BEFORE THE ARBITRATOR

In The Matter of the Arbitration
Of Objections by Members:

STEVEN A. LEVINE
JON E. KINGSTAD
JOHN SOBOTIK
(Referred to herein as the Petitioners)

To The Amount Withheld From Compulsory Dues
For the Fiscal Year 2015-2016 by

THE STATE BAR OF WISCONSIN
(Referred to herein as The State Bar)

Appearances: Member Steven A. Levine, on behalf of himself and Member Jon E. Kingstad.
Member John Sobotik, on behalf of himself.
Attorney Roberta F. Howell, Foley & Lardner, on behalf of The State Bar.

ARBITRATION AWARD

Procedural Background

The Undersigned Arbitrator was appointed pursuant to the terms of SCR 10.03 and the provisions of Article I of the State Bar of Wisconsin Bylaws to determine the objections of the above-captioned members to the amounts withheld from compulsory dues for fiscal year 2015-2016.

A stipulation specifying the activities in dispute and the amounts expended on each such activity provided as follows.

Supreme Court Debate	$64
Federal Lobbying Positions	
Civil Legal Services Funding	$24
State Lobbying Positions:	
Judicial Substitution	$96
Judicial Elections-Limited Terms	$41,829
Private Bar Rate (AB 243/SB235)	$382
Civil Legal Services (AB40)	$150
Court Funding (AB40)	$4,041
Public Defender Funding (AB40)	$397
State Attorney Compensation (AB40)	$397

It was further stipulated that jointly submitted exhibits describe each of these activities; that said exhibits and The State Bar's 2015-2016 dues statement constitute the factual record in this

proceeding; that the determinations to be made herein would be based on this stipulated factual record and briefs; and that a hearing may be convened "… if necessary in the arbitrator's discretion (this hearing is not intended to be an evidentiary hearing, but rather an opportunity for the arbitrator to ask any questions he believes would be helpful in reaching a decision after having an opportunity to review the briefing)."

In a November 23, 2015 telephone conference with the parties it was agreed that the 60-day requirement specified at Article I,Sec.5(e)4 of bylaws of The State Bar was waived; ruled that an affidavit offered by the objecting members would not be received; and ruled that, contrary to the position of The State Bar which requested that it file an initial brief to be followed by a reply by the objecting members and then a reply by The State Bar, there would be simultaneous exchange of principal briefs and reply briefs. A schedule for briefing was agreed upon, with principal briefs to be submitted by December 22, 2015 and reply briefs to be submitted by January 22, 2016.

Following the completion of this briefing schedule, on January 28, 2016, The State Bar submitted an additional reply brief, to which the Petitioners objected; and which the Arbitrator, by a ruling on February 3, 2016, did not accept. On February 11, 2016, The State Bar responded to the aforesaid objections and ruling. In reply, the Arbitrator, *inter alia*, reiterated the intent to proceed on the basis of the briefs received in the above-specified simultaneous exchange process, and the above-quoted understanding that a non-evidentiary hearing might be convened.

The Activities in Issue

Supreme Court Debate: This item is based on an expenditure in support of Bar staff time considering the possibility of a public debate among candidates for election to the Wisconsin Supreme Court. The State Bar emphasizes the importance of that Court to the legal system and contends that the potential for such an event to inform the general public about both the candidates and the institution of the Court are obvious. It asserts that Supreme Court Justices "provide legal services to all the people of the state (sic)" and that an opportunity to hear from those who would serve as Justices is an opportunity for a more informed election and the enhancement of such service.

Judicial Elections: This challenge is based on expenditures in support of a task force formed to recommend revisions to the law regarding the election of Supreme Court Justices. State Bar leaders perceived waning public respect for the Court based on certain current trends and events.

Court Funding: The State Bar contends that this objection is to expenditures in support of the Office of Lawyer Regulation, an agency of the State that investigates and prosecutes complaints against lawyers of ethics violations and other misconduct, and the Board of Bar Examiners appointed by the State Supreme Court to create and grade the bar exam and to monitor compliance with continuing legal education requirements, among other related responsibilities. It explains that at the time, due to certain fiscal strategies adopted by the State Legislature, there was concern on the part of bar leaders that funding for these agencies collected by assessments attached to bar dues would be redirected to mitigate funding losses suffered by the court system.

However, the present evidentiary record discloses only that the State Bar lobbied in favor of "adequate funding of the Wisconsin court system". The evidence in that respect is a memorandum from the State Bar to the Members of the Wisconsin legislature's Joint Committee on Finance. That document recites a substantial list of delays, collection reductions, information technology reductions, undesirable court administration consequences, and workload excesses, but does not specify the matters referred to in the State Bar's aforesaid contention.

Judicial Substitution: This expenditure supported the efforts by The State Bar to resist a bill in the State Assembly intended to terminate the right of defendants in criminal proceedings to peremptory judicial substitution. The State Bar urges that this right speaks to both the actual fairness such proceedings and the general perception of fairness; that a procedure believed to advance such values and goals advances the quality of legal services, particularly in that an attorney's exercise of such a right on behalf of a defendant might be critical to the outcome of the proceeding.

Civil Legal Services (State) and Civil Legal Services Funding (Federal): These challenges are based on expenditures in support of civil legal services that provide legal representation to low-income individuals and families involved in civil legal matters, including domestic abuse, evictions and foreclosures, and other conflicts common among the disabled, veterans and children.

Public Defender Funding and Private Bar Rate: The expenditures to which these objections refer were made in support of funding of the State Public Defender agency and to improve the compensation of private attorneys who accept cases assigned by the State Public Defender. The State Public Defender, deploying staff and private attorneys, provides legal representation to indigent persons in criminal, delinquency and other related cases.

State Attorney Compensation: This objection refers to expenditures in support of the creation of a pay progression for attorneys employed by the State including District Attorneys, Assistant Attorneys general, and attorneys on the staff of the State Public Defender.

Supreme Court Rules, State Bar Bylaws and Court Decisions

SCR 10.03(5)(b)4.provides that " . . . any member requesting arbitration shall file with the arbitrator a statement specifying with reasonable particularity each activity he or she believes should not be supported by compulsory dues under this paragraph and the reasons for the objection."

State Bar bylaws, at Article I Section 5(e) provide, "The State Bar shall bear the burden of proof regarding the accuracy of the determination of the amount of dues that can be withheld."

SCR 10.03 (5)(b)1. provides, *inter alia,* "The State Bar may not use the compulsory dues of any member who objects pursuant to SCR 10.02(5)(b)3. for activities that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services." This echoes the decision of the U.S. Supreme Court in Keller v. State of California 110 S.Ct. 2228 (1990), which held "The State Bar's use of petitioners' compulsory

dues to finance political and ideological activities with which petitioners disagree violates their First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services."

In Kingstad v. State Bar of Wisconsin, 622 F.3rd 708 (7th Cir. 2010) the U.S. Court of Appeals, applying the Keller decision stated as follows.

> From these teachings, we conclude that in a forced group speech case, the First Amendment requires a reviewing court to consider whether challenged expenditures by dissenting members of a mandatory association are reasonably related to the constitutionally relevant purposes of that association. It is not sufficient to examine only the political or ideological nature of those expenditures without also considering whether the expenditures are related to the constitutionally legitimate purposes of the association that permit forced group speech in the first place. The applicable cases do not describe as a test of 'either-or,' as in either the expenditures are non-political and non-ideological 'or' they are non-germane before they implicate the First Amendment. Rather, the key is the overall "germaneness' of the speech to the governmental interest at issue. The political or ideological nature of the speech factors into such analysis.

In the Arbitrator's judgement these decisions, as well as those cited by the Courts in these decisions, require a determination of whether the activities to which the Petitioners object were, perhaps among other things, germane to "the purpose of regulating the legal profession or improving the quality of legal services." The Court in Kingstad, above, which considered expenditures on a "public image campaign" largely comprised of television advertising featuring the contributions of lawyers to their communities, amplified this criterion as follows.

> . . . we do not see a need for a trial that would scrutinize either the subjective motives of bar leaders or the actual effectiveness of the . . campaign. The standard of review is deferential, as when we review a challenged legislation to determine whether it is reasonably related to a legitimate governmental purpose.
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> . . . the State Bar is not required to prove that its expenditures were actually successful in accomplishing the stated purpose, or that they served only that purpose, or that the public image campaign was a particularly wise use of the State Bar's funds. After all, '(p)etitioners may feel that their money is not being well spent, but that does not mean that they have a First Amendment complaint.'…The limited issue before us is whether the public image campaign was reasonably related to the constitutionally legitimate purpose of improving the quality of legal service, and we find that it was.

Discussion and Analysis

Thus, the phrase "necessarily or reasonably related" which appears in SCR 10.03(5)(b)1 and the Keller decision, above, has been restated as "germane" which in ordinary usage is synonymous

with "relevant," and the opposite of "incompatible;" and does not speak to necessity or efficacy or wisdom.

A plain meaning reading of SCR 10.03 (5)(b)1 reveals that there are two separate "purposes" provided by that section, (1) "regulating the legal profession" and (2) "improving the quality of legal services". This reading is based on the ordinary usage of the word "or" that appears between those purposes in that section.

As to the phrase "improving the quality of legal services," The Petitioners would limit its coverage to "educating lawyers to increase legal skills and improve ethical standards." However, judging from the Court's treatment of the "public image campaign" in Kingstad, above, a broader definition that assumes a correlation between public information and perceptions of the legal system and the quality of legal services is applicable.

Under the Keller and Kingstad, above, decisions, an expenditure that is germane to "improving the quality of legal services," even if it supports lobbying and engaging in the political process, may be properly included in compulsory dues. Lobbying is not, as Petitioners contend, *per se*, ideological or political activity that may not be supported by compulsory dues. On the contrary, it may be supported by compulsory dues where it is germane ("reasonably related") to the purpose of "improving the quality of legal service."

The last five challenged activities, above, as well as the court funding and judicial substitution efforts, were essentially lobbying activities. The advocacy for judicial substitution was intended to protect a right viewed as valuable in the representation of criminal defendants; and the others were intended to protect the resources, and thus the capacities, of the courts and Civil Legal Services; or to provide financial support of attorneys who work in the public interest. It seems obvious that these efforts were germane to improving the quality of legal services.

With regard to the Supreme Court debate and judicial elections items, the Arbitrator concludes that both the procedural features of the election process and the information that is provided to the public with regard to candidates for election to the State Supreme Court are also germane to the quality of legal services, or at least as much so as the "public image campaign" ruled upon in Kingstad, above.

The Petitioners emphasize two U.S. Supreme Court decisions that are more recent than the Court of Appeals' decision in Kingstad, above, Knox v. S.E.I.U. 132 S. Ct. 2277 (2012) and Harris v. Quinn 134 S. Ct. 268 (2014). In the judgement of the Arbitrator, those decisions are, however, inapposite. In both cases the matter in dispute was mandatory support for labor unions not mandatory support for an integrated bar. In Harris the Court found that the workers in question were not "full-fledged public employees" to which previously established doctrine was applicable. In Knox the Court held that the Union had not applied sufficient process protections to support certain aspects of its expenditures of funds collected as dues. In neither matter were the purposes of regulating a profession or improving the quality of its services discussed. While First Amendment rights in matters of forced group speech is certainly an overarching and pervasive concern, those two purposes, specified in both Keller, above, and the Supreme Court Rules, seem very far afield from the facts of those cases.

AWARD

On the basis of the foregoing, and the record as a whole, it is the decision and Award of the under signed Arbitrator that all of the objections specified in the above-quoted stipulation of the parties should be, and hereby are, denied.

Signed at Madison, Wisconsin this 22nd day of February, 2016.

Howard S. Bellman
Arbitrator