STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET # 2002-0719

WERME, PAULA J. V. PROFESSIONAL CONDUCT COMMITTEE

RULE 7 APPEAL

APPELLANT'S BRIEF

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753-9384

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CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATION S INVOLVED IN THE CASE

U.S. Const., Amend. 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const., Amend XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 22, Part 1, NH Const. Free speech and liberty of the press are essential to the security of freedom in a state; they ought, therefore, to be inviolably preserved.

RSA 169-C:3, XXI-a. "Party having an interest' means the child; the guardian ad litem of the child; the child's parent, guardian or custodian; the state; or any household member subject to court order.

RSA 169-C:25 Confidentiality. [version effective at time of complaint.]

I. The court records of proceedings under this chapter shall be kept in books and files separate from all other court records. Such records shall be withheld from public inspection but shall be open to inspection by the parties, child, parent, guardian, custodian, attorney or other authorized representative of the child.

II. It shall be unlawful for any party present during a child abuse or neglect hearing to disclose any information concerning the hearing without the prior permission of the court. Any person who knowingly violates this provision shall be guilty of a misdemeanor.

III. All case records, as defined in RSA 170-G:8-a, relative to abuse and neglect, shall be confidential, and access shall be provided pursuant to RSA 170-G:8-a.

History Source. 1979, 361:2. 1983, 331:3. 1990, 19:2. 1993, 266:3, eff. Aug. 14, 1993; 355:4, eff. Sept. 1, 1993.

RSA 170-G:8-a 170-G:8-a Record Content; Confidentiality; Rulemaking. —

I. The case records of the department consist of all official records, regardless of the media upon which they are retained, created by the department of health and human services in connection with a report received pursuant to RSA 169-C:29, or cases brought under RSA 169-B, 169-C, 169-D, or 463, or services provided to the child or family without a court order pursuant to RSA 170-G:4, including intake and assessment reports, service or case plans, case logs, termination reports and a list of persons or entities providing reports to the department or services to the child or

family. Such records do not include:

(a) Records created as part of an action brought pursuant to RSA 170-B or 170-C.

(b) Records submitted to or maintained by the courts, or records created by third parties, such as psychologists, physicians, and police officers, even if such records are prepared or furnished at the request of the department. Requests for access to court records and records created by third parties may be made directly to the court or to the third party who created the record. Nothing in this section shall restrict or limit access to records filed pursuant to RSA 169-C:12-b.

(c) Reports contained in the central registry of abuse and neglect reports maintained pursuant to RSA 169-C:35.

(d) The name of a person who makes a report of suspected abuse or neglect of a child pursuant to RSA 169-C:29, or any information which would identify the reporter.

II. The case records of the department shall be confidential.

(a) The department shall provide access to the case records to the following persons unless the commissioner or designee determines that the harm to the child named in the case record resulting from the disclosure outweighs the need for the disclosure presented by the person requesting access:

(1) The child named in the case record.

(2) The parent of the child named in the case record, as defined in RSA 169-C:3, XXI.

(3) The guardian or custodian of the child named in the case record.

(4) Another member of the family of the child named in the case record, if disclosure is necessary for the provision of services to the child or other family member.

(5) Employees of the department and legal counsel representing employees of the department for the purpose of carrying out their official functions.

(6) Persons made parties to judicial proceedings in New Hampshire relative to the child or family, whether civil or criminal, including the court with jurisdiction over the proceeding, any attorney for any party, and any guardian ad litem appointed in the proceeding.

(7) A grand jury, upon its determination that access to such records is necessary in the conduct of its official business.

(8) The relevant county.

(b) The department shall disclose information from case records or provide access to case records to the following persons or entities, if such information or access is not harmful to the child and is necessary in order to enable the person or entity requesting information or access to evaluate or provide services, treatment or supervision to the child named in the case record or to the family:

(1) A person or entity requested by the department or ordered by the court to perform an evaluation or assessment on or to create a service plan for the child named in the case record, the child's

family, or an individual member of the child's family.

(2) A person or entity requested by the department or ordered by the court to provide services to the child named in the case record or the child's family.

(3) The superintendent of schools for the school district in which the child named in the case record is then, or will, according to the child's case plan, be attending school.

(4) The person or entity with whom the child resides, if that person is not the child's parent, guardian, or custodian.

III. The commissioner shall adopt rules, pursuant to RSA 541-A, governing the procedures regulating access to all of the records of the department. Such rules shall contain provisions relative to:

(a) Access to case records by persons named in paragraph II of this section.

(b) Access to case records by a physician who has examined a child who the physician reasonably suspects may be abused or neglected.

(c) Access to case records by a law enforcement official who reasonably suspects that a child may be abused or neglected, and who is participating with the department in a joint investigation.

(d) Access to case records by a state official who is responsible for the provision of services to children and families, or a legislative official who has been statutorily granted specific responsibility for oversight of enabling or appropriating legislation related to the provision of services to children and families, for the purposes of carrying out their official functions, provided that

no information identifying the subject of the record shall be disclosed unless such information is essential to the performance of the official function, and each person identified in the record or the person's authorized representative has authorized such disclosure in writing.

(e) Access to case records by a person conducting a bona fide research or evaluation project, provided that no information identifying the subject of the record shall be disclosed unless such information is essential to the purpose of the research, each person identified in the record or an authorized representative has authorized such disclosure in writing, and the department has granted its approval in writing.

(f) Access to case records by any person making a report of suspected child abuse or neglect pursuant to RSA 169-C:29, provided that such disclosure is limited to information about the status of the report under investigation, or information reasonably required to protect the safety of such person.

(g) Access to all other records of the department which are not case records as defined in paragraph II.

IV. Additional access to case records and all other records of the department shall be granted pursuant to the terms of a final order issued by a court of competent jurisdiction.

V. It shall be unlawful for any person entrusted with information from case records to disclose such records or information contained in them. Notwithstanding the previous sentence, it shall not be unlawful for a parent or child to disclose case records or the information contained in them to persons providing counsel to the child or family. It

shall be unlawful for any person who receives case records or the information contained in them from a parent or a child to disclose such records or information. Any person who knowingly discloses case records or information contained in them in violation of this paragraph shall be guilty of a misdemeanor.

VI. Notwithstanding the foregoing:

(a) Any person who is entitled to access a case record pursuant to this section may share such information with any other person entitled to access pursuant to this section, unless the commissioner or a designee shall specifically prohibit such additional disclosure in order to prevent harm to a child.

(b) Nothing in this section shall be construed to require access to any records in violation of the order of a court of competent jurisdiction.

Source. 1985, 367:10. 1993, 355:8. 1994, 212:2. 1995, 310:143, 175, 181, 183, eff. Nov. 1, 1995.

RSA 311:6 Oath. — Every attorney admitted to practice shall take and subscribe, in open court, the oaths to support the constitution of this state and of the United States, and the oath of office in the following form: You solemnly swear or affirm that you will do no falsehood, nor consent that any be done in the court, and if you know of any, that you will give knowledge thereof to the justices of the court, or some of them, that it may be reformed; that you will not wittingly or willingly promote, sue or procure to be sued any false or unlawful suit, nor consent to the same; that you will delay no person for lucre or malice, and will act in the office of an attorney within the court according to the best of your learning and discretion, and with all good fidelity as well to the court as to your client. So help you God or under the pains and penalty of

perjury.

Source. RS 177:5. CS 187:5. GS 199:5. GL 218:5. PS 213:5. PL 325:6. RL 381:6. RSA 311:6. 1995, 277:3, eff. Aug. 19, 1995.

NH Rule of Professional Conduct 1.2 (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

NH Rule of Professional Conduct 8.4(a) It is a violation of the Rules of Professional Conduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

STATEMENT OF THE CASE

Following an article in June of 1999 in the Concord Monitor concerning a child protection case heard on appeal in the Merrimack Superior Court, Judge Smukler referred undersigned attorney to the Professional Conduct Committee, stating that undersigned attorney "did not seek" court approval before speaking to the Monitor. The article itself stated that "[the mother] loaned extensive medical, psychological and court records to the Monitor so her story could be told publicly." Appendix, p. 9.

Undersigned attorney stated in reply to the Monitor article that it was her belief that the statute was "unconstitutional" as a prior restraint on free speech, that the law plainly violated Article 22, Part I of the New Hampshire Constitution, and that she had no intention of changing her legal advice to clients regarding her legal advice unless the law was determined to be constitutional by the U.S. Supreme Court. Appendix, p. 3.

The Professional Conduct Committee found a violation of Rules 1.2 (d) and 8.4 (a) of the Rules of Professional Conduct, finding that undersigned attorney "did not seek Judge Smukler's prior approval, as required by RSA 169-C:25, before you and your client spoke to the Monitor," and undersigned attorney "advised her client to violate it" with while being "aware of the criminal penalties" of the statute. It further stated that "that rule 1.2 (d) permits a lawyer to counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, and application of the law, but such a good faith effort should have included a discussion of the legal consequences to the client of that proposed conduct." Reprimand, A. p. 6, ¶ 11 - 12.

She appeals.

SUMMARY OF ARGUMENT

Disclosure of "information" about a case under RSA 169-C:25 is not prohibited by any confidentiality law under RSA 169-C. The only thing prohibited from disclosure by RSA 169-C:25 by a parent or person attending a hearing is information about a hearing. That prohibition is not narrowly tailored to achieve a compelling state interest given the vast majority of information permitted to be released by a parent in possession of the information. To the extent that the statute prohibits disclosure of information about a juvenile hearing by a parent, who is generally the only person in the court room whose fundamental rights are always at stake in the case, the prohibition violates Amendment 1 of the U.S. Constitution and Article 22, Part I of the NH Constitution. The U.S. Supreme Court has expressly and repeatedly stated that a statute or act passed by a legislative body that plainly violates the constitution is not law. In addition, it has held that a person has the right to violate an unconstitutional statute and challenge its constitutionality in the context of a criminal proceeding. Finally, the U.S. Supreme Court stated unambiguously in Marbury v. Madison, 5 U.S. 137 (1803) that "the theory of every such government [with framed constitutions] must be, that an act of the legislature, repugnant to the constitution, is void." If RSA 169-C:25 is plainly repugnant to the First Amendment and Article 22, and is void, as stated by the U.S. Supreme Court, a lawyer cannot be held in violation of Rule 1.2 (d) in counseling a client that the statute is void *ab initio*, and need not be followed. She is merely advising the client of **the law,** as she was properly trained to do. "It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those

only which shall be made in pursuance of the constitution, have that rank." Id., p. 180. Finally, the lawyer, in counseling her client of her right to violate a plainly unconstitutional statute, is upholding her oath to support the constitutions of New Hampshire and the United States.

ARGUMENT

1. NEITHER RSA 169-C:25 OR ANY OTHER PROVISION OF NH LAW PROHIBITS THE DISCLOSURE OF "INFORMATION ABOUT THE CASE" AS ALLEGED BY JUDGE SMUKLER AND THE PROFESSIONAL CONDUCT COMMITTEE IN ITS NOTICE OF CHARGES. Appendix, pp. 2 - 3.

RSA 169-C:25, I states:

> "The court records of proceedings under this chapter shall be kept in books and files separate from all other court records. Such records shall be withheld from public inspection but shall be open to inspection by the parties, child, parent, guardian, custodian, attorney or other authorized representative of the child."

"[W]hen the language of an ordinance is plain and unambiguous, we need not look beyond the ordinance itself for further indications of legislative intent." Healey v. Town of New Durham, 140 N.H. 232, 236 (1995) This portion of the statute is a directive to the courts. By its plain language, it places no obligations on either DCYF or a parent concerning the contents of their own copies of court records with respect to confidentiality.

RSA 169-C:25, II states:

> "It shall be unlawful for any party present during a child abuse or

neglect hearing to disclose any information concerning the hearing without the prior permission of the court. Any person who knowingly violates this provision shall be guilty of a misdemeanor."

Admittedly, this portion of the statute places a criminal penalty on "any party" who discloses any information concerning the hearing without the prior permission of the court. "Party" is not defined in the statute, but "Party having an interest" is defined, and it does not include an attorney present at a hearing. RSA 169-C:3, XXI-a. It does not by its plain language prohibit the disclosure of information by an attorney who is not a party. The constitutionality of this portion of the statute will be discussed later as it applies to parents, but the plain language also does not prohibit disclosure of "information concerning the case." Its proscription is much narrower, and it only prohibits disclosure of information concerning a **hearing** by parties.

RSA 169-C:25, III states:

"All case records, as defined in RSA 170-G:8-a, relative to abuse and neglect, shall be confidential, and access shall be provided pursuant to RSA 170-G:8-a." History Source. 1979, 361:2. 1983, 331:3. 1990, 19:2. 1993, 266:3, eff. Aug. 14, 1993; 355:4, eff. Sept. 1, 1993.

The plain language this section deems the case records "confidential," but does not define "confidential," who is to have access to them, and places no criminal penalties on disclosure. If it were a crime for a parent or "party" to disclose records under this portion of the statute, it would be stated here, as it is in RSA 169-C:25, II. The plain wording of the statute also refers the reader to RSA 170-G:8-a to determine the definition of "case records." It is therefore incumbent on the reader to refer to the statute for the definitions of "case

records" and assess the penalties or lack thereof for disclosing them.

RSA 170-G:8-a, I narrowly defines "case records" as "all official records, regardless of the media upon which they are retained, created by the department of health and human services in connection with a report received pursuant to RSA 169-C:29, or cases brought under RSA 169-B, 169-C, 169-D, or 463, or services provided to the child or family without a court order pursuant to RSA 170-G:4, including intake and assessment reports, service or case plans, case logs, termination reports and a list of persons or entities providing reports to the department or services to the child or family." It specifically **excludes** from its definition "(b) **Records submitted to or maintained by the courts**, or records created by **third parties**, such as **psychologists, physicians**, and **police officers**, even if such records are prepared or furnished at the request of the department." The statutory history of these exclusions is important. RSA 170-G:8-a was extensively revised in 1993. These revisions excluded court records from the definition of "case record." Appendix, p. 16. Undersigned attorney has done no more than take full constitutional advantage of the full impact of the changes in the statute.

The language of RSA 170-G:8-a, I is important, because it is a misdemeanor to disclose "case records or information contained in them." RSA 170-G:8-a, V. However, the plain wording of the statute proscribes **no penalties for disclosing court records or other records excluded from the definition.** Without the necessity of constitutional inquiry, it is not against the law for a parent to publish his or her entire court record on the Internet.

Taken in the context of the REPRIMAND against Paula J. Werme, it is apparent that she was reprimanded at least in part for advising a client correctly on the statute:

Paragraph #4 states "that the article contained quotes about the case from both you

and your client." There is no prohibition on speaking "about the case." To the extent that the REPRIMAND seeks to base a finding of fault on making statements to the press "about the case," it is in error. It is **not illegal to speak about "the case."**

Paragraph # 5 states "that . . . the author [of the newspaper article] explained how he accessed the confidential documentary evidence about the case: "[The mother] loaned extensive medical, psychological, and court records to the Monitor so her story, which had been confined to confidential court proceedings and documents, could be told publicly." Appendix, p. 9. **Medical, psychological, and court records** are all specifically **named in the statute as being excluded from the definition of DCYF records.** RSA 170-G:8-a I (b). Again without the need for constitutional inquiry, there is absolutely nothing in that paragraph that would support a finding of misconduct under Rule 1.2(d) for advising a client to commit a crime.

Paragraph # 6 states "that you did not seek Judge Smukler's prior approval, as required by RSA 169-C:25, II, before you and your client spoke to the Monitor." RSA 169-C:25, II specifically only states that prior court approval is required by a **party** before speaking to another about matters in a **hearing**. The constitutionality of that portion of the statute will be further explored in light of the other provisions of the statute later. Paragraph # 6 of the reprimand then seeks to impose liability for a professional conduct violation based on a sweeping misinterpretation of the plain wording of the statute for disclosing confidential "information" that was perfectly legal for the parent to disclose. While undersigned attorney certainly will not deny advising her client that it was legal to disclose the information cited in the article, she need not rely on the constitution to avoid a reprimand for conduct not prohibited by the statute. Merely speaking to the Monitor without the permission of Judge

Smukler was not criminal.

The Reprimand itself did not narrowly state what confidential information about a "hearing" was disclosed to predicate liability for a violation of the rule, but found liability for disclosure of "information.[1]" That sort of broad prohibition on core political speech is unconstitutional.

2. THE STATUTE(S) THAT UNDERSIGNED ATTORNEY ADVISED HER CLIENT WERE UNCONSTITUTIONAL **WERE** UNCONSTITUTIONAL AND VOID. THEY NEED NOT BE FOLLOWED IF THEY ARE UNCONSTITUTIONAL ON THEIR FACE.

"It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. . . . [T]he great and essential rights of people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws." Near v. Minnesota, 283 U.S. 697 (1931). "If the constitutional guarantee means anything, it means that, ordinarily at least 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . .'" Tribe, American Constitutional Law, Second Edition, p. 780, quoting Police Department of the City of Chicago v. Mosley, 408 U.S. 92.

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[1] Although not a part of the record, undersigned attorney states that to her knowledge and recollection, no records considered to be "case records" under RSA 170-G:8-a, I were given to the reporter for the story. The transcripts for appeal were not yet prepared at the time of the article. Although is seems ludicrous in hindsight, the reason for that was that she did not want to test the statute in a criminal proceeding. Although the article mentioned briefly "testimony," four years after the event, it's impossible to recollect whether that was because of a direct disclosure or something mentioned in a court order, for which there is no criminal penalty regarding disclosure.

Prior restraints are a special category of government restriction that may not be punished. "Any system of prior restraints of expression come to [the U.S. Supreme Court] bearing a heavy presumption against its constitutional validity. . . We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint." Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963). The prohibitions against speech in RSA 169-C:25 and RSA 170-G:8-a are nothing more than legislatively enacted prior restraints on constitutionally protected speech. Particularly because they prohibit disclosure of information concerning government action against its citizens, the statutes bear the heavy presumption against their constitutional validity. "Any attempt to restrain speech must be justified by a compelling State interest to protect against a serious threat of harm. See Nebraska Press Ass'n v. Stuart, supra at 561, 570; Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Wood v. Georgia, 370 U.S. 375, 384-385, 391-393 (1962)." Care and Protection of Edith, 421 Mass. 703, 659 N.E.2d 1174 (1996). In addition, regulation of speech critical of government is entitled to special consideration. "[W]e consider . . . against the background of profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

There was little discussion in the professional conduct hearing concerning the nature of the speech advocated by undersigned attorney and alleged to form the basis of the charge. There is little doubt that RSA 169-C:25 and RSA 170-G:8-a, to the extent that they prohibit on pain of criminal conviction the disclosure of information about child protection cases via

limits on disclosure of information about hearings and re-disclosure of DCYF records, limit fundamental rights of speech concerning actions of government by private citizens. In particular they limit the rights of the very parents whose rights are abridged as a result of governmental action.

The U.S. Supreme Court has spoken on the issue of the serious harms it considers sufficient to justify prior restraints on speech. Among them are the harm from inciting people to violence and if the effect of the speech will cause a threat of serious harm - the "clear and present danger" test. The classic example is shouting "fire" in a crowded theater. The statutes in question do not provide any saving exception to the prior restraint rule by providing a prompt method of judicial review of individually determined court orders restraining speech, but squarely statutorily restrict broad categories of speech concerning governmental action based on the subject matter of the speech without any individual judicial determination that the prohibition is necessary for any reason. They squarely prohibit the core speech intended to be protected by the 1st Amendment and Article 22, Part I of the NH Constitution - information that can lead to open and robust debate on public issues.

Although First Amendment cases use various tests depending on the type of challenge to the law, laws abridging enumerated and fundamental rights in general are analyzed on the basis of the strict scrutiny test. In evaluating a statute under strict scrutiny, in order to pass constitutional muster, the government must show first that it has a compelling interest in abridging the exercise of the fundamental right. If the government can show a compelling interest in doing so, a statute might be held constitutional although it does restrict a fundamental right under that test, provided that the government has used the least restrictive means of achieving that right.

In analyzing the constitutionality of RSA 169-C:25 and RSA 170-G:8-a with respect to strict scrutiny, it is unnecessary to evaluate whether or not the government has a compelling interest in prohibiting the category of speech selected. Assuming that the government does have a compelling interest in protecting a child from some sort of harm as a result of disclosure, the statutes, taken together utterly fail at the outset in achieving that objective by the exclusion from the statute of court records, psychological records, medical records, police records and all third party records from the definition of records that are subject to criminal sanctions. If the statutes utterly fail at achieving their objective by specifically excluding broad categories of information from the statutory prohibitions, they obviously are not narrowly drawn to achieve that objective.

That the statutes are grossly under-inclusive in the material they prohibit from redisclosure by persons entitled to the information in them, and that they utterly fail in achieving the objective of confidentiality is illustrated best by the very article that prompted the charges by the committee. If one reads the Concord Monitor story that is the subject of this appeal, 95 - 100% of the information provided to the reporter concerning the case was in the category of information **excluded in the definition of "record" by statute**.[2] Without any constitutional inquiry, it was absolutely legal to provide that information to the reporter. Undersigned attorney remembers reading one sentence in the entire article that even discussed a hearing on the matter, and could not be sure that the information was not provided to the reporter via the alternative source of a court order. The entire balance of the article used

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[2] The article itself lists the bulk of the documents provided to the reporter. She believes that police records provided to the defense by DCYF were also provided. The transcripts for the appeal were not prepared at the time of the article. Undersigned attorney personally took extreme care that no "DCYF" records as defined in RSA 170-G:8-a were provided. It was entirely unnecessary to do so to tell the story.

information legally given to the reporter. If that one sentence of the article was deleted, obviously a vast amount of information concerning **the case** could legally be disclosed.

If the statutes did criminalize the disclosure of all information concerning a case about a neglected child, there is no doubt that they would be declared unconstitutional under any analysis concerning the prior restraint of speech. While it is likely that the Supreme Court would find the statutes unconstitutional based on their failure to achieve their objective by means of a narrowly defined prohibition, it is also possible that the court may choose to disregard the compelling interest test altogether. Justice Kennedy stated in Simon & Schuster v. Crime Victims Bd., 502 U.S. 105 (1991), "The New York statute we now consider imposes severe restrictions on authors and publishers, using as its sole criterion the content of what is written. The regulated content has the full protection of the First Amendment, and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional. In my view, it is both unnecessary and incorrect to ask whether the State can show that the statute "' is necessary to serve a compelling state interest, and is narrowly drawn to achieve that end."' Ante, at 118 (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987))."

The Massachusetts Supreme Court has had the opportunity to determine the constitutionality of a court order prohibiting a parent from speaking about a child protection case and commented on the need for the appellate process to reverse the court order. After concluding that there was no compelling state interest sufficient to sustain the order, it held "Even if we assume there is a right to appeal from the February 22, 1995 order, the existence of a clearly unconstitutional restraint on speech while an appeal is pending is intolerable." Care and Protection of Edith, 421 Mass. 703, 706 (1996).

Finally, in Bantam Books v. Sullivan, 372 U.S. 58 (1963), the court held that even for determinations of obscenity, which are not entitled to full First Amendment protection, prior restraints are "tolerated . . . only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint." Id., p. 70. Neither statute at issue in this appeal has any method by which individual determinations are promptly made prior to imposing the restraint. If these individual determinations are required for restricting obscenity, which is not given the full measure of constitutional protection as other speech, it is obvious that they are required in the context of prior restraints on core political speech.

3. UNCONSTITUTIONAL STATUTES ARE VOID *AB INITIO*. THEY NEED NOT BE CHALLENGED IN COURT PRIOR TO ENGAGING IN THE PROHIBITED CONDUCT TO AVOID CRIMINAL LIABILITY, AND NEED NOT BE HONORED ON THEIR FACE.

The bulk of the professional conduct hearing was on this issue. T, pp. 8 - 37. There was little discussion on the reasons why or why not of RSA 169-C:25 or RSA 170-G:8-a were unconstitutional. In fact, it was intimated that the Professional Conduct Committee agreed with undersigned attorney that the statute was unconstitutional but that they had no discretion to avoid a finding of misconduct despite that belief. T. pp. 7 - 8.

Although undersigned attorney still maintains that the quote submitted from Walker v. Birmingham, 388 U.S. 307, 336 (1967) in her reply to the Committee represents a most eloquent expression of the concept that unconstitutional statutes need not be obeyed,[3] the

[3] The selected legal quote was "The right to defy an unconstitutional statute is basic in our scheme. Even when an ordinance requires a permit to make a speech, to deliver a sermon, to picket, to parade, or to assemble, it need not be honored when it is invalid on its face."

committee spent the bulk of the almost Kafkaesque hearing discussing whether it represented settled law, because the statement was made by the dissent in Walker. T. pp. 9 - 20.

Walker v. Birmingham considered whether civil rights marchers could be found in contempt of court for violating a court injunction against marching. The quote was from the Douglas/Brennan/Fortas dissent arguing that the court should not be permitted to abuse its power by issuing an injunction that violated the constitution. In retrospect, it was clearly not the best case to submit to the committee, but undersigned attorney did write to Attorney Tom Hanna in 1999, provided him the case as requested, and offered to answer any questions he had. T., p. 25. She received no indication from Attorney Hanna or the committee that the problem they perceived was because the quote was from a minority opinion.

Because the concept that "statements backed up by citations of settled U.S. Supreme Court cases in a Supreme Court dissent are not valid statements of law" was novel to undersigned attorney, and the committee members present at the hearing provided no legal precedent for their opinion on that point, it was a frustrating experience. See T. pp. 13 - 21. Never-the-less, undersigned attorney further submitted case law from Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) to the committee, which was a case involving the same facts, but reversed a criminal conviction for the same conduct based on the statute's unconstitutionality. Its central holding was based on the reasoning in Walker dissent:

> And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.[fn3] "The Constitution can hardly be thought to deny to one subjected

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Walker v. Birmingham, 388 U.S. 307, 336 (1967)

to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." Jones v. Opelika, 316 U.S. 584, 602 (Stone, C. J., dissenting), adopted per curiam on rehearing, 319 U.S. 103, 104." Id., p. 151.

It is not necessary to rely on either Walker v. Birmingham or Shuttlesworth v. Birmingham to verify that the U.S. Supreme Court has repeatedly for 200 years held that unconstitutional statutes are **void**. Marbury v. Madison,, 5 U.S. 137 (1803) stated:

"The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is **void**." Id. p.177. Emphasis added.

Marbury v. Madison is more well known for its opinion concerning the proper role of the Supreme Court in interpreting the constitution.

"So if the law be in opposition to the constitution; if both the law and constitution apply to a particular case, so that the court must decide that case in conformity to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rule governs the case. This is the of the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and the not the

ordinary act, must govern the case to which they both apply." Id., p. 178. Clearly, if the Court meant that their own determinations of the constitutionality of acts and statutes are final statements of the law, then the law is that unconstitutional statutes are **void**.

The Supreme Court has reiterated its opinion that unconstitutional laws are void time and again since Marbury. "An unconstitutional law is void, and is as no law. **An offence** (sic) **created by it is not a crime. A conviction under is not merely erroneous, but is illegal and void**, and cannot be the cause of imprisonment." Ex Parte Siebold, 100 U.S. 371, 375 (1879), *affirmed* Fay v. Noia, 372 U.S. 391, 409 (1963). Emphasis added. Furthermore, "[i]f the laws are unconstitutional and void, the Circuit Court acquire[s] no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws." Siebold., p. 377. "This Constitution, and all laws which shall be made in pursuance thereof . . . shall be the supreme law of the land." Id., p. 395. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Norton v. Shelby County, 118. U.S. 425, 442 (1886), "[W]e are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and non-enforceable. . . That act was therefore inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law." Chicago, Ins. & L.RY.Co. v. Hackett, 228 U.S. 559, 556 (1913).

4. AN ATTORNEY CANNOT BE OBLIGATED BY A RULE OF PROFESSIONAL CONDUCT TO REFRAIN FROM COUNSELING A CLIENT THAT A STATUTE IS PLAINLY UNCONSTITUTIONAL IF IN THE ACT OF REFRAINING, SHE IS VIOLATING HER OATH TO SUPPORT AND PROTECT THE CONSTITUTIONS OF THE UNITED STATES AND NEW HAMPSHIRE.

While the issue of whether or not an unconstitutional law is **void**, inoperable, and not law may be settled in the Supreme Court, the Professional Conduct Committee apparently still believed that it was necessary to avoid a finding of misconduct that undersigned attorney secure a judicial determination of its invalidity prior to violating it or advising her client that it was not necessary to obey it to secure here rights under the First Amendment and Article 22, Part I. T., pp. 20-21, 50 This is not true. While it is perfectly appropriate to obtain a judicial determination of the statutes' invalidity, it is not required. The right to a judicial determination of the constitutionality of a law and an injunction to prohibit prosecution is fairly recent. In Douglas v. Jeannette, 319 U.S. 157 (1943), the U.S. Supreme Court held that "[I]t is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction." Id., p. 163. The Court reversed itself in Dombrowski v. Pfister, 380 U.S. 479 (1965) where the appellants challenged statutes as being overly broad and vague regulations of expression. It held

> "[T]hose affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others. Here, no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, and appellants are entitled to an injunction. . .[I]t is readily apparent that abstention serves no

legitimate purpose where a statute regulating speech is properly attacked on its face, and where, as here, the conduct charged in the indictments is not withing the reach of an acceptable limiting construction. . . " Id., p. 491.

The core issue in the professional conduct complaint appealed is whether an attorney can be found to have violated Rule 1.2(d) of the NH Rules of Professional conduct in the course of advising a client that a statute that places a blanket prohibition on an entire class of speech is unconstitutional on its face, and need not be obeyed. The rule itself prohibits "counsel[ing] a client to engage, or assist a client, in conduct that the lawyer **knows is criminal or fraudulent**. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." In this case, the lawyer has stated that she has, and will continue to advise all of her clients that RSA 169-C:25, II, and RSA 170-G:8-a, V, which criminalize the disclosure of information concerning a child abuse or neglect **hearing** or the disclosure of a **narrowly defined** class of DCYF **records**, are unconstitutional on their face, and need not be followed, because they are **void**.

RSA 311.6 requires lawyers to take an oath to support the constitution of the United States and New Hampshire. If the constitutions of both the United States and New Hampshire prohibit the sort of restriction on free speech embodied by RSA 169-C:25, II and RSA 170-G:8-a, there is a separate professional conduct problem that arises if a lawyer counsels a client that she must obey the statute. It would violate her oath to support the constitutions.
It follows that if:

1) if the lawyer has a good-faith basis based on sound U.S. Supreme Court precedent to believe the law is unconstitutional or

2) the laws are void, and

3) that if the U.S. Supreme Court has determined that it permitted to challenge an unconstitutional statute in the context of a criminal proceeding without first obtaining a prior judicial determination that a law is unconstitutional and

4) if Rule 1.2(d) only prohibits advising a client that it is a violation to advise or assist a client in conduct that the lawyer **knows** is criminal and

5) a lawyer is bound by oath to support the constitutions of New Hampshire and the United States

then there can be no finding of misconduct based on advising or assisting a client to in any course of conduct that would constitute a violation of the statute, because it does not constitute advising or assisting a client to engage in conduct that the lawyer **knows** is criminal. In this case, the attorney **KNOWS** nothing more than the conduct is prohibited by the statute and that the statute made it a crime to violate it. That is what she told the committee. T. p. 54. If the statute is unconstitutional **and therefore void**, it follows that engaging in the prohibited **conduct** is **not criminal**. In addition, whether or not the statute is void, if the lawyer has a good faith basis based on U.S. Supreme Court precedent to believe it is void because it is unconstitutional, the lawyer cannot be advising the client to engage in a course of conduct that the lawyer **knows** is criminal. Advising a client that she must not engage in conduct prohibited by the statute would also violate her oath to support the constitutions of New Hampshire and the United States. Finally, it would violate her oath to support the constitutions of the United States and New Hampshire to advise her client otherwise.

Undersigned attorney has a web site with most of the information concerning this professional conduct complaint available for public viewing. Obviously, all of the information

is available 24 hours per day for anyone to read, and includes her replies to the Professional Conduct Committee and this Court in the matter where she states that RSA 169-C:25 is unconstitutional and void. http://dcyf.home.attbi.com/smukler.html No complaint has been filed against undersigned attorney concerning this page. Since undersigned attorney does not have a lawyer-client relationship with the public at large[4], there can be no violation of Rule 1.2 (d). The rule then operates as a time, place, and manner restriction of undersigned attorney's speech based on the content of the speech. That which is perfectly legal for her to say to the world at large or to argue in a Supreme Court brief constitutes a violation of the Rules of Professional Conduct if said to a client. Undersigned attorney is aware of no instance where U.S. Supreme Court has never upheld a time, place, and manner restriction based on the content of the message.

5. THE PROFESSIONAL CONDUCT COMMITTEE ERRED IN IMPLYING THAT THE FINDING INCLUDED THE DETERMINATION THAT UNDERSIGNED ATTORNEY DID NOT ENGAGE IN A GOOD FAITH EFFORT TO DETERMINE THE VALIDITY, SCOPE, MEANING, AND APPLICATION OF THE LAW, BUT THAT SUCH A GOOD FAITH EFFORT "SHOULD HAVE" INCLUDED A DISCUSSION OF THE LEGAL CONSEQUENCES TO THE CLIENT OF THE PROPOSED CONDUCT.

The NOTICE OF CHARGES included a long recitation of facts, however, the portion that included the actual charges was as follows:

> Involved in this complaint are questions under the Rules of Professional Conduct, in particular, but not limited to Rules 1.2(d); 3.4(c); 8.4(a) and 8.4(b). More specifically questions are raised as to whether you participated in the

[4] There is also a disclaimer on her main page specifically stating that reading the pages on the web site creates no attorney-client relationship.

disclosure of confidential information to the Concord Monitor; whether by doing so you committed criminal acts or assisted your client in committing criminal acts; whether by doing so you knowingly disobeyed an obligation under the rules of a tribunal; and whether, because of the aforesaid conduct, you committed acts that are in violation of the Rules of Professional Conduct."

Appendix, p. 3.

The charge on its face doesn't indicate that the Professional Conduct Committee had any facts that supported a charge of failing to discuss the potential consequences of the proposed course of conduct, but the facts at the hearing, undisputed by any other evidence, showed that undersigned attorney did discuss the potential consequences with her client of the proposed course of conduct. T. pp. 41 - 42.

Following the hearing, undersigned attorney submitted a cover letter with a copy of ABA Formal Opinion 85-352, which is cited in The Annotated Rules of Professional Conduct. Appendix, pp. 17 - 20. The opinion states, among other things, that "[A] lawyer may advise the statement of positions most favorable to the client if the lawyer has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law. **A lawyer can have a good faith belief in this context even if the lawyer believes the client's position probable will not prevail**. . . . However, good faith requires that there be some realistic possibility of success if the matter is litigated." ABA Formal Opinion 85-352, July 7, 1985, Appendix, pp. 19-20.

The REPRIMAND stated, in Paragraph # 16, however,

"that Rule 1.2 (d) permits a lawyer to counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, and application of

the law, but such a good faith effort **should have** included a discussion of the legal consequences to the client of that proposed conduct."

Any finding that undersigned attorney's discussion with her client did not include a discussion of the potential consequences of her conduct is incorrect. Not only were the potential consequences discussed, undersigned attorney was correct in her prediction concerning the consequences. Undersigned attorney specifically said she told her client "that the statute is unconstitutional, [but] that doesn't mean you won't be charged though. . . . [and] "I don't believe you will be convicted of it." T. pp 41 - 42. Since the client wasn't charged, she certainly wasn't convicted.

Undersigned attorney believes that this opinion, once brought to the attention of the Committee, prohibited them from making a finding of misconduct based on undersigned's good faith belief that the statutes in question are blatantly unconstitutional. If so, it follows from the wording of the REPRIMAND that the entire basis for the finding had to be based on the statement in Paragraph # 16, Appendix, p. 6. "that Rule 1.2 (d) permits a lawyer to counsel or assist a client in making a good faith effort to determine the validity, scope, meaning and application of the law **but such a good faith effort should have included a discussion of the legal consequences to the client of the proposed conduct."**

Paragraph # 16 of the Reprimand, to the extent that it implies undersigned attorney did not discuss potential consequences of speaking to the Monitor with her client, is contrary to the evidence. T., p. 41. While the issue should be moot because the statute itself cannot possibly pass any test of constitutional validity, and the course of conduct the attorney advised the client was permissible was not criminal, the information is included to show compliance with the rule. In addition, the NOTICE OF CHARGES included no component that put

undersigned attorney on notice that she was required to produce evidence that she did so. Appendix, pp. 1 - 4. If the evidence produced was not substantial, it was because there was no notice of the issue. It was never-the-less part of the record.

CONCLUSION

For the foregoing reasons, undersigned attorney request that this court reverse the finding of the Professional Conduct Committee finding violations of Rule 1.2(d) and 8.4(a).

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner requests oral argument. Petitioner does wish to inform the court that she has long-standing plans to be out of the state and unavailable from June 30 - approximately November 1, 2003 on a cross country tour. She requests any oral argument to be scheduled with those dates in mind.

Respectfully submitted,

April 14, 2003

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CERTIFICATION PURSUANT TO SUPREME COURT RULE 16 (10)

I, Paula J. Werme, Esq. hereby certify that two copies of the foregoing brief have been forwarded to Corey Belebrow, Esq., Devine and Nyquist, PO Box 1540, Manchester, NH 03105-1540, attorney for the Professional Conduct Committee.

April 14, 2003

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Paula J. Werme, Esq.