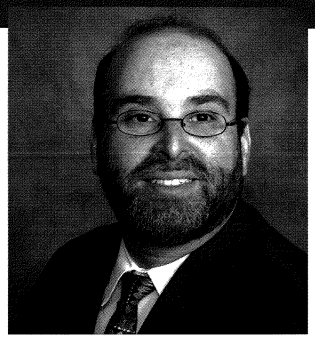
(One) mission accomplished



by Thomas G. Glick

The president of the Bar Association travels to a lot of conferences and conventions. One of the first conferences a president-elect attends is called the American Bar Association's "Bar Leadership Institute" in Chicago. The conference, organized in recent years by BAMSL 's 2001-2002 president Bill Bay, is where you learn how to be a bar president. The purpose of the conference is obvious to any lawyer that has ever modified an old document for use in a new case – to avoid every lawyer's nemesis: reinvention of the wheel. Theoretically, you leave this conference with a good concept of what a bar president should do, so you can focus on doing it instead of figuring out what to do.

Part of the curriculum focuses on writing the Bar President's monthly column, which you are currently reading. The prototype suggests that as the new president I propound my agenda in my first column and then review it in my final column. Regular readers of this column will recognize that I have, to date, followed the prototype.

In my first column in the May issue of this magazine, which until that point had been a newspaper, I talked about BAMSL's role in the creation of the "The Missouri Plan" for judicial selection. I noted that at the time, the plan was under attack by those who believed that a few wealthy people with political connections should be able to select the judges we rely on to adjudicate our clients' disputes.

This attack was not novel – in an earlier article in this publication I concluded on the history of the passage of the plan in 1937 by noting that the battle was hard-fought, and that the plan was under attack again, by the next session of the Missouri legislature. The history of attacks on the plan continued steadily. The most recent of these attacks was an effort by the "Justice for Sale" crowd to circulate an amendment petition to effectively repeal that plan and make the judiciary answerable to moneyed campaign contributors. BAMSL joined a coalition of other bar associations, including the Missouri Bar and both the Missouri Association of Trial Attorneys and their rival the Missouri Association of Defense Lawyers, amongst many others, to defeat this effort.

In the latest enactment of the battle to obtain the non-partisan court plan – and in all such battles since the original – these groups and many others coalesced and prevailed.

The Bar Leadership Institute featured an excellent presentation on the very topic at the Bench and Bar Conference moderated by Ken Vulstake. Ken oversaw an impressive discussion by judges from many courts, which included impassioned speeches by the Hon. David Mason and others. This was followed by Ken's own compelling presentation.

As a result of these presentations and hundreds like them, and many other types of traditional politicking, the petition failed to acquire enough signatures for certification and inclusion on the ballot.

The small group of people behind the petition attempted to cast their failure as anti-democratic, because it meant that the matter would not be subject to a plenary vote by the populace. But this spin incorporates a very narrow definition of democracy that amounts to the utopian concept of true democracy, in which the entire electorate literally governs. Such a system is utterly impractical for any organization as large as our country, our state, our county or even our individual municipalities. Instead, in normal usage, when we talk about something being "democratic" we really mean something closer to "reflecting the view of the people." And in that context, this was a very "democratic" victory. The laws that set the standards for what questions are actually presented to the electorate are not designed to enhance pure democracy but instead enhance the broad will of the people, so that small groups of wealthy individual cannot use the initiative petition process to manipulate the will of the people. In that sense (regardless of how you spin the use of words associated with abstract concepts discussed by political scientists), this was a democratic victory because of the inability of the proponents of the petition to garner the requisite amount of signatures from the electorate despite a substantial budget.

The interesting coincidence is that this sort of technical spin on the use of the word "anti-democratic" to mean the opposite of what most people understand it to mean, is not just true of the failure to gain adequate signatures, but is also true of the underlying issue of judicial selection. It is true that the non-partisan court plan moves us further from utopian true democracy than the judicial elections it replaced. Notwithstanding that technicality, the

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nonpartisan court plan enhances the equality, liberty, and freedom we all enjoy.

In theory, I knew this from my research on the history of the adoption of the plan, but to the extent that my birth occurred substantially after 1937, I had little direct understanding of this. Then came the bitter 2004 Illinois Supreme Court election between Judge Gordon Maag and his opponent, Lloyd Krameier. Together the two candidates raised more than $9.3 million dollars. This amount is nearly double any previous election and to the extent that most of the expenditures were for bitter negative advertising that aired in St. Louis, I think the BAMSL membership has a substantial memory of what a more partisan judicial selection process looks like. I was further educated on this topic at yet another conference I attended at the Coalition of Metropolitan Bar Associations, where the leaders of several midsize cities meet and confer in a largely roundtable format. I listened intently for an hour to an explanation presented with pride by other bar associations on how they had carefully crafted a complex plan of a bar political action committee (PAC) to allow attorneys to contribute to all candidates for judicial elections with a sort of veil of anonymity, to avoid the appearance of impropriety when the donor lawyers appeared in front of the judges. The plan was Kafkaesque in its complexity, and, to give credit where it's due, took substantial effort by the local bar leaders to craft and enact. But in the end, it amounted to nothing more than a variation of public financing of partisan elections. The PAC gave equally to all candidates that qualified for the ballot, which still meant that the local lawyers had to contribute substantial amounts of money to judicial elections. The bulk of that money was still spent on political advertising that bore little or no relationship to a candidate's actual qualifications to serve as a judge.

Many of the other attendees at the conference from other local bar associations took copious notes and asked probing question that clearly indicated to me that they were impressed with the plan and looking to modify it and adopt it for their state. Since it was a roundtable discussion, I did eventually raise my hand and say "You know there might be a better way..." and talked briefly about the non-partisan court plan. The general response of the other leaders was to thank me for my input, but dismiss my suggestion as impractical to the point of being utopian.

This highlighted to me, even more so than the Illinois political attack ads leaking over the border, what had been at stake in the ongoing battle to protect our Missouri Plan. This plan was not just a clever idea that seemed to work pretty well 70 years ago. Instead, this plan is, as it was in 1937, the envy of all well-informed practicing lawyers in the country, who don't enjoy the benefit of a version of it.

Other lawyers may feel that the Missouri Plan is a utopian dream, but it is not. There is nothing made by people that can't be improved. Critics of open government had valid concerns about the openness of the process by which the Commissions select the panels of three candidates for presentation to the Governor. I was pleased when Chief Justice Ray Price (who coincidentally is enjoying his breakfast at Companion Bakery just across the room from where I sit and write this column) announced a series of changes to the selection process at the Missouri Bar Annual Meeting. The changes retain our basic system but shed substantially more light on the selection process. There is no question that these changes are substantial and will radically alter the incentives and considerations of potential judicial candidates. The plan seems sound and poised to effectuate its goals, though it might need some additional fine tuning. But to the extent that it attempts to enhance a judicial selection system that has proven to be the envy of all, rather than abandoning it in favor of other systems that generate substantial frustration for attorneys, I applaud it. The currently open seat in St. Louis County vacated by Judge Jack Kintz will prove to be an excellent trial run for the new system. More recently, the announcement by Judge Michael Wolf that he will leave the Missouri Supreme Court next year will provide an opportunity to try the newly-improved system on a statewide scale.

I am pleased that I can claim victory on one of the most important items of my presidential agenda – and frankly, without very much effort by me. But I would caution the reader that my ability to claim victory on this issue is only a factor of the BAMSL president's term being a single year. I get the credit and blame for the organization this year only, and we have retained, if not improved, the nonpartisan court plan for this year. But the Missouri justice system does not have the luxury of a single year snapshot to evaluate its efficacy. So, just as my predecessor, Samuel Liberman, the President of BAMSL in 1937, made preservation of the non-partisan court plan part of his agenda, you can bet that my successor as BAMSL president in another 73 years, and almost every president in between, will almost certainly need to continue the effort. That's why the other members of our coalition and all the rest of us need to remember that even as we celebrate this year's victory we must continue to gird ourselves for the next battle – by doing things like writing this article. ■