No Mandatory Dues for Ideology

By Richard D. McLellan

The *Bar Journal* has offered me a chance to respond to SBM President Brian Einhorn's President's Page column titled "The Dying of the Light," found on the preceding pages. This gives me an opportunity to speak for the Michigan lawyers strongly opposed to the State Bar's increasing interest in engaging in ideological political activities using members' compelled dues.

As reflected in his column, President Einhorn, his predecessor, and the Board of Commissioners have, in my view, improperly decided to engage in an organized campaign[1] to change state law regarding elections, judicial campaigns, and political speech. These efforts are a violation of the rules under which the State Bar is permitted to compel the payment of dues as a precondition to practicing law. In the October 2013 *Bar Journal*, President Einhorn said:

> I will spend as much time as needed during my year as president to ensure we achieve full disclosure in judicial elections.[2]

The State Bar's active campaign began with a request that the Michigan secretary of state unilaterally amend state law by means of a declaratory ruling.[3] The Bar's ideological policy position was clear: notwithstanding the actual language of Michigan law,

> [W]e believe that all advertising in judicial campaigns is the functional equivalent of express advocacy for purposes of MCFA.

The proposal attempted to impose federal law terms—"functional equivalent" and "express advocacy"—in Michigan election laws without the action of the legislature. More importantly, the State Bar's position wades into complex First Amendment debates that have gone on for decades and is a legitimate subject for state policy. But not for the State Bar using my mandatory dues.

This effort by the State Bar of Michigan is wrong on two grounds. First, the State Bar is a government agency and is improperly using mandatory dues to engage in a political and ideological campaign to change Michigan's election laws. Second, the State Bar's proposed regulation of associational privacy and First Amendment political speech is not the easy straw-man issue—"the right to be free from criticism"—raised by President Einhorn.

Lawyers who have not followed the issue can review the actual timetable:

(1) In 2010, the State Bar's Representative Assembly addressed what it described as "the flow of 'big money' into judicial campaigns" and adopted a resolution calling for an amendment to the Michigan Campaign Finance Act requiring disclosure before a judicial election of the sources of funding for all expenditures for electioneering communications. In the material sent to Representative Assembly members, under the section Opposition to the Proposal, the response was "None known."

(2) On September 11, 2013, State Bar Executive Director Janet Welch asked the secretary of state to issue a "declaratory ruling"[4] that reflected the Bar's position on so-called "issue advocacy."

(3) In the October 2013 *Bar Journal*, Immediate Past President Bruce Courtade sought to defend the effort by claiming the Welch request was "nonpolitical" and that "opposition to secret judicial campaign funding is not ideological."

(4) The Bar's ruling request engendered wide comment, both for and against the proposal. For example, the Michigan Chamber of Commerce told the secretary of state "the unstated result of the State Bar of Michigan request is to violate freedom of association rights of the Michigan Chamber of Commerce, and any other association that exercises its First Amendment Rights to refer to candidates for public office." (Unlike the State Bar, the Chamber is a private organization funded with voluntary dues.) In addition, I submitted a response which stated, in part:

> This purported DRR, with its references to "dark money," "electioneering" and other terms that are not part of Michigan's laws, makes it clear that the State Bar is seeking to use the DRR process for ideological purposes. Its aim is clear, to achieve its political goals of silencing or

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> burdening certain voices in judicial elections where the State Bar claims a special interest. Whether the proposals are appropriate or not is a subject for the political processes of the legislature and the State Bar is precluded, as an organization, from engaging in such activity.
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> The State Bar's document is not a proper declaratory ruling request; it is a political document in an ideological campaign to restrict political speech with which it does not agree. The State Bar's purpose is to expand the scope of reportable activity administratively, with the attendant discouragement of political speech, and it has a political effect of advancing the relative political impact of lawyers in judicial campaigns.

(5) Understandably, the Bar's venture into election politics incurred a political response, including proposals[5] to make membership in the bar voluntary instead of mandatory. The Bar waded further into the political process by calling the proposal a "misguided attack"[6] and disingenuously said "[t]he State Bar scrupulously stays out of politics" while asserting that unnamed "politicians want unfettered access to undisclosed funding."

(6) In her response, the secretary of state rejected the Bar's request, saying, in part:

> The definition of expenditure cannot differentiate between candidate types. An affirmative answer to your question as presented would require the Department [of State] to impose disparate rules based on the office sought, and then require all payments for communications referring only to judicial candidates to be disclosed.
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> The Department cannot create a new disclosure policy, applicable to the general public, through declaratory ruling or interpretive statement.[7]

(7) Nevertheless, the secretary of state subsequently sought to bypass the legislature by proposing administrative rules[8] to change the law by fiat rather than amending the statute. These proposed rules are now pending.

(8) Given this dual assault on the lawmaking powers of the Michigan legislature by both a judicial branch agency and an executive branch official, the Michigan legislature promptly enacted Public Act 252 of 2013 stating, in part:

> (2) Expenditure does *not include* any of the following:
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> (j) [A]n 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".[9] [Emphasis supplied.]

In adopting MCL 169.206(2)(j), the legislature was carrying out its duty under Article II, Section 4 of the Michigan Constitution, which provides, in part:

> The legislature shall enact laws to regulate the time, place and manner of all nominations and elections….The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.[10]

It is the legislature, not the State Bar or the secretary of state, that determines the rules of elections and political spending in Michigan. The fact that the legislature determined to replace a vague standard—"name or clear inference"[11]—with a bright-line test benefits the public and those wishing to be active in issue advocacy and political speech.

The Michigan Campaign Finance Act[12] imposes criminal penalties[13] for political speech that runs afoul of its restrictions. In light of the secretary of state's interest in expanding her authority without legislative approval, the action of the legislature was wise.

The issue continues to be controversial and is subject to an ideological debate within our democratic system. As private citizens, the State Bar leadership has every right to oppose the actions of the legislature and recommend their own approach. And they can participate in private, voluntary organizations like the trial lawyers to advance their views.

They do not, however, in my opinion, have the right to engage in this debate in the name of the State Bar, a government agency that is funded by compelled dues.

Since 1935, the privilege of practicing law in Michigan has been conditioned on association with, and financial support of, the State Bar of Michigan compelled by state government.

The State Bar's actions are limited by the United States Supreme Court's ruling in *Keller v State Bar of California*.[14] The key finding in *Keller* is directly applicable to the present situation. The Court held that the State Bar's use of petitioners' compulsory dues to finance political and ideological activities with which petitioners disagree violates their First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services.[15]

The lawyers who support an integrated bar for revenue purposes but also want to

use our compelled dues for ideological purposes are facing a serious challenge. We must either push to make the State Bar a voluntary trade association without compelled dues or urge the Michigan Supreme Court to reign in the Bar's ideological adventures.

Fortunately, the Supreme Court has at least recognized the need to address the issue in establishing a task force (at the request of the State Bar). The Supreme Court's announcement included the following:

> LANSING, MI, February 13, 2014—Should the State Bar of Michigan continue as a mandatory bar, which attorneys must join in order to practice law in Michigan? That is among the issues a newly created task force will consider, taking into account attorneys' First Amendment rights and the need to regulate the legal profession.[16]

It is critical that the task force seriously recognize the importance of First Amendment political speech and the need to prevent government agencies like the State Bar from using compelled dues to advance the ideological interests of the leadership. The Michigan Supreme Court should exercise its powers to prevent abuses like those occurring now. ■

Richard D. McLellan is a lawyer with a 40-year career focusing on public policy and political matters. He argued Austin v Michigan Chamber, *494 US 652; 110 S Ct 1391 (1990), the First Amendment challenge to prohibition on corporate political speech. In 2009, the Supreme Court overturned the* Austin *decision in* Citizens United v FEC, *558 US ___ (2010). He previously served on the SBM Board of Commissioners.*

ENDNOTES

1. See SBM, *Media Kit: State Bar of Michigan Calls for an End to Secret Funding of Judicial Campaign Ads*, available at <http://www.michbar.org/public_mediaresources/judicialelectionsmediakit.cfm>. All websites cited in this article were accessed April 11, 2014.
2. Einhorn, *Greater expectations*, 92 Mich B J 15 (October 2013).
3. See 92 Mich B J 18 <http://www.michbar.org/journal/pdf/pdf4article2280.pdf>.
4. MCL 169.215(2) provides, in part: "A declaratory ruling or interpretative statement issued under this section shall not state a general rule of law, other than that which is stated in this act, until the general rule of law is promulgated by the secretary of state as a rule under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, or under judicial order."
5. Gentilozzi, *Proposal floated to make State Bar voluntary*, Michigan Lawyers Weekly (September 23, 2013).
6. *Id.*
7. Letter from Michael J. Senyko, chief of staff, Michigan Department of State, to Bruce A. Courtade, president of the State Bar of Michigan, available at <http://www.michigan.gov/documents/sos/SBM_Interpretive_Statement_441953_7.pdf>.
8. See 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--rss,00.html>; see also <http://www.michigan.gov/documents/sos/Proposed_Rules_439978_7.pdf>.
9. MCL 169.206(2).
10. Const 1963, art 2, § 4.
11. MCL 169.206(2)(b).
12. MCL 169.201 *et seq.*
13. MCL 169.254(4). "A person who knowingly violates this section is guilty of a felony…."
14. *Keller v State Bar of California*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990).
15. *Id.* at 8–17.
16. Press release, Michigan Supreme Court (February 13, 2014) <http://courts.mi.gov/News-Events/press_releases/Documents/News%20Release%20Task%20Force.pdf#search="state%20bar%20of%20michigan">.