An Open Letter to Tom Rombach

Brian D. Einhorn

Dear Tom:

I understand there's a tradition in which the outgoing president of the United States leaves a letter in the Oval Office for his successor. Now, serving as president of the State Bar of Michigan is nothing like serving as the president of the United States. For example, no one stands up or plays "Hail to the Chief" when you enter a room (but I find that some people stand up to *walk out* whenever I show up) and we don't get a plane. But then, thankfully, we don't have to deal with the kind of problems facing our U.S. presidents either.

After being a member of the State Bar for 46 years, serving as its president has been an honor for me. So this changing of the guard seemed like a good opportunity to share some thoughts about our State Bar—where we've been, where we are, and where we might be in the future.

Plus, I'm never going to have a pulpit like this one again.

The State Bar in critical condition

There is an old curse: "May you live in interesting times." My term has certainly been "interesting." You know the story. Last September, my predecessor, Bruce Courtade, and State Bar Executive Director Janet Welch called on Secretary of State Ruth Johnson to issue an interpretive ruling that would end secret funding in judicial campaigns.

There is an old curse: "May you live in interesting times." My term has certainly been "interesting."

It was an act of tremendous moral courage. It sought change that Michigan desperately needs. Johnson agreed, and proposed an interpretation that would require the disclosure of contributors to so-called "issue ads."

This proposal angered those who benefit from dark money. Within hours of the proposal, the Michigan senate added language to the Michigan Campaign Finance Act, and within a few weeks, a new law was enacted that fortified the walls protecting issue ad funding from public scrutiny.

But the backlash didn't end there. A group united by ideology—one that I doubt included many State Bar members—began arguing that the State Bar should become a voluntary organization. (My theory is that this argument came about because the Johnson letter was well-received by the media and the community at large.) This group became incensed that the State Bar's position might impact future judicial elections, and their solution was to disband the State Bar entirely.

The drumbeat to dissolve the Bar began the day after I was sworn in last September. The rhetoric of the few people who supposedly favored a voluntary bar made dialogue essentially impossible. For instance, Greg McNeilly of the Michigan Freedom Fund proclaimed that "[e]very worker needs freedom and obviously lawyers are an important part of society. They shouldn't be second-class citizens. So we need to give them freedom to practice."[1] Of course, no lawyers were being prohibited from practicing law, and it's hard to take seriously the argument that lawyers are "second-class citizens." But that was the tenor of the arguments we were facing.

The pro-dark-money faction soon took action in the Michigan legislature. Sen. Alan Meekhof introduced a bill to eliminate the mandatory bar entirely. He expressed the view that the State Bar had "overstepped its bounds."[2] I have no doubt that the legislation was proposed in retaliation for the State Bar's opposition to dark money in judicial campaigns.

The Michigan Supreme Court, not the legislature, oversees the State Bar of Michigan. So we asked the Court to initiate a review of how the State Bar operates within the framework of *Keller v California*,[3] a United States Supreme Court opinion that limits—but does not prohibit—public policy advocacy by mandatory bar associations.[4] The Court responded by creating a task force and charging it with determining whether the State Bar could perform its duties "by means *less intrusive* upon the First Amendment rights of objecting individual attorneys…"

After a period of study, the task force recommended changes based not on *Keller* itself, but on a "strict interpretation" of *Keller*. The task force's proposal would fundamentally alter the State Bar and, in my opinion, prevent it from serving the public; if adopted, it would prohibit the Bar from speaking on any issues where our input might actually be valuable.

In hindsight, maybe the outcome shouldn't have come as a huge surprise, given the "less intrusive upon First Amendment rights" language in the Supreme Court's order. Perhaps the task force thought it was more or less required to say that the State Bar had been "intrusive" on members' First Amendment rights—even though no court has held that the State Bar of Michigan actually intruded on First Amendment rights.

After the task force submitted its recommendations, I asked our treasurer, Don Rockwell, to chair a workgroup to determine how the State Bar should respond. I appointed Vice President Lori Buiteweg, Secretary Larry Nolan, Representative Assembly Chair Kathleen Allen, Representative Assembly Clerk Dan Quick, and Commissioners Dennis Barnes, Rob Buchanan, Tim Burns, Peggy Costello, Steve Gobbo, Jennifer Grieco, and Greg Ulrich to serve on the workgroup.

The workgroup met on two separate weekends in June and July, and participated in teleconferences with representatives of the various State Bar sections, the Representative Assembly, and our attorney discipline system. It reviewed the task force's recommendations and most of the materials the task force said it examined before making its recommendations. The workgroup also had the benefit of hearing from several former State Bar presidents, all the commissioners, and other members of the bar.

The workgroup presented a report to the entire Board of Commissioners at its July 25 meeting, and its suggestions were approved by 25 of the board's 31 members. Four members, three of whom served on the task force, voted against the workgroup's recommendations. Two members (who also served on the task force) abstained.

The board voted that we remain a mandatory bar—a conclusion in line with the task force's recommendation. But the board opposed many of the task force's recommendations:

- The task force recommended that the Supreme Court eliminate the following language from Rule 1 of the Supreme Court Rules Regarding the State Bar of Michigan: "…and in promoting the interests of the legal profession." This proposal implies (at least to me) that the State Bar may not be able to promote the interests of the legal profession. We suggested that this language should be modified to read: "…and to protecting and improving the quality of legal services in the State."
- The task force proposed strict limitations on advocacy by the State Bar. We thought these proposals were far too restrictive. (It is my view that if these proposals were adopted, the State Bar would be muzzled precisely when it was most qualified to speak and its input was most needed.) They would, in short, prevent us from truly serving the public—all in the name of a "strict interpretation" of *Keller* that departed from any *reasonable* interpretation of *Keller*. We concluded that these restrictions should not be adopted.
- We opposed the task force's suggestion that a "super panel" must approve any advocacy by the State Bar. For one thing, State Bar members elect commissioners and Representative Assembly members through a democratic process, obviating the need for a super panel to determine what is and is not *Keller*-permissible. We also opposed this suggestion because it was unworkable: the absence of one or two members would prevent formation of this super panel and, thus, prevent any advocacy by the State Bar.
- The Supreme Court's proposed involvement in the super panel was another problem. The task force suggested that the Supreme Court appoint two members and make a third appointment jointly with the Board of Commissioners. But that kind of direct involvement amounts to more than just oversight. Worse, this proposal is an unfounded rebuke to the State Bar, since it suggests that the State Bar can't be trusted to follow directives from the Court.
- The proposed limitations on State Bar sections are also problematic, particularly the requirement that sections must use a separate name not identified with the State Bar when engaging in public advocacy. There are much better solutions for dealing with the supposed confusion the task force claimed occasionally occurs between State Bar and section advocacy.
- We also opposed changes to the governance of the Representative Assembly.[5]

The board submitted its report and comments to the Court on July 31.[6] The Court also received comments from many lawyers, and I was delighted that 25 former State Bar presidents wrote to the Court opposing the "strict interpretation" of *Keller* that the task force recommended.[7]

As I write, we're waiting for action from the Court on the task force's recommendations. My hope is that the Court will acknowledge that the Bar has correctly performed its duties over the last 30 years. I also hope the Court will allow the State Bar to continue to exist, despite a small but vocal minority opposition to the State Bar's stance on dark money in judicial campaigns.[8]

Dealing with lightning-speed legislation

The proposed elimination of the mandatory State Bar wasn't the only legislative challenge we faced during the past year. We dealt with two instances of what I would (kindly) describe as poorly vetted legislation—laws enacted without the kind of deliberation and discussion necessary to allow public input.

I previously described one of the laws: the legislature's almost instantaneous rejection of the secretary of state's proposal on the elimination of dark money in campaigns. The other example occurred around the same time. In November 2013, the Michigan legislature fundamentally restructured our Court of Claims, and it did so in just 13 days.

The State Bar couldn't offer input on this legislation because, under Supreme Court

administrative order 2004-1, the State Bar can't weigh in on legislative issues until after its position has been posted on our website for 14 days.

We've asked the Court to change the 14-day period to 72 hours. I think this change is necessary to keep up with the breakneck pace of legislation affecting the rule of law in Michigan. And we've made some changes to our bylaws that will allow the State Bar to function more quickly when the circumstances demand such, as in the kind of lightning-speed legislation we saw with the Court of Claims.

Time to deal with judicial elections

So far, I've focused on where we've been and where we are. I need to say something about where we might be. Here, I'm writing as one of your constituents—someone who has belonged to the State Bar for almost a half-century and who sees a chance for real progress.

When United States Supreme Court Chief Justice John G. Roberts Jr. addressed the American Bar Association House of Delegates on August 11, he observed:

> We live in an era in which sharp partisan divides within our political branches have shaken public faith in government across the board. We in the judicial branch must also look to the Bar for broader assistance in maintaining the public confidence and the integrity of our legal system.
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> Lawyers fulfill their professional calling to its fullest extent and simply by helping the public understand the nature of the role that courts play in civil life, a role distinct from the political branches.[9]

Chief Justice Roberts is absolutely right about our obligations as lawyers, both individually and collectively, and he's right about the public perception of the judiciary. To put it bluntly, the public views the judiciary with great skepticism and the State Bar—*our* Bar—has a responsibility to do something about it.

I believe we have a thoughtful and independent judiciary in Michigan. After spending almost five decades in our state's courtrooms, I have nothing but gratitude for our judiciary and real awe at the care our judges put into their work.

These views, I'm afraid, are in the minority. A recent report prepared for the California Assembly Judiciary Committee paints a bleak picture.[10] It notes that "[a] 2010 survey found that 70% of Democrats and 70% of Republicans believe campaign expenditures have a significant impact on courtroom decisions."[11] A vast majority—89 percent—believed "the influence of campaign contributions on judges' rulings is a problem…."[12] And 46 percent of the state court judges surveyed "believed that campaign contributions influence judicial decisions…."[13] Only *5 percent* of state court judges believed "campaign contributions have no influence."[14]

Sixth Circuit Court of Appeals Judge Martha Daughtrey recently shared her observation that judges seeking retention tend to impose harsher criminal sentences.[15] This means that people—and often those who are among the most vulnerable members of society—may be paying a devastating price for judicial aspirations.

This problem gets worse as candidates spend more and more time on judicial campaigns. We've seen spending skyrocket even as rhetoric heads ever downward, a phenomenon I believe is exacerbated by the prevalence of anonymously funded issue ads.

An article in the *New York Law Journal* recently caught my eye—and turned my stomach.[16] It confirmed that the changes we've seen recently in judicial campaigns are the products of unprecedented spending:

> The amount of money in judicial elections has changed dramatically during the past 15 years, according to Bert Brandenberg, executive director of Justice at Stake, which tracks the spending. From 2000 through the last election cycle, more than $263 million was raised in state high court elections, he said.
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> "We're watching spending records fall," Brandenberg said, noting that of 22 states holding contested elections for judgeships, spending records were smashed in 20 in the last decade. That has happened as well in retention elections in Florida, Illinois, Iowa and Tennessee.[17]

These records are being broken because judicial candidates are spending significant time on the campaign trail, speaking to the party faithful and preaching to the converted. The necessity of electioneering puts judicial candidates in a real bind. Again, from the *New York Law Journal*:

> "The Constitution makes judges different from other officeholders," Brandenberg said. "They can't make outright promises; they're supposed to be accountable to the facts and law of the case. Rules like [these canons] have provided insulation from political pressure. The risk here is you would have one more step to wear away that insulation. The stakes couldn't be higher."
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> There are unique considerations in the judicial context, [Mayer Brown partner Michael] Kimberly agreed, but he pointed to comments by former Justice Sandra Day O'Connor in her concurrence in a 2002 decision invalidating certain restrictions on judicial candidates' speech. She wrote: "If the state has a problem with judicial impartiality, it is largely one the state brought upon itself by continuing the practice of popularly electing judges."[18]

Canon 2 of the Michigan Code of Judicial Conduct prohibits judicial candidates from seeking contributions. That means judges have to fundraise through committees. But changes may be on the horizon.

As the *New York Law Journal* notes, the United States Supreme Court is presently considering a petition for certiorari arising from the Florida Supreme Court's rejection of a First Amendment challenge to limits on judicial fundraising.[19] If the Supreme Court grants certiorari and relaxes limits on judicial fundraising, the path from contributors' checkbooks to judges' coffers will become more direct. And the public perception of our judiciary will suffer even more.

These factors make for a serious problem. People need to believe in the justice system. They need to believe in the rule of law. A vast majority *doesn't believe in either*, and I fear their perceptions are only going to get worse.

No one is better equipped to deal with this problem than bar associations like

our State Bar. And as Chief Justice Roberts argued, we have a *duty* to deal with this problem.

There may be a better way to conduct elections. And it may, in fact, be better if we eliminated judicial elections altogether. I don't think our justice system is aided when our judges have to ask for money (even through their committees) and spend four or five nights a week on the road for two years during our election cycles.

I think it may be time for the State Bar to (again) appoint a workgroup to investigate this issue. Tom Kienbaum did so when he was president 20 years ago, and it's time to revisit the issue. Indeed, the need is greater now than ever before. This workgroup should analyze whether it's really in the best interests of Michigan's citizens to elect our judges. And the State Bar should consider whether it should recommend an amendment to the Michigan Constitution that would eliminate judicial elections.

I'm fully aware that appointing judges wouldn't completely eliminate the public perception of bias. We often hear United States Supreme Court justices described with reference to the president who appointed them, the implication being that the justice favors that president's political party. I'm sure the same is true of judges appointed by governors.

I am also aware that there are loud voices belonging to those who do not trust a system in which they perceive that a few individuals are picking the judges, and others who believe we will only have a diverse bench by electing our judges.

But a system of appointing judges may be far better than our current situation. The Michigan Judicial Selection Task Force gave us a model worth considering in its April 2012 report.

Thanks for considering my suggestions. If the State Bar decides to pursue this issue, I stand ready and willing to provide any assistance I can.

The good news

Let me end with the good news. You're going to find yourself working with some of the best lawyers and finest human beings I've had the good fortune to meet.

The State Bar's staff is diligent, devoted, and tireless. Our executive director, Janet Welch, is brilliant. Our internal development director, Candace Crowley, will get you to all the groups you're going to speak with and provide you with all the information you'll need to sound like you know what you're talking about. When Candace sends you on the U.P. tour, I suspect you'll find it to be among the most enjoyable times you'll have as State Bar president—I know it was for me—although I highly recommend you have someone else do the driving.

You're also going to find as you travel throughout this state that members of our State Bar are extraordinarily thoughtful and passionate about the law and the positive role lawyers can serve. I found that, without exception, the members of our State Bar have adopted the advice of our first president, Roberts P. Hudson, and have devoted themselves to serving the public.

I could give you the names of all the wonderful people I've met (actually, I probably couldn't)—the board members, section members, leaders of affiliate bars, and attorneys throughout our state. But I doubt the State Bar would issue the telephone-book-sized edition of the *Bar Journal* I'd need, *and even then I would forget somebody*.

So let me just say that I hope you derive as much inspiration and joy from the people you encounter during the next year as I did during my tenure.

I also hope you'll receive the same kind of professional support I did. I would not have been able to do any of the things I did as State Bar president without the patient help of my partners, colleagues, and assistants at Collins Einhorn Farrell, P.C. I want to especially call out Trent Collier and Geoff Brown for their help in making my President's Pages sound like I actually know how to write.

Tom, you have my best wishes. I'm proud of what our State Bar has accomplished during the past year and I look forward to its many accomplishments in the future. I know our board will do everything in its power to help you do your job.

Good luck—and enjoy the ride. I promise it will be fun.

Yours,

Brian

ENDNOTES

1. Mr. McNeilly is wrong. The State Bar neither employs lawyers nor bargains collectively on lawyers' behalf. The State Bar is part of the public body corporate and it performs a government function—promoting improvements in the administration of justice and advancements in jurisprudence, improving relations between the legal profession and the public, and promoting the interests of the legal profession in the state.
2. Smith, *Should State Bar Membership Be Voluntary? Michigan Supreme Court Task Force to Study Question*, available at <http://www.mlive.com/news/index.ssf/2014/02/michigan_supreme_court_creates.html>. All websites cited in this article were accessed August 25, 2014.
3. *Keller v State Bar of California*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990).
4. *Id.*
5. The Board of Commissioners agreed with the task force's recommendations that the State Bar coordinate with the Attorney Grievance Commission and the Attorney Discipline Board and also that we need a better process of conducting the *Keller* analysis so our members would have more confidence that our positions had been properly vetted.
6. See State Bar of Michigan comments in response to the Report of the Michigan Supreme Court Task Force on the Role of the State Bar of Michigan, available on both the Supreme Court and State Bar websites.
7. See the Supreme Court website for all comments.
8. But the opposition is not coming from Bar members. I have received only one letter from a member complaining about the Bar's position on campaign finance.
9. John G. Roberts Jr., United States Supreme Court Chief Justice, address at the Annual Meeting of the American Bar Association House of Delegates (August 11, 2014).
10. See Lo, Londenberg & Nims, *Spending in judicial elections: State trends in the wake of* Citizens United (Spring 2011), available at <http://gov.uchastings.edu/public-law/docs/judicial-elections-report-and-appendices-corrected.pdf>.
11. *Id.* at 14.
12. *Id.*
13. *Id.*
14. *Id.*
15. Martha Daughtrey, Sixth Circuit Court of Appeals Judge, panel discussion at the Justice at Risk: Research Opportunity and Policy Alternatives Regarding the State Judicial Selection Symposium (March 21, 2014). A transcript is available in *Judicature*, May/June 2014, Vol 97 No 6, pp 279–290.
16. Coyle, *Justices asked to rule on judicial campaign fundraising*, New York Law Journal (August 18, 2014), available at <http://www.newyorklawjournal.com/home/id=1202667067327/Justices-Asked-to-Rule-on-Judicial-Campaign-Fundraising?mcode=1202617075062&curindex=3&slreturn=20140716124305>.
17. *Id.*
18. *Id.*
19. *Id.*