



## Washington State Bar Association

### GENERAL RULE 12(C) ANALYTICAL STATEMENT

Adopted by the Board of Governors 10/22/04

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#### I. PURPOSE

The Washington State Bar Association is frequently requested to take a position on political or social issues and/or proposed or pending legislation. This always raises the question of whether, pursuant to general Rule 12, the Washington State Bar Association is allowed to take a position on such matters. Specifically, GR 12(c) outlines activities of the bar association that are not authorized. While GR 12(c)(1) and (3) are straightforward, GR 12(c)(2) often raises questions. The purpose of this policy statement is to address those issues.

GR 12(c) reads as follows:

**(c) Activities Not Authorized.** The Washington State Bar Association will not:

- (1) Take positions on issues concerning the politics or social positions of foreign nations;
- (2) Take positions on political or social issues which do not relate to or affect the practice of law or the administration of justice;**
- (3) Support or oppose, in an election, candidates for public office.

This same prohibition is stated in Article I of the Bylaws of the Washington State Bar Association.

This memorandum is not intended to be definitive work on this issue, but rather to provide some guidance for future issues that come before the BOG.

**II. THIS IS NOT A KELLER ISSUE ALTHOUGH THAT CASE SHEDS SOME LIGHT ON GR 12(C)'S MEANING**

In the case of Keller v. State Bar of California 496 U.S. 1 (1990), a group of California attorneys challenged the state bar's use of their dues for political or ideological activities. They argued that as members of an integrated or mandatory bar it was a violation of their First Amendment right of free speech. The Supreme Court disagreed. The Court held:

Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.

The court further ruled that some mechanism would have to be put in place where members would not be compelled to pay that portion of their dues that financed activities not germane to regulating the legal profession and improving the qualities of legal services. Washington has implemented such a system.

The one issue that Keller did not address was whether or not it was a violation of the First Amendment to ever take a position on anything of a political or ideological nature when members of the bar are forced to be members. They stated:

In addition to their claim for relief based on respondent's use of their mandatory dues, petitioners' complaint also requested an injunction prohibiting the State Bar from using its name to advance political and ideological causes or beliefs. . . . This request for relief appears to implicate a much broader freedom of association claim than was at issue in *Lathrop [v. Donohue, 367 U. S. 820 (1961)]*. Petitioners challenge not only their "compelled financial support of group activities," but urge that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Aboud [v. Detroit Board of Education, 431 U. S. 209 (1977)]*. The California courts did not address this claim, and we decline to do so in the first instance. The state courts remain free, of course, to consider

this issue on remand.

It appears that under Keller, it is acceptable to engage in activities of a political or ideological nature, as long as the members do not have to pay for activities not related to “regulating the legal profession and improving the quality of legal services.” But that does not conclude the issue of GR 12 (c), which dictates that the WSBA cannot take positions on “political or social issues which do not relate to or affect the practice of law or the administration of justice.”

The activities that were at issue in Keller were described as follows:

Some of the particular activities challenged by petitioners were described in the complaint as follows:

(1) Lobbying for or against state legislation prohibiting state and local agency employers from requiring employees to take polygraph tests; prohibiting possession of armor-piercing handgun ammunition; creating an unlimited right of action to sue anybody causing air pollution; creating criminal sanctions for violation of laws pertaining to the display for sale of drug paraphernalia to minors; limiting the right to individualized education programs for students in need of special education; creating an unlimited exclusion from gift tax for gifts to pay for education tuition and medical care; providing that laws providing for the punishment of life imprisonment without parole shall apply to minors tried as adults and convicted of murder with a special circumstance; deleting the requirement that local government secure approval of the voters prior to constructing low-rent housing projects; requesting Congress to refrain from enacting a guest-worker program or from permitting the importation of workers from other countries;

(2) Filing *amicus curiae* briefs in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline attorneys; a requirement that attorney-public officials disclose names of clients; the disqualification of a law firm; and

(3) The adoption of resolutions by the Conference of Delegates endorsing a gun control initiative; disapproving the statements of a United States senatorial candidate regarding court review of a victim's bill of rights; endorsing a nuclear weapons freeze initiative; opposing federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing. App. 9-13.

So which activities are of a political or ideological nature? Here is the answer given by Keller :

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

### **III. THE PROBLEM PHRASES IN GR 12**

#### **A. "ADMINISTRATION OF JUSTICE"**

The phrase that gives most people some trouble is "the administration of justice." The term "justice" in and of itself can invoke all sorts of opinions on what "justice" requires. Every proponent of a legislative bill or resolution claims that "justice" demands its passage, and the opponents equally claim that "justice" requires its defeat. If we viewed the term "justice" in and of itself, then it would appear that there are no limits on what the Washington State Bar could do.

However, the phrase is not just the word "justice," but "the administration of justice." First, relying solely on dictionaries, the term "administration" is defined in the Oxford English Dictionary as:

1. The action of administering or serving in any office; service, ministry, attendance, performance of duty. *Obs.* in general sense.
2. Performance, execution
3. Management (*of any business*).
4. *ellipt.* The management of public affairs; the conducting or carrying on of the details of government; hence, sometimes, used for *government*.

5. The executive part of the legislature; the ministry; now often loosely called the 'Government.'
6. *Law.* The management and disposal of the estate of a deceased person by an executor or administrator. *spec.* As opposed to *probate*, The authority to administer the estate of an intestate, as conferred by *Letters of Administration* granted, formerly by the Ordinary, now by the Probate Division of the High Court of Justice.
7. The action of administering something to others: **a.** Dispensation (of a sacrament, of justice, etc.). **b.** Giving or application (of remedies). **c.** Tendering (of an oath).

Black's Law Dictionary defines "administration" as follows:

**Administration:** Management or conduct of an office or employment; the performance of the executive duties of an institution, business or the like. In public law, the administration of government means the practical management and direction of the executive department, or of the public machinery or functions, or of the operations of the various organs or agencies. Direction or oversight of any office, service, or employment. *Greene v. Wheeler, C.C.A. Wis., 29 F.2d 468, 469.* The term "administration" is also conventionally applied to the whole class of public functionaries, or those in charge of the management of the executive department.

The dictionary definitions leave little room for arguing that "administration" means anything more than the functional administration of the justice system. That would be everything from court rules to court funding to the operations of the courts.

There is no case law defining the "administration of justice" as it is used in GR 12. However, there is one case that is closely related, In Re Staples, 105 Wn.2<sup>nd</sup> 905 (1986). In a judicial disciplinary proceeding, petitioner Judicial Qualifications Commission charged the respondent judge with violating judicial ethics under former Code of Judicial Conduct Canon 7(A)(4) by campaigning for relocation of a county seat. The commission recommended that he be admonished.

When a new justice center was constructed in Kennewick, the courthouse in Prosser, the county seat, became underutilized. Disagreeing with the decision to update the old courthouse, the judge initiated a campaign to relocate the county seat to Kennewick. He

circulated petitions, made campaign speeches, organized a committee, and ran ads in local newspapers -- but he did no fund-raising. The commission charged him with violating Canon 7(A)(4) which provided that "A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice." It recommended a private admonishment, but the judge refused to accept its ruling. On review, the Supreme Court dismissed the charge without discipline. It explained that activities of the judge fell within the exception in Canon 7(A)(4), regarding political activities designed for the improvement of the administration of justice. The court held that the commission's interpretation of Canon 7(A)(4) was too narrow.

The Court rejected any kind of interpretation of the "administration of justice" that would only ". . . include measures directly relating to the actual administering of the law (*i.e.*, court rules, procedure), and not measures such as this which would have a significant effect on the way in which justice is administered." Staples, at 909.

The Court concluded at 910 as follows:

Furthermore, judges have specifically been allowed to enter political activity designed for the better administration of justice. This provision exists because "of the important and sometimes essential role of judges in legal reform." *Reporter's Note*, at 97. If judges would have to remain silent, with their necessary expertise in matters of improving the law, then beneficial legal reform would be seriously impaired. Furthermore, a judge does not lose his rights as a citizen by assuming the bench.

The Commission has held that Judge Staples' actions nevertheless do not fit within the "administration of justice" exclusion. We disagree. All the judges of Benton County agreed that duplicate courthouses would effectuate duplicate costs and time delays, and greatly inconvenience the majority of taxpayers. Furthermore, Judge Staples, with his experience in the judicial system, would necessarily have an added awareness of the difficulties of such parallel courthouses. We conclude it would be contrary to the purpose of the exclusion provided in Canon 7 to prohibit a judge from attempting reform under such circumstances.

This case could be read narrowly or expansively. The facts of the case seem to make it fall within the definitions of "administration" as set forth in dictionaries. That is,

duplicative courthouses would be an “administrative concern.” On the other hand, when the Court uses language like “the important and sometimes essential role of judges in legal reform,” then one wonders how far this point could be pushed.

Other cases that use the term “administration of justice” also tend to use it in the more narrow sense. The court in In the Matter of the Application for a Writ of Habeas Corpus of Ross R. Miller, v. B. J. Rhay, as Superintendent of the State Penitentiary, 1 Wn.App. 1010 (1970), was concerned about the effect the retroactive application of a law would have on the administration of justice. Another court held that: “It is certainly necessary to the due administration of justice that a defendant be tried by a fair and impartial tribunal.” The State of Washington, on the Relation of Edward M. McFerran, v. Justice Court of Evangeline Starr, 32 Wn.2d 544 (1949). The court may continue a trial date beyond the speedy trial rule when the administration of justice requires it. State v. Dorsey , 72 Wn. App. 85 (1993).

## **B. “AFFECT THE PRACTICE OF LAW”**

GR 12(C) (2) also uses the phrase “affect the practice of law.” Here again is a phrase that could be read narrowly or expansively. On the one hand, it could be read as being limited to issues such as bar admissions, the bar exam, disciplinary measures, and the like. On the other hand, one could say that the passage of “tort reform” would affect the practice of medical malpractice lawyers, as opposed to raising or lowering the drinking age, which would not directly affect anyone’s practice.