

## The Political Process: Roles and Responsibilities

### 1.0 Introduction

In the public policy arena, the bar plays a significant role in the evaluation and consideration of administration of justice issues in the legislative and political processes. The board encourages bar groups to be involved in legislative activities within their jurisdiction subject to the bar's legislative guidelines and relevant election laws. There is a long tradition of lawyers working through the bar process to improve the quality of laws in the state of Oregon and the bar's law improvement program has served to raise the credibility of lawyers as an resource for expertise in a wide variety of areas.

The Oregon State Bar Board of Governors guidelines for legislative and political activity are set forth in BOG Bylaws Article 12. The guidelines are drawn from the bar's statutory purposes, constitutional limits on the use of mandatory membership fees, and election law limits on the activities of public employees. They also reflect the recognition that the Oregon State Bar has a diverse membership with differing views on many subjects.

### 1.1 Statutory Authority

By way of background, the Oregon State Bar is a "public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon..." ORS 9.010(1). Although the board has statutory authority to "at all times direct its power to the administration of the science of jurisprudence and the improvement of the administration of justice" (see ORS 9.080(1)), its actions are still constrained by other applicable law, including *Keller v. State Bar of California*, 496 U.S. 1 (1990). As a state entity, the bar's funds are subject to audit by the Secretary of State pursuant to ORS 297.210 and, for purposes of the expenditure of bar resources, bar "funds" are considered "public funds" and board members may be subject to the restrictions on the expenditure of public funds under ORS 294.100 as public officials.

As a mandatory membership organization, the Oregon State Bar cannot engage in the wide-range of activities allowed voluntary organizations. Even though the bar is partially funded by membership fees as opposed to state general fund revenues, its unique statutory composition makes it subject to various laws. Thus, in pursuing any activity, the expenditure of public funds by the board must be related to the purposes for which the bar exists. If it is not, the public officials who permit the unauthorized expenditure may be subject to personal liability under ORS 294.100 if the expenditure constitutes malfeasance or wanton neglect of duty.

### 1.2 *Keller* Standard

The U.S. Supreme Court's decision in *Keller v. State Bar of California* set the parameters for what a mandatory state bar can do under the First Amendment. In *Keller*, a member of the California bar contested the bar's use of compulsory dues to support and/or advocate "political or ideological" views in violation of his First Amendment rights. The U.S. Supreme Court held that a mandatory state bar's use of compulsory dues to finance

political and ideological activities violates the First Amendment rights of dissenting members when such expenditures are not “necessarily or reasonably incurred” for the purpose of regulating the legal profession or improving the quality of legal services.

The court did not establish a particularly clear standard on what constitutes permissible or impermissible dues-financed activities. However, it stated that the extreme ends of the spectrum were endorsing or advancing gun control or a nuclear weapons freeze which were prohibited on the one hand and disciplining bar members or adopting changes to the profession’s ethics code as acceptable on the other hand. We believe the broad middle area of law improvement is appropriate if it is germane to the bar’s role in improving the quality of legal services to the people of the State of Oregon or relates to the regulation of the legal profession. The Board of Governors has set the scope of OSB permitted activities under *Keller* in BOG Bylaws Article 12.

Additionally, the bar’s guidelines for legislative and policy activities require that the Board of Governors “endeavor to respect the divergent opinions of subgroups within the profession” and make reasonable efforts to “avoid committing bar funds to issues which are divisive or result in creating factions within the profession.” See BOG Bylaws Article 12.

### **1.3 Oregon Election Law**

Bar employees are not public employees within the meaning of ORS 260.432. Therefore, bar staff may participate in advocacy efforts on behalf of the bar.

### **1.4 OSB Board Member (“Elected Official”) Roles and Responsibilities**

The board may do the following:

- 1) Advocate support or opposition to a measure or candidate. A board member may use staff-prepared informational and advocacy materials.
- 2) Use public resources and staff to develop and distribute ~~objective~~ material on the effects of an initiative measure on the bar and the justice system.
- 3) Take a position on an initiative measure. Public announcement of the board’s position by way of a press release is permissible.
- 4) Provide, at bar expense, a content neutral forum at which proponents and opponents of an initiative measure may present their views.
- 5) Personally campaign for or against a measure.

### **1.5 Recent bar activities**

In 2006 the Board of Governors reviewed its policy on involvement in the initiative and electoral process and substantially expanded the scope of its activities. In the 2006 election campaign the bar took a relatively active role in successful efforts to defeat Constitutional Amendment 40. This measure would have required the election of appellate judges by district. Both the Board of Governors and the House of Delegates passed resolutions opposing the measure. Staff worked closely with the Board of Governors in developing materials to disseminate to the public in opposition to the measure’s passage.

Arguments against the measure were posted on the OSB website and placed in the Voter's Pamphlet. Staff also worked on a draft letter that bar members could send to clients urging their opposition to the measure; this was sent to the membership with a cover letter from individual BOG members.

## **1.6 OSB Section/Committee Roles and Responsibilities**

Sections and committees of the bar operate under the umbrella of the bar and thus are subject to the same legal constraints as the board. In light of the political restrictions outlined above, here are some examples of activities that are permitted and some that are restricted:

- 1) Bar groups may propose legislation within their area of jurisdiction subject to BOG approval.
- 2) Bar groups may take positions or respond to public policy activities on legislation. OSB Section/Committee leaders cannot use bar funds to advocate a position on a ballot measure. This means money, staff time during working hours, travel allowances, facilities or equipment. Section/committee members or officers cannot ask staff to research or write a speech designed to support or oppose a ballot measure or charge travel expenses for attending a meeting at which such a position is advocated.
- 3) Bar groups may coordinate or liaison with any group to engage in information gathering on issues involving the bar, the judicial system, the judicial department budget and issues relating to the administration of justice. Meetings to develop strategies to pass or defeat any measure or candidate are not permitted.
- 4) Bar groups can develop legislation for sponsorship to be included in the bar's legislative package or take positions on legislation that fall within *Keller* and legislative guidelines subject to OSB Public Affairs Committee approval.
- 5) Bar groups may not advocate a political position for or against an initiative or referendum or candidate.