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Future of the State Bar: Mandatory/Voluntary Membership Report

Prepared by

The Strategic Planning Committee of the State Bar of Wisconsin

February 2010

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The Strategic Planning Committee of the State Bar of Wisconsin

The Strategic Planning Committee (SPC) of the State Bar of Wisconsin (SBW) develops and recommends the overall strategic direction for the association. An ad hoc SPC Membership Committee created in FY2008-09 completed a membership survey¹ that measured member attitudes regarding the merits of remaining a mandatory bar association (i.e., membership is a condition for the practice of law in Wisconsin) or becoming a voluntary bar. At its May 2009 meeting, the committee referred its findings to the SPC for its consideration and review. In response, the SPC agreed to study the issue of the future of the State Bar: mandatory/voluntary membership and to report its recommendations to the Board of Governors (BOG) prior to the BOG's February 2010 meeting. This report summarizes the steps taken by the committee to fulfill that charge, together with its findings and recommendations.

Introduction and Purpose of the Report

While the SBW's legal status as a mandatory (a.k.a. "integrated" or "unified"; these three terms are used interchangeably in this report and associated materials) association was reaffirmed by order of the Wisconsin Supreme Court in 1992², the issue of whether the SBW should be reorganized as a voluntary association has been a focus of discussion and dispute within the State Bar for decades and remains so today. The member Satisfaction Survey completed in FY 2008-09 revealed that, given the opportunity to do so, a majority of members would vote for a voluntary State Bar.

The SPC established a goal to 1) formulate a process that provides for full discussion and evaluation of the issue, based on the maximum feasible level of input from members and other interested parties, 2) document pertinent information, and 3) provide recommendations to the BOG for a course of action by the end of the SBW's 2009-10 fiscal year (June 30, 2010). Committee members appointed for the 2009-2010 fiscal year by President Kammer are:

- John Macy, Chair
- James Boll
- Wayne Arnold
- James Brennan
- Lisa Chandek
- William Curran
- Robert Goepel
- Douglas Kammer
- Charles "Mike" Kernats
- Michael Morse
- Nicholas Zales

Because the SBW was created by the Wisconsin Supreme Court through its inherent authority over the legal profession in the state, the fate of the association's mandatory status (along with most key features of the association's organization and operation) ultimately rests with the Court. Thus, the object of the committee's deliberations was to provide guidance to the BOG, which will determine whether the association should petition the Supreme Court to take the

requisite steps to review the SBW's mandatory membership rule. Based on the results of the SPC's member survey³, testimony taken at the "listening sessions" held by the SPC⁴, and existing reports and related information⁵, the SPC recommends the Wisconsin Supreme Court be petitioned to review the status of the integrated bar and whether it should be modified or made voluntary.

Overview of the Committee's Process and Activities

The SPC formally launched its "Future of the State Bar: Mandatory/Voluntary Membership Study" and established its procedures for conducting the study at the 2009-10 organizational meeting of the committee on Sept. 16, 2009. The full committee met again on the following dates to discuss the issue and manage the study process: Nov. 20, 2009; Dec. 10, 2009; Dec. 11, 2009; Dec. 12, 2009, Jan. 8, 2010, Jan. 25, 2010 and Feb. 12, 2010. Additionally, the SPC Chair reported to the SBW Executive Committee on two occasions and received unanimous authorization to proceed with the study. The SPC Chair also met with the SBW Finance Committee and received that committee's unanimous approval to proceed with the project as outlined by the SPC.

Much of the committee's work was directed at two information-gathering activities: 1) reviewing relevant reports and other informational materials compiled by the SBW and the American Bar Association; and 2) considering the written and verbal testimony of State Bar members, SBW entities and other stakeholders. All of these materials are archived and available for examination by members and the public on the SBW website at www.wisbar.org/stratplancomm.

The committee and President Kammer also took steps to make all members aware of the process and to solicit their input. The president introduced SBW members to the project in his October 2009 *Wisconsin Lawyer* magazine column⁶ where, among other things, he stressed that the end result will be "a report that incorporates both the considered judgments of all interested members and detailed information about how conversion to a voluntary bar would affect our operations, governance, finances, relations with the court, and of course your practices. All points of view will be considered; all ramifications explored."

Periodic articles updating State Bar members about the committee's activities and work plan were also posted on the SBW website on Oct. 6, 2009, Dec. 2, 2009 and Dec. 16, 2009.

All SBW members also received two direct communications from the SPC advising them of the study it had undertaken and soliciting their input on the mandatory/voluntary bar issue. Both communications included a brief comment form and allowed four methods members could use to submit their responses: 1) completing the form online (i.e., on the SBW website); 2) completing the printed form and mailing it to the SBW; 3) sending an email with the requested information; and 4) the printed form and faxing it to the SBW.

A letter was sent by U.S. Mail to the residential or business addresses of 23,266 members listed in SBW records in the first week of October and a follow-up email message was distributed in early November to 19,769 members with email addresses on file at the State Bar. The communications stressed that while members were free to state their position on the mandatory vs. voluntary bar issue, committee members were "especially interested in learning why you favor one option or the other."

The committee also communicated directly with a total of 160 State Bar entities and Supreme Court agencies seeking their insights on the issue. A letter requesting their input was sent via

U.S. Mail in the first week of October and a follow-up email was distributed one month later. In this case, the committee was interested in learning how conversion to a voluntary bar may impact the entity's mission, governance, court relations and finances/resources. Responses could be submitted in any of the four methods listed above, as well as via liaisons in the case of State Bar committees and sections, and were sought from:

- 28 SBW Committees
- 26 SBW Sections (as well as the Section Leaders Council)
- 4 SBW Divisions
- 19 State Supreme Court Agencies and Committees
- 82 Local and Specialty Bar Associations

Member and entity comments were due Dec. 4, 2009. As of that date, a total of 2,953 comments had been received: 2,902 from SBW members; 43 from SBW entities; and 8 from others in the legal community. A record of all responses received by the due date is posted on the SBW website⁷.

Public hearings on the issue were conducted by the committee at the State Bar headquarters in Madison over a three-day period: 5:30 p.m. to 7:30 p.m. on Dec. 10, 2009; 8:30 a.m. to 4:30 p.m. on Dec. 11, 2009; and 8:00 a.m. to 12:00 p.m. on Dec. 12, 2009. The committee used the above referenced letters and articles to solicit participation in the public hearing phase of the process. A total of 22 speakers, including several former State Bar presidents, presented their views to committee members and responded to questions. A transcript of the public hearings is posted on the SBW website⁸.

Committee members began preliminary deliberations on their findings and potential recommendations regarding the mandatory/voluntary bar issue during the public hearings on Dec. 10 – 12, 2009 and further developed their findings, recommendations and draft report at their Jan. 8 and Jan. 25, 2010 meetings. The final report, including the committee's findings and recommendations, was developed at its Feb. 12, 2010 meeting.

Background

While all 50 states have statewide bar associations, they vary widely in terms of how they were created, how they are structured and what services they offer. The origins of most can be traced back to the mid-19th Century, when the practice of law was largely unregulated. Those in need of legal assistance had no reliable way to determine if individuals who claimed to be lawyers had received even minimum legal training. Leaders of the legal profession in Wisconsin and across the country began to organize self-governing bar associations to establish standards of education and professional conduct.

Wisconsin is one of 32 states with mandatory bars; 21 states have voluntary bars; and three states (North Carolina, Virginia and West Virginia) have both mandatory and voluntary bars. Most integrated bars achieved that status by court rule, although legislatures were involved in 13 cases (seven via joint legislative/court action and six via legislation only). The first wave of bar unifications occurred in the 1920s and the Hawaii State Bar Association was the most recent state to become integrated (in 1989).

Three of Wisconsin's regional neighbors (Illinois, Iowa and Minnesota) have voluntary bars. Other States with voluntary bars are: Arkansas, Colorado, Connecticut, Delaware, Indiana,

Kansas, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Vermont, Virginia and West Virginia.

One neighboring state, Michigan, has a mandatory bar. Other states with mandatory bars are: Alabama, Alaska, Arizona, California, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia and Wyoming.

Voluntary bars are organized and governed by their members. Other than the temporary suspension of mandatory State Bar membership by the Wisconsin Supreme Court from 1988-1992 (discussed below), no state association has converted from mandatory to voluntary status. One notable distinction between the SBW and more than half of the other integrated bars is that SBW does not oversee admissions or discipline of attorneys, with those activities being performed by court agencies in Wisconsin. Table One lists key characteristics of mandatory and voluntary bars nationwide and highlights similarities and differences between the two groups:

TABLE ONE			
Percent of Mandatory & Voluntary Bars with Specific Characteristics			
	Mandatory	Voluntary	SBW
<i>Operations¹</i>			
Admissions mandated as core function	48	0	no
Discipline mandated as core function	76	0	no
Keller relief mechanism	64	NA	yes
<i>Organization²</i>			
Organized by court/legislative action	100	6	yes
Organized by members	0	94	no
Holds 501(c)(6) status	47	100	no
<i>Nominating/Selection of Officers</i>			
Officer nominating committee	52	67	yes
If yes, does president chair	33	0	no
Self-nomination/petition allowed	100	89	yes
President elected by membership	75	64	yes
<i>Sections</i>			
Has sections	93	100	yes
Can take positions on federal legislation separate from bar	19	17	no
Can take positions on state legislation separate from bar	22	33	yes
If above yes, bar approval required to lobby	14	50	no
<i>Dedicated Bar Staff³</i>			
CLE	86	72	yes
Law practice management	38	33	yes
LRIS	34	72	yes
Local bar services	21	33	yes
Membership/Marketing	59	94	yes
Public relations	59	67	yes
Publications	86	94	yes
Attorney discipline	62	6	no
Sections/committees	83	72	yes
<i>Justice System</i>			

Bar made judicial improvement recommendation within 3 years	48	61	no
Bar has judicial office nominee screening committee	30	50	no
<i>Bar has program/activities that address following issues</i>			
ADR	72	61	yes
Judicial campaign conduct guidelines	17	39	no ⁴
Court funding	30	50	yes
Judicial salaries	24	67	no
Unjust criticism of judges	45	89	no
<i>Governmental Affairs</i>			
Positions on federal legislation	46	83	yes
Positions on state legislation	75	100	yes
Maintain "grassroots" network	33	72	yes

¹Based on data from the ABA Division of Bar Services' "1997 Report on Unified Bar Operations" supplemented by comments from ABA staff

²Balance of table based on data from the ABA Division of Bar Services' "2009 Bar Activities Inventory"

³Bar has at least one staff person dedicated to activity at least 50% of their time

⁴While the SBW has not proposed judicial campaign conduct guidelines per se, the SBW has created a "Wisconsin Judicial Campaign Integrity Committee" that has reviewed and commented on past judicial campaign advertising activities.

All state bar associations, whether mandatory or voluntary, support themselves, in part, with dues revenues collected annually from members. The State Bar of Wisconsin's FY2010 dues payment for active members is \$224. In addition, the SBW collects mandatory assessments imposed by the Supreme Court, which amounted to \$232 in FY2010 (\$148 for the Office of Lawyer Regulation, \$18 for the Board of Bar Examiners, \$16 for the Client Security Fund and \$50 for WisTAF). The Supreme Court assesses an additional \$25 on law firms (S.C., LLC or LLP). Table Two summarizes annual membership dues and mandatory assessments (not included the \$25 firm fee) collected by the SBW in selected years:

Fiscal Year	SBW Membership Dues ¹	Court-Mandated Assessments ²	Total
1960	\$15	NA	\$15
1970	30	NA	30
1975	40	NA	40
1980	60	\$39.50	99.50
1985	100	61.20	161.20
1990	130	72.88	202.88
1995	150	110.41	260.41
2000	210	116.32	326.32
2005	224	155.66	379.66
2006	224	205.66	429.66
2007	224	217	441
2008	224	223	447
2009	224	216	440
2010	224	232	456

¹Membership dues for active members; reduced dues apply for other membership categories (new, inactive, emeritus and judicial without voting privilege)

²Assessments for Office of Lawyer Regulation, Board of Bar Examiners, Client Security Fund and (beginning in FY2006) Wisconsin Trust Account Foundation, Inc. (WisTAF)

A national comparison of 2009 state bar membership dues shows that the \$224 dues imposed by SBW ranked 17th lowest and was \$38 below the national average. 2009 membership dues in Wisconsin and neighboring states were: Wisconsin \$224; Illinois \$320; Minnesota \$232, Iowa \$210 and Michigan \$180. When mandatory fees are also included in the national comparison, the SBW total of \$440 ranked 15th highest and was \$37 above the national average. 2009 membership dues plus mandatory fees in Wisconsin and neighboring states were: Wisconsin \$440; Illinois \$609; Minnesota \$449; Iowa \$405 and Michigan \$315⁹.

The Wisconsin Bar was organized on Jan. 9, 1878 as a voluntary association and has had a long and colorful history since then, which is detailed in various articles and reports that are available on WisBar¹⁰. For purposes of this report, only a few of the most relevant aspects of the history of the Wisconsin Bar are summarized here to clarify the long-standing nature of the mandatory/voluntary bar issue in Wisconsin.

The matter was widely discussed in 1943, when the Wisconsin Legislature passed and subsequently overrode a gubernatorial veto of legislation creating a mandatory bar. However, the Wisconsin Supreme Court determined three years later that the legislative action was "advisory" only and asserted that only it had the authority to create a mandatory bar; it then rejected such an option on a variety of grounds (*In re Integration of the Bar*, 249 Wis. 530 (1946)).

A decade later, in June 1956, in response to a petition advanced by a special bar committee, the Court took the opposite position; it ordered the "integration" of the association and directed it to develop draft rules and procedures to accomplish this result, thereby effectively making membership in the association a mandatory condition for the practice of law in Wisconsin. The Court subsequently conducted hearings on the matter and, in December 1958, ordered the creation of the State Bar of Wisconsin (*In re Integration of the Bar*, 273 Wis. 281 (1956)).

In doing so, the court not only defined the organization and activities of the SBW, but its relationships with the court and the legislature as well, as clarified in the following observation included in a 1986 overview of the State Bar's history ("A History of the Organized Bar in Wisconsin") created by the SBW:

For the past six decades, ever since the court began exercising its rule-making power and the legislature began establishing commissions that opened new fields of administrative law, both the court and the Bar have periodically had to do battle with the legislature whenever it sought to invade the court's domain. Most legislators have never understood the separation of powers under the constitution, or the inherent power of the court to regulate pleading, practice, and procedure, as well as to control the admission, discipline, and conduct of lawyers. On this, the court and the Bar have stood solidly together, and successfully resisted all encroachment¹¹.

Opposition to the integration decision quickly emerged within the State Bar's membership, including a constitutional challenge to compelled bar membership by Madison Attorney Trayton Lathrop that went all the way to the U.S. Supreme Court. Lathrop argued that a mandatory state bar should not be allowed to lobby on behalf of political positions and in 1961 a sharply divided Court upheld both integration and lobbying, revealing however, a divided mind on these issues in *Lathrop v. Donohue*, 367 U.S. 820 (1961)¹².

Two justices opposed integration altogether; four declined to address validity of lobbying because opponents failed to specify which lobbying activities are offensive; and three explicitly affirmed the validity of lobbying.

In response to a July 1976 State Bar petition proposing a substantial dues increase, the state Supreme Court appointed a 19-member committee chaired by Judge Andrew Parnell to study and make recommendations to the Court on a number of issues, including whether the integration should continue. In November 1977 the Court issued its opinion (*In re Regulation of the State Bar of Wisconsin*, 81 Wis. 2d xxxv (1977)) approving continuation of the integrated State Bar. The Court noted that:

The Bar often plays a dual role in carrying out its purposes: one public and one as a professional organization. In both roles, however, the ultimate objective of the Bar must be the public good. The court agreed that the two bases for continuing the unified Bar are: 1) mandatory membership and dues give the best assurance that the Bar will have the resources necessary to carry out programs; and, 2) each attorney has an individual obligation to support the Bar in fulfilling its collective responsibilities to society, and the unified bar is the best means to accomplish this.

The court also noted that a large majority of Wisconsin lawyers support or at least do not oppose the unified bar.

Advocates of a voluntary State Bar responded in mid-1979 by polling members on the question of continued integration. The vote was 2,820 against continuation of integration and 1,892 in favor of continuation. Armed with this new data, they again petitioned the Court to end integration. The Court decided in favor of continued integration in (*Matter of Discontinuation of Wis. State Bar*, 93 Wis. 2d 385 (1980)) but created a 16-member committee chaired by business leader John Kelly to review and evaluate State Bar activities¹⁴. The "Kelly Committee" issued a lengthy report¹³ in October 1982 that, among other things, recommended that the State Bar remain integrated.

In 1986 Madison Attorney Steve Levine filed suit in Federal District Court for the Western District of Wisconsin again challenging the constitutionality of an integrated State Bar. In February 1988 Federal Judge Barbara Crabb agreed that the plaintiff's First Amendment rights were violated by the mandatory membership rule (*Levine v. Supreme Court of Wisconsin*, 679 F.Supp. 1478 (W.D. Wis. 1988)). This resulted in the suspension of mandatory State Bar membership by the Wisconsin Supreme Court until the appeal of Judge Crabb's decision was complete. However, the 7th Circuit Federal Appeals Court reversed Judge Crabb's decision later in 1988 and sent the matter back to Federal District Court for the Western District of Wisconsin (864 F2d 457 (7th Cir. 1988)). The U.S. Supreme Court refused to hear the case in October 1989 and Judge Crabb dismissed the Levine suit in February 1991.

On the same day that it denied certiorari in the Levine case, the U.S. Supreme Court agreed to consider another action presenting the speech rights of lawyers who are mandated to belong to a state bar. In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court held that an integrated bar could use mandatory dues for activities that are germane to the goals of regulating the legal profession or improving the quality of legal services, but it could not compel members to fund activities of an ideological nature falling outside those areas of activity.

The following year, the State Bar petitioned the Wisconsin Supreme Court to reinstate the integrated State Bar by resuming enforcement of the Court's mandatory membership rule and to create a procedure for dues reductions to conform with the constitutional limitations cited in *Keller*. Following public hearings on the matter, the Court granted both requests and reinstated the integrated State Bar effective July 1, 1992 (*In the matter of State Bar of Wisconsin*, 169 Wis. 2d 21 (1992)), with one dissent by the only member of that court still serving, Chief Justice Shirley Abrahamson.

In September, 1996, the two remaining court challenges to the mandatory bar were addressed: In *James Thiel vs. State Bar of Wisconsin*, 94 Fed.3d 399 (7th Cir. 1996) and *John Crosetto v. State Bar of Wisconsin* (7th Cir. 1996) the court affirmed its prior decision of 12 F.3d 1396 (1993), both of which reaffirmed the constitutionality of the mandatory bar.

The Supreme Court's implementation of the *Keller* decision led to arbitration and litigation to determine the amount of SBW dues that were not germane to the *Keller* goals of regulating the legal profession or improving the quality of legal services. In 2009, the refund available for the part of State Bar dues not germane to the *Keller* goals was \$7.75 (3.46%). The SBW's determinations have been reaffirmed in all such instances. While subsequent litigation has tested the scope and application of the criteria and process employed by the State Bar to determine the annual *Keller* dues reduction, the Supreme Court has not been asked in recent years to alter the fundamental structure of the State Bar or its relationship with the court. This does not mean, however, that the mandatory/voluntary bar issue has diminished as a source of concern for many SBW members. The member satisfaction survey conducted for the State Bar in 2008 indicated that 57% of respondents said that, given the opportunity to do so, they would vote for a voluntary association while 43% said that they would vote against it.

The State Bar of Wisconsin continues to provide services and programs within the goals of regulating the legal profession or improving the quality of legal services. An example of the programs the Bar has provided is attached as Appendix Three.

The Wisconsin Supreme Court has adopted SCR Chapter 10¹⁴, commonly referred to as the State Bar rules, to govern the State Bar of Wisconsin and its members. SCR 10.01 (2) provides that the court "shall provide for the organization and government of the association and shall define the rights, obligations and conditions of membership therein, to the end that the association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice." SCR 10.02 (1) clarifies that the rules "are adopted in the exercise of the court's inherent authority over members of the legal profession as officers of the court..."

The State Bar's close links to the court are further underscored by SCR 10.02 (2), which defines the association's purposes to include the following:

...to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to conduct a program of continuing legal education; to assist or support legal education programs at the preadmission level; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of

jurisprudence and law reform and the relations of the bar to the public and to publish information relating thereto; to carry on a continuing program of legal research in the technical fields of substantive law, practice and procedure and make reports and recommendations thereon within legally permissible limits; to promote the innovation, development and improvement of means to deliver legal services to the people of Wisconsin; to the end that the public responsibility of the legal profession may be more effectively discharged.

SCR 10 also allows the SBW to adopt "bylaws and regulations, not inconsistent with this chapter, for the orderly administration of the association's affairs and activities."

Themes Identified by Members

The Committee requested and received comments from 2,953 individual members of the State Bar either via the on-line comment or written methods. While members were not required to disclose which bar structure they prefer (if any) when forwarding their comments to the committee, in most cases the nature of the comments indicated a preference for one form of organization or the other. Table Three summarizes some of the general themes cited in responses submitted by members:

**TABLE THREE:
General Themes Cited by Members**

Prefer Voluntary

- Attorneys should have the right to choose whether they want to belong – it's wrong to force membership in an organization.
- The mandatory bar is too expensive for many members ("I don't get my money's worth").
- Mandatory membership raises civil liberties issues because some members are forced to help pay for SBW advocacy of positions they may disagree with.
- A voluntary bar would be more accountable, transparent and responsive to the needs and priorities of its members.
- Forcing aggrieved members to belong to the bar creates needless discord in the organization.
- Other voluntary bars offer excellent services.
- Lawyers in Wisconsin want it and should have freedom of choice, as they do in many other states.
- The SBW takes business away from its members through its pamphlets and pro se information provided to the community.
- Mandatory bars are motivated by self importance and self preservation, not any real concern for the profession, and tend to become bureaucratic.
- The mandatory bar wastes considerable amounts of money, paper and time mailing out CLE fliers.
- We have established regulatory agencies that perform Supreme Court mandates regarding discipline and continuing education -- the State Bar's functions are duplicitous.
- Voluntary members tend to be more active.
- Free enterprise requires a voluntary bar, mandatory state bar membership is like a tax on the practice of law.

- A voluntary bar would speak with more credibility and would be a good first step toward changing the image of lawyers.
- Other than administrative functions (e.g., collecting court fees) that could be privatized by the court, the SBW's functions are like those of voluntary bars.
- Some lawyers (e.g., government and non-resident) participate little and get little value from the SBW and non-resident lawyers are underrepresented in bar governance.

Prefer Mandatory

- A professional association needs 100% participation to function effectively.
- A mandatory bar can maintain adequate resources and financial stability for services like Continuing Legal Education (CLE), Ethics Hotline, online research and Law Office Management Assistance Program (LOMAP).
- The profession gains a strong voice with the public and the legislature through the mandatory bar.
- A mandatory bar can achieve efficiencies by serving all attorneys licensed in the state.
- A mandatory bar supports the legal profession by addressing issues like UPL.
- The stability of a mandatory bar allows the SBW to deliver high quality member services.
- Mandatory membership helps lawyers perform at the highest level.
- A mandatory bar helps promote justice and protect all.
- The Supreme Court needs us -- a mandatory bar allows the Court and the association to create a "one stop shop" for key member needs.
- Mandatory membership encourages the expertise utilized in the CLE program.
- The diploma privilege and absence of a mandatory bar exam makes a mandatory bar essential to maintain professionalism.
- The SBW is a great association -- keep what works.
- Everyone should pay a fair share.
- The mandatory bar creates a forum to address different policy perspectives.
- There has been little discussion about how a voluntary bar would function.
- The loss of government and nonprofit attorney members will reduce the bar's diversity.

Both Prefer Voluntary and Prefer Mandatory

- Results in better bar services.
- Cheaper for lawyers.
- Stops "free riders."
- More "professional."
- Promotes or discourages lobbying.
- Helps the poor.

A complete list of comments submitted by members is available on WisBar¹⁵.

In addition to member comments, 160 bar-related and Court-related entities were invited to offer insight on how conversion to a voluntary bar structure might impact their mission, governance, finances and other operations. Appendix One to this report summarizes major themes

forwarded by 29 of those entities, including four SBW divisions, 15 SBW committees, two SBW sections, five SBW departments and three other entities¹⁶.

Committee's Recommendation

The Strategic Planning Committee voted unanimously at its January 8, 2010 meeting to recommend that the SBW Board of Governors adopt the following proposed resolution:

Resolution Regarding the Integrated (Mandatory) Status of the State Bar of Wisconsin

WHEREAS, the issues surrounding the legality of the integrated bar have a long history dating from 1943 to present, involve volumes of decisions in all levels of courts on complicated concepts balancing the integrated nature of the State Bar of Wisconsin, and have been subject to periodic review; and

WHEREAS, individual members of the State Bar hold diverse opinions on whether bar membership should be voluntary or mandatory; and

WHEREAS, a significant number of the members of the State Bar are asking that the status of the integrated bar be reviewed by the Supreme Court; and

WHEREAS, the Strategic Planning Committee has studied the issue, has produced the attached report, and has concluded that it is in the interest of the State Bar that the Wisconsin Supreme Court review the status of the State Bar as an integrated organization.

NOW THEREFORE, BE IT RESOLVED, by the Board of Governors of the State Bar of Wisconsin as follows:

1. That the report of the Strategic Planning Committee attached to this resolution is accepted and placed on file; and
2. That the Wisconsin Supreme Court be asked to review the status of the integrated bar; and
3. That the Strategic Planning Committee is authorized to draft and to file two or more petitions with the Wisconsin Supreme Court requesting that it review the status of the integrated bar and whether it should be modified or made voluntary; and
4. That all members of the Board of Governors are invited to participate in drafting and advancing the respective petitions.

Committee Member Comments

Statement of Wayne Arnold

- It is apparent a significant percentage, if not a majority, of the bar wishes that the issue of a mandatory bar be put before the Supreme Court.
- The unresolved contentious voluntary/mandatory issue is sapping considerable time, energy and expense from the bar, and needs to be resolved.
- A Petition to convert to a voluntary bar (leading to a reactionary Petition for the status quo) could be filed by any member. It is desirable to have Board of Governor and broad membership participation in such a momentous undertaking.

- Bar participation on “both sides” reduces member dissatisfaction with the present mandatory bar expending funds for any one side to the exclusion of the other.
- The resolution is “result neutral”. It provides a method whereby both factions can, as reasonable people, agree to disagree. Bar members can support, advance or participate in either Petition, as they wish.

Statement of James C. Boll

As a candidate for State Bar President, I made it very clear that I favor a voluntary structure for our organization. During the meetings of the Strategic Planning Committee, I supported the proposal that the State Bar of Wisconsin should file a petition with the Supreme Court seeking a voluntary structure.

During the Strategic Planning Committee meetings, I indicated I arrived at my decision to support a voluntary structure based on my answers to the following questions.

1. Which structure do you support based on your general personal beliefs?
2. Which structure do the majority of the members of the State Bar support?
3. Which structure is constitutionally defensible?
4. What is the best structure for achieving the goals of the organization?

I would like to very briefly outline my responses to these questions.

1. Personally, I do not believe that any organization should be mandatory. I continue to believe that the State Bar of Wisconsin offers its members tangible benefits to membership and performs valued public services. I also believe that, if the organization is voluntary, it will continue to experience 80-90% participation among Wisconsin lawyers. From 1988-1992 when the Federal District Court suspended mandatory dues, 87% of Wisconsin Lawyers continued to be members. The December 2008 State Bar Membership survey indicated that 71% of the representative respondents would join a voluntary organization. Our organization should never oppose a voluntary structure because of a fear that we will lose a majority of our members. If a large percentage of Wisconsin Lawyers only belong to the State Bar because they are required to, then our organization has a much greater problem than one as fundamental as our structure.

2. A majority of State Bar members when asked have continually indicated that they favor a voluntary structure. In 1979 a group of Wisconsin lawyers took a poll of 9,319 members of the State Bar. Over 51% percent responded. 60% of those responding voted against the continuation of the mandatory bar. In 2008 a membership survey was conducted of a representative sample of our members; 57% favored a voluntary structure. Three of the last five State Bar Presidents have favored a voluntary structure. No presidential candidate who has favored the voluntary structure has failed to prevail.

Certainly, not all State Bar members have responded to these surveys. However, the Strategic Planning Committee has worked with State Bar staff tirelessly to give every member of our organization an opportunity to be heard on their preference. At some point we must reasonably conclude that members who do not participate to voice their opinions either are not interested in what the structure of our organization is or have forfeited their right to participate in the discussion.

3. The United States Supreme Court identified two state interests justifying a mandatory state bar association: regulating the legal profession and improving the quality of legal services. *Keller v State Bar of California* 496 U.S. 1, 110 S.Ct. 2228, 110 L. Ed. 2d 1 (1990). These two functions are currently performed primarily by the Wisconsin Supreme Court and are already funded by mandatory assessments all Wisconsin lawyers must pay and will continue to have to pay regardless of whether the organization adopts a voluntary structure.

The State Bar of Wisconsin does not license lawyers. In 1977 the Supreme Court adopted SCR 30.01 which created the Board of Bar Examiners to have the authority over admissions. The State Bar of Wisconsin does not discipline lawyers. The authority to discipline lawyers was transferred by the Supreme Court to the Board of Attorney Professional Responsibility (now the Office of Lawyer Regulation) in 1977. The State Bar of Wisconsin does not administer or govern mandatory legal education for lawyers. In 1976 The Supreme Court created the Board of Continuing Legal Education to administer mandatory legal education requirements for lawyers (now administered by the Board of Bar Examiners).

My view regarding the constitutionality of the mandatory bar is more specifically addressed in the dissent, *In the Matter of State Bar of Wisconsin*, 169 Wis 2d. 21 (1992) Dis.

4. To determine what structure is best for the organization, one has to resolve what the purpose of the organization is. During the Strategic Planning Committee public hearing, the committee heard from many past presidents of our organization. Many of these past presidents stated the primary purpose of the organization was to serve the public. The majority opinion in, *In the Matter of State Bar of Wisconsin*, 169 Wis 2d. 21. Con., indicated the justification for the mandatory structure was that it was the best structure to assure Wisconsin lawyers can, or would, serve the public.

Over the last 18 months as a candidate for and being elected President of the State Bar I have visited over thirty local bars. These meetings and discussions with our members lead me to confidently conclude that members of the State Bar of Wisconsin perform many and varied public services. I do not believe a mandatory structure is required so members of our profession serve a greater good than their own pocket books.

Since the Supreme Court last reviewed the structure of our organization in 1992, the practice of law has changed. As times have changed, all of us including lawyers have greater demands on our time and are looking for ways to alleviate the constant time pressure on our lives. I believe this in part has led to our members' greater desire for member benefits. I believe that a voluntary structure that understands that it must compete with all other providers of goods and services is in the best position to create, offer, and market the best benefits and services to our members.

I certainly understand that members of the BOG, Members of the Strategic Planning Committee, and members of our organization may differ with the way I have answered these questions. I strongly believe our organization should bring the discussion regarding our structure to a logical conclusion with the participation of the Bar leadership to represent the views of our members. This proposal will represent the views of our members.

The proposal being advanced by the Strategic Planning Committee allows every elected member of the BOG to participate and formulate the arguments based on their preference to retain the mandatory structure, change to a voluntary structure, or offer a new structure. This proposal will allow the Supreme Court to decide this issue. Only a decision by the Supreme

Court will bring closure to this issue. This proposal will allow our organization to focus on the future with the confidence of a firm structure.

In the last five years the issue of the structure of our organization as created a membership divide. This unanimous proposal comes from committee members that strongly favor the mandatory structure or the voluntary structure, and some who feel in between. This is the first step in healing the divide and start working together to resolve the issue.

If the BOG does not support this proposal that requests authority to file a petition with Supreme Court, it will lose the opportunity to highlight the pros and cons of both the voluntary and mandatory structures. Without BOG leadership, others will fill that void. Such an outcome will lead many of our members to conclude that Bar leadership is out of touch with its members at best and at worst conclude the leadership of the State Bar is obstructing the will of many of its members. An issue as fundamental to an organization as its structure deserves a compromise so members are confident that all views have had an equitable chance of being heard

On January 9, 1979 the Wisconsin Supreme Court declined to order a referendum pertaining to compulsory bar dues requested by 476 active members of the State Bar. In denying the request the court said "the ultimate decision on integration was for the court, not members of the bar." I agree, and this proposal is consistent with that sentiment.

I support the committee proposal and I hope the BOG will as well.

Statement of William T. Curran

It is time for the Supreme Court to again review the mandatory/voluntary status issue.

The law is settled with Court decisions from 1957 to 1996 that the mandatory Bar is a permissible infringement upon lawyers' First Amendment rights.

Surveys from 1958, 1978, 1992 and 2008 all report that over 50% of members would prefer a voluntary Bar. Consider the challenge: the media promotes high income over public service; growing specialty practice has nothing in common with broader practice; 39% of our members are in small firms, often with incomes of \$25,000 to \$60,000; public appointment fees have not increased in almost 20 years; and yet, the Supreme Court and society keep adding fees, expectations and complications for practicing law. It is easy to see why those in small firms, general practice or public service feel "abused like a rented mule" and why the State Bar has a hard time pulling us together.

I have heard no plan or goal from those for a voluntary Bar that would enhance the service to members, the public or the justice system.

While I feel a unified mandatory Bar is still the best option to accomplish the dual Keller goals of "regulating the legal profession" and/or "improving the quality of legal services," the Bar and the Supreme Court working together have to rebalance, shifting more emphasis onto supporting the health of the "rented mule" that is carrying the load.

Statement of Douglas Kammer

This process has been long and difficult. We address not only the question an integrated bar versus a voluntary bar, but a question of what integrated bar versus what voluntary bar. There are many species of each.

My proposal is a simple vehicle to become the voluntary bar. The reason we are an integrated bar is because of this one sentence in the law found at SCR 10.01: "There shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in the association shall be a condition precedent to the right to practice law in Wisconsin." I propose to delete the phrase I have underlined – that's it. This leaves the entity intact and without change of legal status. It can continue with the same bank accounts, the same employees, the same tax numbers, and so forth.

If I could have my way completely, I would make another minor change too. I would allow the bylaws to be amended by two-thirds of the BOG present and voting, rather than by a total of two-thirds of the BOG. This is a minor change to SCR 10.13(2). I would make this change because some governors miss meetings and it is extremely difficult to put together two-thirds consensus including absent members. I think the voluntary bar needs flexibility to fix its own structure so that it can evolve more quickly to meet the new tasks it faces.

In summary, I don't think the legal entity needs to be changed at all. If the organization becomes voluntary and can control its own bylaws, it will undergo a healthy and productive evolution as it adapts to the demands of the public and the members.

Statement of Charles M. Kernats

I am the current president of the Government Lawyers Division, which has about 3,200 members (roughly 15% of the total Bar membership). As a GLD representative, I support the committee's recommendation because it is consistent with the desire of most government lawyers that the Supreme Court review whether Bar membership should remain mandatory or become voluntary. This is supported by the results of a May 2007 GLD survey of its members, a February 2009 State Bar survey of its members, and the 3,000 individual member and group comments submitted to this committee in December 2009.

Government lawyers responding to the 2007 GLD survey complained about paying mandatory Bar dues and high CLE costs because they felt that the State Bar has not provided useful and relevant services for government lawyers at a reasonable cost. The GLD survey did not expressly ask whether members favored a mandatory or a voluntary Bar, but other responses to the survey leave little doubt about government lawyers' attitude towards mandatory Bar membership. 89% of the GLD survey respondents reported that they did not participate in any GLD sponsored activities, and 37% of the survey respondents reported that they did not participate in any State Bar activities, within the previous year. 73% of the GLD survey respondents reported that, unlike many private employers, their government employers do not pay for State Bar dues. This explains why many government lawyers want Bar membership to be voluntary. They are paying Bar dues out of their own pockets and are not satisfied that they are getting good value for their money.

The 2009 State Bar survey revealed that 57% of all State Bar members who responded to the survey favor a voluntary Bar. The survey provides the following additional details:

- 70% of in-house counsel who responded to the survey favor a voluntary Bar.
- 67% of government lawyers who responded to the survey favor a voluntary Bar.
- 67% of lawyers not currently in practice who responded to the survey favor a voluntary Bar.
- 60% of solo practitioners who responded to the survey favor a voluntary Bar.

The 2009 State Bar survey also found that while 71% of all State Bar members who responded to the survey would remain if membership were voluntary, only 50% of government lawyers who responded to the survey would remain if membership were voluntary.

The committee report provides an excellent summary of the 3,000 comments submitted by individual members and groups. I urge all Bar leaders to review all of the comments, not just the summary in the committee report, so that they are aware of the thoughtful reasons that the members and groups provided to support their views.

I am convinced that a majority of government lawyers want the Supreme Court to re-examine its position on whether Bar membership should be mandatory or voluntary. Based on the 2009 State Bar survey, it appears that a majority of all attorneys, and specifically in-house counsels, solo practitioners, and lawyers not currently in practice share that desire. Leaders of the Bar, as elected representatives, cannot ignore the wishes of so many of its members.

Statement of John P. Macy

As Chairman of the Strategic Planning Committee, I am writing to thank the thousands of members of the State Bar of the Wisconsin who participated in the process weighing in on the incredibly complicated issues associated with the mandatory bar question. Be assured that the Committee has carefully considered all of the members' comments. Additionally, I wish to thank the members of the Strategic Planning Committee for their time and efforts in this important matter. The Committee's recommendation set forth in this report is truly the result of a thorough and comprehensive process wherein every person on the committee was a valuable and active participant.

I believe it is safe to say that when we started this project, the Committee never thought that the recommendation would be what we are presenting to you today. Although we knew we would be sending a "fast pitch" (in that our report was due in time for consideration at your February Board of Governors meeting), we did not realize that we would be sending you this "change up" pitch. It took several months for the members of the Committee to not only realize the import and complexities of this issue, but also to come to the realization that this matter is such that the Wisconsin Supreme Court must address it. Ultimately, the Supreme Court must determine the future structure of the State Bar of Wisconsin. The Committee unanimously presents this resolution to you for your consideration, because each member of the Committee is convinced that it is in the best interest of the Bar Association as a whole that an ultimate decision by the Court is necessary.

The resolution, as well as the report, is silent as to the form of the petitions to be filed with the Court. The Committee has done this deliberately for multiple reasons. First, if the Board of Governors does not feel this matter needs to go to the Supreme Court, there is no need to draft

a petition to the Court in the first instance. In other words, if the Board of Governors does not adopt the resolution, the petition will likely be coming from individual members and/or groups rather than the Committee work groups proposed in the draft resolution. Secondly, because the Committee desires the full involvement by the BOG members in drafting the petition, it is the Committee's recommendation that the members of the Board of Governors participate in this process by signing on to assist in the drafting of two or more petitions.

The following subcommittees are proposed, and each member of the Board of Governors is asked to join one or more of the same on a voluntary basis. The proposed subcommittees would be organized as follows:

1) *Petition Drafting Subcommittee*: Doug Kammer and Jim Boll have agreed to co-chair a subcommittee to draft a petition for consideration by the Court asking the Court to change the status of membership of the organization from a unified Bar to a voluntary Bar.

2) *Public Function Subcommittee*: A subcommittee is being formed to draft a petition for consideration by the Court asking that the Court, pursuant to Section 10.10 of the Wisconsin Supreme Court rules, to review the performance of the State Bar in carrying out its public functions.

3) *Unified Bar Subcommittee*: John Macy and Mike Morse have agreed to co-chair a subcommittee to draft a petition for consideration by the Court asking that the Court modify certain aspects of the unified Bar while maintaining the unified nature of the same.

Other subcommittees could be formed as deemed necessary by the members of the BOG.

It is solely within the purview of each Board of Governor as to whether or not they wish to participate in this process by voluntarily signing on to one of the groups. The committee hopes that, along with the committee members, each BOG members participates in the drafting process.

In closing, I would just like to say that in all of my years of service to the State Bar of Wisconsin, I have never worked on a more important or a more difficult project. I am extremely proud of the committee's work in this regard. Once again, thanks to all for your hard work and thanks for the opportunity to serve.

Statement of Nicholas C. Zales

This study and report represent a historic moment in bar history. Our members requested the State Bar review their membership status and the bar responded. Unlike our local, state and federal governments, which often ignore citizens' calls for action, this bar association heard its members and responded. It must be noted this study would not exist but for the efforts of State Bar President Doug Kammer and the evenhanded leadership of Strategic Planning Committee Chair, John Macy. This issue is not new. It began simmering around the turn of the century and more recently reached full-boil with the election of a succession of pro-voluntary bar presidential candidates.

The past few years those in favor of a voluntary bar have begun to speak louder and louder. Some in the state bar believed those in favor of a voluntary bar were a small but vocal minority that could be ignored without peril. I, as a bar governor from Milwaukee County, wholeheartedly disagreed. When so many of our members call upon the bar's leadership to study and act on

an issue, their concerns must be addressed. As representatives of our members, we cannot ignore their concerns without great peril.

The simple fact this study has been completed is a great victory for our members who expect the bar's leadership to respond to their legitimate concerns. I am proud of the roughly 3,000 lawyers, bar entities and others who took time to provide comments. They were relevant and thought-provoking. Whatever the ultimate outcome of this process, I would hope the bar would use the opinions of its members to improve the association.

¹ 2008 Member Satisfaction Survey, Final Report, December 2008 (Prepared for the State Bar of Wisconsin by Gene Kroupa & Associates, LLC, Madison, Wisconsin).

² In Matter of State Bar of Wisconsin, 169 Wis.2d 21 (1992).

³ Comments submitted by nearly 3,000 members are available at www.wisbar.org/stratplancomm.

⁴ Complete transcripts of testimony are available at www.wisbar.org/stratplancomm.

⁵ Other materials available on www.wisbar.org/stratplancomm include "The Integrated Bar: The Wisconsin Story (1943-1997)," which contains reprints of key decisions of the Wisconsin Supreme Court, United States District Courts, Seventh Circuit Court of Appeals, and the United States Supreme Court; past Wisconsin Lawyer articles and columns; past reports; and other resources.

⁶ "Share Your Thoughts about a Voluntary Bar" by President Douglas W. Kammer, Wisconsin Lawyer, Vol. 82, No. 10, October 2009.

⁷ Responses submitted by entities are available on www.wisbar.org/stratplancomm under the heading "Responses."

⁸ Also available on www.wisbar.org/stratplancomm under the heading "Strategic Planning Committee Public Hearing Transcripts - December 10-12, 2009."

⁹ "Bar Dues and Mandatory Fees Comparison Summary Report."

¹⁰ A list of pertinent articles is available on WisBar; see also "A History of the Organized Bar in Wisconsin."

¹¹ "A history of the Organized Bar in Wisconsin," Chapter 20: "Relations with the Court."

¹² *Lathrop v. Donohue*, 367 U.S. 820 (1961).

¹³ Available on www.wisbar.org/stratplancomm under the heading "Resources."

¹⁴ An annotated version of SCR 10 is also available on WisBar.

¹⁵ A record of all member comments is available on www.wisbar.org/stratplancomm under the heading "Responses."

¹⁶ A record of all entity comments is also available on www.wisbar.org/stratplancomm under the heading "Responses."

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