

Thanks, But No Thanks



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At the Michigan Republican Leadership Conference in September, Greg McNeilly of the Michigan Freedom Fund proposed a radical change to our state bar, one that would turn the clock back by almost 80 years: the abolition of mandatory bar membership.¹ According to press reports, McNeilly said, “Every worker needs freedom, and obviously lawyers are an important part of society. They shouldn’t be second-class citizens, so we need to give them freedom to practice.”²

So the Michigan *Freedom* Fund is advocating *freedom* for attorneys and *freedom* to practice—and freedom is good, right? After all, freedom conjures images of our founding fathers, of Nelson Mandela, of a lone Chinese dissident standing bravely in front of a tank in Tiananmen Square. Indeed, our political heritage is rooted in freedom of the press, freedom of religion, and freedom of speech. Who doesn’t like freedom and admire those who pursue it?

But it doesn’t take much thought to see that whether freedom is a good or bad thing depends a great deal on what exactly we’re liberating ourselves *from*. Freedom is a good and noble thing when we liberate ourselves from an oppressive government

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or the brutality of apartheid. Freedom that allows ideas and creeds to compete in the marketplace of the human conscience is integral to our democracy. But freedom is quite another thing when we liberate ourselves from that which sustains, protects, and nourishes us.

My children, both of whom are now grown, would have enjoyed freedom from curfews and supervision, and might have viewed this cause with as much revolutionary zeal as Washington, Hamilton, and Jefferson. But I knew, as every responsible parent does, that this sort of freedom would only liberate them from rules that kept them safe and provided the security and structure they needed.

Securities brokers wanted freedom from regulation. As a result, all of us reaped the costs of that “freedom”: Enron, Bernie Madoff, the bailout of AIG, the bankruptcy of Lehman Brothers, the forced marriage of Merrill Lynch and Bank of America, and so on. Freedom in this case was liberation from rules that were enacted to keep our financial system viable.

Before we decide to join the Michigan Freedom Fund’s cause to “free” us from a mandatory bar, we have to ask: from what are we being freed?

Michigan adopted a mandatory or “unified” bar in 1935. The objective of unification then, as now, was to ensure that the purposes that unite lawyers hold greater sway than the interests that divide us. First among those purposes is the idea that lawyers are public servants. When we represent our clients’ individual interests, we fill a greater role: promoting justice and ensuring the peaceful resolution of disputes.

We may represent plaintiffs or defendants, the prosecution or the accused, the insurer or the insured. We do so zealously, carrying our clients’ burdens as if they were our own. But when we in Michigan adopted

the unified bar, we declared that our common interests as attorneys are greater than those that might divide us.

These common interests include maintaining the integrity of the judicial process, ensuring an even playing field for litigants, and preserving bedrock constitutional principles like equal protection and access to the courts. We, I hope, are united by the notion that as officers of the court, we treat everyone with respect and dignity and ensure that justice is available to all.

By putting these shared interests ahead of those that divide us, we are able to speak with one voice on issues of common concern. Alfred M. Butzbaugh, one of my predecessors as president of the State Bar, made this point well in his defense of the unified bar:

If our profession polarized into separate ideological organizations, we could not speak as one unified voice to fulfill our duty to improve our justice system and our profession. The unified bar protects us from polarization which would paralyze us from the fulfillment of that duty. The unified bar assures that all members have the opportunity to participate. It binds together the extraordinary and wonderful diversity of our profession: in gender, race, geographic location, firm size, areas of practice, affluence and types of employment.³

The unified bar also ensures that the legal profession is independent and self-governing. We are not governed by the Michigan legislature or the executive branch. Instead we are subject to the oversight of the Michigan Supreme Court—a body uniquely situated to protect core legal principles from the tides of public opinion.

McNeilly hints that elimination of the mandatory bar would allow lawyers to practice for free. No state in the nation allows

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that. In states with voluntary bars, lawyers pay licensing fees set by the legislature or the executive branch bureaucracy, not by the bar and the state supreme court. In several nonmandatory bar states, licensing fees are higher than Michigan's bar dues. In fact, the highest fees paid for the privilege of practicing law are in Connecticut, which has a voluntary bar—\$675. In Michigan, we pay \$305.⁴

It's true that the unified bar comes with a price.⁵ But this price isn't the one the Michigan Freedom Fund seems to have in mind. McNeilly was trying to obtain freedom from the Bar's advocacy for the disclosure of the funding for third-party issue ads in judicial campaigns. He apparently believes that if the mandatory bar is eliminated, the Bar will no longer be able to speak out about matters he does not want it to speak out about, including the way these expenditures degrade public confidence in our judicial system and potentially corrupt its integrity. More on that later.

But if we were to give up the mandatory bar, we would also give up the ability to investigate and enforce professional standards through the attorney discipline process. We would give up the ability to fund critical programs like Access to Justice and the Lawyers and Judges Assistance Program. We would give up the highly regarded Practice Management Resource Center that provides practical skills, resources, and training to lawyers. We would give up support for committees and sections that keep lawyers current in specific fields of practice. We would give up the Attorney Ethics Hotline, the Judicial Ethics Hotline, and the administration of the Client Protection Fund, and we would give up the ability to investigate and prosecute those who engage in the unauthorized practice of law. We would likely also give up the work the Character and Fitness Committee performs for the Bar along with the ability to promote improvements in the justice system and the practice of law.⁶

These benefits (and many others) are manifestations of a more fundamental principle—that we in Michigan believe the law is a profession, and a unique one; that is, we believe attorneys are public servants above all, united by our shared interests in justice and equality more than we are divided by the issues of the day.

Because we are a mandatory bar and because the United States Supreme Court limited mandatory bars from taking positions outside the actual administration of the law and the legal profession,⁷ we are only allowed to promote improvements in the administration of justice. As a mandatory bar we can seek the advancement of jurisprudence and to improve relations between the legal profession and the public. We can also promote the interests of the legal profession in this state.⁸

The 4,200 lawyers (almost all of them males) practicing in 1935 were able to convince the state legislature that a mandatory bar would promote, in a unique way, the irreplaceable sense of community and a shared vision that lawyers have through their service to clients. The only change that has occurred since 1935 is the increased need for our services and the heightened importance of promoting the rule of law.

On that score, a cautionary note to those few who may think the Bar took a political position when it asked Secretary of State Ruth Johnson to revisit a 2004 declaratory ruling concerning the practical and ethical implications of anonymous funding of judicial campaign ads or those who believe that making the Bar voluntary would silence lawyers: they are, in a word, wrong! The Bar's request was not political. It was made because we believe the relations between the legal profession and the public would be vastly improved by eliminating unattributed judicial campaign contributions.

If we were granted "freedom" from the mandatory bar, we would have a voluntary organization that was free to engage in political activities (which many voluntary asso-

ciations and local and special-interest bars are already free to do). The State Bar would be free to comment on civil rights statutes, affirmative action, mandatory sentencing, and many other matters. And we would also be free to engage in and comment on political issues and political campaigns.

My personal view is that we are better off giving up this "freedom" to comment about political issues for the ability to promote the interests of the profession.

As Bob Dylan sang, "Gotta serve somebody." I choose to continue serving the public as a member of a unified bar. I choose not to be "liberated" from the belief that the practice of law is a profession and that our shared interests as attorneys are greater than the interests that divide us. I choose to say to the would-be liberators of the Michigan Freedom Fund: thanks, but no thanks.

I hope you will join me. ■

ENDNOTES

1. Livengood, *Right-to-work leader: Stop forcing lawyers to pay State Bar dues*, The Detroit News, September 21, 2013, available at <<http://www.detroitnews.com/article/20130921/POLITICS02/309210047>> (accessed October 17, 2013).
2. *Id.* Mr. McNeilly apparently thinks that the mandatory bar violates Michigan's newly enacted right-to-work laws. He is wrong! The State Bar neither employs lawyers nor does it collectively bargain for wages or benefits for lawyers. It is part of the public body corporate, performing a governmental function—i.e., promoting improvements in the administration of justice and advancements in jurisprudence, improving relations between the legal profession and the public, and promoting the interests of the legal profession in the state.
3. Butzbaugh, *The importance of the unified bar*, 79 Mich B J 790, 792 (2000).
4. The State Bar portion of our dues is \$180. Although we each pay \$305, \$110 of that goes to fund the Attorney Grievance Commission, the Attorney Discipline Board, and the Judicial Tenure Commission. An additional \$15 goes to fund the Client Protection Fund, which pays persons who retained lawyers who cheated them either by not providing services they were paid to perform or who raided their estates or trusts.
5. In fact, Michigan attorney dues are lower than dues in several voluntary bar states and only 10 percent higher than the voluntary bar average of \$276. Source: ABA Division for Bar Services, *2013 State and Local Bar: Membership, Administration & Finance Survey*.
6. Just one example: the Bar intensely and successfully focused its staff and outside lobbyist in 2008 and 2009 to lobby against a proposed sales tax on lawyers' services.
7. See *Keller v State Bar of Cal*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990).
8. See SBR 1.