IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

CASE NO. 76,893

IN RE: David P. Frankel

PETITIONER FRANKEL'S REPLY TO RESPONSE OF THE FLORIDA BAR TO AMENDED PETITION OF DAVID P. FRANKEL

Petitioner, David P. Frankel, hereby files this reply to the Response of The Florida Bar to Amended Petition of David P. Frankel (the "Bar's Response"), and respectfully states:

(1) On pages 19-20 of the Bar's Response, the Bar suggests that the Amended Petition be considered by this Court in conjunction with the Bar's pending Petition to Amend Rules Regulating The Florida Bar - Bylaws 2-3.10 and 2-9.3 ("Petition of The Florida Bar"). The Bar supports its suggestion, in part, by stating that Petitioner has requested oral argument in that separate Petition of The Florida Bar. The Bar's assertion in that regard is mistaken. Petitioner has never sought oral argument in the Petition of The Florida Bar; nor does he desire oral argument in that proceeding. He has, however, requested oral argument in this pending proceeding and continues to seek it.

Petitioner urges the Court to consider the Amended Petition in this matter separately from the Petition of The Florida Bar for two principal reasons. First, much of the Amended Petition concerns the Bar's lobbying activities as they relate to various issues concerning children. The Petition of The Florida Bar has absolutely nothing to do with any past, present or future

substantive lobbying issues; only procedural issues. Second, the entire Amended Petition concerns the actual methods used by the Bar, past and present, to engage in lobbying activities. The Petition of The Florida Bar deals with many procedural changes proposed for the future, most of which concern arbitration proceedings and have nothing to do with the Amended Petition.

Petitioner seeks a full determination of his claims on their own merits, without confusion that may result from the consideration of many unrelated procedural issues. Petitioner is concerned that if the two unrelated petitions are considered together, the important issues raised will not receive the careful attention deserved and Petitioner's opportunity to argue his position before the Court (e.g., through oral argument) will be curtailed greatly.

(2) The Bar's Response does not address the issue of who bears the burden of proof in this proceeding.[1] The Amended Petition sets forth the applicable law on this issue, as expressed by this Court in The Florida Bar re Schwarz, 552 So. 2d 1094, 1098 (Fla. 1989): It is the Bar that "carries the burden of proof" that its legislative lobbying activities comport with

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[1] On page 6 of the Bar's Response, the Bar writes: "Petitioner seeks to make the Bar accountable, solely under Schwarz II . . . ." This might be read to imply that Petitioner somehow bears the burden of proof in this proceeding. However, it is the Bar that is accountable for how it spends all compulsory Bar dues, and especially such dues that are used for lobbying activities. In addition, Petitioner repeats that he has pursued the Amended Petition, not "solely under Schwarz II," but under the First and Fourteenth Amendments to the U.S. Constitution as well.

the Schwarz standards. Moreover, with respect to the second issue raised in the Amended Petition (the application of the First and Fourteenth Amendments to the U.S. Constitution to the challenged lobbying positions taken by the Bar), it is also clear that "the Bar bears the burden of proving that its expenditures were constitutionally justified." See Gibson v. The Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986). The Bar has not sought to dispute the law on the burden of proof issue and Petitioner contends that the Bar has failed to meet its burden in this case.

(3) The Bar's Response attempts to color the position espoused in the Amended Petition as one that opposes the use of any funds by the Bar to lobby on any issues. That is simply not true. The Amended Petition seeks only to prevent the use of compulsory Bar dues on the first eight of the fourteen very specific issues relating to children that are identified in the Amended Petition. See Amended Petition at Appendix A (items 6.a. through 6.h.). The Amended Petition does not address the question of whether the Bar has the authority to spend voluntary contributions on legislative lobbying.

(4) On page 10 of the Bar's Response, the Bar "arguably suggest[s]" that the fifth of the five subject areas identified in Schwarz ("the education, ethics, competence, integrity and regulation as a body, of the legal profession") may provide "clear justification" for the use of compulsory Bar dues to lobby on the eight issues challenged in the Amended Petition. Specifically, the Bar suggests that such lobbying relates to the

"ethics" and "integrity" of the legal profession. Is the Bar suggesting that it would be "unethical" if compulsory Bar dues were not spent on these issues, or that the integrity of the Bar would be impugned if only voluntary dues were spent on these issues? Is this "clear justification"? The Bar's argument here assuredly is stretching the words "ethics" and "integrity" beyond any reasonable interpretation.

(5) The Bar's Response contends that each of the eight legislative positions challenged in the Amended Petition meets both the second and third criteria of the Schwarz standard for initiatives that fall outside the five standards for which lobbying is "clearly justified." The second criterion provides: "that lawyers are especially suited by their training and experience to evaluate and explain the issue." The third criterion provides: "the subject matter affects the rights of those likely to come into contact with the judicial system."

If the Bar's argument is taken to its logical conclusion, there is virtually no issue on which the Bar could not expend compulsory Bar dues to engage in lobbying. For example, if the Bar received anecdotal evidence that general road conditions in Florida were deteriorating rapidly, it could appoint "The Florida Bar Commission for Roads," which could consist of prestigious interdisciplinary professionals to undertake a time-consuming,

in-depth examination of issues affecting the State's roads.[2] See Bar's Response at 6 (similarly characterizing The Florida Bar Commission for Children). That Commission might find that insufficient maintenance, a lack of good paved shoulders, an increase in potholes, a lack of adequate signs, etc., collectively increase the incidence of property damage, personal injuries, deaths and law suits caused by traffic accidents.[3] Would such a conclusion justify the Bar's use of resources to lobby the state legislature to increase spending on roads, highway safety and related topics? While Petitioner would respond in the negative, even if the answer were in the affirmative, would this justify the use of compulsory Bar dues for such lobbying? Most importantly, who determines how the legislature should spend taxpayers' monies and where those monies should come from? How should the Bar deal with the issues when the choice is between children, roads, drug treatment programs, education, AIDS treatment, homeless shelters, parks, etc.? The Bar cannot spend its members' compulsory dues to right every perceived wrong in society.

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[2] Presumably, the Bar might argue that one result of this Commission would be the creation of sufficient expertise among lawyers to satisfy the second Schwarz criterion: "that lawyers are especially suited by their training and experience to evaluate and explain the issue."

[3] Presumably, the Bar might argue that persons damaged by traffic accidents resulting from deteriorating roads are "likely to come into contact with the judicial system" and that these road conditions therefore affect their rights.

Petitioner's principal point here is that if the Court permits the Bar to use compulsory dues to lobby on the eight issues challenged in the Amended Petition, there appears to be no restriction on the issues on which the Bar could later decide to lobby. What is the limiting principle that is to be applied here? While the Bar offers absolutely no suggestion, Petitioner asserts that the Supreme Court of the United States has established a limiting principle in its Keller decision:

> 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 fund 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.

Keller v. State Bar of California, 110 S. Ct. 2228, 2236 (1990). The Supreme Court has ruled that state bar associations may spend compulsory dues only on issues relating to the regulation of the legal profession and the improvement of the quality of legal services. The eight challenged lobbying positions taken by the Bar do not fit within this standard and the Bar has certainly not met its burden of proof in arguing that they do.

(6) To emphasize the point that the Bar appears to have no meaningful guidelines on which to determine whether it may engage in certain types of lobbying activities, Petitioner offers a recent opinion of the Counsel to The Florida Bar, who is also one of the attorneys listed on the Bar's Response in this proceeding. See Appendix A (letter from Barry Richard to Bar President

Miller, dated Oct. 17, 1990). In that opinion, the Bar Counsel considered the application of the Schwarz, Gibson, and Keller decisions to a proposal that the Bar boycott a community to support the welfare of minority groups there. He concluded (on page 3):

> The essence of all of the foregoing cases is that The Florida Bar is not a general social action association with the freedom to engage in any activity it chooses. There are voluntary bar associations at the local and national levels which do have that freedom. The Florida Bar does not. It derives its power to compel membership from a very circumscribed purpose and it is limited in its pursuits to fulfilling that purpose.

This conclusion appears to be at odds with the Bar's position concerning the Amended Petition. Petitioner questions why the Bar does not apply a similarly narrow construction of the same cases to the lobbying positions challenged in the Amended Petition. The only principle the Bar appears capable of articulating is that it can use compulsory dues for lobbying whenever it wants to.

(7) The Bar's Response, at pages 14-15, takes the extreme position that the three additional Schwarz criteria "present absolutely no federal constitutional question, regardless of their scope provided member dissent is accommodated consistent with Chicago Teachers for those issues advocated beyond Keller's two core areas." [emphasis added] In effect, the Bar is arguing that it may use compulsory dues to lobby on any issue, such as abortion, gun control or flag desecration, so long as dissenting Bar members are provided an adequate explanation of the basis of

their compulsory dues used for such lobbying, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

This argument is a complete misreading of Keller and is contrary to that decision. In fact, Keller represents the outer bounds of permissible use of compulsory dues for lobbying. In a passage that is at direct odds with the Bar's argument, the Keller Court declared: "Compulsory dues may not be expended to endorse or advance a gun control or nuclear freeze initiative." Keller, 110 S. Ct. at 2237. The Court did not limit this conclusion by providing that compulsory dues could be so expended if the Chicago Teachers procedures were implemented. Thus, it is within the bounds of Keller where the Supreme Court requires absolute adherence to the procedures enunciated in Abood and Chicago Teachers.

The Bar's argument on this point is also contrary to the advice that Counsel to The Florida Bar provided to Bar President Miller. See Appendix A (also discussed in point (6) supra). In that opinion (at page 2), the Bar Counsel discussed the Keller decision and summarized its holding as follows:

> The [Keller] Court held that a bar cannot spend compulsory dues over a member's objections for ideological activities not germane to the purpose for which compelled association is justified. The Court found that purpose to be "regulating the legal profession and improving the quality of legal services."

The Bar Counsel's advice was not circumscribed by whether the Chicago Teachers procedures were available. Indeed, the Chicago Teachers decision is not mentioned in the opinion letter. If it had been so circumscribed, then to be consistent with the argument proffered to this Court in the Bar's Response, the Bar Counsel would have had to conclude in his opinion that the Bar can lawfully boycott a particular community in order to further certain social causes relating to the welfare of minority ethnic groups. Obviously, he did not do this.

(8) The third argument contained in the Amended Petition is that the Bar cannot require dissenting members to file objections to "particular" positions and that general objections are the most that can be required consistent with the First and Fourteenth Amendments to the U.S. Constitution. Petitioner relies primarily upon the express statement of the Supreme Court to that effect in Abood v. Detroit Board of Education, 431 U.S. 209, 241 (1977). The Bar's Response is that this portion of Abood was supplanted by the Supreme Court in Chicago Teachers when it outlined a minimum member objection procedure.

The Bar's argument is belied by the facts of Chicago Teachers. In that case, the teachers union implemented a procedure for considering objections by nonmembers. The challenged procedure permitted dissenting nonmembers to "object to the 'proportionate share' figure by writing to the Union President within 30 days after the first payroll deduction." 106 S. Ct. at 1070. Unlike the Abood case, the union rules in

Chicago Teachers did not require dissenters to identify the particular positions with which they disagreed. General objections to the proportionate share figure were sufficient. Thus, the issue of general versus particular objections that had already been decided in Abood, was not before the Supreme Court in Chicago Teachers and the Court did not address the issue. It is evident that Abood is still good law after Chicago Teachers (and was not supplanted by it), especially when one notes how heavily the Supreme Court relied upon Abood when it decided Chicago Teachers and Keller.

Further, the Court of Appeals for the First Circuit has expressly recognized the validity of the Abood holding that dissenters may not be required to reveal their objections to particular lobbying positions. In its recent decision, the court in Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 635 (1st Cir. 1990), stated:

> The district court also ably outlined the measures necessary to bring the Colegio [a compulsory bar association] into conformance with Supreme Court requirements concerning the methods for objecting to expenditures. 682 F.Supp. at 689. As the district court recognized, a primary feature of a constitutional system is that dissenters be able to trigger refunds by means of general objections so that they need not make public their views on specific issues. See id. (quoting Abood, 431 U.S. at 241, 97 S.Ct. at 1802). Dissenters also may not be required to explain the basis for particular objections beyond detailing why they view a disputed activity to be outside the Colegio's core functions.

When the First Circuit later summarized its holdings, it reiterated that one of the two primary procedural defects of the compulsory bar's rules was "the provision, at least on the Rule's face, that refunds are triggered only by objections to specific activities." Id. at 640. See also Conley v. Massachusetts Bay Transp. Auth., 539 N.E.2d 1024, 1029-30 (Mass. 1989) (after citing Chicago Teachers and quoting Abood, the court stated: "[W]e decline to fashion a rule which would require an objecting employee to articulate his or her ideological objection to union membership and then to determine whether the employee's objection is 'ideological' or 'political' enough to be constitutionally protected.").

CONCLUSION

For the above-stated reasons, The Florida Bar has not met its burden of proof that the eight challenged lobbying positions fall within the standards established by this Court. Further, the Bar has not met its additional burden of proof that these expenditures are constitutionally justified under the First and Fourteenth Amendments to the U.S. Constitution. Finally, proper interpretation of controlling Supreme Court precedent requires the Bar to recognize its members' general objections to the use of their compulsory dues to fund legislative lobbying activities.

Accordingly, Petitioner respectfully requests that the Supreme Court of Florida grant the relief requested in the Prayer for Relief of the Amended Petition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via first class mail this 5th day of February, 1991, upon John F. Harkness, Jr., Esquire, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and Joseph W. Little, Esquire, 3731 N.W. 13th Place, Gainesville, Florida 32605.

David P. Frankel