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The Ohio State Bar Association and the Voluntary Bar System—A Perfect Fit?

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LEGISLATION NOTE

THE OHIO STATE BAR ASSOCIATION AND THE VOLUNTARY BAR SYSTEM—A PERFECT FIT?

I. INTRODUCTION

Over the last few years, the Ohio State Bar Association (O.S.B.A.) has been embroiled in a highly publicized confrontation with the Ohio Supreme Court.[1] In the midst of this "battle," the court has removed many long-held rights and privileges of the state's bar association.[2] The impairment of those activities calls into question the effectiveness and utility of the O.S.B.A. in the performance of its remaining functions.

Among the most prominent functions of a bar association is its legislative activity. The Ohio State Bar Association, as a perennial sponsor of major legislative changes,[3] has certainly been no exception. This note will examine the reasons why the lobbying activity of a state bar, such as Ohio's, is so vital to legislative reform at the state level. In addition, it will also compare the type of bar system that is followed in Ohio with those employed in other states in an attempt to determine which system can most effectively execute the O.S.B.A.'s role in the legislative process.

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1. *See, e.g.*, Columbus Dispatch, Aug. 1, 1984, at A10, col. 1; *id.*, Aug. 3, 1984, at B1, col. 4; *id.*, Aug. 5, 1984, at A1, col. 1; Dayton Daily News, Aug. 18, 1984, at 3, col. 1.

2. Since 1982, the Ohio State Bar Association has lost the following powers:

1) The right to print decisions of the Ohio Supreme Court and other Ohio courts.

2) The right to investigate grievances against lawyers and judges or to prosecute complaints regarding legal ethics or unauthorized practices of law.

3) The Supreme Court terminated its subscription to Ohio State Bar Association publications and removed the Ohio Bar Reports from its library shelves.

4) The Ohio State Bar Association has been unable to receive lists of successful bar examination applicants or lists of attorneys registered to practice before the Ohio Supreme Court.

Letter from Frank E. Bazler, president of the Ohio State Bar Association, to members of the Ohio State Bar Association (July 25, 1984) (on file with University of Dayton Law Review).

In addition, the Ohio State Bar Association has revised its judicial rating system in response to a proposal which is being considered by an Ohio Supreme Court committee that would authorize formal disciplinary action against attorneys who participate in rating programs that are outside court guidelines. Frank, *Discipline Specter Raised in Ohio Judicial Ratings*, BAR LEADER, Jan.-Feb., 1985, at 6.

3. *See infra* notes 17–18 and accompanying text.

II. BACKGROUND

A. *The Role of the State Bar in the Lawmaking Process*

For many years, state bar associations[4] have played an active role in the legislative systems that exist in the United States. In pursuing the complementary goals of improving the administration of justice and advancing the science of jurisprudence,[5] state bar associations have made some of the legal profession's greatest contributions to the lawmaking process.[6]

There are two basic functions a state bar performs in the legislative process. First, it serves as an instrument of law reform. Traditionally, the state bar has provided much of the impetus for legislative reform throughout the various states.[7] This is partially attributable to the fact that the judiciary, because of its role in the legal system, is "not in a good position to carry on promotional and lobbying activities in behalf of reform measures."[8] While much of our law emanates from the judiciary, that branch of our government is not involved in the creation of statutory law.[9] The general public is also unable, for the most part, to engage itself in legislative reform because it is unfamiliar with the laws and the mechanics of the legal system.[10]

The state bar, however, is in a unique position to accomplish law reform for several reasons. First, the state bar is in a better position to identify areas in which law reform is warranted because of the technical training of its members and the fact that they are constantly exposed to problematic areas of the law.[11] Second, although some state bars are subject to regulation due to their status as government agencies,[12] they are generally self-regulating,[13] and thus are independent of judicial and legislative restraints. Because of this independence, state

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4. The organized bar is an association of lawyers whose purpose is to promote and maintain the practice of law as a profession in order to further the administration of justice for the benefit of the public. R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 14 (1953).

5. *Id.* In addition, Pound lists two other purposes: upholding the honor of the profession and establishing discussions between members of the profession. *Id.* at 14–15. Most state bar associations have these goals listed in their charter in some form. *Id.* at 15.

6. Seymour, *The Bar as Lawmaker*, in THE LIFE OF THE LAW 403, 403 (J. Honnold ed. 1964).

7. Winters, *The National Movement toward Legal and Judicial Reform*, 13 ST. LOUIS U.L.J. 33, 52 (1968).

8. *Id.*

9. THE FEDERALIST No. 78, at 465–66 (A. Hamilton) (J. Cooke ed. 1961).

10. Winters, *supra* note 7, at 52.

11. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U.L.J. 351, 356 (1968).

12. *See, e.g.*, Address by Anthony Murray, president of the State Bar of California, at the Conference of Bar Presidents, in Monterey, California (Feb. 12, 1983) [hereinafter cited as Murray address] (on file with University of Dayton Law Review).

13. Murray, *The Unified Bar Serves the Public Interest*, CAL. LAW., May, 1983, at 13, 56.

bars can become involved in the legislative process whereas other governmental bodies, such as the judiciary, must refrain from involvement. Finally, the state bars provide a forum in which a constant exchange of ideas and information takes place among their members.[14] From this exchange, legislative proposals are formulated.[15] Unlike the proposals generated by individual members of the public, these proposals are more likely to reach fruition due to the influence that accompanies the size of bar associations.[16]

The impact of state bar organizations on legislative reform in the various states has been extensive and has affected virtually every field of law.[17] For example, in 1983 and 1984, the Ohio State Bar Association was a major force in obtaining new and revised legislation in the areas of probate, corporate, real property, and family law.[18] The State Bar of California has initiated reform in many areas, including those dealing with family law, corporate law, and the rules of evidence.[19] Likewise, the Illinois State Bar Association has recently sponsored two major pieces of legislation that were enacted into law: the Business Corporation Act of 1983 and a no-fault divorce provision.[20]

Along with serving as an instrument of law reform, the second function that the state bar has undertaken in the lawmaking process is that of analyzing proposed legislation and providing technical advice to the drafters of such legislation. Because of the expertise of its members, the state bar can provide much needed technical and substantive advice on significant or complicated legal issues.[21] The basis for such

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14. Petry, *The Public Service Responsibility of the Bar*, in COMMITMENT TO PUBLIC INTEREST LAW 4 (1980).

15. For example, the Ohio State Bar Association will typically offer 20–25 legislative proposals during a given legislative session. Interview with William Weisenberg, director of government affairs, Ohio State Bar Association, in Columbus, Ohio (Sept. 29, 1984) [hereinafter cited as Weisenberg interview] (on file with University of Dayton Law Review).

16. The average size of the state bar organization is approximately 10,300 members. Of the 56 state bars (this includes dual bar associations in some states), eight have over 20,000 members, while the State Bar of California has over 75,000 members. The Ohio State Bar Association numbers over 17,000. 1982–83 DIRECTORY OF BAR ASSOCIATIONS 30 (S. Palmer ed. 1982).

17. Seymour, *supra* note 6, at 414. While the accomplishments of the state bars are too numerous to list here, specific examples include the Ohio State Bar Association's involvement in Ohio's enactment of the Uniform Commercial Code and the Ohio Revised Code. W. VAN AKEN, BUCKEYE BARRISTERS 245, 272 (1980). The Mississippi State Bar was likewise successful in its lobbying efforts for the adoption of the Uniform Commercial Code and the Mississippi State Code. M. LANDON, THE HONOR AND DIGNITY OF THE PROFESSION 175 (1979).

18. *"LEGIS-letter,"* 56 OHIO ST. B.A. REP. 1858, 1858–61 (1983). Senate Bill 104 was signed into law on March 21, 1984. 1984 Ohio Legis. Serv. 5-57, 5-58 (Baldwin).

19. Murray, *supra* note 13, at 56.

20. Letter from Marylou Lowder Kent, director of legislative affairs, Illinois State Bar Association, to Richard D. Anglin II (Oct. 10, 1984) (on file with University of Dayton Law Review).

21. Weisenberg interview, *supra* note 15.

advice is normally derived through analyzing pertinent case law, interpreting existing and proposed statutory law, and reviewing the legal trends that exist in other states—all skills which are unique to the legal profession.[22]

These two functions which the state bar organization performs are becoming increasingly important in today's legislative process. Historically, many of the members of a state legislature have been attorneys.[23] Therefore, much of the technical expertise that has been necessary for the identification of problem areas of the law and the subsequent alleviation of those problems could be found within the statehouse itself. However, in recent years, the number of attorneys serving in state legislatures has diminished,[24] thus increasing the need for an effective state bar organization.

B. Improving the Administration of Justice and Advancing the Science of Jurisprudence

In pursuit of their traditional goals,[25] the state bars have attempted to serve the public[26] by establishing a uniform and equitable system of law. The state bar has taken on the responsibility of examining existing as well as proposed legislation in order to determine what effect it has or will have on the legal system and ultimately on the public.[27] In furtherance of this responsibility, the state bar sponsors legislation it views as important, or provides unbiased advice to those in the legislature who request it.[28] While individual members of the bar may have their own personal preferences or opinions about legislative measures, the deliberative process that occurs prior to the bar formally announcing its position or pursuing a legislative proposal will ensure that the views of the bar are as objective as possible and thus are of maximum benefit to the public.[29]

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22. Besides providing technical advice to the drafters of a bill, state bars often take positions in support of or against legislative bills. *Id. See also* Quade, *The Bar and the Legislature*, BAR LEADER, Mar.-Apr., 1983, at 4, 5 (estimated that the New Jersey State Bar Association would follow 1500 bills in 1983).

23. Eulau & Sprague, *Lawyers in Politics*, in THE LAWYER IN MODERN SOCIETY 61, 61–62 (2d ed. 1976).

24. Quade, *supra* note 22, at 4; Middleton, *Lawmakers Need Bars More and More*, BAR LEADER, July-Aug., 1982, at 9, 9.

25. *See supra* note 5 and accompanying text.

26. Murray address, *supra* note 12.

27. Weisenberg interview, *supra* note 15.

28. *Id.*

29. In Ohio, for example, the genesis of a legislative proposal occurs at the subcommittee level of the Ohio State Bar Association through a review of the current law. Out of these subcommittees will come an amendment or new legislation which is then recommended to the appropriate committee. Such an amendment or legislation will carry with it a commentary explaining why the

Despite the valuable role that bar associations play in the legislative process, this role has come under attack in recent years. Specifically, the attacks have been directed at the legislative activities of unified or integrated bar associations. Membership, as well as the payment of dues, is required of all practicing attorneys in states which employ the unified bar concept.[30] Membership is not mandatory, however, in voluntary bar associations such as Ohio's.[31] Consequently, members of some of the unified bars have contended that their first amendment rights have been violated because the unified bars have used their mandatory dues to support legislative proposals or positions to which these members are opposed.[32] This activity, they contend, violates their rights of free association, free speech, and free belief.[33] This is an issue of extreme importance because of the adverse impact that it may have on a unified bar's legislative activity and thus the overall legislative system of those states. The remainder of this note will focus on the controversy surrounding the unified bar and will examine whether, in its present form or in some modified arrangement, it is a more effective system than the voluntary system that is employed in Ohio.

III. ANALYSIS

A. The Unified Bar under Attack

The first major challenge to the unified bar system was in 1961. In the case of *Lathrop v. Donohue*,[34] a member of the State Bar of Wisconsin sued for a refund of his mandatory dues on the grounds that compulsory membership in the state bar amounted to an unconstitutional violation of his first amendment right of free association, and that the use of his dues for legislative purposes infringed on his first amendment right of freedom of speech.[35] The United States Supreme Court, in the plurality opinion of Justice Brennan, held that compul-

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changes are needed, the effect they will have, and the overall effect that the revised or new law will have. The committee will review the proposal and, if they feel it is appropriate, they will send it to the Counsel of Delegates, which is the ruling body of the Ohio State Bar Association, where it will be reviewed by both a screening committee and the members of the counsel. Individual members of the bar are informed of the legislative proposal through the O.S.B.A. journal and are thereby given a chance to form and present their own views. *Id.*

30. Note, Arrow v. Dow: *The Legacy of* Lathrop—*State Bars under Attack*, 8 OKLA. CITY L. REV. 89, 89 n.2 (1983). Thirty-three states have unified or integrated bar systems. *Id.*

31. T. SWISHER, BAR UNIFICATION IN THE UNITED STATES 32 (1975).

32. Quade, *supra* note 22, at 5.

33. *See infra* notes 34–72 and accompanying text.

34. 367 U.S. 820 (1961).

35. *Id.* at 822–23. The plaintiff alleged that the state bar promoted law reform, made and opposed legislative proposals, and lobbied for changes in " 'codes, laws and constitutional provisions.' " *Id.* at 822. This legislative activity was funded with his mandatory dues and was contrary to his beliefs. *Id.*

sory membership was constitutional.[36] The Court found that the state had a legitimate interest in elevating the educational and ethical standards of the bar in order to improve the quality of legal services available to the people of Wisconsin.[37] The Court then held that the means used (*e.g.*, compulsory membership) to fulfill the state's interest was reasonable and thus did not violate the plaintiff's first amendment right of association.[38] In addressing the second issue, the Court held that it did not have the necessary facts[39] to determine whether the plaintiff's right of free speech was violated and, therefore, it declined to resolve the issue.[40]

The Supreme Court was given the opportunity to reconsider the issue concerning freedom of association in *Abood v. Detroit Board of Education*.[41] The plaintiffs in that case were public school teachers who were required to pay an agency fee to the local teachers' union.[42] Although the teachers were not required to join the union, the service charge levied on them was equal to the regular dues that the members of the union were required to pay.[43] Like the plaintiff in *Lathrop*, the teachers challenged the constitutionality of the mandatory charge because they claimed that part of it was used to support ideological and political programs to which they were opposed.[44]

The Court agreed with the plaintiff's contention that freedom of association included the right *not* to be associated with a private group's beliefs.[45] That is, an individual should be free to believe, and in a free society one's own beliefs should be shaped by his or her own mind rather than by the state.[46] Although the Court held that the state

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36. *Id.* at 843.

37. *Id.*

38. *Id.*

39. The Court felt that it did not have the necessary facts because the plaintiff neither alleged any specific legislative activities engaged in by the bar nor indicated any of his views on particular legislative proposals. *Id.* at 846.

40. *Id.* at 845–46. Both Justice Black and Justice Douglas, in separate dissents, thought the record was adequate and would have ruled for the plaintiff on the freedom of speech issue. *Id.* at 877, 884–85. Justice Douglas also would have found for the plaintiff on the issue of free association. *Id.* at 884–85.

41. 431 U.S. 209 (1977).

42. *Id.* at 212.

43. *Id.*

44. *Id.* at 213. The plaintiffs' complaint read "that the Union is engaged 'in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities.' " *Id.*

45. *Id.* at 234.

46. *Id.* at 235. The Court recognized that at the heart of the first amendment is the idea that an individual should be free to believe. *Id.* " 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their

could infringe upon this right, provided there was an important governmental interest,[47] it also held that the union could not use the mandatory charges to promote political or ideological beliefs that were not germane to its duties as a collective bargaining representative.[48] While a union is not prohibited from promoting political causes or beliefs which are unrelated to its specific duties, this promotion can only be financed by members who do not object to those beliefs.[49]

The ruling in *Abood* was extended to the activity of bar associations in *Arrow v. Dow*.[50] In that case, members of the New Mexico State Bar brought an action for restitution of their bar dues that had been spent by the bar in its lobbying efforts.[51] Relying on the rule set forth in *Abood*, the *Arrow* court held that the lobbying efforts of the New Mexico State Bar did not serve important or compelling governmental interests.[52] Although the bar argued that its lobbying was constitutional since it related to advancing the administration of justice and improving the legal system—both activities which are germane to the reason the bar was created[53]—the court ruled that these purposes were too broad. According to the court, *any* issue lobbied for could conceivably be related to the administration of justice or to the improvement of the legal system.[54] The court did agree, however, with the *Lathrop* holding that improving the ethical and educational standards

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faith therein.' " *Id.* at 235 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

The Court, in a footnote, also quoted James Madison who stated: " 'who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' " *Id.* at 234 n.31 (quoting 2 THE WRITINGS OF JAMES MADISON 186 (Hunt ed. 1901)).

47. *Id.* at 225.

48. *Id.* at 235–36. The Court noted several activities which were germane to a union's role as a collective bargaining representative. For example, when a union bargains for abortion coverage as part of its negotiations for a medical benefit plan, it performs a function for which it is created. Therefore, a member could not withhold dues even if he or she opposed such a plan. *Id.* at 222–23. An example of an activity which is germane to a bar association's purpose would be one involving continuing legal education. Falk v. State Bar (Falk I), 411 Mich. 63, 115, 305 N.W.2d 201, 217 (1981).

49. *Abood*, 431 U.S. at 236.

50. 544 F. Supp. 458 (D.N.M. 1982).

51. *Id.* at 459. The plaintiffs also sought injunctive relief. *Id.*

52. *Id.* at 463. Some of the legislation lobbied for which the court found did not serve important governmental interests included a bill which clarified the Rules of Criminal Procedure as applied to municipal courts, a bill modifying the judicial retirement system, a bill increasing judicial salaries, the Uniform Child Custody Jurisdiction Act, a bill modifying the New Mexico Mental Health Code, and bills which dealt with the education, examination, and licensing of attorneys. *Id.* at 463.

53. *Id.* at 461.

54. *Id.* at 462.

of lawyers was an important governmental interest which justified the infringement upon the first amendment rights of attorneys.[55]

The general holdings of *Abood* and *Arrow* recognize that lobbying activities of an organization impinge upon the first amendment right of free belief of its members if they are required to support the organization through mandatory fees or dues. Such an impingement is not unconstitutional, however, if the activity is germane to, or substantially related to, an important, narrowly defined governmental interest for which the organization is created. While *Arrow* dealt specifically with the lobbying activity of the organization, the *Abood* decision was all-encompassing in holding that "all group activities with political or ideological significance touch on First Amendment rights."[56] Thus, one commentator has suggested that if the lobbying activity of a unified bar association can be brought under the purview of *Abood*, then perhaps all of the activities which a bar engages in while performing its legislative functions may be covered.[57] These activities include the filing of amicus briefs, developing and publicizing bar positions on legislative issues, and providing technical drafting assistance.[58]

Whether these activities are in fact covered by the *Abood* holding was the basis for discussion in *Falk v. State Bar (Falk II)*.[59] The plaintiff petitioned the Michigan Supreme Court for relief from the state bar's use of his mandatory dues for a number of activities, including lobbying and the promotion of political causes.[60] The court held that

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55. *Id. See supra* text accompanying note 37.

56. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RESEARCH J. 1, 64.

57. *Id.*

58. *Id.*

59. 418 Mich. 270, 342 N.W.2d 504 (1983), *cert. denied*, 105 S. Ct. 315 (1984). This was the second time this case came before the Michigan Supreme Court. In the first case, *Falk I*, 411 Mich. 63, 305 N.W.2d 201, a majority decision was not reached because three members of the court believed that the plaintiff was entitled to partial relief, two justices were of the opinion that the plaintiff was not entitled to relief, and the remaining two justices thought that further hearings were required. *Id.* at 82–83, 305 N.W.2d at 201. The three justices who would have accorded the plaintiff partial relief considered the use of mandatory dues for lobbying, taking legislative positions, and providing technical drafting assistance to be impermissible infringements on the first amendment freedoms of a bar's individual members. *Id.* at 115–116, 305 N.W.2d at 217. Apparently, the only activities which they would not have deemed impermissible relate back to the "educational and ethical" standards set forth in the *Lathrop* decision. *Id.*

60. *Falk II*, 418 Mich. at 279, 342 N.W.2d at 505. Additionally, the plaintiff challenged the use of his mandatory dues to finance the following:

> (2) requiring compulsory membership in the Young Lawyers Section; (3) promoting prepaid legal services; (4) supporting lawyer referral services; (5) aiding in lawyer placement; (6) maintaining a Client Security Fund; (7) promoting legal services and educating the public through pamphlets, magazines, radio and television advertisements of the availability and need of legal services; (8) funding Lawyers Wives of Michigan and Children's Charter of Michigan; (9) giving and paying for social functions, including receptions where

the use of mandatory dues to support these activities was constitutional because the government's substantial interest in the political activity of the bar outweighed the injury that the plaintiff suffered as a result of the bar's encroachment on his first amendment rights.[61] In concluding that the government has a substantial interest in the political activities of the bar, the court reasoned that the bar's contribution to the legislative process is particularly valuable because of its collective knowledge.[62] Another factor which influenced the court's decision was that the plaintiff's injury was primarily financial.[63] He was not forced to express his agreement with the bar's political positions, but in fact could assert a contrary position.[64]

The *Abood*, *Arrow*, and *Falk II* trilogy seems to indicate that the legislative activity of an organization which is funded by mandatory dues has a questionable future. Although *Falk II* upheld the bar's legislative activity, the court stated that the practices of the State Bar of Michigan would be subject to scrutiny in the future and that a committee would be appointed to review the bar's legislative activities.[65] While the United States Supreme Court has not yet considered the issue of freedom of belief in the state bar setting, many unified state bars are curtailing their legislative activity or are making provisions for their dissident members in order to avoid litigation over whether their legislative activity is proper.[66] Such action appears to be in accordance with cases decided in the last four years which have placed limitations on the type of activities that a state bar can fund with mandatory dues,[67] or which have required the state bar to implement a refund or rebate

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the Supreme Court Justices are guests of honor; (10) appearing before the State Officers Compensation Commission in support of higher Supreme Court, and other judicial, salaries; and (11) selling the use of the State Bar mailing roster to commercial interests. *Falk I*, 411 Mich., at 140–41, 305 N.W.2d at 229.

61. *Falk II*, 418 Mich. at 298–99, 342 N.W.2d at 514.

62. *Id.*

63. *Id.* at 297, 342 N.W.2d at 513.

64. *Id.* at 296–97, 342 N.W.2d at 513.

65. *Id.* at 270–71, 342 N.W.2d at 504. The Michigan Supreme Court has since required that the bar determine the portion which is spent on lobbying and related activities. "Lawyers may instruct the bar to spend that portion of their dues on other activities. . . ." Frank, *Supreme Court Eases Mich. Dues Use Fears*, BAR LEADER, Jan.-Feb., 1985, at 9. Meanwhile, Mr. Falk has filed another suit challenging the Michigan State Bar's use of mandatory dues, this time in federal district court. Frank, *Falk III*, 71 A.B.A. J. 20 (1985).

66. Weisenberg interview, *supra* note 15.

67. On petition to Amend Rule 1 of the Rules Governing the Bar, 431 A.2d 521 (D.C. App. 1981). The court upheld the validity of a referendum, which was passed by a majority of the bar members, that limited the bar's use of mandatory dues to the following purposes: admission of attorneys; discipline of attorneys; continued registration of attorneys; and maintenance of a client security fund. *Id.* at 522.

procedure for its dissident members.[68] In *Schneider v. Colegio de Abogados de Puerto Rico*,[69] the court went even further in concluding that as long as the bar continued to engage in ideological or political activism, it could not compel its members to pay their dues.[70]

Although a recent Florida case[71] upheld the constitutionality of the Florida Bar's political activity, the majority of recent cases indicate that the trend is against unified bars engaging in legislative activity that is funded by mandatory dues. Because of this growing trend, there is a strong possibility that the legislative systems in the states which have unified bars will be losing a valuable source of legislative proposals and technical advice. The question, then, is whether the unified bar, in either its traditional or in a modified version, can remain as effective as the voluntary bar in its legislative activities. From another perspective, the attacks on the unified bar give rise to the issue of whether the voluntary status of the Ohio State Bar Association is the most effective vehicle for promoting new legislation.

B. Which Bar System is Best for Ohio?

There are currently three organizational options available to the Ohio State Bar Association in furtherance of its legislative activities. The first alternative is the traditional unified status whereby legislative activity is funded by mandatory dues. The second alternative is a modified version of the unified bar whereby a dues rebate is provided for those members who are opposed to the bar's legislative activity. The final alternative is retaining the present voluntary system in which all funding of legislative activity is derived from voluntary contributions. While all three alternatives may be viable, the following analysis will indicate that the third alternative is the most desirable.

1. Traditional Unified Status

This course of action may still be viable in light of the Florida Supreme Court's decision in *In re Amendment to Integration Rule of the Florida Bar*,[72] which departed from the current trend of striking down the legislative activities of unified bar associations. The court in

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68. *See* Reynolds v. State Bar, ____ Mont. ____, 660 P.2d 581 (1983) (holding that state bar could not use mandatory dues for lobbying purposes unless a refund provision was established); Report of Committee to Review the State Bar, 112 Wis. 2d xix, 334 N.W.2d 544 (1983) (court approved rebate plan as recommended by a court committee).

69. 565 F. Supp. 963 (D.P.R. 1983).

70. *Id.* at 978–79.

71. *In re* Amendment to Integration Rule of the Florida Bar, 439 So. 2d 213 (Fla. 1983) (holding that political activities were germane to the compelling state interest of improving the administration of justice and advancing the science of jurisprudence).

72. *Id.*

that case recognized the importance of the state bar in the legislative process,[73] and noted that members who are opposed to the bar's activities have ample opportunity to make their views known to the bar or to the general public.[74] The court further reasoned that a dissenting member is never forced to proclaim any political view or to engage in any "personally-repugnant political activity."[75] However, while the decision of the Florida Supreme Court indicates that the legislative activities of traditional unified bar associations may win the approval of some courts, the cost of litigating the claims of dissident members may continue to make it an unattractive option.

2. Modified Unified Bar—Establishment of a Rebate Procedure

The second alternative is a unified system which provides for a dues rebate to those members who are opposed to the bar's legislative activity. This remedy was recognized in *Abood* when the Court approved the rebate procedure that had been established by the teachers' union.[76] The rebate procedure provided for a refund of a portion of the dues or fees paid by the dissenting employee.[77] The refund was based on the proportion that the union's political expenditures bore to its total expenditures, as calculated by the union.[78] This refund was then followed by a reduction of the employee's future dues or fees by the same proportion.[79]

The Court, while approving the rebate procedures, held that employees should only have to indicate that they are opposed to ideological expenditures of any kind.[80] According to the Court, to require any greater specificity would place a considerable burden on the employees, requiring them to monitor all union expenditures in order to determine whether any expenditures are unrelated to the union's primary functions.[81]

At least two state bars have implemented a rebate procedure since the *Abood* decision. In March of 1983, the Supreme Court of Montana declared that the State Bar of Montana could not use compulsory dues for lobbying purposes unless a refund procedure was established for dissenting bar members.[82] In response to this declaration, the state bar

73. *Id.* at 214.
74. *Id.* at 214–15.
75. *Id.* at 215.
76. *Abood*, 431 U.S. at 240.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 241.
81. *Id.*
82. *Reynolds*, ___ Mont. at ___, 660 P.2d at 581.

adopted a refund resolution which was approved by the court in September, 1983.[83] The refund resolution, as interpreted by the court, allows a dissenting member to obtain a refund on any specific piece of legislation that the state bar lobbied for. Alternatively, the dissenting member may obtain a refund of all dues relating to lobbying efforts.[84] A similar provision was approved by the Wisconsin Supreme Court in 1983, and allows a dissenting member of the Wisconsin State Bar to request a refund of dues expended for all legislative activity or a refund of dues expended for any specific legislative activity.[85]

Although constitutional challenges have not been asserted against either of these two rebate procedures, the unified bar in Puerto Rico recently had its rebate procedure struck down[86] as showing "total disregard or unbelievable callousness as to the membership's right to be free from compelled expression."[87] The procedure was fairly complex and required the dissenter to allege sufficient facts in order to obtain the rebate.[88] Such a provision violated the *Abood* requirement that the dissenting member be able to maintain his or her own beliefs without public disclosure.[89]

While the rebate procedures in Montana and Wisconsin do not appear to violate the *Abood* requirement, they may still be challenged on the basis that dissenting members are temporarily deprived of their financial resources[90] while such money is being used for legislative activity to which they are opposed. This prospect was addressed in *Abood* by Justice Stevens' concurring opinion in which he noted that even though it had approved the union's rebate procedure, the Court's decision had not foreclosed the argument that a union might have to establish a procedure which would avoid the risk that a dissenting member's dues would be used, even temporarily, to finance unrelated ideological

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83. Reynolds v. State Bar of Montana, No. 83-09, slip op. at 3 (Mont. Sept. 15, 1983) (order approving refund procedure).

84. *Id.* at 1–2. The petitioners argued that the specific wording of the resolution required them to disclose their private opinions concerning individual lobbying expenditures and thus was in violation of *Abood*. The court ruled against this contention, noting that the state bar did not intend the resolution to be construed that way. *Id.* at 2. It is still too early to tell whether these rebate procedures will have an impact on the lobbying activities of the State Bar of Montana. Letter from George L. Bousliman, executive director, State Bar of Montana, to Richard D. Anglin II (Oct. 4, 1984).

85. *Review the State Bar*, 112 Wis. 2d at xxiv, 334 N.W.2d at 548.

86. *Schneider*, 565 F. Supp. at 975–77.

87. *Id.* at 976.

88. *Id.* at 975.

89. *Id.* at 976.

90. In both states, the rebate is determined *after* the lobbying has occurred. *Reynolds*, ___ Mont. at ___, 660 P.2d at 581; *Review the State Bar*, 112 Wis. 2d at xxiv, 334 N.W.2d at 548.

activities.[91] While the state bars have not been challenged by this argument, a line of cases involving employee unions and university students has suggested that dissenting members cannot be required to temporarily support unrelated political and legislative activity.[92] Accordingly, one commentator believes that if the unified bars are similarly challenged, they may also be prohibited from collecting money for unrelated ideological activities, even though they provide for some type of rebate.[93]

One possible solution to this problem may be to place the membership dues of a dissenting member into an escrow account until the portion of dues which are unrelated to the bar's purpose is determined.[94] However, while this may provide the necessary protection for a dissenting member, it also places a burden on the bar association insofar as a portion of its normal operating funds would be tied up in escrow. In any event, the success of the "escrow" option would likely depend on the nature of the bar's activities. Provided that it is not involved in very controversial legislative activities, such as abortion or capital punishment, the use of the escrow account may be minimal due to a low number of dissenting members. If the bar does take some fairly controversial positions, an escrow account may impose more costs than benefits.

3. The Voluntary Bar—Maintaining the Status Quo

The final alternative, and the system which is currently used in Ohio, is the voluntary bar association. Under the voluntary bar system, legislative activities are funded by voluntary donations. One obvious advantage to this system is that a bar's "hands" are not tied by dissenting members. Under the present structure, a unified bar risks being sued for recovery of dues paid by dissenting members or being enjoined from participating in legislative activity.[95] Under the voluntary system,

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91. *Abood*, 431 U.S. at 244.

92. *See* Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187 (7th Cir. 1984) (union must establish procedure which will ensure that dissenting nonmembers' agency fees are not used for any activities which are not germane to collective bargaining); Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982) (compulsory student fee used to support research group could not be collected, despite rebate provision, as it temporarily exacted funds from those who were unwilling to pay); Beck v. Communications Workers, 468 F. Supp. 93 (D. Md. 1979) (union enjoined from collecting amounts in excess of that required for its related purposes from agency-fee payors).

93. Schneyer, *supra* note 56, at 66–67.

94. *See* School Comm. v. Greenfield Educ. Ass'n., 385 Mass. 70, 431 N.E.2d 180 (1982) (use of escrow account pending adjudication of permissible amount minimizes impact on the constitutional rights of the dissenting employee by preventing any compulsory subsidization of objectionable activities); Ball v. City of Detroit, 84 Mich. App. 383, 269 N.W.2d 607 (1978) (service fees of non-members should be paid into escrow account pending determination of portion of fees to which union is entitled).

95. Weisenberg interview, *supra* note 15.

however, members who object to a bar's legislative activity can simply decline to join the bar.[96] Furthermore, if a person is already a member, there is still the option of abandoning the bar at the end of the membership term.[97]

An additional reason for adopting a voluntary bar system is that the justifications for employing a unified bar system rather than a voluntary bar system no longer exist. The bar associations, which began their formation in the 1870's, were all of a voluntary nature.[98] A unification movement began in the early part of the century due to a general attitude that voluntary bars were ineffective in the area of law reform.[99] Several reasons contributed to this general attitude—the first being that a voluntary bar was unable to afford a full-time staff in order to keep the bar membership aware of legislative developments and to make the legislature aware of bar positions.[100] However, this may no longer be a concern as only a small portion of a state bar's budget is devoted to legislative activities.[101] A second argument which was advanced by proponents of unified bars was that voluntary bars received little respect from the legislature due to their poor membership levels.[102] However, the relatively high membership rates that the voluntary bars have today also refutes this argument. It was also argued that because a voluntary bar did not have 100% membership, it could never present the views of the entire profession.[103] While this point may still be true, it is probably applicable to the unified bars as well. Although a unified bar receives the financial participation of all the attorneys practicing within its state, this does not necessarily mean that all of the members concur in the views espoused by the bar. This notion is certainly apparent in view of the recent rise in litigation over the unified bar's legislative activity.

Finally, it should be noted that many of the legislative achievements which were referred to earlier apply to the voluntary bar system as well as the unified bar system.[104] Voluntary bar associations have

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96. Quade, *supra* note 22, at 5.

97. Lascher, *Dismantle the Unified Bar*, CAL. LAW., May, 1983, at 1, 12.

98. T. SWISHER, *supra* note 30, at 2.

99. Schneyer, *supra* note 56, at 25.

100. *Id.* at 26.

101. *See, e.g.*, Schneyer, *supra* note 56, at 26 (Wisconsin spends only 2% of its budget on legislative activities); *Bar Services Report*, 58 FLA. BAR J., 19, 34–35 (L. Yates ed. Sept. 1984) (Florida Bar allocated only 2% of its 1984–85 General Fund Budget to legislation).

102. *Id.*

103. *Id.*

104. While the accomplishments of the voluntary bars are too numerous to list, both the Ohio State Bar Association and the Illinois State Bar Association have been quite active. *See supra* notes 18–20 and accompanying text.

had much success in their legislative activities.[105]

An argument which is currently put forth by advocates of the unified bar is that a unified bar represents a commitment to the public interest because it is a public corporation or agency.[106] While a voluntary bar usually serves the public interest, there is no legal compulsion to do so; thus it is contended that voluntary bars are likely to be involved in more self-serving programs than are unified bars.[107] In contrast, because it is a public corporation, a unified bar is *legally* committed, as well as morally and ethically committed, to acting on behalf of the public interest.[108] Proponents of the voluntary system contend, however, that forbearance from self-serving legislative pursuits began long before the bar unification movement took place,[109] and that tradition is still evident in the practices of the voluntary bar associations.[110] Moreover, while it is true that the voluntary bars are under no legal commitment to serve the public, a strong argument can be made that when they do act to serve the public, voluntary bars may be more effective since they are not confronted with the threat of litigation that faces the unified bars.

IV. CONCLUSION

The Ohio State Bar Association has recently lost some of the rights and privileges it had enjoyed for many years. The curtailment of these rights and privileges has seemingly tarnished the integrity of the state bar. Nevertheless, the bar's legislative activity continues to play an eminent role in the passage of important laws. The O.S.B.A. has an outstanding legislative record and its accomplishments are deserving of recognition.

This note, while focusing on the legislative role of state bar associations, has also compared the unified bar with the voluntary bar (and a modified version of the unified bar), in an attempt to determine whether the voluntary system as adopted by the Ohio State Bar Association is the most effective vehicle for engaging in legislative activity. Today, such voluntary bars are viable organizations that have had much success in their legislative endeavors. In addition, high membership rates and continued lobbying success indicate that many of the

105. *See, e.g.*, T. SWISHER, *supra* note 30, at 60.

106. Murray, *supra* note 19, at 13.

107. Address by Anthony Murray, president of the State Bar of California, at the National Conference of Bar Presidents, in Atlanta, Georgia (July 28-Aug. 4, 1983) (on file with University of Dayton Law Review).

108. Letter from Anthony Murray, past president, State Bar of California, in BAR LEADER, March-Apr., 1984, at 30.

109. *See* Lascher, *supra* note 97, at 54; Schneyer, *supra* note 56, at 29.

110. Schneyer, *supra* note 56, at 29.

reasons for which the voluntary systems were abandoned by some states in favor of unified systems are no longer valid. Finally, and perhaps most importantly, the voluntary bars are not affected by the constitutional challenges which have beset the unified bars. They can operate freely and without fear of attack from dissident members. Because of these factors, it is clear that the voluntary system continues to be the best system for not only the Ohio State Bar Association, but for other state bar associations as well.

Richard D. Anglin II