

# The Challenge to the Integrated Bar



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While legal challenges to the integrated bar are not new, the recent United States Supreme Court decision invalidating compelled public employee union fees for nonmembers has brought on a new basis for challenges to integrated bar associations.

## Background

All states require that lawyers admitted to the bar pay a recurring fee for the costs of regulating the legal profession.<sup>1</sup> In a majority of jurisdictions, the members of the bar have been integrated into a role in the regulation itself because the state has designated the state bar as its agent for this purpose. The State Bar of Michigan (SBM) is such an integrated bar.<sup>2</sup> And in 2014, in response to proposed legislation deunifying the bar, an overwhelming majority of you let the SBM know in no uncertain terms that you like it that way.<sup>3</sup>

In 1990, in *Keller v State Bar of California*, the United States Supreme Court settled a season of challenge to the integrated bar by holding that integrated bars may use mandatory member dues to engage in political or ideological activities “for the purpose of

regulating the legal profession or improving the quality of legal services available to the people of the State.”<sup>4</sup> In reaching its decision, the Court relied in part on *Abood v Detroit Board of Education*, which, among other things, upheld agency shop charges to nonunion members to finance expenditures related to collective bargaining, contract administration, and grievance adjustment purposes.<sup>5</sup>

On June 27, 2018, the United States Supreme Court decided *Janus v American Federation of State, County, and Municipal Employees*, overruling *Abood*, to hold that public-sector unions cannot force employees who benefit from a union’s collective bargaining agreement but decline to join the union to pay “fair share” fees.<sup>6</sup> Many have speculated that *Janus* will lead to the invalidation of other mandatory fees, such as those of the integrated bar, considering that the *Keller* decision upholding the constitutionality of integrated bars relied in part on *Abood*.<sup>7</sup> Ready to test that theory was a member’s challenge to an integrated bar, the State Bar Association of North Dakota (SBAND), pending in the Eighth Circuit: *Fleck v Wetch*.<sup>8</sup>

## *Fleck v Wetch*

The facts of the case that precipitated the current challenge will sound strange to Michigan lawyers and underscore the varied ways in which advocacy for each integrated bar works. The SBM’s constraints on its advocacy—imposed from above by the Michigan Supreme Court and from within by its own bylaws and operating procedures—would not have allowed the SBM to act in the way that is being challenged in *Fleck*.

At issue in *Fleck* was SBAND’s opposition to a ballot proposal, the Parental Rights Initiative (also referred to as the Father’s Rights Initiative), that would amend state

law to create a presumption in domestic-relations cases that each parent is a fit parent entitled to be awarded equal parenting time. Attorney Fleck supported the ballot measure, donating money and appearing on radio and television to debate the measure.

Fleck sued SBAND for its monetary support of “Keeping Kids First,” a committee opposing the ballot measure, claiming that under SBAND’s procedures at the time, he did not receive notice of SBAND’s proposed support for Measure 6 and that his sole remedy—requesting a refund from SBAND’s executive director—violated his First Amendment rights. He asserted that the First Amendment requires that members affirmatively allow their dues to be used for advocacy through an opt-in procedure. Fleck sued SBAND, challenging its opt-out procedures.<sup>9</sup> The Eighth Circuit disagreed and affirmed the district court’s grant of summary judgment to SBAND.<sup>10</sup>

Fleck filed a Petition for Writ of Certiorari with the United States Supreme Court, seeking not only review of whether the opt-out rule violated the First Amendment, but adding a “Freedom of Association” claim: whether *Keller v State Bar of California* and *Lathrop v Donohue*<sup>11</sup> should be overruled insofar as they permit the state to require the “petitioner to join a trade association he opposes as a condition of earning a living in his chosen profession.”<sup>12</sup> While the petition was pending review, the Supreme Court issued its decision in *Janus*.

On December 3, 2018, the Supreme Court vacated the judgment in *Fleck v Wetch* and remanded the case back to the Eighth Circuit for further consideration in light of *Janus*.<sup>13</sup> Oral arguments are currently scheduled for June 13, 2019, in St. Paul, Minnesota. The key question is whether the integrated bar should be subject to the same limitations as public employee labor unions under *Janus*.

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## The integrated bar is not a union

*Janus* does not signify the end of the SBM as we know it. Although integrated bars have long been analogized to public employee labor unions, the analogy has always been one more of convenience than precision. Simply stated: integrated bars are not unions.

As we know, labor unions are created by workers organizing to advance their collective interests. The SBM, however, was created by the state to carry out the state's compelling interest in regulating the practice of law, maintaining high standards in the legal profession, and discharging the profession's duty to protect and inform the public.<sup>14</sup> The Michigan Supreme Court has upheld the constitutionality of the SBM's status as an integrated bar, holding that:

[T]he State of Michigan, through the combined actions of the Supreme Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association of attorneys, to support only those duties and functions of the State Bar which serve a compelling state interest and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting attorneys.<sup>15</sup>

Michigan is not alone; currently, 32 states have determined, either by statute or state Supreme Court ruling, that licensing and regulation is best handled through an integrated bar structure.<sup>16</sup> Integrated bars are created by the state, not to advocate for lawyers' interests, but to assist the state in serving the public and maintaining the integrity of the legal profession. It is this focus that makes integrated bars—including the SBM—fundamentally different from labor unions.

## The value of the SBM as an integrated bar

No organization of lawyers can long survive which has not for its primary object the protection of the public.

Roberts P. Hudson wrote these words in the *Michigan State Bar Journal* in 1936, shortly after the Michigan Supreme Court created the SBM.<sup>17</sup> For the past eight decades, the SBM and its members have strived to serve the public. As members of the Bar,

we are officers of the courts of this state with ethical obligations to participate in the maintenance of and improvements in the rule of law.<sup>18</sup> As confirmed in the Preamble to the Michigan Rules of Professional Conduct, a lawyer is not just a representative of clients and an officer of the legal system, but a public citizen having special responsibility for the quality of justice, including “seek[ing] improvement of the law, the administration of justice and the quality of service rendered by the legal profession.”<sup>19</sup>

Individually, these goals may appear laudable but elusive. But when they're pursued by a diverse group of attorneys working together through SBM committees, workgroups, and task forces, they become much more attainable.

The Michigan Supreme Court has been instrumental in helping the SBM and its members achieve their goals by providing much-needed direction concerning permissible ideological activities that the SBM may pursue. Administrative Order 2004-1 permits the SBM to use member dues to advocate on matters reasonably related to:

- regulation and discipline of attorneys;
- improvement of the functioning of the courts;
- availability of legal services to society;
- regulation of attorney trust accounts; and
- regulation of the legal profession, including the education, ethics, competency, and integrity of the profession.

As lawyers in this state, we all have unique insight and expertise in these subject areas. It is critically important to the creation of the law in Michigan by a legislature, especially one consisting mostly of non-lawyers subject to term limits, that we provide guidance on legislation affecting these areas. The integrated bar provides an efficient vehicle, open to all lawyers, to do so.

To ensure that all members have an opportunity to voice their opinions on public policy matters, the SBM provides notice of all matters under consideration by the Board of Commissioners. Members' opinions—whether voiced individually or collectively through sections and committees—

are important factors in the positions that the SBM adopts. Further, the Board of Commissioners has adopted procedures to help ensure that the SBM carries out its advocacy responsibilities within the limits imposed by *Keller* and our Supreme Court. It takes a two-thirds affirmative vote of the Board or Representative Assembly to confirm that the subject matter fits within one of the categories set forth by Administrative Order 2004-01 before either body will consider the matter.<sup>20</sup>

But that is not the end of the story. Simply because the SBM takes a position on a subject matter authorized by Administrative Order 2004-01 does not preclude any member of the Bar from advocating a contrary position. And the SBM helps them do so. Legislation and court rules up for consideration by the Board of Commissioners are posted on the SBM website and in the weekly Public Policy Update, and both resources are updated once the Board takes its positions.<sup>21</sup> It is to the credit of the SBM—and ultimately to the advantage of the public—that so many of our members are invested in matters before the legislature or the Supreme Court and take the time to make their voices heard, often weighing in with opinions different from the Bar's. I believe that the SBM's extensive efforts in advising our members of pending public policy issues play an important role in engaging Michigan's lawyers. In this way, integrated bars *encourage* all persons licensed to practice law within a jurisdiction to participate in advancing the legal system and the administration of justice. And the SBM and the public benefit from the wealth of ideas and input from the Bar's diverse volunteer network.

## Integrated bars protect the public to the benefit of their members

While the work of the SBM for the improvement of the legal profession and the administration of justice protects and benefits the public, it also provides ancillary benefits to its members that would not be available in such a cost-effective manner, if at all, if the Bar were not integrated. Programs such as the Lawyer and Judges Assistance Program, the Lawyer Referral Service, the Ethics Hotline, educational presentations, the Practice Management Resource

Center, and the Economics of Law Practice Survey benefit the public and the legal system and are also necessary resources for the health, wellness, and success of our individual members.

We are fortunate that the SBM, with a force of dedicated and knowledgeable volunteers, has the privilege of being integrated into our state's regulatory structure. We are also fortunate that the individual cost for our more than 45,000 members—funds that cover licensing, discipline, and activities to promote the improvement in the profession and the administration of justice—is consistently lower than most of the country's integrated bars. At \$315 per year for active members, Michigan has the eighth lowest fee, 21 percent lower than the national average of \$397 paid by members of integrated bars. In fact, Michigan's fees are 11 percent below the national average fee of \$352 paid by members of all 51 jurisdictions to practice law, including both integrated and deunified states.<sup>22</sup>

## Conclusion

Practicing law is a privilege. So, too, is practicing law in the great state of Michigan. The Michigan Supreme Court established the SBM's mission to promote improvements in the administration of justice and advancements in jurisprudence and to improve relations between the legal profession and the public. This mission provides the foundation on which the SBM Strategic Plan is built. In addition to administering licenses and the Client Protection Fund, the SBM undertakes the responsibilities that come with the privilege of practicing law, including public education; advocacy for low- and middle-income Michiganders needing legal help; support for an open, fair, and accessible justice system; and resources for members that enable them to best serve their clients.

In our integrated bar, the cost for complying with our ethical obligations as officers of the court and as public citizens is borne by the legal profession, not taxpayers. The people of the state of Michigan would be unfairly affected by the upheaval in a change from an integrated to a deunified bar. Although we all have the same obligations as officers of the court and members of the Bar, we know that, if forced to deunify, SBM

membership would drop off—with no attendant cost savings to individual lawyers and likely cost increases to the state—as voluntary professional associations, including state, local, and affinity bars, struggle with declining memberships.

The people of the state of Michigan would feel the loss of SBM services that benefit the public, a natural result of losing those who do not feel compelled to assist with the Bar's mission if not mandated to do so as part of the responsibility that accompanies their licenses.

The State Bar of Michigan has carried out its mission to benefit the public subject to government oversight and the dictates of the law as an integrated bar since 1935. It does this, along with the licensing and regulation of lawyers, at fees lower than those paid by most lawyers across the country. The integrated bar works in Michigan and should continue. ■

## ENDNOTES

1. ABA, Division of Bar Services, *2018 State and Local Bar Benchmarks Survey: Membership, Administration and Finance* (2018).
2. MCL 600.904.
3. SBM, *State Bar of Michigan Comments on the Report of the Michigan Supreme Court Task Force on the Role of the State Bar of Michigan*, Comments, Recommendation 1: Membership should remain Mandatory (July 31, 2014), p 4: "The vast majority of State Bar members enthusiastically support an integrated State Bar under *Keller*." The SBM noted that the following entities took "the position to maintain a mandatory bar: the democratically elected members of the Board of Commissioners and Representative Assembly; the councils of Sections representing a collective membership of about 30,000 State Bar members, and about 85% of the speakers at the Public Hearing held by the Task Force on May 2, 2014." <<https://www.michbar.org/file/news/releases/archives14/boccomments.pdf>>. All websites cited in this article were accessed February 19, 2019.
4. *Keller v State Bar of California*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990).
5. *Aboud v Detroit Bd of Educ*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), overruled by *Janus v American Federation of State, County, and Muni Employees*, 585 US \_\_\_; 138 S Ct 2448 (2018).
6. *Janus*, 138 S Ct at 2481.
7. Baude & Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv L Rev 171 (2018) <[https://harvardlawreview.org/wp-content/uploads/2018/11/171-204\\_Online.pdf](https://harvardlawreview.org/wp-content/uploads/2018/11/171-204_Online.pdf)> [https://perma.cc/D5GG-SG65].
8. *Fleck v Wetch*, 868 F3d 652 (CA 8, 2017).
9. *Id.* at 653.
10. *Id.* at 657.
11. *Lathrop v Donohue*, 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961).
12. Petition for a Writ of Certiorari, *Fleck v Wetch*, 139 S Ct 590 (2018), cert granted (No 17-886). A question presented on the Petition was: "Does it violate the First Amendment for state law to presume that Petitioner consents to subsidizing non-chargeable speech by the group he is compelled to fund (an 'opt-out' rule), as opposed to an 'opt-in' rule whereby Petitioner must affirmatively consent to the subsidizing such speech?" This and other related pleadings are available at <<https://www.scotusblog.com/case-files/cases/fleck-v-wetch/>>.
13. *Id.* The order is available at <[https://www.supremecourt.gov/orders/courtorders/120318zor\\_gfbb.pdf](https://www.supremecourt.gov/orders/courtorders/120318zor_gfbb.pdf)> [https://perma.cc/GC97-SG3E].
14. MCL 600.901 *et seq.* and *Falk v State Bar*, 418 Mich 270; 342 NW2d 504 (1983).
15. *Falk v State Bar*, 411 Mich 63, 84; 305 NW2d 201 (1981).
16. ABA, Division of Bar Services, *2018 State and Local Bar Benchmarks Survey: Membership, Administration and Finance* (2018). The integrated bars are varied in their creation: some are state agencies, some judicial agencies, some governmental agencies, with others designated as public body corporations. Integrated bars have been created by the Supreme Court or by the legislature. As a result, it's important to note that no two integrated bars are exactly the same. In fact, there are not even a few models that all of the states fall into as each integrated bar varies in its specific role in JD admissions, pro hac vice admissions, discipline, administrative functions for licensing and compliance, professional competence, licensing system integrity such as client protection funds or the unauthorized practice of law, improvements in the law, administration of justice, or the quality of legal services.
17. Hudson, *Message from the President*, 15 Mich St B J 7, 8 (1936).
18. MCL 600.901.
19. MRPC 1.0, Preamble: A Lawyer's Responsibility: "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. As a member of a learned 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 and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest."
20. For a listing of the Permanent Rules of Procedure of the Representative Assembly (adopted January 20, 1973), particularly Section 5.1.1 *Keller* Vote, see SBM, *Representative Assembly Member Handbook* <<https://www.michbar.org/generalinfo/handbook>>.
21. For information related to positions taken by and reported to the SBM, see Public Policy Resource Center <<https://www.michbar.org/publicpolicy/Home>>.
22. *2018 State and Local Bar Benchmarks Survey: Membership, Administration and Finance*. Thank you to SBM Director of Finance James Horsch for providing the mathematical analysis of Michigan's fees in comparison to both integrated and deunified bar states.