SUPREME COURT

STATE OF WISCONSIN

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

Petition No. 17-04

STATE BAR OF WISCONSIN'S
RESPONSE IN OPPOSITION TO PETITION

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Introduction

In 1960, the United States Supreme Court rejected a constitutional challenge by a Wisconsin lawyer to the mandatory bar. *See Lathrop v. Donahue*, 367 U.S. 820 (1960). That was, however, hardly the end of the issue. Since at least 1980, Petitioner has led the charge to abolish the integrated bar in Wisconsin. In that role, Petitioner has been a party to and/or counsel in no fewer than sixteen separate actions (including the present proceeding) [1] directly or indirectly challenging the State Bar of Wisconsin's ability to fulfill the purposes for which this Court created it. In addition, he assisted in drafting, and testified in favor of, no fewer than three proposed constitutional amendments, *while he was president of the State Bar*, stripping this Court of its inherent authority to regulate the practice of law in Wisconsin.[2] "This case

[1] *In re Discontinuation of the State Bar of Wisconsin as an Integrated Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980) (oral argument); *In re Petition to Review State Bar Bylaw Amendments,* 139 Wis. 2d 686, 407 N.W.2d 923 (1987) (petitioner, brief); *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis. 1988), *rev'd, Levine v. Heffernan*, 864 F.2d 457 (7th Cir.1988), *cert. denied*, 493 U.S. 873 (1989) (plaintiff pro se); *In re Arbitration of State Bar of Wisconsin Fiscal Year 1993 Dues Reduction*, Award (Dec. 7 1992) (objector, counsel); *Thiel v. State Bar of Wisconsin*, No. 93-C-603-S, slip op. (W.D. Wis. 1993) (counsel); *In re Arbitration of State Bar of Wisconsin 1995 Dues Reduction*, Award (Jan. 17, 1995) (objector, counsel); *Thiel v. State Bar of Wisconsin*, No. 95-C-0103-S, slip op. (W.D. Wis. 1995), *aff'd*, 94 F.3d 399 (7th Cir 1996) (counsel); *In re Arbitration of State Bar of Wisconsin Fiscal Year 2009 Dues Reduction*, Award (Dec. 12, 2008) (objector, counsel); *Kingstad v. State Bar of Wisconsin*, 2009 AP 171-OA, slip op. (Wis. 2009) (petitioner, counsel); *Kingstad v. State Bar of Wisconsin*, 670 F. Supp. 2d 922 (W.D. Wis. 2008), *aff'd on other grounds,* 622 F.3d 708 (7th Cir. 2010) (plaintiff, counsel); *Petition to amend SCR 10.03(5)(b)1* (No. 09-08) (petitioner, counsel); *Petition for a Voluntary State Bar* (No. 11-04) (petitioner); *Petition to Review Bylaw changes* (No. 11-05); *In re Petition to Amend Supreme Court Rules 10.04 and 10.05* (No. 13-09) (petitioner/objector); *In re Arbitration of State Bar of Wisconsin Fiscal Year 2016 Dues Reduction*, Award (Feb. 22, 2016) (objector, counsel).

[2] 2007 Assembly Joint Resolution 30 ("The supreme court may assess attorneys licensed to practice law in this state for the cost of their regulation, but the court may not assess those attorneys to pay the cost of legal services for the indigent") (http://docs.legis.wisconsin.gov/2007/proposals/ajr30); 2007 Assembly Joint Resolution 31 ("The supreme court may assess attorneys licensed to practice law in this state for the cost of their regulation, but the court may not require those attorneys to become members of the state bar of Wisconsin or pay dues to any bar association.") (http://docs.legis.wisconsin.gov/2007/proposals/ajr31); 2007 Assembly Joint Resolution 56 ("The supreme court may not assess a fee on

represents the latest chapter in the seemingly neverending battle …." *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996).

Petition 17-04 once again seeks significant changes in the Supreme Court rules governing the use of mandatory dues by the State Bar of Wisconsin -- changes which, if adopted, would be tantamount to abolishing the mandatory bar and eliminating this Court's ultimate authority over the State Bar. Petition 17-04 does not seek to dis-integrate the mandatory bar directly. The real purpose of the petition is nevertheless evident in the fact that the primary argument made by the Petition is precisely the same argument made repeatedly by the Petitioner in numerous venues over the past three decades. Petitioner's arguments have just as repeatedly been rejected, by this Court and the Court of Appeals for the Seventh Circuit. Neither the facts nor the law have changed since the last time this issue was before this Court and Petitioner's latest attempt should similarly be rejected.

Argument

Petition 17-04 asks this Court to:

> (1) Amend SCR 10.03(5)(b) to require the State Bar to establish a bifurcated annual budget:
>
> > (A) a budget funded by mandatory dues which may be used only for (a) preparing for and participating in rulemaking proceedings before the Supreme Court; (b) administering the Fund for Client Protection; (c) administering a program to aid lawyers with addictions or other personal problems which may affect their practices and clients; (d) offering legal advice to Wisconsin lawyers concerning the requirements of SCR ch. 20 and other ethical questions; and (e) other regulatory programs which may be specifically approved by the Supreme Court after hearing; and

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any attorney, judge, or justice without statutory authority (http://docs.legis.wisconsin.gov/2007/proposals/ajr56).

(B) a budget funded entirely by voluntary dues, user fees or other revenue sources which may be used for any other State Bar activities;

and provide for arbitration if any member challenges the budgeting process/use of dues under these separate budgets (with the process for the arbitration to be determined by bylaw)

(2) Amend SCR 10.03(6) to permit suspension only for non-payment of mandatory dues.

Three events are identified as prompting the filing of the Petition. First, the Petition points to the adoption by the Nebraska Supreme Court of rules with respect to that state bar's use of mandatory dues. The Petition seeks a similar rule for Wisconsin, at the same time arguing that the Wisconsin Bar no longer serves the regulatory functions that the Petition claims justify the Bar's existence and would be the subject of the mandatory dues portion of the budget proposed by the Petition.

Second, the Petition decries the award in the arbitration conducted in response to Petitioner's challenge to the State Bar's FY2016 dues reduction. In that proceeding, the arbitrator found that mandatory dues were permissibly used to support various Bar activities challenged by petitioner , including legislation relating to judicial substitution, salaries for assistant attorneys general and state public defenders, and this Court's budget, because those activities are germane to regulating the legal profession and/or improving the quality legal services in Wisconsin and are, therefore, permissible under SCR 10.03(5) and the decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990). According to the Petition, use of mandatory dues to fund any kind of legislative activity, on any topic, is "[w]ithout attempting to use hyperbole, . . .a gross, outrageous violation of both state and federal rights of free speech, petition, assembly, and association."

Third, the Petition warns of a State Bar Board of Governors proposal to seek amendments to SCR 10 and the Bar's bylaws which, the Petition claims, is intended to avoid Court oversight of the Bar and therefore "complements" the Petition because if the Petition is adopted, the Bar would be free to govern itself, apart from the oversight of the Court.

The Petitioner touts the Nebraska rule without any discussion of its workability here and/or its expected impact. As explained below, the effects felt in Nebraska since adoption of the rule validate the very concerns that have led this Court to repeatedly conclude that a mandatory bar, and the procedures that it has put in place to safeguard the constitutional rights of Bar members, are the right structure for Wisconsin. Similarly, the Petition's attempt to avoid "hyperbole" when discussing the most recent arbitration and the activities at issue there fails utterly.

More important, however, the position urged by the Petition is not the law, and the Bar's activities, and this Court's rules under which the Bar operates, are entirely consistent with the First Amendment and have been repeatedly approved by the federal courts.

Finally, the Bar has not asked, nor does it intend to ask, for freedom from its relationship with this Court – only the Petition seeks that result. The rule and bylaw amendments that have been approved by the Board of Governors, but not yet submitted to this Court, are largely administrative in nature, making the structure of the Bar more flexible and able to be responsive to its members. If the Petition is granted, however, this Court will lose all or nearly all control over the Bar and its activities.

For all of these reasons, and those set forth below, the State Bar strongly urges the Court to deny the Petition in its entirety.

A. The Petition's Argument that the Bar No Longer Serves a Regulatory Function Justifying Integration Has Been Repeatedly Rejected, and Should be Rejected Again.

The "Argument" section of the Petition begins with a familiar refrain: the only justification for a mandatory bar is a regulatory one and the Wisconsin Bar no longer serves the regulatory purposes which led the Court to uphold its existence in *Lathrop v. Donahue*. The argument is familiar because it has been repeated – by Petitioner and others before him – so many times in the last four decades. Each time, however, it has ultimately been rejected. It should be rejected again here.

Not long after this Court created what was then known as the Board of Attorneys Professional Competence and the Board of Attorneys Professional Responsibility,[3] five attorneys filed a petition seeking to dis-integrate the State Bar. *In the Matter of the Discontinuation of the State Bar of Wisconsin*, 93 Wis. 2d 385, 386-87, 286 N.W.2d 601 (1980).

> The petitioners argue that the reasons for which the Wisconsin bar was integrated, namely, to supervise admission to the bar, to promote continuing competency of lawyers and to enforce lawyer discipline, no longer exist now that these functions are being performed by boards which were created by the court and operate independently of the State Bar. They further argue that lawyers should not be required as a condition of their right to practice law in Wisconsin to financially support State Bar activities of which they do not approve, especially legislative and political activities.

This Court disagreed: "we do not find any or all of the allegations and arguments of the petitioners and others sufficient to warrant changing the status of the State Bar to a voluntary bar." 93 Wis. 2d at 387.

[3] *See In re Regulation of the Bar of Wisconsin*, 74 Wis.2d ix (1976); *In re Regulation of the Bar of Wisconsin*, 81 Wis.2d xxxv, xliv (1977).

A few years later, Petitioner took up the argument. For a short time in 1988, his position was adopted by a trial court, *see Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis. 1988), but was soon thereafter rejected on appeal.

> The principal issue on appeal is whether *Lathrop* controls the disposition of this case. … The district court ruled that *Lathrop* was not dispositive "[b]ecause … the Bar has changed its character since then." …
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> We disagree.
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> In *Lathrop*, Justice Brennan's plurality opinion, in concluding that Wisconsin's integrated bar served a legitimate state interest, delineated several important activities that the bar engaged in. These activities included but were not limited to activities in the areas of continuing legal education and attorney discipline. The Court, however, did not place any special emphasis on those activities. In fact, the plurality opinion, in justifying its decision, expressly noted the multifaceted character of the Wisconsin Bar.

Levine v. Heffernan, 864 F.2d 457, 459, 462 (7th Cir. 1988) (internal citations omitted). The United States Supreme Court rejected Petitioner's petition for *certiorari* seeking review of the Seventh Circuit's decision, 493 U.S. 873 (1989), on the same day it took up a similar challenge to the California Bar. *See Keller v. State Bar of California*, 493 U.S. 806 (1989).

When the Bar petitioned this Court to re-integrate after the U.S. Supreme Court's decision in *Keller*, the same arguments were made once again -- *see In the Matter of the State Bar of Wisconsin: Membership--SCR 10.01(1) and 10.03(4); Membership Dues and Dues Reduction--SCR 10.03(5),* 169 Wis. 2d 21, 34, 485 N.W.2d 225 (1992) (Abrahamson, J. dissenting) -- and were again rejected.

> The court is persuaded that a unified association composed of all persons licensed by this court to practice law in the state is best suited to meet the lawyers' professional obligations to the public and to the legal profession itself. Because all lawyers, as

> practitioners of that profession, share those obligations, an association in which membership were voluntary would not be in the same position to meet them.
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> Members of the legal profession have a duty to promote the public interest, as well as the interests of their individual clients. A significant aspect of the public's interest is the efficient and effective administration of justice. It is necessary that lawyers join in a common effort to carry out this duty, for lawyers acting individually or in discrete groups might lack the commitment and resources to effectively address more than a portion of their professional responsibilities. Acting as one, however, the members of the legal profession constitute a powerful force to further the improvement of the legal system, its laws, its courts and its practitioners.
>
> As each lawyer shares the profession's obligation to the public, each lawyer properly may be required to support the profession's functions and activities directed to the interest of the public, even if only financially by payment of membership dues to the association acting to fulfill those obligations. It is to be hoped, however, that membership in the integrated bar association will motivate lawyers to contribute their time and talent, as well as their money, to the association's activities in furtherance of the cause of justice.

169 Wis. 2d 21, 23-24.

The arguments were made yet again when Petitioner asked this Court to take up the issue of a mandatory bar once more in 2011, *see* Memorandum in Support of Petition for a Voluntary State Bar, Petition 11-04 (https://www.wicourts.gov/supreme/docs/1104petitionsupport.pdf). After consideration of a comprehensive staff memorandum on the issue (https://www.wicourts.gov/supreme/docs/1104commissionermemo.pdf ("Commissioner's Memo")), the petition was rejected without hearing. *In the Matter of the Petition for a Voluntary State Bar of Wisconsin*, Order, June 6, 2012 (https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=83454).

Nothing about the nature of the Bar, its activities, or the law has changed since the decisions above. For all the same reasons that this Court, and others, have repeatedly rejected the argument advanced by Petitioner in the past, the Court should similarly reject the argument here.

B. The Bar May Properly Engage in Political or Ideological Activities So Long as They Are Germane to Regulating the Legal Profession or Improving the Quality of Legal Services in Wisconsin.

The second argument advanced by the Petition is that "[w]ithout attempting to use hyperbole, it is a gross, outrageous violation of both state and federal rights of free speech, petition, assembly, and association to force any Wisconsin citizen to pay dues to an organization which lobbies the legislature with his or her money, against his or her wishes. Lobbying by the State Bar on such subjects as the term of a Supreme Court justice, the salaries of justices and state-employed attorneys, and judicial substitution constitutes political activity into which no lawyer should be coerced."

Notably, the Petition cites no law for this proposition, because there is none. In fact, the United States Supreme Court has made clear that a mandatory bar association may use the mandatory dues of all members so long as those dues are germane, i.e. reasonably related, to regulating the legal profession or improving the quality of legal services. *Keller*, 496 U.S. at 14 ("the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State' (citing *Lathrop*); *id.* at 15 (the State Bar may not "fund activities of an ideological nature which fall outside of those areas of activity"). That does not mean that all political and ideological activities are forbidden. "The

applicable cases do not describe the analysis as a test of 'either/or,' as in 'either' the expenditures are nonpolitical and nonideological 'or' they are nongermane before they implicate the First Amendment. Rather, the key is the overall 'germaneness' of the speech to the governmental interest at issue. The political or ideological nature of the speech factors into that ultimate analysis." *Kingstad v. State Bar of Wisconsin,* 622 F.3d 708 (7th Cir. 2010).

SCR 10.03(5) was adopted by this Court long before *Keller* to address the kinds of concerns raised by Petitioner,[4] and has been amended on numerous occasions[5] in compliance with federal constitutional requirements. *See, e.g., Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (1993) (rejecting challenge to dues reduction rule). The Bar's annual determination of which activities are chargeable and which are not under those rules has similarly been upheld against constitutional challenges. *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir 1996); *Kingstad, supra.* The Petition should be rejected.

C. The Petition's Proposed Rule Would Have Significant Negative Effects for the Court, the Bar and the Public, and Would Effectively Eliminate this Court's Oversight of the Bar.

1. The circumstances motivating the Nebraska order do not exist here.

Although it does not say so directly, the Petition suggests that the Nebraska Supreme Court adopted the rules on which the Petition is patterned as a matter of constitutional necessity. But the Nebraska Supreme Court was clear that its intention was simply to avoid ongoing challenges by members of the Bar. *Voluntary State Bar of Nebraska*,

[4] *See Report of Committee to Review the State Bar*, 112 Wis.2d xix, xxxvi, 334 N.W.2d 544 (1983).

[5] *In Matter of State Bar of Wisconsin*, 169 Wis. 2d at 23 ("The court adopted the proposed amendment to the dues reduction rule [to conform to *Keller*] on March 13, 1992."); *Petition to Review Bylaw Changes*, No. 11-05 (July 5, 2012) (https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=84593); *In re Supreme Court Rules 10.03(3) and (5)*. No. 13-09 (June 24, 2014) (https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=115408).

286 Neb. at 1037 ("by drawing the line in this way, we will clearly avoid the morass of continuing litigation experienced in other jurisdictions.")

That has never been a factor which a majority of this Court has found appropriate for consideration in reviewing the status or activities of the Bar. In fact, this concern was pointed out, among other times, in 1980 (*see, e.g., Discontinuation of State Bar,* 93 Wis. 2d at 391 (Day, J. dissenting) ("[t]his issue will continue to be an unnecessary source of irritation by large numbers of attorneys who favor a voluntary rather than a compulsory membership policy.")); in 1992 (*see* Brief in Support of Board of Governors Petition to Reinstate State Bar of Wisconsin Mandatory Membership Rule (attached as Exhibit A) at 17-18 ("Proponents of a voluntary bar might urge that this Court will not need to devote as much of its resources to supervision of a voluntary bar.")); and 2004 (*see* Commissioner's Memo at 2-12 (discussing the history of the Bar)). In short, the Wisconsin Bar has been the subject of many more challenges than the Nebraska Bar, but this Court has repeatedly found that the State Bar's important role in the Court's regulatory framework and in serving the Wisconsin public outweighs the "irritation" of ongoing challenges. Justice Bablitch, in his concurring opinion in support of the Court's order re-integrating the Bar following *Keller,* put it this way:

> The mandatory bar has been an essential force in assisting lawyers to fulfill their roles as guardians of the rule of law. Of equal importance, the mandatory bar has been a guiding force in assisting lawyers to deliver an increasing quality of justice to society and to those they represent. Many if not most of the services the bar delivers in pursuit of these goals are not self-supporting and are not capable of being subject to user fees. To cite but a few, they include: publications to members keeping them up to date on legal developments including orders and decisions of this Court which regulate the profession and discipline attorneys; publications for public consumption informing the public on matters of justice and the rights and

responsibilities of citizens under law; lawyer referral service, assisting members of the public find qualified lawyers regarding specific legal issues; assistance and promotion of pro bono activities; fee arbitration service; assistance in the disciplinary system by appointing approximately 200 lawyers and lay persons to district grievance committees; ethical advice and guidance to members; assistance to alcoholic, ill and disabled lawyers through the "lawyers helping lawyers" program.

If the bar is voluntary, market forces will eventually dictate that much of the bar's resources, economic and personnel, will have to be directed at recruiting and maintaining membership. The "what's in it for me" syndrome will drive programs, services, and personnel in the direction of self interest, not social responsibility.

If we go back to a voluntary bar, time and money spent on recruiting will mean less time and resources spent on programs. Guess what programs?

If we go back to a voluntary bar, time and money spent on maintaining membership will mean time and money not spent on other services. Guess what services will suffer?

The answers are obvious. Programs and services not targeted to the "bottom line" will inevitably suffer. They are not economically self-supporting and by definition can never be self-supporting. Uncontradicted testimony at the public hearing on the question of an integrated bar evidences that this is already happening with our few short years of "experimentation" with a voluntary bar. One officer testified with chagrin that with increasing frequency she had to commit significant time to the issue of membership and justify the bar's existence to its voluntary members by engaging in activities such as "obtaining discounts at Shopko and at hotels around the state so that lawyers can say the bar responds to 'my' needs." Katja Kunzke, Testimony at the Hearing Before the Wisconsin Supreme Court Concerning Reinstitution of Mandatory Membership to the Wisconsin State Bar Association (March 4, 1992) (tape of hearing available at the Office of the Clerk of the Supreme Court).

All who call themselves lawyer have an obligation to maintain these programs and services that inure to the ultimate benefit of the public. These programs and services go directly to the heart of our social responsibilities. They cannot be maintained without adequate and predictable support levels. To say that only those

> who voluntarily choose to be a member of the bar must pay for them is simply wrong. All share in this responsibility, whether they choose to individually participate in the bar or not. It is a responsibility assumed when they chose to be a lawyer, and continues as long as they choose to call themselves lawyer. This mantle of social responsibility, to society at large and to the individuals within it, is not one that can be shucked at will.

169 Wis. 2d at 29-31 (Bablitch, J., concurring).

Even if this Court did view the "the seemingly neverending battle between Wisconsin attorneys and the Wisconsin State Bar", *Thiel*, 94 F.3d at 399, as a proper consideration, the proposal put forth by the Petition does not address that problem at all, as the Petition continues to provide for arbitration upon request for any State Bar member who believes the Bar has miscalculated the amount of mandatory dues.

Ironically, in Nebraska, it was the ***petitioners*** who recommended the Wisconsin Bar's long-standing procedure as a way to address the constitutional issues in that state. *See* Lautenbaugh Response to NSBA Report to Nebraska Supreme Court, pp. 4-5 (http://c.ymcdn.com/sites/www.nebar.com/resource/resmgr/NSBA_Litigation/Lautenbaugh_Response_NSBAReport.pdf), but the Nebraska Bar rejected that solution as unworkable. *In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 286 Neb. 1018, 1036 (the Bar "asserted that having to perform an item-by-item germaneness analysis would be 'not workable' and 'way too expensive.').[6] There is no such issue here.

In short, while Nebraska chose a bifurcated structure like that proposed by the Petition, the reasons for that choice simply do not exist in Wisconsin. Wisconsin has long had a

[6] *See also Keller*, 496 U.S. at 16-17 (noting the California Supreme Court's concern about the administrative burden of requiring a dues reduction for non-germane activities, and rejecting that concern in light of the procedures it has previously approved in *Hudson v. Chicago Teachers Union*, 475 U.S. 292 (1986), and the fact that unions had been able to operate successfully under such burdens for over a decade.)

dues reduction procedure in place that meets constitutional requirements and is held up as a model by mandatory bar challengers in other states; and this Court has repeatedly found that the important purposes furthered by the existence of the mandatory bar should not be held hostage to the threats of continued challenges.

2. The structure proposed by the Petition would make it more likely Petitioner will be associated with legislative activity of the Bar and have other negative practical consequences.

In the Commissioner's Memorandum prepared in response to the 2011 Petition, it notes: "A voluntary bar may establish a political action committee and individual committees or entities might be permitted to lobby the legislature or petition the court directly under a revised structure." Commissioner's Memo at 30. Under the Petition's proposal, the same would be true. Ironically, then, the Petition would likely have the effect of exacerbating the concern that lawyers will be associated with political positions with which they do not agree, as the public will not distinguish between those activities underwritten by the budget funded with voluntary dues and those funded by mandatory dues, and every lawyer will still be a member of the State Bar. This concern is borne out by Nebraska's experience. The Executive Director of the Nebraska Bar describes it this way:

> [T]he impetus for the petition to deunify the Nebraska State Bar Association was because of a state senator (also an attorney) who was unhappy with the NSBA's legislative program. Although the senator had the opportunity to restrict his dues from supporting lobbying activities, he was unhappy with the fact that an association that he was required to be a member of, frequently lobbied against him as the "voice of the legal profession". The Nebraska Supreme Court ruling has done little to address his underlying concern. The Nebraska Supreme Court's opinion has given the NSBA even more authority to lobby. Because all licensed attorneys are "members" of the NSBA, the NSBA still speaks on behalf of all of those members.

Letter from Elizabeth Neeley, Ph.D., Executive Director, State Bar of Nebraska ("Nebraska Letter"), at 3 (attached as Exhibit B).

3. The structure proposed in the Petition would reduce or eliminate funding for many of the services that the Bar currently provides to the Court, the profession and the public in the state.

Other negative, practical consequences are also likely to follow from the structure proposed by the Petition. In the 2004 Commissioner's Memo, in a list covering approximately three single-spaced pages, numerous Bar activities and services provided to the Court, the members of the Bar and the public were identified. *See* Commissioner's Memo at 26-28. A similar list exists today, including:

> • Legal Research Services: Free, unlimited access to Fastcase online legal research service.
>
> • Fee Arbitration Program: The State Bar offers this informal and economic alternative to litigation for lawyers and clients who are unable to agree upon a fee charged for legal services.
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> • Annual Meeting & Conference (AMC): With more than 500 participants, the AMC is one of the largest gatherings of lawyers in Wisconsin. The AMC brings together State Bar leaders and a diverse mix of members from across the profession and across practice areas. Attendees have access to more than two dozen CLE sessions covering top trends, hot topics, and enduring advice for today's lawyer.
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> • Lawyer Referral and Information Service: A resource for new lawyers seeking clients and an invaluable resource that connects citizens with legal resources to match their needs (including a "modest-means panel").
>
> • Lawyer Hotline: A public service program that provides answers to basic legal questions that can be answered with a return call from a Hotline volunteer at no charge.
>
> • Court-Related & Registration Services: The SBW registers and administers fees for LLC/LLP/SC law firms and acts as an official repository for paper copies of dues payment, trust account certificates and other information for all attorneys, including retrieval of records as required. The SBW also collects and remits

mandatory fees imposed by the Supreme Court for the Office of Lawyer Regulation, the Board of Bar Examiners, the Client Security Fund, and WisTAF); this activity continues throughout the year and can include the mailing of second and third notices.

• InsideTrack: Published twice a month as a State Bar member benefit, this e-newsletter offers practice management tips to insight into legislative, court and other legal developments, as well as the latest in State Bar products and services.

• Client Training Resources: Law Office Videos allow members to prepare their clients for various legal situations including going to court, depositions, medical exams and more.

• Consumer Pamphlets: In addition to providing useful information to the public, these materials allow law offices to establish themselves as a resource the public can turn to for legal information.

• Fillable Forms Bank: The Fillable Forms Bank incorporates hundreds of forms, sample language documents, and checklists generated from the SBW's quality CLE Books, organized into 11 practice area libraries.

• Law Practice Management: Offers an array of law practice management resources through the Law Office Management Assistance Program.

• Law Student Associates Program: The State Bar of Wisconsin offers a variety of resources to help law students connect with the legal profession while in school, including monthly newsletters, information about events they can attend and networking tips.

• Ready.Set.Practice. Mentoring Program: The Ready. Set. Practice. Mentoring Program is a voluntary program that matches new lawyers with experienced mentors in order to assist with law practice management, effective client representation, and career development.

• Greater Wisconsin Initiative Bus Tour: The State Bar's Greater Wisconsin Initiative encourages attorneys to consider practicing in Greater Wisconsin. With many lawyers approaching retirement age, more and more nonurban communities are at risk of losing access to legal services. This program focuses on meeting the legal needs and providing access to justice in rural parts of the state while providing jobs for newer members of the profession.

• Diversity Clerkship Program: The State Bar's program is a limited-term, summer employment opportunity providing first-year law students with diverse backgrounds the opportunity to build legal practice skills and knowledge.

Student clerks gain practical legal experience and participating employers obtain valuable legal support.

• Pro Bono Program: The State Bar encourages members to accept pro bono cases by offering professional liability insurance, networking, expense reimbursement, training, grants, recognition and practical advice. SBW also organizes and supports such pro bono activities as Wills for Heroes.

• Law-related Education (LRE): This program helps educators, students and citizens understand and appreciate the legal system through a variety of programs and publications.

• Lawyer-to-Lawyer Directory: More than 400 lawyers have agreed to share their knowledge of particular areas of the law with other lawyers through brief, 10-minute telephone consultations – free of charge. The service contributes to greater professional competence and improved delivery of legal services.

• Wisconsin Lawyer Magazine: Designated by the Wisconsin Supreme Court as the official monthly publication of the State Bar, Wisconsin Lawyer carries notices of changes in court rules, and regulatory and administrative practice and procedure matters. It also provides information that directly aids and improves law practice and the delivery of legal services, including articles on changes in law, law-related trends and perspective on the practice of law in Wisconsin.

• State Bar Web site (Wisbar.org) offers:

Fast access to reliable, current information about a wide range of matters of interest to Wisconsin lawyers, including summaries of recent court decisions, changes to the law, and other matters affecting the practice of law in Wisconsin and access to justice issues.

Public information about and access to Wisconsin-licensed lawyers, including their disciplinary status.

Quick access to recent official notices of Wisconsin Supreme Court orders adopting, amending, or repealing rules, statutes, or policies.

• Wisconsin Law Foundation: Founded in 1951, the WLF is dedicated to enhancing, promoting, funding and developing charitable and educational programs to promote public understanding of the law.

Many of these Bar programs and activities, provided without cost to taxpayers, serve the public interest in regulating the profession or improving the quality of legal services available to citizens of the state and are neither legislative nor political in nature, yet they would not be

funded by mandatory dues under the narrow definition proposed by the Petition. But the Petition ignores these activities, and offers no analysis of the impact if the Petition were granted. *See also* Commissioner's Memo at p. 31 (noting same lack of analysis in Petition 11-04).

The importance of these activities and services provided by the Bar to the public and this Court, and the impact if mandatory dues were no longer available to fund them, have long been a concern of this Court. As noted by Justice Bablitch in 1992:

> If we go back to a voluntary bar, time and money spent on recruiting will mean less time and resources spent on programs. Guess what programs?
>
> If we go back to a voluntary bar, time and money spent on maintaining membership will mean time and money not spent on other services. Guess what services will suffer?
>
> The answers are obvious. Programs and services not targeted to the "bottom line" will inevitably suffer. They are not economically self-supporting and by definition can never be self-supporting.

169 Wis. 2d at 30 (Bablitch, J., concurring). The reality of these concerns is borne out by Nebraska's experience:

> One of the advantages of a mandatory bar association is that it can look beyond itself to serve both the court system and the public. Voluntary bar associations are inward-looking and must primarily focus on benefits to membership (i.e., strengthening their value proposition for membership and communicating that value proposition). Unfortunately, the cuts to the NSBA budget not only hurt programs that support the profession, but the largest cuts were to programs that support the courts and the public.
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> Many of our lingering challenges are related to the fact that all licensed attorneys are "members" of an association, whether they pay dues or not. The first challenge is in regards to governance.

> That is, non-dues paying members are still allowed to be involved in bar governance (run for President, serve on the House of Delegates or Executive Council). … The remaining activities of the NSBA are non-regulatory, they are voluntary and funded by voluntary dues. Yet someone, who did not pay dues to the Association can vote on the NSBA budget, the NSBA's legislative positions, what benefits are made to dues paying and non-dues paying members, etc. While perhaps unlikely, it would be possible for non-dues paying members to gain a majority within the House of Delegates.
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> Finally, the fact that all licensed attorneys are "members" of the Association has created considerable confusion. There are attorneys who do not want to be considered "members" of the NSBA and are upset that they are considered such. There are attorneys who do not pay dues to the Association but feel that because they are "members" that they should still be entitled to benefits. There are dues paying members who are upset that attorneys who do not pay dues are considered "members" and can be involved in governance. From an association perspective, this has created a marketing challenge. Instead of "member benefits" (which under our system implies all attorneys are entitled to them), we have created benefits for "dues paying members". Prior to the court decision "dues" included the mandatory assessment, and so for many attorneys there is no differentiation between paying their Supreme Court Assessment and paying dues, which leads many back to the assumption that they are entitled to benefits.

Nebraska Letter at 2-3.

If insufficient voluntary dues are paid to fund the numerous activities and services that the Bar currently provides to the Court, the profession and, most importantly, to the public, the Court will have to provide them with its existing staff and/or seek additional funding from the state legislature to add staff necessary to replace the services currently provided by the State Bar; otherwise, these activities and services will cease to exist. Given the

budgetary constraints that the Court is currently facing (*see. e.g., State of the Judiciary: Chief Justice Pushing for Judicial Pay Increases* (http://www.wisbar.org/newspublications/pages/general-article.aspx?articleid=25232), it seems unlikely that the necessary funds would be forthcoming from the Legislature, and many of these services would probably disappear.

4. The Petition would essentially strip the Court of oversight of the Bar.

The Petition describes as "complementary" to the structure proposed by the Petition, certain revisions to Chapter 10 of the Supreme Court Rules governing the Bar and related bylaw amendments that the Board of Governors has considered, suggesting that the Bar would prefer to be free of the Court's governance as well. Notably, the Petition does not attach copies of the proposed amendments. If it had, the fallacy of the Petition's position would be evident.

Generally, the amendments at issue propose moving certain management and operation provisions from the Supreme Court Rules to the State Bar's by-laws to enhance the Bar's efficiency, while ensuring continued Supreme Court oversight. More specifically, as the memorandum prepared by the Governance Committee explaining the proposed amendments to the Board of Governors notes:

> The proposed changes to SCR Chapter 10 can be grouped into four over-arching categories: (1) removing individual officers and the Board of Governors ("BOG") from many of the responsibilities set forth in the Supreme Court Rules and delegating these responsibilities instead to the Bar and its staff, (2) minor changes to the dues structure, (3) removal of the day to day operational duties and obligations of State Bar officers, committees, sections and divisions from the Supreme Court Rules to the Bylaws, and (4) changes to the referendum and amendment procedures [to allow referenda and amendments to occur more easily].
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> . . .

> The proposed changes to the State Bar Bylaws can be grouped into five areas: proposed changes that (1) insert provisions formerly found in the Supreme Court Rules, (2) update the voting procedures for BOG members, (3) create two new standing committees, the Leadership Development Committee and the Audit Committee, while updating the description of some of the other committees, (4) add a new Sections Leaders Council to oversee the interests of the various Sections, and (5) create an entirely new Article of the By-laws dealing with the Divisions.

See Rules and By Laws Committee, Executive Summary of Proposed Changes, January 4, 2017 (attached as Exhibit C). None of these proposed revisions detracts from the Court's ultimate authority and oversight of the Bar. Most fundamentally, the purposes of the Bar set forth in SCR 10.02(2) remain unchanged; the procedure for proposed revisions to the Supreme Court Rules currently set forth in SCR 10.13(1) is unchanged (although renumbered to SCR 10.09(1)); and proposed revisions to the by-laws remain subject to review by this Court under SCR 10.13(2) (renumbered SCR 10.09(2) in the BOG's proposal) upon the filing of a petition signed by 25 members of the Bar. *See* January 4, 2017 Changes to SCR 10 Recommended by the Governance Committee (attached as Exhibit D).

By contrast, the Petition would make the Bar a voluntary organization for most purposes. As a voluntary organization, the Bar's activities would no longer be subject to this Court's review and the provisions of SCR 10 would largely be irrelevant as the structure set forth there would no longer be needed for the few remaining functions that the Petition envisions for the Bar. At a minimum, "[t]here are questions about the extent to which the current structure of the State Bar could be maintained if the court opted to end mandatory bar membership. The petition filed with the court does not analyze, in detail, how the petition would affect the State Bar, its structure, finances and the services it provides. … [C]ertain

organizational relationships between the court and the bar would likely require restructuring." Commissioner's Memo at 31.

Conclusion

If adopted, the Petition would eliminate a system that has been constitutionally approved and worked well in Wisconsin for decades, only to replace it with a an unworkable, unwieldy alternative that would exacerbate some of the very concerns it purports to solve and create a number of additional problems along the way. The Court should reject Petition 17-04.

Respectfully submitted this 15th day of September, 2017.

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