

SUPREME COURT OF WISCONSIN

NOTICE

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No. 13-07 and 13-13

In the matter of petition to amend Supreme Court Rules 10.04 and 10.05 relating to Officers and the Board of Governors of the State Bar of Wisconsin.

FILED

JUL 3, 2014

In the matter of the petition to review State Bar Bylaws Amendments.

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

This order addresses two related matters: an administrative rule petition filed by the State Bar of Wisconsin (State Bar) (13-07) and a formal challenge to the State Bar's adoption of certain amendments to its bylaws (13-13).¹

On June 12, 2013, the Board of Governors of the State Bar (Board) passed a motion to amend the State Bar's bylaws. The amendments create procedures relating to the manner of succession in the event of a vacancy among officers or governors of the State Bar,

¹ The dockets are separate because the procedural rules for amending the State Bar bylaws differ from the requirements to amend or create supreme court rules. A change to supreme court rules can be done only by a petition filed in this court. See SCR 10.13(1). A challenge to bylaw changes is governed by SCR 10.13(2) which provides, in relevant part: "A petition for review of any such change in the bylaws will be entertained by the court if signed by 25 or more active members of the association and filed with the clerk of the court within 60 days after publication of notice of the change. Hearing upon such a petition will be pursuant to notice in such manner as the court directs."

state the terms under which an officer or member of the Board could be removed, and provide a definition of vacancy.

On July 3, 2013, the bylaw changes were duly filed with the clerk of supreme court pursuant to Supreme Court Rule (SCR) 10.13(2) and Article IX of the State Bar bylaws.² That same day, the State Bar, by its then-president, Kevin Klein, filed a rule petition asking the court to create and amend certain supreme court rules to make them consistent with the bylaw amendments.

On September 11, 2013, 27 active members of the State Bar filed a separate petition pursuant to SCR 10.13(2) asking this court to review and reject some of the bylaw amendments. Specifically, the petition challenges the Board's creation of two provisions pertaining to the Board's ability to remove officers and Board members, Article II, Section 7(b), and Article III, Section 10(b),³ which state:

Article II, Section 7(b). Removal by Board of Governors. An officer shall be removed if the officer is unable or unwilling to fulfill his or her duties, or if the officer's conduct while in office is contrary to the best interest of the State Bar as determined by an affirmative vote of 75 percent of the total membership of the Board of Governors (including the officer subject to the motion to remove). Before any vote on the motion, notice of the motion to remove and of the grounds alleged against the

² The amendments were also duly published in the July 2013 Wisconsin Lawyer.

³ The bylaw amendments sought to establish a two-part "removal" provision applicable to officers (Article II, Section 7) and governors (Article III, Section 10). The first part, designated (a), provides for removal following revocation, suspension, or relinquishment of office by the officer or governor, as applicable. These provisions were not challenged. It is the second part, designated (b), that is the subject of a challenge.

officer, and an opportunity to be heard by the Board must be given to the officer.

Article III, Section 10(b). Removal by Board of Governors. A governor shall be removed if the governor is unable or unwilling to perform his or her duties, or if the governor engages in conduct which is contrary to the best interest of the State Bar as determined by the affirmative vote of 75 percent of the total membership of the Board (including the governor subject to the motion to remove). Before any vote on the motion to remove the governor, notice of the motion and of the grounds alleged against the governor, and an opportunity to be heard by the Board must be given to the governor.

After the two related petitions were filed, the court discussed the matters at an open rules conference on September 12, 2013. The court decided to consider the two matters together at a future public hearing. The court directed briefing on the bylaw challenge and issued a letter to interested parties seeking comment on the rule petition. In addition to briefs, the court received written comments from the State Bar, Attorney Douglas W. Kammer, Attorney William C. Gleisner, and Attorney Steven Levine.

The court held public hearings on the petitions on January 21, 2014. State Bar President Patrick Fiedler, State Bar Executive Director George Brown, Attorney Roberta Howell, and Attorney Ray Dall'Osto spoke in support of the bylaw amendments and related rule petition. Attorney Levine and Attorney Kammer, both past State Bar presidents, spoke in opposition to the bylaw amendments and the related rule petition.

The speakers at the public hearing presented very different reasons for the bylaw amendments we review today. The State Bar asserts that the removal provisions stem from the State Bar's growing awareness of the need to create a removal provision based on

incidents that have occurred in other jurisdictions. The State Bar provided several examples for the court. The State Bar maintains that the removal procedure at issue is the considered result of years of work and study and is wholly in line with provisions adopted by other bar organizations, citing similar provisions from other jurisdictions.

The opposition argues that the challenged removal provisions are inconsistent with SCRs 10.04(1) and 10.05(3) and are therefore void; or, alternatively, that the bylaw amendments are unacceptably vague, threaten First Amendment rights, and are undemocratic and unnecessary. The opponents characterize the challenged bylaw amendments as a hasty and improper effort to wrest control from both the State Bar constituency and from this court. They express concern that the provision permitting the Board to remove officers and members for "conduct while in office is contrary to the best interest of the State Bar" will be used to quash the free speech rights of officers or Board members who express opinions that are unpopular with State Bar leadership.⁴

Following the public hearing, the court received additional submissions from Attorney Levine, Attorney Kammer, Attorney Gleisner, and State Bar Executive Director George Brown.

⁴ While the Board was considering these amendments, Attorney Levine, a governor of the Board, offered an amendment that would have added the following language: "'Conduct . . . which is contrary to the best interest of the State Bar' does not include speech, association, activity, or advocacy which is protected by the First Amendment to the United States Constitution or the Free Speech Clause of the Wisconsin Constitution." The Board rejected this proposal by a vote of 37-3.

The court discussed both matters at open conference on April 4, 2014. The court discussed the scope of review applicable to bylaw amendments, noting that when faced with a challenge to bylaw amendments the court traditionally accepts or rejects the challenged bylaw amendment; it does not revise the language submitted for its review. See, e.g., S. Ct. Order 11-05, 2012 WI 78 (issued Jul. 5, 2012).

The court's discussion focused on the challenged removal provisions. The court discussed whether a removal provision was needed; if so, whether it should be contained in the State Bar bylaws or supreme court rules; what constitutes appropriate grounds for removal; and whether the challenged removal provision offers adequate procedural and substantive protections to the persons whose removal is sought. Several justices expressed concern about the scope and potential constitutional implications of the challenged provisions, as drafted. No justice voted to approve the challenged bylaw amendments in Article II, Section 7(b), and Article III, Section 10(b), as written. As such, these amendments are rejected.

Not all the bylaw amendments adopted on June 12, 2013, were challenged. The Board approved changes and additions to Article II, Section 5 (Vacancies), Article II, Section 6 (Temporary Vacancy), Article II, Section 7(a) (Removal), Article III, Section 9 (Vacancy), and Article III, Section 10(a) (Removal). These changes also required renumbering of several affected provisions. The unchallenged amendments are valid.

The court then considered the State Bar's rule petition. The rule petition asks the court to create and amend certain supreme

court rules to reflect the bylaws amendments. One of the proposed rule changes relates to an unchallenged bylaw amendment. The proposed change to SCR 10.04(2)(c) simply conforms the supreme court rule to an unchallenged bylaw amendment and we accept this change. However, the rule petition also asks us to create new rules regarding removal of officers and members by the Board. Consistent with our decision to reject the bylaw amendments pertaining to removal by the Board, we decline to create proposed new SCR 10.04(4) and SCR 10.05(3).

Therefore, as of the date of this order,

IT IS ORDERED that rule petition 13-13, filed on September 11, 2013, by 27 active members of the State Bar of Wisconsin, asking this court to review and reject the Board's creation of Article II, Section 7(b), and Article III, Section 10(b), pertaining to the Board of Governors of the State Bar of Wisconsin's ability to remove officers and board members, is granted and these amendments are rejected.

IT IS FURTHER ORDERED that the unchallenged amendments to Article II of the State Bar of Wisconsin bylaws read as follows:⁵

Section 5. Vacancies. A vacancy is created by the death, incapacity, inability to serve, revocation, suspension, or relinquishment of law licensure, or resignation of an officer, or by removal of an officer pursuant to section 7.

⁵ The amendments restated here are identical to the bylaw changes filed with the clerk of supreme court and published in the July 2013 Wisconsin Lawyer, subject to technical changes needed to reflect the court's decision to reject the removal provisions in Article II, Section 7(b), and Article III, Section 10(b).

(a) *President.* If the office of President becomes vacant, the President-elect shall succeed to the office of President for the unexpired term of the President and shall serve a one-year term thereafter, if the President-elect was elected as President-elect at the previous annual election.

(b) *President-elect.* A vacancy in the office of President-elect shall be filled by a vote of a majority of the total membership of the Board of Governors. A President-elect so chosen shall succeed to the office of President only if necessary to fill a vacancy as provided for in this section and shall not serve an additional one-year term as President unless elected as such at the next annual election or at an earlier special election as the Board of Governors may require.

(c) *Secretary.* A vacancy in the office of Secretary shall be filled by a vote of a majority of the total membership of the Board of Governors. A Secretary so chosen shall not serve an additional term as Secretary unless elected as such at the next scheduled election for secretary, or at an earlier special election as the Board of Governors may require.

(d) *Treasurer.* A vacancy in the office of Treasurer shall be filled by a vote of a majority of the total membership of the Board of Governors. A Treasurer so chosen shall not serve an additional term as Treasurer unless elected as such at the next scheduled election for treasurer, or at an earlier special election as the Board of Governors may require.

Section 6. Temporary Vacancy. If an officer is temporarily unable to perform his or her duties, the Board may appoint a temporary replacement, who shall serve no longer than the remainder of the officer's unexpired term, or until the inability to serve or license status issue is resolved, whichever occurs first.

Section 7. Removal. An officer may be removed from office as follows: Revocation, Suspension or Relinquishment of Law License. If an officer's license to practice law is revoked or relinquished during his or her term, the officer shall immediately be removed from office, without further notice. If the officer's license to practice law is suspended for a term less than the time remaining on his or

her term, the officer's position will be considered temporarily vacant.

IT IS FURTHER ORDERED that the unchallenged amendments to Article III of the State Bar of Wisconsin bylaws read as follows:

Section 9. Vacancy. A vacancy is created by the death, incapacity, inability to serve, revocation, suspension, or relinquishment of law license, or resignation of a governor, or by removal of a governor pursuant to section 10.

(a) *Governor.* Any vacancy in the office of an elected governor shall be filled by the Board for the remainder of the unexpired term. Any member appointed to fill such a vacancy shall be eligible for election to two consecutive full terms as a governor. Any vacancy in the office of an appointed public member shall be filled by the Supreme Court. Any vacancy in the office of a division representative shall be filled in accordance with the bylaws of the division.

(b) *Temporary Vacancy.* If a governor is temporarily unable to perform his or her duties, the Board may appoint a temporary replacement, who shall serve no longer than the remainder of the governor's unexpired term, or until the inability to serve or license status issue is resolved, whichever occurs first. The replacement shall be a member whose principal office, or residence, if the member has no principal office, is in the same district as that of the governor who is being temporarily replaced.

Section 10. Removal. A Governor may be removed from office as follows: Revocation, Suspension or Relinquishment of Law License. If a governor's license to practice law is revoked or relinquished during his or her term, he or she shall immediately be removed from the Board, without further notice. If the governor's license to practice law is suspended for a term less than the time remaining on his or her term, the Governor's position will be considered temporarily vacant.

IT IS FURTHER ORDERED that rule petition 13-07 is granted in part and denied in part.

IT IS FURTHER ORDERED that the court declines to adopt proposed amendments to 10.04 (4) and 10.05 (3) of the Supreme Court Rules.

IT IS FURTHER ORDERED that 10.04 (2) (c) of the Supreme Court Rules is amended as follows:

SCR 10.04 **(2)** (c) Chairperson, board of governors. The chairperson of the board of governors shall be elected from the board membership by its members and shall be a member-at-large of the board of governors after his or her election. The chairperson shall be a member of the executive committee ex officio and shall preside at all meetings of the board of governors. ~~The chairperson shall perform the duties of the president in the absence or disability of the president or in the event of a vacancy in the office of president.~~

IT IS FURTHER ORDERED that notice of this amendment of SCR 10.04(2)(c) be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 3rd day of July, 2014.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

