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The Role of Bar Associations in Advocating for Public Policy Change

You heard it here first: *It's an election year.* Among the issues facing Minnesota voters—tucked in with the perennial question of who will lead us—is whether Minnesota should add this sentence to its Constitution: "Only a union of one man and one woman shall be valid or recognized as a marriage in Minnesota."[1] As we round the final bend and see the finish line in November, hardly a news cycle goes by without a story about the same-sex marriage amendment.

Even this publication has not been immune. In its March issue appeared a scholarly piece by Charles M. Goldstein and Micaela Magsamen entitled "Constitutional Concerns in Defining Marriage in Minnesota," and an opinion piece by Sonja Peterson entitled "Don't Let Minnesota's Bill of Rights Become a Denial of Rights," in which the author applauded the HCBA's position supporting same-sex marriage and exhorted members to take action against the marriage amendment.[2] That same month, the HCBA Board of Directors adopted a resolution captioned "'Call to Action' in Opposition to Amending the Minnesota State Constitution to Ban Same-Sex Marriage."[3] The May issue carried a commentary by Kevin Conneely, "Standing Down on the HCBA's 'Call to Action' Regarding the Marriage Amendment," that rebutted Ms. Peterson's piece and protested the action of the HCBA Board.[4] Mr. Conneely said, in sum, "The HCBA Board of Directors should not be telling me or any of the 8,000 other dues-paying members how to think or act on this emotionally charged, political, legal, and social debate."

The contrasting views of Ms. Peterson and Mr. Conneely are just the latest and most local example of a recurrent debate facing bar associations everywhere: whether and when to stick an oar into a debate about public policy. As a former president of the Michigan Bar Association put it: "How can an association comment on political and ideological issues and still be viewed as a professional, impartial organization? How can an association made up of lawyers holding widely divergent points of view represent and serve its members well when it takes a stand on highly political or controversial topics not directly related to the practice of law? Should a bar association, particularly a mandatory bar, use member dues to speak on issues that fall outside of its central mission? Should an association of lawyers purport to offer one opinion on issues such as gun control, nuclear weapons freeze, deforestation, or abortion?"[5] The author of those questions, alas, did not answer them, and it would be overselling to suggest that this article will do better.

But we can try. The merits of the HCBA board's actions having been addressed by others, this article will delve instead into the broader question of the role of bar associations in advocating for public policy change. It will discuss contemporary and historical examples of bar association advocacy, then describe legal limitations on such advocacy, and finally take a stab at answering the question we began with: Why *can* a bar association like the HCBA commit its members to positions on controversial political issues, and when should it do so? But at the outset, we need to ask:

What Exactly Are Bar Associations?

Despite being an "integral part of the legal profession and, along with law firms,

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courts, legislatures, and law schools, essential features of the modern American legal system," bar associations receive little scholarly attention.[6] There are hundreds of bar associations in the United States, including 282 state and local bar associations with at least 300 members.[7] Bar associations can be divided for discussion purposes into two categories: "comprehensive" bar associations, which contain a broad cross-section of lawyers and are concerned with these lawyers' interests, and "specialty" bar associations, which focus on a particular type of practice or a particular group of lawyers.[8] The American Bar Association is the largest of the "comprehensive" bar associations, with nearly 400,000 members.[9]

The category of comprehensive bar associations can be halved again into so-called "integrated" or "unified" bar associations, in which membership is required as a condition on the practice of law in the state, and voluntary bar associations, which include everything else.[10] Thirty-two states and the District of Columbia have integrated bar associations. The Minnesota State Bar Association is a voluntary bar association, as are the various bar associations serving judicial districts in Minnesota, including the HCBA.[11]

An integrated bar is "an association of attorneys in which membership and dues are required as a condition of practicing law in a State."[12] These bar associations generally function as an arm of the state supreme court, and are subject to its control and supervision; they are generally in the form of a public corporation, and are viewed as a governmental body.[13] In states with integrated bars, any person who is admitted to practice as an attorney becomes a member of the state bar association, subject to its constitution and bylaws, including the requirement to pay dues.[14]

In the category of voluntary bar associations, the comprehensive ones classify themselves by reference to geographic territory (e.g., the American Bar Association, the Minnesota State Bar Association, the Hennepin County Bar Association), whereas specialty associations define themselves by reference to traits and values shared by the group's members, such as race (e.g., the Minnesota

American Indian Bar Association, the Minnesota Association of Black Lawyers, the Minnesota Hispanic Bar Association, the Minnesota Hmong Bar Association, the National Asian Pacific Bar Association), gender (Minnesota Women Lawyers), sexual orientation or preference (Minnesota Lavender Bar Association), focus of practice (Minnesota Association for Justice, Minnesota Defense Lawyers Association, Minnesota County Attorneys Association, Minnesota Association of Criminal Defense Lawyers, Federal Bar Association) or a set of values or political objectives (The National Lawyers Guild). The largest specialty bar association is the American Association for Justice (formerly the Association of Trial Lawyers of American) with some 56,000 members.[15]

A remarkable feature of bar associations is that, except for an administrative staff, most of the work is done by volunteers who generally have full-time jobs in the legal profession.[16] Readers of this publication are undoubtedly aware of the multitude of tasks necessary to run the numerous programs administered by the various bar associations in Minnesota, most of which are performed by volunteers. Nor will it shock said readers to learn that bar associations are generally funded by member dues, although sales of publications, advertising, CLE fees, gifts, and grants also supply significant revenue.[17]

Regardless of type, bar associations exist to benefit three groups: lawyers (members), the legal profession, and the public.[18] They aim to benefit individual lawyers by providing training and other skill-enhancing opportunities; they benefit the profession by maintaining quality and ethics while protecting the profession from unqualified practitioners; and they benefit the public by "protecting and strengthening the administration of justice, by enhancing public understanding of and respect for law and legal institutions, and by identifying and advocating needed changes in the law and opposing those they consider undesirable."[19] It is this last activity that is the focus of this article—bar association advocacy.

Bar Association Advocacy

Bar associations have a long tradition of public advocacy on issues that range from the obscure and highly technical (e.g., whether a proposed rule of the Consumer Financial Protection Bureau will weaken the attorney-client and work product privileges)[20] to the fundamental moral issues that define an era (e.g., *Roe v. Wade*).[21] Law reform activity by bar associations is generally carried out by committees and sections comprised of practitioners in specific areas of law. Working in the trenches, these groups analyze proposed legislation and develop recommendations for use by the public and politicians—recommendations that may be expressed as a committee resolution or as a report, and that are then publicized in press releases and letters to public officials.[22] And sometimes bar associations do more. Sometimes they appoint lobbyists or influential members to meet with politicians or testify in regard to legislation in order to influence the political process, and occasionally they even file amicus curiae briefs in important court

cases. Rarely, a bar association will even litigate an issue of exceptional importance to the membership.[23]

For most bar associations, advocacy is a secondary function, taking a back seat to the administration of programs of benefit to the bar and the public. But many specialty bar associations were formed for the express purpose of advocacy. The National Bar Association was formed in 1925 "to give voice to black attorneys who were excluded from every nationally organized bar association at that time."[24] Its objectives include the promotion of "legislation that will improve the economic condition of all American citizens, regardless of race, sex or creed in their efforts to secure a free and untrammeled use of the franchise guaranteed by the Constitution of the United States; and to protect the civil and political rights of the citizens and residents of the United States."[25] Similarly, the Lawyers' Committee for Civil Rights Under Law was created in 1963 at the request of President John F. Kennedy in conjunction with his introduction of civil rights legislation that evolved into the Civil Rights Act of 1964.[26]

Public policy advocacy is by no means limited to specialty bar associations. The ABA is undoubtedly the most prolific bar association in terms of public advocacy. Its "Legislative Issues List" contains a summary of the ABA's official position on more than 1,000 current legislative and governmental policies.[27] The policies fall into topics arranged alphabetically from "administrative law" to "tax law," including position statements supporting abortion rights and same-sex civil marriages. Its other controversial positions include support for efforts to block enforcement of Arizona's controversial law to crack down on illegal immigration.[28] Predictably, such activities have led to accusations that the ABA is tilting to the left.[29]

ABA involvement in advocacy is nothing new. Historical examples of ABA activism, include its opposition in 1937 to President Franklin D. Roosevelt's plan to "pack" the U.S. Supreme Court with extra justices, which (ironically) led the president to chastise the ABA for its reactionary conservatism. [30] In the 1950s, the ABA threw its support behind the civil rights movement during an era when there was no consensus on the subject among its members.[31] In the early days of the Watergate scandal of the 1970s, the ABA called for the resignation of President Richard Nixon.[32] And in 1981, the ABA mobilized opposition to President Reagan's efforts to eliminate funding for the Legal Services Corporation, an independent nonprofit agency that distributes funding earmarked for legal services to the poor.[33]

In contrast to the ABA's 1,000-plus policy statements, and undoubtedly reflecting Minnesota values of modesty and thrift, the MSBA currently endorses only 29 legislative positions.[34] These positions were largely developed by various topical law sections of the MSBA. These range from a position opposing a tax on legal services to one supporting enactment of a "pet trust" statute, as well as a position opposing the constitutional ban on same-sex marriage, proposed by the MSBA Diversity Committee.

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The HCBA is apparently even more reticent to share its political views, although the Board of Directors had, in fact, endorsed positions related to same-sex marriage three times prior to the action taken in March. A search of this publication's archives by THL staffers failed to locate a single example of an article describing any HCBA stand on controversial social issues until this year.

Bar association advocacy poses obvious risks to a volunteer member organization. In 1992, the ABA endorsed legislation supporting abortion rights, granted affiliate status to the National Lesbian and Gay Law Association, and gave an award to Anita Hill, the Oklahoma law professor who gave testimony at the 1991 confirmation hearing of U.S. Supreme Court Justice Clarence Thomas. The result included resignations by 2,766 members.[35] Almost a decade later, in 2001, responding to critics who perceived the ABA's views as too liberal, President George W. Bush ended a half-century tradition of allowing the ABA to vet federal judicial candidates before submission of their nominations to the U.S. Senate.[36] (In 2009, President Barack Obama restored the ABA to its traditional role.[37])

Legal Restrictions on Bar Association Advocacy

Bar association advocacy, at least for integrated bar associations, was restricted by the 1990 decision of the U.S. Supreme Court in *Keller v. State Bar of California*.[38] In that case, a group of California lawyers led by Eddie Keller sued the State Bar of California—an integrated bar—challenging its use of their dues payments to finance political activities. Because membership in the bar association was compulsory, as was payment of dues, Keller argued that his right of free speech was violated by use of his dues to promote political views with which he disagreed. The activities Keller complained of included lobbying regarding legislation prohibiting polygraph testing of government employees, prohibiting possession of armor-piercing ammunition, creating an unlimited right of action to sue persons causing air pollution, criminalizing display for sale of drug paraphernalia to minors, and many others.

The relevant judicial landscape at the time *Keller* was decided was not barren: A 1961 U.S. Supreme Court decision, *Lathrop v. Donohue,* had rejected a Wisconsin lawyer's claim that compelling him to join a bar association as a condition of practicing law violated his right to freedom of association.[39] The Court in *Lathrop,* however, had declined to address the lawyer's claim that use of his mandatory dues

to support political activities that he found objectionable was impermissible.

In *Keller,* the Court reached that question, and held for the lawyer. Drawing an analogy to precedent involving compulsory union dues, the Court ruled that just as union members cannot be compelled to fund political activities with which they disagree, compulsory bar association dues may not be used in such a fashion either. The Court quoted Thomas Jefferson's view that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Further, the Court held that "The State Bar may therefore constitutionally fund activities germane to those goals [i.e., regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity."

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The *Keller* Court made an effort to draw the line between permissible and impermissible uses of compulsory bar dues. The Court stated that "the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession." The Court set the boundary thus: The "guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" The Court recognized that whether particular activities have "political or ideological coloration which are not reasonably related to the advancement of such goals...will not always be easy to discern." Nearly 1,500 KeyCite citations to *Keller* in court decisions and secondary sources are testament to the fact that the standard set forth in *Keller* is, indeed, not always easy to apply.

While *Keller* by its terms does not apply to voluntary bar associations like the MSBA and the HCBA, the Minnesota Supreme Court has borrowed its analysis and applied it in another context. In the 2004 case *In re Petition of Elliot Rothenberg,* our state Supreme Court held that a Minnesota lawyer could be compelled to attend continuing legal education on the subject of elimination of bias in the legal profession.[40] The lawyer had argued that the elimination of bias CLE requirement compelled him to pay admission fees to promote ideas with which he did not necessarily agree, in violation of his First Amendment rights. The Minnesota Supreme Court rejected his arguments, noting that there were hundreds of available CLE classes that would satisfy the elimination of bias requirement with which the lawyer had no apparent ideological disagreement. On the authority of *Keller,* the Court said that the requirement to attend classes on eliminating bias in the legal profession was "germane to the goals of regulating the legal profession and improving the quality of legal services in Minnesota."

The Court rejected the lawyer's argument that elimination of bias was itself an ideology that could not be forced on lawyers by bar authorities. The Court noted that CLE approval could only be granted to courses that are "directly related to the practice of law" and that are "designed to educate attorneys to identify and eliminate [bias] from the legal profession and from the practice of law." The Court ruled that, as thus limited, the elimination of bias requirement "serves the legitimate function of informing lawyers how to identify and eliminate bias in the legal system." *In re Rothenberg* illustrates that state bar authorities can impose a normative value—the elimination of bias—on Minnesota lawyers without violating their First Amendment rights, provided the reason for the imposition is sufficiently germane to the legal profession.

So Why Can the HCBA Tell its Members What to Think?

The short answer to the question we started with—"Why can the HCBA take positions on controversial matters of public policy?"—is that it is not an integrated bar association and is therefore not restricted by the First Amendment and *Keller v. State Bar of California.* If members don't like a position that a voluntary bar association has taken, they are not compelled to remain members. But beyond the legal issue is a practical one: When *should* a bar association like the HCBA take controversial positions on public issues at the risk of alienating some of its members? On the one hand, the HCBA is not required to stand silently on the sidelines as the important public issues of the day are wrangled over by others. HCBA members by and large possess the four resources that have been found necessary for the successful exercise of professional influence over policy issues: technical expertise, money, prestige, and social connections.[41] Thus, they can wield considerable influence individually and even more as a cohesive bloc. Failing to use these resources to advance the goals of the association would be wasteful.

But on the other hand, there are limits to the influence that bar associations, particularly comprehensive bar associations, should attempt to exert. A former ABA president, the late Jerome Shestack, after an especially contentious annual ABA meeting, argued that the ABA should not shy away from important issues of public policy merely to keep the peace: "The test for consideration of an issue by the ABA should not be whether it is controversial or the subject of political debate. Even such fundamental legal issues as the independence of judges or legal services to the poor can be caught up in the vortex of politics. The true test is whether the issue is germane to our profession."[42]

Shestack believed that two criteria determine whether an issue is something on which the association should take a position, i.e., whether it meets the requirement of being "germane." The first is "whether the matter has a material legal component relevant to our professional interests, to the administration of justice or to the protection of our constitutional system. By this standard, issues such as mandatory sentencing, standards for capital cases, racial and gender diversity in the justice system and in law schools, human rights, and tort reform are clearly substantive or procedural matters affecting the administration of justice and our profession. We should not be deterred from their consideration because they have been made the subject of divisive or demagogic political debate elsewhere."

The second criterion in Shestack's formula is "whether the legal profession can contribute a valuable and informed voice to the subject." For this criterion to be satisfied, the subject must be one on which lawyers have special expertise. The reason for this factor is obvious: The views of a bar association are only valuable to policy-makers when, and to the extent, the subject is something beyond the ken of nonlawyers.

While Shestack argued against shying away from controversy, other writers have suggested the opposite, that a bar association should avoid engaging in a highly disruptive issue that "threatens to cause a substantial number of its members to resign or become inactive, or if that involvement threatens the association's general effectiveness. . . . It seems particularly foolish for a bar association to risk its viability over issues regarding which it cannot realistically expect to exert much influence."[43] While the winners in a battle over whether to endorse a particular viewpoint might be tempted to say "good riddance" to members who resign in protest, cooler heads will recognize that diversity of viewpoints within an organization is generally a good thing, and that narrowing the bandwidth of an association's political views is a recipe for extinction or irrelevance.

In summary, the criteria that a bar association should consider when deciding whether to take a position on a matter of public policy include: (1) how closely the issue relates to lawyers and the legal profession; (2) whether legal training is necessary or at least helpful to understand the issue; and (3) whether the issue is so polarizing that taking a stand on it threatens the continued effectiveness of the association.

Conclusion

Although once regarded as a "monolith of the status quo, conservative by nature and philosophy," over the past few decades the ABA has made itself the focus of conservative critics who accuse it of a liberal bias.[44] It is not an adequate response to these critics to suggest, *àla* comedian Stephen Colbert, that "reality has a well-known liberal bias."[45] By careful consideration of the criteria outlined above, implemented by the HCBA transparently and in good faith, the association can maintain its reputation as non-partisan and maximize its effectiveness when advocating on issues of public policy.

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1 S.F. 1308, Minn. 87th Leg. Session (2011-12) (May 12, 2011).

2 *The Hennepin Lawyer*, Vol. 81, No. 3 (March 2012) at 8 and 34.

3 HCBA Resolution adopted March 13, 2012.

4 *The Hennepin Lawyer*, Vol. 81, No. 5 (May 2012) at 33.

5 Bruce W. Neckers, *A Time to Speak Out: Thanks, Eddie Keller*, 81 Mich. Bar J. 8 (Feb. 2002).

6 Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 Yale L & Pol'y Rev. 193, 193 (1996).

7 E. Chambliss & B. Green, *Some Realism About Bar Associations*, 57 DePaul L. Rev. 425, 426 n. 7 (2008).

8 Johnstone at 193-94.

9 http://www.americanbar.org/utility/about_the_aba.html.

10 *See* 7 C.J.S. *Attorney & Client* § 7 (updated March 2012).

11 Chambliss & Green, supra note 7, at 426 n. 7; see also http://www.hg.org/barassociations-definition.html (listing states and other jurisdictions with integrated bars); http://www.gabar.org/membership/howtojoin/index.cfm; http://www.calbar.ca.gov/AboutUs.aspx; http://www.mnbar.org/nav-about.asp.

12 Keller v. State Bar of California, 496 U.S. 1, 5 (1990).

13 7 C.J.S. *Attorney & Client* § 7.

14 In re Unification of New Hampshire Bar, 109 N.H. 260, 248 A.2d 709 (1968).

15 Chambliss & Green, supra note 7, at 426 n. 7.

16 *See* Johnstone at 197.

17 *Id.*

18 *See* Johnstone at 195.

19 *Id.* at 195-96.

20 Letter from ABA President Wm. T. (Bill) Robinson III to Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, dated April 12, 2012 (available at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012apr13_attorneyclientprivileges_l.authcheckdam.pdf).

21 *See* Johnstone at 240 (discussing ABA abortion controversy).

22 *Id.* at 228.

23 *Id.*

24 http://www.nationalbar.org/our_history.

25 http://www.nationalbar.org/objectives_of_the_NBA.

26 See Charles T. Lester, Jr., *The History of the Lawyers' Committee for Civil Rights Under Law 1963-2008*, www.lawyerscommittee.org/about (accessed 7/1/2012).

27 http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy.html.

28 "*ABA Disputes Arizona Immigration Provisions in Brief to High Court*", ABA Now (March 27, 2012) (http://www.abanow.org/2012/03/aba-disputes-arizona-immigration-provisions-in-brief-to-high-court/).

29 *E.g.*, Josh Gerstein, "*Right Sees Law Group Tilting Left,*" Politico (Sept. 25, 2010) (http://www.politico.com/news/stories/0910/42709.html).

30 James Podgers, *Which Way ABA?: Pondering New Policy Directions*, 78 ABA J. 60, 61-62 (Dec. 1992).

31 *Id.*

32 *Id.*

33 *Id.*

34 http://www.mnbar.org/committees/legislative/LegislativePositionsMSBA.asp.

35 Podgers, supra note 30.

36 Cal. Bar J. (April 2001) (http://archive.calbar.ca.gov/calbar/2cbj/01apr/page10-1.htm).

37 The New York Times, April 13, 2009 (http://www.nytimes.com/2009/04/14/opinion/14tue2.html).

38 496 U.S. 1 (1990).

39 367 U.S. 820 (1961).

40 676 N.W.2d 283 (Minn. 2004).

41 Chambliss & Green, supra note 7, at 434-35 (summarizing a study of the Association of the Bar of the City of New York by Michael J. Powell).

42 Jerome J. Shestack, *President's Page: Defining Our Work*, 83 ABA J. 8 (Oct. 1997).

43 Johnstone at 240; see also Chambliss & Green, supra note 7, at 441.

44 Podgers, supra note 30.

45 White House Correspondent's Dinner Speech, April 30, 2006 (full text available at http://www.dailykos.com/story/2006/04/30/206303/-Re-Improved-Colbert-transcript-now-with-complete-text-of-Colbert-Thomas-video).