Memorandum

DATE: October 25, 2011 **[Administrative Conference Nov. 7, 2011]**

TO: All Justices

FROM: Julie Anne Rich

SUBJECT: Rule Petition 11-04, Petition for Voluntary Bar

Attachments:

A. Peter A. Martin, Comment, A Reassessment of Mandatory State Bar Membership in Light of Levine v. Heffernan, 73 Marq. L. Rev. 144 (1989)
B. John S. Skilton, Heart and Soul . . . and Where Should We Go From Here? 80 Marq. L. Rev. 715 (1997)
C. Lathrop v. Donohue, 10 Wis. 2d 230, 102 N.W.2d 404 (1960)
D. In the Matter of the Discontinuation of the State Bar of Wisconsin, 93 Wis. 2d 385, 286 N.W.2d 601 (1980)
E. Report of Committee to Review the State Bar, 112 Wis.2d xix, 334 N.W.2d 544 (1983)
F. In the Matter of the State Bar of Wisconsin: Membership, 169 Wis. 2d 21, 485 N.W.2d 225 (1992)

The court is scheduled to discuss this petition in open administrative conference on November 7, 2011.

Summary of Petition

On July 6, 2011, Attorneys Steve Levine and James Thiel filed an administrative rule petition renewing their request that this court end the mandatory[1] nature of the State Bar of Wisconsin (State Bar). The petition includes language removing the requirement that attorneys

[1] The phrase "integrated bar" has been used synonymously with terms such as "unified bar," "mandatory bar," or simply "state bar." Two characteristics are germane to every integrated bar association: First, dues-paying membership is a precondition to practicing law in a state that has such a bar; and second, the bar is created by court rule or by legislation. See Peter A. Martin, Comment, A Reassessment of Mandatory State Bar Membership in Light of Levine v. Heffernan, 73 Marq. L. Rev. 144, n. 1 (1989) (citations omitted).

admitted to practice in Wisconsin pay mandatory dues to the State Bar, eliminating the Keller[2] dues rebate rule and bylaw (which would be unnecessary for a voluntary bar because, by definition, all dues paid would be voluntary), and retaining the current structure of the State Bar "in all other respects." The petitioners request a public hearing.

The State Bar was created by the Wisconsin Supreme Court through its inherent authority over the legal profession in the state. Accordingly, the association's mandatory status ultimately rests with the court. See, e.g., State ex rel. Armstrong v. Board of Governors, 86 Wis.2d 746, 751, 273 N.W.2d 356 (1979) (stating "[t]he opinion of Wisconsin lawyers on the question [of a mandatory bar] is of interest to us, but the decision is one of court policy, not bar association policy.").

On September 15, 2011, the court agreed that it would discuss this petition in open conference and I was directed to prepare a memorandum for the court. In preparing this memorandum I have relied heavily on discussions with the petitioner, Attorney Steve Levine, State Bar President George Brown, the petition and memorandum in support of the petition, and the excellent materials prepared by the Strategic Planning Committee of the State Bar and other State Bar publications, including the 31 chapter "History of the Organized Bar in Wisconsin" which covers the history of the State Bar through 1986 and is available on the State Bar website at www.wisbar.org. Indeed, in many sections I have basically repeated narrative from some of these comprehensive publications and reports.[3]

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[2] Keller v. State Bar of California, 496 U.S. 1, 110 S.Ct. 2228, 110 L. Ed. 2d 1 (1990).

[3] I have also reviewed a wide variety of articles and written statements published in the Wisconsin Lawyer and available on the State Bar's website, www.wisbar.org, and from other sites such as Bruce Felmly, Where Have We Been – Where Are We Headed: The Case For and Against the Unified Bar in New Hampshire, New Hampshire Bar Journal, (Vol. 42, No. 2, June 2001), available at http://www.nhbar.org/publications/where-are-we-headed.asp, and Deb Jordahl, Lowering the Bar: How Wisconsin's Biggest Organization for Lawyers is Ruining their

History of the Organized Bar in Wisconsin

A "bar association" is a professional organizations for lawyers who are licensed to practice law in their state or jurisdiction. The roots of the State Bar of Wisconsin date back to the 1800s. On September 21, 1877, at a meeting of the members of the Bar of the Western Judicial District of Wisconsin, A.A. Jackson of Janesville suggested forming a State Bar Association. A committee was promptly appointed, a resolution adopted, and a meeting scheduled on January 9, 1878. Chief Justice Ryan addressed the several hundred lawyers who attended that meeting. I recite portions of his address as it articulates the purpose and vision of the then voluntary organization. He stated:

> Brethren of the Bar: . . .
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> The uses of such an association are obvious. Without it, the bar cannot properly assert itself, or exercise its due influence in matters of interest to it. Doubtless, in matters bearing on the interests of the profession, individual members of the bar exercise some influence, but such influence is necessarily fragmentary, and sometimes discordant. The bar, as a body, can only have the influence which properly belong to it, on professional subjects, through an organization by which it can speak with one voice.
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> The vast body of our law, called the common law, is the work of our profession; the wise and just rules which have been the legacies of generations of lawyers, through the centuries, to all common law peoples. And these constitute today not only the great body of our municipal law, but the bulwarks of civil and religious liberty, of the rights of persons and of things, more extensive and secure than any written constitution. If it be true that the common law was somewhat due to the free spirit of the people amongst whom it arose, it is none the less true that it has educated all the peoples with whom it has prevailed to higher, firmer and more independent manhood. It may be safe to say that no people thoroughly educated in the rights of the common law, could be brought to tolerate an oppressive political system. Civilization from time to time outgrows some of the fixed rules of the common law, and it is the business of legislation to relax them, and to adapt the common law to the existing condition of society. And the profession which is educated in the common law, and has mastered it as a service, ought to have an influential voice in all legislation which modifies or repeals its rules.
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> But it is not outside only, but inside of itself, that the judgment and common voice of the bar should be heard and felt. We are all proud of our profession; proud of

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Public Image, Wisconsin Policy Research Institute, http://www.wpri.org/WIInterest/Vol17No2/Jordahl17.2/Jordahl17.2.html. Not all publications or statements have been attached to this memo because the documents are voluminous.

the multitudinous worthies who have made it illustrious in the past, and who are showing forth its honor in the present. No profession or calling has given so many great names to American history as the bar. There is no state in the Union on which the names of its great lawyers have not shed lustre. An American law list from the beginning would embrace a large proportion of the names held in honorable memory by the American people. There is a passion for military glory amongst all nations, hero-worship. And the glory of the soldier may be more dazzling than the glory of the statesman-lawyer. But it is less solid. For the truest glory of the soldier, here at least, is to preserve the work of the statesman. The path of the soldier, however patriotic or worthy the war, is destruction. The path of the statesman-lawyer is organization; and the path of every lawyer, worthy the name, is preservation. And in a high sense, true heroism may be in a tribunal as well as on the battlefield. Duty, fearlessly and faithfully performed, against all influences and difficulties, is the only true glory. Moral courage is a higher quality than physical.

He reads American history superficially, who does not see the illustrious dead of our profession battling in the vanguard for all true political and social amelioration. And he who looks upon society, without seeing in the profession the sentinel of social order, sees through a glass darkly. In civilization, a community without a bar is worse off than an army encamped without sentinels. For the army may rally against surprise, but a community cannot peaceably defend its rights without the aid of the bar in the administration of justice. If the millennium be coming, it has not come. And the administration of justice is essential to the security of all rights, public and private; essential to all social order. There is the strength of the bar, powerful where an army would be powerless. The peaceful social order, the integrity of the state, and every sacred personal right, are in the keeping of our profession. The legislative power would pass laws and the executive draw and sword to enforce them in vain, if there were no courts to administer them. And a court without a bar would be little better than an untrustworthy illusion; a disturbing phantom of justice. For not only must the bar educate competent judges, but it is the efficient and only fit censor of the judges promoted from it; a police power over the intelligence and justice of courts. In common law courts, the bar is as essential as the bench. A learned and independent bar is a condition of true civilization.

But the glory of the bar and the easy access which it gives to high place have drawn towards it men unfitted for it by nature or education. The bar has no exemption from fools or knaves. The foolish lawyer is perhaps the most dangerous of all fools--almost a knave, by assuming duties of such grave import to the well-being of society, without adequate ability or training. Horace says that poets are born, not made; and perhaps orators are born also, though Horace thinks they are made. But though there may be geniuses who think that they are born lawyers, we know that a lawyer is born only of years of patient, steadfast, laborious study. And even then the safest knowledge of the wisest lawyer is the comprehension of how limited and uncertain his knowledge is. A knavish lawyer is certainly the most dangerous of all knaves. For it is to the profession that, in time of peril, all rights of person and property are committed. The bar is the trustee of everything which man holds sacred. And the opportunity to betray is fearfully easy. Indeed, it may be truly said that integrity of character is as essential to a lawyer as professional learning. For without innate love of truth and justice, it is impossible truly to comprehend a profession essentially founded on truth and justice. And it is perhaps amongst the highest glories of the profession, that instances of betrayed trust are so rare in its ranks.

> But it must be admitted that there are unworthy members of the bar. The rule of admission is unfortunately lax. The doors are not ajar, but wide open. And there are those who have come in at them who should surely pass out of them. Doubtless all or most of you have had the same experience as myself. At the bar and on the bench I have sometimes seen — not often, but sometimes — conduct even amongst able lawyers, calling loudly for scrutiny or censure; ignorance so great as to be almost guilt, and malpractice so audacious as to be almost folly. Such should not be permitted to abuse public confidence in our profession, or to cast a shadow upon its honor.
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> The power of courts to weed the profession of its unworthy members is limited and inadequate. Judges may be painfully obliged to surmise professional default without judicial knowledge. All efficient steps to purge the bar must come from the bar itself. And this could scarcely be done — is almost never done — by individual effort. The aggregate bar must speak and act. The great body of the profession should enforce its ethics; censure what is worthy of censure, and pose to disbar all who forfeit the honor to belong to it. This I take to be a main object of the association which you propose to form.

A History of the Organized Bar in Wisconsin, Ch. 3: "A State Bar is Born," available at http://www.wisbar.org/AM/Template.cfm?Section=BarHistory&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=48657. The bar was a voluntary organization for its first 70-some years. In 1943 the Wisconsin Legislature passed and subsequently overrode a gubernatorial veto of legislation creating a mandatory bar. See ch. 315, Laws of 1943; see also Integration of the Bar Case, 244 Wis. 8, 11 N.W.2d 643 (1943). Three years later, however, this court ruled that the legislative action was "advisory" only and that only the court had the authority to create a mandatory bar. It rejected a mandatory bar on a variety of grounds. See In re Integration of the Bar, 249 Wis. 523, 530, 25 N.W.2d 500 (1946).

In June 1956, in response to a petition advanced by a special bar committee, the court ordered the "integration" of the association and directed it to develop draft rules and procedures to accomplish this result. The result of this decision effectively made membership in the association a mandatory condition for the practice of law in Wisconsin. See In re Integration of the Bar, 273 Wis. 281, 77 N.W.2d 602 (1956). The court subsequently conducted hearings on the matter and, by order dated December 22, 1958, ordered the creation of the State Bar of

Wisconsin. Whether bar membership should be voluntary or mandatory has been, and continues to be, an issue. Since the integration of the bar this court and the federal courts have considered various challenges to the legality of a mandatory bar or requests to discontinue the mandatory nature of bar membership. This debate is not unique to Wisconsin, although Wisconsin is recognized as a state where the issue has remained controversial. See, e.g., Felmly, Where Have We Been – Where Are We Headed, supra; Peter A. Martin, Comment, A Reassessment of Mandatory State Bar Membership in Light of Levine v. Heffernan, 73 Marq. L. Rev. 144 (1989).

For example, in 1960 this court assumed original jurisdiction of a case brought by an attorney seeking to recoup $15 in bar dues he asserted were unconstitutionally compelled. Lathrop v. Donohue, 10 Wis. 2d 230, 102 N.W.2d 404 (1960). The court rejected the challenge to the constitutionality of the unified bar. Id.[4] The court noted that it considered the bar association to be a public agency, discussed the scope and limits on legislative action an integrated state bar could pursue, and stated:

> We are of the opinion that the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as the State Bar, can perform much more effectively than can a voluntary bar association.

Id., 10 Wis. 2d at 239-40.

In 1979, after the bar refused to hold a petitioned-for referendum relating to unification, several bar members financed an independent vote of the membership which revealed that 60% of those voting favored a voluntary bar. See In the Matter of the Discontinuation of the State Bar

[4] In the decision the court notes than in a 1943 decision relating to the legislative creation of a mandatory bar the court concluded that an integrated bar would not violate the Fourteenth Amendment. See Lathrop, 10 Wis. 2d at 236.

of Wisconsin, 93 Wis. 2d 385, 286 N.W.2d 601 (1980) (Day and Callow, JJ., dissenting).[5] Five attorneys then filed a rule petition requesting that the State Bar be discontinued as an integrated bar. A public hearing was conducted and written comments were received from lawyers around the state. The petition, which was filed in the wake of the court's decision to vest authority to oversee lawyer admissions and discipline in boards created by the court and independent of the bar, basically asserted that the core administrative functions that had warranted a unified bar were no longer being performed by the bar. See In re Regulation of the Bar of Wisconsin, 74 Wis.2d ix (1976); In re Regulation of the Bar of Wisconsin, 81 Wis.2d xxxv, xliv (1977).[6] The court's decision on the petition is brief, and basically states: "we do not find any or all of the allegations and arguments of the petitioners and others sufficient to warrant changing the status of the State Bar to a voluntary bar." Discontinuation of State Bar, 93 Wis. 2d at 387.

The court did, however, vote to appoint a committee to review the function of the State Bar, with directions to focus on the bar's legislative activities.[7] Justice Day, joined by Justice Callow, dissented from the court's decision, stating they would have granted the petition in part because of the support from lawyers for a voluntary bar, evidence of successful voluntary bars in other states, and concern that the court was not really fulfilling its obligation of overseeing or

[5] See also State ex rel. Armstrong v. Board of Governors, 86 Wis. 2d 746, 273 N.W.2d 356 (1979) (denying leave to commence original action for an order requiring the Board of Governors of the State Bar to submit referendum questions to the membership concerning the continuation of the integrated Bar) (Day, J., dissenting).

[6] There is some indication that the decision to divest the State Bar of authority over lawyer discipline was "motivated primarily by a concern that the State Bar was not sufficiently accountable to the public; that an organization of lawyers would be more concerned about their own interests than the interests of the public at large." See Peter A. Martin, Comment, A Reassessment of Mandatory State Bar Membership in Light of Levine v. Heffernan, 73 Marq. L. Rev. 144, 158 (1989).

regulating the State Bar as it should for a public agency. The dissent closes, adding "[t]his issue will continue to be an unnecessary source of irritation by large numbers of attorneys who favor a voluntary rather than a compulsory membership policy." Id. at 391.

On December 28, 1981, pursuant to SCR 10.10, the court appointed the committee to review the performance of the State Bar in carrying out its public functions. The committee filed its report on October 1, 1982. A public hearing on the report was held on February 15, 1983, at which several members of the committee, two state legislators, and a number of Wisconsin attorneys appeared and presented their positions on the issues to the court. The report presented five resolutions, including the unanimous conclusion that a unified bar was in the best interests of the bar. The committee's recommendation was qualified, however, acknowledging that compulsory membership in the association raises "certain legitimate concerns about individual freedom of association and expression." The committee thus recommended changes in the manner in which the association engaged in legislative activity and establishment of a procedure whereby a member may obtain a refund of that portion of association dues which are used to support legislation which the member opposes (i.e. a process similar to what is now referred to as a Keller-type dues reduction).

After considering the report and the public testimony the court stated:

> We agree that lawyers may properly be required to financially support these functions, and we also agree with the committee's conclusion that a unified bar association, which all licensed practitioners are required to join, is better suited than a voluntary association to accomplish them. The committee notes that a unified bar association is more likely to administer its programs in the public interest, that the performance of such functions is more efficient and economical if conducted by a single association financially supported by all lawyers and that voluntarism, on which the accomplishment of these goals by the existing association almost exclusively depends, is better promoted by a unified bar association. Whether or not these considerations are sufficient to justify the

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[7] See Report of Committee to Review the State Bar, 112 Wis.2d xix, xxxvi, 334 N.W.2d 544 (1983) (Abrahamson, J., concurring).

> requirement that all lawyers be members of the association, it is our opinion, as it has been for more than 25 years, that a bar association in which membership is mandatory is the best means for the profession to fulfill its obligations to the public. We do not see as a practicable alternative a voluntary association of lawyers to which all practitioners, members or not, would be required to contribute for the performance of only those functions which we deem to be the obligation of every lawyer.

Report of Committee to Review the State Bar, 334 N.W.2d at 546-47.

The court also agreed with a number of the proposed changes recommended by the committee, particularly including the adoption of the "Keller-type" dues rebate and involving the structure and scope of the bar's activities but then concluded that a less frequent review of state bar activities was appropriate.[8] Id. at 551. Then-Justice Abrahamson concurred in the conclusion that a mandatory bar was appropriate "at this time" but expressed concern about the lack of specific guidance provided on how the reforms endorsed in the decision were to be effectuated. Justice Day dissented, continuing to assert that he favored voluntary bar membership.

Then, in 1988, in a case brought by Attorney Steve Levine, the U.S. District Court for the Western District of Wisconsin ruled that this court could not require plaintiff to be a member of the State Bar of Wisconsin as a condition of practicing law. Levine v. Supreme Court of Wisconsin, et al., 679 F. Supp. 1478 (W.D. Wis. 1988). In response to the decision, on May 6, 1988, this court suspended mandatory state bar membership. The Levine decision was reversed by the Seventh Circuit Court of Appeals in Levine v. Heffernan, et al., 864 F.2d 457 (7th Cir. 1988) and Attorney Levine sought U.S. Supreme Court review. The United States Supreme Court denied certiorari in Levine but, on the same day, granted certiorari in another case that

[8] Currently, SCR 10.10 provides that the supreme court "shall appoint a committee to review the performance of the state bar in carrying out its public functions at such time as the court deems it advisable. The supreme court shall determine in its order of appointment the size and composition of the committee. The state bar shall pay the expenses of the committee."

presented the issue of the constitutionality of an integrated bar, Keller v. State Bar of California, 496 U.S. 1, 110 S.Ct. 2228, 110 L. Ed. 2d 1 (1990). The Supreme Court upheld the constitutionality of a mandatory state bar membership rule in Keller. In so holding, the Court identified two state interests that justify a mandatory state bar association: (1) regulating the legal profession, and (2) improving the quality of legal services. Keller, 496 U.S. 1. However, the Keller Court imposed limitations on a state bar association's use of dues that lawyers are required to pay to the association.

Meanwhile, mandatory bar membership in Wisconsin remained suspended[9] and the State Bar conducted a study of its status as a unified bar association and as a voluntary one.

Following that study, on May 16, 1991, the State Bar Board of Governors petitioned the court to reinstate an integrated bar in Wisconsin by resumption of enforcement of SCR 10.03(1) and (4) establishing membership in the bar as a condition precedent to practicing law and limiting practice to enrolled members of the bar. As part of that petition, the State Bar also sought the amendment of the dues reduction rule, SCR 10.03(5)(b), to conform to the Supreme Court's holding in Keller with respect to the constitutional limitations on the bar's use of compulsory dues.

On March 10, 1992, following a public hearing on the matter, the court reinstated the integrated bar in Wisconsin, effective July 1, 1992.[10] In its opinion issued on June 17, 1992, this court stated, inter alia:

[9] The issue remained on hold in Wisconsin because the U.S. Supreme Court then granted certiorari in an action concerning a state bar association's procedures for member objection to its use of compulsory dues, Gibson v. Florida Bar. The United States Supreme Court later dismissed the petition for certiorari as improvidently granted. Gibson v. Florida Bar, 502 U.S. 104, 112 S.Ct. 633, 116 L.Ed.2d 432 (1991).

> The court is persuaded that a unified association composed of all persons licensed by this court to practice law in the state is best suited to meet the lawyers' professional obligations to the public and to the legal profession itself. Because all lawyers, as practitioners of that profession, share those obligations, an association in which membership were voluntary would not be in the same position to meet them.
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> Members of the legal profession have a duty to promote the public interest, as well as the interests of their individual clients. A significant aspect of the public's interest is the efficient and effective administration of justice. It is necessary that lawyers join in a common effort to carry out this duty, for lawyers acting individually or in discrete groups might lack the commitment and resources to effectively address more than a portion of their professional responsibilities. Acting as one, however, the members of the legal profession constitute a powerful force to further the improvement of the legal system, its laws, its courts and its practitioners.
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> As each lawyer shares the profession's obligation to the public, each lawyer properly may be required to support the profession's functions and activities directed to the interest of the public, even if only financially by payment of membership dues to the association acting to fulfill those obligations. It is to be hoped, however, that membership in the integrated bar association will motivate lawyers to contribute their time and talent, as well as their money, to the association's activities in furtherance of the cause of justice.

See In the Matter of the State Bar of Wisconsin: Membership, 169 Wis. 2d 21, 23-24, 485 N.W.2d 225 (1992) (footnote omitted) (Abrahamson, J., dissenting).[11]

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[10] The court adopted the proposed amendment to the dues reduction rule by separate order on March 13, 1992. While no "official" figure is available, the history of the State Bar posted on wisbar.org indicates that nearly 87% of the lawyers in Wisconsin chose to remain as voluntary members of the State Bar during this period. There is anecdotal evidence that State Bar leadership made a substantial effort to encourage members to remain active in the association during the period of voluntary membership.

[11] In addition, in September 1996, the Seventh Circuit Court of Appeals resolved two challenges to the mandatory bar. In Thiel v. State Bar of Wisconsin, 94 F.3d 399 (7th Cir. 1996), and John Crosetto v. State Bar of Wisconsin (Nos. 96-1118, 96-1211, unpublished order 7th Cir. Ct. App. Sep. 19, 1996), the court affirmed its prior decision in Crosetto, 12 F.3d 1396 (1993), reaffirming the constitutionality of the mandatory bar. Since that time the court has also faced indirect challenges to the integrated bar. See, e.g., Kingstad v. State Bar of Wisconsin, 622 F.3d 708 (7th Cir. 2010) (holding mandatory state bar is constitutional, but First Amendment prohibits bar from funding non-germane activities with compelled dues); S. Ct. Order 09-08, 2011 WI 93 (issued Oct. 21, 2011, eff. Jan. 1, 2012) (amending SCR 10.03(5)(b)1.).

Justice Bablitch concurred in the decision, explaining the benefits he perceived in a mandatory bar:

> All lawyers have a special responsibility to society. That responsibility involves far more than merely representing a client. Lawyers are the guardians of the rule of law. The rule of law forms the very matrix of our society. Without the rule of law, there is chaos. Lawyers not only have a responsibility to their clients, they have an equal responsibility to the courts in which the rule of law is practiced, and to society as a whole to see that justice is done. . . . The mandatory bar has been an essential force in assisting lawyers to fulfill their roles as guardians of the rule of law. Of equal importance, the mandatory bar has been a guiding force in assisting lawyers to deliver an increasing quality of justice to society and to those they represent. Many if not most of the services the bar delivers in pursuit of these goals are not self-supporting and are not capable of being subject to user fees.

Id. at 227, 228 (Bablitch, J., concurring).

Then-Justice Abrahamson's dissent sets forth more details regarding the petition as well as her reasons for opposing integration of the bar at that time, including, inter alia, her opinion that there was no solid evidence that a unified bar is inherently better than a voluntary one, that there is value in maintaining the independence of both the bench and bar, and that "[d]iscord and disagreement among members of the State Bar about which activities may be supported by mandatory dues will be a continuing issue." Id. at 42. The dissent also discusses concerns with the administrative structure proposed by the bar and the adverse effect of those rules on the ability of individual bar members to participate in establishing bar policy. Indeed, this dissent appears to form the template for the petition pending before the court today. A copy of this decision is attached.

Today, all lawyers licensed to practice law in Wisconsin must enroll in the State Bar and pay its membership dues and assessments.

How Does the Court Currently Define the Purpose of the State Bar?

Supreme Court Rule 10.02(2) defines the State Bar's purposes as follows:

> [T]o 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 10.05(4)(a)8. allows the State Bar to adopt "bylaws and regulations, not inconsistent with [SCR Chapter 10], for the orderly administration of the association's affairs and activities." The State Bar is managed and directed by a 52-member Board of Governors, which includes the association's five officers and the immediate past president. SCR 10.05(1). Thirty-five members are elected from the l6 State Bar districts. Each is a single-member district except for Milwaukee County, which has 12 members, Dane County which has 7 members, and Waukesha County which has 3 members. In addition, the supreme court appoints three non-lawyer members to the board, and the Government Lawyers Division, Young Lawyers Division, and Senior Lawyers Division each select one member, while the Nonresident Lawyers Division selects five members to sit on the board. Additional information on the structure and composition of the Executive Committee and the Finance Committee is found on the State Bar's website.

This Petition

The administrative rule petition pending before the court reflects the most recent effort to persuade the court to abolish a mandatory bar. The petitioners, Attorney Levine and Attorney Thiel, have long advocated for a voluntary bar. Whether bar membership should be required has

become a significant issue in recent State Bar presidential campaigns. The issue has been the topic of considerable study by the State Bar.

State Bar Membership Studies

The State Bar has conducted a number of member satisfaction surveys over the years. Its 2008 survey 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. In May 2009 an ad hoc Strategic Planning Committee (SPC) Membership Committee conducted a membership survey that assessed - among other things - member attitudes regarding remaining a mandatory bar association or becoming a voluntary bar. That survey revealed that a majority of members (58%) would support a voluntary State Bar. Based on this feedback, the SPC agreed to formally study the issue and to report to the Board of Governors before the Board's February 2010 meeting.

Accordingly, all State Bar members received two direct communications from the SPC advising them of the study it had undertaken and soliciting their input on the mandatory versus voluntary bar issue.[12] Member and entity comments were due December 4, 2009. As of that

[12] 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 State Bar website); (2) completing the printed form and mailing it to the State Bar; (3) sending an email with the requested information; and (4) completing the printed form and faxing it to the State Bar. A letter was sent by U.S. mail to the residential or business addresses of 23,266 members listed in State Bar records in the first week of October and a follow-up e-mail message was distributed in early November to 19,769 members with e-mail addresses on file at the State Bar. The communications stressed that while members were free to state their position on the mandatory versus 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.

date, a total of 2,953 comments had been received: 2,902 from State Bar members; 43 from State Bar entities; and 8 from others in the legal community.

A record of all responses received by the due date is posted on the State Bar website and available for review.[13] The SPC conducted public hearings on December 10, 11, and 12, 2009. In February 2010 the SPC issued its report entitled, "Future of the State Bar Mandatory/Voluntary Membership Report" (the "SPC Report").[14] The SPC Report provides useful background and comparative information vis-à-vis other states and addresses some of the questions posed in the rule petition cover sheet. Members who responded to the surveys identified a number of themes based on whether they favored a voluntary or mandatory state bar structure. Key feedback from the SPC Report includes specific statements from responding members which are repeated here:

Statements of Members Who Would Prefer a Voluntary Bar

- 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.

[13] http://www.wisbar.org/am/template.cfm?section=strategic_plan&template=/cm/contentdisplay.cfm&contentid=86158.

[14] The SPC Report was previously distributed to the Court. The SPC Report is also found at http://www.wisbar.org/AM/Template.cfm?Template=/CM/ContentDisplay.cfm&ContentID=90577.

- 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.

<u>Statements of Members Who Prefer a Mandatory Bar</u>

- 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.

<u>Statements of Members Who Indicated Mixed Preference</u>

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

Proposed Resolution

On January 8, 2010, in view of the results of the various member surveys, the Strategic Planning Committee voted unanimously to recommend that the Board of Governors adopt a resolution that would include asking this court to review the status of the State Bar as an integrated organization. The resolution stated:

> **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.

SPC Report at 13.

On June 25, 2010, the Board of Governors voted 25-17 to petition this court to consider the question of an integrated bar. This vote was one vote short of the 60% majority required for the State Bar to file a petition with this court.

Accordingly, Attorney Levine opted to file the now-pending rule petition of his own accord. At the Board of Governors' meeting on April 8-9, 2011, the Board voted not to take a position on Attorney Levine's petition for a voluntary bar.

Attorney Levine's petition is based on five assertions, summarized as follows:

1. In Keller v. State Bar of California, 496 U.S. 1, 13-14 (1990), the court set forth two activities which justify an integrated state bar and the collection of mandatory dues to support those activities: regulating the legal profession and improving the quality of legal services offered by members of the bar.

2. The State Bar is not a regulatory agency, as are the Board of Bar Examiners and the Office of Lawyer Regulation.

3. While the State Bar does offer continuing legal education programs and publications designed to elevate the ethical and educational standards of Bar members, these programs and publications are supported by user fees and not by State Bar dues.

4. A majority of State Bar members favor a voluntary bar. Four of the last seven State Bar presidents-elect elected since 2005 have advocated a voluntary bar as part of their campaigns.

5. A voluntary State Bar would be a more independent bar, freer to take positions in the best interests of the public and its own members.

The petition proposes amending the applicable supreme court rules, SCR Chapter 10, as follows:

SCR 10.01(1) 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~~ but membership in the association shall not be a condition precedent to the practice of law in Wisconsin.

SCR 10.02(1) Creation of Association. All persons licensed to practice law in this state who choose to join are organized as an association to be known as the "state bar of Wisconsin," subject to the provisions of this chapter. The rules of this chapter, which are adopted in the exercise of the court's inherent authority over members of the legal profession as officers of the court, may be referred to as "state bar rules." The state bar may, for the purpose of carrying out the purposes for which it is organized, sue and be sued, enter into contracts, acquire, hold, encumber, and dispose of real and personal property.

SCR 10.03(1) Persons included in membership. As of the effective date of this rule, membership in the state bar consists of all those persons who on that date are licensed to practice law in this state and who choose to join. After the effective date of this rule, the membership includes all persons who become licensed to practice law in this state and who choose to join; subject in each case to the conditions and requirements of membership. Residence in this state is not a condition of eligibility to membership in the state bar.

SCR 10.03(2) ~~Enrollment.~~ Registration. Every person who becomes licensed to practice law in this state shall ~~enroll in~~ register with the state bar by ~~registering~~ providing his or her name and social security number with the association within 10 days after admission to practice. Any change after ~~enrollment~~ registration in any ~~member's~~ attorney's office address or social security number shall be reported promptly to the state bar. The social security number of a person enrolling in the state bar may not be disclosed to any person or entity except the supreme court and its agencies, or as otherwise provided by supreme court rules.

SCR 10.03(4)(a) No individual other than ~~an enrolled active member of the state bar~~ an attorney licensed by the supreme court may practice law in this state or in any manner purported to be authorized or qualified to practice law.

SCR 10.03(4)(b) A court or judge in this state may allow a nonresident counsel to appear and participate in a particular action or proceeding in association with ~~an active member of the state bar of Wisconsin~~ an attorney licensed to practice in this state who appears and participates in the action or proceeding. An order granting nonresident counsel permission to appear and participate in an action or proceeding shall continue through subsequent appellate or circuit court actions or proceedings in the same matter, provided that nonresident counsel files a notice of the order granting permission with the court handling the subsequent appellate or circuit court action or proceeding.

SCR 10.03(5) (intro) Membership dues ~~and reduction of dues for certain activities~~.

SCR 10.03(6) Penalty for nonpayment of ~~dues~~ assessments. If the annual ~~dues or~~ assessments of any member remain unpaid 120 days after the payment is

due, the ~~membership of the member~~ member's license to practice law is suspended in the manner provided in the bylaws; and no person whose ~~membership~~ license is so suspended for nonpayment of ~~dues or~~ assessments may practice law during the period of suspension.

SCR 10.03(6m)(a) An attorney whose suspension for nonpayment of ~~annual membership dues for state bar operations or~~ assessments imposed by the supreme court has been for a period of less than three consecutive years shall be reinstated ~~as a member~~ by the ~~state bar board of governors~~ supreme court if he or she makes full payment of the amount owing and an additional payment of $20 as a penalty. The secretary of the state bar shall certify the reinstatement to the clerk of the supreme court.

SCR 10.03(6m)(b) An attorney whose suspension for nonpayment of ~~annual membership dues for state bar operations or~~ assessments imposed by the supreme court has been for a period of three or more consecutive years may file a petition for reinstatement with the supreme court. A copy of the petition shall be served on the board of bar examiners and the office of lawyer regulation. Separate payments in the amount of $200 each shall be made to the board of bar examiners and the office of lawyer regulation and shall accompany the petition. Within 90 days after service of the petition for reinstatement, the board shall make a determination regarding compliance and file its findings with the supreme court. Within 90 days after service of the petition for reinstatement, the director of the office of lawyer regulation shall investigate the eligibility of the petitioner for reinstatement and file a response with the supreme court in support of or in opposition to the petition.

Thus, if the court were to adopt the petition advanced by Attorney Levine, the State Bar would remain intact as an entity but membership would be voluntary. The SPC report raises some questions about the viability of this proposed structure. A voluntary bar would not have the same obligations to the supreme court as a mandatory bar and would no longer be required to manage or administer certain functions on behalf of the court.

How are Other State Bar Associations Organized?

It is useful to consider bar membership structures in other states. All 50 states have statewide bar associations. 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. The first wave of bar unifications occurred in the 1920s. The Hawaii State Bar Association was the most recent state to become integrated in 1989. Most integrated bars achieved their status by court rule. The legislature was involved in 13 cases (seven via joint legislative/court action and six via legislation only). With respect to our surrounding states, Illinois, Iowa, and Minnesota have voluntary bars.[15] Michigan has a mandatory bar.[16]

The State Bar of Wisconsin does not oversee lawyer admissions or discipline. In Wisconsin, since 1977, those activities have been handled by court agencies currently known as the Office of Lawyer Regulation and the Board of Bar Examiners. According to the State Bar, about half of the integrated bars administer lawyer admission and/or discipline. Other than the temporary suspension of mandatory State Bar membership by the Wisconsin Supreme Court from 1988-1992, it appears that no state bar association has converted from mandatory to voluntary status.

[15] 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.

[16] 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.

Funding and Dues Issues

All state bar associations support themselves, in part, with member dues revenues. Payment of dues and assessments, the cost of those dues and assessments, and the use of dues is inextricably intertwined with the question of voluntary membership. Some of these issues have come before the court in the form of rule petitions. See, e.g., Rule Petition 06-09, In the matter of amendment of Supreme Court Rule 10.03(3) relating to classes of membership in the State Bar; Rule Petition 08-27, In the matter of the petition of the United States Administrative Law Judges Appointed under 5 U.S.C. § 3105 to Amend SCR 10.03(3)(a); Rule Petition 09-08, Petition to Amend SCR 10.03(5)(b)1 filed 08/24/09 by Steven Levine and 42 other state bar members. Sometimes the issue presents in litigation. See, e.g., Kingstad v. State Bar of Wisconsin, 622 F.3d 708 (7th Cir. 2010). The court is familiar with these issues and they will not be discussed in detail in this memorandum.

The State Bar speculates that many members who state that they would favor a voluntary bar may think that a voluntary bar would reduce the cost of their membership. However, the State Bar reminds the court that a significant portion of the dues paid by members are actually assessments that are imposed by the supreme court to support court services, such as lawyer discipline and bar admission. All lawyers will have to pay these assessments even if a voluntary structure is adopted. It is unclear if the State Bar would continue to invoice and collect the assessments under a voluntary bar structure, or if that task would be assumed by the court.

The State Bar's FY2011 dues payment for active members was $224 for the eighth consecutive year. The mandatory assessments imposed by this court amounted to an additional $243 in FY2011 for a grand total of $467 for actively practicing lawyers ($155 for the Office of Lawyer Regulation, $13 for the Board of Bar Examiners, $25 for the Client Security Fund, and

$50 for WisTAF). The supreme court assesses an additional $25 on law firms (S.C., LLC or LLP).

A national comparison of 2009 state bar membership dues shows that the $224 dues imposed by the State Bar in fiscal year 2009 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. However, when mandatory assessments are also included in the national comparison, the State Bar total of $440 ranked 15th highest and was $37 above the national average.

DISCUSSION AND ANALYSIS

The court has indicated it understands the benefits the State Bar provides and the advantages to the bench, bar, and public of having an organization that encompasses all licensed attorneys. It also understands that some lawyers strongly object to being required to join and pay dues to an association for many reasons, including the fact that the association may support projects or policies the lawyer does not support. While use of mandatory dues remains an issue, the constitutionality of an integrated bar is established. Therefore, whether bar membership in Wisconsin should be mandatory is fundamentally a policy question. The court will likely wish to consider if the State Bar fulfills the legitimate objectives articulated by the Keller decision, its mandate and mission as articulated by this court in SCR 10.03, whether lawyers and the public would be better served by a voluntary bar, the practical effects of abolishing a mandatory bar, and if the cost and logistical aspects of reorganization would warrant such a change. Indeed, the court may find this characterization of the issue helpful:

> We should not be asking whether we should continue a "unified" bar. . . . [M]erely categorizing an organization as "unified" or "voluntary" is not meaningful because a wide variety of entities is included within each category. In

> fact, there may be greater differences among the entities in each category than there are between entities in the two categories.[17] We should be seeking the best possible way to ensure that all lawyers licensed in this state financially support those activities which this court views as "required" professional obligations without forcing lawyers to belong to or pay to support an association which engages in activities that are not true professional obligations.

Report of Committee to Review the State Bar, 112 Wis.2d xix, xxxvi, 334 N.W.2d 544, 555 (1983) (Abrahamson, J., concurring) (emphasis added).

The petitioners advance several key reasons they believe a mandatory bar is not warranted. Basically, they note that in Keller, 496 U.S. at 13-14, the court set forth the two activities which justify an integrated state bar and the collection of mandatory dues to support those activities: regulating the legal profession and improving the quality of legal services offered by members of the bar. In a nutshell, they contend the State Bar does not actually regulate the legal profession and question whether a mandatory structure is necessary to meet the goal of improving the quality of legal services.

First, the petitioners assert that the State Bar is not a regulatory agency like the Board of Bar Examiners or the Office of Lawyer Regulation. It is true that, unlike some other state bar associations, the State Bar neither licenses nor disciplines lawyers. The Board of Bar Examiners has authority over admission to the bar. See SCR 30.01. The Office of Lawyer Regulation administers discipline.[18] See SCR Chs. 21-22. Mandatory continuing legal education

[17] While a unified bar has two essential features, creation by court rule or legislation and licensure conditioned on the lawyer being a dues-paying member, bar unification is a continuum. At one extreme are unified bars carrying out the full range of traditional voluntary bar functions and at the other extreme are unified bars which, although technically compulsory membership organizations, serve only to maintain a registry, collect fees, and carry out certain regulatory functions. Schneyer, Unified but Ungovernable: A Case Study of the Wisconsin State Bar, p. 1, n. 1, passim (1983) (unpublished manuscript) (footnote in original per curiam decision).

[18] 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.

requirements[19] and in-house counsel registration are also administered by BBE, not by the State Bar. Indeed, it appears that in 1976 the court explicitly removed these responsibilities from the State Bar and placed them under the court's supervision to assure the public that lawyer discipline, bar admission, and regulating competence through continuing legal education would be conducted for the benefit of the public, independent of elected bar officials. See In re Regulation of the Bar of Wisconsin, 74 Wis.2d ix (1976); In re Regulation of the Bar of Wisconsin, 81 Wis.2d xxxv, xliv (1977). See also Matter of Discontinuation of the Wisconsin State Bar, 93 Wis.2d 385, 389-90, 286 N.W.2d 601 (1980) (Day and Callow, JJ., dissenting), and Report of Committee to Review the State Bar, 112 Wis.2d xix, xxxvi, 334 N.W.2d 544 (1983) (Abrahamson, J., concurring).

The petitioners concede that the State Bar does offer continuing legal education programs and publications designed to elevate the ethical and educational standards of bar members, but argue that "these programs and publications are supported by user fees and not by State Bar dues." State Bar-branded CLE programming is not funded by State Bar member dues. State Bar dues do fund the Ethics Hotline, WisLAP, Lawyer Dispute Resolution, Pro Bono programs, Practice 411, and the following committees and their respective programs: Legal Assistance, Professional Ethics, Professionalism, Bench/Bar, and the UPL Policy Committee. In addition, it is my understanding that the Young Lawyers Division and the Government Lawyers Division, which are supported by State Bar dues, also have educational programming.

The State Bar has evaluated the programs it provides and the SPC Report identifies a number of examples of State Bar services and programs they assert either regulate aspects of the

[19] In 1976 the court created the Board of Continuing Legal Education to administer mandatory legal education requirements for lawyers (now administered by the Board of Bar Examiners).

profession and/or improve the quality of legal services. These include the following, as described by the State Bar:

- Wisconsin Lawyers' Fund for Client Protection: This fund reimburses people who have lost money through dishonest conduct of Wisconsin attorneys.

- Ethics Advice: All members have access to free informal guidance in addressing Wisconsin's Rules of Professional Conduct for Attorneys.

- WisLAP (Wisconsin Lawyers Assistance Program): WisLAP provides confidential, meaningful assistance to lawyers, judges, law students and their families for coping with alcoholism and other addictions, depression, acute and chronic anxiety, and other problems related to the stress of practicing law.

- Legal Research Services: Free, unlimited access to Fastcase online legal research service and discounted access to LexisNexis®.

- Lawyer Dispute Resolution: This confidential service helps lawyers resolve, by mediation or arbitration, disputes involving such matters as law firm dissolutions, the termination or departure of lawyers from a firm and fee disputes between firms, while balancing the interests of lawyers, law firms and their clients.

- Fee Arbitration Program: The State Bar offers this informal and economic alternative to litigation for lawyers and clients who are unable to agree upon a fee charged for legal services.

- Convention: Over 1,000 members attending the largest annual gathering of lawyers in Wisconsin choose from more than 20 education sessions, gain valuable CLE credits, and network with leaders in the legal profession.

- CLE Books: Available in print, on CD and online to jump-start research, tackle a new area of law, or refine and sharpen existing skills.

- Lawyer Referral and Information Service: A resource for new lawyers seeking clients and an invaluable resource for citizens who need legal help (recently expanded to include a “modest-means panel”).

- Court-Related & Registration Services: The SBW registers and administers fees for LLC/LLP/SC law firms and acts as an official repository for paper copies of dues payment, trust account certificates and other information for all attorneys, including retrieval of records as required. The SBW also collects and remits mandatory fees imposed by the Supreme Court (in FY 2010 these assessments were: $148 for the Office of Lawyer Regulation, $18 for the Board of Bar Examiners, $16 for the Client Security Fund; and $50 for

WisTAF); this activity continues throughout the year and can include the mailing of second and third notices.

- CLE Seminars: The SBW's CLE Department, sections, divisions and committees offer a variety of practical seminars, presented year round and delivered in a variety of convenient ways. The SBW also has several Build Your Practice CLE Seminars, which cover the basics of various areas of practice, allowing members to get the information they need to succeed.

- CLE Ultimate Pass: A one-year subscription allows each subscriber unlimited access to attend any live, video, webcast, webcast replay, telephone, or CLE OnDemand seminar produced by the State Bar of Wisconsin CLE Seminars Division. These seminars include annual updates, national speakers, and the Build Your Practice series.

- InsideTrack: Published twice a month as a State Bar member benefit, this e-newsletter offers practice management tips to insight into legislative, court and other legal developments, as well as the latest in State Bar products and services.

- Client Training Resources: Law Office Videos allow members to prepare their clients for various legal situations including going to court, depositions, medical exams and more.

- Consumer Pamphlets: In addition to providing useful information to the public, these materials allow law offices to establish themselves as a resource the public can turn to for legal information.

- Fillable Forms Bank: The Fillable Forms Bank incorporates hundreds of forms, sample language documents, and checklists generated from the SBW's quality CLE Books, organized into 11 practice area libraries.

- Government Relations: The State Bar's Government Relations Team monitors legislation, Supreme Court activities and other developments in Washington and Madison of interest to members, advocates policy positions taken by the SBW and keeps members informed and engaged through its twice-monthly Rotunda Report e-newsletter, a legislative directory, a summary of SBW policy positions and by other means.

- Law Practice Management: Offers an array of law practice management resources through the Law Office Management Assistance Program (LOMAP).

- Law Student Web site: a site specifically designed for law students containing tips for succeeding in law school, intern information, placement options, and skills building programs to introduce students to the realities of practicing law.

- Pro Bono Program: The State Bar encourages members to accept pro bono cases by offering professional liability insurance, networking, expense reimbursement, training, grants, recognition and practical advice. SBW also organizes and supports such pro bono activities as Wills for Heroes.

- Law-related Education (LRE): This program helps educators, students and citizens understand and appreciate the legal system through a variety of programs and publications.

- Lawyer-to-Lawyer directory: More than 700 lawyers have agreed to share their knowledge of particular areas of the law with other lawyers through brief, 10-minute telephone consultations – free of charge.

- Wisconsin Lawyer Magazine: Designated by the Wisconsin Supreme Court as the official monthly publication of the State Bar, Wisconsin Lawyer carries notices of changes in court rules, and regulatory and administrative practice and procedure matters. It also provides information that directly aids and improves law practice and the delivery of legal services, including articles on changes in law, law-related trends and perspective on the practice of law in Wisconsin.

- State Bar Web site: Fast access to reliable, current information about a wide range of matters of interest to Wisconsin lawyers.

- Wisconsin Law Foundation: Founded in 1951, the WLF is dedicated to enhancing, promoting, funding and developing charitable and educational programs to promote public understanding of the law.

- Wisconsin Lawyer Directory: Every member receives a copy of the Wisconsin Lawyer Directory, published annually in January.

In addition, the State Bar has identified a number of services it provides to or on behalf of this court. These include:

- Publish public notices of the Supreme Court;
- Maintain official electronic records of attorneys and license status;
- Collect and remit mandatory fees imposed by the Supreme Court;
- Register LLC/LLP/SC law firms;
- Act as an official repository for paper copies of dues payment, trust account certificates and other information for all attorneys;
- Act as an official repository for local court rules;
- Administer "deadbeat parent" legislation; and
- Administer the Wisconsin Lawyers Fund for Client Protection.

The petitioners respond that voluntary bars across the country also offer such services to their members. The petitioners state:

> Twenty-one states in this country have voluntary state bar associations, including three of Wisconsin's neighboring states. The State Bar of Wisconsin should be able to survive and prosper as a voluntary state bar. At the same time, a voluntary State Bar of Wisconsin would preserve the freedom of speech and association of all Wisconsin lawyers – a priceless and irreplaceable freedom.

Memorandum in Support of Petition at 7. Indeed, petitioners remind the court that their petition "is motivated primarily by the intent to allow Wisconsin attorneys the precious right to choose for themselves which organizations they wish to belong to." Memorandum in Support of Petition at 5.

Many Lawyers Want a Voluntary Bar

There is evidence that a significant number of Wisconsin attorneys favor a voluntary bar. Indeed, the petitioners assert that a majority of State Bar members favor a voluntary bar. In particular, they note that four of the last seven State Bar presidents-elect elected since 2005 have advocated a voluntary bar as part of their campaigns. Here are results of those elections:

2005	2008	2009	2010	2011
Dietrich 36.9%	Bertz 31.2%	**Boll** 53.2% (Voluntary)	**Brennan** 33% (Mandatory)	**Klein** 55% (Voluntary)
George 22.9%	**Kammer** (Voluntary) 35.4%	Troupis 46.8% (Voluntary)	Sarah Fry Bruch 11.1% (Voluntary)	Carney 45%
Levine (Voluntary) 40.3%	Knudson 33.4%		Margaret Wrenn Hickey 29.6% (no position)	
			Jay A. Urban (Voluntary) 26.3%	

The State Bar cautions against deeming these election results a mandate on the voluntary bar issue. They note that while the voluntary/mandatory bar question is an issue, these are not single issue elections. The outcome of certain elections (particularly the 2005 and 2008

elections) was also influenced by the tradition of rotating the election between Madison, Milwaukee and "outstate" locations and that the prevailing candidate obtained a plurality, not a majority of votes in those elections. Moreover, between 2000 and 2009, voter turnout for State Bar elections has ranged from only about 26% to 33%. However, there is certainly evidence that members of the bar are divided on the question, as they have apparently been since the bar was integrated in 1956.

Finally, the petitioners assert that a voluntary State Bar would be a more independent bar, freer to take positions in the best interests of the public and its own members. They do not develop this argument in the written materials filed with the court, but it is echoed by the comments of individual members who responded in favor of a voluntary bar. Notably, a voluntary bar may establish a political action committee and individual committees or entities might be permitted to lobby the legislature or petition the court directly under a revised structure.

The Practical Effect of Converting from a Mandatory to Voluntary Bar

The petition before the court states that it would: (1) remove the requirement that attorneys admitted to practice in Wisconsin pay mandatory dues to the State Bar, (2) eliminate the Keller dues rebate rule and bylaw (which would become unnecessary for a voluntary bar because, by definition, all dues paid would be voluntary), and (3) would retain the current structure of the State Bar of Wisconsin "in all other respects."[20] Considering the practical

[20] The petitioners assert that their proposal

> . . . preserves the Bar's present administrative functions of registering and billing all lawyers licensed to practice law in Wisconsin, such as collecting supreme court assessments for BBE, OLR, and WisTAF, as well as collecting trust account information and administering the Wisconsin lawyers' fund for client protection, SCR 12.04, 12.05. The State Bar would continue these and all other similar administrative functions without interruption. This continuing structure would also allow the State Bar access to the data base of lawyers admitted to practice in

ramifications of the petition raises the practical issue of how expensive de-unification would be for Wisconsin lawyers and for the court. See, e.g., Felmly, Where Have We Been – Where Are We Headed, supra (evaluating cost of potentially de-unifying New Hampshire bar and noting "[t]here is no serious question that the wide range of 'bundled' services and resources for New Hampshire lawyers under the funding available with mandatory membership will not be afforded in a voluntary bar model with limited participation by New Hampshire lawyers. The changes in services and programs available to New Hampshire lawyers could be dramatically contracted under a voluntary bar format.").

There are questions about the extent to which the current structure of the State Bar could be maintained if the court opted to end mandatory bar membership. The petition filed with the court does not analyze, in detail, how the petition would affect the State Bar, its structure, finances and the services it provides. The State Bar has not been asked to respond formally to the court on that question. However, the SPC Report indicates that it consulted with the ABA, Division of Bar Services staff and reports that at present, no voluntary associations are controlled by their respective courts so certain organizational relationships between the court and the bar would likely require restructuring.

According to the SPC Report, all voluntary bars are structured under Section 501(c)(6) of the Internal Revenue Code.[21] The SPC Report considered the tax consequences of this structure

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> Wisconsin, should the Bar seek to solicit those attorneys to join the Bar, and for other purposes, such as notice of CLE programs.

Memorandum in Support of Petition at 5. However, a voluntary bar would not be required to manage these tasks on behalf of the court so many of these services might be assumed by the court or would require a contractual arrangement with the bar association.

[21] According to the IRS website, a business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. Trade associations

as opposed to the existing mandatory structure, noting that the State Bar currently does not pay any taxes (sales, income, property, etc). Section 501(c)(6) provides for the exemption of business leagues, chambers of commerce, real estate boards, boards of trade and professional football leagues, which are not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual. Thus, as a 501(c)(6) organization a voluntary state bar should not be subject to any of those taxes except for any income that would be considered "Unrelated Business Income." The State Bar asserts that this would be a small amount (e.g., it would include income that isn't related to the tax exempt purpose of the organization and would not include CLE or dues income).

Membership rates and, consequently, dues received would likely decline

According to the SPC Report, on average, in voluntary bar states 66% of eligible lawyers are members – ranging from a low of 32% in Massachusetts to 92% in Iowa. However, the SPC Report notes that "these data should be used with caution" because Iowa, for example, does not include some attorneys (e.g., public sector lawyers) in its computation of the total number of eligible lawyers in the state.

More specifically, the State Bar predicts that 50% of government lawyers would not remain members of a voluntary organization. At the time of the SPC Report, approximately 11.2% of State Bar members are "publicly employed" (2,604 out of 23,426). The SPC Report

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and professional associations are business leagues. To be exempt, a business league's activities must be devoted to improving business conditions of one or more lines of business as distinguished from performing particular services for individual persons. No part of a business league's net earnings may inure to the benefit of any private shareholder or individual and it may not be organized for profit to engage in an activity ordinarily carried on for profit (even if the business is operated on a cooperative basis or produces only enough income to be self-sustaining). The term "line of business" generally refers either to an entire industry or to all components of an industry within a geographic area. It does not include a group composed of businesses that market a particular brand within an industry.

notes that membership in the Government Lawyers Division is 3,334, but some attorneys work in public sector (e.g., as municipal attorneys) but remain in private practice. A decrease in non-resident lawyer membership is also presumed on the theory that some non-resident lawyers have only maintained their current membership in order to retain their Wisconsin law license.

The petitioners respond that the State Bar could minimize its membership losses.

> For example, the State Bar offers Fastcase – an electronic legal research system – to members at no charge. A Wisconsin lawyer who uses electronic legal research may choose to join for this benefit alone, as State Bar membership dues might be less expensive than purchasing such a system privately. Additionally, by differentially pricing its CLE programs and publications, the State Bar can make it more economical for a lawyer to join the Bar than to pay the extra differential for CLE. If a non-member is charged just $15 more per credit for 15 credits of CLE programs than is a State Bar member, it would be more economical for that non-member to join the State Bar and be eligible for CLE at the reduced member price. By using a bit of originality and creativity, the State Bar might be able to minimize membership losses.

Memorandum in Support of Petition at 6-7.

There would, however, be fiscal consequences to reduced membership. The Finance Committee comment in the SPC Report indicates that under a voluntary bar, assuming a one-third reduction in membership, dues revenues would likely decline between $1,246,539 and $1,418,476. Compared with the overall existing State Bar budget this would likely be a 10% to 12% decline in dues revenue.[22]

As petitioners note, Keller rebates which are administratively unwieldy and subject to expensive litigation would no longer be required under a voluntary bar. Those rebates averaged $47,500 over the past four years.

[22] The Finance Committee also reported that if a "single membership rate" was adopted – i.e., one rate for all members rather than differing rates for active, inactive, judicial, judicial non-voting, emeritus members, that would result in a dues reductions between $562,244 and $772,733. The SPC Report does not discuss the existing State Bar Center in much detail but notes that it was financed with both dues and contributions.

The Finance Committee also estimated that investment income earned on the funds collected and held by the State Bar for OLR, BBE, and WisTAF would decline by about $33,800 annually. The Finance Committee was also mindful that a voluntary bar "might not be authorized by the Court to set and collect registration fees, amounting to about $30,000 annually, from firms operating as limited liability companies" and would be required to file a federal and state tax and information return, creating an additional expenditure of about $5,000 annually.

Impact on State Bar (and Affiliated) Entities

The State Bar requested feedback regarding the potential impact of conversion to voluntary bar on various State Bar (and affiliated) entities. Many of the entities comment that the impact was difficult to assess absent specific information about the structure of a voluntary bar. Nonetheless, several consistent themes emerged: reduced membership was anticipated and would likely correlate with reduced services. Services would, presumably, only be available to members and several entities raised questions about how it would evaluate membership before providing services. Most of the committees and departments (i.e. the Public Education Committee) indicated they would expect to maintain the same mission and focus under either structure.

A voluntary bar may establish a political action committee and individual committees or entities might be permitted to lobby the legislature or petition the court directly under a revised structure.[23]

[23] The Legislative Oversight Committee (LOC) notes that all voluntary state bar associations have practice sections and 94% of these impose some guidelines on sections regarding lobbying; 17% of voluntary state bars permit sections or committees to adopt positions separate from the bar on federal legislation; and 33% of voluntary bars permit sections or committee to adopt positions separate from the bar on state legislation.

The court may wish to note the following predictions or concerns expressed by various bar entities, some of which could have a fiscal impact on the courts:

Client Protection Fund. Based on experience with other voluntary bar states, the client protection fund would probably become a court-administered program.

Publications. SCR 10.12 provides that:

> Wisconsin bar bulletin or its successor is the official publication of the State Bar of Wisconsin. All official notices shall be published therein or mailed first class to members entitled thereto at their address of record. Such publication shall constitute notice to all members. The publication shall be sent by mail to all members at their address of record.

Changing to a voluntary bar would affect who has access to State Bar publications and information including open access to all electronic content (i.e. verifying lawyer license status on-line), the Wisconsin Lawyer, the Wisconsin Lawyer Directory and WisBar InsideTrack. Indeed, the Wisconsin Lawyer would cease to be the only publication that reaches every Wisconsin-licensed lawyer.

Under a voluntary bar scenario the State Bar would, presumably, no longer be required to publish notices required by SCR 10.12. The State Bar would choose what information it would communicate to its members and how it would be published. The supreme court, rather than the State Bar, might assume responsibility for disseminating official notices to all Wisconsin-licensed lawyers. This might entail acquiring the software that the State Bar uses to maintain its database of all licensed attorneys or (given the cost of the software and staff to maintain the database) entering into a contract with the State Bar to retain access to that information database.

Committee on Professional Ethics. The Committee on Professional Ethics expressed concern about its ability to maintain the Ethics Hotline noting: (1) it is not clear how the Ethics Committee would be able to discern or limit its services only to voluntary bar members; (2) it is unclear how the Ethics Committee could, in good conscience, limit its services to only voluntary

bar members when such services provide a way that public concerns are met by addressing the ethical conduct of Wisconsin lawyers; and (3) the Ethics Hotline is not an income generator for the State Bar because there is no real mechanism to charge a fee for lawyers who access the Ethics Hotline, and it is likely that lawyers would not access the Ethics Hotline if they were required to pay a fee. The Committee notes that rural, solo practitioner and small firm attorneys tend to make greater use of the Ethics Hotline.

Public Image Committee (PIC). The PIC noted that restrictions on the use of State Bar funds created by Keller, 496 U.S. at 13-14, would no longer apply, thereby expanding the range of issues that could be addressed by PIC and removing the threat of further litigation testing the application of Keller restrictions to PIC activities. The PIC does not estimate the cost savings of eliminating this type of litigation.

Wisconsin Lawyer's Assistance Program (WisLAP) Committee. WisLAP expressed concern about its relationship with the court under a voluntary structure. Currently, WisLAP works with courts both directly and indirectly – it assists with the Monitoring Program in conjunction with the Board of Bar Examiners and the Office of Lawyer Regulation. In addition, WisLAP notes that it is not clear if or how a voluntary bar-funded program would limit assistance to members, especially when providing assistance for a member might necessarily involve working with non-members. WisLAP expressed concern that if funding did not come from a mandatory bar or the courts, the program might cease to exist.[24]

[24] WisLAP is fully funded as a member-service of the State Bar of Wisconsin. The FY10 budget was $176,131 -- the operating budget for a stand-alone organization would be at least $200,000 because the cost of many operating expenses could not be shared.

Young Lawyers Division (YLD). The YLD expressed concern that "[m]oving to a voluntary bar may impact the YLD's objectives by requiring it to focus more on member benefits and less on public service and pro-bono programming."

Wisconsin Law Foundation (WLF). WLF assumes it would be merged into the Wisconsin Bar Association if the Wisconsin Bar Association became a voluntary membership organization.

Administration & Finance Department. The Administration and Finance Department notes that agreements impacting intellectual property ownership, benefit plan administration, in-house printing services, affinity services for members, software licensing, bank line-of-credit, facility maintenance, etc., would have to be reviewed and adjusted.

Many states do successfully operate under a voluntary bar association model. The petitioners respond to concerns about the viability of the State Bar of Wisconsin as a voluntary bar, noting that:

> The state bars of our neighboring states of Minnesota, Iowa, and Illinois, are active, vibrant, voluntary state bars, as are the voluntary state bars of an additional 18 other states.[25] . . . We see no reason why the State Bar of Wisconsin cannot operate as ably as these other voluntary bars. By offering high quality, more economical services to members, the State Bar of Wisconsin should be able to attract a high percentage of Wisconsin lawyers to membership.

Memorandum in Support of Petition at 6. These voluntary bar associations have pro bono programs, law related education, and member services while maintaining the independence of lawyers. The question, as articulated by one New Hampshire lawyer, is "which model will

[25] According to bar officials, the Minnesota bar's membership is about 16,000 members, or about 68 percent of the total lawyers in Minnesota, while the Iowa bar's membership is about 91 percent of the total lawyers in Iowa (8,159 members of a total of about 9,000 lawyers in the state). Illinois is difficult to quantify, because there are two large voluntary bars in Illinois, the Illinois State Bar Association (about 30,000 members) and the Chicago Bar Association (about

enable the profession to respond to great change while remaining true to the principles at the core of our legal system, yet continue to safeguard and enhance the personal freedom of expression which lawyers hold dear?" Felmly, Where Have We Been – Where Are We Headed, supra.

CONCLUSION

The debate over mandatory bar membership is not new and has continued, more or less unabated, since the court reinstated the mandatory bar in 1992. See In the Matter of the State Bar of Wisconsin: Membership, 169 Wis. 2d 21. Recently, significant resources have been invested in evaluating the perspectives of Wisconsin lawyers regarding the mandatory bar as well as assessing the potential impact of a transition from mandatory to voluntary bar on lawyers, the courts, the bar, and the public. The court is now directly presented with another opportunity to revisit the question whether to maintain a mandatory bar in Wisconsin. Whether membership in the state bar of Wisconsin should be a condition of practicing law in Wisconsin is a policy decision for this court so I will not offer a recommendation regarding this petition.

20,000 members) of a total lawyer count of 90,000, but some lawyers belong to both voluntary bars (footnote in original).

A REASSESSMENT OF MANDATORY STATE BAR MEMBERSHIP IN LIGHT OF *LEVINE V. HEFFERNAN*

I. INTRODUCTION

Legal and political divisiveness has been the hallmark of the integrated bar[1] since its initial appearance over a half-century ago.[2] Integrated bar states[3] have frequently encountered opposing viewpoints from lawyers who have objected to the constitutionality of compulsory membership in an association. In no place has this debate been more vigorous than in Wisconsin. In fact, shortly after Wisconsin established its own integrated bar,[4] furor by attorneys over compelled financial support of the bar resulted in a lawsuit which challenged its constitutional validity. In *Lathrop v. Donohue*,[5] the United States Supreme Court held in a plurality opinion,[6] that

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1. The phrase "integrated bar" has been used synonymously with terms such as "unified bar," "mandatory bar," or simply "state bar." Two characteristics are germane to every integrated bar association: First, dues-paying membership is a precondition to practicing law in a state that has such a bar; and second, the bar is created by court rule or by legislation. *See* D. MCKEAN, THE INTEGRATED BAR 22 (1963); Comment, *The Integrated Bar Association*, 30 FORDHAM L. REV. 477 (1962).

2. The first integrated bar association was established in North Dakota by legislative enactment in 1921. For a complete list of other states with integrated bar associations, see *infra* note 3.

3. The following states have integrated bar associations: Alabama (integrated in 1923), Alaska (1955), Arizona (1933), California (1927), Florida (1949), Georgia (1963), Idaho (1923), Kentucky (1934), Louisiana (1940), Michigan (1935), Mississippi (1932), Missouri (1944), Nebraska (1937), Nevada (1929), New Hampshire (1968), New Mexico (1925), North Carolina (1933), North Dakota (1921), Oklahoma (1939), Oregon (1935), South Carolina (1967), South Dakota (1931), Texas (1939), Utah (1931), Virginia (1938), Washington (1933), West Virginia (1945), Wisconsin (1956) and Wyoming (1939). The District of Columbia was integrated in 1972. The territory of Puerto Rico was integrated in 1932 and the Virgin Islands were integrated in 1956. Nineteen states have no integrated bar: Arkansas, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee and Vermont. *See* PARNESS, CITATIONS AND BIBLIOGRAPHY ON THE UNIFIED BAR IN THE UNITED STATES 3-4 (1973). Montana was integrated in 1974. *See* Application of the President of the Montana Bar Association, 163 Mont. 523, 518 P.2d 32 (1974). Rhode Island was integrated in 1973. *See* Petition of the Rhode Island Bar Ass'n, 111 R.I. 936, 306 A.2d 199 (1973).

The trend of unification is evidenced by the number of jurisdictions which unified each decade: six jurisdictions unified in the 1920s, fifteen in the 1930s, three in the 1950s, three in the 1960s, and three in the 1970s. *Id.*

4. In 1956, the Wisconsin Supreme Court unified the bar on an experimental basis. *See* Integration of the Bar, 273 Wis. vii, 79 N.W.2d 441 (1956); *In re* Integration of the Bar, 273 Wis. 281, 77 N.W.2d 602 (1956). In 1958, the Court extended its 1956 unification order indefinitely. *See In re* Integration of the Bar, 5 Wis. 2d 618, 93 N.W.2d 601 (1958).

5. 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961).

6. 367 U.S. 820 (1961) (Brennan, J., majority opinion). Concurring opinions were submitted by Justice Harlan and Justice Whittaker. Justice Douglas and Justice Black dissented.

Wisconsin's mandatory bar membership requirement did not violate the plaintiff's first amendment right not to associate with the state bar.[7] Supporters of the integrated bar movement hoped that the Court's pronouncement in *Lathrop* would silence critics once and for all. However, opposition to the integrated bar in Wisconsin and in other states has persisted.[8]

In 1988, lawyers opposing the integrated bar won an important victory when a United States District Court declared Wisconsin's mandatory bar membership requirement unconstitutional in *Levine v. Supreme Court of Wisconsin*.[9] The district court ruled that *Lathrop* was no longer determinative in assessing the constitutional propriety of Wisconsin's mandatory bar for two reasons.

First, in subsequent Supreme Court decisions in which freedom of association was an issue, the Court typically required that the state demonstrate a compelling interest in abridging the rights of its citizens, rather than the lesser requirement of a legitimate state interest analysis applied in *Lathrop*.[10] Second, because the character of the Wisconsin bar had changed significantly since *Lathrop*, that case was factually distinguishable from the current controversy.[11] Concluding that *Lathrop* was no longer dispositive on the issues, the district court applied a compelling state interest analysis to the first amendment infringement and determined that compulsory bar membership was unconstitutional.[12]

On appeal to the United States Court of Appeals for the Seventh Circuit, the court reversed the district court decision, concluding that *Lathrop* remained the controlling authority on the issue of integrated bar associations.[13] Nevertheless, the court concurred with the district court that the State Bar of Wisconsin had changed significantly since *Lathrop*.[14] Moreover, the court of appeals stated that "[i]f Wisconsin's present integrated bar is substantially similar to its predecessor, *Lathrop* compels us to conclude that it serves a legitimate state interest."[15] Unfortunately, the court of appeals never made an adequate comparison of the past and present bar

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7. *Id.* at 843.

8. *See infra* note 119 for a list of cases raising compulsory bar membership issues.

9. 679 F. Supp. 1478 (W.D. Wis. 1988) (Crabb, C.J.), *rev'd sub nom.* Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989).

10. 679 F. Supp. at 1493-94.

11. *Id.* at 1494.

12. *Id.* at 1502.

13. 864 F.2d 457 (7th Cir. 1988) (Flaum, J.).

14. *Id.* at 458 ("Since *Lathrop* was decided, the character of the Wisconsin bar has changed considerably.").

15. *Id.* at 462.

associations. Consequently, some doubt remains concerning whether *Lathrop* is indeed factually distinguishable from the *Levine* decision.

This Comment will first address the history of the integrated bar and the underlying policy concerns which culminated in its nationwide implementation. Special attention will be given to the integrated bar's evolution in Wisconsin, including a discussion of events before and after the *Lathrop* decision. Part Three of the Comment will explore the constitutional implications raised by compulsory membership in an association. Part Four provides a discussion of the issues raised by the district court in *Levine* as well as a critique of the court of appeals decision. Finally, this Comment will conclude with an assessment of the efficacy of the integrated bar and a recommendation that states opt for voluntary bar status.

II. BACKGROUND

A. History of the Integrated Bar

The national movement for unification of bar associations began in 1914. The principal advocate of the movement was Herbert Harley, founder and executive secretary of the American Judicature Society.[16] Harley believed that voluntary bars were "entirely inadequate to the needs of the lawyer from either the standpoint of self-interest or from the standpoint of public service."[17] He asserted that bar associations should promote "social intercourse," political involvement in "statecraft," and the "need for education of the bar, for its proper discipline, and for the conduct of its business."[18] Harley deemed that the best means to achieve those purposes was to "[weld] all the lawyers of a state into one closely knit organization."[19] In retrospect, Harley had good reasons to argue for bar integration.

First, the membership rate in state bar associations of the nineteenth and early twentieth century was low. For example, as compared to the medical societies of twenty-five states in the late 1920s, which had more than two-thirds of their state's doctors as members, membership in volun-

16. The integrated bar movement in the United States was considered to have commenced in 1914 when Harley delivered a speech to the Lancaster County Bar Association in Lincoln, Nebraska on December 28, 1914. *See* D. MCKEAN, *supra* note 1, at 30-37. For the complete text of Harley's speech, see Harley, *A Lawyer's Trust*, 29 JUDICATURE 50 (1945); Sorenson, *The Integrated Bar and the Freedom of Nonassociation — Continuing Seige*, 63 NEB. L. REV. 30, 34 (1984); Comment, *Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis*, 66 NEB. L. REV. 762, 767 (1987).

17. Harley, *supra* note 16, at 51.

18. *Id.* at 51-52.

19. *Id.* at 56.

tary bar states during the 1920s included only ten percent to thirty percent of the practicing lawyers.[20] Such low membership was inexplicable considering that most bar associations were not selective with respect to whom they admitted.[21] However, since Harley's time, membership in voluntary bar states has improved tremendously.[22]

Second, early state bars had a difficult time maintaining membership stability. Sudden fluctuations in the rank and file resulted in disintegration or reorganization of many associations.[23] Although unpredictable loss in membership is still a problem today, fluctuations are usually small. Typically, losses in membership tend to be a manifestation of a protest against a bar program or decision. Although integrated bars are able to avoid the membership instability that voluntary bars sometimes experience, they are by no means insulated from other sources of instability.[24]

Third, without members, bar associations were also deprived of their greatest source of revenue. Absent modern sources of income, such as advertising, membership dues were the only source of income available for state bars to use. Consequently, dues revenues in the statewide associations of the early twentieth century were insufficient to sustain their programmatic needs.[25] However, when voluntary bars began to integrate, revenues

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20. *See* Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 8.

21. *Id.* One explanation was that lawyers failed to join because activities concerning the administration of justice were not the subject of bar meetings; rather, they were viewed as social clubs. *Id.* According to Harley, the bar was too fragmented from differences in the lawyer's work; the trend toward specialization was antithetical to lawyer solidarity. *Id.* at 9. Professor Schneyer has criticized this argument for two reasons. First, the medical profession was more fragmented and specialized and yet retained two-thirds of its members. Second, membership in the voluntary bar has improved over the years. *Id.* at 9-10.

22. *Id.* at 10. As of February 28, 1989, membership in the voluntary bars in the following Midwest states averaged approximately 85%: Illinois (82% - phone conference with Janet Paul of the Illinois State Bar); Iowa (89% - phone conference with Craig Gaare of the Iowa State Bar); Indiana (83% - conversation with Donna Lucas of the Indiana State Bar); Wisconsin (87% - phone conference with Julie Chrisler of the State Bar of Wisconsin).

23. *See* R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 271-72 (1953); Schneyer, *supra* note 20, at 12.

24. Professor Schneyer has suggested that where the exit from an association is foreclosed, members will be more likely to be vocal and obstructive to policies which they personally find objectionable. *See* Schneyer, *supra* note 20, at 13. Schneyer cites Wisconsin's attempt to assess members a fee for an advertising campaign. Dissident members petitioned the state supreme court, which subsequently prohibited the bar from the levying of the assessment. *Id.* (citing *In re* Petition to Review Change in State Bar Dues, 86 Wis. 2d xv (1978)).

25. *See* Schneyer, *supra* note 20, at 13-14. Modern bar associations gain revenue through selling advertising in their state bar journals, seminar registration fees, admission fees for conventions, and investments. For a list of revenue sources for the Wisconsin State Bar, see State Bar of Wisconsin, *A Year of Introspection*, 61 WIS. B. BULL. 33, 35 (Nov. 1988).

increased significantly.[26] Despite this fact, it is debatable whether integration has made it easier for state bars to collect revenue. One mistaken belief about revenue generation is that some lawyers in integrated bars would be more content to pay higher dues if they knew that all other lawyers would be making a similar sacrifice. In reality, integration gives a voice to the portion of a state's lawyers who do not want to be dues-paying members. As a result, proposals for increases in dues have been met with great resistance.[27] Similar problems are not readily apparent in voluntary bar states. In fact, dues in voluntary bar states tend to be higher than in integrated bar states.[28]

B. The Purposes of Integration

Not only was integration touted as the solution to membership and revenues problems common in the voluntary bar, the integrated bar was promoted as a means of allowing lawyers to speak with one voice on legislative issues and also "weed the profession of its unworthy members."[29] However, more recent events have suggested the integrated bar's ineffectiveness in meeting the goals for which it was originally established.

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26. For example, in 1929 the integrated North Dakota bar raised more money than the demographically similar, but yet to be integrated, South Dakota bar. North Dakota also spent four times as much on discipline. *See* Am. Judicature Soc'y, *Cost of Running State Bar*, 13 J. AM. JUDICATURE SOC'Y 185 (1930).

27. In 1976, the State Bar of Wisconsin petitioned the supreme court to increase the maximum dues amount from $40 to $100. However, the supreme court merely increased dues to $60 due to strong opposition by the membership and appointed a committee to study the bar activities and governance. The following year, the bar renewed its request for the $100 dues amount but the court refused, although it did authorize a separate $30 assessment to support newly created regulatory agencies. *See In re* Regulation of the Bar, 81 Wis. 2d xxxv (1977). In 1980, the District of Columbia Bar Board of Governors proposed an increase in the dues ceiling from $50 to $150. After a large segment of the bar vigorously protested, a subsequent referendum of the members recommended a ceiling increase of not greater than $75. *See* Petition to Amend Rule 1 of the Rules Governing the Bar, 431 A.2d 521, 525-26 (D.C. 1981); *see also In re* Amendment to Integration Rule, Article VIII, Subsection 1 (Dues), 416 So. 2d 1124 (Fla. 1982) (refusal by the court to further raise the dues ceiling for future years); Douglas v. State Bar, 183 Mont. 155, 598 P.2d 1080 (1979) (court reinstates its own authority to approve or disapprove future dues increases).

28. In 1987, Wisconsin's annual dues were $115. In neighboring Illinois, dues were $160, in Iowa $150, and in Minnesota $115. Only in Indiana were dues lower ($95). *See* ABA, BAR ACTIVITIES INVENTORY Tab C (1987).

29. *See* Schneyer, *supra* note 20, at 15 (quoting 1 REP. ST. B. ASS'N. WIS. 5, 6, 9 (1878) (address of Chief Justice Ryan)).

1. Law Reform

The voluntary bar was criticized as an association that had little influence in the legislative arena.[30] This resulted in many integrated bar advocates promoting "improv[ement] [in] the administration of justice" as a formal purpose of the integrated bar.[31] One of the primary justifications for the integrated bar's involvement in the lawmaking process was that its work advanced the public interest because it limited itself to subjects involving purely technical expertise.[32] However, the parameters in which a state bar could engage in such activity allowed it to go beyond merely technical legal issues. For example, the Wisconsin Supreme Court has permitted the State Bar of Wisconsin ("State Bar" or "Bar") to take positions on legislation only in areas pertaining to the "administration of justice, court reform, and legal practice."[33] Admittedly, while some activities were indeed technical, the Wisconsin State Bar assumed an active role in other areas which were highly political and yet pertained to the administration of justice.[34] Nevertheless, despite the latitude the State Bar has on administration of justice issues, further court restrictions on legislative position-taking may not be possible.[35]

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30. "It is . . . common knowledge that any bill proposed by the Association has usually met defeat." *See* Schneyer, *supra* note 20, at 25 (quoting Hudnall, *Address of George B. Hudnall, President State Bar Association of Wisconsin*, 12 REP. ST. B. ASS'N. WIS. 77, 78 (1916)). *But see* Vanderbilt, *Past, Present and Future of the Legal Profession*, 20 J. AM. JUDICATURE SOC'Y 208, 209 (1937) (A unified bar has "standing with the bench, the chief executive, the legislature and the public generally that it has nowhere else attained.").

31. *See* E. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 6 (1954).

32. *See* Harley, *Organizing the Bar for Public Service*, 8 J. AM. JUDICATURE SOC'Y 72, 79 (1924); Schneyer, *supra* note 20, at 30.

33. Lathrop v. Donohue, 10 Wis. 2d 230, 239, 102 N.W.2d 404, 409 (1960), *aff'd*, 367 U.S. 820 (1961).

34. Professor Schneyer highlights the position the State Bar took with regard to no-fault automobile insurance. Schneyer characterized it as a "foray into plain old politics." *See* Schneyer, *supra* note 20, at 32. Another sensitive topic which has created problems elsewhere is the Wisconsin bar's involvement in tort reform. During 1987-88 for example, the Bar's committee on tort law recommended opposition to several tort reform proposals introduced to the Wisconsin legislature, while drafting its own proposals. *See* State Bar of Wisconsin, *A Year of Introspection*, 61 WIS. B. BULL. 20, 30 (Nov. 1988). Bar involvement in tort reform was the subject of a court challenge in New Hampshire. *See In re* Chapman, 128 N.H. 24, 509 A.2d 753 (1986); *see also* Hollar v. Government of the Virgin Islands, 857 F.2d 163, 170 (3rd Cir. 1988) (endorsement of the candidacy of a potential United States attorney); Levine v. Supreme Court of Wisconsin, 679 F. Supp. 1478, 1483 (W.D. Wis. 1988), *rev'd sub nom.* Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989) (among other items, a resolution voted upon and passed by the board of governors opposing apartheid in South Africa).

35. Professor Schneyer argues that further limitations may not be possible in light of two policy considerations:

2. Raising Professional Standards

The most important goal of the integrated bar concerned the upgrade of admission standards and discipline.[36] As law practice became more concentrated in cities and more specialized,[37] lawyers had to rely less on their personal reputations and more on marketing their expertise to unknown persons;[38] consequently, "policing institutions which could establish the bar's general trustworthiness became more valuable."[39]

Although most lawyers felt that more rigorous admission standards would increase client confidence, the greatest criticisms were aimed at the primitive attorney discipline process.[40] Courts were willing to disbar lawyers for egregious behavior but were unwilling to impose sanctions for minor offenses. Some local bar associations did retain grievance committees, but the influence of the committees was minimal due to a lack of legitimacy, funding and subpoena power.[41] Integrating the state bar was considered the most effective method of curtailing these problems since an integrated state bar would have adequate funding for investigatory and disciplinary proceedings. Moreover, in its official capacity, the integrated bar would be capable of establishing binding ethics rules, disciplinary sanctions, and an infrastructure for adjudicating grievances.[42]

> First, even under the state bar's rather broad authority, there has been more handwringing and dissension over "jurisdictional" issues than one finds in voluntary bar associations. If new restrictions were tighter but no more precise than the present ones, still more time and energy would be consumed in jurisdictional squabbles. Yet the line between technical law reform and other legislative subjects seems too elusive to permit more precise guidelines . . . .
>
> Second, the state bar has considered itself to be prohibited from addressing some fundamental questions concerning our legal and constitutional order. If such questions are inappropriate for a state bar, they are nonetheless questions that lawyers, like other citizens, are entitled under the First Amendment to address collectively. Tighter subject-matter limits would widen the gap between what the state bar may address and what lawyers are entitled to address collectively.

Schneyer, *supra* note 20, at 33-34 (footnote omitted).

36. *See* R. POUND, *supra* note 23, at 253-69.

37. J.W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 297-301 (1950).

38. M. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 6 (1977).

39. *See* Schneyer, *supra* note 20, at 16.

40. *See* Schneyer, *supra* note 20, at 16-17. Wisconsin Bar President Claire Bird was sharply critical of the lack of binding rules to govern the practice of law and the deficient lawyer discipline machinery. *See* Bird, *This Association: What Can It Be and Do?*, 10 REP. ST. B. ASS'N WIS. 193, 194 (1914).

41. *See* Schneyer, *supra* note 20, at 17 (citing Bird, *This Association: What Can It Be and Do?*, 10 REP. ST. B. ASS'N WIS. 193, 201 (1914)).

42. *Id.* at 17-18 (citing Bird, *This Association: What Can It Be and Do?*, 10 REP. ST. B. ASS'N WIS. 193, 203 (1914)).

The integrated bar brought some improvement in policing the profession, but not to the degree the early visionaries had foreseen. Most state bars "were never given a significant role in defining admission standards, preparing and grading bar examinations, or performing character investigations."[43] In discipline, the promulgation of ethics rules was undertaken by the state supreme courts, which adopted the American Bar Association standards instead of logically designed rules.[44] In disciplinary enforcement, courts were reluctant to be bound by state bar fact-finding and often exercised their own judgment when enforcing punishment for misconduct.[45] Additionally, courts and legislatures also began to exercise their rulemaking authority to create separate agencies for administering and controlling the disciplinary machinery.[46]

3. The Intrinsic Value of Membership in an Integrated Association

In addition to the integrated bar's potential effectiveness in law reform and discipline, proponents viewed integration itself as having a positive effect on the membership; "that when lawyers are brought into an association . . . they gain an 'enlarged concept of [their] place in our social and economic pattern.' "[47] Still a more popular belief was that a lawyer was "less likely to play his proper role when he 'remains isolated without anything to make him conscious of his relation to the bar as a whole, [and] without . . . contact with its great traditions.' "[48] From a behavioral standpoint, the natural tendency of lawyers was to subordinate their greater social responsibilities to their personal goals and ambitions. Acting as an overriding and guiding force, the integrated bar would direct the lawyer's awareness to more serious socioeconomic concerns.[49] Of course, this argument was premised on the participation of lawyers in bar administration and related activities. However, participation in the integrated bar is completely op-

43. Schneyer, *supra* note 20, at 19; *see also* G. BRAND, BAR ASSOCIATIONS, ATTORNEYS AND JUDGES: ORGANIZATION, ETHICS, DISCIPLINE 1037-71 (1956).

44. *See* Schneyer, *supra* note 20, at 19.

45. *See* Turrentine, *May the Bar Set Its Own House in Order?*, 34 MICH. L. REV. 200, 202 (1935).

46. In 1987, only 22 of the 33 state bars employed a full-time staff lawyer to receive, investigate, and/or prosecute attorney discipline matters. *See* ABA, BAR ACTIVITIES INVENTORY, *supra* note 28, at Tab I. This is down slightly from 1980, in which 24 states had similar involvement. *See* ABA, DIRECTORY OF BAR ACTIVITIES 21 (1980). As of 1980, the courts of 19 jurisdictions have assumed centralized control over all attorney discipline. *Id.*

47. *See* Schneyer, *supra* note 20, at 38 (quoting Petition of Fla. State Bar Ass'n, 40 So. 2d 902, 908 (Fla. 1949)).

48. *Id.* (quoting REPORT OF THE COMM. ON STATE BAR ORGANIZATION, ABA Conference of Bar Delegates (St. Louis, Aug. 24, 1920)).

49. *Id.* at 39.

tional. Consequently, the likelihood of "socializing" a lawyer is the same in both voluntary and mandatory bar associations.[50]

C. The Wisconsin Tradition

In any discussion of the unification debate, special focus on the evolution of Wisconsin's integrated bar seems justified not only because of the *Lathrop*[51] and *Levine*[52] decisions, but also because the integrated bar debate has existed longer in Wisconsin than in other states.

The first proposal for integration was made in 1914 by Wisconsin State Bar President, Claire Bird.[53] Although this proposal did not bring about any immediate changes in the infrastructure of the State Bar, it was the catalyst which sparked further discussion during the 1920s and an unsuccessful legislative campaign in the 1930s.[54]

Finally, in 1943, the Wisconsin legislature enacted a statute which created a state bar and called upon the state supreme court to "provide for the organization and government of the association."[55] Although the court acknowledged the validity of the statute, it postponed its implementation until after the war.[56] In 1946, when the State Bar President petitioned the court to commence integration, the court unexpectedly denied the petition.[57]

The 1946 integration opinion is significant because of its "unprecedented focus on the tension between state bar accountability and autonomy, and for the way this focus affected the court's evaluation of the unified bar."[58] Essentially, the court believed that state bar dues should be treated

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50. *Id.* Professor Schneyer suggests that mandatory state bars have no advantage over voluntary bars in encouraging participation. In committee involvement, he saw no difference between mandatory state bar participation and voluntary bar participation. *Id.* at 39-40. Schneyer also noted that a lawyer could participate in the bar by expressing his opinion in, or being influenced by, the state bar journal. Yet, he saw this mode as ineffective and characterized the Wisconsin Bar Bulletin as "predictable, shallow and one-sided" in issues pertaining to the economics of law practice. *Id.* at 42. Consequently, "whether one looks at active participation by lawyers in state bar affairs or at what lawyers read in state bar journals, one finds scant support for the traditional claim that bringing all lawyers together in an official statewide association expands professional consciousness and thereby benefits society." *Id.* at 43.

51. Lathrop v. Donohue, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961).

52. Levine v. Supreme Court of Wisconsin, 679 F. Supp. 1478 (W.D. Wis. 1988), *rev'd sub nom.* Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989).

53. *See* Bird, *supra* note 40, at 194.

54. *See* Schneyer, *supra* note 20, at 5 n.27.

55. 1943 WIS. LAWS 497.

56. *See* Integration of Bar Case, 244 Wis. 8, 11 N.W.2d 604 (1943).

57. *In re* Integration of the Bar, 249 Wis. 523, 25 N.W.2d 500 (1946).

58. *See* Schneyer, *supra* note 20, at 48.

as public funds.[59] Therefore, close judicial scrutiny of the state bar's activities and expenditures would be required.[60] Believing the State Bar to be a public agency, the court accordingly rejected the petition for integration because "[t]he bar ought to have the untrammeled power of acting in unison . . . without any feeling that its activities are subject to control or censorship."[61] Judicial supervision would effectively nullify the perception that an integrated bar was a self-governing body.[62] Further, integration would saddle the court with the burden of "scrutinizing every activity for which it is proposed to expend funds derived from dues."[63] Despite this ruling, the court eventually reversed itself and established an integrated state bar.[64]

1. The *Lathrop* Decision

In 1960, a Madison lawyer, Trayton Lathrop challenged the Wisconsin Supreme Court's ruling. Lathrop sued to recover his bar dues, arguing that in light of the State Bar's legislative lobbying activity, compelling him to be a member of the State Bar and pay dues in order to practice law in Wisconsin abridged his first amendment rights of association and speech.[65] In a unanimous decision, the state supreme court rejected his claim.[66] In so ruling, the court held that the integrated bar did not "compel the plaintiff to associate with anyone. He is free to attend or not to attend its meetings or vote in its elections as he chooses."[67] Additionally, the court acknowledged that although the use of mandatory dues to advocate positions in which Lathrop disagreed posed a genuine first amendment concern, the "slight inconvenience" to Lathrop was "far outweigh[ed]" by the state's interest in improving the administration of justice.[68] Although some commentary has

59. *In re* Integration of the Bar, 249 Wis. at 528, 25 N.W.2d at 502. "No matter what these fees be called, they are moneys [sic] required to be paid into the treasury of the bar for a public purpose connected with the administration of justice." *Id.*

60. *Id.* "[T]his court must assume the responsibility of seeing that activities of the bar for which these moneys [sic] are paid are sufficiently public to warrant the use of the money for their promotion." *Id.*

61. *Id.* at 530, 25 N.W.2d at 503.

62. *Id.* at 528, 25 N.W.2d at 502.

63. *Id.* at 529-30, 25 N.W.2d at 503.

64. The Wisconsin Supreme Court unified the bar in 1956 on an experimental basis and made these preliminary provisions permanent in 1958. *See supra* note 4.

65. *Lathrop*, 10 Wis. 2d at 230, 102 N.W.2d at 404.

66. *Id.* at 245, 102 N.W.2d at 412.

67. *Id.* at 237, 102 N.W.2d at 408.

68. *Id.* at 242, 102 N.W.2d at 411. The court compared a lawyer's financial support of state bar activities to the general taxpayer's compelled support of the Wisconsin Judicial Council. The court said that both the bar and the Judicial Council were created by state action to serve a public purpose and that a "taxpayer could not successfully challenge the constitutionality of the disbursement of public funds derived from taxes to support the activities of the judicial council

been critical of the supreme court's reasoning in *Lathrop*,[69] the court's decision exonerated the State Bar from the allegations of constitutional infringement and validated the use of mandatory dues to support positions which furthered the administration of justice.

2. Supreme Court Review

It was thought that the Wisconsin Supreme Court's decision would quash further court challenges to State Bar activity. However, "all bets were off"[70] when the United States Supreme Court affirmed *Lathrop* in a plurality decision which left the State Bar's right "to use . . . the dues of dissident members . . . in a state of 'disquieting Constitutional uncertainty.' "[71] Moreover, the view of several justices concerning the State Bar's ability to take positions on legislative issues raised further concerns which relate to the constitutional propriety of the integrated bar.

In the first of the *Lathrop* opinions, Justice Brennan[72] held that mandatory membership in the Wisconsin State Bar was constitutional,[73] but declined to address whether Lathrop could be compelled to contribute to political causes which he opposed.[74] The unresolved dues issue left the State Bar to speculate as to how mandatory dues should be allocated to legislative activity. However, Brennan's opinion may have had deeper significance. In response to Lathrop's argument "that because of its legislative

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merely because he was opposed to certain proposed legislation which it recommended . . . ." *Id.* at 243, 102 N.W.2d at 411.

69. Professor Schneyer criticized the decision on two counts. First, he felt that the court trivialized many of the reasons for protecting the right of non-association, including the expression of disagreement by quitting and the desire not to associate one's self — even passively — with a group's position. *See* Schneyer, *supra* note 20, at 51. Second, the court's use of the taxpayer analogy was not accurate since the Wisconsin Judicial Council was not a membership organization and did not represent a particular constituency. *Id.* One of the purposes of the Wisconsin State Bar is to "safeguard the proper professional interests of the members of the bar." *See* SCR 10.02(2) (1988). Schneyer also was critical of the first amendment scrutiny employed by the court, which he characterized as "hardly . . . demanding" and noted that a stricter review may have focused the court more precisely on the Bar's effectiveness in law reform. *See* Schneyer, *supra* note 20, at 53 n.298.

70. *See* Schneyer, *supra* note 20, at 53.

71. *Id.* (citing *Lathrop*, 367 U.S. at 848 (Harlan, J., concurring)).

72. Justice Brennan wrote for the plurality. Joining him were Chief Justice Warren, Justice Clark and Justice Stewart. *Lathrop*, 367 U.S. at 821.

73. *Id.* at 843. "Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." *Id.*

74. *Id.* at 847-48. Because Lathrop did not specify those bar positions to which he objected, the Court reserved for another day the question of compelled financial support for activities to which a member objects. *Id.*

activities, the State Bar partakes of the character of a political party,"[75] Justice Brennan repeated a policy statement set forth by the Bar, in which legislative activity would not be sponsored unless the board of governors was "satisfied that the recommendation represents the consensus and the best composite judgment of the legal profession of this state."[76] If the membership "is of a substantially divided opinion,"[77] then no action would be taken. Brennan noted that this policy was based on statements made by Alfred LaFrance.[78] LaFrance recommended that in the realm of legislative activity:

> the rule of substantial unanimity should be observed. Unless the lawyers of Wisconsin are substantially for or against a proposal, the State Bar should neither support nor oppose the proposal. . . . The State Bar represents all of the lawyers of this state and in that capacity we must safeguard the interests of all.[79]

Presumably, Justice Brennan applied this rationale to portray the Wisconsin State Bar's legislative advocacy in terms more closely akin to advocacy in which a voluntary bar would engage, with the clear presumption that the payment of dues in a voluntary association is indicative of the member's consent to the activity.[80] Obviously, to have every lawyer consent to an activity in an integrated bar, the rule of substantial unanimity must mean complete unanimity. From this viewpoint, Brennan's argument fails because complete unanimity is unattainable and would paralyze the Bar's ability to take positions on legislative matters.[81]

In a concurring opinion, Justice Harlan believed that bar integration itself was constitutional,[82] yet he felt that Lathrop's allegation relating to compulsory financial support of certain activities posed a genuine first amendment issue which the Court should have addressed.[83] However, Harlan felt that Lathrop's right of freedom from such compulsory support was substantially outweighed by the state's interest in maintaining a public "commission" designed to "recommend changes in the more or less technical areas of the law."[84] To argue otherwise would have the effect of jeop-

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75. *Id.* at 833.
76. *Id.* at 834 n.9.
77. *Id.*
78. LaFrance was a former president of the voluntary Wisconsin Bar Association. *Id.* at 834.
79. *Id.* (quoting A. LaFrance, *Report Respecting Proposed Procedure on Legislative Matters*, 30 WIS. B. BULL. 41, 42 (Aug. 1957)).
80. *See* Schneyer, *supra* note 20, at 56.
81. *See* Schneyer, *supra* note 20, at 56-57.
82. *Lathrop*, 367 U.S. at 864-65.
83. *Id.* at 848-49.
84. *Id.* at 864.

ardizing the use of tax revenues to support the legislative activities of organizations such as the judicial councils of each state and federal organizations like the Interstate Commerce Commission or the Judicial Conference of the United States.[85]

In stark contrast to the concurring opinions upholding integration, Justice Douglas perceived integration to be invalid on its face.[86] Douglas' chief concern was over the notion of forced association itself: "The right to belong — or not to belong — is deep in the American tradition."[87] Justice Douglas also recognized the similarity between bar unification and statutes authorizing compulsory membership in unions; but distinguished the two based on the historically proven need for "collective bargaining as one of the means of preserving industrial peace."[88] Since Wisconsin could not point to any "exceptional circumstances"[89] justifying a first amendment infringement, its integration law could not survive the level of scrutiny called for in such situations.[90]

3. The Wisconsin Bar After *Lathrop*

Constitutional considerations left unaddressed by the Court in *Lathrop* resurfaced several years later when the State Bar became involved in the judicial selection process. In 1963, the State Bar polled its members to determine if they felt a candidate for a federal judgeship was qualified for the job. The bar association stated at the outset that it would not publish the results unless a majority of the respondents favored disclosure. Although a majority did approve of the measure, shortly before publication, an attorney petitioned the state supreme court to prohibit its dissemination on the grounds that judicial polling was beyond the scope of the State Bar's pow-

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85. *Id.* at 853.

86. *Id.* at 877-85. Justice Black also dissented, but saw no need to totally dismantle the integrated bar. He felt that the appropriate remedy was to refund that part of Lathrop's dues spent on programs which he opposed. *Id.* at 877.

87. *Id.* at 881-82.

88. *Id.* at 880; *see infra* notes 163-89 and accompanying text for a discussion of first amendment considerations with respect to unions.

89. *Id.* at 882 (Douglas, J., dissenting).

> [T]he necessities of life put us into relations with others that may be undesirable or even abhorrent, if individual standards were to obtain. Yet if this right is to be curtailed by law, if the individual is to be compelled to associate with others in a common cause, then I would think exceptional circumstances should be shown.

Id.

90. "I would treat laws of this character like any that touch on First Amendment rights. . . . [They must] be 'narrowly drawn' so as to be confined to the precise evil within the competence of the legislature." *Id.* at 882 (citation omitted).

ers. In response, the state supreme court in *Axel v. State Bar of Wisconsin*[91] held that judicial qualification polls were an important aspect of the administration of justice and thus permissible.[92] It is interesting to note, however, that since *Axel*, the State Bar has not engaged in judicial polling.[93]

As for the rule of substantial unanimity enunciated in *Lathrop*, the State Bar opted to abide by its policy statement which required "substantial unanimity" as a prerequisite to position taking. However, in 1977, the Wisconsin Supreme Court's first Committee to Review the State Bar[94] found that the public greatly benefited from the Bar's position taking and thus recommended that the substantial unanimity requirement be relaxed, "even though the liberty of dissenting State Bar members may be abridged as a result."[95]

Important changes in the infrastructure of the Bar also occurred during the 1970s. In 1976, the Wisconsin Supreme Court created the Board of Attorneys Professional Competence and the Board of Attorneys Professional Responsibility to administer bar admission requirements and attorney discipline.[96] By this action, the State Bar was almost totally divested of "hands-on" involvement in regulating discipline and ethics, since both organizations were created and operated under the exclusive aegis of the state supreme court.[97] Financial support for these two agencies was to be derived from assessments on all lawyers separate from the mandatory dues payments.[98] Additionally, the court placed continuing legal education (CLE) into a regulatory agency under its auspices, with funding for the

91. 21 Wis. 2d 661, 124 N.W.2d 671 (1963).

92. *Id.* at 667-68, 124 N.W.2d at 675.

93. *See* Schneyer, *supra* note 20, at 81. As of 1987, only 15 of the 33 integrated bars conduct judicial polling. *See* ABA, BAR ACTIVITIES INVENTORY, *supra* note 28, at Tab P.

94. Supreme Court Rule 10.10 authorizes the Wisconsin Supreme Court to "appoint a committee to review the state bar's performance in carrying out its public functions at such time the court deems advisable." This type of authorization is more commonly known as a "sunset law." *See* Schneyer, *supra* note 20, at 73. The report issued by the first committee was known as the Parnell Report, named after the committee chairman Judge Andrew Parnell of Appleton, Wisconsin.

95. *See* Schneyer, *supra* note 20, at 82 (quoting The Parnell Report at 18). The Wisconsin Supreme Court did not address this issue when responding to the findings of the Parnell Report. *See In re* Regulation of the Bar, 81 Wis. 2d xxxv, xxxix (1977).

96. *See In re* Regulation of the Bar, 74 Wis. 2d ix (1976).

97. *Id.* at x (all members are appointed by the state supreme court).

98. *See* Supreme Court Rule (SCR) 10.03(5) (1988). Lawyers are also separately assessed to support the Client Security Fund, a fund designed to compensate injured clients for the misconduct of their attorneys. *See* SCR 12.04(1) (1988). For the sake of convenience, the state bar collects payments which support these regulatory programs at the same time it collects annual dues. *See* SCR 10.03(5) (1988).

program to be likewise derived from sources other than dues payments.[99] This intervention by the supreme court was motivated primarily by a concern that the State Bar was not sufficiently accountable to the public; that an organization of lawyers would be more concerned about their own interests than the interests of the public at large.[100] Along these lines, the court, in 1977, also made an alteration in the makeup of the bar association's board of governors, permitting three non-lawyers to sit on the board.[101] Voting rights were extended to those members in 1980.[102]

The Parnell Committee[103] was also told to study the State Bar and to make recommendations to the supreme court on the viability of continued operation as an integrated bar.[104] Although the committee and court determined that "the large majority of Wisconsin lawyers, support, or at least do not oppose, the unified bar,"[105] that determination did not prevent more than 400 lawyers from signing a petition requesting that the State Bar's board of governors submit several questions to the membership, the content of which addressed the continuance of the integrated bar.[106] The supreme court denied the petitioner's request based on several technical discrepancies.[107]

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99. CLE is regulated by the Board of Attorneys of Professional Competence and funded by a separate assessment on lawyers. *See Regulation of the Bar*, 81 Wis. 2d at xli. One of the regulatory functions this agency performs is accreditation of CLE providers. *See* SCR 31.08 (1988). Professor Schneyer has suggested that removing these regulatory programs from the bar only enhanced public confidence in its integrity. *See* Schneyer, *supra* note 20, at 98.

100. *See* Schneyer, *supra* note 20, at 72-73, 89, 98.

101. *See Regulation of the Bar*, 81 Wis. 2d at xlii.

102. *See In re* Amendment of State Bar Rules, 96 Wis. 2d xi (1980).

103. *See supra* note 94.

104. The committee was to make recommendations to the court on four questions:

> (1) the concept of the integrated bar and whether it should continue in Wisconsin; (2) the type of activities in which the State Bar should engage; (3) the appropriate means of financing the activities of the State Bar, including the extent to which continuing legal education activities provide funds for other Bar activities; (4) the management of State Bar funds, including budget development, accountability for expenditures, and the development and use of surpluses.

Regulation of the Bar, 81 Wis. 2d xxxv.

105. State *ex rel.* Armstrong v. Board of Governors, 86 Wis. 2d 746, 751, 273 N.W.2d 356, 358 (1979) (quoting *Regulation of the Bar*, 81 Wis. 2d xxxvi (1977)).

106. *Id.* at 748, 273 N.W.2d at 357. The proposed referendum posed three questions; the last one read as follows: "III. Should it be the policy of the State Bar to urge the Supreme Court to take appropriate action to assist the orderly transformation of the mandatory character of the State Bar to a voluntary association?" *Id.*

107. The Wisconsin Supreme Court excluded all three questions, stating that they pertained to "court policy, not bar association policy." *Id.* at 751, 273 N.W.2d at 358. However, the court did not explain why a matter for the court to decide could not be a policy issue on the agenda of the State Bar. *Id.* at 749, 751, 273 N.W.2d at 357-58.

Twice during the 1980s, the supreme court has appointed a committee to review the question of the continued integration of the State Bar. The decision reported in *In re Discontinuation of the State Bar of Wisconsin as an Integrated Bar*[108] involved a petition by a group of lawyers requesting the Wisconsin Supreme Court to make bar membership voluntary. The petition was filed in response to a vote of members of the Bar in which approximately sixty-percent of those voting favored a voluntary rather than an integrated bar.[109] After holding a public meeting on the issue, the supreme court denied the petition.[110] In 1983, the supreme court appointed another committee to review the performance of the State Bar.[111] Continued integration was one of the subjects considered by the committee. After a public meeting on the issues, the supreme court decided to retain the integrated bar but ruled that the use of membership dues for funding legislative advocacy was improper.[112]

III. INTELLECTUAL INDIVIDUALISM VS. COMPULSORY ASSOCIATION

The first amendment[113] has been the guardian of a multitude of individual freedoms, including the freedom of association.[114] A corollary right, which has been sometimes characterized as a "negative right,"[115] is the freedom to not associate with organizations or ideologies. Encompassed within this right have been claims by nonunion employees who were forced to be-

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108. 93 Wis. 2d 385, 286 N.W.2d 601 (1980).

109. *Id.* at 386, 286 N.W.2d at 602.

110. *Id.* at 388, 286 N.W.2d at 603.

111. *See* Report of Committee to Review the State Bar, 112 Wis. 2d xix, 334 N.W.2d 544 (1983). The committee was known as the Kelly Committee, named after the committee chair, John Kelly, a Milwaukee banker.

112. *See id.* at xxv, 334 N.W.2d at 549. The State Bar was only prohibited from supporting political issues and candidates through its political action committee (LAWPAC). *Id.* It could still engage in legislative advocacy on issues germane to improving the administration of justice. However, in 1986, the supreme court developed a rebate procedure which permitted objectors to deduct their pro rata share of dues expended for such legislative activities at the beginning of each fiscal year. *See* SCR 10.03(5)(b) (1988); *In re* Amendment of State Bar Rules: SCR 10.03(5), 127 Wis. 2d xi (1986). Shortly thereafter, the board of governors adopted a by-law which provided for an arbitration proceeding in the event a disagreement arose between the bar and a member concerning allocation of expenditures to legislative activities. *See* Petition to Review State Bar By-Law Amendments, 139 Wis. 2d 686, 407 N.W.2d 923 (1987).

113. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble . . . ." U.S. CONST. amend. I.

114. The right of freedom of association was first addressed in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

115. *See* Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. REV. 995, 996 (1982); Levine v. Supreme Court of Wisconsin, 679 F. Supp. 1478, 1489 (W.D. Wis. 1988), *rev'd sub nom.*, Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989).

come union members as a precondition of continued employment,[116] or pay dues to support union activities with which they disagree;[117] or the claims of students who were required to recite the pledge of allegiance when it was repugnant to their religious beliefs.[118] Also within this category are a subset of cases in which lawyers have challenged both compelled membership in a bar association and use of membership dues for activities with which they did not agree.[119] Together, all of these cases are commonly identified with a principle known as "intellectual individualism."[120] This principle embodies the "right of self-determination in matters that touch individual opinion and personal attitude."[121] The extent to which the Court has been willing to extend first amendment protection in light of this principle is relevant to the integrated bar debate.

A. Framing the Fundamental Importance of Freedom of Choice

Several decisions of the Supreme Court have given credence to the principle of intellectual freedom in the face of government coercion. For exam-

116. Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956).

117. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

118. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

119. *See* Lathrop v. Donohue, 367 U.S. 820 (1961); Hollar v. Virgin Islands, 857 F.2d 163 (3rd Cir. 1988) (integrated bar does not violate first amendment when it expends funds to advance causes germane to the purposes for which it was integrated); Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986) (bar could only expend funds on matters germane to the bar's stated purposes); Schneider v. Colegio de Abogados de Puerto Rico, 682 F. Supp. 674 (D.P.R. 1988) (failure to protect dissenters' rights makes compelled membership in bar association unconstitutional); *Levine*, 679 F. Supp. at 1478 (mandatory bar membership is a constitutionally impermissible burden on an individual's rights of association and speech); Kentucky Bar Ass'n v. Welke, 766 S.W.2d 633 (Ky. 1989); Falk v. State Bar of Michigan, 631 F. Supp. 1515 (W.D. Mich. 1986), *aff'd*, 815 F.2d 77 (6th Cir. 1987); Schneider v. Colegio de Abogados de Puerto Rico, 565 F. Supp. 963 (D.P.R. 1983), *vacated and remanded sub nom.*, Romony v. Colegio de Abogados de Puerto Rico, 742, F.2d 32 (1st Cir. 1984); Arrow v. Dow, 544 F. Supp. 458 (D.N.M. 1982) (bar may use dues to support only functions which serve important government functions); Keller v. State Bar of California, 47 Cal. 3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542 (1989), *cert. granted*, 110 S. Ct. 46 (1989) (as a government agency, the bar can spend funds for any purpose within its authority); Falk v. State Bar of Michigan, 411 Mich. 63, 305 N.W.2d 201 (1981), *sub proceedings*, 418 Mich. 270, 342 N.W.2d 504 (1983), *cert. denied*, 469 U.S. 925 (1984); Reynolds v. State Bar of Montana, 660 P.2d 581 (Mont. 1983) (state bar may not use compulsory dues for lobbying unless it makes refunds to dissenters); *In re* Chapman, 128 N.H. 24, 509 A.2d 753 (1986) (bar must carefully tailor its position on legislative activities to limited issues within its constitutional mandate in order to protect its members' individual rights).

120. Justice Jackson is considered the originator of this principle. He believed that no society could benefit by efforts to compel unity and eliminate dissent. "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." *See Barnette*, 319 U.S. at 641-42.

121. *Id.* at 631.

ple, *West Virginia Board of Education v. Barnette*[122] concerned a resolution adopted by the West Virginia Board of Education shortly after the beginning of World War II. This resolution required public schools to include a mandatory flag salute and the pledge of allegiance at the beginning of each school day in which all students and teachers were required to participate.[123] Any pupil who refused to participate was deemed guilty of insubordination and could be expelled. Additionally, the state would then be permitted to bring a delinquency action against the parents.[124] The plaintiffs were three Jehovah's Witnesses who were parents of several students. They argued that they could not be forced to violate their religious convictions by allowing their children to participate in the mandatory flag salute.[125] The Supreme Court ruled in favor of the plaintiffs, but the plurality opinion did not focus on the principles of religious liberty. Rather, Justice Jackson was concerned about the broader implications of government prescribed orthodoxy. He stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[126]

Of great importance to Justice Jackson was the extent to which government authority could compel speech in a democratic system which guarantees individual freedoms.[127] In light of the primacy of those democratic

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122. 319 U.S. 624 (1943).

123. *Id.* at 626 n.2.

124. *See* Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 341 (1979).

125. *Barnette*, 319 U.S. at 629.

126. *Id.* at 642.

127. "There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." *Id.* at 641.

Whether Justice Jackson would totally prohibit compelled affirmation of a state-sponsored idea is not clear from the *Barnette* opinion. However, more recent commentary suggests that Justice Jackson adopted an absolutist's philosophy with respect to first amendment analysis. *See* Gard, *The Flag Salute Cases and the First Amendment*, 31 CLEV. ST. L. REV. 419, 422-24 (1982). Professor Tribe sees *Barnette* as a case in which the focus of concern is on preventing an invasion of the right of personhood. Freedom of expression is in part "an expression of the sort of society we wish to become and the sort of persons we wish to be . . . ." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 576 (1978). Professor Emerson has similar notions. He stated that the ultimate justification for freedom of expression relates to the right of an individual as an individual to develop his own personality and realize his own potential free from government influence. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 8-11 (1963).

freedoms, he determined that the compulsory flag salute statute violated the first amendment rights of the three plaintiffs.[128]

In *American Communications Association v. Douds*,[129] the Court upheld the constitutionality of a section of the Taft-Hartley Act, which required that union officers file an affidavit stating that they were not communists and did not support the overthrow of the United States government.[130] Union officials who refused to comply with this law were denied numerous benefits which were available through the National Labor Relations Act. Unlike the compelled affirmative speech found in *Barnette*, this case involved compelled disclosure of political affiliations and beliefs. Although Justice Jackson agreed that disclosure of political affiliation was appropriate, he objected to the requirement that union officers sign the affidavit disavowing any belief which they may have had with respect to overthrowing the government.[131] Justice Jackson reaffirmed his belief that the first amendment protects the "realm of opinion and ideas, beliefs and doubts, heresy and orthodoxy, political, religious or scientific."[132] Essentially, *Douds* and *Barnette* concerned themselves with high-sounding democratic values; freedom from government-compelled ideas as a necessary precondition for avoiding forced conformity and protection of the individual's interest in "selfhood."[133]

Subsequently, the Supreme Court expanded the reach of those first amendment values in *Wooley v. Maynard*.[134] In *Wooley*, the Court found that the plaintiff, a Jehovah's Witness, could not be compelled to display New Hampshire's state motto "Live Free or Die" on his license plates.[135] Unlike the flag salute in *Barnette* and the affidavit in *Douds*, the coerced behavior in *Wooley* was incidental since the plaintiff's involvement with the state motto was something less than coerced speech, and because the association between the plaintiff and the motto was not one that would make the world believe that they were advocates of the motto.[136] Nevertheless, the

128. *Barnette*, 319 U.S. at 642.

129. 339 U.S. 382 (1950).

130. *Id.* at 411-12.

131. *Douds*, 339 U.S. at 435-36, 442 (Jackson, J., concurring in part and dissenting in part).

132. *Id.* at 443.

133. *See* TRIBE, *supra* note 127, § 15-1, at 889.

134. 430 U.S. 705 (1977).

135. The plaintiff in *Wooley* covered the objectionable message with tape but subsequently was convicted of a misdemeanor for "knowingly [obscuring] . . . the figures or letters on any number plate." *Id.* at 707 (quoting N.H. REV. STAT. ANN. § 262:27-c (Supp. 1975)).

136. Tribe suggests that the Court's decision may have aggravated this problem. When the New Hampshire law was in effect, no one who saw the motto seriously believed that a person displaying the message would die for his freedom. Yet, after the Court's decision, Tribe argues that everyone in New Hampshire was forced to take a public stance on the motto: If the person

Court determined that New Hampshire's actions constituted promotion of a state-sponsored ideology which was repugnant to the "sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[137] As such, the Court found that the mandated display of the state motto intruded upon the plaintiff's first amendment rights.[138]

While *Barnette* and *Douds* were primarily a response to the fear of state-driven orthodoxy undercutting the incentive to promote nonconforming ideas, *Wooley* was an "appeal . . . to the vindication of individual personality."[139] Together, these cases capsulize two distinct ways in which government-compelled expression may infringe upon the individual's interest in "selfhood." First, compelled expression may interfere with the individual's right to define his public persona.[140] In this respect, compelled affirmation exposes a person's true views to the world or creates a misrepresentation in the public forum of what the individual believes.[141] Second, compelled expression can infringe upon the individual's freedom of conscience.[142] Unlike the latter circumstance which concerns how an individual may present himself to the public, "the interest in freedom of conscience focuses on the individual's self-perception."[143]

The infringement occurs when an individual views compliance with the compelled message as acquiescence or agreement with its principles. Hence, individuals who submit to compulsory affirmation are likely to feel humiliation and disgrace when they are incapable of disassociating them-

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left the license plate unaltered, you were a freedom lover; if the person covered it up, he was a Jehovah's Witness. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-5, at 901 n.16 (1978).

137. *Wooley*, 430 U.S. at 715 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

138. *Id.* at 716-17. The state argued that the requirement of compelled participation facilitated the identification of passenger vehicles because the motto was said to aid police in determining if the vehicle was properly licensed. *Id.* at 716. Secondly, it promoted "appreciation of history, individualism and state pride." *Id.* at 717. The Court determined that these assertions were not sufficient to outweigh the infringement of the plaintiff's interests because vehicle license plates were already distinguishable and there were other ways to promote history and pride which would be less restrictive. *Id.*

139. Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817, 854 (1986). "Although the state's message did not create any pressure to conform, displaying that message made them feel like traitors to their belief system." *Id.* at 854-55.

140. *See* Gaebler, *supra* note 115, at 1004.

141. *Id.* at 1005.

142. *Id.* at 1004.

143. *Id.* at 1005.

selves from the state's message.[144] Although the Supreme Court has not specifically delineated the freedom of conscience in the face of compulsory affirmation, *Wooley* personifies the Court's willingness to protect individually held beliefs, even when the state does not directly interfere with the way the individual projects oneself to the public.

The incidental intrusiveness in *Wooley* can be likened to compulsory membership in state bars. Just as the mere existence of the state's message on the license plate did not create any pressure to conform, the mere payment of an annual membership fee has also been characterized as minimally intrusive.[145] But in order for the integrated bar to be a functioning body, it must be allowed the freedom to carry on its business and make decisions which relate to "furthering the administration of justice" or "serving the public interest." Into these broad categories fall numerous issues that are inherently political in nature and carry with them varying viewpoints, depending on the political disposition of individual lawyers. It is impractical to think that a state bar could accommodate the views of every lawyer when it engages in legislative advocacy. Hence, lawyers are compelled to be members of an association which can take positions that are adverse to the personal beliefs of some of its members.

To many, the constitutional burdens posed by this circumstance are almost trivial. As the connection between the message and the individual becomes more attenuated, it not only becomes less likely that others will attribute the views to a particular lawyer, but it is also less likely that the individual lawyer will view compulsory membership as acquiescence.[146] The inherent difficulty is to ascertain when a member no longer considers involuntary involvement as an affront on freedom of conscience. The resolution of this problem necessarily invokes a subjective determination of each and every individual's tolerance to compelled association. Since no court can say with absolute certainty whether one person or another would find certain activities objectionable, a judicial determination may not be possible. Realizing that the myriad of strong convictions of lawyers will never

144. *Id.* "[S]tate . . . compel[led] expression constitutes a direct and powerful affront to the individual as an individual because it requires a denial of the self and represents the ultimate submission of the individual — submission of mind." *Id.*

145. The Wisconsin Supreme Court noted in Lathrop v. Donohue that the unified bar does not:

> compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. . . . He is free . . . to voice his views on any subject in any manner he wishes, even though such views be diametrically opposed to a position taken by the State Bar.

Lathrop v. Donohue, 230, 237, 102 N.W.2d 404, 408 (1960), *aff'd*, 367 U.S. 820 (1961).

146. *See* Gaebler, *supra* note 115, at 1013-14.

consistently be in harmony, the assumption is that a compulsory association will always pose a first amendment infringement on the individual's freedom of conscience. The only measure for justifying any infringement, therefore, becomes an analysis of the need for such compulsory affirmation in the face of the constitutional infringement. In *Wooley*, preservation of individual identity was deemed more important than the state-sponsored purposes for which the compulsory participation was required.[147] Whether equal deference will be accorded to the first amendment infringement in the integrated bar remains to be seen.

B. The Residual Effect of Compelled Association: Compelled Disclosure

Dissenters in a compulsory association are in a difficult position. Either they remain silent and risk having the association's speech be interpreted as their own, or they openly disavow it and thereby relinquish their right to silence. Such a problem was recognized by the Supreme Court in *Pruneyard Shopping Center v. Robins*.[148] In that case, the Court upheld a state court interpretation of the state constitution permitting high school students to solicit petitions declaring opposition to a United Nations resolution against Zionism on the premises of a privately owned shopping mall.[149] The owner objected to the state's mandate that he provide a forum for third-parties to express their views.[150] Although a majority of the Court agreed that there was no merit to this claim,[151] a concurring opinion by Justice Powell suggested that a better first amendment challenge could have been brought by the mall owner if he argued that the state, by granting the right of access, would in effect compel the owner to speak out in opposition to the views being expressed on the property.[152] Powell suggested that such compelled disclosure could arise even if no confusion existed as to the source of the message, if the property owner found the ideas expressed so objectionable that he, in good conscience, could not remain silent.[153]

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147. *See supra* notes 134-39 and accompanying text.

148. 447 U.S. 74 (1980).

149. *Id.* at 77-78, 88.

150. *Id.* at 85-88.

151. The Supreme Court determined that *Wooley* was distinguishable for three reasons. First, the government itself was not disseminating any particular message in the shopping center; rather, it was granting the public access so that they could display whatever messages they chose. *Id.* at 87. Second, the state law in *Wooley* forbade the Maynards from covering up the motto, while the mall owner could disavow any connection with the message by "simply posting signs." *Id.* Finally, unlike the Maynard's automobile, the shopping center was open to the public, thus making it unlikely that the student-disseminated message would be taken to represent the views of the owner. *Id.*

152. *Pruneyard*, 447 U.S. at 100 (Powell, J., concurring).

153. *Id.* at 99.

Justice Powell continued this theme in *Pacific Gas & Electric Co. v. Public Utilities Commission*,[154] a case in which the Court reviewed the constitutionality of a California Public Utilities Commission order directing the Pacific Gas & Electric Company to periodically insert political editorials which advanced the views of a group which objected to the utility rates.[155] The constitutional challenge was prompted by Pacific Gas' practice of distributing a newsletter along with monthly billings, the content of which was deemed political in nature. Pacific Gas appealed the Commission's decision to the Supreme Court claiming the order mandated dissemination of a political message with which it disagreed. In a plurality opinion, the Court reversed the Commission's order.[156] Justice Powell's opinion emphasized that the right not to speak served the same societal purposes as the right to speak since both assure that public debate on public issues would be vigorous.[157] Declaring open access on the billing statement as punishment for expressing certain views would tend to inhibit expression since the speaker would opt for silence rather than accept the penalty.[158]

The Court's concern about a person's protected right of silence poses difficulties for integrated bars. Although proponents of bar integration argue "that one of the advantages of an integrated bar is that it represents a diversity of viewpoints,"[159] representation in a voluntary bar association could be viewed similarly. Freedom to express views on policy matters is present in both organizations. But in addition to expression of viewpoints, members of voluntary associations have the option to remain silent, knowing that if they disagree with a bar decision, they can disavow the decision by quitting. This avenue is foreclosed to lawyers in integrated bars. Consequently, if an attorney feels strongly about an issue, the only personal satisfaction that he can hope to gain is by disclosing his true views, though he may be reluctant to do so. This result seems contrary to Powell's opinions in *Pacific Gas & Electric* and *Pruneyard* and may also be in contravention to the Court's holding in *Wooley* and *Barnette* which emphasized the vindication of personal beliefs from coerced expression.[160]

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154. 475 U.S. 1, *reh'g denied*, 475 U.S. 1133 (1986).
155. *Id.* at 4.
156. *Id.* at 20-21.
157. *Id.* at 8-9.
158. *Id.* at 10-11.
159. *See Levine*, 679 F. Supp. at 1496.
160. *See supra* notes 122-47 and accompanying text.

C. "Fee Speech"

Attorneys have attacked the constitutional propriety of the integrated bar on two first amendment grounds: freedom of association and freedom of speech. Although these vestiges of the first amendment are interrelated, the freedom of association argument has typically been utilized to attack the very idea of compulsory membership, while the freedom of speech argument has commonly been used to challenge specific bar activities, particularly legislative lobbying. Numerous lawsuits have been brought, both inside and outside the context of the integrated bar, which have challenged the use of compulsory membership dues for activities which individual members may oppose.[161] Unfortunately, the response of the courts has generally been insufficient to resolve all the problems connected with expenditures of compulsory fees. Although the Supreme Court had the opportunity to discuss this issue in *Lathrop*, it nevertheless declined to address the problem.[162] Still, the compelled financial support issue has been addressed by the Court on several occasions in the labor union context.

1. Union Shops

The opinions in *Lathrop* continually reference an analogous relationship between an integrated bar and a union shop.[163] A typical "union shop" requires that workers in a particular field become members of a union and

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161. The payment of compulsory membership dues has been likened to the payment of taxes by citizens, or to mandatory student fees paid by most college students. For the most part, the tax argument has been rejected by the courts because the dues are spent for the benefit of only a segment of the population. *See Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring); *Levine*, 679 F. Supp. at 1498. *But see* Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 22-25 (1983) (Compulsory membership groups are nearly identical to government entities, thus dues expenditures are similar to taxes.). Not much litigation has addressed the comparison between student fees and mandatory bar fees, although they are similar in some respects and different in other ways. Neither type of fee requires the payor to participate in any activity, and the chance of any message being identified with the payor is small. However, there are major differences. First, students are not required to be members of any association and there is no penalty as such for not joining, which is unlike the integrated bar, where the penalty is being barred from practicing law. Second, in many cases, most student fees are not used to support politically-related activities. Moreover, a student denied admission for failure to pay has less of a burden than a lawyer who must move to another state and pass a bar exam before he is allowed to practice law. For an informative discussion on student fees, see generally Wells, *Mandatory Student Fees: First Amendment Concerns and University Discretion*, 55 U. CHI. L. REV. 363 (1988); Comment, *"Fee Speech:" First Amendment Limitations on Student Fee Expenditures*, 20 CAL. W.L. REV. 279, 292-95 (1984).

162. Writing for the plurality, Justice Brennan refused to "intimate [any] view as to the correctness of the conclusion of the Wisconsin Supreme Court that the appellant may constitutionally be compelled to contribute . . . to political activities which he opposes." *Lathrop*, 367 U.S. at 847-48.

163. *Id.* at 842, 871, 879.

financially support its causes, including political and legislative activities, as a prerequisite for continued employment in that particular field.[164] Further, compulsory union membership is authorized by the state through statutory provision.[165]

The analogous relationship between the integrated bar and the union shop was first recognized by Justice Douglas in *Railway Employes' Department v. Hanson*.[166] In *Hanson*, the Court upheld the validity of the union shop provisions of the Railway Labor Act[167] against charges that the union shop agreement forced workers into political associations which violated their freedom of association. Emphasizing that the only condition to union membership authorized by the statute was the payment of "periodic dues, initiation fees, and assessments,"[168] and that the only support required of members was financial support related to the work of the union in the realm of collective bargaining, the Court held that the union shop agreement was no more of an infringement or impairment of first amendment rights than a state law which required all lawyers to be members of an integrated bar.[169]

Hanson has been criticized on a number of grounds, not the least of which was the Court's failure to give sufficient weight to the first amendment concerns raised in the case.[170] Additionally, *Hanson* left unanswered questions concerning the use of compulsory membership dues to support activities other than collective bargaining.[171]

The Court was confronted with the latter issue again in *International Association of Machinists v. Street*.[172] In *Street*, labor unions, which had negotiated union shop agreements pursuant to the union shop authorization

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164. Comment, *The Compelled Contribution in the Integrated Bar and the All Union Shop*, 1962 WIS. L. REV. 138, 148.

165. *Id.*

166. 351 U.S. 225 (1956).

167. Railway Labor Act, ch. 347, 44 Stat. 477 (1926) (current version at 45 U.S.C. § 152 (1976)).

168. *Hanson*, 351 U.S. at 229.

169. *Id.* at 238. Writing for a unanimous court, Justice Douglas noted: "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." *Id.* However, in *Lathrop*, Justice Douglas retracted his statement, noting that "on reflection the analogy fails." Lathrop v. Donohue, 367 U.S. 820, 879 (Douglas, J., dissenting).

170. Bond, *The National Labor Relations Act and the Forgotten First Amendment*, 28 S.C.L. REV. 421, 436 (1977); *see also* Comment, *First Amendment Proscriptions on the Integrated Bar: Lathrop v. Donohue Re-Examined*, 22 ARIZ. L. REV. 939, 958-59 (1980) (*Hanson* misapplied by the Supreme Court in *Lathrop*).

171. *Hanson*, 351 U.S. at 238.

172. 367 U.S. 740 (1961).

in the Railway Labor Act,[173] expended union funds in support of political activities to which the plaintiffs were opposed. The Court said that the use of exacted funds, over an employee's objection, to support political causes, was a use falling outside the reasons advanced by the unions and Congress for creating union shop agreements.[174] However, the Court avoided the issue pertaining to the constitutionality of using compulsory dues to support political activities with which an employee disagrees.[175] It also specifically declined to make a constitutional determination concerning the allocation of membership dues for purposes unrelated to collective bargaining and political activities.[176] Interestingly, the very same issues were before the Court in *Lathrop*, which was decided the same day as *Street*, and the Court still declined to articulate any position on those issues.[177]

2. Agency Shops

Uncertainty remained in the area of freedom of speech until the Court decided *Abood v. Detroit Board of Education*.[178] The appellants in *Abood* were public school teachers who challenged the constitutionality of a Michigan law[179] which authorized a union and a government employer to agree to an agency shop.[180] Under the agreement, a nonunion teacher would be required, as a precondition for employment, to contribute a fee equivalent to union dues to the union.[181] Initially, the Court addressed the coextensive relationship between free speech and making financial contributions to support chosen views. In *Buckley v. Valeo*,[182] the Court held that financial

173. Railway Labor Act, ch. 347, 44 Stat. 477 (1926) (current version at 45 U.S.C. § 152 (1976)).

174. *Street*, 367 U.S. at 768.

175. The Supreme Court relied on the doctrine that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* at 749 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).

176. *Id.* at 769-70.

177. *See generally* Comment, *Freedom from Political Association: The Street and Lathrop Decisions*, 56 NW. U.L. REV. 777 (1962); Note, *Impact of Lathrop v. Donohue and Int'l Ass'n of Machinists v. Street Upon the Expenditures of Associations*, 10 UCLA L. REV. 390 (1963).

178. 431 U.S. 209 (1977).

179. MICH. COMP. LAWS § 423.210 (1970).

180. Agency shop requires the payment of a fixed monthly fee to the union as a condition of employment regardless of whether the payer is a member of the union in order to reimburse the union for costs of representation. This is different from a union shop, which requires the employees to join the union as a condition of employment. *See* Mitchell, *Public Sector Union Security: The Impact of Abood*, 29 LAB. L.J. 697 (1978).

181. *Abood*, 431 U.S. at 211.

182. 424 U.S. 1 (1976) (per curiam).

contributions to political campaigns were a form of speech which merited first amendment protection.[183] Consequently, the *Abood* Court determined that requiring a contribution used to promote an idea opposed by the contributor constituted compelled support for an idea.[184] Invoking the teachings of *Barnette*, the Court concluded that the right of non-association[185] would protect employees from being required to financially support an ideological cause they may oppose as a condition of public employment.[186] Funds could only be allocated to activities germane to collective bargaining.[187]

Lawyers have since argued that the mandatory dues issue in *Abood* was conceptually identical to the issue reserved in *Lathrop*, and therefore, "*Abood* is substantially determinative on the question of the constitutionality of an attorney's use of compulsory dues for causes to which the attorney objects."[188] Moreover, at least one commentator has suggested that *Abood* may spell doom for compulsory bar membership itself.[189]

IV. THE NEW "FRONTAL ATTACK"[190] ON THE BAR: *LEVINE V. SUPREME COURT OF WISCONSIN*

A. Opinion of the District Court

The decision rendered in *Levine v. Supreme Court of Wisconsin*[191] is significant in several respects. In the entire sixty-seven year history of the integrated bar, this was the first time a state reverted to voluntary bar sta-

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183. *Id.* at 21-23.

184. *Abood*, 431 U.S. at 234-35.

185. This was the first time the Court clearly established that freedom of association entailed the right not to be associated through financial support with a private group's promotion of beliefs. *See* Schneyer, *supra* note 20, at 57.

186. *Abood*, 431 U.S. at 235.

187. *Id.* at 236.

188. *See* Sorenson, *supra* note 16, at 54.

189. Professor Schneyer has stated:

> To be sure, *Lathrop* explicitly upheld compulsory bar membership. But it may have done so only because the Wisconsin State Bar had not been shown to engage in any activity for which compulsory dues could not be used. If lawyers cannot be forced to "associate" themselves with bar lobbying positions by providing financial support . . . it will take no great constitutional leap to find that they also cannot be forced to "associate" with those positions through membership.

See Schneyer, *supra* note 20, at 67 (footnote omitted); *see also* Comment, *Arrow v. Dow: The Legacy of Lathrop — State Bars Under Attack*, 8 OKLA. CITY U.L. REV. 89, 110 (1983).

190. *See* Marcotte, *Mandatory Bars Shaken*, 74 A.B.A. J. 36 (Oct. 1988) (comments of Wisconsin State Bar President John Walsh).

191. 679 F. Supp. 1478 (W.D. Wis. 1988), *rev'd sub nom.*, Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989).

tus.[192] More importantly, this was a prototype decision in integrated bar litigation. It recognized that more recent freedom of association cases may have implicated the mandatory bar as constitutionally suspect. Further, the case suggests that changes in the character of the Wisconsin Bar have made *Lathrop v. Donohue*[193] inapplicable.

In 1986, Steven Levine, a Wisconsin lawyer, filed suit in federal district court challenging the constitutionality of the integrated bar.[194] Levine argued that his first amendment rights of association and speech were violated by Wisconsin's mandatory bar membership requirement.[195] Alternatively, he argued that if mandatory bar membership was constitutional, the use of his membership dues to fund political and ideological activities was unconstitutional.[196]

With respect to the first issue, the district court began by framing the importance of the first amendment infringements, reasoning that the essence of the right of individual choice involves "the decision not to do something as well as the decision to do something."[197] Consistent with that reasoning, Judge Crabb ascertained that the first amendment could protect the plaintiff's right not to join the bar. However, Judge Crabb also noted that the right to associate and not to associate was not absolute; that government can and has infringed upon the protected rights of individuals.[198]

Permissible infringements were justified by an analysis of the governmental interest in the regulation and the individual right to speech and association. This "balancing test" was first described in *Douds*,[199] but as the district court noted, when the Court reweighed the conflicting interests, it did not attribute more weight to the individual right in issue as it had done previously in *Barnette*.[200] However, Judge Crabb determined that in recent cases the Supreme Court has been more protective of first amendment rights by requiring that infringements on the right to associate be justified

192. Shortly after *Levine* was decided, another district court determined that the integrated bar was unconstitutional. *See* Schneider v. Colegio de Abogados, 682 F. Supp. 674 (D.P.R. 1988).

193. 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961).

194. Plaintiff brought the action in federal court, alleging jurisdiction under 42 U.S.C. § 1983 (1982). *Levine*, 679 F. Supp. at 1479.

195. *Id.*

196. *Id.* at 1479-80.

197. *Id.* at 1490.

198. *Id.*; *see also* Goldman v. Weinberger, 457 U.S. 503 (1986); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

199. American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

200. *Levine*, 679 F. Supp. at 1491 (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

by regulations which serve a compelling state interest.[201] Further, the infringement must be the least restrictive means available to achieve the compelling state interest.[202]

Nonetheless, it is unnecessary for the test to be applied if the first amendment infringement is *de minimus*.[203] The district court noted that mandatory membership in the State Bar of Wisconsin only consisted of the payment of dues and that the Supreme Court in *Lathrop* did not consider such payments to be a significant infringement on Lathrop's right not to associate.[204] However, Judge Crabb read more recent decisions of the Court as suggesting that mere payment of dues was a significant infringement on the first amendment. For example, Judge Crabb cited *Wooley*[205] and *Pacific Gas & Electric*[206] as indications that the Court had not restricted the definition of compelled association to the identification of an individual with views he does not share; the focus was on the idea of compulsion itself.[207] Additionally, Judge Crabb raised the issue of compelled disclosure, citing to Justice Powell's opinions in *Pruneyard* and *Pacific Gas & Electric*.[208]

As for the mandatory payment of dues, the district court once again looked to modern case law to refute the Supreme Court's conclusion in *Lathrop* that mandatory payment of dues was similar to the payment of taxes and, therefore, the infringement occasioned by compulsory payments was insignificant.[209] Critical to the district court's analysis was *Buckley v. Valeo*.[210] In *Buckley*, the Supreme Court held that financial contributions to political campaigns constituted protected speech and that mandated limitations on political contributions were unconstitutional. The Court found that the legislative limitations on financial contributions imposed restrictions on "political communication and association."[211] Judge Crabb found *Buckley* to extend beyond the realm of political speech and concluded that compelled payment of contributions likewise infringed on the freedoms of association and speech.[212] Further support for this view was found in

201. *Id.*
202. *Id.*
203. *Id.* at 1494 (citing Elrod v. Burns, 427 U.S. 347 (1976)).
204. *Id.*
205. Wooley v. Maynard, 430 U.S. 705 (1977).
206. Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986).
207. *Levine*, 679 F. Supp. at 1495.
208. *Id.* at 1495-96.
209. *Id.* at 1496.
210. 424 U.S. 1 (1976).
211. *Id.* at 18.
212. *Levine*, 679 F. Supp. at 1496-97.

Abood,[213] where Judge Crabb found key language of the Supreme Court opinion as suggesting that the Court had abandoned the *Lathrop* rationale that the payment of dues was an insignificant first amendment infringement.[214]

In addition to the first amendment considerations, the plaintiff in *Levine* also contended that *Lathrop* was no longer determinative because the facts upon which the Supreme Court based its decision had changed.[215] The district court, in addressing this argument, perceived that the majority of the *Lathrop* Court was influenced primarily by the Bar's quasi-public involvement in "elevating the educational and ethical standards of the Bar."[216] Noting the Bar's diminished role in those areas, Judge Crabb concluded that *Lathrop* was factually distinguishable and therefore not determinative on the issues presented.[217]

Since *Lathrop* was no longer dispositive, the district court applied a compelling state interest analysis and determined that the Bar activities which were supported by mandatory dues did not constitute a compelling state interest.[218] Further, the State Bar did not show that compulsory membership was the least restrictive means of achieving its goals.[219] For these reasons, compulsory bar membership was rendered unconstitutional.[220]

B. Seventh Circuit Reversal

The principal issue on appeal was whether *Lathrop* controlled the outcome of the *Levine* decision.[221] In a rather cursory opinion, the United States Court of Appeals for the Seventh Circuit reversed the judgment of the district court.[222] Writing for a unanimous court, Judge Flaum ad-

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213. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

214. To be required to help finance the union as a collective-bargaining agent *might well be thought*, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, *or to refrain from doing so, as he sees fit*. But the judgment in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

Levine, 679 F. Supp. at 1497 (quoting *Abood*, 431 U.S. 209, 222 (1977) (emphasis in text)).

215. *Id.* at 1491.

216. *Id.* at 1492.

217. *Id.* at 1493.

218. *Levine*, 679 F. Supp. at 1501.

219. *Id.* at 1501-02.

220. *Id.* at 1502.

221. Levine v. Heffernan, 864 F.2d 457, 459 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989).

222. *Id.* at 463.

dressed what he perceived to be two alternative premises advanced by the district court. The first premise was that "*Lathrop* has been implicitly overruled by subsequent Supreme Court decisions."[223] Initially, the court noted that for *Lathrop* to have been implicitly overruled, it must be satisfied that "this is one of those rare cases where circumstances 'have created a near certainty that only the occasion is needed for the pronouncement [by the Supreme Court] of the doom' of an obsolete doctrine."[224] The court of appeals could find no circumstances which satisfied this criteria.[225] Further, the court of appeals believed that the cases cited by the district court did not cast any doubt on the validity of *Lathrop*.

Judge Flaum focused primarily on the cases which involved the compelled financial support prong of the first amendment infringement. Specifically, he believed that Judge Crabb's interpretation of *Buckley* was too broad, asserting that the compelling state interest test was applicable only when "core first amendment activity is involved."[226] Compelled financial support of the Bar was apparently not considered core first amendment activity. The court of appeals also distinguished *Abood* and *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,[227] concluding that the compulsory contribution requirements were significant first amendment infringements and were *dicta*.[228] Judge Flaum restricted the compelling state interest analysis in *Abood* and *Ellis* to cases which involved the funding of certain activities with compulsory dues payment and not the very fact of compelled membership itself, which he believed was resolved in *Lathrop*.[229]

Concluding that *Lathrop* was still good law, the court of appeals next sought to determine whether the holding of that case was applicable to the facts of *Levine*. Judge Flaum asserted that "[i]f Wisconsin's present integrated bar is substantially similar to its predecessor, *Lathrop* compels us to conclude that it serves a legitimate state interest."[230] The court of appeals

223. *Id.* at 460.

224. *Id.* at 461 (quoting Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 734 (7th Cir. 1986)).

225. In his analysis, Judge Flaum found that no Supreme Court justice had questioned the validity of *Lathrop* and that lower courts had followed the *Lathrop* precedent. *Id.* at 461 (citing Hollar v. Government of the Virgin Islands, 857 F.2d 163 (3rd Cir. 1988); Gibson v. Florida Bar, 798 F.2d 1564 (11th Cir. 1986)). Finally, because *Lathrop* was the only precedent in the integrated bar area, the district court had to analogize the bar to a union shop in order to reach its conclusion. This policy of employing an analogy to overrule a higher court precedent would undermine the doctrine of *stare decisis*. *Levine*, 864 F.2d at 461.

226. *Id.* at 462.

227. 466 U.S. 435 (1984).

228. *Levine*, 864 F.2d at 462.

229. *Id.*

230. *Id.*

noted the diminished role of the State Bar of Wisconsin in attorney discipline and continuing legal education but concluded that the Supreme Court in *Lathrop* placed no special emphasis on those activities.[231] Consequently, the court of appeals recognized that the district court overemphasized the Bar's role in ethics and education. Finding the State Bar indistinguishable from the one presented to the Court in *Lathrop*, the court of appeals reversed the district court decision.[232]

C. *Questions Unanswered*

Although the decision of the court of appeals was intended to correct what it felt was an aberration in the law, its summary opinion was defective in several respects. First, although the court of appeals ascertained that *Lathrop* was still good law, it conceded Judge Crabb's argument that in order for *Lathrop* to apply, the current Wisconsin bar must be "substantially similar to its . . . predecessor."[233] The only two activities which the court of appeals addressed in its comparison of the two bars was their mutual involvement in continuing legal education and ethics. Perhaps this approach was justified since those were the only two bar activities which the district court gave notable mention to in its analysis.[234] However, other modifications to the Wisconsin State Bar were neglected, which, if applied in a comparative analysis, could realistically distinguish the modern State Bar from the State Bar in the *Lathrop* decision.[235] Nevertheless, the failure

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231. *Id.*

232. *Levine*, 864 F.2d at 463.

233. *Id.* at 462.

234. *See* Levine v. Supreme Court of Wisconsin, 679 F. Supp. 1478, 1492-93 (1988).

235. The court of appeals did recognize, albeit in a footnote, that the Supreme Court in *Lathrop* noted the multifaceted character of the Wisconsin State Bar. *See* Levine v. Heffernan, 864 F.2d at 462 n.11. However, as Professor Schneyer has suggested, a majority of the Court viewed the state bar as a public agency created to fund and administer regulatory programs. *See* Schneyer, *supra* note 20, at 54-55. Most certainly then, the Bar's involvement in discipline and education were influential factors in the Court's decision. In support of this argument, the Court did consider noteworthy the Bar's "major role in the State's procedures for the discipline of members of the bar for unethical conduct." *Lathrop*, 367 U.S. at 830. The Court also found that "[t]he most extensive activities of the State Bar are those directed toward post-graduate education of lawyers." *Id.* at 839 (quoting *Lathrop*, 10 Wis. 2d 230, 246, 102 N.W.2d 404 412 (1960)). However, the Bar's diminished role in discipline and education are not the only noteworthy changes.

First, in the area of unauthorized practice of law, the committee by-law pertaining to that subject stated in part: "The committee shall seek the elimination of such unauthorized practice and participation therein on the part of members of the bar, by such action and methods as may be appropriate for that purpose." *Lathrop*, 367 U.S. at 831 n.7. Currently, the unauthorized practice of law is a statutory violation, which can only be enforced by the state Attorney General or a district attorney. *See* WIS. STAT. § 757.30 (1987-88). The State Bar has petitioned the Wis-

of the court of appeals to make a clear determination on the factual applicability of *Lathrop* to the modern Bar casts doubt on the utility of that decision. Further, the court of appeals itself may not be sure where *Lathrop* stands. At one point in the opinion it stated that "since *Lathrop* was decided, the character of the Wisconsin Bar has changed considerably."[236] The disposition of the case, however, suggests a contrary view.

Second, the court of appeals did not make a complete response to the first amendment arguments raised by the district court. Particularly, it neglected to comment on the district court's comparison of *Wooley*, a freedom of nonassociation case where the degree of state infringement was low, to the minimal infringement posed by compulsory bar membership. Additionally, it made no attempt to reconcile the district court's application of the compelled disclosure argument raised in *Pruneyard* and *Pacific Gas & Electric*.

The court of appeals' narrow construction of the holding in *Abood* is also problematic. Judge Flaum asserted that *Abood* only applied to the use of mandatory dues for certain activities and not to the issue of compulsory membership, which he noted had already been put to rest in *Hanson*.[237]

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consin Supreme Court twice during the 1980s to designate the Bar as an official decision maker concerning unauthorized practice but the court denied both petitions.

Second, although the State Bar has maintained a standing committee on legislation, the procedures with regard to position-taking have changed since *Lathrop*. *See supra* text accompanying notes 75-81.

Third, the State Bar continues to maintain a committee on professional ethics. According to the *Lathrop* bylaw, however, the committee was required to "formulate and recommend standards and methods for the effective enforcement of high standards of ethics and conduct in the practice of law." *Lathrop*, 367 U.S. at 829-30 n.7. The committees' influence on ethics in Wisconsin legal practice has been insubstantial. The committee has not promulgated any standards currently in use in the state. The Wisconsin Supreme Court has deferred to the ABA model standards in ethics. Further, although the committee publishes ethics opinions in the *Wisconsin Lawyer*, those opinions are not binding on any lawyer.

Fourth, at the time of *Lathrop*, a standing committee existed which pertained to judicial selection. Subsequently, this was merged with the committee on administration of justice. Although the stated purposes have remained essentially the same, the Bar has significantly curtailed its involvement in the judicial selection process. *See supra* text accompanying notes 91-93.

The Bar does have several other responsibilities not recognized in *Lathrop*. Supreme Court Rule 12.01 creates a Client Security Fund to reimburse losses to the public caused by dishonest lawyers. The fund is currently managed by the State Bar, but is funded by an assessment on lawyers separate from bar dues.

Lawyers are also required to place client's funds in trust accounts pursuant to SCR 11.05 (repealed June 10, 1987, effective Jan. 1, 1988). Information concerning those accounts must be reported to the State Bar on the lawyer's annual dues statement. The State Bar, in turn, provides that information upon request when the BAPR receives a complaint against a lawyer. Essentially, the Bar's function here is ministerial.

236. *Levine*, 864 F.2d at 458.

237. *Id.* at 462.

The reasoning is anomalous because the compelling government interest involved in *Hanson* and *Abood*, preserving industrial peace, is only applicable to union shops and not to bar associations. If the purposes themselves are dissimilar, then perhaps it is the compelling government interest that they share. Assuming the accuracy of that statement, does the Court's application of the union shop analogy to the bar necessarily mandate the existence of some compelling interest?[238] This seems consistent with the Court's holding in *Lathrop*, since at that time the Wisconsin State Bar was vested with greater regulatory power over the bar than it currently possesses. Unfortunately, the Court has not assessed the governmental interest in the integrated bar since that time.

V. LAW, POLITICS, AND THE VIABILITY OF THE MANDATORY BAR

Whether compulsory membership in the bar is proper ultimately depends on individual perceptions of the bar itself. To the lawyer that perceives the bar as being charged with the maintenance and betterment of justice, integration would be a benefit. Activities and proposals advanced by the bar are seen as neutral in character, addressing strictly technical legal issues which transcend the political arena. To the lawyer who views bar activities as very political, compulsory association is deemed offensive.

However, the integrated bar does not require the "politics" lawyer to associate with views with which he does not agree. He is only expected to pay membership dues. This is constitutionally permissible in light of the purposes for which the integrated bar was established. Nevertheless, these purposes may be too amorphous to justify compulsory membership because many activities which are political can fall under a general descriptive phrase such as "to further the administration of justice."[239] Succinctly stated, "[t]he unified bar's problem lies in its inherently confused legal and

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238. Judge Crabb determined that the Supreme Court, by its holdings in the union shop context, has implied that unified bars must be justified by a compelling state interest. *See* Levine v. Supreme Court of Wisconsin, 679 F. Supp. at 1500.

239. Justices on the Supreme Court recognized this problem at oral argument in *Lathrop*. At one point, oral argument focused on a denial by Mr. Gordon Synkin, counsel for the State Bar, that the integrated bar was like a political party:

> CHIEF JUSTICE WARREN: . . . Take the number of judges a county should have. That is a rather political thing. . . . Also, the question of how much judges should be paid is more or less a political thing . . . .
>
> MR. SINYKIN: I do not think they are political activities . . . .
>
> MR. JUSTICE BLACK: But they are activities in connection with the passage of legislation on which people differ, on which they frequently have differences . . . .
>
> MR. JUSTICE FRANKFURTER: Suppose somebody were to make a proposal . . . before the bar . . . to change your constitution so as to give to the state judges . . . life tenure. . . . Can you think of a more politically charged question than that?

political status, which has trapped the institution in an increasingly destructive cross-fire [sic] of values."[240] This condition has disabled the integrated bar's effectiveness and versatility.[241]

Reverting to voluntary bar status is a feasible alternative for several reasons. First, there are no legal or political identity problems. The voluntary bar is a private organization, not a public agency or a compulsory membership group. Second, voluntary bar membership would be consensual, thus eliminating internal disruption by dissident lawyers. In turn, this would give the bar flexibility in both revenue gathering and in legislative advocacy. More importantly, without a legislature or court constantly looking over its shoulder, the voluntary bar would essentially be an autonomous association.

The State Bar of Wisconsin will lose very little by remaining voluntary.[242] Regulation of attorney discipline and competence is already the responsibility of independent agencies. Moreover, those agencies and the CLE program are already funded by separate assessments on lawyers.

After some further argument on what is a political matter, Justice Frankfurter summed up his position by saying:

> You cannot rest this case on a nice line between what is political and what is not political insofar as the bar as a corporate body in your state may express its views. I do not think you can rest or sustain your Supreme Court by giving a very circumscribed and . . . mutilated notion of something as political and something that is not political. These things are inextricably bound together.

See D. MCKEAN, *supra* note 1, at 102-03.

240. *See* Schneyer, *Sunset for the Unified Bar?*, 12 B. LEADER 20, 22 (Sept.-Oct. 1986).

241. According to Professor Schneyer, problems for the integrated bar are created from external and internal forces. The internal problem is "the obstruction of bar operations by dissident members." *Id.* at 21. The external symptom relates to the involvement of courts and legislatures in the governance and operations of the bar. *Id.* In Wisconsin, for example, the supreme court has the authority to appoint a committee to review the state bar's performance in carrying out its functions. *See* SCR 10.10 (1988). Anytime the court appoints a committee to review Bar activities, the cost for the investigation is borne by the State Bar. For example, the Kelly Committee's work in 1982 cost the State Bar approximately $50,000 in direct expenses and approximately another $50,000 in voluntary time put in by bar leaders. *See* Schneyer, *supra* note 20, at 92-93. Schneyer also suggests that the integrated bar is at a disadvantage in legislative advocacy as compared to other associations. For example, in 1986 a medical malpractice reform compromise was reached between Wisconsin's state medical society and the Wisconsin Academy of Trial Lawyers. The State Bar did not become involved. *See* Schneyer, *supra* note 240, at 22. For a discussion of related problems inherent in the unified bar, see *supra*, notes 24-27 and accompanying text. *But see* Ross, *The Sun Still Shines on the Unified Bar*, 12 B. LEADER 18 (Sept.-Oct. 1986) (unified bar is an effective organization to examine public institutions and processes as well as to insure equal access to justice).

242. Although the Seventh Circuit Court of Appeals has ruled that mandatory membership in the bar is constitutional, the State Bar of Wisconsin continues to operate as a voluntary bar association.

However, certain record keeping programs that would remain under State Bar control should receive funding from additional lawyer assessments.[243]

In membership and finance, statistics indicate that voluntary state bars have learned how to retain a broad membership base and have demonstrated their ability to raise funds just as effectively as the integrated bars.[244] Arguably, membership stability will also be maintained by virtue of the bar's role in providing a forum for CLE courses. Since the Wisconsin Supreme Court has mandated that each lawyer must receive thirty credit hours every two years, the impetus created by that requirement will help retain membership.[245] Furthermore, the concern that voluntary status would significantly reduce bar revenue is misplaced. Currently, mandatory bar dues are only a fraction of the total revenue received by the State Bar.[246] With the proposed additional assessments on lawyers to support bar administrative functions and the increase in dues which would accompany voluntary bar status, the State Bar will be able to maintain a majority of its programs.

VI. CONCLUSION

The mandatory bar was considered the most efficient organization to advance both public interests and the interests of the legal profession. But, as time passed, it became clear that integration did not produce a self-governing bar; however, it did produce a bar that was inherently flawed. Compulsory membership inevitably led to court imposed restrictions, disruption by unwilling participants and costly litigation.

Perception of the constitutional justification for integration has also evolved. Although at one time the mandatory bar was perhaps vested with enough regulatory power to warrant compulsory membership, the trend suggests a more diminished role. Whether this factor will significantly impact on a first amendment analysis of the bar is unclear. A consistent application of the first amendment to compulsory participation in the integrated bar has heretofore eluded the courts. This is the fault of both lawyers and

243. The state bar does perform certain administrative functions (such as collecting records on trust accounts for BAPR) which could be paid for by an assessment on all lawyers. Additionally, the supreme court could always step in and sanction additional assessments on lawyers for essential programs (i.e., the Lawyer Information Referral Service) if the voluntary bar lacks sufficient resources.

244. *See supra* note 28 and accompanying text.

245. This assertion is supported by the fact that nearly 90% of Wisconsin's lawyers renewed their membership in the voluntary bar. *See supra* note 22.

246. According to the 1988 State Bar Annual Report, membership dues were only 33% of the total state bar budget. *See* State Bar of Wisconsin, *1988 Annual Report*, 61 WIS. B. BULL. 33, 35 (Nov. 1988).

judges, who are perhaps more willing to vigorously enforce the rights of others than their own rights as private citizens.

This most recent round of litigation is an opportunity for the courts to recapture and imbue some consistency to the methodology applied to the constitutional infringements occasioned by compulsory association. Although the state might sanction a compulsory association, it has the burden of presenting exceptional circumstances which justify the infringement on individual liberty. Based on the current state of the integrated bar, the voluntary bar seems ideally suited for preserving individual freedom for its members and autonomous unrestricted control for itself.

PETER A. MARTIN*

* The author wishes to extend appreciation to Professor Michael K. McChrystal for his guidance in the preparation of this Comment.

HEART AND SOUL . . . AND WHERE SHOULD WE GO FROM HERE?

JOHN S. SKILTON*

I welcome you all to the joint meeting of the Legal Services Commission and the Legal Education Commission of the State Bar of Wisconsin.[1] This is an historic occasion not only because it marks the conclusion of almost two years of intensive work by both Commissions, but because in my view, these Commissions have made an invaluable contribution to the lawyers of this state and to the future of the legal profession.

The work of these Commissions also significantly advances the mission of the integrated Bar, and forecasts an increased role for the Bar going into the 21st century.

I. WHERE HAVE WE BEEN?

In Wisconsin, of course, we know what it means to fight for the integrated Bar. We have been fighting for it since 1959, when Trayton Lathrop instituted his challenge which ultimately ended up in the United States Supreme Court.[2] But in the last 10 years, our fight has been without interruption, with four separate federal district courts cases,[3] and five straight years of arbitration.

In September, 1986, then President Frank Gimbel asked me to

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* President, State Bar of Wisconsin 1995-96. Mr. Skilton chaired the Commission On The Delivery Of Legal Services Of The State Bar of Wisconsin ("Legal Services Commission"). He received his bachelor's and juris doctor from the University of Wisconsin-Madison in 1966 and 1969 respectively and went on to clerk for the Honorable Thomas E. Fairchild at the U.S. Seventh Circuit Court of Appeals.

1. These remarks were delivered to the joint meeting of the Legal Services Commission and the Legal Education Commission of The State Bar of Wisconsin on March 2, 1996. Both Commissions were appointed in 1994 and were expressly commissioned to study their respective issues and report back to a joint meeting of both Commissions on March 1-3, 1996. At this meeting both Commissions produced draft reports for discussion. These remarks have necessarily been edited and updated to reflect developments since March 3, 1996.

2. Lathrop v. Donohue, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961).

3. Levine v. Supreme Court of Wisconsin, 679 F. Supp. 1478 (W.D. Wis. 1988), *rev'd sub nom.*, Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 493 U.S. 873 (1989); Crosetto v. Heffernan, 810 F. Supp. 966 (N.D. Ill. 1992), *aff'd in part, rev'd in part and remanded*, 12 F.3d 1396 (7th Cir. 1993), *cert. denied*, 511 U.S. 1129 (1994); Thiel v. State Bar of Wisconsin, No. 93-C-6035 (W.D. Wis. Dec. 1, 1993); Thiel, et al. v. State Bar of Wisconsin, et al., No. 95-C-103-S (W.D. Wis. Sept. 5, 1995).

represent the State Bar in a case brought against it by Steve Levine. I said "sure, why not?"—and thought to myself that at most this would be a case resolved by motion, and over in a year, or two, at the most. But on February 19, 1988, Judge Crabb, applying a different legal test than the one the United States Supreme Court had applied in *Lathrop*, declared the State Bar unconstitutional. Judge Crabb wrote, in part, as follows:

> Although the activities cited by defendants are relevant to the goals of professional responsibility and competence, they are of a quite different nature from those presented to the Supreme Court twenty-seven years ago in *Lathrop*. It is not the Bar but arms of the Wisconsin Supreme Court that are primarily responsible for the "educational and ethical standards" of Wisconsin lawyers; and it is not Bar membership dues that support these arms. The Bar challenged by plaintiff is not the same bar examined in *Lathrop*.[4]

On December 8, 1988, the Seventh Circuit Court of Appeals reversed the district court's decision in *Levine*, stating, in part, as follows:

> In fact, the plurality opinion [in *Lathrop*], in justifying its decision, expressly noted the multifaceted character of the Wisconsin bar . . . . Thus, in our view, the district court overemphasized the importance of the bar's role in the areas of continuing legal education and attorney discipline to the *Lathrop* Court.[5]

Shortly after the Seventh Circuit decided the *Levine* case, the United States Supreme Court granted certiorari in the case of *Keller v. State Bar of California*.[6] In *Keller*, the Court affirmed the continuing viability of *Lathrop*, but sought to distinguish between lawful and unlawful use of "mandatory dues," and to impose appropriate arbitration procedures to permit dissenters to challenge the use of their dues. The Court stated in part:

> [T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State."
>
> 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

4. *Levine*, 679 F. Supp. at 1493.
5. Levine v. Heffernan, 864 F.2d at 462, 462 (7th Cir. 1988).
6. 496 U.S. 1 (1990).

> 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.[7]

During this same period, and in response to Judge Crabb's decision, the Wisconsin Supreme Court, by order dated May 6, 1988, suspended the mandatory State Bar membership rules. Thus, our Bar remained voluntary until July 1, 1992—a period of over four years. But after a challenge to the Florida integrated bar was turned down by the United States Supreme Court,[8] the State Bar petitioned the Wisconsin Supreme Court to reinstate the integrated Bar in Wisconsin. By order filed June 17, 1992, the Court granted the Bar's petition.[9]

In his concurring opinion in the "reintegration order," Justice Bablitch put his finger on the benefits of the mandatory bar:

> All lawyers have a special responsibility to society. That responsibility involves far more than merely representing a client. Lawyers are the guardians of the rule of law. The rule of law forms the very matrix of our society. Without the rule of law, there is chaos. Lawyers not only have a responsibility to their clients, they have an equal responsibility to the courts in which the rule of law is practiced, and to society as a whole to see that justice is done.
>
> The mandatory bar has been an essential force in assisting lawyers to fulfill their roles as guardians of the rule of law. Of equal importance, the mandatory bar has been a guiding force in assisting lawyers to deliver an increasing quality of justice to society and to those they represent. Many if not most of the services the bar delivers in pursuit of these goals are not self-supporting and are not capable of being subject to user fees.[10]

I would like to tell you that the litigation ended with the Supreme Court's reintegration order. But, of course, it did not. After reintegration, the dissenters sued again, now to attack *any* use of Bar funds for any purposes that are not literally within the two purposes expressly identified in *Keller*.

So far they have not succeeded. After the first arbitrator (following reintegration) unduly restricted the use of mandatory dues, the Wisconsin Supreme Court granted the Bar's petition to amend SCR 10.03(5)(b) so as to make it express that the Bar had the right to use

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7. 496 U.S. at 14, 15-16 (citing *Lathrop*, 367 U.S. at 843 (plurality opinion)).
8. Gibson v. Florida Bar, 502 U.S. 104 (1991).
9. In Matter of State Bar of Wisconsin, 169 Wis. 2d 21, 485 N.W.2d 225 (1992).
10. *Id.* at 29, 485 N.W.2d at 227, 228 (Bablitch, J., concurring).

mandatory dues for any purpose within its stated purposes. The new rule also made it clear that if the activity was "political" or "ideological," it had to meet the *Keller* "germaneness" tests or could not be funded from mandatory dues. In a decision dated September 6, 1995, Judge Shabaz rejected a challenge to this new rule, finding it constitutional. This decision, of course, has been appealed. It has now been fully briefed, and is set for argument, by Dan Hildebrand (I am now a defendant) on March 23, 1996. I predict that we will win, and that decision will, effectively, end the litigation.[11]

II. WHERE ARE WE NOW?

I believe that, in the end, we State Bar members have benefitted from these litigations, although this was not the intent of the dissenters. In the process we were forced to embrace our purposes, commit to our mission, find our strengths, and accept our limitations. And we also came out with a little more intestinal fortitude, *i.e.*, committed to the proposition that we would not be silenced by dissenters or intimidated by lawsuits.

A. Benefits Obtained During Our Experience As A Voluntary Bar (1988-92)

No one could have attended the Mid-Winter Meeting of the State Bar in Milwaukee in January (1996) without coming away with a sense of renewed commitment to the organized Bar. Wherever you looked, something exciting was going on—for the benefit of lawyers and the clients they serve. The technology displays and offerings were awesome. The programs and seminars were well attended and right on the money. Total attendance was the highest in 20 years.

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11. On September 3, 1996 (six months after this speech was delivered) the Seventh Circuit affirmed the district court. Thiel v. State Bar of Wisconsin, 94 F.3d 399 (7th Cir. 1996). The Seventh Circuit Court pointedly stated: "This case represents the latest chapter in the seemingly neverending battle between Wisconsin attorneys and the Wisconsin State Bar." *Id.* at 400.

The decision affirmed the district court both on its decision to grant Eleventh Amendment immunity to the State Bar and with respect to its approval of new SCR 10.03(5)(b)(1). Crucially, it held as follows: "Accordingly we hold that the First Amendment does not prohibit the Bar from funding non-ideological, non-germane activities with compelled dues." *Thiel*, 94 F.3d at 405. Two weeks later, on September 17, 1996, the Seventh Circuit affirmed the district court's dismissal of the *Crosetto* case. Crosetto v. State Bar of Wisconsin, 97 F.3d 1454 (7th Cir. 1996) (unpublished table decision), *cert. denied*, 117 S. Ct. 959 (1997). On December 16, 1996, Mr. Crosetto filed a Petition For a Writ of Certiorari in the United States Supreme Court that was subsequently denied. *Id.*

There is no doubt that the State Bar of Wisconsin implemented major changes while it was a voluntary Bar. These changes have been, on the whole, positive. During this four-year period, the Bar took steps to solicit and ensure increased member input, involvement and participation in Bar programs, projects, and activities. These steps included aggressive campaigns to inform members of specific Bar opportunities; recognition of members for their contributions; and increased efforts to provide members with the tools needed to help them practice law more efficiently. Perhaps the most important thing the Bar learned was that if it has an active, informed and well-supported membership, and if it operates with the energy and spirit of a *voluntary* organization, then its potential as a positive force is virtually unlimited.

B. Lessons About Being A Mandatory Bar

SCR 10.02(2) lists the purposes to the State Bar and charges the Bar to improve the administration of justice, to create opportunities for legal education, and "to promote the innovation, development and improvement of means to deliver legal serves to the people of Wisconsin; *to the end that the public responsibility of the legal profession may be more effectively discharged.*"[12] Although these have been our stated purposes since time immemorial, the litigation in combination with the accompanying unrelenting scrutiny of our innards, have focused our attention, energy and interest on pursuing them full force. And so we have.

Watch our Bar work: we take stands, we take risks, we make tough decisions, and we have not shied away from controversy. "Tort reform," you say? The Bar has taken a position. The death penalty? Likewise. But we have also tried to select positions based on the *peculiar knowledge* that lawyers have, and for systemic, institutional reasons. At the same time, we have respected the constitutional implications of taking "political" or "ideological" positions and, accordingly, have carefully accounted for, and deemed "nonchargeable," positions and activities that fall within the penumbras of these concepts.

That, in my opinion, is what the law requires—but no more. It does not gag us. It does not render us impotent.

That our Bar has come a long way in the last ten years was graphically brought home in an ABA meeting of integrated bars that I attended in February in Baltimore. At the meeting, the some thirty-plus integrated bars were asked to report on their "*Keller* status." Surprising-

12. SCR 10.02(2) (1996) (emphasis added).

ly few had been sued. But it soon became quite clear, as each reported, why this was so. The response the vast majority had taken to the *Keller* decision, was to avoid taking any controversial action, *i.e.*, to mimic the ostrich. These bars were not just defensive, they had been rendered innocuous and impotent for fear of suit.

As you might guess, when it came my turn to report, I strongly stated my dissent and noted that the State Bar of Wisconsin had refused—at some cost—to be rendered irrelevant. Indeed, I stated that if this were to become so, I would personally petition the Wisconsin Supreme Court to make the State Bar voluntary.

The point is that, when properly understood, the mandatory bar has both the will and the resources to be a force, a player, in dealing with the problems of the legal system, the profession, and, ultimately, the public. *Indeed, for the reasons articulated by Justice Bablitch, it is far more likely to do this than a voluntary bar, which, of necessity, must concentrate on member service and member retention issues.*

Thus, as President, I have taken the opportunity to formulate and hopefully implement an agenda that would promote the mission of the Bar and be consistent with *Keller*. Integral to this agenda was the formation of these two Commissions, *i.e.*, the Legal Service Commission, whose mission is "to improve access to and the availability of legal services to the citizens of Wisconsin"[13] and the Legal Education Commission, whose mission is "to enhance legal education in Wisconsin and the quality of legal services provided to the public."[14]

III. WHERE SHOULD WE GO FROM HERE?

In my opinion, the reports of these Commissions are solid and will serve to advance the fundamental purposes of the Bar for years to come. Although Dean Eisenberg is a tough act to follow, some remarks by me about the work of each Commission seems appropriate.

A. The Legal Services Commission Report

When the Legal Services Commission was first established, I viewed its mission to be looking for ways to improve legal service delivery to persons of moderate income including the so-called "working poor." This point of concentration followed upon recent ABA studies that had

13. *Commission on the Delivery of Legal Services, Final Report and Recommendations*, 1996 STATE BAR OF WISCONSIN 1 [hereinafter *Commission on the Delivery of Legal Services*].

14. *Commission on Legal Education, Final Report and Recommendations*, 1996 STATE BAR OF WISCONSIN 2 [hereinafter *Commission on Legal Education*].

identified and attempted to quantify unmet legal needs for this group.[15] It was also believed that the in-place, federally-funded legal services delivery system to the poor, as supplemented by *pro bono publico* contributions by the Bar, did not require immediate attention.

But how wrong I was. In November 1994, of course, the power shifted to a Congress bent upon significantly de-funding the Legal Services Corporation. As the Legal Services Commission Report notes, the effect upon our Wisconsin legal services law firms has been immediate and profound.[16] Thus, and necessarily, the scope of our Commission's work was broadened. Hopefully, our recommendations, and, particularly, our pilot projects, will help to alleviate the consequences of these deleterious actions.

Some overarching comments on the Report and its recommendations seem entirely appropriate. First, and most importantly, the Report is premised upon the proposition that all "solutions," in the end, must necessarily depend upon lawyers being involved, if not in traditional ways, at least in supportive and quality-control ways. Thus, all of our recommendations, and the accompanying pilot projects, assume an intimate and material role for lawyers.

Secondly, the Report and recommendations fiercely depend upon the concept of *voluntary*, as distinct from *mandatory*, participation by the Bar. Here it is important to make the distinction between the concept of a mandatory membership in the Bar and mandatory participation in *pro bono*. In point of fact, *pro bono publico* has traditionally depended upon the voluntary, public-spirited *giving* of time (or money) by lawyers. Dean Eisenberg said, and I agree, that mandatory giving is an oxymoron.[17] The Commission's Recommendation No. 8 expressly adopts this position.[18]

Thirdly, the Report and recommendations identify and promote the need for *institutional* response to these seemingly overwhelming problems. Thus, for example, the Commission recommends that the Bar itself increase its institutional role;[19] that law firms increase their institutional role;[20] and that the courts, including the Supreme Court,

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15. *Commission on the Delivery of Legal Services*, *supra* note 13, at 2.
16. *Id.* at 2.
17. *See id.* at 74 (President's Perspective, *Mandatory vs. Voluntary: An Old Refrain*).
18. *Id.* at 38 (Recommendation No. 8).
19. *See, e.g.*, *id.* at 43-44 (Recommendation No. 11); *see also id.* at 51-52 (Pilot Project No. 1).
20. *Id.* at 42 (Recommendation No. 10).

increase their institutional role.[21] What the Commission found, at least in part, was a lack of knowledge about, not to mention coordination of, the significant volunteer time freely given by large numbers of lawyers. The conclusion was inescapable that increased institutional involvement is needed not only to encourage and stimulate *increased* giving, but to synergize and render more efficient *existing* giving.

At the same time, however, the Legal Services Commission Report does not lose sight of the fundamental proposition that the responsibility to provide for legal services for the poor is not only the legal profession's, but the public's as well.[22] Thus, fundamental to the Report—as specifically stated in Recommendations No. 12 and 13[23]—is the need for funding of legal services for the poor *from sources outside of the profession itself.*

Finally, it should be pointed out that the approach taken by our Commission was somewhat different than the approach recommended by the ABA, for example in its "Just Solutions"[24] model. Thus, although we involved the public in the "input" stage,[25] we have not done so in the "design" stage—at least not to this point. This was intentional. It was the Commission's view that to have any real chance of success, lawyers—as they would be the ones most affected—must both design and ultimately subscribe to, the solutions. A related concern was that it would be dangerous, and potentially counter-productive, to create unrealizable expectations of the public.

In the end, the Report and recommendations attempt to be creative while maintaining control even where new or experimental forays are promoted: control by the court and/or lawyers of the legal information and services ultimately "delivered" to the public. This stems from a deep-rooted concern that good intentions and commendable motivations notwithstanding, there is still the potential risk of harm to the public.

The recommendations, and particularly the pilot projects, while being conceptually different, are hoped to work in synergy. They are intended to be interwoven and interdependent, while experimenting with different approaches and concepts. In my opinion, each is important, and each needs to be tried, separately and in combination. But if we find that

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21. *Id.* at 30-34 (Recommendations No. 3, 4, 5); *see also id.* at 53 (Pilot Project No. 2).

22. *See id.* at 76-77 (President's Perspective, *With Friend's Like These*); *see also id.* at 79 (*Our Justice System Can't Afford Cuts To Legal Services For Poor*).

23. *Id.* at 45-48 (Recommendation No. 12, 13).

24. *See Just Solutions Seeking Innovation and Change in the American Justice System*, 1994 A.B.A.

25. *Id.* at 18-22.

some of the solutions don't work, or, worse yet, hurt the public, then they can and should be scrapped.

As Dean Eisenberg pointedly commented, however, none of the recommendations or pilot projects will succeed unless we, the profession, do a better job of legal resource allocation. We must find ways to better match-up underutilized lawyers with unmet legal needs. Indeed, this may be our greatest challenge, and to do this, we will need full commitment by the Bar, the court, the law schools and the lawyers themselves.

B. The Legal Education Commission Report

I turn now to the Report of the Legal Education Commission.[26] Dean Eisenberg and Justice Heffernan have amply described the substance and purpose of the Legal Education Commission's recommendations. Let me turn, then, instead to the point of joinder of the two reports, that being the profession's responsibility to deliver legal services to the poor. As stated in the Legal Education Commission Report: "Unfortunately, for segments of the population, the increasing need for legal services has not been met by an increasing supply of affordable or no cost representation."[27] Accordingly, as part of the value "to promote justice, fairness and morality,"[28] the Report notes the responsibility "to ensure that adequate legal services are provided to those who cannot afford to pay for them; and [to contribute] to the profession's fulfillment of its responsibility to enhance the capacity of law and legal institutions to do justice."[29]

The concept of partnership, too, plays loudly in both Reports. The obvious partnerships are expressly identified: between the bar, local bars, the court, court clerks and administrators, law librarians, and the law schools and their faculty. But other potential partnerships are identified and may, in the long run, have even more potential, *i.e.*, with government agencies, public librarians, private foundations, volunteer organizations, and other members of the "public."

The Reports also have in common the willingness to listen to our critics and to the consumers of our services—our clients—and the public. If we listen, we can learn and improve ourselves.

Both Reports also implicitly raise troublesome questions of whether

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26. *See Commission on Legal Education*, supra note 14.
27. *Id.* at 5.
28. *Id.* at 17 (Recommendation No. 1).
29. *Id.*

they go far enough or can really make much difference. In this regard, the most disturbing and disconcerting statement for me in either Report was the following: Many women and minorities in the profession have also questioned whether informal mentoring by experienced practitioners is available to them to the same extent that it is available to white male attorneys at the start of their careers.[30] If this be true—or even if it is just a perception—it must be remedied. For in my mind, and in the end, all of the "formal" educational opportunities so carefully identified and aggressively promoted in the Legal Education Report cannot replace personal mentoring: the kind that occurs late at night on real cases; that tests nerve, ethics, and courage; when something important is really at stake. No set of solutions should presume to replace this kind of personal, hands on, real life, mentoring.[31]

I daresay it is the kind of mentoring that each of us in this room received. And if it is not occurring, then we must remedy this situation. We owe.

CONCLUSION

I would like to conclude these remarks by offering at least one lawyer's perspective on where we as a profession are today and, with this in mind, suggest how these Reports should be read. Said in the negative, in my opinion these Reports should not be misread to infer that our profession is in deep trouble or hopelessly beyond repair.

Yes, the legal profession is under attack. True enough, large numbers of people have voiced concerns about the quality and cost of legal services. And as shown by these Reports, we have listened, and we will respond.

But as we probe and expose our problems, we must not lose our essence or fail to remind the public of what we do, and more to the point, what we must do. We must not ignore our oath nor forget our mission. We must not lose our heart and soul.

I mentioned earlier today that I recently had occasion to reread *To Kill A Mockingbird*.[32] I did so after receiving considerable criticism for inviting Johnnie Cochran to our Bar meeting in Milwaukee. And although I do not strictly compare Johnnie Cochran's role in the O.J. Simpson trial to that of Atticus Finch in *To Kill A Mockingbird*, both

30. *Id.* at 6.
31. *See generally id.*
32. HARPER LEE, TO KILL A MOCKINGBIRD (Lippincott Co. 1960).

roles caused me to reflect on what the "public image" of the legal profession is, or, more accurately, what we really want it to be.

You remember Atticus Finch. In the face of public outrage, risking all, he took a controversial representation—and lost. In my view, the most poignant quote in the book says it all: "'don't see why you touched it in the first place,' Mr. Linkdeas was saying. 'You've got everything to lose from this, Atticus. I mean everything.'"[33] After Atticus tried that case, and lost, he was leaving the courtroom when those who so fervently wished for a different result, and were so bitterly disappointed by the verdict, nevertheless stood up as he passed: "Miss Jean Louise stand up. Your father's passing."[34]

In 1848, Abraham Lincoln took the representation of a fugitive slave owner, seeking, on the slaveowner's behalf, to have a slave returned from Illinois under the Fugitive Slave Act. For his efforts Lincoln was called the "Slave Hound of Illinois." Abraham Lincoln was undoubtedly "the Great Emancipator," but he was a lawyer first!

In 1850, just two short years later, Lincoln authored "Notes On The Practice of Law."[35] He wrote:

> here is a vague popular belief that lawyers are necessarily dishonest. I say *vague*, because when we consider to what *confidence*, and *honors* are reposed in, and conferred upon lawyers by the people, it appears improbable that their *impression* of dishonesty is very distinct and vivid. Yet the impression, is common—almost universal. Let no young man, choosing the law for a calling, for a moment yield to this popular belief. Resolve to be honest at all events; and if, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.[36]

Not fancy, but simply put and right on the mark! Lincoln's point is that honesty is the *sine qua non* of being a lawyer—not liking your client or his issue, *not* popularity, *not* winning, and *not* even being "right." Tough cases. Unpopular positions. Against all odds. The price perhaps being vilification and even contempt. If this is the price we must pay, if our "public image" suffers as a result, then I, for one, say "so be it." In my view, nothing we say or do here today, or state or suggest in these

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33. *Id.* at 135-36.

34. *Id.* at 194.

35. ABRAHAM LINCOLN, *Notes on the Practice of Law*, *in* LINCOLN, SPEECHES, AND WRITINGS 1832-1858 (1989).

36. *Id.* at 246.

Reports, should in any way detract from the role that we, the lawyers, must occasionally play: we cannot throw the baby out with the bathwater.

Is our image worse today that it was 150 years ago? Perhaps. I think these Commissions will help to improve our performance and, perhaps in the process and as a result, our image. But improving our image is not what we set out to do, and, in any event, such an effort would likely fail.

I want to end on this note. I said when Frank Remington won the Goldberg Award that it was up to the next generation to take up the torch in order to pass it on. These Commissions have taken up that torch, and are running as hard as they can—perhaps against the wind.

I am proud to be in your presence. I am honored by your commitment. The Bar has been well served. And most importantly, I am proud to be a lawyer.

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Supreme Court of Wisconsin.
Trayton L. LATHROP, Appellant,
v.
Joseph D. DONOHUE, Respondent.

April 5, 1960.

Action by an attorney to recover dues paid by him to the Treasurer of the State Bar under an alleged unconstitutional compulsion. The Circuit Court, Fond du Lac County, Russell E. Hanson, Circuit Judge, entered judgment adverse to attorney and he appealed. The Supreme Court, Currie, J., held that the orders of the Supreme Court integrating the State Bar, and continuing such integration, and approving rules and bylaws of the Bar imposing requirement of compulsory membership and payment of annual dues, do not violate any of the freedoms of an attorney under the First Amendment to the federal Constitution, as embodied in the due-process and equal-protection-of-the-laws clauses of the Fourteenth Amendment to the federal Constitution, nor do they violate article one of the State constitution.

Judgment affirmed.

West Headnotes

[1] Attorney and Client 45 32(3)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(3) k. Power and Duty to Control. Most Cited Cases
(Formerly 45k32)

A circuit court was without jurisdiction to pass upon the validity of an order of the Supreme Court regulating the practice of law.

[2] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Even though an action challenging annual dues requirement of the State Bar was improperly brought in the circuit court, on appeal from dismissal of such action, the Supreme Court would treat it as though it had been originally and properly brought in the Supreme Court in view of the fact that the action was one publici juris in which the Supreme Court had the benefit of thorough and adequate briefs and oral argument upon the constitutional issue presented, and in view of fact it would work an injustice to dismiss the action.

[3] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

An action challenging constitutionality of annual dues requirement of the State Bar, brought against the treasurer of the Bar, would not be dismissed on ground there was a defect of parties defendant, due to failure to name the State Bar as a defendant, where counsel for the secretary of the Bar so competently marshalled the facts and the law in support of the constitutionality of the orders creating the State Bar that its interests did not require that it be made a party. W.S.A. 260.19(1).

[4] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Both a circuit court and the Supreme Court possessed the power to have compelled, on either court's own motion, the impleading of the State Bar as a party defendant, in an action challenging constitutionality of annual dues requirement of the State Bar, if the State Bar's interests were deemed to require that such be done, as an alternative to dismissal of the action because of failure of plaintiff to

have joined the State Bar as a party.

[5] Constitutional Law 92 3847

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3847 k. Relationship to Other Constitutions. Most Cited Cases
(Formerly 92k251)

Provisions of article one of Wisconsin constitution are substantially the equivalent of due-process and equal-protection-of-the-laws clauses of Fourteenth Amendment to federal Constitution. U.S.C.A.Const. Amend. 14; W.S.A.Const. art. 1.

[6] Attorney and Client 45 14

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k14 k. Nature and Term of Office. Most Cited Cases

The right to practice law is not a right but is a privilege subject to regulation.

[7] Attorney and Client 45 32(2)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(2) k. Standards, Canons, or Codes of Conduct. Most Cited Cases
(Formerly 45k32)

The only limitation upon a state's power to regulate the privilege of the practice of law is that the regulations adopted do not impose an unconstitutional burden or deny due process.

[8] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

The fact that annual dues exacted by the State Bar is not deposited in the public treasury but is disbursed by the State Bar, a court-created agency to which paid, does not militate against the validity of such dues as a license fee.

[9] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Evidence 157 22(2)

157 Evidence
157I Judicial Notice
157k22 Corporations and Associations and Members Thereof
157k22(2) k. Powers and Acts Thereof. Most Cited Cases

The Supreme Court would take judicial notice of the activities of the State Bar in the legislative field since its creation by the Supreme Court in 1956.

[10] Constitutional Law 92 1440

92 Constitutional Law
92XVI Freedom of Association
92k1440 k. In General. Most Cited Cases
(Formerly 92k91, 92k82(6), 92k82)

The general public and the legislature are entitled to know how the legal profession as a whole stands on proposed legislation affecting administration of justice and practice of law, and this is a function of an integrated bar, and fact that State Bar takes a stand on legislation in regard to such matters will not be deemed to impinge upon a member's first amendment freedoms, even though some of such members' dues money might be used to support causes to which such members are opposed. U.S.C.A.Const. Amends. 1, 14.

[11] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Insofar as the State Bar confines its activities in legislative matters to those authorized by the rules and bylaws of the State Bar, the Supreme Court will not interfere or in any manner seek to control or censor the action taken, or substitute its judgment for that of the membership of the State Bar, although the Supreme Court will exercise its inherent power to take remedial action should the State Bar engage in an activity not authorized by its rules and bylaws and not in keeping with the stated objectives for which it was created.

[12] Constitutional Law 92 2484

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2484 k. Police Power Questions. Most Cited Cases
(Formerly 92k70.1(6), 92k70(1))

While the police power is generally considered an exclusive power of the legislature, it may be exercised by courts. U.S.C.A.Const. Amends. 1, 14.

[13] Constitutional Law 92 1150

92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1150 k. In General. Most Cited Cases
(Formerly 92k47)

In situations where regulatory measures adopted by the states, or agencies thereof, pursuant to police power, are attacked as infringing first amendment freedoms, courts are required to balance the competing public and private interests at stake. U.S.C.A.Const. Amends. 1, 14.

[14] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

The State Bar is a public and not a private agency.

[15] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Constitutional Law 92 4273(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4273 Attorneys
92k4273(1) k. In General. Most Cited Cases
(Formerly 92k275(1))

The orders of the Supreme Court integrating the State Bar, and continuing such integration, and approving rules and bylaws of the Bar imposing requirement of compulsory membership and payment of annual dues, do not violate any of the freedoms of an attorney under the First Amendment to the federal Constitution, as embodied in the due-process and equal-protection-of-the-laws clauses of the Fourteenth Amendment to the federal Constitution, nor do they violate article one of the State constitution. U.S.C.A. Const.Amends. 1, 14; W.S.A. Const. art. 1.

****406 *232** Action commenced June 8, 1959, by Trayton L. Lathrop to recover the sum of $15 paid by him to the defendant Joseph D. Donohue under an alleged unconstitutional compulsion.

The material allegations of the complaint are as follows: The plaintiff was admitted to practice of law by the supreme court of Wisconsin in 1948 and since his admission he has practiced his profession at the city of Madison. The defendant***233** is the treasurer of the State Bar of Wisconsin (hereinafter referred to as the 'State Bar') which was integrated on a trial basis in 1956, by order of the supreme court of Wisconsin, and functions under the rules and by-laws of such organization approved by further order of the same court. This integration of the bar was continued in effect on a permanent basis by further order of such court entered December 22, 1958. Such rules and by-laws impose compulsory membership and the payment of annual dues upon all persons admitted to practice law

and engaged in the active practice of law in the state as a requisite of such persons continuing in such active practice. On or about March 6, 1959, the plaintiff paid under protest to the defendant the sum of $15 to cover his annual dues to the State Bar for the calendar year 1959, and accompanied such payment with a letter which stated that such payment was made under compulsion of the by-laws of such organization requiring such payment, and that the plaintiff would hold the defendant personally liable for the amount so paid. The supreme court's order of December 22, 1958, insofar as it coerces the plaintiff to support the State Bar, is alleged to be unconstitutional on the ground that it violates the Fourteenth Amendment of the United States Constitution and art. I of the Wisconsin Constitution.

The defendant demurred to the complaint on the following three grounds:

'1. The court lacks jurisdiction over the subject matter of the action in that exclusive jurisdiction thereof is vested in the Supreme Court of the State of Wisconsin.

'2. There is a defect of parties defendant in that the State Bar of Wisconsin is a necessary party.

'3. The complaint does not state facts sufficient to constitute a cause of action.'

The trial court filed a memorandum decision in which the facts and the legal authorities were carefully and comprehensively***234** considered, and determined that the demurrer must be sustained on all three grounds. An order sustaining the demurrer was accordingly entered. Under date of October 23, 1959, judgment was rendered dismissing the complaint upon its merits. From such judgment the plaintiff has appealed.

Trayton L. Lathrop, Madison, Leon E. Isaksen, Madison, of counsel, for appellant.

Joseph D. Donohue, Fond du Lac, Gordon Sinykin, Madison, of counsel, for respondent.

CURRIE, Justice.

This court has determined to consider the constitutional issue raised on its merits and not to dispose of the appeal upon procedural grounds.

[1][2] While we are of the opinion that the learned trial court properly determined that the circuit court was without jurisdiction to pass upon the validity of an order of this court which regulates the practice of law, we will treat the action as though ****407** it had been originally and properly brought in this court. The reason for so doing is that this action is one *public juris* in which we have had the benefit of most thorough and adequate briefs and oral argument upon the constitutional issue presented. Under such circumstances we deem it would work an injustice to dismiss the action and compel the plaintiff to commence a new proceeding in this court to relitigate the same issue.

[3][4] The other procedural ground upon which the trial court sustained the demurrer to the complaint was that there was a defect of parties defendant. In so holding, the trial court determined that the State Bar is an indispensable party to this litigation under sec. 260.19(1), Stats. However, we deem that there may be some merit to the plaintiff's contention that in order to rule that there is a defect in parties ***235** defendant it is necessary to decide the constitutional issue. This is because, if the orders of this court creating the State Bar an entity are void, then it has no standing which would require it to be made a party. We are satisfied that counsel for the defendant Donohue has so competently marshaled the facts and the law in support of the constitutionality of the orders creating the State Bar that its interests do not require that it be made a party. Both the trial court and this court possess the power to have compelled, on the court's own motion, the impleading of it as a party defendant, if its interests were deemed to require that this be done, as an alternative to dismissal of the action because of failure of the plaintiff to have joined it as a party.

[5] The plaintiff bottoms his contention, that the integration of the bar is unconstitutional, upon the thesis that such integration violates the First Amendment freedoms of free speech, press, assembly, and petition which are inherent in the dueprocess and equal-protection-of-the-laws clauses of the Fourteenth Amendment. He also claims that there is a violation of these same freedoms as stated in various sections of art. I of the Wisconsin constitution. However, such provisions of the Wisconsin constitution are substantially the equivalent of the due-process and equal-protection-of-the-laws clauses of the Fourteenth Amendment. Boden v. City of Milwaukee, 1959, 8 Wis.2d 318, 324, 99 N.W.2d 156, and Pauly v. Keebler, 1921, 175 Wis. 428, 185 N.W. 554. We are satisfied that if the orders creating and continuing the State Bar violate the provisions of art. I of the state constitution they also violate the Fourteenth Amendment. We will, therefore, confine our consideration of the constitutional issue to whether there exists a violation of the Fourteenth Amendment.

In Integration of Bar Case, 1943, 244 Wis. 8, 11 N.W.2d 604, 12 N.W.2d 699, 151 A.L.R. 586, the argu-

ment was advanced that the statute ***236** enacted by the legislature (ch. 315, Laws of 1943), which provided for this court integrating the bar, violated the Fourteenth Amendment. Mr. Chief Justice Rosenberry in his opinion for the court dealt with such argument at pages 41 to 44 of 244 Wis., at pages 619, 620 thereof. It was there determined that an integration of the bar would not violate the Fourteenth Amendment.

While we might ground our decision of the instant case on this sound precedent authored by one of the great chief justices of this court, we choose not to do so. This is because the plaintiff has advanced some arguments that were not presented to the court when it previously considered the constitutional issue in 1943.

The plaintiff commences his argument with the sound premise that the right of any person to belong to an association embodies certain First Amendment freedoms protected by the Fourteenth Amendment. As the United States supreme court recently declared in Bates v. City of Little Rock, 1960, 80 S.Ct. 412, 416, 4 L.Ed.2d 480, 485:

'And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances****408** is protected by the Due Process Clause of the Fourteenth Amendment from invasion of the States. De Jonge v. State of Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 259, 81 L.Ed. 278; National Ass'n for Advancement of Colored People v. State of Alabama ex rel. Patterson, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488.'

This court held to the same effect in Lawson v. Housing Authority, 1955, 270 Wis. 269, 274, 70 N.W.2d 605.

From this premise the plaintiff argues that the converse is also true, i. e., the right not to belong to an association is also a freedom protected by the Fourteenth Amendment. In support thereof he cites the following statement from the opinion of the Maine court in ***237**Pappas v. Stacey, 1955, 151 Me. 36, 116 A.2d 497, 500: 'Freedom to associate of necessity means as well freedom not to associate. * * *'[FN1]

> FN1. In making such statement the Maine court was not referring to rights protected by the Fourteenth Amendment, but was interpreting a state statute which provided, 'Workers shall have full freedom of association * * *' R.S.1954, c. 30, § 15.

However, decisions of serious questions of constitutional law ought not to be ground upon chiché.

The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year. He is as free as he was before to voice his views on any subject in any manner he wishes, even though such views be diametrically opposed to a position taken by the State Bar.

[6] The right to practice law is not a right but is a privilege subject to regulation. Petition for Integration of the Bar of Minnesota, 1943, 216 Minn. 195, 12 N.W.2d 515, 518. As the Arizona court well stated in In re Greer, 1938, 52 Ariz. 385, 81 P.2d 96, 98:

'The right to practice law is not a natural nor constitutional one, in the sense that the right to engage in the ordinary avocations of life, such as farming, the industrial trades and the mercantile business is. It has always been considered as a privilege only, bestowed upon certain persons primarily for the benefit of society, and upon such terms and conditions as the state may fix. The final determination as to what these conditions are, and who has satisfactorily complied therewith, is, and always has been, in the courts before which the individual practices his profession, and from time immemorial such individuals have been considered essentially and primarily as officers of the court admitting them.'

***238** [7] The only limitation upon the state's power to regulate the privilege of the practice of law is that the regulations adopted do not impose an unconstitutional burden or deny due process. Schware v. Board of Bar Examiners, 1957, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796.

[8] Mr. Chief Justice Rosenberry declared in the Integration of Bar Case (1943), supra, that the dues payable by a lawyer to an integrated bar imposed by state action are in the same category as an annual license fee imposed upon any occupation or profession which is subject to state regulation. This is also the holding of the Florida and Louisiana courts in Petition of Florida State Bar Association, Fla.1949, 40 So.2d 902, and In re Mundy, 1942, 202 La. 41, 11 So.2d 398. The fact that a license fee exacted by the courts is not deposited in the public treasury but is

disbursed by the court created agency to which paid, does not militate against the ****409** validity of such license fee. Laughlin v. Clephane, D.C.D.C.1947, 77 F.Supp. 103.

The plaintiff grounds his argument, that the compulsory dues of the State Bar do impinge upon First Amendment freedoms, on the fact that the State Bar does take a stand on legislation pending before the legislature. He points out that he personally is opposed to some of the legislation supported by it. Because of this he contends his rights guaranteed by the First Amendment are violated because part of his dues money is used to support causes to which he is opposed.

Whatever activity in the legislative field in which the State Bar does engage is limited by its rules and by-laws promulgated by this court. Two of the standing committees which the board of governors is directed to establish by Rule 4 are the Committee on Administration of Justice and the Committee on Legislation. Secs. 4 and 9 respectively of the by-laws define the duties of these two committees and read as follows:

'Section 4. *Committee on administration of justice*. This Committee shall study the organization and operation ***239** of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system.

'Section 9. *Committee on legislation*. This committee shall study all proposals submitted to the Wisconsin Legislature or the Congress of the United States for changes in the statutes relating to the courts or the practice of law, and shall report thereon to the board of governors; and with the approval of the board of governors may represent the State Bar in supporting or opposing any such proposals.'

[9] This court takes judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956. In every instance the legislative measures advocated or opposed have dealt with the administration of justice, court reform, and legal practice. Neither the above-quoted by-laws nor the stated purposes set forth in sec. 2 of Rule 1 for which the bar was integrated would permit the State Bar to be engaged in legislative activities unrelated to these three subjects. The plaintiff complains that certain proposed legislation, upon which the State Bar has taken a stand, embody changes in substantive law, and points to the recently enacted Family Code. Among other things, such measure made many changes in divorce procedure, and, therefore, legal practice. We do not deem that the State Bar should be compelled to refrain from taking a stand on a measure which does substantially deal with legal practice and the administration of justice merely because it also makes some changes in substantive law.

[10] We are of the opinion that the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function an integrated***240** bar, which is as democratically governed and administered as the State Bar, can perform much more effectively than can a voluntary bar association. Cf. Petition of Florida State Bar Association, supra.

[11] The plaintiff contends that the State Bar's legislative activities are the same as those of such voluntary bar associations as the former Wisconsin Bar Association and the American Bar Association. Such argument ignores the obvious and very material distinction that exists ****410** between the legislative activities of the State Bar and those of a voluntary association. A voluntary association is free to take a stand on any proposed legislation in any field it deems desirable. This is not true of the State Bar which must confine its activities in legislative matters to those authorized by the rules and by-laws promulgated by this court. Insofar as it confines such activities to those authorized by the rules and by-laws, this court will not interfere or in any manner seek to control or censor the action taken, or to substitute its judgment for that of the membership of the State Bar. This was made crystal clear in our opinion in re Integration of the Bar, 1958, 5 Wis.2d 618, 625-627, 93 N.W.2d 601. Any other course would be abhorrent to our sense of devotion to the ideal of a free and independent bar. However, as we pointed out in our opinion in the 1958 In re Integration of the Bar Case, this court will exercise its inherent power to take remedial action should the State Bar engage in an activity not authorized by the rules and by-laws and not in keeping with the stated objectives for which it was created. If the lawyers of the state wish by group action to engage in legislative activities not so authorized they will have to do so within the framework of some voluntary association, and not the State Bar.

In the recent case of Dulles v. Johnson, 2 Cir., 1959,

273 F.2d 362, the court had before it the question of ***241** whether bequests to certain New York bar associations were exempt from federal estate tax. While such associations were voluntary in character, their activities in legislative matters seem to have been similar in scope to those of the State Bar of Wisconsin. The commissioner of internal revenue contended that the bequests were subject to tax because the associations were attempting to influence legislation and to carry on propaganda. However, the court ruled that the bequests were exempt and stated (at page 367):

'Moreover, the legislative recommendations of the Associations, insofar as these recommendations do not involve matters the responsibility for which has been entrusted to the Associations by the Legislature, are designed to improve court procedure or to clarify some technical matter of substantive law. They are not intended for the economic aggrandizement of a particular group or to promote some larger principle of governmental policy. These two factors lead us to the conclusion that the recommendations of the Associations concerning impending legislation are not such as to cause the forfeiture of charitable status under Section 812(d) [26 U.S.C.A.(I.R.C.1939)].'

In other words, the court of appeals for the Second Circuit determined that these restricted legislative activities were in the public interest and did not destroy the exemption.

[12][13] While the police power is generally considered an exclusive power of the legislature, it may be exercised by courts. Petition of Florida State Bar Association, supra. In such cited case the court held that its exercise of inherent power to integrate the Florida bar constituted an exercise of the police power. We deem that the same is true of the 1956 and 1958 orders of this court integrating the bar of this state, and continuing the same, in order to improve the administration of justice. In situations where regulatory measures adopted by the states, or agencies thereof, pursuant to the police power, are attacked as infringing First Amendment freedoms, the courts are required to balance the competing public and private interests at stake. ***242**Barenblatt v. United States, 1958, 360 U.S. 109, 126, 79 S.Ct. 1081, 3 L.Ed.2d 1115; National Ass'n for Advancement of Colored People v. State of Alabama ex rel. Patterson, 1958, 357 U.S. 449, 463, 466, 78 S.Ct. 1163, 2 L.Ed.2d 1488; and ****411**Schneider v. State of New Jersey (Town of Irvington), 1939, 308 U.S. 147, 161, 60 S.Ct. 146, 84 L.Ed. 155.

When we attempt to balance the competing interests at stake in this action we find no regulation of, or interference with, any of the plaintiff's rights of free speech, assembly, or petition. The only challenged interference with his liberty is the exaction of annual dues to the State Bar, in the nature of the imposition of an annual license fee, not unreasonable or unduly burdensome in amount, part of which is used to advocate causes to which he is opposed. However, this court in which is vested the power of the state to regulate the practice of law, has determined that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the State Bar. The public interest so promoted far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues.

[14] Furthermore, the State Bar is a public and not a private agency. In the annotation entitled, 'State bar created by act of legislature or rules of court; integrated bar,' 114 A.L.R. 161, the author states:

'While the statutes or court rules under which they have been organized differ to some extent, integrated bars have the common characteristics of being organized by the state or under the direction of the state, and of being under its direct control, and in effect they are governmental bodies.'

***243** State Bar of California v. Superior Court, 1929, 207 Cal. 323, 278 P. 432, 434, and In re Gibson, 1931, 35 N.M. 550, 4 P.2d 643, 653, support the above-quoted statement.

In 1951 the Wisconsin legislature created the Judicial Council. Of the present sixteen members thereof, four are chosen by the State Bar as a result of a secret ballot of its active members, three directly for such position, and the fourth ex-officio because of having been elected president-elect of the organization. Such judicial council has been expressly authorized by the legislature to recommend to it 'changes in the organization, jurisdiction, operation and methods of conducting the business of the courts.' Sec. 251.181(2)(f), Stats. Thus it advocates adoption of legislation of the same category on which the State Bar voices a position. The council's activities are financed by an appropriation of the legislature and thus is supported out of

the state's tax revenues. We are satisfied that the plaintiff as a taxpayer could not successfully challenge the constitutionality of the disbursement of public funds derived from taxes to support the activities of the judicial council merely because he was opposed to certain proposed legislation which it recommended be passed by the legislature. We can perceive no valid basis for distinguishing that situation from the one here confronting us insofar as constitutionality is concerned. The State Bar is a public agency the same as the Judicial Council. One has been created by the court and the other by the legislature but each was created by state action as a state agency to serve a public purpose.

While the plaintiff does not challenge the constitutionality of the purposes, other than legislative, for which the State Bar expends the annual dues collected from its members, we deem it advisable to set forth in an appendix to this opinion ***244** an analysis of such activities and the public purpose served thereby. Such analysis is not based upon the allegations of the complaint but upon facts of which this court takes judicial notice.

A considerable portion of plaintiff's brief is devoted to an impassioned argument that the integration of the bar is but the initial step which will lead to fascist syndicalism ****412** of the type rampant in Italy during Mussolini's years of power. As plaintiff points out, the chief evil of such a system was that the syndicates usurped and exercised the powers which in a democracy would be exercised by parliament and the courts, with resulting curtailment of the liberties of the people. That integration will lead to fascist syndicalism is an argument addressed to the policy making functions of the court, which would be material on the issue of whether or not to direct that the bar be integrated, but is hardly pertinent with respect to the issue of constitutionality. It is the constitutional issue alone with which we are here concerned.

Some of the states which have had long years of experience with an integrated bar, and the years in which such integration was accomplished are:

North Dakota	1921
California	1927
South Dakota	1931
Washington	1933
Missouri	1934

If bar integration were to lead to syndicalism one would think that some start in this direction at least would be discernible by now after the lapse of a period in escess of twenty-five years that these five states have had integrated bars. The fact that no such trend has occurred after such ***245** long experience with an integrated bar is to us convincing proof of the groundless nature of plaintiff's fears.

Mr. Justice Holmes, in his famous dissent in Panhandle Oil Co. v. State of Mississippi ex rel. Knox, 1928, 277 U.S. 218, 223, 48 S.Ct. 451, 453, 72 L.Ed. 857, after referring to Chief Justice Marshall's often quoted dictum that the power to tax is the power to destroy, declared, 'The power to tax is not the power to destroy while this Court sits.' This prompts us to observe that any usurpation on the part of the State Bar of the powers of either the legislature or the courts will not occur so long as this court sits. Without such usurpation of legislative or judicial power there can be no fascist syndicalism.

[15] It is our considered judgment that the orders of this court integrating the bar, and continuing such integration, violate none of the First amendment freedoms of the plaintiff as embodied in the due-process and equal-protection-of-the-laws clauses of the Fourteenth Amendment.

While we have considered and resolved the constitutional issue as if this were a proceeding originally brought in this court, our mandate also will affirm the judgment below.

The order of this court of December 7, 1956, which promulgated the rules and by-laws of the State Bar of Wisconsin effective for a two year period, and the further order of this court of December 22, 1958, which continued the State Bar of Wisconsin on a permanent basis, do not violate the Fourteenth Amendment to the United States constitution and are constitutional. The judgment appealed from is affirmed.

***246** Appendix

Major Activities of State Bar of Wisconsin Post-Graduate Education of Lawyers.

The most extensive activities of the State Bar are those directed toward post-graduate education of lawyers. There is a great need for this because of the rapid changes and new developments that have occurred in the field of law subsequent to the admission to practice of a large percentage of the lawyers of the state. This trend shows no signs of abating. In order that lawyers be qualified to properly represent clients such post-graduate education is essential.

The State Bar provides such post-graduate education through its annual and separate mid-winter meetings, its regional meetings, its annual tax school, and its publication of the Wisconsin Bar Bulletin. The annual and the mid-winter meetings of ****413** the State Bar are each of at least two days' duration and are largely devoted to the delivery of papers on technical legal subjects of an instructive nature. The same is true of the one-day regional meetings annually held throughout the state. At the annual two-day tax school the papers delivered are confined to the fields of taxation. Many of these papers delivered at these various meetings are later published in the Wisconsin Bar Bulletin so that they will be available for instant reference by all members of the bar of the state. Each member of the State Bar receives a copy of the Wisconsin Bar Bulletin by mail as issued, it being published bi-monthly.

Post-graduate education of lawyers is in the public interest because it promotes the competency of lawyers to handle the legal matters entrusted to them by those of the general public who employ them.

***247** *Public Relations*.

The field of endeavor carried on under the name of 'public relations' would better be termed 'public service.' The chief activity carried on in this field by the State Bar is the preparation, publication, and distribution to the general public of pamphlets dealing with various transactions and happenings with which laymen are frequently confronted, which embody legal problems. Alternative courses of action are sometimes set forth and the advantages and disadvantages of each explained. Where there is danger that a layman might be likely to overlook some positive requirement of the law, such requirements are pointed out. Among the titles of such pamphlets are: 'It May be Your Turn Next-What to do in Case of an Auto Accident;' 'Have You Made a Will;' 'Sound Steps in Purchasing a Home;' and 'Joint Tenancy-Boon or Boomerang.' Banks and trust companies, local bar associations, and others purchase these pamphlets from the State Bar at slight advance above the cost of publication in order to cover boxing and mailing expense. The statement of receipts and disbursements of the State Bar for the calendar year of 1959 shows receipts of $2,748.27 from the sale of pamphlets which receipts should be credited against a total expenditure for 'Public Relations' of $2,743.55.

Another activity of the State Bar in this field consists of preparation of informative articles on legal subjects which are offered for publication to the newspapers throughout the state, and are published under the heading of 'The Law and You.'

A further public relations activity is the preparation and distribution of news releases covering the activities of the State Bar, such, for example, as the observance throughout the state of 'Law Day, U.S.A.'

***248** *Discouraging Unauthorized Practice of the Law*.

One of the standing committees of the State Bar is that of Unauthorized Practice of Law. The primary purpose of such committee is to protect the public from incompetent laymen attempting to offer or perform legal services which they are not competent to render. This is a constant program since numerous trades and occupations keep expanding their services and frequently start offering services which constitute the practice of the law. As a result of integration the income from dues has enabled the State Bar to employ an additional lawyer on its staff whose major assignment is to investigate complaints made with respect to instances of unauthorized practice of the law, and to cause any unauthorized practices so discovered to be discontinued through persuasion or legal action.

Establishment of a Minimum Fee Schedule.

The State Bar recently adopted a recommended minimum fee schedule covering legal services. The present economic plight of the lawyers in this country is one which has disturbed the bench and the bar. Able young men who otherwise might be ****414** attracted to entering the legal profession are being discouraged not to because of this. Lawyers already in the profession because of insufficient incomes are caused to forsake the practice of law for more financially attractive fields of endeavor. According to statistics gathered by the Economics of Law Practice Committee of the American Bar Association during the

period of 1929 to 1951 the net income of lawyers increased but 58 per cent, while for the same period that of dentists rose 83 per cent and that of physicians 157 per cent. During the same period the net income of employees of all industry increased 131 per cent. ***249** During 1954 the net income before taxes of one-third of all practicing lawyers of the nation was less than $5,485.

The quality of legal service which will be rendered to the public is likely to suffer if young men of ability are dissuaded from entering the profession because of the difficulty of securing an adequate financial reward to enable them to properly support themselves and their families. A minimum fee schedule which realistically recommends charges for legal services that are in keeping with the increased cost of living that has taken place since World War II, should have a tendency toward remedying this condition. Such a schedule also serves a further public purpose because it provides a guide for the basing of legal charges that tends to prevent overcharges as well as undercharges. Lawyers, who are true to their oath of admission, recognize that adoption of a recommended minimum fee schedule does not relieve them from the duty of serving the poor without compensation, or of reducing the charge if the normal charge would be unduly burdensom to a client of limited means. Furthermore, a lawyer's charge for services, even when based upon the recommended schedul, is always subject to the courts' determination of reasonableness.

Legal Aid.

Another of the standing committees of the State Bar is the Legal Aid Committee. This committee has done effective and noteworthy work to encourage the local bar associations of the state to set up legal aid systems in their local communities under which legal services are rendered without charge to the indigent in the need of the same. Such committee has also outlined recommended procedures for establishing and carrying through such systems of providing legal aid.

***250** *Investigation and Adjustment of Grievances.*

The State Bar has created grievance committees for each of the nine districts into which the state has been divided for election purposes. These districts coincide with the Congressional districts of the state except for combining the two Congressional districts of Milwaukee county into one district. While the supreme court has delegated none of its power to punish disciplinary infractions, these State Bar grievance committees perform a valuable function in investigating and adjusting grievances filed against lawyers of the district in which the particular grievance committee functions. Prior to integration of the bar most of such grievances were investigated by the paid counsel of the Board of State Bar Commissioners, and the cost thereof was defrayed from the general tax revenues of the state. Since integration most of such work of investigation of grievances has been done by the grievance committees of the State Bar. As a result there has been a saving to the general taxpayers of the state. One evidence of this is that the Board of State Bar Commissioners is requesting a decrease in its appropriation from the state of $800 less for the coming biennium than was appropriated in the present biennium.

Legislative Activities.

In addition to the legislative activities of the State Bar to which the plaintiff objected,****415** and which are discussed in the opinion, the State Bar performs the further function of promptly publicizing to the lawyers of the state pending and adopted legislation affecting legal practice. Acts lengthy in scope, such as the Family Code and the Act Extending the Jurisdiction of the Courts Over Non-Resident Persons and Corporations, are analyzed and explained by articles published in the Wisconsin Bar Bulletin. Such activities enable the lawyers to better serve their clients.

Wis. 1960
Lathrop v. Donohue
10 Wis.2d 230, 102 N.W.2d 404

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C

Supreme Court of Wisconsin.
In the Matter of the DISCONTINUATION OF the STATE BAR OF WISCONSIN as an integrated bar.

No. 79-1801-OA.
Heard Sept. 13, 1979.
Decided Jan. 8, 1980.

Petition was filed by five attorneys requesting that the State Bar be discontinued as an integrated bar. The Supreme Court, finding the allegations and arguments of the petitioners and others insufficient to warrant changing the status of the State Bar to a voluntary bar, dismissed the petition.

Petition dismissed.

Day, J., filed dissenting opinion in which Callow, J., joined.

West Headnotes

Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Petition to discontinue State Bar as an integrated bar would be dismissed.

****602 *385** John E. Armstrong, John F. Jenswold, Trayton L. Lathrop, Madison, Thomas R. Swisher, Columbus, Ohio, and Arthur DeBardeleben, Park Falls (argued), for petitioners; David S. August, Milwaukee, Douglas W. Kammer, Portage, with Arthur DeBardeleben, Park Falls, and Steward G. Honeck, Milwaukee, of counsel.

***386** Glenn R. Coates, Racine, and Lawrence J. Bugge, Madison, (argued), for State Bar of Wisconsin.

Robert F. Boden, Milwaukee, joined by Victor A. Miller, St. Nazianz, James D. Ghiardi and Charles W. Mentkowski, Milwaukee, (on the brief), Robert F. Boden, James A. Baxter, Ted Johnson, Irvin B. Charne, Milwaukee, Webster Hart, Eau Claire, Amedeo Greco, Steven Levine, Jack McManus, Joseph F. Owens, Douglas Nelson, Richard J. Calloway and David Weber, Madison, (argued), for Milwaukee Bar Association.

PER CURIAM.

On May 8, 1979, a petition was filed by five attorneys asking that this court discontinue the State Bar of Wisconsin as an integrated bar. The petitioners state that they caused a poll to be taken of all active members of the State Bar numbering 9,319 lawyers, on the question "Do you favor the continuation of the State Bar of Wisconsin as an integrated bar?" According to the petitioners, the response to that question was 1,892 affirmative and 2,820 negative. The petitioners allege that continuation of the integrated bar in Wisconsin "would be contrary to the interests of this court, the state of Wisconsin and the public at large."

The petition was noticed for a public hearing, and we also invited all interested persons to submit written comments on the question of continued integration of the State Bar. The public hearing was held on September 13, 1979, and presentations were made by petitioners, by representatives of the State Bar, the Wisconsin Academy of Trial Lawyers and the Milwaukee Bar Association and by several practicing attorneys. Written comments were received from more than 20 attorneys from around the state.

The petitioners argue that the reasons for which the Wisconsin bar was integrated, namely, to supervise admission to the bar, to promote continuing competency of lawyers and to enforce lawyer discipline, no longer exist now that these functions are being performed by boards which were created by the court and operate independently***387** of the State Bar. They further argue that lawyers should not be required as a condition of their right to practice law in Wisconsin to financially support State Bar activities of which they do not approve, especially legislative and political activities.

We have indicated activities which we deem appropriate for the State Bar. Integration of Bar cases, 249 Wis. 523, 25 N.W.2d 500 (1946); 273 Wis. 281, 77 N.W.2d 602 (1956); 5 Wis.2d 618, 93 N.W.2d 601 (1958); 81 Wis.2d xxxv (1977); Lathrop v. Donohue, 10 Wis.2d 230, 102 N.W.2d 404 (1960), affirmed 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961). They are also set forth in the State Bar Rules and Bylaws originally approved and promulgated by the court. 273 Wis. vii (1956).

At the public hearing on the petition we were advised that an organization closely associated with the State Bar has solicited, obtained and spent voluntarily contributed funds in support of partisan political candidates and groups. That organization is the Wisconsin Lawyers Political Action Committee (LAWPAC) and has as its stated purposes "to influence the nomination or election of qualified candidates to elective public office in the State of Wisconsin and to influence voting on referendum issues submitted to vote in the State of Wisconsin." While LAWPAC is organized as a voluntary, non-profit, unincorporated political association and is not supported by State Bar membership dues, its board of directors is elected by the Board of Governors of the State Bar, which also has the power to remove any member of the LAWPAC board for cause, and the LAWPAC office is located in the State Bar building.

We are concerned that the State Bar, through LAWPAC, may be engaging in activities which we have proscribed, but we do not find any or all of the allegations and ****603** arguments of the petitioners and others sufficient to warrant changing the status of the State Bar to a voluntary bar. However, pursuant to State Bar Rule 10, which we adopted on November 18, 1977, we will ***388** appoint in January, 1982, a committee to review the performance of the State Bar in carrying out its public functions, and we will direct that committee to review, evaluate and report by June 1, 1982, on the activities of the State Bar, especially its legislative activities, in the light of our statements on the subject.

The petition to discontinue the State Bar of Wisconsin as an integrated bar is dismissed.

DAY, Justice (dissenting).

I dissent. I would grant the petition to discontinue compulsory membership in the State Bar of Wisconsin. I feel that the best interests of this Court, the members of the legal profession and the people of this state would be better served if membership was voluntary. The association would then depend for support on the attractiveness of its programs to its members instead of depending on the assessment of compulsory dues.

Up until the time this Court decided to "integrate" the bar [FN1] and require payment of dues to a Court sponsored bar association, the Court's role vis-a-vis the "bar" was to each lawyer as an individual, not as a collective mass known as a "bar association." The Court's role was its time honored one of determining who would be admitted to practice before the courts and setting a code of conduct, the infraction of which could result in discipline including disbarment. "Admission to the bar" or permission to hold oneself out as a lawyer and represent clients in the courts of this state, was by examination or graduation from the University of Wisconsin or Marquette University law schools or admission on foreign license in accordance with rules laid down by this Court. The purpose was to assure the people of this state that those who held themselves out as lawyers were ***389** competent. Competence was assumed to continue once admitted to practice. Violation of the Code of Ethics was grounds to take away the privilege of practicing or the imposition of lesser sanctions. The purpose was to protect the public from those who fall short of that standard of conduct expected of those society entrusts with representation of clients, whether individual, corporate or public, in the civil and criminal courts of this state.

> FN1. The bar was integrated on a "trial basis" by Supreme Court order in 1956 and continued in effect on a permanent basis by order of this Court entered December 22, 1958. See, Lathrop v. Donahue, 10 Wis.2d 230, 102 N.W.2d 404 (1960).

Changing needs and different insights have changed the form but not the role of this Court toward the individual lawyer. We now require the continuation of legal education and proof each year of having taken certain prescribed credits of continuing legal education to help insure continuing competence of those whom we have licensed to practice law. Codes of Ethics have changed and we have implemented the means of processing complaints of ethical violation by

lawyers and sought the more expeditious handling of cases requiring discipline by this Court.

This is the time honored and essential ongoing relationship between this Court and the lawyers who are also called officers of this Court. The public rightly expects us to devote our best efforts to insure, as nearly as possible, that those who represent clients in the courts of this state are competent and ethical.

We have set up two Boards directly under us to try and assure these results. The first is the Board of Professional Responsibility to try and assure compliance with the Code of Ethics. The second is the Board of Professional Competence, which is our means of providing for the orderly admission to practice of those seeking admittance and supervising continuing legal education.

Both boards are part of the Court's administrative system to carry out our responsibility for admission to practice and discipline. These boards operate separately from the integrated bar except that we utilize the mailing***390** and billing machinery of the State Bar to collect our assessment ****604** from the lawyers to finance the work of these boards.

These functions do not require that in addition we try and supervise an association performing the myriad tasks and services that professional societies perform for their members and services they undertake for the benefit of the public at large or segments of the public.

It has been my observation in five and one-half years on this Court that we more frequently react [FN2] to bar association action rather than act to initiate specific programs and policies for the bar to carry out. I do not say this in criticism. This Court does not have the time nor the staff to supervise, manage, set up budgets and do the many day-to-day jobs that a professional society may or should undertake. But if we really are to "run" the association, then it seems to me the public has a right to expect us to actively govern the association; [FN3] to ***391** decide what services should be provided to members, to determine what the dues should be and how much of the budget should go for scholarships for disadvantaged law students, how much should go for making legal services available to those under represented, how much should go to seeking legislation to help make the legal system function more responsively to the needs and wishes of various groups. Do we have enough programs for lawyers who are house counsel to corporations and associations and do not engage in private practice? Do we do enough for the large number of attorneys working full time for government agencies or in law enforcement or as public defenders? In my opinion, all of these are very proper concerns. What to do about them, however, is a matter that can bring forth a wide range and variety of opinion.

> FN2. An example is the questioning by the majority of the relationship between the "voluntary" political arm of the Bar and the Board of Governors of the State Bar.

> FN3. This Court previously recognized this requirement when it said in In re Integration of Bar, 249 Wis. 523, 528, 529, 25 N.W.2d 500, 502 (1946):
>
> > "It appears to be assumed . . . that the court will fully exhaust its function by setting up the organization and requiring dues to be paid and that from there on the court will leave the organized bar to operate in a completely democratic and voluntary manner, dealing with such problems as in the opinion of the bar are proper for them to consider and to solve, and expending its moneys for these democratically ascertained purposes.
> >
> > "Nothing is further from the truth in our opinion. It appears to us that the same considerations that may call for the court to exercise power initially to integrate, require it to censor the budgets and activities of the bar after integration. . . . the price of integration would be much greater than this court or any lawyer ought to be willing to pay, unless the exigencies in respect to standards of admission and discipline are so great as to warrant adoption of some such expedient, either temporarily or upon a limited scale."
> >
> > These functions of admission and discipline are now under this Court.

These are proper concerns for the Bar Association

but it is the lawyer members who should debate and decide these questions; not this Court.

An association will be successful if it serves its members. It is the market place that should determine membership and dues, not forced membership as a requirement to practice law.

At the hearing on this matter and in materials submitted to us we were advised of successful voluntary associations in neighboring states with memberships in excess of ninety percent of lawyers admitted to practice.

I find it very significant that a large majority of the lawyers in this state who answered the questionnaire submitted to them by the petitioners [FN4] were opposed to continued compulsory membership. This issue will continue to be an unnecessary source of irritation by large numbers of attorneys who favor a voluntary rather than a compulsory membership policy.

> FN4. 2,820 opposed to integration; 1,892 in favor of continued integration.

***392** It is for these reasons that I would grant the prayer of the petitioners.

I am authorized to state that Justice William Callow joins in this dissent.

Wis., 1980.
Matter of Discontinuation of State Bar of Wisconsin
93 Wis.2d 385, 286 N.W.2d 601

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334 N.W.2d 544
(Cite as: 334 N.W.2d 544)

C

Supreme Court of Wisconsin.
REPORT OF COMMITTEE TO REVIEW THE STATE BAR.

June 1, 1983.

Committee to review performance of State Bar was appointed and filed recommendations. The Supreme Court, held that: (1) proposed procedure for rebate of portion of member fees was acceptable and adequate response to any claimed infringement on rights of members who oppose Bar's position on specific legislation; (2) State Bar could not participate to any extent in political action committees; (3) advisory referendum concerning governing structure should be submitted to members; and (4) rule requiring committee review of Bar programs every four years would be amended to provide for review as need arises.

Order accordingly.

Day, J., dissented and filed opinion.

Abrahamson and Steinmetz, JJ., concurred and filed opinions.

West Headnotes

[1] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Lawyers may properly be required to financially support functions of unified Bar Association in providing continuing legal education, disciplinary system, system for admission to practice, system to control unauthorized practice, and clients' security fund, in maintaining mailing list of all licensed attorneys and program to control trust funds held by attorneys, in operating program of public information, and in collecting funds to support obligatory programs.

[2] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Bar Association in which membership is mandatory is best means for legal profession to fulfill its obligations to public; voluntary association of lawyers to which all practitioners, members or not, would be required to contribute for performance of only those functions deemed to be obligation of every lawyer is not practicable alternative.

[3] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Question of what constitutes composite judgment of members of State Bar on legislative matters or substantial unanimity among membership in order for board of governors to represent to legislature that position on specific legislation is that of Bar Association is for board of governors, and recommendation that positions taken before legislature have support of 60 percent of State Bar's board of governors would not be followed.

[4] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Procedure for issuing rebate of portion of membership fees to State Bar members opposed to Bar's position on legislation was acceptable and adequate response to any claimed infringement on rights of those members who oppose Bar's position; in order that dissenting member not be required to specify those legislative issues on which Bar has taken position to which member is opposed, rebate procedure should entitle member to rebate for that portion

of fees spent on all legislative activity, without specification.

[5] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Where Supreme Court had placed authority and responsibility for establishment of membership dues with Bar's assembly of members, it was not in position to mandate additional funding for programs to provide pro bono legal services and to educate public.

[6] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

While lawyers may voluntarily form and participate in political action committees, it is impermissible for State Bar, funded as it is by compulsory member dues, to participate to any extent in political action committee or in its activities.

[7] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Unlike question of whether State Bar should be retained as compulsory membership association, which is matter of court policy and not Bar Association policy, matter of how Association is to be governed, particularly regarding its representational structure, is in part question of Association policy, and thus question of whether to adopt governing structure composed of house of delegates and board of directors should be submitted to members through advisory referendum.

[8] Attorney and Client 45 31

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k31 k. Bar Associations. Most Cited Cases

Rule requiring quadrennial review of State Bar programs by court-appointed committee would be amended to provide for review as need arises due to costs, both in terms of time and money, of such review and time needed for court consideration of recommendations. SCR 10.10.

***545** PER CURIAM.

On December 28, 1981, pursuant to SCR 10.10, the court appointed a committee, chaired by Mr. John Kelly, to review the performance of the state bar in carrying out its public functions. In addition to Mr. Kelly, the committee consisted of the following persons:

Attorney William Adler, Eau Claire

Mr. Kenneth Blanchard, LaCrosse

Attorney Harry Carlson, Jr., Milwaukee

Professor Arlen Christenson, Madison

Attorney Glenn Coates, Racine

Attorney Karl Goethel, Durand

Attorney Amedeo Greco, Madison

Hon. Richard Greenwood, Green Bay

Professor Joel Grossman, Madison

Mr. Paul Hassett, Milwaukee

Attorney Janet Jenkins, LaCrosse

Dean Charles Mentkowski, Milwaukee

Attorney Charles Richards, Kenosha

Attorney William Skemp, LaCrosse

Ms. Carol Toussaint, Madison

Attorney Jennifer Wall, Waukesha

Professor John Kidwell, Madison (Reporter)

At the time of its appointment, the committee was asked to address the following issues:

1. Continued integration of the state bar

2. Bar activities carrying out its public functions (delivery of legal services)

a. Pro bono services

b. Education of the public as to its legal rights

3. Impermissible bar activities

a. Legislative activities (except those affecting the administration of justice and the practice of law, including substantive issues involving lawyers' special expertise)

b. Political activities, *e.g.*, LAWPAC

4. Representation of members

a. Redistricting or reapportionment of districts

b. Governing structure of the state bar

***546** After the date for the filing of the committee's report had been extended by the court, the committee filed its report on October 1, 1982. A public hearing on the report was held in the supreme court on February 15, 1983, at which several members of the committee, two state legislators and a number of Wisconsin attorneys appeared and presented their positions on the issues to the court.

Before addressing the committee's report and recommendations, we wish to take this opportunity to express our deep appreciation to the members and reporter of the committee, whose work reflects the serious and difficult task they were assigned and whose time and effort to conduct the review was considerable. Their report constitutes a significant public service, and it is most valuable to the court in its consideration of what changes, if any, should be made in the organization and structure of the state bar.

The committee's report consists of five resolutions, which are set forth in the appendix to this opinion.

THE UNIFIED BAR

The committee recommends that the state bar be retained as an organization in which membership is required of all persons licensed to practice law in Wisconsin. This recommendation, however, is not unqualified, for the committee noted that compulsory membership in the association raises "certain legitimate concerns about individual freedom of association and expression." Consequently, the committee's recommendation for continued bar unification is conditioned on the adoption of recommended changes in the manner in which the association engages in legislative activity and the establishment of a procedure whereby a member may obtain a refund of that portion of association dues which are used to support legislation which the member opposes.

The committee was unanimous in its conclusion that membership in the legal profession carries with it certain obligations to the public, as well as to the profession. The report lists the following activities, which it feels every lawyer can properly be required to support, whether by membership in and financial support of a unified bar association or otherwise:

" * the provision of continuing legal education to members of the bar;

" * the provision of a disciplinary system to insure the quality of legal services in the state;

" * the provision of a system for admission to practice which assures the qualification of lawyers admitted to practice;

" * the provision of a system to control the unauthorized practice of law;

" * the provision of a client security fund, and a system to make reparations for losses by clients;

" * the maintenance of a mailing list of all licensed attorneys;

" * the maintenance of a program to control trust funds held by attorneys;

" * the operation of a program of public information with respect to legal questions, the functions of the courts,

and the administration of justice;

" * the collection of funds to support the obligatory programs just identified."

[1][2] We agree that lawyers may properly be required to financially support these functions, and we also agree with the committee's conclusion that a unified bar association, which all licensed practitioners are required to join, is better suited than a voluntary association to accomplish them. The committee notes that a unified bar association is more likely to administer its programs in the public interest, that the performance of such functions is more efficient and economical if conducted by a single association financially supported by all lawyers and that voluntarism, on which the accomplishment of these goals by the existing association almost exclusively depends, is better promoted by a unified bar association. Whether or not these considerations are sufficient to justify the requirement that all lawyers be members of the association, it is our opinion, as it has been for more than 25 years, that a bar association ***547** in which membership is mandatory is the best means for the profession to fulfill its obligations to the public. We do not see as a practicable alternative a voluntary association of lawyers to which all practitioners, members or not, would be required to contribute for the performance of only those functions which we deem to be the obligation of every lawyer.

However, there is one area of the association's activity which the committee believes must be more particularly circumscribed if membership in the association is to continue being mandatory, and that is legislative activity. While all members of the committee believe that a bar association should maintain an active involvement in the legislative process, a majority of the committee urges that we, by rule, alleviate the concerns of those members who oppose all or any particular association involvement in the legislative process, since the dues they pay to maintain membership are used to finance such activity.

We have been sensitive to this issue since the association was unified in 1956 and have addressed it on numerous occasions. *See*, *Lathrop v. Donohue*, 10 Wis.2d 230, 102 N.W.2d 404 (1960), *In re Regulation of the Bar of Wisconsin*, 81 Wis.2d xxxv (1977), *Matter of Discontinuation of the Wisconsin State Bar*, 93 Wis.2d 385, 286 N.W.2d 601 (1980). In our 1977 opinion we limited the state bar association's authorization to engage in legislative activities to "only as to matters concerning the administration of justice and the practice of law, including matters of substantive law on which the views of lawyers have special relevance." *In re Regulation of the Bar, supra*, at xxxix-xl. We then enunciated the guiding principle of the association's legislative activities, indeed, of all its activities, namely, the public interest. *Id.*, at xl.

The committee suggests that the "administration of justice and the practice of law" standard is too broad and that it obscures the demarcation between technical information and advocacy on legislative matters. The committee considered but rejected the creation of a more restrictive definition of permissible legislative activity as a solution to this issue, believing that it would constitute "an unworkable and counterproductive approach" and would unduly hamper the association in its permissible legislative activity. Rather, the committee recommends that the extent possible, the legislative questions on which it is likely to take a position and to inform them as to the time and place of the board of governors' meetings at which action is likely to be taken. Further, the committee recommends that the state bar have the support of 60 percent of its board of governors on any position taken before the legislature.

[3] We addressed this issue in 1977, when we considered the Parnell Committee's resolutions (1) supporting the role of the bar in the lawmaking process on subjects on which the professional expertise of lawyers has special relevance, (2) declaring that it is for the board of governors to determine how this role should be implemented, (3) stating that it is appropriate for the state bar to provide financial support to other entities when effective participation in the lawmaking process requires but not for it to support candidates for office, and (4) urging the bar to place greater emphasis on research and technical services than on traditional lobbying activities. We stated our agreement with all of these points, except that we specified that major issues of legislative policies should, when possible, be brought before the membership at the assembly session of the midwinter or annual meeting. *In re Regulation of the Bar, supra*, at xxxix. We reiterate our prior statement, but we do not go so far as to require that the association's Board of Governors have a specified degree of support for a proposed position on legislation prior to taking that position. We leave to the Board of Governors the question of what constitutes "the composite judgment of the members of the bar" [FN1] or "substantial unanimity among ***548** the membership" [FN2] in order to represent to the legislature that a position on specific legislation is that of the association.

FN1. *Lathrop v. Donohue*, 10 Wis.2d 230, 239,

102 N.W.2d 404 (1960).

FN2. *Wis.Bar Bull.*, vol. 36, no. 5 (Oct. 1963), 5.

[4] The committee apparently believes that no degree of "substantial unanimity" is sufficient to require that members opposed to the bar's position on legislation, whether legislation in general or specific legislative proposals, contribute to the advocacy of that position by the payment of dues, compulsorily exacted, which are used to finance the bar association's legislative activity. Consequently, the majority of the committee recommends that there be instituted a rebate procedure requiring the association to publish in its official publication, after each legislative session, the amount that has been expended from member dues on each legislative matter in which the association participated during that session, showing the total amount expended on all legislative activities, as well as the amount expended on each separate legislative issue. Further, the publication should show the cost to each member of all legislative activity and as to each separate legislative issue. Each member would then be entitled to request and receive a refund of his or her portion of dues expended either as to all legislative activity or only as to one or more specific legislative items. The committee also recommends that the request for a refund be treated in strict confidence and that the refund be granted as a matter of course.

This recommended rebate procedure is obviously in response to recent case law which addresses the issue of the use of mandatory membership dues to support political or ideological activity to which an individual member is opposed. *See, Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), *Browne v. Milwaukee Board of School Directors*, 83 Wis.2d 316, 265 N.W.2d 559 (1978), *Falk v. State Bar of Michigan* (plurality opinion), 411 Mich. 63, 305 N.W.2d 201 (1981), *Arrow v. Dow*, 544 F.Supp. 458 (D.N.M.1982), *Schneider v. Colegio de Abogados de Puerto Rico*, 546 F.Supp. 1251 (D.P.R.1982). Assuming, arguendo, that those cases are applicable here, we believe that the rebate procedure proposed by the committee is an acceptable and adequate response to any claimed infringement on the rights of those association members who oppose the association's position on specific legislation. Moreover, in order that a dissenting member not be required to specify those legislative issues on which the association has taken a position to which he or she is opposed, the rebate procedure should entitle a member to a rebate for that portion of his or her dues spent on all legislative activity, without specification, and if the objecting member wishes to contribute part of the rebated amount in proportion to the amount spent on legislative issues to which he or she was not opposed, he or she may do so voluntarily. In response to this recommendation of the committee, we will propose such a rebate procedure for inclusion in the rules governing the State Bar, and we will hold a public hearing on the proposal, with a view to implementing a rebate procedure prior to the conclusion of the coming legislative session.

DELIVERY OF LEGAL SERVICES AND PUBLIC EDUCATION

[5] The committee commends the state bar for devising and implementing public education programs, coordinating efforts to provide *pro bono* services and considering questions relating to the delivery of legal services. It finds the association's programs to constitute an energetic and effective effort to reach the citizenry of Wisconsin. It notes, however, that the association alone cannot be relied upon to educate and inform the public and provide for delivery of legal services; rather, the responsibility to provide such services must be shared by the public. The committee feels that, given the limitations on funding, the association has functioned appropriately and adequately. Because the association relies heavily on volunteers in carrying out its public functions, the effectiveness of the bar's programs, especially in the area of *pro bono* ***549** legal services, has been hampered to some extent.

The committee suggests that it is for this court to mandate additional funding for such programs if they are to be "truly effective" and of "substantial dimensions." Because we have heretofore placed the authority and responsibility for the establishment of membership dues with the association's assembly of members, *In re Regulation of the Bar, supra*, at xl, we are not in a position to comply with the committee's suggestion. We have previously addressed the professional obligation of lawyers in the areas of public education and delivery of legal services, *Id.*, at xxxix, and we agree with the committee's assessment of the bar association's work and reiterate our opinion that it should continue and be emphasized and augmented.

POLITICAL ACTIVITY

[6] The committee states its belief that a bar association in which membership is compulsory ought not be involved in supporting political candidates, and it recommends that LAWPAC, the political action committee with which the state bar has been involved, directly or indirectly, in the past, be completely severed from the association. It notes that LAWPAC has made use of state bar facilities and services and that a state bar employe, the one

most actively involved in communicating with the legislature as to the state bar's positions on legislation, is the person who operates LAWPAC. The committee recommends that no state bar personnel or facilities be used in connection with LAWPAC, whether or not arrangements for compensation from the latter to the former exist.

Again, we have addressed the issue of bar association political activity on prior occasions. In 1977, we stated that the association may not support candidates for office. *In re Regulation of the Bar*, *supra*, at xxxix. More recently, we expressed our concern about LAWPAC, which at that time was located in the state bar building and whose board of directors was elected by the board of governors of the state bar, which also had the power to remove any member of the LAWPAC board for cause. It appeared that the state bar, through LAWPAC, might have been engaging in activities which we had previously proscribed. *Matter of Discontinuation of the Wisconsin State Bar*, 93 Wis.2d 385, 387, 286 N.W.2d 601 (1980). In the face of the committee's recommendations, we hold that, while lawyers may voluntarily form and participate in political action committees, it is impermissible for the state bar, funded as it is by compulsory member dues, to participate to *any* extent in LAWPAC or in its activities.

REPRESENTATION OF MEMBERS

In assessing the present structure of the state bar, especially with regard to its representation of members, the committee recommends adoption of the structure proposed in the Revised Report of the Special Committee on Rules and Bylaws of the State Bar of Wisconsin, dated May 1, 1981, and set forth as Appendix 6 of the committee's report. The committee concludes that the assembly of members, as presently constituted, should not be retained as the primary policy-making body of the state bar because attendance at the assembly meetings, held in conjunction with the two annual meetings of the association, is customarily too small even to constitute the minimal quorum required by the court's rules-300 out of a membership totaling some 12,000. The committee's second conclusion is that many members of the bar regard the board of governors "as a distant body with concerns independent of those of many of the members." Further, in certain areas of the state it appears that members of the board of governors have failed to communicate on a regular basis with their constituency. Generally, many members believe that they are too far removed from the governing structure of the association to have any meaningful voice. Finally, the committee concludes that the proposal made by the Special Committee on Rules and Bylaws will increase participation and the quality of representation of the members.

The proposal recommended by the committee would replace the assembly of members***550** with a house of delegates (with 142 delegates, based on Wisconsin's lawyer population in 1981), elected for the most part on the one person-one vote concept, as the chief policy-making body of the association and would replace the present 45-member board of governors with a 17-member board of directors which would meet at more frequent intervals than the house of delegates and would function as the administrative and managing body of the association to manage the association and carry out the policies and actions of the house of delegates. Believing that the present governing structure of the association fails to provide adequate representation of members, the committee feels that the creation of a house of delegates, thereby substantially increasing the number of elected representatives of the membership, will result in a more meaningful forum for the discussion of policy matters, as well as an increased opportunity for communication between delegates and their constituents.

With respect to the makeup of the proposed house of delegates, the committee was not unanimous in recommending adoption of the composition proposed in the special committee's report. As proposed, in addition to the delegates elected on the one person-one vote principle, the house would contain representatives of the association's sections and divisions, as well as four nonlawyer delegates appointed by the court and one delegate from each law school in the state. A minority of the committee would recommend strict adherence to the one person-one vote concept for the house of delegates, granting floor privileges but not voting privileges to representatives of sections and divisions.

[7] Unlike the question of whether the state bar should be retained as a compulsory membership association, which is a matter of court policy, not bar association policy, *State ex rel. Armstrong v. Board of Governors*, 86 Wis.2d 746, 273 N.W.2d 356 (1979), the matter of how the association is to be governed, particularly regarding its representational structure, is, in part, a question of association policy. The committee recommends adoption of the proposal of the Special Committee on Rules and Bylaws; the board of governors recommends the continuance of the existing governing structure (Board of Governors' response to Report of Supreme Court Committee to Review the State Bar of Wisconsin, at 26), which is a significant departure from its proposal for a substantial restructure of

the state bar filed with the court on July 14, 1980 and on which a public hearing was held on September 9 of that year. *See, Wis.Bar.Bull.*, vol. 53, no. 8 (August, 1980), 73 *ff.*

We believe that the views of the association's membership are particularly relevant to our consideration of the committee's recommendation to adopt the House of Delegates-Board of Directors governing structure proposed by the Special Committee on Rules and Bylaws. Consequently, we will direct the state bar to submit to its members as an advisory referendum the two governing structures now being proposed: the present structure, as set forth in SCR 10.04, 10.05, 10.06 and 10.07, and the proposed House of Delegates-Board of Directors structure as set forth in Art. II, Art. III and Art. IV of the Revised Report of the Special Committee on Rules and Bylaws, dated May 1, 1981, and included in the committee's report as Appendix 6. The advisory referendum is to solicit the preference of the members of the state bar as to which of the two proposed structures is to be adopted by the court for governing the state bar. The advisory referendum is to be conducted as soon as practicable, and the board of governors will be directed to report the results to the court promptly.

Those members who wish to compare and contrast the two proposed structures in their entirety may do so by comparing SCR ch. 10, which sets forth the court's present rules governing the state bar, and the proposal of the Special Committee on Rules and Bylaws, which was published together with notice of the hearing on the bar review committee's report in *Wis.Bar.Bull.*, vol. 55, no. 12 (December, 1982), beginning at p. 58.

***551** BAR REVIEW

[8] By order of November 1, 1976, the court determined that a committee be appointed to study the activities appropriate for the state bar to engage in, the appropriate means for financing those activities and the management of association funds. 74 Wis.2d xix. One of that committee's recommendations was that there be a biennial review of state bar programs by a court-appointed committee. 81 Wis.2d xlv (1977). The court decided, however, that such review should be quadrennial, *Id.*, at xxxvii, and the court promulgated a State Bar Rule to so provide. SCR 10.10. The report now being considered is that of the first committee appointed under that rule.

The committee recommends that there be a less frequent review of state bar activities, and we agree. The committee's experience indicates that the size of such a committee, the volume of material that the committee must review and assess, the cost, both in terms of time and money, of such review and the time needed for court consideration of the recommendations of the committee, dictate that a review of the kind contemplated by the rule ought not be conducted every four years. The committee suggests that a review every six years would be adequate, but we are reluctant to establish any specific time period for periodic review of state bar activities. Rather, we believe that such review should be conducted as the need arises, and we herein so provide.

ORDER

The court having considered the report of the Committee to Review the State Bar, filed on October 1, 1982, the presentations made to the court at the public hearing on February 15, 1983, and the written materials filed with the court in response to the committee's report, and the court being fully advised,

IT IS ORDERED that, effective the date of this order, SCR 10.10 is amended to read:

"COMMITTEE TO REVIEW BAR PERFORMANCE. The supreme court shall appoint ~~in January 1982 and every 4th year thereafter~~ a committee to review the performance of the state bar in carrying out its public functions at such time as the court deems it advisable. The supreme court shall determine in its order of appointment the size and composition of the committee. ~~The committee shall file its report with the supreme court by June 1 of the year in which it is appointed.~~ The state bar shall pay the expenses of the committee."

IT IS FURTHER ORDERED that the State Bar of Wisconsin submit to its membership as an advisory referendum the following question: "Which of the two proposals for the governing of the State Bar of Wisconsin should be adopted by the Supreme Court: the present structure, consisting of an Assembly of Members and a Board of Governors, as set forth in the Supreme Court Rules, chapter 10, or the proposal set forth in the Revised Report of the Special Committee on Rules and Bylaws, dated May 1, 1981, consisting of a House of Delegates and a Board of Directors?" The advisory referendum is to be conducted in a manner consistent with the court's opinion accompanying this order and at such time as will permit the State Bar of Wisconsin to file the results of the advisory referendum with the court on or before January 1, 1984.

APPENDIX

Resolutions

	Vote
1. The State Bar should continue as an integrated bar, subject to some modifications in the manner in which legislative action is approved, and the right to refunds of that part of a member's mandatory dues used for support of legislation the member opposes.	Yes 12 No 5
2. The State Bar has done a fine job given the limitations on its resources, with respect to programs of public education, and with respect to the study and coordination of programs to deliver legal services to those unable to pay all the costs of legal assistance. The State Bar, however, cannot realistically do more than coordinate volunteerism; volunteerism is not a practical ultimate solution to the problems of the delivery of legal services	Yes 16 No 1
3. Although it is perfectly appropriate for lawyers to participate in political action committees, the present LAWPAC is not sufficiently separate from the State Bar, and should be completely separated from the Bar organization.	Yes 17 No 0
4. The State Bar should adopt the Revised Report of the Special	

Committee on Rules and Bylaws of the State Bar, submitted to the Board of Governors on May 1, 1981, which urges that the Stae Bar be restructured so that the existing Assembly of Members and Board of Governors be replaced with a representative House of Delegates having substantially more members from the present Board of Governors and a Board of Directors having substantially fewer members.

Yes 15 No 2

5. The Committee recommends that the Court consider a less frequent plenary review of State Bar operations.

Yes 17 No 0

ABRAHAMSON, Justice (concurring).

I concur in the court's conclusion that at this time the State Bar of Wisconsin should remain a compulsory membership association. I do not agree with the court, however, that a "unified" bar is inherently better than a voluntary bar and I, unlike the majority, am unwilling to accept, without reservation and without a plan for change, the continuation of the bar's present structure. For the reasons I explain below, I prefer to begin to explore alternative structures which might include a "unified" bar with a limited mandate functioning alongside a voluntary bar. I do not dissent because I cannot at this time propose a coherent plan that allows for an adequate transition from the present unified bar to a different organizational structure.

The majority concludes that Wisconsin should retain the "unified bar," that is, a compulsory membership bar, but adopts a partial opt-out provision for members who do not wish to support all or some of the bar's legislative activities. This compromise between the position of those advocating continuing a unified bar and those advocating replacing it with a voluntary bar does not provide an acceptable solution to the immediate problems we confront regarding the bar's legislative and political activities. Neither does it provide an acceptable solution to the long-range problems that will continue to arise. Lawyers licensed in this state will continue to assert, with some justification, that they are forced to belong to and financially support an organization that engages in activities that are not professional obligations which all licensed lawyers should be required to engage in or support.

The majority proposes two solutions to the immediate problems with the bar's legislative and political activities: (1) separating the bar from LAWPAC and (2) dues rebates. The court resolves the LAWPAC problem by declaring that the bar is not "to participate to *any* extent in LAWPAC or in its activities." Although any good lawyer can separate LAWPAC from the bar on paper, the two cannot be separated in the legislative arena. This probably explains why the bar has failed to adhere to similar past directives. *See In Re Regulation of the Bar,* 81 Wis.2d at xxxix-xl (1977); *Matter of Discontinuation of the Wisconsin State Bar,* 93 Wis.2d 385, 387-88, 286 N.W.2d 601 (1980).[FN1]

FN1. I think that the court may be inconsistent in requiring LAWPAC to be separated from the bar, when, by adopting a rebate procedure, the court in effect treats the bar as a "voluntary bar" for lobbying purposes. A voluntary bar, in contrast to a

unified bar, could work along with LAWPAC.

The majority also resolves the bar's problems surrounding legislative activity by endorsing a rebate procedure that allows dissenting bar members to recapture their proportionate share of dues spent on "legislative" activities; the court leaves the definition of these activities and the details of the rebate to further rule-making proceedings.[FN2] ***553** Rather than consider the constitutional implications of the bar's legislative activities, the court uses its authority to supervise the bar to address the situation that has caused the current unrest among its members. *See Reynolds v. Montana State Bar*, 660 P.2d 581 (Mont.1983). I am not as convinced as the majority apparently is that a rebate procedure is an acceptable response to a possible infringement on members' constitutional right of free association. *See Galda v. Bloustein*, 686 F.2d 159 (3d Cir.1982); *Falk v. State Bar of Michigan: First Amendment Challenge to Bar Expenditures*, 3 Det.C.L.Rev. 737 (1982); and cases cited in majority opinion, slip op., p. 6. At this point I would prefer that the court adopt a procedure whereby members of the bar who oppose the expenditure of their dues on ideological matters may, on payment of dues and before their money is used by the bar, withhold a pro rata share of the bar dues attributable to these matters.

> FN2. The majority's rebate proposal raises significant practical problems which still must be resolved. First, we do not know what type of rebate and rebate procedure the court will adopt, since rebate is subject to further rule-making. Slip op., p. 7. I assume that the rule to be adopted will clarify the scope of the majority's definition of "legislative" activities. The Kelly Committee apparently proposed a board definition of legislative activity for purposes of the rebate, which the bar interprets as striking at the heart of the concept of a unified bar. The bar believes the Kelly Committee's definition would cripple a large part of the bar's program of legal research, law revision and reform, technical assistance, and the like. State Bar Brief Responding to the Kelly Committee Report, p. 23. The bar supports a more limited proportionate dues rebate, upon a member's request, as respects direct bar costs relative to advocating specific legislative positions.

More important than the specifics of a rebate procedure is its implications for the future. The court's endorsement of the rebate procedure is a significant change in the court's concept of the bar. In adopting the rebate procedure, the majority implicitly recognizes that the bar itself, which every lawyer is required to join, may engage in activities supported by dues that this court will not view as professional obligations which all licensed lawyers may be compelled to support financially.[FN3] Ironically, the practical effect of the court's solution is a "unified" association of lawyers to which all practitioners are required to belong and to which practitioners contribute for the performance of only certain activities-a solution that the majority finds impracticable under the label "voluntary." *See* p. 547.[FN4]

> FN3. The court has previously required that certain activities, *e.g.*, section activities and education activities, be conducted by "separate subdivisions" of the bar and funded by user fees, not dues. *In Re Regulation of the Bar of Wisconsin*, 81 Wis.2d xli.

> FN4. The majority says, p. 547: "We do not see as a practicable alternative a voluntary association of lawyers to which all practitioners, members or not, would be required to contribute for the performance of only those functions which we deem to be the obligation of every lawyer."

The court's view of the bar as having identifiable "mandatory" activities is also seen in the court's adoption of the Kelly Committee's list of the eight substantive professional activities that all licensed lawyers may be required to support financially, p. 546. Neither the Kelly Committee list nor the court's opinion explains why all these "required" activities must be supported through a "unified" bar, which forces membership as well as financial support, or why some or all of them cannot be performed by other entities. A close look at the Kelly Committee's "required" list reveals that the bar does not perform four of the eight activities and at least three of the other activities may not need to be performed by the bar.

Three "required" activities are performed by this court through boards: continuing legal education (Board of Professional Competence); attorney discipline (Board of Professional Responsibility); admission to practice (Board of Professional Competence). *In Re Regulation of the Bar of Wisconsin*, 74 Wis.2d xv, xxi (1976); 81 Wis.2d xliv-xlli (1977).

A fourth activity, that of controlling the unauthorized practice of law, is carried out by neither a court board nor

the bar. This court has the power to control the practice of law, and the unauthorized practice of law is, to some extent, controlled by the district attorney and the courts through criminal prosecutions. Sec. 757.30, Stats.1981-82.

***554** The bar does perform four "required" activities specified by the Kelly Committee and accepted by the court: provision of a client security fund; maintenance of a mailing list of all licensed attorneys; maintenance of a program to control trust funds held by attorneys, and "operation of a program of public information with respect to legal questions, the functions of the courts, and administration of justice."

Three of these "required" activities can be accomplished without the bar's organizational structure. The client security trust fund was established by this court at the bar's request and is under the control of a committee appointed by the bar. SCR 12. Although the bar appoints the committee, the bar does not provide any financial support for the fund and does not supervise the committee. Maintaining a mailing list of licensed attorneys and retaining information about lawyers' trust funds are clerical and computer functions and need not be done by the bar as such. This court requires lawyers to report the existence and location of their trust accounts annually to the bar, when they pay their dues, but the bar does not audit or supervise the trust funds. SCR 11.05(3).

Of the eight activities that the Kelly Committee Report and this court specify as "required," the only one left for consideration at this point is "the operation of a program of public information with respect to legal questions, the functions of the courts, and administration of justice." This language appears to be the Kelly Committee's description of the lawyer's professional obligation to serve the public. The court concludes, and I agree, that the bar must continue, emphasize, and augment its *pro bono* services. P. 549. *See also In Re Regulation of the Bar of Wisconsin,* 81 Wis.2d xl, xliii, n. 2 (1977).

There is, however, a question of how to define this obligation. The bar's board of governors criticizes the Kelly Committee Report for too narrowly characterizing the "public service" function. Information services to the public and the legislature emphasized by the Kelly Committee are, according to the bar, only a small part of the public service function. While I believe that lawyers (and judges) should commit a significant amount of time to professional activities in the community interest, I recognize that there is a respectable division of opinion as to the nature of a lawyer's public service obligations and the court's power to compel lawyers, individually or collectively, to provide public service.[FN5] If the bar is to continue to exist in this state to perform this public service function, funded by mandatory contributions of all lawyers licensed in this state, the bar and its members need more guidance than the few paragraphs the majority has devoted to the topic.

FN5. Professor Shapiro, in his article entitled *The Enigma of the Lawyer's Duty to Serve,* 55 N.Y.U.L.Rev. 735 (1980), examines the ambiguous history of the lawyer's public service obligation and the constitutional and policy obligations to require lawyers to perform public service. Professor Shapiro concludes that no such obligation should be imposed on lawyers and that a lawyer's public service should be left, as it is in the ABA Code of Professional Responsibility, "to the lawyer's conscience and sense of professional commitment."

See also In re: Emergency Delivery of Legal Services to the Poor (Mandatory Pro Bono), Fla., --- So.2d ---- (May 12, 1983); Ranii, *Florida High Court Halts Statewide Proposal: Mandatory Pro Bono Rejected,* Nat'l L.J., May 30, 1983, p. 3; ABA, Special Committee on Public Interest Practice, *Implementing the Lawyer's Public Interest Practice Obligation* (June 1977); Kelly Committee Minority Report submitted by Amadeo Greco, pp. 1-2; Resh Memorandum, Wis.Bar Bull., April 1974, p. 39; Abrahamson, *The State Bar Approaches the Age of Majority and Is Already Loaded,* Wis.Bar Bull., April 1974, p. 46; *On Petition to Amend Rule 1 of Rules,* 431 A.2d 521 (D.C.Ct.App.1981).

Of the eight "required" activities, then, the bar is not responsible for the performance of four; the bar need not perform three more; and the court has not defined the eighth. Nevertheless, the majority rests its conclusion that the bar ought to continue as a "unified" bar because there exist "required" professional activities that lawyers should support through association with the bar.

***555** Neither the Kelly Committee nor the court opinion states whether the bar may use mandatory dues to support activities which do not fall within these eight "mandatory" activities. Compare the Kelly Committee list

and SCR 10.02(2), statement of the purposes of the state bar. Rather than wait for this state's lawyers to challenge the bar's various activities one by one, [FN6] I prefer that this court carefully examine the activities in which the bar presently engages or financially supports, determine which professional activities all licensed lawyers must support and which ones they need not, and then decide whether an organizational structure or structures other than the unified bar might better serve the lawyers of this state.

FN6. For a list of bar functions *see* Appendix B, State Bar Board of Governor's Post-Hearing Memorandum.

I would expect that after the court's opinion and rebate plan, more members of the bar will ask for a rebate procedure for other bar expenditures, such as expenditures for conventions, for certain bar publications, and for bar social activities, activities which they will argue are not required obligations of all licensed lawyers. *Cf. Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 685 F.2d 1065 (9th Cir.1982), cert. granted, --- U.S. ----, 103 S.Ct. 1767, 75 L.Ed.2d --- (1983) (labor union).

In Michigan, bar members have raised questions about bar dues being used to finance the young lawyers section, the lawyers' wives group, and the lawyer placement service and the bar's selling its mailing list commercially. *Falk v. State Bar of Michigan*, 411 Mich. 63, 82-83, 166-67, 305 N.W.2d 201, 241. One commentator reports that the State Bar of Michigan has revised its practices and is giving members opportunities to opt out of certain activities. Note, *Falk v. State Bar of Michigan: First Amendment Challenge to Bar Expenditures*, 3 Det.C.L.Rev. 737, 738, n. 7 (1982).

We should not be asking whether we should continue a “unified” bar. As Professor Schneyer points out, merely categorizing an organization as “unified” or “voluntary” is not meaningful because a wide variety of entities is included within each category. In fact, there may be greater differences among the entities in each category than there are between entities in the two categories.[FN7] We should be seeking the best possible way to ensure that all lawyers licensed in this state financially support those activities which this court views as “required” professional obligations without forcing lawyers to belong to or pay to support an association which engages in activities that are not true professional obligations.

FN7. While a unified bar has two essential features, creation by court rule or legislation and licensure conditioned on the lawyer being a dues-paying member, bar unification is a continuum. At one extreme are unified bars carrying out the full range of traditional voluntary bar functions and at the other extreme are unified bars which, although technically compulsory membership organizations, serve only to maintain a registry, collect fees, and carry out certain regulatory functions. Schneyer, Unified but Ungovernable: A Case Study of the Wisconsin State Bar, p. 1, n. 1, passim (1983) (unpublished manuscript).

In the meantime, to avoid further problems the leadership of the bar would be wise to remember that the bar is a “unified” bar, not a voluntary bar, and that a unified bar has more limited functions and different responsibilities than a voluntary bar. Before voting for any expenditure or any project, the leaders of the bar should ask themselves whether they can justify that expenditure or project as a professional obligation of all lawyers. An expenditure or project appropriate for a voluntary association of lawyers is not necessarily appropriate for a “unified” bar.

The court was wise to experiment with an integrated bar association in 1957. The bar has done a good job. It is a strong, healthy organization. Times change, however, and institutions must change to meet current and future needs and expectations. It would be wise now to think about and experiment with different organizational structures. The court is not interested in running an association of lawyers, and undoubtedly the lawyers want to run their own organization. But as long as the court requires all licensed lawyers to be members of the bar, it must retain control over the organization to protect the rights of the ***556** “captive” members. We ought to start devising a better means than we now have to reconcile freedom of association with professional obligation.

STEINMETZ, Justice (concurring).

I agree with the per curiam opinion of the court. I would add another function for the bar association to perform which it presently does not.

It is well-recognized that the practice of law continues to become more and more specialized. The decisions of the

United States Supreme Court upholding the attorneys' qualified right to advertise mandate the ultimate recognition of specialization. With this emphasis on specialization, I think it incumbent on the bar association to establish guidelines so this court can adopt a specialty program in order for the public to be informed when choosing an attorney. It would be far superior to any other approach for the bar association through its special sections to draw up the parameters of a special field of law practice, to set the qualifications, testing and continuing course requirements necessary for each specialty, establish advertising regulations and, in general, to police the membership, all with the supervision of this court.

To be accomplished successfully, the right of the general practitioner to practice in all areas of the law would have to be maintained. A standard of specialty competence may have to be imposed on general practitioners, as well as on the attorneys recognized as qualified in a special field. Special sections of law practice already exist and function competently within the bar association in providing educational material and organizing conferences. These special sections are well-suited presently for establishing criteria for the specialty practice of law ultimately to be approved by this court.

DAY, Justice (dissenting).

I dissent. Three years ago when this court considered the issue of bar integration I disagreed with the majority's decision to continue compulsory membership in the State Bar of Wisconsin as a requirement for the practice of law. *In Matter of Discontinuation of State Bar of Wisconsin as an Integrated Bar*, 93 Wis.2d 385, 388, 286 N.W.2d 601 (1980). Nothing has changed in the relationship of this court to that association that in my opinion justifies continued compulsory membership.

In our review of the Kelly Committee report on the performance of the State Bar of Wisconsin in carrying out its public functions, we have had available to us a thorough, well-researched study of bar integration by Professor Theodore J. Schneyer of the University of Wisconsin Law School. Professor Schneyer's work serves to reinforce the position of those who believe that membership in a statewide association of lawyers ought not be required as a condition to practice law in Wisconsin. The study, entitled "Unified But Ungovernable: A Case Study of the Wisconsin State Bar," is the result of extensive research and investigation undertaken by Professor Schneyer, under a grant from the American Bar Foundation, and it is intended for publication in the near future. A copy of the study was filed shortly after the public hearing on the Kelly Committee report, at which Professor Schneyer appeared and informed the court of his conclusions based on the study. It is the most comprehensive study and analysis of bar integration (compulsory membership) of which I am aware.

The study examines bar unification from historical and nationwide perspectives and focuses on the practical and legal issues involved in unified or compulsory bars in the context of the Wisconsin experience. It refutes any historically-based contentions that integration is necessary in order to provide a professional association with a stable membership and financial base. Professor Schneyer cites statistics showing that, of fifteen statewide bar associations in which membership is voluntary, only two had a membership rate of less than seventy ***557** percent in 1973 and that bar associations dues in three neighboring states having voluntary bars are higher than in Wisconsin. He concludes that a voluntary bar association can insure a respectable membership level by providing its members with quality programs and tangible benefits.

Other reasons used to justify mandatory membership, such as the need to improve the standards of the profession in admitting persons to practice and in enforcing ethical rules of practice, Professor Schneyer finds to be insubstantial in light of the unified bar's less than significant role in the development and enforcement of admission and disciplinary standards, the responsibility for which is placed in two boards attached to our court, subject to the court's inherent power to regulate the profession. Even in the area of law reform, he observes that in Wisconsin the bar's effectiveness with the legislature has never been related to its unified status. Rather, he finds that the state bar has been no more effective in the legislative process than a voluntary bar association would be and that it is not unlike any private group representing the economic interests of its members. Further, he points out the difficulties, both practical and legal, inherent in the use of compulsory dues to support legislative activities of the association.

Legislative activity by the bar association is of particular concern to many lawyers, as is compelled financial support of political or ideological activities. Acting on the Kelly Committee's recommendation, the majority would create a rebate system whereby that portion of a bar member's dues used to support legislation which the member opposes would be refunded at the end of each legislative session. This, however, is no more than a cosmetic remedy to a deeply rooted problem. It means the bar has the use of a dissenting member's money, without his

consent for purposes of which he disapproves.

Lobbying can be a positive part of the legislative process, but the effectiveness of a statewide bar association's legislative efforts is diminished by the fact that membership in that association is made mandatory by court rule. The Wisconsin legislature is not fooled into believing that a position on a legislative matter taken by the State Bar of Wisconsin constitutes the composite judgment of its members. In my view, integration of the bar has hampered the bar's effectiveness in legislative matters.

Additionally, because of the nature of the bar association's legislative activity, the court, exercising its regulatory authority over the bar, has found it necessary to repeatedly demarcate the permissible limits of the association's participation in the legislative process. Thus, integration has consistently worked against the bar in this area: the association is not permitted to engage in lobbying, partisan politics or other legislative activity in which it might like to participate, it cannot speak with a "single voice" on behalf of its membership, and a significant portion of its membership has expressed resistance to being identified with policy positions taken by the association. These reasons in themselves warrant changing the association's status from mandatory to voluntary.

On the practical side, Professor Schneyer discusses three distinct images of the unified bar, images which have proved to be conflicting and irreconcilable in terms of association governance: an autonomous association to be run as a private voluntary association, a public agency whose mission is to serve the public in all of its activities, and a compulsory membership organization, akin to a "closed shop." Tracing the history of bar integration in Wisconsin, Professor Schneyer illustrates the continuous struggle among these competing images of the state bar. For example, when the integrated bar is perceived as a public agency or a closed shop, the dominant theme in bar governance is regulation by the court to insure that the association's activities are in the public interest and that the rights of ***558** dissenting members are protected. He notes a trend in other jurisdictions for courts to view the unified bar as a closed shop, which serves as the basis for their closely scrutinizing its activities for potential infringement on the constitutional rights of its "captive" members. Such view of the unified bar runs directly contrary to the concept of associational autonomy, to which an organization of professionals, certainly should aspire.

It is Professor Schneyer's thesis that these three inconsistent and incongruous images "make the unified bar an inherently awkward institution to govern." In support thereof he examines the difficulties of association governance that the State Bar of Wisconsin has encountered since its integration in 1956, not the least of which concerns the governing structure of the organization, a subject that has received a great deal of attention over the last twenty-seven years, not only by the court, but also by the state bar itself. He attributes these problems to the confusion about the state bar's legal and political status as a voluntary-type professional association, as a public agency, as a closed shop or as any combination thereof.

It is because of this "confused" status that the court has been required to closely supervise the association's activities, even in those areas in which it acts as a voluntary-type professional society. It is also for this reason that the court found it advisable to establish a periodic committee review of the state bar's activities to assess its performance in carrying out its public functions. However, such review has proven so costly, both in terms of time and money, that the majority now has abandoned the quadrennial review originally provided in favor of an "as needed" review.

Professor Schneyer concludes that the unified bar in Wisconsin is not worth the costs, in terms of member dissatisfaction, the organization's lack of autonomy and the continuing need for court oversight. It is his opinion, and one which I share, that the advantages of a unified bar-the development and administration of public-service programs, the regulation of the profession and the provision of services to its members-can be and, in many cases, are being realized through other entities, including voluntary bar associations. After all, there are nineteen states in which the statewide bar association is voluntary, and I have not yet heard it argued that the lawyers in those states are evading or avoiding their professional responsibility to render a public service.

As Professor Schneyer's study shows, there is greater evidence now than in 1980 that mandatory membership in a statewide association of lawyers should be discontinued. As was pointed out in the 1980 bar case, the principal on-going relationship between this Court and "the bar," such as admission, discipline and continuing legal education, is carried out, not by the association, but by Boards created and appointed by this Court. But the other important and useful functions of a professional association that the bar engages in have little to do with this court's traditional relationship with the bar. In Professor Schney-

er's words, “The case for abandonment is chiefly a case for autonomy in associational life and for judicial economy, but also a case for individual freedom.” The State Bar of Wisconsin can and should be a voluntary association.

Wis.,1983.
Report of Committee to Review the State Bar
334 N.W.2d 544

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485 N.W.2d 225
Supreme Court of Wisconsin.

In the Matter of the STATE BAR OF WISCONSIN: MEMBERSHIP-SCR 10.01(1) AND 10.03(4); Membership Dues and Dues Reduction-SCR 10.03(5); Assembly of Members-SCR 10.07(2); Referendum Procedure-SCR 10.08; Amendment of Rules-SCR 10.13(1).

June 17, 1992.

The state bar petitioned for reinstatement of integrated bar and amendment of dues reduction rule. The Supreme Court held that all licensed attorneys within state could be required to join bar association and pay fees, to extent that fees were used to support identified state interest in regulating legal profession and improving quality of legal services.

Rule adopted.

Heffernan, C.J., concurred and filed statement.

Bablitch, J., concurred and filed opinion, in which Heffernan, C.J., concurred.

Shirley S. Abrahamson, J., dissented and filed opinion.

West Headnotes (1)

1 **Attorney and Client**
Bar Associations

All attorneys licensed to practice within state could be required to join state bar association and pay fees, insofar as they went to further identified state interest in regulating legal profession and improving quality of legal services. SCR 10.03(1, 4), 10.03(5)(b).

1 Cases that cite this headnote

Opinion

***21** ****225** PER CURIAM.

On May 16, 1991 the State Bar of Wisconsin petitioned for the reinstatement of the integrated bar in Wisconsin by resumption of enforcement ***22** of the court's rules, SCR 10.03(1) and 10.03(4), establishing membership in the State Bar of Wisconsin as a condition precedent to the right to practice law in Wisconsin and limiting the practice of law in the state to enrolled active members of the State Bar. The court unified or "integrated" the State Bar in 1956 and it has remained so until May 6, 1988, when the court suspended enforcement of its mandatory State Bar membership rules in response to the decision of the United States District Court for the Western District of Wisconsin in *Levine v. Supreme Court of Wisconsin, et al.*, 679 F.Supp. 1478 (W.D.Wis.1988), holding that the court could not require the plaintiff in that action to be a member of the State Bar of Wisconsin as a condition of his practicing law in the state.

Thereafter, *Levine, supra*, was reversed by the United States Court of Appeals in *Levine v. Heffernan, et al.*, 864 F.2d 457 (7th Cir.1988). The United States Supreme Court denied certiorari in *Levine* but on the same day granted certiorari in another action presenting the issue of the constitutionality of an integrated bar, *Keller v. State Bar of California.* This court made no change in the status of the State Bar of Wisconsin while *Keller* was pending. In *Keller* the United States Supreme Court again upheld the constitutionality of a mandatory state bar membership rule but placed limitations on a state bar association's use of dues lawyers are required to pay to the association. *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990).

Soon thereafter, the United States Supreme Court granted certiorari in an action concerning a state bar association's procedures for member objection to its use of compulsory dues, *Gibson v. Florida Bar.* Because that issue was relevant here, this court again took no action on the status of the State Bar of Wisconsin, with the ***23** result that enforcement of the court's mandatory membership rules remained suspended. After hearing argument in *Gibson*, the United States Supreme Court dismissed the petition for certiorari as having been improvidently granted. *Gibson v. Florida Bar*, 502 U.S. 104, 112 S.Ct. 633, 116 L.Ed.2d 432 (1991).

In the meantime, the State Bar of Wisconsin conducted a study of its status as a unified bar association and as a voluntary ****226** one. Following that study, the State Bar petitioned the court to reinstate the integrated bar in Wisconsin. As part of that petition, the State Bar also sought the amendment of the dues reduction rule, SCR 10.03(5)(b), to conform to the holding in *Keller, supra*, in respect to the constitutional limitations on the use of compulsory dues.

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Following the public hearing it held on the State Bar's petition, the court on March 10, 1992 reinstated the integrated bar in Wisconsin, effective July 1, 1992. The court adopted the proposed amendment to the dues reduction rule by separate order on March 13, 1992.

The court is persuaded that a unified association composed of all persons licensed by this court to practice law in the state is best suited to meet the lawyers' professional obligations to the public and to the legal profession itself. Because all lawyers, as practitioners of that profession, share those obligations, an association in which membership were voluntary would not be in the same position to meet them.[1]

***24** Members of the legal profession have a duty to promote the public interest, as well as the interests of their individual clients. A significant aspect of the public's interest is the efficient and effective administration of justice. It is necessary that lawyers join in a common effort to carry out this duty, for lawyers acting individually or in discrete groups might lack the commitment and resources to effectively address more than a portion of their professional responsibilities. Acting as one, however, the members of the legal profession constitute a powerful force to further the improvement of the legal system, its laws, its courts and its practitioners.

As each lawyer shares the profession's obligation to the public, each lawyer properly may be required to support the profession's functions and activities directed to the interest of the public, even if only financially by payment of membership dues to the association acting to fulfill those obligations. It is to be hoped, however, that membership in the integrated bar association will motivate lawyers to contribute their time and talent, as well as their money, to the association's activities in furtherance of the cause of justice.

The United States Supreme Court identified two state interests justifying a unified state bar association: regulating the legal profession and improving the quality of legal service available to the people of the state. *Keller, supra,* 496 U.S. at 13-14, 110 S.Ct. at 2235-2236. Each of these interests is indissolubly bound together with the public's interest in justice and the legal system's ability to make justice attainable. These interests of the state are best furthered by an association in which every lawyer licensed to practice by the state is required to join and, at a minimum, support financially.

The United States Supreme Court held in *Keller, supra,* that mandatory dues of the members of a unified ***25** bar association may constitutionally be used to fund activities germane to the identified state interests in regulating the legal profession and improving the quality of legal services. Consistent with that holding, we have adopted the State Bar's proposed amendment to the dues reduction rule, SCR 10.03(5)(b). The procedure set forth therein for member withholding of payment for activities other than those directed to furthering the identified interests and for objection and arbitration of disputes concerning the State Bar's activities which may constitutionally be funded by mandatory dues provide adequate protection to the association's members who would limit their financial contribution to that which constitutionally can be exacted.

For the reasons set forth above and upon the specific petition of the State Bar of Wisconsin, on March 10, 1992, the court ordered the reinstatement of the integrated ***227** State Bar of Wisconsin, effective July 1, 1992.

HEFFERNAN, Chief Justice (concurring).

I join the Per Curiam opinion in support of the reinstatement of the integrated bar. I also join the concurrence of Justice Bablitch insofar as it recites convincingly the merits of the integrated bar and recounts the accomplishments of the legal profession as the result of bar integration. My own legal career commenced eight years before court-directed integration. My personal observation and experience validates Justice Bablitch's thesis that the delivery of legal services to the public and the standards of the profession were substantially improved as a direct consequence of integration. The bar became a more responsible profession as the result of the unified bar. The reinstatement of the mandatory bar will assure that it will continue to be a responsible organization for the delivery of legal services.

***26** BABLITCH, Justice (concurring).

All lawyers have a special responsibility to society. That responsibility involves far more than merely representing a client. Lawyers are the guardians of the rule of law. The rule of law forms the very matrix of our society. Without the rule of law, there is chaos. Lawyers not only have a responsibility to their clients, they have an equal responsibility to the courts in which the rule of law is practiced, and to society as a whole to see that justice is done. I cannot, and do not, share the view of my dissenting colleague that these responsibilities can be adequately fulfilled by allowing individual lawyers to choose whether they will participate in an organized professional bar. During the years that membership in the bar was mandatory, programs and services that were aimed at fulfilling the special responsibilities lawyers have to society grew and flourished. These programs produced little economic benefit to the lawyers, but great benefit to society. These programs and services, detailed below, will inevitably suffer if we go back to a voluntary bar. Revenues will be unpredictable; programs and services will more and more reflect efforts to recruit and

maintain membership-inevitably at the cost of those programs and services for which there is no economic benefit to the bar and to its members. I therefore write to answer and respectfully express my **disagreement** with my dissenting colleague.

I am not unmindful of, nor unsympathetic with, the feeling of those who are repelled by the very thought of being forced to join any organization regardless of personal preference. I too shared that repugnance when I first entered the field of law some 27 years ago in 1965. My journey from repugnance to acceptance to advocacy has not been particularly constant nor smooth. But it has been shaped by people, experiences, and perspectives ***27** gained. All have led to a growing personal awareness and an inner certainty of conviction that being a lawyer in today's society involves very special responsibilities to society that can best be served, perhaps only be served, by an integrated, mandatory bar association.

In 1965, when I first entered law school, was not that far in years and experience from those years when the bar was completely voluntary. It was not until 1956 that the bar became mandatory. In 1965, and in 1968 when I graduated from law school, many remnants of those voluntary days were still in evidence. Although there were then many highly motivated lawyers, professional in the very best sense of that word, from my perspective the bar as a whole seemed to be dominated by the "bottom liners," the ones for whom the only thing that mattered was the economic pay-off from the degree or the practice. At that time, the bar was largely male dominated, women and minorities were few and their prospects were not bright. They constituted less than half a dozen from my class of 200 plus students. If the bar at that time offered programs and services designed to fulfill our responsibilities to society as a whole, they were few in number and relatively unknown.

****228** Fortunately, at that time, a medley of voices from within the bar began to be heard. They spoke of a growing social awareness, a growing social consciousness, that as members of a special profession, we have special responsibilities. They spoke of the need to enhance and improve our delivery of justice to the people, to bring the courts into the 20th century, to educate and enlighten the public about our system of justice. They spoke about the responsibilities of the bar to the poor in society, the responsibilities of those who call themselves lawyer to engage in continuing legal education, the responsibilities of all of us to police ourselves and discipline those among ***28** us who stray from the high standards of expected practice.

Those voices were eventually heard. The judiciary was transformed from a hodgepodge of courts to a model for the country, the cost and time for justice on appeal was lessened, public defender programs at the state and local levels were established, free legal services such as legal aid came into existence, continuing legal education became mandatory, a system of discipline that heretofore had winked at even serious transgressions was transformed into a system of discipline with teeth. Women and minorities played an ever increasing role. Today, women and minorities account for 50 percent or better of those who stand before us to be sworn into practice.

None of these changes came easily. Placed into existence over a long period of time, many changes were hardly noticed. But when you look at where we were 25 years ago, and where we are now, the change has been fundamental and it has been enormous. Only an irrational person would claim the change has not been beneficial.

As I look back, I cannot see how much of this reform could have been accomplished without a mandatory bar. Certainly there were other variables present during those years, but the primary variable that could affect change that has been in place since 1956, and not before, was a mandatory bar. The mandatory bar gave a platform and an organization to those voices of responsibility within our profession that were not "bottom liners." Socially conscious men and women lawyers were able to take our profession from those pre-mandatory days when the public was largely forgotten in the rush to economic nirvana, to a place today that, although not the epitome of professionalism, is far closer ***29** to the ideal than 25 years ago. Without a mandatory association, and the resulting economic freedom of that association to push and propel these changes, I have no doubt the bar today would look much more like pre-1956 than post-1956. And some wish to return to those good old days of yesteryear? Those who fail to learn from the mistakes of history are bound to repeat them.

Those men and women who helped bring about change, and they know who they are though most of us don't, recognized that being a lawyer involves far more than an opportunity to make a comfortable living. They knew, and it is hoped most of us now know, that being a lawyer involves a special responsibility to society itself.

I fear, in fact I predict with certainty, that a return to a voluntary bar would be a return to those days of stagnation, to those days when the question of "what's in it for me?" drowned out the question of social responsibility. The lessons of the past are evident.

The mandatory bar has been an essential force in assisting lawyers to fulfill their roles as guardians of the rule of law. Of equal importance, the mandatory bar has been a guiding force in assisting lawyers to deliver an increasing quality of justice to society and to those they represent.

Many if not most of the services the bar delivers in pursuit of these goals are not self-supporting and are not capable of being subject to user fees. To cite but a few, they include: publications to members keeping them up to date on legal developments including orders and decisions of this Court which regulate the profession and discipline attorneys; publications for public consumption informing the public on matters of justice and the rights and responsibilities ***229** of citizens under law; lawyer referral service, assisting members of the public find qualified lawyers regarding specific legal issues; assistance and promotion of pro bono activities; fee arbitration service; ***30** assistance in the disciplinary system by appointing approximately 200 lawyers and lay persons to district grievance committees; ethical advice and guidance to members; assistance to alcoholic, ill and disabled lawyers through the "lawyers helping lawyers" program.

If the bar is voluntary, market forces will eventually dictate that much of the bar's resources, economic and personnel, will have to be directed at recruiting and maintaining membership. The "what's in it for me" syndrome will drive programs, services, and personnel in the direction of self interest, not social responsibility.

If we go back to a voluntary bar, time and money spent on recruiting will mean less time and resources spent on programs. Guess what programs?

If we go back to a voluntary bar, time and money spent on maintaining membership will mean time and money not spent on other services. Guess what services will suffer?

The answers are obvious. Programs and services not targetted to the "bottom line" will inevitably suffer. They are not economically self supporting and by definition can never be self supporting. Uncontradicted testimony at the public hearing on the question of an integrated bar evidences that this is already happening with our few short years of "experimentation" with a voluntary bar. One officer testified with chagrin that with increasing frequency she had to commit significant time to the issue of membership and justify the bar's existence to its voluntary members by engaging in activities such as "obtaining discounts at Shopko and at hotels around the state so that lawyers can say the bar responds to 'my' needs." Katja Kunzke, Testimony at the Hearing Before the Wisconsin Supreme Court Concerning Reinstitution of Mandatory Membership to the Wisconsin State Bar Association (March 4, 1992) (tape of hearing ***31** available at the Office of the Clerk of the Supreme Court).

All who call themselves lawyer have an obligation to maintain these programs and services that inure to the ultimate benefit of the public. These programs and services go directly to the heart of our social responsibilities. They cannot be maintained without adequate and predictable support levels. To say that only those who voluntarily choose to be a member of the bar must pay for them is simply wrong. All share in this responsibility, whether they choose to individually participate in the bar or not. It is a responsibility assumed when they chose to be a lawyer, and continues as long as they choose to call themselves lawyer. This mantle of social responsibility, to society at large and to the individuals within it, is not one that can be shucked at will.

The public's perception of lawyers is well known and well documented. We ought not hide from ourselves the fact that some of that perception is self imposed. But as a profession, enormous strides have been made in the past few decades, positive strides towards the recognition of our special professional responsibilities and the fulfillment of them. We are not there yet, but as we get closer to being true professionals in the very best sense of that word, I feel confident that society, who already knows that lawyers play an enormously important role in society today, will come to realize that we are striving to fulfill our responsibilities. And with that realization will come, it is hoped, a greater respect for the profession and those who practice it.

As a graduate of a law school, no person is forced to join any organization, nor to practice law. But if that person wishes to practice law as a member of the legal profession, then he or she must take on the responsibilities of the profession. Those responsibilities come with ***32** the territory, and are far better fulfilled together than apart.

I am authorized to state that HEFFERNAN, C.J., joins in this concurrence.

***230** SHIRLEY S. ABRAHAMSON, Justice (dissenting).

I dissent from the March 10, 1992 order reinstating the integrated bar[1] and granting the State Bar of Wisconsin's petition for the amendment of Supreme Court Rules (SCR) 10.03(5), 10.07(2), 10.08 and 10.13(1)[2] for three reasons.[3]

***33** First, I would not reinstitute a unified bar. I would keep the State Bar of Wisconsin a voluntary organization.

The two activities which, according to the United States Supreme Court, a unified bar may support with mandatory dues (namely, regulating the legal profession and improving the quality of legal service), are performed primarily by the Wisconsin supreme court and funded by annual assessments of all lawyers licensed to practice in this state. The merits of the unified bar have been debated

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for over 75 years. In that time no one has demonstrated that a unified bar has a better record of service to its members or to the public than a voluntary bar. Professor Ted Schneyer studied the State Bar of Wisconsin and concluded that its performance did not justify the claims for a unified bar.[4] The disadvantages of a unified bar, such as the constitutional restrictions on expending mandatory dues and the unified bar's dependency on the court, outweigh any claimed advantages. I believe the values of the individual attorney's freedom of association and a bar association's freedom and independence from the court trump any claimed benefits of mandatory membership.

Second, even if I agreed to a unified bar, I dissent from the amendments of the rules the court adopted which concentrate power in the Board of Governors and reduce the ability of individual members to participate in establishing Bar policy.

***34** Third, even if I agreed to a unified bar, I dissent from the amendments of the rules the court adopted which provide that any pro rata dues reduction awarded by an arbitrator will be refunded only to those members who have requested arbitration.

I.

As the rules and the majority opinion recognize, the United States Supreme Court has limited the activities a unified bar may support with mandatory dues to expenditures "necessarily or reasonably incurred for the purposes of regulating the legal profession or 'improving the quality of legal service available to the people of the State.' " *Keller v. State Bar of California*, 496 U.S. 1, 14, 110 S.Ct. 2228, 2236, 110 L.Ed.2d 1 (1990) (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843, 81 S.Ct. 1826, 1838, 6 L.Ed.2d 1191 (1961)).[5]

****231** I would not reinstitute a unified bar because these two activities, regulating the legal profession and improving the quality of legal service, are performed primarily by the Wisconsin supreme court, not the State Bar of Wisconsin.[6] To support these activities, the court ***35** annually sets assessments which all lawyers licensed to practice in this state are required to pay. In 1976, the court explicitly removed these responsibilities from the Bar and placed them under the court's supervision to assure the public that lawyer discipline, bar admission, and regulating competence through continuing legal education would be conducted for the benefit of the public, independent of elected bar officials.[7]

The court's annual mandatory assessment on the lawyers of the state, not the membership dues paid to the State Bar of Wisconsin, finances the Board of Attorneys Professional Responsibility (BAPR), the investigatory and prosecutorial arm of the court for regulating lawyers. The Bar itself plays no direct role in the grievance process.

The court's annual mandatory assessment on the lawyers of the state, not membership dues paid to the State Bar, finances the court's mandatory continuing legal education program for improving the quality of legal services available to the people of the state. The Board of Bar Examiners (BBE), an arm of the court, ***36** administers the bar examination and the mandatory continuing legal education program imposed by the court. The State Bar is one provider, among many, of continuing legal education programs, but the Bar's continuing legal education programs are not funded by members' dues; they must be self-supporting. *In re Regulation of the Bar*, 81 Wis.2d xxxv, xli (1977).[8]

Thus all lawyers licensed to practice in Wisconsin pay the court-mandated annual assessments to support the court-created and court-supervised boards primarily responsible for regulating the legal profession and improving the quality of legal service available to the people of the state. There are no "free riders."[9] We need not mandate membership in the State Bar to ****232** eliminate a problem with free riders when no such problem exists.

The State Bar of Wisconsin engages in many worthwhile activities, some of which are germane to regulating ***37** lawyers and improving the quality of legal services and some of which are not. For example, the State Bar keeps its members up-to-date on recent legal developments by publishing articles and distributing materials on legal issues, summaries of legislation and cases, and the texts of disciplinary matters; upon direction of the court it appoints lawyers and lay persons to district committees that work with BAPR; it distributes publications designed to inform the public about law and the administration of justice; it encourages lawyer participation in pro bono activities; it operates a telephone "hot line" providing legal advice; it proposes rules to this court about professional responsibility and legal education; it influences legislation; it issues ethical opinions to lawyers; and it provides assistance to alcoholic, ill and disabled lawyers in order to protect the public. Some Bar activities are supported by user fees; others are not. Voluntary bar associations across the country engage in similar activities to those of the State Bar of Wisconsin.[10]

The State Bar is not the only organization of lawyers that plays a valuable role in assisting the court in regulating the legal profession and improving the quality of legal services available to the people of Wisconsin. There are public interest law firms, legal service associations, and other organizations of lawyers, representing the diverse views of lawyers. Although the Bar asserts that a unified bar is much better equipped to speak for the profession with respect to important regulatory and ***38** other issues

and to make appropriate recommendations to this court, the Bar does not explain why.

Numerous lawyers and scholars across the country have compared the virtues of unified and voluntary bars. Although many claims are made for a unified bar, no one has demonstrated that a unified bar has a better record for service to its members or to the public than a voluntary bar. Neither the Bar's petition nor the court's per curiam opinion gives any reason for concluding that the Bar's operation has been hindered by its voluntary status for the past four years or that the Bar's operation would be significantly improved by a mandatory membership requirement.

The State Bar of Wisconsin has operated well during the four fiscal years since the court made membership voluntary in May 1988. Over 80 percent of lawyers licensed to practice in Wisconsin voluntarily joined the Bar during this period; out-of-state practitioners constitute the largest block of lawyers who did not join. When out-of-state lawyers are omitted from the statistics, the percentage of Wisconsin practitioners who voluntarily joined the Bar rises to 90 percent. This large percentage of Wisconsin attorneys who have voluntarily joined the Bar is a forceful argument for leaving the voluntary status undisturbed.[11]

The Bar's voluntary status has resulted, I believe, in the Bar's greater responsiveness to the needs and wishes ***39** of the members in efforts to attract members and keep them enrolled. It also appears that the Bar has worked harder during its voluntary period to include women, minorities and government lawyers in committees and activities in an effort to encourage participation and membership among these sometimes alienated groups.[12]

****233** The Bar's brief asserts that a mandatory bar is less likely to come under the control of discrete elements of the profession and that "it is particularly important that young lawyers, government lawyers, women and minority lawyers and lawyers who practice in rural areas have a strong voice in an integrated bar." Bar's Brief in Support of Petition, at 16. The Bar does not explain how its new structure as a unified bar will accomplish these goals. More about this later.

I wrote in 1983 that I was not persuaded that a unified bar is inherently better than a voluntary bar in ***40** performing the services the State Bar ascribes to itself.[13] I am now persuaded that the disadvantages of a unified bar outweigh any claimed advantages.

Our legal system and our fundamental liberties rest to a large extent on an independent bar and an independent judiciary. The bench and bar should, I believe, strive for amicable relations, but the public interest requires that each be independent of the other. It is important for bar organizations to be free to take positions not favored by the bench, and for the bench to regulate the practice of law in the public interest (which may not necessarily be in the interest of individual lawyers or a bar organization). The unified State Bar of Wisconsin, controlled as it is by this court,[14] cannot be independent, as many lawyers have openly acknowledged.[15] That's not good.

***41** A unified bar is handicapped in speaking out about legislative and public policy issues because of the limitations placed on it by the constitution and the *Keller* decision.[16]

The dividing line between expenditures chargeable and not chargeable to mandatory dues is still unclear. For instance what does "improving the 'quality of legal services' " mean? As the United States Supreme Court wrote, "precisely where the ****234** line falls ... will not always be easy to discern." *Keller*, 496 U.S. at 15, 110 S.Ct. at 2237. The Court concluded that only "the extreme ends of the spectrum are clear." *Keller*, 496 U.S. at 15, 110 S.Ct. at 2237. Professor David Luban concludes that the *Keller* opinion "leaves unanswered the question of how much of the bar's narrow law reform mission the Court has pared away. Even though the Court may believe it is finally through with the issue, the issue is probably not through with the Court." David Luban, *The Disengagement of the Legal Profession: Keller v. State Bar of California*, 1990 Sup.Ct.Rev. 163, 185. Mandatory dues spent on legislative or other activities will raise legitimate questions about the proper classification ***42** of the activities. Discord and **disagreement** among members of the State Bar about which activities may be supported by mandatory dues will be a continuing issue.[17]

I agree with Professor Luban that the *Keller* decision may very well cause a unified bar to refrain from engaging in law reform. This will eliminate the bar association as an important forum for lawyers to discuss these matters and as a key entity working for the public interest. David Luban, *The Disengagement of the Legal Profession: Keller v. State Bar of California*, 1990 Sup.Ct.Rev. 163, 202.

A debate has raged across the country this past 75 years about the merits of a unified bar.[18] Opinions have ***43** been and remain divided. For 75 years no one has resolved the issue of what activities are appropriate for a unified bar association, or whether a unified bar is better than a voluntary one. The arguments in favor of a unified bar are based on the public interest, lawyers' self interest, and the interests of the bar association. Professor Ted Schneyer studied the State Bar of Wisconsin and concluded that its performance did not justify the claims for a unified bar. Professor Schneyer summed it up perfectly when he wrote: "The unified bar's problem lies in its inherently confused legal and political status which has trapped the institution in a crossfire of values. Sixty years after the beginning of unified bars, lawyers, judges and legislators still cannot figure out how the institution fits into our political scheme. They are unsure whether, or

when, to regard a unified bar as a private voluntary association, a public agency or a compulsory membership organization. They are therefore unable to decide with any consistency which of the three corresponding policies should predominate in unified bar affairs-association autonomy, public accountability or ***44** the protection of captive members."[19]

****235** The United States Supreme Court has held that a unified bar with limited functions funded by mandatory dues does not violate constitutional rights. Nevertheless when there is serious doubt across the state and across the country about the merits of a unified bar, and when there is no demonstrated need for a unified bar in Wisconsin, I believe the values of attorneys' freedom of association and a bar association's freedom and independence from the court trump any claimed benefits of mandatory membership. I believe Wisconsin should have the best of both worlds-a voluntary, independent, statewide general-purpose bar association and court-mandated annual assessments on lawyers to finance the court-supervised boards that carry out essential programs for regulating lawyers and improving the quality of legal services.

II.

I also dissent from the amendments of the rules the court adopted which concentrate power in the Board of Governors and reduce the ability of individual members to participate in establishing Bar policy. See SCR 10.03, 10.07, 10.08, 10.13. By approving these amendments the majority has dismantled the open forums for the robust exchange of ideas.

The former rules required that an assembly of the members of the Bar be held at each annual and midwinter meeting or upon petition of 200 active members. A policy matter suggested by at least 10 members had to be placed on the agenda of the meeting. Notice of the time, place and agenda of the assembly was given to each ***45** member by mail or publication in the Bar Bulletin. A quorum of at least 300 members present in person was required. The assembly could take binding action on any matter on the agenda. In addition, at each annual meeting, at a time and place stated in the printed program, the members had an opportunity to confer with the officers and executive committee and present any complaints or suggestions for the improvement of the State Bar. SCR 10.07 (1992).

Under the amended rules, effective July 1, 1992, the two annual required assemblies of members will no longer take place. Under the new rules, an assembly of members *may*, but need not, be held at each annual and midwinter meeting; the purpose of the assembly is limited to "discussing any issue of association public policy." SCR 10.07(2), 166 Wis.2d at xxiii.

Under the former rules, SCR 10.03(5)(a) provided that any change in the Bar dues must be made by a vote of the membership at an annual or midwinter assembly or in a referendum. Review by the supreme court was available on petition of 25 Bar members. Under the amended rules, effective July 1, 1992, changes in the dues may be made by the Board of Governors alone. 166 Wis.2d xxii-xxiii.

Under the former rules, SCR 10.13(1) provided that proposals for amendment of chapter 10 regulating the Bar could be presented to the supreme court by the Board of Governors or by petition approved by a vote of a majority of members present at two consecutive meetings of the Bar. The new SCR 10.13(1) provides that proposals for amendment of chapter 10 may be presented only by the Board of Governors or through the referendum procedure. 166 Wis.2d xxvi.

The amended rules, effective July 1, 1992, further limit the rights of individual members or a minority ***46** group by making the referendum procedure more difficult. Under the old rule, 300 signatures were needed on a petition to submit a referendum to the members. Under the newly adopted rules, 1,000 signatures are needed on such a petition, including at least 50 signatures from *each* of the State Bar's six districts. As if these restrictions were not sufficient to dissuade dissidents, the court adopted an additional requirement at the State Bar's request: the signatures must be obtained within the 90 days before the petition is filed.

Should a dissident group succeed in meeting these petition requirements, the 1,000 petitioners are still not assured that their issue will be brought before the membership for a vote. The amended rules ****236** give the executive director of the State Bar the power to determine whether the petition question is "properly the subject of a referendum." SCR 10.08(6). Any disputes concerning the executive director's decision are resolved by the Board of Governors. 166 Wis.2d xxiii-xxvi.

Referendums will be conducted only once a year, simultaneous with the election of officers of the State Bar, namely in May. The petition of 1,000 members for a referendum has to be filed at the State Bar headquarters on the first business day in January to be on the May ballot. A referendum initiated by the Board of Governors need not, however, be authorized until February 28 to be on the ballot in May.

The Bar's brief in support of its petition for reinstatement of the unified bar stresses that a unified bar will be stronger than a voluntary bar because of the diversity of

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members and of opinion. The brief states: "Dissenting opinions on issues affecting the regulation of the legal profession are important in the formulation of policy. Encouragement of dissent in the integrated bar has prevented the Bar from becoming a sterile organization ***47** in place of the innovative organization that most lawyers are proud to join." State Bar's Brief at 17.[20] After the court ordered integration of the Bar, the State Bar sent a letter to each of its members stressing the value of diversity of opinion and dissent and pledging to be responsive to the members' needs and concerns. I applaud these efforts. I cannot help but note, however, that the Bar's proposed amendments (which the court adopted verbatim) have eliminated forums in which members could express their views, including their **disagreements** with the Board of Governors, and have made it much more difficult for members to challenge the Board's and officers' decisions.

III.

To meet constitutional requirements and to address the use of compulsory dues for activities other than those allowed by the *Keller* decision, the State Bar proposed that an arbitration procedure be combined with dues reduction. The court adopted the Bar's proposal which distinguishes among groups of lawyers for purposes of refunding any dues reduction an arbitrator may award. Only those who request arbitration and those who are admitted to the State Bar after the date of the arbitrator's decision are eligible to receive refunds as a result of the arbitrator's award. SCR 10.03(5)(b) 5. A member who withholds a pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues but who does not demand arbitration does not get the benefit of the arbitration decision. In effect this ***48** rule permits the State Bar to spend compulsory dues on purposes an arbitrator determines to be improper. This result is troublesome.

I see no reason for requiring each member who chooses dues reduction to request and participate in arbitration, which may be a time consuming and costly effort. In 1987, the court asked the Bar to propose a dues reduction procedure whereby all members who had elected dues reduction would share in any additional reduction resulting from arbitration. The court at that time believed this approach to be "reasonable." *In re Petition to Review Bar Amendments*, 139 Wis.2d 686, 693, 694, 407 N.W.2d 923 (1987). I still do. I would have adopted a rule providing that the arbitration awards be refunded to *all* attorneys who chose to pay only the mandatory portion of bar dues.

* * * * * *

Although I would have preferred a voluntary bar association, I join the majority opinion in urging all lawyers to participate in the work of the State Bar. This will ensure that the Bar works in the public interest and truly represents the diversity of its members.

Parallel Citations

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Footnotes

1 The court has addressed the issue of the integration of the State Bar on numerous occasions: *Lathrop v. Donohue* 10 Wis.2d 230, 102 N.W.2d 404 (1960), *In Re Regulation of the Bar of Wisconsin*, 81 Wis.2d xxxv (1977), *Matter of Discontinuation of the Wisconsin State Bar*, 93 Wis.2d 385, 286 N.W.2d 601 (1980), *Report of Committee to Review the State Bar*, 112 Wis.2d xix (1983).

1 The order appears at 166 Wis.2d xxix (1992).
On March 22-23, 1991, the Board of Governors voted 26-14 to file a petition to reinstate the integrated bar in Wisconsin. According to the Brief in Support of the Board of Governors Petition to Reinstate the State Bar of Wisconsin Mandatory Membership Rule, after the Board of Governors' vote, a drafting committee was appointed to prepare the petition for an integrated bar, taking into account the *Keller* decision and to recommend other changes to SCR Chapter 10, including review of a pending petition of the State Bar with the court concerning the governing structure of the Bar. The Executive Committee of the State Bar approved the submission of the integrated bar petition to this court on April 24, 1991. The petition was filed on May 16, 1991.

2 The amendments of the rules are in an order filed on March 13, 1992, and appear at 166 Wis.2d xxi (1992). These rule changes were apparently not adopted by the Board of Governors in 1992. In August, 1987, the Board of Governors submitted a substantially similar proposal to the court for amending the rules relating to setting dues and the referendum procedure. The Court at that time received numerous communications from individual lawyers and one from the Racine County Bar Association objecting to one or more of these changes.

3 I previously dissented from an order refusing to open the decision-making conference on the State Bar's petition to reintegrate the bar. 166 Wis.2d xv (1992). I believe the court should discuss and decide rule-making and administrative matters in open, public

sessions.

4 Professor Schneyer spent the 1981-82 academic year as a visiting scholar at the American Bar Foundation researching the unified bar. His views are set forth in *The Incoherence of the Unified Bar Concept*, 1983 Am.Bar Found.Res.J. 1.

5 SCR 10.03(5)(b) 1, 166 Wis.2d at xxii; Majority opinion at 226.

SCR 10.03(5)(b)(1) provides: "The state bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the state bar. Other activities must be supported by voluntary dues, user fees or other sources of revenue."

6 The court-appointed Kelly committee listed eight substantive professional activities that all licensed lawyers may be required to support. In Wisconsin, entities other than the Bar have primary responsibility for these activities. Patricia Heim, *The Case for a Voluntary Bar*, 64 Wis.Lawyer 10, 60 (Feb.1991).

As the former executive director of the State Bar wrote to the court on February 14, 1992: "Our bar has never sought to control the members in their practice or activities. It does things for lawyers, not to them."

7 *In re Regulation of the Bar of Wisconsin*, 74 Wis.2d ix (1976); *In re Regulation of the Bar of Wisconsin*, 81 Wis.2d xxxv, xliv (1977). See also *Matter of Discontinuation of the Wisconsin State Bar*, 93 Wis.2d 385, 389-90, 286 N.W.2d 601 (1980) (Day and Callow, JJ., dissenting), and *Report of Committee to Review the State Bar*, 112 Wis.2d xix, xxxvi, 334 N.W.2d 544 (1983) (Abrahamson, J., concurring).

See also Report of the Commission on Evaluation of Disciplinary Enforcement to the American Bar Association (May 1991) recommending that investigative, prosecutorial and adjudicative functions of lawyer discipline be independent of elected bar officials.

8 The court's mandatory assessment on the lawyers of the state also supports the Client Security Fund to protect the public.

9 The United States Supreme Court has defined "free riders" in the collective bargaining process as those who "refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 97 S.Ct. 1782, 1792-93, 52 L.Ed.2d 261 (1977).

Chief Justice Rehnquist, writing for a unanimous court in *Keller*, wrote about free riders in the bar association context as follows: "It is entirely appropriate that all of the lawyers who benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Keller*, 496 U.S. at 12, 110 S.Ct. at 2235. Chief Justice Rehnquist concluded that "Here the compelled association and integrated bar is 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." 496 U.S. at 13-14, 110 S.Ct. at 2236.

10 Unified bars in other states differ from the State Bar of Wisconsin in their functions and in the degree of control by the judiciary. For a description of the California State Bar, see, e.g., Anthony Murray, *The Unified Bar Serves the Public Interest*, California Lawyer, May 1983, at 13.

11 The high rate of participation in the voluntary bar should be compared to the high percentage of lawyers who objected to the continuation of the unified bar. In 1979 after the Bar refused to hold a petitioned-for referendum relating to unification, several bar members financed an independent vote of the membership on the unification question. Sixty per cent of those voting favored a voluntary bar. *Matter of Discontinuation of Wisconsin State Bar*, 93 Wis.2d 385, 386, 286 N.W.2d 601 (1980).

12 In connection with the Bar's petition to reinstate the unified bar, Attorney Erica M. Eisinger, Chair, Special Committee on the Participation of Women in the Bar, wrote Daniel W. Hildebrand, President of the State Bar of Wisconsin, on Feb. 11, 1992, as follows: "It is often contended that a unified bar will facilitate greater participation of women and minorities than a voluntary bar. The Special Committee on Participation in the Bar believes it would be helpful to the Court, the Bar, and the public to consider information on the participation of women and minorities in the Bar during a comparable period of time under each system." Mr. Hildebrand and Steve Smay, Executive Director of the Bar, furnished information to the court on the participation of women in the bar. See letters of Feb. 13 (Abrahamson, J.), 19 (Hildebrand), 26 (Smay), 27 (Abrahamson, J.), March 3 (Smay), March 6 (Smay), 9 (Hildebrand), 1992, all on file in *In the Matter of Supreme Court Rules of Chapter 10: Regulation of the State Bar*, Office of the Clerk of the Supreme Court, Madison, Wis.

13 *Report of the Committee to Review the State Bar*, 112 Wis.2d at xxxiii, 334 N.W.2d 544 (Abrahamson, J., concurring).

14 This court has the power to exercise control over the Bar and has used this power. Among other things, the court has ordered the State Bar to stop using a dues checkoff procedure to raise contributions for the Wisconsin Bar Foundation; voided a bar assessment to raise funds for an institutional advertising campaign; altered the Bar's governance structure giving the Assembly of Members additional powers; placed nonlawyers on the Board of Governors; and forbade the Bar to involve itself in the activities of a lawyers' political action committee.

15 Wisconsin attorney Steven Levine wrote that a comment he heard all too frequently in his years on the Wisconsin State Bar Board of Governors was " 'How will it play to the supreme court?' Whenever a controversial proposal was debated at a bar meeting, the supreme court's reaction was a prime consideration in whether the board went ahead with the action. A voluntary bar would be an independent bar-independent to follow its own will." Steven Levine, *Time to Move to a Voluntary Bar,* 1990 Wis.L.Rev. 213, 217.

> The president of the voluntary New York State Bar Association wrote: "A further factor in the life of the unified bar is the existence of control and authority exercised by the highest court over the affairs of the association. One benefit, of course, is the state-action protection available in anti-trust actions. This, however, may be more than offset by the loss of unrestricted self-determination and the ever-present risk of **disagreement** with the supervising judiciary which must produce sobering, if not chilling, effects in the contemplation of action known to be out of favor or likely to cause conflicts." Alexander D. Forger, *The President's Message,* N.Y.St.B.J., June 1981, at 263.

16 For a discussion of the State Bar of Wisconsin's limited role in lobbying about medical malpractice reform, see Ted Schneyer, *Sunset for the Unified Bar?,* Sept./Oct. 1986 Bar Leader 20, 31.

17 See *Matter of Discontinuation of the Wisconsin State Bar,* 93 Wis.2d at 391, 286 N.W.2d 601 (Day and Callow, JJ., dissenting); *Matter of Amendment of State Bar Rules,* 127 Wis.2d at xiii (Abrahamson, J., dissenting); Patricia Heim, *The Case for the Voluntary Bar,* 64 Wis.Lawyer 10, 11 (Feb. 1991); News, *What are the Big Savings?,* A.B.A.J., March 1991, at 36.

18 Herbert Harley the founder of the American Judicature Society is generally credited with beginning the unification movement with a speech to the Lancaster County Bar Association in Lincoln, Nebraska on December 28, 1914. Stephen E. Kalish, *The Nebraska Supreme Court, the Practice of Law and the Regulation of Attorneys,* 59 Neb.L.Rev. 555, 556 (1980).

> For discussions of unified and voluntary bars, *see, e.g.,* James K. Robinson, *Meeting Keller's Challenge to the Future of Michigan's Integrated Bar,* June 1991 Mich.B.J. 516; Patricia Heim, *The Case for a Voluntary Bar,* 64 Wis.Lawyer 10 (Feb. 1991); Irvin Charne, *The Case for a Mandatory Bar,* 64 Wis.Lawyer 10 (Feb. 1991); Steven Levine, *Time to Move to a Voluntary Bar,* 1990 Wis.L.Rev. 213, 217; Robert W. Webster, *The Keller Decision,* July 1990 Mich.B.J. 628; *The Sun Still Shines,* Sept./ Oct. 1986 Bar Leader 19; Ted Schneyer, *Sunset for the Unified Bar?,* Sept./Oct. 1986 Bar Leader 20; Charles W. Sorenson, Jr., *The Integrated Bar and the Freedom of Nonassociation-Continuing Seige,* 63 Neb.L.Rev. 33 (1983); Ted Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case,* 1983 Am.B.Found.Res.J. 1; Edward D. Lascher, *Dismantle the Unified Bar,* May 1983 California Lawyer 12; Alexander D. Forger, *The President's Message,* June 1981 N.Y.St.B.J. 263; Special Project, *Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis,* 66 Neb.L.Rev. 762 (1987); Note, *Renovating the Bar after Keller v. State Bar of California: A Proposal for Strict Limits on Compulsory Fee Expenditure,* 25 U.San.Fran.L.Rev. 681 (1991); Note, *Beginnings: Integration Comes to Texas,* Feb. 1989 Tex.B.J. 196.

19 Ted Schneyer, *Sunset for the Unified Bar?,* Sept./Oct. 1986 Bar Leader 20, 22.

20 The State Bar's brief explains that the integrated bar was not foisted upon unwilling members by current leadership but was subject to open debate, published views and informed member participation before a decision was made.