

MEMORANDUM IN SUPPORT OF PETITION FOR A VOLUNTARY STATE BAR

This petition requests this Court to amend and repeal various Supreme Court rules and to take whatever steps may be necessary to convert the State Bar of Wisconsin from a mandatory bar to a voluntary bar. This petition is based on five arguments:

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

3. While the State Bar of Wisconsin 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.

First, in the case of *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990) the United States Supreme Court identified two purposes of integrated state bars for which mandatory dues could be collected and spent: “regulating the legal profession and improving the quality of legal services.” Mandatory state bar dues may not be spent for other purposes: “The central holding in *Keller*, moreover, was that the objecting members were not required to give speech subsidies

for matters not germane to the larger regulatory purpose which justified the required association.” *United States v. United Foods, Inc.*, 533 U. S. 405, 413-14 (2001)(emphasis added). “[S]peech need not be characterized as political before it receives first amendment protection.” *Id.* See also, *Kingstad, et al., v. State Bar of Wisconsin*, 622 F.3d 708 (7th Cir. 2010).

Second, the State Bar of Wisconsin is not a regulatory agency which regulates the legal profession. That function is performed in Wisconsin by the Board of Bar Examiners and the Office of Lawyer Regulation. Wisconsin lawyers pay assessments to support those two regulatory agencies – as well as other assessments -- in addition to State Bar dues. The State Bar of Wisconsin does not perform one of the functions on which the United States Supreme Court has held that mandatory state bar dues may be spent: regulating the legal profession. See *Matter of State Bar of Wisconsin: SCR 10.01(1)*, 169 Wis.2d 21, 34, 485 N.W.2d 225, 231 (2002)(Abrahamson, J., dissenting).

Third, no mandatory dues of the State Bar of Wisconsin are spent for the purpose of “improving the quality of legal services.” This phrase from *Keller* refers back to the prime regulatory purpose cited by the U. S. Supreme Court in upholding the constitutionality of the integrated State Bar of Wisconsin in *Lathrop v. Donohue*, 367 U.S. 820, 842-43 (1961): to

elevat[e] the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of Wisconsin, in order to further the State’s legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to obtain the objective also engages in some legislative activity.

The State Bar of Wisconsin does provide continuing legal education programs and publications for the ethical and educational improvement of State Bar members, but, by direction of this Court, those programs and publications are paid for by user fees, not by State Bar dues.¹ No State Bar of Wisconsin mandatory dues are used to support the second function cited by the United States Supreme Court to justify mandatory state bar membership: improving the quality of legal services offered by members of the State Bar of Wisconsin.

Fourth, a majority of members of the State Bar of Wisconsin want a voluntary State Bar. In 1979 59+ percent of the bar (2,820 for, 1892 against) voted in favor of a voluntary bar (*See Matter of Discontinuation of Wis. State Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980)), and a survey conducted by the State Bar of Wisconsin itself in 2008 also indicated that 57+ percent of Wisconsin lawyers favor a voluntary bar. (*See Future of the State Bar: Mandatory/Voluntary Membership Report, Strategic Planning Committee of the State Bar of Wisconsin, February, 2010, page 8.*) Since 2005, four candidates (in seven elections) – Steven Levine, Douglas Kammer, James Boll, and Kevin Klein -- who campaigned for the office of State Bar president-elect on the basis of advocating voluntary bar membership have been elected by Wisconsin lawyers. On June 25, 2010, a majority of the State Bar Board of Governors voted to petition this Court to consider the issue of whether State Bar membership should be voluntary or mandatory, but the 25-17 vote fell one vote short of the 60% super-majority necessary for the State Bar to petition this Court. Thus, this petition raises an issue which a 59.5% majority of the State Bar Board of Governors and a 57+% majority of the entire Bar membership wish the Court to consider.

¹ See *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv, xli, xlvi, xlix (1977).

Finally, a voluntary State Bar of Wisconsin would be a more independent bar, free to act in the public interest and the best interests of its membership without the constraints imposed on it by *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990).

Because the State Bar is not a regulatory agency, because it does not use mandatory dues to pay for educational programs and publications designed to improve the ethics and abilities of Wisconsin lawyers, because a majority of Bar members favor a voluntary bar, and because a voluntary Bar would be a freer, more independent bar, petitioners respectfully request this Court to make State Bar membership voluntary by amending and repealing rules as set forth above and/or by any other steps necessary to transition the Bar from a mandatory to a voluntary organization.

Additionally, petitioners believe that the structure of a voluntary State Bar of Wisconsin which they propose serves the best interests of all involved -- this Court, the State Bar, and individual attorneys licensed to practice in Wisconsin. That structure essentially preserves the current structure of the State Bar while making membership in the Bar voluntary instead of mandatory. This proposed structure would serve five important interests. First, it preserves the current close, cooperative, and supervisory relationship between the State Bar as an organization and the Supreme Court as regulator of the practice of law. Throughout the past 50+ years the Court and the State Bar, have developed a close and cooperative working relationship, which recognizes the Court's supervisory authority over the practice of law and the Bar's appropriate role in advising and sometimes respectfully challenging the Court. The structure proposed by petitioners would continue that relationship.

Second, the structure proposed by petitioners frees the State Bar from the restrictions of *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990) and enables the Bar to act as it best sees fit in the interests of the public and its members. At present, the State Bar is restricted by the *Keller* requirements that dues revenue may be spent only for purposes of regulating the legal profession or improving the quality of legal services. A voluntary Bar would be free to participate in all forums and activities – political, economic and social – without the burden imposed by *Keller* and without having to calculate the *Keller* dues rebate.

Third, the structure proposed by petitioners 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 Wisconsin, should the Bar seek to solicit those attorneys to join the Bar, and for other purposes, such as notice of CLE programs.

Fourth, the structure proposed by petitioners respects the freedoms of speech and association of those Wisconsin attorneys who choose not to join. Petitioners wish to emphasize 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. A majority of Wisconsin lawyers have indicated that they wish to respect that choice by having a voluntary State Bar of Wisconsin. The structure proposed by petitioners continues the current operation of the State Bar without interruption while at the same time respecting the speech and association freedoms of all Wisconsin lawyers.

Fifth, by preserving the current structure of the State Bar of Wisconsin to the fullest extent possible, the structure proposed by petitioners assures that the transition from mandatory to voluntary State Bar would be as seamless and non-disruptive as possible.

Finally, the Court may be concerned with the viability -- financial and otherwise -- of the State Bar of Wisconsin as a voluntary bar. 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.² (Three states have both voluntary and mandatory state bar associations. Twenty-nine states have only mandatory state bar associations.)³ 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.

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

² 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 20,000 members) of a total lawyer count of 90,000, but some lawyers belong to both voluntary bars.

³ Please see *Future of the State Bar: Mandatory/Voluntary Membership Report*, Strategic Planning Committee of the State Bar of Wisconsin, February 2010, pages 3-4. The Court is urged to read this entire excellent report prepared by the Strategic Planning Committee of the State Bar and included with petitioners' original petition in this docket.

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.

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. A voluntary State Bar of Wisconsin has advantages for the Court, the Bar itself, and the lawyers of Wisconsin. Petitioners respectfully urge the Court to approve their petition.

Respectfully submitted,

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