To Be or Not to Be: That is the Question Confronting the Mandatory Bar

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After several years of active participation in the State Bar of Michigan leadership, I have seen the workings of our association up close and personal. At no time in my 40-plus-year career have I been more convinced than now that our mandatory status is just one of the many meritorious aspects of the SBM—and we are among the majority of state bars that have a mandatory membership requirement to practice law.

However, some of you may not be aware of the challenges to mandatory state bar associations around the country during the last several years, and the SBM has not been immune to these challenges.[1] Many, if not most, of these challenges have arisen because state bars have engaged in ideological and political activities financed in whole or in part by mandatory dues.

In 1977, one of our members filed a petition for special relief with the Michigan Supreme Court, arguing that the SBM used his mandatory bar dues in violation of the First Amendment to the U.S. Constitution.[2] The Court treated the petition as a request for superintending control over the SBM, which was within its original jurisdiction. After evidentiary hearings and two per curiam opinions, the Court ultimately dismissed the petition.[3]

A few years later, lawyers in California argued that the use of mandatory membership dues to finance ideological and political activities which they opposed violated their First Amendment rights. This matter reached the United States Supreme Court in *Keller v State Bar of California*, where the Court held that there were state interests in regulating the legal profession and improving the quality of legal services that justified certain state bar expenditures and the compelled association of lawyers to further such interests.[4]

After *Keller*, as many of you (including me) will recall, the SBM implemented in 1991 a system whereby dissenting members could deduct a certain portion of their dues that related to political and legislative activities. It appears that a significant percentage of the membership elected to exercise their right to the deduction.[5] Over time, the SBM discontinued much of its lobbying given the apparent dissatisfaction within its membership.[6] In 2004, the Michigan Supreme Court issued Administrative Order No. 2004-1, which states in significant part:

> The State Bar of Michigan shall not, except as provided in this order, use the dues of its members to fund activities of an ideological nature that are not reasonably related to: (A) the regulation and discipline of attorneys; (B) the improvement of the functioning of the courts; (C) the availability of legal services to society; (D) the regulation of attorney trust accounts; and (E) the regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.[7]

More recently, the SBM has implemented strict review procedures that govern and restrict its activities to those that are "*Keller* permissible." For example, any time the SBM considers weighing in on pending legislation, the Board of Commissioners or the Representative Assembly will first consider whether any action on the part of the SBM is in accordance with the *Keller* standard to ensure that the Bar is not involved in impermissible ideological matters.[8]

This seemed to be working fairly well for the status quo of mandatory state bars, especially those like the SBM that zealously avoided taking positions on issues that implicated the First Amendment rights of its members. Whether this holds true in light of a recent decision of the United States Supreme Court remains to be seen. In June, *Janus v AFSCME*[9] overruled *Abood v Detroit Board of Education*,[10] the case primarily relied upon in the *Keller* opinion. In *Abood*, the Court upheld a Michigan law that mandated public school teachers to pay certain union fees even if the teachers were not a part of the union and even if they did not agree with the union's activities. However, in *Janus*, the Court held that the "State's extractions of agency fees from nonconsenting public-sector employees violates the First Amendment."[11]

We may not have to wait long to see whether the United States Supreme Court wishes to expand the impact of the *Janus* decision to mandatory state bars. There is currently a request before the Court for a *writ of certiorari* to the Eighth Circuit Court of Appeals in a matter arising out of the State Bar of North Dakota (SBAND) called *Fleck v Wetch*.[12] In *Fleck*, an attorney in SBAND is arguing that his First Amendment rights are being violated by his bar's opt-out provision for deducting the ideological portion of his bar dues and by his compelled association with SBAND in order to practice law in North Dakota.[13] Obviously, the latter issue may have the greatest impact on mandatory state bar associations

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throughout the country if the Supreme Court elects to fully consider the *Fleck* matter.[14]

We continue to live in uncertain times.[15] It appears now that even our mandatory status as a state bar is uncertain. With that said, I am optimistic at this juncture. Given my experience and knowledge, it is my firm belief that our members and the public are best served by mandatory state bar associations such as the State Bar of Michigan. I have to believe the United States Supreme Court will ultimately see it the same way.[16] ■

ENDNOTES

1. Also known as unified and integrated state bar associations. See Kittay, *Unified bar update: Recent challenges, including 'teeth whitening' and LegalZoom cases*, 39 B Leader 6 (2015) <https://www.americanbar.org/groups/bar_services/publications/bar_leader/2014-15/july-august/unified-bar-update-recent-challenges-including-teeth-whitening-legalzoom-cases.html>. All websites cited in this article were accessed July 19, 2018.
2. Some of the claims concerned the compelled association with and financial support for the integrated state bar, and the financing of legislative lobbying efforts partly through compulsorily exacted dues. *Falk v SBM*, 411 Mich 63, 87–88; 305 NW2d 201 (1981) [commonly known as *Falk I*].
3. *Falk v SBM*, 418 Mich 270; 342 NW2d 504 (1983) [known as *Falk II*].
4. *Keller v State Bar of California*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990).
5. See Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla St U L Rev 35 (1994) <https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1485&context=lr>.
6. *Id.* at 47.
7. Administrative Order No. 2004-01 (2004) <https://www.michbar.org/file/publicpolicy/pdfs/ao2004-01.pdf>.
8. SBM, *State Bar of Michigan Comments on the Report of the Michigan Supreme Court Task Force on the Role of the State Bar of Michigan* (July 31, 2014) <https://www.michbar.org/file/news/releases/archives14/BOCcomments.pdf>.
9. *Janus v AFSCME 31*, ___ US ___; 138 S Ct 2448; ___ L Ed 2d ___ (2018).
10. *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977).
11. *Janus* at 2456.
12. *Fleck v Wetch*, ___ US ___; ___ S Ct ___; ___ L Ed ___ (2017) <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-886.html>.
13. *Fleck v Wetch*, 868 F3d 652 (CA 8, 2017). *Fleck* argues that the opt-out provision of SBAND automatically requires him to pay a portion of his bar dues that relate to the ideological activities of the SBAND if he chooses to do nothing. Rather, he is trying to force the SBAND to have an opt-in, at best, if he is required to be a member of SBAND.
14. So much of what the SBM does is *vitally* important to our members, our clients, and our courts. Any decision by the Supreme Court in the *Fleck* matter that may work to diminish these efforts will have funding and time-commitment consequences because these activities need to be undertaken by our courts or the state, for example, if not by the SBM.
15. See, e.g., Rockwell, *Uncertainty on the Grandest Scale*, 97 Mich B J 1, 12 (2018) <http://www.michbar.org/file/barjournal/article/documents/pdf4article3297.pdf>.
16. I titled this article paraphrasing some of William Shakespeare's most famous words. It seems appropriate, now some 400 years later, to give you his actual, if not also prophetic, words:

> To be, or not to be: that is the question:
> Whether 'tis nobler in the mind to suffer
> The slings and arrows of outrageous fortune,
> Or to take arms against a sea of troubles,
> And by opposing end them?
>
> —*Hamlet, Act III, Scene I*