

Politics, Ethics, & the Bar

As I write this month's column, the 2012 elections have just been concluded and the results are in. Both major political parties were victorious and both were defeated, in roughly equal proportions. There's nothing too shocking in that, as we are a relatively evenly and deeply divided country and state on many politically charged issues. As noted in last month's column, the judicial elections once again were not overtly political this year; a fact that most neutral observers found reassuring. For the most part people are revived after the wearying campaign.¹

Beyond the contests for elected officials, there were of course two proposed amendments to the Minnesota state constitution, one concerning the definition of marriage and the other concerning a proposed requirement that voters must possess a state-issued photo identification card. As we know, both initiatives were defeated. Beyond the merits of these issues, however, there remains substantial disagreement among lawyers over the proper role for bar associations to play in the political process. Both the Minnesota State Bar Association (MSBA) and the Hennepin County Bar Association (HCBA), for example, took an official stand encouraging their members to vote against the proposed marriage amendment. Some members of each organization took exception to that action.

Parameters of Political Activity

The MSBA is a voluntary professional association of lawyers to which members pay dues. Those dues are used to fund many invaluable programs for the benefit of the legal profession and lawyers, and for the public as well. The MSBA is active in continuing legal education, certification of specialists, offering insurance programs to members, and publishing this magazine, among many other activities. It maintains the Bar Foundation to provide

grants to community and bar-related programs aimed at improving the proper administration of justice. It also conducts lobbying activities before the state legislature, advocating for law reform and on other issues of importance to the legal profession.

Working to improve the legal system and the administration of justice is a vital obligation of lawyers. The unofficial preamble to the Rules of Professional Conduct, for example, sets out some aspects of this duty: "As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."

A bar association, in taking a stand on constitutional issues related to the law on behalf of its members, certainly helps to fulfill this obligation,

especially where there is near unanimity of opinion. But what if the issue is one on which there is considerable disagreement, disagreement aligned with partisan political positions? Should an organization such as the MSBA take an official position in such instances?

Agree or disagree with the position ultimately taken, bar associations should take positions on difficult policy issues of interest to lawyers and the public, especially if it is an issue on which lawyers and the legal profession have some unique expertise. A constitutional amendment that affects individual rights falls into that category. Personally, I don't see that as a political decision, but rather an administration-of-justice decision. The position taken may offend some portion of the association's members, but not taking any position simply because it could be controversial and might upset some members does not seem appropriate. As noted, some bar members took exception to the MSBA position, and some resigned their membership in the MSBA, which as members of a voluntary organization they are free to do. I respect their individual strength of conviction, even while I applaud the MSBA for taking a collective position.

Some may question what members of mandatory bars can do. State bar associations are either voluntary or mandatory in a roughly three to two ratio favoring mandatory. In mandatory (or unified) bar states, bar dues also are used to fulfill many of the tasks that the lawyer registration fee does in Minnesota, as mandatory bar states' highest courts have delegated many tasks, such as operating the lawyer discipline system, to the states' bar associations, making each of these essentially a quasi-governmental entity. As a result, for those states the United States Supreme Court has ruled that members are entitled to deduct from their dues the portion that goes to lobbying efforts deemed to be of a political nature with which they take exception.²

Politics in Discipline?

One area of the law in which politics should play virtually no role whatsoever is the lawyer discipline system. We are as nonpolitical and apolitical as it's possible to be. Really. In my 28 years working in the Office of Lawyers Professional Responsibility, there have been Minnesota Supreme Court justices who have been generally perceived as liberal or conservative. But those labels have had little or no meaning when applied to lawyer discipline cases, which are one of the court's areas of original jurisdiction. Liberals are not "soft" on lawyer discipline; conservatives are not "hardline" on discipline. Perceptions of the appropriate discipline for attorneys guilty of serious acts of dishonesty or convicted of a crime are not based upon the lawyer's political affiliation, nor the court's.

Similarly, the Director's Office has prosecuted attorneys of both political persuasions. Prominent Republicans who are lawyers receive complaints, as do prominent DFLers who are lawyers. Both are treated the same in the lawyer discipline system, receiving discipline or dismissals based on the facts, not political leanings. In the vast majority of matters, our staff has absolutely no knowledge of a respondent attorney's



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political positions, nor do we care to. There have been instances where someone commented to me after a public disciplinary decision was announced that the attorney was a leader in some political party or a state legislator or county commissioner, etc. Most often, this information comes as a complete surprise, as it just never came up during the discipline process; what mattered was the individual's conduct as an attorney and nothing more.

Occasionally, an elected official, who no doubt has a political affiliation, contacts our office on behalf of a constituent. Here too, the political leaning of the caller makes no difference; we may not be able to discuss the matter with the caller due to confidentiality rules, but not because of political differences.³

Conclusion

Most lawyers are "political" (small 'p') by nature. Interest in and involvement in the political process (big 'p') by lawyers is healthy, including activity by the bar association on matters of public policy. Politics in the discipline system, however, is not healthy and is carefully avoided. ▲

Notes

¹ As a total aside, I spent time in the Dallas, Texas area right before the election. After the bombardment of political campaigning in Minnesota this year, it was actually disquieting to be somewhere with almost no overt political activity—almost no billboards, television commercials or lawn signs, since there were few seriously contested elections.

² *Keller v. State Bar of California*, 496 U.S. 1 (1990). For example, in Washington, the state bar identifies the percentage of staff time spent on nonchargeable lobbying activities and has a detailed arbitration process for what it calls the "Keller Deduction."

³ Some nonlawyer members of the state legislature, for example, have been surprised to learn that while as a public agency and as a matter of comity we will always respond courteously and provide public data, we are not funded by the legislature, nor subject to data practices requests. The Office of Lawyers Professional Responsibility, as an agency of the judicial branch, is exempt from the Government Data Practices Act. Minn. Stat. §13.90. Access to data of the judiciary is governed by rules adopted by the Minnesota Supreme Court.

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