

Advocating Donor Transparency in Judicial Elections

To the Editor:

I read with interest Richard McLellan's counterpoint ("No Mandatory Dues for Ideology") to State Bar President Brian Einhorn's President's Page in the May 2014 issue of the *Michigan Bar Journal*. Despite the title, Mr. McLellan did not actually "counter" any of the fundamental points made by Mr. Einhorn. Indeed, he didn't actually disagree with anything Mr. Einhorn said, with one exception. That exception was Mr. McLellan's plainly erroneous argument—or thesis—that, somehow, First Amendment rights were violated when contributors to "issue ads" for judicial elections were required to disclose their identities. That's simply untrue. The United States Supreme Court has made it clear that requiring the disclosure of the names of contributors to a candidate's campaign does *not* violate the First Amendment or impinge on free speech. No different standard for issue ads could or should exist. Mr. McLellan does not even argue that there is a different standard—and does not cite a single case to support his argument.

So what, then, is the real issue? It's whether the Bar's principled support for a regulation (to be promulgated by the secretary of state) requiring disclosure of the names of persons or organizations contributing money to these issue ads in judicial elections violates the United States Supreme Court's decision in *Keller v State Bar of California*.¹ In other words, was the Bar's activity

in this regard *Keller*-permitted? The obvious answer is that such a regulation does not violate anyone's First Amendment rights and the Bar's activity *is Keller*-permitted. As the Court made evident in *Keller*, a state bar association is permitted to advocate on behalf of and support legislation, regulations, and the like for activities connected with or for the purpose of regulating the legal profession or improving the quality of legal services. Stated otherwise, the United States Supreme Court has made it clear that the State Bar may expend monies, even for "ideological activities" that are "germane" to the purpose for which the bar was established.

Can anyone, even for a second, deny that the legal profession benefits from and is enhanced if lawyers and their clients are aware of who has supported, whether by issue ads or by direct contributions, a judicial candidate and the extent of that financial support? Isn't the public entitled to know who contributed millions of dollars to attempt to defeat two Oakland County judges and elect two other candidates in 2012? Simply, this issue is germane to the Bar's purposes.

There is no free speech or First Amendment issue implicated by the Bar's activities, but even if there were, and even if such activities were deemed ideological, they are permissible under *Keller*. No one should be able to hide behind the cloak of the First Amendment to prevent the disclosure of who contributed money for issue ads involving judicial candidates. If that were permitted, it would subvert the legal process and interfere with the administration of justice.

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ENDNOTE

1. *Keller v State Bar of California*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990).

To the Editor:

Richard McLellan writes that the legal profession—including judges (all of whom are lawyers)—is limited by the United States Supreme Court from taking any position on the corruption of our courts by secret donors seeking to target judges for removal. He writes that this advocacy is limited by *Keller v State Bar of California*.¹ Mr. McLellan reads the *Keller* decision backwards.

Keller specifically says a compulsory bar may take policy positions on regulating the legal profession or improving the quality of legal services. The Bar may represent all lawyers to ensure lawyers' and judges' conduct is regulated to uphold the fair administration of justice.

Michigan judicial elections are in crisis. According to the Brennan Center for Justice, between \$8.3 million and \$13.9 million was spent in 2012 on TV ads seeking to influence the Supreme Court elections, constituting 75 percent of all spending.² Such secret spending is without precedent: total non-candidate spending in every other Supreme Court race in the U.S. in 2012 was \$8,793,090—less than in Michigan alone.³

A single secret donor can give enough dark money to unseat a local trial judge to get a favorable decision on a case involving his or her interests. This was illustrated in Oakland County, where an unidentified donor gave \$1.2 million—about 75 percent of the money spent in the race—to fund TV ads to unseat two incumbent Oakland County Circuit Court judges.⁴

Such spending threatens the courts, the legal profession, and our society. Most issue ads in judicial races are negative; they tear down judges' reputations and reduce respect for the law.⁵ This is not speculation: polls show that public respect for the fairness and impartiality of the judiciary has declined.⁶

The State Bar chose not to be silent in the face of this threat. A bipartisan majority of members voted to advocate requiring disclosure of donors' identities so donors will have to engage in debate and voters will have access to the information they need to make informed choices.⁷

The Bar clearly has the legal authority to ensure our judicial system is not corrupted by the way money is paid to elect judges. It can advocate for judicial ethics rules limiting a judge's right to sit if that judge is tainted by bias. Polling shows that confidence in our judiciary is in doubt if large amounts are spent by secret donors without a way to monitor the influence of the money.⁸

Judicial bias can be monitored only if facts are revealed about potential sources of bias. Challenges therefore require knowing whether a party in a case is a secret donor

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to the judge. The United States Supreme Court in *Caperton v AT Massey Coal Co, Inc*⁹ held that lawyers and parties have the right to know if a state Supreme Court justice benefitted from large issue ad donations during a recent election to probe whether that judge is too biased to hear the case.

The Bar's advocacy is intended to assure fair and clean judicial elections. It does not seek to limit issue ads or control their content. Its position is simply that buyers of issue ads must be known.

Mr. McLellan opposes this advocacy, arguing that the Bar, the largest protector of judicial impartiality, must be neutral on the issue. His article argues that Bar advocacy should be forbidden because it is ideological, violates the free speech rights of dissenters, and is not reasonable or necessary to protect the fair administration of justice. None of these arguments possess merit.

The Merriam-Webster dictionary defines ideology as "a systematic body of concepts..., a set of integrated assertions, theories and aims that constitute a program within society."

Every argument about legal doctrine contains a component of ideology.¹⁰ That is not a bad thing: our profession's advocacy of fairness and impartiality embodies a "systematic body of concepts." Likewise, advocacy of regulation of influence on judges is ideological.

The Bar does not violate anyone's speech rights by seeking disclosure of identities. Dissenters are not compelled to agree or identify with the Bar's position. The United States Supreme Court in *Keller* held that compulsory state bar associations that collect dues from all lawyers may advocate on how to regulate lawyers to ensure judges remain fair and impartial.

Ironically, Mr. McLellan seeks to silence the Bar in the name of secret donors' First Amendment rights. He would give absolute First Amendment protection to wealthy buyers of third-party issue ads who seek to remain anonymous, while denying the right to free and informed speech the First Amendment guarantees to the targets of their speech. He would allow secret donors to disclose their role freely among their inner circle, but deny voters the ability to

know, evaluate, and discuss the implications of their public speech. McLellan's anti-First Amendment ideology is not shared by a majority of judges or lawyers nor by the United States Supreme Court. It is an ideology at war with the ideal of maintaining a firm foundation of impartial judges. Disclosure of third-party issue ad donors has been held constitutional repeatedly. This is because the First Amendment gives no general right to anonymously fund issue ads to influence an election.¹¹

The remedy for speech one does not like is more speech—and this is the view of the vast majority of Americans (who believe in mandating disclosure of the identity of donors who fund ads in elections).¹² But Mr. McLellan does not like speech about secret donors. He would give them a bullhorn while protecting their identities and protecting them against political blowback. Secret donors, for all of their resources, fear public exposure because it dilutes their message and reduces their ability to influence electoral outcomes.

If the legislature insists on protecting the anonymity of donors, the Bar should advocate that courts have inherent power to honor any party's request to subpoena donor records.

Secret donors want us to protect their First Amendment right to fund third-party issue ads to influence elections anonymously—a right courts have ruled they do not possess. At the same time, secret donors wish to deny voters and judges a right to speak back to their ads knowing who funded the message—a right the First Amendment clearly protects. This hypocrisy is palpable. They must not be allowed to use dark money to destroy the reputations of judges and corrupt the foundation of our litigation system.

We are now in a two-front war being conducted by dark money interests. The McLellan attack on the Bar is a red herring, a flanking attack intended to divert attention and energy from dark money to self-protection, spurring us to argue about the Bar's powers and scope and to spend energies on things other than safeguarding judicial independence, impartiality, and fairness.

Independence of the judiciary is at stake. The increasing amounts of third-party issue

ad funding raise a new concern.¹³ There is a palpable risk of the abuse of power or corruption of our judicial system if anonymous issue ads are allowed to attack judges funded by secret donors. This not only impacts elections, but also sends a message to all judges: if their rulings stray from the demands of anonymous third-party issue ad donors, they face severe consequences. Elections can deal with this threat if they are fair, free, and clean.

Our litigation system may survive the assault of dark money if we have disclosure to enable judges to respond. We need recusal when monied interests create conflicts of interest.

We chose to elect judges. But unlike any other elected officials, judges contend with winners and losers in judicial disputes. The legal profession understands the importance of knowing the bias of a speaker when weighing statements or assessing judicial recusal. This is true of witnesses and jurors, where bias is examined as they are selected or cross-examined.

This attack on the Bar is intended to allow dark interests to operate unopposed on the battlefield of public opinion. If we lose this battle, the foundation on which we built our profession will suffer grievous injury—one that will take generations to repair.

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ENDNOTES

1. *Keller v State Bar of California*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990).
2. Brennan Center for Justice, *Michigan Should Update Disclosure Rules for Judicial Elections* (September 27, 2013) <<https://www.brennancenter.org/analysis/submission-support-declaratory-ruling-request>>. All websites cited in this letter were accessed June 3, 2014.
3. *Id.*
4. Dickerson, *Michigan Bar seeks to drag dark money out of the shadows*, Detroit Free Press, September 12, 2013.
5. See Brennan Center, n 2 *supra*.
6. *Id.*
7. The Bar commented on Secretary of State Ruth Johnson's broader proposal to require third-party issue ad sponsors to be identified publicly in state campaign finance records. Department of State, *Ruth Johnson proposes tough new disclosure rules for campaign attack ads* (November 14, 2013), available at <<http://www.michigan.gov/sos/0,4670,7-127-316394-,00.html>>.

8. Consider these results: (1) "A 2010 survey found that 70% of Democrats and 70% of Republicans believe campaign expenditures have a significant impact on courtroom decisions," (2) "46% of state court judges believed that campaign contributions influence judicial decisions," and (3) "89% of respondents believed the influence of campaign contributions on judges' rulings is a problem." Lo, Londenberg & Nims, *Spending in judicial elections: State trends in the wake of Citizens United* (Spring 2011), p. 14, available at <<http://gov.uchastings.edu/public-law/docs/judicial-elections-report-and-appendices-corrected.pdf>>.
9. *Caperton v A T Massey Coal Co, Inc*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).
10. Rules and legal doctrines shape judges' decisions, but ideology remains an important factor in how judges decide cases. See Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton: Princeton Univ Press, 2010), pp. 136–137 (study of federal judges' behavior showed ideology can play a decisive role, especially if law is uncertain or level of controversy is high).
11. See, e.g., *McCutcheon v Fed Election Comm'n*, 572 US ____; 134 S Ct 1434, 1459–1460; 188 L Ed 2d 468 (2014) [Roberts, J.] ("disclosure of contributions minimizes the potential for abuse of the campaign finance system" and can "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity"); *Buckley v Valeo*, 424 US 1; 96 S Ct 612; 46 L Ed 2d 659 (1976) (finding that disclosure serves voters' interests in knowing who is funding a political message and deters corruption); *Citizens United v Fed Election Comm'n*, 558 US 310, 370; 130 S Ct 876; 175 L Ed 2d 753 (2010) (finding that disclosure allows voters to react to speech in a "proper way" and with it "citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests"), quoting *McConnell v Fed Election Comm'n*, 540 US 93, 259; 124 S Ct 619; 157 L Ed 2d 291 (2003); and *Doe v Reed*, 561 US 186, 219; 130 S Ct 2811, 2832; 177 L Ed 2d 493, 517 (2010) [Scalia, J., concurring].
12. "Huge, bi-partisan majorities of Americans support transparency for political spending. Eighty-one percent of Americans believe that corporations should only spend money on political campaigns if they disclose their spending immediately; this included 77 percent of Republicans and 91 percent of liberals." Kennedy, *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond* (April 30, 2014), available at <<http://www.demos.org/publication/dollars-and-sense-how-undisclosed-money-and-post-mccutcheon-campaign-finance-will-affect>>.
13. The best source on the quantity of spending in the 2012 elections in Michigan is Michigan Campaign Finance Network, *Descending into dark money: A citizen's guide to Michigan Campaign Finance 2012* (June 2013), available at <http://www.mcfn.org/pdfs/reports/MCFN_2012_Cit_Guide_final_rev..pdf>.

To the Editor:

Richard McLellan's counterpoint discussing the Bar's support for donor transparency in so-called "issue ads" is curious at best and disingenuous at worst.

As lawyers, we learn that law springs from facts. So let us examine the factual history. It does not support Mr. McLellan's claim that the Bar's support for donor transparency in judicial elections reflects "ideology" infringing on its members' free speech.

The historical facts begin with a bipartisan task force in Michigan headed by then Chief Justice Marilyn Kelly; Sixth Circuit Court of Appeals Judge James Ryan; and Justice Sandra Day O'Connor as honorary, but not participating, co-chair.¹ The task force was created to improve the independence of the judiciary, and one of its many unanimous recommendations was to support donor transparency in judicial elections. As I understand it, that recommendation was important to the Bar's decision to ask Secretary of State Johnson to clarify the law on donors of issue ads in judicial elections such that their identities be made known to voters. The decision to seek clarification resulted from a unanimous vote by the State Bar Representative Assembly. Yes, unanimous—and from a very bipartisan and representative body of the Bar's elected leaders and officers.

Those unanimous actions by both the task force and the Bar reflected the thinking of eight members of the United States Supreme Court: laws requiring transparency do not infringe on speech. (See President Einhorn's list of Supreme Court cases. Note that Mr. McLellan provided none to the contrary.) That Justice Thomas was the lone dissenter in those cases does not make the decision of those eight justices a political one, nor does his dissent make him ideological. A disagreement does not ipso facto create a political or ideological dispute. That Mr. McClellan chooses to describe his disagreement with the unanimous decision of the State Bar Representative Assembly as one involving suspect speech does not make it so any more than the Flat Earth Society's view is science.

As a lawyer, I take the liberty of doing what we frequently do. Assume the SBM's action was political. Does the First Amendment prohibit it? *Keller v State Bar of California*² clearly permits bar associations to speak for us for purposes of "regulating the legal profession or improving the quality of legal services."³ (My emphasis added.) Mr. McClellan cited the quote, but in his

analysis forgot or ignored it. When the independence of the judiciary is imperiled by millions of dollars in dark money spent on Supreme Court elections, our ability to serve clients is endangered. Why? Because our clients need to believe the system is fair and not rigged. They need to know who is donating money. See Justice Ginsberg, concurring, in *Doe v Reed*.⁴ That's why the task force recommended transparency, the Bar supported the concept, and Justice Antonin Scalia wrote that as an "original" fact of our nation's history, donors' identities were made known to voters and, more strongly, he explained, it is a responsibility of good citizenship to identify yourself as a political donor. I was not aware that support for good citizenship could be a political or ideological act threatening speech until Mr. McClellan told us so. And even after he told us, I do not believe it.

Finally, we should expect the State Bar to use our dues to speak out on important issues affecting the independence of our courts. We should expect the State Bar to carefully discuss the evidence and issues, deliberate well, and act wisely. The Representative Assembly did just that on transparency. As important, we should expect the State Bar not to remain silent when our courts' independence is threatened. As Sir Thomas Moore famously said, "Silence gives consent." To have been silent would have also conveyed a message—a message that would speak for all of us and more loudly: the State Bar does not care about judicial independence. Had the Bar remained silent on that important issue, it would have been a travesty, a breach of trust, even though it may have suited Mr. McClellan just fine. Martin Luther King Jr. said it best: "In the end, we will remember not the words of our enemies, but the silence of our friends."

So thank you, Brian, and thank you, representatives of the State Bar of Michigan.

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ENDNOTES

1. I was a participant in the 24-member task force.
2. *Keller v State Bar of California*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990).
3. *Id.* at 2236.
4. *Doe v Reed*, 130 S Ct 2811 (2010). In the last Supreme Court election, \$19 million was spent, of which all but \$5 million was dark and hidden.