

**VOLUNTARY OR MANDATORY?  
The Bar Structure Debate**

A Discussion Presented to: James E. Doyle Inn of Court  
January 27, 2010 Meeting

*Presented by:*

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***I. Why have a Bar Association? Purposes of the State Bar of Wisconsin- Chapter 10, Supreme Court Rules***

SCR 10.02(2) Purposes. The purposes of the association 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.

***II. Professionalism is a Duty of Lawyers—Preamble, Chapter 20, Supreme Court Rules***

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. ....

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

### ***III. History of challenges to mandatory membership in the State Bar of Wisconsin***

A. The history of challenges to unification of the bar in Wisconsin was digested by former University of Wisconsin Law School Professor Ted Schneyer in 1983 in his article *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*; American Bar Foundation Research Journal, 1983, No 1, p. 5, fn.27 as follows:

The unification debate in Wisconsin has epic dimensions. It began when Wisconsin State Bar Association President Claire Bird proposed in June 1914 that his voluntary association seek legislation unifying the bar. See Claire B. Bird, *This Association: What Can It Be and Do?* 10 Rep. St. B. Ass'n Wis. 193, 194 (1914). This was the earliest such proposal by a bar association president. See Wisconsin Bar's Belated Stan, 17 J. AID. Judicature Soc'y 60 (1933). Unification was regularly discussed in the association in the 1920s and was the object of an unsuccessful legislative campaign in the 1930s. A unification bill was passed over an acting governor's veto in 1943, but in that year and again in 1946 the state supreme court refused to implement the act. See *In re Integration of the Bar*, 249 Wis. 523, 25 N. W. 2d 500 (1946); *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943). In the 1950s, on the initiative of the leadership of the voluntary statewide association, the court did unify the bar, first as an experiment (see *Integration of the Bar*, 273 Wis. vii, 79 N.W.2d 441 (1956); *In re Integration of the Bar*, 273 Wis. 281, 77 N.W.2d 602 (1956)» and then permanently. See *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (1958). In 1960 the court upheld the constitutionality of its unified bar in the only such case ever to go to the United States Supreme Court, where the Wisconsin court's judgment was affirmed on appeal. *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961). Since the mid-1970s, continuation of the unified bar has regularly been an issue, both within the state bar (see,

e.g., Sommer, supra note 20; Candidate for President-Elect Dave August, Wis. B. Bull., Apr. 1978, at II) and before the state supreme court. See In re Discontinuation of the State Bar of Wisconsin as an Integrated Bar, 93 Wis. 2d 385, 286 N.W.2d 601 (1980); State ex re I. Armstrong v. Board of Governors of the State Bar, 86 Wis. 2d 746....

B. More recently, Past President Levine on behalf of himself and two other members of the bar filed arbitration over the Bar's failure to "Kellerize" the costs associated with the Bar's Public Image campaign. In the initial ruling in that suit, the Arbitrator tersely described the history of challenges to the integration of the State Bar of Wisconsin as follows:

The Bar notes, with no rebuttal offered from the objectors, that its status as an integrated bar and/or the proper level of dues in one year or another have been the subject of twelve administrative proceedings before the Wisconsin Supreme Court, four federal constitutional challenges, and three previous arbitration proceedings. Most of this activity took place in the early 1990s, soon after a pivotal case, *Keller v. State Bar of California*, 496 U.S. 1 (1990), was decided by the U.S. Supreme Court. It has been 13 years since the last Wisconsin arbitration proceeding of this type.

***Kingstad, Thiel and Levine vs. State Bar of Wisconsin, Fiscal Year 2009 Arbitration***, Arbitration Decision by Christopher Honeyman, December 12, 2008.

C. The State Bar's *Keller* determination that the cost of the Bar's public image campaign need not be included in the Keller calculation was sustained by the Arbitrator. Past President Levine then sought to institute an Original Action in the Supreme Court of Wisconsin (petition denied) and filed for review of the decision in Circuit Court, Dane County. The State Bar removed the action to Federal Court in the Western District of Wisconsin, and argued there, in its' motion to dismiss:

Further, the constitutionality of funding with mandatory dues the kind of activities at issue in the arbitration proceeding has also been upheld by the only court to address the issue.

This proceeding, then, is simply the "latest chapter in the seemingly never ending battle between [certain] Wisconsin attorneys and the Wisconsin State Bar," *Thiel v State Bar of Wisconsin*, 94 F.3d 399, 400 (7<sup>th</sup> Cir. 1996), and the challenge to the arbitration award should be dismissed.

*State Bar of Wisconsin's Brief in Support of Motion to Dismiss, 09 CV 216, Federal Court, Western District of Wisconsin*

D. The determination by Magistrate Judge Crocker, dated November 24, 2009:

In conclusion, I am not persuaded that *Union Foods* has overruled *Glickman* and *Thiel* or that any room exists to argue that compelled contributions to a state bar's non-political, non ideological speech infringe on the members' First Amendment rights. Even if I inferred that *United Foods* implicitly overruled *Glickman* and *Thiel*—and I do not—my inference would not cause me to change my ruling. See *Levine v. Heffernan*, 864 F.2d 457, 461 (7th Cir. 1988) (out of respect for *stare decisis*, lower courts “are ordinarily reluctant to conclude that a higher court precedent has been overruled by implication”). Therefore, I conclude that it was not improper for the arbitrator to reject plaintiffs' objections to the mandatory dues after concluding that their use was for speech that was not political or ideological. I will deny plaintiff's motion to vacate the arbitrator's decision and, because the parties have agreed that plaintiffs' case rises or falls on plaintiffs' motion, dkt. 12, I will dismiss this case.

**IV. *The 1992 Decision: In Matter of State Bar of Wisconsin 169 Wis. 2d 21, (485 N.W. 2d. 225 (1992)***

A. State Bar was “voluntary” from May, 1988 to July 1, 1992, based on *Levine v. Heffernan*, et al. 864 F. 2d 467 (7<sup>th</sup> Cir. 1988.) *Levine v. Heffernan* sought to end the integrated/mandatory status of the bar based on the first amendment issues. When *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990) was decided, all parties in *Levine* understood and agreed that the *Keller* decision controlled the outcome. The Bar was at a crossroads: should it seek to remain a voluntary membership association, or should it ask the Wisconsin Supreme Court to return it to mandatory status? The Board of Governors voted on 9/14/90 to study the issue and appointed two separate committees to study and develop the arguments for each alternative.

1. 1990 Voluntary Bar Committee: Chaired by Patricia Heim. Arguments submitted by this group in its final report, published in the Wisconsin Lawyer, February, 1991 Edition were:

- a. The obligation to allocate dues to *Keller* imposes too heavy a burden on the organization
- b. No nexus between the bar association and “professionalism”
- c. Voluntary bar should be more responsive to the concerns of its members, retain members with good benefits
- d. Bar no longer performs public agency functions

2. 1990 Mandatory Bar Committee: Chaired by Irvin Charne. Arguments submitted by this group in its final report, published in the Wisconsin Lawyer, February, 1991 Edition were:

- a. Law is a learned profession “in the spirit of public service.”
- b. Mandatory membership is a reasonable means of “mobilizing the legal profession to focus on the public’s interest in the administration of justice.”
- c. Supportive of pro bono services
- d. Risk of becoming a trade association representing interests of particular members
- e/ Can speak for the profession as a whole
- f. Demographics – women and minorities drop out
- g. Can focus on programmatics, more quantifiable revenue for the entity.

C. Bablich opinion in 1992, concurring with the majority approving the petition for reinstatement of the integrated bar:

The mandatory bar has been an essential force in assisting lawyers to fulfill their roles as guardians of the rule of law. Of equal importance, the mandatory bar has been a guiding force in assisting lawyers to deliver an increasing quality of justice to society and to those they represent. Many if not most of the services the bar delivers in pursuit of these goals are not self-supporting and are not capable of being subject to user fees. To cite but a few, they include: publications to members keeping them up to date on legal developments including orders and decisions of this court which regulate the profession and discipline attorneys; publications for public consumption informing the public on matters of justice and the rights and responsibilities of citizens under law; lawyer referral service, assisting members of the public to find qualified lawyers regarding specific legal issues; assistance and promotion of pro bono activities; fee arbitration service; assistance in the disciplinary system by appointing approximately 200 lawyers and lay persons to district grievance committees; ethical advice and guidance to members; assistance to alcoholic, ill and disabled lawyers through the "lawyers helping lawyers" program.

If the bar is voluntary, market forces will eventually dictate that much of the bar's resources, economic and personnel, will have to be directed at recruiting and maintaining membership. The "what's in it for me"

syndrome will drive programs, services, and personnel in the direction of self interest, not social responsibility. Bablich concurrence, 169 Wis. 2d. 21, 29-30

D. Chief Justice Abrahamson dissent in 169 Wis. 2d. 21, 41.

The United States Supreme Court has held that a unified bar with limited functions funded by mandatory dues does not violate constitutional rights. Nevertheless when there is serious doubt across the state and across the country about the merits of a unified bar, and when there is no demonstrated need for a unified bar in Wisconsin, I believe the values of attorneys' freedom of association and a bar association's freedom and independence from the court trump any claimed benefits of mandatory membership. I believe Wisconsin should have the best of both worlds—a voluntary, independent, statewide general-purpose bar association and Court mandated annual assessments on lawyers to finance the court-supervised boards that carry out essential programs for regulating lawyers and improving the quality of legal services. Abrahamson dissent, 169 Wis. 2d 21, p 44

E. Past President of the Bar Daniel Hildebrand, April, 1992, President's Perspective, Wisconsin Lawyer Magazine:

An integrated bar should not be viewed primarily as an organization that provides "benefits" to its members. Rather, an integrated bar is an organization enabling its members to provide service to improve the administration of justice for the benefit of the public.

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Lathrop v. Donohue, 10 Wis. (2d) 230.

## APPENDIX.

*Major Activities of State Bar of Wisconsin.*

## Postgraduate Education of Lawyers.

The most-extensive activities of the State Bar are those directed toward postgraduate education of lawyers. There is a great need for this because of the rapid changes and new developments that have occurred in the field of law subsequent to the admission to practice of a large percentage of the lawyers of the state. This trend shows no signs of abating. In order that lawyers be qualified to properly represent clients such postgraduate education is essential.

The State Bar provides such postgraduate education through its annual and separate midwinter meetings, its regional meetings, its annual tax school, and its publication of the Wisconsin Bar Bulletin. The annual and the midwinter meetings of the State Bar are each of at least two days' duration and are largely devoted to the delivery of papers on technical legal subjects of an instructive nature. The same is true of the one-day regional meetings annually held throughout the state. At the annual two-day tax school the papers delivered are confined to the fields of taxation. Many of these papers delivered at these various meetings are later published in the Wisconsin Bar Bulletin so that they will be available for instant reference by all members of the bar of the state. Each member of the State Bar receives a copy of the Wisconsin Bar Bulletin by mail as issued, it being published bimonthly.

Postgraduate education of lawyers is in the public interest because it promotes the competency of lawyers to handle the legal matters intrusted to them by those of the general public who employ them.

Lathrop v. Donohue, 10 Wis. (2d) 230.

## Public Relations.

The field of endeavor carried on under the name of "public relations" would better be termed "public service." The chief activity carried on in this field by the State Bar is the preparation, publication, and distribution to the general public of pamphlets dealing with various transactions and happenings with which laymen are frequently confronted, which embody legal problems. Alternative courses of action are sometimes set forth and the advantages and disadvantages of each explained. Where there is danger that a layman might be likely to overlook some positive requirement of the law, such requirements are pointed out. Among the titles of such pamphlets are: "It May be Your Turn Next—What to do in Case of an Auto Accident;" "Have You Made a Will;" "Sound Steps in Purchasing a Home;" and "Joint Tenancy—Boon or Boomerang." Banks and trust companies, local bar associations, and others purchase these pamphlets from the State Bar at slight advance above the cost of publication in order to cover boxing and mailing expense. The statement of receipts and disbursements of the State Bar for the calendar year of 1959 shows receipts of \$2,748.27 from the sale of pamphlets which receipts should be credited against a total expenditure for "Public Relations" of \$2,743.55.

Another activity of the State Bar in this field consists of preparation of informative articles on legal subjects which are offered for publication to the newspapers throughout the state, and are published under the heading of "The Law and You."

A further public relations activity is the preparation and distribution of news releases covering the activities of the State Bar, such, for example, as the observance throughout the state of "Law Day, U.S.A."

Lathrop v. Donohue, 10 Wis. (2d) 230.

## Discouraging Unauthorized Practice of the Law.

One of the standing committees of the State Bar is that of unauthorized practice of law. The primary purpose of such committee is to protect the public from incompetent laymen attempting to offer or perform legal services which they are not competent to render. This is a constant program since numerous trades and occupations keep expanding their services and frequently start offering services which constitute the practice of the law. As a result of integration the income from dues has enabled the State Bar to employ an additional lawyer on its staff whose major assignment is to investigate complaints made with respect to instances of unauthorized practice of the law, and to cause any unauthorized practices so discovered to be discontinued through persuasion or legal action.

## Establishment of a Minimum-Fee Schedule.

The State Bar recently adopted a recommended minimum-fee schedule covering legal services. The present economic plight of the lawyers in this country is one which has disturbed the bench and the bar. Able young men who otherwise might be attracted to entering the legal profession are being discouraged not to because of this. Lawyers already in the profession because of insufficient incomes are caused to forsake the practice of law for more financially attractive fields of endeavor. According to statistics gathered by the economics of law practice committee of the American Bar Association during the period of 1929 to 1951, the net income of lawyers increased but 58 per cent, while for the same period that of dentists rose 83 per cent and that of physicians 157 per cent. During the same period the net income of employees of all industry increased 131 per cent.

Lathrop v. Donohue, 10 Wis. (2d) 230.

During 1954 the net income before taxes of one third of all practicing lawyers of the nation was less than \$5,485.

The quality of legal service which will be rendered to the public is likely to suffer if young men of ability are dissuaded from entering the profession because of the difficulty of securing an adequate financial reward to enable them to properly support themselves and their families. A minimum-fee schedule which realistically recommends charges for legal services that are in keeping with the increased cost of living that has taken place since World War II, should have a tendency toward remedying this condition. Such a schedule also serves a further public purpose because it provides a guide for the basing of legal charges that tends to prevent overcharges as well as undercharges. Lawyers, who are true to their oath of admission, recognize that adoption of a recommended minimum-fee schedule does not relieve them from the duty of serving the poor without compensation, or of reducing the charge if the normal charge would be unduly burdensome to a client of limited means. Furthermore, a lawyer's charge for services, even when based upon the recommended schedule, is always subject to the courts' determination of reasonableness.

## Legal Aid

Another of the standing committees of the State Bar is the legal-aid committee. This committee has done effective and noteworthy work to encourage the local bar associations of the state to set up legal-aid systems in their local communities under which legal services are rendered without charge to the indigent in the need of the same. Such committee has also outlined recommended procedures for establishing and carrying through such systems of providing legal aid.



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Lathrop v. Donohue, 10 Wis. (2d) 230.

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Investigation and Adjustment of Grievances.

The State Bar has created grievance committees for each of the nine districts into which the state has been divided for election purposes. These districts coincide with the congressional districts of the state except for combining the two congressional districts of Milwaukee county into one district. While the supreme court has delegated none of its power to punish disciplinary infractions, these State Bar grievance committees perform a valuable function in investigating and adjusting grievances filed against lawyers of the district in which the particular grievance committee functions. Prior to integration of the bar most of such grievances were investigated by the paid counsel of the Board of State Bar Commissioners, and the cost thereof was defrayed from the general tax revenues of the state. Since integration most of such work of investigation of grievances has been done by the grievance committees of the State Bar. As a result there has been a saving to the general taxpayers of the state. One evidence of this is that the Board of State Bar Commissioners is requesting a decrease in its appropriation from the state of \$800 less for the coming biennium than was appropriated in the present biennium.

Legislative Activities.

In addition to the legislative activities of the State Bar to which the plaintiff objected, and which are discussed in the opinion, the State Bar performs the further function of promptly publicizing to the lawyers of the state pending and adopted legislation affecting legal practice. Acts lengthy in scope, such as the Family Code and the act extending the jurisdiction of the courts over nonresident persons and corporations, are analyzed and explained by articles published in the Wisconsin Bar Bulletin. Such activities enable the lawyers to better serve their clients.

