Bill as Introduced

SB 412-FN – AS INTRODUCED

2000 SESSION

00-2646
09/10

SENATE BILL ***412-FN***

AN ACT adopting the "Court Integrity and Attorney's Independence Act."

SPONSORS: Sen. Roberge, Dist 9; Sen. Brown, Dist 17; Rep. Bickford, Straf 1

COMMITTEE: Judiciary

ANALYSIS

This bill adopts a "Court Integrity and Attorney's Independence Act" which:

I. Provides that all part-time judges be phased out by January 1, 2006.

II. Terminates the integration of the New Hampshire Bar Association.

III. Makes the New Hampshire Bar Foundation an independent charity.

IV. Reestablishes the judicial conduct committee as a board which is independent of the judiciary.

V. Reestablishes the professional conduct committee as a board which is independent of the Bar Association and the courts.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears ~~[in brackets and struckthrough.]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

00-2646
09/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand

AN ACT adopting the "Court Integrity and Attorney's Independence Act."

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Title. This act shall be known as the "Court Integrity and Attorney's Independence Act."

2 State Judges to be Full-time. Beginning January 1, 2006, all state judges shall be full-time and shall not act as legal counsel in the state of New Hampshire.

3 Judicial Salaries: Reference to Prohibition From Practice Removed. Amend RSA 491-A:1 to read as follows:

491-A:1 Salaries Established. The salaries for the positions set forth below shall be as follows:

Chief justice, supreme court	$109,848
Associate justices, supreme court	$106,518
Chief justice, superior court	$106,518
Associate justices, superior court	$ 99,861
District court justices [~~prohibited from practice pursuant to RSA 502-A:21~~]	$ 99,861
Probate judges [~~prohibited from practice pursuant to RSA 547:2-a~~]	$ 99,861

4 Disqualification of Justices. RSA 502-A:21 is repealed and reenacted to read as follows:

502-A:21 Disqualifications of Justices. No justice, associate justice, special justice or clerk of any district or municipal court shall be retained or employed as attorney in any action, complaint, or proceeding pending in any court in this state.

5 District Court Justices; Prohibition on Practice of Law. RSA 502-A:21-a is repealed and reenacted to read as follows:

502-A:21-a Prohibition on Practice of Law. A district court justice shall not be permitted to engage in the practice of law to any degree. District court justices shall, when requested by the supreme court, assist other district courts whenever a justice in such other court is disqualified, disabled, otherwise unable to sit, or in need of assistance.

6 Probate Judges; Prohibition on Practice of Law. RSA 547:2-a is repealed and reenacted to read as follows:

547:2-a Prohibition on Practice of Law; Disqualification. A probate judge shall not be permitted to engage in the practice of law to any degree. Probate judges shall receive the salary specified in RSA 491-A:1 and shall be entitled to the same disability and retirement benefits as justices of the

district court. Probate judges designated pursuant to RSA 491-A:4, IV shall assist the probate courts in the other counties whenever a probate judge in such other county is disqualified, disabled, or otherwise unable to sit.

7 Probate Judges; Prohibition on Acting as Counsel. RSA 547:13 is repealed and reenacted to read as follows:

547:13 Acting as Counsel. A probate judge shall not act as counsel or advocate in any business in, or which may be brought into any probate court. Probate judges under RSA 547:2-a shall be prohibited from the practice of law to any degree.

8 Repeal. The following are repealed:

I. RSA 491-A:3, relative to salaries for part-time district court justices.

II. RSA 491-A:4, relative to salaries for part-time probate judges.

9 New Section; Bar Association Membership not Mandatory. Amend RSA 311 by inserting after section 2 the following new section:

311:2-a Bar Association Membership not Mandatory. No attorney shall be required to be a member of the New Hampshire Bar Association in order to practice law in this state.

10 New Subdivision; New Hampshire Bar Foundation. Amend RSA 311 by inserting after section 13 the following new subdivision:

New Hampshire Bar Foundation

311:14 New Hampshire Bar Foundation. The New Hampshire Bar Foundation shall be maintained as an independent charity. Attorneys and law firms which contribute their client's funds to this charitable fund shall not make decisions regarding the disposition of moneys from the fund.

11 Subdivision Heading. Amend the subdivision heading preceding RSA 490:30 to read as follows:

[~~Committee on~~] Judicial Conduct ***Board***

12 Committee on Judicial Conduct Reestablished as Judicial Conduct Board. RSA 490:30 is repealed and reenacted to read as follows:

490:30 Judicial Conduct Board. The judicial conduct board, established by rule of the supreme court, shall be independent of the judiciary. No judges shall be members of the board. The board shall be managed by an administrator, who shall be a classified state employee. The administrator shall be responsible for reviewing complaints and initiating appropriate legal action for those complaints which are considered potential violations of the Code of Judicial Conduct.

13 New Section; Professional Conduct Board. Amend RSA 311 by inserting after section 8 the following new section:

311:8-a Professional Conduct Board. The professional conduct board, established by rule of the supreme court, shall be independent of the New Hampshire Bar Association and the courts. No judge or attorney shall be a member of the board. The board shall be managed by an administrator, who shall be a classified state employee. The administrator shall be responsible for reviewing

complaints and initiating appropriate legal action for those complaints which are considered to be violations of the Rules of Professional Conduct. The costs of operating the board shall be assessed against attorneys on an annual basis.

14 Attorney Professional Conduct Board. The professional conduct board established under RSA 311:8-a replaces the professional conduct committee on the effective date of this section.

15 Effective Date.

I. Sections 2-8 of this act shall take effect January 1, 2006.

II. The remainder of this act shall take effect January 1, 2001.

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SB 412-FN - FISCAL NOTE

AN ACT adopting the "Court Integrity and Attorney's Independence Act."

FISCAL IMPACT:

The Office of Legislative Budget Assistant is unable to complete a fiscal note for this bill as it is awaiting information from an agency.

Committee Minutes

Date: 1/12/00
Time: 11:00AM
Room: 103SH

The Senate Committee on Judiciary held a hearing on the following:

SB412 adopting the "Court Integrity and Attorney's Independence Act.."

Members of Committee present:
Senator Pignatelli
Senator Gordon
Senator Brown
Senator Cohen
Senator Eaton
Senator Fernald
Senator Squires
Senator Trombly
Senator Wheeler

The Chair, Senator Katie Wheeler, opened the hearing.
I.
Senator Katherine W. Wheeler, D. 21: (Acting as Chair) I'm going to open the hearing on Senate Bill 412, *adopting the "Court Integrity and Attorney's Independence Act.."*

Call on the prime sponsor, Senator Roberge.

Senator Sheila Roberge, D. 9: Madame Chair and members of the committee. Due to the fact that this bill was late coming out of Legislative Services and very early it being scheduled for a hearing. I would ask that this hearing be postponed to a later date and be given a date when the bill will be heard at some other time.

Senator Katherine W. Wheeler, D. 21: I'm certain that Chair Pignatelli will agree to that. But, as a number of people have come today to testify and as we are fortunate to have a wonderful person that's going to record this and transcribe it, so your words will not be lost.

Anyone who wishes to testify today should feel free to do that and I would encourage Senator Pignatelli to call on anyone who wishes to testify later at that time also.

So Caroline Douglas, would you like to testify today?

Caroline Douglas: I actually would like to testify the later time; however I'm not sure from what you just said whether that's certain and there will be a later time?

Senator Katherine W. Wheeler, D. 21: Oh yes. There will be.

Caroline Douglas: Would I be allowed to address it then? Because I don't have my exhibits prepared today?

Senator Katherine W. Wheeler, D. 21: Yes..

Caroline Douglas: Then, I'll just make a brief comment now. My name is Caroline Douglas and I'm an attorney and I'm testifying in favor of this bill. I'd like to tell the committee members that I know of other attorneys who would support this bill. But we have discussed they're appearing here with brown-bags on their head and voice disguisers, somewhat in jest, and yet, not really.

I think that you're going to find a lack of attorneys who are willing to publicly come out and support this bill because they fear retaliation. I think that I'm at the point in my career where retaliation isn't a factor for me.

I believe that it's very, very important to poll the Bar Association and licensing of attorneys away from the Bar Association as it currently exists. Because it's been given so many powers, which have, in my opinion been improperly used to retaliate against attorneys like me, who are whistle blowers.

I think the Bar could function very, very well as a lobbying association and as a charitable organization and it can do what it does well, which is a function of the American Bar Association. Those lobbying functions really have nothing to do with the licensing functions of attorneys.

Not all states have an integrated Bar. It should be possible to be a licensed attorney without being a member of this rather extensive lobbying organization. It costs us over $500 a year just to be a member of this Association.

My biggest problem is that we have something called a Judicial Conduct Committee and a Professional Conduct Committee over all attorneys and all judges. Because of the way that those committees function currently, even with the reform, they are able to be ineffective in their function of protecting the public and they are able to be very effective as a tool of retaliation against attorneys who speak out.

I come to you today as an attorney who has been a very outspoken critic, not only of the Bar Association, but of our court system, as it functions today with all of its defects. What I propose, next time I testify, is, I will have a packet of exhibits that will support and, hopefully(sound like) persuade you that they are not being administered fairly as they could in a manner which promotes justice.

That is my position on that. I think we have already some hearings. You are going to hear from members of the Bar and members of the Judiciary who are going to tell you how well the Judicial Conduct Committee functions. How well the Professional Conduct Committee functions. I think, perhaps, every committee member here has received some of my packets that I have sent out over the last 2 years.

I have over 100 pages of packets, a 100 page packet of why, I believe, the Professional Conduct Committee operates with a 3 tiered system. They have 1 system of preferential treatment for attorneys who are privileged and powerful attorneys. A lot of times those complaints won't even docketed. More than 50% of the complaints against attorneys never even get assigned a docket number.

You can't track them, they operate in a secret society of piers. They operate without minimum due process. The rules and initial hearings of those committees, I think, are like a star's chambers(sounds like). They operate, not only without minimum knowledge of the charges which pend against you.

They don't have adequate rules to allow representation, opportunity to confront your accusers, a fair hearing by an impartial tribunal. The Supreme Court Professional Conduct Committee acts, not only as a prosecutor, they act as the investigator....

Senator Katherine W. Wheeler, D. 21: Attorney Douglas, I'm sorry to interrupt you, but, if you're planning to testify at another time, I'd rather you not give a full testimony now. That's what I'm going to ask of all the other people, too. That if you want to make sort of an opening statement, telling us

that you're going to testify more at length later, that's fine, but we don't really want 2 sets of long testimony.

Caroline Douglas: That's fine, I'll keep it very brief. I think I can just say that I support this bill for a variety of reasons. I have sent almost everybody information about it, but I will do it in much further depth and I think that there is a real need for this state to have a full hearing with lots of people and with press and with lots of knowledge about what this is.

I would encourage the committee to look at how other states do it. To recognize that the Bar Association is an integrated unit is an effective part of the National Bar Association Lobbying unit and that we should be allowed to practice our profession without being a member or the Bar and without being subject to those rules and administration.

The rest of occupations in New Hampshire are regulated by the Legislature. I used to be a bill drafter, and I drafted all the occupational regulation bills. I was just stunned to find that doctors and everyone else, land surveyors, estuations(sounds like), everyone else is regulated by the Legislature.

You certainly have the ability to regulate attorneys and to protect the public safety. To carve out this little niche that they did in the 1960's and early 70's and make attorneys mandatorily be members of this is something that's a relatively new concept that's only 30 years old. I'd encourage you to get some hindsight and look backwards in time. It's not a new, special concept and I think it should be changed. Thank you very much for your time.

Senator Katherine W. Wheeler, D. 21: Thank you. A lot of people have signed up and have not...oh yes, they all said up they wish to speak, I was just looking at the wrong column, it's a new format. Nina Gardner? I'll say the same thing, you're welcome to give your full testimony now or an introduction and a full testimony later.

Nina Gardner: Thank you Senator Wheeler and members of the committee. For the record, my name is Nina Gardner. I'm the Executive Director of New Hampshire Judicial Counsel and my testimony this morning will be introductory and brief.

I merely wanted to let this committee know, and I've spoken to Senator Roberge, to let her know that the Judicial Counsel, more that 1 year ago began to undertake a study of the issue of full time and part time judges in this state.

Many years ago the Judicial Counsel did a study that led to the consolidation of the district and municipal courts. The phase(sounds like) that took place such, that eventually, there will be no more municipal courts. Based upon that historical study, we looked at the question of whether or not the state might be better served in a different system of judicial resources which might look at, whether or not the part time judge system should be phased out over time.

We are engaged in that study at the present time, it's a study that is ongoing and will be ongoing probably for a good year. We have the services of a Franklin Pierce law student. I wanted to let you know that this independent study is going on at this time.

So you'll know, the Judicial Counsel is an Executive Branch Agency established 52 years ago. I am the Executive Director and I am not a lawyer, there are more than 7 members of the counsel who are, what we describe in the statute(sounds like) as lay persons and more that half the committee that is studying this issue is composed of these lay members. The other members of the committee are some of the judges who have been providing us with information on the current nature of the present system.

I would like to keep you informed with what's going on with that study and urge you to, perhaps, defer action on any kind of transition from the present system until we complete our study. If any of you would like to-we will be holding public hearings on this study around the state as we go forward.

We are modeling after the project we did with the family court in which we held studies around the state and heard from the public as well.

I'll be glad to answer any questions.

Senator Katherine W. Wheeler, D. 21: Are there any questions?

Nina Gardner: Thank you.

Senator Katherine W. Wheeler, D. 21: Senator Cohen, while you were gone...Thank you very much.

Nina Gardner: Your welcome.

Senator Katherine W. Wheeler, D. 21: [addressing Senator Cohen] While you were gone, I tried to follow a model that Senator Gordon established over the summer. People who wish to make opening statements now and testify

more fully at a later date may do that or people will give their complete testimony now, then they can testify at either one. Does that seem to be..

Senator Burton J. Cohen, D. 24: Sure.

Senator Katherine W. Wheeler, D. 21: All right? So, I'm just going to go down the list, and those that are on the list, I'll give an opportunity to speak afterwards. George Moore?

George Moore: Today, I'll speak only very briefly. My name is George Moore, I'm the President of the New Hampshire Bar Association. I was going to speak at some length concerning the section of Senator Roberge's bill dealing with the fact(sounds like),New Hampshire Bar Association as a unified Bar.

In fact, by unified meaning that all practicing attorneys in the state have to be members of the Association in order to practice. It has been a unified Bar for over thirty years. There are significant public policy reasons why the Bar became unified thirty years ago. Which includes the method by which lawyers fulfill their public obligations to the poor and less fortunate in our society.

The way the Bar functions from the standpoint of the discipline process and the way that the organization itself provides the type of access to justice that we have a good reason to be proud of here in New Hampshire. I think that this bill has several sections which would fundamentally change the delivery of justice to citizens in New Hampshire and would make a significant difference in the amount of public effort given to the public, both by members of the Bar and the organizations, with discipline Bar being particularly the PCC(sounds like).

Where this has come out rather quickly for public hearing, I have not made available, but I certainly can make available to the committee, if it wants, the documentation that existed giving the public policy reasons why the Bar was integrated back in the late 1960's.

There is a significant amount of information about that, that discusses it in some detail that certainly would clarify anything I could say before you. The compelling reasons why New Hampshire, like a majority of other states, not all, but a majority of other states, have a unified Bar to better effectuate the public purposes of the Bar.

So, as you go to the second, whenever this is scheduled for a second hearing, certainly, if any member of the committee wants to be in touch with the

association, through either myself personally, at my office, which is 669-1000 in Manchester or through Jean(sounds like) McCoy, the Executive Director of the Bar Association which is 224-6942. We will make available the documentation which initially unified the Bar and how the Bar has been operating, as I say, for the past 30 years.

Because it's an involved subject, a subject which went through a considerable public process at the time and to simply attempt to dismantle that system on the basis-without research, I think, is moving too quickly. I make that offer and I will be back to talk more substantly(sounds like) about the bill. when it comes for hearing, whenever you reschedule it.

Senator Katherine W. Wheeler, D. 21: Thank you. I would suggest that the documentation about the formation of the Unified Bar would be important to the committee to have as well as what other states have such a system.

Any other questions from the committee? I'm going to suggest to Senator Pignatelli that she allow a great deal of time.

[Laughter]

Anthony McManus: Good morning. I'm here as Vice-Chair the New Hampshire Bar Foundation. I think the committee has received a letter from Charles DeGrandpre [see Attachment 1-1st Hearing] who is the Chairman, but I just wanted to follow-up on some of the comments that he made.

I'm not aware that any of the sponsors of the legislation have approached any member of the Board or our Executive Director to find out exactly what we do. I'm not aware for the reasons for wanting to do away with the New Hampshire Bar Foundation. I'd just like to explain 1 area that we deal with and that's the IOLTA funds (refer to Attachment 1-1st Hearing). An IOLTA is "Interest on Lawyers Trust Accounts". That forms a major part of our income and the money that we have to distribute to the system of justice is the state of New Hampshire.

IOLTA exists only because of a Supreme Court Rule that allows this to be done. There are very limited circumstances in which we can use that money and distribute that money and pay out to grantees. If the Bar Foundation was disestablished or done away with, the rule regarding IOLTA would no longer apply to an independent charity, as described in the legislation.

That money would not be available to the independent charity and would not be able to be distributed. The Bar Foundation, each year, pays, in the past few years, it's been over $800,000 annually to New Hampshire Legal

Assistance. It's a major portion of their funding. If that money is no longer available through IOLTA and not available through distribution, the question then becomes how does New Hampshire Legal Assistance make up that amount of money.

I would suggest that they would be looking to the State of New Hampshire to provide that difference. I think the state supports New Hampshire Legal Assistance to some degree in some related programs, but the question, in my mind, would be if the Bar Foundation no longer is functioning, where is that money going to come from? Is it going to be a charge against the state.

I noticed that the financial group asked for some additional time because they hadn't been able to calculate the cost to the state, as a result of this legislation. But I would suggest to you that's one affect it would have.

In terms of the specific legislation, I don't know what an Independent Charity means. The New Hampshire Bar Foundation is a separate 501[c]3 organization. It functions charitable organization, it's subject to the rules and regulations of IRS. It's subject to the rules and regulations and oversight of the Attorney General's office.

We are audited on an annual basis, the board members are bonded. The legislation doesn't say if an independent charity were created, who would be on the board. Who appoints the board, it says that lawyers or law firms can't decide where the money goes, but it doesn't say who does decide.

So, just simply to do away with an organization that has existed successfully and contributed substantially to the system of justice in the State of New Hampshire for a number of years, just doesn't make any sense at all.

I'd also like to make a comment regarding the professional conduct committee. I was a member of the committee for 9 years and have represented that committee as Bar Council on a number of others cases over the last 3 to 4 years. Point out to you that Professional Conduct Committee works as it does because we do have an integrated Bar and, as a member of the New Hampshire Bar Association.

We are all subject to the code of professional responsibility which is adopted by the New Hampshire Supreme Court. The Supreme Court through the Professional Conduct Committee, which is a Supreme Court Committee and not a Bar Association Committee, reviews complaints and applies discipline.

My fear is that, if you do away with the integrated Bar and a member who is no longer a member of the Bar Association, does something that would,

otherwise be professional misconduct, what is the system for disciplining that person who's no longer a member and no longer subject to the Supreme Court? The legislation certainly doesn't address that.

My concern would be what authority does the Replacement Committee have to enforce the code of professional responsibility? Again, the legislation doesn't say who would be on the committee, who would appoint the committee, who would be responsible for oversight for the committee and who would pay for the cost of the committee, which now is underwritten by members of the Bar Association and the court system.

It seems to me that, if you were going to have any kind of committee, it becomes a state function to pay for that. There's no indication of how that's going to be done or what the cost of that is going to be.

Certainly, in its present form, the legislation doesn't make any sense and would be an extreme burden on the state and the citizens of the state who now receive legal services through the good offices(sounds like) of the Bar Foundation. I'd be glad to answer any questions that any member of the committee might have.

Senator Katherine W. Wheeler, D. 21: Any questions for Mr. McManus? .., Thank you for your testimony.

Anthony McManus: Thank you.

Senator Katherine W. Wheeler, D. 21: As I turn these proceedings back to the

Senator Edward M. Gordon, D. 2: No, no I think that's all right with me.

Senator Katherine W. Wheeler, D. 21: Well I established the precedent and I used your name for establishing. As Senator Roberge asked for the bill to be recessed I said that if people wanted to make brief, opening remarks now, they could give their fuller testimony at the recess date.

Senator Edward M. Gordon, D. 2: Okay.

Senator Katherine W. Wheeler, D. 21: Is that okay?

Senator Edward M. Gordon, D. 2: It makes a lot of sense to me.

Senator Katherine W. Wheeler, D. 21: I thought it was a good precedent.

Senator Edward M. Gordon, D. 2: No you go ahead.

Senator Katherine W. Wheeler, D. 21: Kevin Duncan.

Kevin Duncan: Thank you Senator. I won't even bother to sit down because my conducts are so brief that as not to require it. I'm here for the New Hampshire Trial Lawyers Association. To express our opposition to the bill and we'll save the details for the later hearing. Thank you.

Senator Katherine W. Wheeler, D. 21: Model of brevity. Howard Zibel.

Howard Zibel: I will not be the model of brevity. I have decided to go forward with my testimony because I have some handouts which I think may be helpful to the committee in preparing for the full testimony. I guess, that way?

I have 3 things, 1 is my remarks, so any senators, who are not here will have the benefit of them. Then I have the latest annual reports for both the Judicial and Professional Conduct Committees. They cover the year 1998.

Thank you Senator Wheeler and members of the Committee. My name if Howard Zibel, I am the Clerk and Reporter of Decisions for the New Hampshire Supreme Court and also the Executive Secretary of the Judicial Conduct Committee.

Refer to Attachment #2-1st hearing-1/12/00

That ends my prepared remarks. One thing that I would like to add is that the new judicial conduct rules are appended to that report that I passed out. In response to one thing said by Caroline Douglas, just to clarify, that that 60% of filings with the Professional Conduct which are not docketed as complaints will be made public, effective with the new rules., prospectively.

Those matters not docketed will be subject to public scrutiny. I'm available for questions.

Senator Katherine W. Wheeler, D. 21: Are there any questions for Mr. Zibel? Senator Squires.

Senator James W. Squires, D. 12: Mr. Zibel. I know this is going to sound ignorant, and it is, but, would clarify or summarize or set out for me the role of the Bar Association in the judicial system. My model, obviously, is the medical society which is not similar, but sort of in the same range. You have to-the Bar gives an exam and-which you have to pass to get a license?

Howard Zibel: Right, the Bar Association has no role in that exam. The Supreme Court appoints a Board of Bar Examiners. Naturally, the Supreme Court appoints 2 committees that are involved in the Bar Admissions process. To take that aspect of your question.

The first of those is the Board of Bar Exams. There are 13 members of the Board of Bar examiners, all lawyers in the state. They prepare the Bar exam. My office actually administers it, does the physical administration of it. They prepare, 1 day of the exam to 2 day exam. 1 day is a national examination called, The Multi-State Bar Exam prepared under the auspices of The National Conference of Bar Examiners, we give that 1 day. The 2nd day is an examination prepared by the examiners appointed by the court. Consists of 12 essay questions.

The 2nd committee involved in Bar Admissions is the Character and Fitness Committee. Appointed by the court, it has 7 members, I believe, on it. One public member, actually a member of the, I believe she's a member of the House, Elizabeth Corey(sounds like) is the public member on the Character and Fitness Committee.

That committee's oversight is, just what it says, to look into the character and the fitness of a prospective-of an applicant to be a member of the Bar. They're character and fitness to practice law and there actually have been instances where there's been denial on character issues.

Senator James W. Squires, D. 12: In practical terms-and maybe Senator Gordon could answer this, or somebody-what does it mean to be a member of the Bar or not when it comes to practicing law, in New Hampshire...

Howard Zibel: As an integrated Bar Association, you've heard the term, "integrated Bar", that means that you must be a member of the Bar Association in order to practice law in New Hampshire. It's a requirement to practicing law in the State of New Hampshire to be a member of the New Hampshire Bar Association.

Senator James W. Squires, D. 12: So, that then, where comes the disciplinary power. I mean does the Bar sanction people, does it review people or..?

Howard Zibel: No, the Bar has no disciplinary power over lawyers. Only the Supreme Court does. I guess in one sense, the Bar does monitor the dues structure and the Bar reports to the court, those people who haven't paid dues. Since membership is a requirement for practice, if you don't pay your dues you get suspended. There's a whole series of notice from the Bar,

eventually get suspended by the Court if you don't pay your dues and you can't practice law.

In that sense, that's the only oversight where the Bar Association would have some play in the ability to practice law. In terms of discipline for violating the rules of professional conduct, that is solely in the hands of the Professional Conduct Committee, which is a committee appointed by the Supreme Court.

Senator James W. Squires, D. 12: Is it true that if I choose so, I can have a non-attorney represent me in a court action and, if so, is that individual not practicing law?

Howard Zibel: You can, New Hampshire is very liberal, on that score. RSA311-1(section 1) allows citizens to be represented by non-lawyers. There are 2 requirements: 1)the non-lawyer doing the representation must be a citizen of good character; 2)must not be doing so commonly.

There have been no cases that have interpreted *"commonly"*. Those are the 2 requirements to be allowed to be represented by a non-lawyer.

Senator James W. Squires, D. 12: So in that situation, is it fair to say that someone is practicing law who is not a member of the Bar?

Howard Zibel: In that limited situation, they could be.

Senator James W. Squires, D. 12: Okay.

Howard Zibel: The difference would be, if they start doing it *"commonly"*, they would then run a fall of the statute(sounds like).

Senator Katherine W. Wheeler, D. 21: Any further questions for Mr. Zibel?

Senator Edward M. Gordon, D. 2: Do you plan to come back again?

Howard Zibel: I will come back and be available for questions on a recessed hearing.

Senator Edward M. Gordon, D. 2: There are 2 things that intrigue me most about the bill are- the issue to do away with part-time judges. I guess the question is is I'm not sure you're asked as Clerk of the Supreme Court, you're going to be able to answer this, but, is it possible to reorganize the probate courts and district courts in such a way as you would be able to have a full time judiciary at a current level of expense for salaries?

Howard Zibel: I don't know about the current level of expense. It would probably be best asked of the administrative judges of those systems. There's no question that complete reorganizing into a full time judiciary. However, you've got to realize that it would take many years to accomplish this.

The, I think, 1963-64 legislature eliminated lay judges from the district court. Eliminated the municipal court system and eliminated the lay judges. Thirty-Eight years later, I think there's still one municipal court still functioning because they couldn't do away, constitutionally, with people appointed. If the legislature embarks on a full time judiciary, I don't know if it'll take 40 years, but it's going to take well into the 1st half of this century before you'll see your work come to fruition.

Speaking, personally, I would urge that. I think there's been a lot of talk in the past, going back to the John Fairbanks situation of the problems of the part-time judiciary. I have seen a little bit, nothing of a serious nature, but I have seen problems with the part-time judiciary in my work on the Judicial Conduct Committee.

Senator Edward M. Gordon, D. 2: The other area that intrigues me the most is the integration of the Bar Association. I guess I'm trying to figure out the down side. If the legislature were to say that we no longer want to have an integrated Bar and say that the court will continue to determine qualifications to practice in New Hampshire courts, but, you don't necessarily have to be a member of the New Hampshire Bar Association to practice her. Would there be any consequence to the court if we(sounds like) did that?

Howard Zibel: Consequence to the court?

Senator Edward M. Gordon, D. 2: Yes.

Howard Zibel: I guess the Bar would speak for itself, I don't particularly see consequence to the court. I see a tremendous down side to the public in the State of New Hampshire, tremendous.

Speaking personally, for 5 years I chaired the Bar Association's committee in Law Related education. Dealing with getting education about the law into the school systems of New Hampshire. An integrated Bar makes that possible, Senator.

That dues structure allows the Bar Association to have somebody on staff who is the Law Related Education coordinator. Who can run the mock trial in which something like 30 or 40 schools in the State of New Hampshire participate. Who run the "We the People Program" which I've been very

active in, which is a high school level competition on the Constitution and Bill of Rights.

Who Can Run lawyer in every school day in May in conjunction with Law Day. Generally, you've had 300 to 400 lawyers going out to the schools and reach approximately 15,000 student in that one day.

These things happen because there's a Bar Association with enough dues structure to do these public things in the public's interest. Now lawyers would still be free without an integrated Bar to do all these things. But, I can guarantee you, without that coordination that the New Hampshire Bar Association offers, things like that wouldn't happen.

That goes on, I'm sure the Bar could fill you in on the legal services to the poor and efforts on that. Public information pamphlets that the Bar Association puts out a myriad of things.

I think the downside would not be so much the New Hampshire Supreme Court as it would be to the citizens of the State of New Hampshire.

Senator Katherine W. Wheeler, D. 21: Any other questions for Mr. Zibel? I see none, thank you very much for your testimony. Maureen Manning.

Maureen Manning: Thank you. My name is Maureen Raiche Manning and I will leave remarks, primarily, for another day and just briefly address the part of the bill that deals with the New Hampshire Bar Foundation. I have been a member of the New Hampshire Bar, and an attorney practicing law since 1986. In 1997, I was asked to serve on the New Hampshire Bar Foundation Board and have been on that Board since then.

I don't know what the bill is intended to cover, which is primarily why I'm going to preserve my comments for another day. We already are an independent charity so I don't know what the intent of the sponsors are in using that phrase, *"independent charity"*.

I'd be interested to hear what they have to say on that and, on the point of, attorneys and law firms contributing client funds and then having a say in things. As it is now, attorneys and law firms do not contribute any client funds to the New Hampshire Bar Foundation.

It is not client funds that run the Bar Foundation, that keep the legal services in this state going. I think that there's a misunderstanding about what the Bar Foundation does and, again, I would hope when the sponsors testify about the bill they clear that up for us and, perhaps, in the interim, we

might be able to get a little information on their misunderstanding as well. It would help clear things up for the committee.

I'd be happy to take any questions now. I would certainly anticipate that a follow-up hearing, there'll be a lot more questions by this committee. Thank you.

Senator Katherine W. Wheeler, D. 21: Thanks. Are there any questions for Attorney Manning? I see none, thank you very much.

Maureen Manning: Thank you.

Senator Katherine W. Wheeler, D. 21: Mr. Cushman.

William Cushman: I don't need to speak.

Senator Katherine W. Wheeler, D. 21: You'll wait until another time?

William Cushman: Thank you.

Senator Katherine W. Wheeler, D. 21: Is there anyone else in the room who would like to speak now?

Ken Blevins: Thank you, Senator Wheeler, thank you committee members. My name is Ken Blevins. I just wanted to express, very shortly, a problem that I have with the Judiciary in respect to its function within this state.

It goes back some 30 years and I think this has been mentioned by previous speakers. The problem seems to have started about 30 years ago and, about that time, there were amendments to the New Hampshire Constitution. I refer specifically to Article 41, Article 72A and Article 73A.

Probably of the 3, the one known most by the general public is Article 73A, where there appeared in this article, the sentence, "T*he rules so promulgated shall have the force and effect of the law.*" This really has struck a nerve with a lot of people, the implication is, that the court can now make law.

If I could ask the committee to do 2 things. Find out how that wording got in the constitution as it was not on the ballot. It was not on the ballot when we voted on the issue. How did it get in the constitution? The fact is, should it be there, if it was not on the ballot.

As far as the other 2 amendments to the constitution, I would like to see this committee come out with a recommendation that all 3 of these amendments

be repealed and the citizens of this state have the opportunity to at least vote on that out of this legislature because it is a very important factor in this whole equation.

It is basis that the court is acting on, I believe. I think if this committee could address that, it would bring a lot of closure to this complete issue. The State of New Hampshire should be represented by the people's representatives and that's this body and not the court.

I'm trying to be short on this, I'll be more thorough later on. If there's any questions, I'll be happy to answer them.

Senator Katherine W. Wheeler, D. 21: Any questions? I see none, thank you very much.

Ken Blevins: Thank you.

Senator Katherine W. Wheeler, D. 21: Mr. Haas, did you wish to testify?

Joe Haas: I'll try to be as brief as I can. I have 4 points to make. Three of them will just be preliminary and 1 will be full.

Senator Katherine W. Wheeler, D. 21: All right. I would like you to follow the same procedure as others.

Joe Haas: Sure.

Senator Katherine W. Wheeler, D. 21: If you intend to testify at a later date, then, please just make introductory remarks.

Joe Haas: Okay.

Senator Katherine W. Wheeler, D. 21: Very introductory remarks.

Joe Haas: I know. Number 1 is on the part-time judges becoming fulltime. I disagree with that. I give an example of the David L. Kent as an excellent judge of the Plymouth District Court being a law professor at Plymouth State College.

That's my brief statement, what I'm going to do is, I'm going to "doc" (sounds like) some of this up. If I can access to the files, because what I'd like to present to this committee is evidence of part-time judge complaints about them verses fulltime and do a comparison. It might show just the opposite, of what the sponsors of this bill want. That's #1.

Number two, is in regards to the Bar Association membership not being mandatory. I agree with that and I make a statement that there was an attorney by the name of Michael Totchee(?) of Center Harbor who quit being an attorney. He said that some of the Bar Association requirements were against his religion. What I intend to do in that case is look at this file and present that evidence to you, too.

That's number two of four, number 3 is, when you come to the cost of operating this Board, in the back page here, you used the word, *assessed against attorneys,* and I just wanted to make a reference to what I said before. Taxation of costs(sounds like). You know, you assess a building, then you have a tax, then you the debt.

Why can't we make that stronger so that these attorneys can't back out of making their payments? Using the same taxation of costs against them, that is used against people in writ of execution. That's my full testimony on that, I won't come back on that one.

The fourth one, I wanted to make mention of is what Howard Zibel said, was, in regards to the 2 conduct committees. Whenever I hear the word "conduct" I think like the conductor of a train. But, when you go to their committees and you complain, they say, well, it has to do with his behavior.

Now why don't they call it behavioral committees, rather than conduct committees. Like I said in the last testimony, I went up there and I spoke with Sherman Horton(?), he was the Chairman of the Committee and I got into this taxation of cost, you know, my case in Grafton County where the judge commingled the judgement with that form to come out with an assessment against me of over $40,000.

I demanded a right to a trial by jury on and I never got it, by the constitution. Judge Horton was interested in that aspect, but my big question is: What is he going to do about it?

I mean, I make the complaint and my suggestion is if these two, roman numerals IV and V have to be independent because if it exists as it is now nothing will get done, nothing will change. The same old junk will be going on and people will get angry and who knows what's going to happen.

Senator Katherine W. Wheeler, D. 21: Thank you very much, you were very brief.

Joe Haas: Thank you.

Senator Katherine W. Wheeler, D. 21: Is there anyone else in the room who wishes to testify today? Seeing none, then I will recess the hearing on Senate Bill 412 and a future date will be posted in the calendar. The resuming time I assume will be about 2:15, tentative.

THIS CONCLUDES THE FIRST HEARING FOR SB412-FN

The Second Hearing for SB412-FN convened on February 7, 2000 at 12:05PM in room 103-SH

Members of Committee present at the second hearing:

Senator Sheila Roberge, D. 9:
Senator Debora B. Pignatelli, D. 13:
Senator Edward M. Gordon, D. 2:
Senator Katherine W. Wheeler, D. 21:
Senator Rick A. Trombly, D. 7:
Senator Mary E. Brown, D. 17:
Senator Burton J. Cohen, D. 24:
Senator Mark Fernald, D. 11:

Senator Debora B. Pignatelli, D. 13: I'm going to open the Hearing on Senate Bill 412-FN and call on the Prime Sponsor, Senator Roberge to introduce the bill.

Senator Sheila Roberge, D. 9: Good afternoon Madame President, Madame Chairman and members of the committee. My testimony on Senate Bill 412, *"the Court Integrity and Attorney's Independence Act."*

As suggested by the name of the proposed act, Senate Bill 412 has 2 major purposes.

1) First the bill is intended to establish the independence of attorneys in certain respects and also enable them to become stronger advocates in unpopular cases.

2) Second, the bill is intended insure the integrity of the courts by minimizing instances in which the judicial impropriety and the appearance of impropriety may be questioned and by establishing a more effective mechanism for hearing and resolving complaints about the judicial conduct which now exists. In this way, the public's trust in the functioning of the judicial system will be increased.

I. First, in regard to requiring all state judges in New Hampshire to be fulltime judges. At present, a good many judges in New Hampshire serve part-time with the balance of their working time spent in private practice of law in New Hampshire. One of the potential problems with this arrangement is the risk, real or perceived, that a part-time judge could, intentionally or not, use his or her position as a judge to obtain for a private client than might otherwise be possible.

The extreme example of this might be a part-time judge who seeks to trade a judicial decision favorable to another lawyer or the lawyer's client in return for the lawyer's concession in another case in which the judge is privately practicing law.

Or a judge, who takes the position on behalf of a private client, might be faced with an inalienable task the next day of having to rule on the same issue in a different case as an impartial arbitrator. Better for our legal and judicial systems not to mix and match the separate role of judge and counsel.

Few or fulltime judges could travel circuit and thus provide the state with more judges on a rotating basis. Alaska has a system like this. Obviously, there are logistic hurdles to overcome in putting this provision into effect.

The bill gives 5 years of lead time until January 1, 2006 for this to be achieved.

II. Second, in regard to terminating integration of the New Hampshire Bar Association. Lawyers with a license to practice law in New Hampshire are required to join the New Hampshire Bar Association. Although this system has been in effect in New Hampshire for a good many years, it is not the only alternative and it is not universally accepted as being the preferable system by New Hampshire lawyers.

Massachusetts, for example, requires its licensed lawyers to pay fees to fund certain mandatory administrative programs. But lets its lawyers decide for themselves whether to pay dues or join the Bar Association.

The requirement to join the New Hampshire Bar Association was put in effect at a time when there were not nearly so many lawyers as there are today. Economics may have required all lawyers to join and pay dues in order to insure that the Bar Association would survive as an organization.

Circumstances have changed; however, and the Bar Association should be big enough now to stand on its own. I'm not saying that the Bar Association does not do good work in the public interest, it does. However, particularly, where the Association takes positions of its own on issues and engages on its own in the political and lobbying process, membership should be voluntary.

The positions taken by the organization do not necessarily coincide with the views of all of its individual members. Lawyers should have a choice of whether to join or remain members of the organization.

III. Third, in regard to making the New Hampshire Bar Association and independent charitable organization. Under the Interest on Lawyers Trust funds, IOLTA program, lawyers are required in certain circumstances to have their banks remit the interest on the funds of their clients, which they're holding, to the foundation.

The foundation uses the interest, as well as voluntary contributions, to fund various public programs, including Legal Assistance. The bill would keep separate the responsibilities, 1)collecting the funds and 2) deciding how the funds are spent. By prohibiting attorneys and law firms which contribute their clients' funds to the foundation for making decisions regarding how the funds are spent.

With the present system, one of the things that could happen is that the legal assistance sues a lawyer's client at the same time the earnings on the client's money is going to the Bar Association, which, in turn, funds the Legal Assistance Program.

This measure is not meant to discourage charitable contributions to the Foundation, nor is meant as a condemnation of the programs it funds. It is intended to decrease the potential of conflict of interest and the appearance of conflict of interest in the funding and spending process.

IV. In regard to reestablishing the judicial conduct committee as a Board independent of the Judiciary.

The Judicial Conduct Committee is made of 4 judges, 2 lawyers and 5 members of the public. All appointed by the Supreme Court. Administration of the committee is handled by a person paid by the court system. The committee acts to judge the judges in cases where misconduct is claimed.

The Supreme Court has taken a number of positive steps recently, by opening up the process of the judicial and lawyer discipline to greater public scrutiny than before.

This bill is also intended to enhance public confidence in the judicial system, but we go further than the court's rule changes and make the judicial conduct award(sounds like) completely independent of the judiciary by prohibiting judges from being members of the board and having an executive branch of classified state employee to be the administrator of the board.

Massachusetts is an example of a state which uses classified state employees to administer its judicial conduct function.

V. Fifth, in regard to reestablishing the professional conduct committee as a board independent of the Bar Association and the courts.

Like the changes proposed in the judicial conduct committee, the lawyers professional conduct board would be made completely independent of people whose conduct it must review.

Under the bill, no judge or attorney would serve on the board and the board would be managed by an administrator who is a classified state employee.

The 5 improvements proposed by the bill are designed, not only, to alleviate the potential of a real impropriety, but equally as important to reduce the appearance of impropriety in instances where it may be questioned.

Both objectives are critical in maintaining the public's confidence in the functioning of our legal and judicial system.

Senator Debora B. Pignatelli, D. 13: Thank you very much for introducing the bill.

Senator Sheila Roberge, D. 9: Your welcome.

Senator Debora B. Pignatelli, D. 13: Representative Bickford?

Representative David Bickford: Thank you, Madame Chair. My name is Representative David Bickford, for the record. That was very thorough from Senator Roberge. I guess I'll just reiterate a few things after that.

When I first saw this bill, I was asked if I was interested in signing onto it and I said, I didn't think I would be. I looked at, this is way too in depth to go there. Particularly about the Bar Association.

As you well know, the Supreme Court has come out with some decisions in that area. So, we're going to get into some murky ground when we go there.

But, at second look, I said, which do I think is better? I looked at each one of these points and I said, yes, I believe that we would be better footing for the citizens of our state if each one of these were changed in this direction. So, if we can do that, I recommend us doing it.

However, I recommend that the 2 sponsors of the bill might consider separating the Bar issue from the part-time judge issue. I think that's an area we can go into easily. I don't like part-time judges, only because they have law practices. As you know, fulltime judges are not allowed to have law practices.

It's been my experience, what I've heard from other people, that they're going to those lawyer's practices. Judge Fairbanks built a tremendous practice, not because he was, necessarily a great lawyer, but because he was considered the judge in the community.

He was a part-time judge, not full time. We all think of him as Judge Fairbanks. I had a fellow I worked with, his son in Connecticut was being-they do this down there-his son in Connecticut was getting divorced. He wanted grandparents rights. He ran right down there to find an attorney.

Where did he go? To one that was a part-time judge, she must know the law, she's a judge. I'm seeing this happen throughout this state, too. I think it's wrong to be in conflict with what we expect of full-time judges. I think it's unfair to the other lawyers practicing in this state and unfair to the citizens.

So, I won't go further into the Bar Association issue, I'll let others do that. Thank you.

Senator Debora B. Pignatelli, D. 13: Thank you very much, Representative Bickford. Representative Paul Mirski.

Representative Paul Mirski: Thank you very much for the opportunity to testify. My name is Paul Mirski, Representative of Grafton, District 12, which is the town of Enfield. I have also handed you some testimony from an individual, Ed Moska, who had to leave and couldn't present his testimony in person. I'd ask that you give it some consideration.

I think of the 5 recommendations for reform, these are the principal ones that we ought to consider. I think that this bill is one of-I think summarizes the areas that are most important to us. I think in terms of achieving an impartial judiciary and one that's less likely to be criticized for over political involvement and for decisions.

I'd like to address a couple of items in the bill; 502a:21a which relates to the *Prohibition on Practice of Law.* I would suggest that the bill be expanded to include the earning of outside income as well. Campaign reform is a big thing politically these days. Certainly if a $2000 contribution can corrupt someone in a $10 or $20,000 job outside. The courts could corrupt someone just as easily.

I think it's important that judges not give the appearance that they are beholding to anyone, other than the state and so I would ask you to include the prohibition on there of outside income. Perhaps, with the exception of investments which could be placed in a blind trust, and so forth.

With respect to Bar Association membership. I've been a vociferous opponent to the Claremont decisions. One of the great discouragements to me, is related to the conversations with many, many, many lawyers around the state have read those decisions who complained about them or expressed great dismay at the judicial(sounds like) and quality of the writings and the intellectual components, the consideration of aspects(sounds like).

Many, many attorneys and I've often asked them, can you help present this case in a public forum? They have universally, with exception of, I would say 2, have declined. Because they view the hierarchy of the court in such a way as to be that speaking out on this subject could potentially damage their reputations or employment or protecting their clients.

I think it's important to separate the Bar from oversight by the Justices who are at the top of the pyramid. I think until we do that, the citizens of this state cannot expect to be able to have advocates who will help them challenge abuses in the judiciary.

I think it's a given, I think it ought to be clear to anybody who thinks about conflict of interest and I can tell you in this case, 1st hand, that it's deprived me and other individuals who have found this particular problem so difficult, it's deprived them of advocates and I think that's a great disservice to the people of this state.

With respect to Judicial conduct. Oftentimes, when the subject of the 3 branches of the government come up, the judiciary will always speak about these bonds of amity, etceteras that are referenced. That these 3 branches ought to be separate, except as the bonds of unity and amity, there's some language in there that's necessary to the function of government.

That language isn't there to encourage judges to become political. The language is there to provide legislature with the right of oversight. Just as it has under Part 2-article 4.

It's essential(sounds like) language that says we have the authority to constitute courts and, even though, we have 2 constitutional courts, a superior court and a supreme court, the guts of those courts are subject to legislative definition.

So, the language in part 1:37, which relates to the relationship of the branches is really there for the benefit of the legislative oversight, it's not to encourage judges to be political.

The Judicial Conduct Board...it raises the question, in the constitution, where is the authority in the constitution, for judges to essentially review their own behavior and it's really not there. The responsibility is the legislature's, not the judiciary.

The judiciary is granted no authority whatsoever to hire and fire judges. Judges are appointed by the Governor, subject to approval of the Governor's Council, hearings before the Council.

The removal of judges falls within the purview of the House and Senate to either address procedures which are provided for in the constitutional impeachment procedures. I can't find anything anywhere that would suggest that a judge on the Supreme Court could fire any subordinate judges.

Why is that? It's because, if the Governor, wished to change the composition reports through appointees, that were otherwise, the court could find the means to remove those appointees and would create a conflict which is unacceptable, and I think ...in a Republican form of Government.

The review of the judicial conduct, and the conduct by lawyers ... and lawyers within this body, both from the first case as a mandated from a consumer protection point of view with respect to lawyers.

So, both of those functions do not belong within the judiciary, and I think that they have been misplaced there. So, I think that that is...this bill...to the extent in which the bill addresses this particular problem, I think is very, very important.

Finally, with respect to....Professional Conduct Committee. With respect to the right to know. The constitution is very clear on right to know. And, one aspect of the opening of the rule of judicial complaints, which has still not been addressed, is the opening of all past complaints before the Bar.

It was my experience on Fairbanks, the Fairbanks committee, I truly believe that if the complaint process had been open and available to the public that his behavior as a judge on the bench, particularly with respect to the abuse of individuals who came before him, traded, basically, sex for decisions would have been revealed much earlier.

But, because there is a complaint in there that essentially deals with favorable treatment to a sex offender, a complaint made by 13 or 14 nurses, which, really, never saw the light of day until it was way too late.

And, I think, certainly, had that complaint been public there would have been other people in the community who would have known exactly what those nurses were talking about and there would have been other people come forward and I think we would have prevented the abuse of individuals who came before his court.

With respect to the 311:8A-Professional Conduct Board-I would suggest that the cost of operating the board(sounds like)not be assessed against attorneys, but simply be a general, general fund matter. I think that it is preferable to keep the costs of operating, whatever office would see to the proper behavior of attorneys as separate from a part of the funding.

That is separate and apart from the act itself. We don't require judges to support and pay for the operation of the courts and I don't think attorneys ought to be paying for whatever oversight committee would exist in the public's interest.

I think someone used the word, we need to empower the legislature. It's important to understand the legislature does have full and complete ability to exert oversight over the court system. What we need to do is provide a way to give legislators the courage to do it.

Finally, just as a...to give you some perspective, I don't have any personal complaint, in any way shape or form anywhere in my personal experience

against any judge or lawyer, none. Whatever experience I've ever had in that kind of environment has not been....has either been fair or has not been a problem to me.

I bear no animosity of any kind, but, I know a fellow who lives in Sullivan County who knows one of these individuals who was abused by Judge Claremont.

An individual who traded a DWI conviction for sex. And he's a fellow who lives in a trailer at the end of the road. He's one of these folks who really is not...feels a sense of complete disempowerment.

There's a guy who made complaints about the judges behavior while he was incarcerated, I think in the Sullivan County court and the chief of police were not able to carry complaint forward and get it resolved in any particular way.

The Fairbanks hearings taught me that the system protects its own. That complaints against judges were routinely deep sixed. And even those becoming open now, to some extent, there may still be problems with(sounds like).

But the point is, that bureaucracies protect their own interests. And what we need to do is vigorously work to insure that the least powerful people in the community who were, quite frankly, many of the individuals who came before the judge in district court, these were people without wealth.

These weren't the people he stole money from as an attorney, these were people who came before him in a court to try to gain justice who were badly abused.

I drive home every night through a part of town, the way I get into Enfield. And, you would say, I suppose, that if we had a railroad, if we had a railroad, it would maybe be the wrong side of the tracks. And I think about the folks I drive by at night.

The folks, who along that road may think...I come to these hearings and a lot of people are well spoken individuals who are professionals, people who have long experience with the court system. I think about the people in the mobile homes, in the double wides and some in great financial difficulty, I'm sure who wouldn't even think of making a complaint.

They would accept the abuse from a judge and go on with the lies because they would be no other alternative for them. And so, what we need is to work

pretty hard to make sure that those kind of injustices are not common place in our court systems.

In fact, we should work very hard to make sure they never occur. And certainly if they do occur, that there's a swift way of addressing...we can't do that without opening the system, we can't do that without disengaging the Bar from the court. We can't do that without fully dependent judges self-funded or funded by the state who are not compromised outside this arena.

So, I'm very supportive of this bill. I think these reforms basically summarize most of the focus of the individuals who have an interest in some form of court reform in New Hampshire. This is a wonderful bill and we ought to try to do everything we can to improve it and see that its provisions are placed in law. Thank you.

Senator Debora B. Pignatelli, D. 13: Thank you for your testimony. George Moore.

George Moore: Good day. This is my second time before the committee on this bill. My name is George Moore and I'm the president of the New Hampshire Bar Association, at least for the next 6 or 7 months.

I want to talk a little bit today the section of Senator Roberge's bill that deals with the unification of the state Bar Association. But, before I do that, I would like to make one observation that Senator Roberge made in her opening remarks, because I think it has a solution already underway.

And that's this question of part-time verses full time judges. It is a, most assuredly, an issue which needs study. The last major study that was done was a long time ago. I want to say 20 years ago, or more than 20 years ago.

And the judicial counsel, which is a creature of the legislature, not of the court system, has undertaken to do that and commence the study of that about 7 or 8 months ago.

I'm a member of that subcommittee, which also includes public members and we have worked out an arrangement with Franklin Pierce to have some assistance from law students at Franklin Pierce to, in depth, go through the issue of how a full time judiciary or district court would work.

And, so, the system is underway with a legislative organization as it is now and if this committee would want to expand on that, God forbid, fund it a little bit, or do something which would help that process that's fine, but it's ongoing now and I think it would be duplative to have a separate study

committee here working on the exact same issue which the Judicial Council which was formed by the legislature to look into things affecting the administration of justices is presently doing.

Garrett Hicks chairs that committee and, certainly, if the committee would like more information on exactly where they are and what they plan on doing, I'm sure Garrett would be more than happy to come and discuss what's ongoing about that.

With regard to the unification of the Bar, I believe that every member of the committee was given a set of historical materials. I know that some of the staff called over and made sure that I followed up on what I said the last time, which was that I'd make those available.

Of, how the Bar became unified approximately 30 years ago. And really what all that speaks is the fact that, prior to the Bar unification, the Bar was a relatively small organization in which the Association itself, the organized Bar, was a much, even a much smaller organization, almost club-like.

And it operated for its own purposes, call it a trade union, call it what you will. But it was very narrowly scopeded [sic] as far as what it did. And other than social occasions and sharing information as lawyers will want to do about cases and instances before the court. It really did virtually nothing in the public arena.

And one of the compelling reasons to go into unification, 30 years ago, was the fact and the recognized need for the organized Bar, as a main component, in the justice system to do more for the public. To do more, if you have a license to practice law, that should entail more than simply trying to compete for clients and trying to bill hours to make a living.

That there's a public element to gaining that license to practice law. And, in the years that have gone by, I must say, you know, I am proud of what the Bar Association has accomplished in New Hampshire. We have been held up by the American Bar Association on numerous occasions on numerous subjects as a leader in the effective use of Bar Association programs to effect legal services for the poor.

Our Probono system was 1 of the 1st and most effective in the country at giving free legal advice and services to people who could not afford to pay anything for a lawyer. These type of programs were nonexistent under the preexisting non-unified Bar.

If it was done, it was done on an individualized basis. And, as in all organizations, there are some people that are very publicly spirited and go about their work and give a lot of their time and efforts to the public. But there are a lot of people who are not. Without the ability of an organization to support that and refer that to, to make that happen on a broader scale.

It did not work well in the past, before there was a unified Bar. At present, the pro-bono system itself refers in excess of a thousand cases a year through the system to lawyers who volunteer to give their time free to those indigent people who need legal services.

There is a domestic violence program, which is presently referring in excess of 200 cases per year. The lawyers handle, free of charge, for people who are identified being involved with domestic violence, usually on an emergency basis.

We have a legal advice referral center, which routinely provides legal advice and referral for the people who have legal problems and are having problems coping with what to do. Our reduced fee Lawyer Referral Program is where people of low income, who cannot, they can afford something, but they can afford the lawyer of their choice, perhaps.

Those individuals who have specific issues, we are referring presently in excess of 5000 cases a year. When lawyers agree to take a substantial cut in what their hourly rates are. Then that's the thing that gets negotiated between the attorney, but the fact is, you put the citizen, the person in touch with the lawyer and you make the connection happen, which under a pre-unified Bar would have never happened.

Allied with this, a purpose of the unified Bar is to maintain a high level of competency within the Bar Association itself. Senator Roberge is right, 30 years ago the New Hampshire Bar Association was a relatively small organization.

Its membership in the, I'll say, mid hundreds, matter of fact, 5, 600 members, perhaps. Today we're in excess of 5000 lawyers in the state. But a lot has changed in 30 years everything from the state budget to the size of the RSA's. Thirty years ago the RSA's comprised 2 volumes, 2.

And anyone who's seen them on the shelf behind my office knows they take up the whole wall. And that's just the way society's gone. But there is certainly a need to maintain a level of competency within the Bar Association, which the unified Bar provides that service.

How do you provide it? You provide it through mandatory continuing legal education. The Supreme Court mandating that lawyers take a certain number of hours of continuing legal education each year. The Bar Association runs in excess of 80 programs a year. That are run, organized by New Hampshire lawyers for New Hampshire lawyers and are attended, almost universally by New Hampshire lawyers.

We endorse, we make professional liability insurance available to the members who take it under a Bar endorsed program. We hope that program has the broadest coverage at the least expense. We review every couple of years to make sure that the company who handles it, presently, it's a company called *Amler Insurance* (sounds like) still has that.

The public goal being that the most lawyers possible have professional malpractice.

TAPE CHANGE

...for situations where there has been an attorney defalcation where there's been theft. Where it's been the kind of situation such as Representative Mirski just alluded to with Judge Fairbanks. That fund (sounds like) is run by a set of rules, there are public members, members of this legislature who sit on that governing board that have rules for administering money that will eventually get paid out to clients if they are harmed by lawyers like that.

If there was not a unified Bar to do that, it would have to be done by somebody. And somebody who presumably would be on a salary. And somebody who'd be, it would be a fiscal impact, if you will to that sort of thing.

Regardless of the type of service we offer, whether it's the lending liability-library for lawyers. We have a law office management services we have when a new lawyer is trying to set up, or trying to go out on their own and wants to know just how do I keep track of these trust funds that I have for clients?

And what's the proper accounting that I should have? We have a service available to help those people. If you had a deunified Bar those services would not be available, and you say, well, let lawyers sink or swim anyway they want to.

Well, ultimately, you don't have to be terribly farsighted to see who gets hurt in that process, in the long run, is the citizen, is the client. So, these are all things which have been developed under a unified Bar, under the mantle of

everybody being required to be a member of the organization, so that we discharge our public obligations.

We do public education programs, I know that many of you are familiar with the mock trial competitions that we hold each year. The "lawyer in every school programs", the "We the People" programs.

These programs have expanded under the unified Bar to the point where we now reach 60,000 students per year in our legal education programs. We have an adopted a classroom program in which I'm proud to say a number of firms in the state have adopted a specific classroom to deal with civics issues.

Now, is this all necessary to practice law? No, it's not. You know? But it is good or bad for the state to have lawyers engaged in that process, to have firms be able to say, I'll adopt that 9th grade classroom in Civics and talk a little bit about the constitution and give a little bit of my time for that sort of thing?

It's those type of things which made the organization tick. And it's those sort of things that I'm proud of as an organization that we do. Deunification would have the effect, or Senator Roberge's bill sets out to let lawyers belong or not belong if they want to.

And I'm sure a lot of lawyers, in Wisconsin, the Bar was deunified, maybe 8 years ago. And membership went from 100% to about 30% and all the programs in a similar nature, types I'm talking about, all came crashing down.

All of a sudden, there was no Probono system. All of a sudden, the "We the People" program stopped. All of a sudden, those type of things went away. And 3 years later, the Wisconsin legislature readopted the unification of the Bar.

And the experience is not universal. I will grant you that approximately 2/3 of the states have unified Bars, 1/3 do not. Massachusetts does not. Massachusetts does it by court rule. It doesn't meat that if you deunify the Bar all of a sudden there's no oversight in this, so-called, chilling effect that Representative Mirski was talking about.

That doesn't just go away, whether there's a unified Bar or not a unified Bar. The Supreme Court is going to adopt those rules necessary to control the practice of law and to set ethical standards for the practice of law. That, if the Bar is deunified, that's not, all of a sudden become an issue, which lawyers can do whatever they think is right and there's no playing field.

There will be a set(sounds like), it's just a matter of whether it's done within the context, if you will, of a unified Bar. Which I think is worked out, since the days it was founded to be a good thing. To be something which is good for the state. I think it's good for the lawyers, because it puts the lawyers in a position where they can exercise their public duties much easier and facilitate the type of thing which is very difficult to do during a very busy practice.

I'll say only one other thing which was mentioned a little bit earlier which is the lobbying which the Bar Association does. There have been, both the United States Supreme Court precedent and, in New Hampshire, a Supreme Court precedent dealing with the limited circumstances under which the state Bar Association, as a unified Bar can lobby here before you on issues.

They have to be central to the administration of justice and we have a lobbyist who, most of you know, who's in these hallways on a daily basis and many, many bills, that are before you, we provide an informational role. We provide with information with, with things which may be of help to the committee, but we don't take a position one way or the other.

We do take a position on things which are central to the administration of justice, but that, that's fair game. Where it's not fair game, is taking positions on issues which would be of a political nature or would be of a nature which are not really justice issues, they're much more, entitlement type of issues.

And, that, in fact, has been a problem with some other Bar Associations in other states on the lobbying side. So, you know, while I understand Senator Roberge's bill goes into a number of other issues with regard to the PCC and the JCC and talks about essentially changing the way that those committees operate.

I don't think there's any cause for changing the way that the Bar Association presently operates. I think it's a good system, I think it works well, I think the public gets served well through it. And it doesn't mean that we don't, once in awhile, have a Judge Fairbanks come along, just like any other profession.

It doesn't mean that we don't have lawyers who will act unethically and have to be sanctioned by the Supreme Court. All those things are going to happen, but to the extent possible, I think the Unified Bar is a system by which we can keep that to a minimum.

Thank you and I will answer any questions anyone's got.

Senator Debora B. Pignatelli, D. 13: Senator Brown.

Senator Mary E. Brown, D. 17: You mentioned, Wisconsin, I think, that had deunified?

George Moore: Yep.

Senator Mary E. Brown, D. 17: Why did they do that, do you know?

George Moore: I don't know, exactly. I know that there was a sense that the dues in the association had become way out of line with what some of the people who had unified the Bar only 10 years or 15 years before that had anticipated. Which had to do, I guess, the amount of programs that they had.

I think it was as much a financial issue, as anything. But then, the question came up, quite quickly after that, was that, now everybody wasn't paying all these dues, but yet, there was these programs that people still wanted and they..., the money had to come from somewhere.

Senator Debora B. Pignatelli, D. 13: Senator Wheeler.

Senator Katherine W. Wheeler, D. 21: Thank you. Did you say that Wisconsin had been re-unified?

George Moore: Yes. Yes they did.

Senator Debora B. Pignatelli, D. 13: Senator Gordon.

Senator Edward M. Gordon, D. 2: I guess, I'm...There seems to be a difference of opinion on the trends. Whether or not there should be a unified Bar. I saw on the material that you provided us with today, the case in the 70's, which there was a vote taken which was 200 and odd [number] to 50.

I guess, ...

George Moore: Which shows it was a hot issue, everybody was there.

[laughter]

Senator Edward M. Gordon, D. 2: That's when people used to go to the meetings, I guess. The question is, which I think is a simulation of the pending(sounds like) bill, is why, should I, as an attorney, being licensed to

practice law, be compelled to associate with an association which does, in fact, lobby on bills here at the legislature?

And, in some cases, at least, expressing a personal opinion, show some resistance to bringing about change in the judicial system, or legal system in the state to the frustration of many of us.

George Moore: Well, I guess I would say, if you go back over some of the material, I'm sure that part of what was provided was the initial Supreme Court decision justifying the unification of the Bar.

And, I think one of the compelling reasons that the Supreme Court pointed out was that there needed to be a...only by having a consistent membership in an organization, could the Supreme Court make sure that the, monitor the ethical conduct of all the lawyers, not just some of the lawyers.

And that, rather than benignly letting the situation be with nothing, controlling the performance of a lawyer until there was a problem. Until the Supreme Court had to sit down and grab somebody out of a particular town and disbar them because of something they had done.

That mandating that universal membership would allow them to control the performance of all lawyers and you couple that with the public issues, which is that we facilitate, we don't force people to do it, the ethical rule under Probono representation and that sort of thing doesn't mandate that you, or I , or anybody else has to necessarily represent some poor people during the course of a year to fulfill that duty.

We can give that money to legal assistance, we can sit on boards of charitable organizations, we can do a number of things. But it at least facilitates the ability to have those sort of public service programs.

Senator Edward M. Gordon, D. 2: But the Professional Conduct Committee isn't contingent upon a unified Bar.

George Moore: No. No it's not, but the rules, but to adopt rules that apply to all members. You have to have an organization to do that and rather than doing it, as in Massachusetts, which is by a supreme court rule and by direct supreme court assessment and there's, you know, the Board of Bar Overseers in Massachusetts is not a Bar Association function.

It's a committee the supreme court and it's made up by other people and it's funded totally separately and it's, you know, it's outside of the organization. The concept of the unified Bar is to put it inside the organization, like we

collect the dues, for instance, on your Bar bill, there's the regular Bar dues and then there's the, whatever there is, a $60 or a hundred dollar surcharge for the PCC.

Otherwise, it's simply outside that system. So, it's a, you can do it the other way, you can control lawyers without a Bar Association, no doubt about it. The question is what's the, how efficient and what's the best way to do it.

Senator Debora B. Pignatelli, D. 13: Other questions?

Senator Edward M. Gordon, D. 2: And by Bar bill, you mean your dues?

George Moore: Yes.

Senator Edward M. Gordon, D. 2: Okay. Then I guess...

[laughter]

Senator Edward M. Gordon, D. 2: If,...we have a Trial Lawyers Association.

George Moore: Right.

Senator Edward M. Gordon, D. 2: And, as an attorney, I can decide whether or not I want to participate in that and we take them aside(sounds like) and they come here and they lobby on particular issues. But I have a choice in deciding whether or not I want to support them.

I guess, I'm trying to figure out that shouldn't be true of the Bar Association itself. Why shouldn't I be able to choose whether or not I believe that what they're doing, having been, having proposed what the Bar Association has proposed(sounds like).

I'm saying that I don't necessarily want to do that. I don't want to advocate for my own demise. So, why should I have to, why should I have to support what I don't understand?

George Moore: Well, the system that has worked in other states, and I can't, well , it's actually, it's happened a couple of times in New Hampshire, too. But, certainly, it's happened in other states, is that if you, as an individual member of the Bar object to lobbying on a particular bill by the Bar Association, regardless of whether it's integral to the administration of justice or whatever else, you can object to that.

And, other Bars have an organized system of refunding that section of the dues that relates to our lobbying effort for that particular bill to you. And not to argue about it or anything else, if you disagree with it, that section of the dues gets refunded.

Senator Edward M. Gordon, D. 2: I guess I have 1 last question. And that is-charged as an attorney, I go to the staff of the Bar Association ..... When I was 1st in training 10 years ago(sounds like), there was only 6 staff member and now total of these there are 30 or more.

And, I guess, like I see a couple of staff members here, lobbyists here.....I guess what I'm trying to figure out is, as an attorney, why should I, again, be compelled by the court in order to practice law be forced to participate in an organization I don't necessarily think that organizationally everything might be required...

George Moore: Well, I guess I would go back to the issue of, and I 'd like to get the correct statistics to you, I don't have them, but, in the last 10 years, to my knowledge, there's been a very, very small growth in the number of administrative staff at the Bar. The dues have virtually, there's a significant number of years and I can't tell you whether it's 10 or 12 or 8, but it's been a long while since there's been any increase.

And if we go back, even longer than that, the percentage of increase is less than the inflation in the general economy and what have you. But I'd like to get you the actual numbers, I don't want to guess at them, as we're here. But I think that it's incorrect to say that there's been a mushrooming of the size of the staff or the cost of running the organized Bar.

Our budget has not changed like that, I'd like to be building an empire, but I'm not. And, but, the work that the Bar Association does, is controlled by a Board of Governors, that sets priorities and we have a couple of elections coming up, if you want to run, we'd be happy to have you on the Board.

I mean, it's controlled by majority, if people come in with an agenda and say, I would like to say that we do more in regard to legal education. Our program is, you know, we haven't had enough, you know it the educational area like that. We'll advocate for that.

That's no different than the legislative process here, and so you tend to start doing more work there or we spent more time, a few years ago, when the economy went downhill considerably, working on our public service programs to keep them up, so that, because, of course, as federal funding goes down, which has happened with legal services corporation quite a bit.

You end up with the phenomenon that at, just at the time, when legal services dollars to pay for representing poor people are going down, the number of poor people in the state are going up, because the economy's no good.

So, those cross currents don't work well. And we put a significant amount more effort in during, whatever it was, '91 through '93, or there abouts, in trying, at all possible, to maintain the same number of cases being referred out because times had gotten much tougher on lawyers and making a living and trying to get that 4-5 cases per year into a particular law firm is that much more difficult. So, it changes.

Senator Debora B. Pignatelli, D. 13: Are there any further questions? Thank you very much for your testimony.

George Moore: Thank you.

Senator Debora B. Pignatelli, D. 13: Philip Cobbin.

[12:50PM Senator Gordon and Cohen left]

Philip Cobbin: Thank you once again, Senator and members of the Committee. For the record, my name is Philip Cobbin, former Representative of the General Court. I'd like to testify in favor of Senate Bill 412.

I'd like to start my remarks ...in listening to the gentleman from the Bar, and thank him for the admission that on the Fairbanks matter that from time to time, we're going to have judicial officers who violate the roles of ordinance law(sounds like). We're going to have some Fairbanks problems in the future, because that's part of human nature and the government system should be designed to pull out, identify those people.

That's why we have police officers and such. And that's why I think some aspects of this bill really are on point with regard to that. And I'll just go down through the analysis sections, rather than bore you with all the details of the bill.

Provides for part-time judges to be phased out-I think, and I'm sorry Senator Cohen had just left, but when I was an intern to Senate Judiciary, I remember Senator Cohen is the only person who was here back then in '93 when a policy bill came through to allow police officers who are members of the Bar to practice law.

It was the law then, and I believe it's still the law, that a police officer who happens to be a member of the Bar is, by statute, barred from practicing law in the state of New Hampshire. And I seem to recall the judicial council and even a number of judges came in back then, in '93, testifying against the bill that would have removed that prohibition.

And, I would suggest you, you may want to go back and take a look at the legislative history on that because the 1st section of this bill dealing with phasing out of part-time judges really is kind of an extension of that public policy device that becomes an inherent conflict of interest being a judicial officer and being an advocate.

Just like there's an inherent conflict of interest in being a police officer and an advocate because someone may tell you about a crime and you now have a real problem. You're a police officer, supposed to uphold criminal law and someone has just disclosed a crime.

So, the 1st section of the bill is really extending public policy in an area of the legislature already has done so previously and I think don't, [it's pretty clear, don't have](sounds like) the power to do so.

The termination of the integration of the New Hampshire Bar Association, I would agree with Senator Gordon's comments and the ... there. These things really are a forced association and I think you really should take a look at, from a legislative stand point at how this Bar Association and the New Hampshire courts have had this very symbiotic relationship.

These guys have really grown together, just go look at the Bar news and you're going to see it really resolves around the judges point of view. But that's not the thing that really concerns me the most about the integrated Bar, it's the fact that it's a forced association.

I'm compelled to associate with someone created by the government. That sounds like, almost like, a trade union in a communist country where you had to join all the trade unions authorized by the polar bureau(sounds like).

And, in effect, that's what we have structurally, is you have a government entity imposing an association. That's bad enough, the worst part and one I think this committee should really address and it's in an asset(sounds like) to the bill. Is that, in effect, the Bar Association is behaving as a taxing authority and it is collecting taxes imposed on the practice of law by the New Hampshire judiciary.

The New Hampshire Judiciary was elected by no one and I think in a republic it is fundamentally against republican principles that this country was founded on to have taxes imposed through non-representative government bodies.

And I think if we're going to have those taxes, those should come through a represented body. The logical one should be the House and Senate passing law as to create taxing authorities to do that so that the representative aspect of the government is maintained.

So, I'm fully in favor of terminating the integration of the New Hampshire Bar. I believe we would find a flowering of the Bar with respect to the Trial Lawyers Association and really building in some independence between the bench and the Bar.

It's really sad to see the extent to which I think there's been a lot of mutation in the Bar Association. I mean, I'm a member of that Bar and I'm sorry it is a forced association under the guidelines.

And I don't really feel that attorneys really have that much affect in it and I know a lot of attorneys who feel very chilled in speaking at...in fact, I know of one member of New Hampshire House I served with that complained, I think somewhat bitterly, that when he did speak about some issues at some Bar meetings, some of the ostrazation that was imposed on him.

It would be okay in a private association, but I think it is totally repugnant to our principles of government when that ostrasization in government imposed trade unions. There really is no difference between that and a trade union in the Soviet system as far as I'm concerned.

So, it should be, and making and independent charity, you've got an issue if this judiciary keeps wanting to effect policy on those IOLTA accounts and, in effect, you're now allowed to get in there and play around with charitable funds and, no business in there.

Not a judicial function and I think if we start looking at some serious review of what is a judicial function, we're going to find a lot of meddling with the Bar as not good judicial function.

And the comments earlier, about, if you don't like the lobbying the Bar is doing, you can get part of your funds back. I believe that totally misses the point of the United States Supreme Court's precedence in this area. They were not supposed to be doing to be able, as a predicate to a unified Bar, you had to agree not to engage in prohibitive lobbying.

And it's my view that engaging in prohibitive lobbying means, you have to forfeit the integration. It's not a question of refunding, it's a question, you cross that line, you don't belong over there, there should be a forfeiture of that.

Of course, I'm no fool to realize that all of us would go broke trying to litigate that, the federal courts over there, because the judiciary is going to be hostile to reviewing those earlier decisions.

That's going to come, I think it frankly falls on the legislative branch, to reassert the seriousness of this(sounds like).

The last 2 things respect to Judicial Conduct Committee, when I started my testimony, I thanked him for his recognizing that "Fairbankses" are going to be coming along.

One is we have to understand about the judicial conduct system in this state even today, and particularly in the earlier years, is, it infringed upon the general court's right to impeachment.

Because the earlier rules imposed restrictions on people speaking about complaints they had that were founded about Judge Fairbanks. So you never heard about, so you never had an opportunity to impeach him.

I find it hard to believe that the legislature in the state continues to not assert its constitutional prerogatives to review judicial offices formerly and have a system, with, particularly with respect to judicial offices.

Now, it is something that legislature, I believe, has a duty to do to maintain its powers with respect to impeachment.

And also, with the Professional Conduct Committee, if we look at the true nature of judicial power, the notion that continues to creep into this state, that only the judiciary can review lawyers, is really repugnant to the republican form of government.

The legislative body creates the laws and most...and you will find, go look at the statutes, you have laws regulating who can practice law right now. So, you have plenty of constitutional authority.

In fact, you likely have plenty of authority with respect to regulation and practice of law, and then, when the legislature gets a little overwinding and wants to try and restrict free speech or rights of association or whatever, then

the judiciary rightfully would hear cases and strike some of your rules and laws down let's say and stay within the area of judicial acts, which that would be and staying out of legislative acts and if you look at everything that the Supreme Court has been doing recently, those are legislative acts.

Laudable as they are for opening things up; they, nonetheless, are legislative acts and should be done by the legislature. So this bill, I think, all the way down the line really addresses a lot of key issues that are out there and will continue to fester in the State of New Hampshire and I would encourage the Senate to have faith in this committee and to look favorably on this legislation.

[12:55PM Senator Wheeler left]

And, with respect to the full time judges, I would suggest looking at the prohibitions that will be looked at and reaffirmed by this committee, I believe, back in 1993, when the attempt was made to relax the program and let police officers practice law.

Senator Debora B. Pignatelli, D. 13: Senator Brown.

Senator Mary E. Brown, D. 17: One quick question. As a lay person, not a lawyer, I'm aware that other professionals in New Hampshire have to be licensed, for example, doctors have to be licensed by the Board of Medicine and CPAs have to be certified by a Board that oversees them. How is a lawyer different? How is it, where are you coming from, to say that you don't want the Board, the Bar, to act in that in sense of overseeing lawyers?

Philip Cobbin: Well I believe most of those other agencies are creatures of the legislature and are not creatures of the, first off, the New Hampshire Bar Association just started off as an association of lawyers. It was not, then, a government, did not start out as a government entity. It's become a government entity, but it became that way, not through a legislative act, it came through judicial..., or judicial claims of having the authority to do so.

So, in that respect, yeah, they're different. And I don't know if all those other, collecting taxes. When I talk about fees, if it walks like a duck and it talks, you know, it squawks like a duck, it's a tax.

And the fees that are collected for that Client Indemnity Fund, he was talking about, well that was required by the New Hampshire judiciary to be imposed. That's collecting fees, I mean, that's tax. Okay? It was a tax levied, not by an elected assembly or representative government, it was levied by an unrepresentative organ of government that's inherent in the judiciary.

Particularly in this state, this not an elective, representative body. It's a judicial body, it's different and that's, you really got to catch that as a fundamental distinction in our republic that is really repugnant to the republican notion, I'm not talking republican in a political sense, I'm talking political theory now. That, that's really repugnant to the republican frame of government.

Thank you.

Senator Debora B. Pignatelli, D. 13: Thank you for your testimony. Hank Amsden.

Hank Amsden: ...Hank Amsden, who testified many long hours ago. I want to emphasize that I am a lay person, my professionalism does not extend beyond being a land surveyor.

I've just tried to do my thing in trying to understand some of these things and I have discovered what we call a "buzz word". And, I believe it can be demonstrated by people who know a great deal more about this than I do that that "buzz word" is inherent, inherent powers.

This morning I mentioned the fact, the legislature, executive branch had no existence before we created them...had no inherent powers. The court system did, but we wiped out the court system. Once in 1813, and 4 more times in the 1800's.

Because I have heard this word inherent again and again, I just called up, I have the cases up to the last few years ago, back to the 50's. And I just put the word "inherent" in and poked a button.

Several hundred came up and I just sat there and I poked it and I poked it. And I read every bloody one of them. Until, I came to this...guess who was saying this, "Common law, judicial powers and the authority of courts traditionally described as inherent," in quotes, " are constitutional prerogatives only to the extent that the constitutions make them so." 1975- State vs. Dean(sounds like).

I suggest to you that the policy and the position of our New Hampshire Supreme Court is 180°(degrees) from that finding of our Supreme Court in 1975. I believe that can be documented.

I also heard another "buzz word" earlier this morning which I'd like to mention before we go on and that 's the "unification of the courts." Most of

you are aware that the unification of the courts took place by judicial fiat about 1968.

I am going to quote 1 phrase from that case to you. At the time the case came before the court and shortly before, there had been a bill in, in fact, a bill in the Senate. No, I beg your pardon, it was in the House. The bill was to unify the courts. So, in other words, it was in quote, your court, at 1 time.

The House indefinitely postponed dealing with this bill. Shortly after, in regarding unification, came before the Supreme Court who noted that this was going on in the House and stead, as such, that this quote should not be regarded as of particular significance.

Madame Chairman, how do you like them apples?

I suggest to you , that in these 2 questions, inherent powers and this statement that the court system ceased to be a court system. I am not in a position to tell you what it is, but any court system which poses as a court system, but no longer is constrained by judicial principles is a dangerous animal.

James Madison, you've heard this before, but this is a good place to hear it again. The accumulation of all powers, legislative, executive, judiciary in the same hands, whether of 1, few or many and whether hereditary, self-appointed or elective may be justly described, the very definition of tyranny.

I wish to speak to #4 and 5 of this bill. My feelings about #2 and 3, I think are self-evident. Number 5 asks you to take the power over disciplining lawyers from the judiciary and the law profession and return it to some other agency.

I think there are valid reasons for doing this and none to soon. I have here something which we waited patiently at the end of the day to get. It was a complaint against John C. Fairbanks. Before, shortly after, we came in possession of this complaint, we learned from testimony what was taking place in the chambers, not only the office, but the chambers of Judge Fairbanks.

[1:05 PM Senator Cohen returned]

This complaint was in 1983. The complaint concerns a little article that appeared in the *Artist's Champion* of Newport. A certain fellow has pleaded guilty to sexual assault on a 12 year old girl. His sentence is suspended. Another fellow was into some kind of nonsense with a little weed and a few other things...120 days in the big house.

The timing is important because of who these people are. I believe this appeared in the *Champion* approximately 1 or 2 days before this complaint was sent to Governor Sununu. It is signed by 14 medical people, nurses, practitioners. I don't know their precise function, some of them are LPNs, some are RNs.

Their concern is that there is inconsistency in the sentences given by Judge Fairbanks. Watch what happens to this. It's possible that Governor Sununu never saw it, but it was given to his legal counsel a few days later, who was Steven E. Merrill. Steven E. Merrill sent it to the Judicial Conduct Committee at the Supreme Court, Ralph Wood and shortly thereafter, Ralph Wood sent it to Judge William O'Neil in Manchester for his comments.

Judge O'Neil, in his letter dated 6/8/83, I spoke by phone, this date with Judge John Fairbanks. No, he recommends no action be taken, but I want to call your attention to 1 little sentence in this. Judge Fairbanks does not recognize any of the names, 14 names, appearing on the letter to the governor dated May 4, '83.

A few weeks later, Ralph Wood sends a letter to Steven Merrill, not to the victims, but Steven Merrill. Basically, it's all over, there's no problem. That was 1983.

I have spoken with several of those nurses. The best of my knowledge, no one, whatsoever, ever responded to them in 17 years. In fact, in 1996, the Judicial Conduct Committee was concerned about releasing all this information and who did they write to? Steven Merrill!

Sure, and he signed his name at the bottom and I have, so doesn't a lot of other people. And I have the names of all those people. And in 1983, unbeknown to them, a judge, who was also a lawyer, who was also a banker, who was also a part-time politician and a closet democrat knew who was after him.

Senator Burton J. Cohen, D. 24: Mr. Amsden?

Hank Amsden: Yes.

Senator Burton J. Cohen, D. 24: I know we're talking about a situation where...

Hank Amsden: Yes.

Senator Burton J. Cohen, D. 24: ...there seems to have been judicial misconduct. I wonder if we could get back to the bill?

Hank Amsden: I'm all done with judicial misconduct, I think my feelings about your bill are self-evident. Can we move on to Professional Misconduct?

Senator Burton J. Cohen, D. 24: All right.

Hank Amsden: I will add my comment, Senator Cohen, that I don't think it works.

Another complaint, this time, through the Professional Conduct Committee, quite distinct from the Judicial Conduct Committee, was entered against Judge Fairbanks in 1987. The woman is elderly, I know her, she's the daughter of a judge, she was concerned about what Judge Fairbanks was doing with her mother's estate and so forth.

Her mother was still alive. He was allowed to respond, it's still 1987. He responds about, that he doesn't like the false and abusive allegations. He says, I am willing to rely on my reputation in the area after practicing law here for 35 years.

A few months later, the woman responds, her language is prophetic. Yes, Attorney Fairbanks, I speak for all the old people's wills you've manipulated for your own monetary gains. I've researched your wills, your codicils, your hidden monies, your take over Power of Attorneys, and so on.

The last substantive communication with the woman was in November of 1987. In April 26, 1990, the committee responded to this woman. *"The purpose of this letter is to advise you that John C. Fairbanks was disbarred by the New Hampshire Supreme Court on April 18, 1990."* Suppose it(sounds like) file and complaint submitted by you. And what is the difference between November, 1987 and 1990? The difference between the North Pole and the South Pole, all the world.

I'll close with a very, very little quick, silly little story. I was over here in the Walker lecture and we had a fascinating fellow who came from Yosemite Park. He's got a beard, he's kind of "humpty dumpty"[sic]and quick guy, great guy.

He described a situation when he was working for the forest service, when a Volkswagen sunroof was parked in the hot sun, the people just went their way. While they were gone, a medium sized bear got up on and opened up the sunroof, went down in. Ate up their lunch, ate up the Exlax® in the glove

compartment. And had some problem within the Volkswagen®, couldn't get out, he was too big now. And there was considerable damage within the Volkswagen®. The Park Service came up, quickly opened the door and ran, the bear came out, closed the door and they put a little note on the Volkswagen®. *"Dear Sir, Dear Friends, A bear got in your car. Thank you, Forest Service."*[sic]. And, of course, the place broke up .

I don't think I need to say anymore, we need this bill. We need lay control of the judiciary and lawyer misconduct. We need more than that, I'm a professional land surveyor, one of the reasons I'm here is because of what happened to me.

In my view, anyone who acts in the State of New Hampshire with license or authorization, by the state, should be tried for misconduct, before a jury. And there's no other way. Incidentally, I heard O.J. Simpson mentioned. [Laugh] Big time trial, who decided it? The judge? No, 12 reasonable people, and they saw things we couldn't see on television in 3 hours. To quote a lawyer, *"Never underestimate the intelligence of a jury."*[sic]. Thank you.

Senator Debora B. Pignatelli, D. 13: Thank you for your testimony. Marilyn Billings?

Marilyn Billings-McNamara: That's Marilyn Billings-McNamara, I don't know...

Senator Debora B. Pignatelli, D. 13: Oh, I'm sorry.

Marilyn Billings-McNamara: I was just writing my testimony...

Senator Debora B. Pignatelli, D. 13: I'm sorry.

Marilyn Billings-McNamara: out, in case I wasn't able to testify. I am Marilyn Billings-McNamara, I am an attorney admitted to practice since 1977 in the State of New Hampshire. I have a practice in Lebanon, New Hampshire.

I am the Chair of the Pro bono Policy Board, you've heard Mr. Moore refer to the Pro bono program of the Bar Association. I wanted to elucidate that program a little and talk about the 1 area of the bill which I would like to focus on and that is the integration, or disintegration, if you will, of the Bar. And what we believe the impact of that would be for the Pro bono program, specifically.

To explain further about the Pro bono program, the Pro bono Policy Board, is actually an independent board; although, we reside, physically, in the New Hampshire Bar Association building. Our board consists of lawyers who volunteer to sit on the board. And also lay people including low income individuals who come together once every several months to oversee policy and the operation of the board. We have a very capable director who's name is Virginia Martin.

Our program is, as George Moore mentioned, award winning, cutting edge, innovative, supported through IOLTA Grants. United Way funding, a fund raiser of our own which is a golf tournament and also voluntary cash contributions from lawyers.

We actually obtain no funding from membership fees of the Bar Association. So, theoretically, at least, if the Bar Association were to become voluntary and membership fees were to be reduced or otherwise, become non-existent, theoretically, we would be funded by other sources and could continue to exist.

We; however, that we believe would not, in fact, be the case. As George mentioned we refer about a thousand people per year to lawyers who provide voluntary legal services. Those services can range from an initial consultation to a fully litigated divorce or custody matter or other civil litigation. All of our referrals are civil in nature, they are not criminal.

Our clients are not eligible for services in any other program that we are aware of. We do work very closely with, and plan very closely with, New Hampshire Legal Assistance and also with the Lawyer Advice and Referral Center to be sure that services are not duplicated.

We think we run a very efficient and compassionate program, but we don't meet all of the needs of the people of New Hampshire for low income of legal services. It simply seems to be impossible to do that.

However, we think we meet the needs of low income people in New Hampshire better than almost any state in the union. And we think that, in part, that is as a result of the energy and commitment of the Bar Association's staff and of our own staff at the Pro bono program.

And this is where the Bar Association becomes vital to our program. Without access to membership power, if you will, without access to the Bar Association and all 4000 some odd members, we feel that we would not be able to have a voice in communicating with lawyers frequently.

Often, some would say too often, about the need for legal services here in New Hampshire. We feel that the unified Bar gives us the best possible engine to drive provision of legal services among members of the private Bar.

We feel that, without the unified Bar, we'd still have a vehicle, but the engine would be much smaller and we would go much more slowly. We've heard about Wisconsin's deunification and then reunification and the 30% number. We look right here in New England at the Vermont Bar Association and the Vermont System.

Vermont has, does not have a mandatory Bar, it has a deunified system as well. There are approximately 2000 lawyers in Vermont. Last year Vermont was able to refer 100 cases. All of the lawyers in Vermont are, like the New Hampshire lawyers, generous, giving and committed people who want to provide justice to poor people. But there is a very small vehicle available in Vermont, because there are no resources available. There is no power of the membership, if you will, coming together for good, in Vermont and, as a result, those people suffer.

Not only are they unable to refer than about 100 cases through the Bar Association, those cases tend to be uncontested divorces. Those are the ones that, in New Hampshire, we regard as a piece of cake. We can refer uncontested divorces and do, with some ease.

In New Hampshire, unlike most other states that we talk to, we are also able to refer contested, custodial matters and child support matters and other matters to lawyers who take them willingly. In part, because, not only do they have a desire and a need to provide services to low income people, but, because the Pro bono program, using the resources of the Bar Association, provides mentoring, we provide staff assistance; although not with typing and pleading, nevertheless, an ear to people, just learning perhaps, how to be lawyers.

We provide training, we provide subsidized training at times and sometimes free training. We provide the ability for a lawyer taking a Pro bono case to come to us in the Pro bono program with almost any problem and say, *"Help, I have a Pro bono client I can't deal with, teach me how"* and we can, generally, try to be sure, not always successfully, to make the situation better, both for the client and for the lawyer.

Without the Pro bono programs involvement with the New Hampshire Bar Association it is our fear that we would be reducing our referrals. Even in a best case scenario, even if the Bar Association collapsed down to 50% of the membership. Which, perhaps, because we are a creative and innovative and

energetic group of people, would mean that we would only lose 25% of our ability to refer cases; meaning, perhaps, we would only be able to refer 700 divorces and custodial matters and child support matters and the like.

That means that 200 people in our system, 200 clients, will go unserved that were served last year. 200 cases where children may not get custodial or visitation orders in place, thus, living in the sea of chaos between separated parents.

200 cases, at least 80% of which are domestic at any given time; and which, support orders may have to depend upon the state division of child support enforcement to ultimately obtain the order and collect on it, where, now, we are able to do the same with private lawyers.

That may mean that the dying young mother who needs a guardianship for her sister or some of her family members to protect her children, may not be able to obtain that service quickly. We think we'll probably be able to do that, but we would ask that this committee consider the impact on those people in the mobile homes and the double homes. Those are the folks that we are particularly interested in.

I understand Senator Gordon's question about why should I have to associate with people who disagree with me and be forced to pay dues? And it's a fair question, I, we all wish that we didn't have to support financially who we disagree with. And the best answer that I think I could give him is, because it's for the greater good.

Because, at least in this program, and others you've heard Mr. Moore talk about, including the low income referral services and others because your discomfort, for the moment, of having someone do something you disagree with is only a piece of what the Bar Association, in its unified state is able to do.

And I'm afraid that Senator Gordon, and others, may just have to, sometimes take some discomfort to also benefit the greater good.

And I thank you.

Senator Debora B. Pignatelli, D. 13: I just have a question.

Marilyn Billings-McNamara: Yes.

Senator Debora B. Pignatelli, D. 13: You say you're able to refer 1000 people a year, do you need to turn any away because you are not funded?

Marilyn Billings-McNamara: There are many people who are not able to receive referrals through our program, the Pro bono program. Referrals start with the Legal Advice and Referral Center as a rule. They are screened at that center and about a thousand of them are then sent to us. Those are the ones we are able to help. Legal Advice and Referral will tell you that they probably turn away 4 times that or more. Their phones ring all the time, there is many, many, there are many, many more cases that are receiving no assistance.

They do other things with some of those people, giving them advice only. Giving them documents and pamphlets and pro se handbooks and other materials. But, yes, the need for low income legal services in New Hampshire is not met.

Senator Debora B. Pignatelli, D. 13: Thank you very much.

Marilyn Billings-McNamara: Thank you.

Senator Debora B. Pignatelli, D. 13: Joseph Haas.

Joseph Haas: Good afternoon. My name is Joseph Haas53@hotmail.com. That's what it says on my sheet...your sheet. I just will take 2 minutes. And I am in favor of this bill. And I just wanted to emphasize lines #6 through 14 on the 2nd page. And that has to do with the salaries of the judges, I see that the practice part was taken out. I remember testifying at the 1st part of this bill, I think this is the same one, on part-time judges, that I did give an example of David Kent of Plymouth State College of being an excellent part-time judge in Plymouth District Court.

And I don't want to dwell on that issue, but I just wanted to make a comment on some personal experience that I've had on the bankruptcy court in Manchester. And they, what they do is they structure the trustee at $5000 less than the judge as far as the salary.

So, when I heard that the other bill, when Caroline Douglas said that the administrative office of the courts was refusing to give a senator a salary breakdown, how can these amounts be determined by a outside source like this legislature without the figures? Are these dictated to the legislature, these amounts, or how are they arrived at? I'd like somebody to look into that.

The last example I wanted to make was, a few years ago, I was up in Grafton County and I was at the budget hearing there and even the custodian made

more than the sheriff. So, when I see this Jim Taylor for president, he said because everything is "crappy"[sic], that I think, perhaps, he's right, that, perhaps the 30 hour work week could be in existence and that these judges...I see some other bills are considering outside sources of income and the Thayer, the Judge Thayer case that, perhaps these amounts...I mean the legislature, you guys only make $100 a year as a volunteer almost.

I think, perhaps, this co-equal branch of government could be looked at to a similar degree. That's all I have to say.

Senator Debora B. Pignatelli, D. 13: Thank you for your testimony. Steve Tober.

Steve Tober: Thank you Senator. My name is Steve Tober and I am a practicing attorney in Portsmouth and I sense that I am probably between you and lunch, so I 'm going to be as brief as I possibly can.

There are certain portions of senate bill 412 that are significantly important to me for the following reasons:

Back in 1977, I had the privilege of being the first president of the New Hampshire Trial Lawyers Association. I wish Senator Gordon was here, I could answer some of his questions about that. That gives me an opportunity to have a perspective on what it's like to create and run a voluntary association of lawyers and the effort it takes, continually, to poor into membership and fund raising and many other things that are not something that a unified Bar needs to do for obvious reasons.

In 1988, '89, I happened to become president of the New Hampshire Bar Association, the 1st crossover into both of those jobs. There is one other person in the state who has also done that , but he presently sits on the Supreme Court so I don't think he'll be here today to talk about it.

But having been president of the state Bar, I'm able to sit here and tell the importance of a unification of a Bar and how that turns into translatable benefits to this state, to the citizens of this state and to the people who practice.

I also had the unique opportunity to be counsel for a gentleman, a lawyer, by the name of Steven Feld, who happened to be the lawyer that shared, unfortunately, in the fortunes of Carolyn Roberge during which time I, obviously got to meet, and have tremendous respect for Senator Roberge and her entire family.

It was a process that I watched unfold, as she watched unfold, for some 2 to 3 years. Pointing out, in my opinion, only that, at least the last portions of it, that being the referee and the Supreme Court wound up getting the process back in order and right. But that, too, gives me some reason to be here on Senate Bill 412, because you have elements that you've addressed in that bill as well.

[TAPE CHANGE]

...to admit, publicly, that Justice Thayer is guilty of misconduct. They'd have a very hard time doing that, and most probably, the result of this investigation, because it's skewed, the way it is, will be, that he will be found, not guilty of misconduct, just in the same way as during the "Thave"(sounds like) case, the state Supreme Court, Superior Court judge said he is not guilty of violating any federal law, something that she's in totally incompetent of having said.

The, in every state, in which, you have Judicial Conduct Committees, and Professional Conduct Committees run by the people who have the greatest gain to foreclose findings on professional conduct, it just doesn't work. It doesn't work throughout the United States and it even doesn't work when the complaints become public.

I don't want you to be seduced by the fact that we now have professional conduct Complaints going public and we now have judicial conduct complaints going public, because, in this public rush and the public awareness of these complaints is a restriction that's been built in.

In the professional conduct arena, it wasn't built in before and it prevents a great deal of professional conduct complaints from being capably brought by people such as attorneys or people who have a disinterested view of the system.

And that is the standing requirement brought into play now. The standing new requirement does not exist in the states that have openness in their proceedings. The standing requirement means, that unless you're affected by the misconduct, or you witnessed the misconduct, you cannot make a complaint, you have no standing to make a complaint.

The theory of standing, usually deals with people who are parties to the proceedings. A person who makes a professional conduct or a judicial conduct complaint is not a party to the proceedings. They are merely a facilitator of the statutory purpose. And therefore, standing has no reason to be a part of the proceeding, of the bill, of the law.

Standing was a requirement in the judicial conduct scheme before, but they never observed it. I suggest they will observe it now. The Bar Association's contribution was to insist on the standing requirement in the professional conduct and to lobby very heavily for it.

And that's how, there was a trade off. We won't oppose you too much, if we could get that standing requirement in. Because it would eliminate persons like myself who are attorneys, who want to make a complaint about a case.

I never am a witness to professional misconduct, in most cases. I just read it, I'm doing a brief on a case and I'm reading the transcript in the case and I see it, so I make a complaint. I would say I've made maybe 20 to 30 complaints in which I have never, ever, would never be able to make a complaint now under the present scheme.

What that does is it eliminates complaints by people who are not as they characterize as misgruntled litigants. So we got a scheme here that is going to give you many years down the road, the Supreme Court will say, I told you so.

All the complaints have been made by misgruntled litigants and that's going to be a fact of the rule as it exists today. This is a question of some litigation because what will have to be litigated is whether a person has standing who reads a transcript of the case and has the same standing as the person who attends the proceeding. The point in this is, this is a contribution of the Bar Association or the unified Bar to prevent competent complaints against attorneys.

Now, I would just like to take your time to compare one other instance. There is a question, and it was mentioned by Mrs. Thayer before and I would like to talk to you about that. And that is, the question, of, in a marital situation, that in Europe, the wife or either spouse has the right to counsel, government paid and you don't have that right here in the United States.

There is a right in Europe pursuant to a ruling by the court of human rights. In Europe they have a parliament called "The Council of Europe" which is the separate entity from the United Nations and they resolve all their disputes within the "The Council of Europe." This has nothing to do with the economic community, this is the political arm of Europe.

It sites

#1 - 1st Hearing - 1/12/00

NEW HAMPSHIRE BAR FOUNDATION

Charles A. DeGrandpre
Chair
Anthony A. McManus
Vice-Chair
James E. Duggan
Secretary
Richard Y. Uchida
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Kevin M. Leach
Maureen Raiche Manning
Marilyn B. McNamara
George R. Moore
Emily G. Rice
Gregory D. Robbins
Linda S. Saunders
Steven B. Scudder
Tony F. Soltani
Martha Van Oot
Gretchen L. Witt

Christina W. Abramson
Executive Director
Mary White
Finance & IOLTA
Operations Coordinator

January 12, 2000

Debora Pignatelli, Chairman
Edward Gordon, Vice Chairman
And Members of the Senate Judiciary Committee

RE: Senate Bill 412

Dear Senators Pignatelli and Gordon, and the members of the committee,

I write, as Chair of the New Hampshire Bar Foundation Board of Directors, in opposition to Senate Bill 412, section 10, which amends RSA 311 by inserting a section that makes the New Hampshire Bar Foundation an "independent charity" and further states that "attorneys and law firms that contribute their client's funds to this charitable fund shall not make decisions regarding the disposition of moneys from the fund."

The Bar Foundation is the single largest supporter of legal services for disadvantaged people in the state. The Bar Foundation also funds significant efforts to provide civic education in virtually every school in the state. Attached please find our annual report for your review, which details the Bar Foundation's grants and work to strengthen justice throughout the state.

The New Hampshire Bar Foundation is already, by law, an independent 501c3 organization. Attorneys and law firms do not contribute client's funds to the Bar Foundation. In their role as Board members and as members of an elected grants committee, attorneys are responsible for making decisions each year about grants to be made, within the Bar Foundation's mission. Attorneys are never directly involved in dispersing funds that they themselves contributed.

Please note the following in considering the proposed bill:

1. The Bar Foundation was founded in 1977 as an independent charitable foundation classified as a non-profit organization under section 501(c)3 of the internal revenue code. The Board of Directors is comprised of 21 members. The Bar Foundation Board of Directors includes a member of the public.

2. The Bar Foundation administers the Interest on Lawyers Trust Accounts program (IOLTA) which was created by Supreme Court rule 50 and 50a.

3. In general, under the IOLTA rule, attorneys must deposit nominal or short-term client funds in an IOLTA account, unless they file a notice indicating that they would like to decline to participate in the program. In short, participation is voluntary.

4. In an IOLTA account, short term or nominal client funds are pooled together and the interest that is generated by the account balance is forwarded to the New Hampshire Bar Foundation for charitable purposes. Before this innovative program was created, clients funds were pooled in non-interest bearing accounts, giving the banks money on deposit for which they do not pay interest. Now, with IOLTA, many banks in New Hampshire offer special interest rates for IOLTA accounts and they waive routine service charges. This is considered an important community service by the banking community.

5. Interest generated in an IOLTA account is not the property of the attorney or the client. With IOLTA, there is no assignment of income and no 1099s issued. Therefore, IOLTA does not constitute a "contribution" by attorneys or clients.

6. Bar members who participate in IOLTA elect a committee of five members, who must also be participants in the IOLTA program, to review IOLTA grant proposals and make annual grant recommendations to the Board of Directors of the Bar Foundation. The Bar Foundation Board then votes to accept the recommendations of the grants committee and the grants are made. This committee and the Bar Foundation Board monitor the grants throughout the year.

7. The large majority of IOLTA funds support organizations that provide legal services for low income people (about 98%). IOLTA also provides support for public education about the law, including programs in virtually every school in New Hampshire, and occasionally supports other projects in the administration of justice. Please review our annual report for a list of grantees.

8. The Bar Foundation also accepts voluntary contributions from members of the Bar and the public. These contributions are entirely voluntary and the donors do not have any direct say in how they are used. The Bar Foundation raises funds for its permanently restricted endowment funds, which are held by the New Hampshire Charitable Foundation, and the Bar Foundation also has an annual membership program to raise operating funds. Most of these contributions, and the income from the endowment, are also used to make grants. These grants are given to strengthen the justice system in a variety of ways and are decided on by a committee of the board of directors.

In short, the New Hampshire Bar Foundation is a significant resource for the people of New Hampshire. We provide more funds that either state or federal government, or any other source, to support legal services for children, for the elderly, and for victims of domestic violence. We provide significant funding for civic education in the schools. The Bar Foundation is a repository of the highest ideals of the legal profession and it is one of the many ways that lawyers "give back" to their communities.

Please do not hesitate to let me know if you need further information about the Bar Foundation.

Sincerely,

Charles A. DeGrandpre
Chair

#2 - 1st hearing - 1/12/00

Exhibit A

PRESENTATION ON JUDICIAL AND PROFESSIONAL CONDUCT COMMITTEES BEFORE SENATE JUDICIARY COMMITTEE RE SB 412-FN

January 12, 2000

by Howard J. Zibel, Clerk of Supreme Court and Executive Secretary of the Judicial Conduct Committee

Senate Bill 412-FN would reconstitute the Judicial and Professional Conduct Committees as independent bodies without judges on the Judicial Conduct Committee (JCC) and without judges or lawyers on the Professional Conduct Committee (PCC). Today, I would like to explain the organization of these two committees and discuss why I believe this legislation is unnecessary.

I. Organization of JCC

The JCC was established on June 23, 1977, to receive and review complaints against judges for violations of the Code of Judicial Conduct. The word "judges" is used very broadly in this context. It includes masters, referees, clerks, deputy clerks, registers and deputy registers of probate, and court stenographers and reporters.

Originally, the JCC had seven members - three judges, two lawyers, and two public members. In 1991, the membership was increased to nine by adding one judge and one public member, then, just two years ago, the size of the JCC was increased again by two to eleven members, this time adding two public members. Thus, the current composition of the committee is four judges, two lawyers, and five public members - public members being the plurality of the committee. All of the members are appointed by

the supreme court. Pursuant to the recent amendment to the rules establishing the JCC, members will serve three year terms and may serve three terms. All members are volunteers and are not compensated for their service.

II. Organization of PCC

The PCC was established exactly three years before the JCC on June 23, 1974, to receive and review complaints against attorneys for misconduct. Originally, the PCC had fifteen members. There was no provision for public members; however, there have been public members on the committee for some time. In 1987, membership was increased to sixteen by adding the vice-president of the New Hampshire Bar Association as an *ex officio* member. Four years ago, in 1996, the PCC was increased again this time by two to its current level of eighteen members. A provision was added requiring that at least four members be public members. The court has stated its desire to have at least six public members on the PCC. No judges currently serve on the PCC. All of the members are appointed by the supreme court and serve three year terms to a maximum of three terms. Like JCC members, all PCC members are volunteers.

III. Opening JCC and PCC Filings to the Public

Last Monday, the New Hampshire Supreme Court issued new rules governing the Judicial Conduct Committee. Similar rules are expected later this month governing the Professional Conduct

Committee. The major change made by these new rules is that all matters brought before these disciplinary committees will be made public, effective with filings after April 1, 2000. They will be public at the earliest of final action by the committee or the initiation of formal charges. Thus the public will be able to review the actions of these two important committees.

As executive secretary of the JCC, I can attest to the fact that the committee is hard-working and takes its responsibility quite seriously. Thankfully, in New Hampshire serious judicial misconduct is rare. Only two cases have reached the level of public discipline since 1991. Over the past ten years approximately five percent of the complaints before the committee have resulted in minor, private discipline. Now these too will be public. In fact, the new rules will make New Hampshire the most public judicial conduct system in the United States.

On the PCC side, discipline is not as rare. Of course, there are now over 5,000 members of the New Hampshire Bar as opposed to less than 130 members of the judiciary. New Hampshire has a reputation as a jurisdiction which has little tolerance for attorney misconduct. Matters which other states have treated less harshly have resulted in disbarment here. Attorneys in New Hampshire know that any act of dishonesty will result in severe discipline.

In sum, I do not believe the proposed legislation is necessary. The judicial and professional conduct systems in New Hampshire work well. In the past, the judicial branch said,

"Trust us. The system is working well." The difference in the new rules is that effective with filings before the JCC and PCC after April 1, 2000, we can now invite you to look for yourself. I have no doubt that you will reach the same conclusion.

Date: February 7, 2000
Time: 12:05 p.m.
Room: Room 103, State House

The Senate Committee on Judiciary held a hearing on the following:

SB 412-FN adopting the "Court Integrity and Attorney's Independence Act"

Members of Committee:

Senator Pignatelli
Senator Gordon
Senator Trombly
Senator Wheeler
Senator Roberge
Senator Cohen
Senator Brown
Senator Fernald

Transcriber's note: The transcription of the first hearing, held on January 12, 2000, was done by Laurel Hanlon. Laurel also transcribed the first part of the hearing reconvened on February 7, 2000. Those two transcripts together comprise 53 pages, ending with the testimony of Steve Tober. This transcription begins where that prior transcription ended and is separate and apart from that prior transcription.

Attorney Tober: As I understand it, a desire on the part of this legislation to make it voluntary for lawyers in this State, some five thousand now, to decide whether to opt in or opt out of a Bar Association. I understand the reasons why such a request might be before this Legislature.

I have had the privilege, in all those things I have told you that I have done, of representing the New Hampshire Bar before the U.S. Supreme Court in the California case that talks about whether or not unification is constitutional and indeed it is. I have represented the New Hampshire Bar Association before the New Hampshire Supreme Court in a challenge by an attorney by the name of Michael Cocci to de-unify the Bar Association. For reasons that are clear in the decision of that case, the Bar Association still stands today.

It is an intriguing and seductive proposal to say, "Look, people should be free to join anything and everything they wished and nobody should be forced to do anything simply because they happen to be a lawyer". I understand the attraction of that. It is shortsighted, though, and it is wrong to suggest that it is something that we should do here.

This is still, whether we like it or not, something of a rural state and this is still a state that has only 5,000 lawyers. That is a building in Manhattan; it is a state to us. If you had hundreds of thousands of lawyers practicing in this State, you could probably talk about creating a voluntary Bar that would attract a significant number of people who are willing to pay significant enough money to make the programming that that money goes into useful. But, we are still a small state. We still all hang together in this profession and if you attempt to de-unify it, you are going to break down the system and the process that serves the general public. You are not going to do anything more or less for lawyers that they haven't already done for themselves.

I think it should be understood that people who are not happy with the position that the Bar Association takes have a process with which to voice their individual differences. If they are right, if it is determined to be that the Bar Association, for example, as a unified organization, takes a position on something before this General Court that is outside of the core responsibilities of what we do as a bar association, that individual is entitled to a refund of a portion of their dues. That is what the U.S. Supreme Court says has to happen. That is what the New Hampshire Supreme Court says has to happen and indeed, that is what does happen. We have tremendous respect for the individual rights and the freedom of speech and all the other constitutional notions that you would have as a lawyer. Simply holding a license doesn't mean you give those up. The only thing that we ask in this State, given our size and the dimensions of what we give back to the consuming public, is that this be a unified bar.

And, I want to point out something because I am not sure it is abundantly clear. I am sitting here as an advocate of a unified bar and I have been President of this Bar and I have been President of other Bars in this State. I am a plaintiff's lawyer from Portsmouth. I have a small firm. There are three lawyers who work with me. I am not what I would think one would characterize as a traditional bar leader. Yet, the Bar Association has been embracing enough to allow me to be involved to rise to a position where I can make a difference for the people in this State and to be able to serve the general good in a way that is probably atypical.

I would ask you to think about how many lawyers of a similar background have served as Presidents of the New York State Bar or those bigger associations that are voluntary. The point remains that it is a very open and forgiving Bar. It is not a social club that precludes or includes. It does not speak contrary to notions of individuals without giving them redress, without giving them an opportunity to come before the process and say, "I don't think you did the right thing before the General Court".

And, it brings so many other benefits to the public that we could be here all day going through them. You heard about legal services for the poor. That indeed is nationally recognized that New Hampshire has been able to bang for the buck provide the kind of services to the poor and the disadvantaged in this State that otherwise would do without.

But let me give you just yet another example of what an organized unified bar was able to do, that I dare say a fractious and broken up bar could not have done. I chaired a committee for almost six years that wrote the rules of professional conduct in this State. They are based upon the ABA model, but we turned them into the best of what we thought, in the 1982 to '86 era, was what New Hampshire lawyers should do. It was a tremendous undertaking. It was a tremendous education for me and for many others. The resources, the support staff, the ability to convey from concept to reality, rules of professional conduct for this State, governing all lawyers, protecting the citizenry of this State, was a remarkable tribute to that Bar Association. It wasn't the Supreme Court. It wasn't the Trial Lawyers. It was the New Hampshire Bar, because it had the wherewithal, the insight, the unified belief, that ethics needed to be updated, modernized, and put into effect, and we did that.

Now, I dare say that, if you took the New Hampshire Bar Association and you broke it up and you made it voluntary, that that kind of effort would not be the same kind of effort under that kind of development. The example that George Moore told you about in Wisconsin is absolutely true. One of the states that New Hampshire joined with when I went down to the U.S. Supreme Court on the issue of unification was Wisconsin. They were a powerful, well-organized, successful bar association. They gave tremendous services to the people of Wisconsin. They wound up getting broken up, only to be put back together again. But, they fell from the pinnacle. They collapsed. That bar association struggled to get back to the notion of public service, member service, you name it, because they were broken into the component parts that a group of people thought was appropriate. It was a good example for us because Wisconsin is a much larger state and they couldn't put together a successful voluntary bar that really would translate into social benefits for their communities.

That leads me, I guess, to the professional conduct board proposal that Senator Roberge has put in this bill. I mention the Rules of Professional Conduct and the ability of the Bar Association to study effectively and well and coalesce around these rules that today still govern. If I read this proposed legislation correctly, you would take the Professional Conduct Committee from under the auspices of the Supreme Court and, let me make it clear, it is not anything to do with the Bar Association. Professional Conduct is a committee of the Supreme Court, just like the Board of Bar Examiners and Judicial Conduct. You would take that and you would move it over to a lay board, which would have no connection whatsoever with the practice of law or the Supreme Court. So, what you will wind up doing, in my belief, is disconnecting the process from the rules. The rules were crafted, and continue to be crafted, by lawyers on a national and state scale. They are an incredible undertaking. The American Bar Association still, at every meeting, generates debate, provocation, thought and resolution on what to do with these rules because life changes. Society changes, the rules are changing. You would disconnect from that ongoing organic process the way you would apply them here in the State of New Hampshire. It is not a logical result that calls anything to mind that would argue for its adoption.

The Professional Conduct Committee does work. It is subject to some blemishes. I have had the privilege over the last ten years of probably being in front of the Professional Conduct Committee, thankfully on behalf of others, about sixty times, one of which was the Roberge and Feld case. I can tell you of great successes that are before that Committee, but what you hear about are the occasional difficult cases.

I think an earlier speaker talked in terms of the complexity of cases and how that can affect things. Well, Carolyn Roberge and Steve Feld had a very complex case. The result was not easy to obtain, but the ultimate result was appropriate.

So, I guess I just have to point out to you that, by the simple suggestion of moving the Professional Conduct Committee out from under the Court and creating a board on which no lawyers and no member of the Bar Association would serve is, to me, a significant disconnect in a process that, quite frankly, is working, and I believe is working well.

I am reminded from many years ago when I served on the City Council over in Portsmouth and we would give someone like Commissioner John Clemens from the Highway Department a hard time. He would come in with something. We didn't like the proposal; we wanted to tinker with it and come up with our ideas; and we would suggest, sometimes, globally different

approaches to a systemic problem that Commissioner Clemens was dealing with. He looked at us one time, after we had given him a very hard time and he said, "You know, you don't build a church for Easter". I think that is an analogy I want to stress here. You don't have to go and take the system or process, both by way of a unified bar and a professional conduct committee and a judicial conduct committee that is working. It may not be optimum for the moment, but it is working and it is working well. You need not take those processes, throw them out and go to fundamentally different approaches without first very carefully deciding what it is you think you are accomplishing. The unified Bar is a very strong and vibrant Bar in this State and we continue to draw great numbers of people into this State to practice law. It is a tribute to our profession. The Bar Association is able to take that and translate it into consumer services that are integral to the administration of justice.

The Professional Conduct Committee acts, as does the Judicial Conduct Committee, to pick up the occasional problem within our profession and it responds appropriately and well when it does so. I have great respect for Senator Roberge. I understand her thoughts. I was there with her in the trenches. I suggest that this is a point where reasonable people disagree reasonably. I hope you will give these things careful consideration and recognize that, in fact, the Bar Association and the present status of the Professional Conduct Committee and the Judicial Conduct Committee, with the new rules going into effect on April 1, are indeed the best process we can have in place right now to bring about proper justice for all.

Thank you.

Senator Pignatelli: Thank you for your testimony. Kevin Dugan?

Attorney Kevin Dugan: Thank you Madam Chairwoman. My name is Kevin Dugan and I will be very brief. I am here on behalf of the New Hampshire Trial Lawyers Association and personally as a practicing attorney in Manchester. We oppose this bill and all of its subparts and I will address each of them separately and briefly.

Dropping down to the second part of the bill dealing with the integration or unification of the Bar. Frankly, some of our members are divided on this issue and some share the concerns raised by Senator Gordon. But, the bottom line consensus seems to be does the Bar do a lot of good? The answer is yes. Are there any real problems created by the unified Bar? The consensus seems to be no. And, is there a compelling need to undo the unification or the integration and the consensus seems to be that there is no compelling need to do that. Others have spoken about the deeds, the work

that the Bar has done and is doing and I think we all see that as practicing lawyers.

Next on the bill is the New Hampshire Bar Foundation. That has nothing to do with the Trial Lawyers Association and we have no interest in that. But, as a practicing attorney, I want to voice my concern that this bill would prohibit attorneys who contribute from serving on the board of the Foundation, which makes no sense at all. Again, we raise the issue of is there a compelling need for this and I think the answer to that is no.

The other two provisions of the bill relate do the Judicial Conduct Committee and the Professional Conduct Committee. The bill would remove the present Professional Conduct Committee from the Supreme Court and create an independent board. It would do that with the Judicial Conduct Committee as well. We would raise a couple of issues with that. First off, I think you need judges and lawyers on these committees to bring context and perspective to the complaints that come before the Board. If you prohibit judges and lawyers from serving on these committees, you will not have that context and perspective when these issues come up.

As has been testified earlier, we have new rules in place that I think will address a lot of the concerns that have been raised in the legislation and we should give them a chance to go into effect and see how they work and take things as they come up, as the need arises. It just strikes us that this is just another bill or attempt to try to clip the wings of the Supreme Court by taking away the oversight and responsibility for lawyers and, just as it is important to have lawyers and judges sit on these committees for context and perspective, I think it is also important to consider the context and perspective of the complaints about the current system. Again, the bottom line being, is there a compelling need for this bill? No. I have not heard one in all of the testimony that we have heard.

Thank you. Any questions?

Senator Pignatelli: Thank you. Nina Gardner?

Nina Gardner: Good afternoon, Senator Pignatelli and members of the Committee. For the record, my name is Nina Gardner. I am Executive Director of the Judicial Council and I am here to speak primarily in an informational role. The Judicial Council did not vote to take a position on this bill per se, but asked me to come and speak on two sections of the bill.

The first section which relates to the transition from a part-time to a full-time judiciary. You have already heard from George Moore about the study

that the Judicial Council is conducting. I would very much urge you to let us complete our study, which I believe will be completed some time this fall. Our intention is to take that study and to bring it forth to the Legislature as proposed legislation, whereupon, you could have a chance to look at it again.

The study we are conducting is in the same format and mode that we conducted our family court study and that is, the Committee is composed primarily of our lay members, who have no vested stake in the State system as it exists now. They have been consulted with and are being provided information from the district and probate administrative judges and some of the actual judges in the system. We have learned a great deal already about the part-time system. We have done that over the past several months. We are now doing comparative studies to see how other states transitioned.

I think one of the things that you should know is that the Judicial Council did the study that was implemented in the '70s to take the district and the municipal court system and combine them. That was a phased-in system. There is only one municipal judge still sitting. Underlying this transition notion is the fact that all judges are commissioned for a term by the Executive Council and that commission cannot be removed. So, any judge who is a sitting judge, we cannot simply, by waving a wand, take away their judgeship. So, we thought it was important to do this study, to look at the resources that would be needed within the district and probate system. I think it would be fiscally quite an undertaking for the State to provide that all of the current fifty some odd part-time district court judges become full-time. I am not sure there is a need statewide for all of those people to be full-time and we would want to look at that and we are looking at that as part of our study.

Because I have participated in and the Judicial Council has participated in these studies before, we have become acutely aware of the fact that there is not necessarily a statewide fit between what works in more populous southern parts of the state and the more rural northern part of the state where I live. So, we really want to look very carefully at how we propose to deliver services, particularly in the district courts in those areas.

Familiarity breeds both contempt and information and we are very, very much driven by the concerns that motivated Senator Roberge's bill as we undertake this study. We are concerned about the perceptions of conflict and the reality of those conflicts, but we also need to figure out how best to have judges who know what the resources are within given geographic areas as they provide resources for kids, particularly in CHINS, abuse and neglect cases, and delinquency, which is a very significant part of the district court caseload. They also need to be cognizant of the needs of the domestic violence

arena in terms of services, and those vary from the southern part of the state to the northern part. Hence, our study is going to take those factors into consideration.

We are also going out on the road as we did with our family court study. This fall we intend to have five or more public hearings around the state so that we can receive public input as to the benefits or the disadvantages of the present system and a proposed full-time judge system. Most states have converted to a full-time judge system and we need to see what the cost and benefit analysis of that is in terms of delivery of services and costs. We will make that study available to the Legislature and to the public upon its completion. So, I hope you will let us do that study. I can tell you that it is conceivable that we might bring forth a recommendation to you that you would implement sooner than this bill proposes because I think there are concerns that need to be addressed, as outlined in this bill.

I would also like to speak to the provisions relating to the Bar Foundation briefly, to tell you that currently, the Legislature funds a very small portion of the operating costs of New Hampshire civil legal assistance through a direct appropriation that literally passes through the Judicial Council to New Hampshire Legal Assistance and I can tell you that appropriation is $200,000. That provides the delivery of civil legal services in the north country only. As somebody who really is very concerned about those services, I would hope that you realize that if we somehow disengage the Bar Foundation and it is not able to provide those services, there is a magnificent and huge and gaping gap that will need to be filled somehow and thus far, the State has not seemed to be willing to provide all that money. So, I do want you to know that the Bar Foundation provides a very valuable service to New Hampshire Legal Assistance.

In concluding, I would like to also mention that the Bar Foundation funds a very significant portion of the costs of delivering educational services that you heard reach some 60,000 students in this State. As a former government instructor and as somebody who is very concerned about teaching of civics, understanding of the Constitution and the judiciary, I want you to know that, without that component, I am not sure exactly how that would be provided. Again, I don't want anything to displace the very significant role the Bar provides in providing legal education to the students of this State.

The state assessment exam does not have a large number of questions dealing with an understanding of the Constitution or an understanding of our legal system. Quite frankly, it is something I am very concerned about and to any extent that we can get those questions greater focus, it is going to come about through classroom teachers teaching such matter in their classrooms.

I would be very glad to answer any questions you may have. Thank you for allowing me to testify out of order.

Senator Pignatelli: Thank you. Theodore Kamasinski?

Theodore Kamasinski: My name is Theodore Kamasinski. I live in New Hampshire in Pittsfield and I am not a lawyer. I would just like to comment on two positions here on the bill.

One is the Bar Association and why we have a Bar Association and why we shouldn't have one. If I became an attorney, passed the Bar, and wanted to practice law as a lawyer in this State, I would not be able to unless I joined the Bar Association. I would never join the Bar Association, so that is probably the main reason why I have never become an attorney. The Bar Association to me is a guild and it operates as a guild mentality. It is very successful in protecting mediocre lawyers who can assumingly hide in this Association.

For a living, I write briefs for attorneys and have been doing that for more than thirty years, actually close to forty years. What I have found out is there is a great deal of incompetence in the legal profession. The Bar Association, we have heard people say, 50%, if it wasn't mandatory, would leave the Association. Well, I don't see what possibly could be wrong with that if they left the Association and they practiced without this oversight. They have the license to practice law by passing the Bar and being approved by the conduct and the fitness committees and that should be sufficient. They shouldn't have to belong to a guild.

The question of pro bono as a benefit of a Bar Association. The threat is always that, without the Bar Association, we would not have pro bono attorneys. Well, the way some courts, the federal court system, for example, there isn't a bar association for the federal courts. To be admitted to the federal court, you have to be an admitted lawyer within the state. The federal courts do not have a particular association. In order to practice law before the federal courts, you must simply be, as I said before, admitted to the state courts. I have lost my train of thought. What the federal courts do with pro bono, however, is they don't go to the Bar Association. What they do is that they have a list of lawyers and they say whoever comes up on the list gets the pro bono assignment. Most of the firms, the way it rotates, they all get an equal amount except in a very, very large state where you are not going to get to the great majority of law firms.

What they do in New York is rather unusual. What they do in New York is that they make sure their pro bono assignments go to the best possible firms, the largest firms, the most successful firms because they feel they have the financial ability and the legal ability to do a good job. If you read in the newspapers recently, in the *New York Times* and in the *Boston Globe*, there have been articles about attorney competence and efficiency. One of the most startling articles that have occurred is the studies that have been with respect to death penalty cases taken by lawyers on a voluntary basis or an assigned basis without any, essentially any competence. In Chicago, I don't know if Illinois is more destroyed, withheld the imposition of the death penalty. The Governor signed the bill to do that because they found that too many of those cases were improper convictions. The *New York Times* has done a study of death penalty cases across the country and determined that it was incompetence of counsel most of the time that resulted in some of these terrible, terrible injustices.

The pro bono system, the way it is instituted here through the Bar Association, is not a terrific situation. You can just as easily have the Supreme Court, on its own can assign attorneys who are competent. You know, the best judge of a competent attorney is not other attorneys. The best judge of a competent attorney is the court. They see attorneys in front of them. Believe me, the justices of this court know who is competent and who isn't competent. If a justice of the Supreme Court was required to assign a death penalty, and that could happen in this State, he would assign the best and most competent person to do it or from a list of competent persons. What we are doing with the Bar Association is that we are dealing in mediocrity and we are dealing with people who need the money who normally get these assignments. I can tell you that honestly because I have to write appeals based on some of these travesties.

We talked about comparisons to Fairbanks and it always comes up, the comparison to Fairbanks, as a basis to redo the judicial conduct or the professional conduct scheme. Well, right now, as we speak, there are cases before the Judicial Conduct Committee and there are cases before the Professional Conduct Committee that we may, in five years, with hindsight see, are extremely messed up. If you, instead of passing this bill right now, if you did an honest to goodness study of what is going on before these committees now, you would be able to make a determination of whether there is a need to take it away from them. If you called me before you, I could speak to you for a week unending on each case that I know of before the committee that has been well-handled or has been messed up seriously. The Fairbanks situation is not a good barometer of what is going on and they don't always fail to discipline an attorney or a judge, but they do in many, many cases and those cases are the ones which make it absolutely essential

that this Judicial Conduct Committee be taken away from court supervision and put into a real format, with funding, that enables it to work. You know, the old excuse that is made regularly by the Supreme Court is they don't have any money and they do it on a voluntary basis. We can't fault them for what they do. Well, that is a very serious question of course, that they don't have money and they aren't able to get any investigation done. But, it isn't the end of it. The people should be willing to devote their time to get at the truth and the system does not permit it, especially in a small state where you have the guild and the guild mentality. The guild mentality, I mean, it is very difficult for a professional in a profession to admit that any other professional of guilty of misconduct.

Tape change...

To admit publicly that Justice Thayer, they would have a very hard time doing that and most probably the result of this investigation, because it is skewed the way it is, will be that he will be found not guilty of misconduct just in the same way as during the Thayer case the Superior Court judge said he is not guilty of violating any federal law, something that she is totally incompetent of having said.

In every state in which you have Judicial Conduct Committees and Professional Conduct Committees run by the people who have the greatest gain to foreclose findings on professional conduct, it just doesn't work. It doesn't work throughout the United States and it even doesn't work when the complaints become public. I don't want you to be seduced by the fact that we now have professional conduct complaints going public and we now have judicial conduct complaints going public because, in this public rush and the public awareness of these complaints is a restriction that has been built it. In the professional conduct arena, it wasn't built in before and it prevents a great deal of professional conduct complaints from being capably brought by people such as attorneys or people who have a disinterested view of the system.

And that is the standing requirement brought into play now. The standing new requirement does not exist in the states that have openness in their proceedings. The standing requirement means that, unless you are affected by the misconduct or you witness the misconduct, you cannot make a complaint; you have no standing to make a complaint. The theory of standing usually deals with people who are parties to the proceedings. A person who makes a professional conduct complaint or a judicial conduct complaint is not a party to the proceedings. They are merely a facilitator with a statutory purpose and therefore standing has no reason to be a part of

the law. Standing was a requirement in the judicial conduct scheme before but they never observed it. I suggest they will observe it now.

The Bar Association's contribution was to insist on the standing requirement in the professional conduct and to lobby very heavily for it. And that is how there was a trade-off. We won't oppose it too much if we could get that standing requirement in because it would eliminate persons like myself or attorneys who want to make a complaint about a case. I never am a witness to professional misconduct in most cases; I just read it. I am doing a brief on a case and I am reading the transcript in the case and I see it. So, I make a complaint. I would say I have made maybe twenty to thirty complaints in which I have never, ever, would never be able to make a complaint now under the present scheme. What that does is it eliminates complaints by people who are not as they characterize as misgruntled litigants. So, we've got a scheme here that is going to give you... Many years down the road, the Supreme Court will say, "I told you so. All the complaints have been made by misgruntled litigants". That is going to be a fact of the rule as it exists today.

This is a question of some litigation because what will have to be litigated is whether a person has standing who reads a transcript of the case and has the same standing as the person who attends the proceeding. The point in this is this is a contribution of the Bar Association, or the unified Bar, to prevent competent complaints against attorneys.

Now, I would just like to take your time to compare one other instance. There is a question, and it was mentioned by Mrs. Thayer before, and I would like to talk to you about that. That is the question of, in a marital situation, that in Europe, the wife or either spouse has the right to counsel, government paid, and you don't have that right here in the United States. There is a right in Europe pursuant to a ruling by the Court of Human Rights. In Europe they have a parliament called the Council of Europe, which is a separate entity from the United States, and they resolve all their disputes within the Council of Europe. This has nothing to do with the economic community. This is a political arm of Europe that sits in Strasbourg. They have a court and they also have a Declaration of Human Rights, which mirrors very much our Bill of Rights. They did a case called Arey v. Ireland, which has a divorce case in which husband, who was an attorney, was divorcing his wife and his wife didn't have the finances. The judge in this country named David Bazalon contributed to that case. He was a circuit court judge who is since deceased, with the federal circuit in Washington. He said, just like in this country, the right of effective access to the court is an important component of a fair trial. They said that the right of effective access to the court includes an attorney to represent you before the court, a competent attorney, of course. In Arey v. Ireland, the judges in the European

Court of Human Rights ruled that, in order to have effective access to the court, forgetting about the Sixth Amendment limiting it to criminals, they don't have such limitations in Europe, in order to have effective access to the court, you have to have an attorney represent your goals, if it is too complicated for a citizen to understand. They determined that in a divorce case the emotions are so high it is too complicated for a citizen to understand.

So, in every country in Europe, twenty-one countries that belong to the Council of Europe, access to an attorney, for free, in civil matters, is a constitutional right, a constitutional right by virtue of the European Declaration of Human Rights, which essentially is the same as the Constitution.

In this State and in every state in the United States, having a competent attorney represent you in a civil proceeding is not a right, although, according to a judge of the Circuit Court of Appeals, the United States Circuit Court of Appeals, David Bazalon said it is a component of effective access to the courts. This is a contribution lawyers could make. Lawyers could litigate, go to court and litigate that issue just the same way in this country as it was litigated in Europe in a scheme that doesn't have a Bill of Rights.

There is one other I want to talk to you about and that is IOLTA. The Bar Association is well aware, the Supreme Court is well aware, of the fact that the United States Supreme Court, in 19, I think it was, I am not going to mention the year, but it was very recently, stated that the IOLTA funds that are held by attorneys in interest bearing accounts, that interest belongs to the citizen, it belongs to the client. This Court and the Bar Association and all the associations that relate to IOLTA funds have yet to make that adjustment, including the Supreme Court. What occurs is, if you are a, and this is another misgiving and this is a reason why we don't need a bar association, because they are not looking at major rights involving the citizens in spite of the fact that we have a great deal of rhetoric that captures that with euphemisms.

There is a substantial amount of money that the citizens of the State put on deposits every year and it goes into a bank and it generates interest. The Supreme Court of this State stated, when that occurred, that the interest did not belong to the clients. That is the Supreme Court of this State. The Supreme Court of the United States says, of course it belongs to the clients because, without their money, it wouldn't have occurred. Every year there is a committee that makes decisions on how clients' money or the interest that is generated is going to be spent. I, for one, thought, for my part, do not want an attorney representing me to use the interest on my money to litigate

something which is against my beliefs, such as gay marriages or something like that. I just don't want it to be done.

The Bar Association has known about this issue for years now and sits on it and doesn't correctly make a notification to the people that you have the right to determine what happens to your interest. So, all these millions of dollars every year is being frittered away under the mistaken belief and, of course, it is still law in this State, the Supreme Court doesn't decide decisions or overturn anything unless there is a controversy in front of them and indeed, they can't. All that is being done when the United States Supreme Court said it belongs to the people and we have that money misspent. That is a misuse of the Bar Association and it is a big secret and they keep it a secret because it is beneficial to them as a group and it further promotes mediocrity.

Listen, they do provide attorneys for people and they do make some public benefit by doing that. You can have another scheme that does that better and I think the best scheme is the court assigns attorneys themselves. None of these things that are done by the Bar Association cannot be done in an alternate way and done more successfully. If you believe the belief that, if the one who makes the rules is the one who should oversee the rules, that is pathetic. I mean, the fact that the lawyers got together and made a Professional Conduct Code means that the lawyers have to oversee it. That is like saying the Legislature makes the law and therefore the Legislature should oversee the law and not the courts. It is a pathetic argument.

I should say also that what Steven Tober said is correct. They worked a long time on adopting the ABA recommendations and took out of the ABA some very important aspects involving honesty and deviated from those aspects in putting the New Hampshire Code of Professional Conduct in place. Even that being the case, if the Professional Conduct Code was adhered to in its present form, we wouldn't have half the difficulties that we do with attorneys, including the inability to practice law in a way which is beneficial to their clients, most beneficial to their clients. You get that impression very clearly if you look at the number of cases on appeal in this State, percentage wise when compared to other states. Mr. Zibel is here and he will tell you that they presently now got 900 cases pending before the Supreme Court. Considering the size of the cases, the number of cases that are docketed, that is an awful number.

Thank you.

Senator Pignatelli: Mr. Kamasinski, do you have time for a question?

Mr. Kamasinski: Sure.

Senator Pignatelli: Do all states have Professional Conduct Committees and Judicial Conduct Committees?

Mr. Kamasinski: Yes. It started in roughly 1975 when many states began, usually by legislative enactment, not by judicial enactment. The first states did it by legislative enactment and them some states by judicial. Many of the states the Constitution doesn't allow them to have a Judicial Conduct Committee. For example, Connecticut which I am very familiar with, they had to pass a constitutional amendment to allow it. In this state, the way it is set up, the court essentially created it and it is an arm of the court. That is not a problem insofar as I can see, it being an arm of the court. The problem is that it is not independent and it is not composed of enough members of the public to insure that they do a successful job. Mrs. Thayer mentioned the question, mentioned the problem that they have, the individual members and if that person from the Professional Conduct Committee was here, she would tell you, the problem they have is they have a group think and the group think is based mostly on getting instructions from the professionals, the lawyers who are judges on the Committee.

Senator Pignatelli: Mr. Kamasinski, how many states have their Professional Conduct Committee and Judicial Conduct Committee made up entirely of non-lawyers or judges?

Mr. Kamasinski: I would say probably none. I would say, though, that some of them have, I can't say that for sure, but I have never known of one that has not at least a minority of judges or lawyers on either committee. I think this is something that is based on the Rules of Professional Conduct and the Code of Judicial Conduct.

Both of these instruments are easily understood by lay people. They are not complicated at all. They are very simple. They have to do with honesty and proficiency. I don't think you need a lawyer to explain to you what honesty is. You may, for some of the complex rules in professional conduct where someone makes a complaint that the lawyer was totally ineffective, you may need a lawyer for some guidance at that point. But, if you had a lay committee, they would have the ability to call an expert witness to testify. The point with the law committee is you don't get into this group mentality that you get that exists.

I mean, I have made more complaints than anyone before the Judicial Conduct Committee and I sat up in a hearing right next to one of the members there and I was talking back and forth to him and he never heard of me before. Now, that is not really looking at your complaints, every second

complaint that comes in has my name on it. I couldn't believe that. I don't want to mention his name because I don't want to embarrass anybody, but he wasn't a lay person.

I think that the experiments that they have done in some of the open states with professional conduct and so on in letting people get into the deliberation process, which we have no intention of doing here, makes it a better process. But, I think what you are leaning to is saying, if we don't have judges in there, we can't find out what the correct stance is on the legal problem that is presented or if you don't have lawyers. Well, that is easy. You just have a hearing and you have witnesses who are experts, just the same as when you conduct a court. The judge in the court and the jury are not experts. They hear from experts who are experts to make their opinion, to make their decision correctly. That is how a court works. You receive all the facts, you receive the expert evidence and you make a decision.

Having a judicial conduct board that works like a jury is not a bad idea, or having a Professional Conduct Committee that works like a jury. It is going to be the same result. So, the answer is not do other states do it. The question is not do other states do it. It is, can we do it successfully and capably because, if we do do it that way, we will never have a question that it isn't done correctly in the future. I really want you to, and I would, you know, urge you to have some sort of a subcommittee that looks at whether these things are really functioning now. If these two organs are functioning now, then you don't need this, you don't need a board, you don't need anything. If you look at if they are functioning and you come to the conclusion they are not functioning, then you need to make a change.

As I tell you, we can sit here, I can tell you horror stories and good stories from now and it would last a week and I would talk fast. I mean, there are so many cases that are neglected, is a nice word, that cry out for this type of a board, that cry out for a citizen jury to look at the complaints and arrive at a decision. Having experts and having a case prove, as the normal court works, is not a bad idea. Juries in this country, everybody says juries are stupid, they can't do anything. Juries made up of plain ordinary people grasp the most complex issues possible and arrive at verdicts correctly in most cases. This is not a complex issue. Professional conduct is not complex, nor is judicial conduct.

Senator Pignatelli: So, no other states have seen fit to have entire boards of the Professional Conduct Committee or their Judicial Conduct Committee made up the way you would say that ours should be made up? Yes or no?

Mr. Kamasinski: I will say no.

Senator Pignatelli: OK.

Mr. Kamasinski: But...

Senator Pignatelli: I understand all the other stuff that you said.

Mr. Kamasinski: No, no the qualifier is no other state has had a Fairbanks, has had situations where there are complaints of judicial conduct neglected to such an extent. Those states that have have revamped the system to make it more responsible.

One other thing, more important than that, the last state that had the major problem was Connecticut. I started all that stuff in Connecticut and succeeded. And, in Connecticut, what happened is they got legislative oversight. They have absolute legislative oversight. They have a committee set up in the legislature on a permanent basis for program review. When they go out, they look at these people on a regular basis. What they did is, when I started the fuss in Connecticut, they took away the conduct committee's money and said they were a worthless organization. And, then what they did, is they got program review in there to look at them and they put out a public report that was that thick that proved that they took away their money on the basis that they were a worthless organization and they did not take care of conduct complaints. They put in legislation that said, we are going to take care of you and look at you every year and they re-created the conduct committee with a good balance of lawyers and public and they create public members to it, and an independent prosecutor that has nothing to do with practicing law. Nobody practices law on that conduct committee, on the Judicial Conduct Committee. And, they got offices and they got funding and they are very effective, very, very effective. That is what happens when the Legislature gets involved and does what it should.

What they are asking you here is to change it because they are ineffective. I say, do what Connecticut does, take a look at them and see if they are ineffective or corrupt or anything else, and then make a determination because that is the only way you can make a determination if you want to change it. What you are doing is that you grasping on, grasping, with due respect, the easy way out and the easy way out is to say no other state does it. I say, find out if there is something here that has to be fixed. Don't believe me. Call people in and talk about their experiences with the Conduct Committee. Look at their records. Look and see what they did and how they handled complaints. Look and see, when I, I passed around a letter from 1993. What I was talking about there is that the judge, the state judge, who took a bribe in Canada before he became a judge. Look at that complaint and

see how it was taken care of. Those are the things that you can't make your decision based on what other states do or don't do. You have to base your decision on what is the best for this State and does this Committee function or not function correctly. If it functions correctly, don't do anything. If it functions incorrectly, look at some of the suggestions for legislation.

Thank you.

Senator Pignatelli: Caroline Douglas?

Attorney Caroline Douglas: Thank you members of the Committee that are still here. I know we are all tired and I am going to try to, I am not going to speak to what I initially was going to. I am going to go through and mention things that haven't already been brought to the Committee's attention and then a slight rebuttal on a couple of things that we have heard.

One thing that Mr. Kamasinski just said to you is that he passed around a letter and I am not sure that that is clear. The allegation is that a $250,000 bribe to a New Hampshire attorney before he was given a federal appointment. Since you have the letter, I would ask that this Committee go ahead and do the investigation because that will tell you if that has been skimmed over or that hasn't been properly. Then, I think it may give you a shortcut to the question that he is asking you, do we have a problem in this State with our conduct committee and how they handle allegations of abuse. So, if that one particular example, because that is one of the few examples I have heard of in New Hampshire where money has changed hands and affected the outcome of the case and indicates corruption. Frequently, what I hear about in New Hampshire is just abuse of power, but it is not for money. That allegation is a quarter million dollars and you have got the letter in your record.

While we talking money, I would like to talk to you. As an attorney, I pay $550 a year to the Bar, plus we have a new dues that we put into for a special fund to make restitution. Now, you have heard from, I think it was George Moore, that we have 5,000 members and I think, if you want to do the math, what you are looking at is two and three quarter million dollars that the Bar handles. Now that doesn't count the IOLTA money, which is also millions of dollars. We have heard that the IOLTA money isn't being addressed properly by this State and it is going to catch up with them, probably in the form of a civil rights lawsuit. I expect it is a class action. I have been hearing about that for a year now that a class action lawsuit is going to be formed.

The U.S. Supreme Court, at least two years ago, ruled for all fifty states, that the IOLTA interest money off client trust accounts belongs to the clients.

The Bar Association has known about it. I know, because I told them about it and the committees ignore it. So, what do you do when you get ignored, the courts ignore it, the Bar ignores? What do citizens do when they get frustrated? They will bring a class action lawsuit and sue the State of New Hampshire and the Bar Association and I am not sure which one is going to end up being the defendant, but probably both of them.

Now, we have heard about the Judicial Council setting. I think, why don't we just start through Section I, in the interest of time. It talks about part-time judges being phased out and it gives a certain date. And, you heard Nina today talking about the study that is already ongoing by the Judicial Council. I would submit to you that that study cannot replace your own independent study. First of all, the focus is totally wrong on that and it ignores the conflict of interest that judges have. The last time that we saw a big power pull ignoring the conflict of interest was, again, the Colebrook case where we had a part-time district judge, a selectman and a practicing attorney that was one person wearing three different hats and the system blew up there. It didn't work right and it was national level news for a week about what happened in the Colebrook debacle.

I think that, as good as Nina's study may end up being, it is an administrative study. If it has the same kind of outcomes that the family court study had, as a practicing family law attorney, I am critical of the family court study because what it ended up doing was implementing a new study program that railroads people through divorce so fast they can't possibly deal with all of the issues that come up between separation and divorce, the impact on families, the impact on children, and there is no provision for covering when one of the two spouses preplans the divorce and sets everything up. There is absolutely no remedy for the injustice that follows when you have an innocent spouse and when you have a spouse that is familiar and manipulates the issues. The family court study, I think, does a real disservice to people who are getting... I'm sorry, the new program that is set up based on the Judicial Council's family court study I think does a real disservice to people in divorce.

So, if they are going to go ahead and do a similar study on the Judicial Council about part-time judges, everything that Nina talked about I thought didn't handle this conflict of interest, especially in small towns. She says it is a geographic issue and it is a matter of allocation of resources and you are looking at a cost benefit analysis. But, I think that you can handle that a lot of different ways, but I have much more trust in the Legislature than I do in any committee that comes out of the judiciary. I think what we are looking at is a crisis in trust in the judicial system. So, I submit to you that that study is not a replacement for the study that is provided in Paragraph I.

Second, we are talking about termination, in Paragraph II, termination of the integration of the New Hampshire Bar Association and we heard from the present President of ATLA, that is called the American Trial Lawyers Association, and it is the New Hampshire branch. I happen to know that the former President, that was Steve Tober, and he talked about a vote that was taken. But, I would submit to you that it wasn't a vote of the ATLA members; it was a vote of the Executive Council. Even then, he told that the Executive Council wasn't unanimous and I happen to know they are not unanimous because the former President, Finis Williams, felt that it would be a great idea to disintegrate the Bar and allow competition. So, for those provisions of the Bar that handle lobbying, let that be open to competition. ATLA or the New Hampshire chapter may be much better at lobbying or they might do it cheaper, or any number of things. But, allow other organizations to compete and for its members' lobbying money to see who is going to do the best job in lobbying the Legislature, or addressing issues. I think that any time you insert competition, you end up with a much better result.

The New Hampshire Bar Association, I think we had George Moore, the current President, come in and tell you all the advantages of having a Bar Association and all the things they do for the people of the State of New Hampshire. I want to quickly go through what those things are and rebut what they...

Tape change

I remember when Steve McAullife was President of the Bar three or four years ago, that is the first year that they put in CLE requirements. We had no CLE requirements. I mean, we are supposed to maintain good attorneys, but I will tell you, the Legislature can put in CLE requirements as easily as anybody else can. So, this Bar Association functioned for over thirty years without out this minimum level of educational competency, educational learning that would help competence of practicing attorneys and that isn't contingent on the Bar. Now, I think the CLE courses, I don't know, but I believe they are self-sustaining or they may actually make money. For what we pay for the CLE courses, it goes on number of hours and they have a staff and I will tell you, it is a greatly expanded staff.

When I first came in 1988, I worked at the New Hampshire Bar Association and the pro bono answering telephones and doing that kind of thing and I know how the Bar functions. I will tell you, not only has their staff increased greatly, they have this beautiful mansion up on Pleasant Street that has been totally revamped and they have a mortgage. So, in addition to what our dues are going to pay for, we pay for a mortgage, we pay for trips to the Balsams,

we pay for delegates to the American Bar Association, we pay for resume building. People who are in the Bar Association get together every year in a beautiful resort and they vote on who is going to be President and who is going to hold all the offices and it is a great resume building. I mean, it looks really impressive. You can just churn through all the different committees in the Bar. If there is any question about your honesty or your integrity, then you just volunteer for the Professional Conduct Committee. Boy, nothing looks better than having Chairman of the Professional Conduct Committee and if anybody wants to question your integrity at any time, you can just point to that as a resume builder.

A lot of the money is used for programs that we don't need. We are forced to subscribe to a newspaper that is a propaganda sheet. I have tried writing for the newspaper, but somehow I never seem to get published because I do contrarian views. As an attorney, it is a contrarian view. So, we pay for that kind of publication.

We have heard about a lawyer in every school and the, what is the debate problem called, moot court. I think that, if you had a voluntary bar, those kinds of people who love that kind of thing and who want to teach trial advocacy will still volunteer and you will still have that kind of a program. The lawyer in every school may drop back, but if you think that sending a lawyer in to talk for half an hour, an hour, forty-five minutes, whatever it is, to 60,000 students, forty-five minutes a year really contributes a lot to civics. I think that is naïve. I don't think that contributes a lot to the New Hampshire Civics and Government Program anyway. I think it is kind of a commercial for the Bar Association.

Let me see what else the Bar does for us. Oh, they have an office supply organization that allows us to buy office supplies at a discount. I think you can, through the national Bar Association, apply for a credit card. You are supposed to be able to get discounted life insurance. You get all the services as an attorney that are the little benefits that come with a big hunk of people getting together and buying something, but that doesn't help the general public.

Then, we are down to free legal services, pro bono services. I know that there is a tremendous number of people who call and who get turned away, because that was my job to answer the telephone and it drove me crazy, frankly. I wasn't practicing law, but it was one of the initial jobs I had when I came here. Most people do not get served through the IOLTA program, through the Bar program, or through any kind of program like that. There are a number of private organizations. VOCALS is one and I know they do a tremendous amount of work.

One the things that the Bar Association I thought would do, and the court system could do in the pro bono program, and Joe Nadeau has a special pro bono program, is provide law libraries. But, I have to tell you there was a law library in Strafford County and then there was a library, a law library in Rockingham, but it wasn't available to the public. The Strafford County one was available to the public. So, pro bono people got together and made a complaint to Joe Nadeau that they wanted access to the Rockingham County law library because, on that side of the State there aren't law libraries. I will tell you, as a pro bono person, you really need access to a law library. So, in the last twelve months they have closed both of them to the public. The public is not allowed access to that library, so they have to come over here and go to the Supreme Court library. They are not actually allowed in Franks anymore, except in the public document section. So, they have little markers on the floor and you are allowed to be in that room of the library. But, pro bono really need access to libraries and they are not getting it.

So, the Bar Association has some nice pamphlets, they have a rack full of pamphlets, but I don't think that the amount of money that we contribute to the Bar Association every year, those pamphlets can continue anyway.

I just don't see the cost benefit analysis and I think that the money that is spent on the Bar and in resume building and in getting free trips and in going to national ABA conferences and going to nice places or even getting the newspaper. Oh, one other thing about the newspaper. Madam Chairman, I called it a propaganda sheet, but it is one of the things that we pay for as members of the Bar and we get this newspaper. But, now the New Hampshire state government has this wonderful online service and so many of the things that are reported in that newspaper are now online and we get them for free. You have to be computer literate or, like Mr. Haas, you have to go to the public library and get on the computer there. But, the access in a way, I think that that service which was a benefit no longer is a benefit and most of it can be privatized. I think the lobbying function can be privatized. We heard from, not Nina, but we heard from Marilyn Billings-McNamara. Her funding is not going to dry up because it doesn't come from the Bar Association per se.

I wanted to tell you that I have never signed up with the pro bono program, but it used to be a minimum 10% of my practice and I will now submit to you that about 90% of my practice is pro bono. There are literally hundreds of us across the State who donate our time and we don't do it through that formalized program. I think that there are other programs such as Franks that is still in existence and then you have some lay programs that are out there that are in existence. I think that, with almost $3 million, there is the

possibility of funding an even better program for pro bono that doesn't include all these superfluous activities that the Bar spends money on.

We heard from Steve that we are still a small state and we hang together. Unfortunately, that is my criticism as we go into Section IV where we talk about the Judicial Conduct Committee and I want to combine that with V. You have heard from a number of people about what the problems are with having these committees be part of a volunteer peer review where we all hang together. I don't think it is that difficult to measure the effectiveness of these two committees and I have some suggestions for how we can do it, but unfortunately, all of the data, the docket numbers, the docket names and the cases are all sealed. It was supposed to be opened under new rules of openness that you have heard about. What I have a copy of and I am going to submit to the Committee. I believe the rules are bogus that open up the committee. Mr. Kamasinski has told you about the standing problem. I am going to tell you that there is a timing problem. I am going to tell you none of them go backwards retroactively and that they are opened at the wrong stage and it is too little, too late. It still serves to hide people who have committed misconduct.

What I have is a copy of the McKay Commission Study Opening Complaints. This is a national study that came out of the American Bar Association that studied Oregon and Florida and West Virginia, which are states which have all opened their conduct complaints almost totally. What they found, as I told you in my earlier testimony, that Oregon has been opened for seventeen years. A part of that study I would like to read to you says, "The President of the Oregon State Bar testified to the McKay Commission supporting a completely open system and he said, 'Our experience indicates that the concerns that lawyers are unnecessarily damaged by an open records process have not been substantiated'. Supporters of the Oregon system argue that the hundreds of Oregon lawyers invited to testify before the McKay Commission, not one single person testified that they or anybody they knew had been harmed by Oregon's early opening of its records." That means it opens it records early on from the docketing time. Although initially they believed that the Oregon rule would cause tremendous damage to their reputations. Initially, there was a little intrigue with the attorney discipline process and the judicial discipline process and I will tell you the media soon fell off and it is the same boredom that you have probably in any other process, such as the medical process.

When I was a bill drafter for the Legislature, I used to handle occupational regulation. What I first noticed, because I was an out-of-state person who knew laws of other states when I came here, comparatively speaking, I was shocked at the unified Bar. It is higher than one-third. It is more than

sixteen, I think it is closer to twenty-one states, and what I will tell you is that there are eight states that also looking at de-unifying themselves.

Wisconsin had one kind of experience, but what happened when they reintegrated it is that they changed an awful lot of things. So, many things that were wrong, like the $550 a year and where the money goes and the accountability for that money and how it purports into actual services and benefit to the public, could be greatly reformed. I think it is important that we not have a unified Bar and one of the reasons that I chose New Hampshire to move to, I didn't know about this document at the time that I did, but I knew about the New Hampshire attitude because my father grew up in Claremont and lived here for many, many, many years and I spent summers in New Hampshire for a long time and I knew what New Hampshire, I thought I knew what New Hampshire was all about. I took a course and found out that women have the most political power in New Hampshire, probably because you only get paid $100 a year, but you have the highest number of women in any state in the country in the Legislature. I mean, I look at what happens in this State and I think that women have a real opportunity and that was one of the things that pulled me here. That and the fact that there weren't taxes.

What I want to put before you, in summation, is this is a document that was dated June 21, 1788 and it was a convention of the people of the State of New Hampshire and it was ratifying becoming a state of the United States of America. And, two other things, in addition to the opening verbiage which I am not going to read to you because it is too long, there are two paragraphs.

First, and it is most important because it is first, that it be explicitly declared that all power is not expressly and peculiarly delegated by the aforementioned Constitution are reserved to the states, to be exercised solely by them. But, last, the second thing, is Paragraph V, that Congress shall elect no company of merchants with exclusive advantages of commerce. That is what we have done. By unifying the Bar, we have picked out a company of merchants, namely the law and attorneys, and they are given an exclusive advantage.

I was stunned that I had to become a member of the Bar because the state that I came from, you didn't have to be a member of the Bar in order to be an attorney. I argued about it and I found out that that was a relatively new law because I argued with a man named Chuck Douglas, who told me that he was instrumental in rewriting the rules. Now, that was in the '70s and early '80s when the rules were first written that unified the Bar and I will tell you that it was a national movement funded by the American Bar Association as a lobby and they put a lot of money into it. It kind of rolled across the

country, the idea, it was like a wave, that we were all going to have unified Bars. Now, in the judicial reform movement that is also rolling across the country, we have at least six states, maybe eight states, that are re-looking at whether they are going to have unified bars or not. I submit that we should not have a unified Bar in this State. Every function that is already carried on will still be carried on. We can still have the Bar Association. There is no reason it can't be voluntary and it can do all the benefits for members that everybody else does. But, to make that a condition of your ability to practice law, I think, is a real injury to people like me who are advocates and who speak out and who speak freely and who want to speak freely.

The rules that were changed in 1986 that you heard about earlier, I believe you heard one man's opinion. He is a past President of two different Bar Associations and his opinion is that we have wonderful Bars. He also told you that we are a very small state and that we work well. I will tell you, from my perspective, the system does not work well. The changes that were made in 1986 impair my freedom of speech as an attorney. I no longer have freedom of speech. It is one of the reasons I know that Senator Wheeler didn't want to me to say anything personal and name any names. Every time I name a name, I am referring to the office. That would be the Chief Administrator Officer of the Superior Court. It happens to be Joseph Nadeau, but that is why I refer to him, because it is the position that he holds and I believe that, with the changes that were made, that we have a real problem with attorneys like me who need to speak out. We are not allowed to under the new rules. I actually had several complaints put in against me to have my license taken away because I was critical of the court system on national television. And, to have to go through the debacle of trying to defend yourself against speaking out for what I think is freedom of speech for all citizens, and I have argued again and again. Senator Wheeler didn't want me to discuss it, but I have to tell you, at least here, I have immunity and I can't have another conduct complaint for what I say to you folks. I am tired of defending myself for speaking out.

I come to you, not as a disgruntled litigant. I come to you as a professional woman who knows her area of law, who knows it intimately, and who has observed tremendous injustices based on the rules that were put in place in 1986. Part of those rules have promulgated what I call "star chambers" and I am not being facetious about it. I am so not facetious that I filed a First Amendment lawsuit in the federal court and pursued it for two years until I lost. Two judges at the federal court level down in Boston who had secret decisions that said no attorney at any time should be allowed to criticize any judge, ruled against me and they would not let me put in their prior decisions because they sealed them. Now, I think that if you can't listen to the very people who know these laws well, who have studied them, who have to stand

up in court and see how it happens again and again and again, that you might as well just give up and go home. Because, if the very people who are trained to see and spot injustices aren't allowed to speak out about them or they end up going, under the rules, the '86 rules, to a committee process, a professional conduct committee process, which ignores due process.

I want to end up by giving you a very small scenario of what it is to go before the Professional Conduct Committee. Under the rules promulgated in '86, Mr. Kamasinski told you that what they did is they took the national Bar rules and they modified them for New Hampshire. They did, they modified them real badly. Mr. Tober thinks that they are wonderful rules, but I think they protect bad judges and bad attorneys and they are allowed to be misused to punish people who want to speak out and criticize.

I have had a total of sixteen complaints and a full audit of me and my practice in the last three years since I lost my practice in a hostile takeover. I have stood before committees before and said, either I am the most corrupt attorney in the State or I am being persecuted. I submit to you that I am being persecuted under the selective rules, the 1986 rules of the Professional Conduct Committee. I have analyzed them in very great detail and I believe they lack due process. How the Legislature can let a whole court system come into place where the same group of individuals are the prosecutors, they are the investigators, they are the judges. You are not allowed to face your accusers, you are not given a full set of charges against you. You are supposed to come in and you are not allowed to have witnesses, you are not allowed to have discovery. I was denied discovery, so I sent a letter to the Conduct Committee saying I will not appear at any of your proceedings until I have the full panoply of rights that I am afforded under our State Constitution, which is why I soon stand to be tried. For the first time, I will stand up and tell my story in the Conduct Committee, but only because I go to the Supreme Court. I don't go to the peer review committee.

What I said earlier, Senator Pignatelli, was part of the problem I have with the Bar is that it is all volunteer. So, if you have an area where you want to clean up your resume and look really good or if you have a problem with ethics, maybe you sign up for the Conduct Committee. It is a volunteer organization. I am sorry that I am cynical. I think that large law firms allow some of their members to be volunteers on the Conduct Committee, first of all, to keep their pulse on who is doing what in New Hampshire; secondly, to protect members of their committee; and thirdly, to resume build. But, you have some people who are, in essence, full-time lawyers and it is the large firms who underwrite the cost. I think that because you don't have due process and because you don't have minimum rights under the law. I have said again and again, give me a jury. I will take any six people; I will take

any twelve people in this whole State, rather than a committee of my peers under the 1986 rules. I think that it is unjust that any attorney who stands up and criticizes is due to be retaliated against. I have asked again and again for a special prosecutor to investigate those conduct committees because I think that, just as there is a punitive track where they punish people who speak out or who embarrass them, they also has a deep hole track where, if it is a very powerful person or a favored attorney, that any complaints against them will fall into a deep, dark hole and won't be treated for one, two, three or four years and then finally brought forward and dismissed.

The changes that the Supreme Court has put into place were designed to silence critics like me. Now they can stand up, and they do, and say, we are open. Well, they are not open. April 1st they have a set of rules that are going into place that are not open. I think that it is absolutely essential and compelling for the Legislature to do its own independent review of both the Professional Conduct Committee and the Professional Conduct Committee (sic) and I believe that you will find that there is an adequate basis for the Legislature to take these functions back in order to protect the people and in order to break into the "old boy network".

I will take any questions. Thank you very much for your patience.

Senator Pignatelli: Thank you. Tina Abrahamson?

Tina Abrahamson: Hi. Thanks very much. I am Tina Abrahamson and I am the Executive Director of the New Hampshire Bar Foundation. I am really just hear to clarify some things that have been said about the Bar Foundation.

Senator Pignatelli, we sent you a letter a couple of weeks ago that gives sort of a basic outline of how the Bar Foundation relates to the Bar Association and how our board is set up and how the IOLTA process goes through the Bar Foundation, so I won't repeat all of that. I will just clarify that the Bar Foundation is an independent charity. We are a 501-C-3 charitable organization under the tax code. We have a separate board. We certainly are associated with the Bar Association, but we are an independent charity.

IOLTA is a significant source of revenue for the Bar Foundation and that money is collected by the Bar Foundation. The Bar Association has no official interaction with IOLTA funds at all. All of the money is collected by the Bar Foundation under Supreme Court rule, which enables the IOLTA program to go forward in New Hampshire.

Other people have already testified to the large amount of public resource available through the Bar Foundation. That is $1.3 million this year. That makes us one of the largest grant making organizations in the State. We do provide for a significant amount of legal services. The majority of legal services funding comes from the Bar Foundation.

Senator Roberge talked a little bit about the potential for conflict of interest in that the Bar Foundation both collects the money and distributes the money. We function just like any other charitable foundation in that sense in that we raise money and we also distribute money, just like the New Hampshire Charitable Foundation or any other charitable foundation. I am not a lawyer; I don't function as a lawyer. I am a fundraiser and a non-profit manager and our primary role is to do grant making like any other charitable foundation. IOLTA is a somewhat unique source of revenue. Some of our revenue does come from private contributions. There is no conflict of interest in the sense that donors that contribute who are lawyers get to decide where their money goes. We certainly operate like any other charitable foundation. Donors give up control of that money and then our board makes those decisions.

In the case of IOLTA, attorneys do get elected, attorneys who participate in the IOLTA program, help to generate that revenue, do elect a representative board to make decisions about how that money is distributed. There is no direct conflict of interest in the sense that there are no lawyers who benefit from their decisions, their grant making decisions, other than the sort of general benefit to the public.

Both Mr. Kamasinski and Ms. Douglas talked about a Supreme Court case recently about IOLTA and it is really too complicated. I don't want to insult you; of course, you would understand the details, but you may not want to go into them at this hour. The Bar Foundation is well aware of that Supreme Court case. I have followed it for many years and the U. S. Supreme Court did rule that clients have a sort of theoretical property interest in the money that is distributed through IOLTA and they remanded the rest of the case back down to the district court to decide whether there was any unjust taking of that money by the State. The district court just ruled last week that there is in fact no taking of that money. It isn't clients' money. They also ruled that there is no First Amendment problem. There is no client money; therefore, clients don't have a say in where that money should go. The people that make IOLTA possible are the lawyers that participate and most importantly, banks in New Hampshire which allow the program to operate within their banks. Because banks see such a great benefit to the public by IOLTA, they provide increased interest rates for IOLTA accounts. So, it is

really a partnership between lawyers and banks and it is lawyers, by virtue of the ...(inaudible)... who make those funding decisions.

That is I really wanted to clarify. Does anyone have any questions about IOLTA?

Senator Pignatelli: Tell me about the make-up of your board.

Ms. Abrahamson: There are twenty-one board members. Eleven of them sit on our board by virtue of their position on the Bar Association Board. Ten of them are elected by the Board from members of the Bar Association, or any attorney who wants to do it. Actually, nine of them now. We do have one person who is serving on the board who is a member of the public, not a lawyer.

Senator Pignatelli: So, one out of the twenty-one members of your Board is a lay person?

Ms. Abrahamson: That is right.

Senator Pignatelli: And the other twenty are lawyers?

Ms. Abrahamson: That is right. There is also the selective grants committee that does make decisions about IOLTA funds, not about the Bar Foundation's other funds, and there are five people who serve on that committee and they are attorneys, elected from attorneys who participate in the IOLTA program.

Senator Pignatelli: Does Vermont and Maine have a similar program?

Ms. Abrahamson: Yes. Vermont is much smaller because they have a voluntary Bar Association and a voluntary IOLTA program. Maine has an IOLTA program similar to ours which is called an opt out program, which means that, if you are an attorney and you hold client funds, you are required to participate in IOLTA, unless you opt out, unless you say I don't want to participate in IOLTA and file a letter with the court saying that. That is the same in Maine. Maine generates a little bit less revenue than New Hampshire, but it is very similar.

Senator Pignatelli: I don't see any further questions. Thank you for your testimony.

Ms. Abrahamson: Thank you.

Senator Pignatelli: William Cushman? I am calling on you last because I knew you would have to be here because you were running the camera.

William Cushman: Thank you. I thought I saw Mr. Zibel signing up. He didn't?

Senator Pignatelli: You were here just to answer questions?

Clerk Howard Zibel: I have already given my testimony.

Mr. Cushman: Well, I will have to change some of this now, but it is interesting, having sat here for hours and hear two entirely perceptions of the way the court is working. It is almost like we had the other day in the hearings on the Nadeau case. Three quarters of the people there wanted to canonize Nadeau and the other quarter wanted to use a real cannon.

Anyhow, I think this bill bringing the Judicial Conduct Committee back to the Legislature would be one step in making it much more difficult for someone like Fairbanks to hide his activities. That scenario took thirteen years to expose and the amount of money stolen has never been determined and the victims never been compensated.

With the JCC back in legislative hands, we will be able to explore a lot more problems in the system, many of which occur out of sight of the public, protected by rules of confidentiality, etc., which rules have been set by the court under 73-a.

There are several things that I have noticed and I don't quite understand how they got to be. For instance, burnt out judges. There was a bill introduced earlier this year to review judges every seven years. Mrs. Sytek testified in favor of it and what she said was astonishing. She said, you know there are judges that are burned out and are making wrong decisions, but these decisions aren't matters of judicial misconduct. That is the only revenue that the average unfunded person can use.

Tape change...

...appeal, but these people don't have money for the appeal, it is very difficult to have to tell them that. Well, how long has this been going on? She was on the JCC for years and she has been off it for years. How come... It is obviously not a secret. How come it was allowed to go on so long and only surface earlier this year?

Now, alimony after death is a property right. I got that out of *Douglas & Douglas*, the book on family law. When I die, my ex-wife can sue my estate to continue alimony. But, by that time, my estate will be my children. So, the law has pitted my kids against their own mother. I think that stinks. Now I am not about to change things. I have reconciled to the fact that I will be paying alimony until I die because my ex-wife is disabled and it would be the wrong thing to take her back to court and try to do it. I want to leave it as it is. But, nevertheless, that set-up exists.

Rules of Evidence in Divorce – we have two categories, ordinary citizens are one. Relaxed hearsay is admitted. Recently I heard testimony over in the other building that what is seen as a lie by one party is merely a different perspective by the other on the same event and is in no way a lie. OK. Now, to change and say the husband is a member of the Supreme Court. On a hearing before the PCC on a matter related to this divorce, the PCC allowed the husband to block evidence on the flow of money in the law firm, which could have exonerated the charges against the wife. Representative Jacobsen and others from the Fairbanks Committee watched in amazement and the Honorable Alf said, "how can they ever find out the truth unless they see all the evidence?" He was astonished.

Attorneys prolong their case, making children the prize, very destructive to children. Nina Gardner, who was here earlier testified many years ago, about ten years ago, that this goes on. She said this in testimony on HB 1560, which would have mandated arbitration in a divorce.

Supreme Court rejects six hundred cases a year. It can go nowhere.

Now, I saw something happen about a month ago that I still don't understand. A judge did not allow the defense to inform the jury how the plea bargain system works. The prosecutor asked the defendant, "did you ever tell a judge that you never committed these crimes?" and the guy said yes. "Did you also plead guilty to all these crimes?" and the defendant again said yes. Whereupon, the prosecutor turns to the jury and says, "how can you ever expect to believe anything a man like that says?" The man said one word, plea, and said it quietly. Later on I asked the defending attorney what happened and he said, "the judge forbade me to inform the jury how plea bargaining works".

Testimony of a victim does not have to be corroborated. Well, even Soldati himself knows that there are a lot of people up in the prison who don't belong there, who are up there simply on the strength of the testimony against them.

DCYS seals family records and the family has to sue, but has to pay both sides of the court costs. You are talking $100,000. Who can afford that? Now, with this ruling in SB 210 several years ago, the Department rid itself of something like $60 million worth of lawsuits.

Now, talk about unconstitutional things, years ago Fathers United of Manchester and also here in Concord, was destroyed by subpoena which was issued by a grand jury down in Manchester. They asked for the records of the membership, the financial records, and everything else. Fathers United panicked and Mr., what was his name, fled. But, this membership list thing had already been to the U. S. Supreme Court in the case of Alabama v. The NAACP and it has been declared void by the U.S. Supreme Court. How come it uses a tool by one of our own grand juries?

Now, divorce is really nasty, as you know, but, if justice is equal, how come Thayer pays only two years alimony and child support and I have to pay until I die? Furthermore, most divorces, the wife ends up with the house. But, there are two cases, Douglas and Thayer, wherein both wives lost their houses.

Now, there is one thing that my ex-wife discovered. Looking at the chart of people going to trial one day in the Strafford Court, she noticed that her attorney had three other clients, maybe four, whose cases were going before the judge that day. She had been billed one hour for her attorney's trip from the office to the court, a trip which takes ten minutes. Do the multiplying and you come out with that charge of $100 against four different clients works out to $1,200 per hour. Even the surgeon who reassembled Wayne Bobbit didn't get that kind of money.

Now, I hope the foregoing convinces you that that is only a bit of what I have picked up in ten years of hanging around. I really commend the Legislature for looking at this and I think this would be a very good thing to do. Furthermore, I will let you know what kind of an answer I get out of ex-President Brock. OK?

Senator Pignatelli: Thank you very much.

Mr. Cushman: I have documentation on this stuff I will give you. **Please see "Testimony, S.B. 412, Court Integrity and Attorney's Independent Act" attached hereto and referred to as Attachment #1.**

Senator Pignatelli: Fine. Judith Thayer? I'm sorry. Your name wasn't on this list and I saw you, but I didn't think you wanted to testify.

Judith Thayer: That's fine. I am going to just testify from a public policy perspective and I am cross-eyed, as I am sure you all are, too.

As I was sitting here listening to the testimony, I was trying to come up with some kind of an analogy to what we are talking about today – the Bar Association, the judiciary, the executive branch and the legislative branch. It came to me that, and this might not be a very good analogy, but we not only have an institution for the legal system, but we have the judiciary, which is a branch of government and we have a state mandated arm of that branch of government, mandated by the State to help that branch be able to do its job, to facilitate justice, etc. I started thinking, what would something similar be? Well, we have the executive branch of government. We have the Governor. Would it make sense for the State to mandate that all politicians that hold executive positions in the cities and towns, whether it be chair of the selectmen, mayors, whatever, have to belong to an association that will help or facilitate the executive branch being able to carry out their mandate, or the legislative branch? Would you feel it correct that there be a mandated group or an association of members of the various town or city boards that would then have this association and would be able to enjoy some kind of status because they are kind of an arm of the legislative branch? I mean, to me, it is the same thing and it really doesn't make much sense. Speaking from a public policy perspective, it doesn't seem like it really serves the needs of the citizens.

Mr. Tober spoke of how you must not disassemble a fundamentally sound organization. The mandated Bar Association was established on a fundamentally wrong premise, which is that a branch of government should have a legislatively mandated or judicially mandated association made up of practitioners. That is why I am here to testify today.

I also want to say that I don't believe this bill has been proposed by Senator Roberge to remediate a personal perceived wrong. I feel that Mr. Tober's comments were very, very improper to say that. I think that the points that she makes in this bill can be really, really resonate with many citizens in the State, just from a common sense perspective, or even from a perspective that they have had dealings with the court.

The onus for this bill represents issues that continue to surface as flaws in the administration of justice. Mr. Tober talked about the rules of the PCC and the JCC and he said that if we didn't have the Bar Association, we would not have the volunteers in the State that would help to craft professional conduct rules or judicial conduct rules. Having served on other state boards, I find that absolutely not to be true. That people are interested in serving and they are interested in trying to do what is right. Right now you have a

group that is interested in serving on these committees because the committees are self-serving. Case in point, the Professional Conduct Committee, the Judicial Conduct Committee, when you take into consideration a litigant's complaint about a conflict of interest by a lawyer. The Professional Conduct Rule right now states that the lawyer himself or herself must make the determination about whether there was a conflict and never addresses the allegation of the litigant. Who does that serve? Does that serve the citizen or does it serve to take care of the lawyers that are representing either side?

The same thing with the Judicial Conduct Committee. A judge makes a decision about whether they should recuse themselves. I believe the standard is that recusal should take place if there is a conflict of interest that can be perceived as biased or prejudiced by any member of the public. You do not need a professional to be able to ascertain whether there is a problem here.

Now, I am in favor of Senator Roberge's bill because it seeks to address some of these root problems in the legal system today. The administration of justice, as I have said before, is a fundamental goal of our founding document, the Constitution. The need for a mandated association to assist the judiciary is improper. From a public policy perspective, it is bad public policy when a group or association becomes as powerful, or is perceived to be as powerful, as the institution and, in this case, the branch of government itself. The institution should be subject to the goals of the people and should always be accountable to the people. The Bar Association, as an arm of the judiciary, is not accountable to the people. The Bar, which is under the Supreme Court and which works closely with the courts to determine rules and regulations governing the courts and the administration of justice, wields much power with the judiciary and vise versa.

For example, the Professional Conduct Rules. We decide there needs to be professional conduct rules; there needs to be judicial conduct rules. Who serves on the committee? The Bar Association.

By the State mandated membership to an association or organization of individuals who are practitioners in that institution, say doctors in an association for medicine, it seems to raise the association to the same status, authority and responsibility of the branch of government that we are talking about today, without the accountability to the people. And, I know that this has been litigated, as Mr. Tober said, on the national level as well as the state level, but it doesn't seem possible that we could have an association as an arm of a branch of government and consider that constitutional.

While the Bar may offer many worthwhile programs, membership should not be mandated by the judiciary. It really smacks of a conflict of interest and according to the Judicial Code Canon of Ethics, no judges are allowed to be involved in anything that is a perceived conflict of interest, never mind actual conflict of interest.

And, also the mandated association politicizes the justice system by building into the legal and judicial system not only a built-in lobbying vehicle, but a pre-determined reservoir of Bar members who will become judges only with Bar approval.

To sum it up, I will conclude by saying that we do not need a pro bono referral system, we do not need lawyers in every classroom, we already have teachers that teach history, government and civics. We do not need the Bar to be writing rules that are going to govern their conduct in the courts, as well as judges' conduct. And, judges should participate in discussions, they should be used as expert witnesses, but they should not be in control of conduct of the Bar or the judiciary.

Thank you very much for your time. Are there any questions?

Senator Pignatelli: Thank you for your testimony. That concludes the people on our list.

Mr. Kamasinski: Can I just respond to the IOLTA problem that was raised by Mrs. Abrahamson?

Senator Pignatelli: Can you do it briefly?

Mr. Kamasinski: Oh, sure. The question of IOLTA is really simple. There was a west Texas case. It is not binding. It is not a Supreme Court case, in which they stated that there was no property taking from taking the interest earned by the client's money, which is used by IOLTA.

The U.S. Supreme Court decided very simply this. If it is my money, if I give my attorney a million dollars and the attorney puts it into an account, the interest that is earned by that account is my money, irrespective of whether it is in a special account. IOLTA says if it is in a special account, which it can only be for a short period of time, that interest does not belong to me. The Supreme Court has said clearly that is not the case. The west Texas case does not change the mix at all because it is obviously going to go the route all the way up again.

All I want them to do in New Hampshire is very simple. All I want them to do is say to the clients on a mandatory basis, "this is your money. You decide what you want with it" and not keep the client in the dark that his money is earning interest that is being used in programs which he may object to. That is the only point. Nothing is changed and, although Ms. Abrahamson said she isn't an attorney, she is trying to give you the results of a case which is not binding at all at the present time.

Thank you.

Senator Pignatelli: Thank you. I am going to close the hearing on this bill.

Hearing concluded at 3:17 p.m.

Respectfully submitted,

Recorded by Laurel Hanlon
Transcribed by L. Gail Brown

8/22/02
1 Attachment

ATTACHMENT #1 Bill Cushman

Testimony
S.B. 412
Court Integrity and Attorney's Independence Act

Item 4 of this bill returns the Judicial Conduct Committee to the Legislature. This one step alone should make it much more difficult for someone like Judge Fairbanks to hide his activities. That scenario took 13 years to expose and the amount of money stolen has never been determined. and the victims never compensated.

With the JCC back in Legislative hands we will be able to explore a lot more. problems in the system many of which occur out of sight of the Public, protected by rules of confidentiality, etc. which are set by the court.under 73a. I know of a few.

Example:

Burnt out judges - wrong decisions. which are not Misconduct but only a cause for appeal,. But complainant can't afford appeal. Ergo Justice denied..(Sytek 7 Year Review)

Alimony after death is a "Property Right" When I die my ex-wife can sue my estate to continue. But my estate will be my children. So the Law has pitted my ex against her own children.

Rules of Evidence in Divorce (Ordinary Citizens)- "relaxed" hearsay can be admitted. Recently I heard testimony that "what is seen as a lie by one party is merely a different perspective by the other on the same event and in no way a lie"

(Husband was Supreme Ct Justice) In a hearing by PCC on matter related to this divorce, PCC allowed husband to block evidence on flow of money in firm which could have exonerated wife. Rep Jacobson and others from Fairbanks Committee watched in amazement. The Honorable Alf said " How can they ever find the truth unless they see ALL evidence" He was astonished.

"Attorneys prolong case, making children the prize. Very destructive for the children" Nina Gardner of The Judicial Council testified to that on H.B. 1560

Supreme Court reject 600 cases a year no where to go

Judge did not allow defense to inform Jury of Plea bargain system (State v Marti)

Testimony of victim does not have to be corroborated, (Handy weapon for hatred)

DCYS seals Record Family can sue but pays BOTH sides of court costs S.B.210

Fathers United destroyed by Unconstitutional Subpoena (Membership list - "Alabama v NAACP" declared void by U.S. Sup CT.)

Court Justices and divorce. How come J. Thayer pays only 2 years alimony and Child Sup. but I have to pay until I die, and then my ex sues my estate. (Ex sues her own kids.) Furthermore Douglas and Thayer wives lose the house. Public smells Court Bias, husbands are **both** Justices of Sup Ct.

Attorney bills 4 clients 1 hour each for same trip to Court (10 min) = $ 1,200 per hour) Even the Surgeon who reassembled Wayne Bobbit did not charge that kind of money.

I hope the foregoing convinces you that we need to restore JCC & PCC to the Legislature. Having the Court run them is akin to appointing the fox to guard the hen house. It ain't a good idea No farmer I know of would do it. But then he never went to college.

I will let you know what Dr. Bok says.

William E. Cushman
47 River Road
New Castle, N.H. 03854

Remarks By
Speaker Sytek March 17, 1999
to House Judiciary
On C.A.C.R. 22
Seven year Term for Judges

Speaker Sytek Spoke in Favor of CACR 22. But insisted that the "Court System is working well and is not broke. as claimed by numerous Court Bashers who regularly testify before this Committee".

But as a former member of the Judicial Conduct Committee she said the following:

"If you have someone who is burned out, and I can tell from my years on Judicial Conduct we have several Judges who are burned out. We are just waiting for them to retire. If they had a term, it would be a graceful way out for some of them" and later

"Patterns of decisions,One of the most frustrating things for the members of the Judicial Conduct was to have to tell the person who complained [that this isn't a matter for Judicial Conduct,] that this is a subject for an appeal and these people had no ability to go out and hire an lawyer to bring an appeal. And when you see judges repeatedly making decisions that are probably incorrect and would be reversed on appeal but people can't afford to do it, I don't think that's fair to the public. That they should have to pay because the judge has a pattern of making wrong decisions that are corrected on appeal, if the person can afford the appeal"

<u>Question !!!</u>

Speaker Sytek left the J.C.C. some years ago

How can it be that she and other members of the Judicial Conduct Committee routinely witnessed the condition of which she tells us

yet did nothing to correct it ?

House Judiciary rejected bill to review Judges every 7 years.

Other stuff : * If your attorney screws up, YOU pay to fix it. (Ch. J. Brock)

* Court Appointed Guardians: Some Records sealed so even client can't see them .

* Client's own bank refuses to give detail of his own accounts.

NEW HAMPSHIRE PRACTICE
Volume 3A

FAMILY LAW
Second Edition

by

Charles G. Douglas, III

Caroline G. Douglas

§ 18.16. Effect of Death

When weekly payments are ordered for a fixed, statutory term, in accordance with RSA 458:19, and no conditions are attached that the payments should terminate upon the supporting party's death or for any other reason, then the supported party has a binding claim against the other's estate.[147] When these circumstances are present, the right to alimony is a property right enforceable after the payor's death, under *Stritch v. Stritch*.[148] The case of *Robertson v. Brewer*[149] had previously left unanswered the question of whether an alimony decree in effect during the supported party's life was enforceable after the payor's death.

When the right to receive alimony is a "property right," which it is when the *Stritch v. Stritch* test is met, the supported spouse has an enforceable claim against the payor's estate. *Clevesy v. Clevesy*[150] said "the right to receive alimony pursuant to court order could be a property right, but not necessarily as a matter of law."[151] When alimony is not a property right, the payor's death terminates support payments.[152]

Where a wife died during the pendency of an appeal by her husband and there were no specific provisions in the divorce decree relating to the payment of alimony in the event of death, the alimony obligation terminated upon the date of the wife's death.[153]

Alimony may be structured not to terminate upon the death of the responsible party by use of an annuity payment or QDRO distributions from qualified pension plans.[154] Care must be exercised regarding the tax treatment of such structured settlements, as discussed in *In re Estate of Wade*.[155]

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147 Stritch v. Stritch, 106 N.H. 409, 412, 213 A.2d 426, 428 (1965).

148 Id.

149 88 N.H. 455, 456, 190 A. 709, 710 (1937); Leclerc v. Leclerc, 85 N.H. 121, 123, 155 A. 249, 251 (1931) (also left open the issue of whether a husband's obligation to pay alimony remained in force after he died).

150 118 N.H. 604, 392 A.2d 135 (1978).

151 Clevesy v. Clevesy, 118 N.H. 604, 606, 392 A.2d 135, 137 (1978) (emphasis added).

152 Stebbins v. Stebbins, 121 N.H. 1060, 438 A.2d 295 (1981).

153 Hazen v. Hazen, 122 H.H. 836, 451 A.2d 398 (1982).

154 For further discussion of QDROs (qualified domestic relations orders), see Chapter 19 on property division.

155 129 N.H. 618, 529 A.2d 992 (1987).

TESTIMONY ON HB1560 (Arbritration in Divorce) BEFORE THE HOUSE JUDICIARY COMMITTEE 1/26/94

(SPONSOR) Rep. Tyler Harwell: "We do have a court crisis". "Our court system is not functioning the way it should." "(it) is overburdened with all types of cases, especially divorce." "Anyone who studies this problem will see the link that exists between social decay, economic malaise, marital failure, and the volume of marital cases that come into our court system." "Our present law makes this possible (and) we can no longer afford the social cost."

NINA GARDNER, (Executive Director, Judicial Council): "(in our statewide public hearings) We heard from next to no one who was satisfied with the existing system." "Everything we heard talks about a system which perhaps should not be set up as it is now." "We have no doubt that the judicial system needs to be changed." "Testimony received clearly says to us that the current system of disolving marriages in an adversarial situation may not be the best thing. The people most hurt in an adversarial situation are the children. In those marriages, they become part of the barter." "The attorneys can elongate, convolute, & complicate the system, (and) there is no excuse for it". What is continuing to increase, are the re-filings (Ed.note; re-litigation). Those are the ongoing disputes over custody, visitation, child support, arrearages.....things that make the current system unworkable." "(the) Poor person's divorce often starts in Distric Court with a domestic violence petition, because that's one immediate way to get away from the problem (s)."

The above comments were transcribed from a tape recording of the hearing made by William E. Cushman.

Please note the admission by Ms. Gardner, that many domestic violence complaints are filed as a tactic in divorce, not because of any real violence.

Paul M. Clements, Ed. (Representing Dads Against Divorce Discrimination)

THE STATE OF NEW HAMPSHIRE
GRAND JURY
SUBPOENA DUCES TECUM
HILLSBOROUGH, SS

TO: THE KEEPER OF THE RECORDS, FATHERS UNITED FOR EQUAL JUSTICE, MANCHESTER, NEW HAMPSHIRE

YOU ARE REQUIRED to deliver to Officer Philip Alexakos of the Manchester Police Department, Manchester, New Hampshire, acting as an agent for the Hillsborough County Grand Jury sitting in October, 1993, the following records of Fathers United for Equal Justice covering the time period of January, 1988 through September, 1993, including:

a. the names and addresses of members of Fathers United for Equal Justice;

b. the names and addresses of individuals who work for Fathers United for Equal Justice;

c. any notes, records, or correspondence and documents regarding the number of hours per week each individual listed in (b) work for Fathers United for Equal Justice; and

d. any records, cancelled checks, and ledgers regarding the amount of money individuals listed in (b) were paid for their work for Fathers United for Equal Justice.

These records must be mailed or delivered to Officer Philip Alexakos no later than October 29, 1993.

HEREOF, FAIL NOT, as you will answer for your default under the penalties as proscribed by law.

Dated at Manchester, NH, this 18 day of October, 1993.

Vernon C. Sharp
Foreperson

I hereby authenticate that the above signature is the true signature of the Foreperson of the Hillsborough County Grand Jury sitting within and for the Northern District of Hillsborough County in October, 1993.

John M. Safford
John M. Safford, Clerk
Hillsborough County Superior Court

Syllabus.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* ALABAMA EX REL. PATTERSON, ATTORNEY GENERAL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 91. Argued January 15–16, 1958.—Decided June 30, 1958.

Petitioner is a nonprofit membership corporation organized under the laws of New York for the purpose of advancing the welfare of Negroes. It operates through chartered affiliates which are independent unincorporated associations, with membership therein equivalent to membership in petitioner. It had local affiliates in Alabama and opened an office of its own there without complying with an Alabama statute which, with some exceptions, requires a foreign corporation to qualify before doing business in the State by filing its corporate charter and designating a place of business and an agent to receive service of process. Alleging that petitioner's activities were causing irreparable injury to the citizens of the State for which criminal prosecution and civil actions at law afforded no adequate relief, the State brought an equity suit in a state court to enjoin petitioner from conducting further activities in, and to oust it from, the State. The court issued an *ex parte* order restraining petitioner, *pendente lite*, from engaging in further activities in the State and from taking any steps to qualify to do business there. Petitioner moved to dissolve the restraining order, and the court, on the State's motion, ordered the production of many of petitioner's records, including its membership lists. After some delay, petitioner produced substantially all the data called for except its membership lists. It was adjudged in contempt and fined $100,000 for failure to produce the lists. The State Supreme Court denied certiorari to review the contempt judgment, and this Court granted certiorari. *Held:*

1. Denial of relief by the State Supreme Court did not rest on an adequate state ground, and this Court has jurisdiction to entertain petitioner's federal claims. Pp. 454–458.

2. Petitioner has a right to assert on behalf of its members a claim that they are entitled under the Federal Constitution to be protected from being compelled by the State to disclose their affiliation with the Association. Pp. 458–460.

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any of the requirements of New York's statute but rather had refused to furnish the State with *any* information as to its local activities.

We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have. Accordingly, the judgment of civil contempt and the $100,000 fine which resulted from petitioner's refusal to comply with the production order in this respect must fall.

IV.

Petitioner joins with its attack upon the production order a challenge to the constitutionality of the State's *ex parte* temporary restraining order preventing it from soliciting support in Alabama, and it asserts that the Fourteenth Amendment precludes such state action. But as noted above, petitioner has never received a hearing on the merits of the ouster suit, and we do not consider these questions properly here. The Supreme Court of Alabama noted in its denial of the petition for certiorari that such petition raised solely a question pertinent to the contempt adjudication. "The ultimate aim and purpose of the litigation is to determine the right of the state to enjoin petitioners from doing business in Alabama. That question, however, is not before us in this proceeding." 265 Ala., at 352, 91 So. 2d, at 216. The proper method for raising questions in the state appellate courts pertinent to the underlying suit for an injunction appears rather

Is This Equal Justice ?

The Crime	By	Penalty
Draws Will for stroke victim Inherits $ 1,500,000	Attorney	Reprimand keeps 1.5.Mil
Bills woman $ 264,465 for divorce Converts a check to her to his a/c	Attorney	Told to refund She has to sue to get - Suspended
Writes Will for 92 year old man leaving nothing for widow but $ 9+ mil to his own family and friends	Attorney	Retires happy Widow has to sue to get only 1/3
Solicits bribes in promise reduced taxes Real Estate Collects $ 150,000	Tax Assessor	**30 years in Jail**

If Justice is equal
ALL would have gone to Jail !

If $ 150,000 = 30 years than

$ 1,500,000 gets 300 years

$ 264,000 gets 52.8 years

$ 9,000,000 gets 1,800 years

But Attorneys are disciplined by the

Supreme Court, Not the Criminal System

Justice is NOT Equal !! *???*



1: Kalled's Case - N.H. Supreme Court - 135 N.H. 557

2: Trus v. Fleet Bank N.H. SupremeCourt - 138 N.H. 679

Original
Nos. LD-91-005
LD-90-020

KALLED'S CASE

May 14, 1992

Attorney and Client—Reprimand, Suspension and Disbarment—Particular Cases

Where attorney's many violations of ethical code and claimed ignorance of its requirements led supreme court to seriously question his fitness to continue practicing law, he was suspended from practice of law, ordered to reimburse professional conduct committee for investigation and prosecution costs, would not be allowed to petition for reinstatement for a period of five years, his reinstatement would be contingent upon his satisfying bar requirements for new applicants and, in addition, would be required to notify all of his clients, as well as opposing counsel, of his inability to act as an attorney in any pending matter.

Sheehan, Phinney, Bass & Green P.A., of Portsmouth and *Boutin & Solomon*, of Londonderry (*Peter F. Kearns* on the brief, and *Mr. Kearns* and *Edmund J. Boutin* orally), for the committee on professional conduct in case LD-91-005.

Shaines & McEachern P.A., of Portsmouth (*Paul McEachern* and *Susannah Colt* on the brief, and *Mr. McEachern* orally), for the respondent in case LD-91-005.

Hillsborough-northern judicial district
No. 93-423

ALICE C. TRUE

v.

FLEET BANK-NH

July 19, 1994

1. Commercial Paper—Indorsements—Restrictions

In absence of written authorization from plaintiff empowering her attorney to negotiate, on her behalf, two checks made payable to both plaintiff and her attorney, attorney lacked authority to sign checks for plaintiff. RSA 382-A:3-116 (1961) (current version at RSA 382-A:3-110(d) (Supp. 1993)).

2. Commercial Paper—Liability of Parties—Particular Cases

Trial court did not err in ruling that conversion occurred when bank made payment on two checks having incomplete indorsements; transaction could not be characterized as "commercially reasonable" where it amounted to the discharge of plaintiff's interest in checks without her consent, and monies could not be said to have reached their intended destination since plaintiff was one intended beneficiary and was deprived of any incident of ownership. RSA 382-A:3-419(1) (1961) (current version at RSA 382-A:3-420(a) (Supp. 1993)).

3. Commercial Paper—Actions—Defenses

Any common law defenses to conversion that might have been available to bank which made payment on checks having incomplete indorsements were displaced by strict liability standard set forth in former statute. RSA 382-A:3-419(2) (1961) (current version at RSA 382-A:3-420(b) (Supp. 1993)).

3: York County Probate Court Case 84 - 500. Estate of Sanford Petts

Widow's share is settled in probate case

By Brenda Buchanan

Most of the cases in York County's Probate Court enjoy the anonymity of a docket number. Case 84-500 is a notable exception.

What has come to be known as "the Petts case" is one of the most controversial probate matters to be filed in York County in recent years. It has been the subject of news coverage and gossip, both because it involved a lot of money and because of allegations of impropriety on the part of a local attorney.

The case was settled by agreement of the parties last month. The 10 individuals who were involved, including former employees and neighbors of the deceased, divided the $9 million estate of former Kennebunkport resident Sanford Petts so as to allow his widow, separated about eight years ago. Such dual representation is common, but there is a fine line, attorneys say, when the interests of the parties cease to be the same.

It has been reported that the Board of Overseers of the Bar, the arm of the Maine Supreme Court that investigates questions related to the ethical behavior of lawyers, is looking into Waterhouse's handling of the Petts case.

Neither board Chairman John Ballou nor Waterhouse's lawyer, Jack Simmons, would comment this week on that matter. Both cited confidentiality rules when declining to speak.

Ballou said only that the board "was aware" of the issues raised in the Petts case; Simmons said as far as he was concerned, all questions about Waterhouse's actions had been considerable fortune, and he and his wife moved from Massachusetts to the home on Kennebunkport's River Road after his retirement more than 20 years ago.

He wrote a will in 1969 that left $50,000 to a cousin and the rest of his estate to his wife. But his intentions about where his money would go after his death changed during the next 15 years.

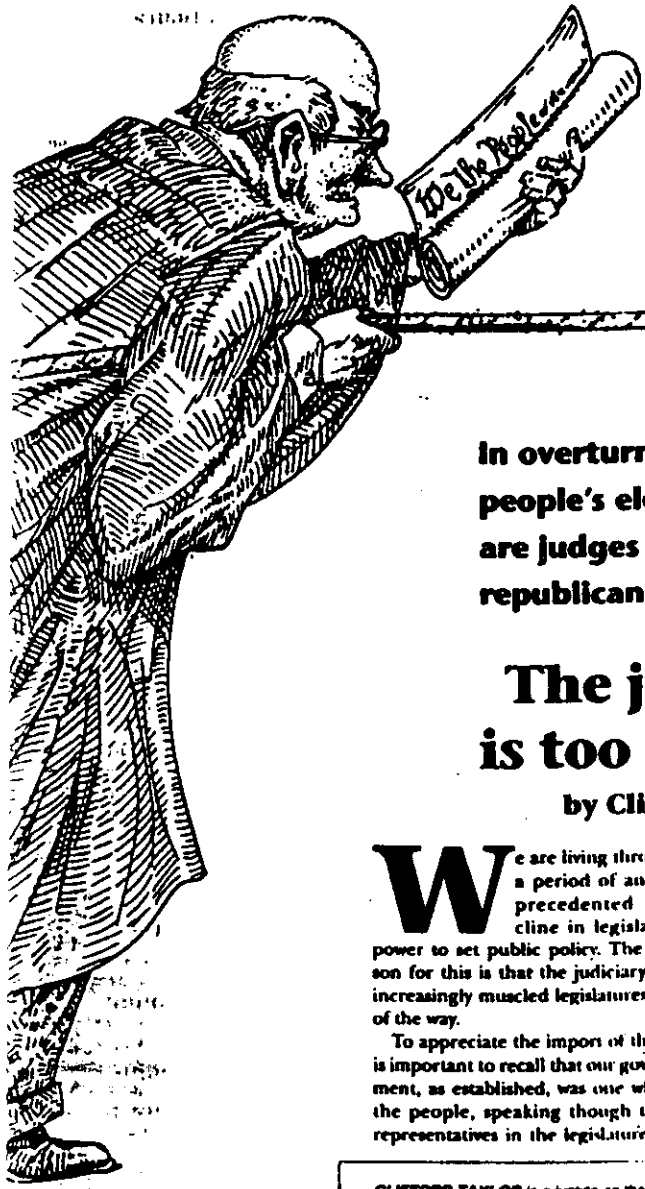
Petts wrote several other wills before he died, the last of which was dated Sept. 8, 1982. That is the document that was filed in York County Probate Court last June 1, and it didn't provide for any inheritance for his wife.

Alice Petts, 74, moved to Kennebunk after the couple separated about eight years ago, but they were never divorced. Her husband set up a $1 million trust fund for her at the time of the

4: See Portsmouth Herald Nov 21, 1997 Re: David Page, Kittery Assessor

KITTERY — Former tax assessor David Page Sr.'s admission that he solicited

Assessor admits bribery scheme



In overturning the actions of the people's elected representatives, are judges undermining America's republican form of government?

The judiciary is too powerful

by Clifford Taylor

We are living through a period of an unprecedented decline in legislative power to set public policy. The reason for this is that the judiciary has increasingly muscled legislatures out of the way.

To appreciate the import of this, it is important to recall that our government, as established, was one where the people, speaking though their representatives in the legislature, established laws, the executive carried them out, and the judiciary had the modest role of adjudicating disputes that arose under the statutes.

CLIFFORD TAYLOR is a justice on the Michigan Supreme Court.

At no time was it contemplated, much less claimed by the most zealous advocates of judicial power, that the courts should be in the policy-making role. That was for the legislature. There, with robust debate, few rules of evidence, and easy entry of unpopular and poorly financed views, the people could be sovereign.

The Constitution made only a few areas off limits to the will of the majority. They are set forward, for the most part, in the Bill of Rights.

While this separation of powers still exists, few could doubt that much of the power to set policy has shifted from the legislative arena into the judicial. The courts have done

(continued on page 30)

Justice Taylor's and Judge Cohn's articles are reprinted with permission of the *Michigan Bar Journal*.



A state supreme court justice and a federal district judge offer their views.

Judicial review is exercised properly

by Avern Cohn

The view of some legislators, columnists, and even judges that the judiciary these days has, in Justice Taylor's words, "increasingly muscled the Legislature out of the way" displays a considerable lack of understanding of the institutional role that judges play in our constitutional scheme and reflects little knowledge of history. This view also expresses a lack of confidence in a legislature's ability to maintain its status as a co-equal branch of government, as well as a belief that the people have little knowledge of the judicial branch's daily activities in resolving a myriad of disputes.

It is wrong to suggest that judicial "restraint or discipline has been, in this century, greatly eroded." From the inception of the republic, there have been differing views about the proper scope of judicial authority and the role of judges with conflicting views over what the Constitution says. Justice David Souter, in his concurring opinion in *Washington v. Glucksberg*, canvasses very well the history of the shifting approaches to constitutional interpretation over the last 200 years.

A similar position, that at first "the judiciary had the modest role of adjudicating disputes that arose under the statutes" and "[t]he Constitution made only a few areas off limits to the will of the majority," is also flawed.

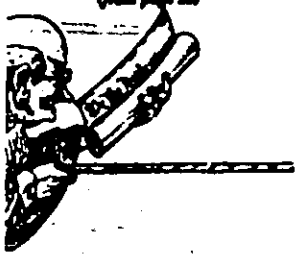
AVERN COHN is a U.S. district judge for the Eastern District of Michigan.

(continued on page 32)

centuries of "we the ...
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The judiciary is too powerful

(from page 28)



this by the use of an ancient tool, judicial review of legislation, used in a new and quite undisciplined fashion, with the result being that courts, not legislatures, are now in control of important agendas of American life.

It has been accurately said that more public policy is determined on an average Monday in June by the U.S. Supreme Court when it issues its decisions than by Congress during an entire session. This is a remarkable development, one that should concern not only those with legislative responsibilities, but also each of us as citizens who speak through our legislators and, thus, wish to preserve legislative policy making.

Properly understood, judicial review derives from the necessity to decide a case or controversy in which one party is relying on the law and the other is relying on the Constitution, and where the law and the Constitution are in conflict. In that rare situation, the Constitution prevails over the statute. This is an American law concept that was developed by Chief Justice John Marshall in the famous case of *Marbury v. Madison* in 1803. It was needed to establish supremacy of our written Constitution (the first in the world) over legislative enactments.

In exercising judicial review, the Constitution was to be read in a common-sense fashion, and the courts were deferential to the elected representatives of "we the people." The goal was to attempt to determine the understanding of the words used in the Constitution at the time of adoption. This wasn't an exercise that was intended to be complicated. The dictionary or common-law tradition was the principal tool to determine meaning, just as one would with a contract or a bill of sale. The idea was that the Constitution was a document meant to be understood by the people, not just by lawyers. And, at the end of the consideration of the statute, the statute was not to be held to be in conflict with the Constitution if, by any construction, it could be held to be harmonious.

Eroded restraint

This restraint or discipline has been, in this century, greatly eroded. On the basis of highly debatable and novel theories, courts read into the Constitution their own ideas about what constitutes wise policy and strain to find statutes that offend their notion of what the people should want unconstitutional. To get an idea of this, the most recent theory set forward by the U.S. Supreme Court in *Planned Parenthood v. Casey* says that our Constitution, which you will recall was a late 18th century document, notwithstanding no words to this effect, was written to establish the liberty to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

The result of judicial review gone astray has been that, increasingly, many important areas of American cultural or political life are no longer in control of the people through their elected representatives, but are more and more controlled by judges. For example, if the legislature decides that it wishes to move in the areas of welfare rights, term limits, crime, punishment, and prisons, the courts are almost invariably invited, by those who lost in the political arena, to replace the policy of the legislature with a policy that is more congenial to the petitioners and, hopefully, the judges.

Similarly, the courts seem disposed to displace legislative determinations on moral questions such as who can and cannot get married, or what lifestyle forms are acceptable or unacceptable. Indeed, when the people, either through the legislature or by referendum, act in areas such as homosexual rights, vagrancy, homelessness, panhandling, nude dancing, pornography, and other forms of explicit sexual activity they feel produce moral chaos, the courts, on what seems to be in some cases highly debatable constitutional grounds, step in to displace the people's choices with the court's.

Of those who are alarmed by this trend toward judicial supremacy, few are more outspoken than Harvard law professor Mary Anne Glendon, who traces it, simply stated, to the notion among certain well-educated individuals that the educated are better equipped to govern than the masses. She argues that these elites have a disdain for ordinary politics and the legislative process.

It is hard to read the scholarly legal defenses of this growth of judicial power and not agree. This issue was also put forward with great force by Judge Andrew Kleinfeld of the U.S. Court of Appeals for the Ninth Circuit in his dissent in the "right to die" litigation when he said, "That a question is important does not imply that it is constitutional. The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary."

Government by judiciary

Frequently, when this is pointed out and even acknowledged, the response is to assert that the alarm giver just doesn't like the thrust of the decisions—that is, that he or she would simply prefer different outcomes. This is a red herring and an unfortunate trivialization of a significant constitutional issue. Indeed, I want to go so *far* as to suggest that the outcomes of these cases are not what should be alarming. Rather, what is most disturbing is that we are witnessing a movement to, as Robert Bork describes it, government by judiciary with decisions further and further removed from the moorings of original meaning and the intent of the drafters of the Constitution.

This means that we are moving in a direction to deprive each and every one of us in our capacities as citizens of our right to self-government. The issue is not liberal or conservative policy results, but who is entitled to make decisions about the direction of our society. After all, when something is declared a constitutional right, it simply means that the people and those holding their voice—the legislators—are forever silenced on the topic (unless, of course, a constitutional amendment can be effected, which is so difficult to do that it isn't much of a remedy). This precludes effective debate, discussion, and compromise. The issue goes in the constitutional deep-freeze and is off limits to the people. This has many effects.

The first, as I've mentioned, is a reduction of the ability of the people to set their own agenda.

The second effect, which is also alarming, has been to change the judiciary and how it is perceived. When the judiciary simply accepted the policy choices of the legislature, the importance of a judge's political and policy views were nearly irrelevant. However, when the courts could displace a policy they disliked with one perceived to be more enlightened or beneficial on the claimed basis that the policy violated the Constitution, it became clear that the politics of the judge were all important. After all, if judges are to determine issues like abortion, school prayer, homosexual rights, and the death penalty, it suddenly makes a difference what they think about these issues. Thus, the sad spectacle of the Bork and Thomas confirmation hearings that took place at the federal level.

In Michigan, as in other states such as Florida, Alabama, and Texas, the last several supreme court races have become, for all intents and purposes, partisan political races. Special interests on both sides increasingly spend huge sums in an effort to elect persons with whom they expect to share policy positions. Both these developments are recent and traceable, I believe, to the expanded power the courts have assumed. After all, with power comes, reasonably enough, an interest by those affected in how it is exercised. Judges, rather than being seen as having no ax to grind, will be, and are increasingly seen as, practicing politics by another name.

Further, judicial decisions are different from legislative decisions. There are no compromises, no half-loaves, no give-and-take. It's all or nothing, and one can't, unlike a legislative decision, modify it if it doesn't work, absent the court overruling itself or the people utilizing the constitutional amendment process, which is very rare.

We are moving in a direction to deprive each of us in our capacities as citizens of our right to self-government.

This point was well made by U.S. Supreme Court Justice Antonin Scalia in his dissent in the Virginia Military Institute case. He said, "A virtue of the democratic system with a free Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution."

Currently, legislatures seem passive, even apologetic, when the courts aggressively enter the political arena. Witness the legislative reaction to the Michigan courts' handling of emergency assistance, general assistance, campaign finance reform, teacher strike legislation, charter schools, executive branch reorganizations, tort liability reform, to name but several recent exercises of judicial review. While some of these rulings may have been legitimate exercises of judicial power, the legislature, almost always, accepts each arrogation of power with resignation, rather than with perplexity or even outrage.

Indeed, it is enough to cause the suspicion that some legislators seem to appreciate having "tough" decisions made by the judiciary. Perhaps, aware of what is at stake institutionally, a little less comity and toleration would be appropriate in view of courts' disinterest in separation of powers.

Restoring the balance

What is to be done? I would modestly suggest that legislative staff should monitor court decisions. When a court oversteps, there could be legislative reaction in the form of thoughtful press comment and, also, if possible, appropriate formal legislative action so as to undo the judicial usurpation. This should not be merely a reflexive irritation at every exercise of judicial review because, as is obvious, there are occasions when we would all agree that it has been appropriately exercised, but on those occasions where that cannot be said, the comment would be justified.

Further, legislation could be considered to require notification of the leaders of both chambers of the legislature, as well as the governor and attorney general, when an issue of a statute's constitutionality has been raised, or if that is too onerous, to require a trial court to notify them when a statute has been declared unconstitutional. Intervention by the legislature with amicus briefs could

Speakers

SB 412-FN Public Sign In - JUDICIARY

APPEARING: IN FAVOR	APPEARING: TO OPPOSE	DATE: JANUARY 12, 2000 TIME: 11:00 AM NAME / REPRESENTING	WISH TO SPEAK?
✓		Caroline Douglas - will testify later on recess date	– ✓
		NINA GARDNER - Judicial Council	✓ ✓
		George MOORE - President, NH BAR Assoc.	– ✓
		Anthony McMANUS & Chantina Abramson - NH BAR FOUNDATION	– –
		Kevin Duggan - NH Trial Lawyers Assoc	– ✓
		HOWARD ZIBEL - NH SUPREME COURT	✓ ✓
		Maureen Manning - Self + N.H. Bar Foundation	✓ ✓
✓		William Cheshire Self	
		KEN BLEVENS	✓
		JOE HAAS	✓

SB 412-FN *[Continued]* Senate Judiciary Hearing Sign In

APPEARING: IN FAVOR	APPEARING: TO OPPOSE	DATE: FEBRUARY 7, 2000 TIME: 10:30 AM NAME / REPRESENTING	WISH TO SPEAK?
✓		Philip Cobbin Esq	Yes
✓		Rep. David Bickford	✓
✓		Hank Amsden	
	✓	Marilyn Billings McNamara, Chair Pro Bono Policy Gov. Board	✓
✓		Shelley Ridley	✓
✓		Rep. Paul Mirski	✓
✓		Theodore Kamasinski	Yes
✓		Caroline Douglas	✓
✓	✓	~~Steve Tober~~ GEORGE MOORE	Yes
	informational	Maureen Raiche Manning	yes
✓	✓	Steve Tober (Steve Tober)	Yes
✓	✓	Nina Gardner	Yes
✓		JosephHaas53@HotMail.com	"
✓	✓	KEVIN DUGAN NH TRIAL LAWYERS ASSN	YES
		HOWARD ZIBEL	ANSWER QUESTIONS
✓		Lorraine Chisholm	Yes
✓	✓	Ting Abrahanson	Yes
		~~Ed Mosca~~	~~Yes~~
✓		Judith Thayer	Yes.

Testimony

Senator Sheila Roberge

221 McKinley Road
Portsmouth, NH 03801
February 2, 2000

Senator Sheila Roberge
Deputy Republican Whip
Senate Office Building
Concord, NH 03301

Committee Hearing February 7, 2000

Dear Senator Roberge,

Whereas I will be in South America February 7, 2000 I cannot testify as much as I would like to. Please have this letter read into the record.

For the past ten years I have been a pro se litigant in the New Hampshire Judicial System and I have learned the law by representing myself in court several times and by researching in law libraries for 4000 hours.

Having observed the NH Judicial it is clear they do not rule on state law, federal law, constitutional law or any other laws of our land. Instead they rule by **"BROCKLAW"!!**

They have now become so brazen and arrogant that they have isolated themselves from the other 49 states and will not accept an order I have from Connecticut even though by Constitutional and Federal Law Full Faith and Credit they must. Because of this Justice Brock an Justice Nadeau have established a policy that accepts International Mail Order Fraud,

During my oral arguments 10 years ago at the NH Supreme Court 1 judge snoozed, another read a tiny book, Judge Brock acted like the "old man in the mountains", David Souter failed to ask questions like he normally does and the other judge asked no questions at all. The session in front of the 5 Supreme Court judges was nothing other than a pre arranged Hollywood stage show My attorney took a "bad fall" in front of the judges so I sued her for legal malpractice in Maine and 8 days later in Waterville, Maine she met with the presiding judge and they held a trial on me in the Holiday Inn without inviting me but because it is my birthplace I caught them.

In January 1999 the Supreme Court of North Dakota ruled on a case identical to mine. They ruled the man in that case did not have to pay $75,000 because it would be unconscionable.

In my attempts to recover the $75,000 that was stolen by thieves in the judicial I filed a case on Rockingham Court claiming 17 counts of perjury by the person who got what was left of the $75,000. I have the documents to prove the perjury Judge Coffey wrongly rejected the case and Judge Brock would not give me an appeal so he believes perjury too to be acceptable in his court system along with International Mail Order Fraud.

My trials in the NH Judicial have been akin to trials the Nazi's used to inflict upon the Jews. From seeing my treatment and knowing many other injustices I have determined the NH Judicial is corrupt to the core and nothing other than a huge lie to the people of New Hampshire.

Over twenty years ago NH had an RSA that all persons were entitled to an appeal. The judicial again conned the legislature and the law was revoked. We are the only state in the nation without an appeal process. My former attorney, Julia Nye, who I sued for malpractice once told me "we should not present too much case law to the five judges because they don't like to do so much research". Last year the North Dakota Supreme Court ruled on twice as

many appeals as the NH Supreme Court. Julia Nye once worked at the NH Supreme Court.

I question why my airline pilot friends in divorce lose the big house to the ex spouse but in Douglas v Douglas and Thayer v Thayer the big houses did not go to the wives!

In summary I will add that in 49 states of the nation per the US Constitution Article 4 Full Faith and Credit and United States Code 28 at 1738 I am married but in New Hampshire I am divorced as ruled on by **"BROCKLAW"!!**

It is my opinion under the present leadership of the NH Judicial a man or woman's property is unsafe. What country do I live in?

Major James M. MacFarlane
United States Army, Aviation (ret).

The Berlin Daily Sun

MONDAY, DECEMBER 20, 1999 VOL. 8 NO. 194 BERLIN, N.H. 752-5858 FREE

MORIN, COOS COUNTY JUSTICE SYSTEM CONDEMNED BY PORTSMOUTH MAN..

To the Editor:

County Prosecutor Pierre Morin should be fired along with the others responsible for the injustice by Coos County and the State of New Hampshire inflicted upon Red Elk and his family.

This is not the first injustice by the state and county against the people of Coos. A young man named Laumier spent nine months in jail on numerous counts of arson earlier in the decade and a jury acquitted him on every count.

My own experience was devastating. Peter Smith incarcerated me for 12 days and I had to cough up $75,000 of funds protected by Federal Law, Contract Law and Public Policy to get released to pay a "wife" from the UK who spent 120 days here, who I was never legally married to per a court order from New Haven Superior Court, Connecticut. I also allege the Brit committed perjury in front of Peter Smith 17 times and I have the documents to prove it. Peter Smith's order was **unconscionable!!**

My most recent visit to check files in Coos County Superior Court I was ordered by security guards to remove my hat upon entering with no judge in the building. It is the only court in the state I now of with such a policy to include Concord Federal Court.. Next we the peasants, will be asked to shine the shoes of security personnel at Coos County Superior Court.

The reason tragedies against us peasants occur is because those responsible in the judicial are not held accountable because we have a body of legislators for the most part who are weak and continue to bury their head in the sand because it did not happen to them!

James M. MacFarlane
Portsmouth, NH 03801

Not printed in the Berlin Daily Sun is another man from Maine who Peter Smith did not have jurisdiction over, Richard Tremblay , spent 93 days in jail ordered by Peter Smith, a Title 42 1983 violation of Tremblay's Civil Rights. His wife lived in Vermont.

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date: **MARCH 16, 2000**

THE COMMITTEE ON **Judiciary**

to which was referred **Senate Bill 412-FN**

AN ACT ***adopting the "Court Integrity and Attorney's Independence Act.."***

Free copy

VOTE: **6 / 1**

Having considered the same, report the same with the following resolution:
Resolved, that it is: **INEXPEDIENT TO LEGISLATE.**

Senator Katherine Wheeler
For the Committee

SB412 Docket

Next|Prev|Results List|Main|Bill Status

Bill Title: adopting the "Court Integrity and Attorney's Independence Act.."

Date	Body	Description
1/5/2000	**S**	Introduced and Ref. to Judiciary; SJ Convening Day, Pg.13
1/6/2000	**S**	Hearing, Jan. 12, 11:00 a.m., Room 103, SH; SC1, Pg.3
1/19/2000	**S**	==RECESSED AND WILL BE CONTINUED==) Feb.7, Room 103, SH, 10:30 a.m.
3/13/2000	**S**	Committee Report Inexpedient to Legislate; 3/16/00, SC17, Pg.4
3/16/2000	**S**	Inexpedient to Legislate, MA, VV, = KILLED=; SJ 6, Pg.186

Next|Prev|Results List|Main|Bill Status

Docket Abbreviations