

Our Responsibility to the Public

To the Editor:

State Bar President Brian Einhorn's "swan song" message in the July issue of the *Bar Journal* is most compelling. It reflects outstanding leadership on a subject of profound importance—the role of the State Bar in protecting and serving the public.

As a Michigan lawyer for many years, I am deeply concerned about, and opposed to, proposals to limit—in fact, to silence—the State Bar's ability to comment on policy issues, particularly judicial selection and the financing of judicial campaigns.

Decades ago, the first president of the State Bar of Michigan, Roberts P. Hudson, warned that "No organization of lawyers can long survive which has not for its primary object the protection of the public." But how can the public be protected if lawyers cannot, through their association, speak out for or against matters that affect the justice system? Who knows better the impact of political decisions on the administration of justice? Who knows better the qualifications and character of judicial candidates than their peers? The latter issue is particularly important in states such as Michigan, where judges are elected and voters have very little information about judicial candidates beyond the increasingly negative and distorting campaign commercials.

In 2003, the American Bar Association, in a report from its Commission on the 21st Century Judiciary, expressed pointed concern about the escalating partisanship and corrosive effects of excessive amounts of money spent in judicial campaigns. The concern is even more justified today.

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In some unfortunate instances, money has corrupted the judicial decision-making process. The ineffectual regulation of campaign funding for judicial candidates is negatively impacting public perception of what should be an independent, impartial, and fair judiciary.

Some 10 years after the ABA report, and with the United States Supreme Court decision in the *Citizens United* case, the Michigan Judicial Selection Task Force was created under the leadership of former Michigan

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Supreme Court Justices Marilyn L. Kelly and James L. Ryan. Its principal mission was to study the judicial selection process and recommend changes to generate public trust in the impartiality and fairness of the courts.

The task force released its report in April 2012. Of its recommendations, one cried out for immediate consideration: amending the Michigan Campaign Finance Act to require full disclosure of all campaign contributors to judicial candidates and the amounts each had given.

The State Bar—concerned about the potential for such contributions to influence judicial decisions and public perception of a system in which candidates can receive undisclosed amounts of money from unnamed sources—believed remedial action was necessary. The Bar's involvement generated some criticism and resistance, in some instances from those who have a special interest or self-interest in the present system. But in publicly pursuing the issue, the State

Bar is simply doing what its first president considered its primary responsibility: to protect the public interest and to see that justice—uncontaminated by self-interest or the cloud of potential corruption—is available to every citizen and litigant.

Meaningful change in public policies and practices is frequently a slow process, requiring education and enlightenment. Such has been the case for transparency in campaign funding for judicial and other public offices. Change will come, but not without the impetus of strong and effective advocacy. Public sentiment supports transparency. Many voices are speaking out on the need for it. But no voice is better positioned or more important to be heard in Michigan than that of experienced lawyers, speaking as one voice through their statewide organization—the State Bar of Michigan.

Accordingly, I strongly disagree with the recommendation of the Task Force on the Role of the State Bar of Michigan that the State Bar be prohibited from advocating to government agencies and the public at large on matters concerning judicial selection and campaign funding. Such a prohibition would undermine the fundamental ethical and historical reasons for the State Bar's very existence and deprive policymakers and the general public of information on matters of vital importance.

The State Bar has many activities and programs relating to professional competence and responsibility to assure that litigants get the best, most ethical, most vigorous, and most effective representation and, ultimately, the best and most impartial decisions possible in our courts. Nothing could be more important to that mission or more germane to its interests or to the public interest than to speak up when the fairness and impartiality of our courts, in actuality or in public perception, are called into question by the flood of so-called dark money into judicial campaigns.

Nothing could be more proper or relevant to its mission than that the State Bar advocate or initiate discussion of the public policies necessary to give us a justice system that in both reality and perception is fair, just, transparent, and inclusive.

John D. O'Hair
Detroit

Risky Business

To the Editor:

Douglas Toering's list of questions raised by Michigan's business courts ("Michigan's Business Courts and Commercial Litigation: Past, Present, and Future," August 2014 *Michigan Bar Journal*) omits one of the more salient ones: pro-business bias by judges appointed to that court. That's not much of an issue when the litigation is between businesses, but becomes a big issue when a consumer seeks justice against a business. In the latter instance, assigning the case to a judge who is more "experienced" in business matters (read: more sympathetic to the business party) creates the appearance, if not the reality, of impropriety.

Although business court is supposed to be limited to interbusiness disputes, declaratory judgment actions by insurers against business tortfeasors *and their tort*

victims have been thrown to the business court division.

It is bad enough that business interests control all three branches of Michigan's government. Business courts are another pro-business thumb on the scales of justice (joining the fist that is already there).

**John Braden
Fremont**

Response from the Author

The business court statute unanimously passed the state senate and passed the house with an overwhelming majority (101 for, 7 against). Under the statute, disputes between businesses or their principals go to business courts. But most matters involving individuals—such as personal injury, product liability, residential landlord-tenant, residential mortgage foreclosure, insurance coverage, employment discrimination, and

civil rights—are generally excluded from the definition of "business or commercial disputes." Thus, those cases will typically not be in the business courts. MCL 600.8031(3). Apart from that, the quick processing times in the business courts can benefit those who cannot afford protracted litigation. Also, the parties in the business courts have the same rights to discovery and jury trials as in other circuit court cases. In any event, there is no reason to believe that a business court judge—who will face reelection in his or her own county, whose decisions are subject to appellate review, and whose written opinions are posted on an indexed website for the public to read—will favor a business over a consumer in the unusual situation where an ordinary consumer has a case in the business court.

**Douglas L. Toering
Troy**



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