STATE OF WISCONSIN
SUPREME COURT

PETITION TO AMEND SCR 10.03(5)(b)1 DOCKET 09-08

**STATE BAR OF WISCONSIN'S MEMORANDUM
IN OPPOSITION TO PETITIONER'S PROPOSED AMENDMENT
AND IN SUPPORT OF ALTERNATIVE AMENDMENT**

Introduction

Supreme Court Rule ("SCR") 10.03(5)(b)1, defines the activities in which the State Bar of Wisconsin may engage, identifies those activities which may be funded with the mandatory dues of all State Bar members, and limits the use of mandatory dues of members who object for certain activities. SCR 10.03(5)(b)1 was adopted in its current form when the integrated bar was reinstated in Wisconsin following the United States Supreme Court's opinion in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and was adopted expressly to comply with the requirements of that decision. *In the Matter of the State Bar of Wisconsin: Membership*, 169 Wis.2d 21, 485 N.W.2d 225 (1992); *In the Matter of the Amendment of Supreme Court Rules: 10.03(5)(b) – State Bar Membership Dues Reduction*, 174 Wis. 2d xiii. (1993). In 1996, the United States Court of Appeals for the Seventh Circuit upheld the rule in its current form in the face of a constitutional challenge by petitioner Thiel (represented by petitioner Levine). *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996).

The Seventh Circuit overruled a portion of its decision in *Thiel* in a recently concluded challenge to the Bar's FY 2009 dues reduction. *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708 (7th Cir. 2010). Specifically, the Seventh Circuit held that under more recent Supreme Court precedent, all activities funded with mandatory dues – not just political and ideological

activities – must be germane to regulating the legal profession or improving the quality of legal services, the two purposes identified in *Keller* as justifying the First Amendment impingement inherent in a mandatory bar association. *Id.* at 709, 718.

Thus, there is no dispute that SCR 10.03(5)(b)1 must be amended to eliminate the current requirement that only political and ideological activities be germane. The State Bar does, however, take issue with petitioners' additional proposed amendments. Those amendments propose a definition of the activities which may be funded with mandatory dues and a burden of proof that goes far beyond the requirements of *Kingstad* and its predecessors and is found nowhere in the governing case law.

Argument

Petitioners propose that SCR 10.03(5)(b)1 be amended as follows:[1]

> The State Bar may engage in and fund any activity that is reasonably intended for the purposes of the association. The State Bar may not use compulsory dues of any member who objects to that use for ~~political or ideological~~ activities that are not ~~reasonably~~ directly, primarily, and substantially intended for the purpose of regulating the legal profession or improving the quality of legal services. The state bar shall fund those ~~political and ideological~~ activities by the use of voluntary dues, user fees or other sources of revenue. The burden of demonstrating that an activity is directly, primarily, and substantially intended for the purposes of regulating the legal profession or improving the quality of legal services shall be on the State Bar and shall be met by clear and convincing evidence.

In their memorandum supporting the Amended Petition,[2] as supplemented by their email dated March 27, 2011, Petitioners state that (a) "[t]he stricken language is required to be removed by"

[1] Proposed deletions are stricken; proposed additions are underlined.

[2] Petitioners originally sought amendment to SCR 10.03(5)(b)1 by petition dated August 24, 2009 in which they sought solely to remove the words "political and ideological" from the rule. As explained above the State Bar has no objection to the revisions proposed by the original Petition. An Amended Petition was filed by petitioners Kingstad, Levine and Thiel on December 3, 2010. It is the additional revisions requested in the Amended Petition that the Bar opposes and that are addressed in this Memorandum.

Kingstad; and (b) the underlined language is requested because *Kingstad* did not apply the proper test in determining whether the activities at issue in that case were germane to the goals approved in *Keller*.

Quite simply, other than the deletion of the phrase "political and ideological," petitioners' proposed changes find no support in *Kingstad*, or any other case. Rather, the compelled contribution cases make clear that in determining whether a challenged activity is "germane" to the purposes justifying compelled membership and, therefore, may be funded with mandatory dues, "the test *must be* whether the challenged expenditures are *necessarily or reasonably incurred*" for the identified purposes, here regulating the legal profession and improving the quality of legal services. *Keller*, 496 U.S. at 14 (emphasis added), *quoting Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984).[3] *See also Kingstad*, 622 F.3d at 718 ("Under *Keller* and *Ellis*, the test here is whether the challenged expenditures were 'necessarily or reasonably incurred' for the constitutional legitimate purposes that authorize mandatory dues." (internal citations omitted)).

Petitioners' requested language is apparently based on the mistaken belief that each activity funded with mandatory dues must be separately justified under a strict scrutiny standard. But that is not the law. As the *Ellis* Court expressly noted, "[B]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. … The issue is whether these expenses involve additional interference with the First Amendment interests of objecting employees…." *Ellis*, 466 U.S. at 455-56. Thus, for example, *Ellis* approved the use of mandatory funds for union social activities, publications and conventions, noting that the union

[3] Thus, while the Bar believes that the rule, with the deletion of the phrase "political and ideological" accurately states the test set forth in the governing case law, it has proposed that the phrase "necessarily or" be added as set forth in Exhibit A to quote the applicable language of those cases in its entirety. In addition, at its meeting on April 9, 2011, the State Bar's Board of Governors also approved certain amendments to the by-law setting forth the procedure for challenges to the dues reduction, which are also set forth on Exhibit A.

must have "a certain flexibility in its use of compelled funds" to fulfill its statutory duties. *Id.* at 456. Similarly, the Bar must have that same flexibility. *See Thiel*, 94 F.3d at 1036 (Ripple, J. concurring), *quoting Ellis*, *supra*.[4]

Petitioners argument mirrors that made by the plaintiffs in a recent union shop challenge, and it should suffer the same fate. In *Knox v. California State Employees Ass'n*, 628 F.3d 1115 (9th Cir. 2010), the objectors challenged the notice sent by the union outlining the dues reduction for non-chargeable expenses. The Ninth Circuit held: "The Plaintiffs argue we should abandon the balancing test established in [*Chicago Teachers Union, Local No. 1 v.] Hudson*, [475 U.S. 292 (1986)], in favor strict scrutiny review. … *Hudson* itself articulated the legal standard to be applied, and we are not free to reject the balancing test mandated by the Supreme Court." *Id.* at 1120.

The legal standard articulated in *Hudson* is clear. In identifying the activities that may be funded with mandatory dues, and creating a process to address challenges to the Bar's identification of such activities: "The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the [Bar's] ability to require every [member] to contribute to the cost of" regulating the legal profession or improving the quality of legal services. *Hudson*, 475 U.S. at 302 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237). *See also Keller*, 496 U.S. at 17 ("We believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*.").

The method adopted in *Hudson* to balance these competing interests places on members the burden of raising an objection, and on the Bar the burden of proving that the amount of the dues reduction has been calculated appropriately. *Hudson*, 475 U.S. at 306 n.16. That

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[4] *Kingstad* adopts Judge Ripple's analysis. 622 F.3d at 718.

burden is already contained in the Bar's by-laws implementing SCR 10.03(5)(b). *See* SCR ch. 10, Appendix, State Bar By-Laws art. I, § 5(e) ("The State Bar shall bear the burden of proof regarding the accuracy of the determination of the amount of dues that can be withheld."). That burden, however, is not the heightened burden that petitioners' propose. As explained in *Ellis* and *Thiel*, the Bar must have a "certain flexibility" in its use of compelled funds. *Ellis*, 466 U.S. at 456; *Thiel*, 94 F.3d at 1036 (Ripple, J. concurring). Similarly, the *Hudson* court recognized that "absolute precision in the calculation of the charge to nonmembers cannot be expected or required." *Hudson*, 475 U.S. at 307, n.18 (internal quotations and citations omitted).

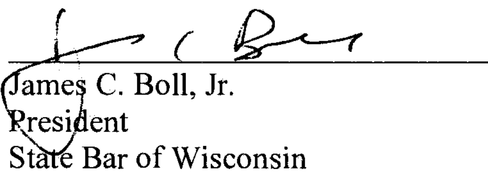
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991), cited by Petitioners, does not support the proposed amendment either. Rather, as *Kingstad* notes, *Lehnert* follows the test set forth in *Keller*, *Ellis* and the other compelled association cases. *Kingstad*, 622 F.3d at 714-15. *See also Lehnert*, 500 U.S. at 519 (requiring that chargeable activities be "germane" and not significantly add to the burden on free speech inherent in the compelled association, citing *Ellis*); *id*. at 522 ("we have never interpreted that test [of "germaneness"] to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit"); *id* at 524 ("There must be *some* indication that the payment is for services that may ultimately enure to the benefit of the members of the local union … but the union *need not demonstrate a direct and tangible impact* upon the dissenting employee's unit.") (emphasis added)).

Nor can the analysis in *Lehnert* (rather than its language) be interpreted, as petitioners suggest, to require that a challenged activity be "directly, primarily and substantially" related to the purposes of compelled membership or that that connection be proved by some heightened burden of proof. Indeed, that was precisely the complaint voiced by Justice Scalia in his dissent from the majority opinion in *Lehnert*: "the manner in which the Court applies it [the

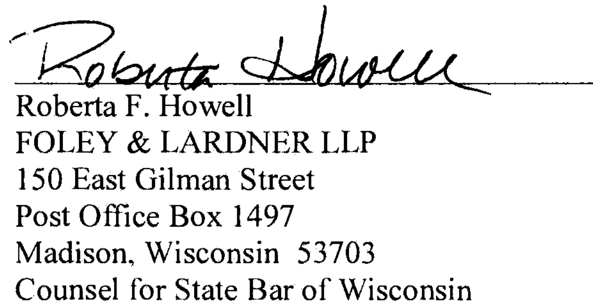
test of germaneness] to the expenditures before us here demonstrates that the Court considers an expenditure "germane" to collective bargaining not merely when it is reasonably necessary for the very performance of that collective bargaining, but whenever it is reasonably designed to achieve a more favorable outcome from collective bargaining...." 500 U.S. at 557 (Scalia, J., dissenting).

Conclusion

SCR 10.03(5)(b)1 must be amended in light of the decision in *Kingstad v. State Bar of Wisconsin* to remove the phrase "political and ideological" from the category of expenses that must be germane to regulating the legal profession or improving the quality of legal services in order to be funded with the mandatory dues of members who object. Petitioners' request goes far beyond that, however, and seeks to impose burdens on the Bar which are not required by *Kingstad*, *Keller* or any other case law governing the used of mandatory fees by a mandatory association. Those revisions should be rejected.



James C. Boll, Jr.
President
State Bar of Wisconsin



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SCR 10.03(5)(b)1

The state bar may engage in and fund any activity that is reasonably intended for the purposes of the association. The state bar may ~~not~~ use the compulsory dues of any member who objects ~~to that use for political or ideological~~as provided in SCR 10.03(5)(b)3 to fund only those activities that are ~~not~~ necessarily or reasonably ~~intended for the purpose of~~related to regulating the legal profession or improving the quality of legal services. The state bar shall fund ~~those political or ideological~~all other activities by the use of voluntary dues, user fees or other sources of revenue.

SCR 10 Appendix (State Bar Bylaws)

Section 5. Dues Reduction Arbitration Procedure. (a) Demands for arbitration of the dues reduction under SCR 10.03 (5) (b) shall be made in writing and shall be delivered to the Executive Director of the State Bar within 30 days of receipt of the member's dues statement. Delivery may be made in person or by first class mail, and mailed demands will be deemed delivered upon mailing. Demands shall include the name and address of the member or members demanding arbitration, a brief statement of the claim or objection, and the signature of the member or members.

(b) If one or more timely demands for ~~arbitrations~~arbitration are delivered, the State Bar shall agree to submit the matter forthwith to arbitration. All timely demands for arbitration shall be consolidated for hearing before the arbitrator appointed, and the provisions of ch. 788, Stats., shall apply as if the parties had entered into a written agreement for arbitration, except that where a member demanding arbitration claims that mandatory dues were spent on activities in violation of the member's constitutional rights, review of the arbitration award by the court shall be de novo. A member demanding arbitration is required to pay his or her dues by October 31 or 15 days following the arbitrator's decision, whichever is later. Failure to pay dues by such date shall automatically suspend the delinquent member.

(c) Upon receipt of all demands for arbitration, the State Bar shall apply for appointment of an impartial arbitrator to the Chief Judge of the Federal District Court for the Western District of Wisconsin.

(d) Members demanding arbitration shall have access to the financial records upon which the State Bar based the determination of the amount of dues that can be withheld. These records shall be available for inspection and copying during normal business hours. Copying shall be at the member's expense.

(e) The arbitrator shall determine the date, time and location of the arbitration hearing(s) or the briefing schedule, as the case may be, and shall so notify the parties at least 15 days prior to said hearing(s) or the deadline for the filing of the opening brief. The arbitrator will promptly hold hearings in which the parties will be permitted to participate personally or through a representative, unless the parties agree that the matter may be decided on briefs. The State Bar shall bear the burden of proof regarding the accuracy of the determination of the amount of dues that can be withheld. All parties will be given the opportunity to present evidence and to present arguments in support of their positions. The arbitrator shall not be deemed a necessary party in judicial proceedings relating to the arbitration. The arbitrator shall have no authority to add, subtract, set aside or delete from any Supreme Court Rule, or State Bar bylaw.

Unless otherwise agreed by the parties, the following rules shall apply to the arbitration proceedings:

i. There will be no transcripts or post-hearing briefs.

ii. The arbitrator will issue an award stating the reasons for the decision within 30 business days of the closing of the hearing. The opinion will be brief, and based on the evidence and arguments presented.

iii. The ~~arbitrators~~arbitrator will charge a ~~maximum of $100 per hour~~ reasonable hourly fee for services, including the hearing, preparation and study time, and shall be reimbursed for all necessary expenses of the arbitration.

iv. The hearing(s) or the briefing schedule, as the case may be, shall be ~~held~~completed within 60 days of appointment of the arbitrator.

~~v. The arbitrator shall not be deemed a necessary party in judicial proceedings relating to the arbitration.~~

~~vi. The arbitrator shall have no authority to add, subtract, set aside or delete from any Supreme Court Rule, or State Bar bylaw.~~

(f) Members first admitted to the State Bar after the date of notification to members shall be given that notification with their initial dues statements. Such members shall be further notified that they may deliver a demand for arbitration within 30 days following receipt of the notification. If arbitration is pending at the date of delivery of a demand for arbitration by a newly admitted member, the newly admitted member's demand shall be consolidated with the pending arbitration. All of the provisions of this section shall otherwise apply to demands for arbitration filed by newly admitted members.