STATE OF WISCONSIN
IN SUPREME COURT

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

Petitioner Steven Levine hereby petitions this Court to repeal SCR 10.03(5)(b), to adopt a new SCR 10.03(5)(b)-(e), and to amend SCR 10.03(6) as follow: Adopt SCR 10.03(5)(b)-(e) to read:

"(b) Prior to the beginning of each fiscal year the State Bar shall approve a budget which shall be the basis for mandatory dues and a budget which shall be the basis for voluntary dues.

(c) The budget for mandatory dues may include only the costs of the following regulatory programs:

1. Preparing for and participating in rulemaking proceedings before the Supreme Court;

2. Administering the Fund for Client Protection;

3. Administering a program to aid lawyers with addictions or other personal problems which may affect their practices and clients;

4. Offering legal advice to Wisconsin lawyers concerning the requirements of SCR Ch. 20 and other ethical questions.

5. Other regulatory programs which may be specifically approved by the Supreme Court after hearing.

(d) All State Bar activities other than those specified in SCR 10.03(5)(c) shall be supported by voluntary dues, user fees, or other sources of revenue, which shall be segregated from mandatory dues.

(e) Any State Bar member who believes the Bar has miscalculated the amount of mandatory dues may request arbitration under an arbitration process adopted by the State Bar via bylaw and affirmatively approved by the Supreme Court."

Amend SCR 10.03(6) to read: "Penalty for nonpayment of mandatory dues. If the annual mandatory dues or assessments of any member remain unpaid 120 days after the payment is due, the membership of the member may be suspended in the manner provided in the bylaws; and no person whose membership is so suspended for nonpayment of mandatory dues or assessments may practice law during the period of the suspension." (additions underlined)

MEMORANDUM

INTRODUCTION

These proposed rule changes are submitted to the Supreme Court because of three events. First, in December 2013 the Supreme Court of Nebraska issued an opinion in response to a petition asking that court to make membership in its mandatory state bar voluntary: *In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska,* 286 Neb. 1018, 841 N.W.2d 167 (2013). After reviewing all of the relevant state and federal precedents, the Nebraska Supreme Court continued its bar as a mandatory bar, but the court determined that the dues of its mandatory state bar could only be used for regulatory purposes. If the bar wished to engage in non-regulatory activities, only voluntary funds could be used. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska,* 286 Neb. 1018, 1035-36,

841 N.W.2d 167, 178-79 (2013). That court then specified the regulatory activities on which mandatory dues could be spent and set the amount of mandatory dues. The rule proposed in this proceeding is modeled on the Nebraska court's action, but it allows the State Bar of Wisconsin to set the amount of both mandatory and voluntary dues. Mandatory dues could only be used to support the specified regulatory activities engaged in by the Bar; voluntary dues must be used to support all other activities.

Second, on February 22, 2016 arbitrator Howard Bellman issued his decision in a request by three State Bar of Wisconsin members (including petitioner in this rulemaking proceeding) under SCR 10.03(5)(b)3 for arbitration concerning the expenditure of State Bar dues for legislative lobbying purposes.[1] The arbitrator determined that the use of mandatory dues for legislative lobbying by the State Bar was appropriate under federal case precedent. Some of the State Bar lobbying activities at issue in the arbitration were: (1) lobbying in favor of a State Bar proposed constitutional amendment to extend the term of a supreme court justice from 10 years to 16 years, but limit the justice to a single term (the largest lobbying expenditure at issue in dollar terms); (2) lobbying in favor of the judicial branch budget, which included in substantial part the salaries of judges and justices; (3) lobbying concerning the salaries of assistant district attorneys, assistant public

[1] The arbitrator's decision is included with this petition and also will be filed electronically. Prior to commencement of that proceeding, petitioner in this rulemaking proceeding twice offered to withdraw his request for arbitration if the State Bar would agree to use only voluntary funds for future legislative lobbying. The Bar refused that proposal, deciding instead to spend tens of thousands of membership dues dollars on the arbitration in order to vindicate its ability to lobby the legislature with mandatory dues. The State Bar – supposedly a quasi-public entity -- refuses to disclose the total amount of Bar dues revenues it spent on the arbitration.

defenders, and attorneys employed by state agencies; and (4) lobbying on a bill concerning judicial substitution.[2]

None of these proposals lobbied by the State Bar were regulatory in nature, nor did they directly concern either lawyer ethics or education. They were political matters about which Wisconsin attorneys and judges have different opinions. Certainly, there can be no greater violation of the rights of free speech, petition, assembly, and association – under both state and federal constitutions – than for government to force citizens to join and pay dues to an association which lobbies the legislature with their money against their will.

Third, at its April 21, 2017 meeting the State Bar Board of Governors voted to petition the Supreme Court to amend several Supreme Court rules (SCRs) to transfer a number of regulatory subjects from SCRs to State Bar bylaws – thus making the Bar more free from direct Court regulation and increasing the power of the Board of Governors. (That petition may be filed with the Court shortly. The Court may wish to consider that petition at the same hearing as the present petition.) This attempt by the Bar to free itself from direct Court regulation in a number of important areas complements the present petition. Except for the use of State Bar "mandatory dues," which are to be used only for regulatory purposes under proposed SCR 10.03(5)(b)-

[2] The arbitrator wrote at page three of his decision:

"Under the Keller and Kingstad, above, decisions, an expenditure that is germane to "improving the quality of legal services," even if it supports lobbying and engaging in the political process, may be properly included in compulsory dues. Lobbying is not, as Petitioners contend, *per se,* ideological or political activity that may not be supported by compulsory dues. On the contrary, it may be supported by compulsory dues where it is germane ("reasonably related") to the purpose of "improving the quality of legal service.""

(e), the Bar should be free to govern its affairs in all other "non-regulatory" areas, including the setting of "voluntary dues" – just as does every other voluntary professional association. Granting both petitions at the same time would initiate a new era of State Bar operations.

ARGUMENT

From its very beginning, the State Bar of Wisconsin was proposed -- and upheld as constitutional – as a body which would supervise and regulate the practice of law in this state. At oral argument in *Lathrop v. Donohue*, 367 U.S. 820 (1961), Attorney General John Reynolds told the court: "And the integrated bar is merely a mechanism for the Court to supervise its own Bar. And it's up to the State to determine which method of supervision, granting they have the authority to supervise it and it's reasonable as to which method they – they should use." The Attorney General described the State Bar as "a governmental agency" designed to "police the activities" of lawyers in Wisconsin.[3]

In upholding the constitutionality of the integrated bar, the United States Supreme Court stated at page 843:

Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating 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 any 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 attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of

[3] Text and voice of the oral argument are available on line.

reasonable annual dues, we are unable to find any impingement upon protected rights of association. (emphasis added)

Thus, the integrated State Bar of Wisconsin was presented as and upheld as a governmental agency through which the Supreme Court of Wisconsin would supervise, regulate, and improve the ethics and abilities of attorneys who practice law in Wisconsin. Several United States Supreme Court decisions subsequent to *Lathrop* have reiterated the principle that mandatory assessments --such as State Bar dues -- may be used to fund only "regulatory" activities, which are subject to the test of "exacting First Amendment scrutiny" on judicial review.[4]

In Wisconsin the important regulatory functions of admission to the practice of law, continuing legal education (CLE), and compliance with SCR Ch. 20 are now performed by the Board of Bar Examiners (BBE) and Office of Lawyer Regulation (OLR), not the State Bar.[5] Today, the situation of the State Bar has substantially

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[4] See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014), *Knox v. Service Employees Intern. Union, Local 100*, 132 S. Ct. 2277, 2289 (2012) and *United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001).

[5] *See Matter of State Bar of Wisconsin: SCR 10.01(1)*, 169 Wis.2d 21, 34, 485 N.W.2d 225, 231 (2002):
***231** I would not reinstitute a unified bar because these two activities, regulating the legal profession and improving the quality of legal service, are performed primarily by the Wisconsin supreme court, not the State Bar of Wisconsin.6 To support these activities, the court ***35** annually sets assessments which all lawyers licensed to practice in this state are required to pay. In 1976, the court explicitly removed these responsibilities from the Bar and placed them under the court's supervision to assure the public that lawyer discipline, bar admission, and regulating competence through continuing legal education would be conducted for the benefit of the public, independent of elected bar officials.7
The court's annual mandatory assessment on the lawyers of the state, not the membership dues paid to the State Bar of Wisconsin, finances the Board of Attorneys Professional Responsibility (BAPR), the investigatory and prosecutorial arm of the court for regulating lawyers. The Bar itself plays no direct role in the grievance process.
The court's annual mandatory assessment on the lawyers of the state, not membership dues paid to the State Bar, finances the court's mandatory continuing legal education program for improving the quality of legal services available to the people of the state. The Board of Bar Examiners (BBE), an arm of the court, ***36** administers the bar examination and the mandatory continuing legal education program imposed by the court. The State Bar is one provider, among many, of continuing legal education programs, but the Bar's continuing legal education programs are not funded by members' dues; they must be self-supporting. *In re Regulation of the Bar,* 81 Wis.2d xxxv, xli (1977).8
Thus all lawyers licensed to practice in Wisconsin pay the court-mandated annual assessments to

changed from what was described in 1961, with the Bar performing few if any regulatory functions while becoming more a professional association of lawyers. In 1976 this court drew a clear line of demarcation, deciding to completely separate from the State Bar the regulatory functions performed by the predecessors of OLR and BBE – enforcing SCR chapter 20, CLE, and admission-to-practice requirements – and financing these agencies by assessments entirely separate from State Bar dues. (Please see fn. 5.) The purpose and character of the State Bar have completely changed from what was originally intended as a regulatory agency to primarily a private, professional association of lawyers.[6]

Also, by order of the Court, the costs of CLE courses are paid for by those who attend the courses and not by mandatory State Bar dues.[7] Thus, BBE and OLR assessments and the tuition for CLE courses pay for the important regulatory activities of enforcing ethics, bar admission, CLE requirements, and offering CLE courses – not State Bar dues.[8] As a matter of compromise and good will, proposed SCR 10.03(5)(c) includes a number of governmental-like functions which may be

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support the court-created and court-supervised boards primarily responsible for regulating the legal profession and improving the quality of legal service available to the people of the state. There are no "free riders."9 We need not mandate membership in the State Bar to ***232** eliminate a problem with free riders when no such problem exists. (Abrahamson, C.J., dissenting)

[6] The United States Supreme Court has held that, for purposes of First Amendment analysis, an integrated state bar is not a government agency. *See Keller v. State Bar of California*, 496 U.S. 1, 10-13 (1990).

[7] *See In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv, xli, xlvii, xlix (1977).

[8] *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). See also *Matter of Discontinuation of the Wisconsin State Bar,* 93 Wis.2d 385, 389-90, 286 N.W.2d 601 (1980) (Day and Callow, JJ., dissenting), and *Report of Committee to Review the State Bar,* 112 Wis.2d xix, xxxvi, 334 N.W.2d 544 (1983) (Abrahamson, J., concurring).

considered as regulatory and which are included as supportable by "mandatory dues." All other State Bar expenditures should be voluntary.

Without 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[9] into which no lawyer should be coerced. Thomas Jefferson wrote that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."[10] This Court should end the use of mandatory dues for any activities except those which regulate or educate lawyers – the two purposes for which the State Bar of Wisconsin was established.[11]

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[9] The term "political" is defined by an online dictionary as "relating to the government or the public affairs of a country." To be "political" an activity need not necessarily be *partisan* political.

[10] *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, fn. 15 (1986). The freedom to associate – or not to associate – is also recognized by international law: United Nations Declaration of Human Rights, Article 20:
"(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association." (emphasis added)

[11] The Court has held that the Wisconsin Legislature has no jurisdiction to regulate either legal ethics or continuing legal education. *Please see, e.g., State v. Cannon*, 196 Wis. 534, 221 N.W. 603 (1928); *State v. Cannon*, 206 Wis. 374, 240 N.W.2d 441 (1932); *State ex rel. Reynolds v. Dinger*, 14 Wis.2d 193, 202, 109 N.W.2d 685, 690 (1961)(" . . . we hold that such broad power over the practice of law is a judicial power vested in the courts by Art. VII, sec. 2 of the state constitution."); *In Re Admission of Certain Persons to the Bar*, 211 Wis. 337, 247 N.W. 877 (1933); *Fiedler v. Wisconsin Senate*, 155 Wis. 2d 94, 103, 454 N.W.2d 770, 774 (1990). (The judiciary's authority to regulate the practice of law is "inherent and exclusive"; therefore, the legislature may not prescribe continuing educational requirements for attorneys who seek appointment as guardians *ad litem*.) Regulation of attorneys admitted to practice in Wisconsin and the practice of law in this state are the exclusive province of the Wisconsin Supreme Court. The Wisconsin Legislature has no regulatory authority or jurisdiction over lawyer ethics or continuing legal education requirements in this state. Therefore, all State Bar

CONCLUSION

Proposed SCR 10.03(5)(b)-(e) represents a reasonable compromise.[12] It vindicates the state and federal constitutional freedoms of speech, petition, assembly, and association of all State Bar members while at the same time continuing the State Bar as a going concern, able to continue its few regulatory functions as well as its non-regulatory activities – albeit the latter with voluntary dues. Coerced participation in the legislative process is abhorrent to both conservative principles of government and to any notions of civil rights and civil liberties.[13]

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legislative lobbying is *per se* non-regulatory. It is political activity into which no lawyer should be coerced.

[12] Proposed SCR 10.03(5)(b)–(e) represents a reasonable compromise between mandatory membership in the State Bar and an entirely voluntary State Bar, the alternative which is favored by a large majority of State Bar members. In the most recent membership survey conducted on the issue by the State Bar of Wisconsin itself (in 2008), 57+ per cent of Wisconsin lawyers favored a voluntary State Bar. (If the Court has any doubt about the accuracy of this State Bar membership survey, the Court may wish to direct the State Bar to hold an advisory referendum of all bar members on the issue of whether State Bar membership should be voluntary. There is precedent for the Court to order such a referendum on an important issue concerning regulation of the profession. Prior to requiring mandatory continuing legal education in Wisconsin, the Court ordered such a referendum. After Wisconsin lawyers voted in favor, the Court ordered mandatory CLE. *See In the Matter of the Supreme Court Rule Requiring Continuing Legal Education of Members of the Wisconsin Bar*, 71 Wis. 2d xix-xxii (1975).) Additionally, of the last twelve elections for State Bar president-elect, four involved candidates who favored a voluntary State Bar in their platforms. All four candidates who favored a voluntary State Bar won. Proposed SCR 10.03(5)(b)–(e) represents a reasonable compromise between the two positions of mandatory bar membership and an entirely voluntary bar.

Although just a few years ago the court voted 4-3 to dismiss a petition to make membership in the State Bar voluntary, if the court now believes that the voluntary bar alternative is preferable to the compromise proposed in the present rulemaking petition, petitioner is willing to submit a new petition for a voluntary bar.

[13] In acting to limit the use of mandatory State Bar dues to support only regulatory or educational activities, the Court may ground its decision on any or all of the following bases: the First Amendment to the United States Constitution, Article I Sections 3 and 4 of the Wisconsin Constitution, and the Court's inherent authority to regulate the practice of law. This Court is not bound by the minimums set forth in federal court decisions in interpreting the Wisconsin Constitution or in exercising its inherent authority over the practice of law:

"Certainly it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment.

At the same time, proposed SCR 10.03(5)(b)-(e) retains individual lawyer responsibility to financially support State Bar efforts to improve attorney ethics regulation and continuing legal education. State Bar proposals to the Court – such as updating ethical rules or the Bar's recently proposed amendment of CLE rules to allow CLE credit for *pro bono* activities -- would continue to be supported by mandatory dues, as set forth in proposed SCR 10.03(5)(c)1. Proposed SCR 10.03(5)(b)-(e) retains those financial responsibilities inherent in being a member of the legal profession while guaranteeing a lawyer's freedom of speech, association, assembly, and petition.[14]

The proposed repeal and recreation of SCR 10.03(5)(b) is a rulemaking proceeding, not an appellate one. The Court is entitled to set policy and use its discretion. Some members of the Court may believe in a conservative philosophy of government, a philosophy that minimizes government intrusion into individuals' lives and frees them to maximize their potential. Forcing Wisconsin lawyers to join and pay dues to an association which uses those dues to lobby the legislature against their wills – forcing them to financially support political activity with which

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This court has demonstrated that it will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *State v. Doe*, 78 Wis. 2d 161, 171, 172, 254 N.W.2d 210, 215, 216 (1977).

Certainly the Wisconsin Constitution prevents the State from forcing a person to join and pay dues to an association which uses those dues to lobby the legislature against his or her wishes and principles. Can there be a more invasive violation of the civil liberties of assembly, association, petition, and speech than forced participation in the legislative process?

[14] When a lawyer turns age 70 and reaches emeritus status, the only State Bar administered program he or she must continue to financially support is the Fund for Client Protection, indicating that this program is the only Bar activity which is presently considered regulatory. Proposed SCR 10.03(5)(b)-(e) is more generous in its inclusion of State Bar programs which are considered regulatory in nature.

they disagree -- is entirely inconsistent with the most basic conservative principles of government.

Other Justices may not consider yourselves to have a conservative philosophy of government; nevertheless, defending the civil rights and civil liberties of all Wisconsin citizens is also of utmost importance to you. There is nothing consistent with civil rights or civil liberties in forcing Wisconsin lawyers to join an organization which lobbies the legislature with their money against their principles and wishes. This violation of the most fundamental of civil rights – the decision whether and how to participate in the political process – should be abhorrent to all members of the Court, regardless of philosophy of government.

On April 20, 2017 this Court upheld the First Amendment right of all citizens to participate in judicial election campaigns when it rejected proposed recusal rules which would have seriously impaired that right. In a similar fashion, the Court should vindicate the constitutional right of all Wisconsin lawyers to determine for themselves whether, when, and how they wish to participate in the legislative process. The Court is respectfully requested to repeal current SCR 10.03(5)(b) and replace it with proposed SCR 10.03(5)(b)–(e), and amend SCR 10.03(6).

Respectfully submitted,

/s/ Steven Levine

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