

## MEMORANDUM IN SUPPORT OF PETITION FOR A VOLUNTARY STATE BAR (11-01)

This petition requests this Court to amend and repeal various Supreme Court rules and to take whatever steps may be necessary to convert the State Bar of Wisconsin from a mandatory bar to a voluntary bar. This petition is based on five arguments:

1. In *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990) the court set forth two activities which justify an integrated state bar and the collection of mandatory dues to support those activities: regulating the legal profession and improving the quality of legal services offered by members of the bar.

2. The State Bar of Wisconsin is not a regulatory agency.

3. While the State Bar of Wisconsin does offer continuing legal education programs and publications designed to elevate the ethical and educational standards of bar members, these programs and publications are supported by user fees and not by State Bar dues.

4. A majority of State Bar members favor a voluntary bar. Three of the six State Bar presidents-elect elected since 2005 have advocated a voluntary bar as part of their campaigns.

5. A voluntary Bar would be a more independent bar, free to take positions in the best interests of the public and its own members without the constraints of Supreme Court control.

First, in the case of *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990) the United States Supreme Court identified two purposes of integrated state bars for which mandatory dues could be collected and spent: “regulating the legal profession and improving the quality of legal services.” Mandatory state bar dues may not be spent for other purposes: “The central holding in *Keller*, moreover, was that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required

association.” *United States v. United Foods, Inc.*, 533 U. S. 405, 413-14 (2001). “[S]peech need not be characterized as political before it receives first amendment protection.” *Id.* See also, *Kingstad, et al., v. State Bar of Wisconsin*, 622 F.3d 708 (7<sup>th</sup> Cir. 2010).

Second, the State Bar of Wisconsin is not a regulatory agency which regulates the legal profession. That function is performed in Wisconsin by the Board of Bar Examiners and the Office of Lawyer Regulation. Wisconsin lawyers pay assessments to support those two regulatory agencies in addition to State Bar dues. The State Bar of Wisconsin does not perform one of the functions on which the United States Supreme Court has held that mandatory state bar dues may be spent: regulating the legal profession. See *Matter of State Bar of Wisconsin: SCR 10.01(1)*, 169 Wis.2d 21, 34, 485 N.W.2d 225, 231 (2002)(Abrahamson, J., dissenting).

Third, no mandatory dues of the State Bar of Wisconsin are spent for the purpose of “improving the quality of legal services.” This phrase from *Keller* refers back to the prime regulatory purpose cited by the U. S. Supreme Court in upholding the constitutionality of the integrated State Bar of Wisconsin in *Lathrop v. Donohue*, 367 U.S. 820, 842-43 (1961): to

elevat[e] the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of Wisconsin, in order to further the State’s legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to obtain the objective also engages in some legislative activity.

The State Bar of Wisconsin does provide continuing legal education programs and publications for the ethical and educational improvement of State Bar members, but, by direction

of this Court, those programs and publications are paid for by user fees, not by State Bar dues.<sup>1</sup> No State Bar of Wisconsin mandatory dues are used to support the second function cited by the United States Supreme Court to justify mandatory state bar membership: improving the quality of legal services offered by members of the State Bar of Wisconsin.

Fourth, a majority of members of the State Bar of Wisconsin want a voluntary State Bar. In 1979 59+ percent of the bar (2,820 for, 1892 against) voted in favor of a voluntary bar (*See Matter of Discontinuation of Wis. State Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980)), and a survey conducted by the State Bar of Wisconsin itself in 2008 also indicated that 57+ percent of Wisconsin lawyers favor a voluntary bar. (*See Future of the State Bar: Mandatory/Voluntary Membership Report, Strategic Planning Committee of the State Bar of Wisconsin, February, 2010, page 8.*) Since 2005, three candidates (in six elections) – Steven Levine, Douglas Kammer, and James Boll -- who campaigned for the office of State Bar president-elect on the basis of advocating voluntary bar membership have been elected by Wisconsin lawyers. On June 25, 2010, a majority of the State Bar Board of Governors voted to petition this Court to consider the issue of whether State Bar membership should be voluntary or mandatory, but the 25-17 vote fell one vote short of the 60% super-majority necessary for the State Bar to petition this Court. Thus, this petition raises an issue which a 59.5% majority of the State Bar Board of Governors and a 57+% majority of the entire Bar membership wish the Court to consider.

Finally, a voluntary State Bar of Wisconsin would be a more independent bar, free to act in the public interest and the best interests of its voluntary membership without the constraint of Supreme Court control. Supreme Court control restricts the Bar's ability to act in ways which

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<sup>1</sup> *See In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv, xli, xlvii, xlix (1977).

may be contrary to the interests or positions of the Supreme Court or to express views which would not be popular with the Court. A voluntary State Bar would be freer to act in furtherance of its concept of the public interest. *See Matter of State Bar of Wisconsin: SCR 10.01(1)*, 169 Wis.2d 21, 40, 485 N.W.2d 225, 233 (2002)(Abrahamson, J., dissenting).

Because the State Bar is not a regulatory agency, because it does not use mandatory dues to pay for educational programs and publications designed to improve the ethics and abilities of Wisconsin lawyers, because a majority of Bar members favor a voluntary bar, and because a voluntary Bar would be a freer, more independent bar, petitioners respectfully request this Court to make State Bar membership voluntary and to appoint a committee to recommend the steps necessary to transition the State Bar from a mandatory to a voluntary organization.

Respectfully submitted,

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