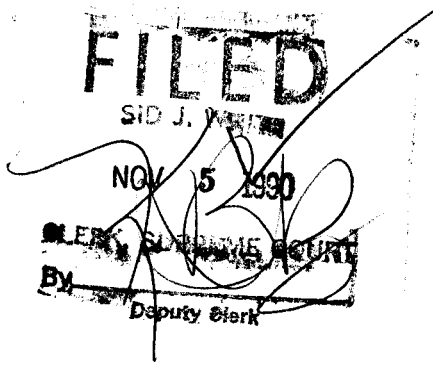
IN THE
SUPREME COURT OF FLORIDA



THE FLORIDA BAR

Re David P. Frankel

CASE NO. 76-853

INTRODUCTION TO AMENDED PETITION

PETITIONER, David P. Frankel, Esquire, is an active member in good standing of The Florida Bar.[1] PETITIONER submits this Amended Petition because he questions the propriety of eight recommendations pertaining to a legislative position adopted by the Board of Governors (the "Board") of The Florida Bar during its meeting of October 4, 1990 and officially noticed to the Bar membership in the October 15, 1990 issue of The Florida Bar News.[2]

PETITIONER comes before the Supreme Court of Florida, in accordance with this Court's statement in The Florida Bar re Schwarz, 552 So.2d 1094, 1097 (Fla. 1989) (hereinafter "Schwarz"), that "any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this

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[1] While PETITIONER is an attorney with the Federal Trade Commission ("FTC"), he is pursuing this Amended Petition solely as a member of The Florida Bar and not in his capacity as an attorney with the FTC. Therefore, the views expressed in this Amended Petition are solely the PETITIONER's and do not represent those of the FTC.

[2] This Amended Petition would have been submitted sooner, but because The Florida Bar membership records department had altered PETITIONER's mailing address on its own, without notice to PETITIONER, PETITIONER did not receive his copy of the October 15, 1990 issue of The Florida Bar News until October 23, 1990. PETITIONER has taken steps to correct this error for the future.

Court." PETITIONER, as set forth more fully below, petitions this Court for a declaration that the eight recommendations pertaining to the legislative position discussed in this Amended Petition are improper when considered against the standards adopted by this Court in Schwarz. Petitioner further petitions this Court for a declaration that the "additional criteria" adopted in Schwarz are violative of the First and Fourteenth Amendments to the United States Constitution, both by their express language and as applied. PETITIONER further petitions this Court to issue an order enjoining The Florida Bar, both pendente lite and thereafter, from engaging in any lobbying activities pertaining to the eight recommendations discussed in this Amended Petition, as well as any lobbying activities not clearly within the five subject areas recognized by the Court in Schwarz as clearly justifying legislative activities by the Bar. Finally, PETITIONER urges the Court to order The Florida Bar to recognize general objections made by Bar members who object to the Bar's spending any portion of their compulsory Bar dues on legislative lobbying activities or amicus brief filings.

THE FLORIDA Bar CANNOT SUSTAIN ITS BURDEN OF PROOF THAT THE LEGISLATIVE POSITIONS AT ISSUE SATISFY THE STANDARDS ADOPTED BY THE SUPREME COURT OF FLORIDA IN SCHWARZ.

The October 15, 1990 issue of The Florida Bar News at page 4 contains an "Official Notice" under the heading "Legislative positions adopted" which notifies Bar members that the Board of Governors adopted seven legislative positions during its meeting

of October 4, 1990. A copy of the Official Notice is attached as Appendix A. One of those seven adopted positions -- number 6 -- concerns the Board's decision to support fourteen recommendations of The Florida Bar Commission for Children relating to:

a. Expansion of the women, infants and children (WIC) program.

b. Extension of Medicaid coverage for pregnant women.

c. Full immunization of children.

d. Establishing children's services councils.

e. Family life and sex education/teen pregnancy prevention.

f. Increasing Aid to Families with Dependent Children.

g. Enhanced child-care funding and standards.

h. Creation of children's needs consensus estimating conference.

i. Establish child-care funding and standards.

j. Termination of parental rights/revision of Chapter 39, F.S.; cocaine-exposed infants.

k. Guardians Ad Litem-dissolution and custody.

l. Establish foster care review boards.

m. Eliminate select public disclosure exemptions in child abuse cases.

n. Development of juvenile offender rehabilitation and treatment programs.

Of these fourteen recommendations, only the final six (items 6.i. through 6.n.) colorably satisfy the Schwarz standards, and

even some of these six probably fail the test. The descriptions of these six recommendations are too vague to determine whether they satisfy the Schwarz standards.[3]

In Schwarz, this Court expressly "approve[d] the recommendations of the Judicial Council [of Florida] and adopted them as guidelines to be followed with respect to determining the scope of permissible lobbying activities of The Florida Bar." Id. at 1098. Thus, these are the standards this Court must apply to test recommendations 6.a. through 6.h. at issue in this Amended Petition. Moreover, as the Court made clear in Schwarz, it is the Bar that "carries the burden of proof" that its legislative lobbying activities comport with the Schwarz standards. See id. at 1098; accord Gibson v. The Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986) ("the Bar bears the burden

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[3] Rather than complicate this Amended Petition with arguments over whether the final six recommendations of The Florida Bar Commission for Children meet the Schwarz standards, PETITIONER will concede, for purposes of this Amended Petition only, that recommendations 6(i) through 6(n) comport with the Schwarz standards. PETITIONER further notes, however, that it is the Bar that bears the burden of proof on all legislative lobbying positions and nothing contained in the Bar's Official Notice explains how these six recommendations comport with the Schwarz standards.

For example, it is possible, that recommendation 6.j. (concerning the termination of parental rights/revision of Chapter 39, F.S.; cocaine-exposed infants) may be designed to improve the functioning of the courts, judicial efficacy and efficiency. However, the report of The Florida Bar Commission for Children may express other, unrelated reasons for this recommendation that have nothing to do with judicial efficiency. The Official Notice contained in the Bar News does not provide any rationale for any of the fourteen recommendations.

of proving that its expenditures were constitutionally justified."). The Bar cannot carry that burden here.

The Judicial Council recommended, and the Schwarz Court adopted, that the following subject areas be recognized as clearly justifying legislative activities of the Bar:

> (1) Questions concerning the regulation and discipline of attorneys;
>
> (2) matters relating to the improvement of the functions of the courts, judicial efficacy and efficiency;
>
> (3) increasing the availability of legal services to society;
>
> (4) regulation of attorneys' client trust accounts; and
>
> (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

See id. at 1095.

The Judicial Council further recommended, and the Court adopted in Schwarz, that the following additional criteria be used to determine "the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside of the above specifically-identified areas:"

> (1) That the issue be recognized as being of great public importance;

(2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) the subject matter affects the rights of those likely to come into contact with the judicial system.

See id.

None of the first eight recommendations of The Florida Bar Commission for Children, as adopted by the Board as legislative positions of the Bar (legislative positions 6.a. through 6.h.), meet the Schwarz standards. None of those eight recommendations concern: (1) "the regulation and discipline of attorneys"; (2) "matters relating to the improvement of the functions of the courts, judicial efficacy and efficiency"; (3) "increasing the availability of legal services to society"; (4) "regulation of attorneys' client trust accounts"; or (5) "the education, ethics, competence, integrity and regulation as a body, of the legal profession."

Rather than demonstrate in detail how each of the eight recommendations fails to meet the Schwarz standards, PETITIONER will apply those five standards to one of the eight recommendations for illustrative purposes only. Recommendation 6.c. pertains to full immunization for children, a subject that has no relationship to the regulation and discipline of attorneys; that will not improve the functions of the courts, judicial efficacy and efficiency; that will not increase the

availability of legal services to society; that has no bearing upon the regulation of attorneys' client trust accounts; and that has no bearing upon the education, ethics, competence, integrity and regulation as a body, of the legal profession. In any event, the Bar bears the burden of proof to demonstrate how such standards are met, which PETITIONER asserts the Bar cannot achieve.

Plainly, the Board cannot demonstrate that legislative positions 6.a. through 6.h. are subject areas "recognized as clearly justifying legislative activities by the Bar." Thus, the issue becomes whether legislative positions 6.a. through 6.h. are "recognized as being of great public interest," and "that lawyers are especially suited by their training and experience to evaluate and explain the issue," and that "the subject matter affects the rights of those likely to come into contact with the judicial system." Here, unlike the subject areas that are clearly justified as recognized area for legislative activities, the Bar must demonstrate that all three criteria are met. Once again, PETITIONER asserts that the Bar is unable to meet this burden.

While PETITIONER disagrees with such a broad reading of the "great public interest" criterion, he concedes, for purposes of the Amended Petition only, that legislative positions 6.a. through 6.h. may satisfy the first prong of the three prong standard.

The second prong of this standard, however, is clearly not met here for any of the eight legislative positions at issue. None of these positions pertain to issues "that lawyers are especially suited by their training and experience to evaluate and explain." To illustrate, PETITIONER turns again to legislative position 6.c.: "full immunization of children." PETITIONER asserts that few, if any, lawyers (responding as lawyers rather than as parents) could recite what types of immunization are available for children, at what cost, who pays for those immunizations, when they are to be provided, how frequently, and by whom. Moreover, PETITIONER is unaware of any subjects taught in law school or in any Continuing Legal Education courses that train law students or practitioners on the subject; or of any subjects tested on the Florida Bar Examination that cover these issues. In short, lawyers have no special training and experience to evaluate and explain proper public policy on full immunization for children,[4] and have far less training and experience in this area than doctors and other allied health professionals, social workers, and public health officials.

The third prong of this Schwarz standard is also clearly not satisfied here. None of these issues affects the rights of those likely to come into contact with the judicial system. Although

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[4] If the Bar is permitted to lobby on "full immunization for children" what is to prevent it from lobbying on additional (or fewer) homeless shelters, additional (or less) maintenance of roads, additional (or fewer) parks, etc?

every person at some point in life may come into contact with the judicial system as a party, witness, juror, or court employee, such ordinary contact cannot be what the Court meant in the Schwarz criterion that the issues to be lobbied on "affect the rights of those likely to come into contact with the judicial system."

This Schwarz criterion must require some substantial nexus between: (1) the rights affected by the issue being lobbied on; and (2) the reason for the contact with the judicial system. Two illustrations here may be useful. If the Florida Legislature proposes to enact a statute that would require mandatory prison sentences for certain types of criminal offenses, the Bar should be able to meet its Schwarz burden of demonstrating that this will affect the rights of certain criminal defendants when they come into contact with the judicial system.

By contrast, a legislative proposal to require the public funding of full immunization for all children from tax revenues would affect the rights of children, but not with any relation to their contact with the judicial system. In short, to hold that Bar lobbying on full immunization for children meets this Schwarz criterion would be tantamount to holding that any proposed legislation affecting the rights of any group or individual would affect the rights of those who may at any time come into contact with the judicial system. Such an interpretation would render this Schwarz criterion a dead letter. The analysis applied here to the "full immunization for children" legislative position

applies equally for the other legislative positions contained in 6.a. through 6.h.

In sum, the Bar cannot carry its burden of proof that legislative positions 6.a. through 6.h. fall within any of the five subject areas recognized in the Schwarz decision as clearly justifying legislative activities by the Bar. Similarly, the Bar cannot carry its burden of proof that these legislative positions fall within the additional criteria used to determine the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside the five subject areas enumerated in the Schwarz decision. Thus, PETITIONER respectfully requests this Court to enjoin the Bar, both pendente lite and thereafter, from engaging in any lobbying on legislative positions 6.a. through 6.h.

THE THREE "ADDITIONAL CRITERIA" ADOPTED IN SCHWARZ VIOLATE THE FIRST AND FOURTEENTH AMENDMENT RIGHTS OF DISSENTING Bar MEMBERS TO BE FREE FROM COMPELLED SPEECH AND ASSOCIATION

The First Amendment to the United States Constitution provides that: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . ." U.S. Const. amend. I. This language has been interpreted by the Supreme Court of the United States as protecting both the right to speak and to associate freely, as well as the right not to speak or associate. See, e.g., Abood v. Detroit Board of Education, 431 U.S. 209, 234-35 (1977).

The First Amendment is applicable to the states via the Fourteenth Amendment. See, e.g., DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Gitlow v. New York, 268 U.S. 652, 666 (1925). The Florida Bar is "an official arm" of the Supreme Court of Florida and this Court has, by its rules, established "the authority and responsibilities" of the Bar. See Rules Regulating The Florida Bar, Ch. 1 (General Introduction). As an official arm of the State of Florida, The Florida Bar is bound by the First and Fourteenth Amendments. See Keller v. State Bar of California, 110 S. Ct. 2228 (1990).

In Abood, the Supreme Court of the United States applied the First and Fourteenth Amendments to a labor union that engaged in ideological activities with compulsory dues collected in part from non-union members. The Court held that a union cannot expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified. Abood, 431 U.S. at 222-23. In that case, the compelled association was justified only by the union's collective bargaining activities. Thus, any funds expended by the union for ideological activities not germane to collective bargaining were violative of the First and Fourteenth Amendments.

Recently, the Supreme Court applied its Abood analysis to the State Bar of California. Keller, 110 S. Ct. 2228 (1990). Like The Florida Bar, the State Bar of California is an integrated bar that performs a variety of functions, such as "examining applicants for admission, formulating rules of

professional conduct, disciplining members for misconduct, preventing unlawful practice of law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice." Id. at 2231. Indeed, the State Bar of California has a stronger claim to perform these functions than does The Florida Bar because the State Bar of California is created by California statute, while The Florida Bar is merely an official arm of this Court.

Despite the broad statutory mandate of the State Bar of California to improve "the administration of justice," the Supreme Court ruled that the bar was prohibited from expending compulsory dues of dissenting members on matters not germane to the regulation of the legal profession and improvement of the quality of legal services. Specifically, the Court declared:

> 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.

Id. at 2236.

In its Schwarz decision, this Court adopted a three part test to be applied when determining "the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside of the [five] specifically-identified areas" adopted by the Court. See supra pp. 5-6.

This three part test, by necessary implication, permits The Florida Bar to use compulsory dues of dissenting Bar members to engage in ideological activities not germane to "regulating the legal profession and improving the quality of legal services." After all, there are likely to be many issues that are "recognized as being of great public importance," where lawyers have the "training and experience to evaluate and explain" the issues, and where the issues affect "the rights of those likely to come into contact with the judicial system," but nevertheless are not germane to "regulating the legal profession and improving the quality of legal services." Any such issues must not be lobbied upon by The Florida Bar through the use of the compulsory dues of dissenting members. In addition, the fact that the Board has adopted legislative lobbying positions 6.a. through 6.h. demonstrates that the Bar is applying the Schwarz criteria in a manner that is violative of the First and Fourteenth Amendments.

Thus, this aspect of the Schwarz standard is an unconstitutional infringement of dissenting Bar members' First and Fourteenth Amendment rights against compelled speech and association. PETITIONER therefore respectfully requests this Court to abrogate the "additional criteria" adopted in its Schwarz decision and to enjoin The Florida Bar, both pendente lite and thereafter, from engaging in any lobbying on legislative positions not clearly within the five subject areas recognized by the Court in Schwarz as clearly justifying legislative activities by the Bar.

IN ACCORDANCE WITH ESTABLISHED PRECEDENT OF THE SUPREME COURT OF THE UNITED STATES, THE FLORIDA BAR IS REQUIRED TO RECOGNIZE ITS MEMBERS' GENERAL OBJECTIONS TO THE USE OF THEIR COMPULSORY DUES TO FUND LEGISLATIVE LOBBYING ACTIVITIES AND IS FURTHER REQUIRED TO PROVIDE REFUNDS FOR SUCH GENERAL OBJECTIONS

Rule 2-9.3(c) of the Rules Regulating The Florida Bar requires dissenting Bar members to "file with the executive director a written objection to a particular position on a legislative issue." Thus, by clear implication from the Rule as well as advice provided by the Bar,[5] general objections to the Bar's legislative activities are not recognized.

Nevertheless, for the past two years, PETITIONER has paid his annual compulsory Bar dues in full with an accompanying letter demanding that no portion of his compulsory Bar dues be used directly or indirectly to fund or support any legislative lobbying by or on behalf of The Florida Bar. Copies of these two letters are attached to this Amended Petition as Appendices D and E.[6]

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[5] See Appendices B and C for an example of an exchange of correspondence between PETITIONER and the Bar on the issue of general objections to the Bar's legislative activities.

[6] PETITIONER's letter of August 8, 1990 to the Bar (Appendix C) is slightly broader than his letter of June 14, 1989 (Appendix B) in that the 1990 letter includes amicus filings as well as legislative lobbying. This addition was deemed necessary because the December 1, 1989 issue of The Florida Bar News reported that the Board voted to file its own amicus brief in a case pending before the Supreme Court of the United States. It was further reported that the Board had voted to spend up to $10,000 to have counsel prepare the brief and to have the brief printed. While PETITIONER was subsequently informed by the Bar that none of the authorized $10,000 was spent, PETITIONER

In response, the Bar has asserted that it may lawfully compel PETITIONER, as a dissenting Bar member, to contribute compulsory dues for lobbying activities on the basis of the United States Supreme Court's decision in Keller and the Eleventh Circuit's decision in Gibson v. The Florida Bar, No. 89-3388 (11th Cir. July 23, 1990), as well as the opinion of Bar counsel. Despite numerous requests, the Bar has never explained in any detail to PETITIONER why the Bar will not recognize PETITIONER's general objections to its legislative activities. Thus, the Bar has refused to recognize PETITIONER's general objections to the Bar's lobbying program and has insisted that PETITIONER submit written objections to particular legislative positions in order to receive refunds for the compulsory dues related to the particular objections.

Established precedent of the Supreme Court of the United States, interpreting the First and Fourteenth Amendments to the United States Constitution, make it clear that those who are compelled to pay dues to practice their livelihoods (including lawyers) may assert general objections to lobbying activities conducted by the recipients of their compulsory dues. Such persons cannot be required to identify specific expenditures to

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recognized that the filing of amicus briefs raises identical issues as those raised by lobbying before the Florida Legislature or Congress.

In Keller, 110 S. Ct. at 2231 n.2, the Supreme Court treated the dissenting bar members' objections to the bar's amicus brief filing program in the same manner it treated the dissenting bar members' objections to the bar's legislative lobbying and resolution adoption activities.

which they object. In Abood, 431 U.S. 209 (1977), the Supreme Court held that non-union teachers could not be compelled to contribute to various political and other ideological activities that they did not approve of. In its decision, the Court stated as follows:

> But in holding that as a prerequisite to any relief each appellant must identify to the Union the specific expenditures to which he objects, the Court of Appeals ignored the clear holding of Allen. As in Allen, the employees here indicated in their pleadings that they opposed ideological expenditures of any sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

Id. at 241 (emphasis in original).

The Abood decision was cited with approval and relied heavily upon by the Supreme Court of the United States in its recent decision in Keller. This fact makes it evident that Abood is applicable to compulsory bar associations such as The Florida Bar. Dissenting Bar members cannot be compelled to identify specific expenditures to which they object. To the extent that the decisions of this Court and the Eleventh Circuit are inconsistent, they must give way to the clear precedent established by the Supreme Court of the United States.

Similarly, in Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986), the Eleventh Circuit reached an analogous conclusion. The federal appellate court, relying upon Abood and applying it to The Florida Bar, stated: "Lawyers would only have to notify the Bar of a general disagreement, since the first amendment also protects an individual's right not to disclose his beliefs." Id. at 1570 n.5.

Moreover, in Schneider v. Colegio de Abogados de Puerto Rico, 682 F. Supp. 674 (D.P.R. 1988), the court applied Abood and invalidated a rule of the integrated bar association that required dissenting bar members to identify specific activities they did not wish to fund. The court stated:

> As a separate matter, the 1986 Rule requires dissenting attorneys to object at the end of the year to specific activities they do not wish to fund. . . . The general objection filed initially acts merely as a "notice of the right to object," and no refund is made until the Review Board adjudicates the specific objections. . . . That, of course, violates the specific mandate of Abood, 431 U.S. at 241 . . . . Once it is determined how much was spent for the activities forecast in the budget that do not come under one of the permissible headings, all those who made general objections should automatically be refunded the proper proportion of their funds.

Id. at 689 (citations to bar rule and quotation from Abood deleted).

Thus, PETITIONER respectfully requests this Court to require The Florida Bar to recognize the established right of all dissenting Bar members to state general objections to the Bar's

lobbying activities and to provide dissenters with refunds of all compulsory Bar dues used for legislative lobbying.

PRAYER FOR RELIEF

THEREFORE, PETITIONER prays that the Supreme Court of Florida:

(1) Declare that legislative positions 6.a. through 6.h., as adopted by the Board of Governors during its October 4, 1990 meeting are improper when considered against the standards adopted by the Court in Schwarz;

(2) Declare that the "additional criteria" adopted by the Court in Schwarz must be abrogated in light of the First and Fourteenth Amendments to the United States Constitution;

(3) Issue an order enjoining The Florida Bar, pendente lite and thereafter, from engaging in any lobbying activities to support legislative positions 6.a. through 6.h.;

(4) Issue an order enjoining The Florida Bar, pendente lite and thereafter, from engaging in any lobbying activities to support any legislative positions that are based solely upon the three "additional criteria" adopted by the Court in Schwarz;

(5) Issue an order requiring The Florida Bar to recognize PETITIONER's established right to state general objections to the Bar's lobbying activities and to provide PETITIONER with refunds of all compulsory Bar dues expended on his behalf (plus interest at the legal rate) for legislative lobbying for the dues years

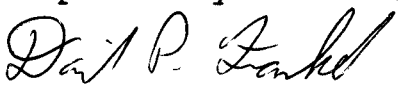
1989-90 and 1990-91, as well as any future years for which PETITIONER submits similar general objections;

(6) Issue an order invalidating the "particular position" language of Rule 2-9.3(c) of the Rules Regulating The Florida Bar and requiring The Florida Bar to recognize all other dissenting Bar members' rights to state general objections to the Bar's lobbying activities and to provide such dissenting members with appropriate refunds (plus interest at the legal rate), as well as any future years for which other dissenting members submit similar general objections;

(7) Award PETITIONER such additional relief as the Court may deem just and proper; and

(8) Award PETITIONER his costs of this Amended Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Petition was served via first class mail this 1ST day of November, 1990, upon John F. Harkness, Jr., Esquire, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

David P. Frankel