STATE OF WISCONSIN IN SUPREME COURT

In the matter of: 13-07, 13-13

The petition of the State Bar of Wisconsin proposing revisions to SCR 10.04 and SCR 10.05 relating to Officers and the Board of Governors of the State Bar of Wisconsin.

State Bar Bylaw Amendment – Removal by Board of Governors

REPLY BRIEF IN OPPOSITION TO BAR BYLAWS AND RULEMAKING PETITION

By Steven Levine

INTRODUCTION

On January 3, 2014, the State Bar of Wisconsin (Bar) submitted its brief in these combined dockets. This reply brief will respond to the points made in that brief. In considering each of these issues, however, the Court should keep in mind three major points. First, as the Bar admits in its brief at pages 6 and 8, none of the evils it sets forth as justifications for granting it the authority to remove officers and governors have ever occurred in Wisconsin. In fifty-plus years of existence of the mandatory Bar, no officers or governors have had their licenses suspended or revoked; no officers or governors have been convicted of serious crimes such as child assault or embezzlement (the out-of-state examples cited in the Bar's brief). The Bar could not find a single case in Wisconsin of such misconduct by officers or governors in fifty-plus years! The removal authority sought by the Bar is a solution in search of a problem.

Second, the problem of removing officers or governors who do commit serious crimes or misconduct meriting license suspension or revocation has already been dealt with by this Court. Supreme Court Rules 10.05(3) and 10.04(1) require that only active members of the Bar may hold office. Thus, if a Bar officer or governor should have his or her license suspended or revoked by the Court, that official becomes non-active and automatically is removed from Bar office. Of course, in such a situation, the officer or governor would likely resign on his or her own, but, if not, the Supreme Court Rules provide for automatic removal. The removal authority sought by the Bar is redundant and unnecessary.

Third, as the Bar's brief makes clear, the Board of Governors (Board) seeks the authority to remove officers and governors for conduct which the Board believes is contrary to the best interest of the Bar but which does not merit license suspension or revocation – including conduct protected by the First Amendment or

Free Speech Clause of the Wisconsin Constitution: i.e., speech, petition, association, political activity or advocacy. Thus, an officer or governor may be suspended for advocating and working for a voluntary Bar; opposing a Bar position before this Court or the Legislature; being a member of a group – political or otherwise – which is distasteful to the Board; pointing out wasteful or inappropriate Bar spending or conduct to the membership; etc. At its meeting of June 12, 2013, the Board voted 34-3 to reject a compromise amendment to the removal bylaws then adopted which would have exempted conduct protected by the First Amendment from being a basis for removal. Now, with membership funds, the Board has hired counsel to defend that position. What can one say about a board which does not respect the most basic freedoms of its members? The Board's position with respect to the First Amendment is both embarrassing and threatening. The removal authority sought by the Bar is a danger to the freedom and independence of Bar officers and governors.

I. The Integrated State Bar of Wisconsin is not in the Position of Other Similar Organizations. It Already Has a Method of Dealing with Lawyers Who Engage in Misconduct.

At pages 1 and 17-18 of its brief, the State Bar cites egregious cases of misconduct (sexual assault of a minor and mishandling of a large amount of money) by bar officials in other states to illustrate the kind of conduct which justifies granting the Bar the authority to remove officers and governors. But in Wisconsin, the conduct cited would surely result in license revocation by the Supreme Court – and therefore automatic expulsion from State Bar office under SCR 10.05(3) or 10.04(1). Other state bar associations or organizations which are not subject to similar rules of their state supreme courts may require their own bylaws to deal with such situations, but not the Bar. (State bar associations such as Minnesota's and other organizations such as the Western District of Wisconsin Bar Association are voluntary membership organizations not subject to supreme court rules and can adopt whatever bylaws they please. Different considerations apply to these voluntary groups.) The examples cited by the State Bar are certainly egregious and deserving of a response. SCR 10.05(3) and 10.04(1) already deal with the situation.

II. The Wisconsin Legislature and Congress Have the Authority to Remove Their Members Only Because of Voter Approval of Explicit Language in their Constitutions. If the State Bar Wants Similar Authority, It Should Hold a Referendum of the Membership.

At pages 9, 16, and 17 of its brief, the State Bar points out that both Congress and the Wisconsin Legislature have the authority to remove their own members. Therefore, argues the Bar, it is not undemocratic to give that authority to the Board of Governors. The authority of Congress and the Wisconsin Legislature to remove their own members is slightly different in each case, but in both cases – as the Bar's brief points out -- the authority exists because it is contained in their respective constitutions. The authority therefore exists only because it was approved by those

voters who approved each constitution. If the people of Wisconsin had not voted to approve that authority in the state constitution, the authority to remove members of the Legislature would not exist. Without that vote by the people, the State Legislature would have no inherent authority to remove its own members.

The authority to remove Board members represents a significant shift of power from the lawyers of Wisconsin who elect Bar officers and governors to the Board itself – as removal contradicts the voice of the electorate. As such, that authority should not be given to the Board absent a vote by the Bar membership. The Bar should be instructed that if it wants the authority to remove officers and governors, it should first hold a referendum on the subject pursuant to SRC 10.08(4) – and that without such a referendum, the Court will not consider its petition.

The Court should also note that the authority given to the Wisconsin Legislature is limited in an important way. Article IV, section 8 of the Wisconsin Constitution limits the legislature to only a single time that it may remove a member. If the member is re-elected, the legislature my not remove him or her a second time "for the same cause." This limitation recognizes that the will of the people is superior to that of the Legislature. Because the bylaws which are the subject of docket 13-13 do not contain a similar provision which protects the voters, the bylaws should be rejected by the Court. The Board of Governors exists to represent the lawyers of Wisconsin – not to become a fiefdom unto itself.

III. The 75% Majority Required to Remove Board Members is Not Particularly Reassuring.

At pages 6 and 7 of its brief, the Bar argues that the bylaws challenged in 13-13 needn't be of concern for misuse, because they require a 75% vote by the Board of Governors to remove an officer or governor. The Bar describes this 75% threshold as a "significant burden" which might be met only by "substantial and egregious conduct." On its face, the Bar's argument makes sense. In most circumstances 75% would certainly be a reasonable percentage for such bylaws, for most groups. However, at its meeting of June 12, 2013, the Board rejected a compromise amendment to those bylaws which would have exempted activity protected by the First Amendment from being included in "conduct which is contrary to the best interest of the State Bar." The vote was 34 to 3 – 91.89% against.

For a board of lawyers (elected to represent the legal profession of Wisconsin) to reject First Amendment protection for its members by a 91.89% margin is embarrassing, discouraging, and does not give much confidence that the Board will adequately protect the freedoms of its members. Sadly, this 91.89% vote indicates that the Board is overwhelmingly willing to trample on the rights of its members and remove them for the exercise of their First Amendment rights. The question for the Court is whether a Board which voted 91.89% against the First Amendment can be trusted to act responsibly at a lower 75% threshold?

IV. Unless SCR Chapter 10 Is Amended to Add Explicit Authorizing Language, the Bar Lacks Authority to Remove Board Members via a Bylaw.

At pages 8 to 10 of its brief the Bar argues that it already possesses the authority to adopt bylaws concerning the removal of officers and governors, and there is no conflict between that authority and SCR 10.04(1) or SCR 10.05(3), which set specific terms for Bar officers and governors. The Bar cites its general purposes of "maintaining high standards of conduct" and "high ideals of integrity" (page 8, Bar brief) as granting it the authority to remove officers or governors. There are a number of problems with this argument.

1. The provisions relied on by the Bar at page 8 of its brief refer to the practice of law in general and not specifically or explicitly to the removal of Bar officers or governors. **2**. The argument by Bar counsel that the Bar already possesses the authority to remove officers and governors is directly contrary to the Bar's July 3, 2013, petition in docket 13-07, which requests amendment of Supreme Court rules to authorize the Bar to adopt bylaws which allow it to remove officers and governors. If the Bar already possesses such authority, there is no need for Court action in docket 13-07 to grant such authority, and that petition may be dismissed. Bar counsels' argument in the Bar's brief is directly contrary to the Bar's conduct in filing the petition in 13-07. **3**. Both the federal and state constitutions which are relied on by the Bar (Bar brief at pages 9, 16, 17) contain explicit language authorizing Congress and the Wisconsin Legislature to remove members, while SCR Chapter 10 does not contain any explicit language authorizing the Board of Governors to do so. Without such explicit language, the Bar lacks that authority.

4. Both this Court and the Legislature have determined that general statutory language setting forth the purposes or jurisdiction of an agency do not grant that body any specific authority – as in this case, the authority claimed by the Bar to remove officers and governors. *See Kimberly-Clark Corp. v. Public Service Comm.*, 110 Wis. 2d 455, 462, 466, 329 N.W.2d 143 (1983); *Citizens Concerned for Cranes and Doves v. DNR*, 270 Wis. 2d 318, 335, 2004 WI 40, ¶14, 677 N.W.2d 612 (agency's enabling statute is to be strictly construed; any reasonable doubt as to the existence of an implied power is resolved against the agency); Wis. Stat. sec. 227.11(2)(a): **"**A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature." (emphasis added) **5**. Nowhere in SCR 10.05(3) or 10.04(1) is there any explicit language authorizing the Board to remove officers and governors. The language there does, however, explicitly set fixed terms for officers and governors.

V. The Court Should Protect the First Amendment Rights of Officers and Governors.

At pages 4 and 5 of my original brief in docket 13-07, I suggested language to protect the First Amendment rights of officers and governors, should the Court amend its rules to allow the Board to remove officers and governors for conduct contrary to the best interest of the Bar: "The State Bar may not remove an officer [governor] because of his or her speech, association, advocacy, or activity which is protected by the First Amendment to the United States Constitution or the Free Speech Clause of the Wisconsin Constitution. . . ." This is similar to language I proposed as a compromise amendment at the June 12, 2013, meeting. The amendment was rejected 34-3. Had the amendment been approved, docket 13-13 and the controversy, time, and expense of all parties to docket 13-07 would be unnecessary. The Court should adopt this or similar language to protect the First Amendment freedoms of Bar officers and governors, if the Court grants the Bar's petition in 13-07.

In its brief at pages 19 and 20, the Bar appears to oppose this compromise language, stating that speech or conduct protected by the First Amendment may, in some circumstances, constitute an appropriate basis for removal of a governor or officer. (No such circumstances are described, however.) Instead of language which would absolutely protect the exercise of First Amendment rights by a governor or officer, the Bar asserts that the better route is to wait for a court to determine the issue on a case by case basis under a balancing test. (The cases cited by the Bar apply to the First Amendment rights of public employees and are not applicable here. Bar officers and governors are members of a legislative body; they are not employees.) While the Bar's proposal suggests a procedure, it is hardly a remedy.

Board officers and governors are volunteers who are not compensated. While they may receive reimbursement for expenses, some officers and governors refuse such reimbursement and actually contribute more to the Bar than they are eligible to receive. Offering a long and costly litigation route to an officer or governor removed from the Board is not an affordable or practical remedy, especially since the officer's or governor's one or two year term may well expire before the end of any litigation. It is hardly reasonable to impose these costs on an uncompensated officer or governor. If the Court does grant authority to the Board to remove officers and governors, the Court should adopt language absolutely protecting the exercise of a governor's or officer's First Amendment rights of speech, assembly, association, or advocacy, etc.

Or, another way of accomplishing this First Amendment protection might be to limit the Bar's removal authority to officers or governors whose licenses to practice have been revoked or suspended. (Perhaps those who have been convicted of crimes or egregious civil offenses might be included.) All of the examples cited in the Bar's brief fall into these categories, so this limitation would adequately serve both the Bar's interests and those of Bar officers or governors who wish to exercise their First Amendment freedoms in ways unpopular to the Board. If the Court does grant the Bar's petition in 13-07, the Court should select one of these alternatives – either the explicit

language protecting First Amendment rights or the language limiting removal to those who have had their licenses suspended or revoked, (or perhaps who have been convicted of crimes or serious civil offenses.) This is a fair compromise.

Conclusion.

This proceeding presents the Court with the dilemma of how to balance the interest asserted by the State Bar in removing Board members for conduct contrary to the best interest of the Bar with the rights of speech, assembly, advocacy, and conduct protected by the First Amendment. The latter protection is necessary because the Bar has indicated both at its meeting of June 12, 2013, and in its brief filed January 3rd that it may very well seek to remove a member for his or her protected speech, association, or advocacy.

In its petition and supporting memo in 13-07, the Bar indicated that it needs the authority to remove officers or governors, because governors or officers may have their law licenses suspended or revoked, or may engage in "misconduct." All of the examples of misconduct cited in the Bar's brief constitute crimes for which the lawyers involved would certainly be suspended or disbarred. Therefore, authority limiting the Bar to removing officers or governors who have lost their licenses to practice law would suffice to protect both the Bar *and* the First Amendment rights of officers and governors. Such language was suggested at page 8, paragraph numbered "2" of my original brief: **"SCR 10.04 Officers.** Officers <u>whose licenses to practice law have been revoked or suspended</u> may be removed from office and <u>their</u> vacancies filled in accordance with the bylaws," and; [SCR 10.05(3)] "Governors <u>whose licenses to practice law have been revoked or suspended</u> may be removed from office and <u>their</u> vacancies filled in accordance with the bylaws." This is the best way to both address the Bar's interest and to protect the First Amendment freedoms of officers and governors.

Alternatively, if the Court wishes to grant broader authority to the Bar to remove officers and governors, the following language – proposed at page 8, paragraph numbered "3" of my original brief – also protects both the Bar's interests and the First Amendment rights of officers and governors: "The State Bar may not remove an officer [SCR 10.04(4); The word "governor" replaces "officer" in SCR 10.05(3)] because of his or her speech, association, advocacy, or activity which is protected by the First Amendment to the United States Constitution or the Free Speech Clause of the Wisconsin Constitution. The decision to remove an officer ["governor" in SCR 10.05(3)] is judicially reviewable by a civil action in circuit court." These sentences would be added directly following the Bar's proposed SCR 10.04(4) and amended 10.05(3). Perhaps a note should also be appended indicating that this First Amendment protection is absolute and not subject to any balancing test.

Both of these proposals are balanced compromises which serve the interests of both the Bar and its officers and governors, although the first proposal is simpler, clearer, and less vulnerable to misinterpretation and misuse.

Again, in the past 50 years of the mandatory Bar's existence, no State Bar officer or governor has had his or her license to practice law suspended or revoked, nor has an officer or governor been charged with the serious offenses listed in the Bar's brief. If such misconduct occurs in the future, SCR 10.05(3) and 10.04(1) solve the problem of removing the offending officers and governors from the Board. So, the need for the authority requested by the Bar in 13-07 is slim to none. The Bar has indicated, however, that, if given the authority, it may well remove officers and governors who exercise their First Amendment rights in ways unpopular with or distasteful to the Board of Governors. This threat to the liberties of officers and governors provides a much greater danger to the integrity of the State Bar than does any lack of Bar authority to remove Board members.

The Court therefore should deny the Bar's petition in docket 13-07 and reject the bylaws at issue in 13-13. These bylaws were adopted on June 12, 2013, when the Board had no authority to adopt them. If the Court decides to grant the Bar some authority to remove officers and governors, the Court is urged to adopt the language of page 6, paragraph 2, discussed on the preceding page of this brief – or, as a last resort, the language of page 6, paragraph 3, which explicitly protects the First Amendment freedoms of officers and governors.

Respectfully submitted,

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