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FEB. 7 1991
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

IN RE: David P. Frankel CASE NO. 76,853

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

The response of The Florida Bar to the amended petition intermingles and confuses two independent, but somewhat related, issues. One is whether the Bar possesses the power under state law to engage in activities of the sort challenged by Petitioners. The proper resolution of this issue is determined by consideration of what powers are available to this Court under Article V of the Florida Constitution to delegate to the Bar and to what extent the Court has delegated them. This question was last addressed by this Court in Schwarz II, 552 So.2d 1094 (Fla. 1989) and resolved by this Court's approval of five discrete clearly justified areas of legislative lobbying (i.e. lawyer regulation and discipline; functioning of courts; availability of legal services; trust accounts; and education, ethics, competence and regulation of the profession). 552 So.2d at 1095. In addition, this Court acknowledged a narrow field outside the clearly justified areas as to matters satisfying three criteria: (1) great public interest; (2) lawyers are specially suited by training and experience to evaluate and explain; and (3) the subject matter affects the rights

of those likely to come into contact with the legal system. Id. In Schwarz II, this Court cautioned the Bar to "exercise caution in the selection of subjects upon which to take a legislative position" pertaining to fields controlled by the additional three criteria. Id., at 1097.

In Schwarz II, this Court also established a remedial process when the Court stated, "In any event, we also wish to make clear 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 Court." Id. (e.s.). Petitioners are executing this procedure in this action.

The second issue concerns, not with basic source of power, as does the first outlined above, but instead concerns constitutional limitations on governmental power, whatever the source. This second issue questions whether some attempted exercise of authorized power is nevertheless unconstitutional because the manner in which it is exercised infringes First Amendment rights of dissenting members, such as Petitioners. This issue is controlled by a series of United States Supreme Court decisions currently culminating in Keller v. State Bar of California, 110 S.Ct. 2228 (1990). But see Gibson v. The Florida Bar, 906 F.2d 624 (11th Cir. 1990), writ of certiorari applied for. (Gibson II). This issue is plainly independent of the source of power question in that it applies to private organizations (i.e. labor unions) regulated by government and, thereby, by First Amendment principles (i.e. Ellis v. Broth. of Ry, Airline and S.S. Clerks, 104 S.Ct.

1883 (1984); to state bars created by legislatures under their plenary powers (i.e. Keller); and to state bars created by courts under their restricted regulatory powers (i.e. Gibson II and Schneider v. Colegio de Abrogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990).)

It is this issue of limitation that underlies the pending related proceedings in this Court styled, "The Florida Bar Re Petition to Amend Rules Regulating The Florida Bar - Bylaws 2-3.10 and 2-9.3." Petitioner Little is a respondent in that parallel action and has made certain objections to the Bar's petition therein on the ground that the rule it proposes does not comply with the requirements of the First Amendment. By contrast, the gravamen of Petitioner Little's argument in this reply has nothing to do with the proposed by-law amendments, but has to do with the basic question of existence of the Bar's authority to engage in the challenged action, under the guidelines this Court set forth in Schwarz II.

The Bar in its response to the Amended Petition has divided its argument as follows (numbers supplied by Petitioner for convenience):

1. "Recent United States Supreme Court Action Has Clarified The First Amendment Implications of Political Activities of the Integrated Bar." (Response, p.2)
2. "The Eight Legislative Positions in Question are within Allowable Subject Areas of Political

Involvement of The Florida Bar." (Response, p.4)

3. "Additional Criteria of this Court for Determining Acceptable Legislative Activities of The Florida Bar are Valid Under the United States Constitution." (Response, p.12)

4. "A Resolution of the Instant Petition May Involve Collateral Issues of Significance to the Legislative Activities of The Florida Bar." (Response, p.19).

In this reply, Petitioner Little replies only to Points 2 and 3 of the Bar's response.

POINT ONE: THE BAR'S RESPONSE DOES NOT SUSTAIN THE BAR'S BURDEN OF PROOF THAT ITS LEGISLATIVE LOBBYING POSITIONS AT ISSUE IN THESE PROCEEDINGS SATISFY THE STANDARDS OF SCHWARZ II.

Point 2 (pp. 4-12) of the Bar's response addresses the Amended Petition's assertion that the eight specifically identified legislative positions are outside the Bar's authority as prescribed in Schwarz II. The response wholly fails to carry the burden of justification that rests upon the Bar.

First, the Bar's Response does not address the issue of who

bears the burden of proof in this proceeding. The Amended Petition sets forth the applicable law on this issue. As stated by this Court in The Florida Bar re Schwarz, 552 So.2d 1094, 1098, the Bar "carries the burden of proof" that its legislative lobbying activities comport with the Schwarz II standards. The Bar has not sought to dispute the law on the burden of proof issue and has failed to meet its burden in this case.

As to the merits on the substantive issue, the agents of the Bar itself have recently acknowledged in an independent matter that its field of activities is narrowly limited. The current president of The Florida Bar propounded the following question to the Bar's principal independent legal counsel in these and related proceedings:

> Can The Florida Bar lawfully boycott a particular community in order to further certain social causes relating to the welfare of a minority ethnic group?[1]

In the opinion given in reply, Bar counsel applied Schwarz II, Gibson II and Keller to the question and concluded:

> 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

[1] See letter of October 127, 1990 to Honorable James Fox Miller, President, The Florida Bar from Barry Richard, Esq., Roberts, Boggett, LaFace & Richard. See Appendix A.

purpose and it is limited in its pursuits to fulfilling that purpose.[2]

This conclusion is dramatically at odds with the Bar's position concerning the Amended Petition as expressed under point 2 of its response (pp. 4-12). Petitioner briefly indicates the flaws in the response below.

The Bar's Response contends that each of the eight legislative positions challenged in the Amended Petition meets all three of the Schwarz II criteria standard for initiatives that fall outside the five standards for which lobbying is "clearly justified." The first criterion - great public interest - has no defined limit. Although Petitioner does not deny that the welfare of children is of great public interest in the abstract, the difficulty with this term is that its very breadth makes it a non-criterion.[3] Accepting the Bar's construction of it would simply equate the breadth of the Bar's lobbying power with the breadth of the legislature's power to legislate for the general welfare. This Court has always acknowledged that it is a court and that the Florida constitution has allocated the plenary police powers to the legislature and not to the judiciary. Hence, to serve any limiting function as stated in Schwarz II, the term "great public interest" must be constrained to fields that are directly and tightly related to the five

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[2] Id., p. 3.

[3] Petitioners assert that the list of causes that could satisfy this criterion is unlimited. It would include the elderly, the special problems of black men, violence against women, drugs, education, AIDS, the homeless, recreation, conservation, etc.

"clearly justified" areas of Schwarz II. The eight areas identified in the Amended Petition do not meet that standard.

Moreover, the second criterion - "that lawyers are especially suited by their training and experience to evaluate and explain the issue" - and the third - "the subject matter affects the rights of those likely to come into contact with the judicial system," - are not satisfied by the response. If the Bar's argument is taken to its logical conclusion, there is virtually no issue on which the Bar could not lobby. For example, suppose the Bar believed that the acknowledged general deterioration of highways in Florida was causing excessive highway crashes, property damages, personal injury, and deaths, and, consequently, resulting in excessive litigation. Would this be a sufficient tie to Schwarz II to permit the Bar to lobby the state legislature to increase spending on roads, highway safety, and related topics? Petitioner asserts that the special knowledge lawyers possess pertaining to the secondary and tertiary effects of these issues (i.e. representing clients in traffic crash litigation) is simply not within the Court's requirement in Schwarz II "that lawyers are especially suited by their training and experience to evaluate and explain the issue[s]," 552 So.2d at 1095, pertaining to highway funding and safety. The same is true of the substantive matters pertaining to children.

Similarly, by the same reasoning, Petitioner asserts that the connection between the "subject matter" of the lobbying position is too attenuated in logical and practical connection to satisfy

the criterion that it "affects the rights of those likely to come into contact with the judicial system" in the manner intended by this Court in the third of the additional Schwarz II criteria.[4]

In short, Petitioner asserts that if the Bar has authority to lobby on the eight issues challenged in the Amended Petition, Schwarz II contains no restriction on the issues the Bar could later decide to lobby. The Bar acknowledges no limiting principle. Petitioner asserts that the limit is set by the limited powers that exist within the judicial system under Article V of The Florida Constitution as set forth by this Court in Schwarz II.

POINT TWO: THIS COURT SHOULD RECONSIDER THE ADDITIONAL CRITERIA OF SCHWARZ II.

Part 2 of the Amended Petition (pp. 10-13) asserts that the three "additional criteria" of Schwarz II, as the Bar seeks to employ them, violate the First Amendment rights of dissenters. The Bar's response to this assertion (point 1, pp. 12-15) mixes the issues of sources of authority (i.e. the primary issue of Schwarz II) and limitations on power (i.e. Keller et.al.) to reach the conclusion that Keller somehow expands the Bar's authority. It is a truism, of course, but necessary for Petitioner to state, that the First Amendment is not a source of governmental authority (i.e. The Bar) but is a limitation on it.

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[4] I.e., "the subject matter affects the rights of those likely to come into contact with the judicial system." 552 So.2d at 1095.

In reply to The Bar's response, Petitioner merely repeats the limitations on power imposed upon The Bar by the First Amendment as applied in Keller:

> 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 its 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). (e.s.). 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. Accordingly, Petitioner asserts that the "three additional" criteria of Schwarz II provide no effective guidelines for the Bar and should be eliminated to protect the First Amendment rights of dissenting members of The Bar.

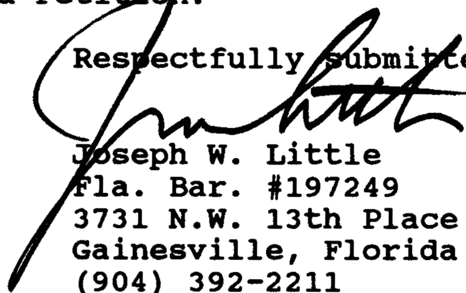
POINT THREE: THIS REPLY ADOPTS THE EXTENDED First Amendment ARGUMENTS PROPOUNDED IN THE SEPARATE REPLY OF PETITIONER FRANKEL.

For the sake of brevity, Petitioner Little adopts and endorses the extended First Amendment arguments propounded in the separate reply of Petitioner Frankel.

Conclusion

For the reasons stated above, Petitioner Little asserts that the eight legislative positions identified in the Amended Petition are outside the authority of the Bar as prescribed in Schwarz II and that the Bar by its actions has demonstrated that the three additional criteria of Schwarz II will not prevent it from violating the First Amendment rights of dissenting members. Accordingly, Petitioner respectfully requests this Court to grant the relief requested in paragraphs (1) through (8) stated in the Prayer for Relief of the Amended Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Reply was mailed to John F. Harkness, Jr., Esq., The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, and David P. Frankel, Esq., 4336 Garrison Street, N.W., Washington, D.C. 20016-4055, this 5 day of February, 1991.

Joseph W. Little