

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

Docket No. 2003-0482

In Re: New Hampshire Bar Association (Legislative Deunification)

**BRIEF ON BEHALF OF THE
NEW HAMPSHIRE BAR ASSOCIATION**

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QUESTION PRESENTED FOR REVIEW

Whether Laws 2003, Chapter 250 impermissibly infringes on the constitutional authority of the New Hampshire Supreme Court to regulate the New Hampshire Bar Association.

CONSTITUTIONAL PROVISIONS AND STATUTES

New Hampshire Constitution

Pt. I, Art. 37 Separation of Powers

In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

Pt. II Art. 72-a Supreme and Superior Courts

The judicial power of the state shall be vested in the supreme court, a trial court of general jurisdiction known as the superior court, and such lower courts as the legislature may establish under Article 4th of Part 2.

Pt. II, Art. 73-a Supreme Court, Administration

The chief justice of the supreme court shall be the administrative head of all the courts. He shall, with the concurrence of a majority of the supreme court justices, make rules governing the administration of all courts in the state and the practice and procedure to be followed in all such courts. The rules so promulgated shall have the force and effect of law.

New Hampshire Statute

311:7-g State Bar Association Membership; Vote Required.

I. The supreme court, pursuant to its power to regulate the practice of law under this chapter and its continuing supervisory authority over attorneys practicing before courts of this state, may assess fees for the purpose of regulating the practice of law and for maintaining a professional conduct committee.

II. The supreme court may require all persons engaged in the practice of law in this state to be members of the New Hampshire Bar Association; provided that the members of the Bar Association have approved the requirement pursuant to paragraph III.

III. The board of governors of the New Hampshire Bar Association shall place on the ballot with the election of officers of the association, the following question: "Shall membership in the New Hampshire Bar Association be required for all attorneys licensed to practice in this state?" An affirmative vote of a majority of those voting on the question shall allow for the requirement by the supreme court under paragraph II. Approval by the membership under this paragraph shall be valid for a 5-year period beginning on the date of the affirmative vote.

311:7-h Bar Association Legislative Activities.

I. The New Hampshire Bar Association, if membership is mandatory for attorneys under RSA 311:7-g, shall be prohibited from using any part of dues paid by its members for the purpose of lobbying or influencing the general court on any matter, except as provided in paragraph III.

II. If membership in the New Hampshire Bar Association is mandatory for attorneys under RSA 311:7-g, no person shall be permitted to engage in legislative activities on behalf of the New Hampshire Bar Association for the purpose of lobbying or influencing the general court on any matter, except as provided in paragraph III.

III. The Bar Association may use a part of dues paid by its members, and may engage a person to lobby or influence the legislature on its behalf provided the Association:

(a) Limits its activities before the general court to those matters which are directly related to the regulation of the legal profession and improving the quality of legal services available to the people of the state. The scope of such permissible activities shall be narrowly defined; and

(b) Has determined that substantial unanimity exists within the bar as a whole in agreement with the position taken on a matter.

IV. Nothing in the section shall prevent officers and members of the Bar Association from appearing before the general court to express their views as individuals, as members of voluntary associations, or as representatives of clients.

V. Any member of the New Hampshire Bar Association, if membership is mandatory for attorneys under RSA 311:7-g, may refuse to pay that portion of the Bar Association dues that are used for lobbying or influencing the legislature or other political matters.

311:7-i Severability. If any provision of this subdivision or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications hereof which can be given effect without the invalid provisions or application, and to this end the provisions of this subdivision are severable.

STATEMENT OF THE CASE

The New Hampshire Bar Association was unified by decisions of this Court on a temporary basis in 1968 – *In Re Unification of the New Hampshire Bar*, 109 N.H. 260 (1968) – and on a continuing basis in 1972 – *In Re Unification of the New Hampshire Bar*, 112 N.H. 204 (1972).

During the summer of 2003, the New Hampshire General Court adopted House Bill 175 (Laws 2003, Chapter 250), which was signed by the Governor on July 14 and which took effect on July 1 (codified as RSA 311:7). This so-called “deunification” law mandates that the New Hampshire Bar Association undertake a vote of its membership every 5 years to determine whether continued membership shall be mandatory or voluntary, and limits the legislative activities of the Bar.

In this action, the New Hampshire Bar Association challenges the constitutionality of this effort by the Legislature to regulate the Bar.

SUMMARY OF ARGUMENT

Laws 2003, Chapter 250 mandates the New Hampshire Bar Association to conduct a referendum of its members, by placing a specifically worded question regarding unification on its election ballot, and further establishes limitations on the legislative activities of the Bar depending upon the outcome of the mandated vote.

The New Hampshire Bar Association respectfully submits that this legislation impermissibly infringes the authority of this Court to regulate the Bar, and is inconsistent with the constitutionally-based rules and decisions of this Court regarding unification. In addition, the limitations on legislative activities run afoul of the free speech rights afforded by the state and federal constitutions, and the mandated referendum violates the Contract Clause of the United States Constitution.

For all of these reasons, the legislation is constitutionally invalid, and should be so declared by this Court.

ARGUMENT

Introduction

The New Hampshire Bar Association has petitioned for declaratory relief as to the constitutionality of Laws 2003, Chapter 250 (HB 175). This legislation purports to deunify the Bar if the outcome of a mandated referendum of Bar members so determines, *see* RSA 311:7-g, II, and further purports to limit the scope of the Bar's legislative activities to "matters which are directly related to the regulation of the legal profession and improving the quality of legal services available to the people of the State." *See* RSA 311:7-h, III. The Bar respectfully contends that this legislation violates certain provisions of both the state and federal constitutions.

Background of Unified Bar

This case presents this Court with its fifth opportunity to consider unification of the practice of law in this State. In each of the earlier cases, the Supreme Court expressed in definite terms its power to regulate the state bar association.

In the first case, *In Re Unification of the New Hampshire Bar*, 109 N.H. 260 (1968), this Court concluded it had jurisdiction to order the establishment of a unified bar:

The Legislature by specific legislation has granted to this court authority over the admission of a person to practice law as an attorney as well as the power to supervise, control and discipline those so admitted. RSA ch. 311. However, this court held in *Ricker's Petition*, 66 N.H. 207,

211, that the “authority to make reasonable rules for the admission and removal of members of the bar ‘is necessarily inherent in every court, in order to enable it to discharge its duties, as much so as to preserve order.’” It was also stated in that opinion by *Doe*, C. J.: “The constitution... vests in the courts all the judicial power of the state. The constitutional establishment of such courts appears to carry with it the power to establish a bar to practice in them.” *Id.*, 210. This would be the prerogative of this court as RSA 490:4 vests in it the general superintendence of all our courts.

We hold that the determination of whether the administration of justice in New Hampshire will best be served by the compulsory enrollment of all the members of the Bar of this state into one unit to which the members must pay dues necessary to its efficient operation is an integral part of the inherent power of this court to regulate the practice of law and to supervise those engaged therein in New Hampshire. Lawyers being thus uniquely related to, and subject to supervision and regulation by the judiciary, we hold that this court has jurisdiction to decide the issue of the unification of the Bar of this state presented by the petition before us.

Id. at 263-64.

In the second case, *In Re Unified New Hampshire Bar*, 112 N.H. 204 (1972), this Court recognized the beneficial development of the unified bar during the preceding four years and determined that a unified bar best serves the public and the bar of this State:

We conclude that the association has prospered and grown in stature under unification, and that unification should now be continued without limitation of time, under the court's continuing jurisdiction.

Id. at 207.

The next two cases considered challenges by individual members of the Bar. In *Petition of Chapman*, 128 N.H. 24 (1986), the Court clarified the role of the Bar in the

context of a challenge to its Board of Governors' decision to oppose certain tort reform legislation. That case gave the Court the opportunity to both clarify its authority to regulate the organized bar, and to note the unified bar's history of impressive accomplishment and service to the public.

This court, in the exercise of its inherent constitutional power to regulate the practice of law, ordered the integration of the bar and retains continuing supervisory authority over the Association and its activities, *see In re Unification of the New Hampshire Bar*, 109 N.H. at 263-64, 248 A.2d at 711-12.

Id. at 31.

Finally, in *Petition of Tocci*, 137 N.H. 131 (1993), the Court made note of its inherent power to regulate the bar to ensure that the bar is in fact both qualified and ethical. The *Tocci* Court flatly rejected the argument that the Court had usurped the authority of the legislature in unifying the bar. As explained in that decision,

Nothing in *Tocci's* lengthy brief persuades us that these **unification** decisions should be overruled. Our prior decisions were reinforced when the State Constitution was amended in 1978 to provide, in part II, article 73-a, that the chief justice of this court, 'shall, with the concurrence of a majority of the supreme court justices, make rules governing . . . the practice and procedure to be followed in all [the] courts' of New Hampshire. We must assume that the judicial branch possesses all the authority necessary to perform its judicial functions; otherwise, the judicial power vested in the courts by part II, article 72-a becomes meaningless. Because the judicial branch requires a qualified and ethical bar to perform its functions, we hold that it has the inherent power to regulate the bar to ensure that the bar is, in fact, qualified and ethical.

Id. at 135.¹

¹ Excerpts of the Bar's brief in *Tocci*, providing a brief history of the unified bar concept, are appended to this brief.

Argument

I. Laws 2003, Chapter 250 infringes on the authority of the judicial branch to regulate the Bar in violation of the New Hampshire Constitution.

The New Hampshire Constitution includes the following provisions relevant to the authority of this Court to regulate the Bar:

Pt. I, Art. 37 Separation of Powers

In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

Pt. II, Art. 72-a Supreme and Superior Courts

The judicial power of the state shall be vested in the supreme court, a trial court of general jurisdiction known as the superior court, and such lower courts as the legislature may establish under Article 4th of Part 2.

Pt. II, Art. 73-a Supreme Court, Administration

The chief justice of the supreme court shall be the administrative head of all the courts. He shall, with the concurrence of a majority of the supreme court justices, make rules governing the administration of all courts in the state and the practice and procedure to be followed in all such courts. The rules so promulgated shall have the force and effect of law.

To the extent this new legislation is inconsistent with any of these provisions, or the inherent authority referenced in the unification decisions, it is invalid.

As noted in the preceding section, this Court has, on several occasions, recognized and acted upon its constitutionally-conferred authority to regulate the Bar,

particularly in *Tocci*, when the suggestion was made that regulation of the Bar was a legislative function.

The provisions of RSA 311:7-g, II, relating to deunification following a mandated referendum, are inconsistent with this Court's requirement of membership in the New Hampshire Bar Association in order to practice law in this State. If the referendum were conducted, and the majority favored deunification, the legislation provides that, *ipso facto*, the Bar would be deunified. Given the constitutionally-derived authority of the Court, such a legislative enactment violates the above-referenced state constitutional provisions, and is therefore invalid.²

II. The limitations on legislative activity imposed by Laws 2003, Chapter 250 violate relevant provisions of the state and federal constitutions.

By its own constitution, and in recognition of its unified status, the legislative activities of the Bar are circumscribed:

The Association shall confine its activities before the General Court to those matters which are rarely directed to the administration of justice; composition and operation of the courts; the practice of law and a legal profession.

Constitution of the New Hampshire Bar Association, Article I (Purposes).³ The recent legislation would significantly restrict the legislative activities of the Bar “to those

² Our research does not reveal any other instance in which a bar unified by a court has been deunified, or sought to be deunified, by legislative act.

³ See *Chapman, supra*, at 32 (“We believe that circumspection is the watchword to be observed by the Board. Where it can reasonably be argued at an issue is outside the scope of its authority, the Board should take no position on the matter. Where a substantiated unanimity does not exist or is not known to exist within the bar as a whole, particularly with regard to issues effecting members’

matters which are directly related to the regulation of legal profession and improving the quality of legal services available to the people of the state.” RSA 311:7-h, III.

Associations and organizations such as the Bar possess the “free speech” rights of individuals, *see Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), which may not be infringed by the legislature. United States Constitution, Amendment I; New Hampshire Constitution, Part I, Article 22.⁴ No legitimate cause exists to authorize a legislative enactment seeking to silence a group of citizens with respect to matters pending before the General Court, and thus the attempt is invalid.

III. The referendum mandated by Laws 2003, Chapter 250, impermissibly interferes with the affairs of a private organization, in violation of the Contract Clause of the United States Constitution.

This legislation, in RSA 311:7-g, III, requires the following action on the part of the Bar:

The board of governors of the New Hampshire Bar Association shall place on the ballot with the election of officers of the association, the following question: “Shall membership in the New Hampshire Bar Association be required for all attorneys licensed to practice in this state?”

economic self-interest, the Board should exercise caution. Positions taken by the Association and its Board should be tailored carefully and limited to issues clearly within the Association’s constitutional mandate.”)

⁴ This is so even with respect to heavily regulated businesses. *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530 (1980).

Apparently, this mandated action is to take place at the expense of the New Hampshire Bar Association.

In a venerable decision having its roots in this State, the United States Supreme Court recognized in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 4 L.Ed. 629 (1819) that the Contract Clause of the United States Constitution, Article 1, Section 10,⁵ prohibits a state from meddling in the internal affairs of a private organization.

In that case, the Legislature of New Hampshire proposed to change the Charter of Dartmouth, and make it Dartmouth University. Among other alterations in the Charter, the act increased the number of trustees to 21, gave the appointment of additional members to the executive of the state, and created a board of overseers with the power to inspect and control the most important acts of the trustees. The board consisted of 25 persons, including the president of the New Hampshire Senate, the speaker of the New Hampshire House of Representatives, and the Governor and Lt. Governor of Vermont, *ex officio*. The board was to be complete by the Governor and Council of New Hampshire, who were also empowered to fill any vacancies which might occur.

⁵ “No state shall enter into any treaty, alliance or confederation; grant letters of mark and reprisal; coin money; emit bills of credit; make anything but gold and silver coin as tender and payment of debt; pass any bill of attainder, *ex post facto* law, **or law impairing the obligation of contracts**, or grant any title of nobility.” (emphasis added)

Chief Justice Marshall concluded that the corporate charter was a contract, the obligation of which could not be impaired without violating the Constitution of the United States.

This Court has occasionally referenced contract clause issues, generally holding, consistent with federal law, that substantial alteration of a contract does create a contract clause violation, and that the inquiry includes three components: whether it is a contractual relationship, whether a change in law appears in that contractual relationship, and whether the impairment is substantial. *See Opinion of the Justices*, 135 N.H. 625 (1992); *see also Lower Village Hydroelectric Associates, L.P. v. City of Claremont*, 147 N.H. 72 (2001).

While not frequently litigated, it is respectfully submitted that a legislative enactment requiring a private organization to conduct a poll of its members, at its own expense, in order to determine the answer to a mandated question, which would substantially alter its structure, qualifies as such a violation, and cannot be constitutionally sustained.

CONCLUSION

Based on the forgoing, the New Hampshire Bar Association respectfully submits that Laws 2003, Chapter 250 violates relevant provisions of the state and federal constitutions, and is, accordingly, properly declared invalid.

ORAL ARGUMENT

Frederic K. Upton, Esquire, or his designee, will present the argument on behalf of the petitioner.

Respectfully submitted,

NEW HAMPSHIRE BAR ASSOCIATION

By Their Counsel

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Date: September 17, 2003

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CERTIFICATION

I hereby certify that two copies of this Brief have been mailed this date to the Honorable Peter W. Heed, Attorney General.

David P. Slawsky