

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Re: New Hampshire Bar Association

Docket No. 2003-0482

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BRIEF ON BEHALF OF THE SPEAKER OF THE HOUSE OF REPRESENTATIVES  
AND THE SENATE PRESIDENT  
AS AMICI CURIAE

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## PROVISIONS OF THE NEW HAMPSHIRE CONSTITUTION

### *PART II, ARTICLE 2*

#### Art. 2. Legislature, How Constituted.

The supreme legislative power, within this state, shall be vested in the senate and house of representatives, each of which shall have a negative on the other.

### *PART II, ARTICLE 5*

#### Art. 5. Power to Make Laws, Elect Officers, Define Their Powers and Duties, Impose Fines and Assess Taxes; Prohibited from Authorizing Towns to Aid Certain Corporations.

And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defense of the government thereof, and to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom are hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this state, and the forms of such oaths or affirmations as shall be respectively administered unto them, for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution; and also to impose fines, mulcts, imprisonments, and other punishments; and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same; to be issued and disposed of by warrant, under the hand of the governor of this state for the time being, with the advice and consent of the council, for the public service, in the necessary defense and support of the government of this state, and the protection and preservation of the subjects thereof, according to such acts as are, or shall be, in force within the same; provided that the general court shall not authorize any town to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stock or bonds. For the purpose of encouraging conservation of the forest resources of the state, the general court may provide for special assessments, rates and taxes on growing wood and timber.

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER RSA 311:7-g AND 7-h IS A CONSTITUTIONALLY PERMISSIBLE EXERCISE OF LEGISLATIVE AUTHORITY TO REGULATE THE PRACTICE OF LAW.
2. WHETHER THE COURT SHOULD DEFER ACTION UNTIL AFTER THE MEMBERSHIP OF THE BAR HAS EXPRESSED ITS OPINION PURSUANT TO RSA 311:7-g.

## STATEMENT OF THE FACTS

House Bill 175, “relative to membership of attorneys in the New Hampshire Bar Association and lobbying by the Bar Association”, was introduced in the 2003 Session of the General Court. The bill was adopted by the House and Senate and signed by the Governor on July 14, 2003. It became effective on July 1, 2003.

This is not a “deunification” law as Petitioners suggest. The law requires the New Hampshire Bar Association to poll its members every five years to allow the attorneys licensed to practice in the state to weigh in on whether the Court should compel membership in the New Hampshire Bar Association for all attorneys. Only if a majority of members do not support Court compelled membership will the bar be “deunified.”

## SUMMARY OF ARGUMENT

RSA 311:7-g and 7-h are statutes enacted by the Legislature pursuant to its clear authority to regulate the practice of law. The Legislature has an extensive regulatory scheme already in place and has regulated the practice of law for hundreds of years. The Court also has authority to regulate the practice of law through both inherent and statutory authority so that the two branches have a shared responsibility. In adding these new regulatory provisions to the extensive regulatory scheme already in place the Legislature is not interfering with the role the judicial branch has and will play in regulating the practice of law.

Rather than entertain the claims brought by the Bar Association, this Court should apply the ripeness doctrine and defer ruling on these complex constitutional issues until the necessity for such ruling becomes clear. This case is appropriate to application of the ripeness doctrine, as the case is not presently fit for adjudication and the petitioner will not suffer significant harm if the Court defers judgment.

## ARGUMENT

### I. RSA 311:7-g and 7-h IS A CONSTITUTIONALLY PERMISSIBLE EXERCISE OF THE GENERAL COURT'S LEGISLATIVE AUTHORITY TO REGULATE THE PRACTICE OF LAW.

#### A. The Legislature has the authority to regulate occupations and professions, including the practice of law.

The New Hampshire Constitution vests supreme legislative power in the General Court. N. H. Constitution, Part 2, Art. 2. The Constitution also specifically grants the Legislature the power to make public policy. N.H. Constitution, Part 2, Art. 5. The police power is inherent in the nature of the legislative power itself. *Soucy v. State*, 127 N.H. 451, 506 A.2d 288 (1985). The Legislature has the authority to regulate occupations and professions by enacting public policy that protects the public interest and safety.

The legislature has in fact exercised its authority by acting numerous occupational and professional regulatory statutes that are currently in force, including the following: Accountancy (RSA 309-B); Professional Engineers, Architects, Land Surveyors, Professional Geologists and Natural Scientists (RSA 310-A); Auctioneers (RSA 311-B); Dentists and Dentistry (RSA 317-A); Pharmacists and Pharmacy (RSA 318); Registered Nurses, Licensed Practical Nurses, and Licensed Nursing Assistants (RSA 326-B); Optometry (RSA 327); Physicians and Surgeons (RSA 329); New Hampshire Real Estate Practice Act (RSA 331-A); Shorthand Court Reporting (RSA 331-B); New Hampshire Veterinary Practice Act (RSA 332-B); Insurance Agents (RSA 402). Notably included in the list of statutorily regulated occupations are the other so-called professional

occupations, which, like the practice of law require specialized and/or higher educational degrees, such as physicians and surgeons, architects, dentists, and veterinarians.

The Legislature currently exercises its regulatory authority over the practice of law under RSA chapter 311. This chapter is an extensive pronouncement of the power of the legislature in this area.

B. New Hampshire's elected representatives have a long history and precedent of exercising the legislative authority to regulate the practice of law.

The state's elected representatives have been regulating the legal profession for more than three hundred years, beginning to do so well before the time New Hampshire became a state. In 1686 the provincial assembly enacted the first written law regulating attorneys, continuing the common law tradition of allowing only sworn attorneys to practice law. Shortly after New Hampshire became a state, the new Legislature re-enacted the practice of law statute. That original statute has been codified and re-codified many times from 1842 up through the more extensive attorney regulatory scheme currently in place as RSA 311.

C. The Legislature's regulation of the practice of law and the enactment of RSA 311:7-g and 7-h does not interfere with the role of the judicial branch.

The Legislature's regulation of the practice of law, including the enactment of RSA 311:7-g and 7-h, has not and will not interfere with the role of the judicial branch in ensuring that practicing attorneys are qualified and ethical. Indeed much of the court's

authority to regulate the bar has been recognized by the Court as a grant or delegation of authority by the Legislature through both RSA 311 and RSA 490:4.

“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.” *In re Unification of the New Hampshire Bar*, 109 N.H. 260, at p. 263, 248 A.2d 709 (1968). The court also asserts that it has authority to regulate the bar because “RSA 490:4 vests in it the general superintendence of all our courts.” *Id.*, at 263. The Court has never said that the Legislature has overstepped its bounds in delegating such general authority to the judicial branch. If the Court had believed the Legislature did not have such authority to begin with, let alone to delegate it, the Court would have said so.

In fact, the Court long ago clarified that where the legislature has not acted to regulate the bar, it could act, clearly affirming the authority of the Legislature. “In the absence of written law establishing a different state of things, authority to make reasonable rules for the admission and removal of members of the bar ‘is inherent in every court, in order to enable it to discharge its duties, as much so as the power to preserve order.’” *Ricker’s Petition*, 66 N.H. 207, at 210, 29 A. 559 (1890) (emphasis added), citing *Bryant’s Case*, 24 N.H. 149, at 158 (1851). The Court may even be conceding that the Legislature has the fundamental authority to regulate the practice of law and that the Court only acts when the Legislature has not, out of apparent necessity.

The Court commonly acknowledges that the legislative and judicial branches share responsibility for the regulation of the practice of law. However, much of the shared responsibility is shared only because the Legislature has delegated some of its authority.

“Moreover, RSA 311:1 cannot be read in isolation, but must be read in conjunction with other statutory provisions court rules, case law, and the Code of Professional Responsibility, all addressed to the unauthorized practice of law.” *Bilodeau v. Antal*, 123 N.H. 39, at 42, 455 A.2d 1037 (1983). “It is clear that the legislature, when it enacted RSA 311:1 and its predecessors, did not intend to give non lawyers free rein to practice law in circumvention of other statutory restrictions and of the powers delegated to this court to regulate the practice of law in the courts of this State.” *Id.*, at p. 42.

“(A)dmision to the practice of law and regulation of the conduct of attorneys in this State has been dealt with as an area of shared responsibility between the legislative and judicial branches of government.” *Averill v. Cox*, 145 N.H. 328, at 332, 761 A.2d 1083 (2000).

The Court enunciates the authority of the Legislature to regulate attorneys in many of its decisions and even sanctions legislative action in the area of practice of law regulation. In *Averill*, a matter involving the application of the Consumer Protection Act to the practice of law, this Court clearly acknowledges the power of the Legislature to regulate the conduct of attorneys because it recognized that the Legislature had affirmatively excluded attorneys from the scope of the Act. “Our holding is supported by the Legislature’s failure to expressly include the practice of law within the Act’s scope.” *Id.*, at p. 333. The Court suggests that the Legislature could choose, if it were so inclined, to extend the jurisdiction of the Consumer Protection Act to lawyers and that this would be within the scope of the Legislature’s authority.

The Court asserts in a long line of decisions that it has both inherent and statutory authority to discipline lawyers. *Petition of Brooks*, 140 N.H. 813, 678 A.2d 140 (1996);

*Barnard's Case*, 101 N.H. 33, 34, 131 A.2d 630, 630-31 (1957) ("This court has the inherent power to take reasonable and expeditious actions in the suspension or removal of members of the bar for the protection of the community."). "The courts have the authority to remove attorneys because it is necessary, not as a mode of inflicting a punishment for an offense, but in order to enable the courts to prevent the scandal and reproach which would be occasioned to the administration of the law by the continuance in office of those who had violated their oath or abused their trust, and to take away from such persons the power and opportunity of injuring others by further acts of misconduct and malpractice." *Ricker's Petition*, 66 N.H. 207, 212, 29 A. 559, 561 (1890).

The Court says it has inherent authority to discipline attorneys but repeatedly cites only RSA 311:8 and RSA 490:4 as the sources of any specific authority. Other than the Court's statements that it must have some authority out of the necessity of ensuring an ethical bar, it is clear that it is under RSA 311:8 that the Legislature empowers the Court to impose either disbarment or indefinite suspension as sanctions against attorneys. In fact the Legislature requires the Court to suspend an attorney from practice if there is satisfactory evidence of guilt of fraud, malpractice, or contempt of court. *Eshleman's Case*, 126 N.H. 1, 489 A.2d 571 (1985).

It is not absolutely clear where the Court derives its asserted inherent authority, especially in this area where the Legislature has already enacted an extensive statutory regulatory scheme. The Court does say that 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." *Ricker's Petition*, 66 N.H. 207, at 210, 29 A. 559 (1890) (emphasis added).

If is, nonetheless, clear that because the Legislature has delegated certain authority to the Court that the regulation of the practice of law is a shared responsibility between the two branches. This scheme of shared responsibility for the regulation of the practice of law has worked without conflict and worked well for hundreds of years. The Court's role in regulating attorneys is to ensure that the bar admits only qualified attorneys and to ensure that attorneys so admitted to practice remain ethical. The Legislature's regulatory scheme does not interfere with that role. It does not attempt to interfere with that role either with the current statutory scheme or with the enactment of RSA 311:7-g and 7-h. The Court administers bar exams and other procedures incident to the application for license to practice to ensure that only qualified attorneys are admitted to practice law. It can also administer and operate a professional conduct entity for attorney discipline purposes to ensure an ethical bar.

Since the Legislature has clear authority to regulate the practice of law the enactment of RSA 311:7-g and 7-h is a constitutional exercise of legislative authority to regulate the practice of law. The Court also has authority to regulate the practice of law. It has statutory authority, delegated to it by the Legislature. The Court has also asserted that it has inherent authority. Amici does not object to the Court's assertion of inherent authority, even though the source of that authority is not as clear, because amici recognizes that the regulation of the practice of law is a shared responsibility.

Amici also do not dispute the Bar Association's history of impressive accomplishment and service to the public, during the time it was a voluntary bar association or during the time it was a mandatory bar association. The good and worthy

work of the Bar Association in “serving the public” is not at issue here nor is it at issue in RSA 311:7-g and 7-h.

RSA 311:7-g and 7-h in no way prevents the judicial branch from exercising its authority to make sure that a qualified and ethical bar exists. The Court can clearly do that with or without compelled bar association membership. While a unified bar may be one reasonable way for the court to fulfill its role, it is certainly not the only way. The Court can administer bar exams and conduct other business incident to application for license to practice and it can administer a professional conduct entity for attorney discipline purposes independent of any organized and/or mandatory bar association. If the attorneys licensed to practice vote and the results show that they do not support compelled membership in a bar association the judicial branch will continue to be able to exercise the regulatory authority it has today. The Legislature is not interfering with the role of the judicial branch.

**II. GIVEN THE POTENTIAL FOR CONFLICT BETWEEN THE JUDICIAL AND LEGISLATIVE BRANCHES WITHIN THE AREA OF MUTUAL AUTHORITY, THE COURT SHOULD DEFER ACTION UNTIL AFTER THE MEMBERSHIP OF THE BAR HAS EXPRESSED ITS OPINION.**

The Petition brought by the Bar asks this Court to wade unnecessarily into the turbulent waters of constitutional separation of powers. Constitutional decision-making in this case will be particularly difficult, as regulation of various aspects of the practice of law have long been regulated by both the judicial and legislative branches of government. Rather than decide these uniquely difficult questions, however, this Court should instead find that this matter is not ripe for adjudication,

and defer action until the membership of the Bar has voted on the issue. Depending on the outcome of that poll, some or all of the issues raised in this case may be rendered moot.

A. The Two-Pronged *Abbott Laboratories* Ripeness Test

This Court has endorsed the *Abbott Laboratories v. Gardner*, 387 U.S.136 (1967), “two-pronged analysis used by other jurisdictions that evaluates the fitness of the issue for judicial determination and the hardship to the parties if the court declines to consider the issue.” *Appeal of State Employees Association, Inc.*, 142 N.H. 874, 878 (1998)(citing *Abbott Laboratories*, 387 U.S. at 149 (1967)). Application of the *Abbott* ripeness test to the matter now before the Court indicates the this Court would be best served by deferring judgment on this case until after the opinions of members of the Bar have been expressed in a vote.

1. The First Prong – The Issue is Not Presently Fit For Adjudication

The first prong of the *Abbott* test requires a court to examine the factual and procedural posture of the case and determine whether, and to what extent, the issues are “fit” for judicial consideration. This Court has stated that “[r]ipeness relates to the degree to which the defined issues in a case are based on actual facts ... and are capable of being adjudicated on an adequately developed record.” *Appeal of State Employees Association, Inc.*, 142 N.H. at 878 (quoting *Dept of Enviro. v. Chemical Waste*, 643 N.E.2d 331, 336 (Ind.1994)).

The issues in the present case are in no way fully factually developed, as the applicable portions of the law cannot be determined until the Bar has polled its membership. Until that time, the harms complained of are entirely speculative.

Thus, the declaration that the Bar seeks from the Court may be partially or entirely unnecessary, depending on the outcome of the vote. This Court should decline to make a ruling of constitutional dimension on a matter in which a case or controversy will only arise in the event of a particular electoral outcome. See, *New York Public Interest Research Group v. Carey*, 399 N.Y.S.2d 621, 623-24 (1977)(declaratory judgment not ripe for adjudication where failure of voters to approve ballot proposition would render claims moot). Uncertainty as to the ultimate factual relevance of the claims presently before the Court indicates that this case is appropriate for application of the ripeness doctrine.

2. The Second Prong – The Hardship to the Bar Caused by Deferring Judgment is *de minimis*.

The second prong of the *Abbott Laboratories* ripeness inquiry focuses on the practical, immediate effect of the government action on the party seeking to invalidate it. RSA 311 imposes no onerous burdens on the Bar. Indeed, the only immediate obligation the challenged law imposes on the Bar is the inclusion of a single question on the already scheduled balloting at the next Bar election. It is difficult to discern any legally cognizable harm from the requirement that the Bar include such a question on the ballot at its next election. To the extent that the Bar suggests any harm at all, that harm is based on incorrect assumptions of law, is speculative, and is *de minimis*.

The Bar's claim that the contract clause "prohibits a state from meddling in [its] internal affairs" relies on the incorrect assertion that it is in all respects a "private organization." Despite the abundance of case law from around the country addressing issues related to unified bar associations, the New Hampshire Bar provides

no authority for its claim of fully private status. Courts and commentators have expended substantial effort attempting to characterize the nature of a unified bar. At various times, bar associations have been held to have aspects of government agencies, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and labor unions, *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Lathrop v. Donahue*, 367 U.S. 820 (1961). Legislative counsel are aware, however, of no precedent suggesting that a unified bar is in all respects the equivalent of an ordinary voluntary corporation. Certainly the Bar has provided no such authority.

While it is difficult to identify exactly what the Bar is, it is rather simple to identify what it is not. Even a cursory review of the characteristics of the Bar establishes without question that it is not an ordinary private corporation. First, the New Hampshire Bar Association was established not pursuant to a statute authorizing individuals to form corporations, but rather by an act of the legislature. 1873 Laws, Ch. 115. Membership in the Bar Association is closed to anyone who is not an attorney, and attorneys, in order to practice their profession in this state, are compelled to join. Unlike an ordinary corporation, the Bar Association is specifically recognized by the Legislature and is authorized to make appointments, or to have its members appointed, to specific positions in government agencies and commissions. Finally, and perhaps most importantly, ordinary corporations need not apply to the government for permission to amend their corporate charters. Surely no fully private entity is required to operate under the supervision of an arm of the State. The Bar Association, however, requires the assent of the New Hampshire Supreme Court in order to amend its fundamental charter. The suggestion that the Bar

Association is an ordinary, private corporation is simply incorrect. Thus, the Bar Association's claim that it suffers any harm due to "governmental meddling" is based on factually and legally faulty assumptions. Since the Bar Association is not, in fact, a wholly private entity, and does not conduct its affairs free from "government meddling," the legislative requirement that a poll of the membership be conducted can in no sense be said to represent a substantial harm.

The harm occasioned by the statutory ban on a unified bar expending members' dues for lobbying is likewise incorrect and speculative. In asserting its free speech rights, the Bar Association again relies on the notion that it is a fully private entity. In asserting these rights, the Bar Association ignores completely the fact that it is already subject to government-ordered prior restraint of its communicative activities. *Petition of Chapman*, 128 N.H. 24, 28(1986)(government of State of New Hampshire prohibits the Bar Association from speaking in favor tort reform bill). Furthermore, the language in RSA 311:7-g is substantially similar to the limitations in *Keller*.

Pursuant to the terms of the statute, the lobbying prohibition only takes effect if the Bar remains unified following the vote of its members required by RSA 311:7-g, III. The next Bar Association elections are scheduled to occur in the spring of 2004. Thus, the legislation is of no immediate concern, and the lobbying prohibitions are not likely to take effect until the end of the 2004 legislative session. In the event that New Hampshire's lawyers vote to continue compelled membership, the Bar Association will have the opportunity to raise its first amendment claims.

The issues raised in this petition involve complex constitutional questions that the Court should not answer at this time. Regardless of the outcome of a vote by the

members of the Bar, at least one of these issues will be moot. However, until such time as the vote occurs, it is impossible to know question will become moot. In this procedural posture of uncertainty, the Court should defer performing the delicate task of constitutional interpretation until such time as the need for that interpretation is manifest and the issues are concretely before the Court.

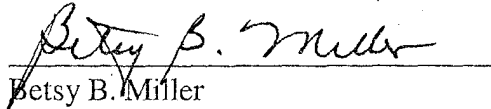
CONCLUSION

For the foregoing reasons, the Speaker of the House, Gene G. Chandler, and the President of the Senate, Thomas R. Eaton respectfully request that this Honorable Court uphold the constitutionality of RSA 311:7-g and 7-h.

Respectfully submitted,

THE SPEAKER OF THE HOUSE  
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CERTIFICATE OF SERVICE

I certify that I have this day mailed by first-class mail a copy of this brief to Frederic Upton, Esq. And have made arrangements to deliver in hand a copy of this brief to Attorney General Peter Heed.

Dated: 10/17/03

  
Richard J. Lehmann