

SUPREME COURT OF WISCONSIN

FILED

NOV 15 2011

In the Matter of the Petition to
Review Change in State Bar Bylaw

No. 11-05

CLERK OF SUPREME COURT
OF WISCONSIN

MEMORANDUM OF STATE BAR OF WISCONSIN

In April 2011, the Board of Governors of the State Bar of Wisconsin approved amendments to the State Bar bylaws governing the process for adjudicating member objections to the Bar's dues reduction calculation under SCR 10.03(5)(b), *Keller v. State Bar of California*, 496 U.S. 1 (1990), and subsequent case law including, most recently, the Seventh Circuit's decision in *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708 (7th Cir. 2010).

By petition dated July 6, 2011, 25 active members of the State Bar filed a petition asking this Court to void the amendment or adopt alternative amendments to the bylaws. The petition was discussed at the Court's open administrative conference on September 15, 2011 and the Court ordered that

on or before November 15, 2011, the petitioners and the State Bar of Wisconsin shall each file and exchange letter briefs addressing: (1) whether the amendments to Article I, Section 5 of the bylaws of the State Bar of Wisconsin providing for de novo judicial review of an arbitrator's decision is inconsistent with Wis. Stat. Ch. 788 (Arbitration) or cases interpreting that statute, and (2) whether the supreme court has the authority to adopt proposed bylaw language.

Order, October 7, 2011 at 2. The State Bar of Wisconsin hereby submits this letter brief to address the issues identified by the Court in its October 7, 2011 Order.

1. The Amendment Correctly Provides for De Novo Review of An Arbitrator's Decision On Constitutional Claims.

The Petitioners challenge the amendment to State Bar Bylaw Art. I, § 5(b) which added the following, underlined, language to the bylaw: “All timely demands for arbitration shall be consolidated for hearing before the arbitrator appointed, and the provisions of ch. 788, Stats., shall apply as if the parties had entered into a written agreement for arbitration, except that where a member demanding arbitration claims that mandatory dues were spent on activities in violation of the member's constitutional rights, review of the arbitration award by the court shall be de novo.” Petitioners' challenge is two-pronged: (1) they claim that: “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”; and (2) the language amounts to an amendment of the provisions of Wis. Stat. ch. 788, which the State Bar has no authority to amend. Petition at 3.

The issue, however, is neither efficiency nor the Bar's authority, or lack thereof, to amend chapter 788. Rather the provision for de novo review of an arbitrator's decision is merely an express recognition of the constitutional standard applicable to dues reduction arbitration decisions first set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). In *Hudson*, members of the Chicago Teachers Union objected to the Union's determination of the amount of dues which it could constitutionally require members to pay consistent with the Court's earlier decision in *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). By the time the case reached the Supreme Court, the plaintiffs' had dropped their attack on the use of their dues for particular activities and, instead, “they concentrated their attack on the procedure used by the Union to determine the amount of the deductions and to respond to their objections.” 475 U.S. at 299.

Ultimately, the Court determined that “the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.” *Id.* at 310. With respect to the second requirement – a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker – the Court noted: “we think that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker....” *Id.* at 308 n.21. It further held that: “*The arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action.*” *Id.* (emphasis added). *See also id.* at 307 n.20 (“the courts remain available as the ultimate protectors of constitutional rights”).

Fourteen years later, in *Keller*, the Supreme Court held that a mandatory bar could meet its constitutional obligations to its members by adopting a procedure consistent with that approved in *Hudson*. 496 U.S. at 17. The dues reduction procedure adopted by this Court, and implemented by State Bar bylaws, is intended to, and does, comply with *Keller*. *See In the Matter of the State Bar of Wisconsin: Membership*, 169 Wis. 2d 21, 485 N.W.2d 225 (1992); *In the Matter of the Amendment of Supreme Court Rules: 10.03(5)(b) – State Bar Membership Dues Reduction*, 174 Wis. 2d xiii. (1993), *Crosetto v. Heffernan*, 810 F. Supp. 966 (N.D. Ill. 1992).

Thus, in light of the Court’s holding in *Hudson*, de novo review of constitutional questions decided by an arbitrator has been the law since the bylaw was originally adopted, and would be required whether or not the State Bar’s bylaw contained the challenged provision. Nevertheless, the standard of review applicable to the arbitrator’s decision was raised as an issue in *Kingstad*. Thus expressly recognizing the appropriate standard merely ensures that everyone

involved in an arbitration proceeding under the rule clearly understands the legal and constitutional requirements at issue.

2. The Court's Review of Bar Bylaw Amendments Is Limited to Approval or Rejection of the Petition Challenging the Proposed Bylaw. Here, The Court Should Reject the Petition and Allow the Bar's Proposed Amendment to Take Effect.

SCR 10.13(2) provides:

Amendment of bylaws. The provisions of the bylaws of the state bar of Wisconsin are subject to amendment or abrogation by resolution adopted by vote of two-thirds of the members of the board of governors, or action of the members of the association expressed through the referendum procedure defined in SCR 10.08. ... A petition for review of any such change in the bylaws will be entertained by the court if signed by 25 or more active members of the association and filed with the clerk of the court within 60 days after publication of notice of the change. Hearing upon such a petition will be pursuant to notice in such manner as the court directs.

The procedure for amending the bylaws is clear. They may be amended by: (1) a resolution adopted by two-thirds of the members of the Bar's Board of Governors; or (2) a referendum of the members of the Bar under SCR 10.08. There is no provision in this Court's rule for amendment by petition. Rather, this Court's involvement is limited to review of a proposed amendment adopted pursuant to one of the two approved procedures.

SCR 10.13 does not further describe the review process, but this Court's practice, on the limited occasions where it has been called upon to exercise its review authority has been limited to grant or denial of the petition seeking review in its entirety. In S. Ct. Order 07-10, 07-13, 2008 WI 11, a petition to review was filed challenging a portion of a bylaw amendment that would have imposed geographic requirements on the nomination process for candidates for State Bar President-Elect. The Court granted the petition and rejected the challenged portion of the proposed amendment. Similarly, in a challenge to an earlier version of the dues reduction procedure (adopted long before *Keller* was decided), this Court rejected the alternative proposal

put forth by the petitioners in its entirety, thereby leaving that adopted by the Bar intact. *See Petition to Review Bar Bylaw Amendments*, 139 Wis. 2d 686, 407 N.W.2d 923 (1987).

That kind of limited review is appropriate, as it allows for meaningful exercise of the Court's supervisory authority over the Bar, while at the same time allowing the Bar autonomy to manage its affairs and avoids saddling the Court with the administrative burden of involvement in the details of day-to-day operations.

Here, the petition should be rejected. Not only does the petition challenge the proposed amendment, but, instead, it offers alternative revisions and a different procedure. While portions of the amendments offered by the Petitioners are not controversial, and indeed are very similar to those of the Bar's amendment which they challenge (e.g. revision to the rule governing the compensation for the arbitrator), others are more problematic. For example, the petition proposes that the Chief Judge of the Circuit Court for Dane County "or any other arbitration pool" be added as those to whom the State Bar may apply for appointment of an impartial arbitrator. The proposal is both problematic and unnecessary. It is problematic because the bylaw as it currently exists, which requires appointment by the Chief Judge of the federal district court for the Western District of Wisconsin, was crafted to ensure that the appointing authority is not a mandatory member of the State Bar in order to comply with *Hudson's* requirement of an impartial arbitrator. Thus, the petition's proposal may actually violate that requirement.

Similarly, the burden of proof proposed in the petition's alternative amendments is admittedly inconsistent with the case law governing challenges to mandatory dues. While it is true that, in its governing authority over the Bar, this Court can set any burden of proof it wishes with respect to whether the Bar is spending member dues within the authority granted by this

Court, it is also true that with respect to a constitutional challenge under *Keller, Kingstad*, etc. those cases are binding regardless of the language of the bylaw. Thus, setting a different standard than is required by those cases will, at best, hopelessly confuse future challenges to the Bar's dues reduction calculation and, at worst, spawn an entirely new round of challenges to the Bar's authority to use dues wholly apart from the constitutional questions which have been the subject of litigation over the last 20+ years.

Other revisions proposed by the Petitioners are less problematic, but still present unnecessary issues. For example, the petition proposes a new provision allowing the parties to agree to "an alternative to any of these provisions." While allowing the parties to agree to amend the procedures in a way that is agreeable to everyone involved makes sense, it does not seem likely that the petitioner's proposed revision really means what it says.

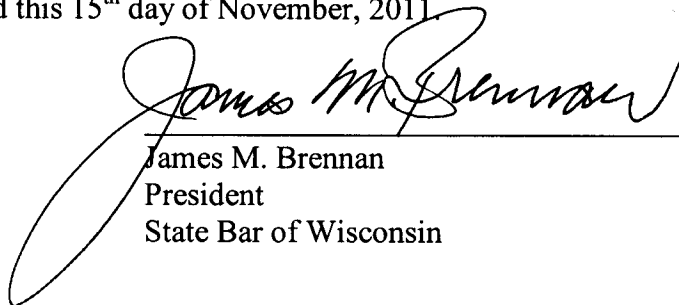
For example, one of "these provisions" which immediately precedes the new proposal is the provision that the arbitrator has no authority to add, subtract, set aside or delete from any Supreme Court Rule or State Bar bylaw. Read literally, then, the proposed revision would allow the parties in a particular challenge to agree that the arbitrator could simply ignore SCR 10.03(5)(b)3, the rule which codifies the holding in *Kingstad*. As unlikely as that may be, such a provision simply makes no sense.

Finally, the petitioner's proposed revisions would eliminate a number of changes made by the Bar to streamline the arbitration process and codify the practices which have developed over the course of the arbitrations which have occurred to date because they have been convenient for all of the parties and the arbitrators. Petitioners offer no specific objection to any of those changes (indeed as noted, they propose similar revisions in some cases); they are simply ignored in the Petitioners' alternative proposal.

The State Bar's proposed bylaw amendments were the subject of careful review by a Committee appointed by the President to ensure that the requirements of *Kingstad v. State Bar of Wisconsin* were incorporated into the rules and bylaws governing the Bar and that the bylaws governing the procedure for challenges brought under *Kingstad* were workable, reflected actual practice, and, most importantly, were substantively accurate. The committee met on several occasions to complete its work and, ultimately presented its recommendations, in writing and orally, to the full Board of Governors for review at its meeting in April 2011. Attorney Levine was also present and spoke at the meeting. (A copy of the report and Minutes of the April 2011 meeting are attached.)

Thus, the amendments proposed by the State Bar were not proposed lightly or without an opportunity for input by Petitioners. Petitioners' attempt to circumvent that process because they are unhappy with the result, particularly where their alternative proposal does not comply with the standards set in governing case law should be rejected.

Respectfully submitted this 15th day of November, 2011



James M. Brennan
President
State Bar of Wisconsin

MINUTES

**Board of Governors
April 8-9, 2011
KI Convention Center/Hotel Sierra
Green Bay, WI**

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NOV 21 2011

CLERK OF SUPREME COURT
OF WISCONSIN

Chairperson Susan Collins, Presiding

Chairperson Collins called the meeting to order at 1:08 p.m.

1. Roll Call.

Present:	James Boll	James Brennan
	Douglas Kammer	Michael Remington
	Margaret Hickey	Susan Collins
	Brian Anderson	Colleen Ball
	Samuel Benedict	Nathaniel Cade
	Wendy Calvert	William Curran
	Raymond Dall'Osto	William Fale
	Robert Gagan	Thomas Gehl
	Robert Goepel	Kimberly Haines
	Charles Hanson	Arthur Harrington
	Tom Heine	Donna Jones
	Frederick Kaftan	Charles "Mike" Kernats
	Kevin Klein	Lynn Laufenberg
	Steve Levine	Atheneé Lucas
	Kevin Lyons	Lynnette McNeely
	Theodore Molinari	Kelly Nickel
	Carmen Ortiz-Babilonia	Christine Rew Barden
	John Schomisch	Steven Schuster
	George Steil	Patricia Struck
	Robert Swain	Paul Swanson
	James Thiel	Kelli Thompson
	Nicholas Vivian	R. Michael Waterman
	Amy Wochos	Nicholas Zales
	Catherine Zimmerman	Robin Dalton
	Mike Diaz	Nicole Standback
	Rebecca Webster	
Absent:	Gordon Kirsten	W. Craig Olafsson
	Frank Remington	Jeffrey Zirgibel
Also Present:	George Brown	Jan Marks
	Lynda Tanner	Lisa Roys
	Adam Korbitz	Sandy Lonergan

Joyce Hastings
Derek Novotny
Joe Troy
Jan Wood
Mike Morse
Lee Turonie

Bill Connors
Nicki Oster
Joe Forward
Roberta Howell
Sherry Coley

Chairperson Collins introduced Atty. Sherry Coley, president-elect of the Young Lawyers Division and made announcements related to the meeting.

- 1:14 p.m. 2. Approval of Agenda. President Boll moved to amend the agenda to add two additional items. He asked that the letter from Atty. John Byrnes resigning from the Finance Committee be added to the agenda as an informational item. He indicated that there was discussion among some governors that this should be a discussion item but he felt the Finance Committee should be given an opportunity to review and respond to the letter at its May 13 meeting. He also asked that the "Date and Location of the 2012 Annual Meeting of the State Bar of Wisconsin" memo be placed on the agenda as an action item. Governor Cade seconded the motion. The motion passed unanimously.

Governor Goepel moved to approve the agenda as amended. President Boll seconded the motion. The motion passed unanimously.

- 1:15 p.m. 3. Approval of February 4-5, 2011 Meeting Minutes. Past President Kammer moved to amend the minutes to reflect that the speaker on page 7 was Governor Frank Remington. President Boll seconded the motion. The motion passed unanimously.

Governor Hanson moved to approve the minutes as amended. Governor Lyons seconded the motion. The motion passed unanimously.

- 1:16 p.m. 4. President's Report. President Boll reported on the Legal Stakeholders group, which he reminded the Board was a group of individuals from each aspect of the criminal justice system. He noted that they held their second meeting and arrived at a plan to create an educational program that would be presented to various groups around the state in order to educate those groups about the criminal justice system and how the budget cuts would impact the criminal justice system.

President Boll noted that next week he, President-elect Brennan, and several other members of the Board would be going to Washington D.C. to meet with legislators during ABA Days to talk about issues of concern to the Bar. He also noted that a meeting was planned with the nonresident lawyers in the D.C. area.

President Boll reminded the BOG committees that each committee would be speaking to the Board on Saturday to outline what type of action the committee would be seeking at the June Board meeting.

President Boll thanked Atty. Mike Morse, chair of the State Bar's Finance Committee, Ms. Lynda Tanner, the State Bar's Assistant Executive Director and Director of Administration and Finance, and other State Bar staff for their work on the budget. He indicated it was a very difficult budget situation because of the budget deficit and the many cuts that needed to be made.

President Boll recognized Governor Kelli Thompson as the newly-appointed State Public Defender.

- 1:20 p.m. 5. President-elect's Report. President-elect Brennan said he had attended the ABA Bar Leadership Institute held in Chicago and had an opportunity to meet with nonresident lawyers in Illinois.

President-elect Brennan indicated he had extended the deadline for people to submit committee preference forms used in committee appointments. He said he firmly believed that committee action really moved the Bar forward and committees were a great opportunity for members to get involved. He said he was looking for balanced committees with regional and practice background diversity in order to bring some new perspectives to committee work and he encouraged governors to invite their constituents to apply for a committee appointment.

President-elect Brennan announced he had appointed a committee to select next year's Chairperson of the Board. The committee members included: Chairperson of the Board Collins and Governors Kernats, Wochos and Schuster. He said the committee would review people who were interested and make a recommendation to the Board at the June meeting.

- 1:23 p.m. 6. Past President's Report. Past President Kammer said that he had nothing to report at this time.

- 1:23 p.m. 7. Executive Director Report. Executive Director Brown updated the Board on the reengineering of WisBar and talked about the schedule for rolling out the new website.

Executive Director Brown noted that the PINNACLE department had been working intensively on two Institutes. He said the first Institute would be held in May in Milwaukee and would focus on litigation, dispute resolution and appellate practice. The second Institute, held in conjunction with the annual meeting, would be in June in Wisconsin Dells and would focus on business law and real estate law. He said it was hoped that attendance at the two Institutes would come close to matching the former convention attendance.

Executive Director Brown stated that ballots had gone out for State Bar officers, candidates for the Judicial Council, and candidates for the Board. He noted that there was a mechanical error related to inserting and some members in Milwaukee County did not receive biographies for the Board candidates. He indicated that due to this error, members in Milwaukee County were provided the biographies electronically.

Executive Director Brown commented on staff activities and mentioned that Publications Director Joyce Hastings was part of a three member panel at the National Association of Bar Executives meeting talking about the future of print, the use of social media in publications, and alternative distribution networks for publications, and Assistant Executive Director and Director of Administration and Finance Lynda Tanner was asked to speak at the ABA Bar Leadership Institute on long range financial planning. He also noted that Atty. Lisa Roys, the State Bar's Public Affairs Director, would be chair of the Government Relations Section of the National Association of Bar Executives beginning in mid-August.

1:30 p.m. 8. Consent Agenda. President Boll moved to approve the Consent Agenda which included: Request from Health Law Section to Amend Bylaws (Attachment A), Request from International Practice Section to Amend Bylaws (Attachment B), and Request from Taxation Section to Amend Bylaws (Attachment C). Governor Lyons seconded the motion. The motion passed unanimously.

1:31 p.m. 9. Litigation Section Request to Repeal a Public Policy Position. (Attachment D) Litigation Section Board member, Atty. Joe Troy, spoke on behalf of the Litigation Section and explained that the section was asking to repeal a State Bar public policy position to make sure that patient records were accessible for all those who needed them, both pre-litigation and post-litigation. He said there was currently a statute that set rates that the Litigation Section unanimously agreed was desirable and appropriate. He stated that in the present budget bill there was legislation that would repeal the current statute and direct that the Department of Health & Family Services set the rates which would create an unregulated period that could last years. He stated that the Litigation Section would like to be able to weigh in on this issue in the interest of attorneys represented by the Litigation Section but, in order to do so, the Section would need the Board to rescind or repeal the present public policy position with respect to medical records from January 2004. He said the Section was asking that the Board remove any barrier that would prevent the Litigation Section from lobbying on its own behalf for modifications to the proposed statute or to maintain the statute as presently enacted.

Governor Laufenberg moved to approve the Litigation Section request to repeal an existing public policy position with respect to medical records. Governor Schomisch seconded the motion.

Governor Laufenberg stated that the Board's current policy with respect to medical records originated with a request from the Litigation Section and, at that time, the policy was required to be stated that way because the Board was dealing with a different situation. He explained that voting for approval of this motion did not reflect a change in Board policy but simply eliminated a roadblock that would prevent the Litigation Section from lobbying on this issue as it was currently being proposed in the budget bill.

The motion passed unanimously.

- 1:38 p.m. 10. Voluntary Bar Petition. (Attachment E) Chairperson Collins outlined the process that would be used to deal with the petition.

Past President Kammer moved that the Board take no position on the petition. Governor Jones seconded the motion.

Past President Kammer reminded the Board the amount of time spent by the Strategic Planning Committee looking at this issue and suggested the Board look back at what has been done with regard to this issue and how we got to this point. He suggested that by taking no position it would free members of the Board and any lawyer to take any position they might want to take.

The motion passed.

- 1:44 p.m. 11. Legislative Report. Public Affairs Director Lisa Roys reported that Governor Walker had introduced his budget bill and she outlined various items that were included in the budget along with various items not included in the budget. She said it was her belief that 90% of the budget would be enacted. She stated that currently there was an Office of Lawyer Regulation lapse in the budget and the Chief Justice testified before the Joint Finance Committee asking for control over her budget to determine where the lapses would come from and she also testified on CCAP and how that would be funded going forward. Atty. Roys indicated that a notice had been sent to assistant district attorneys stating that they would be required to take six furlough days by July 1 or be subject to reduction in staff.

Governor Kernats encouraged the State Bar to lobby against the furlough days for state prosecutors and the attempt to lay off state prosecutors.

There was general discussion on the work of the Legal Stakeholders group, the timeline for the recall elections, and whether or not the recall efforts would have a tempering effect on the budget.

- 2:11 p.m. 12. Date and Location of 2012 Annual Meeting of the State Bar of Wisconsin. (Attachment F) President Boll moved that the Board of Governors set the date and location for the 2012 Annual Meeting of the State Bar of Wisconsin as June 13-15, 2012 at the Chula Vista Resort in Wisconsin Dells, Wisconsin. Governor Klein seconded the motion.

Several governors questioned the reason for holding the 2012 meeting in Wisconsin Dells when the 2011 meeting was also in Wisconsin Dells and wondered about the cost of going to Wisconsin Dells versus Madison or Milwaukee. It was also suggested that Wi-Fi be available at the Institutes.

Executive Director Brown responded that holding the annual meeting in Wisconsin Dells was a request from the planning committee that was planning the 2012 Institute. The committee wanted a family friendly place and a place that was large enough. He also explained that since the change over to the Institute process, the Bar was behind the curve when it came to booking hotels and this was one of the few places still available for 2012.

PINNACLE Director Bill Connors also responded that in terms of cost, holding an Institute in Madison or Milwaukee would be more expensive. Wisconsin Dells was the least expensive.

Past President Kammer questioned the timing of the Board meeting and felt the meeting should overlap with the Institute so members could attend the Board meeting if they wished to do so.

Executive Director Brown noted that the Board used to meet at the end of the Annual Convention but for various reasons the Board meeting was moved to the beginning of the convention. It was thought that the Board meeting could be used to kick off the start of the convention and encourage Board members to attend the CLE programming.

The motion passed unanimously.

- 2:17 p.m. 13. Closed Session. Governor Hanson moved that the meeting go into closed session to discuss the closed session minutes from the February 4-5, 2011 Board meeting. Governor Goepel seconded the motion. The motion passed unanimously.

2:27 p.m. The meeting returned to open session.

- 2:27 p.m. 14. Practice Area of Education. Governor Art Harrington asked the Executive Committee to consider presentations at upcoming Board meetings that educate the Board of Governors on the variety of practice areas in the state. The Executive Committee voted to place a report on the bankruptcy area of practice on the April Board agenda. Governor Swanson gave a brief report to governors on the practice area of bankruptcy law.

The meeting recessed on Friday, April 8 at 2:41 p.m.

The meeting reconvened on Saturday, April 9 at 9:10 a.m.

15. Amendment of Agenda. Governor Curran moved to amend the agenda to allow as an action item consideration of a minor change in the language in a State Bar public policy position referring to the supervision of paralegals. Treasurer Hickey seconded the motion.

Governor Curran noted that sometimes State Bar public policy positions were addressed to a specific proposal that was before the Board in years gone by and now that language was either too specific and needed to be made more generic or there was a need to readdress the whole issue.

The motion passed.

- 9:13 a.m. 16. Financial Overview. (Attachment G) Assistant Executive Director and Director of Administration and Finance Lynda Tanner gave a powerpoint presentation on elements of

the budget, how the budget was developed, the reserves held by the Bar, and using the reserves.

- 9:35 a.m. 17. Policy on Policies. (Attachment H) Governor Nickel stated that this was the work of the BOG Governance Committee and it was the committee's attempt to create a policy to assembly and organize the general and administrative policies of the State Bar. The committee felt this would make it easier to modify the policies or create new ones and would also make the policies easily accessible to members.

It was noted that this would be an action item at the June Board meeting.

- 9:38 a.m. 18. FY 2012 Annual Budget. (Attachment I) Atty. Mike Morse, chair of the State Bar's Finance Committee, reported that the Finance Committee had provided for the Board's consideration a proposed budget for the next fiscal year. He highlighted various items and explained the overall committee rationale on some of the proposals. He noted that after cuts, the budget ended with a projected \$150,000 deficit which would be taken out of two reserve funds, the Opportunity Fund and the Dues Stabilization Fund. He indicated that the Finance Committee would be reviewing input from the Board along with any appeals on the budget that would take place at the May Finance Committee meeting and would bring back a budget for final action at the June Board meeting.

Governor Harrington said he felt one of the most important jobs of the Board of Governors was reviewing the financial reports. He stated that what Atty Morse and the Finance Committee were doing was incredibly important and he expressed appreciation on behalf of the Board to Atty. Morse and Finance Committee members for their efforts.

Atty. Morse commended the Finance Committee members and the staff for their work on the budget.

Atty. Cade said it appeared in the budget that the legal expenses were expected to go down fairly dramatically and he questioned whether the legal expense should go down given the petitions that were being put forward and the debate about *Keller*.

Atty. Morse responded that it wasn't anticipated that legal expenses would be as expensive as they were in the past and said there was a general contingency that would be available for such expenses, if needed, in the coming fiscal year.

There was general discussion about the budget and budget cuts, especially to the divisions.

Atty. Morse reminded the Board that the Finance Committee would be meeting in May to consider all appeals of any of the proposed budget adjustments. He noted that actions at this meeting might modify the final budget recommendation that would come before the Board in June and, if so, the Finance Committee would address how it proposed to fund the restorations.

10:11 a.m. 19.

Keller Review Committee Recommendations. (Attachment J) Secretary Mike Remington, chair of the *Keller* Review Committee, reminded the Board that President Boll appointed the committee to develop a report and recommendation for submission to the Board in response to a petition filed with the Wisconsin Supreme Court by Past President Steve Levine, Governor Jim Thiel, and Atty. Jon Kingstad. He noted that the petition was filed before the end of the year and it requested that the Court adopt certain changes to the Supreme Court rules governing State Bar membership dues. He said that the committee felt the Supreme Court rules governing the use of membership dues should reflect the letter, meaning, and intent of the *Kingstad* decision. The committee agreed with the petition in so far as it called for the Supreme Court to adopt rules that reflected, in part, the position taken by the petitioners in their lawsuit against the State Bar. However, the committee believed the petition sought relief different and exceeded the language in the 7th Circuit's decision. He said the committee recommended that the Board respond to the petition and oppose it to the extent that the petition proposed rules or bylaws that exceeded the language of the decision and that the Board support amendments to Supreme Court rules and bylaws that brought the rules and bylaws in specific compliance with the *Kingstad* decision.

Past President Levine responded that there was no controversy in the first part of the petition which sought to eliminate the words "political" and "ideological" from Supreme Court Rule 10.03(5)(b)1 as required by the 7th Circuit's decision. He said the controversy was in the second part of the petition which sought to correct what he and Governor Thiel felt was a mistake made by the 7th Circuit in ruling on the specific expenditure that was involved in the *Kingstad* case. The 7th Circuit said that the standard of review that it was going to apply in determining whether a State Bar expenditure met the criteria of regulating the legal profession or improving the quality of legal services was the rational basis standard which was the same test used to determine whether legislation which was adopted reasonably related to a legitimate governmental interest. He indicated that he and Governor Thiel believed that the more correct standard would be the strict scrutiny test because this was a First Amendment issue and the standard of strict scrutiny has traditionally been applied to First Amendment issues.

President-elect Brennan moved to accept the report and approve the recommendations of the *Keller* Review Committee. Governor Lyons seconded the motion.

Treasurer Hickey, a member of the *Keller* Review Committee, said the committee talked about the fiduciary obligation that Board members have to State Bar members and the organization and, while simply adopting the position being advocated by Past President Levine might avoid legal fees, the committee did not feel it was consistent with the 7th Circuit decision and the 7th Circuit decision was what should govern in this case.

The motion passed by a 38 to 4 show of hands which is greater than a 2/3 majority of all the members of the Board of Governors.

President Boll thanked Secretary Mike Remington and the members of the *Keller* Review Committee for their work on this important issue.

The meeting recessed for a short break at 10:35 a.m.

The meeting reconvened at 10:59 a.m.

20. Board of Governors Committee Reports. Each Board of Governors committee chair gave a brief report on their committee's work to date.

BOG Policy Committee. Governor Kernats said the Policy Committee was asked to look at various policy issues and to give some consideration to those policies. He said the Policy Committee was also asked to provide advice to the lobbying staff as to whether the committee thought they had the authority to lobby based on existing positions or whether it would be necessary to come before the Board and ask for an amendment of a position. He indicated that the committee addressed some policies that it thought it had the authority to address including a policy related to the use of exhibit space at State Bar events and a policy on self-help centers. He indicated the committee addressed another policy relating to the supervision of paralegals and determined that it did not have the authority to make the change that was requested and concluded that a recommendation should be made to the Board asking the Board to amend the existing policy position.

Governor Kernats said the Policy Committee also addressed the aggressive legislative agenda from the current administration and the Bar's inability to respond because the legislation moved so quickly. He stated that unless the Bar had an existing position, the Bar staff did not have the ability to take a position and lobby. He indicated that the committee had been struggling with trying to determine what mechanisms could be implemented to give the Bar the ability and the authority to take positions and respond to important policy issues while there was an opportunity to have an impact. He indicated that the Policy Committee would be bringing recommendations on how to deal with the issue of fast moving legislation and was considering a couple of options including making the BOG Policy Committee into a standing committee that would provide advice and interpretation to the lobbying staff or possibly giving the Executive Committee the authority to issue pronouncements on important policy positions when the Board was unavailable to meet.

Governor Curran noted that one of the issues mentioned by Governor Kernats was the request from staff to make a change to a State Bar public policy related to the supervision of paralegals. This change would reflect a current matter before the Legislature that is supported by the Paralegal Association to authorize paralegals to be licensed under the Department of Licensing instated of the Supreme Court.

Governor Curran moved that the Board of Governors amend a State Bar public policy position referring to the supervision of paralegals as follows: The State Bar of Wisconsin supports attorney supervision of paralegals licensed ~~under the authority of the Supreme Court~~ pursuant to law. Governor Goepel seconded the motion.

Past President Kammer thought this issue should have been sent to the Unauthorized Practice of Law Committee to deal with the licensing of paralegals as a consumer protection issue.

Governor Curran responded that licensing paralegals was a concern of a State Bar committee back in 2000 and thus the adoption of the current policy with attorney supervision of paralegals. The Supreme Court was petitioned in 2004 and did not approve the licensing of paralegals. He stated that currently the reference to "under the authority of the Supreme Court" would not apply because this was not a petition before the Supreme Court. The wording "pursuant to law" would broaden the policy to allow attorney supervision of paralegals regardless of whether paralegals were licensed under the Department of Licensing or under the Supreme Court.

The motion passed unanimously with Governor Jones abstaining.

BOG Governance Committee. Governor Kaftan stated that the Policy on Policies would be an action item at the June meeting. He said that the committee had also been putting together a Board self-assessment that would be sent to governors in the next couple of weeks. He encouraged governors to take the time to complete the self-assessment and a report of the findings would be given at the June meeting. He said the committee was hopeful that the data would serve as a basis for determining how to proceed with meetings in the future. He said the other two items the committee had been working on was reviewing the election of officers and the role of the Executive Committee. Both items would be informational items at the June meeting.

BOG Committee on Committees. Governor Struck reported that chairs of State Bar committees had been interviewed and the committee had begun the process of sifting through all the results with the objective of doing two things: 1) recommending changes in the current committee structure including the possibility of merger or elimination of some committees; and 2) identify and anticipate needs not met by current committees and to recommend a strategy for addressing them. She indicated that the committee plans to make three bylaw recommendations: 1) to define in the bylaws various categories of committees including standing committees, management or special committees, advisory committees, and task forces or ad hoc committees; 2) calling for three-year staggered terms for almost all committees; and 3) recommending regular interface with committees to keep committees on task and review their activities, possibly looking at the Board of Governors liaison function to staff that activity.

BOG Challenges to the Profession Committee. Governor Molinari said the committee narrowed down a large list of challenges and identified four particular areas where the committee felt the Bar could help its members. These four areas included: 1) technology; 2) the direct competition to provide legal services; 3) the regulation of the legal process; and 4) new lawyer development. He stated that the goal of the committee was to develop a set of recommendations that could be acted on by next year's committee.

BOG Bylaws Revisions Committee. Governor Cade stated that the Board would get one last set of bylaw changes. He outlined the process that would be used to address the proposed bylaw changes. He said he was hopeful that debate on the bylaws would be accomplished at the June meeting.

Treasurer Hickey wondered when the bylaw changes would be submitted to the Supreme Court.

Governor Cade responded that whatever bylaw changes were passed would not be submitted to the Supreme Court until December or January in order to give people an opportunity to think about the changes. He said there would also be the need to review the Supreme Court rules to determine how they would interact with the new bylaws.

21. Adjournment. There being no further business, the meeting adjourned at 11:41 a.m.



STATE BAR OF WISCONSIN

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Board of Governors
Keller Review Committee
Report and Recommendation
April 8, 2011

Committee Membership and Charge

On February 25, 2011, State Bar President James Boll appointed a committee of members of the Board of Governors to develop a report and recommendations for submission to the Board of Governors in response to a petition to the Wisconsin Supreme Court by State Bar members Steve Levine, John Kingstad, and Jim Thiel. That petition requests that the Court adopt certain changes to the Supreme Court rule governing membership dues to the State Bar.

The committee members include State Bar Secretary Michael Remington, chair; and governors Christine Rew Barden, Robert Goepel, Margaret Hickey, and George Steil, Jr.

President Boll's charge to the committee: is to review and recommend action in response to the petition filed by State Bar Past President Steve Levine, State Bar member Jon Kingstad, and Governor Jim Thiel to amend SCR 10.03 (5)(b)1, in the wake of the Seventh Circuit Court of Appeals decision in *Kingstad v. State Bar of Wisconsin* (7th Cir. 2010). The committee will make its recommendation to the Board at the April 8-9 meeting in Green Bay. On April 8, each committee member will present the committee's recommendation to one of the five Board committees and will answer questions. On April 9, the committee will give its full report to the Board for discussion and vote. The committee will then review the Keller process that the State Bar currently uses to calculate the Keller dues rebate, and will report to the Board and make any recommendations for changes in the process at the Board's June 8 meeting.

This first report and recommendation addresses only those issues intended for presentation at the April Board of Governors meeting.

Committee Deliberation

The committee met by teleconference on Wednesday, March 9, 2011. At its first teleconference, the members discussed whether it was appropriate for the Board of Governors to respond to the petition, what the response should be if one was warranted, and what form that response would take. The committee reconvened on Thursday, March 31, 2011 and reached a consensus on the committee recommendations to the Board and adopted proposed language amendments to SCR 10.03(5)(b)1.

The committee members discussed the Levine, Kingstad, Thiel petition in light of the decision by the 7th Circuit in *Kingstad, et. al v. State Bar of Wisconsin*. The committee members believe

that any changes to Supreme Court rules governing the use of membership dues should reflect the letter and intent of the 7th Circuit decision in Kingstad et. al. The members agreed that the petition calls for the Supreme Court to adopt rules that reflect in part the position taken by the petitioners in their lawsuit against the State Bar. However, the petition seeks relief different from the 7th Circuit decision and, in fact, goes even further than the dissent by Judge Sykes in that decision. To that end, the committee makes the following recommendations to the Board of Governors.

Recommendations

The Keller Review Committee recommends that the Board of Governors respond to the petition. The Committee recommends that the Board of Governors oppose the petition to the extent that it proposes rules or bylaws that do not comport with the decision of the United States Court of Appeals for the 7th Circuit decision in Kingstad, et. al v. State Bar of Wisconsin. In addition, the Committee recommends that the Board of Governors support amendments to the Supreme Court Rules governing Bar membership (SCR 10.03) that bring the rules in compliance with the Court's decision in Kingstad et. al. To that end, the Committee recommends the Board of Governors adopt the amendments incorporated in the attachment to this report (Attachment A) and forward them to the Wisconsin Supreme Court in time for their April 11, 2011 hearing on petitioners' petition.

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SCR 10.03(5)(b)1

The state bar may engage in and fund any activity that is reasonably intended for the purposes of the association. The state bar may not use the compulsory dues of any member who objects to that use for political or ideological as provided in SCR 10.03(5)(b)3 to fund only those activities that are not necessarily or reasonably intended for the purpose of related to regulating the legal profession or improving the quality of legal services. The state bar shall fund ~~those political or ideological~~ all other activities by the use of voluntary dues, user fees or other sources of revenue.

SCR 10 Appendix (State Bar Bylaws)

Section 5. Dues Reduction Arbitration Procedure. (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 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.

(b) If one or more timely demands for ~~arbitration~~ 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 ch. 788, Stats., shall apply as if the parties had entered into a written agreement for arbitration, except that where a member demanding arbitration claims that mandatory dues were spent on activities in violation of the member's constitutional rights, review of the arbitration award by the court shall be de novo. 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.

(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.

(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) or the briefing schedule, as the case may be, and shall so notify the parties at least 15 days prior to said hearing(s) or the deadline for the filing of the opening brief. The arbitrator will promptly hold hearings in which the parties will be permitted to participate personally or through a representative, unless the parties agree that the matter may be decided on briefs. 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 arbitrator shall not be deemed a necessary party in judicial proceedings relating to the arbitration. The arbitrator shall have no authority to add, subtract, set aside or delete from any Supreme Court Rule, or State Bar bylaw.

Unless otherwise agreed by the parties, the following rules shall apply to the arbitration proceedings:

i. There will be no transcripts or post-hearing briefs.

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~~ arbitrator will charge a ~~maximum of \$100 per hour~~ reasonable hourly fee for services, including the hearing, preparation and study time, and shall be reimbursed for all necessary expenses of the arbitration.

iv. ~~The hearing(s) or the briefing schedule, as the case may be, shall be held~~ completed 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.~~

(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.