

NEW HAMPSHIRE BAR ASSOCIATION
BOARD OF GOVERNORS SPECIAL MEETING
REMOTE
May 24, 2021

MINUTES

Present for all or part of the meeting were:

Cathy Shanelaris
Chrissy Hanisco
Christopher T. Regan
Daniel Will
Geoffrey Gallagher
Jason B. Dennis
Jonathan M. Eck
Joseph D. Steinfield
Leslie Nixon
Lisa M. English
Richard Guerriero
Sandra L. Cabrera
Scott J. Whitaker
Susan Aileen Lowry

George R. Moore
Deborah Hawkins
Allison Borowy

Guests:
Michael Iacopino
Stephen Buckley
Margaret Byrne
Christopher Hawkins
James Kennedy
Christopher Boldt
Lindsey Courtney

A meeting notice was emailed to all governors on May 21st. The agenda is duplicated below in the order of consideration of agenda items. Unless otherwise noted, all motions reported are deemed to have been appropriately proposed, seconded, and voted upon by those present

A. Call to Order

President Dan Will called the meeting to order at 3:33 p.m. Due to Dan's role in the ongoing litigation, he will have President-Elect Richard Guerriero lead the meeting. Dan recused himself from voting.

B. Discussion of HB 108 and what action this board and the association should take.

Today's meeting is to consider if the bar association should weigh in on this pending legislation, which addresses the interplay of attorney client privilege and the right to know statute and arose in response to a NH Supreme Court decision in *Hampstead vs. SAU #55*. The board will have to consider if this is within the scope of bar association legislative activity prescribed by the Chapman decision and whether we should send a letter of support from the NHBA Board of Governors supporting the amendment.

President-Elect Richard Guerriero has checked in with our lobbyist, Kathy Fox. Senate Judiciary is going to meet tomorrow (5/25) to consider the proposed amendment. It has bipartisan support in the Senate. If the bill is amended by the committee, and then by the full Senate, it will have to go back to the House for concurrence. Richard shared his concern that the association could be moving too fast and may not make a good decision. He also feels that it is important to hear from more than one point of view. He did reach out to others that might have contrary views.

Attorney Jim Kennedy, Concord City Attorney spoke in support of the legislation on behalf of municipal attorneys. The finding in the case would subject the attorney client privilege to a privacy test similar to the one government attorneys apply to health records and other similar pieces of information. This would have a drastic impact on how they function. Many city entities seek advice from his office about how they should act. He looks at this legislation as being consistent with the right to know law. Jim shared that he has written many publications and taught seminars to public officials on right to know law. Under this decision, there are real problems and issues that government lawyers will face. This ruling also impacts private practitioners representing public entities in the same way. There was discussion about whether work product and privileged communications should fall under the same rules, as other potentially private records.

President-Elect Richard Guerriero shared the thoughts that the opposition might have. Their argument is that public attorneys are different. Since they are paid with public money, there should be a balancing test. The board discussed this idea – neither the trial court nor state court looked at this. If this were the case, then the public would have access to public defender records, which they don't.

Attorney Chris Boldt, whose practice is made up both of municipal boards and of clients before municipal boards, shared his thoughts. This is a change that creates an ethical issue, to have to treat different clients differently under the rules of professional conduct. He feels it makes no sense. The balancing test starts with the premise you don't have privacy. He wonders how a municipal board works with this presumption. It would also create a disconnect with other current statutes regarding public meetings and right to know.

Public Sector Governor Lisa English shared that the Public Sector Section met today and discussed the amendment. There was a robust discussion, and those present voted 14 -1 to ask the NHBA Board of Governors to support the amendment. There wasn't a unified position, but close to consensus. This would allow attorneys to continue to provide advice and have frank discussions, knowing for sure that their opinions and advice would be protected. Lisa added thanks to the BOG for voting to continue the Public Sector section as it made it easy to pull together the group to meet and discuss these issues. She added that if the Court grants the request for additional briefing, this section would like to share their thoughts.

The board discussion continued. President-Elect Richard Guerriero shared that he did make an effort to seek out alternative points of view. He reached out to the NHBA Ethics Committee chair Stephanie Burnham and member Mitch Simon but received no response. He also spoke with Giles Bissonnette of the ACLU who is not taking a position, as well as to general 1st amendment media outlets and plaintiffs lawyers but received no response.

The board then went on to discuss the Chapman decision, which the association looks to for guidance when considering taking positions on proposed legislation. Richard referenced page 8 and shared that he thinks today's issue falls in the heart of Chapman. Executive Director George Moore agreed about the Chapman constraints. This is clearly an issue concerning the practice of law and is squarely within the purview of a unified bar. He shared his view that this would open the door to practitioners attempting to get around the discovery system; it is bad for practicing law and bad for attorney client privilege.

Mike Iacopino, chair of the NHBA Legislation Committee concurs with the reading of Chapman and protecting attorney client privilege. He is not sure if the amendment passes, we won't still have the problem. The balancing test still exists which will be conducted. Mike thinks the problem is bigger than just getting the amendment passed.

ACTION

On motion to notify the New Hampshire Senate and House of Representatives of the bar association's position regarding the Senate Amendment 2021-1251s to House Bill 108 by sending a letter from the bar's President or President-Elect. That amendment adds to the exemption from the Right to Know in N.H. R.S.A 91-A:5, "Records protected under attorney client-privilege or the attorney work product doctrine." The New Hampshire Bar Association supports this legislation and recommends that it be passed into law. Passed 12-0 with 2 abstentions (Jonathan Eck and Dan Will).

The meeting adjourned at 4:45 p.m.

Respectfully Submitted,

Deborah J. Hawkins

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for Robert R. Howard, III, Secretary