

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 09-08A

In the matter of petition to amend
Supreme Court Rule 10.03(5)(b)1.

FILED**AMENDED ORDER****NOV 11, 2011**

A. John Voelker
Acting Clerk of
Supreme Court
Madison, WI

On August 24, 2009, Jon Kingstad, Steven Levine, James Thiel, and 40 other members of the State Bar of Wisconsin petitioned this court to amend Supreme Court Rule (SCR) 10.03(5)(b)1. On November 17, 2010, this court issued an order holding this rule petition in abeyance pending final disposition of all federal litigation in Kingstad v. State Bar of Wisconsin, a case filed by the named petitioners challenging the use of mandatory dues to fund a State Bar public image advertising campaign. On December 3, 2010, following the Seventh Circuit Court of Appeals' decision in Kingstad, 622 F.3d 708 (7th Cir. 2010), the petitioners amended their rule petition, proposing further changes to the language of SCR 10.03(5)(b)1.

At open administrative conference on January 12, 2011, the court voted to conduct a public hearing on the amended petition. A letter to interested parties was sent on February 16, 2011. Attorney Steven

Levine filed a letter dated March 27, 2011. The State Bar filed a response to the amended petition on April 11, 2011.¹

A public hearing was conducted on April 11, 2011. Attorney Steven Levine presented the petition to the court. Attorney Roberta Howell appeared on behalf of the State Bar. At the ensuing open administrative conference the court discussed the matter extensively.

Supreme court rule 10.03(5) is entitled "Membership dues and reduction of dues for certain activities." Supreme court rule 10.03(5)(b)1. currently provides as follows:

(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 compulsory dues of any member who objects to that use for political or ideological activities that are not reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services. The state bar shall fund those political or ideological activities by the use of voluntary dues, user fees or other sources of revenue.

In Kingstad, the Seventh Circuit Court of Appeals stated, inter alia, that:

[T]he State Bar may use the mandatory dues of objecting members to fund only those activities that are reasonably related to the State Bar's dual purposes of regulating the profession and improving the quality of legal services,

¹ The petitioners objected to the State Bar filing as untimely, but the court accepted the filing. The State Bar's response notes that on April 9, 2011, the State Bar Board of Governors approved certain amendments to the State Bar bylaws, SCR Ch. 10 Appendix, Article I, section 5, pertaining to procedures for dues reductions. On July 6, 2011, 25 active members of the State Bar of Wisconsin filed a petition asking this court to review and void or amend the amendment. That request is pending before the court. See Rule No. 11-05, In the matter of the petition to review change in State Bar Bylaw.

whether or not those same expenditures are also non-ideological or non-political.

Kingstad, 622 F.3d at 718. The Seventh Circuit Court of Appeals specifically addressed SCR 10.03(5)(b)1., stating:

This holding effectively finds that the second sentence of Wisconsin Supreme Court Rule 10.03(5)(b)1 is too narrow because it authorizes objections to the use of mandatory dues only for political and ideological activities that are not reasonably related to the constitutional purposes of regulating the legal profession and improving the quality of legal services.

Id.

The question before the court in this administrative rule matter was whether to adopt the amendments proposed by the petitioners. The petitioners asked the court to modify SCR 10.03(5)(b)1. as follows:

(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 compulsory dues of any member who objects to that use for ~~political or ideological~~ activities that are not reasonably directly, primarily, and substantially intended for the purpose of regulating the legal profession or improving the quality of legal services. The state bar shall fund those ~~political and ideological~~ activities by the use of voluntary dues, user fees or other sources of revenue. The burden of demonstrating that an activity is directly, primarily, and substantially intended for the purposes of regulating the legal profession or improving the quality of legal services shall be on the State Bar and shall be met by clear and convincing evidence.

The State Bar's response objected to aspects of the amended petition and proposed different amendments to read as follows:

(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.

The court considered these proposals. The court unanimously agreed that the words "political or ideological" and "political and ideological" must be deleted from SCR 10.03(5)(b)1. The court opted to amend the rule to comport with language cited in the Kingstad decision.²

The court took the matter under advisement. On October 17, 2011 and November 7, 2011, the court discussed the matter in open administrative conference and voted, unanimously, to amend SCR 10.03(5)(b)1. as set forth herein. Therefore,

IT IS ORDERED that the Supreme Court Rules are modified, effective January 1, 2012, as follows:

SECTION 1. 10.03(5)(b)1. of the Supreme Court Rules is amended to read:

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 set forth in SCR 10.02(2). The State Bar may not use the

² The court considered the petitioners' request for an amendment adding language that would impose a burden of proof on the State Bar. Members of the court expressed different opinions regarding whether a burden of proof should be imposed on the State Bar in SCR 10.03(5)(b)1., whether language in proposed bylaws was sufficient to impose a burden of proof on the State Bar, and what burden of proof might be required or otherwise appropriate. On April 11, 2011, the court voted 5 to 2 (C.J. Abrahamson and J. Prosser, dissenting) to defer adoption of any language imposing a burden of proof on the State Bar pending the court's review of recent State Bar bylaw amendments (Rule No. 11-05, In the matter of the petition to review change in State Bar Bylaw).

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

Expenditures that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services may be funded only with voluntary dues, user fees or other sources of revenue.

SECTION 2. The following Comment to SCR 10.03(5)(b)1. is created to read:

Comment

The term voluntary dues in SCR 10.03(5)(b)1. refers to the dues of members who do not withhold dues pursuant to SCR 10.03(5)(b)2. or successfully object pursuant to SCR 10.03(5)(b)3.

IT IS FURTHER ORDERED that the Comment to 10.03(5)(b)1. is not adopted, but will be published and may be consulted for guidance in interpreting and applying SCR 10.03(5)(b)1.

IT IS FURTHER ORDERED that notice of this amendment of SCR 10.03(5)(b)1. be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 11th day of November, 2011.

BY THE COURT:

A. John Voelker
Acting Clerk of Supreme Court

