A Time to Speak Out: Thanks, Eddie Keller

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As I write this, the Representative Assembly, the final policy-making body of the State Bar, is scheduled to meet on January 26 to address highly controversial issues surrounding the federal government's plan to use military tribunals and search certain correspondence and other communications between lawyers and clients. The assembly will also discuss multidisciplinary practice issues. Some have rightly criticized the assembly for uninspiring meetings. Not this time. There is much to do and the purpose of the assembly will never be better served.

The Representative Assembly will not, however, attempt to speak on issues, important as they may be, that are unrelated to the principles and practice of law. It will focus on access to justice, equal rights under law, and fair representation for all—weighty issues on which the legal community is the best authority. Each of us is bound to grapple with such issues by virtue of the oath we took when we were admitted to practice.

In the not-so-distant past, the Representative Assembly was not as limited. In 1979, former State Bar of Michigan executive director, Michael Franck, described the first seven years of the Representative Assembly in a *Michigan Bar Journal* Lansing Letter:

> *[T]he Assembly has determined State Bar policy on major professional issues such as advertising, certification, specialization and mandatory continuing legal education. The Assembly has also set State Bar policy with respect to major public issues such as heroin maintenance programs, gun control and appointment versus election of judges.*

And so it was with the California Bar, which took positions on armor-piercing handgun ammunition, air pollution, immigration, low-rent housing, gun control, a freeze on nuclear weapons, abortion, public school prayer, and busing. Predictably, the bar alienated some of its members. One of them, Eddie Keller, took the California bar to court, and as a result changed the landscape for mandatory bar associations. In *Keller v the State Bar of California*, 496 US 1 (1993), the U.S. Supreme Court ruled that a bar receiving compelled dues must stay out of partisan political and philosophical issues unrelated to its purpose.

In the early days that followed *Keller*, there were those in our profession, and particularly in Michigan, who predicted the demise of the organized bar because it could no longer speak on every important public policy issue. In my opinion, they were wrong. The integrated bar is stronger because of *Keller*. That is particularly true in Michigan where we have our hands full with major issues directly related to the practice of law.

Eddie Keller may simply have wanted to ensure that his money was not used to advocate for positions he opposed, but *Keller* also raised fundamental questions about the image and integrity of a mandatory bar association. 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?

Since *Keller*, our bar has been prohibited from making statements about topics such as heroin maintenance programs or gun control, and it's time to stop lamenting that prohibition. Is the world really any different because the Representative Assembly of the State Bar of Michigan spoke out on heroin maintenance and gun control? I think not. And we certainly know that taking positions on such issues creates divisions among us and distracts us from our central purposes. At one time it was fashionable for the bar to be involved in controversial public policy issues, but experience has shown that bar associations better serve their members and the public by focusing on what we know best—the principles and practice of law.

The ABA provides a high-profile example of the confusion and loss of respect that can result when a diverse body purports to speak on behalf of all of its members on controversial public policy issues. For many years, the

ABA House of Delegates has taken positions on political and philosophical issues. Some years ago, they took a position in favor of a woman's right to choose an abortion in consultation with her doctor. The resulting outcry and exodus of members was deafening.

More recently, Paul Greenberg, the conservative editorial page editor at the *Arkansas Democrat Gazette*, wrote:

> *The news comes like a fresh breeze: The Bush administration is not going to rely on the American Bar Association to screen its judicial nominees. Good riddance to a bad practice.*
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> *For too long the ABA has posed as some kind of apolitical professional association capable of viewing nominees for the bench with Olympian detachment . . .*
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> *In recent years, the bar association has been openly taking political stands and letting its ideological prejudices show. It still pretends to be only a professional organization when it seeks to judge the nation's judges, but is anybody fooled? This administration isn't. . . .*
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> *A private outfit with a political agenda of its own, the ABA has no business vetting appointments to the federal bench.*

Not so, says Martha W. Barnett, then-President of the ABA. She says that the standing committee on the federal judiciary

> *has historically been in the unique position as the National organization representing all segments of the legal profession in all areas of the country to perform this service and has played a big part in ensuring quality and professional competence on the federal bench.*

Barnett pointed out that the ABA began evaluating judicial nominees in 1948 for the Senate and has done so for every president since Eisenhower. She noted that the 15-member standing committee "evaluates the professional qualifications of potential candidates on three criteria: integrity, judicial temperament and professional competence." In other words, the committee is totally objective and fair.

Not everyone agrees. The White House responded to Barnett through its counsel, Alberto R. Gonzales, who said, "the ABA takes public positions on diverse political, legal and social issues that come before the court and should not play a unique quasi-official role and thereby have its voice heard *before* and *above* all others."

As a member of the ABA for nearly my entire career, I have greatly appreciated the quality of materials and seminars that it produces. It is a professional organization and I have valued its participation in the evaluation of judges. Lawyers are in a unique position to evaluate their brothers and sisters who desire to take lifetime appointments to the federal judiciary. I wish the current administration had maintained the tradition of ABA consultation, and I hope that future presidents will return to that practice, but the argument can be made that the ABA got just what it deserved. Although the standing committee on the federal judiciary is totally separate and distinct from the ABA House of Delegates, for those who disagree with the House of Delegates on particular political or philosophical issues or who object to the decisions of the standing committee on the judiciary, the distinction is unpersuasive.

When organizations such as the ABA take positions on political issues, they do so at great cost and with questionable benefit. It places the ABA in a position in which there are "winners" and "losers" among its members, creating serious and lasting internal conflict. The cost is a significant reduction in the impact of the ABA's voice on important legal issues where it most needs to be heard. That the ABA is a voluntary bar and can do what it wants begs the question. If it continues to speak on controversial major public policy issues, should it then expect to be believed when it tries to convince the president and the public that it can be fully objective in making federal judiciary appointment recommendations—a non-political process well-known to be highly partisan?

Today, the Representative Assembly of the State Bar of Michigan operates in safer territory. Only when the issue fits under one of the exceptions to *Keller* is the assembly or the Board of Commissioners able to take a position. *That does not mean that we will only look at non-controversial issues. Nor does not mean that we must take a position on every issue permitted by Keller.* Last year the assembly debated whether Michigan should appoint its appellate judges; at the January 2002 meeting it will consider military tribunals, attorney client privilege, and MDP. All are controversial issues, but the profession needs to grapple with them because they are issues on which lawyers are most qualified to speak, and they will have a significant impact on how justice is accessed.

The State Bar of California was turned upside down because of Eddie Keller, but in the end the State Bar of Michigan has been the beneficiary. Eddie Keller really is a friend.

While there are some who may wish for the old days, I am not among them. We have limited resources and can actively lobby on no more than four or five major issues each year. Self-righteous pronouncements accomplish nothing unless they are accompanied by legislative lobbying, time, and a great deal of money.

When we do participate in the legislative process, we appear with significant resources in the form of expert witnesses and well-drafted policy positions. We also provide significant member resources in the form of staff and volunteer time. Our lobbyist, David Haynes, is exceptionally well-informed and participates actively with legislative committees and subcommittees. State Bar officers and others meet with legislators and work to uphold the vital principles of law on which our nation is founded. We need to ask ourselves whether we would rather expend our limited resources on issues affecting lawyers, the availability of legal services, the right of the courts to continue to settle disputes, or on hot-button and generally divisive political issues such as the death penalty, abortion, and gun control.

The State Bar leadership believes that the largest percentage of our lawyers support our participation on the critical issues facing our profession rather than those that are questions of judgment, values, and emotion. Because we are prohibited from participating in the legislative process on some political issues does not mean that individual lawyers or even some of our sections, which have no *Keller* restraints, may not seek to do so. However, the role of the Bar is to represent all Michigan lawyers, and we believe it does so best when it refuses to take positions on political issues irrelevant to the practice of law, access to justice, or the operation of the courts.

As always, your comment on this or other issues is welcome and appreciated. ✦