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**MSBA Human Rights Committee  
MSBA Diversity Committee  
MSBA Women in the Legal Profession Committee  
MSBA Family Law Section  
Ramsey County Bar Association  
Hennepin County Bar Association Diversity Committee  
Minnesota Lavender Bar Association  
National Lawyers' Guild – Minnesota chapter  
American Academy of Matrimonial Lawyers – Minnesota chapter<sup>1</sup>**

**RESOLVED:** That the Minnesota State Bar Association urges the Minnesota Legislature to permit same-sex couples access to civil marriage, with all its attendant legal rights and responsibilities, while preserving the constitutional freedom of religious institutions and their personnel to participate in or support, or refrain from participating in or supporting, civil marriages.

**Report**

In 2004, the Minnesota State Bar Association (MSBA) Assembly approved a resolution urging the Minnesota Legislature to reject a proposed state constitutional amendment that would have prohibited all forms of legal recognition for same-sex couples, including but not limited to marriage. Four years later, in April 2008, the MSBA Assembly unanimously approved the creation of the Task Force on the Rights of Unmarried Couples. Specifically, the Assembly's charge to the Task Force was as follows:

That, in light of the disparity between legal rights and protections available to same-sex couples as compared to different-sex couples, the President of the Minnesota State Bar Association create a task force to review the current state of Minnesota law and to make recommendations as to desirable changes, if any, in the law to address this disparity.

This Task Force's work was premised on the notion that a comprehensive solution for same-sex couples, either in the form of marriage or something else, was not likely in the short term.

In June 2009, the MSBA Assembly unanimously accepted (and referred on for further action) an inventory of dozens of possible statutory amendments in areas such as family law, estates and trusts, criminal law, and Minnesota tax law. In addition, the Assembly unanimously approved the Executive Summary of the Task Force's report, which observed:

The deprivation of access to marriage these couples experience works real harm. Though in most other respects indistinguishable from heterosexual couples who affirm their commitment through marriage, same-sex couples are systematically denied the legal protections and obligations marriage would provide, leaving these couples and their families vulnerable to concerns and disparities not faced by married couples. In many instances, there are no means available to these couples to arrange these protections outside of marriage, e.g., through private contract. This absolute exclusion fosters a state approved, second class-citizenship, and casts same-sex couples into a legal void.<sup>2</sup>

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<sup>1</sup> List accurate through March 2010. Footnotes 4 and 7 contain updated information. Though the Minnesota chapter of the American Academy of Matrimonial Lawyers did not vote on this resolution, the Minnesota chapter noted it is bound by the position of the national organization, which endorsed marriage equality in November 2004.

<sup>2</sup> Minnesota State Bar Association Unmarried Couples Task Force Report, June 2009, at 1-2.

The same Executive Summary approved by the MSBA Assembly, while acknowledging that assessing a comprehensive solution for same-sex couples was not part of its task, characterized the Task Force's series of legislative proposals for "discrete reform" as

limited – but potentially important – steps the State may take in the short term to afford unmarried couples critical legal protections, while moving toward a viable long-term solution to the problem of the wholesale exclusion of same-sex couples from the protection of our legal system.<sup>3</sup>

It is time for the MSBA to complete its analysis of the situation by adding its support and voice to the call for marriage equality for all Minnesotans. As the voice of the state's legal profession, and having already identified the plight of same-sex couples in Minnesota as a "state-approved, second-class citizenship ... a legal void," the MSBA must speak out, and speak clearly, in favor of full citizenship and full equality for all Minnesota families.

This resolution recognizes that only access to civil marriage fully solves the problem. A lesser scheme, such as domestic partnerships or civil unions, is inadequate, as demonstrated by the experiences of other states. For instance, some states, such as Washington, Oregon, Nevada, California, and New Jersey, offer same-sex couples an alternative legal institution (referred to as either "civil unions" or "domestic partnerships") which largely or completely reproduce all the state-law rights and responsibilities of marriage.<sup>4</sup> However, in 2008, the Supreme Courts of both California and Connecticut held that their respective state constitutions entitled same-sex couples to access to full civil marriage, not just to an institution that resembled marriage.<sup>5</sup> Additionally, in April 2009, Vermont, which pioneered civil unions in the United States in 2000, concluded that its civil-union scheme was not adequate and legislatively extended marriage equality to same-sex couples (effective September 1, 2009); New Hampshire, which also offered civil unions, followed suit a few weeks later (effective January 1, 2010). Finally, a state commission in New Jersey concluded in December 2008 that while civil unions in that state offered valuable protections to same-sex couples, they were nonetheless inadequate compared to those offered by marriage, and called for the extension of marriage equality in that state.<sup>6</sup> The experience of several states that provided an alternative legal structure for same-sex couples has shown, as has been learned in the past, that "separate but equal" institutions are simply not equal in reality. "Marriage by another name" is still not marriage, and is still not equal treatment. The experiences of states including California (temporarily), Iowa, Massachusetts, Connecticut, and Vermont demonstrate that permitting same-sex couples to marry legally protects these families, embodies the cherished concept of full equality under the law, and produces no insurmountable legal obstacles for the government bodies involved.<sup>7</sup> This resolution does *not* call for the creation of a new legal institution for same-sex couples, but rather their inclusion within the existing legal institutions and legal system.

This resolution is not inconsistent with the spirit or substance of the 2009 report (and continuing work) by the MSBA's Task Force on the Rights of Unmarried Couples. Rather, that report explicitly focused on statutory reforms that could provide *short-term* solutions to discrete problems faced by unmarried couples, and explicitly distinguished its work from that related to producing a "viable *long-term* solution" (emphasis added) to the same set of problems. The

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<sup>3</sup> *Id.* at 3.

<sup>4</sup> Additionally, Hawaii, Wisconsin, Colorado, and Maine offer same-sex couples registering with the state a more limited package of legal rights and responsibilities.

<sup>5</sup> See *In re Marriage Cases*, 43 Cal. 4<sup>th</sup> 757, 183 P.2d 384 (Cal. 2008); *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407 (Conn. 2008).

<sup>6</sup> See "The Legal, Medical, Economic, and Social Consequences of New Jersey's Civil Union Law," December 10, 2008, at 45.

<sup>7</sup> Same-sex couples may also marry in the District of Columbia (March 2010), Canada, Spain, Sweden, South Africa, Belgium, and the Netherlands.

sponsors of this resolution recognize that legislatively establishing marriage equality in Minnesota could be a long-term prospect, and are confident that the MSBA is fully capable of articulating both short-term and long-term solutions that address the concerns raised by the exclusion of same-sex couples from civil marriage.

The sponsors of this resolution acknowledge that this position is one which continues to be controversial for some. In many cases, the opposition to marriage equality is based on objections arising from religious concerns. In recent years in Minnesota, many religious voices have been raised both in support of, and in opposition to, marriage equality. It is not – and cannot be – the purpose of this resolution or report either to “take sides” in a religious debate or to even attempt to comment on the deeply and sincerely held religious beliefs of many in the community, including many in the legal profession. This resolution and report focus exclusively on *civil* marriage and the *legal* rights and responsibilities thereof, and *do not* touch on religious aspects. This call to action legitimately and indeed squarely falls within the appropriate ambit of the MSBA’s interests and expertise. Indeed, this resolution and report not only acknowledge, but assert a specific respect for the already-existing constitutional rights of religious institutions and their personnel to determine for themselves, in light of their particular doctrines, the extent to which, if any, they will participate in or support civil marriages, whether same-sex or different-sex.

It is possible that some may object to a call for marriage equality based not merely on a narrow concern with the definition of marriage as a religious institution, but on a broader position challenging the inherent morality of gay and lesbian people. However, one’s potential moral concerns cannot override other citizens’ right to equality under the law. Moreover, from an institutional standpoint, the MSBA has repeatedly adopted positions implicitly rejecting that notion: the MSBA has recognized in its Bylaws the Minnesota Lavender Bar Association as a formal affiliate; has supported inclusion of sexual orientation in the Minnesota Human Rights Act (1993); has opposed legislation that would have removed every reference to sexual orientation from Minnesota law (2003); has opposed a state constitutional amendment that would prohibit all forms of legal recognition of same-sex couples (2004); has extended benefits available to members’ spouses to members’ domestic partners (2005); has studied issues facing gay, lesbian, bisexual, and transgender (GLBT) and other “diverse” lawyers in the Minnesota legal profession (2006) and made best-practice recommendations for addressing these and other issues (2008); has created the Task Force on the Rights of Unmarried Couples (2008) and unanimously accepted its preliminary legislative recommendations and approved the Executive Summary to its initial report (2009). In short, the MSBA has a long and inspiring record of supporting full GLBT legal equality and inclusion in its own organization, in the legal profession, and in Minnesota society generally. Endorsing marriage equality in Minnesota is entirely consistent with this exemplary history.

The MSBA would not be alone among state bars in supporting marriage equality. On April 2, 2005 the New York State Bar Association adopted a resolution urging the New York legislature to “enact legislation that will afford same-sex couples the ability to obtain the comprehensive set of rights and responsibilities now afforded opposite-sex couples.” The NYSBA resolution, however, suggested that legislative relief could come in the form of a domestic-partner or civil-union statute, or the expansion of marriage to include same-sex couples. As noted above, the supreme courts of California and Connecticut have subsequently held that domestic partnerships and civil unions, respectively, were inadequate to satisfy the equal-protection guarantees then in place in each state’s constitution; also, Vermont and New Hampshire have abandoned civil union plans in favor of marriage equality, and New Jersey may soon follow suit. Moreover, while the New York legislature has yet to enact *any* legislative relief, the state of New York nonetheless is recognizing the full validity of New Yorkers’ same-sex marriages validly contracted elsewhere.

More recently, on September 19, 2008 the Board of Governors of the Washington State Bar Association (an integrated bar) approved a resolution “support[ing] equal access for same-sex couples and its attendant legal rights and obligations.” Importantly, WSBA arrived at this conclusion having noted that:

promoting and protecting the right of persons to have access to and rely upon the legal rights and obligations of civil marriage serves the administration of justice and the practice of law ... predictability and fairness in the laws that protect property rights, parental rights and access to the judicial system are necessary if lawyers are to fulfill their duties to their clients and serve the interests of justice ... .

Minority bar associations have also joined state bars in getting involved with the issue. For example, in the California marriage litigation that resulted in full marriage equality in 2008, one *amicus curiae* brief was filed by the Asian American Bar Association of the Greater Bay Area and 62 other Asian-Pacific American community organizations.<sup>8</sup> Even more broadly, in Washington's unsuccessful marriage litigation of 2006, the Washington Supreme Court received an *amicus curiae* brief from several organizations, including the Loren Miller Bar Association, the Latina/O Bar Association of Washington, the South Asian Bar Association of Washington, and the Asian Bar Association of Washington.<sup>9</sup>

Finally, in August 2009, the American Bar Association, with the support of the Beverly Hills Bar Association<sup>10</sup>, the Massachusetts Bar Association, and the Bar Association of San Francisco, endorsed a resolution calling on the United States Congress to repeal the provisions of the federal Defense of Marriage Act (DOMA) "which den[y] federal marital benefits and protections to lawfully married same-sex spouses." While the ABA resolution and report explicitly did *not* take a position with respect to marriage equality in the various states, the fact is that this resolution by the ABA, a *national* organization, was directed specifically to *Congress* to take appropriate action at the *federal* level to recognize the marriage-equality steps that many states have already taken. A resolution directed to Congress supporting marriage equality would not have made sense as legislating marriage equality is a state, not federal, responsibility. Sponsors of this resolution believe it is time the MSBA call upon the Minnesota legislature to undertake that responsibility.

### Conclusion

Having described in strong terms the nature of the problem same-sex couples in Minnesota face due to their absolute exclusion from the civil institution of marriage, it is time for the MSBA to now take the final step and articulate in strong terms a solution to that problem. A second-class legal status, such as civil unions, does not remedy, but rather emphasizes, the problem of second-class citizenship. Other bar associations and other states have demonstrated that supporting and legislating marriage equality helps move our society closer to our long-held goal of full equality under the law. It is appropriate that Minnesota join those states ending discrimination in marriage, and it is imperative that the Minnesota State Bar Association build on its commitment to justice to take a public stand in favor of such a measure.

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<sup>8</sup> See 2007 WL 3307701 (October 4, 2007).

<sup>9</sup> See 2005 WL 723811 (February 14, 2005). The Loren Miller Bar Association ([www.lmba.net](http://www.lmba.net)) is "a statewide organization and local affiliate of the National Bar Association ("NBA"), which is the oldest minority bar and the largest organization of African-American attorneys in the United States."

<sup>10</sup> Another local organization, the Bar Association of Baltimore City, participated in an *amicus* brief submitted in the Maryland marriage case, *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571 (Md. 2007); see 2006 WL 3381872.