

SUPREME COURT OF WISCONSIN

No. 13-11C

**In the matter of the petition for amendment to
Supreme Court Rule 10.03(4) (b)2 relating to pro
hac vice applications**

FILED

JUL 1, 2019

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

By order dated May 16, 2019, this court amended the Wisconsin Comment to Supreme Court Rule (SCR) 10.03(4) to reflect the court's determination that effective July 1, 2019, or as soon thereafter as practicable, the State Bar of Wisconsin will receive and administer the fee for admission pro hac vice established in SCR 10.03(4)(b)2, according to the terms of this court's rule and a Memorandum of Understanding between the State Bar of Wisconsin and the recipients of those funds. The Memorandum of Understanding is subject to this court's prior approval. See S. Ct. Order 13-11B, 2019 WI 52 (issued May 16, 2019, eff. Jul. 1, 2019).

Thereafter, the State Bar of Wisconsin provided this court with a draft of the proposed Memorandum of Understanding between the State Bar and the Wisconsin Trust Account Foundation, Inc. ("WisTAF") and Wisconsin Access to Justice Commission, Inc. ("ATJC"). The Memorandum of Understanding provides, inter alia, that of the \$250 fee, \$50 shall be allocated to the Office of Lawyer Regulation and

the remaining \$200 shall be allocated equally to WisTAF (\$100) and ATJC (\$100). Therefore,

IT IS ORDERED that the Memorandum of Understanding required by S. Ct. Order 13-11B, 2019 WI 52 (issued May 16, 2019, eff. July 1, 2019) is approved by the court.

Dated at Madison, Wisconsin, this 1st day of July, 2019.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

¶1 DANIEL KELLY, J. (*dissenting*). The mission of Wisconsin Access to Justice Commission, Inc. (the "Commission") is "[t]o develop and encourage means of expanding access to the civil justice system for unrepresented low-income Wisconsin residents." Wisconsin Access to Justice Commission, <https://wisatj.org> (last visited June 27, 2019) (emphasis removed). It furthers this mission "through legislative education, public education, and by providing a forum for sharing information about what works in civil legal aid. We help build bridges that overcome barriers to justice." Id.

¶2 I applaud the Commission's mission, and wholeheartedly desire its rapid advancement. But the importance and urgency of its efforts do not, by themselves, confer on us the authority to compel others to support its work. Nor do they exempt us from constitutional prohibitions on compelled speech. Therefore, I respectfully (and regretfully) dissent from this order.

¶3 The compelled-speech dynamic created by our funding of the Commission is a consequence of the relationship between the Commission, the Wisconsin Supreme Court, and the out-of-state attorneys who apply to practice in Wisconsin's courts pro hac vice. Understanding that relationship begins with the Commission's nature and origin.

¶4 Chapter 14 of the Wisconsin Supreme Court Rules required the Wisconsin State Bar (the "Bar") to create an "Access to Justice Commission." SCR 14.02(1). In response, the Bar caused the Commission to be incorporated as a new entity

pursuant to Chapter 181 of the Wisconsin Statutes on March 11, 2010. The Commission is a private organization created for charitable and educational purposes:

The corporation is organized and shall be operated exclusively for charitable and educational purposes within the meaning of I.R.C. Section 501(c)(3). Such purposes may include, but are not limited to, developing and encouraging the expansion of access to the civil justice system in Wisconsin for unrepresented, low-income residents. The corporation may carry out its purposes directly or by making gifts, grants, or other payments to qualifying organizations, as well as by making distributions in accordance with subsections 181.1302(3) and 181.1302(4) of the [Wisconsin Statutes].^[1]

The Commission is governed not by the Wisconsin Supreme Court, but by its own Board of Directors:

The affairs of the corporation shall be managed by its board of directors (the "Board of Directors" or "Board"), which shall consist of such number of persons as shall be fixed by the Bylaws from time to time, but such number shall not be less than the number of directors required by [Chapter 181 of Wisconsin's Statutes], which at the time of execution of these Articles of Incorporation is three (3).^[2]

¶5 The Supreme Court Rules purport to control membership of the Board, see SCR 14.03(2)(a)-(i), but in actuality it is the Commission's bylaws that determine who may join and what qualifications they must have: "The terms of office,

¹ See Wisconsin Access to Justice Commission, Inc., Articles of Incorporation, art. II (available at <https://wisatj.org/wp-content/uploads/2010-03-18-Articles-of-Incorporation-WDFI-Filed.pdf>) (last visited Jun. 27, 2019).

² Id. at art. VI.

qualifications, and method of election of the directors shall be as specified in the Bylaws."³ And because the Commission's Articles of Incorporation provide that it has no members, revisions to the bylaws are at the Board's sole discretion. See Wis. Stat. § 181.0206(2) ("After the adoption of the initial bylaws under sub. (1), bylaws may be adopted either by the members or the board Any bylaw adopted by the board is subject to amendment or repeal by the members as well as by the directors."). Therefore, to the extent the Commission seats a director identified in SCR 14.03(2)(a)-(i), it does so as an accommodation, not as a requirement.

¶6 The upshot of all this is that, although the Wisconsin Supreme Court commanded the creation of the Commission, it neither brought the Commission into existence (the individual incorporator identified in the Articles accomplished that task) nor does it have any authority to govern the Commission (the Board reserves to itself that function). Consequently, the relationship obtaining between the Commission and the Wisconsin Supreme Court is that of a private organization and a branch of government.

¶7 Into this relationship we introduced the funding mechanism at issue in this Order. Five years ago, this court ordered that \$50.00 of every fee paid by someone applying to practice pro hac vice in Wisconsin's courts should go to the

³ Id.

Commission. See S. Ct. Order 13-11, 2014 WI 42 (issued Jun. 20, 2014, eff. Jul. 1, 2014) (SHIRLEY S. ABRAHAMSON, C.J. and ANN WALSH BRADLEY, J., dissenting). Just last month, the court agreed to increase the Commission's share of that fee to \$100.00. See S. Ct. Order 13-11B, 2019 WI 52 (issued May 16, 2019, eff. Jul. 1, 2019).

¶8 I voted in favor of S. Ct. Order 13-11B contingent upon presentation of an appropriate contract or memorandum of understanding documenting the purpose and use of the Commission's share of the pro hac vice fees. Specifically, I was looking for a description of goods or services that the court may legitimately obtain in the private marketplace. My purpose for insisting on such a description is that I do not understand the court to have the authority to make grants of compelled fees to private entities whose missions or activities we favor. The memorandum of understanding attached to this order, however, documents that we are making a grant of compelled fees to a private organization for no other reason than that we favor its mission and activity.

¶9 And that brings me to the constitutional problem I believe we have created.⁴ The freedom of speech guaranteed by

⁴ I only say I "believe" we have created a constitutional problem because we have not had the benefit of briefing or argument on this issue. This Order follows from a rule petition we brought on our own motion, so we have not even had the benefit of public input on this question. These brief remarks are not meant as an exhaustive treatment of this issue, nor as a definitive statement on the constitutionality of the method we use to fund the Commission.

both the First Amendment to the United States Constitution and Article I, § 3 of the Wisconsin Constitution applies both to the freedom to speak, as well as the freedom not to speak. Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."). The United States Supreme Court has been most adamant about this:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642, (1943).

¶10 An exception to that principle may not have occurred to the Court in 1943, but it found one in 1977 when it decided Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977), overruled by Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018). There, the Court approved of an "agency fee" arrangement in which a public-sector union could charge nonmembers for union-related activities (such as collective bargaining and grievance representation), but not for political or other unrelated functions. Abood, 431 U.S. at 225-26. Both collective bargaining and grievance representation, of course, involve the expression of, and advocacy for, certain objectives. But the

Abood court believed "labor peace" and the avoidance of the "free rider" problem were sufficiently weighty governmental justifications for requiring nonmembers to accede to the union's orthodoxy on those matters. Id. at 224-25. The Court returned to the subject in 1990, deciding that the Abood rationale justified mandatory membership in state bars. Keller v. State Bar of Cal., 496 U.S. 1 (1990).

¶11 The funding mechanism in this case is not precisely that of Abood or Keller, but the differences are marginal and do not affect the constitutional interest at stake. Here, an out-of-state attorney may not represent a client pro hac vice in a Wisconsin court unless he pays the fee mandated by the Wisconsin Supreme Court. This is similar to Abood insofar as employment by the Detroit Board of Education was conditioned on payment of an agency fee to the local union, even if not a member. It is also similar to Keller because payment of the pro hac vice fee stands between the applicant and his ability to practice law in Wisconsin's courts (albeit on a much more limited basis than that involved in Keller). Consequently, we make an attorney's ability to work contingent on his financial support of the Commission's goals—regardless of whether he approves of them, or would prioritize other causes above those pursued by the Commission. That is the same dynamic approved by Abood and Keller.

¶12 But Abood was just overruled, and smartly so. See Janus, 138 S. Ct. 2448. The Supreme Court observed that:

[w]hen speech is compelled . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.

Id. at 2464 (internal citations omitted). The same is true when the State compels the financial support of a belief one does not hold:

Compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." We have therefore recognized that a "'significant impingement on First Amendment rights'" occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences."

Id., (alterations in original; internal citations omitted). That is true even when the compelled subsidization is thought to benefit the person forced to pay:

Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. "[P]rivate speech often furthers the interests of nonspeakers," but "that does not alone empower the state to compel the speech to be paid for." In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.

Id. at 2466-67 (alterations in original; internal citations omitted).

¶13 Ultimately, the United States Supreme Court concluded that this type of compulsion is not consistent with the First Amendment. It struck down the specific agency-fee arrangement at issue, but went much further by overruling Abood as well. Id. at 2479. It is conceivable that the method we have chosen to fund the Commission does not violate the First Amendment, but it is not immediately apparent how it would escape Janus's condemnation. I believe it is unwise for us to further perpetuate this arrangement without accounting for what Janus teaches us about compelled speech. For these reasons, I respectfully dissent.

¶14 I am authorized to state that REBECCA GRASSL BRADLEY, J. joins this dissent.

Memorandum of Understanding

Between

State Bar of Wisconsin
("State Bar")

and

Wisconsin Trust Account Foundation, Inc. ("WisTAF") and
Wisconsin Access to Justice Commission, Inc. ("ATJC")

with approval of

Wisconsin Supreme Court
("Court")

This Memorandum of Understanding ("MOU") sets forth the terms and understanding between the State Bar and WisTAF and ATJC, with approval of the Court, as to the collection and distribution of pro hac vice fees in the State of Wisconsin.

Background & Purpose

As the fee established in SCR 10.03(4)(b)2, i.e. \$250, is further defined via the Comment to SCR 10.03(4)(b)2 to consist of \$50 made payable to the Office of Lawyer Regulation and \$200 made payable to the State Bar of Wisconsin, and seeing that it is the intent of the Court that the \$200 made payable to the State Bar be further divided and distributed \$100 to WisTAF and \$100 to the ATJC, this MOU sets forth how the State Bar will distribute and report on these fees.

On a monthly basis (in the month following receipt), the State Bar will equally distribute the pro hac vice fees that it receives – 50% to WisTAF and 50% to ATJC.

Funds received by WisTAF, as established in SCR 13.02(1), are to be used in fulfilling their mission as cited below and affirmed as of the date of signature:

The Wisconsin Trust Account Foundation Inc. (WisTAF) is dedicated to equal access to the civil justice system, funding legal services for low-income persons through the fair and effective administration of Interest On Lawyers' Trust Accounts (IOLTA), Public Interest Legal Services Fund (PILSF), and other sources.

Funds received by ATJC, as established in SCR 14.02(1) and SCR 14.03(1), are to be used in fulfilling their mission as cited below and affirmed as of the date of signature:

Our mission is to develop and encourage means of expanding access to the civil justice system for unrepresented low-income Wisconsin residents.

Reporting

Each month, the State Bar will provide WisTAF and ATJC with a reporting of dollars received in the previous month, the breakdown of those dollars, and the respective distribution thereof that is then enclosed.

Annually, the State Bar will provide the Court with a full listing of receipts and distributions of the pro hac vice fees received during the previous State Bar fiscal year from July 1 through June 30.

Funding

No commitment of funds beyond those actually received via the pro hac vice rule is being made through this MOU between the State Bar, WisTAF, and ATJC.

Duration

This MOU may be modified by mutual consent of authorized officials from the State Bar, WisTAF, and ATJC and with approval of the Court. This MOU shall become effective upon signature by the authorized officials representing the four parties noted and will remain in effect until modified or terminated by mutual consent. Upon notification by an authorized official from the State Bar, WisTAF, or ATJC that one or more of the foregoing no longer agrees to the terms of this MOU, and with the approval of the Court, this MOU shall end as of a date to be determined by the Court, with any fees obtained during the pendency of the MOU distributed as stated above. This MOU may also need to be modified or terminated should there be a subsequent change to SCR 10.03(4)(b)2. The parties mutually agree to keep one another informed and to seek cooperation if modifications are warranted or to work through the termination of this agreement if the need for the MOU no longer exists or is no longer operable. Any work-in-process as of an end or termination date related to this MOU will be wrapped up and fully completed through that end/termination date.

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Signed in agreement to this MOU between the State Bar, WisTAF, and ATJC:

_____ Date: _____

(Signature)
State Bar of Wisconsin
Paul L. Marshall
Assistant Executive Director & Chief Financial Officer

_____ Date: _____

(Signature)
Wisconsin Trust Account Foundation, Inc.
Rebecca Murray
Executive Director

_____ Date: _____

(Signature)
Wisconsin Access to Justice Commission, Inc.
Daniel Hoff
President

Signed in approval of this MOU by the Court:

_____ Date: _____

(Signature)
Wisconsin Supreme Court
Sheila T. Reiff
Clerk of Supreme Court