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The Missouri Bar's Role in the Legislative Process

by Catherine J. Barrie[1]

Each year, The Missouri Bar pursues passage of bills drafted by bar committees and endorsed by the bar's Board of Governors. These proposals have varied widely; revisions to the probate and trust laws, the Durable Power of Attorney for Health Care Act, Limited Liability Company Act, Uniform Commercial Code revisions, changes to child custody laws, Uniform Trade Secrets Act, changes in anatomical gifts laws, and securing state funding for legal services through a filing fee surcharge are examples.[2] These bills are often publicized in *The Missouri Bar Bulletin*, the bar's weekly e-mail newsletter *ESQ* and other bar publications.

In addition to pursuing legislation initiated by its committees, The Missouri Bar takes an active role each year with respect to many bills affecting the justice system. The basis for the bar's input is study and comment on legislation by members of its Legislative Committee and members of legislative review subcommittees appointed by various bar committee chairs. Upon request, the bar provides input to legislators regarding ideas for legislation that have not yet been formally filed.[3] During the legislative session, technical drafting comments may be forwarded to legislative sponsors, even when the bar does not support or oppose their legislation. Other times, a position is taken on behalf of the Board of Governors, and comments explaining the reasons for the bar's support or opposition are provided to bill sponsors and other key members by the bar's legislative counsel. In some cases, bar committee members write letters, make phone contacts and present public testimony. The bar's legislative counsel coordinates these activities.

Because of The Missouri Bar's status as a unified bar, restraint is exercised in taking positions on legislation that would offend a substantial portion of the membership. See *Keller v. State Bar of California*.[4] Pursuant to a formal policy adopted by the Board of Governors, all positions on

legislation must be agreed upon by a two-thirds majority of the board. The policy further provides: "The Board of Governors may determine to take no position on proposed legislation that is or may be factional, partisan, narrow in interest or as to which substantial constituencies of the bar may in good faith differ."[5] A seven-member executive committee has authority to act on behalf of the bar between regularly scheduled board meetings. A Missouri Bar Protest and Dues Refund Procedure adopted by the Board of Governors on November 1, 1990 allows any bar member to object and receive the pro rata portion of their dues that supports those activities the member feels are inappropriate.

When the unified bar chooses to weigh in on an issue, its expertise and political neutrality are accorded significant weight. Though individual members may be politically active, the bar is non-partisan and makes no political contributions. Lawyer-legislators share a common bond, independent of political philosophy, and best understand the impact of some of the ideas being promoted. These individuals are very often key in preventing passage or "cleaning up" many proposals filed each session that would have a detrimental effect on the justice system.

The following are several examples of issues in which the bar was involved during the 2003 regular session:

House Bill 111 required courts to award court costs and reasonable attorney fees to the prevailing party in all civil actions. The Missouri Bar Executive Committee opposed this bill on the basis that the "English rule" precludes access to the justice system for everyone regardless of economic status. Numerous comments from members of the bar's legislative review subcommittees were sent to the bill's sponsor, Representative Blaine Luetkemeyer.

The following is a sampling of the many comments received:

"I'm opposed to this bill. There have been plenty of times that I wish I could stick a losing party with my bill, but there have also been a few times my clients lost and couldn't have afforded the other side's bill. This bill will not solve the 'litigation crisis,' if one exists. The losing party will invariably be broke or go bankrupt (and know that will happen beforehand), and the winning party will get nothing as a result."[6]

> One practical consequence of this statute, if passed, is that the decision of an attorney to take a personal injury case will cease to be simply a question of the assessment by that attorney of the merit of the case, the likely costs of advancing expenses, and the time to be expended by the attorney upon the effort. . . .
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> Insurance companies would also use HB 111 to enhance their negotiation stance. They might advise injured (but unrepresented) persons that although they certainly have the right to take the matter to a lawyer and court, but could add, "By the way, did you know that under Missouri Revised Statute 666.789 that you will have to pay our attorney fees if you lose.? And wouldn't you like to reconsider our very fair offer to settle?"
>
> Although less dramatic than in the personal injury case, the proposed statute would have a similar effect on those types of cases in which the attorney (in, say, a contractual dispute case) takes the case but requires a retainer for fees or costs."[7]

"The 'loser pays' concept promotes aristocratic justice. . . . If the design of this legislation is to punish

those that file frivolous lawsuits, the mechanism of punishing those litigants is already in place!(e.g., Motion for Sanctions; Lawsuit for malicious prosecution or abuse of process.) Those that live in a civilized society should promote the civil justice system as a civilized manner of resolving honest disputes."[8]

> Loser pays is a poor idea. The concept is intimidating to the average person and acts as a bar to the courtroom. One of the requirements of a free society, a democratic nation, is that all are treated equal, or at least have the possibility of equality. We all have one vote. We all have a say in our government. We all should continue to have equal access to our courts. Loser pays tips the scale in favor of ones who can afford to pay.
>
> We live in a society of relative calm. When Joe Lunchbox is wronged, he has the opportunity to seek redress without violence, the courts. If he cannot seek justice in the courts, he may seek it on the streets. Over the last 200 years no nation has prospered more than ours. No nation is more free. Why change a fundamental concept of our great nation?[9]
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> I represent both plaintiffs and defendants. In advising plaintiffs, I would have to tell them that they could possibly face an attorney fee's award from the other side if they lose. Virtually all plaintiffs think they have a case with merit, even after we carefully review their case and decline to take their case. Worst case scenario for a losing plaintiff is to lose the case, get a big "loser pay" attorney fee and then go into bankruptcy. For the small businesses I represent, it will be much worse. I represent a Jackson County restaurant. Slip and fall is always a concern. My client would almost always be forced to settle, even if there is an unreasonable demand, because there is a good chance you can lose any slip and fall case at any time. The additional threat of attorney fees is just too much to risk. I do not think it will deter litigation by plaintiffs, the obvious goal, and will hurt small businesses.[10]

House Bill 111 was assigned to the House Judiciary Committee, chaired by Representative Richard Byrd, a lawyer-legislator. The bill was not voted on by the committee. The "English rule" provision was also not included in Senate Bill 280, the Truly Agreed and Finally Passed tort reform measure vetoed by Governor Holden.

House Bill 321, sponsored by Representative Kevin Wilson, made numerous changes in the workers' compensation law. Among these, the bill would have enacted a substantially more narrow definition of "accident," restricted benefits for aggravation of pre-existing conditions and increased the penalty imposed when violation of drug and alcohol rules is involved in a work-related accident The Missouri Bar did not take a position on these liability issues, but actively opposed proposed changes to § 287.610, relating to appointment and retention of workers' compensation administrative law judges. House Bill 321 proposed that these judges be appointed with the advice and consent of the Senate and limited to terms of four years, subject to retention. These changes were opposed by the bar based on a concern that they would politicize administrative law judge positions and inhibit judicial independence. Testimony against these provisions of the bill was presented at a Senate hearing on behalf of the bar, and the provisions were later removed from the bill.[11] Members of the Workers' Compensation Law Committee who had sent in comments regarding liability portions of the

bill were invited to communicate their individual comments to the sponsor and other legislators. The bar also opposed **House Bill 270 and Senate Bill 248**, which would have eliminated judicial retirement benefits for workers' compensation judges. Neither House Bill 270 nor Senate Bill 248 came out of committee; House Bill 321 died on the Senate Third Reading Calendar. Workers' compensation "reform" issues can be expected to resurface in the current session.

House Bill 573, filed relatively late in the session by Representative Rex Rector, provided for mandatory mediation of disputes relating to defective residential construction. Numerous bar members who practice in the areas of construction law, commercial law and alternate dispute resolution commented on the bill.

A letter from the bar's legislative counsel to the bill's sponsor summarized concerns raised by bar members. All members of the House Judiciary Committee, to which the bill was assigned, were provided with the following comments.

> [T]here is currently no significant bar to the parties to a contract adopting alternative dispute resolution mechanisms. Numerous concerns were raised regarding how this bill, in mandating such a procedure, would impact consumer protection. Among these:
>
> • The complexity of the procedures set out in the bill would adversely impact the ability of consumers to represent themselves, as they currently do in small claims court. Elderly, uneducated and unsophisticated consumers would have difficulty with the service requirements, descriptive requirements and documentation requirements in giving notice to the contractor and starting the 90-day periods.
>
> • The costs of the mediation process may exceed the value of the claim. There should be either a required disclosure by the mediator of anticipated fees, a fee cap, or something similar.
>
> • It does not make sense to require mediation when attendance of necessary parties cannot be reasonably anticipated. If a necessary (responsible) party does not attend, the likelihood of settlement is significantly diminished.
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> • Under the provisions of the bill, a skilled attorney could prevent an unrepresented party from introducing necessary documents at trial when the documents had been submitted at mediation.
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> • Rather than granting the right of inclusion to the contractor alone, both parties should be permitted to invite support people to the mediation. The unavailability of any third party the contractor may be allow[ed] t[o] bring into the mediation should not derail the process with the claimant.
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> . . .
>
> • The contractor who makes an offer should be required to commence the corrective measures within a reasonable amount of time after claimant accepts contractor's offer to correct [a] defect with claimants not waving [sic] any right to further action until after the corrective work is completed.

• It is unfair to allow the contractor's litigation to proceed while the consumer's claims are bogged down in a required mediation process.

• It seems paradoxical, at best, to re1quire [sic] a consumer claiming fraud or deceptive practices to go through a mediation process with the contractor alleged to have committed the fraud or deception.[12]

At the hearing before the House Judiciary Committee on this bill, no testimony was presented opposing the bill due to the unavailability of witnesses. However, many of the above concerns were raised by lawyer-legislators on the committee and debated during the hearing. Although the bill did not progress beyond the committee hearing, it can be expected to be reintroduced during the current session.

Senate Bill 59 and Senate Bill 97 proposed to expand non-attorney representation in administrative law settings. In the mid-1990s, after studying court rules of other states, the Board of Governors recommended and the Supreme Court implemented a change in Supreme Court Rule 5.29 to allow non-attorney representation of any party in any employment security hearing before the state Division of Employment Security. Business groups that had lobbied for this change soon became dissatisfied with the limited application of Rule 5.29 and began to promote legislation to more widely expand permissible non-attorney representation.

Senate Bill 97 amended Chapter 484.020, which defines the practice of law and sets out the penalty for unauthorized practice of law. A new subsection would allow any corporation authorized to do business in the state to be represented by either the president or chief executive officer, providing that "such representation shall not be construed to be the practice of law." Senate Bill 59 would have repealed the current Supreme Court Rule 5.20, and enacted a new rule allowing non-attorney practice not only before the state Division of Employment Security, but also "[i]n any proceeding before the administrative hearing commission, [and] any workers' compensation pro-ceeding."[13]

Workers' Compensation Law Committee Chair Phil Hess testified on behalf of the bar against these bills at a Senate committee hearing. In addition, a written statement expressing concerns about the bills was submitted by James Selle, chair of The Missouri Bar Business Law Committee. Among the concerns outlined in Mr. Selle's memo were:

• Whether rules of the Missouri Supreme Court regulating the practice of law should be changed only by the Missouri Supreme Court.

• Exposure of business owners to ineffective representations in proceedings after which there is no trial de novo and appeal is based solely on the agency record.

• Whether this type of representation should be limited to controversies of a certain dollar amount, similar to small claims court actions.

• The reference to an "officer" or "person in the full-time employment of the entity in a managerial capacity" may not fit, or be easily discernable with respect to, all of the various types of business entities that are permitted in Missouri (particularly partnerships, limited partnerships, limited liability partnerships, limited liability limited partnerships, and limited liability companies).

• The extent to which rules regarding service of process, rules of evidence, as well as ethical rules and other rules of conduct (and penalties or sanctions arising from violation thereof),will continue to apply.

• Whether Administrative Law Judges will be put in the difficult position of being asked to, or otherwise feel obligated to, advise claimants regarding various rights or remedies, and what recourse an entity (or its owners) will have if a matter is mishandled by an officer or employee because they do [not] understand all applicable rights and remedies;

• Whether allowing non-attorney representation in areas such as workers' compensation law, which involve complex bodies of statutory and case law, is contrary to proper administration of justice and the interests of employers and employees alike.[14]

Although neither Senate Bill 59 or Senate Bill 97 were reported out of committee this session, the issue of non-attorney representation remains on the wish list of business community advocates and is sure to be pursued in future sessions.

Senate Bill 377 proposed to tax health care liability settlements and judgments, with proceeds dedicated to reducing health care "mishaps and errors." Several strongly worded comments were received regarding this bill. The following are examples:

> If a class of defendants wants to impose a tax on themselves for their misconduct, that makes sense. Taxing the victim adds insult to the injury caused by the negligent person/entity. So, if after a jury determines what the victim's damages are, the legislature wants to additionally punish a defendant, make the defendant pay an additional 2% or whatever. But, don't take money from the victim and, essentially, give it back to the tortfeasor or the tortfeasor's colleagues. Ultimately, I think the statute should be unconstitutional.[15]

"A 2% tax on medical malpractice settlements and judgments is an unconstitutional attempt at taxation without any basis. It is discriminatory against a class of citizens (medical malpractice victims) while it does nothing toward solving the so called malpractice insurance premium crisis."[16]

A letter expressing the bar's opposition and enclosing these comments was sent to the sponsor of Senate Bill 377. The bill did not progress beyond a committee hearing.

Senate Bill 526, introduced by Senator Charles Gross, proposed to prohibit contingent attorneys' fees in property tax appeals. The bill was sent to the Administrative Law Committee, Government Attorneys Committee, Local Government Law Commitee and Taxation Law Committee legislative review subcommittees for comment. Although several attorneys commenting on the bill expressed neutrality or support, a majority of reviewers opposed it. As summarized in a letter from the bar's legislative counsel to the bill's sponsor:

> A large number of comments were received from bar members regarding this legislation. It was noted that a prohibition against contingent fees limits the ability of taxpayers to retain qualified legal counsel, which in turn limits the likelihood of a successful result for the taxpayer. Furthermore, individuals with limited resources

> would be discriminated against since it is unlikely they could retain counsel if counsel cannot work on a contingent fee basis. It was noted that the bill does not include property tax consultants, CPA's or other persons who handle tax appeals.
>
> Another important consideration is that the bill conflicts with the Supreme Court's exclusive authority to regulate the practice of law pursuant to Article V, Section V of the Missouri Constitution.[17]

On the basis of these concerns, the bar's Executive Committee voted to oppose Senate Bill 526. The bill was heard by the Senate Judiciary and Civil and Criminal Jurisprudence committees, but did not progress beyond that stage last session.

The Missouri Bar also opposed **House Bill 154**, which sought to establish covenant marriages in Missouri. Introduced by Representative Bradley Roark, this bill proposed to establish an alternative to a traditional marriage called a "covenant marriage." Under covenant marriage, premarital counseling is required and limits are placed on a spouse's ability to legally separate or dissolve the marriage.

Opinions of Family Law Section members about this legislation varied. Some members saw the bill as returning dissolution "back to the dark ages to have to prove fault to get a dissolution."[18] Concerns were expressed that the covenants created by the bill "could result in direct harm through potentially abusive situations and violent or codependent behaviors."[19] It was suggested that the bill "opens [the] door to false allegations of adultery and abuse to get [a] divorce."[20]

However, another member of the Family Law Section's legislative review subcommittee wrote, "I view this as more of a matter of social policy than legal process. While I do not favor the additional burden it may put on our courts[,] it seems to be in the realm of the legislative branch to deal with the policy issue since it creates an option."[21] Two lawyer-legislators co-sponsored the bill, further evidence of differing views on the subject.[22]

Weighing the various opinions expressed, past positions taken by The Missouri Bar on similar bills, and the bar's historic involvement in enacting no-fault divorce legislation, the Executive Committee voted to oppose House Bill 154. A letter was written to the sponsor explaining the bar's concerns about the bill. Margo Green, a member of the Family Law Section, wrote several members of the House Children and Family Committee to express her personal opposition. Margaret Donnelly, a lawyer-legislator from St. Louis, was helpful in explaining technical concerns about the bill during a committee hearing. The bill was heard in committee on February 18, 2003, but did not advance further last session.

Participation by the unified bar in legislative activities is an art rather than a science, as complete unanimity on an issue rarely, if ever, exists. Just as judicial precedents evolve, opinions of the bar sometimes change over time. Every Board of Governors or Executive Committee represents a unique chemistry of personalities and perspectives. The common thread of integrity, political neutrality, technical expertise and a commitment to providing constructive input earns respect for the bar among members of the legislature and appreciation of the unique contribution the unified bar makes to the legislative process.

Footnotes

[1] Catherine J. Barrie received her B.A. in history from Duke University and her J.D. from St. Louis

University School of Law. She has served as legislative counsel to The Missouri Bar since 1988 and previously served as counsel to the Labor and Industrial Relations Commission. She has published several articles relating to administrative law and the legislative process.

[2] Section 473.097, RSMo 2000; Chapter 461, RSMo 2000; Chapter 469 RSMo 2000; §§ 404.800 to 404.865, RSMo 2000; Chapter 400, RSMo 2000; Chapter 452.375, RSMo 2000; Chapter 417.450, RSMo 2000; Sections 194.210 to 194.290, RSMo 2000; §§ 477.650 and 488.031, RSMo 2000.

[3] The bar does not, however, support or oppose legislation that has not been filed in bill form, except for legislation proposed by Missouri Bar committees.

[4] 496 U.S. 1 (1990). In *Keller*, 21 members of the State Bar of California sued, claiming use of compulsory bar membership dues to finance certain ideological or political activities violated "their First and Fourteenth Amendment rights to freedom of speech and association." Among the challenged activities were: "lobbying for or against state legislation" relating to "prohibiting possession of armor [] piercing handgun ammunition," "creating an unlimited [cause] of action to sue [anyone for] causing air pollution," endorsing "a gun control initiative" and endorsing "a nuclear weapons freeze initiative." The United States Supreme Court held that "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.'" *Keller*, 496 U.S. at 14, citing *Lathrop v. Donohue,* 367 U.S. at 843 (l961). The Court further held that determining the scope of appropriate bar activities "will not always be easy to discern. But 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 rules for the profession." *Keller*, 496 U.S. at 15-16. The Supreme Court agreed with the lower court's view that it was unreasonable to require the state bar to accept the risk of litigation every time it decides to lobby a bill or file an amicus brief. The Court further stated that the bar could satisfy constitutional requirements by providing members with an explanation of the basis of their dues, an opportunity to challenge amounts spent on actuates they consider objectionable, and a process to receive a refund of amounts in dispute. *Keller*, 496 U.S. at 16-17.

[5] Policy Statement Regarding Legislative Procedures, revised by Board of Governors May 9, 2003 (on file with the author).

[6] E-mail from Scott Gardner, Solo and Small Firm Legislative Review Subcommittee (Jan. 11, 2003, 20:45 CDT) (on file with the author).

[7] E-mail from Gary Bollinger, Solo and Small Firm Legislative Review Subcommittee (Jan 14, 2003, 17:47 CDT) (on file with the author).

[8] Fax from Mark D. Pheiffer, Tort Law Legislative Review Subcommittee (Jan. 13, 2003, 16:01 CDT) (on file with the author).

[9] E-mail from Robert Halas, (Jan. 18, 2003, 15:50 CDT) (on file with the author).

[10] E-mail from Stephen Bough, Tort Law Legislative Review Subcommittee (Jan. 15, 2003, 09:16 CDT) (on file with the author).

[11] Christopher Archer, member of the bar's Workers' Compensation Law Committee, presented testimony on behalf of The Missouri Bar Board of Governors on March 19, 2003 before the Senate Small Business, Insurance and Industrial Relations Committee. Truman Allen, past chair of the Workers' Compensation Law Committee, presented testimony partly on behalf of the bar and partly on his own behalf.

[12] The letter's summary incorporates comments provided by Michael Geigerman of the Alternate Dispute Resolution Committee's legislative review subcommittee, as well as Michael Ferry, Wendell Sherk, Bernard Brown and Robert Swearingen of the Commercial Law Committee legislative review subcommittee.

[13] Mo. Const. art. V, § 5 provides: "The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. *Any rule may be annulled or amended in whole or part by a law limited to the purpose."* (Emphasis added)

[14] Memorandum from James M. Selle, chair, Missouri Bar Business Law Committee (Jan. 27, 2003) (on file with the author).

[15] E-mail from Mark Pfeiffer, Tort Law Committee legislative review subcommittee (Mar. 11, 2003, 14:53 CDT) (on file with the author).

[16] Letter from Larry Glenn, Tort Law Committee legislative review subcommittee (undated) (on file with the author).

[17] Comments that formed the basis for the bar's opposition to this legislation were provided by: John Landwehr and David Zerrer of the Administrative Law Committee's legislative review subcommittee; John Thompson, James McCoy, Deborah Lane, Patrick Cronan, Marc Ellinger and Nathan Nicholas of the Local Government Law Committee's legislative review subcommittee; and John Barrie and Bill Prugh of the Taxation Law Committee legislative review subcommittee. Conflicting views were expressed by Peggy Gustefson, Maggie Johnston, Lyndel Porterfield and Sean Clancy. Some other members expressing views on SB 526 asked that their names not be published.

[18] Fax from Margo Green, Family Law Section legislative review subcommittee (Jan. 31, 2003, 15:44 CDT) (on file with the author).

[19] Letter from Mary Lou Martin, Family Law Section (undated) (on file with the author).

[20] Fax from Tina Neff, Family Law Section legislative review subcommittee (Mar. 13, 2003, 13:45 CDT) (on file with the author).

[21] Letter from Alan Stewart, Family Law Section legislative review subcommittee (undated) (on file with the author).

[22] Representative Bryan Stephenson and Representative Jason Crowell. This is an example of the occasional case where the bar takes a position adverse to legislation endorsed by its own member(s). With rare exception, I have found lawyer-legislators very tolerant of the expression of

different views.

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