

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

Docket No. 2003-0482

In Re: New Hampshire Bar Association (Legislative Deunification)

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

**Frederic K. Upton
Russell F. Hilliard
UPTON & HATFIELD
10 Centre Street
Concord, N. H. 03302-1090
(603) 224-7791**

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CONTRARY TO ASSERTION OF THE STATE, THE CHANGES MADE BY LAWS 2003, CHAPTER 250 TO THE COURT-PRESCRIBED TERMS OF THE UNIFICATION OF THE NEW HAMPSHIRE BAR ARE HIGHLY INTRUSIVE AND EVISCERATING.

Laws 2003, Chapter 250 (the "Statute") does violence to the essence of existing Bar unification far beyond the effect of a single referendum. It strips and divests the unified Bar of several integral features and prerogatives of its unification.

Unification as established by the Court was given an indefinite life. After a trial period of 3 years, the Court in 1972 concluded ".....that unification should now be continued without limitation of time, under the Court's continuing jurisdiction". In Re Unified New Hampshire Bar, 112 N. H. 204, 207. The Statute ends the Court's continuing jurisdiction and terminates the existing unified status of NHBA. Resumption of unification under Legislative aegis is made to depend upon (1) a favorable vote of the membership of the NHBA in a referendum which the Association is ordered to conduct on the issue of unification, and (2) following such vote an order of the Supreme Court requiring unification (which the Court is authorized to make by grace of the Legislature). The Court might well, out of concern for what it believed to be the best interests of the Bar and the public good, wish to order unification notwithstanding a vote against unification by a majority of the Association's membership. Its power to do so is taken away. In considering in 1972 whether to make unification of the Bar permanent, the Court had this to say about majorities or lack thereof:

"It has been suggested that failure of a majority of the membership to participate in the latest referendum is significant of lack of approval of unification. At this stage of the proceedings we shall not speculate upon the significance of votes cast or withheld, or of comparison with votes previously taken. The issue

now presented is one of policy for the court.” In Re Unified New Hampshire Bar, 112 N. H. 204, 206.

The duration of unification pursuant to a favorable vote and Court order is limited to 5 years.¹ The Court’s authority to require unification is predicated on the continued existence of a valid vote in favor of unification. Presumably periodic 5-year referenda by the Association producing favorable votes followed by new Court orders will be necessary to enable the Association to maintain unified status under the Statute. These referenda are required willy-nilly without any showing of a demand by the membership of the Association for such pollings or other evidence of membership dissatisfaction with unification. This provision should be contrasted with the rule in the labor field where any petition to the National Labor Relations Board for an election to de-authorize a union shop or other labor security provision must be supported by 30% or more of the employees in the bargaining unit. (Section 9(c) (1) of the National Labor Relations Act, 29 U. S. C., s. 159 (e) (1)). The uncertainty and turmoil attendant to periodic referenda on the issue whether to remain unified hardly requires exegetic discussion.

Under Court-ordered unification, NHBA is authorized to advise the Legislature on legislative proposals which are directly related to the administration of justice. While the use of this prerogative has been restricted by the Court in Petition of Chapman, 128 N. H. 24 (1986), its proper exercise importantly serves a purpose for which the Court ordered unification of the Bar, namely: to provide the Legislature and the public with the composite judgment of the State’s legal profession on improving the

¹ “Approval by the membershipshall be valid for a 5-year period beginning on the date of the affirmative vote”. (RSA 311: 7-g, III)

administration of justice. Embraced are such matters as effective access to the legal system for indigent persons and efficient vindication of rights - matters on which lawyers are uniquely qualified to advise. The Court recognized the importance of this role when it first unified the Bar. In Re Unification of the New Hampshire Bar, 109 N H 260, 265-66 (1968). This role has historical roots:

“In serving as an advisor to the General Court , the Association furthers a vital public interest and fulfills one of its essential functions. Improving the administration of justice has been a raison d’etre of the Association since its inception”. Batchelder, J concurring in part and dissenting in part in Petition of Chapman, 128 N H 24, 45.

The Statute sharply curtails the legislative activities of the New Hampshire Bar Association as a unified body, confining it 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 to be narrowly defined .(RSA 311:7-h, III). It is now illegal for any representative of New Hampshire Bar Association to advise the General Court on improving the administration of justice. The proud heritage of the unified Bar as legislative advisor is largely discarded under the Statute, contrary to what has long been perceived to be the public interest. This muzzling of the New Hampshire Bar Association leaves it an emasculated body

ARGUMENT

LAWS 2003, CHAPTER 250 CONSTITUTES AN IMPERMISSIBLE AND UNAVOIDABLE VIOLATION OF PART I, ARTICLE 37 OF THE NEW HAMPSHIRE CONSTITUTION,

Although regulation of the practice of law falls in the zone of overlapping powers of the judicial and legislative branches of government, the judiciary has primary and final authority in this zone under its inherent power to regulate lawyers as officers of

the court. Unification of the New Hampshire Bar was undertaken by the Court in the exercise of such inherent power, and was clearly an appropriate judicial function. The enactment of the Statute in deliberate derogation of an established undertaking of the Court, one to which it had committed itself for more than thirty-four years, without attempting to find an accommodation, was an impermissible and affronting intrusion under the Separation of Powers Clause.

Lawyers are first and foremost officers of the Court, and the power to regulate officers of the court has been traditionally a power inherent in the judicial branch. In ordering unification of the New Hampshire Bar on a trial basis in 1968 and on a permanent basis in 1972 the Court relied upon its inherent power to superintend lawyers as officers of the Court. (In Re unification of the New Hampshire Bar, 109 N. H. 260, 264; and In Re Unified New Hampshire Bar, 112 N. H. 2040). The Court found support for these decisions in Ricker's Petition, 66 N. H. 207, 221 (1890), a venerable decision by then Chief Justice Doe who explained that courts could not exist and function without the power to establish a bar and regulate its conduct, thus accounting for the power's inherent nature. In 1993 when claim was made that the Court had "...usurped the authority of the legislature by unifying the bar", the Court referred to Article 73-a of Part II of the Constitution, added by amendment in 1978, as simply confirming the inherent power it already had to regulate the Bar in order to ensure that it was qualified and ethical. Petition of Tocci, 137 N. H. 131, 133, 135.

A power inherent in the judicial branch means a power intrinsic to it, one that is essential to the existence, dignity and functions of courts from the very fact that

they are courts. In re Integration of Nebraska State Bar Association, 133 Neb. 283, 275 N. W. 265, 267 (1937).

The important difference between regulation of the legal profession and regulation of other professions is that admission to the bar is a judicial function and members of the bar are officers of the court. In re Attorney Discipline System, 19 Cal. 4th 582, 967 P. 2d 49, 55 (1998). The Legislature may, of course, prescribe the qualifications of doctors, plumbers and persons following other professions and callings.

In Ricker's Petition, *supra*, Justice Doe made note of an important truism: "The constitution vests in the courts all the judicial power of the state"(it still does today in Part II, Article 72-a of the Constitution). Furthermore, it seems to be widely accepted law that unification of a bar is a judicial function and not a legislative function.

Integration of Bar Case, 244 Wis. 8, 11 N. W. 2d 604, 619 (1943)
Ford v. Board of Tax-Roll Corrections, 431 P. 2d 423, 430 (Okla., 1967)

This is the position of a leading general treatise:

"integration of the bar is a judicial and not a legislative function, falling within the scope of the inherent power of the judiciary to regulate the practice of law....."
7 Am. Jur. 2d, "Attorneys at Law", s.7

Going further, this Court regards the defining of obligations of the Bar as its sole domain. In 1978, referring to the obligation of the legal profession to represent indigent defendants, the Court said:

"The obligations and responsibilities of the bar are matters of judicial concern alone". Smith v. State, 118 N. H. 764. 770 (underscoring supplied)

Unification of the New Hampshire Bar was importantly concerned with various obligations of the Bar that were not being met satisfactorily by NHBA as a voluntary organization, such as the obligation to observe high standards of ethical conduct. It was

adopted to provide a vehicle that could address such obligations more effectively.

Accordingly, it may be said that unification was the sole business of the Court.

Historically, the Legislature, to protect the public from persons unfit to practice law and in the exercise of the police power, has adopted measures regarding the qualifications of attorneys and the practice of law in this State. This Court has recognized this sharing of responsibilities. Averill v. Cox, 145 N. H. 328, 332 (2000). An examination of such legislation, particularly RSA 311, reveals a purpose to aid and assist the Supreme Court in connection with the admission, qualifications and disciplining of attorneys, and not to displace the Court. RSA 311:2 requires an applicant for admission to the Bar to possess "suitable qualifications", but leaves it to the Court to flesh out this requirement. RSA 311:6 prescribes an oath to be taken in open court under which the attorney swears to act "with all good fidelity as well to the court as to your client", thereby becoming an officer of the Court. RSA 311:8 confirms the Court's power to suspend or remove an attorney for fraud or malpractice, a power that was always inherent in the Court (Barnard's Case, 101 N. H. 33, 34 (1957)). The legislation on the whole does no more than set minimum standards, leaving it to the Court to demand more under its inherent power over admission and discipline. Heretofore there has not been any conflict between the legislation relating to admission and practice of law and rules of the Court governing such matters.

It is well established that legislative enactments relating to admission and the practice of law are valid only to the extent they do not conflict with rules for admission and the practice of law adopted by the judiciary, and where conflict exists the enactment must give way. Merco Const. Engineers, Inc v. Municipal Court, 581 P. 2d 636, 638

(Cal.,1978). It is the court and not the legislature that is the final “policy maker” in this area. In re Attorney Discipline System, *supra*, 967 P. 2d 49, 61 (1998). Legislative enactments under the police power may not “supersede or detract from” the inherent power of the courts 7 Am. Jur. 2d, “Attorneys at Law”, s.2 at pp. 66-67. See also Annotation: “Power of legislature respecting admission to bar”, 144 ALR 150, 151(1943).

The foregoing principles were particularly involved in Sams v. Olah, 169 S. E. 2d 790, 796 (Ga., 1969). The Georgia legislature had enacted legislation (the State Bar Act) authorizing the Georgia Supreme Court “...to establish, as an administrative arm of the Court, a unified self-governing bar”, but prescribing that the rules adopted by the Court for governing the unified bar could be amended “ only upon recommendations” of the bar. When the legislation came under constitutional attack, the Georgia Court upheld the basic provisions of the Act authorizing it to create a unified bar, a power which inhered in the Court, such provisions simply being in aid of the Court in the performance of a “judicial function”, but struck down the provisions attempting to limit its rule-making authority. The Court expressed its agreement with the generally accepted view “...that the judiciary could not be circumscribed or restricted in the performance of its duties related to its inherent power to regulate the practice of law.”

“The provisions of the State Bar Act attempting to limit this court in the exercise of its judicial function in creating the State Bar, and adopting and amending rules and regulations for its government, are void.” (169 S. E. 2d at 796)

The Washington Supreme Court has specifically held that legislation which directly “..... conflicts with a rule of court governing Bar Association powers and responsibilities is unconstitutional as it violates the separation of powers doctrine; such legislation is therefore void”. Washington State Bar Association v. State, 125 Wash. 2d

901; 890 P. 2d 1047, 1050, 1051 (1995). In the course of its opinion the Washington Court addressed the effect of overlapping:

We have recognized that it is sometimes possible to have an overlap of responsibility in governing the administrative aspects of court related functions. However, a legislative enactment may not impair this court's functioning or encroach upon the power of the judiciary to administer its own affairs. The ultimate power to regulate court related functions, including the administration of the Bar Association, belongs exclusively to this Court".

This Court, in acknowledging that it shares power with the Legislature in the regulation of the practice of law, is simply giving recognition to the general understanding that our remarkable Separation of Powers Clause does not expect a hermetic sealing of the three branches of government from one another, and that from the very nature of government overlapping of powers will occur. This recognition is based upon principles of comity and pragmatism and is not to be viewed as an abdication of the Court's inherent authority over its core functions of admission and regulation of attorneys as officers of the court. In re Attorney Discipline System, *supra*, 967 P. 2d 49, 62. Statutes, such as RSA 311, to the extent they are complementary and helpful, have been accepted in the spirit of comity and not out of constitutional compulsion. Cf. State v. Rush, 46 N. J. 399,411; 217 A. 2d 441,447 (1966).

Having in mind the foregoing principles, especially the limited role of the Legislature under the police power to regulate the practice of law, with primary and final authority over such regulation residing in the judiciary, and since unification is generally acknowledged to be a judicial and not a legislative function, and mindful that the New Hampshire Supreme Court had ordered unification of the New Hampshire Bar nearly a quarter century ago and had since constructed a web of rules for achieving goals of

unification, the General Court, in considering legislation relative to mandatory membership of attorneys in the NHBA, legislation that would decimate unification as judicially structured, **was absolutely and unequivocally required by the Separation of Powers Clause to make a “cooperative accommodation” with the Court so as to avoid intruding upon the Court’s essential function of regulating officers of the court.** Opinion of the Justices (Prior Sexual Assault Evidence), 141 N. H. 562, 569 (1997). The Legislature, in enacting Laws 2003, Chapter 250, **“did not make any such accommodation”** (Petition of Mone, 143 N. H. 128, 136 (1998)), even ignoring the Court’s invitation to seek a cooperative arrangement. Although Part I, Article 37 contemplates some overlapping, it nevertheless requires the three departments of government to **“..... move in concert** without improper encroachments by one branch upon the functions of another”. Opinion of the Justices, 113 N, H, 287, 290 (1973). The Legislature’s unilateral action was incompatible with the felicitous language of our Separation of Powers Clause: **“.... that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity”**.

The conflict between Laws 2003, Chapter 250 and the terms of the Court-ordered unification of the New Hampshire Bar is unavoidable and complete. The two cannot be harmonized and, therefore, the Statute must fail in toto.

CONCLUSION

For all of the foregoing reasons, New Hampshire Bar Association respectfully requests the Court to rule and declare that Laws 2003, Chapter 250 violates Part I, Article 37 of the New Hampshire Constitution, and is null and void in its entirety.

Respectfully submitted,

NEW HAMPSHIRE BAR ASSOCIATION
By its Attorneys,
Upton & Hatfield, LLP

Dated: November 14, 2003

By Frederic K. Upton
Frederic K. Upton
Russell F. Hilliard
10 Centre Street
Concord, N. H. 03302-1090
224-7791

CERTIFICATION

November 14, 003

I hereby certify that two copies of the within Brief have this day been mailed, by first class mail, postage prepaid, to Suzanne M. Gorman, Senior Assistant Attorney General, Richard J. Lehmann, Senate Legal Counsel, and Betsy B. Miller, House Legal Counsel.

Frederic K. Upton