

MEMORANDUM IN SUPPORT OF PETITION

Petitioners respectfully request the court to review and either void or replace the State Bar's recent amendment to State Bar Bylaw Article I, Section 5 (copy attached), because it would entirely destroy the purpose of arbitration. State Bar Bylaw Article I, Section 5 concerns the arbitration process when a State Bar member asserts that an expenditure of State Bar dues by the State Bar was not for purposes of "regulating the legal profession" or "improving the quality of legal services," as required by SCR 10.03(5)(b)1.

Wisconsin courts have stated that the purpose of arbitration is to provide "a speedy, inexpensive and final resolution" – "an alternative to litigation," not a prelude to it. *Meyer v. Classified Ins. Corp.*, 179 Wis.2d 386, 399, 507 N.W.2d 149 (Wis. App. 1993). "The merits of the arbitration award are not within the province of courts on review. *Milwaukee v. Milwaukee Police Asso.*, 97 Wis. 2d 15, 24, 292 N.W.2d 841 (1980).

The State Bar's recent amendment to subsection (b) of bylaw Article I, section 5 provides for de novo judicial review of the arbitrator's decision. Such de novo review destroys the entire purpose of arbitration and multiplies the time and cost involved. If a reviewing court can disregard the arbitrator's decision and make a de novo decision, the entire purpose of arbitration as an inexpensive, expeditious alternative to litigation is destroyed. The State Bar lacks any authority to in essence amend Wis. Stat. Ch. 788 by amending one of the Bar's bylaws. The Court is respectfully requested to strike this provision of the State Bar's recently amended bylaw.

Petitioners also submit the following proposed language for the Court to adopt as a better alternative to the entire State Bar amendment to State Bar Bylaw Article I, Section 5. An explanation is provided for each proposed change.

State Bar Bylaw Article I, Section 5:

(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, by email, 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.

(Explanation: This proposed change allows a request for arbitration by email.)

(b) If one or more timely demands for 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 ~~see~~ ch. 788, Stats., shall apply as if the parties had entered into a written agreement for arbitration. 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.

(Explanation: This proposed change corrects a typographical error from "sec." 788 to "ch." 788.)

(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, the Chief Judge of the Circuit Court for Dane County, or any other arbitration pool.

(Explanation: This proposed change expands the State Bar's options in selecting an arbitrator.)

(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) and shall so notify the parties at least 15 days prior to said hearing(s). The arbitrator will promptly hold hearings in which the parties will be permitted to participate personally or through a representative. 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 following rules shall apply to the arbitration proceedings:

- i. There will be no transcripts or post-hearing briefs: unless the parties agree otherwise.

(Explanation: This proposed change gives the parties more flexibility to determine an arbitration procedure regarding briefing that works for them.)

- 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 will charge a maximum of \$100 per hour for services, including the hearing, preparation and study time, and shall be reimbursed for all necessary expenses of the arbitration. and the State Bar shall agree on a reasonable fee, which shall be paid by the State Bar.~~

(Explanation: The current rule sets an unrealistically low fee for the arbitrator. The proposed change is more realistic.)

- iv. The hearing shall be held 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.
- vii. The parties may agree to an alternative to any of these provisions.

(Explanation: This proposed change gives the parties more flexibility to determine an arbitration procedure that works for them.)

- viii. The burden shall be on the State Bar to prove by a preponderance of the evidence that a challenged expenditure was intended for purposes of regulating the legal profession or improving the quality of legal services.

(Note: The preponderance of the evidence burden on the State Bar requires that the Bar actually submit evidence to prove that a challenged expenditure was intended for purposes of regulating the legal profession or improving the quality of legal services. There is no presumption that a State Bar expenditure was made for purposes of regulating the legal profession or improving the quality of legal services, and, on the basis of the evidence presented by both sides, the arbitrator may conclude that an expenditure was or was not made for those purposes. This burden of proof for the State Bar is different from the “deferential” standard set forth in *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 719 (7th Cir. 2010) and is imposed by the supreme court as a matter of state law in the court’s capacity as regulator of the State Bar.

(Explanation: This change is necessary to clarify that the supreme court is imposing a burden different from the “deferential” burden set forth in *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 719 (7th Cir. 2010), i.e., that the State Bar has the burden to prove by a preponderance of the

evidence that a challenged expenditure was made for purposes of regulating the legal profession or improving the quality of legal services – and that, on the basis of the evidence presented, the arbitrator may decide that the challenged expenditure was or was not made for those purposes.)

- (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.

Respectfully submitted,

/s/ Steven Levine

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