

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LUCILLE S. TAYLOR,

Case No. 1:19-cv-00670

Plaintiff,

Hon. Robert J. Jonker

v.

DENNIS M. BARNES, in his official capacity as President of the State Bar of Michigan Board of Commissioners; ROBERT J. BUCHANAN, in his official capacity as President-Elect of the State Bar of Michigan Board of Commissioners; DANA M. WARNEZ, in her official capacity as Vice President of the State Bar of Michigan Board of Commissioners; JAMES W. HEATH, in his official capacity as Secretary of the State Bar of Michigan Board of Commissioners; and DANIEL D. QUICK, in his official capacity as Treasurer of the State Bar of Michigan Board of Commissioners,

**JOINT STATEMENT
OF MATERIAL FACTS**

Defendants.

Plaintiff and Defendants hereby submit the following joint statement of undisputed material facts in support of their respective motions for summary judgment:

Background

1. The Michigan Legislature integrated the Michigan bar and created the State Bar of Michigan in 1935.

2. The State Bar of Michigan is a public body corporate under the control of the Michigan Supreme Court. MCL 600.901.

3. The State of Michigan requires attorneys to become and stay members of the State Bar of Michigan as a condition precedent to being licensed to practice law in Michigan. MCL 600.901.

4. Becoming and staying a member of the State Bar of Michigan requires that lawyers, including Plaintiff, pay dues to the State Bar of Michigan. *See* MCL 600.904.

5. The State Bar of Michigan has over 46,000 members in good standing.

6. Plaintiff is a member of the State Bar of Michigan, and her dues have been paid through 2020.

7. Plaintiff has paid her dues since becoming a licensed attorney in Michigan and is not in arrears.

8. The named Defendants are officers of the State Bar of Michigan acting solely in their official capacities and acting under color of state law to enforce laws requiring membership in and paying dues to the State Bar of Michigan.

9. This action is brought under 42 U.S.C. §§ 1983 and 1988.

10. Venue is appropriate in the Western District of Michigan under 28 U.S.C. § 1931.

The State Bar of Michigan's Governance

11. The Michigan Supreme Court has the power to provide for the organization, government, and membership of the State Bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the State Bar of Michigan and its members; the schedule of membership dues therein; the discipline, suspension, and disbarment of its members for misconduct; and the investigation and examination of applicants for admission to the bar. MCL 600.904.

12. The Michigan Supreme Court has exercised its authority over the State Bar of Michigan by promulgating the Rules Concerning the State Bar of Michigan (the "RCSBM") as

well as various administrative orders, including Michigan Supreme Court Administrative Order No. 2004-01. A copy of the current RCSBM is attached hereto as **Exhibit A**. At all times relevant to this lawsuit, the State Bar of Michigan has operated in accordance with the RCSBM and the administrative orders promulgated by the Supreme Court.

13. The Representative Assembly is the final policy-making body of the State Bar of Michigan. (See RCSBM Rule 5, Section 1.)

14. The elected representatives of the Representative Assembly are elected by member lawyers in each judicial circuit. The judicial circuits are the election districts. Each judicial circuit is entitled to one representative. The remaining seats are to be apportioned among the circuits on the basis of lawyer population. (See RCSBM Rule 6 Section 3.)

15. The Representative Assembly is comprised of 142 elected representatives and 8 commissioner representatives who are the members of the executive committee of the Board of Commissioners. The Board of Commissioners, in turn, is comprised of 20 elected members, and 5 members appointed by the Supreme Court. At no time will more than 5 members of the 150 representatives to the Representative Assembly (3.333% of the total) be appointed by the Supreme Court. (See RCSBM Rule 6, Section 2, and Rule 5, Section 2.)

16. No person holding judicial office may be elected or appointed an officer of the Representative Assembly. No person holding judicial office may be elected or appointed an officer of the Board of Commissioners. (See RCSBM Rule 7 Sections 1 and 2.)

17. The Board of Commissioners elects its officers from among its member commissioners. (See RCSBM Rule 7, Section 1.)

18. Three percent or more of the active members of the State Bar of Michigan may, by written petition, require consideration by the Representative Assembly of any question of public policy germane to the function and purposes of the State Bar. (See RCSBM Rule 13.)

19. Twenty-five or more active members of the State Bar of Michigan may file a written petition with the secretary at the principal office of the State Bar no later than 90 days before the annual meeting of the State Bar, to require the convening of a congress of the active members of the State Bar in conjunction with the annual meeting to consider the subject matter raised in the petition. One hundred active members constitute a quorum. (See RCSBM Rule 14, Section 1.)

20. Each year the Board of Commissioners shall cause to be presented an audited financial statement of the receipts and expenditures of the State Bar of Michigan for the fiscal year. Such a statement shall also be filed with the Clerk of the Supreme Court and shall be published in the January issue of the official publication of the State Bar of Michigan. (See RCSBM Rule 9.)

21. The Board of Commissioners of the State Bar of Michigan adopts the budget for the State Bar. (See RCSBM Rule 5, Section 1(a)(3).)

The State Bar of Michigan's Dues

22. Plaintiff's dues amounts, as well as all members' dues amounts, are set by the Supreme Court of Michigan and are allocated into three separate amounts for: (1) dues to fund the Attorney Grievance Commission and the Attorney Discipline Board, which for active members in the 2019–20 fiscal year are set at \$120.00; (2) dues to fund the Client Protection Fund, which for active members in the 2019–20 fiscal year are set at \$15.00; and (3) dues to fund the State Bar of Michigan's other operations, which for active members in the 2019–20 fiscal year are set at \$180.00. (See RCSBM 4(A).)

23. All dues are paid into the State Bar of Michigan treasury and maintained in segregated accounts to pay State Bar expenses authorized by the Board of Commissioners and the expenses of the attorney discipline system within the budget approved by the Supreme Court, respectively. (See RCSBM Rule 4(G).)

24. The State Bar of Michigan's mandatory dues are not automatically collected from each member. Instead, members must affirmatively act to renew their membership each year and remit payment via credit card, check, or money order.

25. Not all State Bar of Michigan members are required to pay the non-disciplinary portion of expenses. A person who has been a member of the State Bar for at least 50 years shall not be assessed general expenses, but shall pay the full amount assessed other members for the client security fund and the discipline agencies. (See RCSBM 4(D).)

26. The State Bar of Michigan also collects voluntary dues on behalf of its numerous subject-matter-specific sections. Plaintiff stipulates that those dues and the activities to which they are applied are not at issue in this case.

27. The State Bar of Michigan uses the mandatory dues it collects from members to engage in a variety of activities including, without limitation, the following:

- a. Collects license fees and administers licensing requirements.
- b. Investigates the character and fitness of candidates for admission to the Michigan bar.
- c. Maintains the official record of attorneys licensed to practice in Michigan.
- d. Operates and supports its governance mechanisms, including the Board of Commissioners and the Representative Assembly.
- e. Investigates and prosecutes the unauthorized practice of law.

- f. Administers IOLTA financial institution registrations.
- g. Issues ethics opinions interpreting the Michigan Rules of Professional Conduct and the Michigan Code of Judicial Conduct.
- h. Provides ethics counseling to lawyers and judges through its Ethics Helpline.
- i. Administers the Client Protection Fund to reimburse clients whose attorneys misappropriate funds.
- j. Administers the Lawyers and Judges Assistance Program, which assists attorneys and judges with substance abuse, mental health, and general wellness issues.
- k. Analyzes and supports the development of public policies concerning the courts, the administration of justice, the provision of legal services, and the legal profession, including by reviewing, taking positions on, and advocating for or against proposed court rules and legislation affecting these matters, all in accord with Michigan Supreme Court Administrative Order No. 2004-01 and *Keller v. State Bar of California*, 496 U.S. 1 (1990).
- l. Coordinates *pro bono*, legal aid, and access to justice initiatives.
- m. Provides the Practice Management Resource Center, a broad-based information clearinghouse and resource center for Michigan lawyers for services and goods necessary to successfully manage a legal practice.
- n. Manages the State Bar website and produces the *Michigan Bar Journal*, *e-Journal*, and other publications intended to address the educational and ethical standards of the bar, toward the end of seeking to improve the administration of justice and the quality of legal services available to Michigan's citizens.

The Client Protection Fund

28. The Client Protection Fund was established by the State Bar of Michigan's Board of Commissioners, as authorized by the Michigan Supreme Court, on February 25, 1966, for the purpose of reimbursing clients who have been victimized by attorneys who violate the profession's ethical standards by misappropriating funds entrusted to them.

29. Programs like the Client Protection Fund exist in all 50 states and the District of Columbia. In all but two states, these programs are funded with mandatory bar dues or licensing fees.

30. The Client Protection Fund operates under the Client Protection Fund Rules. A copy of the current Client Protection Fund Rules is attached hereto as **Exhibit B**. At all times relevant to this lawsuit, the State Bar of Michigan complied with the Client Protection Fund Rules.

31. The Client Protection Fund Rules provide that the purpose of the Client Protection Fund is "to promote public confidence in the administration of justice and integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in Michigan. Reimbursable losses must have occurred in the course of the lawyer-client or other fiduciary relationship between the lawyer and claimant and must have a significant contact with Michigan."

32. The Client Protection Fund is not an insurance policy, and no person has a legal right to reimbursement from the Client Protection Fund.

33. The State Bar of Michigan uses the Client Protection Fund to reimburse claimant losses that the Board of Commissioners determines fall within the definition of the reimbursable losses under the Client Protection Fund Rules, subject to the reimbursement limits set forth in the rules. The Client Protection Fund does not reimburse claimants for losses that fall outside the

definition of reimbursable losses under the rules nor, when it does reimburse claimants, does it always fully reimburse those claimants. The Client Protection Fund sometimes awards partial reimbursements.

34. Between August 23, 2016, and August 22, 2019, the Client Protection Fund received 322 claims requesting total reimbursement of \$7,812,082.15.

35. As of November 25, 2019, the State Bar of Michigan had resolved 205 of the 322 claims to the Client Protection Fund, including 28 claims that were withdrawn by claimants and 177 claims that had received a determination by the Board of Commissioners.

36. The 177 claims requested reimbursement of \$5,073,175.26 in the aggregate. The Client Protection Fund Committee determined that \$910,035.75 of such asserted loss could be substantiated and fell within the scope of reimbursable loss under the Client Protection Fund Rules. The Client Protection Fund Committee recommended and the Board of Commissioners approved payment of \$810,035.75 to the claimants on such claims.

37. One claim accounted for the \$100,000 difference between the loss that could be substantiated and fell within the scope of reimbursable loss under the Client Protection Fund Rules and the amount recommended and approved to be paid described in the preceding paragraph. That claimant suffered \$250,000 in reimbursable loss but could receive a maximum reimbursement of \$150,000 under the Client Protection Fund Rules.

38. As of November 25, 2019, 117 of the 322 claims remained pending.

The State Bar of Michigan's Advocacy

39. The State Bar of Michigan uses mandatory dues to fund activities in accordance with Michigan Supreme Court Administrative Order No. 2004-01. That Order prohibits the use of State Bar dues to fund ideological activities except in the following areas: (A) the regulation and discipline of attorneys; (B) the improvement of the functioning of the courts; (C) the

availability of legal services to society; (D) the regulation of attorney trust accounts; and (E) the regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession. A copy of Administrative Order No. 2004-01 is attached hereto as **Exhibit C**. At all times relevant to this lawsuit, the State Bar of Michigan complied with Administrative Order No. 2004-01.

40. Plaintiff does not challenge that, at all times relevant to this lawsuit, the State Bar of Michigan has constrained itself to public policy advocacy that the U.S. Supreme Court held allowable in *Keller v. State Bar of California*, 496 U.S. 1 (1990). Plaintiff is not alleging that the State Bar of Michigan has exceeded *Keller*'s parameters.

41. The advocacy of the State Bar of Michigan is not promulgated or published with an indication that it has come from the Michigan Supreme Court, the state judiciary, the governor, the legislature, or any State Bar of Michigan member or group of members. It is always attributed to the State Bar of Michigan.

42. A summary of the positions taken by the State Bar of Michigan on legislation proposed during the 2017–18 and 2019–20 sessions of the Michigan Legislature through January 31, 2020, is attached hereto as **Exhibit D** and incorporated by reference herein.

43. The State Bar of Michigan reports that it dedicates approximately 6% of its annual budget to public policy development, analysis, and advocacy.

Challenges to Ideological Activities

44. Since the Supreme Court decided *Keller v. State Bar of California*, 496 U.S. 1 (1990), no party has filed a lawsuit challenging Michigan's requirement that attorneys be a member of and pay dues to the State Bar of Michigan.

45. Since the Michigan Supreme Court promulgated Administrative Order No. 2004-01 on February 3, 2004, the State Bar of Michigan has received one challenge to the State Bar of Michigan's expressive activities.

Plaintiff and the State Bar of Michigan's Advocacy

46. Plaintiff has always been free to speak privately and publicly about any issue on which the State Bar of Michigan has deliberated or taken a position.

47. The State Bar of Michigan is not in any way Plaintiff's exclusive representative in the collective-bargaining sense. Again, Plaintiff is free to speak privately and publicly about any issue on which the State Bar of Michigan has deliberated or taken a position.

48. Plaintiff is free to join and has joined other bar associations and special-interest groups that take positions contrary to those taken by the State Bar of Michigan.

49. Plaintiff has never filed a comment with the State Bar of Michigan in response to a public notice nor objected at a public hearing of the Board of Commissioners or Representative Assembly regarding any proposed State Bar of Michigan position on public policy issues.

50. Plaintiff has never filed a challenge with the State Bar of Michigan claiming that the State Bar took or proposed to take a public policy position with which she disagreed or otherwise impermissibly used mandatory dues under the First Amendment. Plaintiff has never sought revocation of a State Bar position or reimbursement for her share of such activity's cost.

51. Plaintiff has never withheld her dues payable to the State Bar of Michigan for any reason, including because she opposed a position for which the State Bar advocated or proposed to advocate.

52. Plaintiff has never communicated to the State Bar of Michigan that the State Bar's expressive activities did not reflect her best interests or the best interests of Michigan's citizens and attorneys.

53. In addition to challenging a State Bar of Michigan position based on the procedures set forth in Administrative Order No. 2004-01, if the State Bar were to take a position to which Plaintiff objects, Plaintiff could say so and could actively lobby decision makers to reject the State Bar's position.

54. If the State Bar of Michigan were to take a position to which Plaintiff objects, Plaintiff could say so and could seek reimbursement of her dues under Administrative Order No. 2004-01.

Michigan's Interests in the Practice of Law and the State Bar of Michigan

55. The administration of justice is a primary government function. Attorneys are essential to that function.

56. The State of Michigan has an interest in the practice of law within the state and has broad power to protect the public health, safety, and other valid interests by establishing standards for licensing attorneys and regulating the practice of law.

57. The State of Michigan has an interest in elevating the ethical and educational standards of the bar, enhancing the quality of legal services, and improving relations between the legal profession and the public.

58. The State of Michigan has an interest in protecting the public from unethical attorneys.

59. Because attorneys are in the business of knowing, understanding, utilizing, and interpreting the law and utilizing the court system, the State of Michigan has an interest in receiving systematized input from licensed attorneys on legislation concerning the administration of justice, the functioning of the court system, and the legal profession.

60. Licensed attorneys are subject to detailed ethics rules. Under those rules, all licensed attorneys 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. (MRPC 1.0, Preamble Comment.)

61. The State Bar of Michigan is currently a component of Michigan's regulatory scheme for attorneys. Under that scheme, members of the bar, rather than the general public, bear the expense of ensuring that attorneys adhere to ethical practices.

62. None of Michigan's voluntary associations and special-interest groups for attorneys and judges includes all attorneys licensed to practice law in Michigan.

63. The following states do not have an integrated bar: Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont. These states still require licensed attorneys to pay fees for purposes that may include funding attorney regulation, attorney discipline, the state's client protection fund, and other programs.

64. The remaining states and the District of Columbia have integrated bars.

The Attorney Grievance Commission and the Attorney Discipline Board

65. The Attorney Grievance Commission and the Attorney Discipline Board are separate entities, which are governed separately and are not funded out of the State Bar of Michigan's general funds. Rather, the State Bar of Michigan collects and forwards a designated

portion of the dues collected to those two entities for their specific functions. All dues are collected and paid into the State Bar treasury and are maintained in segregated accounts to pay State Bar expenses authorized by the Board of Commissioners and the expenses of the attorney discipline system. Plaintiff is not challenging fees related to these two attorney-discipline entities. (See RCSBM 4(G).).

66. In addition to maintaining the official record of attorneys licensed to practice in the State of Michigan, the State Bar of Michigan provides finance, administration, and human resources department support to the Attorney Grievance Commission and the Attorney Discipline Board. The Attorney Grievance Commission and the Attorney Discipline Board reimburse the State Bar for the cost of these services.

67. The Attorney Grievance Commission is the prosecution arm of the Michigan Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice or otherwise subject to the disciplinary authority of the Supreme Court. The Attorney Grievance Commission is governed by the rules set forth in subchapter 9.100 of the Michigan Court Rules.

68. Attorney Grievance Commission commissioners are appointed solely by the Supreme Court. The Supreme Court chooses a chairperson and a vice-chairperson. Other officers are chosen by the commissioners appointed by the Supreme Court. (See MCR 9.108(A),(B), and (C).)

69. The Attorney Discipline Board is the adjudicative arm of the Michigan Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice or otherwise subject to the disciplinary authority of the Supreme Court.

70. The Attorney Discipline Board is governed by the rules set forth in subchapter 9.100 of the Michigan Court Rules. The board consists of 6 attorneys and 3 laypersons appointed solely by the Supreme Court. The Supreme Court shall designate from among the members of the board a chairperson and a vice-chairperson. Other officers are chosen by the board from among its Supreme Court-appointed members. (See MCR 9.110(A) and (B).)

Dated: May 15, 2020

/s/Derk A. Wilcox

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Dated: May 15, 2020

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