



STATE BAR OF WISCONSIN

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MEMORANDUM

TO: Chief Justice Shirley Abrahamson
Justice Ann Walsh Bradley
Justice Patrick Crooks
Justice David Prosser
Justice Patience Roggensack
Justice Annette Ziegler
Justice Michael Gableman

FROM: James C. Boll, President

RE: Decision of the United States Court of Appeals for the Seventh Circuit in
Kingstad, Levine, and Thiel v. State Bar of Wisconsin

DATE: September 10, 2010

On September 9, 2010, the Seventh Circuit Court of Appeals issued its decision in *Kingstad, Levine, and Thiel v. State Bar of Wisconsin*. Attached for your information is a copy of the decision and an article from the Wisconsin Law Journal in which Mr. Thiel states that he believes that he and the other objectors will appeal the decision.

At this time, State Bar of Wisconsin is beginning its process of *Keller* review for the FYE 2011 fiscal year. That review is scheduled to be performed by the Executive Committee of the Board of Governors at its November 12, 2010, meeting so that State Bar staff may have time to calculate the rebate costs and that the Finance and Executive committees and the Board of Governors may review and approve the costs in time for inclusion on the FYE 2012 State Bar dues and Supreme Court assessments statement.

Pending the outcome of any decision by the United States Supreme Court, the State Bar will follow the decision of the Seventh Circuit unless and until otherwise directed by the Wisconsin Supreme Court.

In the
United States Court of Appeals
For the Seventh Circuit

No. 09-4080

JON E. KINGSTAD, STEVE LEVINE AND
JAMES S. THIEL,

Plaintiffs-Appellants,

v.

STATE BAR OF WISCONSIN,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.

No. 3:09-cv-00216-SLC—Stephen L. Crocker, *Magistrate Judge.*

ARGUED APRIL 15, 2010—DECIDED SEPTEMBER 9, 2010

Before BAUER, ROVNER, and HAMILTON, *Circuit Judges.*

HAMILTON, *Circuit Judge.* To practice law in the State of Wisconsin, lawyers must join the Wisconsin State Bar. To join the State Bar, lawyers must pay State Bar dues. For more than fifty years, this system has been generating First Amendment litigation, and this case is the latest installment. In 2007, the State Bar used a portion of members' dues to conduct a public image cam-

paigned with the goal of improving the public's perception of Wisconsin lawyers. Petitioners Jon Kingstad, Steven Levine, and James Thiel (collectively, the "Objectors") objected to the State Bar's use of their mandatory dues to fund the campaign as a violation of their rights under the First Amendment. Their objection was first heard by a state arbitrator, who ruled in favor of the State Bar. The Objectors appealed to a state trial court, and the State Bar removed their appeal to the federal courts. The parties consented to having their case heard by Magistrate Judge Stephen Crocker, who upheld the arbitrator's determination. The petitioners now appeal to this court.

We hold that to withstand scrutiny under the First Amendment, State Bar expenditures funded by mandatory dues must be germane to the legitimate purposes of the State Bar. In doing so, we overrule one of the alternative holdings of *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 405 (7th Cir. 1996), in light of more recent teachings. Because the public image campaign at issue in this case is germane to those constitutionally legitimate purposes, however, we affirm the judgment in favor of the State Bar.

Factual and Procedural Background

I. Purposes, Activities and Funding of the State Bar of Wisconsin

The State Bar of Wisconsin is a creation of the Wisconsin Supreme Court, which also governs bar activities

under its rules. See Wis. S. Ct. R. 10.01. Membership in the State Bar is a "condition precedent to the right to practice law in Wisconsin." Rule 10.01(1). The stated purposes of the State Bar are to:

aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to conduct a program of continuing legal education; to assist or support legal education programs at the preadmission level; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform and the relations of the bar to the public and to publish information relating thereto; to carry on a continuing program of legal research in the technical fields of substantive law, practice and procedure and make reports and recommendations thereon within legally permissible limits; to promote the innovation, development and improvement of means to deliver legal services to the people of Wisconsin; to the end that the public responsibility of the legal profession may be more effectively discharged.

Rule 10.02(2). To serve these broad purposes, the Wisconsin Supreme Court rules permit the State Bar to engage in and fund "any activity that is reasonably in-

tended" to further the State Bar's purposes. Rule 10.03(5)(b)1. However, the Rules make clear that the State Bar may not use the compulsory dues of any objecting member "for political or ideological activities that are not reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services." *Id.* Those activities must be funded by voluntary dues or other sources of revenue.

A bar member may choose to withhold his or her pro rata portion of dues that were budgeted for activities that cannot be supported by compulsory dues. See Rule 10.03(5)(b)2. To enable members to assert their rights, the State Bar must publish each year a written notice of the activities that can and cannot be supported by compulsory dues, including each member's pro rata portion of each. If a member contends that the State Bar has allocated dues incorrectly between compulsory and voluntary activities, the member may demand that the question be settled by an arbitrator. See Rule 10.03(5)(b)3. In this case, the Objectors objected to the State Bar's expenditure of mandatory dues on a public image campaign for lawyers in fiscal year 2007.

II. *The State Bar's Public Image Campaign*

The State Bar launched the public image campaign in response to signs that some bar members saw a need for such a program. In the State Bar's 1998 Membership Survey, when asked what they needed from the State Bar, 15 of 145 members responding indicated that they would like the State Bar to improve the image of the

legal profession in the community.¹ One member wrote that the State Bar needed “better involvement in addressing the public’s perception of lawyers.” Another commented that “the Bar needs to do more to improve the image of lawyers and the legal profession in general.” A third noted that members needed “an aggressive public relations program.” In 2000, a poll of all State Bar division, section, and committee chairs and local bar presidents showed that 78% believed a State Bar-led message development campaign was necessary. And in 2001, 89% of respondents to the State Bar’s Bench Bar survey indicated that they believed the reputation of the legal profession had declined in the eyes of the public.

In the midst of these studies, the Office of the Chief Justice of the Wisconsin Supreme Court, the Director of State Courts, the League of Women Voters of Wisconsin, and the State Bar established the Public Trust Steering Committee to address issues of public trust and confidence in the Wisconsin justice system. The project had three phases: first, to research and identify issues concerning public trust and confidence; second, to gather input from public focus groups; and third, to create an action plan. The action plan was finalized in October 2000. The Committee reported, among other points, that judges and attorneys needed to be encouraged to be involved in the community. The Committee found that increasing public confidence in the justice system

¹ Only one other need—lowering costs and fees of State Bar seminars, conventions, dues, and section memberships—received more comments.

depended on people knowing and trusting the decision-makers and understanding the legal process, and that judges and attorneys who were active in the community were perceived to be more trustworthy. The Committee recommended increased judicial and attorney participation in and connection to their communities.

The State Bar formed a Public Image Committee to address some of these concerns. Its purpose was to “educate the public about the legal profession and develop a common theme about how lawyers contribute to the community.” *President’s Message*, 74 Wis. Law. 11 (Nov. 2001). The effort focused on the expertise, problem-solving skills, and service to the community of Wisconsin lawyers.

In 2002 the Public Image Committee unveiled a public image campaign that carried the slogan “Wisconsin Lawyers. Expert Advisers. Serving You.” Examples of the materials developed and aired include:

- television spots featuring lawyers from the Green Bay and Fox Valley area involved in a number of community projects to improve the lives of senior citizens and the Hmong population, elementary and high school students involved in mock trial efforts, and other community groups and activities;
- television spots featuring Dane County area lawyers volunteering their time to the Dane County Bar Association’s Family Law Assistance Center; and
- television spots featuring La Crosse and Eau Claire area lawyers using their legal skills to assist the

La Crosse County Bar's Free Legal Clinic, a free legal clinic for homeless veterans in Tomah, and the La Crosse area bar's support for "Jim's Grocery Bag," eleven La Crosse School District food pantries.

In fiscal year 2007—the year on which the fiscal year 2009 reduction was based and the focus of this lawsuit—the State Bar spent \$97,886 of mandatory dues on the public image campaign. That amounted to \$5.16 per member.

III. *Proceedings Before the Arbitrator and the District Court*

Pursuant to Wisconsin Supreme Court Rule 10.03(5)(b), the Objectors' claim was first heard by an arbitrator. The Objectors argued that the State Bar's expenditure of mandatory dues on the public image campaign violated their rights under the First Amendment because the expenditures were not related to either the regulation of lawyers or improving the quality of legal services, and were ideological in nature. Cautioning that under the State Bar bylaws he had "no authority to add, subtract, set aside or delete from any Supreme Court Rule or State Bar bylaw," the arbitrator ruled in favor of the State Bar. Arb. Dec. at 6, citing Wis. State Bar Bylaws, Art. I, Sec. 5(e)(vi). Although the arbitrator expressed "doubts about the 'germaneness' of the public image campaign," he concluded that having a good reputation was a proper professional interest for any profession and that the public image campaign appeared to fit into the State Bar's statutory purposes to "provide a forum for the discussion of subjects pertaining to the practice of law, . . . and the relations of the Bar to the

public and to publish information relating thereto." See Rule 10.02(2).

The arbitrator, however, ultimately was convinced that "germaneness" was irrelevant unless the challenged expenditure was political or ideological. See Arb. Dec. at 6-7, citing Rule 10.03(5)(b)1. The Objectors did not argue that the public relations campaign was political, and the arbitrator considered but rejected the Objectors' argument that the public image campaign was ideological. The arbitrator thus found that the State Bar had demonstrated that the public image campaign was within the language and intent of the applicable Wisconsin Supreme Court Rules and that the Objectors could be required to pay their share of its costs.

The Objectors sought judicial review of the arbitrator's decision in the state courts. The State Bar removed the action to federal court. Removal was proper under 28 U.S.C. §§ 1331 and 1441(b) because the Objectors' claim arose under the federal Constitution.² The parties

² The district court also suggested that after removal, the Federal Arbitration Act would control review of the arbitrator's decision. The point is largely moot because the standards under either the Wisconsin or federal arbitration statutes are identical. See Wis. Stat. § 788.10(1)(d); 9 U.S.C. § 10(a)(4). However, the FAA was not invoked by the parties, and our jurisdiction is based on the federal question raised by the Objectors, not the FAA, which is not an independent source of jurisdiction. *E.g., Minor v. Prudential Securities, Inc.*, 94 F.3d 1103, 1104-05 (7th Cir. 1996). Because the state arbitrator

(continued...)

consented to have their case heard by Magistrate Judge Crocker under 28 U.S.C. § 636(c). Judge Crocker affirmed the arbitrator's decision. He rejected the Objectors' argument that language in this court's decision in *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996), was overruled by the Supreme Court in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). See *Kingstad v. State Bar of Wisconsin*, 670 F. Supp. 2d 922, 926 (W.D. Wis. 2009). The Objectors then appealed to this court.

Analysis

I. Mandatory Associations under the First Amendment

The Objectors argue that even though the State Bar's public image campaign was not political or ideological, it was not germane to the purposes of the State Bar that allow the group to compel members to support its group speech activities. Objectors contend that such forced expenditures must also be germane to the purposes of the State Bar in order to pass First Amendment scrutiny. Our review of this constitutional question is *de novo*. *Zbaraz v. Madigan*, 572 F.3d 370, 378 (7th Cir. 2009); *Klementanovsky v. Gonzales*, 501 F.3d 788, 791 (7th Cir. 2007). On this threshold issue of law, we agree with the Objectors.

² (...continued)

arguably exceeded his powers, his decision was appealable, and because the underlying claim arose under the federal Constitution, the appeal was removable.

To understand why Objectors can be compelled to subsidize some but not all of the State Bar's activities, one must understand why integrated or mandatory bars are permissible under the First Amendment. We begin with a brief overview. The First Amendment issue arises because bar members are required by force of law to join the group (as a condition of practicing their profession) and to provide financial support for group speech. These requirements implicate the First Amendment freedom of association, which includes the freedom to choose not to associate, and the First Amendment freedom of speech, which also includes the freedom to remain silent or to avoid subsidizing group speech with which a person disagrees. See generally *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471-72 (1997); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573-74 (1995); *Railway Employees' Department v. Hanson*, 351 U.S. 225, 236-38 (1956).

Despite this general rule against "forced speech," however, the Supreme Court has found that certain mandatory associations—agency shops, agricultural marketing collectives, and integrated or mandatory bars—are permitted under the First Amendment because the forced speech serves legitimate governmental purposes for the benefit of all members. For example, "agency shop" arrangements, in which all employees must pay union dues whether they are union members or not, are permitted because the government has an interest in peaceful labor relations. In general, peaceful labor relations are promoted if all employees share in

the expenses related to the collective bargaining from which all employees benefit—both union members and non-members. See, e.g., *Abood v. Detroit Board of Education*, 431 U.S. 209, 221-23 (1977) (“agency shop” arrangement was permitted to prevent “free riders” on union’s collective bargaining efforts); *International Association of Machinists v. Street*, 367 U.S. 740, 763-64 (1961) (same); *Hanson*, 351 U.S. at 235-38 (purpose of promoting peaceful labor relations was legitimate; without a showing that agency shop arrangements were used to force ideological conformity or to infringe on employees’ freedom of expression or that dues were imposed for reasons unrelated to collective bargaining, agency shop arrangement did not violate First Amendment). Similarly, statutorily-mandated agricultural marketing collectives can pass First Amendment muster because the government has an interest in establishing and maintaining a comprehensive marketing plan for agricultural commodities. *Glickman*, 521 U.S. at 469, 473.

“Mandatory” or “unified” bars, under which dues-paying membership is required as a condition to practice law in a state, are also permitted under this theory. See generally *Lathrop v. Donohue*, 367 U.S. 820 (1961) (examining Wisconsin’s mandatory bar).³ In *Lathrop*, the

³ This arrangement has been described variously as an “integrated,” “mandatory” or “unified” bar. See, e.g., *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 297 n.5 (1st Cir. 2000) (“integrated” or “unified”); *Morrow v. State Bar of* (continued...)

Court analogized a state bar to an agency shop and found that Wisconsin had an interest in establishing an integrated bar 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 attain the objective also engages in some legislative activity.

367 U.S. at 842-43 (internal footnote omitted). The *Lathrop* Court reserved judgment on the question whether the dissenters' rights were being violated by using mandatory bar dues to support political activities, finding

³ (...continued)

California, 188 F.3d 1174, 1175-76 (9th Cir. 1999) ("unified" and "mandatory bar memberships"); *Schneider v. Colegio de Abogados de Puerto Rico*, 187 F.3d. 30, 31 (1st Cir. 1999) ("mandatory bar"); *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 979 (1st Cir. 1993) ("unified bar"). "Integrated" and "unified" sound more positive, but "mandatory" is closest to reality.

that the record was not sufficiently developed to address that claim. *Id.* at 847-48.

However, it is also now clear that the group speech itself is not a sufficient purpose for a mandatory association to withstand First Amendment scrutiny. In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Supreme Court examined an agricultural collective under which most of the collected assessments were spent on generic advertising. Although the dissenting group members were not restricted from communicating their own messages, were not compelled to participate in any actual or symbolic speech, and were not compelled to support any particular political or ideological viewpoint, the Court still held the program unconstitutional. The Court found that the underlying program was different from the program that had passed muster in *Glickman* in one critical respect: "In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme." *Id.* at 411-12. A forced subsidy of group speech, in other words, is permissible when it is "a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity." *Id.* at 414. In *United Foods*, there was no "larger expenditure." The principal purpose of the group was the compelled speech itself, so the Court found that the mandatory subsidy of that speech violated the dissenters' First Amendment rights.

II. *Subsidy of "Non-Germane" Speech under the First Amendment*

In light of these principles, Wisconsin's mandatory State Bar is constitutional, and the Objectors may be compelled to pay their share of direct and indirect expenses that are reasonably incurred by the State Bar to serve its dual constitutional purposes of regulating the legal profession and improving the quality of legal services. The Objectors' argument is that the State Bar's public image campaign simply does not fit that bill. More specifically, they argue that the constitutional issue cannot be resolved based solely on the arbitrator's finding that the State Bar's public image campaign was non-political and non-ideological. We agree that the issue of germaneness must also be part of the constitutional analysis.

In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the petitioners were practicing lawyers subject to California's integrated bar. They claimed that the use of their membership dues to finance ideological or political activities that they opposed violated their rights under the First Amendment. They objected to the bar's lobbying efforts, its filing of amicus briefs in pending cases, and its expenditures for its annual conference and education programs. The California Supreme Court upheld the expenditures, but the Supreme Court of the United States reversed. It stated that the constitutionally permissible purposes of the integrated bar were to regulate the legal profession and to improve the quality of legal services. A reviewing court had to determine whether

the challenged activities were necessarily and reasonably incurred for those purposes, or whether they were "activities of an ideological nature which [would] fall outside of those areas of activity." *Keller*, 496 U.S. at 13-14. The Court explained:

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

Id. at 15-16.

We also learn from the Supreme Court's exploration of this question in other forced group speech contexts. In *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks*, 466 U.S. 435, 449-55 (1984), the Court considered whether a union's convention expenses, litigation expenses that were not for bargaining or grievances, union publication costs, social event expenses, employee death benefits, and expenses related to general organ-

izing efforts were “germane” to the union’s purpose. The Court considered each category of expense to see whether it was “necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.” *Id.* at 448. The dissenters’ belief that the money was not being well spent on any one of these endeavors was not enough. *Id.* at 456. Ultimately, without discussing whether any of the challenged categories were political or ideological, the Court found that of the challenged expenses, only the union’s litigation expenses that were not for bargaining or grievances and expenses related to its organizing efforts were not germane to the union’s purposes that permitted forced speech. *Id.* at 448-55. The other categories of expenditures—social events, publications, and conventions—did not infringe the objecting employees’ First Amendment rights any more than their compulsory contribution to the union, and were upheld by the Court. *Id.* at 455-57.⁴

Also, in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), the Court reiterated that, to be charged to dissenting employees, the agency shop union expenses must “(1) be ‘germane’ to collective bargaining activity;

⁴ At the time of the Court’s opinion the union was no longer the exclusive bargaining agent, and the petitioners were no longer involved in the death benefits system. Employee death benefits were left as an open question. *Ellis*, 466 U.S. at 454-55.

(2) be justified by the government's vital policy interest in labor and peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. The Court cautioned that the test did not require "a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit." *Id.* at 522. We need not list the specific expenditures under review aside from one that is particularly relevant here—a public image campaign. The Court found that, under this standard, the public image campaign was not germane to the union's collective bargaining functions. *Lehnert*, 500 U.S. at 528-29.⁵

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 expenses 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 the analysis as a test of "either-or," as in "either"

⁵ The *Lehnert* Court also noted, without discussion or explanation, that the campaign was political in nature. See *id.* The Objectors have not argued that the public image campaign conducted by the Wisconsin State Bar was similarly political.

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 that ultimate analysis.

The parties have framed the issue before us as whether the Objectors may be required to subsidize speech that is not political or ideological but that is also not germane to the constitutionally permissible purposes of a mandatory bar. Since we last addressed this issue in *Thiel v. State Bar of Wisconsin*, both the Supreme Court and the First Circuit have provided additional guidance. In *United Foods*, the Supreme Court reviewed its earlier decisions in *Abood* and *Keller* and explained the test not in terms of politics or ideology but in terms of germaneness: “speech need not be characterized as political before it receives First Amendment protection,” and “lawyers [can] be required to pay moneys in support of activities that [are] germane to the reason justifying the compelled association in the first place [O]bjecting members [are] not required to give speech subsidies for matters not germane to the larger regulatory purpose which justifie[s] the required association.” *United Foods*, 533 U.S. at 413-14, discussing *Abood*, 431 U.S. at 232 (union dues), and *Keller*, 496 U.S. at 14 (mandatory state bar).

The First Circuit considered this problem of germaneness for bar expenditures in *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291 (1st Cir. 2000). Puerto Rico’s

mandatory bar (the "Colegio") required members to purchase life insurance from its group life insurance program. That expenditure was obviously not political or ideological, but could unwilling members be required to pay the bar for life insurance they did not want? Noting that in some years the insurance premium constituted as much as 72% of the bar dues, the First Circuit found the mandatory payment to the Colegio's group life insurance plan was unconstitutional, holding specifically that mandatory bar association dues could not be used to fund non-germane activities even if those activities were not ideological. See *id.* at 300 ("To say that germaneness is the test in ideological expenditure cases is not to say that it is not also a relevant inquiry in cases involving non-ideological expenditures."). In reaching its conclusion, the First Circuit considered the applicable Supreme Court precedents and the policy supporting its conclusion. As the court explained, the First Amendment permits the government to force a union or bar member to pay only for those expenses that are germane to the purposes that justify requiring the member to belong to the group in the first place:

[S]trong public interests justify the intrusion, and the germaneness test guarantees that these public interests are being served by any challenged activity. Compelling financial support for activities wholly unrelated to those public interests, however, changes the balance and weakens the justification that supported the intrusion on First Amendment associational interests in the first place. Simply stated, that an individual may be compelled to associate and