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STATE OF WISCONSIN  
IN SUPREME COURT

CLERK OF SUPREME COURT  
OF WISCONSIN

PETITION TO REPEAL AND REPLACE SCR 10.03(5)(b) WITH SCR 10.03(5)(b)-(e)  
AND TO AMEND SCR 10.03(6)

RULEMAKING DOCKET 17-04

REPLY BRIEF IN SUPPORT OF PETITION

1. Introduction.

On September 16, 2017, the State Bar of Wisconsin submitted a brief in response to petitioner's rulemaking petition and to the memorandum in support of the petition in this docket. This reply brief will respond to those arguments raised by the State Bar. While the Bar makes a number specific arguments in response to the petition, the larger thrust of its argument is that no change to SCR 10.03(5)(b) is necessary, because the rule is fine as is -- "has been constitutionally approved and has worked well in Wisconsin for decades ..." -- and State Bar spending of mandatory dues under the current rule has been upheld in other forums. This reply brief will respond to the State Bar's arguments as well as those of other participants.

2. Federal Protection of the Constitutional Rights of Wisconsin Lawyers Has Proven Inadequate, Requiring Action By This Court Under The Wisconsin Constitution Or Under The Court's Inherent Authority To Regulate The Legal Profession.

The fact that non-regulatory expenditures by the State Bar with mandatory dues have been upheld under federal case law is precisely why this Court should adopt the amendment proposed in this proceeding. Under current rule SCR 10.03(5)(b)1 the language "improving the quality of legal services" as a criterion for State Bar expenditures has been expanded to such a limitless extent that anything and everything on which the Bar wishes to spend mandatory dues has been held

acceptable. In *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 711, 718 (7<sup>th</sup> Cir. 2010) the federal court determined that under that language the Bar properly spent \$97,886 of mandatory dues dollars on a media public relations campaign to improve the image of the legal profession.

In the arbitrator's decision which accompanied this rulemaking petition, the arbitrator determined that under federal case law the Bar was entitled to spend mandatory dues for lobbying the legislature on such proposals as a constitutional amendment (drafted by the State Bar) to change the terms of Supreme Court justices; the salaries of judges and lawyers employed by state agencies; and Wisconsin's statute on substitution of judges. All of these legislative measures were not regulatory in nature. They were political proposals on which reasonable people can disagree.

Engaging in a media public relations campaign to improve the image of the profession – and lobbying the Legislature concerning non-regulatory matters of interest to the profession – are activities which any voluntary association should be able to engage in with dues voluntarily paid by members. But using the mandatory dues of State Bar members for a public relations campaign or for political lobbying violates State Bar members' rights of free speech, association, assembly, and petition. Acting under either the Wisconsin Constitution or the Court's inherent authority to regulate the legal profession, this Court should draw a bright line as to which activities the State Bar should be able to engage in with mandatory dues.

The activities listed in proposed SCR 10.03(5)(c)1-5 are either regulatory activities or activities which are essential to protect the public interest. (These two

categories obviously at times overlap.) These are activities which every member of the profession has an obligation to financially support and has no objection to supporting. These are the only types of activities the Court should allow mandatory dues to be used for. Using mandatory dues for other purposes violates members' constitutional rights. Proposed SCR 10.03(5)(b)-(e) replaces a vague, open-ended rule with certainty, as proposed SCR 10.03(c)1-5 lists those specific activities on which mandatory dues may be spent. Those activities are the activities for which the mandatory State Bar was originally established by this Court and upheld as constitutional by the United States Supreme Court - "regulatory" activities. See *Lathrop v. Donohue*, 367 U.S. 820 at 843 (1961).

Participation in the political/legislative process is one of the most important activities which constitutional protections of free speech, assembly, association, and petition were designed to protect. Can there be a more stark violation of those protections than government forcing Wisconsin lawyers (or any Wisconsin citizens) to join and pay dues to an organization which lobbies the Legislature with their money, against their wishes? This Court should make a bold statement that no Wisconsin citizen can be forced to pay mandatory dues to any association which dues are not used for regulatory purposes. Acting on the basis of Article I, Sections 3 and 4 of the Wisconsin Constitution - or under the Court's inherent authority over the practice of law -- the Court should adopt the amendments proposed in this rulemaking proceeding.

3. The State Bar Should Be Able To Thrive and Operate Quite Nicely Under Proposed SCR 10.03(5)(b)-(e).

At a number of points in its brief, the Bar (as well as Hon. Gary Sherman, a past president of the Bar) argues that the Bar will be unable to survive if it is required to use only voluntary dues for non-regulatory activities, because not all Wisconsin lawyers will choose to pay the voluntary dues. The Bar will be required to spend time and money recruiting voluntary dues-paying members; and services to bar members, the public, and the Court will suffer, according to the Bar's argument. While it would appear to be a truism that fewer lawyers will pay voluntary dues if they are given the opportunity to make their own decision as to membership, the Bar should be able to survive and thrive quite nicely.

If non-regulatory activity dues are made voluntary, Wisconsin lawyers will be able to determine for themselves whether paying voluntary dues is justified by the services and activities offered by the Bar. Bar services such as Fastcase, Law Office Management programs, Fee Arbitration, Lawyer to Lawyer, LRIS, and the Lawyer Hotline Program should be able to attract membership. Like any organization, the Bar will be able to attract sufficient membership if the members believe the services offered by the Bar are of value to them. This is as it should be:

Numerous lawyers and scholars across the country have compared the virtues of unified and voluntary bars. Although many claims are made for a unified bar, no one has demonstrated that a unified bar has a better record for service to its members or to the public than a voluntary bar. Neither the Bar's petition nor the court's per curiam opinion gives any reason for concluding that the Bar's operation has been hindered by its voluntary status for the past four years or that the Bar's operation would be significantly improved by a mandatory membership requirement. The State Bar of Wisconsin has operated well during the four fiscal years since the court made membership voluntary in May 1988. Over 80 percent of lawyers licensed to practice in Wisconsin voluntarily joined the Bar during this period; out-of-state practitioners constitute the largest block of lawyers who did not join. When out-of-state lawyers are omitted from the statistics, the percentage of Wisconsin practitioners who voluntarily joined the Bar rises to 90 percent. This large percentage of Wisconsin attorneys who have voluntarily joined the Bar is a forceful argument for leaving the voluntary status undisturbed.<sup>11</sup>

*See Matter of State Bar of Wisconsin: SCR 10.01(1), 169 Wis.2d 21, 38, 485 N.W.2d 225 (1992)(Abrahamson, J., dissenting).* The State Bar's attraction of 80% of its possible membership and 90% of in-state members over a four-year period of being a voluntary bar (1989-92 fiscal years) argues strongly against its current prediction of doom and gloom if non-regulatory activities must be supported by voluntary dues.

Twenty states currently have voluntary bar associations – with all of them successfully operating for decades:

- Arkansas Bar Association
- Colorado Bar Association
- Connecticut Bar Association
- Delaware State Bar Association
- Illinois State Bar Association
- Indiana State Bar Association
- Iowa State Bar Association
- Kansas Bar Association
- Maine State Bar Association
- Maryland State Bar Association
- Massachusetts Bar Association
- Minnesota State Bar Association
- New Jersey State Bar Association
- New York State Bar Association
- North Carolina Bar Association
- Ohio State Bar Association
- Pennsylvania Bar Association
- Tennessee Bar Association
- Vermont Bar Association
- Virginia Bar Association

Three of Wisconsin's bordering states – Iowa, Minnesota, and Illinois have voluntary bar associations. The Iowa State Bar Association's website states that it was formed in 1874. The website boasts that 90% of Iowa lawyers have voluntarily chosen to join that Bar – perhaps the highest percentage in the country. The Illinois State Bar Association was formed in 1877, while the Minnesota State Bar Association was formed in 1883. (Establishment dates listed on their websites.) These voluntary state bar associations have attracted enough members to serve the

profession, the public, and the courts for more than 130 years. Their success in attracting membership and their continued existence for over a century indicate that the State Bar of Wisconsin will also be able to attract sufficient members to engage in non-regulatory activities with voluntary dues.

4. The State Bar Should Be Able To Adequately Serve The Profession, The Public, And The Courts Under Proposed SCR 10.03(5)(b)-(e).

Beginning at page 15 of its brief, the State Bar argues that a number of non-regulatory activities and services offered by the Bar will suffer or be eliminated if they are required to be supported by voluntary dues. Quoting former Justice William Bablitch, the Bar argues that without mandatory dues to support non-regulatory activities, the Bar might become a purely self-interested, economic-centered professional association of lawyers. The State Bar will be either unable or unwilling to provide to the profession, the public, and the courts the services it now provides. So goes the Bar's argument.

Valuable activities and services which are at risk include Fastcase, fee arbitration, Lawyer Referral and Information Service, lawyer hotline, consumer pamphlets and forms, law office management services, pro bono, the Bar's Lawyer to Lawyer Directory, the Wisconsin Law Foundation, and even the State Bar's website. (For a complete list of threatened activities, see Bar brief at 15-17.) The loss of these activities and services would be unfortunate, but objective evidence indicates that if the petition is granted in this proceeding, that will not happen. The facts indicate that voluntary bars offer the same services which the State Bar of Wisconsin argues would be threatened if the Bar is required to pay for them only with voluntary dues.

A look at the websites of the voluntary state bar associations of our three neighboring states indicate that they are able to offer the same services offered by the State Bar of Wisconsin. The Minnesota State Bar Association site indicates that it offers: Fastcase, CLE (including CLE on demand), annual bar convention, sections and committees, diversity, bar foundation, access to justice, law practice tools, court opinions, lawyer directory, programs for new lawyers, pro bono, mock trial, publications, technology, find a lawyer, access to civil legal services, complaints against lawyers, and many more services and activities.

The websites of the Iowa and Illinois bar associations are similar, and I urge the Court to visit them, so the Court can reach its own conclusion. The activities and services offered by these and other voluntary bar associations indicate that if the State Bar of Wisconsin is required to fund non-regulatory activities and services from voluntary dues, the Bar should do quite well in continuing to provide valuable programs and services to Wisconsin lawyers, the public, and the Court.

5. Under The Rule Proposed In This Docket, The Bar's Relationship With The Court Should Remain Unchanged.

Beginning at pages 20-21 of its brief, the Bar argues that under the revision of SCR 10.03(5) proposed in this docket, it will be unable to provide those services to the Court which it currently provides, and the Bar argues that the Court would lose the ability to supervise the Bar, because many Bar activities would be supported by voluntary dues. No such result is intended by the proposed rule. Nowhere in proposed SCR 10.03(5) is there any language eliminating either State Bar oversight by the Court or State Bar cooperation in the regulatory process. All

State Bar activities which are either regulatory or designed to protect the public are included in proposed SCR 10.03(5)(c)1-5 as activities supportable by mandatory dues:

- “1. Preparing for and participating in rulemaking proceedings before the Supreme Court;
2. Administering the Fund for Client Protection;
3. Administering a program to aid lawyers with addictions or other personal problems which may affect their practices and clients;
4. Offering legal advice to Wisconsin lawyers concerning the requirements of SCR Ch. 20 and other ethical questions.
5. Other regulatory programs which may be specifically approved by the Supreme Court after hearing.”

State Bar research and development for the Court of new ideas concerning ethics, CLE, and other subjects which result in new Supreme Court Rules and regulatory provisions or provisions essential to protect the public are usually adopted through the rulemaking process. Proposed SCR 10.03(5)(c)1 and 5 are specifically designed to impose on all Wisconsin lawyers the costs of State Bar participation as an important resource and aid to the Court in the regulatory process. If the State Bar believes that refinement of the proposed language or the addition of more paragraphs to the proposed rule is required, petitioner welcomes the Bar's suggestions. State Bar participation in the regulatory process or the development of proposals essential to protect the public should be the obligation of all Wisconsin lawyers, and the proposed rule recognizes this obligation.

Finally, giving the Bar the freedom to use voluntary dues as it sees fit does not lessen this Court's oversight of the Bar. It merely recognizes that any association collecting voluntary dues should have the ability to spend those revenues as it sees fit. One would think that the Bar would value this independence, rather than see it as a disadvantage. From the very beginning of the State Bar as a mandatory association, this Court pledged independence to the Bar in deciding which activities and which services the Bar would engage in and offer. *In re Integration of the Bar*, 5 Wis. 2d 618, 626-627, 93 Wis. 2d 601 (1958).

When the Bar decided to spend just less than \$100,000 of mandatory dues revenues on a public relations campaign to improve the image of lawyers, the Bar did not first seek Court permission, nor did the Court step in to approve or disapprove that expenditure. Nor did the Bar seek Court approval before drafting and lobbying for a Constitutional amendment to change the terms of members of this Court. Bar activities have never required preapproval by the Court. Drawing a sharp line to differentiate "mandatory" activities from "voluntary" ones gives the Bar the freedom that any voluntary organization should have: the freedom to spend its voluntary dues as it best sees fit to benefit the profession, the public, and this Court.

6. Proposed SCR 10.03(5) Is A Reasonable Compromise Which Serves the Interest Of The State's Individual Lawyers, The Bar, The Court, And The Public.

Proposed SCR 10.03(5) is a reasonable compromise which benefits all stakeholders. The proposed rule returns to Wisconsin's lawyers their constitutional freedoms of speech, association, assembly, and petition. It reaffirms the principle

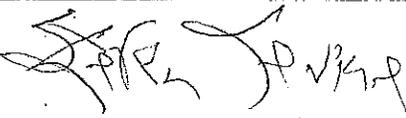
that no individual should be forced to engage in the legislative process or in non-regulatory activities against his or her will. The proposed rule benefits the State Bar itself by insuring that activities which are regulatory or essential to protect the public are financially supported by all Wisconsin lawyers. Requiring that non-regulatory activities be supported by voluntary dues will ensure the Bar of the independence to use its voluntary funds as it sees best and make the Bar more responsive to its membership.

Under the proposed rules, the State Bar of Wisconsin will remain a resource and trusted advisor to the Court in the development of new, innovative proposals concerning lawyer ethics, education, and other regulatory measures essential to protect the public. The Court will continue to be able to call on the Bar for its advice and expertise. Finally, the public will also benefit from adoption of the rule proposed in this docket. All Bar regulatory activities designed to protect the public will continue – with the financial support of all Wisconsin lawyers – as set forth in proposed SCR 10.03(5)(c)1-5. And the adoption of the rules proposed in this docket will set a clear example for the public to rely on: No Wisconsin citizen may be required to engage in legislative or non-regulatory activities with his or her money, against his or her wishes.

Petitioner respectfully requests adoption of the rules proposed in this docket.

Respectfully submitted,

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