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October 17, 1990

John Broderick, Esquire
New Hampshire Bar Association
112 Pleasant Street
Concord, New Hampshire 03301

Re: Keller

Dear John:

Pursuant to the instructions of the Board of Governors at the meeting of September 7, 1990, Steve Tober and I met to discuss Keller and make a recommendation to you and the Board of Governors. We have reviewed Keller carefully along with Chapman and cases cited by both opinions. Our conclusions are as follows:

Keller specifically addresses the use of mandatory bar dues to support "political and ideological" pursuits which may be antithetical to one or more members of a mandatory organization. Although acknowledging, as did Chapman, that drawing the line between political and ideological issues on the one hand and core issues on the other is more difficult in practice than in theory, the Supreme Court clearly found that the pursuit of core issues and the application of mandatory dues in that pursuit do not violate any constitutional principles. The bulk of the Keller opinion addressed the due process requirements imposed by the Constitution on mandatory organizations when pursuing political and ideological issues. Specifically, on pages 10 and 11 of the Keller opinion the Court states:

. . . Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally find activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. . .

. . . Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of legal service available to the people of the State."

The New Hampshire Bar Association has always agreed with the opinion of the Court in Keller and has never sought authority to pursue activities outside of its core areas. The Chapman case dealt not with the unlimited pursuit of political or ideological issues but rather with determining where specific issues fell. Again, both Courts agreed that the determination is difficult and, as Justice Souter said in Chapman, reasonable minds could disagree. Keller leaves open the so-called negative First Amendment issue which could bar political and ideological pursuits entirely.

It is our belief that the procedural requirements set out in Keller do not apply to the New Hampshire Bar Association since we do not seek to involve ourselves in political or ideological issues and probably could not do so under Chapman notwithstanding the fact that the U.S. Supreme Court has left that issue open. That does not mean, however, that we may ignore Keller. To the contrary, it is incumbent upon us to review our general policies and procedures in light of Keller. Specifically, we recommend the following:


1. Affirmatively assert our intention to limit our activities to core issues and to reject the "invitation" of Keller to expand our areas of involvement by implementing a review and refund procedure.
2. Applying Keller to Bar activities other than legislative activities and reviewing those activities in light of Keller. Chapman applied to legislative positions only; Keller apparently does not.
3. Ratifying our present procedures for determining if an activity extends beyond our core area. In the first instance, a request is made to the Board of Governors to review any position adopted or activity undertaken. If the response is unsatisfactory to the member, he or she may seek the review of the New Hampshire Supreme Court as did Attorney Chapman. The New Hampshire Supreme Court is clearly the appropriate body for ultimate resolution because of its constitutional status, its role as our governing body, and its demonstrated willingness to address the scope of core responsibilities.

4. Creating a mechanism for dues refund in the event the Bar has inadvertently crossed the line into political or ideological activities. It is recommended that members who question a Bar activity be informed of their right to request a refund of that portion of the dues expended on the activity should it ultimately be determined that they are correct. Should they so desire, the estimated portion so expended would be placed in escrow and if they prevail and the exact amount cannot be agreed to, the matter would be referred to binding arbitration (e.g., Lawyer-to-Lawyer Dispute) at no cost to the members.

Both Steve and I are available to discuss this issue and our recommendations with you.

Sincerely,

EPSTEIN, BURKE, MACINTOSH & DEVITO, P.A.



Matthew S. Epstein, Esquire

MSE/cmm

cc: Stephen Tober, Esquire

Steve Tober

3. SPECIAL ORDER

A. Discussion of Proposed New Hampshire Bar Policy Following Keller v. State Bar of California

John Broderick explained that Stephen Tober and Matt Epstein had been asked to review the Supreme Court decision in the Keller v. State Bar of California matter and make recommendations regarding any necessary action the N.H. Bar Association should take in light of the Keller decision. Steve Tober called the Board's attention to the letter in Board packets outlining the analysis of the Keller case. Since the Chapman decision, the N.H. Bar has always gone through a "Chapman analysis" to determine if the Bar should take a position on legislative matters. Keller indicates that a unified bar can go beyond court allowed activities as long as a dues rebate is offered for the portion of dues that would go to support such activities. Since New Hampshire does not intend to go beyond activities allowed by the N.H. Supreme Court under Chapman for legislative matters, the Keller analysis needs to be applied for other, non-legislative activities.

It is recommended that Bar leaders be educated regarding Keller guidelines and stay within them. It is recommended that objections regarding activities seen as being beyond the Bar's core responsibilities be addressed by the Board of Governors and appealable to the N.H. Supreme Court. A mechanism should be established to set aside the amount of dues that might potentially be rebated if the objection is accepted by the Supreme Court. A system for binding arbitration should be established, perhaps through the Lawyer-to-Lawyer Dispute Resolution Committee. Notification of the implementation of this policy will be provided through the Board report in Bar News. Board members thanked Steve Tober and Matt Epstein for their work on this issue.

ACTION

Motion to adopt in principle the content of the October 17, 1990 letter from Matt Epstein containing the recommendations of Steve Tober and Matt Epstein regarding the New Hampshire Bar Association's procedure to respond to the Keller decision. PASSED (unanimously).

The letter is attached and made a part of these minutes.

2) Request for Approval to Join as a Party in the In Re Michael Tocci Matter

The New Hampshire Supreme Court has accepted the petition of Michael Tocci "asserting a right to practice law in this State without being a member of the New Hampshire Bar Association..." Tocci has previously objected to paying the mandatory dues and was suspended for non-payment of 89-90 dues. The Supreme Court ordered Tocci to pay 89-90 dues in escrow pending a decision on the matter. The Supreme Court has asked the New Hampshire Bar and the Attorney General's office to be parties and has requested other amicus briefs. Steve Tober will write the brief and participate in the oral argument for the New Hampshire Bar.