A Swan Song

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The Task Force on the Role of the State Bar of Michigan submitted its report to the Michigan Supreme Court on June 3, 2014.[1] Both the task force and its report were products of the Michigan Supreme Court's February 13, 2014 order, which charged the task force with "determin[ing] whether the State Bar duties and functions could be accomplished in a means less intrusive upon the First Amendment rights of objecting attorneys."[2] It was directed to keep in mind "the importance of protecting the public through regulating the legal profession and how this goal can be balanced with attorneys' First Amendment rights."[3]

The report documents the overwhelming support among Michigan lawyers for maintaining a unified bar and identifies the multiple bar programs that provide benefits to the members and the public.

You might think that, as State Bar president, I would be pleased that the task force supported a mandatory bar. But I'm not. The task force proposed what I view as draconian restrictions and procedures. Indeed, the "concerns" the task force expresses are so divorced from legal precedent that the task force abandons the actual rule of the controlling Supreme Court opinion—*Keller v California*[4]—and opts for an interpretation no other bar in the country has recognized and *Keller* did not contemplate.

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If the Court accepts the task force's recommendation to use a "strict interpretation" of *Keller*, it will prevent the State Bar from doing what it's supposed to do: serve the public. Under the task force's strict interpretation, lawyers would still be required to join the bar—but the State Bar would be able to address few, if any, of the issues on which its input might actually be helpful. The task force's proposal would leave a mandatory bar—but silence it almost entirely.[5]

The backstory

Let's step back. If you're new to these pages, the task force report was generated because the State Bar wrote a letter to Secretary of State Ruth Johnson late last summer asking her to eliminate issue ads in judicial campaigns. She proposed a new rule that would have required full disclosures in all elections, not just judicial elections (even though the State Bar's advocacy was limited to judicial elections).

At least one member of the bar thought the letter to Secretary Johnson was an "ideological stance" that stepped beyond the boundaries of permissible advocacy under *Keller*.[6] But see the Opinion and Dissent pages of the June 2014 *Michigan Bar Journal* in which three bar members forcefully set forth that the State Bar's advocacy was well within *Keller*.[7] And even before that, Greg McNeilly, a representative of the Michigan Freedom Fund, opined that the State Bar was taking an "ideological position" and was impinging on its members' First Amendment rights.

Shortly after McNeilly made his remarks, a state legislator introduced a bill[8] designed to eliminate the mandatory bar. My opinion then and now is that this opposition and the proposed legislation had nothing to do with lawyers' rights; they were designed to punish the State Bar for opposing secret funding in judicial campaigns.

Creation of the task force

In response to this new legislation, the State Bar asked the Michigan Supreme Court—the entity constitutionally charged with oversight of the legal profession in Michigan[9]—to initiate a review of how the State Bar operates within the framework of *Keller*. The Court responded by creating the task force.

In my view, the court order creating the task force presumes that the State Bar *was* being intrusive—and this presumption may have shaped the task force's subsequent recommendations. Yet the Court never identified the offending activities or explained how they may have intruded upon First Amendment rights.

Certainly, caselaw provides little insight into what the Court may have had in mind. Since the Supreme Court's 1993 *Keller* order more than 20 years ago, there have been only two formal *Keller* challenges from members of the bar who thought that an activity of the State Bar intruded on their First Amendment rights. And neither challenge resulted in a finding that the State Bar had actually violated their rights.

The task force's report

Now back to the task force's report. The task force notes toward the outset that "a clear majority" of those providing written and public comments "supported the continuation of the mandatory state bar."[10] Every single State Bar section and every local bar

association that provided the task force with feedback also supported a mandatory bar.[11] After listing the many programs and resources maintained by the State Bar and the corresponding costs, the task force wrote: "[T]he State Bar delivers a variety of services to the public at no cost to the taxpayers and provides benefits to its members that would not be available on the same scale or quality, if at all, through a voluntary bar."[12]

But what to do about the supposed First Amendment concerns the Supreme Court noted (albeit without explanation or legal support) in its charge to the task force?

Although the vast majority of the task force concluded that the "State Bar's advocacy within the executive and legislative branches is essential to its core mission"[13] the panel recommended the State Bar only be permitted to continue its advocacy within the executive and legislative branches subject to a new procedure and a new, *Keller*-focused oversight.

But the task force's *Keller* isn't the *Keller* authored by the United States Supreme Court. It is what the task force calls a "strict interpretation" of *Keller*[14]—one the task force admits no other bar association in the country has adopted. In the task force's words, they propose "a more rigorous standard...that would go beyond the safeguards imposed on any of the mandatory state bars that engage in legislative advocacy."[15]

Of course the task force never explains what exactly it means by "strict interpretation" or how that interpretation corresponds to an "*accurate* interpretation." Justice Scalia was right when he wrote, "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[16] Unfortunately, the task force rejected a reasonable interpretation of *Keller* for a "strict" one.

The *Keller* panel proposal

The task force's strict interpretation provides that, before the State Bar can even consider an issue, the issue must be vetted by an independent *Keller* panel.[17]

I was one of approximately 30 people who testified to the task force on May 2, 2014. During my testimony, I acknowledged that the State Bar could do a better job identifying our reasons for concluding that a piece of legislation was or was not *Keller*-permissible. I also acknowledged we could do a better job of publishing our analysis and providing the analysis to members so they could offer a dissent if they thought one was necessary. Consequently, I understand and accept the task force's recommendations about what the State Bar should do when considering a position on legislation.

But the proposed *Keller* panel is a different matter. The panel would be comprised of seven members: two appointed by the Board of Commissioners, two appointed by the Representative Assembly, two appointed by the Supreme Court, and one appointed jointly by the Supreme Court and the Board of Commissioners. It is to have "exclusive" responsibility to determine the *Keller*-permissibility of issues on which State Bar advocacy is proposed. Five of the seven panel members would need to vote for an issue to be considered *Keller*-permissible and eligible for further consideration by the Board of Commissioners.

The task force doesn't explain why we need an "independent panel," and the rationale certainly isn't obvious. Our Supreme Court has been issuing directives since *Falk v State Bar of Michigan*, the most recent being Administrative Order 2004-1.[18] The State Bar has always complied with the Court's directives. There's no reason for the task force to doubt that the Board of Commissioners and the Representative Assembly will continue doing what they have been doing for more than 30 years. And there certainly is no need for a supermajority vote before a matter is deemed *Keller*-permissible.[19]

Even if there were a compelling case for this independent panel[20]—and, if there is, the task force didn't make it—there's no basis for the new *Keller* administrative order the task force proposes. This proposal states:

a) The order should specifically provide that the following are *Keller*-permissible:
   i. positions on legislation, policies, or initiative that regulate or directly affect the regulation of the legal profession
   ii. positions on legislation, policies, or initiative that improve or diminish the quality of legal services, such as by providing or impeding legal services for the poor or disadvantaged, or by affecting the delivery of legal services by lawyers, other legal service providers, or the courts
   iii. the provision of technical expertise at the joint request of the Speaker and Minority Leader, the Senate Majority and Minority Leaders, or a Committee Chair and Minority Vice Chair of the Committee to which the legislation has been referred

b) The order should specifically identify the following as impermissible areas for State Bar advocacy:
   i. Ballot issues
   ii. Election law
   iii. Judicial selection
   iv. Issues that are perceived to be associated with one party or candidate, and endorsements of candidates
   v. Matters that are primarily intended to personally benefit lawyers, law firms, or judges
   vi. Issues that are perceived to be divisive within the bar membership.[21]

None of this, of course, is required by *Keller*. And, in my view, adopting this list of "forbidden issues" would create a new State Bar that is incapable of serving the public.

Our past sins

The most troubling aspect of the report (and what appears to have driven the strict interpretation) is its reference to supposed incidents "of the Bar promoting or opposing legislation that falls outside a strict reading of *Keller*."[22] Of course, when the State Bar was considering the various pieces of legislation that the task force identifies, we were not guided by a strict interpretation of *Keller*, as the task force now proposes—a process "intended to go beyond the safeguards imposed on any other mandatory bar that engages in legislative advocacy." We were guided by the text of *Keller* itself.

One of the issues the task force complains about is the State Bar's opposition to legislation that, if adopted, would have allowed trial courts to award costs and actual attorney fees to a prevailing party in an action against the Department of Environmental Quality.[23] We opposed the legislation for three reasons: (1) we thought it affected access to justice, (2) it violated the American

Rule, and (3) it impacted a court's discretion to determine appropriate sanctions on a case-by-case basis.

The task force's concern about the State Bar's position on this legislation is impossible to square with *Keller*. We were talking about access to justice and preserving judicial discretion. That may be beyond the task force's strict interpretation, but it certainly isn't beyond *Keller* itself.

The task force also complains about the State Bar basing its positions on "attenuated, speculative reasoning."[24] Of course, it doesn't identify specific matters where the State Bar used "attenuated, speculative reasoning." I suspect this criticism is aimed at the Bar's position on campaign finance in judicial elections. Apparently, the task force believes we were only speculating about dark money diminishing public confidence in the court system.[25]

In my view, the task force veers completely off the rails when it criticizes the State Bar for opposing a proposed sales tax on legal services. The report states that the Bar opposed this legislation primarily because of our economic self-interests.[26] But our *clients* would have paid this sales tax, not us. The Bar opposed this tax because it would have had a negative impact on access to legal services. We pointed out that most people who obtain legal services do so because they *have* to—e.g., they've been sued for divorce, cited for speeding, embroiled in a dispute with a neighbor, or forced to deal with an ailing or dying parent.

I ask you to read the State Bar's position and then decide whether taking such a position is an example of the Bar improperly imposing on members' First Amendment rights and violating *Keller*. Then consider what will happen if the task force's recommendations are accepted. We will no longer be able to speak up when the legislature again needs money and fails to consider the impact that taxing legal services will have on the most at-risk and underprivileged members of our society.

The task force's forbidden issues

Now go back to the list of "forbidden issues" and ask yourself what exactly the State Bar will be able to address under the task force's strict interpretation of *Keller*. It would be precluded from taking a position on legislation "perceived" to be associated with one party or candidate. Perceived *by whom*? The task force's use of passive voice makes these forbidden issues almost incomprehensible (someone please contact Bryan Garner). Does this perception have to be reasonable? What if an issue is associated with *both* parties? What exactly does "associated" mean, for that matter? Does one person's perception suffice?

Moreover, exactly how "divisive" must an issue be? In my experience, lawyers are peerless in their capacity to disagree about anything and everything. Yet, according to the task force's proposal, any "perception" of "divisiveness" is enough to silence the State Bar.

According to the task force's strict interpretation of *Keller*, the State Bar would have to stand mute if:

- The legislature proposed banning unemployed people from sitting on juries in employment cases or banning nurses and healthcare workers in medical malpractice cases
- The legislature enacted a statute stating that only judges appointed by the governor can hear cases on the Court of Claims docket
- The Bar wanted to rate candidates for judicial positions
- One of the political parties championed a constitutional amendment that would require all medical malpractice cases to be arbitrated by medical practitioners or all claims by union employees to be arbitrated by union members
- The legislature proposed changing the governance of the legal profession itself

And don't think that any of these examples are speculative. I can't recall a legislative session where there wasn't some proposal that, if adopted, would have limited a court's discretion or dictated how a court must decide a case or sanction.

We are in the legal business, and legal issues are often of significant interest to political parties or candidates. Because any perceived political question makes a matter off limits under the task force's strict interpretation of *Keller*, the State Bar could comment only on the most mundane and uncontroversial matters. In other words, we could offer input only when our input wasn't needed at all.

Henry Ford is purported to have said that a customer could purchase a Model T in any color—as long as it was black. That, in essence, is the task force's position: the State Bar can weigh in on any issue as long as its input is worthless.

Other problematic recommendations

There are other issues created by the task force's recommendations. For example, the task force recommended an amendment to Rule 1 of the rules concerning the State Bar that strikes the language that the State Bar should act "in promoting the interests of the legal profession in this State."[27] In case you don't understand the significance of eliminating that language, it means we would be required to pay a fee to an organization that can't and won't promote what we do.

The task force also recommends changes to the Representative Assembly governance, striking the language from Rule 6, Section 1 of the rules concerning the State Bar, which makes the Representative Assembly the final policymaking body of the Bar.[28] There are also significant proposed changes to the way the sections can advocate, including a requirement that sections change their names if they intend to advocate.[29] Perhaps one of the more disturbing recommended changes would require a formal *Keller* analysis during the budgeting process for judicial initiative programs.[30]

Professional responsibility and public comment

When the Supreme Court released the task force's report to the public, it also invited public comment (on or before August 4, 2014) on whether the report (1) adequately assessed the First Amendment problems concerning the acquired membership in a bar association and (2) provided a sufficient blueprint to ensure that the bar

association's ideological activities will not encroach on the First Amendment rights of members.

I encourage members to comment, but I don't think the comments should be limited to the two questions asked by the Court. The Court should also know what you think about the task force's specific recommendations and its blatant attempt to mute the State Bar.

We, as a group, must conform to the Rules of Professional Conduct. The preamble to the Rules states in part:

- A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility to the quality of justice.
- While it is the lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process.
- As a public citizen a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession.
- [A] lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.
- A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time in civic influence on their behalf.
- A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.
- A lawyer should strive to obtain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.
- The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement.
- Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of the legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.
- Lawyers play a vital role in the preservation of society.[31]

If the Court adopts the task force's recommendations, the State Bar will be unable to pursue many, if not all, of these goals.

And when considering your comments, I ask you to recall a statement by former State Bar President Al Butzbaugh that was part of my November President's Page:

> If our profession polarized into separate ideological organizations, we could not speak as one united voice to fulfill our duty to improve our justice system and our profession. The united bar protects us from formalization which would paralyze us from the fulfillment of that duty.

There are those who want to make sure the State Bar never again speaks in a united voice, never again voices a united opinion opposing or supporting legislation. If the Court adopts the task force's recommendation, those people will no longer need to worry about that voice. That voice will be mute. And our opposition to unattributed campaign contributions and the corrosive effect of undisclosed contributions in judicial campaigns will have been our swan song. ■

ENDNOTES

1. Task Force on the Role of the State Bar of Michigan, Report to the Michigan Supreme Court, available at <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Comments%20new%20 2013/2014-07_2014-06-03_SBM%20Task%20 Force%20Report.pdf> (accessed June 24, 2014).
2. Administrative Order No. 2014-5.
3. *Id.* The task force was also asked to examine State Bar programs and activities that are germane to the compelling state interest recognized in *Falk v State Bar of Michigan*, 418 Mich 270; 342 NW2d 504 (1983), and *Keller v State Bar of California*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990), to examine other programs the State Bar of Michigan ought to undertake to enhance its constitutionally compelled mission, and examine how other mandatory bars satisfy their constitutionally permitted mission.
4. *Keller*, n 3 *supra*.
5. Even if some task force members debate this conclusion, they won't deny that our ability to serve the public will be severely impaired.
6. See McLellan, *No mandatory dues for ideology*, 93 Mich B J 20–22 (May 2014).
7. Letters to the editor by Alter, Rose & Rosen, *Advocating donor transparency in judicial elections*, 93 Mich B J 14–16 (June 2014).
8. See 2013 PA 252, § 6(2ii).
9. Const 1963, § 5; see also *Grievance Administrator v Fieger*, 476 Mich 231, 240; 719 NW2d 123 (2006) (holding that the Michigan Supreme Court has "the duty and responsibility to regulate and discipline the members of the bar of the state").
10. Task Force Report, n 1 *supra* at 2.
11. *Id.*
12. *Id.* at 5.
13. *Id.* at 7.
14. *Id.* at 7.
15. *Id.* at 9.
16. Scalia, *A Matter of Interpretation: Federal Court and the Law* (New Jersey: Princeton University Press, 1997), p 23.
17. Task Force Report, n 1 *supra* at 7 and 8.
18. Administrative Order No. 2004-1.
19. Administrative Order 2004-1 requires a two-thirds vote before the Board of Commissioners can support or oppose legislation. Why do we also need another supermajority before we can discuss legislation?
20. Why is it "independent" if three members appointed by the Court would decide whether the Bar should comment on something or not?
21. Task Force Report, n 1 *supra* at 8 and 9.
22. *Id.* at 10.
23. HB 4953 of 2007.
24. Task Force Report, n 1 *supra* at 10.
25. 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 influenced 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> (accessed June 24, 2014).
26. Task Force Report, n 1 *supra* at 10.
27. *Id.* at 6.
28. *Id.* at 16.
29. *Id.* at 13 and 14.
30. *Id.* at 13.
31. MRPC 1.0 Comment, Preamble: A Lawyer's Responsibilities.