Nebraska Supreme Court
S-36-120001

Comments of David A. Domina (NSBA #11043)

Concerning Petition for a Rule Change to Create a Voluntary State Bar of Nebraska

Overview

1. As an individual member of the Nebraska State Bar Association (NSBA) in good standing, I respectfully submit comments in opposition to the Petition for a rule change to create a voluntary State Bar of Nebraska. Briefly, the Petition is respectfully opposed because:

    1.1. The governing law cited by the petitioner does not support the petitioner's position. The 1937 decision creating NSBA is ignored in the Petition.

    1.2. The Nebraska State Bar Association's continuing legal education programs are part, but not all, of the Bar's mission and service to the State.

    1.3. NSBA historically served as a forum for the legal profession and the community. It has done so by serving as a change agent, generally in areas where the application of the law is technical, and not of broad awareness or political interest to the public, but of significant importance to the judiciary, and to practicing lawyers.

2. The Nebraska State Bar Association provides a myriad of services that protect the public from:

    2.1. Unauthorized legal practice.
    2.2. Otherwise likely uninvestigated complaints against lawyers or judges.
    2.3. Lawyers suffering from addictions though its intervention processes.
    2.4. Incomplete service from lawyers who suffer impairments, unexpected disabilities, or who die prior to completion of services.
    2.5. Fee disputes with its dispute resolution processes.
    2.6. Ignorance of judicial processes with its education and awareness programs.

3. The Bar Association attempts to influence legislation. It can do better at this process, though it does well, generally. For example, a) NSBA makes a mistake by displaying the web links and address of its lobbyists on its website; b) the Bar fails to make its members aware of the standards used to select or define issues upon which NSBA will permit its lobbyist to comment, or on which NSBA takes position, and c) NSBA could do better at including its members in the process of selecting positions to be taken on legislative issues.

3.1. While improvements can be made in these areas, current circumstances do not impair NSBA's important public functions, or its appropriate status as an organization in which membership is a concurrent requisite to licensure as a Nebraska lawyer.

The Petition for a Rule Change Oversimplifies Its Legal Basis

4. The Petitioner's request that the Supreme Court's rules be modified to de-link Bar Association membership and licensure as a Nebraska lawyer suffers substantive analytical deficiencies. Petitioner's reliance on *Keller v. State Bar of California* 496 US 1 (1990), is only partially well-placed. Narrowly, *Keller* holds:

> … [T]he 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 the legal service available to the people of the State."

Keller at 14. But there is more to *Keller's* holding than Petitioner acknowledges. The Supreme Court observed in *Keller*:

> Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

Id at 16. This holding limits what NSBA can spend money upon. It limits the discretion of Bar officials to make expenditures, and it curbs lobbying on political issues unrelated to the kinds of technical matters of importance to the practice of law and the functioning of courts to which NSBA's lobbying efforts have generally been, and should always be, limited.

5. *Keller* cannot be read in a vacuum because its subject is an integrated bar association. Since 1990 when *Keller* was decided, other cases have clarified the right to assess persons to support a regulatory scheme or to finance speech affecting an industry. *Keller* is part of a:

> …line of cases [that] deals only with compelled funding, rather than compelled speech in the literal sense. *See United[States v United] Foods*, 533 US [405]at 417, 121 SCt 2334 [(2001)](Stevens, J., concurring) (noting that the regulation in *United Foods* was distinguishable from that in *Wooley* and *Barnette* because it did not compel speech itself, but rather the payment of money). *United Foods* reasons that the mushroom producers, who were not voluntarily collectivized, were being forced to fund the message to which they were opposed—that any mushroom is worth consuming regardless of its brand. 533 US at 411, 121 SCt 2334. In striking down the law, *United Foods* is careful to distinguish *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 US 457, 117 SCt 2130, 138 LEd2d 585 (1997)—a case that upheld mandatory advertising contributions—noting that the requirements at issue there were incidental to a "valid scheme of economic regulation" in which "the producers were bound together and required by the statute to market their products according to cooperative rules" and had therefore already surrendered many individual liberties to a collective entity. 533 US at 412, 121 SCt 2334. In the case of the mushroom law, by contrast, collective advertising was "the principal object of the regulatory scheme." *Id.*
>
> *Jerry Beeman & Pharmacy Services, Inc v Anthem Prescription Mgmt, LLC*, 652 F3d 1085, 1104 *reh'g en banc granted*, 661 F3d 1199 (9th Cir 2011).

6. The *Keller* decision approves the form of integrated Bar used in Nebraska. It limits the use of dues to purposes within the scope of its statutory authority and when it functions are entirely appropriate, with the exception of certain election campaigning. The *Keller* Court distinguished Bar membership compelled association in the context of labor unions serving only private economic interests in collective bargaining. This is true because Bar Associations serve "more substantial public interests."

7. *Keller* concludes that "the guiding standard for determining permissible Bar expenditures relating to political or ideological activities is whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services." 499 US at 18.

The NSBA's Founding Purpose Upon Integration; Current Rules

8. The Petition for Rule Change does not deal with the rationale for integration of the Bar adopted by the Nebraska Supreme Court in *In Re Integration of Nebraska State Bar Ass'n*, 133 Neb 283, 275 NW 265 (1937).

9. Many of the purposes for which the Nebraska Supreme Court originally ordered integration of the Bar remain valid. Without Supreme Court Rules which, until recently, were cohabitus with the NSBA, even disbarment was not provided for by the law of Nebraska. When integration was accomplished, Justice Carter, writing for the unanimous Court, observed the Court's inherent judicial power to exercise disciplinary control of lawyers, and take steps to assure "intellectual aid…be rendered [to] the Court by a competent Bar…" 275 NW 268. The Court noted that:

> "a good Bar is a necessity for a good bench; and the labors of the latter are lightened and rendered more effective by the learning and ability of the Bar, exactly as they are facilitated by efficient receivers, commissioners, referees…" *Id* at 268.

Id.

10. The Court concluded its 1937 opinion by creating, controlling and regulating the Nebraska State Bar Association. It did so…

> "For the advancement of the administration of justice according to law, and for the advancement of the honor and dignity of the legal profession, and encouragement of cordial intercourse among the members thereof, for the improvement of the service rendered the public by the Bench and Bar…"

275 NW 269. The Court's Order provides that "those persons, who…are residents of this State and are licensed to practice law in this State, and those who shall…become licensed…and are residents of this State, shall constitute the membership of the Nebraska State Bar Association." *Id*.

11. The Supreme Court established dues ($5.00 per year; $1.00 for inactive members), and a general organization that included seven (7) committees. The first committee created was the *Committee on Legislation*, which was ordered by the Supreme Court to fulfill this duty:

> "It shall be the duty of the Committee on Legislation to consider and recommend to the Association action concerning proposed legislation and Constitutional Amendments."

12. *In Re Integration* has been cited eighty-three (83) times, most recently in *State Ex Rel Commission on Unauthorized Practice of Law v. Tyler*, 283 Neb 736, ___ NW

2d ___ (2012). In *Tyler*, the Court noted that it has "inherent power to define and regulate the practice of law and as vested with exclusive power to determine the qualifications of persons who may be permitted to practice law. 283 Neb 739. The Supreme Court's rationale for organizing the Bar in 1937 included the need for:

> "F. a Committee on Unauthorized Practice of the Law"

275 NW at 271. In 2012, as the Tyler decision makes clear, this rationale for an integrated Bar, remains vibrant.

13. The Bar Association's Committee structure, identified upon integration in 1937, also include committees on Judiciary, Legal Education, American Citizenship, cooperation with the American Law Institute, and Finance. Today, the NSBA's Committees include:

    13.1. Legislation;
    13.2. Judicial Resources;
    13.3. Member Dues Grievance;
    13.4. Membership Support;
    13.5. Nebraska Lawyer Assistance Program;
    13.6. Publications;
    13.7. Real Estate Practice Guidelines;
    13.8. Volunteer Legal Services;
    13.9. Budget and Planning.

14. The Bar would do well to return to the committee names, and the structure and substructure consistent with *In Re Integration*. Its authority to stray from the Supreme Court's structure for the Bar is not known to me. I can find nothing in the Supreme Court's published opinions suggesting a basis for a committee structure different from that identified in 1937.

15. The Supreme Court has issued rules controlling the State Bar Association. *Neb Ct R* §§ 3-801 *et seq*. In these Rules, the Court provides for a "Budget and Planning Committee" and "other committees." §3-807. But it does not appear to have modified its pronouncement in *In Re Integration*. Since *In Re Integration* was a decision adjudicating a Petition, it may have legal superiority to the Court's published Rules. Rules do not adjudicate a matter; the ruling on the Petition for integration appears to have done so.

16. Nonetheless, the Rules limit the use of dues for "lobbying and related activity." *Neb Ct R* § 3-803 (B)(2) provides that:

> "(a) This Association may use dues to analyze and disseminate to its members information on proposed or pending legislative proposals.

> All lobbying activities shall be subject to the following restrictions: the Annual Dues Notice shall offer the members of the Bar an opportunity to direct the stated amount of their dues intended for lobbying activities to be placed instead in a restricted account. Funds from this account shall be budgeted by the executive council for activities which will promote the administration of justice or improvements of the legal system. The established budget for lobbying activities shall be reduced by the amount that is directed to the restricted account."

17. The Rules appear to accommodate objections in the Petitioner's Petition. They appear to provide a specific mechanism whereby each member of NSBA must, annually, decide whether a portion of dues will be used to fund lobbying, or will be placed in a restricted account. This selection is made by choosing to divert, or decline to divert, funds to the restricted account. Accordingly, no member is compelled to associate with the Bar in any lobbying manner, or to be viewed as associating with it in connection with lobbying activities. The Bar does not speak for any member who chooses to have funds placed in a restricted account because the Supreme Court's public rule makes clear that only members who do not divert funds to the restricted account are represented in lobbying activities.

18. Perhaps the Petitioner has an ideological difference with NSBA's position on issues it lobbies from time to time, about what laws for regulations affecting the practice of law or the functions of the Courts should be. Petitioner can readily segregate himself from the otherwise integrated NSBA by diverting the relevant portion of his annual dues to the restricted account created by §3-803.

Practical Issues

19. Petitioner's ideological differences with NSBA ought not disenfranchise members who desire to expend funds to support NSBA activities. No organization NSBA's size can function if it cannot express a position on behalf of its members on legitimate subjects over the voice of a single dissenter, or a handful, of dissenters. NSBA's activities do not prevent a dissenter from being heard. Indeed, the dissenter's voice might gain volume by separation from the Bar, and contrast with the Bar's position. Certainly, no mistake about association with the Bar will occur as a result of a position expressed by NSBA lobbyists who speak on behalf of those who fund the lobbying effort.

20. NSBA's activities relate to defined matters. The Supreme Court retains control over those matters, and regulates the Bar with its Rules. Adhering closely to the principals announced in *Keller*, the Supreme Court has avoided Rules, or dues-for-members structures, that "compel members to fund activities of an ideological nature that are not germane to the state interest justifying compelled membership." 1 *Smolla & Nimmer on Freedom of Speech* § 4:26 (Westlaw 2012).

21. At least one scholar has noted that "one of the most fundamental questions concerning how a lawyer is to serve the People focuses on the relationship between the lawyer and the non-lawyer individual or association (political, business, religious, or of some other kind). Specifically, is it permissible for a lawyer to choose whom he or she represents?" *Anand, The Role of the Lawyer in the American Democracy*, 77 Fordham L Rev 1611, 1625 (2009).

22. The work of the Bar Association is more mundane. Its focus is upon the nuts and bolts: do the Courts work as a practical matter, are they funded adequately, do they have enough personnel? Are lawyers responsibly educated, or given sufficient opportunities for responsible continuing education? Is someone, on an organizational basis, assisting members of the Bar to keep any eye on the Legislature, to assure that defunding of the judiciary does not occur because the judiciary is without its own political voice absent its members.

23. Nothing in the Supreme Court's 1937 integration decision, current rules, or NSBA's mission statement (www.nebar.com/displaycommon.cfm?an=3) suggests a political message or hints at any perception that it would be proper for the NSBA to participate in political activity. Organizationally, I can find no indication that the NSBA advances a political agenda.

Suggestions for NSBA

24. These suggestions are respectfully made for the NSBA's consideration and consideration by the Supreme Court:

    24.1. Return, by name, to the committee system established in *In Re Integration* in 1937 and ask for formal decisions about changes to the committee structure in the Court's opinion, with subcommittees used freely.

    24.2. Provide an alternative to formal disciplinary complaints with the Supreme Court's Office of Counsel for Discipline.

    24.3. Publish guidelines used by the Association's leadership to ascertain positions on legislation. Do not link from the NSBA website to the law firm that lobbies for the Bar.

    24.4. Offer at least one hour of free CLE to every member, preferably in the area of ethics, annually. (Perhaps it could be offered annually by the immediate past President, for example.)

Conclusion

25. I respectfully oppose the "Petition for a Rule Change to Create a Voluntary State Bar of Nebraska." The Petition is not well founded legally, does not connect thoughtfully to the Supreme Court's governing rules concerning dues, and cites no meaningful historical precedent suggesting that NSBA has strayed into lobbying on controversial issues, and fails to link to the Supreme Court's 1937 decision to make NSBA membership for lawyers practicing in Nebraska mandatory.

Respectfully

David A Domina, NSBA # 11043
2425 S 144th St
Omaha NE 68144-3267
402 493 4100
ddomina@dominalaw.com