

STATE OF WISCONSIN  
IN SUPREME COURT  
RULEMAKING DOCKET 09-08

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AMENDED PETITION TO AMEND SCR 10.03(5)(b)1

09-08

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Petitioners Attorneys John Kingstad, Steven Levine, and James Thiel hereby petition the Supreme Court of Wisconsin to amend SCR 10.03(5)(b)1 as follows:

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.

Reasons for the petition are as follow:

1. The stricken language is required to be removed by the United States Court of Appeals for the Seventh Circuit's opinion in *Kingstad, et. al v. State Bar of Wisconsin* (09-4080, September 9, 2010). In that opinion, the court specifically held that the inclusion of the words "political or ideological" made SCR 10.03(5)(b)1 "too narrow." (Slip opinion at page 22; Judge Sykes' dissenting opinion at page 31.). The court held that the State Bar must inspect all its expenditures – not just those which are "political or ideological" – to determine whether they were made for purposes of "regulating the legal profession or improving the quality of legal services."

2. Addition of the underlined language is requested because of the "deferential" rational basis standard of review adopted by the 7<sup>th</sup> Circuit in *Kingstad* in determining whether a State Bar expenditure is intended for the purposes of "regulating the legal profession or

improving the quality of legal services.” (Slip opinion at pages 24-25) In *Kingstad* the court upheld the State Bar’s public image advertising campaign (to improve the image of lawyers) as reasonably related to the purpose of “improving the quality of legal services.” (That court has also upheld the State Bar’s “Economics of Practice” survey as germane to improving the quality of legal services. Slip opinion at page 28.)

We agree with Judge Sykes’ dissent at page 39 of the Slip Opinion that the 7<sup>th</sup> Circuit’s standard of review “is not merely generous, it is meaningless.” Petitioners believe that their proposed additional language for SCR 10.03(5)(b)1 is necessary to adequately protect the First Amendment interests of Wisconsin lawyers and that it is germane to and inextricably intertwined with the original amendment proposed in this docket. The proposed additional amendment also offers better guidance and provides a more definite standard for the State Bar to follow when setting its annual budget. Hearing both proposed amendments at the same time is advisable to save time and expense for all parties – and to avoid continued litigation.

A memorandum in support of this petition is attached.

Dated: December 3, 2010.

Respectfully submitted,

/s/ *Jon E. Kingstad*

/s/ *Steven Levine*

/s/ *James S. Thiel*

Cc: State Bar of Wisconsin

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## MEMORANDUM IN SUPPORT OF RULEMAKING PETITION

In its opinion in *Kingstad, et al, v. State Bar of Wisconsin*, --- F.3d --- (7<sup>th</sup> Cir. 2010), the court partially overruled its decision in *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 405 (7<sup>th</sup> Cir. 1996) and held that the State Bar is constitutionally required to inspect all of its expenditures, not merely those which are political or ideological, to determine whether they are made for purposes of “regulating the legal profession or improving the quality of legal services.” (Slip opinion at pages 17-22). Because SCR 10.03(5)(b)1 is limited to only “political or ideological” expenditures, both the majority opinion and the dissent in *Kingstad* found the rule “too narrow.” (Slip opinion at pages 22, 31.). There is no doubt, therefore, that the “political or ideological” and “political and ideological” language stricken in the proposed rule set forth above must be removed, or the rule is unconstitutional.

Petitioners also suggest that this court add the language underlined above to the rule for the following reason: The 7<sup>th</sup> Circuit’s *Kingstad* decision applied an extremely deferential “rational basis” test to determining whether a State Bar expenditure is made for purposes of “regulating the legal profession or improving the quality of legal services” – the same test used by courts for determining whether “legislation . . . is reasonably related to a legitimate governmental purpose.” (Slip opinion at 24-25) Under this test, an expenditure is to be upheld if the reviewing court can imagine any purpose of the expenditure which fits the standard of “regulating the legal profession or improving the quality of legal services” and assume the expenditure was made for this purpose – whether that was the actual purpose of the expenditure or not. Under that standard, the 7<sup>th</sup> Circuit has upheld the State Bar’s Public Image public relations advertising campaign as well as the Bar’s Economics of Practice survey (Slip opinion at 28).

Petitioners believe this court should adopt a stricter standard evidenced by the language underlined above for two reasons: 1. State Bar expenditures from compulsory dues represent potential violations of Bar members' First Amendment rights, and the standard of strict scrutiny has traditionally been applied to First Amendment issues. *State v. Baron*, 2009 WI 58, ¶ 31, 318 Wis. 2d 60, 77, 769 N.W.2d 34: “[R]egulation must survive strict scrutiny if it is content based. . . .” 2. Petitioners believe that this Court’s intent is not to require mandatory membership in the State Bar in order to force Bar members to pay for such activities as a public relations campaign to improve the image of lawyers or a survey to assess the economic status of lawyers. While these expenditures may be entirely appropriate for members of voluntary professional associations, they should not be forced on members of integrated bars.

The Court is respectfully requested to adopt Petitioners’ amended version of SCR 10.03(5)(b)1.

Respectfully submitted,

*/s/ Jon E. Kingstad*

*/s/ Steven Levine*

*/s/ James S. Thiel*

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