertise on potential election statutory conflicts with the Code of Judicial Conduct.

Judicial selection. The State Bar does not endorse judicial candidates, but the public should not be deprived of the benefit of the bar's collective view on how to improve the process of judicial selection as there are few issues more directly related to the administration of justice. In this area, the State Bar can be uniquely helpful: e.g., the State Bar's Judicial Qualifications Committee provides input on gubernatorial appointments. Further, lawyers are uniquely positioned to make recommendations to the public regarding a recurring proposal to move to a method of judicial selection by merit.

Matters primarily intended to personally benefit attorneys, law firms or judges. The State Bar does not serve as a union for attorneys. In those instances when proposals affecting the quality of legal services have the potential incidental effect of benefiting some attorneys, law firms or judges, the State Bar should not be prohibited from advocating positions on those proposals. In 2010, the State Bar took the lead in showing why a reduction in judicial compensation would violate the state constitution; arguably, this prohibition could be invoked to prevent such advocacy. The State Bar's Judicial Crossroads Task Force also

addressed the compensation and working conditions of judges, as well as the right sizing of the court system and appropriate court consolidation.

Issues that are perceived to be divisive within the State Bar membership. As an "impermissible" category, this criterion is too ambiguous and subjective to be a realistic, practical limitation. As a consideration however, the State Bar endorses the concept and avoids taking a position when there is a conflict between groups of lawyers. In fact, avoiding divisiveness is already a precept of the State Bar's Strategic Plan, and in the past five years, the State Bar has removed 11 pieces of legislation from consideration because the bills contained potentially divisive subject matter.

The Task Force's recommendation for a "*Keller* Panel" is not a suitable option for enhancing and formalizing a rigorous *Keller* explanation because:

1. Commissioners and assembly members are elected by the members of the State Bar by a democratic process and determining permissibility should be performed under procedures established by the elected members;

2. The Supreme Court's involvement in appointment of three (3) panel members (who could collectively veto any position) could have the appearance of the Court engaging in more than the oversight and regulation of the State Bar; and

3. An individual member should have the right to request of the entire Board of Commissioners (and Supreme Court, if the Supreme Court wishes to retain that appeal process) that a position not be taken on legislation the member believes to infringe upon his or her First Amendment rights before the State Bar takes the position, rather than an appointed panel. *See, e.g., Hudson v Chicago Teacher's Union, 922 F.2d 1306* (7th Cir. 1991) and *Keller*.

Rather than a seven-person panel, the State Bar proposes an increased emphasis on developing a clear understanding on the part of Board and Representative Assembly members and Section councils of *Keller*, improving internal accountability, increasing the effectiveness of communication to State Bar members before taking a position on pending

legislation, systematically considering responses from members before voting and publishing dissenting viewpoints of those who want their dissent known. Specifically:

1. Increased training. Staff should provide a written memorandum explaining the constitutional restrictions on State Bar activities to new Commissioners, Representative Assembly members, and Section and Committee leaders. State Bar staff and experienced leadership should also conduct in-person training sessions. Training materials should include detailed discussion of *Keller* and any applicable administrative orders or rules. Training should be provided to new board members, Section and Committee chairs and an annual refresher course should be provided for returning Commissioners and Representative Assembly members.[8]

2. Written Explanation. The State Bar recommends that general or other designated counsel provide a written explanation of whether non-judicial issues comply with *Keller*. The explanation may disclose objecting members' concerns and any known objections. The written explanation should be provided to the Commissioners and Representative Assembly members before the meeting.

3. Publication of Notice. Before the Board of Commissioners or Representative Assembly takes any public policy advocacy position, the State Bar should publish any proposed positions submitted to it, and when applicable, its written explanation regarding *Keller* permissibility on a members'-only page of the State Bar website. Members will be able to comment on the website and their comments gathered and included in the materials provided to the Commissioners and Representative Assembly members before the meeting. This process will protect members' First Amendment rights. *See, Lathrop v Donahue*, 367 U.S. 820, 856-857 (1961), relied upon by the United States Supreme Court in *Keller*.

[8] Currently, materials are provided and training is conducted for new Commissioners, Representative Assembly and Section and Committee leaders. These materials and training would be made more comprehensive and mandatory.

4. Add Advisory Members to Public Policy, Image and Identity Committee: The Public Policy Committee will include at least one of the Supreme Court appointed Commissioners, the Vice Chairperson of the Representative Assembly and two non-Board of Commissioner members appointed by the President with approval of the Board of Commissioners.

5. Vote by Public Policy, Image and Identity Committee or Rules and Calendar Committee. Public Policy, Image and Identity Committee (or, in the case of the Representative Assembly, the Rules and Calendar or other designated Committee) will vote on the *Keller* permissibility before taking a position on any public policy issue. The majority of the members present must agree the issue is *Keller* permissible for the issue to be submitted to the Board of Commissioners (or Representative Assembly).

6. Vote by Board of Commissioners or Representative Assembly. The Board of Commissioners (or Representative Assembly) will also vote on the permissibility before taking any public policy position. At least 2/3 of the members present must vote that the issue is *Keller* permissible before the Board of Commissioners (or Representative Assembly) can take a position on the matter.

7. Posting State Bar Positions on Pending Legislation. All public policy positions adopted by the Board of Commissioners on pending legislation will be posted on the State Bar's website. A record of the number of votes for and against the issue will be included. The written opinion and vote regarding permissibility under *Keller* will be posted upon request.

8. Posting Dissents. Dissenting members will have the right and ability to express their opinions on all public policy positions taken by the State Bar on the State Bar's website and the State Bar would post their opinions on the website.

We believe this process will be substantively more rigorous, transparent and reliable. Despite our current practices since the issuance of AO 2004-1 (*see page 7*), the Report describes the State Bar's process for determining *Keller* permissibility as imprecise, informal,

casual, last-minute, and based on attenuated, speculative, and dubious reasoning. These descriptions are harsh and, we believe, unearned. Although we believe our procedures should be more formal and our explanations more thorough, we do not think we are on a path to engaging in "mission creep".[9] Our proposed procedures for determining *Keller* permissibility in the Board of Commissioners and Representative Assembly will move the State Bar towards a more rigorous *Keller* process as desired by the Task Force. Further, these procedures should help make clear the *Keller*-permissible reasons why the State Bar has taken such positions.

Task Force Section Advocacy Recommendations.

State Bar Comment. Membership in Sections is voluntary and Sections' right to advocate on ideological issues is not being questioned and therefore should not be at issue. There are eight task force recommendations regarding Section advocacy centered around: (a) assessing the cost of administrative functions and services provided to Sections for any *Keller* impermissible activity and (b) the possibility of confusion that a Section is not a section, but rather the State Bar.

The State Bar does not object to an appropriate assessment to Sections for the cost of services used by a Section for non-*Keller* permissible activity.

The State Bar firmly opposes requiring Sections to form separate entities, for which there is no precedent in any other mandatory state bar. We sympathize with the Sections whose councils reject this recommendation as potentially disingenuous. The State Bar does not

[9] The Task Force suggests that a revised *Keller* order prohibiting advocacy on "matters primarily based upon lawyers' economic self-interest" would not have permitted advocacy concerning a proposed tax on legal services. While we recognize that a tax on legal services would not be in lawyers' economic self-interest, we were careful not to base any part of our decision on that consideration. Rather, our opposition was based on the quality of legal services available to the public and the administration of justice. Our internal *Keller* analysis reflects this. Specifically, at a time when record numbers of indigent people were being turned away from legal aid due to lack of funding and an ever greater percentage of people were forced to represent themselves in court, a tax on legal services would have made it even more difficult for Michigan's citizens to afford legal representation. Litigants without lawyers slow down the administration of justice and increase the cost to the public of judicial services because these litigants rely unduly upon the courts to do for them the work of lawyers.

object to additional requirements designed to reduce confusion between Sections and the State Bar, including a requirement that every page of a Section's written communication on a public policy position should contain the disclaimer required by AO 2004-1 (F)(1)-(3) and the same disclaimer should be verbalized at the inception of any oral communication to the public on behalf of the Section. If these safeguards are not sufficient, the State Bar would support a rule prohibiting Section use of the logo of the State Bar of Michigan on written communications to the Legislature and executive branch on public policy issues.

Recommendation 3: Provide Better State Bar Integration with the Activities of the Other Attorney Regulatory Agencies

State Bar Comment. The State Bar agrees with the recommendations for better integrating the activities of all regulatory agencies with the State Bar. Further, it supports the establishment of a standing (or temporary) Discipline System Advisory Committee to review and implement the recommendations. We urge that implementation of these recommendations take into consideration the American Bar Association and National Association of Bar Counsel Model Standards for Attorney Discipline Systems as well as the State Bar's history of involvement in attorney discipline.

The State Bar objects to the recommendation that the appointment or selection of the Executive Director should be subject to the approval of the Supreme Court because the Executive Director is a confidential employee of the Board of Commissioners of the State Bar and there should be independence between the Supreme Court and the operation of the State Bar.

Recommendation 4. Modify State Bar governance for greater clarity and efficiency.

Recommendation 1: Eliminating the ambiguous designation of the Representative Assembly as the "final policy-making body of the State Bar."

State Bar Comment: The State Bar embraces the Representative Assembly as the most democratically elected representation of its members. If any operation of the State Bar is the

least intrusive on the First Amendment rights of its members, it is the Representative Assembly because of its democratically elected representation, which is diverse both geographically and by practice area. (*See, Endnote 1)* The Representative Assembly should continue to serve its policy making function with limited changes designed to increase efficiency, clarify which matters will be handled between the Representative Assembly and Board of Commissioners, and implement further *Keller* screening safeguards as described above. *(Endnote 2*)

Recommendation 2: Designating the Board of Commissioners the exclusive decision-maker on management issues of the State Bar (which presumably means administrative decisions of the State Bar addressed in State Bar Rule 5.1.a.3-5 and 5.1.b), and the Representative Assembly the exclusive decision-maker on dues recommendations to the Supreme Court.

State Bar Comment: The State Bar supports this recommendation, which is already enshrined in current State Bar Rules and Bylaws providing for final policy-making and dues-setting authority.

Recommendation 3: Requiring the agendas and schedule of meetings of the Board of Commissioners and the Representative Assembly to be established by a majority of the State Bar officers and a majority of the officers of the Representative Assembly, meeting jointly.

State Bar Comment: The State Bar opposes formal adoption of this recommendation because it interferes with the intended independence of the two bodies. This is contrary to the 1972 Supreme Court purpose for the Representative Assembly and could thwart its role as a democratic check upon the BOC. The State Bar officers and Representative Assembly officers already form an informal "cabinet" of State Bar leadership that discusses and assists in developing agenda items for both bodies. Because the structure is informal, it can be easily modified as needed to enable each body to function according to its respective purpose.

Recommendation 4: Providing that although the Board of Commissioners is exclusively responsible for adopting positions on proposed court rules published for comment and on

pending proposed legislation, both the Board of Commissioners and the Representative Assembly must approve all other policy positions.

State Bar Comment: Because the State Bar's proposed blueprint will ensure compliance with *Keller*, the State Bar does not believe this recommendation is necessary. (*Endnote 3)*

Recommendation 5: Reduce Inactive Dues and Convene a Special Commission to Examine Active and Inactive Licensing, Pro Hoc Vice, and Recertification Issues.

State Bar Comment. The State Bar supports convening a special commission to further study these issues.

ENDNOTES

Endnote 1

The Representative Assembly's role as the final policy maker of the State Bar was adopted by the Supreme Court in 1972. State Bar membership has nearly quadrupled since then, making all the more apposite the purpose for establishing the Representative Assembly - "[A] Board which involves only 23 individual points of view cannot adequately represent the range and variety of viewpoints to be found in so large and diverse a membership, particularly with respect to policy decisions." The State Bar's position on this issue is supported by the actual working relationship between the Representative Assembly and the Board of Commissioners during the past 42 years. Specifically, the Representative Assembly's jurisdiction over policy issues has not conflicted with the Board of Commissioners'.

Endnote 2

The Bylaws contain numerous existing safeguards to ensure *Keller* compliance. They include:

- The importance and limitations of *Keller* are prominently displayed on the home page for the Representative Assembly on the State Bar website (http://www.michbar.org/generalinfo/origin.cfm).

- Positions recommended by any Section or State Bar entity must be in writing and which inter alia must "[d]escribe why the recommendation should be considered *Keller*-permissible policy." (Bylaw VIII.2.1.d) State Bar staff is involved in reviewing and vetting any such position while under consideration by the Section or entity and before a position is recommended.

- Such a recommended position is then reviewed by the Executive Director, who again confirms *Keller* permissibility before placing it upon the agenda of either the Board of Commissioners and/or the Representative Assembly. (Bylaw VIII.7.5)

- For initiatives which originate directly from Representative Assembly membership, a written submission is required. *Keller*-permissibility is assessed by (a) the Chair, (b) the Rules and Calendar committee and the Drafting Committee and (c) State Bar staff, all before the item is placed upon the agenda.

The current leaders of the Representative Assembly propose additional measures to further safeguard State Bar members' *Keller* rights, including having general or other designated counsel provide a written explanation on *Keller* permissibility of proposed agenda items, a majority vote by the Rules and Calendar Committee (or another designated committee) on *Keller* permissibility, circulation of same and any minority report, if one, to the Representative Assembly members, and 2/3 threshold vote by Representative Assembly members on *Keller* permissibility before taking substantive action on any matter submitted to the Representative Assembly for consideration.

Endnote 3:

Generally, "proposed court rules published for comment and … pending proposed legislation" are not items which implicate State Bar policy and are not regularly referred to the Representative Assembly. However, there are often items which go to core policy issues of the State Bar which may overlap with either existing or proposed court rules changes or legislation, and hence a bright line rule stripping all such matters from the Representative Assembly's consideration could impinge upon its role as the final policy making body of the State Bar. Finally, removal of court rules that have been published for comment from the Representative Assembly's jurisdiction would undoubtedly diminish the appetite of volunteers to serve the public and profession through the Representative Assembly.