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In the Matter of the Amendment of Supreme Court Rule 13.045

Rule Petition No. 24-05

PETITIONERS' RESPONSE TO COMMENTS ON RULE PETITION

Introduction

Petitioners thank the Court for the opportunity to respond to comments on Petition 24-05. The comments, including the lone comment opposed to the petition, are unanimous in acknowledging the need for, the value of, and the inadequacy of current funding for civil legal aid.

As Ryan Billings, President of the State Bar of Wisconsin, said, "those on both sides of the debate generally agree that civil legal aid is critical and that the Petitioners provide vital services to those who cannot afford civil representation." State Bar of Wisconsin Comment (Dec. 13, 2024) at 1 (hereafter "SBW Comment").

Attorney Lisa Lawless, who filed the only comment opposing the petition, similarly acknowledges that, "Of course, the funding of legal services for the indigent in Wisconsin is a pressing public need and extremely important. The organizations that provide these civil legal services do incredibly important work which serves persons throughout our state." Comment to Petition by State Bar Member Lisa Lawless at 3 (December 13, 2024) (hereafter "Lawless Comment").

More than two dozen parties support the petition. These comments – from organizations around the State serving elders facing abuse and exploitation, victims of domestic violence and other crimes, people facing homelessness and loss of health care and other benefits, military veterans dealing with a variety of civil legal problems, and other vulnerable Wisconsinites – testify to the importance of civil legal aid to the legitimacy of our courts and of meeting basic human needs for people in poverty.

None of those who have commented doubt the fact that a modest $50 assessment imposed almost 20 years ago is now outdated and needs updating for

the assessment to more effectively meet its purpose: lawyers providing a fair share of the funding needed to ensure access to justice.

Opposition to the Petition

Those who oppose the petition contend that lawyers should not be expected, as a condition of their license to practice law in Wisconsin, to contribute financially to ensuring access to justice.

Two primary arguments are advanced: the assessment is an unconstitutional tax on lawyers, and the amount of the assessment is excessive.

Neither of these arguments is persuasive.

The PILSF Assessment is not a tax

The Court has already ruled on the principal argument made in opposition to the Petition. In 2005, when the Court approved the PILSF assessment, it ruled that the assessment constitutes a permissible regulatory or licensing fee, not a tax.

In *In re WisTAF*, 2005 WI 35, the Court considered and rejected the argument that is made here. The Court studied the difference between a permissible regulatory fee and a constitutionally impermissible tax and concluded that "the proposed assessment, designated to provide direct legal services for the poor, is fully consistent with activities recognized as permissible under the state and federal constitution." *Id.*, at 5-6. The court explicitly rejected the views of two dissenting justices who embraced the argument that the assessment was a tax. *Id.*, ¶¶ 21-27 (Prosser, J., dissenting).

A regulatory fee is not a tax if it bears a reasonable relationship to a legitimate regulatory purpose. *State v. Jackman*, 60 Wis. 2d 700, 707, 211 N.W.2d 480 (1973) ("This court has made a distinction between taxes and fees. A tax is one whose primary purpose is to obtain revenue, while a license fee is one made primarily for regulation . . . ").

The *Jackman* court upheld boat registration fees against a constitutional challenge because the fee funded both the registration function and a related safety program. *Id.* Because the registration of boats bears a reasonable relationship to boating safety, the Court considered it reasonable to consider the cost of the related safety program in judging the reasonableness of the fee. *Id.*; *see also Rusk v. City of Milwaukee*, 2007 WI App 7, ¶¶ 12-15, 298 Wis.2d 407, 415-16, 727 N.W.2d 358.

The line that divides taxes from regulatory fees is sometimes hard to discern, but that line has been surveyed in at least one other case involving a mandatory fee

charged to lawyers to support legal services for the indigent. In *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), the United States Court of Appeals for the Fifth Circuit had to determine whether a fee was a tax for purposes of applying the federal Tax Injunction Act. The court concluded that the fee served a legitimate regulatory purpose and therefore was not a tax. "The legal services fee . . . is linked to the regulation of the legal profession, given that its purpose is to ensure adequate funding of 'basic civil legal services to the indigent and legal representation and other defense services to indigent defendants in criminal cases.' In other words, its purpose is not to raise revenue but to ensure that members of the legal profession are able to provide a particular legal service." *Id.*, 4 F.4th at 243.[1]

Despite her thorough analysis, Attorney Lawless does not cite a single case finding contrary to *McDonald*. No court has concluded that a fee on lawyers to support civil legal aid constitutes a tax, even though at least five other states have such mandatory fees.[2]

Attorney Lawless points the Court to two other decisions involving the demarcation between taxes and regulatory fees under the Tax Injunction Act. *See Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722 (7th Cir. 2011); *Kathrein v. City of Evanston, Ill.*, 752 F.3d 680 (7th Cir. 2014). Although the cases recognize generally the distinction between taxes and regulatory fees, neither case is helpful in sorting out that question in this dispute because in neither case could the proponent of the levy demonstrate that what it sought to characterize as a fee served a reasonable regulatory purpose. The revenue set-aside in *Empress Casino* wasn't regulation, it was a naked "exaction" on casinos to bolster purses at horse racing tracks. *Id.*, 651 F.3d at 733 ("taxing one industry for the benefit of another"). Of the "demolition tax" at issue in *Kathrein,* the *Empress Casino* court wrote, "[t]axes that seek both to deter and to collect revenue when deterrence fails ... are commonplace," and that the Evanston ordinance was an example of a "sin tax." *See Kathrein,* 752 F.3d at 686.

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[1] Attorney Lawless points out, correctly, that *McDonald* did not involve a question of separation of powers or judicial, as opposed to legislative, authority to impose payments on participants in the legal system. Lawless Comment at 26. But separation of powers is merely the background of this dispute. What the Court must confront in the foreground is whether the PILSF assessment is a regulatory fee or a tax. The decisive analysis in *McDonald* is helpful on this central issue.
We pause to acknowledge how thoroughly Attorney Lawless has summarized the law governing separation of powers and the Legislature's authority to levy taxes to raise general revenue. We do not take issue with this background.

[2] Minnesota (Minn. Admin. Order Rule 9-7-23), Illinois (Ill. R. 756), Texas (Tex. State Bar Act § 81.054(c) & (j)), Missouri (Mo. R. 6.01(m)), and Pennsylvania (Pa.R.P.C. 1.15(u)) currently have mandatory fees paid by lawyers to support civil legal aid.

The PILSF assessment meets the test this Court observes in distinguishing regulatory fees from taxes, because the PILSF assessment is quite reasonably related to the Court's legitimate regulation of our courts and members of the bar. It goes almost without saying that one of the Court's principal regulatory objectives is to ensure the legitimacy of court judgments and public trust and confidence in our courts. Another is to ensure the efficient operation of our courts. *In re WisTAF*, 2005 WI 35 at 3. The Court pursues a range of regulatory strategies to achieve these essential goals.

The PILSF assessment serves each of these essentials. The assessment is a response to the severe lack of lawyers and legal assistance for those who come to court to seek justice and who are called into court to defend themselves. When litigants are forced to go it alone, our system suffers in at least two distinct ways. The outcomes in such disputes are often chalked up to one side having a lawyer while the other doesn't. And administering these cases imposes an extraordinary burden on the courts themselves. If more litigants have access to more lawyers and legal assistance, these afflictions can be mitigated. The PILSF assessment will help fund more assistance for those who otherwise wander our courts alone.

Lawyers have a particular stake in doing their share for funding civil legal services, because lawyers and their clients benefit in an even more direct and particular way. Distilled to its essence, what lawyers and clients seek from our courts – clients for their own interests, and lawyers whose livelihood depends on helping clients protect those interests – are timely, dependable and widely accepted judgments. But the more the judgments of our courts are called into question, because the community questions whether some litigants are treated more fairly than others, and the more the judgments of our courts are impeded, by the delay and frustration of ministering to those who have no help, the less timely, dependable and widely accepted those judgments become.

That the PILSF assessment is focused on lawyers and not on clients is a natural counterpart to the privilege we hold as lawyers. At the very front door to our profession we recognize that not all can "afford adequate legal assistance" and "[t]herefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice." Preamble: A Lawyer's Responsibilities, SCR Chapter 20, Rules of Professional Conduct for Attorneys.

Lawyers are more than mere sellers in an ordinary marketplace for goods and services. They are officers of the court, responsible, along with this Court, for the fair functioning of the highly regulated marketplace for justice. "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." *Id.* Lawyers "are admitted to the rank of the bar not only that they may practice their profession on behalf of those who can pay well for their services, but that they

may assist the courts in the administration of justice." *Green Lake County v. Waupaca County*, 113 Wis. 435, 436, 89 N.W.2d 549 (1902).

Attorney Lawless' comment suggests, correctly, that the reasonableness of the relationship between a regulatory fee and the regulatory purpose it serves can be measured, at least in part, by whether the fee "cover[s] the cost and the expense of supervision or regulation." *Jackman*, 60 Wis.2d at 707; *see also Town of Hoard v. Clark Cnty.*, 2015 WI App 100, ¶ 13, 366 Wis. 2d 239, 246–47, 873 N.W.2d 241, 244; *Rusk v. City of Milwaukee*, 2007 WI App 7, ¶¶ 12-15, 298 Wis.2d 407, 415-16, 727 N.W.2d 358; *City of River Falls v. St. Bridget's Catholic Church of River Falls,* 182 Wis.2d 436, 441–42, 513 N.W.2d 673 (Ct. App. 1994).

The PILSF assessment meets this test. The amount collected will not exceed the cost of achieving its regulatory purpose. Indeed, the cost of closing the enormous gap – the gap between the funding that is needed to provide enough lawyers and legal assistance to ensure the legitimacy of all court judgments and efficient court operations – is itself enormous. The proceeds of this fee will not come anywhere near covering this cost, nor is it the ambition of the assessment to do so.

Opponents' other concerns are not well founded

Ironically, some opponents of the Petition profess a concern that the increase will "serve only as a band-aid, addressing a small fraction of the need and potentially taking pressure off the legislature to act." SBW Comment at 4. This argument cannot sustain a constitutional attack on the fee.

Furthermore, the existence or amount of the modest PILSF assessment cannot explain the lack of legislative action on funding civil legal aid in Wisconsin. The assessment was adopted in 2005. Three years after that, in 2008, the Legislature nonetheless appropriated state funds for civil legal aid for the first time. It appears the existence of the assessment was not a deterrent to concurrent legislative action. The Legislature repealed general revenue funding in 2011, but there is no indication in the legislative history that the Legislature did so because of the PILSF assessment, which had not changed.

And experience in other states with mandatory attorney contributions to legal aid, such as Texas, demonstrates that legislatures can be persuaded to provide both general revenue and adopt licensing fees to fund legal aid. *See* Hecht, "Beyond Partisanship & Ideology – Access to Justice as Good Government," 73 *Baylor L. Rev.* 231, 236-37 (2021) (describing Texas Legislature's appropriation of $10 million, for the first time from general revenue, to fund for civil legal aid in addition to previously existing funds from the attorney legal services fee and other special source revenues).

Indeed, as some Bar members have noted, it will help make the case to the legislature if lawyers, who benefit from a fair adversary system, demonstrate leadership in funding it. SBW Comment at 5. The justice gap is a social problem that will ultimately require a legislative solution that goes far beyond what a modest increase in the PILSF assessment can accomplish. But making that case to the Legislature will not get to first base without the bar and the courts leading the way.

Those who oppose the Petition also argue that it puts the Court on a slippery slope. They argue that if lawyers can be required to contribute to PILSF, there is nothing to stop the Court from compelling lawyers to pay for "raises for court staff or construction of new courtrooms." Lawless Comment at 10, 17, 21. That the slope is not so slippery, and that the concern is overstated, is shown by the fact the PILSF assessment has been in place for nearly twenty years, and the chronic underfunding of court operations dates back even farther, but this Court has not attempted to extract funds from lawyers to bolster the Court's operations budget.

The amount of the assessment is not excessive

The State Bar notes that, even among lawyers who believe the PILSF assessment is legally permissible, some "believe that it is fundamentally wrong or unfair to saddle lawyers with the burden of addressing a broader public need." SBW Comment at 3. A significant number of lawyers who responded to the Bar's survey do not want to have to pay more to support legal aid. When asked in an optional on-line survey whether they should pay more, most of the 17% of State Bar members who responded chose "no." SBW Comment at 2. As the Bar comment acknowledges, the survey "was not a scientific poll, nor were efforts taken to ensure that the results were statistically representative of the Membership." *Id.*

To begin with, many lawyers may not have received the email invitation to participate at all, as it was subject to quarantine or caught in spam filters for many lawyers, including lawyers working for some of the petitioners. Although some lawyers and firms may have solved this problem, as petitioners did, many others undoubtedly did not and may not have even known there was a problem to resolve.

As for those who did respond, when asked, in essence "do you want to pay more money," most answered "no." This data does not reveal much, however. Experience teaches that "no" is typically the answer to such a question when the justification for paying more hasn't been framed as particularly as it has been in this discussion. Nor can we know the views of the silent majority of the bar (83%) who did not respond. *See* SBW Comment at 5. Perhaps the most that can be said is that the vast majority of the bar is not troubled by increasing the assessment.

The SBW also notes that the assessment can be especially burdensome to solo practitioners and others with tight margins. To the extent that the assessment, which will amount to less than $2 per week if the petition is granted, constitutes a hardship, SCR 13.045(1) provides for a waiver of the assessment for any attorney whose annual state bar membership dues are waived for hardship. First year lawyers are also exempt from the assessment.

Some state bar members opposed to the petition cite concerns about unintended consequences. They worry that an increase in the PILSF petition might undermine contemplated incentives to attract lawyers to underserved communities. SBW Comment at 4. If the incentives under consideration would be counteracted by a $50 increase in the PILSF fee, they seem unlikely to be substantial enough to be effective in the first place. It should also be noted that the petitioners employ some of the few lawyers practicing in many of these underserved communities. Failure to fund those lawyers is more likely to exacerbate the problem of "legal deserts" than a modest increase in the PILSF assessment is to "undermine" what are at this point hypothetical economic incentives for rural practice.

Some lawyers opposed to the petition expressed a fear "that Senior Active Members and Non-Resident Attorneys may decide to forfeit their licenses due to the permanent increase in cost, reducing not only PILS funds but also funds that are distributed to the BBE, OLR, and Client Protection Fund." SBW comment at 4. Similar concerns were professed when the assessment was adopted in 2005, *see In re WisTAF*, 2005 WI 35 at ¶ 29 (Prosser, J. dissenting), but we now have almost twenty years of experience with the fee and have not seen any evidence that any lawyer surrendered their Wisconsin law licenses as a result.

Conclusion

As Chief Justice Annette Kingsland Ziegler recently noted, "we face a serious lawyer shortage, particularly in our more rural counties, and access to justice is seriously impacted when those who wish to be represented, are unrepresented." Ziegler, *State of the Judiciary Address* at 1 (Nov. 13, 2024). Chief Justice Ziegler also noted that, "[w]e each have a role to play in making sure that our judicial system works for everyone." *Id.* at 3. The role of this Court includes ensuring the fairness and accessibility of the system over which it presides. It can and should require the officers of the court who are instrumental in and benefit from that system to contribute to its proper functioning and demonstrate the leadership that will be necessary to persuade the Legislature to step up to a solution.

Respectfully submitted this 27th day of December, 2024.

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