

MICHIGAN SUPREME COURT

PUBLIC ADMINISTRATIVE HEARING  
BEFORE THE MICHIGAN SUPREME COURT TASK FORCE ON THE  
ROLE OF THE STATE BAR OF MICHIGAN  
Friday, May 2, 2014 - Lansing, Michigan

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Lansing, Michigan  
Friday, May 2, 2014

R E C O R D

CHAIRPERSON BUTZBAUGH: Welcome to all of you  
for being here with us. My name is Al Butzbaugh. I  
am the chair of the Task Force on the role of the  
State Bar of Michigan. I know it's going to be a  
little difficult for some of you to see me, but I  
discussed this, and the podium for speakers is going  
to block some people no matter where I sit, so they  
told me just to sit.

It's my understanding that this is the  
courtroom that the Supreme Court uses. It's my  
understanding that this proceeding is being broadcast  
live on the website of the Supreme Court. Appreciate  
all of you being here.

The first thing I am going to do is introduce  
all the others on the Task Force who are here, and we  
will start to my far left and just ask you to  
introduce yourself.

EXECUTIVE DIRECTOR WELCH: Good morning. I  
am Janet Welch.

MR. ELLSWORTH: I am Peter Ellsworth.

MR. WALSH: John Walsh.

MR. ROMBACH: I am Tom Rombach.

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MS. BROWN: Danielle Brown.

MR. MCSORLEY: John McSorley

MR. CRANMER: Tom Cranmer.

JUDGE RIORDAN: Michael Riordan.

CHAIRPERSON BUTZBAUGH: We have a few members  
who are not here today. Colleen Pero and John Reed  
had obligations outside the state and could not be  
here today. And Vanessa Williams will be here a  
little bit later.

The Task Force was established on February 13  
of this year, 2014. It wasn't very long ago. The  
purpose of the Task Force is set forth in the  
Administrative Order issued by the Supreme Court as  
Administrative Order 2014-5, and in that they  
instructed the Task Force to address a question raised  
about the appropriateness of the mandatory nature of  
the State Bar.

Now, the State Bar, everybody, as we know,  
everybody who is a lawyer practicing in Michigan is  
required to belong, and that's what's called a  
mandatory version of the State Bar.

Also the Task Force was charged with  
determining whether the State Bar's duties and  
functions can be accomplished by means less intrusive  
about the First Amendment, upon the First Amendment

5

1 rights of objecting individual attorneys.

2 The Supreme Court went on to caution that at

3 the same time the Task Force should keep in mind the

4 importance of protecting the public, to regulate the

5 profession, and how this role can be balanced with

6 attorneys' First Amendment rights.

7 The Supreme Court gave us a very short time

8 line. Our report is due June 2, which is not very

9 long after February 14, February 13, when the Task

10 Force was formed. All the members of the Task Force

11 have taken this as a serious issue. Our first meeting

12 was on February 25 in person. This is now our 7th

13 in-person meeting since that time. The purpose of

14 these meetings has been to gather information to learn

15 about the issues before we begin figuring out what we

16 are going to do. We want to make sure we have all the

17 information in the beginning.

18 The views of our members and of the public

19 are very important to us. Early on in our process we

20 sent an e-blast e-mail to every member of the

21 State Bar. That's over, I am not sure the exact

22 number, but something over 42,000, as I recall. We

23 have received many, many comments back from our

24 members about the Bar.

25 And then in addition we decided to have this,

6

1 what we are calling the public hearing, where members

2 of the Bar or members of the public can address us

3 personally and state to us directly what their view is

4 of our task in this matter, and will give members here

5 on the Task Force an opportunity to question the

6 speaker as well.

7 The Task Force is not here to respond to

8 questions. Our response will be given when we issue

9 our report. So if someone who is addressing us asks

10 us a question, we are not going to answer. Just so

11 everybody is clear.

12 We have a number of speakers that are going

13 to go into the afternoon and, indeed, there are a

14 couple of speakers for this afternoon who asked if

15 they could be put into the morning. We'll have to

16 wait and see how things go this morning, but we,

17 because we want to make sure we get everything done

18 timely, in the morning we are not going to take a

19 break. If anybody on the Task Force wants to take a

20 short break, they will just get up and walk out and

21 come back and rejoin their seat. If any of you want

22 to take a break, do the same thing.

23 I think that's all that I had. Does anybody

24 else have anything? Is there anything else that I

25 missed.

7

1 UNIDENTIFIED SPEAKER: I don't think so.

2 CHAIRPERSON BUTZBAUGH: Here is Vanessa.

3 Vanessa, thank you for coming. We appreciate having

4 you here, and we are just starting. And I have asked

5 everyone to introduce themselves just by their name,

6 and if you would just tell everyone your name.

7 MS. WILLIAMS: Vanessa Williams.

8 CHAIRPERSON BUTZBAUGH: Thank you, Vanessa.

9 We have set a rule of the number of minutes

10 that one of you can speak to us, and that's five

11 minutes. There is a timer up there. Nelson Leavitt

12 is our -- where is Nelson? I can't see him, but

13 Nelson Leavitt is our recorder. Nelson has done a

14 wonderful job for us, has been very helpful, and he

15 has set up everything here for us today.

16 Nelson is managing the clock, and when you

17 come up to speak, you will see that there is a proctor

18 with lights, and the person, you can see back here of

19 what the timing is. That will be for a speaker's

20 initial comments. If the speaker is asked questions

21 and wants to respond, the five minutes doesn't count

22 against that. You can feel free to answer the

23 question however you see fit.

24 With that, we are ready to proceed, and the

25 first speaker is Allan Falk. Mr. Falk is a practicing

8

1 attorney from Okemos, Michigan. Mr. Falk, the name

2 Falk may be very familiar to many of you who are

3 interested in this issue. Mr. Falk was a party to

4 litigation regarding the State Bar back in -- and the

5 Michigan Supreme Court issued opinions in 1981 and

6 1983. And, indeed, the Supreme Court formed one of

7 the opinions in the Administrative Order establishing

8 this task force.

9 Mr. Falk, pleased to have you here, and you

10 are welcome to proceed.

11 MR. FALK: Thank you, Chairman Butzbaugh,

12 members of the committee, or Task Force. I have to

13 start off by noting that this Task Force consists of

14 only two members who aren't strongly affiliated with

15 the State Bar. It's kind of like showing up at an

16 arbitration where the other sides get to name all

17 three arbitrators. But we will deal with what we

18 have. I just want to make that comment for the record

19 and also, on behalf of the TV audience, apologize.

20 They are probably already asleep.

21 But, anyway, I mostly want to talk about the

22 State Bar's lobbying program, but let me preface that

23 by saying I don't think that the mandatory bar, there

24 is any evidence that a mandatory bar does anything

25 useful that a voluntary bar doesn't also do you.

9

1 There is voluntary bars in 13 or 14 states. We  
2 explored that in some depth in previous hearings held  
3 when I first sued the State Bar on this issue. We  
4 heard from the president of Iowa Bar Association, for  
5 example. They do all the same kinds of things that  
6 the Michigan State Bar does or other mandatory bars.  
7 And since then we have separated out the disciplinary  
8 function entirely. We now just fund it.

9 So the State Bar's current legislation  
10 program. I went to the website. There is quite a few  
11 bills. I couldn't possibly address them all, but I  
12 just went through the first 15 or so and picked out a  
13 few examples of things where I find it annoying that  
14 my dues is being used to support causes or notions  
15 that I find not only bad policy but poorly thought  
16 through.

17 For example, HB-4083, State Bar opposes a  
18 bill to require persons convicted of crimes to pay a  
19 fee of \$5 for a misdemeanor, \$10 for a felony, and  
20 that's per case. So if you are charged with ten  
21 felonies, it's still only ten bucks, to support crime  
22 stopper activities. The would allow rewards for  
23 reporting crimes, pay rewards for information released  
24 to criminal prosecutions, and the State Bar's  
25 opposition is grounded on the notion that it would be

10

1 a privately administered program. In other words, the  
2 rewards would not be by a government agency but by  
3 some private agency that has been approved by a local  
4 government.

5 I find that entirely hypocritical, since for  
6 20 years the State Bar funded LawPAC and aided LawPAC  
7 by putting a line on the dues notice that you had to  
8 check not to pay it. The Supreme Court finally put a  
9 kibash on that. If that's the only concern, it must  
10 be a good idea and there must be a way around it, but  
11 the State Bar hasn't proposed anything to get around  
12 it. It's just critical.

13 Next, HB-4120. The State Bar opposes a bill  
14 creating a presumption that joint custody is in the  
15 best interest of children unless a parent is unfit,  
16 unwilling, or unable to care for the child. That  
17 doesn't seem like a terrible idea to me, but the  
18 State Bar says this does not protect battered women.  
19 Well, that's a completely separate subject. Whether  
20 children should have both parents or one parent is not  
21 a function of whether one parent treats another parent  
22 badly. I won't deny that if one parent batters  
23 another parent, that parent is probably going to go to  
24 jail, or should go to jail, and when you are in jail  
25 you can't do very much parenting, and that affects

11

1 your fitness as parents and, in fact, you can lose  
2 your parental rights for more than two years.

3 So, again, I don't know why the State Bar  
4 thinks this is bad policy or, more importantly, why  
5 this affects the quality of legal services or the  
6 delivery of legal services, which is what, according  
7 to the Keller opinion, Keller V State Bar of  
8 California, is supposed to be legitimate lobbying by a  
9 mandatory bar.

10 HB 4186, State Bar supports a bill to expand  
11 the power of the judiciary to expunge criminal  
12 convictions. To me this is a use or pay of the  
13 governor's exclusive prerogative to grant pardons.  
14 And, again, I don't see where that aids in the quality  
15 of legal services or otherwise promotes the delivery  
16 of legal services.

17 HB 4583 and 4584, a pair of bills. The State  
18 Bar opposes them. These bills would permit a court  
19 sentencing an offender for criminal sexual conduct or  
20 assaultive crimes to terminate grandparent visitation  
21 or parental rights. The State Bar says this is a bad  
22 idea because the judge involved in family court knows  
23 more about the family and should decide whether to  
24 terminate the rights, but who knows more about what  
25 the particular person did committing the crime than

12

1 the judge who presided at the conviction, whether it  
2 was a trial or a guilty plea. Again, I don't see what  
3 this has to do with delivering legal services, the  
4 quality of legal services or anything in which a  
5 mandatory bar has had a legitimate interest.

6 HB 4913, State Bar opposes a bill to allow  
7 dismissal of SLAP suits, Strategic Lawsuits Against  
8 Public Participation. No reasons given.

9 CHAIRPERSON BUTZBAUGH: Just so you know,  
10 your time is expired.

11 MR. FALK: Okay. I will take any questions.

12 MR. MCSORLEY: Mr. Falk, I want to thank you  
13 on behalf of the committee for your, not just recent  
14 outspokenness, but also your historic outspokenness  
15 and observations about the management and the  
16 operation of the Bar. I think it gives us pause to  
17 reflect on how business is conducted and perhaps how  
18 business should be conducted.

19 As I listen to you this morning and actually  
20 go back to 1979-1980 and your correspondence that you  
21 sent to the committee, it seems that you have a strong  
22 sort of generic position that the Bar should not be  
23 mandatory or compulsory but should be voluntary, and  
24 you I think mentioned the Iowa Bar and others as an  
25 example, but of course you didn't offer any specifics.

1 This is really my question to you. You have  
2 addressed, I think, issues where you believe the Bar  
3 may have had, in your opinion, irresponsible or  
4 misplaced legislative advocacy. You mentioned family  
5 law matters, matters of criminal law, I believe. So  
6 my question is, do you have a constructive  
7 recommendation as to how the Bar might be more  
8 circumspect or how it might be more limiting in its  
9 involvement in legislative advocacy with reference to  
10 regulation, discipline, and matters involving the Bar  
11 and involving the public?

12 MR. FALK: That's a very broad-based  
13 question. I will try to answer it to some degree.

14 MR. MCSORLEY: I was trying to compliment you  
15 at the same time.

16 MR. FALK: And I appreciate that. I think  
17 probably even one said after a flowery introduction, I  
18 am not sure how much of that is true, but it did me no  
19 harm to hear it.

20 So let me start by saying that when it comes  
21 to sections of the Bar, those are in effect voluntary.  
22 To belong to a section, you choose to belong and you  
23 pay extra dues. So the current structure is that a  
24 section can't take a position on something in the  
25 legislature without getting the approval of the Board

1 So I think it may be a problem of the  
2 procedure that is being followed, and I don't know  
3 that, without making it more cumbersome and unwieldy,  
4 that you would be able to get around that.

5 MR. MCSORLEY: This isn't something that is,  
6 I know, fresh in your thinking. It's been there for  
7 some period of time, and you have been answering the  
8 question that I have, but just a little bit deeper.  
9 In that concept of the parent Bar, of the Bar as a  
10 whole, it seems at least to me that your observation  
11 and perhaps criticism is not the involvement in some  
12 legislative advocacy but it's the choosing and the  
13 decision making of where to have that legislative  
14 advocacy?

15 MR. FALK: That's not quite correct, but go  
16 ahead. Go ahead and complete your question.

17 MR. MCSORLEY: I was going to then ask, have  
18 you had the opportunity to perhaps formulate your own  
19 mind what safeguards, what screening, what perhaps  
20 protocol might be utilized to ensure to a greater  
21 extent that the Bar is not treading away from the role  
22 that it should be playing?

23 MR. FALK: Yeah. In general, I don't think a  
24 mandatory bar should be lobbying on anything except  
25 the very limited things that Keller laid out, which

1 of Commissioners, I think, and usually the Board of  
2 Commissioners takes a position for the whole Bar and  
3 everybody has to tow the line.

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

12 But when it comes to the whole Bar, I just  
13 think there is a long history of not thinking things  
14 through, and I don't think that means that people  
15 aren't trying to. They just aren't, there are just no  
16 advocates for other sides of questions it seems when  
17 the Board is considering these issues.

18 Somebody comes up, makes a presentation, and  
19 there is nobody, because it's not like any kind of  
20 litigation that we are used to, there is no adversary  
21 there saying, Well, wait a minute, you haven't  
22 addressed this question. Your argument on this  
23 question is flawed because of this, this, and this.  
24 People go, Wait a minute, that is a problem. That's  
25 something we have to do.

1 would be the quality of legal service, which --  
2 pardon?

3 MR. MCSORLEY: You don't have a problem with  
4 the Keller principles?

5 MR. FALK: No.

6 MR. MCSORLEY: Okay.

7 MR. FALK: But everything else are debates  
8 over public policy. You may have your views, and they  
9 may be legitimate views. I may disagree with them. I  
10 don't understand why the Bar should take one side or  
11 the other. I don't know what the Bar's interest is.

12 JUDGE RIORDAN: You talked a little bit, I am  
13 not sure. How could the Bar in your opinion ensure  
14 that only Keller-permissible activities occur, they  
15 lobby only on Keller-permissible activities? Is there  
16 any type of procedure that could be put in place to  
17 ensure that?

18 MR. FALK: Yeah, I think so. I mean, first  
19 of all, you could as a group or just by reading the  
20 opinion, you know, find that little spot where  
21 Chief Justice Rehnquist in the Keller opinion says,  
22 Well, this is kind of what's legitimate. He does say  
23 it's a gray area now. It's not a hundred percent  
24 clear. Let's say you agreed with me and it's quality  
25 of legal services, delivery of legal services. Those

1 are the legitimate things. So every time you thought  
2 about taking a position, you would say, okay, first of  
3 all, do we think it meets these criteria, and is this  
4 the main thing of it, or is this just an ancillary  
5 point we are using to shoehorn our way into talking  
6 about something else? And then when we are talking  
7 about this legislation, are we talking about the  
8 quality of legal service aspect of it, or are we  
9 talking about some other aspect. So we are going to  
10 limit ourselves that way.

11 And then, if you really wanted to have a good  
12 procedure in place, you would then put in the Bar  
13 Journal, in the monthly Bar Journal or on the website  
14 somewhere, along with e-journal, and say, okay, here  
15 is legislation. In the next month, we have got 30  
16 days to weigh in and tell us whether we are fine with  
17 Keller if we take this position on this bill. And  
18 then at least you will know whether somebody out there  
19 says, you know what, you guys don't have it right this  
20 time, you know, you are way off the mark, and you can  
21 rethink your position. And then, of course, under  
22 Keller there is supposed to be a Hudson protest  
23 mechanism as well.

24 MR. MCSORLEY: Your want is to get the  
25 information out to the Bar by way of e-journal or

1 objection, and now we would be getting into just my  
2 view of joining bars or not joining bars, and that's  
3 really not a relevant question here. We currently  
4 have a mandatory bar. I don't know the legislature is  
5 about to unmandatory it, so within those parameters,  
6 let's ask ourselves, well, okay, if we are going to be  
7 that way, then how do we treat our members? If we  
8 were a voluntary bar, then we would have to sell our  
9 members on what we are doing.

10 MR. CRANMER: I think you clarified my  
11 question maybe better than the one I posed.

12 JUDGE RIORDAN: I have a quick follow-up. If  
13 we did follow your bar, the Supreme Court's,  
14 recommending that any public policy should be  
15 disseminated to the membership, further input as to  
16 whether or not it's Keller permissible, what if one  
17 member of the Bar could say, This is not Keller  
18 permissible, I don't think you should be advocating  
19 that, would that, would that one member of the Bar in  
20 your opinion have veto power? Is that majority rule?  
21 These are first amendment issues we are talking about.  
22 How do we protect the First Amendment rights of all of  
23 our members?

24 MR. FALK: Now I get to say good question to  
25 you. Return the favor.

1 through the website before the Bar perhaps takes that  
2 position and to gain feedback with reference to  
3 whether there is someone out there that believes it's  
4 outside parameters of Keller --

5 MR. FALK: Correct.

6 MR. MCSORLEY: -- ruling?

7 MR. FALK: I think so.

8 MR. MCSORLEY: Thank you.

9 MR. ELLSWORTH: Mr. Falk, do you have, by any  
10 chance, the session numbers for each of the bills that  
11 you identified?

12 MR. FALK: No, I took these off the website.  
13 I didn't see any session numbers there. I think this  
14 is for the current session, because it's on the  
15 current website, as I see affirmative nod by the  
16 executive director.

17 MR. CRANMER: Mr. Falk, just to be clear, is  
18 my understanding correct that you wouldn't necessarily  
19 be opposed to a mandatory bar provided that the Bar or  
20 public as a whole only took Keller-permissible  
21 positions, and to the extent that there were advocacy  
22 positions the Bar wanted to take, that would be  
23 strictly limited to the sections and section  
24 advocates?

25 MR. FALK: I would have no First Amendment

1 Well, I only appeared in front of you once  
2 when you were at the Court of Appeals. And I'm sure  
3 it's a good question if you ask me one. But anyway.

4 No, it's not that the filing of an objection  
5 says that you can't go forward. The filing of an  
6 objection calls to your attention, well, have you  
7 thought about how this relates to Keller, and you  
8 rethink your position as an honest member of the Board  
9 of Commissioners and say either, okay, you know what,  
10 you have convinced me, I overlooked something, or, no,  
11 you haven't convinced me and it is Keller legitimate,  
12 and then there is the Hudson proposition that says,  
13 okay, if I still dissent, if now I am a dissenting  
14 member, then I get to file an objection and somebody  
15 has to give me back two cents of my dues because I  
16 don't have to support that.

17 JUDGE RIORDAN: So it would still be left to  
18 the Board of Commissioners as some governing body or  
19 some committee?

20 MR. FALK: Right. Presumably at the end of  
21 this process the Supreme Court is going to amend  
22 Administrative Order, what is it, 2004-1 or something,  
23 to better define what it is the State Bar can and  
24 can't do. So, you know, when you have -- so if it  
25 says more directly these are things we think are

1 permissible under Keller, then, you know, unless I  
2 challenge the Administrative Order, okay, that's your  
3 guideline, and presumably you are going to try to  
4 follow it in good faith, and if I go to the Supreme  
5 Court and say, you know what, they are flouting it,  
6 well, you know, then they will do what they do, which  
7 might be nothing. It might be saying, okay, you guys  
8 are hopeless, or getting rid of all of you and, you  
9 know, applying a whole new board of commissioners, or  
10 something in between.

11 CHAIRPERSON BUTZBAUGH: Thank you, Mr. Falk.

12 MR. FALK: Thank you.

13 CHAIRPERSON BUTZBAUGH: Robert Gillett.

14 Mr. Gillett is from a Legal Services of South Central  
15 Michigan. His office is in Ann Arbor.

16 MR. GILLETT: Good morning, Chairman  
17 Butzbaugh and members of the Task Force. I am coming  
18 to express my support for a mandatory bar and to make  
19 a couple comments about the reasons for that support.

20 In general, I think that there is a need for  
21 some regulation of the legal profession, and I think  
22 that that regulation is meant to support two main  
23 values -- protection of the public and to provide a  
24 voice to speak for the profession on issues that  
25 affect the profession. And the current mechanism is

1 issue, I describe what Michigan does, and almost  
2 invariably someone would comment, yes, yes, we know,  
3 the Michigan Bar is really great on these issues.

4 And so I just hope that the Task Force  
5 recognizes what I didn't for quite a while, and that  
6 is that the State Bar of Michigan programs in the  
7 areas of access to justice and support of pro bono are  
8 seen as among the best in the country and, as you  
9 review the Bar operations, I urge you to see that  
10 those aspects of the Bar's work are preserved.

11 My comment on my experience in the Bar's  
12 decision-making process, and I would describe it as  
13 kind of a bottom-up or mid-level view. I have never  
14 been on the Board of Commissioners or a member of the  
15 Representative Assembly, but I have been involved in a  
16 lot of policy discussions that have ended up there  
17 eventually.

18 My impression is that the Bar has elaborate  
19 systems for developing policy and that it follows  
20 these systems fastidiously and religiously. From my  
21 point of view as co-chair of the Bar's Pro Bono  
22 Initiative, before something discussed in our  
23 committee becomes Bar policy, it's reviewed either by  
24 four, depending on which track it takes, Board of  
25 Commissioners versus Representative Assembly, by

1 the State Bar, and the question that the Task Force is  
2 looking at is whether these functions could be  
3 performed more efficiently or more effectively through  
4 some different structure. And I wanted to mention two  
5 elements of the Bar's current efforts to serve the  
6 public, and that's access to justice and pro bono, and  
7 I also wanted to comment on my experience in the Bar's  
8 decision-making process.

9 Programs and services to assure access to  
10 justice are critical to the public. These programs  
11 address the ideal that all citizens should be  
12 permitted to participate equally in our justice  
13 system. These programs are critical also to the  
14 judicial system. The whole credibility, if our  
15 judicial system depends on the public's confidence  
16 that they will have access to and be treated fairly by  
17 that system.

18 I practiced in Michigan my whole career, and  
19 because of this I think I underappreciated our  
20 State Bar for many years. In the last 15 years or so  
21 I have been on a number of national boards and  
22 committees through the National Legal Aid and Defender  
23 Association, the American Bar Association, the Legal  
24 Services Corporation. Time after time I would be  
25 involved in a discussion with some access to justice

1 either four or five independent sets of eyes.

2 Something is raised at the Pro Bono  
3 Initiative. We invariably, if it's a policy issue,  
4 create a subcommittee or work group where all the hard  
5 work takes place and the issues are hashed out. The  
6 committee brings a draft back to the Pro Bono  
7 Initiative. The Pro Bono Initiative, after it reviews  
8 it and approves it, sends it on to the Committee on  
9 Justice Initiative. From there it goes on to either  
10 the Representative Assembly or the Board of  
11 Commissioners. But before it goes to the Board of  
12 Commissioners, it's reviewed by the Public Policy  
13 Committee.

14 So it seems to me that the Bar has sound  
15 systems in place to assure that it's complying with  
16 Keller on public policies issue, and it doesn't seem  
17 to me that the Bar ever acts rashly or impetuously on  
18 policy issues.

19 A couple other comments on the Bar process.  
20 In every Bar discussion the goal is to hear from as  
21 many voices as possible. Any time I have been in one  
22 of these committees, the question is who cares about  
23 this, how can we get their input, and the Bar position  
24 evolves because of this broad discussion.

25 The committees are very self-policing, both

25

1 at the committee level and the individual level. On  
2 the Committee on Justice Initiatives our chairs really  
3 understand Keller. You know, I know that the Bar at  
4 the Commissioner's level has invalidated a number of  
5 things as Keller impermissible, but I also want to say  
6 that at the committee level and at the individual  
7 level there is a great deal of policy issues that are  
8 screened out.

9 And all of us are individuals and are  
10 advocates, and we understand how to advocate. We know  
11 what is a Bar issue, and we know what is not a Bar  
12 issue. I am a member of many organizations, several  
13 of which have registered lobbyists, and so it's not  
14 like if I can't go through the Bar I can't express an  
15 opinion on anything.

16 So thanks again for considering my comments  
17 and for your work in serving on this Task Force.

18 MR. MCSORLEY: One quick question. Do you  
19 think if the Bar had an additional screening protocol  
20 or additional screening process in place in reference  
21 to what seems to be the topic of discussion,  
22 legislative advocacy, that that would be mere  
23 duplication of what's already in place?

24 MR. GILLET: Yes. I mean, if you had asked  
25 me before this whole process started what my

26

1 recommendation is about tweaks to the Bar process, my  
2 recommendation is that it's a very slow, very  
3 deliberate process and, if anything, it tests the  
4 patience of its volunteers. If I am going to work on  
5 a Bar policy issue, I am committing myself to two  
6 years, you know. And so before this current issue  
7 came up, my recommendation was how can we make things  
8 move more quickly, how can we encourage volunteer  
9 participation?

10 Having said that, you know, any system can be  
11 improved. My strongest urging is that we retain a  
12 mandatory bar and, if there are tweaks to the system  
13 that add screening and that make it quicker and more  
14 efficient, I would be in favor of that.

15 As a partial response to Mr. Falk, I  
16 understand how you can read those bills and say  
17 someone can have a different opinion of those, but if  
18 you have been at the work group level and if this  
19 happens all the time, that person then who takes  
20 Mr. Falk's position says that at the committee level,  
21 and then the explanation is given, and the person  
22 either says, Oh, I get it now, I agree, I am fine with  
23 this, or they say, Okay, I still disagree, but I  
24 understand why the group is moving forward. And so  
25 hardly anything proceeds without a real discussion of

27

1 the Keller implications and some attempt to address  
2 that right up the line, committee to the Board of  
3 Commissioners.

4 CHAIRPERSON BUTZBAUGH: Thank you.

5 Bruce Courtade. Mr. Courtade is a lawyer who  
6 is with Rhodes McKee in Grand Rapids, and he is the  
7 immediate past president of the State Bar. He also  
8 was the chair of the Representative Assembly from  
9 2000-2001.

10 MR. COURTADE: Thank you, Mr. Butzbaugh.  
11 Thank you, members of the Task Force, for the honor of  
12 being here today.

13 The issue before you is very complex, very  
14 broad. It impacts not only the profession in which we  
15 practice; it affects the citizens in the state of  
16 Michigan and every member of the judiciary. It's  
17 difficult as I stand here to think of an issue more  
18 critical to what we are doing as a profession than  
19 what you are charged with reviewing. Therefore, to  
20 assist you in your assigned task I would like to  
21 offer, based on my 26-year experience as a member of  
22 the Bar, my nine years as a member of the  
23 Representative Assembly -- excuse me, six years on the  
24 Representative Assembly, nine years with the Board of  
25 Commissioners, including one year as State Bar

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1 president, my insight. . . That was approximately 15  
2 seconds of silence.

3 Imagine now that you are sitting here  
4 wondering what my position is, do I care, do I have a  
5 take, what can I offer based on my experience, my  
6 expertise. What do I have that I can assist you with.  
7 Imagine it's a piece of legislation that's pending  
8 before the Michigan Legislature that's going to change  
9 the way we practice law, that's going to change the  
10 shape and size of our judiciary, and the State Bar of  
11 Michigan, which has 42,600 officers of the court,  
12 stands silent and offers no opinion, no expertise, no  
13 guidance.

14 Does that really serve the purposes of the  
15 State Bar of Michigan? Does that protect the public?  
16 Does that serve the judiciary?

17 When you look at what the purpose of the  
18 State Bar is, what the appropriate role of the  
19 State Bar is, start out with rule one of the  
20 Supreme Court rules. State Bar of Michigan shall aid  
21 in promoting improvements in the administration of  
22 justice and advancements in jurisprudence in improving  
23 relations between the legal profession and the public  
24 and in promoting the interests of the legal profession  
25 in this state.

1 I think personally that a better way to state  
2 it is on the walls of the State Bar of Michigan  
3 written by the first president, Roberts P. Hudson. No  
4 organization of lawyers shall long survive which has  
5 not for its primary object the protection of the  
6 public.

7 Now, I am concerned about our members' First  
8 Amendment rights, and without making too little of  
9 this, I will also be trying a little bit of a Star  
10 Trek theme. Mr. Spock said, The needs of the many  
11 outweigh the needs of the few or of the one.

12 When you look at the current protections in  
13 place under the Administrative Order, they limit the  
14 State Bar as to what it can speak about, as to what it  
15 can advocate about. There are protections currently  
16 in place.

17 Responding briefly to Mr. Falk. I don't want  
18 to burn through my time on all of this. There are  
19 already procedures in place where legislation has to  
20 be posted for 14 days before the State Bar can comment  
21 on it. We have just seen a recent instance in which  
22 there was a sea change in the Court of Claims that  
23 because of that very rule the State Bar was not  
24 allowed to comment. I think that had the State Bar  
25 been allowed to comment, we had some pretty good

1 insight, we being the collective body of lawyers, had  
2 some pretty good insight as to why that might or might  
3 not be some good legislation, but we were precluded  
4 from talking.

5 Mr. Garvey said that there is a cumbersome  
6 process. I agree. It takes a long time to get policy  
7 through the State Bar of Michigan. Nothing is done  
8 haphazardly.

9 I am going to wrap up and take questions if  
10 you have them, but before I do, there is a less famous  
11 quote by Roberts P. Hudson, one that's too long to put  
12 on a wall, but was quoted in the Falk decision, the  
13 initial Falk decision when he wrote, Your organization  
14 is designed not only for the benefit and betterment of  
15 its members but primarily for the public at large who  
16 require the services of the profession. It must never  
17 be subservient to political dictation or intimidation  
18 nor control from outside its membership. It cannot  
19 represent the interests of any group of political  
20 faith. It must not draw distinctions of color, race  
21 or creed. It must not submit to politically-minded  
22 leadership. It must not stand aloof from its  
23 membership. It is now and must remain democratic,  
24 independent, and representative of the best ideas of  
25 citizenship.

1 Any attempt to silence or intimidate the Bar,  
2 to silence its objective voice and its expertise is  
3 simply . . .

4 If you have any questions, I would be happy  
5 to answer.

6 CHAIRPERSON BUTZBAUGH: Any questions of  
7 Mr. Courtade? Thank you, Mr. Courtade.

8 MR. COURTADE: Thank you.

9 CHAIRPERSON BUTZBAUGH: David Schut.  
10 Mr. Schut is an attorney from Farmington Hills.

11 MR. SCHUT: Good morning. Thank you for the  
12 opportunity to speak. I am David Schut, P38924,  
13 licensed in 1986. I have been in solo general  
14 practice for the last 20 years in the metro Detroit  
15 area. Prior to that I operated the state's medical  
16 malpractice arbitration program until its repeal in  
17 '94. I have appeared in a dozen or so circuit courts,  
18 a few dozen district courts, Court of Appeals, various  
19 state administrative hearing forums. My clientele  
20 have primarily been lower income Michigan residence.

21 We lawyers as a profession are in a unique  
22 position when we regulate and license ourselves.  
23 Every other licensed professional in this state has a  
24 board and State agency oversight. None of those  
25 professionals are required to be members of their

1 private state professional organization as a condition  
2 of state licensure. Only us. It may be finally time  
3 for our profession to separate licensing and  
4 regulation from our private professional organization,  
5 and the reason is that the primary purpose of  
6 licensing and regulation is protection of the public,  
7 and the primary purpose of our private professional  
8 organization is to promote our interest, not the  
9 public's. We are simply dishonest to say there is no  
10 inherent conflict between protection of the public and  
11 promotion of lawyers' financial interests.

12 Our first State Bar president said something  
13 you guys have already heard this morning about  
14 protection of the public. The introductory page to  
15 our 2013 annual is our mission statement, and you have  
16 heard that also. Nowhere in our mission statement is  
17 there protection of the public as their primary  
18 object. I believe it is now time for our Bar to alter  
19 its structure to promote protection of the public as  
20 our true primary purpose, ahead of our economic  
21 self-interest and all other vested interests.

22 Despite this belief, I do not believe that  
23 ending the mandatory bar association membership is a  
24 correct solution. I think our Bar needs some major  
25 modernizing and a more thorough, honest

1 self-assessment than has been done previously. I  
2 think we need to comprehensively survey other states  
3 to see what is working for them. Our Bar needs basic  
4 structural and programmic change. I believe our  
5 Supreme Court should revisit its charge to the Bar and  
6 mandate protection of the public as the number one  
7 goal and purpose.

8 So what are my specific suggestions? First,  
9 I would urge that we adopt mandatory CLE. Presently  
10 48 states mandate CLE. The CLE Regulators Association  
11 website provide information on what's done in every  
12 state beyond ensuring that lawyers stay current,  
13 mandatory CLE. Also gives the Bar an opportunity to  
14 directly address all its members every year, including  
15 all the lawyers that don't go to the annual meeting or  
16 read the Bar Journal. I can't understand how 48  
17 states can be wrong and we are right not to require  
18 CLE.

19 Secondly, I would urge the Bar to adopt  
20 specialty certification standards and reign back in  
21 some of the lawyer advertising I feel is over the top.  
22 Presently 20 states have some sort of specialty  
23 certification standards, and we don't have to wait  
24 until 48 of them do that for us to do that as well.

25 Certification clearly helps the public, and I

1 need to do the things that they do. They require  
2 insurance of 100, 200 limits. They require 15 hours  
3 of CLE each year, including ethics and other special  
4 topics. They have a special counseling and rehab  
5 function that is protected from a duty to disclose and  
6 new ethics rules. They have separate licensing and  
7 discipline from their bar association to eliminate the  
8 inherent conflict between protecting the public and  
9 advancing lawyers' interests.

10 Oregon also aggressively promotes its members  
11 in doing pro bono work. Its website is full of  
12 present opportunities for its members to take on  
13 pro bono work, detailed specifics on what pro bono  
14 work was done, et cetera. By comparison here, I feel  
15 we give it more lip service. We can do better and  
16 shame on us if we don't.

17 I reviewed our strategic plan. No where in  
18 there does it talk about looking at other courts or  
19 what other state bars do. And no where in there is  
20 there any talk about protection of the public as the  
21 primary object. It is a plan to maintain the status  
22 quo. I would throw it out and start over.

23 Long ago our society granted a few  
24 professions special status to at least partially  
25 regulate themselves. It is a social contract that I

1 don't think the disability train TV ad has anything  
2 legitimate to do with providing legitimate legal  
3 services. Lawyers who advertise on TV should actually  
4 be in courts with clients and cases and not just  
5 referring clients they sign up to other lawyers. We  
6 can all be forced to give up some of our blessed First  
7 Amendment rights if we want to be lawyers when it  
8 helps to protect the public.

9 Thirdly, I believe we need an overhaul of our  
10 present disciplinary system, at least as far as the  
11 treatment of bar applicants and lawyers who  
12 voluntarily seek assistance for alcohol or substance  
13 abuse and related mental health issues. Our system  
14 has a lack of confidentiality and our ethics rules  
15 have no provision for excluding certain disclosures  
16 from our general duty to report lawyer misconduct.

17 Finally, I believe that some form of  
18 malpractice insurance should be mandatory. Our Client  
19 Protection Fund paid out about \$300,000 last year.  
20 That's not a lot of public protection. If that's all  
21 the damage we caused last year, our premiums for  
22 coverage should be very cheap.

23 The State Bar of Oregon is a mandatory Bar.  
24 I suggest we look very closely at what they do and we  
25 reexamine our well-rehearsed reasons for why we don't

1 believe we have long been reaching for our own selfish  
2 economic interest. We are interested in prosecuting  
3 unauthorized practice of law cases instead of making  
4 simple legal proceedings something that the average  
5 college-educated person could do themselves without  
6 hiring us. We are all for plain English in the law  
7 unless it takes a fee away from us. We are still  
8 officers of the court, but we have forgotten who owns  
9 the courthouse.

10 Thank you for allowing me to speak.

11 MS. BROWN: First of all, thank you for being  
12 so organized and succinct with your suggestions. We  
13 really appreciate that.

14 You mentioned something along, you cited the  
15 idea of a lack of confidentiality, and I am really  
16 curious for you to go back to that and maybe just  
17 reiterate what you said, and I think you were alluding  
18 to there are some issues that shouldn't be reported.  
19 I want to understand you on that.

20 MR. SCHUT: When Bar applicants are initially  
21 referred into a treatment process or attorneys  
22 voluntarily seek assistance, there needs to be in our  
23 ethics rules an ability for the people that are taking  
24 care of those folks to not be required to report  
25 lawyer misconduct, otherwise there is no

1 confidentiality in the treatment process, and it's not  
2 treatment then, it's punishment. It's not  
3 rehabilitation, it's punishment. We need to separate  
4 the two concepts. We need to treat people and try to  
5 get them better and not sort of treat them but report  
6 them anyway. That's not treatment. Look at what  
7 Oregon does and you will understand the difference  
8 between what we do and why it's important.

9 MS. BROWN: Thank you.

10 MR. SCHUT: Yes, sir.

11 MR. ROMBACH: It seems like you want to  
12 change the focus of the State Bar to more protection  
13 of the public as opposed to what it does now, is that  
14 a proper characterization?

15 MR. SCHUT: Yeah, I think so.

16 MR. ROMBACH: As opposed to the order under  
17 which we labor as Task Force members --

18 MR. SCHUT: I understand.

19 MR. ROMBACH: -- you made an interesting  
20 comment. You said that you are willing to relinquish  
21 some of our lauded First Amendment rights --

22 MR. SCHUT: Absolutely.

23 MR. ROMBACH: -- in order to be more  
24 aggressive as a profession to extend these  
25 protections?

1 MR. SCHUT: Yes, sir. I think as a condition  
2 of licensure we could all be required to waive some of  
3 our First Amendment rights, very simply.

4 MR. ROMBACH: Just out of curiosity, because  
5 we are, again, operating under a certain charge from  
6 the Court under the two Falk decisions, under Keller,  
7 how do you square that constitutionally if we are  
8 calling upon lawyers to give up First Amendment rights  
9 and then still comport with the orders that we are  
10 trying to be compliant with?

11 MR. SCHUT: I think that there are all sorts  
12 of professional circumstances under which people are  
13 required to waive a portion of some constitutional  
14 right in order to obtain a privilege to practice law  
15 or a privilege to do something else. It's a  
16 trade-off, and it's a trade-off because the goals that  
17 are obtained in that way are more important than my  
18 First Amendment rights as an individual.

19 MR. ROMBACH: So you are for the Bar  
20 seasonably palpating perhaps more than it has up to  
21 now, shifting the focus to primarily protection of the  
22 public as opposed to perhaps promoting the profession,  
23 I think that's the tension you saw now?

24 MR. SCHUT: Yeah, if we are going to function  
25 as our own regulator, we have to do that, yes, if we

1 are going to be our own regulator.

2 MR. ROMBACH: Appreciate the insight.

3 MR. SCHUT: Thank you very much for the  
4 opportunity.

5 CHAIRPERSON BUTZBAUGH: Mr. Rose. Mr. Rose  
6 is an attorney who is practicing in East Lansing.

7 MR. ROSE: Good morning. Thank you for  
8 serving on the Task Force.

9 My name is Patrick Levine Rose, and I am a  
10 member of the Bar and have been a solo practitioner  
11 for 22 years. I believe the State Bar should advocate  
12 to ensure the fair administration of justice in our  
13 court system.

14 Why is advocacy by the legal profession  
15 essential? When lawyers are licensed, they swear an  
16 oath to uphold the Michigan and U.S. Constitution.  
17 Under the Revised Judicature Act lawyers are admitted  
18 to practice law as officers of the court. That's in  
19 the statute. That's why the federal courts refuse to  
20 get involved in State Bar regulation of their  
21 professional practice in the courts.

22 Only lawyers can become judges. Only lawyers  
23 are admitted to practice law in court. Michigan has a  
24 long history of acknowledging. Who knows how courts  
25 work or do not work? It's lawyers. No other

1 profession has our training, knowledge, or experience  
2 in the administration of justice. This is why we must  
3 advocate. We are part of the third branch of  
4 government. We are there to protect and safeguard its  
5 proper function.

6 Lawyers obviously do not agree on what  
7 justice might require. If we did, why have judges,  
8 juries, or appellate courts. Lawyers do not speak  
9 with one voice; however, it is our duty as a  
10 profession to arrive at collective judgments on how  
11 courts should function and transmit those judgments to  
12 the policymakers in the judicial branch and the  
13 legislature because they need it and the public needs  
14 it and our clients need it.

15 Why is collective advocacy so essential in a  
16 mandatory bar? The majority of lawyers want the State  
17 Bar of Michigan to advocate on administration of  
18 justice. I bet less than 20 percent or even 10  
19 percent or maybe only two percent would vote to  
20 silence the Bar entirely. Take a vote. If the Bar's  
21 advocacy role is going to be silenced, it should be  
22 based on a vote of the majority of all lawyers.

23 In 35 or so states a mandatory bar exists and  
24 lawyers advocate as a group. In most of those cases,  
25 including in Michigan, let's leave it that way.

1 Third, why does advocacy by the Bar on  
2 justice fill such a great need? I worked in two small  
3 law firms prior to going into solo practice for almost  
4 22 years. The ABA says in the 2012 report 49 percent  
5 of lawyers are sole practitioners like myself.  
6 Seventy percent of private practice lawyers are in  
7 small firms like the ones I practiced in. We lack the  
8 time, the resources, and the backup to advocate for  
9 justice, and we need a mandatory bar to solve our  
10 collective action problem and to advocate to keep  
11 courts fair, functional, and accessible.

12 There is no First Amendment right that exists  
13 to silence the bar. I clerked for Judge Collins Seitz  
14 in the 3rd circuit in '91 to '92, just after the U.S.  
15 Supreme Court decided *Lehnert versus Ferris Faculty*  
16 *Association*, 500 US 507, a case in which the question  
17 was were they honoring the Hudson opt-out rule from  
18 1986, and were they providing a way not to compel  
19 people to pay for speech with which they disagreed.

20 The Abood-Keller cases do not give a First  
21 Amendment right to silence bar advocacy on  
22 administration of justice issues, and I do not believe  
23 the U.S. Supreme Court, *Quinn V Harris*, will decide to  
24 silence mandatory bars.

25 For one thing, read the state sovereignty

1 Keller permissible necessarily will survive scrutiny.  
2 And in *Knox* the Court said they are looking at the  
3 possibility that an opt-in is constitutionally  
4 mandated, and if they do that, it would be impossible  
5 for the State Bar of Michigan to defend what they've  
6 called a Keller pure system with no opt-out at all.

7 My former forms addressed this. First, I  
8 propose allowing dissenting statements to State Bar  
9 positions. Such dissenting statements are filed with  
10 committee reports in congress, in state legislatures.  
11 They are used in other state bars. They are used in  
12 Supreme Court opinions. The Bar does not now do this,  
13 but it should. I've participated in dissenting  
14 statements in other bars. So dissenters who disagree  
15 with Keller positions can write statements to give a  
16 contrary view and they are not ghettoized or  
17 marginalized as sole dissenters. They can coalesce  
18 and form a block and state their views and advocate  
19 them simultaneously.

20 I ask the Task Force to propose the Bar  
21 create a process allowing up to two groups in a  
22 minority to draft written dissenting statements if  
23 other lawyers support them.

24 Second, I propose e-mail notice to all  
25 lawyers that the Bar may advocate on an issue. If

1 cases, including Michigan case involving the  
2 affirmative action issues and the Obamacare case, and  
3 the Justice Roberts decision. The U.S. Supreme Court  
4 has refused to require states to restructure their  
5 form of government to fit a federal law.

6 But let's go further. There is not even a  
7 First Amendment policy concern at issue when the Bar  
8 advocates on Keller issues. The Bar does not compel  
9 any individual lawyer to speak when it votes by a  
10 majority to take a position. No one says or thinks  
11 the Bar speaks for every lawyer. If the State Bar  
12 speaks, it speaks for a majority. If the Bar speaks  
13 on a non-Keller issue, one can object.

14 My next point is my most important, and it  
15 directly answers anyone who might claim their First  
16 Amendment free speech rights justify silencing all bar  
17 advocacy. I say again what the U.S. Supreme Court  
18 said; namely, the remedy for speech if you don't like  
19 it is more speech, so if you oppose a Bar position,  
20 you should dissent.

21 Now, I have serious concerns about how the  
22 Bar maps the Keller distinction. I don't think it has  
23 a defensible position, and when I read *Davenport* from  
24 2007, a U.S. Supreme Court case, and *Knox* from 2012, I  
25 do not believe that the way the Bar determines what is

1 they opt in to get notices, the Bar does not now send  
2 those notices of its intent to debate, whether to  
3 advocate on Keller policy initiatives. The Bar only  
4 posts notice on a website. The Bar could easily  
5 e-mail notices with the e-news or e-journal. It  
6 should have to tell any member who wants to know when  
7 it proposes to vote and whether to take a position on  
8 a Keller justice issue.

9 If you are not clairvoyant and you can't  
10 anticipate what will be said in the room and you don't  
11 get the notice and you can't be heard, how can you  
12 possibly be set to have a Keller procedure to opt out  
13 of a Keller distinction that hasn't even been  
14 discussed? If you don't have a Keller procedure  
15 that's defensible and you don't have an opt-out  
16 procedure, I think you are in trouble, and I want to  
17 save the Bar's advocacy function.

18 Third, the Bar should ask lawyers to e-mail  
19 their views, and the Bar should have to post all  
20 lawyer statements on a website so anyone can read  
21 them. The Board of Commissioners needs to hear from  
22 as many lawyers as care to write before they take the  
23 Keller position and after. This is what the Supreme  
24 Court now does with comments it receives on proposed  
25 court rule changes.

1 Fourth and last, I propose allowing lawyers  
2 to opt out of having their money used to pay for bar  
3 advocacy speak. It's very nice to say we are Keller  
4 pure. I don't think that's defensible. The Bar  
5 currently does not allow members to opt out of paying  
6 for advocacy as do other bars, like Wisconsin, and an  
7 opt-out procedure would neither be onerous nor would  
8 it substantially dilute the money available for the  
9 advocacy function. I believe it would cause it to  
10 have far greater legitimacy and an opt-out procedure  
11 would avoid making lawyers feel as if their dues pay  
12 for Keller advocacy and non-Keller advocacy that they  
13 oppose, and I think the U.S. Supreme Court has five  
14 votes to require it. Why wouldn't we do it. Give  
15 lawyers a real way to opt out or have an easier way to  
16 object to a Keller determination, but that's a  
17 nonchargeable issue.

18 It's a small price to pay for the freedom  
19 most lawyers want, to have our profession speak by a  
20 majority on Keller justice issues before the judiciary  
21 and the legislature, and if we adopt these four  
22 reforms, bar advocacy will result in a more fair  
23 process that celebrates these free speech and doesn't  
24 deny it, but if the Bar is silenced, which is what is  
25 proposed, the legislature and our clients and

1 especially the courts will be the biggest losers.  
2 Thank you.

3 MS. WILLIAMS: Mr. Rose, are you proposing  
4 that we either/or the opt out or send to committee or  
5 both?

6 MR. ROSE: Both.

7 MS. WILLIAMS: Thank you.

8 MR. CRANMER: Mr. Rose, this opt out, you are  
9 talking about opting out individually with regard to  
10 specific positions the Bar might take, or is your  
11 vision of an opt-out something that a lawyer might do  
12 just generally when he or she pays the bar dues for  
13 the year, that they simply don't want to be involved  
14 in any advocacy as well?

15 MR. ROSE: Both, and I think both are  
16 essential

17 MR. MCSORLEY: How can it be both? If I am  
18 hearing you correctly, you are suggesting that when  
19 the Bar sends out its notice for Bar payment of Bar  
20 dues that there be a check-off that an individual can  
21 opt out of a portion of their dues, they opt out,  
22 refrain from participating in any legislative advocacy  
23 through their Bar dues, right?

24 MR. ROSE: Presuming there is non-Keller  
25 nonchargeable time that shows up on a time sheet and

1 that presumes that the Bar has a procedure by which  
2 it's segregated out nonchargeable. If you go back and  
3 look in the Davenport and the Knox case, you had  
4 organizations that compelled you to be a member. They  
5 compelled you to pay the money, and they had no  
6 defensible procedure to say, which they did say in  
7 each case, both in Davenport and in Knox, that we  
8 never violate your First Amendment rights, and they  
9 never gave a meaningful way for a person to know that  
10 there was money spent on non-Keller issues.

11 MR. MCSORLEY: That's really your concern.  
12 Your perspective is that there is currently no  
13 defensible procedure in place within the Bar to assure  
14 that it is conforming to Keller?

15 MR. ROSE: That's correct, and that's because  
16 the debate on the precise details that would make it  
17 Keller or non-Keller occurs at a meeting of the Board  
18 of Commissioners which you can know about only if you  
19 are looking on the website every single day, and only  
20 if you are then able to take the time and the money to  
21 come to listen to the debate, and only then if you are  
22 given an appeal, but your appeal rights have  
23 evaporated at that point. So it's an illusory  
24 procedure. The so-called Keller appeal procedure  
25 doesn't even exist, and beyond that, you can't opt out

1 individually and say, go look at the website, I  
2 dissented. My views are there, and look at how many  
3 lawyers joined me. That's not allowed. You can't say  
4 I have a huge 20 percent minority who has dissented in  
5 writing, as occurs in many state bars and across every  
6 legislative process I know of.

7 You can't say that, so you are compelled to  
8 pay. You are not given notice till you have an appeal  
9 period that says it's nonchargeable. You can't  
10 individually tell the Bar that you disagree so that  
11 you can tell the world that you are not associated,  
12 which if you could do that, you might change the Bar's  
13 view. You can't get a group to show that you've got  
14 the right side of the issue to persuade the court that  
15 that view should prevail, and so at all levels there  
16 is no opt out.

17 MR. MCSORLEY: Mr. Rose, you heard Mr. Falk  
18 speak, right?

19 MR. ROSE: Yes.

20 MR. MCSORLEY: And he was speaking of e-mail  
21 notice or website. You would move in that direction  
22 that the Bar at the very least promote and give notice  
23 of its positions through e-mail through its website  
24 which went to all members which would give them an  
25 opportunity to then at least give response or notice

1 of their objections or support?

2 MR. ROSE: I support that, because I think

3 that's what we are all about. We want to hear from

4 everybody, because that's going to change how we think

5 about the issues.

6 MR. MCSORLEY: And I believe you are not

7 opposing a mandatory bar; you just see that there is

8 some tweaking that needs to be done with reference to

9 the legislative advocacy involvement by the Bar?

10 MR. ROSE: Correct.

11 MR. MCSORLEY: Thank you.

12 MR. ROSE: Thanks.

13 CHAIRPERSON BUTZBAUGH: Thank you very much.

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1 things that I wish the Bar had taken positions on.

2 And I have come to appreciate how rigorous the process

3 is when the Bar takes a position.

4 I do find it takes a long time and sometimes

5 way too long and sometimes we don't take positions

6 when we should take positions, but your task is to

7 figure out whether the programs and activities that

8 support, that we do, deserve to continue to be a

9 mandatory Bar. In other words, whether our activities

10 are within what we are supposed to do and, if so,

11 whether it can be done in a way that will recognize

12 the supposed First Amendment violations of expressing

13 an opinion that Mr. Falk, for example, may not agree

14 with or that he doesn't bother to listen to or review

15 how to find out how we came to the conclusion.

16 But I can tell you that without having an

17 association such as the State Bar of Michigan to take

18 positions on certain things, they either wouldn't have

19 happened or they wouldn't have happened well, and I

20 can give you some examples. Four, five years, maybe

21 longer, when Governor Granholm was in office she

22 wanted to and proposed sales taxes on attorney fees

23 and physicians fees and other fees, and the Bar

24 organized quickly by using lobbyists and by having us

25 as an organization talk to the various members of the

1 CHAIRPERSON BUTZBAUGH: Brian Einhorn.

2 Brian Einhorn is with the law firm of Collins,

3 Einhorn & Farrell in Southfield, Michigan, and he is

4 the current president of the State Bar of Michigan.

5 MR. EINHORN: Thank you, Judge, and thank

6 you, Panel. I am not here though on behalf of the

7 State Bar. I have my own personal views about things.

8 Although before I start, and I understand Mr. Rose's

9 thought process and some of it wouldn't be all that

10 difficult to do, but we do have a procedure and it's

11 set forth in the Administrative Order 2004-1 that

12 allows for challenges about positions taken, and it

13 allows an appeal to the court. So that procedure is

14 there.

15 I have not been a member of the Board of

16 Commissioners for a long time. I guess eight years.

17 And I was never a member of the Representative

18 Assembly. I am not a Bar groupie. I have become

19 interested in how the Bar functions once I became a

20 member of the Board of Commissioners. I wasn't a big

21 fan of how the Bar did their things before I became

22 involved in it until I learned how they went about

23 doing what they did and came to appreciate how they

24 did what they did. I have always had a problem as a

25 practitioner on positions the Bar hasn't taken on

1 sections to explain why that wasn't a benefit to the

2 public. Had nothing to do with whether it was going

3 to hurt lawyers. It was going to not benefit the

4 public. It was going to cost them more money for what

5 they needed. Most people who need lawyers need

6 lawyers not because they are looking to do something

7 unimportant. They have been caught into the judicial

8 system, they don't have a lot of money, and now they

9 need a lawyer to help them out of it. If we are going

10 to have sales taxes on lawyers, it's going to cost

11 them more.

12 Being competitive in the industry, if we are

13 having corporate law firms having to compete with law

14 firms in Wisconsin or Ohio, those are the types of

15 things the Bar was able to gather together, get

16 various people together to make the point. And so of

17 all the programs we have -- and I have written a

18 couple times about the subject, I am not going to

19 spend the time to do it -- but in, I think, the

20 November Bar Journal, I talked about the advantage of

21 a mandatory bar and the many services we provide, and

22 Mr. Falk is consistent in his complaints, and I sent a

23 response to his letter complaining about my article

24 and set forth again many programs that we at the Bar

25 perform that we couldn't perform or probably wouldn't

1 perform as well if we were a voluntary bar.

2 But the public advocacy thing, if we do away  
3 with it, maybe we don't need the Bar, because the most  
4 important thing we do is to be involved in the public  
5 advocacy. The business courts probably wouldn't exist  
6 without the Bar having advocated. We advocate  
7 judicial salaries and increases it, we advocate for  
8 the rules of law, we advocate for access, we advocate  
9 for due process. We maintain the integrity of the  
10 judicial process. That's what us lawyers do. It  
11 wouldn't work without us. And that is what we  
12 advocate. And we can't lose that.

13 So if there is a concern that somehow we are  
14 not communicating our thought process quickly enough  
15 so that members can have an opportunity to opt out if  
16 they choose or to express their view, I am all for it.  
17 I mean, if we have a process now for setting forth  
18 that the Board of Commissioners met last week and we  
19 talked about certain things that the public policy  
20 committee had already reviewed, had made their  
21 determination on Keller, so if we need to be clearer  
22 about why we thought something was Keller permissible  
23 and that we are going to talk about something and we  
24 are going to express a view and this is our view and  
25 then we communicate it to the members and they have an

1 opportunity within a reasonable period of time, a week  
2 to say we disagree with this, we want to dissent.  
3 When you send in your opinion tell us these 15 people,  
4 these hundred people disagree with it, I am okay with  
5 that. If that's going to protect the First Amendment  
6 rights of members, let's do it, but not do anything to  
7 change what we have been doing.

8 I mean, you are going to look at what it is,  
9 and my hope is you will report the Bar is doing very  
10 fine, very nicely, thank you very much, let's not  
11 touch it.

12 MR. RIORDAN: Mr. Einhorn, is there any  
13 failsafe way to protect the First Amendment rights of  
14 those who may not have agreed with Bar positions on  
15 certain issues?

16 MR. EINHORN: At this point I am going to  
17 rely on Bruce Courtade. That's the first time I have  
18 ever done it.

19 I mean, there are times where we as a  
20 collective group are going to make a statement that  
21 some person I won't agree with. I mean, the business  
22 courts, I am not a big fan of the business courts. I  
23 have been opposed to it, but the Bar took a position  
24 on it, I understand the reason why they took a  
25 position on it, and so I guess I could say they didn't

1 meet my First Amendment rights because they are taking  
2 a position on something I disagree with, but there is  
3 a collective value in us making a statement.

4 MR. RIORDAN: I understand your collective  
5 value argument, but what may be good for you or you  
6 may support, somebody else may not. How do we support  
7 the issue of collectively funding positions that the  
8 whole collection may not support?

9 MR. EINHORN: So we don't take a position on  
10 something that three people disagree with? So the Bar  
11 is not going to take a position on access, the Bar is  
12 not going to take a position on the Court of Claims,  
13 which we didn't, which was a disaster in my view,  
14 because we couldn't, and so because two people think,  
15 oh, we will change the Court of Claims is a great  
16 idea, so we are not going to take a position? We are  
17 not doing service to the community or the public when  
18 we do that.

19 But if Brian Einhorn or Mike Riordan thinks  
20 that the Bar's position on the business courts, for an  
21 example, is -- I just oppose it. It's a bad idea --  
22 then so long as the Bar has a way, and I think it's  
23 there, but maybe it's not that easy. I mean, it's on  
24 the website, so people -- our meeting notices, I  
25 think, are sent out in advance and the subjects are

1 there for people to look at. But once the public  
2 policy committee, usually it's the same day of the  
3 meetings, and you are personally aware of that, and as  
4 a lot of people are on this committee personally aware  
5 of the procedures we go through, the public policy  
6 makes a recommendation, the Board of Commissioners  
7 listens to it, and we vote on it.

8 So perhaps we adopt the thought process that  
9 Mr. Rose had that we at that point send out to the  
10 members, okay, you knew that this was going to be on  
11 the docket. We have taken a position. This is our  
12 position. If you object to it, send us your  
13 objections, your reason for your objections, and when  
14 we send in our letter to the legislature when we send  
15 our report to the court, your objections will be  
16 included. So their voice is heard, but it's an  
17 individual voice or a group of individual voices, not  
18 the big voice which needs to be, which needs to be  
19 stated.

20 So I think that protects the pure thought  
21 process that somebody, no one should take a view and  
22 express a view for me that I disagree with. I mean,  
23 there is a balancing act, and the balancing act is  
24 very much in favor on these issues to allow us to do  
25 it. But if they want to be heard about what their

1 objection is, fine. If they want to opt out -- we  
2 used to have a procedure for that, the court actually  
3 had one after the second Falk, and I don't know what  
4 happened to it. When the order, the 2004 order was  
5 enacted, that was taken out. So the Court has the  
6 ability to look back at what was done back '83, '84,  
7 something like that, and put it back in there.

8 Opt out, sure. Having an opportunity to  
9 dissent, no problem.

10 MR. WALSH: Just a quick question. Thank you  
11 for being here with your presentation. I am curious  
12 if you have any thoughts on the bifurcation between  
13 Keller issues being presented on behalf of the full  
14 Bar and then non-Keller issues or non-Keller advocacy  
15 to more voluntary sections?

16 MR. EINHORN: Well, I think that's already  
17 done, but the sections cannot advocate on something  
18 that we don't give them permission to advocate on.  
19 So, I mean, I suppose if it was non-Keller permissible  
20 and it would have the Bar's imprimatur on it, it's  
21 something we probably shouldn't do either. There are  
22 lots of sections of the Bar, there is lots of --  
23 Michigan Association of Justice, Michigan Defense  
24 Trial Lawyers Association, and other groups that are  
25 independent of the Bar, and they can advocate for

1 non-Keller permissible things.

2 I mean, we obviously need to be careful, and  
3 we have been very much so, much more so than I prefer  
4 honestly, on what is Keller permissible. We have  
5 issued, I didn't bring it up, but on everything that  
6 the public policy and the Board of Commissioners looks  
7 at, there is a box to check as to why we are  
8 addressing it and how it is or is not Keller  
9 permissible. If it doesn't get any checks, it's  
10 something we don't discuss because it's not, quote,  
11 Keller permissible. It's there. It says it.

12 Maybe we need to do a better job of  
13 communicating that to the members as to why we thought  
14 it was Keller permissible, but it's in the materials.  
15 I think if you go on the website you can find it. I  
16 don't know how to go to the website, so I can't find  
17 it, but it's there.

18 MR. MCSORLEY: Mr. Einhorn, you personally  
19 believe that the process that's in place, has been in  
20 place for some period of time, in reference to the  
21 Bar's involvement with legislative advocacy is  
22 vigorous and perhaps even too cumbersome?

23 MR. EINHORN: I don't know if it's  
24 cumbersome, certainly rigorous.

25 MR. MCSORLEY: Perhaps a bad choice of words,

1 but it's protracted, it takes perhaps longer than it  
2 should, and at times becomes ineffective because it is  
3 so rigorous, but what you have also said, I believe,  
4 is that the Bar membership is seemingly in the dark  
5 about the procedures that are already in place or it's  
6 not clear enough to them what's going on, and if  
7 that's true, I assume the public is even more in the  
8 dark and not aware of the procedures that we go  
9 through, which may have been in part what led to the  
10 proposal of the Senate going to a mandatory -- a  
11 voluntary bar. How would we correct that?

12 MR. EINHORN: Well, I don't think the  
13 membership is in the dark. I mean, you are in the  
14 dark because you don't read anything. You are in the  
15 dark because you don't try to find things. You are in  
16 the dark because you don't look for things. You are  
17 in the dark because you don't care. I mean, most of  
18 my lawyer friends are trial lawyers, and most of them  
19 are on the other side of the V. from me. I defend  
20 cases. They make me money by starting lawsuits.

21 But they have always believed, I mean, this  
22 is a big day, that the Bar sucks. The Bar does  
23 nothing for them. There is not a program involved  
24 that the Bar does that is beneficial to them, and lots  
25 of members think that. But that's because they don't

1 look. I mean, how do we educate somebody who chooses  
2 to be ignorant? I mean, if you choose not to read  
3 anything, you choose not to see what's going on, it's  
4 not my fault. It's theirs. I mean, there is all  
5 kinds of things on the website. I am not somebody who  
6 goes through the computer; younger people are.

7 I think we can do a better job, and we have  
8 been doing a better job of communicating with the  
9 members when things happen. We have these e-blasts  
10 where we can send something out. When the Senate,  
11 when this bill came in from the Senate for the  
12 voluntary bar, we set forth an e-mail to all the  
13 members in our e-blast as to what was going on that,  
14 we were going to as a -- because we couldn't even as a  
15 commission, we couldn't even address it for two weeks.  
16 So we sent it out that this is what we are going to  
17 do, this is the day we are going to do it.

18 So we do communicate. Could we communicate  
19 better? Yes, I think so. I don't believe that people  
20 are in the dark. If they are in the dark, they choose  
21 to be in the dark.

22 CHAIRPERSON BUTZBAUGH: Thank you,  
23 Mr. Einhorn.

24 MR. EINHORN: Thank you.

25 CHAIRPERSON BUTZBAUGH: Chad Engelhardt.

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1 Mr. Engelhardt is with Goethel Engelhardt.

2 MR. ENGELHARDT: Thank you, Mr. Chair and

3 this Task Force for allowing me the opportunity to

4 speak today on this important issue on behalf of the

5 Negligence Law Section of the State Bar of Michigan in

6 support of a mandatory, unified, and effective

7 State Bar.

8 The Negligence Law Section is composed of

9 over 2,000 trial lawyers, negligence lawyers in our

10 state, from both the plaintiff and defense bar. Our

11 leadership council is made up of an elected governing

12 council equally comprised of plaintiff and defense

13 attorneys, and all of the decisions that are made by

14 the leadership council are done on a consensus basis.

15 Not a simple majority, but a consensus basis. That is

16 how policy issues are made, decisions taken, and after

17 that there is an extensive system of checks and

18 balances, as Mr. Courtade and Mr. Einhorn have

19 indicated, of checks and balances to make sure there

20 is Keller permissible action being taken and views

21 being taken.

22 As a profession granted the exclusive right

23 to practice law in our state, the Bar and its sections

24 recognize its obligation and our obligation to assist

25 our elected officials in their policy making, to

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1 inform them and educate them about the impact of

2 policy decisions that they may have on our system of

3 justice, on our profession and our state.

4 As members of this Task Force are well aware,

5 in the judiciary we do so by filing amicus briefs and

6 by holding bench/bar conferences. I don't think there

7 is any controversy over that. The work that we take

8 in the executive and legislative branches of

9 government I would submit are equally as important and

10 in many ways more so. Unlike the bench, which is

11 filled with legal scholars in their own rights, not

12 all of our legislators or executive officials are

13 lawyers. Obviously there are some notable exceptions,

14 as our speaker pro tem, Representative Walsh, an

15 esteemed lawyer, but not all legislators are lawyers,

16 and even those that are lawyers may be asked to make

17 policy decisions in areas of law in which they don't

18 have background and practical experience. So what the

19 State Bar does through its sections and

20 institutionally is provide subject matter experts on

21 specific policy issues, matters that may be pending

22 before the executive or legislative branches.

23 We do so in essentially three basic

24 mechanisms. The first is by working in working

25 groups. Representative Walsh and his vice chair when

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1 he was on the Judiciary Committee, Representative

2 Heisey, put together working groups, for example, in

3 medical negligence and gross negligence standards and

4 things of that nature, and we are able to provide them

5 with our insight and our subject matter expertise.

6 Sometimes because of the complexity and

7 nuances involved in policy decisions what the

8 State Bar will do in its Negligence Section and other

9 sections is provide multiple experts on both sides of

10 an issue. Typically that's providing an expert on

11 both the defense and plaintiff side of the issues and

12 that way we are able again to examine multiple roles

13 and assist the legislature and the executive branch in

14 making sound policy decisions.

15 As well, we provide educational testimony at

16 public hearings, and when there is consensus on an

17 issue, we submit formal, well-researched

18 Keller-approved position statements. In order to

19 submit those statements, again, there has to be a

20 consensus by both the plaintiff and defense members of

21 the Bar. Herding squirrels may be an apt analogy

22 there.

23 And then there is the process of having that

24 position approved by the Board of Commissioners, and

25 through our policy counsel and our Bar leadership to

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1 make sure there is a permissible reason, oftentimes

2 access to justice or regulation of our profession.

3 I would like to give the Task Force a couple

4 of examples where we have done that, and it's worked

5 out very well, not for just our profession, but I

6 think also for the policy makers and also for our

7 state. The first and more recent example is the issue

8 of the runners and cappers bill. The Bar became very

9 concerned when we learned that there were members of

10 even some of our profession and other members of the

11 public that were engaging in conduct that we

12 considered to be spurious. They were soliciting

13 injured people to seek medical services. We felt that

14 that undermined our system of justice, and we felt

15 that that undermined our profession and the public

16 confidence in our profession and our system of

17 justice, and we worked with the Legislature to enact a

18 bill that criminalized some of that activity, and just

19 last week, two weeks ago now, we had a meeting where

20 we learned that that bill has been very effective in

21 curtailing the concerning conduct.

22 Another instance, and it was mentioned by

23 both Past President Courtade and President Einhorn of

24 the State Bar, was the Court of Claims issue. When

25 that legislation was initially passed under Senate

1 Bill 652 and enacted to move the Court of Claims from  
2 the circuit courts to the Court of Appeals, there was  
3 significant public concern and concern from our  
4 executive, Governor Snyder, about the  
5 constitutionality of part of the provisions.

6 The State Bar, its Negligence Section and  
7 Appellate Practice Section, provided subject matter  
8 experts to a working group with the governor's office,  
9 with both houses of the legislature, and from both  
10 caucuses. We assisted in drafting legislation that  
11 was adopted, along with an amendment by Representative  
12 Greimel, that was ultimately passed on a unanimous  
13 basis through both houses. So both the Senate and the  
14 House of Representatives by a unanimous vote enacted  
15 this legislation, and it prevented what we believed  
16 and what many people believe was a constitutional  
17 crisis. Ultimately the public benefited from that,  
18 and, again, that is the kind of effective advocacy  
19 that our State Bar and its sections can provide, and I  
20 would ask the Supreme Court and this Task Force to  
21 issue its recommendation supporting an effective and  
22 unified mandatory state bar. I am happy to answer any  
23 questions.

24 MR. CRANMER: Mr. Engelhardt, thank you for  
25 being here, and you certainly provided some excellent

1 happens to be a voluntary section is of any  
2 consequence, because we are a member of the Bar itself  
3 and fall under those purviews.

4 CHAIRPERSON BUTZBAUGH: Thank you,  
5 Mr. Engelhardt.

6 MR. ELLSWORTH: I want to ask one question.  
7 Whether it's a good idea for the Board of  
8 Commissioners to be able to tell a section that it  
9 either can't lobby on a certain subject or that it  
10 can't take a certain position before legislative  
11 committee.

12 MR. ENGELHARDT: I would hesitate to speak on  
13 behalf of the section on that issue because I don't  
14 know that we have a consensus position on that.

15 MR. ELLSWORTH: What's your view?

16 MR. ENGELHARDT: My personal view is that  
17 sections should be allowed to issue policy statements  
18 of their own accord, just making clear that it's not a  
19 statement on behalf of the State Bar, that it's on  
20 behalf of this section of the State Bar, for example  
21 the Negligence Section and its membership.

22 MR. ELLSWORTH: Thank you.

23 MR. ENGELHARDT: Thank you.

24 CHAIRPERSON BUTZBAUGH: Mr. Saffell.  
25 Mr. Saffell is an attorney from Traverse City.

1 suggestions and examples of how effective the  
2 Negligence Section is in terms of advocating and  
3 offering help to the Legislature and what have you,  
4 but to extend that argument, how would you respond to  
5 the argument that, in essence, the Negligence Section  
6 is a voluntary bar? People don't have to join it and  
7 all of the benefits that you are ascribing to a  
8 voluntary section could be appropriate and perhaps  
9 could be beneficial.

10 MR. ENGELHARDT: Well, it's true that the  
11 section memberships are voluntary, and people pay  
12 additional dues to belong and receive additional  
13 benefits. They receive additional benefits through  
14 our continuing education seminars. There is even  
15 additional benefits, including some of the advocacy  
16 work that we do, and they pay an extra portion of  
17 their Bar dues for that.

18 However, even though we are a voluntary  
19 portion of the Bar, section of the Bar, we still fall  
20 underneath the umbrella of the Bar itself, and so in  
21 order to engage in advocacy, we still fall under the  
22 umbrella of Keller, for example, and the Falk decision  
23 in making sure that what we are doing is a permissible  
24 use of those resources.

25 I don't think the fact that our section

1 MR. SAFFELL: Yes, thank you very much. I am  
2 honored to be invited to speak here today. I am going  
3 to be he very brief. My name is James Saffell. I am  
4 an attorney in Traverse City. I am here on behalf of  
5 the Grand Traverse/Leelenaw/Antrim Bar Association. I  
6 am proud to be a member of the State Bar, I want to  
7 say that, and when this issue came before our Bar, we  
8 got together and discussed it, and there was  
9 overwhelming support on our Board for a mandatory bar.  
10 We then polled our members, and our members  
11 overwhelmingly support a mandatory bar. So we have  
12 passed a resolution. I think that might be in the  
13 record. We would ask that if it's not on the record  
14 that it be placed on the record supporting a mandatory  
15 bar for the state of Michigan.

16 I don't need to repeat many of the things  
17 that have already been said and, frankly, I don't have  
18 much experience at the State Bar level with these  
19 issues, but I would say that it's our belief that with  
20 both the Supreme Court and the U.S. Supreme Court and  
21 the Michigan Supreme Court upholding the  
22 appropriateness of a mandatory bar for purposes of  
23 establishing high standards in the profession and  
24 protecting the public, we believe that there is a  
25 strong basis for continuing that. We believe that the

1 Keller decision and the opportunities for screening  
2 the proper role of the advocacy are in place and are  
3 functioning well and ought to continue.

4 Hearing some of the discussion today, I  
5 personally believe that some of the opt-out  
6 provisions, e-mailing members, you know, of ongoing  
7 issues, those kinds of things are reasonable to  
8 consider, but throwing out the system as we have it  
9 today when we believe it's functioning very well would  
10 be a mistake.

11 And I am kind of struck in reading the Keller  
12 opinion, frankly, about the level of contentiousness  
13 of the issues the Supreme Court addressed in that  
14 case -- gun control, abortion, death penalty. These  
15 kinds of issues are obviously very contentious, and I  
16 can understand why it rose to a Supreme Court level.  
17 However, I don't see the State Bar of Michigan getting  
18 anywhere close to that level of issue and, as we have  
19 heard today, you know, it's very carefully thought  
20 out, the procedures are in place, and we would  
21 strongly advocate that it continue.

22 And when balancing First Amendment rights  
23 against the interest in advocating on behalf of the  
24 profession, we believe that a reasonable balance has  
25 been drawn and that it ought to continue.

1 pro bono services are, I believe, an extremely  
2 important function of any state bar. It was true in  
3 Colorado. It's true here. I personally believe that  
4 it ought to be mandatory and that it ought to be  
5 supported even more.

6 MR. RIORDAN: You mentioned advocacy on  
7 behalf of -- what do you mean by that?

8 MR. SAFFELL: Well, I believe that the  
9 advocacy that has taken place in the state of Michigan  
10 is helpful. Like Mr. Einhorn said, I personally  
11 believe that the Bar ought to speak out on issues  
12 important to the state and issues important to the  
13 public.

14 MR. RIORDAN: Any political speech?

15 MR. SAFFELL: I think it has to be tempered  
16 by the law, and I think it has been, and to the extent  
17 that the consensus is that it's political speech or  
18 speech that is crossing the line, the permissible  
19 line, then no. However, I don't think that's  
20 occurring and, frankly, I think that the processes  
21 that I am hearing about, many of which I was really  
22 sort of unfamiliar with before today, you know, are  
23 the kind of measures that ought to be in place and  
24 seem to be working well.

25 MR. RIORDAN: When you were out in Colorado,

1 Any questions?

2 MR. RIORDAN: I have one, Mr. Saffell. We  
3 spoke outside. I know you are from Birmingham. You  
4 spent a lot of time in Colorado and you are still a  
5 member of the Bar?

6 MR. SAFFELL: I am.

7 MR. RIORDAN: It's a voluntary bar  
8 association?

9 MR. SAFFELL: It's a voluntary bar.

10 MR. RIORDAN: What's your feeling about that  
11 voluntary bar association as opposed to the mandatory  
12 bar we have here in Michigan?

13 MR. SAFFELL: I personally think that a bar  
14 association, that practicing law in the state is a  
15 great privilege and that it ought to be mandatory. I  
16 think it helps protect the public. I really think  
17 that state bars generally and our state bar  
18 particularly does a good job of maintaining access to  
19 justice, pro bono activity. That's something that's  
20 very important to me.

21 I sit on the Conflict Resolution Services  
22 Board in Traverse City as well that does essentially  
23 low cost or no cost mediation to folks that are going  
24 through the court system. Most of the appointments  
25 come directly from the court, so my point is that

1 were you involved in any advocacy or involved in any  
2 voluntary bar association advocacy?

3 MR. SAFFELL: No. No.

4 MR. RIORDAN: Thank you.

5 CHAIRPERSON BUTZBAUGH: Thank you,  
6 Mr. Saffell.

7 Mr. LaBre. Mr. LaBre is with LaBre Law  
8 Office.

9 MR. LABRE: Judge, it's a pleasure to see you  
10 again. Thank you. For all of you, good morning. My  
11 name is Bill LaBre. I am from Edwardsburg, the  
12 metropolitan hub of the midwest located just north of  
13 South Bend and Elkhardt, Indiana on the Michigan side  
14 where a marvelous village of 1,100. With our  
15 township, we are all the way up to 8,000.

16 I have been a member of the Indiana State Bar  
17 and of the Michigan State Bar since 1977. The Indiana  
18 Bar Association is voluntary. Here it's mandatory. I  
19 have two reasons to tell you that my suggestion,  
20 strong suggestion, is that we become a voluntary bar.  
21 The two reasons are pecuniary and principled. Let me  
22 start with pecuniary.

23 First of all, a law firm, and a lot of  
24 lawyers in the state are. The privilege of practicing  
25 law in the state of Indiana cost me \$145 per year.

1 That sum operates the disciplinary system and also  
2 character and fitness for admission to the Bar.  
3 Basically it's a governmental function in regard to a  
4 lawyer, whether he should be admitted or be allowed to  
5 continue to practice or should be disciplined or  
6 should be given help. Those kinds of things are  
7 operated through the Indiana Supreme Court, and that's  
8 what the \$145 pays for.

9 The Indiana State Bar that I have also been a  
10 member of since '77 because I choose to provides all  
11 the member services, provides the collective advocacy  
12 that we heard so much about this morning, provides  
13 positioned reasoning, provides a substantial amount of  
14 education to the Bar, and basically is extraordinarily  
15 similar to what the State Bar of Michigan does.

16 On the level of principle, the Indiana  
17 State Bar Association avoids the Keller problems.  
18 It's just not there. The Indiana State Bar takes a  
19 position on something, it's going to be because the  
20 members who practice law in the state of Indiana who  
21 choose to join the Bar association believe  
22 collectively that this is what ought to occur or ought  
23 not to occur, as the case may be.

24 Those who choose not to join may do so for a  
25 number of reasons. Had a number of friends of mine

1 tell me, I just don't care about that. I don't want  
2 to become involved with it. I take care of my  
3 clients. I go home to my family. I am done. That's  
4 the right not to speak, which is equally protected by  
5 the First Amendment.

6 I suggest that the most effective means to do  
7 all of the marvelous things that we heard about this  
8 morning that this Bar does and yet to preserve the  
9 integrity of individual freedom, which is at its core  
10 why we are Americans, is that our Bar be voluntary,  
11 and I would suggest that just as I would be a member  
12 of the Indiana Bar Association since 1977, as has my  
13 son who practices law with me, I might add, since 2010  
14 when he was admitted, also voluntarily belongs to the  
15 Indiana Bar Association. Thank you very much.

16 MR. MCSORLEY: Mr. LaBre.

17 MR. LABRE: Yes, sir.

18 MR. MCSORLEY: Thank you for appearing today  
19 and offering your views, particularly where you have  
20 experience of being in both voluntary as well as  
21 mandatory. Are you familiar with the statistics of  
22 the Indiana voluntary bar; that is, what percentage of  
23 the lawyers are actual members of the voluntary bar?

24 MR. LABRE: Not a specific number, I am not.  
25 I think it's around 75 percent or better, so by far a

1 majority of lawyers do belong. They provide wonderful  
2 services.

3 MR. MCSORLEY: The Indiana Bar, does it fund  
4 entirely the disciplinary service, grievance  
5 procedures, or is it complemented or supplemented by  
6 state subsidy?

7 MR. LABRE: Neither. In Indiana the \$145 to  
8 the Supreme Court of Indiana takes care of the  
9 admission and the discipline issues, what I  
10 characterize here as simply governmental functions  
11 relating to the continuing practice of law. Indiana  
12 State Bar deals with policy, with member benefits,  
13 with all of the other collective things that we have  
14 heard discussed this morning.

15 So it's the Supreme Court, the short answer  
16 is the Supreme Court does that through the \$145 to the  
17 court every year.

18 EXECUTIVE DIRECTOR WELCH: Mr. LaBre, can you  
19 tell us what the annual dues are for the Indiana  
20 State Bar Association?

21 MR. LABRE: For a man my age, which is quite  
22 up there, \$125.

23 EXECUTIVE DIRECTOR WELCH: And for someone  
24 who is in their --

25 MR. LABRE: I think I paid \$75 for my son

1 when he was first admitted.

2 EXECUTIVE DIRECTOR WELCH: And the maximum  
3 would be?

4 MR. LABRE: Where I am, the 125 and 145 for  
5 the Supreme Court for a total of 270 for me, which is  
6 still cheaper.

7 CHAIRPERSON BUTZBAUGH: Thank you, Mr. LaBre.

8 MR. LABRE: Thank you.

9 CHAIRPERSON BUTZBAUGH: Judge Thomas Boyd,  
10 and Judge Boyd is chief judge of the 55th District.

11 JUDGE BOYD: Good morning, Mr. Chairman,  
12 members of the Task Force and the Representative. I  
13 am going to tell you I am not a Bar guy. I have not  
14 had a lot of experience with the Bar. I come to the  
15 Bar as first a partner and now a participant on public  
16 policy issues. I am interested in public policy and  
17 the Supreme Court through Canon 4 of the Michigan Code  
18 of Judicial Conduct tells us to be involved in public  
19 policy. It says, As a judicial officer and person  
20 specifically learned in the law, a judge is in a  
21 unique position to contribute to the improvement of  
22 the law, the legal system, the administration of  
23 justice.

24 It goes on to encourage that involvement to  
25 the extent that your docket permits, and it

1 specifically suggests you do that through a bar  
2 association, a judicial conference, or other  
3 organization.

4 I have been involved in the Michigan District  
5 Judges Association for a number of years where I  
6 currently serve as an officer, and it's really through  
7 that that I sort of bumped into the Bar. So everybody  
8 you have heard from today knows more about the Bar  
9 than I do.

10 What I see is the effect, and I guess that  
11 brings us to our question for today, which is should  
12 the State Bar of Michigan have the ability to speak  
13 out on public policy issues related to the Michigan  
14 system of justice? And I think it's an interesting  
15 time to ask that question, because I am going to pick  
16 on my good friend, Representative Walsh, because  
17 during his career as a legislator the State Bar is on  
18 a really good run. There has been incredible  
19 successes in terms of the State Bar of Michigan  
20 improving the system of justice through its advocacy.

21 Let's start with the Crossroads Commission  
22 on -- excuse me, the Judicial Crossroads Task Force of  
23 the Michigan State Bar. This is an organization  
24 brought together -- the bench, the bar, the public --  
25 in a way that only the State Bar of Michigan, they

1 were uniquely qualified to do. The result of this  
2 work is several recommendations.

3 Just to tick off a couple of those  
4 recommendations, base the number of judges in each  
5 trial court on accepted and reliable data for  
6 achieving savings for potential reductions in  
7 judgeships. What happened? We have now, again, with  
8 a lot of help from Representative Walsh, we have had  
9 two successful restructurings right sizing the  
10 judiciary based on the judicial resources report  
11 coming from the Supreme Court. That report comes out  
12 every other year, and every other year it is just  
13 ignored, but after the State Bar spoke, we have had  
14 now two different bills that have passed changing the  
15 shape of the judiciary to right size it to the needs  
16 of the citizens.

17 Next recommendation, test and implement  
18 methods for improving resolution of business disputes.  
19 Boom, we get business courts. Use the successful  
20 techniques of problem solving courts to better provide  
21 service and save for the taxpayers. These are direct  
22 quotes from the report of the task force. What do we  
23 have? We have rapid expansion of problem-solving  
24 courts in different areas, in different communities.  
25 Now with the legislative support and the

1 administrative support from the Supreme Court, we have  
2 regionalization of problem-solving courts. We are  
3 just going leaps and bounds forward. This is all  
4 within a relatively short period of time because the  
5 State Bar of Michigan spoke.

6 I am not going to go on because I am going to  
7 run out of time, but I am going to tell you about my  
8 experience, which is through the Michigan District  
9 Judges Association I was dispatched to essentially try  
10 and kill House Bill 5676 a few years back. Now,  
11 Richard McClelland (sp) wrote the bill, so I am going  
12 to be really nice about the bill, since he is sitting  
13 behind me, but it had to do with indigent defense, and  
14 the District Judges Association, Michigan Judges  
15 Association, and the Prosecuting Attorney Association  
16 of Michigan did, in fact, kill that bill. We didn't  
17 see that as a proper way to address the issue of  
18 providing indigent criminal defendants with counsel.

19 But the State Bar of Michigan would not let  
20 it go. And I have with me, I will leave for your  
21 reporter, copies of an excellent article by former Bar  
22 President Julie Fershtman having to do with the long  
23 history of the Bar and the court's relationship on  
24 this issue, starting back in 1975 when the  
25 Supreme Court asked the Bar to create the Defense

1 Services Committee. So in partnership the court, the  
2 bench, and the Bar addressing the issue of what do we  
3 do to address the issues of Gidding versus Wainwright.  
4 I am not going to go into the details. We are not  
5 really good at this. This is something we have been  
6 lagging behind in the rest of the country, but we have  
7 been fighting it in the Bar. If you look at this  
8 article, ever since 1975 there has been fighting on  
9 this issue. So when we killed the House Bill 5676,  
10 the question is what happens next?

11 Well, Elizabeth Lyon, who was the government  
12 relations staff person for the State Bar at the time,  
13 brought together the people repeatedly. Conference  
14 calls, meetings, was not going to let it go. That  
15 process led eventually to a white paper, which led to  
16 an executive order from the governor, which led to an  
17 advisory commission, which led to legislation, which  
18 again Representative Walsh helped usher through, which  
19 we have Public Act 93 of 2013.

20 Have we fixed the problem? No, we have got a  
21 long way to go, but we have come a really long way  
22 because the State Bar of Michigan spoke.

23 So back to our question, Should the State Bar  
24 of Michigan be able to effectively speak? And the  
25 answer in my brief experience as an outsider is

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1 absolutely. We are all better off if the State Bar of  
2 Michigan speaks. That's all I have for you,  
3 Mr. Chairman.

4 CHAIRPERSON BUTZBAUGH: Thank you.

5 MR. CRANMER: We thank you very much for  
6 being here and sharing your views. Is it your sense  
7 that if the Bar was a voluntary bar as opposed to a  
8 mandatory bar that some of these things that you  
9 talked about, like the Judicial Crossroads Task Force  
10 and some of their recommendations, would not have come  
11 in?

12 JUDGE BOYD: Yeah, I mean, it's a question of  
13 resources, obviously. I don't live in the lofty  
14 worlds of Supreme Court chambers. I live in district  
15 court. To me everything is cause and effect. We are  
16 here because the State Bar chose to speak on a  
17 contentious political issue. It's one of the reasons  
18 I stopped what I was doing today to come down and have  
19 this opportunity to speak with you, because that  
20 contentious political issue had to do with judges, had  
21 to do with whether or not judicial elections should  
22 continue the way they have been going or whether they  
23 should take a different path.

24 In my world of the district court of cause  
25 and effect, the cause of our conversation today is

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1 they said something that people didn't like, and the  
2 effect is adversaries. People who didn't like what  
3 they said are trying to go after the pocketbook.  
4 That's why we are here. So in the world of cause and  
5 effect, if a pocketbook is cut off, less speech will  
6 happen. We all know that.

7 So if there is less money available because  
8 we have a voluntary bar instead of a mandatory bar,  
9 there will be less robust attention to these issues.

10 MR. ROMBACH: Did the State Bar play a role  
11 in the recent preliminary examination legislation?

12 JUDGE BOYD: That's going to be awful hard to  
13 answer without flattering you a great deal,  
14 Mr. Rombach. I am not sure I can do that.

15 For those of you not involved in the criminal  
16 justice system, the issue of sort of some  
17 inefficiencies developed over many decades in the  
18 system of determining whether or not someone should be  
19 held over for criminal trial in a felony case, which  
20 we have a preliminary examination system in Michigan,  
21 inefficiencies have crept up, hasn't kept up with  
22 technology, but then the issue became overly  
23 politicized when the attorney general, whose name I  
24 will not say -- sort of like Voldemort -- when he  
25 spoke on the issue and it became a political issue.

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1 We were at loggerheads, and we could not fix things  
2 even though there was basic agreement of everybody  
3 involved -- the court, the defense bar, the  
4 prosecution. There were inefficiencies that needed to  
5 be weeded out of the system. With leadership from a  
6 lot of people, that initiative got going again in the  
7 last couple of years, and the State Bar of Michigan,  
8 specifically Chairman-Elect Tom Rombach, really doing  
9 some shuttle diplomacy with the parties, ironed out  
10 all of the last details. It was the State Bar -- I  
11 don't know which group did it. Someone within the  
12 State Bar, Board of Governors or something, narrowed  
13 it down to five issues and, again, with  
14 President-Elect Rombach's leadership, those issues  
15 were ironed out over a period of time and eventually  
16 that bill -- I wish I could tell you the governor  
17 signed it, but it's kind of stuck. We have gone from  
18 a situation where there was a political fight that  
19 nobody could even begin to receive a vote to a  
20 situation where the bills in question I think passed  
21 the house 108 to 0 and passed the senate 37 to 1,  
22 something like that. You know, just broad-ranging  
23 consensus based upon people talking to each other,  
24 again with leadership from the State Bar of Michigan.

25 CHAIRPERSON BUTZBAUGH: Thank you, Judge.

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1 JUDGE BOYD: Thank you.

2 CHAIRPERSON BUTZBAUGH: Edward Pappas.

3 Mr. Pappas is with the law firm of Dickinson Wright  
4 and served as president of our State Bar 2008-2009.

5 MR. PAPPAS: Good morning. My comments this  
6 morning will be based on my experience as the past  
7 president and board member of not only the State Bar  
8 of Michigan, but the Oakland County Bar Association,  
9 which is, I believe, the largest voluntary bar in the  
10 state. My comments will also be based on my  
11 experience as co-chair of the Judicial Crossroads Task  
12 Force, with former Judge Barry Howard, who couldn't be  
13 here today, but wanted me to convey his support for a  
14 mandatory bar.

15 The State Bar has been a leading force for  
16 judicial reform, access to justice, pro bono service,  
17 professionalism and ethics, and most importantly the  
18 protection of the public. Without the gravitas and  
19 resources of a mandatory bar, many of the programs  
20 supporting the ideals I just mentioned would never  
21 have been accomplished or would eventually disappear,  
22 and to best explain what I mean I would like to talk  
23 briefly about two of the programs in which I was  
24 involved, personally involved.

25 The Judicial Crossroads Task Force brought

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1 together 125 leaders of diverse background and  
2 political alliances from the bench, bar, and wider  
3 justice community to develop a plan to transform,  
4 modernize and streamline our justice system for the  
5 purpose of providing justice and access to justice for  
6 all of the people in the state of Michigan. We worked  
7 with the judicial, legislative, and executive branches  
8 of government to receive input and buy-in or our  
9 recommendations.

10 Many of our recommendations, some of which  
11 you have already heard about this morning, have  
12 already been implemented, and many more are in the  
13 implementation stage, but there is no question in my  
14 mind that without the gravitas and resources of a  
15 mandatory state bar we could have never achieved the  
16 reforms and improvements that are recommended in the  
17 task force report, which, by the way, was prepared by  
18 the State Bar staff. Nor would we have been able to  
19 bring together so many leaders to work together on  
20 such an important project. In other words, the  
21 State Bar was both the glue and the engine that fueled  
22 this project.

23 The second program that I would like to  
24 mention briefly is the State Bar's professionalism in  
25 action program, which I championed as State Bar

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1 President. This program emphasizes the importance of  
2 civility and ethics in the practice of law, and it is  
3 now a part of the orientation sessions of every law  
4 school in the state of Michigan every single year.

5 Without the gravitas and resources of a mandatory  
6 state bar, this program would never have gotten off  
7 the ground.

8 Voluntary bars, which I have served on, serve  
9 a very important purpose in this state. Without a  
10 mandatory state bar the legal profession and the  
11 judicial branch of government would lose a major  
12 player in advocating for improvements to our justice  
13 system, access to justice for all, and protection of  
14 the public. In this regard I want to point out that  
15 in my nine years serving on the Board of Commissioners  
16 of the State Bar of Michigan that the State Bar took  
17 its obligation to engage in Keller permissible  
18 activities very seriously. The Bar already has a  
19 deliberative process for determining what is Keller  
20 permissible activity. If anyone believes that the  
21 State Bar has not lived up to its obligation in this  
22 area, and I am not one of those people, then you  
23 should not throw out the baby with the dirty bath  
24 water, rather you should establish clear guidelines on  
25 compliance with Keller.

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1 I learned long ago that people should not  
2 make important or drastic decisions based on a single  
3 incident. The State Bar as a mandatory bar has  
4 benefited our profession and the public for almost 80  
5 years, and I urge that you recommend the continuation  
6 of its status as a mandatory and unified bar. Thank  
7 you.

8 MR. RIORDAN: You talk about guidelines for  
9 permissible and impermissible speech by the Bar. Do  
10 you have any suggestions?

11 MR. PAPPAS: I personally believe that the  
12 guidelines established by Keller are very helpful as  
13 they are.

14 MR. RIORDAN: How do we implement them?

15 MR. PAPPAS: What do you mean how do we  
16 implement them? I think the State Bar does implement  
17 this. I think when we make a decision on whether to  
18 proceed with an issue, we first determine whether it  
19 is Keller permissible, and it starts with committee.  
20 I think the State Bar members are given notice.  
21 Everybody participates. It does get to the board  
22 level.

23 And I will say this, that there are times  
24 when it's not a clear, defined line, and I am not sure  
25 that you can actually get to a situation when you can

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1 clearly define what that line is, but I think it's  
2 clear enough in my experience with the State Bar when  
3 we have had these issues come up, we have always had  
4 very, very, how do I say it, animated discussion, both  
5 in committee and the board, on some of these issues,  
6 and we have been very conservative during the time  
7 that I have been there on what we proceed with and  
8 what we don't.

9 MR. RIORDAN: I guess my question goes more  
10 towards procedure. You think the things are fine the  
11 way they are?

12 MR. PAPPAS: I think they are. They can be  
13 tweaked, there is no question, but I listened to a lot  
14 of people this morning, and I think the State Bar  
15 already has in process many of the things you are  
16 talking about, but you could tweak it if you thought  
17 that it would be more informative for the Bar in  
18 general or the public or it would help the people that  
19 are making the decision to make those decisions in the  
20 right way.

21 MR. RIORDAN: How do you suggest?

22 MR. PAPPAS: I actually don't, because I am  
23 satisfied that we do or the State Bar does a very good  
24 job, at least they did when I was on the board in  
25 determining what is Keller permissible.

1 MR. MCSORLEY: I would like to take part of  
2 that question as well. It seems at least to my ears  
3 that every speaker we have been privileged to hear  
4 from this morning, just about every speaker, including  
5 Mr. Falk, and I mentioned him because of his initial  
6 activity in bringing the litigation seeking protection  
7 of First Amendment rights, but each person has the  
8 belief or has the satisfaction that the Bar should  
9 continue with a role in legislative efficacy. Maybe  
10 it should be more limited, maybe it should be better  
11 communicated, but no one really is speaking against  
12 it. It's the manner of how we do it and how we get  
13 the information to the Bar.

14 My question, knowing that you are satisfied,  
15 but as a past president of a voluntary bar, the  
16 Oakland Bar, past president of the State Bar, the  
17 mandatory bar, any thoughts at all on how we better  
18 and more efficiently and more quickly communicate,  
19 understanding that legislative advocacy by its very  
20 nature has a limited amount of time to be effective.  
21 How do we communicate better to the Bar?

22 MR. PAPPAS: I actually think with what we  
23 have now with the internet, websites, that  
24 communication is immediate, and I think that, I am  
25 pretty sure, because I take a look at the website

1 quite often, that the State Bar has information on  
2 almost anything it's doing well before the time that  
3 they do it unless it's an emergency.

4 I do agree with what Mr. Einhorn had  
5 indicated, there are some people that will complain  
6 that no matter how you try to get the information to  
7 them, they are just not interested. They are not  
8 interested. They have no willingness to do anything.  
9 Those people who are interested who may have  
10 dissenting views, I think they are pretty informed as  
11 to what's going on.

12 But I would increase the use of technology if  
13 we can to get the information out. I would have some  
14 guidelines on when you do get it out and how much  
15 time, if it's not already there, and I don't know if  
16 it is now, how much time before you actually make a  
17 decision so you have an actual process, and I would  
18 have exceptions, however, for those situations where  
19 you might have to have a voice before that time frame  
20 comes. But other than actually setting out the  
21 process again for people and letting them know ahead  
22 of time this is the process we are going to be  
23 following and we probably are following now in letting  
24 them know, that might be a helpful idea.

25 MR. MCSORLEY: We used to have newspapers

1 that landed on everyone's doorstep, but we don't have  
2 that any longer. But I suppose the internet is the  
3 way where tweaking might be done. I lost my other  
4 thought.

5 MR. PAPPAS: Thank you.

6 CHAIRPERSON BUTZBAUGH: Patrick Geary.  
7 Mr. Geary is with Smith Haughey in Grand Rapids.

8 MR. GEARY: Thank you and good morning. I  
9 actually have the privilege to serve as the vice  
10 president of the Grand Rapids Bar Association, and I  
11 am here to address the Task Force on its behalf. The  
12 Grand Rapids Bar Association is made up of members in  
13 and around Grand Rapids, Michigan. We have  
14 approximately 1500 members. We are not here to debate  
15 with any other speaker which local bar association may  
16 be larger than which other local bar association. Let  
17 me just say that we are the largest local bar,  
18 voluntary bar, outside of metropolitan Detroit.

19 The Task Force, we believe, is aware the  
20 Grand Rapids Bar Association submitted a letter in  
21 response to the issues that you are facing. Hopefully  
22 it's part of your record. That letter does express on  
23 behalf of the board of trustees of the bar association  
24 our belief that the mandatory bar should remain in  
25 place.

1 While I would certainly be pleased to address  
2 any of those issues with you, I think that the letter  
3 speaks for itself adequately, but one of the things it  
4 does not do is it does not specifically address the  
5 Keller issue, if I can use that term, which I know is  
6 of particular concern today to the Task Force. We  
7 don't want that to be misconstrued, the fact that it  
8 was not specifically addressed in that letter, so I am  
9 here just to very briefly bring you up to date on that  
10 particular issue and our viewpoint with respect to it.

11 The Task Force should know that prior to the  
12 publication of our letter we did communicate with our  
13 members carefully to ask them for their opinions about  
14 the broad issue that you are addressing for us, and we  
15 listened carefully to the responses received. Those  
16 responses led us to the letter we did write. The  
17 communication did give our members an opportunity  
18 should they have wished to do so also to communicate  
19 with us their thoughts on the specific Keller-related  
20 issues that are part of your obligation.

21 And I am here to report that, and this is  
22 despite perhaps the public perception that the  
23 political persuasion of the Bar members in West  
24 Michigan might have a rather narrow window. That's  
25 not really true. We are really very diverse. Even

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1 political conviction, we are across the spectrum, our  
2 members.

3 That having been said -- and these are  
4 members who are not reluctant, believe me, to express  
5 their opinions on things. That having been said, you  
6 should know that no member upon this invitation  
7 expressed an opinion that the State Bar of Michigan is  
8 not operating within its mandate, is not operating in  
9 a way that makes it uncomfortable or that makes them  
10 feel that their rights are not being observed.

11 It's a little bit like proving a negative, I  
12 understand, the fact that we didn't get a comment. We  
13 do think that's significant though, because we do make  
14 an effort to know our members' minds. We think that,  
15 frankly, this is a nonissue to the vast majority of  
16 our members. Whether you can extrapolate from that  
17 the opinions of any other lawyer in the state of  
18 Michigan we don't express an opinion on, but hopefully  
19 this additional information would clear up any  
20 potential concern about our letter and also convey our  
21 point of view.

22 That's all I have to say other than to convey  
23 the thanks of the Grand Rapids Bar Association for  
24 your service.

25 CHAIRPERSON BUTZBAUGH: Thank you very much.

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1 MR. MCSORLEY: I am never willing ever to let  
2 anyone go without a question. Every person who has  
3 appeared so far, and I believe on our agenda is a  
4 member of the Bar, but it seems the way this issue has  
5 come forward is from a nonmember of the Bar,  
6 specifically Senator Meekhof, who has proposed the  
7 legislation. And so my question is, it doesn't seem  
8 to be just a parochial issue to the Bar. It seems to  
9 be a little bit broader than that, a more public  
10 issue, and do you have, Mr. Geary, any feelings about  
11 the Bar's responsibility to be more public, more open  
12 to the public about how it conducts its business,  
13 particularly in the field of legislative advocacy?

14 MR. GEARY: Well, sir, if I may be allowed  
15 just to express a personal opinion --

16 MR. MCSORLEY: Please.

17 MR. GEARY: -- and not on behalf of the  
18 Grand Rapids Bar, I think that the Bar does everything  
19 it needs to do with respect to transparency. I,  
20 frankly, have not heard one of my friends,  
21 acquaintances, casual conversation participants ever  
22 express a concern about how we as lawyers reach our  
23 decisions on positions to take with respect to  
24 legislation. I think that the public certainly in its  
25 elected representatives could express a different

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1 opinion. One apparently has, but I don't sense that  
2 there is any vein of concern that's been tapped here  
3 at all.

4 MR. MCSORLEY: Thank you.

5 MR. GEARY: Thank you very much.

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1 MR. VAUTER: Thank you, members of the Task  
2 Force meeting regarding Administrative Order 2014-5.

3 My name is Brad Vauter, by way of  
4 introduction. I have been an attorney since 1983. I  
5 am of the age now that when I look at the Bar Journal  
6 I look at In Memorium before I look at the discipline  
7 section, but I have also split my career between  
8 private and public, sort of do-good service, at about  
9 nine or ten years in the Detroit area, Southfield and  
10 Detroit, in a private small firm, then I did about 20  
11 years in various legal aid, State Bar, other  
12 activities, Elder Law of Michigan. Now I am back in  
13 private practice, because I read those Kiplinger  
14 magazine articles that said if you don't want to live  
15 under a bridge you have to have 28 bucks in your  
16 checking account before you retire.

17 So having said that and being relatively  
18 active in a low-grade way at the State Bar, since I am  
19 the immediate past chair of the Elder Law and  
20 Disability Rights Section of the State Bar, which is,  
21 as you know, a voluntary thing, people get their  
22 checkbooks out, join that. I am here to suggest that  
23 addressing the question put out by the Task Force that  
24 we would be better served to be a voluntary bar. I  
25 don't really object to a mandatory bar, per se, in

1 many of the activities and stuff they do, but I,  
2 frankly, think that Falk and Keller and other things  
3 sort of hamstringing us, and I have been dismayed many  
4 times by decisions that the State Bar has made. I am  
5 probably one of the few people in the room besides  
6 Mr. Falk who has made a Keller challenge to the  
7 State Bar, and that was on taxation and different  
8 things, and I know that sprang from an executive  
9 meeting, and I have got the minutes, where there was  
10 no discussion about the Keller need, et cetera, in  
11 2005, and that was the spring board for the 2007  
12 decision.

13 Here we had a ship at stake sinking, and we  
14 had a State Bar that said, Don't tax me, and I found  
15 that offensive, and I didn't think it was really  
16 related to access to justice. If we thought that a  
17 taxation issue was access to justice, then we should  
18 fight every Social Security increase, we should fight  
19 every increase in other taxes. I buy a lot of paper  
20 for my office, you know. We should fight the  
21 Affordable Care Act, because all of those might raise  
22 costs and thus access to justice.

23 So I think the direction given by Keller and  
24 Falk, as Justice Rehnquist said, it may be easy to  
25 find in the extremes where a mandatory bar could speak

1 readily. It's more difficult in the middle area, and  
2 the middle area is a huge area that causes discontent.  
3 I do believe we need, obviously, or maybe it shouldn't  
4 be -- I would say it's obvious that we need  
5 discipline, we need registration, we need et cetera.

6 But that is done in many other states,  
7 including states I have lived in. I spent a few years  
8 in Illinois where I was executive director of the AIDS  
9 Legal Counsel of Chicago. I spent a couple of years  
10 in New York where I worked with the Community Health  
11 Center, and those are both states in which the bars  
12 are voluntary. I belonged to bars in those areas,  
13 sometimes even just the city bar. In Chicago I  
14 belonged to the Chicago Bar Association. You can have  
15 a nice room in there and get a meal and charge it to  
16 your dues.

17 But they have, in New York, it is actually  
18 cheaper to be an attorney to be registered. You pay  
19 375 every two years. Sixty of that is diverted to the  
20 fund for client protection, 50 is diverted to indigent  
21 defense, 25 to legal services, and much has been said  
22 about the mandatory bar having a premier access to  
23 justice thing.

24 I actually think sadly for all the ballyhoo  
25 about access to justice that we do, and maybe rightly

1 so in this state. I think it's shameful. You can  
2 take the 2012 contributions to the Access to Justice  
3 Fund, divide by the number of attorneys in Michigan,  
4 and you know what the whopping contribution is? It's  
5 around 17 bucks. You know that's a pathetic average  
6 contribution.

7 Now, obviously people are contributing in  
8 other ways. They are doing a case. They are taking  
9 on a pro bono matter, et cetera. I am visiting, when  
10 I get out of here, I am going to visit a 92-year-old  
11 lady who I am helping with for free whose niece ripped  
12 off every penny she has. So that's not reflected, but  
13 if that's our access to justice and it's roughly 17  
14 bucks per attorney around the state, that's actually a  
15 pathetic state of affairs. New York does better by  
16 building it into the fees.

17 In Michigan annual fees are 305. We pay the  
18 discipline of 110, about 180 is for general membership  
19 you might say, and 15 is for client protection.

20 In Illinois they charge 342 a year. This is  
21 again done through the State, and they have 95 for  
22 IOLTA, seven for lawyer assessment programs, 15 for  
23 professionalism, 25 for client protection, so the  
24 thought it would be more expensive I don't think is  
25 true.

1 I think we were caught flat-footed in the  
2 Court of Claims issue because of the procedures we  
3 have in place, and our section, the section that I am  
4 immediate past chair of, we were one of the few  
5 sections that was able to jump on it, jump on it  
6 quickly, have a vote and go and testify. As we know,  
7 it didn't do much good, and the State Bar as a whole  
8 didn't have a chance to really get going.

9 I see my time is up. I just wanted to say I  
10 think we can be more robust as a voluntary bar. If I  
11 look at the Dental Association of the state of  
12 Michigan, dentists have to be licensed. They do that  
13 through the state. They have an 85 percent  
14 penetration rate, and when they go down and testify on  
15 bills, people don't say, well, gee, you are not  
16 mandatory, we are not going listen to you. I think  
17 they are actually listened to more.

18 MR. ROMBACH: I am struck that you called the  
19 \$17 per attorney a contribution to access to justice,  
20 but then if there weren't a state bar with an access  
21 to justice fund, is there some voluntary bar out there  
22 that's doing better than \$17 per 42,000 lawyers that  
23 amasses this amount of money?

24 MR. VAUTER: I would be giving to NAELA. I  
25 donate -- NAELA is the National Academy of Elder Law

1 Attorneys, that's my main field of practice, and I  
2 donate there. I think we do better. I think the ABA  
3 probably does it good.

4 If you are thinking that the mandatory bar is  
5 helping raise money, it's not obligatory that they do  
6 it anyhow. So I think voluntary contributions -- I  
7 don't think it could get any worse.

8 MR. ROMBACH: How about the pro bono,  
9 because, again, you seem to be in stark contrast to  
10 Mr. Gillett's testimony about assembling pro bono  
11 services. Is there a voluntary bar that is doing what  
12 you would consider a laudable job? I mean, you  
13 mentioned the ABA, but I know that they're still a  
14 (inaudible) in a whole lot of circles. Do they have  
15 the same market penetration?

16 MR. VAUTER: Sure, sure. In Chicago that I  
17 referenced, I was the executive director of the AIDS  
18 Legal Aid in Chicago where we had a few attorneys on  
19 staff and a paralegal with operations in Cook County  
20 Hospital, and we were right down on State Street. We  
21 used the Chicago Bar Association voluntary pro bono  
22 thing. Now, of course Chicago is rich in big firms  
23 and medium-sized firms and, sad as it may seem, AIDS  
24 was an urgent issue in '94 and '96 when I was there,  
25 '92 to '94 rather, when I was executive director.

1 that the position of the Bar was unwise?

2 MR. VAUTER: I thought it was. I thought an  
3 issue like that really didn't go to the heart of what  
4 the Bar should comment on. I really didn't think it  
5 was an access to justice issue. I certainly don't  
6 think it was an improvement of the legal field issue,  
7 and so I challenged it as basically being more  
8 political activity in nature and knowing that  
9 Richard McClelland was on the executive committee who  
10 set forth at the executive meeting conference call on  
11 March or May 9th, 2005 and here is the entire -- when  
12 we say, by the way, we can find these things out and  
13 attorneys can find these things out, I agree an  
14 aggressive attorney can.

15 Here is the complete discussion in the  
16 minutes, the official record of the State Bar of how  
17 the thing got started. Tax on legal services. The  
18 committee discussed the Keller implications of tax  
19 authorization. Motion was made and second to adopt  
20 the following position statement. The State Bar of  
21 Michigan opposes the adoption of the legislation that  
22 burdens the public's access to justice, including the  
23 adoption of a tax on legal services, following  
24 discussion. The motion carried. That was done by the  
25 executive committee, not by the Representative

1 People were dying very quickly. There weren't the  
2 medicines.

3 We could get volunteer attorneys regularly  
4 and constantly, including appeals to the Supreme Court  
5 for different things, for our clients, plus we had  
6 what I call voluntary help of a very low level. Knock  
7 out a will for somebody, knock out a power of  
8 attorney, that sort of thing. We had no difficulty  
9 whatsoever, so the Chicago Bar Association was very  
10 active. I am assuming the record is as good or better  
11 than the State Bar, and partly because the State Bar  
12 was so dispersed, all the way from the U.P., where I  
13 once lived, down to Detroit, down to Benton Harbor and  
14 everywhere in between.

15 MR. ROMBACH: You mentioned also you were one  
16 of the attorneys to issue a Keller challenge. Within  
17 the Bar mechanism, right?

18 MR. VAUTER: Right, I used the -- I sort of  
19 bellyached, and I made a little case, and I didn't get  
20 very far, and I didn't bother to appeal it, but I did  
21 come forward in 2007 mainly regarding the Bar taking a  
22 position that they thought any services tax would be  
23 an insult or would be detrimental to any sort of  
24 access to justice, and I disagreed with that.

25 MR. ROMBACH: What was your challenge though,

1 Assembly, not by the Board of Commissioners, and there  
2 was no legislation in place in 2005, none whatsoever.  
3 There was no exigent circumstances that were required.  
4 And so then in 2007 the Representative Assembly saw,  
5 oh, well, our executive committee, we have already  
6 discussed this.

7 So I found it a political vote really more  
8 than an access to justice vote, and I am somebody who  
9 spent more than half my career working for people who  
10 really have little or no chance in the system. And  
11 just as I personally wouldn't have voted for the  
12 business court, because to me I understand some of the  
13 purpose behind it, but to me, to the general public,  
14 the people I talk to, oh, well, if you can buy your  
15 way, you can it buy your own courthouse.

16 MR. ROMBACH: You then conducted a hearing in  
17 front of the Board of Commissioners?

18 MR. VAUTER: Right, right, I did the whole  
19 thing. You were there, yeah.

20 MR. ROMBACH: And that was, in dealing with  
21 your concerns, did you feel that that was a respectful  
22 hearing with regards to your concerns?

23 MR. VAUTER: Not particularly. It wasn't  
24 disrespectful, but when I went there I very much felt  
25 it was a fait accompli, and why I say that is you can

1 look at the minutes of that meeting or almost any  
2 Board of Commissioners meeting or almost any  
3 Representative Assembly meeting and see unanimous or  
4 semi-unanimous vote after vote after vote. Now, maybe  
5 the heavy lifting is done in the back rooms or  
6 committee meetings or whatever, but to me, if it is a  
7 real democracy and it's a unanimous vote time after  
8 time after time and all you have to do is look at your  
9 own minutes and see how often it happens, it's  
10 certainly not like a vote at the legislature.

11 MR. ROMBACH: Could that be because of the  
12 vetting with regards to other committees and other  
13 groups? In other words --

14 MR. VAUTER: Oh, it may be, because if they  
15 are saying it, as I said, maybe work that's done in  
16 the back rooms or study groups or something like that  
17 helps them form a quicker vote at the meeting, but  
18 that is the meeting. Those are the decision makers,  
19 not a back room committee.

20 MR. ROMBACH: But do you consider your elder  
21 law section a back room meeting? I mean, were you  
22 notified of the issues before the Board of  
23 Commissioners and do you have input into that as a  
24 chair and as a section? Aren't you notified?

25 MR. VAUTER: I have to clarify. I only did

1 the State as a section.

2 MR. ROMBACH: But the State Bar had no  
3 involvement in that?

4 MR. VAUTER: We actually have to run it by  
5 legal counsel. We have to run it by Cliff Flood or  
6 whoever. We have to run it by Lyon or Lyons,  
7 Elizabeth or others, and so I actually think, again,  
8 going to why I think it could be a more robust system,  
9 we wouldn't be hamstrung like that, you wouldn't be  
10 hamstrung like that, none of us would, if we were a  
11 voluntary bar. And I actually think our penetration  
12 rate would be pretty high, because I think it is in  
13 the medical society, which is voluntary; it is with  
14 the dental thing, and yet they are licensed by the  
15 State, they are disciplined by the State. It's part  
16 of our taxpayer dollars. Their licensing fees are  
17 similar to ours, maybe less, more in some cases, and  
18 so we wouldn't even have to deal with Keller or Falk.  
19 We could do more quickly what we wanted to do.

20 I, frankly, as I said, I think we were caught  
21 as a state bar with our requirements for three weeks  
22 when the legislature and the legislature that's  
23 controlled by one party can have a vote and be done  
24 with an issue and literally in three weeks. They can  
25 do it this quickly if they go like rocket science.

1 the Keller challenge to the tax thing on my own. So I  
2 am --

3 MR. ROMBACH: Is your Elder Law Committee  
4 voluntary -- or not a committee, I am sorry,  
5 section -- does that help inform the consensus that's  
6 built by the Bar? In other words, you have meetings,  
7 you have a voice, you take your concerns either to the  
8 Assembly or to the Board of Commissioners; you are  
9 free to do that at any moment?

10 MR. VAUTER: I don't know how many we bring  
11 directly to the Board of Commissioners. Within the  
12 Keller parameters, sections have some latitude to make  
13 decisions on their own if you haven't actually voted  
14 against it, if you haven't said no. I should say not  
15 you but the Board of Commissioners. So we have some  
16 latitude. We have used that.

17 Now, I am not really speaking for the  
18 section, because I am immediate past chair, which is  
19 nice to say, immediate past, but we are also one of  
20 the few sections that have actually sued the State of  
21 Michigan. We have used our own treasure to pay money  
22 to sue the State if they think, for instance, they are  
23 not enforcing federally required regulations for  
24 Medicaid. So some little old lady isn't going to get  
25 Medicaid by some State decision. We've actually sued

1 And if we have a two-week requirement to even like  
2 kick around the idea before we can comment on it, we  
3 are going to lose, and that's probably not going to be  
4 the only time something like that that's important to  
5 us will happen.

6 CHAIRPERSON BUTZBAUGH: Thank you,  
7 Mr. Vauter.

8 Mr. Ulrich. Mr. Ulrich is with the law firm  
9 of Ulrich Law, PLC.

10 MR. ULRICH: Good morning. I wanted to pick  
11 up on a comment that was made --

12 CHAIRPERSON BUTZBAUGH: I am sorry. I should  
13 mention also Mr. Ulrich was the chair of the  
14 Representative Assembly 1991.

15 MR. ULRICH: Chair of the Young Lawyers,  
16 chair of Master Lawyers, and a few other things, which  
17 has given me maybe an historical perspective that I  
18 didn't seek out, but I still pay attention to over  
19 these 35 or so years.

20 I wanted to mention that as a follow-up to a  
21 couple of the comments from a couple of earlier  
22 speakers. The idea that the Bar is open to the public  
23 is something that is more easily answered today with  
24 technology, obviously, and that seems to be the answer  
25 to the question how can we improve and accelerate

1 maybe some of the decision making and still get  
 2 feedback from members.

3 I have always looked at variation of the  
 4 phrase who is watching the watchers. There are  
 5 various derivations of that, and I have taken it to  
 6 mean who is watching our government? Is the press the  
 7 watcher of everything, or are we as citizens the ones  
 8 who ultimately have the responsibility to watch what's  
 9 going on?

10 The Bar has had a history of ups and downs in  
 11 terms of its outreach to the public. We have no  
 12 longer a public affairs or PR person. That was  
 13 Phil Spellman. The technology has replaced  
 14 journalists who would come to the Board meetings, for  
 15 instance, or the RA. We depend on all this type of  
 16 distilled communication, and I think, as John  
 17 mentioned, we don't get newspapers every day the way  
 18 we used to. I have basically no clue what goes on in  
 19 my own community except by virtue of the very local  
 20 paper that somehow picks up on things otherwise in the  
 21 metro area. Everything else has to come over the  
 22 internet or CNN. And how much of the public is even  
 23 able to access that type of information in their daily  
 24 life?

25 What I want to address, I guess, are some of

1 the opportunities that come up with this task force  
 2 and the approach that Representative Meekhof  
 3 originated. This is not the first time the Bar has  
 4 had some type of an introspective look at voluntary  
 5 status. We have had it in the past. We had it in the  
 6 past in terms of policy making, and we also had it in  
 7 the past in terms of member service, Michigan Lawyers  
 8 Mutual. That was then carved out as a separate  
 9 entity, but it did engender some discussion about  
 10 having a voluntary bar. Would we have more latitude  
 11 in terms of service to the membership? Those  
 12 discussions went by the wayside. We didn't proceed  
 13 with that. We stayed the course with mandatory bar.

14 But policy intruded. It intruded with  
 15 Keller. It intruded with Falk 1 and 2, and Falk, to  
 16 my eyes, is more of an intention on the operation of  
 17 the Bar and the governance of the Bar. Keller is kind  
 18 of an overarching issue, but what I have come to find  
 19 in discussions with the ABA Bar Services Office and  
 20 some of the our predecessors in the Bar going back in  
 21 to 1972 eras, '72, '75, is that we use the term  
 22 policy. We use the term policy in terms of the final  
 23 policy-making body of the Representative Assembly,  
 24 policy in terms of the board's action during those  
 25 periods when the Assembly isn't meeting.

1 Other states, as I came to learn, use the  
 2 term public policy. Now, I don't know what type of  
 3 research capability you have. This whole process  
 4 could take you literally years, not months, not by  
 5 June or in the near term, but other states do use the  
 6 term public policy as their operative phrase for final  
 7 decision-making by their governing bodies.

8 That got me into a little bit of a look at  
 9 what other states are doing, both voluntary and  
 10 mandatory. And bar services, I hope you already have  
 11 the bar services statistical compilation. This was  
 12 somewhat interesting to me because I was concerned  
 13 about, and I will admit it was because of chitchat at  
 14 the Board meeting, I was concerned about the  
 15 Representative Assembly, not because I am completely  
 16 vested in it, not because I have an involvement in it  
 17 and really think like a lot of lawyers you either find  
 18 a niche, you find an interest or somebody asks you,  
 19 and John was one of the people that asked me to get  
 20 involved in the Young Lawyers.

21 The RA concept or a plebiscite vote or an  
 22 Assembly vote or a vote by the entire membership of a  
 23 state bar was something that I didn't see in the ABA's  
 24 compilation. I started to do a little digging. I am  
 25 not going to say I am anywhere near finished, because

1 I just started this last week, but what I found was  
 2 even in those bars and in the cluster of those large  
 3 bars, unified bars 20,000 to 50,000 members, of which  
 4 Michigan is one of them the existence of an Assembly,  
 5 hundred people, 150, 80 people, is one of them.  
 6 However, there is always a default to the entire  
 7 membership can call a meeting with a very small  
 8 percentage of them calling for a meeting. It can be  
 9 an Assembly meeting. It can be at the annual meeting.  
 10 Georgia I found, which has, I believe, a 20-member  
 11 Board of Governors, has also the ability at its annual  
 12 meeting for the members to take up any issue, any  
 13 public issue, any public policy issue.

14 In Wisconsin, which I have some experience  
 15 with over the years, I admit primarily through the ABA  
 16 and the young lawyers. I was astounded. Their board  
 17 of governor's consists of 51 people. I think you are  
 18 inching up to a point of critical mass of inertia, but  
 19 interestingly the Board there is comprised of -- I am  
 20 sorry, I used my time. The Board is comprised of  
 21 public members. It's comprised of members appointed  
 22 by the Supreme Court, senior members and officers of  
 23 the Bar. Can I finish with a couple of things?

24 We are looking at a self-examination that I  
 25 think is prompted by a political process, not by a

1 requirement of our members or our court. I think our  
2 court has reasonably reacted to the situation, but  
3 this has to be a measured approach, and I hope what I  
4 am indicating in just what I tried to look at that the  
5 information if you are going to look for comparison is  
6 not going to be in black and white necessarily. You  
7 are going to have to do some calling, you are going to  
8 have to do some examination, and I hope that  
9 information is available.

10 As far as protection of the public, that came  
11 up at the very onset this morning. It is not in  
12 Rule 1. It is not in Roberts P. Hudson's quote being  
13 placed into our mission statement nor the  
14 Representative Assembly's mission statement. I  
15 believe it needs to be there, and I think that is  
16 critical phrasing that is needed to support the Bar's  
17 efforts in any type of policy making, the protection  
18 of the public.

19 The other thing is, take a look at Roberts P.  
20 Hudson's letter in which that quote is pulled out.  
21 That was a situation when the Bar was in disrepute,  
22 and the existence of a mandatory bar gave the  
23 attorneys in Michigan the structure, the credibility,  
24 and the support. And I know that the support is  
25 what's needed. I teach a graduate law course and I

1 five counties that I serve need and qualify for our  
2 services.

3 I think it disingenuous to take the position  
4 that without a mandatory state bar magically more  
5 attorneys are going to volunteer their time and  
6 resources to provide free civil legal services to this  
7 same population. I also think it's disingenuous to  
8 think that without the mandatory state bar and our  
9 urging of pro bono and contributions financially to  
10 access to justice programs that more attorneys will  
11 magically come forward and donate so much more money  
12 to our office, to Legal Services of Eastern Michigan  
13 and the various other legal aid organizations  
14 throughout the state of Michigan.

15 Why would they do that? I think that it is  
16 also disingenuous to read the Keller opinion to say  
17 that the State Bar of Michigan cannot take a political  
18 position, let alone a controversial political position  
19 that all of its members may not be in agreement with,  
20 because the Keller obligations that our State Bar  
21 takes so seriously regulating our legal profession  
22 throughout the state of Michigan and improving the  
23 quality of legal services provided to all Michigan  
24 residents, not just the chosen few who can afford  
25 them, are necessarily political in nature.

1 ask the students about what do you know about the  
2 State Bar. Some of them have been practicing for 20  
3 years, and the question usually is answered by I look  
4 to the services, I look to the support, I look for  
5 opportunities that will make me a better lawyer,  
6 better to serve my clients. That's what I want to  
7 hear, but it's their own words. They are not being  
8 prompted. Thank you.

9 CHAIRPERSON BUTZBAUGH: Tracie D. Boyd.  
10 Ms. Boyd is an attorney for Lakeshore Legal Aid,  
11 practices in Port Huron.

12 MS. BOYD: Good morning, and thank you  
13 members of the Task Force for allowing me to speak  
14 this morning.

15 I am a legal aid attorney. I am one of three  
16 legal aid attorneys to serve five counties. Five  
17 counties of people living at or below poverty level,  
18 the majority of which are seniors.

19 We have a sister organization, Legal Services  
20 of Eastern Michigan, who has one attorney to serve  
21 those same five counties. Obviously we are not in  
22 competition. There is no way that four attorneys can  
23 serve five counties worth of people that live at or  
24 below poverty level with all of their civil legal  
25 needs, yet the majority of the population of those

1 Now, my position may be unpopular and my  
2 position may be considered radical, but the majority  
3 of citizens and residents within the state of Michigan  
4 cannot afford a lawyer. Our working middle class,  
5 when they come to the unusual position where they need  
6 to access justice, to go to the legal system struggle  
7 to be able to hire a lawyer that is qualified and has  
8 the knowledge base that they do not possess to help  
9 them navigate that system. I think that it is  
10 unrealistic to think that the disbanding of a  
11 mandatory state bar association would better serve the  
12 legal needs of the population of the state of  
13 Michigan.

14 The mandatory State Bar of Michigan has taken  
15 positions that I personally don't agree with. I think  
16 its safe to say that my political views personally do  
17 not match up with the majority of the attorneys that  
18 practice in the five counties that I serve. I serve a  
19 largely rural area. I think it's safe to say that the  
20 overwhelming majority of the attorneys in the area  
21 that I serve, my brethren do not agree with my  
22 personal political views, but every attorney that I  
23 have spoken with on this issue since we were first  
24 sent that e-mail by the Task Force asking all of us to  
25 express our opinion on the importance of a centralized

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1 mandatory state bar have unanimously told me  
2 individually during our conversations that they are in  
3 support of the continuation of a mandatory state bar.  
4 The members of the judiciary and court system  
5 that I have spoken with are also unanimously in  
6 support of the continuation of the mandatory  
7 State Bar, because not only does this organization  
8 serve the public, which is important, because what is  
9 the legal profession but a public service profession,  
10 but it provides an invaluable service to our court  
11 system.  
12 The number of pro se litigants is staggering.  
13 It creates a great bottleneck for the court system.  
14 We have a court system that is underfunded and  
15 understaffed in almost every single county that we  
16 have in the state of Michigan. All 83 counties are so  
17 diverse in the resource levels but also in the  
18 economic levels of the litigants that are served by  
19 those resources that without a centralized system to  
20 help regulate our legal profession, to help educate  
21 our legal profession, and also to help educate and  
22 provide services to the public that we serve, the  
23 system would collapse. Thank you very much for  
24 allowing me to comment today.  
25 CHAIRPERSON BUTZBAUGH: Thank you very much

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1 for coming here.  
2 MR. MCSORLEY: Ms. Boyd?  
3 MS. BOYD: Yes.  
4 MR. MCSORLEY: Thank you for appearing, and I  
5 am assuming you also responded to the written inquiry  
6 that we made to all members of the Bar as well?  
7 MS. BOYD: I did.  
8 MR. MCSORLEY: And you have been about the  
9 business of speaking with the judiciary as well as  
10 members of the Bar in the five counties that you are  
11 servicing for legal aid services. My question, this  
12 bill that prompted the existence of the Task Force was  
13 sponsored by Senator Arlan Meekhof. Have you written  
14 to Senator Meekhof about your views?  
15 MS. BOYD: I have not.  
16 MR. MCSORLEY: Do you intend to?  
17 MS. BOYD: At your suggestion, I do intend  
18 to, and it's my oversight for not so doing.  
19 MR. MCSORLEY: Thank you.  
20 MS. BOYD: Thank you very much.  
21 CHAIRPERSON BUTZBAUGH: Robert Gardella.  
22 Mr. Gardella is practicing law in Brighton.  
23 MR. GARDELLA: Good morning members of the  
24 Task Force. Thank you for your patience going through  
25 all the thoughtful remarks this morning.

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1 First of all, I wanted to point out I am the  
2 former chairperson of the Representative Assembly. I  
3 have also sat on the Board of Commissioners during my  
4 time as an officer of the Representative Assembly.  
5 And I will start from the beginning and say  
6 that I am a proud member of the mandatory Bar. I want  
7 it to stay that way. I am a good lawyer because we  
8 have a mandatory bar in Michigan and because we also  
9 have the Institute of Continuing Legal Education in  
10 Ann Arbor, two absolutely extremely valuable  
11 institutions that we have, and I think that sometimes  
12 we don't get the message out as to what we do and how  
13 we do it well enough. But I am strongly in favor of  
14 keeping the State Bar of Michigan as a mandatory bar  
15 association.  
16 The State Bar of Michigan, including all of  
17 its current operations, is a stabilizing force in our  
18 justice system. It's an information sharing tool for  
19 all attorneys. It's also a powerful education source  
20 for lawyers and the general public and is overall a  
21 jewel for our system of government.  
22 I am very much opposed to the Senate bill  
23 that's pending. My own personal opinion is I think  
24 the Senate bill is sending a message to the Bar. I  
25 don't think it has a chance for passage in my own

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1 personal opinion, but I take it seriously, because  
2 someone else took it seriously enough as a legislator  
3 to present it and sponsor it and possibly advocate for  
4 its approval. I think that it's a valuable lesson for  
5 us as lawyers to reevaluate where we are at and how we  
6 do business.  
7 The State Bar of Michigan does have very,  
8 very thoughtful organizations in terms of the Board of  
9 Commissioners and the Representative Assembly. The  
10 Representative Assembly is the final policy-making  
11 body for the State Bar. For example, if the Board of  
12 Commissioners takes a position on something and a  
13 large number of members of the State Bar don't like  
14 that particular position, the Representative Assembly  
15 can consider a proposal to undo what the Board of  
16 Commissioners has done.  
17 What are the duties of the Representative  
18 Assembly and the Board of Commissioners? Those are  
19 established by bylaws and other orders. First of all,  
20 the Board of Commissioners implements policy adopted  
21 by the Assembly and establishes policy for the  
22 State Bar between Assembly meetings. The Board of  
23 Commissioners also establishes and prescribes  
24 functions and organization of the committees of the  
25 sections and also manages the State Bar staff, adopts

1 a budget, publishes the Michigan Bar Journal, conducts  
2 litigation, and there are other duties that they have.

3 The Representative Assembly, on the other  
4 hand, is a body that considers all of the issues that  
5 are Keller permissible, and we take the Keller  
6 permissible position very seriously. When I was an  
7 officer of the Representative Assembly I took that  
8 very seriously, worked in conjunction with the  
9 State Bar staff, the executive director, and also the  
10 legal counsel to make sure that things were in place  
11 and that we didn't step over the line.

12 But I believe that there is a fix-it to  
13 address any concerns that our Bar members have and  
14 members of the general public. The mechanical,  
15 quote-unquote, fix-it that I would suggest to address  
16 any Keller concerns that many members of the Bar or  
17 the legislature might have, I would give credit to  
18 Ed Haroutunian, who is going to be one of the speakers  
19 here today. He and I have talked at length on this,  
20 and I am strongly in support of his idea. I don't  
21 want to take credit for his idea, but I strongly  
22 support it.

23 It's a proposal which would add a measure to  
24 the bylaws where we would have a rule where before we  
25 consider anything in a Board of Commissioner meeting

1 so many other areas, but I think when we have the  
2 proposals come forward we have to have the State Bar  
3 staff, particularly the legal counsel, give an opinion  
4 on Keller permissibility, and then also have the  
5 various bodies give a vote, a threshold vote on that  
6 first.

7 So overall I think the Bar is doing an  
8 excellent job, and I would definitely support  
9 wholeheartedly the continuation of a mandatory bar. I  
10 think a voluntary bar would be an awful mistake. It  
11 would be a disaster for the general public. Our job  
12 is to protect the general public. The State Bar does  
13 that in so many different ways, and so I would end my  
14 remarks on that note.

15 CHAIRPERSON BUTZBAUGH: Thank you,  
16 Mr. Gardella.

17 MR. RIORDAN: Mr. Gardella, what is the  
18 absolute about the proceedings between the RA and the  
19 Board of Commissioners, the procedures and  
20 responsibilities?

21 MR. GARDELLA: They do have, in terms of  
22 public policy making, or the policy positions I should  
23 say for the State Bar, the Representative Assembly has  
24 the ultimate final say on all of the decision-making  
25 regarding the policy decisions, but the Board of

1 or a Representative Assembly meeting we would take a  
2 Keller vote. The Keller vote would mandate that  
3 before we could consider the advancement of a proposal  
4 or a debate on the proposal that there has to be a 75  
5 percent approval that it is Keller permissible. That  
6 would be a threshold vote.

7 Then after the vote has been approved and we  
8 have surpassed that 75 percent concept, then we would  
9 have debate and voting on the actual meat and potatoes  
10 of the issue that's before either the Representative  
11 Assembly or the Board of Commissioners.

12 I think our intentions are good. Sometimes  
13 it's a feel-good issue that might come before the  
14 various bodies, but I think that that threshold vote  
15 is important and that way we are dealing with all the  
16 requirements of the Keller case and also  
17 Administrative Order 2004-1. So I think that that is  
18 an excellent step in the right direction to, I guess,  
19 address the concerns that members of the general  
20 public might have had or most importantly members of  
21 our profession.

22 Also, I think that the State Bar staff has to  
23 give more effort into doing an analysis of some of  
24 these issues. Sometimes they don't have a lot of  
25 time, and, you know, they do such an excellent job in

1 Commissioners meets more frequently than the  
2 Representative Assembly, but there have been some  
3 years where the Representative Assembly has met, I  
4 believe, four times early on.

5 I was on the Representative Assembly for  
6 approximately nine years, and so I know they can  
7 sometimes only meet two times a year, sometimes they  
8 can meet four or five times a year, but the Board of  
9 Commissioners deals with their policy committee on the  
10 legislative activity that comes quickly, and I think,  
11 as Mr. McSorley said before, sometimes you don't have  
12 very much time.

13 I used to be a legislative aide in the State  
14 Senate for two different senators years ago, and  
15 things move fast. Sometimes things are gone within  
16 five days, and you have to act quickly.

17 The Board of Commissioners can sometimes take  
18 a quick look at that and come up with a position.  
19 Sometimes they won't be able to meet the deadline.  
20 But I agree with one of the other commentaries that  
21 the Representative Assembly can possibly take a look  
22 in the future for using technology, the internet, to  
23 possibly engage in some votes and use that as, or at  
24 least a debating tool before a vote is taken so we can  
25 expedite things, and I think we can probably use

1 technology a little bit more in that regard or at  
2 least for dispersing information. The Bar has made a  
3 lot of great efforts in that regard, but we can always  
4 do a better job and brainstorm as to how we can be  
5 more creative there.

6 MR. RIORDAN: I have heard, and I am sure you  
7 have heard all these things, people commenting,  
8 questioning maybe the Bar has one too many  
9 policy-making bodies. How would you respond to that?

10 MR. GARDELLA: I strongly disagree. The  
11 Representative Assembly has 150 members, and it's --in  
12 fact, I often tell people that there is no better  
13 group to analyze an issue that confronts the legal  
14 profession than the Representative Assembly. The  
15 diversity is so excellent there. You have government  
16 attorneys, private attorneys, large law firm  
17 attorneys, mid-size lawyers, people who are lawyers  
18 but may not practice, and you have public interest  
19 attorneys, law school professors. Every time I go to  
20 a Representative Assembly meeting, I walk out of there  
21 saying, wow, I never even thought of that issue.

22 The Representative Assembly in my opinion is  
23 the better deliberative body to analyze an issue and  
24 hear all of the points of view and then also take the  
25 pulse of the profession.

1 that the Representative Assembly has concluded, but  
2 the Representative Assembly is the deliberative  
3 policy-making body in debating society, if you want to  
4 call it that, and it should remain the same.

5 Also, the Representative Assembly, it's so  
6 large with 150 members. We put links in every corner  
7 of the state of Michigan and bring people in to our  
8 Bar. The Board of Commissioners doesn't do that. The  
9 Board of Commissioner may have a limited number of  
10 members in a particular region of the state, but the  
11 Representative Assembly has people in every circuit  
12 and all the way up in Ironwood, Michigan and in  
13 Sault Ste. Marie and all the other border areas of the  
14 state, and they have an active, important role in the  
15 Assembly and nothing can replace that. The Board of  
16 Commissioners cannot replace that.

17 And the Representative Assembly is so  
18 important also as a feeder for getting people involved  
19 in sections, the sections of the Bar, and also  
20 volunteering for the Bar. The Representative Assembly  
21 is probably the best concept that we have ever had in  
22 the State Bar to bring the voice of the regular  
23 practitioners out there into the Bar, and to change  
24 that or take the voice away or take the power away of  
25 the Representative Assembly as the final policy-making

1 The Board of Commissioners cannot take the  
2 pulse of the profession on policy issues anywhere near  
3 the magnitude that the Representative Assembly can  
4 because of the diversity.

5 The Board of Commissioners is a smaller  
6 group. A lot of times you find members on the Board  
7 of Commissioners from larger law firms who can afford  
8 to go to all of those meetings. The Representative  
9 Assembly, okay, those are a lot of solo practitioners  
10 and people from more medium-sized firms and other  
11 areas, because there is less of a time commitment for  
12 the Representative Assembly, somewhere between two and  
13 four meetings a year, and so it's a better reading of  
14 the pulse, and it should, the Representative Assembly  
15 should not be changed at all in my opinion. It's  
16 exactly the way it should be except for that 75  
17 percent threshold on the Keller issue. I think both  
18 the Board of Commissioners before they vote on a  
19 public policy issue and the Representative Assembly  
20 should do the threshold vote, credit to  
21 Mr. Haroutunian's idea, and I think that the structure  
22 should remain the same.

23 The Board of Commissioners has more of a  
24 function for implementing things in terms of  
25 administrative issues and implementing the concepts

1 body would be a humongous mistake.

2 CHAIRMAN BUTZBAUGH: Thank you, Mr. Gardella.

3 MR. GARDELLA: Thank you.

4 CHAIRPERSON BUTZBAUGH: George Googasian.  
5 Mr. Googasian is with Googasian Law Firm in  
6 Bloomfield Hills. He was president of the State Bar  
7 from '92 to '93.

8 MR. GOOGASIAN: My notes say good morning,  
9 Mr. Chairman. I find my notes are outdated.

10 Good afternoon, Chairman Butzbaugh, members  
11 of the Task Force. I thank you for this opportunity,  
12 because you have generated through this task force  
13 thought and focus in the Bar, and that is important,  
14 because the lawyers of Michigan need to be aware.  
15 They need to know what is going on, because there is  
16 something enormously valuable at risk here, something  
17 enormously at risk here. In the time I have today I  
18 would like to respond to the question posed in  
19 Administrative Order 2004-5. I want to do so before  
20 Mr. McSorley asks me a question.

21 Now, the question posed by the court is  
22 whether the State Bar of Michigan's current programs  
23 and activities support its status as a mandatory bar.  
24 In my view the question is important and appropriate  
25 because I think what the court is saying, tell us

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1 about your current programs and activities and justify  
2 what you are doing as a bar to the people of the state  
3 of Michigan and to your profession.

4 Some would and, as I have heard today, do  
5 argue that in order to discharge its duty to protect  
6 and inform the public and protect the profession the  
7 Bar should do more. Some argue it should do less, and  
8 I guess I have heard that some argue the mandatory bar  
9 shouldn't be at all, that it should be abolished.

10 However, the first thing that I need to point  
11 out, at least in my review of this, is the State Bar  
12 doesn't make up the rules of advocacy under Keller.  
13 The State Bar didn't do that. We can't do that. It's  
14 not our job. The Supreme Court of the state of  
15 Michigan has both inherent and constitutional  
16 authority over the State Bar of Michigan, and in its  
17 order that brings us here today it states that the  
18 court has that authority. So the ultimate test is  
19 what is in the administrative order of the court or if  
20 there are changes to be made how do we amend the  
21 administrative order of the court? That should really  
22 be the focus.

23 Keller was decided in 1990, and obviously in  
24 1990 when the U.S. Supreme Court made that case it  
25 represented a perditious change in how Michigan did

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1 business and other state bars did business in terms of  
2 advocacy, and the Michigan Bar and the Michigan  
3 Supreme Court immediately responded to Keller with  
4 1991.3, Administrative Order 1991.3. And in that  
5 administrative order the procedure was that the Bar  
6 was to make a calculation of those activities that it  
7 engaged in that were outside, that were not Keller  
8 permissible, make a computation of that and an  
9 objecting member would then be able to get a deduction  
10 from dues for the Keller advocacy.

11 One individual, my very good friend Falk,  
12 challenged that. We had a hearing at the State Bar on  
13 Mr. Falk's challenge, and the result was that the Bar  
14 had complied with the Supreme Court's administrative  
15 order.

16 There have been a number of Supreme Court  
17 administrative orders since 1991. The current one is  
18 the administrative order entitled 2.004-1, or at least  
19 that's the one that has been in effect for the past  
20 ten years, and those who have, or at least some by way  
21 of being critical, but some who have criticized the  
22 Bar ought to do this and the Bar ought to do that  
23 should read the order. It's a five-page order. It  
24 gives details as to what the Bar can do, how the Bar  
25 can do it, when the Bar can do it, what votes have to

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1 be taken, when the votes have to be taken and then how  
2 they can advocate, how they have to relate to their  
3 sections. It's all in this order.

4 Now, what I think, the task is to review this  
5 order and look at changes. For example, the Bar can't  
6 act for 14 days. Well, if that's meaningless, okay,  
7 but, hey, somebody could change the whole court system  
8 in 14 days. Believe it? It can happen in Michigan.  
9 It can happen. So some changes have to be made in the  
10 rule to allow the Bar to be responsive.

11 Well, I want to talk about the membership,  
12 because 2004-1 has been in effect for ten years. In  
13 that ten-year -- and there is a complaint process.  
14 There is an appeal process. During that ten-year time  
15 frame from 2004 to 2014, one, one, one lawyer  
16 complained about State Bar advocacy.

17 My reaction is, Why? 43,000 lawyers, and one  
18 complains about State Bar advocacy. That is hardly an  
19 argument for fundamental change in the structure of  
20 the Bar or its advocacy. On the contrary, it  
21 demonstrates strong support for the conclusion that  
22 the basic programs and activities do support our  
23 status as a mandatory bar. It becomes difficult to  
24 comprehend the consideration of changing State Bar  
25 advocacy or structure when one member has objected to

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1 State Bar advocacy in ten years. That history doesn't  
2 exactly jump out as representing something that's  
3 broken that needs to be fixed.

4 And that objector was here today. He spoke.  
5 I wasn't going to name his name, but he was here. He  
6 spoke. You heard him talk. It was a tax issue. He  
7 didn't like the position the State Bar took on a tax  
8 issue. He objected. They ruled against him. He  
9 didn't appeal.

10 The order provides a direct appeal to the  
11 Michigan Supreme Court. Who else can, through one  
12 little complaint, one piece of paper -- all lawyers  
13 can read and write. I know they can file complaints.  
14 Write a letter to the State Bar, they get -- all you  
15 have to do is appeal directly to the Supreme Court.  
16 Who else can do that? Maybe the governor, but nobody  
17 else can do that, but you can do that under this  
18 order. So there are protections in place for our  
19 members, and the members, 43,000 strong, one objects  
20 in ten years, that doesn't sound like something that  
21 needs a lot of change.

22 They talk about privatization. In 1990 I was  
23 there at the table. Privatization was an active point  
24 of discussion among the membership of the State Bar.  
25 Mike Franck, the executive director of the State Bar,

1 there was active discussion about privatization. The  
2 conclusion was then, the conclusion is now,  
3 privatization is a bad idea, and it should be  
4 rejected.

5 We examined it carefully in the '90s. There  
6 are complicated issues of ownership and control of  
7 State Bar assets, State Bar buildings, Foundation  
8 assets. There is a lot of money somewhere. Who does  
9 it belong to, how is it going to be determined, and  
10 the abandonment of the State Bar's traditional service  
11 to the public, to giving it a private corporation for  
12 private objectives.

13 Our conclusion was you create more problems  
14 than you solve, because in Michigan you have today an  
15 80-year history of a unified Bar and lawyers who  
16 support a unified Bar. So those who want  
17 privatization, be careful what you ask for. The  
18 Supreme Court has no control over private  
19 corporations.

20 Judge Boyd pointed out, Ed Pappas pointed  
21 out, Tracie Boyd pointed out the sum of the things  
22 that the State Bar does that absolutely justify its  
23 position with the Supreme Court and the advocacy and  
24 the things that we do why we should continue as a  
25 State Bar.

1 state believe that the State Bar runs the disciplinary  
2 process, which obviously it does not. I would be  
3 interested in your view with respect to whether the  
4 State Bar ought to have a larger role in the  
5 disciplinary process and, if so, in what manner.

6 MR. GOOGASIAN: Well, I have served for about  
7 30 years as a chair of a panel for the attorney  
8 discipline system. I don't charge for that. Nobody  
9 charges for that. Attorneys of the state of Michigan  
10 volunteer as judges in all of those panels. So there  
11 is involvement of the State Bar of Michigan on a  
12 volunteer basis, pro bono basis, in that system.

13 And, you know, in regard to what goes on with  
14 the Discipline Board, I would defer to John VanBolt  
15 who is the retired chair, and I see he is on the  
16 speaker's list here shortly after I am. As soon as  
17 Mr. McSorley gets done asking his questions, he is  
18 going to come up.

19 So I don't have any issue with the  
20 Supreme Court's control of the discipline system. I  
21 served on the Board of Law Examiners for five years.  
22 I have chaired the Character and Fitness Committee. I  
23 simply don't have any issue with that separation. I  
24 don't think it in any way inhibits what we do as a bar  
25 in terms of what is important to the people of the

1 In Michigan -- and I will conclude with these  
2 observations -- the main objective of the State Bar  
3 has to been to protect the public. The State Bar  
4 alone is organized to capture the disparate  
5 experiences and the competing viewpoints of lawyers  
6 across the state and across practice areas. The  
7 lawyers in the 37 sections of the State Bar are  
8 uniquely equipped to present objective, competent  
9 views on legislation. There is no other entity or  
10 service, nor can there be, that provides what the  
11 State Bar of Michigan brings to the legislature and  
12 provides to the public. There is no question in my  
13 mind that the best and only structure to discharge the  
14 profession's duty to protect and inform the public is  
15 a unified bar. That's who we have been for 80 years,  
16 a public body, corporate, dedicated to the protection  
17 of the public. That's what we stand for, that's who  
18 we are, who we must continue to be. Thank you.

19 MR. ELLSWORTH: Mr. Googasian, I would like  
20 to ask you about something a little different. The  
21 state's bar, the organized bar no longer has much of a  
22 role to play in the disciplinary process. One of the  
23 things that I think we have been surprised about, at  
24 least a number of us on this Task Force, is written  
25 comments that come in, a lot of lawyers around the

1 state.

2 MR. ELLSWORTH: Does the Bar itself, the  
3 State Bar of Michigan, should it be playing any kind  
4 of larger role in that system than it does now?  
5 Apparently maybe not.

6 MR. GOOGASIAN: This is just on a personal  
7 note. I frequently feel that, you know, the rules  
8 kind of restrict what as a discipline board we are  
9 able to do to lawyers who I think should lose their  
10 licenses forever and ever, because you see some of the  
11 practices that they do. So I would like to have us  
12 have a voice in that, but I don't really have any  
13 major fault with the system that tells me that that  
14 part needs to be overhauled.

15 MR. MCSORLEY: I don't want to disappoint.

16 CHAIRPERSON BUTZBAUGH: I knew you wouldn't.

17 MR. MCSORLEY: But, Mr. Googasian, you  
18 identified that a road map is in place and speaking of  
19 Administrative Order 2004-1 and then provides for  
20 appeal. I think I have done that correctly. But I  
21 thought I heard you tick off that maybe within that  
22 administrative order there is an opportunity for some  
23 tweaking, for some adjustment. Did you have something  
24 particular in mind?

25 MR. GOOGASIAN: Let me answer you this way,

1 Mr. McSorley. My reading of your charge, my reading,  
2 maybe not yours, is that's your job. Look at the  
3 order, make suggestions to the court, and so the  
4 answer to your question is yes, and one those  
5 suggestions from my point of view is eliminate the  
6 14-day requirement. Give the Bar an opportunity to  
7 respond to stuff timely.

8 If there are other safeguards that have to be  
9 built in -- you know, if you read this, it's not  
10 simple to get stuff through. People think the Bar  
11 simply takes a position and runs off. That's not the  
12 way this works. It's very carefully thought through.  
13 The Supreme Court, I assume, wrote it. It's very  
14 thoughtfully drafted, and if it needs some tweaking,  
15 sobeit. It shouldn't change who we are, what we do.

16 MR. MCSORLEY: Thank you.

17 CHAIRPERSON BUTZBAUGH: Okay.

1 and as members of the profession, but it gave me an  
2 opportunity to observe things like the way in with  
3 which other states do integrate the functions of the  
4 court and the bar, whether it's voluntary or not, in  
5 dealing with the protection of the public issues that  
6 we have been talking about today. It's also given me  
7 a chance to look at how the Michigan system in  
8 particular stacks up compared to those systems and how  
9 the State Bar of Michigan in particular, to me at  
10 least, seems to excel in the work that it does,  
11 largely by virtue of the resources that it has and  
12 that are only available to a mandatory bar.

13 The annual budget of the attorney discipline  
14 system in Michigan is just shy of \$5 million, and the  
15 purpose of that \$5 million is expressed directly -- in  
16 fact, this is a direct quote from the Michigan Court  
17 Rules -- is primarily to protect the public.

18 There was a mention earlier of the words of  
19 first Bar president, no legal organization can long  
20 survive which has not as its primary purpose the  
21 protection of the public. This is not mere  
22 coincidence, and these are not just words, although in  
23 the case of Bar they are, in fact, engraved in brass  
24 on a marble wall. But it seems to me that the notion  
25 that these two similar mission statements are

1 CHAIRPERSON BUTZBAUGH: We lost one of our  
2 members, Representative Walsh just had to leave. You  
3 have got the rest of us here.

4 Our first speaker this afternoon is  
5 John VanBolt.

6 MR. VANBOLT: Thank you, Mr. Butzbaugh,  
7 members of the Task Force. I am impressed that you  
8 are all back, and I am also glad that you took the  
9 break when you did. I didn't have to go to any  
10 advocacy training to figure out that being the person  
11 to follow George Googasian and the one obstacle  
12 between you and lunch was not a road map to success as  
13 a speaker.

14 I do want to -- and if you will bear with me,  
15 I will get to it -- follow up on one the points that  
16 Mr. Googasian made and also I think touched on by  
17 Mr. Ellsworth's question.

18 From 1980 to 1986 I was employed by the  
19 Attorney Grievance Commission in the discipline system  
20 that we have talked about here today. From '86 until  
21 last October, I was the director of the Attorney  
22 Discipline Board. That gave me an opportunity to  
23 observe a number of things, not just the foibles of my  
24 fellow attorneys, but also the heights to which my  
25 fellow attorneys can rise as members of hearing panels

1 coincidental or that the relationship between the  
2 organized bar and the discipline system is simply to  
3 collect the dues and perform a few administrative  
4 services misses the mark.

5 Let me tell you about some of the activities  
6 of the State Bar of Michigan that I personally have  
7 engaged in with members of the staff and volunteers of  
8 the Bar. These include the Character and Fitness  
9 Committee, which is not paid for out of Bar dues.  
10 Well, it's not paid for out of the discipline dues, I  
11 am sorry.

12 The professional program that Ed Pappas  
13 mentioned of the professionalism program that the Bar  
14 conducts with law schools, I have participated in a  
15 couple of those, and they really do work.

16 The Lawyers and Judges Assistance Program,  
17 the Ethics Hotline, the publication of ethic opinions.  
18 The Tips and Tools, what we used to call ethics  
19 school, that's put on for disciplined and  
20 nondisciplined lawyers. The trust account  
21 notification requirement seminars that are conducted  
22 by the State Bar, the Practice Management Resource  
23 Center that helps keep lawyers on top of changing  
24 technology and office practices, the prosecution of  
25 unauthorized practice of law, the administration of

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1 the client protection fund.

2 Membership registration which, by the way,

3 is, in fact, a function that somebody has got to do.

4 People in the public need to know is the person who

5 says he or she is a lawyer actually a lawyer and are

6 they in good standing. And the Bar Journal, which is,

7 in fact, the means by which members of the Bar are

8 informed of developments, educational activities,

9 opportunities.

10 Of these, these are not just feel-good things

11 that may or may not make a difference. I can tell you

12 that in terms of the relationship between the

13 discipline system and these functions, the Discipline

14 Board, of which I was the director, in its orders

15 routinely requires people to seek assistance from

16 Lawyers and Judges Assistance, and they also receive

17 evaluations from Lawyers and Judges Assistance as part

18 of both the investigative process of the Grievance

19 Commission and the discipline process of the Board.

20 Lawyers are referred specifically to PMRC for

21 help in their office management issues if that seems

22 to be the core of the problem. Law firm audits have

23 been ordered by PMRC. Referral to the Tips and Tools

24 sessions are ordered. They are part of the discipline

25 order by a branch of the Michigan Supreme Court

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1 referred to the State Bar of Michigan, which is not

2 paid for out of the discipline portion of the dues.

3 The trust account notification seminars. All

4 of these are part of, I guess, what you could call a

5 fabric of maintaining protection of the public from

6 the time a person is in law school until they leave

7 the profession.

8 Let me just say -- this has given me, and I

9 have already gone over. Let me just give you two sort

10 of aphorisms or two things I have learned.

11 One is there is no perfect system. I have

12 had personal dealings with any kind of system there is

13 in the country, whether it's one like ours or part,

14 it's funded by the bar but supervised by the court.

15 Some that are all part of the court structure, I mean

16 literally in the court building, some that are all

17 part of the Bar, not anything to do with the court

18 other than ultimate supervision. There is no perfect

19 system, but Michigan's system, which is certainly not

20 the only one of its kind, works extremely well.

21 The other part is there is no free lunch, and

22 by that I mean there have been some references to

23 other states -- Colorado, Indiana. First you should

24 bear in mind, and I think probably the Bar has these

25 figures, that the mandatory fee paid in the 18 states

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1 that have a voluntary bar in every one of those states

2 is more than the discipline portion of the dues that

3 is paid in Michigan, in some cases significantly more.

4 All of the things that I just mentioned, so,

5 for instance, the speaker from Indiana who mentioned

6 that the Supreme Court of Indiana takes care of

7 admissions and discipline. Well, either Indiana is

8 not doing any of those other things that I mentioned

9 or somebody is. It's either the Supreme Court, it's

10 either some kind of registration fee, but somewhere or

11 how, some way or another those things need to get

12 done, they are being done, and somebody is paying for

13 them, and the idea that a magic wand would separate

14 the dues function of the Bar in collecting the dues

15 for the discipline system, and the discipline system

16 would do just discipline and that's all we need is

17 just not going to work.

18 I think the sheer mechanics of separating out

19 a system that has now been in place for 30 or 40 years

20 in terms of dealing with all these disparate parts of

21 ethics, professionalism and discipline is going to be

22 an enormous task. It's going to cost money. It is

23 not going to protect the public, and it is not going

24 to serve the public of the state of Michigan or the

25 Supreme Court for that matter. Thank you.

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1 CHAIRPERSON BUTZBAUGH: Just a moment. Any

2 questions?

3 MR. RIORDAN: Mr. VanBolt, you have an

4 historical perspective of the disciplinary system here

5 in Michigan, at least better than mine.

6 MR. VANBOLT: Because I am old.

7 MR. RIORDAN: Older than me. But I know at

8 one time the State Bar had more of a role in

9 discipline than it does now.

10 MR. VANBOLT: Uh-huh.

11 MR. RIORDAN: Do you think it's possible that

12 the State Bar could maybe go back and assume the role

13 that it had before and take the burden off the

14 Supreme Court? We are charged with looking into

15 discipline too, as well as the State Bar, but I would

16 appreciate your thoughts.

17 MR. VANBOLT: The simple answer, is it

18 possible? Sure, because other states do it. Would it

19 be a simple process to figure out who does what and

20 who pays for what? Maybe not so much. But if there

21 continues to be a mandatory bar, then I am not sure

22 how difficult would it be. If it was a voluntary bar,

23 then I think the problems would be enormous. It would

24 be like saying, Oakland County Bar, here, you take

25 care of discipline.

1 MR. RIORDAN: Right now the State Bar handles  
2 the administrative functions of the disciplinary  
3 system.

4 MR. VANBOLT: Right.

5 MR. RIORDAN: And for whatever reason, I  
6 think sometime back in the '80s --

7 MR. VANBOLT: Early '90s

8 MR. RIORDAN: Early '90s things were  
9 separated where the State Bar no longer had the  
10 oversight of the disciplinary process.

11 MR. VANBOLT: The financial oversight, that's  
12 correct, uh-huh. And let me tell you, I personally  
13 never had any problems with the Bar. I would appear  
14 on behalf of the Board in front of the fiscal  
15 committee, and things went well. Sometimes better  
16 than they went with the court.

17 MR. ELLSWORTH: What did the State Bar do  
18 before the Supreme Court assumed the oversight of the  
19 discipline system?

20 MR. VANBOLT: Let me be clear, the court, and  
21 this is true in every state, the Supreme Court always  
22 maintains the ultimate authority over the system. The  
23 difference was primarily in the financial aspect. As  
24 I said, up until about '92 the Discipline Board and  
25 the Grievance Commission would each propose a budget.

1 Their executive person would come to the Bar building,  
2 appear before the fiscal committee, just like a  
3 department head at the Bar. The fiscal committee  
4 would make a recommendation. It would go to the Bar.  
5 The Board of Commissioners would approve it. In my  
6 tenure no budget proposed by the Board, the  
7 Commission, was not approved by the Bar.

8 The fear was that the body that holds the  
9 purse strings could exercise some undue authority.  
10 Part of it had to do with a particular case involving  
11 a particular former president of the State Bar and how  
12 that particular investigation was handled, and there  
13 were some questions raised as to the appearance of  
14 whether or not -- no one ever said that it did, but  
15 whether there could be undue influence by the Bar, for  
16 instance, if you don't do thus and so we are going to  
17 cut your budget. That never, in fact, happened nor  
18 was the threat ever exercised, but that was the  
19 theory.

20 So the financial oversight went directly to  
21 the Court, so after '92 the budget would be submitted  
22 to the fiscal director of the Supreme Court, then go  
23 to the chief justice, it would go to the justices. If  
24 you remember, for a period there were public  
25 administrative hearings in this very room, and we

1 would defend our budgets. That was the primary  
2 change.

3 The only other change really was that prior  
4 to '90 or '92 the Grievance Administrator was  
5 appointed by the Grievance Commission. Since then he  
6 or she has been appointed by the Court.

7 MR. ELLSWORTH: Which of the offices is  
8 filled by the Supreme Court now?

9 MR. VANBOLT: The director of the Attorney  
10 Grievance Commission, the other one, not the one I  
11 worked for. The prosecutor.

12 MR. ELLSWORTH: You were appointed in by  
13 what, the Discipline Board?

14 MR. VANBOLT: The Discipline Board. I was  
15 their general counsel. I reported to them.

16 MR. ELLSWORTH: Let me ask you the same  
17 question I asked of Mr. Googasian, but not very  
18 artfully. Do you see any way that the organized bar,  
19 the State Bar itself, should be playing a greater role  
20 with any aspect of the disciplinary system than it  
21 does now by collecting dues and things?

22 MR. VANBOLT: Greater? Well, the reality is  
23 that administratively the discipline agency is a part  
24 of the Bar. I mean, we are served by, under the Bar's  
25 direction.

1 MR. ELLSWORTH: Volunteers and things?

2 MR. VANBOLT: Oh, that part.  
3 Administratively we are effectively part of the Bar.  
4 The system, again, you can -- there is one state that  
5 has a professional, full-time state discipline board,  
6 and that's California. Costs an enormous amount of  
7 money. Every other state, pretty much the actual  
8 adjudication part, which is where the volunteers in  
9 Michigan fit in, the 400 and so volunteers, they are  
10 either volunteers, who are very good in Michigan by  
11 the way, or the adjudication is done by the court  
12 itself. That works in some smaller states.

13 So for instance -- I believe in Indiana, for  
14 instance, the cases, every single case is brought  
15 before the Supreme Court for either approval or rubber  
16 stamping or de novo hearing of some kind. The  
17 disadvantage there is it takes up the court's time,  
18 and the court may or may not have the stomach to deal  
19 with those cases on a regular basis.

20 But for almost any kind of system you can  
21 think of, there is a model somewhere in the country.  
22 If you want discipline cases to go to a jury, look at  
23 Texas. That's a terrible system, but if you wanted to  
24 do it, there is a system that does it.

25 So is Michigan's system perfect? No. I said

1 no system is perfect. I personally think it's better  
2 than the other systems that I have looked at, and it's  
3 not the only one like it. We are virtually identical  
4 to Massachusetts, Louisiana. I could name four or  
5 five others probably.

6 MR. ELLSWORTH: Thank you.

7 CHAIRPERSON BUTZBAUGH: Mr. VanBolt, thank  
8 you very much.

9 MR. VANBOLT: Thank you.

10 CHAIRPERSON BUTZBAUGH: Next speaker is  
11 Edward Haroutunian. Mr. Haroutunian practices law in  
12 Bingham Farms and he was the chair of the  
13 Representative Assembly 2006-2007.

14 MR. HAROUTUNIAN: Thank you, Chair Butzbaugh,  
15 and good afternoon, ladies and gentlemen. My name is  
16 Ed Haroutunian. I am a former chair of the  
17 Representative Assembly of the State Bar of Michigan  
18 and currently a member of the Board of Commissioners.

19 With respect to the issue that has been put  
20 before you of whether the State Bar's current programs  
21 and activities support its status as a mandatory bar  
22 and the potential to make recommendations regarding  
23 changes to state bar activities, let me say I am in  
24 favor of a mandatory bar with the continuation of the  
25 current structure of the Representative Assembly and

1 restraint upon the Bar. The leadership of the  
2 Representative Assembly and the Board of Commissioners  
3 is responsible for following the Strategic Plan and  
4 the restraint set forth in the Supreme Court's  
5 Administrative Order. To assist in accomplishing that  
6 goal, I suggest the following:

7 First, with respect to any issue presented  
8 before either the Representative Assembly or the Board  
9 of Commissioners, that counsel for the State Bar give  
10 an opinion as to the Keller applicability, along with  
11 a detailed analysis of the reasons underlying that  
12 opinion.

13 Second, the Representative Assembly or the  
14 Board of Commissioners, as the case may be, then vote  
15 on whether the specific issue is Keller permissible  
16 with a required super majority of 75 percent of those  
17 present and voting.

18 Third, if the Keller vote passes by the 75  
19 percent, then the issue to be voted upon by the  
20 Representative Assembly or the Board of Commissioners,  
21 as the case may be, prevails with a simple majority of  
22 those present and voting.

23 With these suggestions, I believe the  
24 restraint required by Keller and Administrative Order  
25 2004-01 for a mandatory bar is more likely to be

1 the Board of Commissioners; however, I have some  
2 additional comments to make in that regard.

3 The Representative Assembly came into  
4 existence in about 1972 when the then 23 members of  
5 the Board of Commissioners recommended to the Michigan  
6 Supreme Court that a Representative Assembly should be  
7 formed to better express the views of the then  
8 approximately 12,000 lawyers in the Michigan State Bar  
9 and that a larger body than the Board of Commissioners  
10 was needed to fully represent the members of the  
11 State Bar and that this body would be the final  
12 policy-making body of the State Bar of Michigan. The  
13 Supreme Court agreed with the Board of Commissioners.

14 Today we have in excess of 43,000 lawyers in  
15 the State Bar, and it appears clear to me that the  
16 need that was expressed in 1972 for the creation of  
17 the Representative Assembly is even more pressing  
18 today.

19 The Representative Assembly and the Board of  
20 Commissioners approved the Strategic Plan for the  
21 State Bar, which focused upon those areas that are of  
22 priority to the Bar. The members' dues in a mandatory  
23 bar are to be used only for matters that relate to our  
24 Supreme Court's Administrative Order 2004-01, which  
25 mirrors the Keller decision and which acts as a

1 achieved.

2 Thank you for the opportunity to express my  
3 views on these issues, and I want to thank  
4 Chairman Butzbaugh for all of his courtesies  
5 throughout this process, and, as a wise man once said,  
6 my remaining time I give back to the chair.

7 CHAIRPERSON BUTZBAUGH: I am not going to  
8 take it.

9 MS. WILLIAMS: Mr. Haroutunian, I do have a  
10 question. As to the super majority vote as to whether  
11 it's Keller permissible, are you saying either the  
12 Representative Assembly or Board of Commissioners or  
13 both prior to either body making a decision on an  
14 issue?

15 MR. HAROUTUNIAN: In effect the latter,  
16 meaning that if an issue comes in front of the Board  
17 of Commissioners, then the opinion of counsel would  
18 come with the rationale behind that opinion, and then  
19 the Board of Commissioners would vote on that issue,  
20 and the threshold would be the 75 percent of those  
21 present and voting would have to agree that, in fact,  
22 it was Keller permissible.

23 On the other hand, if an issue came before  
24 the Representative Assembly, any issue, opinion of  
25 counsel again would have to come before the RA and

1 indicating whether it was Keller permissible and with  
2 the rationale -- this is important -- with the  
3 rationale as to why it's Keller permissible or not.  
4 And then the membership of the Representative Assembly  
5 would then vote. You would need 75 percent in order  
6 to make it a reality, and then you move on from there.  
7 Did I answer your question?

8 MS. WILLIAMS: Yes, thank you.

9 MR. ELLSWORTH: Why not stick with the  
10 existing system? Is there something wrong with it?

11 MR. HAROUTUNIAN: The answer is the existing  
12 system does not do a couple of things. The existing  
13 system sometimes does not take seriously the Keller  
14 side in my experience, and I think that using this  
15 procedural kind of tool that I am suggesting would  
16 make that something that was taken more seriously by  
17 the Representative Assembly and by the Board of  
18 Commissioners.

19 MR. ELLSWORTH: How do you feel about the  
20 suggestion that has come from some that the Bar  
21 itself, as distinguished from the sections, should  
22 refrain from any legislative activity?

23 MR. HAROUTUNIAN: I think that -- I  
24 understand the rationale for that, but I am not in  
25 favor of that. I think that the Bar has a role to

1 play, recognizing that the Bar represents everybody  
2 that's in the Bar. The section only represents the  
3 folks who are in that voluntary section.

4 I think that if you allow for keeping the  
5 issues that are Keller permissible and under the  
6 administrative order, if you stick to those, then you  
7 end up with a bar, mandatory bar, that ends up  
8 speaking for the entire group, and in my judgment that  
9 carries more weight with the people who are going to  
10 be influenced than if it's just a section.

11 CHAIRMAN BUTZBAUGH: If the counsel opinion  
12 says it's not Keller permissible, what happens?

13 MR. HAROUTUNIAN: A vote, in my judgment, my  
14 suggestion is that that issue -- again, before the  
15 body. If the counsel says, in my opinion based on  
16 these reasons 1, 2, 3, 4, I do not believe that the  
17 issue is Keller permissible, the matter comes in front  
18 of the body, whether the body is the Board of  
19 Commissioners or whether the body is the  
20 Representative Assembly, and a vote is taken.

21 CHAIRPERSON BUTZBAUGH: So it does not  
22 require that counsel support it?

23 MR. HAROUTUNIAN: That's correct, it does not  
24 require that counsel for the Bar support it because --  
25 and I liken that, frankly, to, you know, sometimes an

1 attorney general's opinion, sometimes somebody will  
2 say, well, that's just one lawyer's opinion, until it  
3 gets to another body. Well, in this case the counsel  
4 for the Bar is giving the members of that group --  
5 Board of Commissioners, Representative Assembly -- his  
6 or her opinion and the rationale for his or her  
7 opinion. The members may disagree with that opinion,  
8 and I believe that it's appropriate that the members  
9 have the opportunity to express that disagreement one  
10 way or the other.

11 MR. ROMBACH: Mr. Haroutunian, you believe  
12 that there has been a distinct role for both the Board  
13 of Commissioners and the Representative Assembly  
14 within the State Bar, that they can play well together  
15 and coexist?

16 MR. HAROUTUNIAN: Mr. Rombach, you well know,  
17 having been on the Representative Assembly as its  
18 chair and also as a member of the Board of  
19 Commissioners and the president-elect of the Bar, that  
20 in fact the past history, the past history of the  
21 Representative Assembly and the State Bar and the  
22 Board of Commissioners is clear that they have played  
23 well together. The fact that the Representative  
24 Assembly is the final policy-making body of the Bar,  
25 it's a very interesting kind of thing, and in many

1 respects it acts as a check and balance on the entire  
2 Bar. And that's the reason why I believe that to be  
3 sure the core structure of the Board of Commissioners  
4 and the core structure of the Representative Assembly  
5 should not be changed. Does that answer your  
6 question?

7 MR. ROMBACH: It certainly does.

8 CHAIRPERSON BUTZBAUGH: Thank you.

9 MR. MCSORLEY: Mr. Haroutunian, if the vote,  
10 75 percent majority fails, I assume that same issue  
11 could then go to a section of the State Bar, because  
12 it would not be handcuffed or --

13 MR. HAROUTUNIAN: Yes.

14 MR. MCSORLEY: -- corralled by Keller  
15 requirements?

16 MR. HAROUTUNIAN: I think the answer would be  
17 clear that that could certainly be the outcome, and a  
18 section then could go forward and, you know, do as it  
19 thought it could, yes.

20 MR. MCSORLEY: And the 75 percent majority,  
21 that's of those present, so we are kind of  
22 anticipating that we are having strong attendance at  
23 either the Representative Assembly meeting or at the  
24 Board of Commissioners meeting?

25 MR. HAROUTUNIAN: That's exactly right, and I

1 will give you an example of that, by the way. A  
 2 recent vote of the Board of Commissioners was taken,  
 3 and there were 31 members who voted, and of the 31 who  
 4 voted, eight voted saying that this issue was not  
 5 Keller permissible and it should not go forward. If  
 6 the rule that I am espousing here had been in place,  
 7 that issue would have come to an end at that moment.  
 8 Why? Because the 23 would not be, it was close, but  
 9 23 would not be 75 percent of the 31, and in that  
 10 instance that issue would have come to an end.

11 Now, that's -- I mean, I give you that as an  
 12 example that took place within the last two weeks.

13 Any other questions?

14 MR. CRANMER: I have one.

15 MR. HAROUTUNIAN: Yes.

16 MR. CRANMER: Mr. Haroutunian, we've heard  
 17 from a number of people today that perhaps Keller  
 18 permissibility ought to be polled to all the lawyers,  
 19 that we ought to publicize issues that the Bar might  
 20 take a position on to let the individual members voice  
 21 their view that a particular position might not be  
 22 Keller permissible. That doesn't seem to be part of  
 23 your proposal. Am I correct in that and, if so, what  
 24 is your view about the idea of publicizing  
 25 possibilities in advance to give people the

1 opportunity, individual lawyers the opportunity to  
 2 weigh in on Keller permissibility.

3 MR. HAROUTUNIAN: Mr. Cranmer, I think that  
 4 that's an excellent question. The answer is that I  
 5 have not addressed it. However, let me be clear on  
 6 that, and that is I don't think that it's always  
 7 appropriate to go to the membership and say to the  
 8 membership, What do you think about this? However, to  
 9 be able to go to the membership and indicate, Here are  
 10 the members of your Board of Commissioners. Here are  
 11 the members of your Representative Assembly. If you  
 12 have a thought on this issue, if you would like to  
 13 express a thought, go to these folks and you give --  
 14 and, frankly, we have the technology to make this  
 15 happen. I don't know that it has happened, but we  
 16 have the technology to make it happen. And you turn  
 17 around and you encourage people -- you know, we  
 18 encourage the public in ordinary elections, state  
 19 reps, state senate, you got an issue, go to the people  
 20 who represent you. They will take the issue forward.  
 21 This is no different, only our group happens to be  
 22 lawyers as opposed to the public at large.

23 So I agree with you that that should be  
 24 encouraged, because too many times, that's true,  
 25 lawyers say I don't know what a member of the Board of

1 Commissioners does, I don't know what a member of the  
 2 Representative Assembly does, and, by the way, I don't  
 3 know what the State Bar does, however you define  
 4 State Bar.

5 So my point is that I agree with you. I  
 6 think that that encouragement should be there. I  
 7 think that people should turn around and be able to  
 8 speak with their representatives, whether at the BOC  
 9 level or at the RA level, so that people can come to  
 10 the meetings and say, you know, people called me. I  
 11 talked to people.

12 The only way that happens is if we tell  
 13 lawyers who the members are of the Board of  
 14 Commissioners and we tell lawyers who the members are  
 15 of the Representative Assembly and we say to them,  
 16 look, here is an issue that's going to come up. You  
 17 have a point of view on this, God love you. Talk to  
 18 these folks. Talk to these folks. Let them express  
 19 themselves, because they will. Most lawyers I have  
 20 found in my experience are not shy. They will tell  
 21 you what they think.

22 So I agree with you. I think that's exactly  
 23 what should happen, and I think that's an aspect, and  
 24 I think it's a great opportunity here, it's an aspect  
 25 of this process that we ought to take advantage of to

1 be able to suggest to members of the Bar to get more  
 2 active in all phases.

3 CHAIRPERSON BUTZBAUGH: Thank you,  
 4 Mr. Haroutunian.

5 MR. HAROUTUNIAN: Thank you, Mr. Butzbaugh.

6 CHAIRPERSON BUTZBAUGH: Next speaker is Kerry  
 7 Morgan.

8 MR. MORGAN: Thank you. Good afternoon. My  
 9 name is Kerry Morgan. I am an attorney. I am  
 10 licensed in Michigan, District of Columbia, and  
 11 Virginia, as well as the D.C. and 6th circuit and  
 12 Supreme Court. I was first admitted to practice law  
 13 in 1981. Just having heard a few of the comments  
 14 today, I fear my comments might sound like they are  
 15 from Mars today, but nevertheless, we will sally  
 16 forth.

17 I am not here to debate the intricacies of  
 18 the current system. To me that is not the significant  
 19 and controlling principle. My testimony, therefore,  
 20 is fairly simple. It states certain propositions,  
 21 which I would draw to your attention.

22 The first is this: To compel an attorney to  
 23 join a state bar organization that advances opinions  
 24 or promotes goals or programs to which he objects is a  
 25 violation of his right to freely associate. His right

1 to freely associate is, as a matter of fact, one which  
2 is voluntary, but the Bar makes it mandatory as a  
3 matter of law. This is inconsistent. Voluntary  
4 association is by definition voluntary. It should not  
5 be subject to compulsion.

6 Compulsory association also has harmful and  
7 needless secondary effects. The attorney who refuses  
8 to comply with such a compulsory measure is denied the  
9 freedom to labor, to put bread on the table for his  
10 family. He has acquired certain abilities through  
11 study, through labor, through skill. Refusal to pay  
12 the dues or to associate denies him the ability to  
13 earn his living. These gifts and abilities did not  
14 come from the Bar. Attorneys are not subject to the  
15 Bar in terms of their skills and abilities. They  
16 aren't owing to it.

17 When the Bar says to a lawyer, Look, if you  
18 don't pay your dues, you are out. What it does is it  
19 deprives him of the ability to use those skills. It  
20 effectively constitutes a statewide, lifetime  
21 noncompete. It's not in the public interest to tell  
22 attorneys or tell anyone they may not be employed in  
23 their profession. We would never ever permit that in  
24 a court under the statute, noncompete agreements in  
25 the statute. Here we make it a matter of our rule.

1 Suppose, on the other hand, an attorney  
2 thinks the State Bar of Michigan is the greatest  
3 organization. It's just. It's goals are just. It's  
4 rationale and purpose are superior to all other  
5 organizations. Even here to compel an attorney to  
6 join that organization or subsidize those goals and  
7 rationales, views or programs, even those of his own  
8 liking, even those with which he agrees, nevertheless,  
9 deprives that attorney of the comfortable liberty of  
10 freely giving and of freely associating with those  
11 organizations whose views he would make his own.

12 I think that the debate about association and  
13 whether a man should be compelled to associate with  
14 organizations with which he disagrees misses this  
15 element, the element of freely associating, even to  
16 advance those organizational views which one agrees  
17 with. Every man is denied, every woman is denied that  
18 right, even if they believe the Bar is doing a worthy,  
19 admirable, and desirable object. They are  
20 nevertheless denied of the liberty of freely giving.

21 There has been some discussion about Keller.  
22 Keller held that attorneys who are required to be  
23 members of the State Bar Association have a First  
24 Amendment right to refrain from subsidizing the  
25 organization's political or ideological activities,

1 but for the reasons stated here, attorneys also have  
2 the right to freely associate or not associate in the  
3 first instance and to subsidize or refuse to subsidize  
4 any organization of their choice or no organization at  
5 all. Let's not forget that Keller sets the floor, not  
6 the ceiling.

7 Michigan Constitution provides greater  
8 protection than the federal one. Article 1,  
9 Section 23 exists for this very reason. Yet,  
10 Administrative Order 2014-5 seems not to notice our  
11 own constitution. It makes the federal constitution  
12 the rule.

13 I would also suggest that the Bar is not  
14 justified nearly as a convenient auxiliary of the  
15 Supreme Court. If it were, its objects would be  
16 subsidized from that body's budget through a  
17 legislative appropriation to that end to pursue those  
18 objects which the Supreme Court believes are within  
19 its core regulatory functions. The use of compulsion  
20 to join, the extraction of dues, not be necessary to  
21 achieve those objectives.

22 Perhaps there are many that predict the  
23 downfall of justice itself were the Bar to be  
24 disestablished, but is the use of force and coercion  
25 against Michigan attorneys consonant with justice or

1 contrary to justice? I would suggest that a diversity  
2 of private voluntary bar organizations is a far surer  
3 guide to advancing justice and protecting the public  
4 than a single, mandatory, compulsory bar organization  
5 could ever be.

6 The Supreme Court has power enough to police  
7 the practice of law. It does not need a system of  
8 coercion that suppresses the right to freely associate  
9 or compels financial support to exercise that power.

10 If you have been paying attention, you  
11 probably get a sense that I do not really support the  
12 Bar and it's integrated mandatory sentence. There are  
13 other options more consistent with the freedoms that  
14 we all enjoy, or should enjoy, and that to continue  
15 the current system is contrary to that. Trying to  
16 rearrange the current system, make adjustments, minor  
17 adjustments in the current system still runs contrary  
18 to those principles. Thank you for your indulgence.  
19 Any questions?

20 MR. ELLSWORTH: Mr. Morgan, I was having a  
21 little bit of trouble hearing you at the beginning,  
22 but I think you said you were also members of two  
23 other Bars, Virginia, and what was the other one?

24 MR. MORGAN: District of Columbia Bar.  
25 MR. ELLSWORTH: Are you currently an active

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1 member of both those?

2 MR. MORGAN: Yes.

3 MR. ELLSWORTH: Virginia is a mandatory bar,  
4 correct?

5 MR. MORGAN: Correct.

6 MR. ELLSWORTH: Are you a full member of the  
7 Virginia Bar or an associate member?

8 MR. MORGAN: No, I am a full member of all.

9 MR. ELLSWORTH: Of all. I am curious then,  
10 you are not in favor of a mandatory bar, but you  
11 maintain your bar memberships in D.C. and Virginia.  
12 Is that because you are practicing in those states, or  
13 why did you maintain membership?

14 MR. MORGAN: Yeah, I maintain my membership  
15 in Virginia because I lived there one time when I was  
16 working for the United States in the Commission on  
17 Civil Rights. And also the same in D.C., and we may  
18 return to Virginia. Can't practice law, you can't  
19 make a living without being at least a licensed member  
20 of these Bars, so, you know, I have to consider my own  
21 financial well-being.

22 MR. ELLSWORTH: But you are a full, active  
23 member?

24 MR. MORGAN: Yes.

25 MR. ELLSWORTH: As opposed to an associate

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1 member?

2 MR. MORGAN: No, I am not an associate or an  
3 emeritus or on the bad list.

4 MR. ELLSWORTH: My second question, you  
5 mentioned, you said the Michigan Constitution is more  
6 protective than the federal constitution. Then you  
7 cited, I think, Article 1, Section 23. What does that  
8 say?

9 MR. MORGAN: That's the clause that states  
10 that just simply because there are enumeration of  
11 rights in this constitution doesn't mean there aren't  
12 others that are retained by the people. It's the  
13 equivalent of the 9th Amendment, except it's even  
14 stronger. Of course we are talking like the amendment  
15 isn't really part of the constitution. It doesn't get  
16 any favor. It doesn't get any opinions. It doesn't  
17 get any respect, but that's not because it wasn't  
18 written that way. That's because the courts refuse to  
19 enforce it. So to here. We have a great  
20 constitution, and it provides for these rights. Ought  
21 not to be ignored. Ought to be examined. Ought to be  
22 looked at.

23 You know, we've made Keller, again, the  
24 landmark, the guide, the rule, and really that's a  
25 minimum one. We are all very happy that we comply

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1 with Keller or maybe we don't comply with Keller, but  
2 that's not the rule. That's not the guide. Here we  
3 have a greater principle, a greater concept, this idea  
4 of freedom of association.

5 MR. ELLSWORTH: Why does Article 1,  
6 Section 23 of the Michigan Constitution provide more  
7 protection than the First Amendment of the U.S.  
8 Constitution?

9 MR. MORGAN: I believe it does, absolutely.

10 MR. ELLSWORTH: Why? Can you articulate?

11 MR. MORGAN: As a matter of law. I mean,  
12 Michigan, just in terms of constitutional law, state  
13 constitutions, amendments can provide greater  
14 protection. I mean, we just had a case come down from  
15 the Supreme Court, Schuette versus Coalition. We have  
16 a constitutional amendment. Our constitutional  
17 amendment can create greater protections in terms of  
18 equality than the federal constitution. So, you know,  
19 that's been the whole amendment to our Proposal 2 on  
20 equality, banning affirmative action, you know, and  
21 now we have the next amendment going up on marriage,  
22 all being, you know, struck down by federal courts.

23 Yet Michigan, as a state -- don't forget the  
24 states were in the system before the federal  
25 government even existed. It was the states that

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1 signed the Declaration of Independence, not any  
2 federal government. They didn't come into existence  
3 until many years later.

4 States are the residual sovereignty in this  
5 country. The fact they have been co-opted and, you  
6 know, induced to receive bribes to give up their money  
7 or we call funding or gifts. Jefferson uses the term  
8 bribes, giving and taking of bribes, but that doesn't  
9 change the constitutional basis of states.

10 MR. ELLSWORTH: Thank you.

11 CHAIRPERSON BUTZBAUGH: Thank you,  
12 Mr. Morgan. Do you have a question?

13 EXECUTIVE DIRECTOR WELCH: Mr. Morgan, you  
14 suggested there were other options to the mandatory  
15 bar, and, of course, we know the voluntary bar is  
16 another option. I am curious whether you support  
17 annual licensing of lawyers and a system to ensure the  
18 quality of lawyers within that system or whether you  
19 have other options as well.

20 MR. MORGAN: Well, you know, when you are  
21 admitted to practice law, you are admitted to practice  
22 law, and we come up with this system of annual, you  
23 call it licensing. It's really the annual payment of  
24 dues, because there is no other criteria by which you  
25 are evaluated in the one-page form. What sections do

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1 you want to join? What Bars are you a member of?  
2 There is no substance here. This is just a bill. The  
3 dues statement is a bill, okay. Tell us whether you  
4 have malpractice insurance. So it's not a true  
5 licensing of any kind. It's just an automatic renewal  
6 if you pay your dues, because there is no substantive  
7 evaluation of the lawyer. Matter of fact, there is  
8 never any substantive evaluation of the lawyer, unless  
9 or until he gets in trouble or commits malpractice or  
10 someone files a complaint against him. When we talk  
11 about annual licensing, I mean, we shouldn't kid  
12 ourselves. We call it a license, but you are just  
13 paying the fee.

14 EXECUTIVE DIRECTOR WELCH: I am sorry, I  
15 didn't make my question clear. Do you support, in  
16 lieu of a mandatory bar association, the state  
17 licensing lawyers on an annual basis and having some  
18 sort of a disciplinary process for violation?

19 MR. MORGAN: Well, Supreme Court certainly  
20 have oversight over those that are admitted to  
21 practice before the courts in this state. The problem  
22 has been that its kept growing. It's grown through  
23 the Bar, it's grown through the Court. It wasn't that  
24 number of years ago that the Bar proposed to  
25 discipline a lawyer who was a member of an

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1 organization that promoted hate crimes. Of course,  
2 the effect was that if you attended a church which  
3 taught that sodomy was a sin, you could be subject to  
4 discipline. It's these kinds of offensive rules that  
5 were proposed and discussed that I think really  
6 discredited the Bar.

7 But, yes, the Supreme Court has authority,  
8 and if it chooses to set up an annual licensing scheme  
9 so I can get a new card, that's fine. But when the  
10 Bar goes in and starts to give opinions on legislation  
11 or promote diversity of its own type and it hasn't  
12 been the diversity of Jennifer Gratz, and it hasn't  
13 been the diversity of Barbara Bruder, and it hasn't  
14 been the diversity of Eric Russell, who were all my  
15 clients, then you see this is not an objective  
16 organization.

17 There can be a bar, don't get me wrong, but  
18 it should be voluntary. If everybody thinks the Bar  
19 is a great thing, let the Bar persuade those who wish  
20 to contribute money to it to join it. But right now  
21 the Bar doesn't have to do any persuasion. Right now  
22 the Bar is in the business of force and coercion. You  
23 are not persuading anybody to join the Bar. You  
24 either pay or you are out. I think if you want an  
25 alternative, then you promote a system of voluntary

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1 bars and let the Supreme Court do what it's going to  
2 do as a licensing entity.

3 The courts are open for malpractice, the  
4 courts are open for theft and fraud lawyers commit  
5 upon their clients. The criminal courts are open for  
6 lawyers that commit crimes. So you have some remedies  
7 already there.

8 CHAIRPERSON BUTZBAUGH: Thank you,  
9 Mr. Morgan.

10 MR. MORGAN: Yeah, sure. Thanks.

11 CHAIRPERSON BUTZBAUGH: Kathleen Allen.  
12 Ms. Allen is the current Representative Assembly  
13 chair, and she is with Legal Aid of Western Michigan.

14 MS. ALLEN: Good afternoon. I am  
15 Kathleen Allen. I am this year's Representative  
16 Assembly chairperson. I would like to thank the Task  
17 Force for the opportunity to speak to the issues  
18 covered by Administrative Order 2014-07.

19 As the RA chairperson, I and the RA believe  
20 the RA advances the concerns raised in the order  
21 performing key functions that support a mandatory bar  
22 in a way that lessens the intrusions on Michigan  
23 lawyers' First amendment rights.

24 As many of you know, the Assembly was created  
25 in 1972 because the State Bar membership had increased

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1 significantly since 1935. The Board of Commissioners  
2 requested the Supreme Court create a Representative  
3 Assembly to increase the proportion of members who  
4 could actively participate in policy-making decisions  
5 to ensure the State Bar policy was governed by a body  
6 that was more reasonably representative of its  
7 membership. Since 1972, the Assembly has grown from  
8 127 to 150 members. State Bar membership has more  
9 than tripled, growing to over 43,000 members as of  
10 March 2014.

11 Two basic First Amendment rights are affected  
12 by the mandatory bar, freedom of association and  
13 freedom of speech. Freedom of association is  
14 protected by the State Bar's adherence to Keller.  
15 Keller limits a mandatory state bar's activities to  
16 issues germane to the goals that are related to the  
17 regulation of the legal profession and improving the  
18 quality of legal services.

19 Protecting freedom of speech is a little  
20 harder to describe. The State Bar protects freedom of  
21 speech by assuring that its policy positions represent  
22 only those broadly held by Michigan lawyers that is  
23 within Administrative Order 2004-01, Keller.

24 Looking back, it seems the Supreme Court of  
25 1972 could foretell the future. The policy decisions

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1 of a large mandatory organization with diverse  
2 membership necessarily cannot reflect the beliefs of  
3 every one of its member, but the best, least intrusive  
4 organizations that are set up so that policy decisions  
5 are made after deliberation that considers, hears, and  
6 reflects the diverse interests of its members. The  
7 Assembly over the years has confirmed the wisdom of  
8 its creators, to uphold its broad demographics and  
9 geographic diversity. The Assembly's composition and  
10 diversity of members' opinions, viewpoints, and  
11 experiences fairly reflect the diversity of the  
12 State Bar membership.

13 The 1972 Supreme Court also showed its wisdom  
14 by structuring the Assembly as a deliberative body.  
15 Through these qualities, the Assembly makes our Bar  
16 association fairer and stronger.

17 At its April 26 meeting the RA affirmed its  
18 belief that the State Bar functions properly,  
19 supported its status as a mandatory Bar. The RA  
20 directed that its members' comments be summarized and  
21 provided to the Task Force at a later point. We  
22 couldn't do it so quickly for today.

23 The order, though, challenges the State Bar  
24 to demonstrate its fidelity to its proper Keller  
25 purposes carried out that are even less intrusive on

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1 the First Amendment rights of Michigan lawyers. One  
2 way, although that the suggestions were discussed, the  
3 RA did not clearly discuss a consensus of adopting  
4 those changes. I was looking at the process, and  
5 there was quite a bit of discussion, and so one way of  
6 being able to implement being less intrusive on the  
7 First Amendment rights would possibly be a joint Board  
8 of Commissioner/RA policy committee.

9 Those purposes of this committee would be to  
10 identify policies that are of interest to Michigan  
11 lawyers within the Administrative Order 2014-01, and  
12 obtain counsel's written opinion on whether policy  
13 issues might be addressed fit within the mandates of  
14 Keller or Falk. The committee could also sort policy  
15 issues for action.

16 The RA continues to believe its role as the  
17 State Bar's final policy-making body best protects  
18 Michigan lawyers' First Amendment rights as a diverse,  
19 transparent, deliberative body that often moves slowly  
20 but also moves with greater certainty of consensus.  
21 The RA could meet more often, perhaps quarterly, to  
22 address policy issues. RA members overwhelmingly  
23 support more frequent meetings, and through  
24 technology, which was discussed here today, the RA  
25 could better solicit the views of individual lawyers.

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1 Communication seems to be the key thing for  
2 most in our proud membership. E-mails to individual  
3 lawyers could discuss the policy issues and include  
4 e-mail links directly to the lawyer's representative.  
5 Policies about which the broad consensus could be  
6 addressed by electronic vote with the super majority  
7 required for passage. Work with the State Bar for  
8 creating RA with commissioner district issues to  
9 enhance targeted member distribution.

10 There was also discussion at the RA with  
11 regard to include the budget process. Currently the  
12 RA has authority to address revenue by raising dues.  
13 Consideration should be given to providing RA with  
14 more involvement, with knowledge of the budget and  
15 process. Familiarity and awareness of the budget  
16 process could help assure State Bar activities address  
17 Michigan lawyers' needs in meeting important State Bar  
18 goals.

19 The standard of State Bar policy success and  
20 failure possibly could be recalculated. If the best  
21 government is government that governs the least,  
22 perhaps the best State Bar policy is that which speaks  
23 less often but speaks clearly and with great force.

24 (Inaudible) could be given at RA functions  
25 providing input about the opinions and beliefs of

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1 Michigan lawyers on issues involving administration of  
2 justice, advancement of jurisprudence, improving  
3 relations between the legal profession and public and  
4 promote the interest of legal profession.

5 Again, at its April 26 meeting, the RA firmly  
6 believes the State Bar functions properly support the  
7 status of the mandatory bar. The RA directed that its  
8 members' comments be summarized and presented to this  
9 committee. On behalf of myself, the RA, its members,  
10 I thank the Task Force for this opportunity to address  
11 the concerns of the RA, identify some possible  
12 structural changes that might enhance protection of  
13 Michigan lawyers' First Amendment rights, but I want  
14 to raise first the fact that the RA believes in its  
15 current structure as a transparent, diverse,  
16 deliberative, final State Bar policy-making body  
17 already provides ample protection for the First  
18 Amendment rights of Michigan lawyers.

19 I want to say something separate from the RA.  
20 I also work for Legal Aid, and there were some  
21 questions earlier with regard to the access to justice  
22 and that particular part of the mandatory bar. I  
23 think that program, as for myself, is a phenomenal  
24 program. What we need is to be able to meet the needs  
25 of our members and the community. That program has

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1 collaborated with the community, attorneys, and  
2 reaches parts of the state. I had worked with the  
3 Legal Assistant Center in Grand Rapids, and I have  
4 never seen such a collaborative work that is  
5 incredible and has reached and met the goals also of  
6 the State Bar by protecting its people.

7 Any questions?

8 CHAIRPERSON BUTZBAUGH: Thank you, Ms. Allen.  
9 MS. ALLEN: Thank you.  
10 CHAIRPERSON BUTZBAUGH: Valerie Newman.  
11 Ms. Newman works for the State Appellate Defender  
12 Office.

13 MS. NEWMAN: Good afternoon. There is a  
14 little bit of ringing from the microphone. I tend not  
15 to need it, so if you want me to use it, I will. If  
16 it's okay, I am going to step to the side. If you  
17 can't hear me, let me know.

18 MR. MCSORLEY: I will raise my hand.  
19 MS. NEWMAN: Excellent.

20 I want to thank Chairman Butzbaugh, of  
21 course, and everyone for being here.

22 I think I have somewhat of a unique  
23 perspective. I personally feel completely muzzled by  
24 Keller. As someone who's been involved with the Bar  
25 for over 20 years, I guess I have the opinion that the

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1 Bar really adheres to Keller in a very significant and  
2 proper manner. Despite the fact that I personally  
3 would like to do more, I am often told no, and I am  
4 often told that my creative approaches to Keller are  
5 just not going to fly.

6 So I speak as one. For those of you who  
7 don't know me, I have been involved with the Bar for  
8 20 years. I started out on a committee that no longer  
9 exists, which is Defender Systems and Services. We  
10 heard from an earlier speaker, I think it was  
11 Judge Boyd, the decades that we have been working on  
12 indigent defense and the fight within the Bar, and it  
13 was our committee actually, even before I got on it,  
14 when Norris Thomas was leading it, that decades and  
15 decades ago started working towards reform on indigent  
16 defense.

17 I think without the resources that a  
18 mandatory bar has, something, whatever you think of  
19 the Michigan Indigent Defense Commission legislation,  
20 I don't think it would happen, I don't think those  
21 reforms would have happened without the steady hand,  
22 the consistent, steady hand of the State Bar moving  
23 the project forward. If we were a voluntary and the  
24 resources weren't there, I think it's a project that  
25 easily could have been dismissed at any point along

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1 the way.

2 And I want to speak in particular to two  
3 projects. I have been involved in a lot in the  
4 State Bar. I have presented to the Representative  
5 Assembly. I have had things go up to the Board of  
6 Commissioners. I have interacted in many different  
7 ways and in different State Bar, and I have chaired  
8 committees, but two things I think of particular  
9 importance for what we are talking about here today in  
10 terms of resources and inclusion and transparency are  
11 two task forces that I co-chaired, both with  
12 Nancy Diehl, and for those of you who don't know  
13 Nancy, she is a former State Bar president, as well as  
14 at the time of the first task force was head of the  
15 Wayne County Prosecutor's Office, Trial Division. At  
16 the time of the second task force she was retired.  
17 For those of you who don't know my background, I am a  
18 criminal defense attorney.

19 So it was Nancy and I -- well, proposals were  
20 submitted to the Representative Assembly, and they  
21 were passed. And so for the first task force the  
22 charge was to look at issues involving custodial  
23 interrogations, and we had a wide charge to, you know,  
24 suggest court rule reforms, legislation, you know,  
25 basically anything that we thought could better the

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1 process. And one of the reasons I undertook this  
2 project is because from what I see in my work that  
3 there is a lot of problems in the criminal justice  
4 system with the lack of transparency when suspects are  
5 interrogated, and in doing research, there is a lot of  
6 states that already either had legislation or by court  
7 rule had adopted procedures to make the process more  
8 transparent. And you will hear that word a lot from  
9 me, because that's sort of my mantra, and that's one  
10 of the reasons I love the State Bar and working with  
11 the State Bar, because I think transparency is  
12 critical, and I think the State Bar is very  
13 transparent.

14 I will diverge for a second. To the people  
15 who say there is not enough information, should we be  
16 sending more e-mails, should we be involving people  
17 more? I don't know about the rest of you, but I am on  
18 every list serve that the State Bar has. I get a lot  
19 of e-mails. Do I always have time to read them? No,  
20 but the information is so easily accessible and in  
21 front of you about everything that's going on and the  
22 positions that groups have taken and the statements  
23 and how many people on the committee, how many voted  
24 in favor, how many opposed, how many abstained, what  
25 the Keller permissible reason is for moving forward.

1 So personally I don't know how there could be  
2 more information, at least maybe I am not that smart.  
3 I couldn't absorb more information, I don't think,  
4 than is already available. Maybe other people can,  
5 but I think that the Bar does a really wonderful job  
6 of conveying what's going on. And the committee  
7 structure is a wonderful way for people to get  
8 involved as well, and I can tell you as head of a  
9 committee, it's really difficult to get people  
10 involved. I love everyone who is here today, but  
11 where are all the people when you are trying to  
12 populate these committees and you are sending out  
13 notices, and I don't know about other people, but I  
14 talk to people how great it is to work with the  
15 State Bar, why don't you volunteer? You often get I  
16 don't have time or I can't make the commitment kind of  
17 thing. So I think it's important to keep all that in  
18 mind.

19 Again, I think the Bar does a really  
20 wonderful job of trying to bring lawyers in by  
21 notifying them of opportunities to get involved and to  
22 make their opinions heard in a meaningful manner, and  
23 so no one is -- on the First Amendment grounds, I  
24 don't see it. I just don't see it. There is so much  
25 opportunity to express your voice whether you agree

1 with something or disagree with something or want to  
2 get involved so you can be involved in a more  
3 meaningful manner. It's all there for anybody who  
4 wants to do it.

5 So getting back to the task forces. So the  
6 task force, the first one was on custodial  
7 interrogations. Ultimately legislation was passed,  
8 but it's, sort of echoing Bob Gillett's comments from  
9 before, sometimes it takes a long time. Took us seven  
10 years of what was supposed to be a one-year task force  
11 that kept getting renewed, but we were making great  
12 progress, and it took a long time, because we wanted  
13 to do it right, and to do it right means you get all  
14 the stakeholders involved. We had prosecutors, we had  
15 judges, we had criminal defense attorneys, and we had  
16 police officers, because they are the ones doing the  
17 work. So we reached out -- that's the other thing I  
18 wanted to make note of is we reached outside of  
19 lawyers to bring other stakeholders into the process  
20 so that we would have everyone at the table that was a  
21 stakeholder in this issue.

22 And, you know, it's really unprecedented, and  
23 Nancy and I spoke to the Michigan Association of  
24 Chiefs of Police and presented on the topic. We had  
25 complete buy-in from that organization to our project,

1 and it wound up being a real -- you know, you want to  
2 talk about consensus and that kind of a group, it was,  
3 for me, it was a real learning experience in dealing  
4 with a wide variety of people who are coming from  
5 insulated perspectives but yet everyone was willing to  
6 sit at the same table, listen respectfully to what  
7 people had to say, and a lot of people moved in that  
8 room in different directions to reach that consensus.

9 And I think we wound up with a really  
10 spectacular piece of legislation, and my time is up,  
11 so I won't bore you with the second task force, but I  
12 think it's evident that I am in favor of the mandatory  
13 bar. I think the Bar works exceptionally well. With  
14 the things that we have in place now, could things be  
15 better? Things can always be better. They could also  
16 be worse.

17 So over my using the Bar, I have certainly  
18 seen stronger and stronger adherence to Keller, and  
19 under Janet I think, like I started out saying, it's  
20 an immovable line. It either fits and we can go  
21 forward or doesn't fit and you have got to find  
22 another way outside of the State Bar to try and do  
23 whatever advocacy you want to do.

24 So are there any questions?

25 MR. MCSORLEY: I do. Ms. Newman, you have

1 clearly told us that you fully and unquestionably and  
2 unhesitatively -- making up a new word there --  
3 embrace the mandatory, compulsory bar as it exists in  
4 the state of Michigan, correct?

5 MS. NEWMAN: Yes, absolutely.

6 MR. MCSORLEY: You were here, you have been  
7 here this afternoon and know that not everyone shares  
8 that view?

9 MS. NEWMAN: Yes.

10 MR. MCSORLEY: There are some members of the  
11 State Bar who believe we would operate just as  
12 effectively, perhaps more effectively and perhaps more  
13 responsibly at times if we were either a single  
14 voluntary or a number of voluntary associations. I  
15 don't want to put you on the spot, but I am. How do  
16 you respond to that?

17 MS. NEWMAN: I would just say that I disagree  
18 with that. I mean --

19 MR. MCSORLEY: That's a good start.

20 MS. NEWMAN: I argue here a lot. I have  
21 learned to answer questions directly.

22 The reason for that is -- well, there is a  
23 number of reasons for that, but I think the primary  
24 reason for that is resources. So I have seen myself,  
25 when you work through, let's say the Criminal Law

1 Section or a section, any of the sections that operate  
2 somewhat independently from the Bar, you can do  
3 certain things, but there is not -- there is not the  
4 overarching follow-through. I mean for me, the key  
5 reason that myself and Nancy were successful with the  
6 task forces and some of the other work that's been  
7 very successful through the Bar is because of the  
8 resources that the Bar is able to put behind these  
9 efforts, and if I were doing this individually or  
10 let's say as part of Criminal Law Section, because  
11 that would be the logical place for me to be, I would  
12 say unequivocally it wouldn't have happened.

13 Even as passionate as I was about the issue  
14 and driving as I was about the issue, because we  
15 needed those resources. There is no way that as the  
16 Criminal Law Section we were going to reach out to the  
17 Michigan Association of Chiefs of Police and the  
18 Sheriff's Association and these types of groups with  
19 the credibility that the Bar brings to the table, and,  
20 in fact, this is the State Bar of Michigan. That's  
21 why those groups were willing to participate, because  
22 it was the State Bar of Michigan.

23 So I think it's a -- I mean, I understand as  
24 is a noncompulsory bar there would still be resources  
25 to do some things, I understand that, because people

1 would, many people like me would voluntarily pay the  
2 extra money, but the resources would not be sufficient  
3 I don't think, and I am no expert like some of the  
4 other folks that have talked about bars. I haven't  
5 don in-depth research into anything. But from what I  
6 have read, resources would not be sufficient for us to  
7 be able to do task force type work of that caliber and  
8 that length, and I can tell you it would not have come  
9 to fruition without the State Bar folks. I mean, they  
10 sent out letters and they helped us contact people and  
11 they helped us find things and we got some interns to  
12 do research. I mean, the resources that were given to  
13 us were significant. And the credibility of it coming  
14 from the State Bar made a significant difference.

15 MR. MCSORLEY: One other question. And you  
16 mentioned that there is no dearth of information. You  
17 have plenty of information coming across the internet,  
18 more than perhaps you are able to keep up with, I  
19 think you said. But your comment with reference to  
20 positions by the Bar as to legislative advocacy, at  
21 least I heard it to -- you were speaking of after the  
22 fact, after the Bar's reporting positions it has  
23 taken.

24 MS. NEWMAN: Right.

25 MR. MCSORLEY: Do you think there is an

1 increased value of the Bar being in a position or  
2 developing a format, a protocol, a resolution of some  
3 sort that would have the information out there before  
4 the Bar takes a position?

5 MS. NEWMAN: I don't see any problem with  
6 that. I was here all morning, so I was listening to  
7 the different suggestions that people had, and I don't  
8 think there is any -- the only thing I would urge is  
9 that if any reforms are undertaken that they not slow  
10 down the process even more or the Bar won't be able to  
11 respond in a meaningful manner to virtually anything.  
12 But I think that, for example, I co-chair a criminal  
13 issues initiative with my co-chair who is going to  
14 speak after me. If we take a position and it goes to  
15 the Bar, I don't think it would hurt to have a  
16 mechanism where the Bar then could post these groups  
17 have taken a position on these legislative items maybe  
18 before it goes to the Board of Commissioners so other  
19 people would have an opportunity to see what's going  
20 on and weigh in.

21 If we are saying it's Keller permissible for  
22 this reason and Allan Falk wants to say, Well, I  
23 vehemently disagree with you, it's not Keller  
24 permissible for the reason you stated and it's not  
25 Keller permissible for any reason, then sure, make it

1 available.

2 Personally, you know, we are lawyers. I  
3 think the more input the happier the Board of  
4 Commissioners and people would be because that's the  
5 point, right? We want to speak on behalf of  
6 everybody, even if everybody doesn't agree with us.  
7 The more input the better.

8 MR. RIORDAN: I am going to, Ms. Newman, need  
9 your microphone.

10 MS. NEWMAN: I can repeat the question if you  
11 like.

12 MR. RIORDAN: You said early on that perhaps  
13 the Bar doesn't even go far enough in some of its  
14 advocacy, if I heard you correctly.

15 MS. NEWMAN: Personally speaking.

16 MR. RIORDAN: What other things do you think  
17 the Bar should be involved in?

18 MS. NEWMAN: I guess it all depends on your  
19 definition of access to justice. I have I think a  
20 very broad definition of access to justice that  
21 doesn't necessarily match with a very strict  
22 interpretation of Keller. If you are going to ask me  
23 for something specific, I would have -- I should have  
24 come prepared with an example, but I don't have one  
25 off the top of my head.

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1 MR. RIORDAN: That's all right.

2 MS. NEWMAN: I know I have been shot down

3 many, many times, and if I had to go through my file,

4 I could probably find numerous examples. Does that

5 help?

6 MR. RIORDAN: That's fine.

7 CHAIRPERSON BUTZBAUGH: Thank you,

8 Ms. Newman.

9 CHAIRPERSON BUTZBAUGH: Ms. Garretson.

10 Ms. Garretson is a professor at Cooley Law School.

11 MS. GARRETSON: Good afternoon. William

12 Shakespeare's lines are often taken out of context.

13 He did not say, for example, first let's kill the

14 lawyers. That line was uttered by Dick the Butcher,

15 who was a follower of the anarchist, Jack Cole, who

16 sought to overthrow the government, and Dick the

17 Butcher knew that the first thing any potential tyrant

18 has to do to eliminate freedom from a society was to

19 kill the lawyers.

20 This is a compliment to our profession. A

21 profession that at its core advocates for freedom and

22 for justice. But we should not take advocating for

23 justice, as many have taken Shakespeare, out of

24 context.

25 Every single person who has taken the oath in

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1 Michigan to practice law has promised to advocate for

2 justice. When we put up our hand and we swear that we

3 will uphold the constitution, Michigan's Constitution,

4 we promise to uphold the right of every single

5 individual. We promise that no one will be deprived

6 of life, liberty, or property without the due process

7 of law. And that's fairness. And you know what the

8 definition of justice is in Black's Law? Fairness.

9 We all as lawyers make a promise to advocate for

10 justice.

11 And the State Bar has a constitutionally

12 recognized right to take part in activities that

13 relate to the very specific areas of justice that have

14 been defined and outlined in Keller. We should not

15 take this right out of context. This right, which is

16 not to use dues for activities of an ideological

17 nature but to provide positions in Keller specific

18 areas only, is an effective and important rule for the

19 Bar.

20 Why a unified voice? Because ideological

21 positions advance one agenda, but a position from a

22 unified bar includes those agendas and adds more, and

23 it adds more from an expertise of lawyers all across

24 the state. And the Bar's position is stronger for

25 that.

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1 As you well know, the Bar is permitted to use

2 its dues to take positions on activities that include

3 activities that are reasonably related to the

4 improvement of the functioning of the courts and the

5 availability of legal services. These things. The

6 functioning of the courts and access to them are

7 matters of justice.

8 Every single person who is a member of the

9 State Bar who talked to you today promised when they

10 took the Michigan oath that they will never reject the

11 cause of the defenseless. That was an individual

12 promise by every lawyer in Michigan. It's the seventh

13 promise in our oath. The Bar took a position on that

14 too, and the Bar spoke in a unified voice in defending

15 the defenseless, and as a result of our unified voice

16 Governor Snyder signed legislation that will overhaul

17 Michigan's indigent defense system.

18 The Bar's position on indigent defense was

19 the result of vibrant discussion among its members. I

20 was in those meetings with criminal defense attorneys,

21 and they did not uniformly approve of that

22 legislation. And there were prosecutors in those

23 meetings who rejected a lot of that legislation too.

24 But the Bar's position was a makeup of all of those

25 voices, and it reflected a bar membership that knows

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1 that it is just to improve the functioning of the

2 courts and the availability of legal services.

3 Now, can some aspects of justice look

4 differently to individual members of the Bar? Of

5 course. I as a former federal prosecutor who was then

6 a criminal defense attorney understand very well that

7 standing on different hills casts different shadows in

8 the valley. But no matter the view from where you are

9 standing, you can see what is fair. A shadow does not

10 obscure what is just. Improving the functioning of

11 the courts is just. Making legal services available

12 is just. And as the great trial lawyer, Daniel

13 Webster, said, Justice is the greatest concern of man

14 on earth.

15 The Bar has a constitutional right to take

16 part in activities that relate to the very specific

17 areas of justice that we can all see no matter where

18 you are standing and that are outlined for us in

19 Keller. And denying the Bar the right to take

20 positions on the basic issues of how the courts work

21 and who has access to them denies justice, and I am

22 afraid that doing so will replace our force voice with

23 a cacophony of special interests only.

24 MR. RIORDAN: Professor.

25 MS. GARRETSON: Judge.

1 MR. RIORDAN: Very funny. I notice that you  
2 graduated from law school in Nebraska?

3 MS. GARRETSON: I did.

4 MR. RIORDAN: You have been at Cooley a long,  
5 long time. Do you still keep in touch with your  
6 friends out in Nebraska, assuming you had friends when  
7 you were in law school?

8 MS. GARRETSON: My constitutional law  
9 professor, Professor Fenner, for whose brother I  
10 clerked at the Western District in Kansas City, is now  
11 the president of their hot mess of a voluntary bar.

12 MR. RIORDAN: That's what I was going to ask  
13 you about. What's your opinion on what's going on in  
14 Nebraska?

15 MS. GARRETSON: From what I know from people  
16 who I know, I don't think that anybody has an opinion  
17 right now except that it is in tremendous flux. I  
18 still get their Bar magazine. I am actually an  
19 inactive member, and when I left and came back to  
20 Michigan seven years ago from Kansas City, I  
21 maintained my inactive membership there, so I still  
22 get some of the stuff. They are very unsure as to  
23 what will happen and they are very unsure about what  
24 to do, and they are very unsure about what their  
25 mission statement will look like in a year.

1 MR. RIORDAN: I notice that your e-mail to  
2 Chairman Butzbaugh, that by calling the Keller  
3 guidelines, we forgot the Bar took positions  
4 politically, so the Bar improved the system for  
5 everyone. I was sure that those guidelines are  
6 actually followed. That's why we are here today,  
7 because there has been a blurring and there have been  
8 instances where there is a perception people crossed  
9 those guidelines. In your opinion how do we  
10 accomplish that? Nebraska on one end and maybe  
11 Michigan over on this end, how do we strike some kind  
12 of balance?

13 MS. GARRETSON: For two points. One, that  
14 might be the perception, but perception is not always  
15 reality. And it is not necessarily a political  
16 opinion if you just simply disagree with it. We have  
17 ways to reflect dissent on the committees I am on, on  
18 the sections that I am on. We tell the whole world  
19 less comes out of the committees because we can't come  
20 to a decision than actually moves forward. So if  
21 Keller needs to be implemented differently, I think,  
22 you know, okay.

23 MR. RIORDAN: What suggestions do you have  
24 for us?

25 MS. GARRETSON: I am involved at a pretty low

1 MR. RIORDAN: So administratively it's in a  
2 state of flux. I read a letter today from the  
3 executive director there, but their supreme court has  
4 to make a decision, and you talk a little bit about  
5 justice, I think it was Justice Oliver Wendell Holmes  
6 said it's not their job to do justice. It's got to  
7 follow the law, and it looks like the Supreme Court in  
8 Nebraska tried to follow the law, the First Amendment,  
9 and seeing how political the arena. Maybe that's an  
10 extreme, but is that something that we should be  
11 looking at as a Bar here to ensure that the Bar stays  
12 out of politics?

13 MS. GARRETSON: Well, I think so. I think  
14 absolutely, and I think already right now when Keller  
15 prohibits us from using our Bar dues to promote an  
16 ideological advancement, absolutely. And if that  
17 needs to be more clarified, if Allan needs to be told  
18 no more, you know. But there is a difference. There  
19 is a difference in saying it's an ideological  
20 advancement and advancing access to the courts. I  
21 mean, that is not political. That is justice. Those  
22 are things we promise as lawyers to do, and does there  
23 have to be a line drawn? Absolutely, and it was drawn  
24 in Keller. And do there have to be tweaks as to how  
25 Keller is applied? Maybe.

1 level at the Bar. I get a lot of we can't do that  
2 because that's not Keller permissible. So I don't  
3 know that I have any ideas as to -- transparency, one,  
4 I think is important, but also explaining the reasons  
5 why no I think is important. And to the extent that,  
6 as the Representative Assembly president offered  
7 earlier, letting the entire Bar know about positions  
8 before they are taken, positions by the Bar, I mean,  
9 more active transparency of that would certainly be  
10 helpful.

11 MR. RIORDAN: My apologies using you as an  
12 example.

13 MS. GARRETSON: Oh, no. You know me well  
14 enough. It takes more than that. Thank you.

15 MR. ELLSWORTH: I have one question. You  
16 referred several times to the availability of legal  
17 services or access to legal services, but the wording  
18 in Keller is improving the quality of legal services.  
19 Isn't there a difference between availability and  
20 quality?

21 MS. GARRETSON: Sure. Improving the  
22 functioning of the courts though must include access  
23 to the courts. I mean, if there are some people who  
24 simply can't get in, then those courts don't function.

25 MR. ELLSWORTH: So that's the distinction

1 that you would make?

2 MS. GARRETSON: Yeah, but we would include,  
3 right, the quality of services. I am sorry. I am not  
4 disagreeing that it includes the quality of services  
5 and improving the functioning of the court, which  
6 includes access to the court.

7 MR. ROMBACH: I think what we may be getting  
8 at is the difference between Administrative Order  
9 2004-1 and actually what's coming from Keller. I  
10 think you are quoting the Administrative Order as  
11 defined by the Supreme Court's direction to the State  
12 Bar, right?

13 MS. GARRETSON: That's right, and thank you.

14 MR. ELLSWORTH: Thank you.

15 CHAIRPERSON BUTZBAUGH: Anything else?  
16 Thank you very much.

17 Danielle Burza. Is Danielle Burza here?  
18 Danielle Burza.

19 Carl Schier.

20 MR. SCHIER: Good afternoon. My name is  
21 Carl Schier. I am a lawyer. It's my view that the  
22 State Bar of Michigan should remain an integrated bar  
23 association.

24 In the first Falk decision Justice Williams  
25 declared that the state, and by state he meant the

1 The second is the Bar should actively promote  
2 the rule of law, and we all know what that is, but  
3 that subject was addressed in a symposium whose  
4 contents were reproduced in the February 1961 edition  
5 of the Michigan Law Review. That's available and is  
6 still fresh today.

7 I would also add the following as being  
8 properly within the scope of the Bar's attention. The  
9 well-being of public institutions in a time of extreme  
10 partisanship. That's under attack by the legislature  
11 in an attempt to weaken the Bar, and that's the  
12 subject. I know it's political, and I would disagree  
13 that we can't have some content that bears on politics  
14 and yet remains within the integrity of the profession  
15 and the law, but when the Bar is attacked and it's a  
16 public institution, which it is, then that should be  
17 responded to.

18 Another is widespread hostility to government  
19 under law, and the last is a rampant misconduct and  
20 disregard of the law and the financial affairs of the  
21 public and private sectors. These are all legitimate  
22 subjects of attention by the organized Bar and the  
23 public interest.

24 Recent Law Review article suggests that all  
25 lawyer speech, and this was surprising to me when I

1 Bar, has a compelling interest in promoting  
2 improvements in the administration of justice and  
3 advancing the size of jurisprudence in order to  
4 fulfill its function of protecting the health, safety,  
5 and welfare of citizens. The state may employ  
6 activities which are germane to this compelling state  
7 interest. That's Schier's preference, but the law is  
8 in Keller, and the standard there is the guiding  
9 standard must be whether the challenge expenditures  
10 are necessarily or reasonably incurred for the purpose  
11 of regulating the legal profession or improving the  
12 quality of legal service available to the people of  
13 the state.

14 Now, I think it's important to expand that  
15 notion, because I think it's far too narrow, and I  
16 think that the Bar can properly identify and announce  
17 functions that fall within regulating the legal  
18 profession or improving the quality of legal service.

19 Number one, and it's been talked about  
20 briefly, but number one is enlarging access to the law  
21 in the broadest sense of access. I am not talking  
22 about access to courts or access to justice. I mean  
23 access to the law in the broadest way that you can  
24 achieve that, and I will talk about an example of that  
25 in just a minute.

1 read this, recent Law Review article suggests that all  
2 lawyer speech should have First Amendment protection.  
3 That's Tarkington. It's in 45 U.C. Davis Law Review  
4 2011. It's a very interesting article.

5 That approach, together with a reasoning in  
6 Citizens United, in my view provides a different  
7 framework for analysis of Falk-type claims arising in  
8 the future. Obviously Keller is the law, but the law  
9 in Michigan is also the second Falk opinion, and I  
10 think that the legal landscape for First Amendment  
11 freedom of speech has changed dramatically since the  
12 last Falk opinion, so that you have to have that in  
13 mind as you proceed.

14 Earlier this year the Supreme Court solicited  
15 comments and conducted a hearing on proposed new rules  
16 2E001 et seq. These are rules governing electronic  
17 case management and filing. The proposal drew a  
18 comment from the State Bar of Michigan over the  
19 signature of its executive director and drew comments  
20 from various Bar committees in writing. Correctly  
21 adopted and developed, the electronic case filing,  
22 electronic file and case management will greatly  
23 expand access and provide a trove of information about  
24 the operation of courts. Mismanaged spiraling costs  
25 will reduce access substantially. The organized Bar

1 has a prominent role in the proper development and  
2 application of this service.

3 This is what I mean about access. Number  
4 one, the current pilot programs are activities that  
5 deserve the attention of the Bar, because as currently  
6 constituted, it's simply revenue streams for counties  
7 who have adopted programs. There is no attempt to  
8 have a unified statewide program, and I know they are  
9 called pilot projects and I know it could be argued  
10 that the pilot projects will lead to a uniform  
11 standard, but currently they are simply revenue  
12 sources, and that's unconstitutional.

13 The second and more important thing is that a  
14 proper program would provide a trove of information  
15 about the operation of the courts. I have come to  
16 learn at the end of my career how important numbers  
17 are everywhere, and they are important in the practice  
18 of law and the administration of justice as well as in  
19 the medical profession or in economics or wherever.  
20 But we don't have numbers, but you can get them if you  
21 have a uniform system and you have data coming in in  
22 streams to you about decisions and how cases are  
23 decided and how judges are deciding cases and how many  
24 cases are decided on summary disposition and how many  
25 plaintiffs cases are resolved against them and how

1 many defendants cases are resolved in their favor by  
2 summary disposition. All of this information is  
3 access, and this is what I mean by access in its  
4 broadest sense.

5 Thus, the scope of neutral Bar activity, and  
6 I say neutral with my tongue in cheek. I know I am  
7 talking about politics. The scope of neutral bar  
8 activity which is of compelling state interest greatly  
9 exceeds but has been acknowledged by an existing  
10 judicial opinion. How such activity will fare in the  
11 balance of competing First Amendment claims remains to  
12 be seen.

13 The Michigan Supreme Court has asked whether  
14 the State Bar's duties and functions can be  
15 accomplished my means less intrusive upon the First  
16 Amendment rights of objecting individual attorneys.  
17 My response is Michigan has had an integrated bar for  
18 79 years. It has survived the Falk suits. The second  
19 Falk opinion affords an adequate framework to address  
20 First Amendment challenges from aggrieved attorneys.  
21 I would let future claims play out on a case-by-case  
22 basis. Thank you.

23 CHAIRPERSON BUTZBAUGH: Any questions.

24 MR. MCSORLEY: I will ask a quick question.

25 We are delighted that you came to join us today. You

1 made a promise about toward the end of your practice.  
2 I hope it's not too soon.

3 MR. SCHIER: What else am I going to do?

4 MR. MCSORLEY: Right. The question that I  
5 asked Valerie previously was you began your comments  
6 that you are in support of the mandatory bar and you  
7 referenced the fact that it has a 79-year history, but  
8 recognizing that not everyone shares that perspective,  
9 how would you respond to those who are just as fervent  
10 about voluntary bars as opposed to a compulsory  
11 mandatory bar?

12 MR. SCHIER: I looked at the history of the  
13 Bar and I looked at the Inns of Court, and  
14 unfortunately I didn't have time to look as far as I  
15 would have liked to look, but they date back to the  
16 15th century, and they were first, as I understand it,  
17 designed to educate lawyers because there weren't a  
18 lot of books, and so lawyers came together to read law  
19 and to understand law, but they did it in groups  
20 because there weren't enough books. And Inns of Court  
21 have continued, and as best I can find they are all  
22 now controlled by legislation in Great Britain, but I  
23 think it's compulsory, and I think everyone has to  
24 join, but don't quote me. I am not absolutely  
25 certain.

1 There are 22 states in the United States who  
2 have a mandatory bar, and a bar association, joining a  
3 mandatory bar doesn't mean you are compromised in some  
4 fashion by having to join a bar. What it means is  
5 that the Bar has said it's important enough to the  
6 public interest of the people of the state that we all  
7 be together in one organization and support one  
8 another. The bar is saying this to its members. If  
9 the bar is saying that to its members and the bar  
10 feels that this is the way it should be, and 22 states  
11 have done it that way, then members of the bar should  
12 appreciate the fact that together they speak with one  
13 voice about many issues and about some of the things  
14 they can dispute if they wish, but it's one  
15 organization, it's institutional, and it is active in  
16 the public interest. Because what is the practice of  
17 law if not something done in the public interest?

18 So I don't know whether that's a satisfactory  
19 answer to the question, but I think that a unified  
20 integrated bar represents something to the public that  
21 a voluntary bar doesn't, and for that reason I think  
22 it can be supported.

23 MR. MCSORLEY: Thank you very much.

24 CHAIRPERSON BUTZBAUGH: Any other questions  
25 for Mr. Schier? Thank you, sir.

1 MR. SCHIER: Thank you.

2 CHAIRPERSON BUTZBAUGH: Austin Hirschhorn

3 MR. HIRSCHHORN: Good afternoon. I did

4 something a little different to prepare for talking to

5 you this afternoon. I have spent the last several

6 weeks talking to as many lawyers, judges and lay

7 people as I could about this issue.

8 It's interesting, because every lawyer I have

9 spoken to and every judge I have spoken to seems to

10 favor the mandatory bar for two reasons. First, the

11 protection of the public. Second, the rigorous

12 investigations that the State Bar does in the

13 admission process and in the regulatory process of

14 dealing with lawyers who take advantage of clients.

15 Now, I have been a lawyer since December of

16 1960. Early in my career I was a lawyer who

17 represented the Client Security Fund and the

18 collection from the lawyers who caused claims to be

19 filed with the State and paid by the State. I am

20 proud to say that I was successful in catching up with

21 many of these thieves and recovering the money that

22 the State had paid.

23 I am also a lawyer who did a lot of work for

24 the State Bar of Michigan in connection with the

25 unauthorized practice of law. I am also proud to say

1 I may have won the only case the State Bar ever won in

2 the unauthorized practice of law litigation. That

3 involved the Christian Memorial Cultural Center that

4 Judge Hilda Gage, when she was on the Oakland County

5 bench issued a permanent injunction against preventing

6 them from, as part of their cemetery lot sales

7 process, providing free estate planning to the

8 purchasers of the cemetery lots.

9 But I also have many good friends. In fact,

10 college roommate, brother, his brother who are lawyers

11 in Illinois -- Illinois does not have a mandatory bar.

12 They have a voluntary bar association. There are

13 weaknesses in voluntary bar associations, I think,

14 that do not have the regulatory activity that we have,

15 and I think that's important to maintain the client

16 confidence in what we are doing. And the people that

17 I have talked to, they all have stories about lawyers,

18 and they paid the lawyers money and they didn't get

19 what they bargained for. There are others who say

20 every lawyer they have ever worked with has been great

21 and done everything I expected and more.

22 I think that at least personally I think the

23 system works. I have been proud to be part of it. I

24 think it works. I don't see any reason to fix it if

25 it isn't broken. And I think the areas where it's

1 broken have been addressed and are being fixed and are

2 being dealt with on a fine basis. That's about all I

3 have to say. If anyone has any questions, I will be

4 happy to try to answer them.

5 CHAIRPERSON BUTZBAUGH: Any questions?

6 MR. HIRSCHHORN: One thought I will share

7 with you today, today I was at a pre-trial this

8 morning. That's why I didn't get here earlier. I was

9 in the 36th District Court. It involved a case where

10 the plaintiffs did not show up for a mandatory

11 pre-trial, and I was talking with the judge who

12 dismissed the case when they didn't show up. I had

13 called the plaintiffs in the case. I was representing

14 a corporate defendant. It had been filed as a small

15 claims case and got transferred into the general

16 jurisdiction because my client was a corporation,

17 et-cetera, et cetera, and I called the plaintiffs, and

18 they said to me that when the judge told them at the

19 last pre-trial that they needed a lawyer to represent

20 them and they told me that they weren't coming to

21 court because they couldn't afford to hire a lawyer.

22 Now, my heart went out to them, but the judge

23 made me sit around for about 45 minutes to see if they

24 would show up and then dismissed the case without

25 prejudice. So they are going to have the right to

1 file again. They can get back in the system if they

2 want to. I don't believe they will.

3 But this is -- and then I had a discussion

4 with the judge. I told him I was coming to Lansing, I

5 would appreciate him getting me out of there

6 reasonably quickly, and he said that the 36th District

7 Court is facing a very interesting dilemma with the

8 landlord/tenant practice and the foreclosure practice.

9 There are a, as he quoted, advisers, who are

10 distributing 35-page memorandums that they are selling

11 to litigants and promising litigants that filing these

12 35-page memorandums will prevent the foreclosure

13 action, will prevent the landlord/tenant action and

14 will protect them, and they are charging a lot of

15 money for it. And he is saying, he was saying that if

16 this practice continues, what are we going to do? How

17 are we going to deal with it with these hoards of

18 people who have paid money for this horrible advice

19 and will get nothing for it, and what shall we do

20 about it.

21 MR. MCSORLEY: I know what we are going to

22 do, we are going to call Austin Hirschhorn, because he

23 has already won the case in front of Judge Hilda Gage.

24 MR. HIRSCHHORN: That was a little different

25 case. I know that within the federal system where I

1 do quite a bit of practice, and I have been on the  
2 federal panel for more than 50 years, so I am not  
3 talking to you from a totally plaintiff's position. I  
4 have done all sorts of legal work. In fact, many  
5 lawyers who I would refer to as clients of mine  
6 because they trust me to do things that they can't do  
7 themselves, and they will hire me to do things for  
8 them.

9 But in the federal system, in the bankruptcy  
10 courts at least, they were finding that with the 2005  
11 amendment to the bankruptcy code that permitted  
12 advisors or practitioners to file bankruptcy petitions  
13 on behalf of people, petition preparers, they have  
14 instituted criminal procedures to prevent these people  
15 from filing them, referring matters to the U.S.  
16 Attorney's Office when they continue to file after  
17 having been barred from filing them, and they are  
18 dealing with it. And one of the answers to some of  
19 the problems that exist within the system is using  
20 more of the criminal procedure.

21 One of the programs I attended this week  
22 involved an attorney lawyer confrontation or exchange  
23 that was part of the State Bar general practice  
24 section. It was a meeting at Amdiano's Monday night.  
25 They had a Macomb County circuit judge who does family

1 difference between the young lawyers today and the  
2 lawyers that were around when there was a 15,000  
3 member bar. The courts and the lawyers all knew who  
4 the bad guys were, the guys' whose word you could not  
5 trust.

6 Today many lawyers complain because perhaps  
7 25 percent of their time is spent documenting what  
8 they are doing because they cannot rely on the word or  
9 the things that another lawyer says to them. That's  
10 one of the sad things that is going on in the Bar, and  
11 I think one of the things that, one of the  
12 recommendations that should probably be made is that  
13 there be mandatory ethics courses within all of the  
14 law schools, and I am sort of a proponent for some  
15 mandatory continuing legal education for the Bar,  
16 which has never worked in this Bar, because the people  
17 who need it would never show up for the classes. But  
18 I still think it's a good idea. Thank you.

19 CHAIRPERSON BUTZBAUGH: Thank you. James  
20 Derian.

21 MR. DERIAN: Good afternoon Mr. Chairman,  
22 members of the Task Force. I don't know if I am more  
23 relieved to finally stand up before you or get off  
24 those hard wooden benches. Either way, it's good to  
25 be here.

1 law, Judge Switalski. They had Connie Kelley, a Wayne  
2 County family law judge. They had John O'Brien, who  
3 is an Oakland County general practice judge. They had  
4 Ed Sosnick, a retired Oakland County circuit judge,  
5 who was a mediator. And then they had an assistant  
6 U.S. attorney, John O'Brien. They had Dan McGinnis, a  
7 family law practitioner in Oakland County, and they  
8 had the new chief of the Macomb County Homicide  
9 Division, a fellow who has done a lot of defense work  
10 in his lifetime and is now prosecuting murder cases  
11 for Macomb County. And it was very fascinating,  
12 because all of them seemed to think that an organized  
13 mandatory bar was very helpful to their practices,  
14 first in sanction issues that come before them very  
15 frequently, and in regulatory provisions that,  
16 practices that come before them frequently. My  
17 position is let's go with the mandatory bar. I think  
18 it works.

19 MR. RIORDAN: You think because the Bar is  
20 good for lawyers it should be a mandatory bar?

21 MR. HIRSCHHORN: Absolutely.

22 I will share one other thought with you. A  
23 week ago I talked with a contemporary that I have  
24 known for more than 50 years who practices law, a very  
25 good trial lawyer, and we were discussing the

1 While I am an inhouse attorney with Delphi  
2 Corporation in Troy, I am here primarily as president  
3 of the Oakland County Bar Association.

4 When I and other members of our association  
5 received the invitation from this Task Force to offer  
6 our input, I immediately instructed our executive  
7 director to send out an e-mail blast to all our  
8 members urging them to respond because it was much  
9 needed for this group to hear all voices. And after a  
10 unanimous board of directors vote, the OCBA also sent  
11 a letter to you folks, and this letter essentially  
12 affirmed our opposition to Senate Bill 743, which  
13 proposes to turn the State Bar into a voluntary  
14 organization, and we also affirmed our conviction that  
15 the State Bar has stayed within the bounds of Keller  
16 and Administrative Order 2004-01. And this is more  
17 anecdotal evidence, a la Austin Hirschhorn, but I can  
18 tell you I personally and our staff have received a  
19 flood of approving e-mail and phone calls for that  
20 letter that we sent, and we have not received a single  
21 negative reply, and we have 3,100 members, the largest  
22 voluntary bar association in the state of Michigan.

23 So the State Bar, more importantly, I think  
24 has not violated Keller, and this is really the main  
25 thing I want to stress our view on this. I mean, all

1 the legislative activity I have heard mentioned today,  
 2 this is all activity, this is all activity that  
 3 affects the delivery of legal services, the  
 4 effectiveness of legal services, the quality. I  
 5 understand people can be unhappy about the outcome,  
 6 and I would like to talk a little bit about perhaps  
 7 improving processes, so we have less of that and more  
 8 inclusiveness, but I haven't heard anything, any  
 9 evidence that the State Bar has violated Keller,  
 10 engaged in activities that aren't Keller permissible.

11 The one big piece of evidence that I have  
 12 heard of and has been brought to our attention is the  
 13 September 11, 2013 letter that was sent by the  
 14 State Bar to Secretary of State Johnson regarding  
 15 taking another look and perhaps updating an  
 16 administrative ruling over the issue ad exception to  
 17 the Michigan Election Law, and this was done, I  
 18 understand, after great review from the Representative  
 19 Assembly level on to the Board of Commissioners, and  
 20 they have a very broad, diverse body, and they did  
 21 their Keller review and they sent their letter, and I  
 22 must say, you know, from our perspective, this letter  
 23 raised legitimate due process concerns about the  
 24 delivery of justice, the delivery of legal services,  
 25 and it was based on U.S. Supreme Court cases.

1 So we view this as strictly a question  
 2 regarding the delivery or the effectiveness of the  
 3 delivery of legal services in the state of Michigan,  
 4 the lack of transparency and the inability for lawyers  
 5 to determine which judge might have been unduly  
 6 influenced by a vastly disproportionate campaign  
 7 contribution.

8 And there are examples. I mean, the U.S.  
 9 Supreme Court case the State Bar cited was a shocking  
 10 case. U.S. Supreme Court forced this West Virginia  
 11 justice to recuse himself.

12 But these may be unusual circumstances, but  
 13 nonetheless they affect delivery of services, and they  
 14 affect the public's view of the integrity of the  
 15 judicial process, which is equally important.

16 So we viewed this letter, this  
 17 September 11th, 2013 letter as not political activity  
 18 at all but actually an attempt to de-politicize the  
 19 judicial process, and Secretary of State Johnson  
 20 herself expressed herself publicly late last year  
 21 stating that the abuse of this issue ad exception  
 22 victimized all candidates of all political  
 23 persuasions, and I think it's clear that this is not a  
 24 trivial concern.

25 All you have to do is look at the 2012

1 judicial elections. For the Michigan Supreme Court  
 2 races alone, over \$19 million was spent. Of that 19  
 3 million, 14 million, or fully 75 percent, was dark  
 4 money, unaccountable and no one knew where it came  
 5 from. That put Michigan by a factor of four as the  
 6 most expensive judicial elections in the United  
 7 States. The closest state was North Carolina.

8 So we are an outlier on this, a serious  
 9 outlier, and I can speak for Oakland County as well.  
 10 It threw a complete shock through the entire legal  
 11 community in Oakland County when it turned out that  
 12 \$2 million in dark money was spent in behalf of two  
 13 candidates in hatcheting a couple incumbent judges.

14 Now, It turned out that the incumbents  
 15 weren't turned out of office for various reasons, but  
 16 I can tell you from my personal acquaintanceship with  
 17 judges of all political, they are all scared and all  
 18 disturbed by this, and it I didn't see any partisan  
 19 views with respect to this issue, this issue ad  
 20 exception.

21 So it's an equal opportunity victimizer, and  
 22 I think that's how the State Bar approached it. So we  
 23 think it was perfectly legitimate for the State Bar to  
 24 raise concerns about the due process implications of  
 25 this, lack of transparency in judicial elections, but

1 we do think the State Bar's processes for better  
 2 assuring Keller compliance could be improved, and that  
 3 would be to promote more inclusiveness and more  
 4 transparency. I don't think we can ever get enough of  
 5 that, and we have heard some good suggestions today.

6 And I hasten to add, I don't think that this  
 7 updating of these processes because the State Bar has  
 8 violated Keller or the Administrative Order governing  
 9 it presently, but rather because it would be good  
 10 policy. And some of the suggestions I heard today I  
 11 think would be perfectly agreeable to our members.  
 12 Taking advantage of information technology to  
 13 communicate more rapidly with members, sending e-mail  
 14 blasts to all members regarding upcoming legislative  
 15 advocacy questions, and this would not be to conduct a  
 16 plebiscite on the issue but to inform the  
 17 Representative Assembly members or Board of  
 18 Commissioners members. They would take that  
 19 information and they would use it as they should in  
 20 their deliberations.

21 And I also like the idea of the super  
 22 majority threshold vote. I don't think there is  
 23 anything wrong with that. It's just one more  
 24 safeguard to assure that the process is being  
 25 respected. And beyond that, I like the idea about

1 publishing immediately on the website these decisions  
2 and also publishing any dissenting views. Why not? I  
3 mean, I think the whole purpose here is for as many  
4 voices to be heard, because there is value in that.  
5 It helps us to make better decisions.

6 So I think these reforms could actually allow  
7 the shortening of the current two-week waiting period,  
8 notice period, because we would be giving people  
9 instant notice, and this would bring them more into  
10 the process, and I wouldn't have said this but for the  
11 fact that the Court of Claims bill last year was  
12 rocketed through the legislature in less than two  
13 weeks, and it appeared to be deliberately done, if you  
14 have a suspicious mind, but whatever the intention, it  
15 managed to avoid a comment by the State Bar, and I  
16 think it would have been helpful, because immediately  
17 afterward there was a rushed attempt to try to fix up  
18 some of the deficiencies, and apparently they were  
19 addressed, but what would have been the harm of  
20 sending it to the judiciary committee, letting it go  
21 through the normal process?

22 So, in summary, we think we need more speech,  
23 more points of view, not less speech, and that's why  
24 we favor a unified bar with Keller permissible  
25 legislative activity. We think a unified bar offers

1 the best value to lawyers and the public, and it would  
2 promote the best practices in the delivery of legal  
3 services, but we are certainly in favor of giving a  
4 larger voice to dissenters and catching up with  
5 information technology to promote more transparency  
6 and more inclusiveness in the State Bar's Keller  
7 permissible advocacy. Thank you.

8 CHAIRPERSON BUTZBAUGH: Any questions? Thank  
9 you.

10 MR. DERIAN: Thank you, everybody.

11 CHAIRPERSON BUTZBAUGH: We have reached the  
12 end of our speakers. Those of you who are still here,  
13 thank you very much for coming and participating. Let  
14 the record reflect, somebody has been here all day  
15 without saying anything, unless you want to say  
16 something.

17 MS. BUITEWEG: I am not on the list, so I  
18 don't want to break any rules.

19 CHAIRPERSON BUTZBAUGH: Did you want to say  
20 something? It's up to you.

21 MS. BUITEWEG: Sure, I will say something,  
22 because I am a lawyer.

23 CHAIRPERSON BUTZBAUGH: You were the first  
24 person here this morning.

25 MS. BUITEWEG: Lori Buiteweg, vice president

1 of the State Bar of Michigan

2 MR. MCSORLEY: Your name.

3 MS. BUITEWEG: Lori Buiteweg.

4 MR. MCSORLEY: What's your position again?

5 MS. BUITEWEG: Vice president of the

6 State Bar of Michigan, former chair of the  
7 Representative Assembly, former president of the  
8 Washtenaw County Bar Association.

9 In terms of I think what you are all looking  
10 for is recommendations on what we think might be  
11 helpful in terms of potential change. I really like  
12 the idea of having a memorandum, a Keller memorandum  
13 that goes with each position that we take for us to  
14 review before we take it. I don't so much like the  
15 idea of having a super majority vote or any type of  
16 vote on whether a matter is Keller permissible,  
17 because I think we turn over the issue from somebody  
18 who would be an expert in the field to people, to  
19 attorneys who don't specialize in that, and that we  
20 run the risk of nefarious attorneys who might not want  
21 a position to be taken on an issue, would vote that  
22 it's Keller impermissible, just so a position doesn't  
23 get taken. And I know that sounds shrewd or skeptical  
24 or untrusting, but as the one gentleman said, maybe  
25 the practice isn't what it once was in terms of being

1 able to trust all of our membership and knowing who we  
2 can trust.

3 So I like the idea of a memorandum written by  
4 counsel who is knowledgeable in Keller to go along  
5 with each before we vote, but I don't so much like the  
6 idea of leaving it up to the membership to vote on  
7 whether something is Keller permissible.

8 We do, as all of you know, I think, do a lot  
9 of publicizing of public policy issues well before we  
10 take votes on them. We have our public policy e-mail  
11 blast, which everybody in the Bar is invited to sign  
12 up for and has to I think unsubscribe from it. I  
13 think at some point we sent it out to everybody and  
14 you have to unsubscribe.

15 I read that thing thoroughly every single  
16 week. Click on each court rule change, each bill  
17 that's out there and think is this going to show up in  
18 my packet when I go to the public policy meeting.

19 We ask all of our sections and committees to  
20 comment on things. So we do vet. I think we do a  
21 really good job of vetting issues before we vote on  
22 them. And I think we do a really good job of making  
23 information available to the general membership to  
24 give opinions if they want to.

25 Again, it's an issue of whether they want to.

1 It's there for them. We can't make them go. We can't  
 2 make them subscribe to the public policy blast that  
 3 comes out weekly. We can't make them read it or give  
 4 us their opinions. But it is there for them. And  
 5 sometimes we send stuff out for comment, and we get  
 6 nothing back and, you know, sometimes there just isn't  
 7 interest in it.

8 That's really all I have. I would be happy  
 9 to answer any of your questions. You are all probably  
 10 catatonic at this point. I am going to feel really  
 11 bad if you don't ask me a question.

12 MR. MCSORLEY: You are saying that the e-mail  
 13 blast goes out before the vote is taken?

14 CHAIRPERSON BUTZBAUGH: Well, when the e-mail  
 15 blast is not -- it's not going out saying, hey, we are  
 16 going to take a vote on this. It's a public policy,  
 17 yeah, and it shows us everything that gets introduced  
 18 from SCAO or from the legislature, and then it gets  
 19 introduced, of course, before we take a position on  
 20 it. So any time anything gets introduced, it's out  
 21 there, and then eventually, you know, it goes through  
 22 our system, internal system, to decide whether it's  
 23 Keller permissible and gets presented as something we  
 24 may want to take a position on.

25 Thank you for the opportunity.

1 CHAIRPERSON BUTZBAUGH: Thank you.  
 2 (Hearing concluded.)

3 STATE OF MICHIGAN )  
 4 COUNTY OF CLINTON )

5 I certify that this transcript, consisting  
 6 of 222 pages, is a true and correct transcript of the  
 7 proceedings and testimony stenographically recorded by  
 8 myself from an electronic recording of the proceedings had  
 9 in this matter on Friday, May 2, 2014.

10 June 22, 2014

11 Connie S. Coon, CSR-2709  
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