Voluntary Counterpoint

To the Editor:

In his November 2013 President's Page column, Brian Einhorn, a true believer, took issue with proposed legislation to make the State Bar of Michigan a voluntary association. Contrary to his assertions, the existence of the State Bar, in any form, has nothing whatever to do with the independence or self-governing nature of the profession. In fact, we are not self-governing. The Michigan Supreme Court appoints the Attorney Grievance Commission, consisting of six lawyers and three nonlawyers (MCR 9.108(B)), and likewise appoints the identically constituted Attorney Discipline Board (MCR 9.110(B)) and the grievance administrator and deputy (MCR 9.109(A)). The cost of the disciplinary machinery is paid separately by each licensed attorney, and the State Bar's only involvement is administering fee collection.

Nor does the State Bar have any role in "maintaining the integrity of the judicial process," which is handled either by the Judicial Tenure Commission or the Supreme Court itself, or with "ensuring an even playing field for litigants," which is the duty of our "one court of justice," or with "preserving bedrock constitutional principles." If the State Bar is supposedly at the forefront of preserving fundamental constitutional rights, why does it continue to flout the First Amendment rights of its members contrary to *Keller v State Bar of California*, 496 US 1 (1990)? Why did the State Bar continue, post-*Keller*, to subsidize LAWPAC until the Michigan Supreme Court finally put the kibosh on that cozy arrangement?

The worst thing the State Bar does is purport to "speak with one voice on issues of common concern." That is the most egregious poppycock in a column replete with bumf. While it would be impossible to pick the single-most moronic lobbying effort ever perpetrated by the State Bar, two exemplars must merit consideration for that dubious distinction. One was the State Bar's attempt to induce the legislature to adopt a State Bar-drafted penal code, which would have prevented the use of deadly force to keep someone from stealing, say, my iron lung, or to protect my fiancée from sexual assault by armed thugs but would have sanctioned shooting school children fleeing the truant officer. Another was the State Bar's effort to have our Supreme Court adopt a specialty-certification rule that provided for self-declaration of specialist credentials, drafted by another State Bar group that was unaware that other professions, e.g., physicians, had a rigorous system of specialty certification that might have been worthy of emulation. Fortunately for all of us, those efforts went nowhere.

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I am perfectly capable of speaking for myself, on any issue. I neither need nor want the State Bar to tell me what I think, or to tell a legislator or a justice my view on good public policy. Stealing my good name (and my dues) to flog the State Bar's anathematic ideas is an unbearable affront as well as an egregious falsehood that my imprimatur has been given. Mr. Einhorn, you and your fellow commissioners never have spoken for me and never will, and your self-aggrandizing assertion of a right to do so bespeaks a gross usurpation of my rights—you know, those rights the mandatory bar claims to protect but tramples instead. Such malevolent tyranny stands as a condemnation of the legal principles you purport to hold sacred.

If, as Mr. Einhorn maintains, the State Bar has wonderful programs and provides laudable services, then surely lawyers will flock to join the organization when the gun to their head that is mandatory membership is removed. Other states have voluntary bars, their legal profession has not collapsed, their courts remain open and functioning, and the constitutional rights of their citizenry appear to be at least as healthy as ours. Indeed, there are no mandatory bar associations in the federal courts, yet somehow the federal judiciary appears to function reasonably well, and the United States Supreme Court remains the last bastion for protection of our rights.

If bar membership were voluntary, I might perhaps be persuaded to join. But never will I join a bar that considers lobbying a primary mission, particularly a group with so egregious a track record of spending my money on unconscionable ideas and unworthy causes, permeated with a generous dollop of incompetence and venality. My support for meritorious causes comes from my heart and my checkbook, and the State Bar has no legitimate claim on either one.

Allan Falk
Okemos

Response to Allan Falk

I thank Allan Falk for his spirited response to my November 2013 President's Page if for no other reason than I am happy at least one person actually read one of my articles. I'm also grateful for Mr. Falk's contribution to my vocabulary. His letter refers to a statement from my column as "the most egregious poppycock in a column replete with bumf." According to my dictionary, "bumf" refers to "memoranda, official notices, or the like," is slang for toilet paper, and is derived from "bumfodder."[1] The connotation, I gather, is that my column is fit

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only for a particularly private but necessary use.[2] And because I always try to be positive, I am glad Mr. Falk finds my column somewhat useful.

That said, Mr. Falk is mistaken about a number of issues, and I fear that the central thesis of his letter—his assertion that the bar has not spoken with "one voice" on issues of common concern because people have disagreed at times with positions the bar has taken—goes quite astray.

The content of his letter, not to mention its tone, makes me quite confident that Mr. Falk sincerely disagrees with the bar's official position on some issues. I am equally confident that Mr. Falk is not the only member of our bar who disagrees with its leadership at times.

In fact, I cannot think of *any* organization with a membership that lacks dissenting voices. The prospect of an organization that not only speaks with one voice but *thinks with one mind* is truly frightening. The only precedents for such an organization of which I'm aware are found in science fiction.

But an organization can speak with one voice while including and even fostering dissent. Just look at our courts, at the committees that manage our law firms, at the many secular and religious organizations to which we belong. Indeed, I am confident that at some point Mr. Falk has even disagreed with a family member's expressed opinion.

Of course there's dissent in the bar. There's dissent in any group worth joining.

The issue, it seems to me, is what we do with dissent. We could, as those advocating a voluntary bar propose, take our ball and go home. We could say that, if we can't agree on *everything*, then we can't agree on *anything*. We could even go as far as Mr. Falk and conclude that requiring individuals to participate in organizations that sometimes express official views that diverge from members' personal views is tyrannical.

I suppose tyrannies do have dissenters. But democracies do, too. So I don't think that view gets us very far.

I propose a different view—one that I think is common to those who advocate for a mandatory bar. As I said in the column that Mr. Falk characterizes as "poppycock," I do believe that the interests that unite us are greater than those that divide us. Whatever ends we favor, we attorneys are united in the belief that our means must be just. We believe that disputes can and should be settled through civil discourse rather than violence. We believe in the value of debate, study, and reflection. These beliefs are the lifeblood of our everyday work. And these views can best be debated, sorted through, and expressed by an integrated group.

Personally, I believe these values are greater than our differences and that it is worthwhile to commit, through a unified bar, to a view of the legal profession that puts these shared interests ahead of those that divide us. To quote Nebraska Supreme Court Chief Justice Michael G. Heavican addressing the American Bar Association's House of Delegates, "When we engage in collaborative dialogue, we multiply our impact."[3]

As for Mr. Falk's contention that the State Bar of Michigan has strayed into political issues, I disagree with his reading of *Keller v State Bar of California*,[4] the leading opinion on the scope of advocacy by mandatory bar associations. Mr. Falk, of course, was the plaintiff in the two Michigan Supreme Court decisions that preceded *Keller*'s explication of the First Amendment implications of mandatory bar association: *Falk v State Bar of Michigan* (1981)[5] and *Falk v State Bar of Michigan* (1983).[6] *Keller* holds—and I wholeheartedly agree—that the First Amendment of the United States Constitution prohibits mandatory bar associations from using members' dues to fund political activities.

But *Keller* allows bar associations to use member dues for matters relating to the legal profession. As the United States Supreme Court put it, "[T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'"[7]

This standard does not, by any stretch, suggest that mandatory bar associations can only take positions on which every member would agree. Not every attorney agrees on how to regulate our profession or how to improve legal services. But according to *Keller*, a mandatory bar can weigh in on these issues, even in the face of dissent, without violating members' constitutional rights, provided the bar has a valid process for challenging the activities and for redress if it violates *Keller* restrictions. As a mandatory bar, we are subject to more restrictions and bureaucratic red tape in our advocacy than I often would prefer, but these boundaries and the red tape are a small price to pay for the advantages of self-regulation and a unified state bar.

The recent push to do away with our mandatory bar association seems to be animated, as far as I can tell, by umbrage at the State Bar of Michigan's attempts to obtain greater transparency in judicial elections. But let's be clear: the State Bar's official position has always been limited to the role of money in *judicial* elections, not in elections generally. The process through which we choose our judges concerns the regulation of the legal profession and the integrity of our legal system under our rules of procedure and ethics. It is therefore *Keller*-permissible.

Those few who may favor unattributed funding in judicial campaigns are certainly entitled to their opinions. They were entitled to make their arguments before the State Bar's Representative Assembly when

the position on greater transparency was before that body. They were entitled to challenge the adoption of the position. And they are entitled now to attempt to persuade others that anonymous funding of judicial campaigns is healthy for (or even consistent with) the rule of law. Although I'm skeptical, I'm always open to persuasion, and I know my colleagues in the State Bar of Michigan leadership are as well.

Mr. Falk believes that my column on the intangible benefits of a mandatory bar was "poppycock." So let me stress some of the *tangible* benefits lawyers and the public will either lose or have less access to should our bar become voluntary:

- We may lose the Lawyers and Judges Assistance Program, which serves a vital need for mental health and addiction services in our profession.
- We may lose all the State Bar does to provide and promote pro bono services, including the Access to Justice program.
- We may lose the State Bar's lawyer referral service, which helps people connect with lawyers.
- We may lose all of the State Bar's educational programs.
- We may lose the State Bar's ethics hotline, which counsels lawyers with questions on ethical issues.
- We would not be able to conduct the Economics of Law Practice Survey, which the courts use daily to evaluate appropriate legal fees.
- Most importantly, we *would* most certainly lose the unique privilege to have a voice in our own regulation. (Mr. Falk wrote that we're not self-regulated because the Michigan Supreme Court appoints both lawyers and nonlawyers to panels overseeing disciplinary matters. He misses the point entirely. It's the *judiciary*, not the legislative or executive branches, that oversees discipline. Lawyers are the backbone of character and fitness committees, our ethics committees, and a rich assortment of committees and sections that are a forum of the views of the whole spectrum of our profession. That's self-regulation.)

And then there's the fiscal impact of the elimination of mandatory bar membership. Either the taxpayers will pay more to ensure proper regulation of the legal profession or there will be insufficient resources for regulation—meaning more ethical violations and more unauthorized practice of law. Or, the legislature will decide what it takes to regulate the profession and what members must pay to practice law—a situation that has not worked out well for lawyers in the voluntary bar states where annual licensing fees exceed the cost of State Bar of Michigan dues.

In any of these scenarios, the public suffers.[8]

Mr. Falk's letter shows exactly what the case for a voluntary bar is built on: a misreading of *Keller*, a strange sense that having to tolerate views other than one's own within the bar association is "oppression" and "tyranny," and a whole lot of hyperbole. That's an awfully shabby basis for permanently muting the collective voice of Michigan's lawyers that has been an exemplary model throughout the country for nearly eight decades.

Brian D. Einhorn
President, State Bar of Michigan

ENDNOTES

1. Random House Webster's Unabridged Dictionary (2d ed), 277.
2. This impression was confirmed by a helpful analysis of the term at <http://www.worldwidewords.org/qa/qa-bum1.htm> (accessed February 6, 2014). That said, I think Mr. Falk meant to say that my column *is* bumf, not that it *contains* bumf.
3. Nebraska Supreme Court Chief Justice Michael G. Heavican, president of the Conference of Chief Justices, Remarks in the State of the State Courts address to the ABA's House of Delegates (February 10, 2014).
4. *Keller v State Bar of California*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d (1990).
5. *Falk v State Bar of Michigan*, 411 Mich 63; 305 NW2d 201 (1981).
6. *Falk v State Bar of Michigan*, 418 Mich 270; 342 NW2d 504 (1983).
7. *Id.* at 14 (citations and quotations omitted).
8. See SB 743.

Landslide Winner

To the Editor:

I thoroughly enjoyed the Election Law theme issue of the *Michigan Bar Journal* (January 2014). I thought the articles were both interesting and well written. It is easily the best theme issue I can remember reading in a while. I am a real believer in the *Bar Journal* as a vital platform for the dissemination of important, influential ideas, and the January issue strikes me as an example of the magazine at its best.

Adam D. Pavlik
Caro

Total Recall

To the Editor:

I write in response to Jason Hanselman's article, "Total Recall: Balancing the Right to Recall Elected Officials with the Orderly Operation of Government," which appeared in the January 2014 issue of the *Michigan Bar Journal*. The article references me by title in the text and by name in an endnote.

In his article, Mr. Hanselman discusses and defends Act 417 of 2012, which revises Michigan's procedures for voter-initiated recall of an elected official. Most of his analysis is sound, but he makes several errors.

First, he is mistaken when he writes that I am "one of three members of the County Board of Canvassers." Each board of canvassers has *four* members, not three. Indeed, under MCL 168.24b, as an elected official, I am not even *eligible* to be a member of the County Board of Canvassers. I am, however, as county clerk, one of three members of the County Election Commission, a completely different body which, among other things, reviews proposed reasons for recall of a public official.

Before Act 417, an acceptably clear reason for recall of a public official was one that would, in the words of MCL 168.951a(3), "enable the officer whose recall is being sought and the electors to identify the course of conduct that is the basis for the recall." In the Washtenaw County Election Commission, those exact words are included in every motion to find a recall petition either clear or unclear. However, determination of ballot-language clarity by the commission was never endorsement of the truth of any assertions in the reasons for recall.

There is some understandable dissatisfaction with this. During my years in politics and election administration, I heard

many complaints from public officials, especially recall targets, about the commission's lack of involvement with the truth or falsity of assertions in proposed reasons for recall.

However, I have always regarded the commission's official neutrality on these often highly contested issues as proper adherence to the requirement in the Michigan Constitution, Article II, Section 8, which provides, "The sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question."

This point is made emphatically by the Court of Appeals in *Meyers v Patchkowski*, 216 Mich App 513 (1996), referring to a situation in which a circuit court stood in the shoes of a county election commission: "Once the court decided that the recall petitions were clear, it should have concluded its review. The court did not have authority to review the statements in the petitions for truth or falsity. Such a determination is a political question for the voters, not the courts."

Act 417 purports to require that recall petitions be factual as well as clear; the word "factual" is not defined in the act. Recall petitions are already required to be clear enough to enable the officer and electors to identify the course of conduct that is the basis for the recall; that is, they must be statements that can be confirmed or disconfirmed. An additional requirement that they be factual can only mean the allegations made in the reasons for recall must also be *true*.

For the County Election Commission to decide the truth or falsity of proposed reasons for recall would be to rule on their *sufficiency*, a determination which the Constitution explicitly reserves to the voters.

It would also be an infringement on the political neutrality of election administration if the body that promulgates ballots had to take official positions on the contested issues in a recall.

Moreover, the commission is not a court or fact-finding body. It does not have the authority to subpoena witnesses or put them under oath.

Mr. Hanselman defends Act 417 under the legislature's plenary power to enact election laws. I agree that all of Act 417, with the sole exception of the factuality requirement, is a valid exercise of this power.

He states that the Constitution mandates the establishment of recalls, but "does not otherwise limit the legislature's plenary power to establish processes and requirements for recall elections." I submit that the final sentence of Section 8 provides a very clear and specific limitation—one which is flagrantly violated by this new factuality requirement.

Lawrence Kestenbaum
Washtenaw County Clerk
and Register of Deeds

Worth Repeating

To the Editor:

Thanks to Professor Joe Kimble for reprinting George Hathaway's article in the February 2014 Plain Language column. I remember reading the original article as a young attorney and have shared the story over the years with countless new attorneys and support staff. I have actually stricken the "SS" from jurats as a meaningless bit of legalese. (Hence the opportunity to tell the tale.) The article is truly timeless.

James R. Keller
Troy