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July 29, 2014

Office of Administrative Counsel
P.O. Box 30052
Lansing, Michigan 48909

RE: Comments regarding The *Report of the Task Force on the Role of the State Bar of Michigan* and Administrative Order No. 2014-5—Mandatory Bar

Dear Sir/Madam:

The Supreme Court has solicited comments in connection with its February 13, 2014, Order, which sought to determine whether state bar duties and functions could be accomplished by any means less intrusive upon the First Amendment rights of objecting attorneys.

The undersigned was privileged to testify before the task force on Friday, May 2, 2014. I have attached a copy of my revised remarks for your consideration.

I have also reviewed the task force report itself as well as President Brian Einhorn's opposition comments in the July 2014 *Bar Journal*. The report and comment, despite their apparent differences, are all in one accord affirming the use of force to promote ideas. Indeed, a careful review thereof will show that neither objects to the use of state coercion to require an attorney to contribute monies called dues, for the propagation of ideas which he or she disbelieves or disagrees. Moreover, neither objects to the use of state coercion in depriving an attorney of the right to freely give his or her contributions to that bar or other organization whose views he would make his own.

While the Court has framed its order in terms of First Amendment rights and therefore in terms of its derivative *Keller* applications, either broadly or narrowly applied, I call the Court's attention to the unalienable right of free association underlying the First Amendment itself – a preexisting right which *Keller* alienates rather than preserves.

The unalienable right of free association empowers attorneys to affiliate with those organizations which they have consensually created, rather than compelling association with one organization which has been created for them. The Bar wants to hold onto its organizational

monopoly. This is an understandable expression of human nature which lies in each of us to covet our neighbor's property and money. Yet, all of the objects to which it has appointed itself as the one true defender to secure, can, upon examination, be secured on equal or superior terms by individuals or a multiplicity of organizations voluntarily established and funded.

This truth is self-evident to all except those who earn their bread from another attorneys forced dues, or whose professional standing or particular views, however, even-keeled or idiosyncratic, are enhanced and advanced through the use of force and coercion in extracting dues from others.

Human nature would have us all believe that each man's views are the one true and only to which all others should yield and subscribe. It is a small step to convince oneself that to compel others to support such views through the use of mandatory and coercive funding arrangements is right and true and perhaps even necessary for the welfare of others! That step, however, is not necessary. The greatness of the object does not justify the singularity of the means. Such a step moreover, is also dangerous because it puts the power of the purse behind those who control the levers of power and advances their ideologies by depriving their opponents of previously appropriated funding.

The Bar pretends to know what is best for justice. Good for it. Now let it persuade others of the merits of its claim. Let it persuade others by volition. Let it persuade others to join in funding it voluntarily to advance its views. But by the same token, do not take from any man the ability to contribute to another organization which persuades him that a better path to justice or to protecting the community exists. Do not take from any man the ability to refuse his contributions, believing that the path to justice is otherwise obtained. The simple truth is this: coercion in funding is not necessary to advance just legislation, ensure the quality of legal services, the protection of the public, or for the provision of technical expertise to the legislature or executive branch.

The same propositions apply to a representative assembly. Whom does a representative assembly represent? A representative assembly "represents" those who are first compelled to associate. The concept of a representative assembly is built on the foundation of coercion of association and therein lies its chief defect. To rearrange the particulars of the assembly, its number or its structure or other nuanced arrangements misses the point. The point is that it is based upon a false premise-- that lawyers may be compelled to associate against their will in the first place.

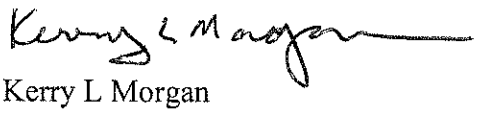
At the end of the day the current arrangement treads heavily upon the unalienable and preexisting right to freely associate. The use of force through the threat of loss of license or even disbarment tramples down the freedom of one to associate with another to advance those causes and to advance those views, which to him or her seem right.

If the Court will return to first principles, it will see that *Keller* is a very limited expression rather than the foundation itself. The bar should discontinue assessment of all dues. Lawyers should be free to join or not join the bar. The bar should continue to exist only if it can generate sufficient support from individuals whose views are likewise aligned, as is the case with every voluntary organization.

There are certainly auxiliary functions of this Court such as those pertaining to admission, licensure and discipline. These pertain to governmental objects and as such should be funded by the State of Michigan if the State finds them worthy.

Should you have any questions, please free to contact the undersigned.

Very truly yours,



Kerry L Morgan

Enclosure

cc: Robert P. Young, Jr., Chief Justice

Testimony of Kerry Lee Morgan before the State Bar Task Force on the Role of the State Bar of Michigan, May 2, 2014.

My name is Kerry Lee Morgan. I am licensed in Michigan, Virginia and the District of Columbia, the Eastern and Western districts of Michigan, the Federal Circuit and Sixth Circuit, and Supreme Court. I was first admitted to practice law in 1981.

My testimony is simple. To compel an attorney to join a state bar organization that advances opinions or promotes goals or programs to which he objects, is a violation of his right to freely associate. It is a violation of the right of association, simply because it seeks to compel in law, that association which is voluntary in fact.

Compulsory association also has harmful and needless secondary effects. The attorney who refuses such compulsion is denied the freedom to labor, to put bread on his table for him and his family. He is denied the ability to exercise those legal gifts, skills and abilities of which he is endowed or has labored to acquire of his own right, and not as a gift bequeathed by the State Bar of Michigan or the Michigan Supreme Court. The result of non-association or refusal to pay dues, has the effect of a Bar-imposed lifetime and statewide non-compete agreement.

Yet, suppose an attorney believes the State Bar is the best organization, its goals are just, and its rationale and purpose superior to all other organizations. Even here, to compel an attorney to join with that organization, or subsidize those goals and rationales, views or programs--even those of his own liking and with which he agrees--nevertheless deprives that attorney of the comfortable liberty of freely associating and of freely giving his dues and contributions. He is deprived of the freedom to choose—the freedom to choose the particular bar organization whose views and programs he would advocate, and whose organization he feels most persuasive to advancing justice and protecting the public, if any.

Moreover, to permit or empower the State Bar to intrude its powers into the field of opinion, to support or oppose this or that legislative bill, to advocate this or that view of diversity, or even promote labor *pro bono*, is not necessary to protect the public. These powers in fact, serve a different master. They serve and preserve our legal monopoly.

In ***Keller v. State Bar of California***, 496 U.S. 1 (1990), the Supreme Court held that attorneys who are required to be members of a state bar association have a First Amendment right to refrain from subsidizing the organization's political or ideological activities. But for the reasons stated here, attorneys also have the right to freely associate or not associate in the first instance, and to subsidize or refuse to subsidize any organization of their choice or no bar organization at all. Let us not forget, that ***Keller*** sets the floor not the ceiling. The Michigan Constitution provides greater protection that the federal one. Article 1, section 23 exists for this very reason. Administrative order 2014-5 seems not to notice our own State Constitution.

Nor is the bar justified merely as a convenient auxiliary of the Supreme Court. If it were, its objects would be subsidized from that body's budget through a legislative appropriation unto that end. The use of compulsion to join, and extraction of dues, would not be necessary.

Many predict the downfall of Justice itself if the State Bar were disestablished. Nonsense. The use of force and coercion against Michigan attorneys is not consonant with Justice. A diversity of private voluntary bar organizations is a surer guide to advancing Justice and protecting the public, than a single mandatory bar organization can ever be. The Supreme Court has power enough to police the practice of law. It does not need a system of coercion which suppresses the right to associate freely, or compels financial support, to exercise that power.