

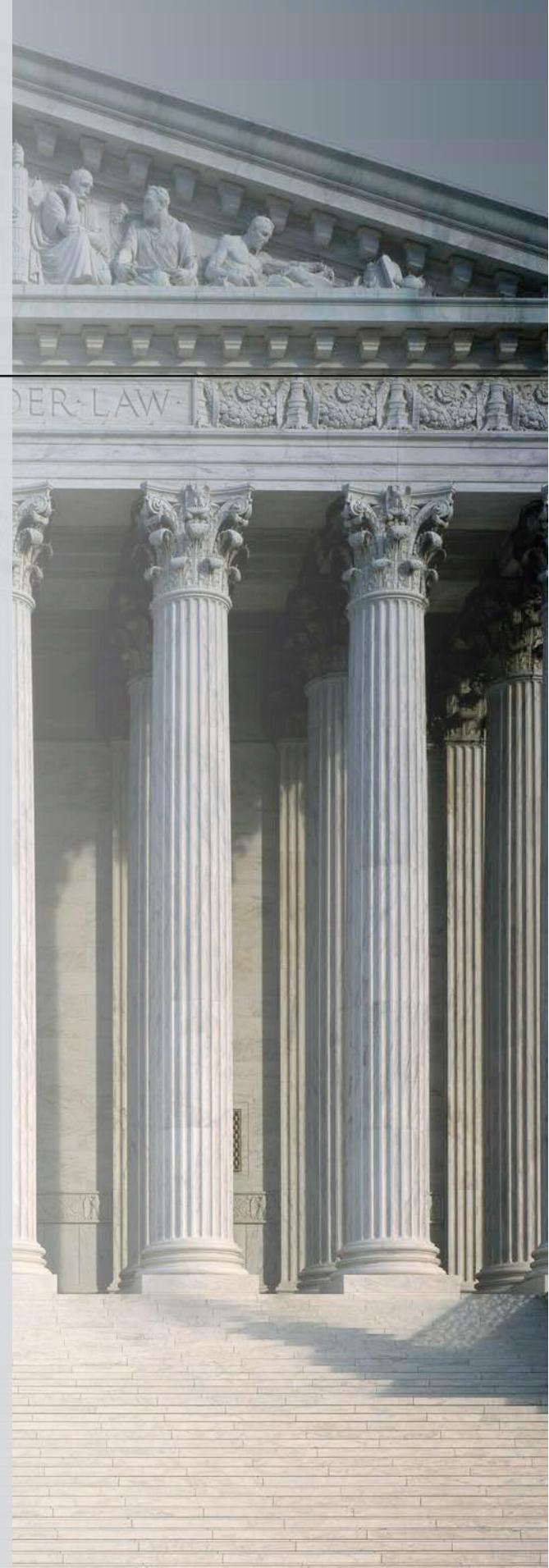
Mandatory State Bar Associations

# Managing Keller

The following information regarding mandatory bars and how they manage Keller related activities was compiled by State Bar of Michigan between February 2014 and May 2014. This was a significant research initiative to support the Michigan Supreme Court Task Force on the Role of the State Bar of Michigan. As information was gathered, executive directors from several state bars expressed an interest in receiving this compilation of material. We are pleased to share this information with those who find it useful. Please note that the State Bar of Michigan does not update this compilation as policies and statutes change in various states. Users are encouraged to check with the state bars directly to learn of any relevant changes.

Return to main contents page  
<http://www.michbar.org/opinions/keller.cfm>

**SBM**  
STATE BAR OF MICHIGAN



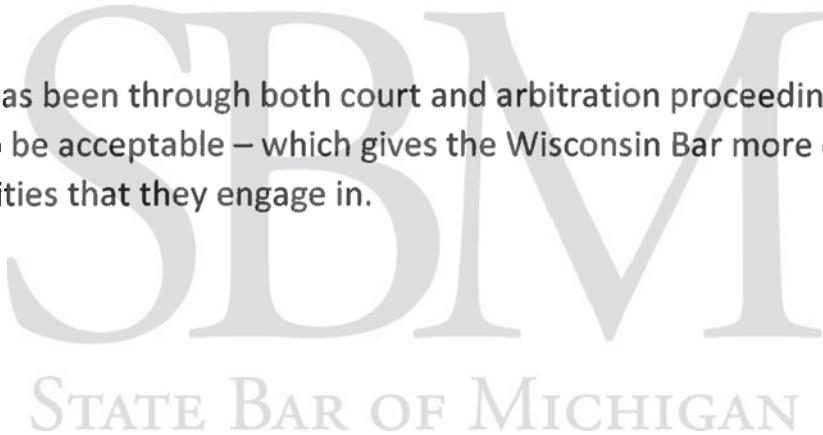
- Wisconsin
  - Summary
  - General Information
  - Board of Governors Policy Positions
  - Email- Keller Determination Process
  - Notice concerning state bar dues reduction
  - Wisbar Notice of Keller Deduction
  - Keller Dues Reduction
  - Rules and Bylaws related to Keller
  - Revised Keller Process- FY15
  - Executive Committee takes up Keller Dues Evaluation
  - Final Judgement-2010
  - Public Affairs Positions
  - Keller Process FY13

## Wisconsin State Bar

Telephone conversations with Lisa Roys, Director of Public Affairs, and Linda Tanner, Assistant Executive Director.

Wisconsin uses a unique process for managing Keller. They put a time and billing code on every activity. They use 15 minute increments. At the end of the year the Executive Committee reviews all of the activities and makes a determination about whether an activity is chargeable or non-chargeable under Keller. The total cost of all non-chargeable activities is then divided by the total number of members to determine the amount that will be available as a check-off amount that a member can choose to deduct from their dues in the following year.

This process has been through both court and arbitration proceedings and has been found to be acceptable – which gives the Wisconsin Bar more comfort in the scope of activities that they engage in.





Home > About Us

## About Us

### Overview

The State Bar of Wisconsin is a professional association that provides educational, career development and other services to its 24,000 members. It also provides public services, including attorney referrals, public education and reduced-fee legal assistance for low-income state residents.

[Overview](#) | [Sections, Divisions, Committees](#) | [Public Services and Programs](#) | [Membership Statistics](#) |  
[History](#)

### Leadership

While the overall governance and structure of the State Bar are established by Supreme Court Rule, members control the association's day-to-day operations, finances and strategic planning.

[Leadership](#) | [Officers](#) | [Board of Governors](#) | [Executive Committee](#) | [Staff Leadership](#)

## STATE BAR OF MICHIGAN

### Government Relations

The State Bar's Government Relations (GR) program works with State Bar members and state government officials (including legislators, executive branch and judicial branch agencies and their staff) to improve the administration of justice and the delivery of legal services in Wisconsin.

[Government Relations](#) | [Policy Positions](#) | [Federal Nominating Commission](#) | [For the Media](#) | [Videos of Interest](#) | [Judicial Elections](#)

### Reports

The State Bar researches critical issues affecting the community. Here you will find credible, evidence-based reports on how the public interacts with the legal system.

[Reports](#)

Live

## Legal History

The Wisconsin Constitution, adopted in 1848, provides the basic powers and framework of the court system through Article VII. Though reshaped over the years, the independent branch of government has its own place in Wisconsin's history.

[Legal History](#)

## Membership

Attorneys who are admitted to practice law by the Wisconsin Supreme Court are required to join the State Bar of Wisconsin as a condition of practicing law in the state.

[Membership](#) | [Member Benefits](#) | [FAQs](#)

## Careers

The State Bar staff works to support the professional goals of Wisconsin attorneys. Our employees work together in an environment that fosters continuous learning and improvement, along with professional growth.

[Careers](#) | [Current openings](#) | [Application Process](#) | [Benefits](#) | [Our Culture](#) | [Our Location](#)

## For Law Students

Take steps now to boost your future legal career. The State Bar of Wisconsin offers a variety of resources to help you get connected to the legal profession while you're still a student.

[For Law Students](#) | [Sign Up](#) | [Diversity Program](#) | [Benefits](#)

## Wisconsin Law Foundation

The Wisconsin Law Foundation (WLF), founded in 1951, is dedicated to enhancing, promoting, funding, and developing charitable and educational programs to promote public understanding of the law.

[Wisconsin Law Foundation](#) | [Join or Donate](#) | [WLF Grants - Apply](#) | [History](#) | [News](#) | [Awards of Excellence](#) | [Fellows](#) | [Contact Us](#)

## Awards and Recognition

The State Bar of Wisconsin recognizes the contributions of Wisconsin judges and attorneys to the practice of law and the administration of justice.

LAW



WisBar.org may be unavailable Feb 19th from 5:30PM until 10:00PM for system maintenance.

Home > About Us > Government Relations > Policy Positions

## Board of Governors Policy Positions

The State Bar is led by a 52-member Board of Governors, including the association's five officers and the immediate past president, who are elected by the membership or appointed by the Wisconsin Supreme Court. The organization operates under the rules of the supreme court and the State Bar's bylaws.

The Board of Governors works with the Government Relations staff on a wide variety of issues and policy decisions important to the legal profession, the general public, and the justice system. The Board adopts public policy positions on behalf of the entire organization, consistent with the State Bar's mission.



State Bar of Wisconsin  
Policy Positions

### On This Page

[State Bar Position Statements](#)

[Current Legislation](#)

[Previous Sessions](#)



### State Bar Position Statements

The State Bar of Wisconsin takes legislative positions on general policy items of importance to the legal profession. By a 60 percent majority vote, the Board of Governors has the authority to determine the legislative positions of the State Bar.

The following are guiding principles for the State Bar's public policy positions. Specific examples of issues which fall under those guiding principles are also included.

The six principles include:

- Regulation of the Practice of Law
- Delivery of Legal Services
- Administration of Justice
- Funding of the Justice System
- Criminal Practice and Procedure
- Civil Practice and Procedure

Live 1

## Previous Sessions

2011-2012

**OPEN ALL**

### Assembly

#### Assembly 488 (ADA Pay Progression)

- **Companion Bill:** SB 394
- Relating to establishing an assistant district attorney pay progression plan.
- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill History
- Bill Text

#### Assembly 4 (Auto Insurance Anti-Stacking)

- **Companion Bill:** SB 7
- Relating to automobile insurance coverage limits, permissible policy provisions, and proof of financial responsibility.
- **Position:** Active Opposition
- **Final Status:** 2011 Wisconsin Act 14
- Bill History
- Bill Text

#### Assembly 18 (Data Collection - ethnic and racial profiling)

- **Companion Bill:** SB 15
- Relating to collection and analysis of motor vehicle traffic stop information and law enforcement training standards.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill History
- Bill Text

#### Assembly 173 (Immigration)

- Relating to local ordinances, determining the lawful presence of a person arrested for or charged with a crime or certain civil violations, and providing a penalty.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill History
- Bill Text

#### Assembly 109 (Judicial Substitution)

- **Companion Bill:** Senate Bill 74
- Relating to eliminating substitution of judges in criminal matters.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill History
- Bill Text

#### Assembly 538 (Product Liability)

- **Companion Bill:** SB 373
- Relating to changes to product liability law and the law governing remedies against manufacturers, distributors, sellers, and promoters of a product.
- **Position:** Active Opposition
- **Final Status:** Failed to pass

LIVE 1

- Bill History
- Bill Text

**Assembly 544 (Product Liability)**

- **Companion Bill:** SB 373
- Relating to changes to product liability law and the law governing remedies against manufacturers, distributors, sellers, and promoters of a product.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill History
- Bill Text

**Senate****Senate 394 (ADA Pay Progression)**

- **Companion Bill:** AB 488
- Relating to establishing an assistant district attorney pay progression plan.
- **Position:** Active Support
- **Final Status:** 2011 Wisconsin Act 238
- Bill History
- Bill Text

**Senate 7 (Auto Insurance Anti-Stacking)**

- **Companion Bill:** Assembly Bill 4
- Relating to automobile insurance coverage limits, permissible policy provisions, and proof of financial responsibility
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill History
- Bill Text

**Senate 15 (Data Collection - ethnic and racial profiling)**

- **Companion Bill:** Assembly Bill 18
- Relating to collection and analysis of motor vehicle traffic stop information and law enforcement training standards.
- **Position:** Active Opposition
- **Final Status:** 2011 Wisconsin Act 29
- Bill History
- Bill Text

**Senate 74 (Judicial Substitution)**

- **Companion Bill:** Assembly Bill 109
- Relating to eliminating substitution of judges in criminal matters
- **Position:** No Position
- **Final Status:** Failed to pass
- Bill History
- Bill Text

**Senate 373 (Product Liability)**

- **Companion Bill:** AB 538 & AB 544
- Relating to changes to product liability law and the law governing remedies against manufacturers, distributors, sellers, and promoters of a product.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill History
- Bill Text

**Special Session**

Special Session 1 (Jan. SS AB 1 - Tort Reform: product liability, non economic damages & expert lay/witness testimony)

- **Companion Bill:** Jan. SS SB 1
- Relating to limiting noneconomic damages awarded in actions against long-term care providers; actions against manufacturers, distributors, sellers, and promoters of certain products; confidentiality of health care services reviews; use as evidence of information regarding health care providers; reporting of quality indicators identifying individual hospitals; homicide or injury by negligent handling of a dangerous weapon, explosives, or fire; criminal abuse of individuals at risk; criminal abuse and neglect of patients and residents; evidence of lay and expert witnesses; damages for frivolous claims; and punitive damage awards.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill History
- Bill Text

Special Session 1 (Jan. SS SB 1 - Tort Reform: product liability, non economic damages & expert lay/witness testimony )

- **Companion Bill:** Jan. SS AB 1
- Relating to limiting noneconomic damages awarded in actions against long-term care providers; actions against manufacturers, distributors, sellers, and promoters of certain products; confidentiality of health care services reviews; use as evidence of information regarding health care providers; reporting of quality indicators identifying individual hospitals; homicide or injury by negligent handling of a dangerous weapon, explosives, or fire; criminal abuse of individuals at risk; criminal abuse and neglect of patients and residents; evidence of lay and expert witnesses; damages for frivolous claims; and punitive damage awards.
- **Position:** Active Opposition
- **Final Status:** 2011 Wisconsin Act 2
- Bill History
- Bill Text

Special Session 12 (Sept. SS AB 12 Reasonableness of Attorney Fees)

- **Companion Bill:** Sept. SS SB 12
- Relating to factors for determining the reasonableness of attorney fees.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill History
- Bill Text

Special Session 13 (Sept. SS AB 13 Liability for Defective Products)

- **Companion Bill:** Sept. SS SB 13
- Relating to providing immunity from liability to drug and device manufacturers and sellers under certain circumstances.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill History
- Bill Text

Special Session 12 (Sept. SS SB 12 Reasonableness of Attorney Fees)

- **Companion Bill:** Sept. SS AB 12
- Relating to factors for determining the reasonableness of attorney fees.
- **Position:** Active Opposition
- **Final Status:** 2011 Wisconsin Act 92
- Bill History
- Bill Text

## Special Session 13 (Sept. SS SB13 Liability for Defective Products)

- **Companion Bill:** Sept. SS AB13
- Relating to providing immunity from liability to drug and device manufacturers and sellers under certain circumstances.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill History
- Bill Text

2009-2010

**OPEN ALL****Assembly**

## Assembly 189 (Homestead Exemption)

- **Companion Bill:** Senate Bill 160
- Relating to increasing the amount of the homestead exemption.
- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill Text

## Assembly 224 (Private Bar Rate)

- Relating to the reimbursement rate for private attorneys appointed by the State Public Defender.
- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill Text

## Assembly 291 (Family Justice Bill)

- **Companion Bill:** Senate Bill 203
- Relating to claims for loss of society and companionship in medical malpractice cases.
- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill Text

## Assembly 891 (Prosecutor Funding)

- **Companion Bill:** Senate Bill 636
- Relating to imposing a surcharge for certain forfeitures and making an appropriation.
- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill Text

## Assembly 732 (17-Year-old Juvenile Court Jurisdiction)

- Relating to the age at which a person who is alleged to have violated a criminal law, a civil law, or a municipal ordinance is subject to circuit court or municipal court jurisdiction rather than juvenile court jurisdiction; creating a community youth and family aids surcharge; authorizing the Department of Corrections to set the youth aids daily rates for care of a juvenile in a juvenile correctional facility or a treatment facility; providing an exemption from rule-making procedures; and making an appropriation.
- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill History
- Bill Text

**Budget**

## Budget (AB 75 - Elimination of No Probable Cause Hearings)

- Relating to the elimination of administrative hearings on no probable cause findings regarding complaints alleging discrimination in employment, housing, public accommodations, and other applicable statutes; and the proposed elimination of five ALJ positions as they relate to the elimination of probable cause hearings in the Equal Rights Division.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill Text

## Budget (AB 75 - Transportation: State Highway Program)

- Relating to caps on attorney fees in appeals of eminent domain proceedings.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill Text

## Budget (AB 75 - General Provisions)

- Relating to changes to contributory negligence and joint and several liability.
- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill Text

## Budget (AB 75 - Insurance)

- Relating to repeal of anti-stacking provisions related to automobile insurance.
- **Position:** Active Support
- **Final Status:** Passed
- Bill Text

## Budget (AB 75 - Circuit Courts)

- Relating to increase in court interpreter reimbursement.
- **Position:** Active Support
- **Final Status:** Passed
- Bill Text

## Budget (AB 75 - Administration: Office of Justice Assistance)

- Relating to civil legal services for the indigent.
- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill Text

## Budget (AB 75 - Caseload Standards: Public Defender Staff)

- Relating to caseload standards for individual Public Defender staff attorneys.
- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill Text

## Budget (AB 75 - District Attorneys)

- Relating to support of reasonable caseload standards for prosecutors that will ensure effective representation of the public in criminal cases. The State Bar of Wisconsin supports General Purpose Revenue funding for additional staff necessary to maintain reasonable caseloads in District Attorney offices. Understaffing of District Attorney's offices threatens the quality of justice in the criminal justice system by depriving the public of effective representation.
- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill Text

## Budget (AB 75 - DOA Attorney Consolidation)

- Relating to consolidation of state attorney positions into Department of Administration.
- **Position:** Active Opposition

- **Final Status:** Passed in part, failed in part
- Bill Text

Budget (AB 75 - Eligibility for Appointed Counsel)

- Relating to eligibility to receive appointed counsel.
- **Position:** Active Support
- **Final Status:** Failed but passed as separate legislation SB 263
- Bill Text

Budget (AB 75 - Compensation Rates)

- Relating to the reimbursement rate for private attorneys appointed by the State Public Defender.
- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill Text

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## Senate

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Senate 40 (Impartial Justice Bill)

- **Companion Bill:** Assembly Bill 65
- Relating to public financing of campaigns for the office of justice of the supreme court, making appropriations, and providing penalties.
- **Position:** Active Support
- **Final Status:** 2009 Wisconsin Act 89, vetoed in part
- Bill Text

Senate 127 (State Notification in Medical Malpractice Cases)

- **Companion Bill:** Assembly Bill 179
- Relating to notification to the state and certain public agencies regarding a medical malpractice claim and limits on liability.
- **Position:** Active Support
- **Final Status:** 2009 Wisconsin Act 278
- Bill Text

Senate 259 (Homestead Exemption)

- Relating to the homestead exemption and increases in the value of the exemption for various property that is exempt from execution.
- **Position:** Active Support
- **Final Status:** 2009 Wisconsin Act 80
- Bill Text

Senate 263 (SPD Eligibility)

- **Companion Bill:** Assembly Bill 395
- Relating to criteria for determining indigency for purposes of representation by the State Public Defender and requiring the exercise of rule-making authority.
- **Position:** Active Support
- **Final Status:** 2009 Wisconsin Act 164
- Bill Text

Senate 386 (Repeal of Auto Stacking and Other Provisions)

- **Companion Bill:** Assembly Bill 525
- Relating to automobile insurance coverage limits and proof of financial responsibility.
- **Position:** Active Opposition
- **Final Status:** Failed to pass
- Bill Text

Senate 674 (Juvenile Court Jurisdiction)

- Relating to the age at which a person who is alleged to have violated a civil law or municipal ordinance is subject to circuit court or municipal court jurisdiction rather than to juvenile court

jurisdiction and prohibiting a juvenile who has committed a civil law or municipal ordinance violation from being placed in a juvenile detention facility.

- **Position:** Active Support
- **Final Status:** Failed to pass
- Bill Text

Senate 636 (Prosecutor Funding (ADAs))

- **Companion Bill:** AB 891
- Relating to imposing a surcharge for certain forfeitures and making an appropriation.
- **Position:** Active Support
- Bill History
- Bill Text



# NOTICE CONCERNING STATE BAR DUES REDUCTION AND ARBITRATION PROCESS

## §1.0 Overview

In *Keller v. State Bar of California*, the United States Supreme Court held that a mandatory bar may not fund political or ideological activities with mandatory dues unless those activities are germane to regulating the legal profession or improving the quality of legal services. The *Keller* Court further held that a mandatory bar could satisfy its constitutional obligation to ensure that such activities were funded only with voluntary payments by adopting a procedure that would allow dissenting members to deduct the pro rata amount spent on those activities from their mandatory dues payment, and providing a mechanism to challenge the calculation of the reduction it had previously approved for mandatory union dues in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Following *Keller*, the Wisconsin Supreme Court adopted the procedure set forth at SCR 10.03(5)(b) and State Bar bylaw Article 1, Section 5 when it reintegrated the Bar. That procedure was upheld in the face of a constitutional challenge in *Thiel v. State Bar of Wisconsin*, and has governed the Bar's procedures for calculating the annual dues reduction since then. However, in *Kingstad v. State Bar of Wisconsin*, decided in September 2010, the Seventh Circuit held that case law subsequent to *Thiel* required that all activities of the bar, not only political or ideological activities, must be germane to the purposes identified in *Keller* in order to be funded with mandatory dues. Activities that are not germane to these two purposes are considered to be "nonchargeable." The State Bar may use compulsory dues of all members for all other activities, provided the activities are within the purposes of the State Bar as set forth in SCR 10.02(2). These activities are considered to be "chargeable."

The method used to calculate the amount of the dues reduction is based on the method approved in *Chicago Teachers Union v. Hudson*. In that case, the U.S. Supreme Court indicated that a labor union may use the year for which the most recent audit report is available as the base line period for determining chargeable and nonchargeable activities and calculating the cost of the nonchargeable activities.

To calculate this year's dues reduction, the State Bar's Executive Committee used this historical approach and reviewed activities for the fiscal year ending June 30, 2012 (FY12), the most recent fiscal year for which there is an audit report. (A copy of the audit report can be found at: [www.wisbar.org/2012\\_Auditors\\_Report](http://www.wisbar.org/2012_Auditors_Report)). The committee scrutinized all State Bar activities during FY12 to identify nonchargeable activities. For each activity found to be nonchargeable, the State Bar calculated the cost of the activity—including all applicable overhead and administrative costs—and the amount of dues expended on the activity. That process resulted in the determination that \$114,286 of dues was expended on nonchargeable activities during FY12.

## §2.0 Dues Reduction for FY14

Each State Bar member's FY14 pro rata portion of the dues devoted to nonchargeable activities was calculated by a process that involved translating the anticipated total dues paid for FY14 (before reduction) into the equivalent number of full dues payments. The State Bar estimates that there will be 25,167 State Bar members in FY14 paying various levels of dues that translate into 20,294 full dues payment equivalents. Dividing \$114,286 (the total dues devoted to nonchargeable activities in FY12) by 20,294 (the number of full dues payment equivalents) results in a pro rata reduction of \$5.63 for members paying full dues.

Although strict calculation results in an available dues reduction of \$5.63 for members paying full dues, the Board of Governors voted to set the available dues reduction at \$5.75 for members for the fiscal year beginning July 1, 2013 (FY14). (Active members admitted to their first bar April 30, 2011, or earlier, voting judicial members, and Supreme Court justices can withhold \$5.75; active members admitted to their first bar after April 30, 2011, and inactive members can withhold \$2.88; nonvoting judicial members can withhold \$3.83.) The purpose of setting the dues reduction at the higher amount of \$5.75 is to give those who take the reduction the benefit of any error that may have been made in the calculation and to make it unnecessary for members to request arbitration for small amounts.

## §3.0 Detailed Calculation of the Dues Reduction

### §3.1 Cost of and Dues Expended on FY12 Nonchargeable Activities

As noted earlier, to calculate the cost of and dues expended on chargeable and nonchargeable activities, the State Bar used the year for which the most recent audit report exists—that is, FY12. The State Bar reviewed all FY12 activities to determine activities nonchargeable as activities not germane to the regulation of the legal profession or improving the quality of legal services.

If an activity was determined to be nonchargeable, its cost was calculated, including all staff time and the expenses of facilities, governance, and administration, which were allocated in accordance with established State Bar accounting practices. Any revenues generated by the activity, such as Wisconsin

Lawyer advertising, or other income earmarked for the activity were deducted from the total cost before the amount of dues devoted to the activity was calculated. In addition, surplus revenue over expense from other State Bar activities and unallocated revenue were considered to be devoted to the activity on a pro rata basis with dues revenue. Using this methodology, the total cost of and amount of dues devoted to nonchargeable activities in FY12 is calculated as follows:

Activity	Cost of Chargeable Activity	Proportion Funded by Dues
Public Relations	\$1,070	4.5%
Public Service Division	\$83	7.1%
Disciplinary Lawyer Defense Committee	\$34	3.0%
Senior Lawyer Lawyer Referral	\$135	5.6%
Lawyer Referral	\$1,335	1,119
Law of the Future	\$440	3.6%
Professionalism Committee	\$37	3.0%
Legal Education Committee	\$4,573	3,952
Legislative	\$3,863	3,373
Research	\$4,372	3,846
Facilities Committee	\$4,577	3,984
Technology	\$3,555	3,069
Government Lawyer Division	\$9,545	8,341
Legislative Oversight Committee	\$2,459	2,157
Board of Governors	\$2,239	1,969
Advisory	\$13,573	11,763
Legislate	\$13,370	11,717
Lawtown	\$3,929	3,412
State Bar Committee on Employment	\$1,722	1,518
Total Cost of Nonchargeable Activities	\$33,131	
Total Dues Devoted to Nonchargeable Activities		\$114,286

A brief description of each of these FY12 nonchargeable activities follows.

**Government Relations Activities.** Work on the following legislative issues:

- Legislative Council Study Committee
- Legislative Report Book
- Public Affairs Policy Book (White Book)
- SBW Federal Lobbying Positions
- SBW Lobbying Positions
- Government Relations Division - Section Support
- Assembly Bill 4 - Auto Insurance Anti-Stacking, SB 7
- Assembly Bill 7 - Photo ID for Voting, SB 6
- Assembly Bill 18 - Data Collection - Ethic and Racial Profiling, SB 15
- Assembly Bill 30 - Power of Attorney for Child, SB 82
- Assembly Bill 54 - Equal Placement
- Assembly Bill 69 - Privilege of Self-Defense, SB 79
- Assembly Bill 122 - Unpardoned Felons Employment Discrimination, SB 86
- Assembly Bill 134 - Termination of Maintenance
- Assembly Bill 147 - Medical Apology, SB 103
- Assembly Bill 150 - Payday Loans, SB 99
- Assembly Bill 154 - Abortion Coverage Under Health Exchanges, SB 92
- Assembly Bill 155 - Landlord Preemption, SB 107
- Assembly Bill 168 - Compensation to the Wrongfully Imprisoned, SB 141
- Assembly Bill 173 - Immigration
- Assembly Bill 210 - Health Insurance
- Assembly Bill 222 - Evidence of Citizenship for Public Assistance
- Assembly Bill 235 - Premarital Agreements

*Continued on back*

- Assembly Bill 240 - Disclosure of Juvenile Records, SB 173
- Assembly Bill 244 - Restricting Eligibility for the Homestead Tax Credit, SB 175
- Assembly Bill 249 - Privileged Communication
- Assembly Bill 271 - Adult Disabled Child Support, SB 534
- Assembly Bill 286 - Employment Discrimination Against Felons, SB 207
- Assembly Bill 307 - Unsatisfied Judgment for Motor Vehicle Accident, SB 217
- Assembly Bill 312 - Implementing Federal Health Insurance Law, SB 206
- Assembly Bill 396 - Safe Haven Law, SB 313
- Assembly Bill 477 - Caps on Family Care, SB 380
- Assembly Bill 549 - UCC Article 9, SB 416
- Assembly Joint Resolution 28 - Health Care Freedom Amendment, SJR 21
- Senate Bill 8 - Conforming WI FMLA to Federal Law
- Senate Bill 63 - Termination of Parental Rights Petitions
- Senate Bill 232 - Power of DHS to alter MA
- Senate Bill 373 - Product Liability, AB 538, AB 544
- Senate Bill 560 - Juvenile Guardianship Reform
- Budget Bill AB 40 - Amendment: Race-Based Nicknames, Logos, Mascots and Team Names, SB 27
- Budget Bill AB 40 - Payment of Insurance Settlements - Motion 43, SB 27
- Budget Bill AB 40 - Provision Allowing Medical Record Fees to be set by Administrative Rule, SB 27
- Budget Bill AB 40 - Provision Capping Enrollment in Family Care Programs, SB 27
- Special Session Bill 1 - Jan. SS AB 1 - Tort Reform: Product Liability, Non-Economic Damages & Expert Lay/ Witness Testimony, Jan. SS SB 1
- Special Session Bill 11 - Jan. SS AB 11 - Budget Repair - Badger Care, Jan. SS SB 11
- Special Session Bill 11 - Jan. SS SB 11 - Budget Repair, Jan. SS AB 11
- Special Session Bill 13 - Sept. SS AB 13 Liability for Defective Products, Sept. SS SB 13
- Special Session Bill 14 - Sept. SS AB 14 Interest Rates on Judgments, Sept. SS SB 14
- Policy Issue - Adult Guardianship
- Policy Issue - Federal Health Insurance Law
- Policy Issue - Health Insurance Mandates
- Policy Issue - Out-of-State Insurers
- Policy Issue - Proposed MOE Waiver
- Policy Issue - Repeal of Same Day Voter Registration
- Policy Issue - State Facilities Access Policies

**Wisconsin Lawyer Magazine.** Six and three quarter pages devoted to the following items:

- August 2011 President's Message titled "Mining Opportunities for Lawyers" by James Brennan.
- September 2011 article titled "A Call to Reform Wisconsin's Class-Action Statute" by Paul Benson, Joe Olson and Ben Kaplan

**InsideTrack.** Expenses in connection with the following articles:

- July 20, 2011 article titled "Mining Proposals Mean Lawyers Should Prepare for Issues" by Deborah Spanic
- July 20, 2011 article titled "Proposed Regulations Change Accounting of Disclosure Rules Under HIPAA" by Leah Olsen
- September 21, 2011 article titled "Castle Doctrine: Lawmakers Considering Law on Self-Defense in the Home" by Joe Forward
- October 5, 2011 article titled "Special Session on Jobs will Include Tort Proposals"
- October 5, 2011 article titled "Board Takes Policy Positions Related to Immigration and Civil *Gideon*, Among Other Actions"
- January 4, 2012 article titled "Iron Mining Bill Proposes to Significantly Alter Environmental Permitting Process and Requirements" by Elizabeth Wheeler
- January 18, 2012 article titled "Pothole Liability: Proposed Bill Could Create "Discretionary" Immunity for Highway Defects" by Joe Forward

**Payments are due no later than July 1, 2013.**

**Payments received after July 1, 2013  
may be subject to late fees.**

- March 7, 2012 article titled "Redistricting: Litigation Common, Current Cycle Unique in Wisconsin" by Joe Forward

**Board of Governors Discussions/Activities.** The board's discussion of the Legislative Report and the Immigration Status Legislation AB173.

**BOG Policy Committee:** The committee's discussion of the Bar's position opposing any state efforts to regulate actions that conflict with Article VI, Clause 2 of the United States Constitution whenever the federal government is acting in pursuit of its constitutionally authorized powers, the Bar's position opposing any state efforts related to immigration that encourage a conflict to arise between federal law and either the state constitution or state law and the process of review of more than 20 policy positions and recommendations for either sun-setting, reaffirming or reaffirming with modifications for those positions.

**Executive Committee.** The committee's discussion of Immigration Status Legislation AB173, the ABA House of Delegates and the disparity of sentencing issue.

**ABA.** All of the expenses related to the State Bar Delegates attending the ABA House of Delegates at the ABA annual or midwinter convention and all of the expenses related to ABA Lobby Day.

**Division ABA Activities.** Expenses in connection with the division representatives attending the ABA House of Delegates at the ABA annual or midwinter convention or any other ABA training.

**Press Releases.** There was one press release devoted to the following items:

- November 29, 2011 release titled "Children and the Law Section Welcomes New Law Offering Parental Delegation Option"

**Diversity Outreach Committee.** Expenses in connection with the committee's discussion of the Interviewing/Networking Skills Presentation.

**Professionalism Committee.** Expenses in connection with the committee's discussion of CLE credit for State Bar of Wisconsin Committee work and an update report on informal feedback regarding CLE credit for bar meeting attendance.

**Legal Assistance Committee:** Expenses in connection with committee's discussion of the Public Interest Law Section's activity.

**Government Lawyers Division.** Expenses in connection with the Government Lawyers Division Board of Directors meetings discussing the Legislative Update, GLD awards, ABA award submissions and ABA award winners.

**Government Lawyers Division Newsletter.** Expenses in connection with the following:

- Portion of June 2012 article titled "President's Message: Board Fills Vacancies and Submits Nominations for ABA Awards" by Melanie Swank

**Senior Lawyers Division.** Expenses in connection with the Senior Lawyers Division Board of Directors meetings discussing the Elder Law Section request for authorization to file amicus brief in *Fond du Lac County vs. Helen E.F.*

**Senior Lawyers Division Newsletter.** Expenses in connection with the following:

- Portion of October 2011 article titled "Significant Actions Taken by State Bar Board of Governors" by Joseph Mell

**Legislative Oversight Committee.** The committee provides oversight to the legislative activities of the Bar and Sections. All expenses related to the committee were treated as nonchargeable

## 54.0

### Deadline for Arbitration Requests

Any member who wishes to call for arbitration of the amount of the dues reduction permitted for FY14 should deliver a request in writing to the Executive Director of the State Bar within 30 days of receipt of the dues statement. For details of the arbitration process, see SCR 10.03(5) (b) and article I, section 5 of the State Bar bylaws, which are available on [wisbar.org](http://wisbar.org) and [wicourts.gov](http://wicourts.gov).



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FEBRUARY 07, 2011 State Bar Board of Governors authorizes amicus brief in lawyer sanction case, approves Keller reduction amount

Feb. 7, 2011 – The State Bar of Wisconsin's Board of Governors (board) approved the Appellate Practice Section's request to file an amicus brief in a case challenging judicial authority to impose sanctions against a lawyer, and accepted a \$5.25 *Keller* rebate of State Bar dues for 2010. The board convened Feb. 4-5 at the State Bar Center in Madison.

In addition, State Bar President Jim Boll, President-elect James Brennan, and Past President Douglas Kammer voiced support for an increased compensation rate for private bar members who take State Public Defender cases by appointment.

Boll intends to raise private funds to conduct an empirical report that highlights the adverse impact of the current \$40 rate on the constitutional rights of defendants.

In his president-elect address, Brennan called on board members to help recruit "the future leadership of the bar," noting that he will make around 800 appointments to State Bar committees and working groups when he begins his State Bar presidency in July.

Appellate Practice Section Chair Michael Halfenger comments on the section's purpose for filing an amicus curiae brief in a case that concerns the sanctioning of lawyers by appeals courts. The State Bar Board of Governors approved the section's request.



Milwaukee governors Ray Dall'Osto (left) and Lynn Laufenberg await the start of the Feb. 4 meeting at the Bar Center in Madison.

Live 1

"I will be looking for well-balanced committees ... for people who want to get involved and bring something new, and I ask you to help recruit really what is the future leadership of the bar through this committee appointment process," Brennan told board members.

## Appellate Practice Section amicus brief

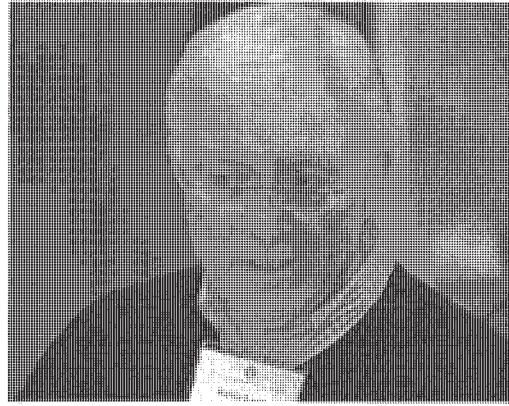
The State Public Defender (SPD) filed a petition for Wisconsin Supreme Court review in an appeals case in which a lawyer was sanctioned based on the court's conclusion that the appendix to the SPD's brief did not comply with statutory requirements for completeness.

The board unanimously approved the Appellate Practice Section's request to file an amicus brief in the case, observing that supreme court review would "provide clear guidance to the Wisconsin Court of Appeals regarding imposition of sanctions for alleged procedural or substantive violations by litigants or their counsel."

The section noted 18 such cases in which lawyers were fined between \$100 and \$200 for violating the court's rules on certifications and appendices. Section Chair Michael Halfenger provided background on the case and the section's position.

"While the Appellate Practice Section certainly understands the importance" of rules "requiring that all materials essential to understanding the appeal's issues are included in the appendix and the rule requiring certification," Halfenger said in video comments for the State Bar, "the section believes that the court should at least allow the lawyer to explain him or herself."

Several board members commented that sanctioning a lawyer in this situation without notice or an opportunity to be heard may invoke due process concerns.



Governor Kevin Lyons voices support for the Appellate Practice Section's request to file an amicus brief in the pending Wisconsin Supreme Court case of *State ex rel. Office of the State Public Defender v. Wisconsin Court of Appeals*, Appeal No. 2010AP387.



State Bar Treasurer Margaret Hickey prepares for the State Bar Board of Governors meeting to start, while governors George Steil, Janesville, and Robert Gagan, Green Bay, discuss the agenda.



In response to an oral report on the State Public Defender Office by Deputy SPD Kelli Thompson, State Bar Governor T.J. Molinari, from Milwaukee, shares his comments

Live 1

"Notice and a hearing, notice and a hearing, notice and a hearing," said board governor

Kevin Lyons, noting what he remembered his civil procedure professor at U.W. Law School saying. "This strikes me as being so fundamental to the practice of law, that the least we can do is unanimously support the request to file an amicus brief."

regarding SPD appointments. Thompson's report was part of an effort to educate the board on a variety of practice areas.

## ***Keller* rebate**

Under *Keller v. State Bar of California*, 496 U.S. 1 (1990), the State Bar cannot use compulsory dues of objecting members for activities that are not reasonably related to regulating the legal profession or improving the quality of legal services.

The board approved a *Keller* dues reduction of \$5.25 for members who object to certain bar expenditures. The amount is calculated by the Finance Committee using financial statements and activities for the State Bar's most recent audited fiscal year (in this case, FY 2010).

The board also approved the rebate amount proposed for 2011 dues by voice vote after turning back a proposed amendment for a higher rebate level. The State Bar will explore potential changes to the *Keller* calculation process to reflect changes in the law.

## **Zealous or rigorous?**

State Bar Professional Ethics Committee Chair Dean Dietrich updated the board on a petition to amend Supreme Court Rules that would strike references to "zealous" lawyer representation in favor of "vigorous" lawyer representation, and solicited comments from board members.

Attorney John Schweitzer filed petition 10-09 and a supporting memo with the Wisconsin Supreme Court, noting the word "zealous" encourages a win-at-all-cost approach to litigation. The petition has not been scheduled for a hearing yet.

Dietrich informed the board that the Ethics Committee will review the petition and make a recommendation on whether the State Bar should take a position.

## **Other business**

At the board's request to learn more about challenges in different practice areas, Deputy State Public Defender Kelli Thompson gave an overview of the SPD office structure, funding, attorney caseloads, and other challenges.

The board consented to the Individual Rights and Responsibilities Section's request to change its section name to the Civil Rights and Liberties Section.

The board also consented to the Resolution of Fee Disputes Committee's request to amend Rule 37 of the arbitration program's rules to update and clarify a party's rights concerning confidentiality. The State Bar maintains a program to resolve attorney fee disputes between attorneys and clients through arbitration.

## **Related:**

- To view photos from the Board of Governors meeting, visit the State Bar's Facebook page, or click here. [\[Link\]](#)



*John Voelker, director of Wisconsin State Courts, presented the budgeting picture for the court system, commenting that "the structure is under extreme stress."*



*District 3 Gov. Paul Swanson supports the proposed FY 2015 budget and questioned the wisdom of cutting programs and services.*

*Visit the State Bar of Wisconsin on Facebook for more photos from today's meeting.*

The position notes "compelling studies that demonstrate a mere contact with the criminal justice system can have a significant detrimental stigma on persons seeking employment or housing," and supports efforts to expand expungement remedies.

### **Board Adopts \$5 *Keller* Dues Reduction Amount**

Under *Keller v. State Bar of California*, 496 U.S. 1 (1990), the State Bar may not use the compulsory dues of any member who objects to activities not reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services.

To calculate the dues reduction amount for FY 2015, the State Bar reviewed all activities in FY 2013 to determine amounts not chargeable to mandatory dues.

An amount of \$92,716 was identified. Based on the number of full-dues equivalent members, the board adopted a \$5 rebate amount for those objecting in FY 2015.

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## JANUARY 31 2014 State Bar Board Discusses Possible Dues Increase, First in 10 Years

**JOE FORWARD**  
Legal Writer

Board also adopts a policy position on record expungment in anticipation of proposed legislation, and adopts a *Keller* dues reduction amount of \$5 for FY 2015.

Jan. 31, 2014 – The State Bar of Wisconsin's Board of Governors, the organization's 52-member governing body, today discussed a budget proposal to raise State Bar dues by \$30, which would represent the first dues increase in 10 years. The board took no action but is expected to approve a fiscal year 2015 budget at its April board meeting.

Recently, the board's nine-member Finance Committee unanimously recommended the dues increase, which would require full dues paying members to pay \$254 per year. New lawyers pay half dues the first three years, and emeritus lawyers pay no dues (see sidebar for potential changes to the dues structure for new and emeritus lawyers).



*Nick Vivian, chair of the State Bar's Finance Committee, explained the proposed budget for fiscal year 2015, which includes a \$30 dues increase.*

Live 2

The proposed \$12 million budget represents a modest 1.19 percent increase from last year's budget, said Nick Vivian, chair of the board's Finance Committee. He noted that proposed dues increases in prior years failed, in part because reserve funds were available to fill deficit gaps. "But those reserves are now largely depleted," Vivian said. "The money isn't there."

A dues increase is necessary, Vivian said, to avoid significant cuts to major State Bar programs and services. It also includes money for two new positions in PINNACLE and the State Bar's Law Office Management Assistance Program (LOMAP), as well as merit-based salary increases. Without a dues increase, the State Bar faces a budget shortfall of about \$500,000 next year.

## As State Bar Services Grow, Dues Remain Level

Vivian noted that in the last decade, member demand drove expansions in State Bar programs and services with no corresponding dues increase.

Since 2005, the State Bar has expanded programs like LOMAP, the Wisconsin Lawyer Assistance Program (WisLAP), and the Ethics Program to address the growing professional and personal needs of its members.

In addition, the consumer price index climbed 20 percent in the last decade, meaning the cost to provide services to members rose consistently.

"Had membership dues kept pace with the consumer price index, dues would be \$45 greater than they are today," Vivian said.

The budget aims to sustain core programs and allows the State Bar to maintain a stable financial course while addressing member needs, Vivian said. One board member suggested the State Bar should make cuts to programs before raising dues.



*District 2 Gov. Margaret Hickey voiced support for the proposed budget and a dues increase, saying it is critical to maintain current services to members.*

*Visit the State Bar of Wisconsin on Facebook for more photos from today's meeting.*

## Questions or Comments about the Proposed Budget?

Contact Lynda Tanner, assistant executive director for the State Bar of Wisconsin, by email or by phone at (608) 250-6116.

Live 2

"We are funding the State Bar programs that the board's strategic planning committee determines are valuable to the members," said Vivian. "When you start talking about cuts, you impact programs that are determined to be valuable to the members."

## Proposed Budget Assumes Dues Changes for New and Emeritus Members

More than a year ago, the State Bar of Wisconsin's Board of Governors approved a plan that would change the dues structure for new and emeritus lawyers.

Under the proposal, now pending before the Wisconsin Supreme Court, new lawyers would pay half dues for the first five years of membership. Currently, new members pay half dues the first three years.

The potential change addresses the economic struggles of new lawyers after graduation, and would reduce overall revenue by an estimated \$122,520 for FY 2015.

Additionally, emeritus members who actively practice up to age 75 would pay full or half dues, depending on the number of hours billed (lawyers who bill the equivalent of 800 hours or more pay full dues; those who bill less than 800 hours pay half-dues). Currently, members who reach age 70 can elect to pay no dues.

Supported by the State Bar's Senior Lawyers Division, the change recognizes that more lawyers practice well into their 70s while retaining access to State Bar services and programs. If approved, the plan would generate an estimated \$26,880 in dues revenue for FY 2015, which helps offset dues revenue losses from new lawyers.

The proposed budget for FY 2015 assumes these changes, but would be modified if not approved by the Wisconsin Supreme Court.

A recent article posted on WisBar has more information on these proposals.

other board members declared that any dues increase could hurt new and rural lawyers who are struggling financially.

In addition, Vivian said the proposed budget recognizes the State Bar's effort to retain talented and experienced employees through a competitive compensation package.

Vivian noted that the State Bar annually addresses whether programs and services should be funded or eliminated. He said the organization has trimmed expenses and eliminated waste through careful planning and the renegotiation of contracts with vendors. In addition, the State Bar reduced staff by 10 percent in 2012.

Board member Margaret Hickey said the State Bar, in the last few years, has provided "more services to more people with less money." She said the approving the budget as proposed "is critical to maintain service to members," especially newer lawyers.

## Reserves, Salaries, and New Revenue Streams

Vivian also noted that since 2007, the State Bar has dipped into various reserve funds to plug holes in operating deficits, spending down about \$1 million. This leaves reserves at a level below the five months operating expenses recommended.

In addition, the "dues stabilization reserve" – a fund established to mitigate dues increases – is budgeted to be depleted of a remaining \$505,000 by the end of the current fiscal year (however, positive investment returns could minimize this need).

State Bar Treasurer Jennifer Stuber suggested that a larger dues increase could help replenish depleted reserve funds, while

The proposed budget includes a 4 percent bump for merit-based salary increases, combined with a 2 percent reduction in the State Bar's contribution to employee retirement funds, better aligning base pay and benefits with the current marketplace.

State Bar Executive Director George Brown said the organization's salary structure still lags by market comparison, based on an external evaluation conducted in 2010. But the proposed budget does not include any upward structural salary adjustments besides merit pay.

The budget plan also includes about \$90,000 to fund a "business plan reserve." These funds would help the State Bar explore and implement new revenue sources through business opportunities that could help mitigate dues increases in the future.

"We must identify other revenue streams that allow us to fund the budget in a meaningful way," Vivian said. "Or we risk having this discussion every year."

Yearly membership dues represent less than half of the State Bar's revenue. Dues would fund about \$5 million of the proposed \$12 million budget for FY 2015. The State Bar relies on other revenue sources, such as PINNACLE sales, to fund the remainder.

Membership dues are separate and distinct from assessments imposed by the Wisconsin Supreme Court, currently \$236 per year for full "active" members. Again, new lawyers pay a reduced amount for assessments and emeritus lawyers pay a \$20 fee.

Vivian noted that the State Bar of Wisconsin's dues amount is currently the lowest compared with Minnesota (\$252), Iowa (\$260), Indiana (\$280), and Illinois (\$320). Only neighboring Michigan (\$180) has a lower bar dues rate among Midwestern peers.



*District 9 Gov. Niles Patel raises questions about the proposed budget.*

## **Board Takes Policy Position on Expungement**

The board adopted a policy position related to record expungement to support anticipated legislation expanding expungement remedies in appropriate circumstances.

In 2009, the State Bar's board unanimously supported a petition to modify supreme court rules on record retention and the expungement of records accessible through the Wisconsin Consolidated Court Automation Program (CCAP). After public hearings, the court held the petition in abeyance, choosing to work towards a legislative solution.

Now the State Bar's Policy Committee expects the introduction of related legislation, and made its position known through a restated policy that supports the inherent authority of the courts to manage and expunge records in appropriate situations.

Live 2

## MEMORANDUM

CLIENT-MATTER NUMBER  
086280-0106

**TO:** State Bar Executive Committee **ATTORNEY CLIENT  
COMMUNICATION**  
**FROM:** Roberta F. Howell  
**CC:** George Brown **PRIVILEGED AND  
CONFIDENTIAL**  
Lynda Tanner  
**DATE:** November 8, 2010  
**RE:** *Keller* Dues Reduction; Impact of *Kingstad* decision

On November 12, 2010, the Executive Committee is meeting for the purpose, among other things, of reviewing all of the activities of the State Bar for the most recently completed fiscal year to determine which of those activities must be “*Kellerized*”, i.e. to determine which may be funded with mandatory dues and which may not. The committee’s recommendation will then go to the Board of Governors for approval and, once approved, will be used by State Bar staff to determine the amount of the voluntary dues reduction which will be made available on the dues notice to be sent out in spring 2011.

In light of the Seventh Circuit’s recent decision in *Kingstad v. State Bar of Wisconsin*, this memo is provided to (a) summarize the differences between the analysis that has been applied in prior years and the analysis that is now mandated by *Kingstad*, (b) provide you with a list of those activities that have been found chargeable or not chargeable in prior arbitrations and cases addressing the issue, and (c) explain why this process uses last year’s activities to determine the reduction for next year’s dues. Finally, the last page of this memo provides a one-page summary that you can use as a reference during our discussions.

### Background

As you are all undoubtedly aware by now, in *Kingstad*, State Bar members Jon Kingstad, Steven Levine and James Thiel (“the objectors”) challenged the dues reduction calculation for fiscal year 2009. In general, they challenged the Bar’s determination that expenditures for the Public Image Campaign were chargeable. They made timely demands for arbitration under SCR 10.03(5)(b) and their claims proceeded under that procedure. In the arbitration proceedings, the objectors claimed that (a) SCR 10.03(5)(b)1 was unconstitutional because it required that only political and ideological activities be germane in order to be funded

with mandatory dues, i.e. that unless all activities funded with mandatory dues were germane, the rule was unconstitutional, and (b) the Bar's Public Image Campaign was not germane.

Ultimately, the Seventh Circuit agreed with the objectors on the first issue, overruling its earlier holding in *Thiel v. State Bar of Wisconsin*, and held that limiting the germaneness analysis to political and ideological activities was too narrow constitutionally. However, the Court disagreed with the objectors on the second issue, holding that the Public Image Campaign was germane to improving the quality of legal services and, therefore, was properly funded with mandatory dues.

#### How Does *Kingstad* Change the Test For Determining Chargeability?

Since re-integration in 1992, the Bar has employed a two-step process in determining which activities may be funded by mandatory dues and which must be included in the voluntary dues reduction required by *Keller*. That two-step process was expressly approved in the face of an earlier constitutional challenge by James Thiel, represented by Steve Levine, in *Thiel v. State Bar of Wisconsin*. That test was as follows:

##### Old Test

1. Is the activity political or ideological?  
If no, no further review is necessary.  
If yes, proceed to question 2.
  
2. Is the activity "germane" to regulating the legal profession or improving the quality of legal services available to the people of the state?  
If either is true, then the activity is chargeable.  
If neither is true, then the activity is not chargeable.

In addition, as a matter of policy, the Bar has historically added a final step: If the question is a close one, then the activity is non-chargeable (the "close call rule"). This practice, combined with several other conservative steps that the Bar has historically taken in its calculations minimizes the likelihood that a mistake will be made in the determination of what activities are chargeable or non-chargeable and builds a cushion into the amount of the dues reduction to eliminate the need for an arbitration on de minimis amounts.<sup>1</sup>

Under *Kingstad*, only the second question is asked. Thus, the new test is, simply:

##### New Test

Is the activity "germane" to regulating the legal profession or improving the quality of legal services available to the people of the state?  
If either is true, then the activity is chargeable.  
If neither is true, then the activity is not chargeable.

---

<sup>1</sup> Those actions, in addition to the close call rule include (a) allocating administrative and overhead expenses pro rata to chargeable and non-chargeable activities, discussed below, and (b) rounding up the amount of the dues reduction actually allowed on the annual dues statement.

As a matter of policy, I recommend that, in addition, the close call rule continue to be applied.

**Does *Kingstad* Provide Any Guidance in Determining Whether An Activity is Germane?**

Yes. Not only did *Kingstad* find that the activity challenged in that case, the Public Image Campaign, was germane, its discussion and analysis leading to that ruling is instructive.

First, while *Kingstad* overruled its holding in *Thiel* that only political and ideological expenditures need be germane to be constitutionally funded with mandatory dues, it expressly reaffirmed the alternative holding in *Thiel* that all of the activities challenged there were germane. Those activities included: the Bill of Rights Pamphlet, Economics of Practice Survey, Gavel Awards, Lawyers Concerned for Lawyers, Local Bar Grants, Mock Trial Competition, and Wisconsin Law Foundation. According to the *Thiel* Court, the question as to the germaneness of these activities was not a close one and required little analysis. Rather, it held that: “All of these [activities] … are geared towards improving the quality of legal services in Wisconsin. Under *Keller*, they are germane and may be funded by compulsory dues....” The concurring opinion by Judge Ripple added: “[T]his case again presents us with a relatively straightforward situation .... Here, all of the activities of which the plaintiffs complain *fit quite comfortably* within the category of nonideological, nonpolitical activities that are germane to the regulation of the legal profession or the improvement of the quality of legal services. … [W]e are not confronted here with a situation in which the bar can be said to be engaging in nonpolitical, non-ideological activities that are also completely divorced from those statutory purposes that justify mandatory dues.” (Emphasis added.) Judge Ripple also noted that: “Until the Supreme Court speaks more definitively, all we can say … is that we ought not give the term ‘germane’ a crabbed reading. Like a union, a bar association must have ‘a certain flexibility in its use of compelled funds.’”

**STATE BAR OF MICHIGAN**

*Kingstad* added to the list of State Bar activities which have been upheld as germane, namely the Public Image Campaign. In reaching that conclusion, it further explained what is and is not relevant to determining germaneness:

1. Under *Keller*, an activity is “germane” if it is “necessarily *or* reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the State.” (Emphasis added)
2. The standard of review is deferential, as when legislation is reviewed to determine whether it is reasonably related to a legitimate governmental purpose.
3. The subjective motives of bar leaders are not relevant.
4. The State Bar is not required to prove that (a) its expenditures were actually successful in accomplishing the stated purpose, or (b) they served only that purpose, or (c) the expenditures were a particularly wise use of the State Bar’s funds.

This is not to say that the political or ideological nature of an activity is entirely irrelevant, however. As one court put it:

All other things being equal, an expenditure with a strong political or ideological coloration is less likely to be germane to the practice of law, less likely to be related to or justified by the state's interest in regulating the legal profession or improving the quality of legal services, and more likely to add to the existing burden of First Amendment rights.

The *Kingstad* decision makes the same point: "the key is the overall 'germaneness' of the speech to the governmental interest at issue. The political or ideological nature of the speech factors into that ultimate analysis.".

Finally, a related question has been raised regarding general and administrative (G&A) expenses and how those are to be treated in the chargeable/non-chargeable determination. Historically, the Bar has allocated all general and administrative expenses to chargeable and non-chargeable activities on a pro rata basis (i.e., if 4% of the Bar's expenditures were for non-chargeable activities, then 4% of its G&A expenses have been allocated to the dues reduction as well). While the Bar could reasonably take the position that all/most G&A expenses are chargeable, this historical methodology is a conservative and prudent approach to the treatment of such expenses.

In *Ellis v. Railway Workers*, the activities challenged included, among others, the expenses of social activities and union conventions. The Court found that both were fully chargeable to dissenters/non-members on the ground that they were activities necessary to the organization's existence and, with respect to the social activities, had no separate communicative content and, therefore, did not further implicate the dissenters' First Amendment rights beyond that already inherent in the mandatory association.

Subsequent courts have interpreted *Ellis* to allow mandatory associations, both unions and state bar associations, to fully fund all general and administrative expenses with mandatory dues. In addition, some courts have further justified finding such expenses fully chargeable because the organization would have incurred those expenses regardless of whether it engaged in non-chargeable activities or not. In other cases, the organization has adopted the same procedure of pro rata allocation as the State Bar of Wisconsin has historically applied and that has also been approved. Because the pro rata allocation takes a conservative approach to the use of mandatory dues and, in essence, is part of the "cushion" mentioned above to minimize the impact of any mistakes in the determination of what is and is not chargeable, I recommend that the Bar continue this practice.

#### What Other Guidance Is Available In Deciding Whether A Particular Activity is Germane?

In addition to *Thiel* and *Kingstad*, the decisions in the early arbitrations involving the State Bar and the decisions in several other jurisdictions provide some guidance as to what activities have been determined to be germane to the purposes identified in *Keller*, or not, in the past. While the list is not long, it is at least useful in providing an analogy in thinking about how other activities ought to be treated. The complete list follows:

Germane

Public Image Campaign (*Kingstad, Gardner v. State Bar of Nevada*)  
Bill of Rights pamphlet (*Thiel*)\*  
Economics of Practice survey (*Thiel*)\*  
Gavel Awards (*Thiel*)\*  
Lawyers Concerned for Lawyers (*Thiel*)\*  
Local bar grants (*Thiel*)\*  
Mock Trial Competition (*Thiel*)\*  
Wisconsin Law Foundation (*Thiel*)\*  
Expenses of arbitration proceedings challenging chargeable/non-chargeable determination  
(*Popejoy v. New Mexico Bd. of Bar Comm'rs*)  
Funding of State Public Defender (1994 Dues Arbitration)  
Circuit Court funding (1994 Dues Arbitration)

\*Each of these activities was found to be not germane by the arbitrator in the 1993 Dues Arbitration.

Not Germane

Gun control (*Keller*)  
Nuclear weapons freeze (*Keller*)  
Research re sales tax on professional services (1993 Dues Arbitration)  
Mentor Council (1993 Dues Arbitration)  
Chapter 180 Revision (1993 Dues Arbitration)  
Sealing of court records (1994 Dues Arbitration)  
Computer-aided transcription equipment (1994 Dues Arbitration)  
Sales tax on legal services (1994 Dues Arbitration)  
Access to public records for incarcerated persons (1994 Dues Arbitration)

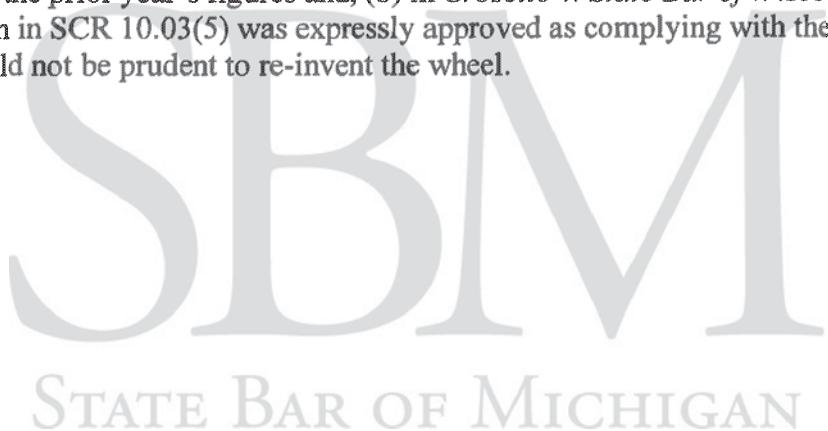
**Why Do We Use Last Year's Activities to Determine Next Year's Dues Reduction?**

As you know, in determining the dues reduction for each year, the amount is based on the activities identified as non-chargeable from the fiscal year just completed. A question has been raised as to whether it would be a better practice for the Bar to attempt to build the chargeable/non-chargeable determination into its budgeting process and set the dues reduction amount on a prospective basis. It is not altogether clear to me how that would work in practice (e.g. would there then be a reconciliation of the budget v. actual at some point? How? When?, etc.).

Regardless, court decisions establishing and reviewing dues reduction procedures have firmly established that the reduction calculation and challenge procedure must be based on audited financial statements which, in turn, requires the use of completed fiscal years. In particular, in *Hudson v. Teachers Union*, which established the dues reduction/arbitration procedure on which the Wisconsin rule is based, the U.S. Supreme Court noted:

We continue to recognize that there are practical reasons why absolute precision in the calculation ... cannot be expected or required. Thus, for instance, the Union *cannot be faulted for calculating its fee on the basis of the basis of its expenses during the preceding year*. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, *as well as verification by an independent auditor*.

(Emphasis added.) Later cases have interpreted this language as requiring the use of audited financial statements in most circumstances, with the exceptions not applicable here. Given the fact that it would be impossible to meet the audit requirement for proposed, budgeted expenditures, basing the dues reduction on budgeted figures instead of the most recent audited figures would not appear to comply with the requirements of *Hudson*. Relatedly, in light of the fact that, (a) the Supreme Court has expressly held, as noted above, that an entity “cannot be faulted” for using the prior year’s figures and, (b) in *Crosetto v. State Bar of Wisconsin*, the procedure set forth in SCR 10.03(5) was expressly approved as complying with the requirements of *Hudson*, it would not be prudent to re-invent the wheel.



**Reference Sheet**

**Test** to be applied in determining chargeability or non-chargeability under *Keller* and *Kingstad*:

Is the activity “germane” to regulating the legal profession or improving the quality of legal services available to the people of the state?

If either is true, then the activity is chargeable.

If neither is true, then the activity is not chargeable.

“Germanc” means necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State.

If the question is a close one, then the activity is non-chargeable.

**Prior Decisions on Specific Activities, with source**

**Germanc**

Public Image Campaign (*Kingstad, Gardner*)

Bill of Rights pamphlet (*Thiel*)

Economics of Practice survey (*Thiel*)

Gavel Awards (*Thiel*)

Lawyers Concerned for Lawyers (*Thiel*)

Local bar grants (*Thiel*)

Mock Trial Competition (*Thiel*)

Wisconsin Law Foundation (*Thiel*)

Expenses of arbitration proceedings challenging chargeable/non-chargeable determination  
(*Popejoy v. State Bar of New Mexico*)

Funding of State Public Defender (1994 Dues Arbitration)

Circuit Court funding (1994 Dues Arbitration)

**Not Germanc**

Gun control (*Keller*)

Nuclear weapons freeze (*Keller*)

Research re sales tax on professional services (1993 Dues Arbitration)

Mentor Council (1993 Dues Arbitration)

Chapter 180 Revision (1993 Dues Arbitration)

Sealing of court records (1994 Dues Arbitration)

Computer-aided transcription equipment (1994 Dues Arbitration)

Sales tax on legal services (1994 Dues Arbitration)

Access to public records for incarcerated persons (1994 Dues Arbitration)

## **RULES AND BYLAWS RELATED TO KELLER**

### **SCR 10.03 Membership.**

*(5) Membership dues and reduction of dues for certain activities.* (a) The annual membership dues for state bar operations for an active member shall be established as provided herein. Other classes of members shall pay the fraction of the dues of an active member as follows: Supreme Court Justices, the full amount; inactive member, one-half; judicial members, two-thirds; and members admitted to practice for 3 years or less, one-half. For purposes of determining an active member's dues status based on the number of years admitted, there shall be no proration based on the exact month and year of admission. A fiscal year for which any dues are required to be paid under Bylaw 1, Section 2 shall count as a full year and a fiscal year for which no dues payment is required shall not count as a year. A change in the dues of an active member for state bar operations may be made by the board of governors or as set forth herein. The state bar shall include in the dues statement each year the amount necessary to pay the costs of the Lawyer Regulation System and of the continuing legal education functions of the Board of Bar Examiners as approved by the Supreme Court. Judicial members other than Supreme Court Justices are not liable to pay the portion for the costs of these boards, as reflected in the dues statement. The state bar shall also include in the dues statement each year an assessment to support the public interest legal services fund, as approved by the supreme court. The state bar shall show separately on its annual dues statement the portion of the total dues for state bar operations, the assessments for each of the boards, and other assessments imposed by the supreme court.

(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 compulsory dues of any member who objects pursuant to SCR 10.03(5)(b)3. for activities that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services. 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 user fees or other sources of revenue.

2. Prior to the beginning of each fiscal year, the state bar shall publish written notice of the activities that can be supported by compulsory dues and the activities that cannot be supported by compulsory dues. The notice shall indicate the cost of each activity, including all appropriate indirect expense, and the amount

of dues to be devoted to each activity. The notice shall set forth each member's pro rata portion, according to class of membership, of the dues to be devoted to activities that cannot be supported by compulsory dues. The notice shall be sent to every member of the state bar together with the annual dues statement. A member of the state bar may withhold the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues.

3. A member of the state bar who contends that the state bar incorrectly set the amount of dues that can be withheld may deliver to the state bar a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the member's dues statement.

4. If one or more timely demands for arbitration are delivered, the state bar shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. No later than 7 calendar days before the hearing, any member requesting arbitration shall file with the arbitrator a statement specifying with reasonable particularity each activity he or she believes should not be supported by compulsory dues under this paragraph and the reasons for the objection. The costs of the arbitration shall be paid by the state bar.

5. In the event the decision of the arbitrator results in an increased pro rata reduction of dues for members who have delivered timely demands for arbitration for a fiscal year, the state bar shall offer such increased pro rata reduction to members first admitted to the state bar during that fiscal year and after the date of the arbitrator's decision.

## **Article I Membership**

***Section 5. Dues Reduction Arbitration Procedure.*** (a) Demands for arbitration of the dues reduction under SCR 10.03(5)(b) shall be made in writing and shall be delivered to the Executive Director of the State Bar within 30 days of receipt of the member's dues statement. Delivery may be made in person or by first class mail, and mailed demands will be deemed delivered upon mailing. Demands shall include the name and address of the member or members demanding arbitration, a brief statement of the claim or objection, and the signature of the member or members.

(b) If one or more timely demands for arbitration are delivered, the State Bar shall agree to submit the matter forthwith to arbitration. All timely demands for

arbitration shall be consolidated for hearing before the arbitrator appointed, and the provisions of sec. 788, Stats., shall apply as if the parties had entered into a written agreement for arbitration<sup>1</sup>. A member demanding arbitration is required to pay his or her dues by October 31 or 15 days following the arbitrator's decision, whichever is later. Failure to pay dues by such date shall automatically suspend the delinquent member.

(c) Upon receipt of all demands for arbitration, the State Bar shall apply for appointment of an impartial arbitrator to the Chief Judge of the Federal District Court for the Western District of Wisconsin.

(d) Members demanding arbitration shall have access to the financial records upon which the State Bar based the determination of the amount of dues that can be withheld. These records shall be available for inspection and copying during normal business hours. Copying shall be at the member's expense.

(e) The arbitrator shall determine the date, time and location of the arbitration hearing(s) or the briefing schedule, as the case may be, and shall so notify the parties at least 15 days prior to said hearing(s) or the deadline for the filing of the opening brief. The arbitrator will promptly hold hearings in which the parties will be permitted to participate personally or through a representative, unless the parties agree that the matter may be decided on briefs. The State Bar shall bear the burden of proof regarding the accuracy of the determination of the amount of dues that can be withheld. All parties will be given the opportunity to present evidence and to present arguments in support of their positions. The arbitrator shall not be deemed a necessary party in judicial proceedings relating to the arbitration. The arbitrator shall have no authority to add, subtract, set aside or delete from any Supreme Court Rules, or State Bar bylaw. Unless otherwise agreed by the parties, the following rules shall apply to the arbitration proceedings:

- i. There will be no transcripts or post-hearing briefs.
- ii. The arbitrator will issue an award stating the reasons for the decision within 30 business days of the closing of the hearing. The opinion will be brief, and based on the evidence and arguments presented.
- iii. The arbitrator will charge a reasonable hourly fee for services, including the hearing, preparation and study time, and shall be reimbursed for all necessary expenses of the arbitration.

iv. The hearing(s) or the briefing schedule, as the case may be, shall be completed within 60 days of appointment of the arbitrator.

(f) Members first admitted to the State Bar after the date of notification to members shall be given that notification with their initial dues statements. Such members shall be further notified that they may deliver a demand for arbitration within 30 days following receipt of the notification. If arbitration is pending at the date of delivery of a demand for arbitration by a newly admitted member, the newly admitted member's demand shall be consolidated with the pending arbitration. All of the provisions of this section shall otherwise apply to demands for arbitration filed by newly admitted members.

<sup>1</sup> "The arbitrator's decision would not receive preclusive effect in any subsequent section 1983 action." *Chicago Teachers Union v. Hudson*, 472 U.S. 292, 308 n. 21 (1986).





## STATE BAR OF WISCONSIN

*Your Practice. Our Purpose.<sup>TM</sup>*

### MEMORANDUM

**To:** Liaisons, Directors & Department Managers  
**From:** George C. Brown, Executive Director  
**Date:** July 30, 2013  
**Re:** Revised Keller Process for FY 2015

---

In the past, under Keller, the State Bar could not use the compulsory dues of any member who objects to their use for political or ideological activities which are not reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services. On September 9, 2010 the United States Court of Appeals for the Seventh Circuit issued a decision in Kingstad, et al vs. State Bar of Wisconsin that requires that the political and ideological test be dropped. With that decision the Bar may not use compulsory dues of an objecting member for any activities that are not reasonably related to the purpose of the mandatory bar; regulating the legal profession or improving the quality of legal services. This decision is now reflected in SCR 10.03.

We will be using the fiscal year ending June 30, 2013 (FY13) as the baseline period for calculating the amount of the dues reduction for FY15. I need for each of you to analyze your activities during FY13 to determine whether you or your department was involved in anything not related to those two purposes. Please review any and all files or records that will call any such activities to your attention.

I recognize that regulating the legal profession or improving the quality of legal services may be difficult for you to define. For the purpose of this exercise, however, please use an expansive concept and include any activity on your list where you think any semi-reasonable argument might be made that it is not intended for such purposes. It is critical that we call the executive committee's attention to any activities that might be subject to the Keller reduction. Attached is a listing of items from FY12 identified as subject to Keller under the new rules. Please consider this list only as examples of issues that may be considered non-chargeable to dues.

Past cases and arbitrations have provided a sample of bar activities that were determined to fit the purpose of regulating the legal profession or improving the quality of legal services. These include: Equal Justice Fund; WISLAP, Attorney Image Campaign; Ethics; Understaffing of the Public Defender System, Bill of Rights pamphlet; Economics of Practice Survey; Gavel Awards; Local Bar Grants; Mock Trial; public defender and circuit court funding.

Those specifically determined to not fit the purpose include: Sealing of court records, sales tax on legal services, access to public records for incarcerated persons; tort reform; court filing fees.

Please include supporting documentation with your list of possible activities. The "Guidelines for preparing materials for the Executive Committee to review in regards to the Keller calculation" is attached and I ask that you carefully read and follow those guidelines as well. Executive Committee members will determine whether activities are "reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services." If the activities are not related to these two purposes, we will then make a detailed calculation as to the amount of dues money devoted to those

activities during FY13. The result of those calculations will be the amount of the Keller dues reduction for the 2015 fiscal year.

The Board of Governors will be called upon to approve the amount of the Keller dues reduction for next year at the December Board meeting. In order to get the materials to the Executive Committee so that it can develop a well-reasoned recommendation, I need input from each of you by **Monday, August 19, 2013**. Please give your materials that are clearly marked in a manner that can be successfully photocopied to Jan Marks.

Thank you in advance for your careful attention to this important task. Please let me know if there are any questions or problems.



**Guidelines for preparing materials for the Executive Committee to review in regards to the Keller calculation:**

**Overview**

Each year staff is asked to review materials of programs and services to search for activities that may be non-chargeable under Keller. Those materials are then forwarded to the Executive committee.

**Material Preparation**

In the past few years, materials have been sent to the executive committee in several forms – email, photocopies, minutes of meetings, etc. The executive committee reviews anywhere between 500 and 750 pages of material. This, as you may suspect, is a daunting task.

In order to ease the burden on the committee members, be certain to use the following guidelines in preparing materials:

- Make sure photo-copies are clear. Your copies will be copied and clarity is lost with each occurrence.
- Mark the pertinent passage in the materials. Use a black or blue pen to be certain the photocopy is clear. **Do not use highlighters as they do not transfer to a copy.** Keep in mind that the materials will be submitted to the executive committee just as you have submitted them, so neatness is appreciated.
- Be certain the name and date of the activity is clearly noted on the material.
- If cover memos are necessary as an explanation, write one per activity (or recurrence of the same activity) and include the number of pages attached as supporting documents. We've found that a single memo listing multiple activities can become confusing and often does not add value to the process.
- If you are adding notes in the margins, please keep in mind that they may be cut off during reproduction.



## MEMORANDUM

**To:** George Brown  
**From:** Kris Wenzel  
**Copy:** Larry Martin  
Cara Mavis  
**Date:** July 21, 2011  
**Re:** Keller Process for Fiscal Year 2011  
Young Lawyers' Division

---

Upon careful review of the minutes and work products of the Young Lawyers Division, I did identify discussion on a recommendation to approve a recommendation for Petition 10-09 proposing changes to SCR 20 that could reasonably not be intended for the purpose of regulating the legal profession or improving the quality of legal services.

That information will be found on pages one, four and six of the attached minutes of the December 15, 2010 meeting of the YLD Board of Directors.

STATE BAR OF MICHIGAN



## STATE BAR OF WISCONSIN

*Your Practice. Our Purpose.™*

### MEMORANDUM

**To:** George Brown  
**From:** Kris Wenzel  
**Copy:** Larry Martin  
Cara Mavis  
**Date:** July 21, 2011  
**Re:** Keller Process for Fiscal Year 2011

---

Upon careful review of the minutes and work products of the State Bar entities listed below, I did not identify discussion/projects that might not be reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services:

1. Nonresident Lawyers Division
2. Committee on Resolution of Fee Disputes
3. Lawyer Dispute Resolution Committee
4. Bench and Bar Committee
5. Local Bar Relations Committee
6. Board of Bar Examiners Review Committee
7. Admissions

STATE BAR OF MICHIGAN

A brief description of each of these FY12 nonchargeable activities follows.

**Government Relations Activities.** Work on the following legislative issues:

- Leg Council Study Committee
- Legislative Report Book
- Public Affairs Policy Book (White Book)
- SBW Federal Lobbying Positions
- SBW Lobbying Positions
- Government Relations Division - Section Support
- Assembly Bill 4 - Auto Insurance Anti-Stacking , SB 7
- Assembly Bill 7 - Photo ID for Voting, SB 6
- Assembly Bill 18 - Data Collection - Ethic and Racial Profiling, SB 15
- Assembly Bill 30 - Power of Attorney for Child, SB 82
- Assembly Bill 54 - Equal Placement
- Assembly Bill 69 - Privilege of Self-Defense, SB 79
- Assembly Bill 122 - Unpardoned Felons Employment Discrimination, SB 86
- Assembly Bill 134 - Termination of Maintenance
- Assembly Bill 147 - Medical Apology, SB 103
- Assembly Bill 150 - Payday Loans, SB 99
- Assembly Bill 154 - Abortion Coverage Under Health Exchanges, SB 92
- Assembly Bill 155 - Landlord Preemption, SB 107
- Assembly Bill 168 - Compensation to the Wrongfully Imprisoned, SB 141
- Assembly Bill 173 - Immigration
- Assembly Bill 210 - Health Insurance
- Assembly Bill 222 - Evidence of Citizenship for Public Assistance
- Assembly Bill 235 - Premarital Agreements
- Assembly Bill 240 - Disclosure of Juvenile Records, SB 173
- Assembly Bill 244 - Restricting Eligibility for the Homestead Tax Credit, SB 175
- Assembly Bill 249 - Privileged Communication
- Assembly Bill 271 - Adult Disabled Child Support, SB 534
- Assembly Bill 286 - Employment Discrimination Against Felons, SB 207
- Assembly Bill 307 - Unsatisfied Judgment for Motor Vehicle Accident, SB 217
- Assembly Bill 312 - Implementing Federal Health Insurance Law, SB 206
- Assembly Bill 396 - Safe Haven Law, SB 313
- Assembly Bill 477 - Caps on Family Care, SB 380
- Assembly Bill 549 - UCC Article 9, SB 416
- Assembly Joint Resolution 28 - Health Care Freedom Amendment, SJR 21
- Senate Bill 8 - Conforming WI FMLA to Federal Law
- Senate Bill 63 - Termination of Parental Rights Petitions
- Senate Bill 232 - Power of DHS to alter MA
- Senate Bill 373 - Product Liability, AB 538, AB 544
- Senate Bill 560 - Juvenile Guardianship Reform
- Budget Bill AB 40 - Amendment: Race-Based Nicknames, Logos, Mascots and Team Names, SB 27
- Budget Bill AB 40 - Payment of Insurance Settlements - Motion 43, SB 27
- Budget Bill AB 40 - Provision Allowing Medical Record Fees to be set by Administrative Rule, SB 27
- Budget Bill AB 40 - Provision Capping Enrollment in Family Care Programs, SB 27
- Special Session Bill 1 - Jan. SS AB 1 - Tort Reform: Product Liability, Non-Economic Damages & Expert Lay/ Witness Testimony, Jan. SS SB 1

- Special Session Bill 11 - Jan. SS AB 11 - Budget Repair - Badger Care, Jan. SS SB 11
- Special Session Bill 11 - Jan. SS SB 11 - Budget Repair, Jan. SS AB 11
- Special Session Bill 13 - Sept. SS AB 13 Liability for Defective Products, Sept. SS SB 13
- Special Session Bill 14 - Sept. SS AB 14 Interest Rates on Judgments, Sept. SS SB 14
- Policy Issue - Adult Guardianship
- Policy Issue - Federal Health Insurance Law
- Policy Issue - Health Insurance Mandates
- Policy Issue - Out-of-State Insurers
- Policy Issue - Proposed MOE Waiver
- Policy Issue - Repeal of Same Day Voter Registration
- Policy Issue - State Facilities Access Policies

*Wisconsin Lawyer Magazine.* Six and three quarter pages devoted to the following items:

- August 2011 President's Message titled "Mining Opportunities for Lawyers" by James Brennan.
- September 2011 article titled "A Call to Reform Wisconsin's Class-Action Statute" by Paul Benson, Joe Olson and Ben Kaplan

*InsideTrack.* Expenses in connection with the following articles:

- July 20, 2011 article titled "Mining Proposals Mean Lawyers Should Prepare for Issues" by Deborah Spanic
- July 20, 2011 article titled "Proposed Regulations Change Accounting of Disclosure Rules Under HIPAA" by Leia Olsen
- September 21, 2011 article titled "Castle Doctrine: Lawmakers Considering Law on Self-Defense in the Home" by Joe Forward
- October 5, 2011 article titled "Special Session on Jobs will Include Tort Proposals"
- October 5, 2011 article titled "Board Takes Policy Positions Related to Immigration and Civil Gideon, Among Other Actions"
- January 4, 2012 article titled "Iron Mining Bill Proposes to Significantly Alter Environmental Permitting Process and Requirements" by Elizabeth Wheeler
- January 18, 2012 article titled "Pothole Liability: Proposed Bill Could Create "Discretionary" Immunity for Highway Defects" by Joe Forward
- March 7, 2012 article titled "Redistricting: Litigation Common, Current Cycle Unique in Wisconsin" by Joe Forward

**Board of Governors Discussions/Activities.** The board's discussion of the Legislative Report and the Immigration Status Legislation AB173.

**BOG Policy Committee:** The committee's discussion of the Bar's position opposing any state efforts to regulate actions that conflict with Article VI, Clause 2 of the United States Constitution whenever the federal government is acting in pursuit of its constitutionally authorized powers, the Bar's position opposing any state efforts related to immigration that encourage a conflict to arise between federal law and either the state constitution or state law and the process of review of more than 20 policy positions and recommendations for either sun-setting, reaffirming or reaffirming with modifications for those positions.

**Executive Committee.** The committee's discussion of Immigration Status Legislation AB173, the ABA House of Delegates and the disparity of sentencing issue.

**ABA.** All of the expenses related to the State Bar Delegates attending the ABA House of Delegates at the ABA annual or midwinter convention and all of the expenses related to ABA Lobby Day.

**Division ABA Activities.** Expenses in connection with the division representatives attending the ABA House of Delegates at the ABA annual or midwinter convention or any other ABA training.

**Press Releases.** There was one press releases devoted to the following items:

- November 29, 2011 release titled “Children and the Law Section Welcomes New Law Offering Parental Delegation Option”

**Diversity Outreach Committee.** Expenses in connection with the committee’s discussion of the Interviewing/Networking Skills Presentation.

**Professionalism Committee.** Expenses in connection with the committee’s discussion of CLE credit for State Bar of Wisconsin Committee work and an update report on informal feedback regarding CLE credit for bar meeting attendance.

**Legal Assistance Committee:** Expenses in connection with committee’s discussion of the Public Interest Law Section’s activity.

**Government Lawyers Division.** Expenses in connection with the Government Lawyers Division Board of Directors meetings discussing the Legislative Update, GLD awards, ABA award submissions and ABA award winners.

**Government Lawyers Division Newsletter.** Expenses in connection with the following:

- Portion of June 2012 article titled “President’s Message: Board Fills Vacancies and Submits Nominations for ABA Awards” by Melanie Swank

**Senior Lawyers Division.** Expenses in connection with the Senior Lawyers Division Board of Directors meetings discussing the Elder Law Section request for authorization to file amicus brief in *Fond du Lac County vs. Helen E.F.*

**Senior Lawyers Division Newsletter.** Expenses in connection with the following:

- Portion of October 2011 article titled “Significant Actions Taken by State Bar Board of Governors” by Joseph Melli

**Legislative Oversight Committee.** The committee provides oversight to the legislative activities of the Bar and Sections. All expenses related to the committee were treated as nonchargeable



STATE BAR  
OF WISCONSIN

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About Us

for Members

Marketplace

News 8

Home > News & Publications > InsideTrack > Article

INSIDE TRACK

BI-WEEKLY NEWSLETTER OF THE  
BAR OF WISCONSIN

AUGUST 2013 VOLUME 51

[Back to Issue](#)

## Executive Committee Takes Up *Keller* Dues Evaluation Sept. 6

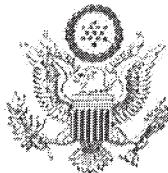
Aug. 7, 2013 – On Sept. 6, the State Bar Executive Committee will perform its annual *Keller* dues reduction evaluation for Fiscal Year 15 (July 2014 - June 2015). The Executive Committee announces the date of the meeting in case members may wish to attend.

Under *Keller v. State Bar of California*, 496 U.S. 1 (1990), the State Bar cannot use compulsory dues of objecting members for activities that are not reasonably related to regulating the legal profession or improving the quality of legal services. The board approves an annual reduction of amount for members who object to certain bar expenditures as identified by the Executive Committee. The amount is approved by the Board of Governors using financial statements and activities for the State Bar's most recently audited fiscal year. Therefore, FY 13 (July 2012 - June 2013) is used to calculate the amount of rebate available to objecting attorneys for the FY 15 fiscal year.

Members who plan to attend the meeting should contact Jan Marks at (608) 250-6106 by Sept. 4.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse  
Room 2722 - 219 S. Dearborn Street  
Chicago, Illinois 60604



Office of the Clerk  
Phone: (312) 435-5850  
[www.ca7.uscourts.gov](http://www.ca7.uscourts.gov)

FINAL JUDGMENT

CERTIFIED COPY

A True Copy  
Testo:  
  
Deputy Clerk  
of the United States  
Court of Appeals for the  
Seventh Circuit

September 9, 2010

BEFORE: WILLIAM J. BAUER, Circuit Judge  
ILANA DIAMOND ROVNER, Circuit Judge  
DAVID F. HAMILTON, Circuit Judge

No.: 09-4080	JON E. KINGSTAD, et al., Plaintiffs - Appellants  v.  STATE BAR OF WISCONSIN, Defendant - Appellee
--------------	--

Originating Case Information:

District Court No: 3:09-cv-00216-slc  
Western District of Wisconsin  
Magistrate Judge Stephen L. Crocker

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

A True Copy

Teste:

*John M. Keast*  
Deputy Clerk  
of the United States  
Court of Appeals for the  
Seventh Circuit

# United States Court of Appeals

For the Seventh Circuit  
Chicago, Illinois 60604

October 21, 2010

## Before

WILLIAM J. BAUER, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 09-4080

JON E. KINGSTAD, STEVE LEVINE and  
JAMES S. THIEL,  
*Plaintiffs-Appellants,*

v.

STATE BAR OF WISCONSIN,  
*Defendant-Appellee.*

Appeal from the United States District  
Court for the Western District of  
Wisconsin.

No. 3:09-cv-00216-slc

Stephen L. Crocker,  
*Magistrate Judge.*

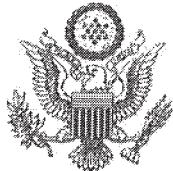
## ORDER

On consideration of the petition for rehearing, filed on September 22, 2010, all of the judges on the original panel have voted to DENY the petition for rehearing.

Accordingly, the petition for rehearing is DENIED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse  
Room 2722 - 219 S. Dearborn Street  
Chicago, Illinois 60604



Office of the Clerk  
Phone: (312) 435-5850  
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NOTICE OF ISSUANCE OF MANDATE

October 29, 2010

To: Peter Oppeneer  
UNITED STATES DISTRICT COURT  
Western District of Wisconsin  
P.O. Box 432  
Madison, WI 53701-0000

No.: 09-4080	JON E. KINGSTAD, et al., Plaintiffs - Appellants  v.  STATE BAR OF WISCONSIN, Defendant - Appellee
--------------	--

**Originating Case Information:**

District Court No: 3:09-cv-00216-slc  
Western District of Wisconsin  
Magistrate Judge Stephen L. Crocker

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

PARTIAL RECORD RETURN

Record to be returned later

Loose pleadings to be returned later: 1

**NOTE TO COUNSEL:**

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten (10) days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date:

Received by:

---

STATE BAR OF MICHIGAN

form name: c7\_Mandate (form ID: 135)

CERTIFIED COPY

A True Copy

Teste:

*John D. Paul*  
Deputy Clerk of the  
Court of Appeals for the  
Seventh Circuit

In the  
**United States Court of Appeals  
For the Seventh Circuit**

No. 09-4080

JON E. KINGSTAD, STEVE LEVINE AND  
JAMES S. THIEL,

*Plaintiffs-Appellants,*

v.

STATE BAR OF WISCONSIN,

*Defendant-Appellee.*

Appeal from the United States District Court  
for the Western District of Wisconsin.  
No. 3:09-cv-00216-SLC—Stephen L. Crocker, Magistrate Judge.

ARGUED APRIL 15, 2010—DECIDED SEPTEMBER 9, 2010  
**STATE BAR OF MICHIGAN**

Before BAUER, ROVNER, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. To practice law in the State of Wisconsin, lawyers must join the Wisconsin State Bar. To join the State Bar, lawyers must pay State Bar dues. For more than fifty years, this system has been generating First Amendment litigation, and this case is the latest installment. In 2007, the State Bar used a portion of members' dues to conduct a public image cam-

aign with the goal of improving the public's perception of Wisconsin lawyers. Petitioners Jon Kingstad, Steven Levine, and James Thiel (collectively, the "Objectors") objected to the State Bar's use of their mandatory dues to fund the campaign as a violation of their rights under the First Amendment. Their objection was first heard by a state arbitrator, who ruled in favor of the State Bar. The Objectors appealed to a state trial court, and the State Bar removed their appeal to the federal courts. The parties consented to having their case heard by Magistrate Judge Stephen Crocker, who upheld the arbitrator's determination. The petitioners now appeal to this court.

We hold that to withstand scrutiny under the First Amendment, State Bar expenditures funded by mandatory dues must be germane to the legitimate purposes of the State Bar. In doing so, we overrule one of the alternative holdings of *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 405 (7th Cir. 1996), in light of more recent teachings. Because the public image campaign at issue in this case is germane to those constitutionally legitimate purposes, however, we affirm the judgment in favor of the State Bar.

*Factual and Procedural Background*

I. *Purposes, Activities and Funding of the State Bar of Wisconsin*

The State Bar of Wisconsin is a creation of the Wisconsin Supreme Court, which also governs bar activities

No. 09-4080

3

under its rules. See Wis. S. Ct. R. 10.01. Membership in the State Bar is a "condition precedent to the right to practice law in Wisconsin." Rule 10.01(1). The stated purposes of the State Bar are to:

aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to conduct a program of continuing legal education; to assist or support legal education programs at the preadmission level; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform and the relations of the bar to the public and to publish information relating thereto; to carry on a continuing program of legal research in the technical fields of substantive law, practice and procedure and make reports and recommendations thereon within legally permissible limits; to promote the innovation, development and improvement of means to deliver legal services to the people of Wisconsin; to the end that the public responsibility of the legal profession may be more effectively discharged.

Rule 10.02(2). To serve these broad purposes, the Wisconsin Supreme Court rules permit the State Bar to engage in and fund "any activity that is reasonably in-

tended" to further the State Bar's purposes. Rule 10.03(5)(b)1. However, the Rules make clear that the State Bar may not use the compulsory dues of any objecting member "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." *Id.* Those activities must be funded by voluntary dues or other sources of revenue.

A bar member may choose to withhold his or her pro rata portion of dues that were budgeted for activities that cannot be supported by compulsory dues. See Rule 10.03(5)(b)2. To enable members to assert their rights, the State Bar must publish each year a written notice of the activities that can and cannot be supported by compulsory dues, including each member's pro rata portion of each. If a member contends that the State Bar has allocated dues incorrectly between compulsory and voluntary activities, the member may demand that the question be settled by an arbitrator. See Rule 10.03(5)(b)3. In this case, the Objectors objected to the State Bar's expenditure of mandatory dues on a public image campaign for lawyers in fiscal year 2007.

## II. *The State Bar's Public Image Campaign*

The State Bar launched the public image campaign in response to signs that some bar members saw a need for such a program. In the State Bar's 1998 Membership Survey, when asked what they needed from the State Bar, 15 of 145 members responding indicated that they would like the State Bar to improve the image of the

legal profession in the community.<sup>1</sup> One member wrote that the State Bar needed "better involvement in addressing the public's perception of lawyers." Another commented that "the Bar needs to do more to improve the image of lawyers and the legal profession in general." A third noted that members needed "an aggressive public relations program." In 2000, a poll of all State Bar division, section, and committee chairs and local bar presidents showed that 78% believed a State Bar-led message development campaign was necessary. And in 2001, 89% of respondents to the State Bar's Bench Bar survey indicated that they believed the reputation of the legal profession had declined in the eyes of the public.

In the midst of these studies, the Office of the Chief Justice of the Wisconsin Supreme Court, the Director of State Courts, the League of Women Voters of Wisconsin, and the State Bar established the Public Trust Steering Committee to address issues of public trust and confidence in the Wisconsin justice system. The project had three phases: first, to research and identify issues concerning public trust and confidence; second, to gather input from public focus groups; and third, to create an action plan. The action plan was finalized in October 2000. The Committee reported, among other points, that judges and attorneys needed to be encouraged to be involved in the community. The Committee found that increasing public confidence in the justice system

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<sup>1</sup> Only one other need—lowering costs and fees of State Bar seminars, conventions, dues, and section memberships—received more comments.

depended on people knowing and trusting the decision-makers and understanding the legal process, and that judges and attorneys who were active in the community were perceived to be more trustworthy. The Committee recommended increased judicial and attorney participation in and connection to their communities.

The State Bar formed a Public Image Committee to address some of these concerns. Its purpose was to "educate the public about the legal profession and develop a common theme about how lawyers contribute to the community." President's Message, 74 Wis. Law. 11 (Nov. 2001). The effort focused on the expertise, problem-solving skills, and service to the community of Wisconsin lawyers.

In 2002 the Public Image Committee unveiled a public image campaign that carried the slogan "Wisconsin Lawyers. Expert Advisers. Serving You." Examples of the materials developed and aired include:

- television spots featuring lawyers from the Green Bay and Fox Valley area involved in a number of community projects to improve the lives of senior citizens and the Hmong population, elementary and high school students involved in mock trial efforts, and other community groups and activities;
- television spots featuring Dane County area lawyers volunteering their time to the Dane County Bar Association's Family Law Assistance Center; and
- television spots featuring La Crosse and Eau Claire area lawyers using their legal skills to assist the

No. 09-4080

7

La Crosse County Bar's Free Legal Clinic, a free legal clinic for homeless veterans in Tomah, and the La Crosse area bar's support for "Jim's Grocery Bag," eleven La Crosse School District food pantries.

In fiscal year 2007—the year on which the fiscal year 2009 reduction was based and the focus of this lawsuit—the State Bar spent \$97,886 of mandatory dues on the public image campaign. That amounted to \$5.16 per member.

### *III. Proceedings Before the Arbitrator and the District Court*

Pursuant to Wisconsin Supreme Court Rule 10.03(5)(b), the Objectors' claim was first heard by an arbitrator. The Objectors argued that the State Bar's expenditure of mandatory dues on the public image campaign violated their rights under the First Amendment because the expenditures were not related to either the regulation of lawyers or improving the quality of legal services, and were ideological in nature. Cautioning that under the State Bar bylaws he had "no authority to add, subtract, set aside or delete from any Supreme Court Rule or State Bar bylaw," the arbitrator ruled in favor of the State Bar. Arb. Dec. at 6, citing Wis. State Bar Bylaws, Art. I, Sec. 5(e)(vi). Although the arbitrator expressed "doubts about the 'germaneness' of the public image campaign," he concluded that having a good reputation was a proper professional interest for any profession and that the public image campaign appeared to fit into the State Bar's statutory purposes to "provide a forum for the discussion of subjects pertaining to the practice of law, . . . and the relations of the Bar to the

public and to publish information relating thereto." See Rule 10.02(2).

The arbitrator, however, ultimately was convinced that "germaneness" was irrelevant unless the challenged expenditure was political or ideological. See Arb. Dec. at 6-7, citing Rule 10.03(5)(b)1. The Objectors did not argue that the public relations campaign was political, and the arbitrator considered but rejected the Objectors' argument that the public image campaign was ideological. The arbitrator thus found that the State Bar had demonstrated that the public image campaign was within the language and intent of the applicable Wisconsin Supreme Court Rules and that the Objectors could be required to pay their share of its costs.

The Objectors sought judicial review of the arbitrator's decision in the state courts. The State Bar removed the action to federal court. Removal was proper under 28 U.S.C. §§ 1331 and 1441(b) because the Objectors' claim arose under the federal Constitution.<sup>2</sup> The parties

STATE BAR OF MICHIGAN

<sup>2</sup> The district court also suggested that after removal, the Federal Arbitration Act would control review of the arbitrator's decision. The point is largely moot because the standards under either the Wisconsin or federal arbitration statutes are identical. See Wis. Stat. § 788.10(1)(d); 9 U.S.C. § 10(a)(4). However, the FAA was not invoked by the parties, and our jurisdiction is based on the federal question raised by the Objectors, not the FAA, which is not an independent source of jurisdiction. *E.g., Minor v. Prudential Securities, Inc.*, 94 F.3d 1103, 1104-05 (7th Cir. 1996). Because the state arbitrator

(continued...)

consented to have their case heard by Magistrate Judge Crocker under 28 U.S.C. § 636(c). Judge Crocker affirmed the arbitrator's decision. He rejected the Objectors' argument that language in this court's decision in *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996), was overruled by the Supreme Court in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). See *Kingstad v. State Bar of Wisconsin*, 670 F. Supp. 2d 922, 926 (W.D. Wis. 2009). The Objectors then appealed to this court.

### *Analysis*

#### *I. Mandatory Associations under the First Amendment*

The Objectors argue that even though the State Bar's public image campaign was not political or ideological, it was not germane to the purposes of the State Bar that allow the group to compel members to support its group speech activities. Objectors contend that such forced expenditures must also be germane to the purposes of the State Bar in order to pass First Amendment scrutiny. Our review of this constitutional question is *de novo*. *Zbaraz v. Madigan*, 572 F.3d 370, 378 (7th Cir. 2009); *Klementanovsky v. Gonzales*, 501 F.3d 788, 791 (7th Cir. 2007). On this threshold issue of law, we agree with the Objectors.

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<sup>2</sup> (...continued)

arguably exceeded his powers, his decision was appealable, and because the underlying claim arose under the federal Constitution, the appeal was removable.

To understand why Objectors can be compelled to subsidize some but not all of the State Bar's activities, one must understand why integrated or mandatory bars are permissible under the First Amendment. We begin with a brief overview. The First Amendment issue arises because bar members are required by force of law to join the group (as a condition of practicing their profession) and to provide financial support for group speech. These requirements implicate the First Amendment freedom of association, which includes the freedom to choose not to associate, and the First Amendment freedom of speech, which also includes the freedom to remain silent or to avoid subsidizing group speech with which a person disagrees. See generally *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471-72 (1997); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573-74 (1995); *Railway Employees' Department v. Hanson*, 351 U.S. 225, 236-38 (1956).

Despite this general rule against "forced speech," however, the Supreme Court has found that certain mandatory associations—agency shops, agricultural marketing collectives, and integrated or mandatory bars—are permitted under the First Amendment because the forced speech serves legitimate governmental purposes for the benefit of all members. For example, "agency shop" arrangements, in which all employees must pay union dues whether they are union members or not, are permitted because the government has an interest in peaceful labor relations. In general, peaceful labor relations are promoted if all employees share in

the expenses related to the collective bargaining from which all employees benefit—both union members and non-members. See, e.g., *Abood v. Detroit Board of Education*, 431 U.S. 209, 221-23 (1977) (“agency shop” arrangement was permitted to prevent “free riders” on union’s collective bargaining efforts); *International Association of Machinists v. Street*, 367 U.S. 740, 763-64 (1961) (same); *Hanson*, 351 U.S. at 235-38 (purpose of promoting peaceful labor relations was legitimate; without a showing that agency shop arrangements were used to force ideological conformity or to infringe on employees’ freedom of expression or that dues were imposed for reasons unrelated to collective bargaining, agency shop arrangement did not violate First Amendment). Similarly, statutorily-mandated agricultural marketing collectives can pass First Amendment muster because the government has an interest in establishing and maintaining a comprehensive marketing plan for agricultural commodities. *Glickman*, 521 U.S. at 469, 473.

“Mandatory” or “unified” bars, under which dues-paying membership is required as a condition to practice law in a state, are also permitted under this theory. See generally *Lathrop v. Donohue*, 367 U.S. 820 (1961) (examining Wisconsin’s mandatory bar).<sup>3</sup> In *Lathrop*, the

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<sup>3</sup> This arrangement has been described variously as an “integrated,” “mandatory” or “unified” bar. See, e.g., *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 297 n.5 (1st Cir. 2000) (“integrated” or “unified”); *Morrow v. State Bar of*  
(continued...)

Court analogized a state bar to an agency shop and found that Wisconsin had an interest in establishing an integrated bar to:

elevat[e] 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 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.

367 U.S. at 842-43 (internal footnote omitted). The *Lathrop* Court reserved judgment on the question whether the dissenters' rights were being violated by using mandatory bar dues to support political activities, finding

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<sup>3</sup> (...continued)

*California*, 188 F.3d 1174, 1175-76 (9th Cir. 1999) ("unified" and "mandatory bar memberships"); *Schneider v. Colegio de Abogados de Puerto Rico*, 187 F.3d. 30, 31 (1st Cir. 1999) ("mandatory bar"); *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 979 (1st Cir. 1993) ("unified bar"). "Integrated" and "unified" sound more positive, but "mandatory" is closest to reality.

that the record was not sufficiently developed to address that claim. *Id.* at 847-48.

However, it is also now clear that the group speech itself is not a sufficient purpose for a mandatory association to withstand First Amendment scrutiny. In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Supreme Court examined an agricultural collective under which most of the collected assessments were spent on generic advertising. Although the dissenting group members were not restricted from communicating their own messages, were not compelled to participate in any actual or symbolic speech, and were not compelled to support any particular political or ideological viewpoint, the Court still held the program unconstitutional. The Court found that the underlying program was different from the program that had passed muster in *Glickman* in one critical respect: "In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme." *Id.* at 411-12. A forced subsidy of group speech, in other words, is permissible when it is "a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity." *Id.* at 414. In *United Foods*, there was no "larger expenditure." The principal purpose of the group was the compelled speech itself, so the Court found that the mandatory subsidy of that speech violated the dissenters' First Amendment rights.

*II. Subsidy of "Non-Germane" Speech under the First Amendment*

In light of these principles, Wisconsin's mandatory State Bar is constitutional, and the Objectors may be compelled to pay their share of direct and indirect expenses that are reasonably incurred by the State Bar to serve its dual constitutional purposes of regulating the legal profession and improving the quality of legal services. The Objectors' argument is that the State Bar's public image campaign simply does not fit that bill. More specifically, they argue that the constitutional issue cannot be resolved based solely on the arbitrator's finding that the State Bar's public image campaign was non-political and non-ideological. We agree that the issue of germaneness must also be part of the constitutional analysis.

In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the petitioners were practicing lawyers subject to California's integrated bar. They claimed that the use of their membership dues to finance ideological or political activities that they opposed violated their rights under the First Amendment. They objected to the bar's lobbying efforts, its filing of amicus briefs in pending cases, and its expenditures for its annual conference and education programs. The California Supreme Court upheld the expenditures, but the Supreme Court of the United States reversed. It stated that the constitutionally permissible purposes of the integrated bar were to regulate the legal profession and to improve the quality of legal services. A reviewing court had to determine whether

the challenged activities were necessarily and reasonably incurred for those purposes, or whether they were "activities of an ideological nature which [would] fall outside of those areas of activity." *Keller*, 496 U.S. at 13-14. The Court explained:

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

*Id.* at 15-16.

We also learn from the Supreme Court's exploration of this question in other forced group speech contexts. In *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks*, 466 U.S. 435, 449-55 (1984), the Court considered whether a union's convention expenses, litigation expenses that were not for bargaining or grievances, union publication costs, social event expenses, employee death benefits, and expenses related to general organ-

izing efforts were "germane" to the union's purpose. The Court considered each category of expense to see whether it was "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Id.* at 448. The dissenters' belief that the money was not being well spent on any one of these endeavors was not enough. *Id.* at 456. Ultimately, without discussing whether any of the challenged categories were political or ideological, the Court found that of the challenged expenses, only the union's litigation expenses that were not for bargaining or grievances and expenses related to its organizing efforts were not germane to the union's purposes that permitted forced speech. *Id.* at 448-55. The other categories of expenditures—social events, publications, and conventions—did not infringe the objecting employees' First Amendment rights any more than their compulsory contribution to the union, and were upheld by the Court. *Id.* at 455-57.<sup>4</sup>

Also, in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), the Court reiterated that, to be charged to dissenting employees, the agency shop union expenses must "(1) be 'germane' to collective bargaining activity;

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<sup>4</sup> At the time of the Court's opinion the union was no longer the exclusive bargaining agent, and the petitioners were no longer involved in the death benefits system. Employee death benefits were left as an open question. *Ellis*, 466 U.S. at 454-55.

No. 09-4080

17

(2) be justified by the government's vital policy interest in labor and peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. The Court cautioned that the test did not require "a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit." *Id.* at 522. We need not list the specific expenditures under review aside from one that is particularly relevant here—a public image campaign. The Court found that, under this standard, the public image campaign was not germane to the union's collective bargaining functions. *Lehnert*, 500 U.S. at 528-29.<sup>5</sup>

From these teachings, we conclude that in a forced group speech case, the First Amendment requires a reviewing court to consider whether challenged expenditures by dissenting members of a mandatory association are reasonably related to the constitutionally relevant purposes of that association. It is not sufficient to examine only the political or ideological nature of those expenditures without also considering whether the expenses are related to the constitutionally legitimate purposes of the association that permit forced group speech in the first place. The applicable cases do not describe the analysis as a test of "either-or," as in "either"

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<sup>5</sup> The *Lehnert* Court also noted, without discussion or explanation, that the campaign was political in nature. See *id.* The Objectors have not argued that the public image campaign conducted by the Wisconsin State Bar was similarly political.

the expenditures are non-political and non-ideological "or" they are non-germane before they implicate the First Amendment. Rather, the key is the overall "germaneness" of the speech to the governmental interest at issue. The political or ideological nature of the speech factors into that ultimate analysis.

The parties have framed the issue before us as whether the Objectors may be required to subsidize speech that is not political or ideological but that is also not germane to the constitutionally permissible purposes of a mandatory bar. Since we last addressed this issue in *Thiel v. State Bar of Wisconsin*, both the Supreme Court and the First Circuit have provided additional guidance. In *United Foods*, the Supreme Court reviewed its earlier decisions in *Abood* and *Keller* and explained the test not in terms of politics or ideology but in terms of germaneness: "speech need not be characterized as political before it receives First Amendment protection," and "lawyers [can] be required to pay moneys in support of activities that [are] germane to the reason justifying the compelled association in the first place.... [O]bjecting members [are] not required to give speech subsidies for matters not germane to the larger regulatory purpose which justifie[s] the required association." *United Foods*, 533 U.S. at 413-14, discussing *Abood*, 431 U.S. at 232 (union dues), and *Keller*, 496 U.S. at 14 (mandatory state bar).

The First Circuit considered this problem of germaneness for bar expenditures in *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291 (1st Cir. 2000). Puerto Rico's

mandatory bar (the "Colegio") required members to purchase life insurance from its group life insurance program. That expenditure was obviously not political or ideological, but could unwilling members be required to pay the bar for life insurance they did not want? Noting that in some years the insurance premium constituted as much as 72% of the bar dues, the First Circuit found the mandatory payment to the Colegio's group life insurance plan was unconstitutional, holding specifically that mandatory bar association dues could not be used to fund non-germane activities even if those activities were not ideological. See *id.* at 300 ("To say that germaneness is the test in ideological expenditure cases is not to say that it is not also a relevant inquiry in cases involving non-ideological expenditures."). In reaching its conclusion, the First Circuit considered the applicable Supreme Court precedents and the policy supporting its conclusion. As the court explained, the First Amendment permits the government to force a union or bar member to pay only for those expenses that are germane to the purposes that justify requiring the member to belong to the group in the first place:

[S]trong public interests justify the intrusion, and the germaneness test guarantees that these public interests are being served by any challenged activity. Compelling financial support for activities wholly unrelated to those public interests, however, changes the balance and weakens the justification that supported the intrusion on First Amendment associational interests in the first place. Simply stated, that an individual may be compelled to associate and

financially contribute for some purposes does not mean she may be compelled to associate and financially contribute for all purposes. Without this germaneness check, once a person is compelled to join and support a bar association for legitimate reasons, she could be forced to pay for any bar activity for any reason or no reason, as long as it did not involve political or ideological expression. Under the Colegio's theory, for example, it could mandate that members join its life insurance program and then spend 99% of member dues on life insurance.

*Romero*, 204 F.3d at 301 (internal citation omitted). We agree with *Romero* and this reasoning.

To avoid an inquiry into germaneness, the State Bar relies heavily on our opinion in an earlier chapter of the Wisconsin bar saga, *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996). In *Thiel*, plaintiffs challenged the facial validity of Wisconsin Supreme Court Rule 10.03(5)(b) to the extent it authorized the use of mandatory dues for non-germane, non-ideological expenditures. After resolving an Eleventh Amendment issue, the *Thiel* majority opinion reviewed the then-recent Supreme Court cases on forced speech and concluded that the court did not need to decide whether the State Bar's non-political and non-ideological speech was germane to its purposes of regulating the legal profession or improving the quality of legal services: "we hold that the First Amendment does not prohibit the Bar from funding non-ideological, non-germane activities with compelled dues." 94 F.3d at 405. The *Thiel* majority then

addressed the challenged activities and concluded that they were all in fact germane to the State Bar's legitimate purposes. *Id.* Either of these alternative holdings was sufficient to decide *Thiel* itself.

Writing separately, Judge Ripple concurred with the judgment but disagreed with the broader holding. He cautioned that all of the activities complained of in *Thiel* "fit quite comfortably within the category of non-ideological, nonpolitical activities that are germane to the regulation of the legal profession or the improvement of the quality of legal services." He concluded that the court was "not confronted here with a situation in which the bar can be said to be engaging in nonpolitical, non-ideological activities that are also completely divorced from those statutory purposes that justify mandatory dues." *Id.* at 406 (Ripple, J., concurring). Judge Ripple noted further that "certainly, the same procedural protections that ferret out activities of an ideological and political nature will also identify nongermane activities that are not ideological or political. But that does not mean necessarily that such nongermane activities need not be identified or that they can be supported by mandatory dues." *Id.*

Today's case again presents the question that divided the *Thiel* panel. The arbitrator and the district court understandably relied on the language of the majority's first alternative holding in reaching their decisions in this case. With the benefit of the later guidance from *United Foods* and the First Circuit's helpful opinion in *Romero*, however, we agree with Judge Ripple's conclu-

sion. We agree that the 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, whether or not those same expenditures are also non-ideological and non-political. We thus overrule the first alternative holding in *Thiel* and hold that the First Amendment prohibits the Wisconsin State Bar from funding non-germane activities with compelled dues.<sup>6</sup> 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.

### *III. Germaneness of the Public Image Campaign*

The State Bar argues that its public image campaign expenses were germane to improving the quality of legal services available to the people of Wisconsin. The Bar's

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<sup>6</sup> Because this decision overrules the alternative holding of *Thiel*, this opinion has been circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(e). No judge favored a rehearing en banc on the question of overruling that portion of *Thiel*. Judge Sykes would rehear the case on the issue of the actual germaneness of the State Bar's public image campaign, and her dissent from the denial of rehearing en banc follows.

concern was that, if the public lacks trust in lawyers and the legal system, more people may represent themselves rather than seeking out the assistance of a lawyer. On the other hand, if people have more confidence in lawyers and the legal system, they are more likely to participate in that system and will be more likely to refrain from extra-legal, and even violent, self-help measures. By attempting to promote trust in lawyers and the legal system, the public image campaign also sought to solidify the fiduciary relationship between lawyer and client and to improve lawyer-client communications by encouraging disclosure, candor, and compliance with competent advice.

The Objectors counter that there was no demonstrated connection between improvement of the public's perception of lawyers and the legal profession and the improvement of the quality of services that those lawyers provide. According to the Objectors, the public image campaign was designed to benefit lawyers, not the public, by encouraging more people to engage the services of lawyers, thus generating more fees. Although the arbitrator had "doubts" as to the germaneness of the public image campaign, he did not reach the issue because he concluded he was not authorized to decide the constitutional issue. Unlike the arbitrator, we are so authorized. The record has been supplemented, and the key facts about the content and nature of the State Bar's public image campaign are not disputed. We can apply the constitutional test for reasonableness without remand.

Under *Keller*, 496 U.S. at 14, and *Ellis*, 466 U.S. at 448, the test here is whether the challenged expenditures were "necessarily or reasonably incurred" for the constitutionally legitimate purposes that authorize mandatory dues. No one contends the public image campaign costs were "necessarily" incurred to improve the quality of legal services. The issue is whether the costs were "reasonably" incurred for that purpose. The State Bar believes there is a relationship between improving the public's trust in lawyers and improving the quality of legal services that those lawyers are able to provide. By fostering that trust, the State Bar hoped to encourage better communication between lawyers and clients, and, in doing so, to encourage development of the attorney-client relationship. The hope was that trust and communication would improve the quality of the relationship and the service provided.

Our dissenting colleague finds that theory to be speculative and unsupported by the record. We do not suggest that the theory is beyond debate. It relies on a series of assumptions: a "soft" image campaign will improve the public image of lawyers, which will lead in turn to better attorney-client relationships, which will lead in turn to better quality legal services. We do not assert that the record shows the public image campaign has actually improved the quality of legal services, but we do not see a need for a trial that would scrutinize either the subjective motives of bar leaders or the actual effectiveness of the public image campaign. The standard of review is deferential, as when we review challenged

legislation to determine whether it is reasonably related to a legitimate governmental purpose. Under that deferential standard, we find that the State Bar's theory is not unreasonable. A client who trusts his or her lawyer seems more likely to disclose relevant information, particularly if that information is sensitive, and better, more candid communication should enable lawyers to give better, more comprehensive advice—which should improve the quality of services. Also, it seems reasonable to us to expect that a client who trusts his or her lawyer is more likely to accept and act upon any advice the lawyer is able to provide. When people follow competent legal advice, the system itself is improved.

Do Wisconsin lawyers themselves benefit from the State Bar's public image campaign? We can assume that they may. If more people seek out the services of lawyers as a result of the public image campaign, those lawyers will benefit from the increased business that results. But that additional effect does not nullify the legitimacy of the campaign. Again, the State Bar is not required to prove that its expenditures were actually successful in accomplishing the stated purpose, or that they served only that purpose, or that the public image campaign was a particularly wise use of the State Bar's funds. After all, "[p]etitioners may feel that their money is not being well-spent, but that does not mean that they have a First Amendment complaint." *Ellis*, 466 U.S. at 456, quoted by *Thiel*, 94 F.3d at 405. The limited issue before us is whether the public image campaign was reasonably related to the constitutionally legitimate

purpose of improving the quality of legal services, and we find that it was.

Although the Supreme Court in *Lehnert* found that a union's public image campaign was not germane, the purposes supporting mandatory union dues (collective bargaining and grievance resolution) and a mandatory bar (regulating the profession and improving legal services) are very different. See *Lehnert*, 500 U.S. at 528-29. We find persuasive here the Ninth Circuit's decision in *Gardner v. State Bar of Nevada*, 284 F.3d 1040 (9th Cir. 2002), which distinguished *Lehnert* and found a public image campaign for lawyers was "highly germane" to the legitimate purposes of a mandatory bar. The court provided a powerful defense of the legal profession and the need for fostering—and earning—public trust:

Among the functions of the State Bar in this case is the function identified by the district court—"to advance understanding of the law, the system of justice, and the role of lawyers, as opposed to nonlawyers, to make the law work for everyone." That purpose is satisfied by the State Bar's campaign to dispel any notion that lawyers are cheats or are merely dedicated to their own self-advancement or profit. The law, rightly understood, is not a business where the bottom line dictates the conduct that is permissible. The law is a profession where a near monopoly of access to the courts is granted to a trained group of men and women on the basis that they will follow the profession's rules of conduct and in so doing serve the cause of justice.

No. 09-4080

27

[Plaintiff] Gardner makes the point that lawyers are supposed to serve their clients, not “everyone.” But the underlying assumption that justifies the justice system is that everyone is served by the adequate representation of conflicting interests and perspectives. It is perfectly true, not puffery, that lawyers strive to make the law work for everyone by their fair and zealous representations of their clients. It is important for the public to understand that a lawyer representing a defendant in a criminal case is not a defender of crime, and that a lawyer advising his or her client of a tax break is not a scoundrel but an ally of a government that should collect as tax no more than the law allows. It is equally important for citizens to know that a prosecutor seeking to imprison a man believed guilty of a crime is serving justice, as is the state tax department’s attorneys seeking to collect a tax. The lawyer who represents a client who believes she has been unfairly denied promotion is as much a partner in the system of justice as the lawyer who acts for her employer seeking to explain the apparent discrimination.

The public needs to know that often there are two, or more, sides to a story or a situation. More’s Utopia has no lawyers, but in our real world, lawyers are not merely a necessity but a blessing. If the public doesn’t understand that—and the State Bar had reason to think many members of the public did not—the justice system itself will wither. The work of the State Bar to foster public understanding of the adversary nature of law is vital to the bar’s function.

It is no infringement of a lawyer's First Amendment freedoms to be forced to contribute to the advancement of the public understanding of law.

284 F.3d at 1043.

The Ninth Circuit's generous approach to germaneness in *Gardner* is consistent with the portion of *Thiel* that remains binding, where we found that all of the particular activities at issue were germane to the purpose of the State Bar and could be funded with mandatory dues. The disputed activities in *Thiel* included publishing and distributing a Bill of Rights pamphlet for pre-college students, conducting an "Economics of Practice" survey designed to help lawyers address business decisions related to the practice of law, funding awards given to reporters for writing on law-related topics, sponsoring a group to assist alcoholic lawyers, local bar grants, and sponsoring a mock trial competition. *Thiel*, 94 F.3d at 405. Although we have overruled the alternative holding in *Thiel*, its unanimous assessment of the actual germaneness of these activities remains sound. There is no meaningful difference between the public image campaign at issue here and several of those expenditures we approved in *Thiel*. We do not believe the reasonableness test requires federal courts to engage in closer parsing of the State Bar's expenditures.<sup>7</sup> In light of

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<sup>7</sup> The dissent's call for increased scrutiny of the State Bar's public image campaign would also cast doubt on the germaneness of the activities approved in *Thiel*. For reasons previously (continued...)

No. 09-4080

29

*Gardner* and *Thiel*, we conclude that the State Bar's public image campaign was germane to the Bar's constitutionally legitimate purpose of improving the quality of legal services available to the Wisconsin public.

The judgment of the district court affirming the arbitrator's decision to overrule plaintiffs' objections is AFFIRMED.

SYKES, *Circuit Judge*, dissenting from the denial of rehearing en banc. Three Wisconsin lawyers filed an objection to the State Bar's use of their mandatory bar dues to fund a public-relations campaign designed to improve the image of lawyers and the legal profession. Their First Amendment challenge raises important questions about the continued viability of *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996), the validity of Wisconsin Supreme Court Rule ("SCR") 10.03(5)(b)1, and the proper approach to the "germaneness" inquiry that determines whether a compulsory speech subsidy is

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<sup>7</sup> (...continued)

stated, we do not believe that this holding of *Thiel* needs to be revisited, or that the federal courts should engage in such a close parsing of the contents of the State Bar's programs.

consistent with the constitution, at least in the context of a mandatory bar. The State Bar defends *Thiel* and SCR 10.03(5)(b)1, and argues that its use of mandatory bar dues for a public-image campaign is constitutional under *Keller v. State Bar of California*, 496 U.S. 1 (1990).

My colleagues side with the challengers on the first two inquiries, overruling the primary holding in *Thiel* and effectively invalidating SCR 10.03(5)(b)1. Panel Op. at 14-22. I agree with this part of the opinion. The compelled-subsidy doctrine of *Keller* is not limited to cases challenging the use of compulsory bar dues for *ideological* or *political* activities, as *Thiel* held and the supreme court rule implies. It applies more broadly, for the reasons the panel has amply explained. Under *Keller* and the Supreme Court's related decisions in the union-shop context, a mandatory bar association may use compulsory bar dues *only* for activities that are germane to the constitutionally relevant justifications for forced bar-association membership: (1) the regulation of the legal profession; and (2) the improvement of the quality of legal services. *Keller*, 496 U.S. at 14; *see also Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 297-303 (1st Cir. 2000). Activities not germane to these purposes must be funded from voluntary dues. This is so regardless of whether the challenged expenditure qualifies as "political" or "ideological."

More specifically, *Keller* held that "the guiding standard" for assessing the constitutionality of a mandatory bar association's use of compulsory bar dues is "whether the challenged expenditures are necessarily or reasonably

incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" 496 U.S. at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)). The panel comprehensively explains why *Keller* and more recent developments in Supreme Court caselaw require us to overrule the primary holding in *Thiel*. Panel Op. at 14-22.

Overruling *Thiel*, in turn, effectively invalidates critical limiting language in SCR 10.03(5)(b)1. This rule was adopted by the Wisconsin Supreme Court in response to *Keller* and essentially reflects the more limited understanding of *Keller* articulated in *Thiel*. The rule provides, in pertinent part, that "[t]he 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." WIS. SUP. CT. R. 10.03(5)(b)1. To the extent that this language limits the constitutionally required germaneness inquiry to "political or ideological activities," the rule is too narrow, as the panel has correctly held.<sup>1</sup> Panel Op. at 22.

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<sup>1</sup> The plaintiffs here—Jon Kingstad, Steven Levine, and James Thiel—are frequent mandatory-bar litigants and are currently waging a two-front war against the alleged unconstitutional use of their compulsory bar dues. This case is one front. The other is a petition before the Wisconsin Supreme Court to amend SCR 10.03(5)(b)1 to delete the language that limits the *Keller* "germaneness" inquiry to State Bar activities that are "political or ideological" in nature. *See* Pet. to Amend SCR 10.03(5)(b)1, (continued...)

Thus far I have no quarrel with anything in the panel's analysis; to the contrary, I think it is thorough and sound.

I cannot agree, however, with the panel's application of these principles, which appears in Part III of the analysis section of the opinion. Panel Op. at 22-29. I recognize that this sort of disagreement would not ordinarily justify rehearing this case *en banc*. But in this case I think it does. After setting the constitutionally required germaneness inquiry on a sound doctrinal foundation, the panel applies the standard in a way that drains it of any real meaning. The panel concludes that the State Bar's public-image campaign satisfies *Keller's* germaneness requirement; in my view, this conclusion is procedurally questionable and substantively flawed.

As to procedure, as the panel has noted, this case came into federal court from an arbitration proceeding commenced in accordance with the procedural scheme established in SCR 10.03(5)(b) for challenging State Bar expenditures of mandatory bar dues. Pursuant to the requirements of the rule, the objecting lawyers sought arbitration on the question of whether the State Bar's public-image campaign could properly be funded from

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<sup>1</sup> (...continued)

No. 09-08, filed on August 24, 2009, by Petitioners Jon Kingstad, Steven Levine, James Thiel, and 40 other State Bar members, *available at* <http://www.wicourts.gov/supreme/docs/0908petition.pdf>. The state supreme court is holding this rulemaking petition in abeyance pending the outcome of this litigation.

No. 09-4080

33

their compulsory dues or must instead be funded from voluntary dues. The arbitrator held that because the public-image campaign was not “political or ideological,” the germaneness limitation on the use of compulsory dues set forth in SCR 10.03(5)(b)1 was not implicated. The arbitrator did *not* decide the *Keller* germaneness issue, properly understood—that is, he did not decide whether the public-image campaign was germane to “improving the quality of legal services.”<sup>2</sup> The arbitrator did, however, express some significant skepticism on the matter. He said:

I believe that based on the evidence presented it is a stretch, in fact, to regard [improving the quality of legal services] as the campaign’s primary purpose. There is simply too much in the record indicating that the predominant goals have more to do with the interests of lawyers than with the interests of their clients or potential clients.

I will return to this point in a moment.

The objecting lawyers sought judicial review of the arbitrator’s decision in state court, and the State Bar removed the suit to federal court based on the lawyers’ First Amendment challenge to SCR 10.03(5)(b)1 and this use of their mandatory bar dues. As I have noted, the State Bar’s fallback position was that if the political/ ideological limitation in the supreme court rule was invalid, this court can and should decide the

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<sup>2</sup> No one suggests that the public-image campaign had anything to do with “regulating the bar.”

broader germaneness question. And that's what the panel has done.

Here's the (arguable) procedural problem: The objecting lawyers asked for a remand if they prevailed on their claim that the supreme court rule is unconstitutional. They said a remand was appropriate because the arbitrator did not decide the broader germaneness question and because the record in the district court on that issue is nonexistent or at best incomplete. It's not entirely clear to me whether a remand is necessary or appropriate under the circumstances. What is clear, however, is that the panel's germaneness holding rests *entirely* on broad and generalized assertions about public trust in the legal profession, not on anything in the record.

And this is where I think the opinion is off-track as a substantive matter. The panel concludes that the State Bar's public-image campaign is indeed germane to "improving the quality of legal services." The rationale for this conclusion is essentially twofold. First, the panel simply accepts the Bar's assertion that the point of the image campaign was to foster public trust in the legal profession and defers to the Bar's "theory" that greater public trust will improve the quality of the legal services Wisconsin lawyers provide to their clients. Panel Op. at 24-25. Second, the panel adopts the rationale of the Ninth Circuit's decision in *Gardner v. State Bar of Nevada*, 284 F.3d 1040 (9th Cir. 2002), an analogous case involving a First Amendment challenge to the Nevada State Bar's use of compulsory dues to fund a similar

public-relations campaign. Panel Op. at 26-28. This is a serious misapplication of *Keller's* germaneness requirement. The panel credits the Bar's germaneness "theory" with little critical analysis and assigns *Gardner* far more persuasive weight than it can reasonably bear.

The State Bar's factual characterization of the image campaign is called into question by the very slogan under which the public-relations effort flies: "Wisconsin Lawyers. Expert Advisors. Serving You." The Bar's purpose here is unmistakable: It is to boost public opinion of Wisconsin's lawyers, not enhance public understanding of the legal profession or improve the quality of the work lawyers do for their clients or the public. To be "germane" to "improving the quality of legal services," an expenditure of compulsory bar dues should as a factual matter have at least *some* connection to the law, legal advising, legal education, legal ethics, or the practice of law. The public-image campaign was aimed at none of these things; it was all about marketing. Indeed, the State Bar called it a "Branding Initiative" and pitched it to Wisconsin's lawyers as a public-relations effort designed to "brand the profession" in order to "improve the public's perception of the profession."

The ads themselves were totally content-free, at least insofar as conveying any meaningful information about the law or the role of lawyers in our legal system. They depicted lawyers engaged in various forms of legal and nonlegal volunteer work in their communities. This kind of "soft" advertising may have a place in the package of services a bar association might legitimately want to

provide for its members, but let's not pretend it had anything to do with educating the public about the actual role of lawyers in our legal system. This was an *image* campaign, after all.

But even accepting at face value the State Bar's contention that the ads were designed to promote public understanding of and therefore trust in the legal profession, any claim that the image campaign was reasonably related to improving the quality of legal services is at best strained and at worst a little odd. To state the obvious—and as the arbitrator recognized—an ad campaign directed at boosting sagging public opinion of the legal profession serves the interests of *lawyers*, not their clients or the public. In what sense was this an expenditure "necessarily or reasonably incurred for the purpose of . . . improving the quality of . . . legal service[s]," as required by *Keller*? 496 U.S. at 14. The opinion contains a number of conclusory assertions on this point—e.g., that greater public trust as a general matter will yield better communication between individual clients and their attorneys and ultimately lead to more competent legal advice. Panel Op. at 24-25. This strikes me as both implausible and entirely speculative; it is highly attenuated as a matter of constitutional justification and in any event is completely unsupported on this record.<sup>3</sup>

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<sup>3</sup> I am not suggesting that the germaneness inquiry requires an examination of the "subjective motives of bar leaders" or that the State Bar must establish that its "expenditures were  
(continued...)

The Ninth Circuit's opinion in *Gardner*, on which the panel heavily relies, is long on rhetoric and short on reasoning. It also misses the whole point of *Keller*. *Gardner* rests its conclusion entirely on lofty truisms about the importance of lawyers and a naked assertion that the public "needs to know" about their role in making the justice system work. From this the court concludes that the Nevada State Bar's public-relations campaign is "highly germane to the purposes for which the State Bar exists." *Gardner*, 284 F.3d at 1043. This is not the correct legal standard. The pertinent question is *not* whether the challenged expenditure is reasonably related to *any* purpose for which a bar association exists; that is useless as a decision principle if the point is to protect free-speech rights in the context of forced bar-

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<sup>3</sup> (...continued)

actually successful in accomplishing its stated purpose." Panel Op. at 24-25. *Keller*'s germaneness requirement does not require close scrutiny of a challenged expenditure of compulsory bar dues, but it requires something more than mere rational-basis review, which applies to all laws, starts from a presumption of constitutionality, and "deems a law valid if any justification for it may be imagined." *United States v. Skoien*, No. 08-3770, 2010 WL 2735747, at \*3 (7th Cir. July 13, 2010) (citing *Vance v. Bradley*, 440 U.S. 93 (1979)). *Keller*'s germaneness requirement implements the protections of the First Amendment; it therefore is not analogous to rational-basis review, as my colleagues suggest. Panel Op. at 24-25 ("The [germaneness] standard of review is deferential, as when we review challenged legislation to determine whether it is reasonably related to a legitimate governmental purpose.").

association membership. The pertinent question—the one the Supreme Court said is the “guiding standard” for First Amendment purposes—is whether the challenged expenditure is reasonably related to one of the *constitutionally relevant* purposes that justify mandatory bar membership: regulation of the bar or improving the quality of legal services. *Keller*, 496 U.S. at 14. The Ninth Circuit did not address *this* question, and it is the only one that matters. The court made no effort, that is, to explain how the Nevada State Bar’s expenditure of compulsory bar dues on a public-image campaign for lawyers was “necessarily or reasonably incurred for the purpose of . . . improving the quality of . . . legal service[s].” *Gardner* is unpersuasive. We should not follow it.

In the end, while the panel has done an exemplary job of articulating the constitutional principles that govern this case, its application of those principles effectively dilutes them.<sup>4</sup> I have no objection to a “generous”

STATE BAR OF MICHIGAN

<sup>4</sup> As the panel observes, *Thiel*’s alternative holding provides some support for a loose and highly deferential understanding of the germaneness review required by *Keller*. Panel Op. at 28-29. *Thiel* approved the use of compulsory bar dues for a variety of programs sponsored by the State Bar of Wisconsin—including a mock-trial competition and awards given to reporters for law-related writing—but offered no explanation for this conclusion. 94 F.3d at 405 (“All of these [programs], it seems, are geared towards improving the quality of legal services in Wisconsin. Under *Keller*, they are germane and (continued...)”)

interpretation of the germaneness requirement. Panel Op. at 28. But the panel has gone well beyond "generous." If a public-image campaign designed to benefit lawyers can be considered germane to improving the legal services they provide to their clients, then the germaneness standard in this circuit is not merely generous, it is meaningless. I would rehear this case en banc.

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<sup>4</sup> (...continued)

may be funded by compulsory dues, regardless of whether they are ideologically oriented."). My colleagues summarily reaffirm this aspect of *Thiel*. Panel Op. at 28-29 (*Thiel*'s "unanimous assessment of the actual germaneness of [the challenged] activities remains sound."). This alternative holding in *Thiel*, and the panel's endorsement of it here, reflect an implicit concern about excessive federal-court involvement in the affairs of state bar associations. I share that concern. But the state supreme court's decision to make bar-association membership mandatory for all lawyers operates as a continuing burden on their First Amendment rights, which imposes constitutional responsibilities on the State Bar and makes a federal-court role inevitable, or at least unavoidable. And in this context, deference does not have a particularly strong claim. The State Bar is not (as the Supreme Court observed in *Keller*) "the typical government official or agency." 496 U.S. at 12.



## Public Affairs Department FY 2013

Project	Description	FY12
Supreme Court Vacancies	The Supreme Court's Department generally manages the activities of the State Bar of Wisconsin with respect to the Supreme Court, including serving as a liaison between the Bar and Court staff.	
Supreme Court Debate	In order to better inform the voting public, the State Bar of Wisconsin organizes public debates. In particular, the Bar attempts to organize a debate for Supreme Court Candidates.	C
Judicial/DA Vacancies	Whenever a vacancy occurs in a state judiciary or district attorney position, staff prepares announcements which are posted on wisbar and an e-mail sent to members in the affected areas.	C
Leg Council Study Committees	Study committees are established by the Joint Legislative Council to examine major issues and problems identified by the Legislature. The study committees are made up of Legislators and citizens who are interested in or knowledgeable about the study topic.	NC
Uniform Laws Commission	The Government Relations Team serves as a liaison to the Wisconsin Uniform Laws Commission. The Commission generally reviews national uniform draft codes on various issues and prepares them for implementation in Wisconsin.	
Legislative Report Book	The Government Relations Team prepares and provides as required by SCR 10.05, a report of all section positions taken during a legislative cycle.	NC
Public Affairs Policy Book	(White Book) The Government Relations Team prepares and provides to the Board of Governors a summary of all legislative positions taken by the Board of Governors.	NC
SBW Federal Lobbying Positions	SBW's Federal Lobbying Team of the State Bar of Wisconsin staff generally monitors federal legislative activity which is not related to any particular issue or legislation.	NC
SBW Federal Lobbying Positions	SBW Funding - Civil Legal Services Corporation Funding - The State Bar of Wisconsin supports state general purpose revenue funding to provide civil legal assistance by lawyers to low-income citizens and supports federal funding for the Legal Services Corporation to adequately provide low-income citizens access to the legal system. Further, the State Bar of Wisconsin supports participation of the private bar in state and federal civil legal services programs. The State Bar of Wisconsin favors a legal aid system that does not interfere with a poor person's full access to the courts or deny advocacy that is available to others in our society. The State Bar of Wisconsin recognizes that legal needs of low-income individuals go largely	C

SBW Lobbying Positions	In behalf of the State Bar, lobbying staff generally monitors legislative activity which is not in particular issue of legislation.	C
Juvenile Court Jurisdiction	The State Bar of Wisconsin strongly supports this proposed change because we know, from our experience and our training, that 17-year-olds, no matter how big and tough they may appear to be, are children. We also know that the best way to protect society against further crimes by 17-year-olds is to treat them in the juvenile justice, not the criminal justice system. Recent national research shows that juveniles who are treated in the juvenile justice system are less likely to recidivate than those who are tried in the adult criminal justice system. The experience of the members of the Children & the Law Section is that the national research seems to be true in Wisconsin. Yes, the juvenile justice system is more expensive, but the adult criminal system is just not equipped to handle 17-year-olds. Long term, like the investments we make in education, The Federal Nominating Commission has been making recommendations to Wisconsin's United States Senators since 1979 and was charged with recommending four to six candidates for the position. For the Seventh Circuit vacancy, the Commission was chaired by University of Wisconsin Law School Dean Kenneth B. Davis, Jr.	
Federal Nominating Commission		
Tax on Legal Services	The State Bar of Wisconsin opposes a professional tax on legal services. The State Bar of Wisconsin supports access to legal services as the essential operation of an ordered society and a tax on legal services would further increase legal fees and decrease low-income and moderate-income individuals' access to justice.	
Scales of Justice	The Legislative Oversight Committee provides awards to legislators who have taken a leadership role on issues of importance to the courts, the legal profession and the public.	

# Positions-KellerOrder

## Assembly Bill 53 (Medicaid Expansion)

### Companion Bill: SB 38

Relating to: Medical Assistance for certain adults who are not currently eligible for traditional Medicaid or BadgerCare Plus.

#### **Public Interest Law Section: Active Support; Amendment Position: No Position**

This bill essentially accepts the Medicaid Expansion money from the federal government to support Wisconsin's BadgerCare Plus and Medicaid programs and grow enrollment. The bill makes adults who are under 65 years of age, who are not pregnant, who are not otherwise eligible for MA under the state's traditional MA program or BC+, and whose income, as determined under federal law, do not exceed 133% FPL eligible for the BC+ Benchmark plan beginning January 1, 2014. The bill also eliminates BC+ Core and the language regarding BC+ Basic. The bill requires that, if the benefits under the BC+ Benchmark plan are not sufficient to qualify DHS to obtain an enhanced FMAP, DHS must provide coverage that complies with the Affordable Care Act in order to qualify for an enhanced FMAP. The bill expands eligibility of BadgerCare Plus programs for more uninsured, low-income adults, bringing billions in federal money to the state, and affirming a commitment to those in need of adequate access to health care and coverage.

## Assembly Bill 115 (UCC: Remittance Transfers)

### Companion Bill: SB 116

Relating to: remittance transfers under the Uniform Commercial Code Article 4A, relating to funds transfers.

#### **Business Law Section: Active Support; Amendment Position: No Position**

AB 115/SB 116 enacts changes recommended by the Uniform Laws Commission that are needed to maintain coverage of UCC Article 4A (Wis. Stats. Ch.410) over certain "remittance transfers" that are not electronic funds transfers. Electronic funds transfers are governed by the federal Electronic funds Transfer Act (EFTA).

Originally, UCC Article 4A (Wis. Stats. Ch. 410) was designed to cover wholesale wire transfers (not involving a consumer), and the EFTA covered aspects of wire transfers of funds that involved consumers. However, an amendment to the EFTA contained in the Dodd-Frank law, which amendment recently became effective, expands the coverage of the EFTA to cover "remittance transfers" whether or not they are also electronic funds transfers covered by the EFTA. Under current section 410.108, a funds transfer initiated by a remittance transfer will be entirely outside of Chapter 410, even if the remittance transfer is not an electronic fund transfer (and thus also not covered by the EFTA). Thus section 410.108 needs to be amended so that Chapter 410 still applies to remittance transfers that are not electronic funds transfers. That amendment is AB 115.

The State Bar of Wisconsin Business Section supports the enactment of AB 115/SB 116 to maintain the effectiveness and utility of Chapter 410 with respect to governance over remittance transfers that are not electronic funds transfers, and to maintain the uniformity in commerce of UCC Article 4A.

## Assembly Bill 120 (Medical Apology)

### Companion Bill: SB 129

Relating to: inadmissibility of a statement of apology or condolence by a health care provider.

#### **Litigation Section: Active Opposition; Amendment Position: No Position**

The State Bar Litigation Section supports the concept that health care providers should be encouraged to express to their patients words of sympathy or concern without fear of liability arising from such expressions. To the extent the current legislation promotes that objective, the Litigation Section supports it. However, the legislation should not exclude from evidence admissions of fault by anyone, whether patient or medical care provider. To the extent the proposed legislation would have the effect of making admissions of fault by health care providers non-evidentiary, the Litigation Section opposes it. The problem with the bills could be corrected by deleting the words "fault," liability," and "responsibility."

**Assembly Bill 200 (Motor Vehicle Warranty)**

**Companion Bill: SB 182**

Relating to: the law governing repair, replacement, and refund under a motor vehicle warranty.

**Public Interest Law Section: Active Opposition; Amendment Position: No Position**

The bill relates to the repair, replacement and refund of motor vehicles under Wisconsin's "lemon law." Wisconsin has been praised for its thoughtful consumer protection laws, such as this lemon law, but this bill seeks to destroy those protections and fix a system that is not broken. Currently, the lemon law provides remedies for a person who purchases, receives, or leases a motor vehicle that is under an express warranty and that has a condition or defect that substantially impairs the use, value, or safety of the motor vehicle and that is covered by an express warranty.

The bill imposes additional limitations on civil actions brought to recover damages caused by lemon law violations. Under the bill, any action must be commenced within 24 months after first delivery of the motor vehicle to a consumer. The bill changes several definitions and requires the person returning the vehicle to meet several burdensome deadlines, otherwise the case cannot proceed. It also extends the time for a manufacturer to provide a comparable new vehicle to the inconvenienced consumer.

Consumer lawyers serve as "private attorneys general" by bringing such cases and making large manufacturers responsible for their faulty products. Currently, the award of pecuniary losses, costs and attorney fees to a prevailing consumer is mandatory, but this bill wants to reduce consumers' protection and make it harder for attorneys to take these cases by making the fees discretionary. In addition, under this bill, a consumer can only be awarded up to the amount of the consumer's pecuniary loss because this bill removes the double damages provision, which seeks to compensate consumers for their troubles and to punish a manufacturer that does not follow the law.

**Assembly Bill 243 (Private Bar Rate)**

**Companion Bill: SB 235**

Relating to: increasing the rate paid to private attorneys for representing indigent clients.

**State Bar of Wisconsin: Active Support; Amendment Position: No Position**

The State Bar of Wisconsin supports private practice lawyers' compensation for assigned counsel appointments at a rate that fairly compensates lawyers for their time, travel and any other costs associated with providing quality representation to their clients. Rates of compensation should be at least as much as those set by the Wisconsin Supreme Court for court-appointed attorneys. A rate of compensation less than that set by the Wisconsin Supreme Court for court appointed attorneys does not safeguard the constitutional rights of individuals accused of committing a crime. The State can guarantee constitutional safeguards by providing fair and timely reimbursements to private bar attorneys to ensure a more efficient and effective criminal justice system.

**Senate Bill 68 (Termination of Maintenance)**

NC

Relating to termination of maintenance upon the payee's or payer's death and notices relating to maintenance.

**Family Law Section: Active Support; Amendment Position: No Position**

An order requiring a party to pay maintenance to the other shifts taxable income from the payer to the payee. The IRS has additional rules before the payer can deduct maintenance and the payee must claim maintenance as income. The IRS requires that the maintenance payments terminate upon the death of the payee. We request statutory confirmation of this requirement so decisions made by the courts or agreements entered into by the parties satisfy this IRS requirement. This problem is becoming more common as the number of divorce cases increases where neither party has an attorney to properly prepare the judgment. Further, no Wisconsin published decision has directly addressed this limited issue and clarification is necessary.

#### REVISION TO Wis. Stat. § 767.58

Each order for family support or maintenance shall include an order that the payee notify the court and payer within 10 business days of the payee's remarriage.

#### RATIONALE

Wis. Stat. § 767.59(3) states that maintenance terminates upon the remarriage of the payee. However, the statutes do not contain any notice requirement wherein the payee must inform the court or payer of the remarriage. After divorce, many parties have little to no contact. The payer would not know or have any reason to know that the payee has remarried. Further, the payer may not be able to secure "proof of remarriage." We request that Wis. Stat. § 767.58 be revised to require the payee to notify the payer and the court of the remarriage so that maintenance terminates in a timely manner as contemplated in Wis. Stat. 767.59(3).

Further, family support is "a substitute for child support orders under s. 767.511 and maintenance payment orders under s. 767.56." See Wis. Stat. § 767.531. A payer of family support is entitled to notice that the payee has remarried since the maintenance portion of the family support is no longer appropriate. Please note that in order for the family support to change, the payer must still file a motion to convert family support to an appropriate child support award.

#### REVISIONS TO Wis. Stat. § 767.59(3)

We ask that the section be revised by adding the language underlined below. "After a final judgment requiring maintenance payments has been rendered and the payee has remarried, the court shall, on application of the payer with notice to the payee and upon proof of remarriage, or upon receiving notice of remarriage from the payee, vacate the order requiring the payments."

#### RATIONALE

Wis. Stat. § 767.59(3) states that maintenance terminates upon the remarriage of the payee. This simple change permits the court to vacate maintenance upon notification by the payee of the payee's own remarriage. The payer should not be required to petition the court to terminate the payee's maintenance if the payee notifies the court directly of the remarriage.

#### **Budget Bill 40 (Changes to Medicaid/BadgerCare Plus)**

Relating to provisions of AB 40 that change Medicaid/BadgerCare Plus.

**Public Interest Law Section: Active Opposition; Amendment Position: No Position**

PILS opposes the Governor's decision to turn away over \$4 billion in federal money over the next 6 years that would have helped support Wisconsin's Medicaid programs and expand the program to more, newly eligible adults. Instead, the budget proposes to cap BadgerCare Plus for non-disabled adults at 100% of the Federal Poverty Level, meaning a loss in BadgerCare Plus enrollment and a cost to the state and taxpayers. The legislation stifles the implementation and efficient deployment of health reform in Wisconsin that could be beneficial to many low income parents, adults, veterans, uninsured and under-served people. The changes include changed eligibility and coverage for children, pregnant women (as written), and individuals with disabilities. Changes also include eliminating the BadgerCare Plus Basic Plan and programs such as Badger RX Gold for prescription coverage. It also assumes a decline in Family Planning Only Services (from over 76,000 to only 1,000) by June 2015 and changes to self-employed families, like farming families, who use depreciation calculations. The bill expands eligibility for childless adults under 100% FPL, but does not clarify exact benefit levels for these individuals. The non-partisan Legislative Fiscal Bureau (LFB) released its analysis of the Biennial budget proposal, explaining that the budget proposal, as written, results in fewer adults having BadgerCare Plus coverage, while costing the state taxpayers hundreds of thousands of dollars. There are a few changes to the Medicaid Assistance Purchase Plan that are favorable—changing the way income is calculated. However, the bill changes the work requirement reporting for MAPP which would be detrimental to many on the program.

The Public Interest Law Section has voted to actively oppose sections of AB 40 (Biennial Budget) relating to transit funding and moving transit out of the transportation fund.

#### **Budget Bill 40 (Civil Legal Services)**

Relating to adding language in the state budget bill, AB 40, that provides state general purpose revenue funding to give civil legal assistance by lawyers to low-income citizens.

#### **State Bar of Wisconsin: Active Support; Amendment Position: No Position**

The State Bar of Wisconsin supports state general purpose revenue funding to provide civil legal assistance by lawyers to low-income citizens and supports federal funding for the Legal Services Corporation to adequately provide low-income citizens access to the legal system. Further, the State Bar of Wisconsin supports participation of the private bar in state and federal civil legal services programs. The State Bar of Wisconsin recognizes that legal needs of low-income individuals go largely unmet and that access to legal services removes obstacles for low-income individuals in obtaining and maintaining employment, health care and child care.

#### **Budget Bill 40 (Commercial Bail Bond Agents)**

Relating to licensure of commercial bail bond agents and bail bond agencies and certification of commercial bail recovery agents, providing an exemption from emergency rule procedures, granting rule-making authority, and providing a penalty.

#### **Criminal Law Section: Active Opposition; Amendment Position: No Position**

The Criminal Law Section strongly opposes any legislation relating to authorizing bail bond agents in Wisconsin.

The Criminal Law Section is a voluntary organization within the State Bar, representing over 500 criminal defense lawyers, prosecutors, judges and academicians with the purpose of promoting respect, fairness and professionalism in the administration of criminal justice in Wisconsin.

The State of Wisconsin outlawed bail bondsmen in 1979 by mandating in Wisconsin Statute 969.12 that a surety must be a resident of the state, must be a natural person and that no surety may be compensated for acting as such. The Criminal Law Section opposes any legislation that would authorize the compensation of a surety on a bail bond, even if the surety was a bail bond agent or a bail bond agency licensed by the Department of Safety and Professional Services and the bond was underwritten by a company authorized to do a surety business in Wisconsin. The section also takes issue with a bail bond agent or agency that could potentially be compensated as a percentage of the amount of bond set, frequently as much as 10 percent of the amount of the bond set.

This system would tend to act as another tax on those in our society that are less economically able to bear it. Implementing bail bond legislation could mean that a bail bondsmen or agency would be compensated at a rate of 10 percent of the amount of the bond set. Under the present law, (no bondsmen) after posting a \$1000 cash bail, the defendant would receive back the entire \$1000 if the he/she obeyed all conditions and showed up for court as ordered and was found not guilty. With a bail bondsman, the defendant would receive \$900.

Another group that would suffer would be crime victims. Using the above scenario, if the defendant showed up for all court appearances, obeyed all conditions of bail and was found guilty, the \$1000 cash bail could be available to the court to pay restitution to the victim and/ or court costs under Wisconsin Statute 962.02(6) and 962.03(4). With a bail bondsman, the court has nothing to award the victim.

The Criminal Law Section disagrees with the assertion that enacting legislation authorizing bail bond agents would lead to substantial job growth. Based upon our state's present economic condition, Wisconsin does not need to create private sector jobs around the criminal justice system where motives are driven by profit and not protection of the community. The "full and odorous bloom" of the professional bondsman service is not what we believe the people of the State of Wisconsin want or need.

For all the above reasons, the Criminal Law Section opposes any legislation relating to authorizing bail bond agents in Wisconsin.

## STATE BAR OF MICHIGAN

### **Budget Bill 40 (Court Funding )**

Relating to adequate funding of the Judicial Branch of government.

### **State Bar of Wisconsin: Active Support; Amendment Position: No Position**

The State Bar of Wisconsin fundamentally believes the Judicial Branch of government should be funded through sum-sufficient general purpose revenue. The Bar supports funding for all areas of court operations and for all personnel related to court operations such as: law libraries, deputy and assistant clerks of court, secretaries, law clerks and court commissioners. Adequate funding is of critical importance to provide a system of justice which is fairly administered and impartial to all people.

### **Budget Bill 40 (Estate Recovery/Divestments)**

Relating to provisions in the 2013 state budget bill, AB 40, relating to living and pooled trusts, estate recovery and divestments.

### **Elder Law Section: Active Opposition; Amendment Position: No Position**

The Elder Law section is opposed to all of the provisions in the 2013 budget proposed by Gov. Walker which affect living and pooled trusts, estate recovery, and divestments, because the budget provisions are either in conflict with federal law or are in conflict with good public policy affecting the elderly and disabled citizens of Wisconsin".

### **Budget Bill 40 (Estate Recovery/Marital Property)**

Relating to Medical Assistance, estate recovery and marital property provisions contained in the 2013 state budget bill, AB 40.

#### **Family Law Section: Active Opposition; Amendment Position: No Position**

The Family Law Section is opposed to the provisions in the 2013 budget proposed by Gov. Walker that disregard marital property law in Wisconsin and eliminates protection for absent spouses. The provisions related to marital property law will encourage divorce among couples facing high costs of care and will discourage second marriages in the post-retirement age population. The elimination of the spousal refusal option places a spouse requiring assistance in a hardship in situations where there is an absent, abusive or uncooperative spouse. The effects of these provisions violate public policy.

1. The estate recovery provisions are completely disregarding marital property laws. According to marital property law, each spouse owns 50% of the marital property and each spouse can do what he or she pleases with his or her 50% upon his or her death. Under the proposed law, if a spouse receives benefits, the community spouse is prevented from passing his/her 50% share of the marital property as he/she pleases. The estate can recover on it all. This is especially concerning in second marriages with children from a previous marriage. If the community spouse has children from a previous marriage, he/she will not be able to leave anything to his/her children upon death because the state will be able to make a claim for all of the assets because of the benefits given to the step-parent. This is also contrary to intestate law, which would leave 50% of the deceased spouse's marital property to his/her children and 50% to the surviving spouse. If this bill passes, it would be prudent for people to get divorced instead of deal with these provisions.
2. The community spouse is also prohibited from doing what he/she pleases with his/her 50% of the marital property during his/her lifetime under the proposed law. Currently, the community spouse is disregarded after eligibility and can make gifts or sell assets for less than fair market value after eligibility. Under the proposed law, the community spouse will no longer have the freedom to do what he/she pleases with his/her assets because a divestment of the community spouse would penalize the nursing home spouse.
3. The proposed bill eliminates the spousal refusal provision, which states that if a person's spouse refuses to provide information the application spouse is treated as a single person. Under the proposed bill, the application spouse would be unable to receive benefits because there is no protection for an applicant whose spouse refuses to cooperate. The state probably thinks that this provision is being misused, however, there is a legitimate purpose for it. Some couples separate but do not file for a legal separation or divorce for various reasons (moral, religious, etc.). In many of those instances, the spouses have not had communication for years. In some instances, one spouse is being abused by the other spouse and the children intervene to get the abused spouse away from the abusive spouse. They may get a restraining order and keep the spouse's location protected from the abusive spouse (this is an example from a true case). Those spouses should not be denied benefits because they are unable to obtain financial information from the spouse.
4. One domino effect of encouraging divorce is that it could increase the number of guardianships. Once a petition for divorce is filed, the spouse cannot act as agent. If the nursing home spouse is incompetent, he/she cannot amend or create a new power of attorney document. This would result in a need for guardianship if there is not a second agent listed that could act. This would just use more county resources because many times the county petitions for guardianship if there is no family to submit the petition.

### **Budget Bill 40 (MAPP: Informal Work Arrangements)**

Relating to provisions contained in the 2013 state budget bill, AB 40, calling for the elimination of Informal Work Arrangements.

#### **Elder Law Section: Active Opposition; Amendment Position: No Position**

The Governor's budget proposes eliminating the current policy of permitting MAPP recipients to engage in informal work arrangements for in kind payment. The budget bill changes would require MAPP recipients to have more formal work arrangements with federal and state taxes withheld from their pay checks. We oppose this change to the informal work requirement at this time, based on our direct work with clients, and our concern that the supports needed to assist people in a transition to formal employment and/or to provide other access to Medicaid are not in place. The Legislative Fiscal Bureau paper projects that about 9000 MAPP recipients are likely to lose eligibility as a result of this change.

Some MAPP recipients have medical and mental health conditions that, at least temporarily, prevent them from engaging in formal work. Many of these recipients have worked most of their life and paid federal and state taxes.

Contrary to what DHS has stated, many MAPP recipients who currently engage in informal work will not be able to easily access other categories of Medicaid. For instance, many of these individuals will only be eligible for Medicaid through a spend-down/deductible. But, because the current income limit for EBD Medicaid is \$591.67, which is only 61% of the FPL, their deductibles will be very high and unaffordable. The legislature must increase the Medicaid income limit to reflect the true basic cost of living for individuals in 2013 in order to make the spend-down a realistic option for these individuals.

The loss of Medicaid will result in tremendous hardship to individuals, as well as increased cost of health care overall, especially increased use of emergency room care. The loss of Medicaid reimbursement will also result in counties facing increased costs for mental health care

The employment barriers experienced by some individuals make formal, paid employment in a traditional work environment unachievable. In order to support movement towards competitive employment, more funding (through DVR or other means) should be targeted for employment supports for this population.

The increased documentation of work and taxes required by this change will result in 10%-15% of MA recipients losing eligibility according to the LFB.

#### **Budget Bill 40 (Medicaid Expansion)**

Relating to the inclusion of amendment language in the 2013 state budget bill, AB 40, which expands Medicaid up to 133% of FPL under the Affordable Care Act.

#### **Elder Law Section: Active Support; Amendment Position: No Position**

The combination of changes required by the federal Affordable Care Act (ACA) to the private insurance market, along with opportunities to expand Medicaid, have the potential to guarantee health care coverage to more people with disabling conditions than ever before.

Beginning in 2014, people with pre-existing conditions can no longer be denied insurance. The federal government's offer to pay all Wisconsin costs for the next three years to provide care for people under 133% of the Federal Poverty Level (FPL) – calculated for the ACA to be #32,499 for a family of four – would support an estimated additional 175,000 people, one-quarter of whom have mental health disorders, depression and other chronic disabling conditions, such as multiple sclerosis or seizure disorders.

Because the federal government would fund the entire first three years of Wisconsin's expansion of coverage to all childless adults under 133% FPL, the state will actually save money. The Governor has proposed not taking additional federal money and only expanding coverage to people under 100% FPL. The plan also means an estimated 100,000 people currently covered in BadgerCare above this income level will lose their coverage on January 1, 2014 and be expected to transition to private insurance. Hospitals and other medical providers are concerned that the new private insurance market will not be ready to support these low-income people who will also now have steep out-of-pocket costs equating to as much as 20% of their total income.

### **Budget Bill 40 (Medical Assistance Purchase Plan)**

Relating to provisions contained in the 2013 state budget bill, AB 40, that make changes to the Medical Assistance Purchase Plan (MAPP).

#### **Elder Law Section: Active Support; Amendment Position: No Position**

The Elder Law section actively supports MAPP Premium Reduction.

The Governor's budget proposes changing the MAPP premium calculation rules to give parity to individuals with unearned income, such as pensions and SSDI, in the same manner as those with earned income from a job.

Currently, the premium calculation for MAPP provides greater deductions for individuals with earned income as opposed to those with unearned income. The changes in the budget bill will act as an effective work incentive by reducing premium costs for many participants who have faced added barriers to employment because of extremely high MAPP premium costs.

### **Budget Bill 40 (Public Defender Funding)**

Relating to providing compensation, including benefit packages, that are adequate to attract and retain public defenders.

#### **State Bar of Wisconsin: Active Support; Amendment Position: No Position**

The State Bar of Wisconsin supports compensation, including benefit packages that are adequate to attract and retain public defenders to ensure that ethical, effective representation is provided to each client.

### **Budget Bill 40 (Rent-to-Own)**

Relating to language in the budget that states "Revise state statutes related to rental-purchase agreements to create more choices for Wisconsin consumers."

#### **Public Interest Law Section: Active Opposition; Amendment Position: No Position**

PILS opposes the language in the budget that states "Revise state statutes related to rental-purchase agreements to create more choices for Wisconsin consumers." The rent-to-own industry seeks to exempt itself from the Wisconsin Consumer Act. Of particular concern is the requirement that it disclose fees in terms of annual interest rate, which can run as high as 300%. The WI Consumer Act has been the governing law for consumer credit transactions for several decades. Wisconsin has long been a leader in protecting its citizens. Consumer protection laws exist to protect the least sophisticated consumer and the Consumer Act has done a wonderful job of guarding against unfair and unconscionable practices. There is no need to put this law in jeopardy by giving exemptions to a specific industry. Instead, we should be reviewing our commitment to our WI residents that we expect industries that do business in WI to follow its laws.

### **Budget Bill 40 (State Attorney Compensation)**

Relating to compensation, including benefit packages, that are adequate to attract and retain experienced and qualified attorneys employed by the State of Wisconsin.

#### **State Bar of Wisconsin: Active Support; Amendment Position: No Position**

The State Bar supports compensation, including benefit packages that are adequate to attract and retain experienced and qualified attorneys employed by the State of Wisconsin.

### **Budget Bill 40 (Transit Funding)**

Relating to the Governor's proposal to move transit out of the transportation fund and into the general fund.

#### **Public Interest Law Section: Active Opposition; Amendment Position: No Position**

PILS opposes the Governor's proposal to move transit out of the transportation fund and into the general fund where it must compete with many other publicly funded programs. Transit isn't a welfare program, it is a vital form of transportation, and belongs in the transportation fund. PILS opposes the 10% cut in state aid for public transportation operations in the last budget and supports full restoration of those cuts in this budget cycle. Low income residents, persons of color, and persons with disabilities are disproportionately dependent on public transportation to access work, school, health care, shopping, etc. Cutting support for transit – in a state in which, unlike virtually every other place in the country, there is no dedicated source of transit funding – will profoundly harm those communities and make it difficult or impossible for many to access work and vital services.





## STATE BAR OF WISCONSIN

*Leaders in the Law. Advocates for Justice.*

August 18, 2013

TO: George Brown

FR: Cale Battles

CC: Lisa Roys

RE: Keller Process for fiscal year 2013  
Board of Governor's Policy Committee (BOG Policy)

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After review of all of the minutes and reports from the Board of Governor's Committee on Policy (BOG Policy), below is a summary of the activities of the committee for the fiscal year of 2013:

- The committee met in conjunction with the Board of Governors five times during the fiscal year.
- The focus of the September meeting was the continued review and modification of the State Bar's public policy positions.
  - The committee reaffirmed positions on Circuit Court Branches, Department of Justice Funding, Criminal Penalty Legislation, Eligibility for Appointed Counsel and Substitution of Judges.
  - The committee also made the recommendation to modify the following positions.
    - **Circuit Court Operations** - *The State Bar of Wisconsin fundamentally believes the Judicial Branch of government should be funded through sum-sufficient general purpose revenue. The Bar supports funding for all areas of court operations and for all personnel related to court operations such as: law libraries, deputy and assistant clerks of court, secretaries, law clerks and court commissioners. Adequate funding is of critical importance to provide a system of justice which is fairly administered and impartial to all people.*
    - **Judicial Compensation** - *The State Bar of Wisconsin supports judicial compensation, including benefits packages, for both state and federal courts which is adequate to attract and retain judges capable of administering justice fairly and efficiently. The Judicial Branch is a co-equal branch of government and should have the ability through an independent Judicial Compensation Commission to set judicial salaries at an equitable level that properly compensates the work of the judiciary."*
    - **Court Interpreters** - *The State Bar of Wisconsin supports the funding of court interpreters. The goal is to maintain an education program for court interpreters so that they are sufficiently able to understand court procedures, terms and processes, and to be able to interpret that for individuals with a variety of language barriers*

- **Age of Juvenile Court Jurisdiction** - *The State Bar of Wisconsin supports returning original jurisdiction of 17-year-old juveniles to the juvenile justice system and not the adult criminal justice system. The adult criminal justice system is not adequately equipped nor designed to handle juveniles in the adult system. The juvenile justice system has specific programming designed to address issues which are unique to our state's youth. The State Bar is not advocating the elimination of the ability of the court to try truly dangerous and mature 17-year-olds in adult court when appropriate or to change the existing original jurisdiction in adult court for juveniles who have committed a homicide or certain other offenses or the ability to waive a juvenile into adult court*
  - **Death Penalty** - *The State Bar of Wisconsin opposes reinstatement of the death penalty in Wisconsin*
  - **Racial Profiling** - *The State Bar of Wisconsin opposes racial and ethnic profiling*
  - **Right to Counsel** - *The State Bar supports the right of criminal defendants to effective assistance of counsel. Case law at both the federal and state level have set the standard for effective assistance of counsel as providing the client with zealous, competent and independent representation. The State Bar supports the principle that all criminal defendants are entitled to effective representation to assure that justice is served*
- In December the committee discussed two policy positions: Alt Decision requested by the Litigation Section and a resolution from the Board of Governors in support of the Judiciary. The committee made the following action:
  - *"Alt Decision – The State Bar of Wisconsin opposes judicial and legislative efforts to codify or expand expert witness privilege provisions known as the Alt decision [Burnett v. Alt, 224 Wis. 2<sup>nd</sup> 72, 589 N.W.2 d 21 (1999)] specifically as proposed by the 2012 Judicial Council draft 905.055."*
  - *Recommend that the State Bar has a current and active public position on the Independent Judiciary from July 2005 and that a new position is not needed at this time.*
- During the December meeting BOG Policy requested that the State Bar Government Relations staff give a report on the following questions:
  - How should the Board of Governors be more effective in how they communicate with their local legislators?
  - How can the State Bar be more proactive in lobbying?
  - How can the Board of Governors develop a long term relationship with the legislature and maintain a continuous spokesperson or group of leaders who can speak on the Bar's behalf?
  - What structure can be put into place to give the State Bar and Government Relations staff more latitude and flexibility on current active public policy positions?
  - What can the Board of Governors do to make sure the legislature understands that the State Bar is a balanced/non-partisan organization?
  - How can we present current legislative issues to the Board of Governors and how can we create an open dialogue with members.

- At the February meeting the Government Relations Staff presented a report regarding all the previously mentioned questions. The Committee only took one action, which referred the public policy position on the Alt Decision back to the Litigation Section for further review.
- The committee in April completed their review of the following public policy positions:
  - **Prosecutors Funding and Caseload Standards:** *The State Bar of Wisconsin supports funding for all state prosecutors. The State Bar also supports compensation, including benefit packages that are adequate to attract and retain prosecutors that are capable of ensuring effective representation of the public in criminal cases. The state of Wisconsin has a constitutional obligation to fund all parts the criminal justice system. By ensuring that District Attorney Offices around the state are adequately staffed and funded based on reasonable caseload standards; we are creating a more efficient and effective criminal justice system.*
  - **State Public Defender Funding and Caseload Standards:** *The State Bar of Wisconsin supports compensation, including benefits packages, that are adequate to attract and retain public defenders to ensure that ethical, effective representation is provided to each client. The State Bar of Wisconsin also supports caseload standards for individual Public Defender staff attorneys which reasonably allow attorneys time to provide ethical, effective representation to each client, which are based upon objective standards recognized by the American Bar Association. The integrity of the justice system requires that litigants be fairly and effectively represented regardless of economic resources. Overworked Public Defenders are forced by too-high caseloads to cut corners in their representation of their clients.*
  - **Habeas Corpus:** *The State Bar of Wisconsin supports the right of habeas corpus. The State Bar affirms that the right of habeas corpus is "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).*
  - **Private Bar Compensation:** *The State Bar of Wisconsin supports private practice lawyers' compensation for assigned counsel appointments at a rate that fairly compensates lawyers for their time, travel and any other costs associated with providing quality representation to their clients. Rates of compensation should be at least as much as those set by the Wisconsin Supreme Court for court-appointed attorneys. The current rate of \$40 makes it increasingly difficult to safeguard the constitutional rights of individuals accused of committing a crime. The State can guarantee constitutional safeguards by providing fair and timely reimbursements to private bar attorneys to ensure a more efficient and effective criminal justice system.*
  - **Compensation for State Attorneys** - *The State Bar supports compensation, including benefits packages that are adequate to attract and retain experienced and qualified attorneys employed by the State of Wisconsin*
  - **Other Action** – BOG Policy also voted to direct staff to lobby against current legislation dealing with collateral source payments and injunctions against state court actions
- In June the committee did a retrospective review of the past year and took no committee actions.