

We Live in Interesting Times



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“May you live in interesting times.”

This phrase is commonly referred to as an ancient Chinese curse, though it is neither ancient nor Chinese.¹ But its use as a curse is typically quite clear. “Interesting times” are meant as an era of turmoil and tumult, upheaval and strife.

Many lawyers have remarked that the State Bar has been “living in interesting times” for more than a year. Specifically, on September 11, 2013, the State Bar sent a letter to Michigan Secretary of State Ruth Johnson requesting an administrative rule change requiring disclosure of donors for so-called issue ads in judicial campaigns. This letter did not materialize out of thin air. Three years earlier, the Representative Assembly—the State Bar’s final policymaking body—called for disclosure, concluding that anonymous funding of third-party issue ads in Michigan judicial campaigns could conceal instances when a judge should be disqualified under MCR 2.003.²

In the fall of 2012, the Oakland County Circuit Court race was deluged by a tsunami of televised issue ads funded by anonymous sources. The State Bar received a bipartisan request to take preemptive action

for the next election cycle. In response, SBM President Bruce Courtade appointed a Judicial Campaign Workgroup composed of nine State Bar commissioners that was “diverse politically, ideologically and geographically.”³ I was asked to chair the workgroup because of my leadership on the issue since 1997—advocating statewide reforms at the first annual State Bar Bench-Bar Conference and implementing countywide reforms in Macomb County judicial campaigns soon afterward as Macomb County Bar Association president.

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On April 26, 2013, the workgroup presented its findings to the State Bar’s Board of Commissioners. The Board adopted the workgroup’s recommendations, among which was a reaffirmation of the Representative Assembly’s position against anonymous funding of judicial campaign ads. Acting on those directives, the State Bar asked the secretary of state to end anonymous donations for issue ads in judicial campaigns only. In his majority opinion in *Citizens United v Federal Elections Commission*,⁴ United States Supreme Court Justice Anthony M. Kennedy suggested that campaign funding disclosure laws should be enacted for all elections—executive, legislative, and judicial—to maintain the public’s trust. But Courtade and

SBM Executive Director Janet Welch appropriately limited our request to judicial campaigns to conform to the restrictions on using mandatory bar dues for ideological advocacy contained in the United States Supreme Court’s decision in *Keller v State Bar of California*⁵ and the Michigan Supreme Court’s decision in *Falk v State Bar of Michigan*.⁶

On November 14, 2013, Secretary of State Johnson issued a formal response to the State Bar’s letter, declining to exercise her rulemaking authority to regulate judicial elections only. Instead, she proposed new transparency requirements for issue ad donations for all three branches of government.

But the proposed transparency rules were short-lived. Within hours of the secretary of state’s announcement, a single new definition was added to Senate Bill 661—a bill previously introduced for other purposes—to nullify the proposed disclosure rules.⁷ SB 661 was quickly passed by the legislature and signed into law before the end of the year. Judicial campaign finance reform had reached a dead end.

Despite the State Bar’s loss, our principled, nonpartisan stand against unidentified campaign contributions in judicial elections drew criticism in political circles. Opponents called for a de-unification of the State Bar. On January 23, 2014, Senate Bill 743 was introduced in the Michigan Senate to make membership in the State Bar voluntary under a “right to work” theory. Although our State Bar position against anonymous funding in judicial campaigns was overwhelmingly supported by our membership, some attorneys asserted that their First Amendment rights to dissent from the State Bar’s position were not properly protected.

At the State Bar’s request, the Michigan Supreme Court considered the matter and assembled the Michigan Supreme Court Task

The views expressed in the President’s Page, as well as other expressions of opinion published in the *Bar Journal* from time to time, do not necessarily state or reflect the official position of the State Bar of Michigan, nor does their publication constitute an endorsement of the views expressed. They are the opinions of the authors and are intended not to end discussion, but to stimulate thought about significant issues affecting the legal profession, the making of laws, and the adjudication of disputes.

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Force on the Role of the State Bar of Michigan. The task force was charged with

determining whether the State Bar's duties and functions "can[] be accomplished by means less intrusive upon the First Amendment rights of objecting individual attorneys" (*Falk*, 411 Mich at 112 [opinion of Ryan, J.]) under the First Amendment principles articulated in *Keller* and *Falk*. At the same time, the task force should 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.⁸

In only 74 working days, the task force held 10 in-person meetings and conducted an all-day public hearing at the Michigan Hall of Justice, taking testimony from 27 speakers. More than 500 State Bar members contributed written comments, as did the Representative Assembly and many voluntary State Bar sections and local and affinity bar associations. The task force issued its report to the Michigan Supreme Court on June 3, 2014. The report was met with a firestorm of criticism from defenders of the State Bar status quo. The Michigan Supreme Court invited the public to comment on whether the report:

- (1) adequately assessed the First Amendment problems concerning required 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 its members.⁹

A multitude of State Bar entities and members responded with their thoughts before the August 4 deadline. State Bar groups with a significant public policy role stepped

up and advocated to maintain our voice. I, for one, could not have been prouder.

As a member of the task force, I was overwhelmed by the outpouring of support for the State Bar from our members. Almost to a person, our members and their voluntary associations applauded the State Bar's efforts to protect the public. Many voices echoed the three goals I have held dear as the State Bar has navigated through these interesting times:

- (1) Remain a mandatory bar
- (2) Maintain our public policy advocacy
- (3) Preserve our governance structure

I recognize that many State Bar members took exception to some of the task force's recommendations. Most of the critics believed the proposed *Keller* restrictions on the State Bar were too severe, while others felt the recommendations still allowed the State Bar too much latitude. Even the task force members didn't agree on everything.

But reasonable minds can differ. And we can disagree without being disagreeable. Although we have different perspectives, we have no difference in the sincerity of our beliefs. As attorneys, we are sworn to uphold the constitutions of the United States and the state of Michigan, both of which include First Amendment rights of every one of our members. Inevitably, the balance between the State Bar's prerogatives to protect the public as a state-mandated organization of all attorneys and the First Amendment rights of dissenting members will be determined by the Michigan Supreme Court.

Certainly, as lawyers, we are always under attack from those who do not understand our ethical obligations to champion the interests of our clients. Every time an attorney takes on an unpopular cause or a judge makes an unpopular decision—no

matter how righteous the facts and the law may be—opponents are quick to question our motives and our morals. Because of this phenomenon, lawyers and judges are convenient political targets. At no time in recent memory has the organized bar been under such a concerted political attack as in the last year—not just in Michigan, but around the country.

To defend against this attack and survive these interesting times, we must circle our proverbial wagons. But we must resist the temptation to fire inward at one another. And we must not fire blindly into the wilderness either. We need to act and react strategically. Inevitably, we must trumpet the accomplishments of the State Bar in protecting the interests of the public. We must prove that a mandatory State Bar of Michigan—governed by a popularly elected Representative Assembly and Board of Commissioners—featuring voluntary sections and vibrant nonpartisan public policy advocacy, can safeguard the First Amendment rights of its members and best protect the interests of Michigan citizens. We must make our case to our fellow lawyers on the Michigan Supreme Court.

Because the question of State Bar regulation is administrative in nature, the prohibition of ex parte contact with the justices does not apply; both formal and informal advocacy in support of the State Bar is welcome. This is an argument that we, as lawyers, can and should inevitably win. Why? Because we have the boundless abilities of our members, who are professional advocates. Because in a battle of ideas, we are the greatest corps of thinkers. And because, by our nature, attorneys are problem solvers. We can emerge from this cauldron of controversy by building on the similarities in our goals rather than the differences in our approach. In fact, our strength as a mandatory State Bar is our diversity—of background, of thought, of life experience.

But we are all lawyers and we instinctively protect the interests of our clients. Now is the time to protect the interests of the State Bar of Michigan. By standing together, I am confident we can achieve a stronger State Bar, more capable of protecting the public. Each year, we have thousands of lawyers volunteering in various

capacities for the State Bar. And we have many more attorneys volunteering for local and affinity bar associations. At this very moment, volunteer attorneys are working around the state for the advancement of the profession and the betterment of the public.

Indeed, to paraphrase Mark Twain, the report of the State Bar's death is an exaggeration.¹⁰ Serious discussions about forming a voluntary statewide bar to supplement or replace the State Bar are premature. If our worst fears are realized—that the State Bar's public policy voice is silenced—efforts to form a voluntary entity to fulfill our professional public policy obligations should begin in earnest. But until then, we have a rare opportunity to recalibrate our organization. Since I was sworn in as an attorney in 1987, I do not remember a time when:

- Michigan lawyers have been more energized,
- the State Bar has been more valued by its members,
- the State Bar has attracted so many avid supporters,
- the past presidents have been so actively engaged,

- the sections have been more fervently outspoken,
- the committees have been more vigilant of their responsibilities,
- the Representative Assembly has been more articulate in its deliberations,
- the Board of Commissioners has been so focused and hard-working, and
- the staff has been so tirelessly devoted to our mission.

The debate about the State Bar's future has rekindled the fire in our volunteers. We must harness this passion to build a better State Bar, more focused on our core mission of protecting the public.

I thank my predecessor, Brian Einhorn, for the part he played in inspiring this passion in our members and for leading our profession during these interesting times. As president, I pledge to do my best to safeguard the hopes and dreams of our organization and to achieve a brighter future for our profession. I know I am surrounded by incredibly talented, caring, and successful people in our corps of volunteer attorneys and our professional staff. Because of such

people, the State Bar of Michigan has prospered for 79 years. I'm confident the State Bar will survive these interesting times and thrive in the decades ahead. ■

ENDNOTES

1. Wikipedia <http://en.wikipedia.org/wiki/May_you_live_in_interesting_times>. All websites cited in this article were accessed September 18, 2014.
2. See *Caperton v A T Massey Coal Co, Inc*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).
3. E-mail from SBM President Bruce Courtade to the SBM Board of Commissioners (December 12, 2012, 16:37 EST) (on file with author).
4. *Citizens United v FEC*, 558 US 310; 130 S Ct 876; 175 L Ed 2d 753 (2010).
5. *Keller v State Bar of California*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990).
6. *Falk v State Bar of Michigan*, 411 Mich 63; 305 NW2d 201 (1981).
7. See SB 661 (amending section 6(2)(j)) "...an expenditure for a communication if the communication does not in express terms advocate the election or defeat of a clearly identified candidate so as to restrict the application of this act to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for governor,' 'vote against,' 'defeat,' or 'reject.'")
8. Administrative Order No. 2014-5.
9. Michigan Courts News Release (June 3, 2014), available at <http://courts.mi.gov/News-Events/press_releases/Documents/SBM%20Task%20Force%20Report.pdf>.
10. See Wikipedia <http://en.wikipedia.org/wiki/Mark_Twain>.



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