



WISCONSIN COURT OF APPEALS

DISTRICT IV

TEN EAST DOTY STREET, SUITE 700
MADISON, WISCONSIN 53703-3397

Chambers of
JUDGE GARY E. SHERMAN

Telephone (608) 266-9338
TTY: (800)-947-3529
Fax: (608) 267-0432

Stephanie Zulkoski, Law Clerk
Jane L. Dixon, Judicial Assistant

RECEIVED

August 24, 2017

AUG 24 2017

CLERK OF SUPREME COURT
OF WISCONSIN

Clerk of Supreme Court
P.O. Box 1688
Madison, WI 53701-1688

Attention: Deputy Clerk—Rules:

I am writing in response to the solicitation by the Wisconsin Supreme Court for my comments on Rule Petition 17-04. While I write with the perspective of a former President of the State Bar of Wisconsin, I speak only for myself.

The State Bar is an agency created and governed by the Wisconsin Supreme Court. Pursuant to the Court's mandate, the State Bar has developed a complex and extensive array of programs and services that not only aim to improve its member's welfare, but also aim to help improve the quality of justice in Wisconsin. To this end, the State Bar publishes highly regarded books, holds educational programs in person and in several media, advises the Supreme Court and other public policy makers on issues of importance to the profession and the courts, maintains a nationally recognized web presence and provides an array of other programs. During my time in leadership, though not by my personal efforts, the State Bar of Wisconsin led the nation in bringing the benefits of computerized legal research and law office automation to the profession, transforming the practice of law to benefit the bench, bar and the public in Wisconsin.

The State Bar also collects fees from its members on behalf of the Wisconsin Supreme Court for other agencies which operate under the Court, including the Board of Bar Examiners, the Office of Lawyer Regulation and two funds set up by the Supreme Court, the Clients' Protection Fund and the Civil Legal Services assessment administered by the Wisconsin Trust Account Foundation. The State Bar also annually collects each member's Trust Account/WisTAF Certification on behalf of the Supreme Court, along with its dues.

All of this is only possible because the State Bar can rely upon a predictable and reliable stream of revenue, a substantial minority of which comes from member's dues. It is the collection of both these dues and the several fees that fund the other agencies which the State Bar collects on behalf of the Supreme Court that has engendered resentment and a seemingly perpetual attempt

to de-integrate the State Bar. That effort has not only resulted in multiple petitions to the Wisconsin Supreme Court, but also lawsuits in federal court which were appealed all the way to the United States Supreme Court, all unsuccessfully.

Despite the fact that these serial litigations have repeatedly been unsuccessful, they have and continue to require the commitment of substantial resources, both financial and human, by the State Bar, resources that would be better applied to fulfilling the mission assigned to the State Bar by the Wisconsin Supreme Court.

For perspective, when this debate arose in the 1990's, I was initially on the side of the State Bar being voluntary. I was even the floor manager for the voluntary side in the debate in the Board of Governors over whether the Board should vote to petition the Wisconsin Supreme Court to return the State Bar to mandatory status.

However, events took place around the time that I was active on the Board of Governors and, later, President, that eventually changed my mind. For a period of time in the 1990s, the United States District Court for the Western District of Wisconsin caused the Wisconsin Supreme Court to suspend the mandatory aspect of State Bar membership and the State Bar became temporarily a voluntary bar. I was intimately involved in governing the State Bar as it struggled to cope with the effect of being voluntary. This experience demonstrated two things to me:

First, the bar was required to expend tremendous resources on the effort to recruit and retain members. This was successful, but, in an organization with limited resources, it dominated the State Bar's operations at the time and diverted greatly from the State Bar's attempts to carry out its mission.

Second, in an effort to please its members and maintain a critical level of membership, the State Bar was transformed from an organization whose primary goal was to serve the public interest on behalf of a mission mandated by the Wisconsin Supreme Court, into an organization whose primary goal was to serve its members' desires. While this had positive aspects, including greatly elevating member approval, the overall change of focus was not entirely healthy nor reflective of the purpose for which the State Bar had been created.

As a result of this experience, I changed my opinion on voluntary membership in the State Bar and become a supporter of integration of the State Bar. As with many things, the practical outcome of what seemed a laudable ideal was not consistent with the reality of the public interest.

I also note that there is a relationship between mandatory membership and Wisconsin being the only state in America to retain the "diploma privilege" for admission. Under the diploma privilege, lawyers who work in certain fields where they do not offer their services to the public, such as government service, the military or as inside counsel for corporations, need no other bar membership or licensure no matter where in America they work. The result is that, alone of any Bar Association in America, the State Bar of Wisconsin has a substantial percentage of its membership who are not residents of Wisconsin. If membership were not mandatory for this large group of lawyers, there would be no reason for them to continue as members. Not only would they have no reason to pay dues, but they would not be as subject to the regulation of the bar or the services provided by the State Bar, to the detriment of the public all around the country.

The current petition takes a new tack, addressing not the integration of the bar itself, but its funding. The petition would create a bifurcated dues structure, with mandatory dues to be used for a very narrow regulatory purpose and a second, voluntary, dues to fund the balance of the

operations of the State Bar. The petition seems to presuppose that the Bar is using mandatory dues for inappropriate purposes.

Yet, this is no more than a chimera, since SCR 10.03(5)(b)1 already reads: "The State Bar may engage in and fund any activity that is reasonably intended for the purposes of the association set forth in SCR 10.02(2). The State Bar may not use the compulsory dues of any member who objects pursuant to SCR 10.03(5)(b)3. for activities that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services. Expenditures that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services may be funded only with user fees or other sources of revenue." This rule, which I had an active role in drafting, directly reflects the holding of the United States Supreme Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990).

The State Bar has operated under this rule for more than 20 years, annually refunding to objecting members the dues-supported cost of any activity not related to "regulating the legal profession or improving the quality of legal services." The manner in which the rebate is calculated is the result of a procedure developed by three lawyers, one of whom was me. The process is designed to give all benefit to the objectors. Any activity that is even arguably non-germane to the regulation of the legal profession or improving the quality of legal services is subject to the rebate. In calculating the amount, that activity's full share of the cost of overhead and administration is included. Every attempt was made to carry out the spirit, as well as the letter, of the mandate of *Keller*. No non-frivolous argument can be made that anything about that process minimizes or abuses the purpose of the rebate.

In particular, the petitioners apparently object to the State Bar advising policy makers. In fact, this is a core function of the State Bar and a major purpose for its integration in the first place. Rather than have various interest groups within the profession lobbying for their own self-interest, under the integrated bar the organized profession as a whole speaks with a unified voice in the public interest on matters upon which we have special expertise that can be of value to those who have to make public policy decisions. The rules for when the State Bar can take a public policy position are strict. Any position taken must be approved by a roll call vote of 60% of the Board of Governors.

Apparently, the petitioners here, after decades of pursuing their expensive vendetta against the organized bar, now object to the use of mandatory dues for precisely the purposes singled out as appropriate by both the United States Supreme Court in *Keller* and the Wisconsin Supreme Court in SCR 10.03(5)(b)1.

I urge the Wisconsin Supreme Court to reject the petition.

Sincerely,



Judge Gary E. Sherman

GES/jld