

March 28, 2011

Dear Commissioner Rich,

On April 11 the Supreme Court will hold hearing into a petition to amend SCR 10.03(5)(b)1. Petitioners submitted a memo in support of that petition, but we omitted one point concerning the burden of proof in demonstrating that a State Bar expenditure was made for purposes of “regulating the legal profession or improving the quality of legal services.” (page 4, supporting memorandum).

While the court of appeals in the *Kingstad* case stated that the “rational basis” test applied in determining whether a State Bar expense was made for those purposes, this test is contrary to the Supreme Court’s decision in *Lehnert v. Ferris Faculty Ass’n.*, 500 U.S. 507, 528 (1991). Under the court of appeals “rational basis” test, the reviewing court is to *presume* that a reasonable connection exists between a State Bar expenditure and “regulating the legal profession or improving the quality of legal services.” 622 F.3d at 719. See also 724, fn. 3.

But this was not the standard employed in *Lehnert*, where the Supreme Court closely scrutinized a labor union’s public relations expenses and determined that they were not sufficiently related to the union’s collective bargaining function to be chargeable to dissenting members. 500 U.S. at 528. The court of appeals standard of review set forth in *Kingstad* is contrary to the Supreme Court’s precedent in *Lehnert* and should be corrected by adopting the underlined language in the petition to amend SCR 10.03(5)(b)1.

Petitioners’ rule language underlined in the petition is consistent with the *Lehnert* decision and should be adopted by the supreme court. Thank you.

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