

SUPREME COURT OF WISCONSIN

In the matter of the petition to review change in State Bar Bylaw

11-05

ARBITRATION BYLAW HEARING PRESENTATION OUTLINE

STEVEN LEVINE, PETITIONER

1. GENERAL PRINCIPLES OF ARBITRATION: REVIEWING COURT IS NOT TO REDECIDE THE MERITS OR CORRECT ERRORS OF FACT OR LAW. *Milwaukee v. Milwaukee Police Asso.*, 97 Wis.2d 15, 24-25, 292 N.W.2d 841, 846 (1980). ARBITRATION IS TO BE AN EFFICIENT, INEXPENSIVE ALTERNATIVE TO LITIGATION, NOT A PREREQUISITE FOR IT.

THE STATE BAR'S PROPOSED BYLAW INCLUDES DE NOVO REVIEW AND THEREFORE VIOLATES THESE PRINCIPLES.

2. WIS. STAT. CH. 788 CONTAINS 4 GROUNDS FOR REVIEW: SEC. 788.10(1). THE STATE BAR'S PROPOSED BYLAW ADDS A 5TH GROUND FOR REVIEW – DE NOVO REVIEW. THE STATE BAR – AS A PRIVATE PARTY TO AN ARBITRATION – HAS NO AUTHORITY TO ADD TO THE GROUNDS FOR REVIEW. *Hall Street Associates v. Mattel*, 522 U.S. 576, 584-89 (2008). PARTIES TO ARBITRATION HAVE NO AUTHORITY TO EXPAND THE GROUNDS FOR REVIEW, EVEN BY MUTUAL AGREEMENT. *Affymax v. Ortho-McNeil-Janssen Pharmaceuticals*, 660 F.3d 281, 284 (7th Cir. 2011).
3. THE WISCONSIN SUPREME COURT HAS NO AUTHORITY TO AMEND CHAPTER 788, STATS. BY APPROVING THE STATE BAR'S BYLAW IN A RULEMAKING OR LEGISLATIVE PROCEEDING. THAT WOULD CONSTITUTE INVADING THE LEGISLATURE'S AUTHORITY -- A VIOLATION OF SEPARATION OF POWERS. THE SUPREME COURT HAS NO AUTHORITY TO ENGAGE IN WHAT THIS COURT HAS CALLED "JUDICIAL LEGISLATING." *State ex rel. Newspapers Inc. v. Showers*, 135 Wis.2d 77, 98, 398 N.W.2d 154, 164 (1987). IF THE STATE BAR WISHES TO EXPAND THE STATUTORY GROUNDS FOR ARBITRATION REVIEW, IT MUST DO SO VIA THE LEGISLATURE, NOT THE SUPREME COURT.
4. A REGULATING AUTHORITY HAS THE POWER TO DENY, GRANT, OR GRANT WITH CONDITIONS, AN APPLICATION OR PROPOSAL FROM A REGULATED

ENTITY. *City of Appleton v. Transportation Comm.*, 116 Wis.2d 352, 358, 342 N.W.2d 68 (1983) and *Black River Country Bank v. Comm'r of Banking*, 201 Wis.2d 64, 70, 548 N.W.2d 114 (Wis. App. 1996). THEREFORE, THIS COURT HAS THE AUTHORITY TO AMEND, AND APPROVE AS AMENDED, THE STATE BAR'S PROPOSED BYLAW ARTICLE I, SECTION 5.

5. THE COURT SHOULD ADD PETITIONER'S SUGGESTED PROVISION REGARDING BURDEN OF PROOF (PAGES 5-6, ORIGINAL PETITION) TO THE STATE BAR'S ARBITRATION BYLAW. THE BURDEN IN A CONTROVERSY INVOLVING THE FIRST AMENDMENT WHERE THE CONTENT OF SPEECH IS AT ISSUE IS "HEIGHTENED SCRUTINY," (*Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 – 2667 (2011); *Hart v. Electronic Arts, Inc.*, 808 F.Supp.2d 757, 769 (D. N.J. 2011)), NOT "REASONABLE BASIS," AND THE BURDEN OF PROOF IS ON THE STATE BAR. THE ARBITRATION BYLAW SHOULD MAKE THIS VERY CLEAR TO THE ARBITRATOR.

6. AS TO THE REMAINDER OF THE PROPOSED STATE BAR BYLAW PROVISIONS (OTHER THAN DE NOVO JUDICIAL REVIEW), IF THE COURT DOES NOT WISH TO INVOLVE ITSELF IN THE MINUTIA OF THE ARBITRATION BYLAW, PETITIONER SUGGESTS THAT THE COURT REMAND THIS MATTER TO THE STATE BAR FOR REWRITING, AFTER REFERRAL TO A FAIR AND BALANCED COMMITTEE. THE COMMITTEE SHOULD HAVE AN EQUAL NUMBER OF LAWYERS WHO HAVE USED THE ARBITRATION PROCESS AND THOSE WHO HAVE NOT. THE COURT SHOULD ORDER THE BAR TO RESPOND BY JANUARY 1, 2013, AS TO WHETHER AN AGREEMENT HAS BEEN REACHED, OR, WHETHER THE COURT WOULD NEED TO INTERVENE.