2005 WI 35

SUPREME COURT OF WISCONSIN

NOTICE
This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 04-05

In the matter of the Petition of the Wisconsin Trust Account Foundation, Inc. for a Rule Assessing Members of the State Bar of Wisconsin for an Annual Sum to Support Organizations that Provide Civil Legal Services to the Indigent of this State

FILED

MAR 24, 2005

Cornelia G. Clark
Clerk of Supreme Court
Madison, WI

On June 2, 2004, the Wisconsin Trust Account Foundation, Inc. (WisTAF) filed a petition proposing creation of a supreme court rule to establish an annual assessment of each active member of the State Bar of Wisconsin ("State Bar") in the amount of Fifty Dollars ($50.00) for the support of civil legal services for persons who cannot afford a lawyer. On January 12, 2005, the court conducted a public hearing on the petition, in which numerous persons participated. At the ensuing open administrative conference the majority of the court voted to adopt the petition, with two justices dissenting.

WisTAF operates the Interest of Lawyer Trust Accounts (IOLTA) program, which was created by this court in 1986 to provide a source of funding for legal services to the poor. SCR

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13.01, 13.03(2)(a), 13.03. As reflected in its existing grant-making philosophy, WisTAF is dedicated to equal access to the justice system and endeavors to make its funding decisions in a manner free from political bias.

WisTAF filed this petition because, for a variety of reasons, including changing practices regarding lawyers' use of trust accounts, and the fact that interest rates are at a 45-year low, the funds available to the IOLTA program have dropped drastically in recent years, resulting in extensive funding cuts to legal services providers.

In our complicated legal system, access to justice is sometimes synonymous with access to a lawyer. As a comment to the Rules of Professional Conduct for Attorneys observes, "[t]he rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms."

> As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well to do.

SCR 20:6.1 (comment); see also SCR ch. 20 (Preamble) at paragraph 5. Yet, as the materials and testimony submitted to this court reflect, Wisconsin's poor citizens increasingly lack access to legal representation for fundamental civil legal issues such as custody matters, domestic violence, housing, government benefits, and health care.

Without access to legal representation, these critical legal needs remain unmet——sometimes with tragic results——or individuals attempt to pursue their rights and remedies, pro se.

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Indeed, the majority of individuals who represent themselves in civil actions have legitimate legal problems that can only be resolved through judicial intervention. See, e.g., Paula Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 14 Court Review 1 (Winter 2003).

However, individual litigants attempting to navigate the legal system on their own experience frustration at the complexity of the endeavor and pose an enormous challenge for our courts in terms of increased staff time, administrative costs, and decreased efficiency. The result undermines public trust and confidence in the courts as effective and responsive social institutions.

The Supreme Court of Wisconsin is responsible for the administration of justice in this state. Wis. Const. art. VII. The lawyers of this state also have special responsibilities in this regard. Lawyers are officers of the court with a professional responsibility to the legal system. "[T]hey are admitted to the rank of the bar not only that they may practice their profession on behalf of those who can pay well for their services, but that they may assist the courts in the administration of justice." Green Lake County v. Waupaca County, 113 Wis. 435, 436, 89 N.W.2d 549 (1902).

We recognize that many individual attorneys provide pro bono legal services and contribute monies to legal services providers, consistent with their obligations under SCR 20:6.1. The State Bar, existing legal services programs, many law firms, private entities, and individual citizens are also deeply

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committed to our shared responsibility to ensure that all citizens have access to justice. Those efforts are laudable; some are even heroic. However, the pro bono efforts of the legal community are simply not enough to close the gap in legal assistance needs for low-income citizens of Wisconsin. See Comments to SCR 20:6.1. Indeed, a $50 contribution from each of the lawyers in this state will not solve the problem of access to legal services for Wisconsin's low-income citizens. It will scarcely return WisTAF's funding to the level provided in 1986, when the IOLTA program was created.

The legal profession, alone, cannot solve the problem of adequate civil legal representation for the poor, nor should it be expected to do so. The very integrity of our justice system is compromised when legal representation for critical needs is available only to those with financial means. As such, this issue affects our entire community. Our entire community will need to participate if a long-term solution is to succeed.

To that end, we adopt the State Bar's recommendation for a study to assess and quantify the civil legal needs of Wisconsin's poor and to evaluate and make recommendations for long-term solutions to this problem. It is our hope that this study will raise both lawmakers' and the public's awareness of this critical problem affecting our entire state and that it will assist legal services providers and other legal services advocates in their continuing quest to obtain necessary funding from other sources, including the legislature.

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We urge the State Bar to collaborate with WisTAF, legal services providers, and with representatives from the law schools of this state as we strive, collectively, to find creative, workable solutions to the needs facing so many of our fellow citizens. We direct the participants to report to this court upon completion of the study, with recommendations that will enable us to review and address this matter in a forward-looking manner. We also amend SCR ch. 13 to clarify that we expect WisTAF to solicit and obtain funding from other sources, both public and private.

However, the civil legal needs of the poor will not await completion of a comprehensive study. Presently, those needs greatly exceed the services available. We conclude that the result, aside from the human toll, is a profoundly adverse impact on the effective and meaningful administration of justice.

Our state constitution grants this court power to adopt measures necessary for the due administration of justice in the state. State v. Holmes, 106 Wis. 2d 31, 44, 315 N.W.2d 703 (1982). We deem the assessment necessary to maintain the integrity and efficiency of the judicial system of this state, and fully consistent with the heightened obligations of lawyers, both to our justice system and to assist this court with the effective administration of justice. See id. The dispute engendered by this petition is not about $50 but about constitutional rights and obligations. We have carefully considered the guidance provided in Keller v. State Bar of

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California, 496 U.S. 1 (1990), Lathrop v. Donohue, 367 U.S. 820 (1961), State v. Jackman, 60 Wis. 2d 700, 211 N.W.2d 480 (1973), and related authorities, and we have concluded that the proposed assessment, designated to provide direct legal services for the poor, is fully consistent with activities recognized as permissible under the state and federal constitution.

We note that we have previously deemed certain assessments necessary for the protection of the public, or to ensure the continued effective administrative of justice. In 1981, this court established the Wisconsin Lawyers' Fund for Client Protection, to reimburse persons who have lost money through dishonest conduct of Wisconsin attorneys. The assessment proposed by WisTAF is akin to the assessments we have imposed to support the Office of Lawyer Regulation and the continuing legal education function of the Board of Bar Examiners, which, for administrative convenience, are also collected via the State Bar's annual dues statement.

Therefore, we adopt the WisTAF petition, as modified herein, and direct that the lawyers of this state shall be assessed an annual sum of $50 to support the delivery of direct legal services to persons of limited means. The assessment will be segregated from IOLTA funds in a fund entitled public interest legal services fund, and shall not be used to support activities of a political or ideological nature. The funds are specifically designated to provide direct legal services to the poor, so as to maintain access to the justice system and improve

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the quality of the legal services available for all the citizens of this state.

The petition filed by WisTAF sought to impose the assessment upon active members of the State Bar, and, accordingly, that is the request we grant today. Although the petition does not encompass judicial, emeritus, or inactive members of the State Bar as defined in SCR 10.03, we emphasize the importance of this assessment to our justice system. The justices of the Wisconsin Supreme Court will pay the assessment. We encourage lawyers not mandated to pay the assessment to consider voluntary contributions to the WisTAF public interest legal services fund. To assist this process we direct the State Bar provide practitioners with information to facilitate their making of voluntary contributions to the WisTAF legal services fund with the July 2005 bar dues statement. In addition, we ask the State Bar to advise this court whether, in its estimation, future bar dues statements may be readily amended to require a voluntary contribution option for lawyers who are not required to pay the mandatory assessment.

Finally, in recognition of the fact that this assessment may impose a financial burden on some practitioners, we direct that an attorney whose annual State Bar membership dues are waived for hardship shall be excused from the payment of the annual assessment. Therefore,

IT IS ORDERED that the State Bar of Wisconsin is directed to advise this court, in writing, within 60 days of the date of this order if it will undertake to lead a study addressing the

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civil legal needs of low-income residents of Wisconsin. The State Bar's response should include a tentative timetable for completion of the study. It is the court's view that the study should be conducted with an emphasis upon workable solutions to the existing crisis in legal services funding. The State Bar is urged to collaborate with WisTAF, representatives from legal services organizations, the University of Wisconsin Law School, Marquette Law School, members of the bench and bar, and other interested persons.

IT IS FURTHER ORDERED that the last three sentences of Supreme Court Rule 10.03 (5)(a) are amended to read as follows:

SCR 10.03 (5) (a). Judicial members other than Supreme Court Justices are not liable to pay the portion ~~of the annual dues~~ 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, ~~and~~ the assessments for each of the boards, and other assessments imposed by the supreme court.

IT IS FURTHER ORDERED that Supreme Court Rule 10.03 (6), entitled penalty for nonpayment of dues, is amended to read in its entirety as follows:

SCR 10.03 (6). If the annual dues or assessments of any member remain unpaid 120 days after the payment is due, the membership of the member may be suspended in the manner provided

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in the bylaws; and no person whose membership is so suspended for nonpayment of dues or assessments may practice law during the period of the suspension.

IT IS FURTHER ORDERED that the first sentence of Supreme Court Rule 10.03 (6m)(a) is amended to read as follows:

SCR 10.03 (6m) (a). An attorney whose suspension for nonpayment of annual membership dues for state bar operations or assessments imposed by the supreme court has been for a period of less than 3 consecutive years shall be reinstated as a member by the state bar board of governors if he or she makes full payment of the amount owing and an additional payment of $20 as a penalty.

IT IS FURTHER ORDERED that the first sentence of Supreme Court Rule 10.03 (6m) (b) is amended to read as follows:

SCR 10.03 (6m) (b). An attorney whose suspension for nonpayment of annual membership dues for state bar operations or assessments imposed by the supreme court has been for a period of 3 or more consecutive years may file a petition for reinstatement with the supreme court.

IT IS FURTHER ORDERED that Supreme Court Rule ch. 13 is amended to read in its entirety as follows:

SCR CHAPTER 13

INTEREST ON TRUST ACCOUNTS PROGRAM AND PUBLIC INTEREST LEGAL SERVICES FUND

SCR 13.01	Creation and purpose~~; definitions~~.
SCR 13.015	Definitions.
SCR 13.02	Administration.
SCR 13.03	Powers and duties of the board.

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SCR 13.04 Attorney participation in the program.
SCR 13.045 Assessment of attorneys; enforcement.
SCR 13.05 Grants~~ of program funds~~.

SCR 13.01 Creation and purpose~~; definitions~~.

In order to aid the courts in carrying on and improving the administration of justice and to facilitate the improved delivery of legal services to persons of limited means in non-criminal matters the following are created:

(1m) An interest on trust accounts program ~~of the state bar is created for law-related charitable and educational purposes as provided by this chapter~~.

(2m) A public interest legal services fund.

SCR 13.015 ~~**(2)**~~ In this chapter, unless the context otherwise requires:

(1~~a~~) "Attorney" means a person who is a~~n~~ ~~active~~ member of the state bar of Wisconsin ~~who is providing legal services under his or her license to practice law in Wisconsin~~.

(2) "Available Funds" means net assets less a realistic estimate of the reasonable and necessary expenses of the board and other costs reasonably and necessarily incurred for the administration of the program or the fund.

(3~~b~~) "Board" means the board specified in SCR 13.02 (1).

(4) "Fund" means the public interest legal services fund created under SCR 13.01 (2) consisting of the annual assessments received by the State Bar under SCR 13.045 to fund direct legal services to persons of limited means in non-criminal matters.

(5)"Net Assets" means total assets minus total liabilities.

(6~~c~~) "Program" means the interest on trust accounts program ~~administered by the Wisconsin Trust Account Foundation, Inc.~~ consisting of the funds received by the program under SCR 20:1.15 (c) (1m), and from other sources including, but not limited to grants, gifts, and bequests to the fund, however denominated, from any person or entity, public or private.

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(7~~d~~) "State bar" means the state bar of Wisconsin.

SCR 13.02 Administration.

(1) The fund and program shall be operated ~~and administered~~ by the board of a Wisconsin nonstock, nonprofit corporation organized for law-related charitable and educational purposes within the meaning of section 501 (c) (3) of the Internal Revenue Code of ~~1954~~1986, as amended (or corresponding provisions of any future federal internal revenue laws), to be known as the Wisconsin Trust Account Foundation, Inc.

(2) The board shall consist of 15 persons. The president of the state bar shall appoint, with the approval of the state bar board of governors, 9 attorney and 3 non-attorney members who shall serve staggered 3-year terms. The chief justice shall appoint 3 members from the Wisconsin judiciary who shall serve staggered 2-year terms. The terms of 3 attorney and one non-attorney members shall expire each year. No person may serve more than 2 full terms consecutively.

(3) Each year the board shall select a board member to serve as chairperson at the pleasure of the board.

(4) The board members shall serve without compensation but shall be entitled to reimbursement from the program for their expenses reasonably incurred in the performance of their duties.

SCR 13.03 Powers and duties of the board.

(1) In consultation with the state bar board of governors, the board shall adopt articles of incorporation, bylaws and rules and procedures consistent with this chapter for the ~~management~~ operation and administration of the fund and the program and the management of its affairs. Except as provided in sub. (2), these actions are subject to review by the supreme court on its own motion or upon petition of any interested party.

(1m) The board shall manage the fund and the program and may invest any moneys received by the fund or program consistent with the purposes of this Chapter.

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(2) (a) The board shall accept grant applications and make grants or expenditures ~~of funds received under SCR 20:1.15 (c)~~ from the program for any of the following purposes:

1. To aid the courts and improve the administration of justice by ~~provide~~ providing legal services to ~~the poor~~ persons of limited means.

2. To fund programs for the benefit of the public as may be specifically approved from time to time by the supreme court for exclusively public purposes.

3. To pay the reasonable and necessary expenses of the board and other costs reasonably and necessarily incurred for the administration of the program~~, including the employment of staff for that purpose~~.

(am) The board shall accept grant applications and make grants or expenditures from the fund to aid the courts and improve the administration of justice by providing legal aid to persons of limited means.

(b) Grant-making decisions of the board are final and not subject to appeal or judicial review.

(3) ~~Funds received by the program under SCR 20:1.15 (c) may be invested by the board.~~ Omitted.

(4) If a client asserts a claim against an attorney based upon the attorney's determination to place the client's funds in a trust account under SCR 20:1.15 (c) (1) rather than in a segregated trust account under SCR 20:1.15 (c) (2), the board, upon written request by the attorney, shall review the claim and:

(a) If, at the time of their deposit, the funds could reasonably have been expected to produce a positive net return to the client, approve the claim and remit directly to the claimant any sum of interest remitted to the board on account of the funds; or

(b) If, at the time of their deposit, the funds could not reasonably have been expected to produce a positive net return to the client, reject the claim and advise the claimant in writing of the grounds therefor. If there is subsequent litigation involving the claim, the board shall interplead any sum of interest remitted to the board on

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account of the funds and shall assume the defense of the action.

(5) The fund and program shall be audited by auditors annually and at such other times as the supreme court may direct, the audits to be at the expense of the program and fund. Each year the ~~program~~ board shall submit to the supreme court and the state bar board of governors a report of its activities during the preceding year, including the audit, reviewing in detail the administration of the fund and the program ~~and its activities during the preceding year~~.

SCR 13.04 Attorney participation in the program.

(1) An attorney shall participate in the program as provided in SCR 20:1.15 unless:

(a) The attorney certifies on the annual trust account statement filed with the state bar that:

1. Based on the attorney's current annual trust account experience and information from the institution in which the attorney deposits trust funds, service charges on the account would equal or exceed any interest generated; or

2. Because of the nature of the attorney's practice, the attorney does not maintain a trust account; or

(b) The board, on its own motion or upon application from an attorney, grants a waiver from participation in the program for good cause.

(2) The board may reimburse an attorney incurring service charges on an account established under SCR 20:1.15 (c) (1) if the charges were reasonably and necessarily related to the attorney's participation in the program.

(3) Refusal or neglect by an attorney to participate in the program, except as provided under sub. (1), constitutes professional misconduct and may be grounds for disciplinary action under the rules governing enforcement of attorneys professional responsibility.

SCR 13.045 Assessment of attorneys for fund; enforcement.

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(1) Annual assessments. Commencing with the State Bar's July 1, 2005 fiscal year, every attorney who is an active member of the state bar, and all Supreme Court Justices, shall pay to the fund an annual assessment, to be determined by the supreme court. The assessment shall be $50.00. Emeritus members, judicial members, and inactive members of the state bar are excused from the annual assessment. An attorney whose annual state bar membership dues are waived for hardship shall be excused from the payment of the annual assessment for that year. An attorney shall be excused from the payment of the annual assessment for the first fiscal year during which he or she is required to pay dues and assessments.

(2) Collection: Failure to pay. The annual assessment shall be collected at the same time and in the same manner as the annual membership dues for the state bar are collected, together with the assessments imposed to pay the costs of the lawyer regulation system and the continuing legal education function of the board of bar examiners, as set forth in SCR 10.03 (5) (a). An attorney who fails to timely pay the annual assessment shall have his or her right to practice law suspended pursuant to SCR 10.03 (6).

(3) Reinstatement. An attorney suspended from the practice of law for failure to pay the annual assessment may petition for reinstatement pursuant to SCR 10.03 (6m).

SCR 13.05 Grants~~ of program funds~~.

(1) The ~~program~~ board may make grants of available funds held by the program to eligible programs for ~~any of~~ the purposes specified in SCR 13.03 (2).

(1m) The board may make grants of available funds held by the fund only to eligible programs for the purposes specified in SCR 13.03 (2) (a) (1).

(2) The ~~program is authorized to~~ board shall maintain a reasonable reserve in the fund and in the program.

(3) The ~~program~~ board shall solicit applications for grants at least annually.

(4) The board shall promulgate written rules and procedures for submission, review and approval of grant applications and for termination of grants.

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(5) The ~~program~~ board shall require grantees to submit a report detailing application of the grant funds within a reasonable time after the conclusion of the period for which the grant was made. The board may require periodic interim reports at any time respecting a particular grantee.

IT IS FURTHER ORDERED that the amendments to the supreme court rules set forth in this order shall be effective July 1, 2005.

IT IS FURTHER ORDERED that WisTAF shall promptly undertake a comprehensive review of its bylaws and program documents and shall amend any such documents as needed to ensure compliance with the terms of this order.

IT IS FURTHER ORDERED that notice of these amendments to the supreme court rules be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 24th day of March, 2005.

BY THE COURT:

Cornelia G. Clark
Clerk of Supreme Court

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¶1 DAVID T. PROSSER, J. *(dissenting)*. The petition of the Wisconsin Trust Account Foundation, Inc. (WisTAF) asking this court to adopt a rule imposing a mandatory annual assessment on active members of the State Bar to pay for civil legal services for the poor has no precedent in our state. By adopting a modified version of the petition, the court breaks new ground and assumes powers that it does not possess. Because a laudatory end does not justify an illegitimate means, I respectfully dissent.

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¶2 The State Bar of Wisconsin is a unified bar. Thus, as a general rule, to practice law in Wisconsin, a person must be a member of the State Bar.

¶3 Wisconsin lawyers may not "opt out" of membership in the Bar without losing their licenses. As a result, the Bar must carefully circumscribe its programs and activities to protect its members' constitutional rights. A unified bar, as opposed to a voluntary bar, violates a member's First Amendment rights if the bar spends the member's dues on political or ideological activities that are not reasonably related to regulating or enhancing the quality of the legal profession. See Keller v. State Bar of California, 496 U.S. 1, 15-16 (1990).

¶4 Keller involved the California Bar Association, a unified bar that used its members' dues to fund lobbying activities and promote a political agenda. The California Supreme Court concluded that the California Bar, which is recognized by statute as having a mission to promote the

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improvement of the administration of justice and is given numerous quasi-regulatory functions to perform, should be considered a "government agency." See Keller v. State Bar of California, 767 P.2d 1020 (Cal. 1989). The California court viewed the Bar's "governmental" status as conveying a right to act like a government agency, or a government official: "If the bar is considered a governmental agency, then the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial." Id. at 1029.

¶5 The United States Supreme Court disagreed. It reasoned that a bar association is more analogous to a labor organization than a government agency. Keller, 496 U.S. at 12. In the course of its opinion, the Court cited Lathrop v. Donohue, 367 U.S. 820 (1961), the case in which Wisconsin's unified or "integrated" bar was challenged. It quoted Lathrop to the effect that, "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 . . . even though the organization . . . also engages in some legislative activity." Id. at 8 (quoting Lathrop, 367 U.S. at 843). The Keller Court added, with respect to the California Bar, that it is "appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost

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of the [Bar's] professional involvement in this effort." Id. at 12.

¶6 Having reaffirmed the principle of a unified bar, the Supreme Court curtailed bar activities funded with mandatory dues. It limited the use of dues to activities justified by the State's interest in regulating the legal profession and improving the quality of legal services, id. at 13-14, and it decried the use of mandatory dues for activities of an ideological nature. Id. at 14. See also Alper v. The Florida Bar, 771 So. 2d 523, 525-26 (Fla. 2000) (dues to fund ballot initiatives on merit selection of judges did not violate First Amendment only because dissenters could opt-out by demanding a refund of dues spent for that purpose).

¶7 In the wake of Keller, some courts have determined that a state bar may permissibly support causes of an ideological nature if membership in the bar is not mandatory, or if the bar permits its members to demand refunds of mandatory dues used for ideological activity. If a bar chooses to follow the latter procedure, it must adopt certain safeguards to assure that no money serves impermissible purposes and that the complaining members have a chance to obtain complete information about and receive a fair hearing on the contested issues. Accord Chicago Teachers Union v. Hudson, 475 U.S. 292, 304-09 (1986) (Union's dues collection procedures constitutionally defective).

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¶8 This court is clearly cognizant of the Keller/Hudson formula, as evidenced by Supreme Court Rule 10.03(5)(b).[1] This

[1] SCR 10.03(5)(b) provides:

> 1. The State Bar may engage in and fund any activity that is reasonably intended for the purposes of the association. The State Bar may not use compulsory dues of any member who objects to that use for political or ideological activities that are not reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services. The state bar shall fund those political or ideological activities by the use of voluntary dues, 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.
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> 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.

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rule recognizes that "The State Bar may not use compulsory dues of any member who objects to that use for political or ideological activities that are not reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services." SCR 10.03(5)(b)1.

¶9 If one interprets the new mandatory assessment for WisTAF as a component of mandatory bar dues, the assessment is plainly contrary to First Amendment principles. The Wisconsin Trust Account Foundation is organized under SCR Chapter 13. It presently receives money from the interest on trust accounts under SCR 20:1.15(c)(1) and makes grants to organizations. Between 2000 and 2004, WisTAF made grants totaling $7,637,335 to such organizations as the American Civil Liberties Union of

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> 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.

SCR 10.03(5)(a), SCR 10.03(6), and SCR 10.03(6m) are amended by the new rule.

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Wisconsin, Inc. ($105,000), the AIDS Resource Center of Wisconsin ($5,000), and Legal Action of Wisconsin ($3,313,824).[2] These organizations are singled out because, according to the State Ethics Board, they employ registered lobbyists.

¶10 Some of these organizations not only lobby the legislature but also "lobby" the courts on rules petitions. In addition, they take action somewhat analogous to lobbying by filing amicus briefs in this court, the court of appeals, and federal courts. For example, Legal Action has filed appellate briefs in a number of important cases.[3]

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[2] Legal Action of Wisconsin has now merged with Legal Services of Northeastern Wisconsin and Western Wisconsin Legal Services. Together these organizations received $4,287,809 between 2000 and 2004.

[3] See Kolupar v. Wilde Pontiac Cadillac, 2004 WI 112, 275 Wis. 2d 1, 683 N.W.2d 58 (attorney's fee and costs award); Baierl v. McTaggart, 2001 WI 107, 245 Wis. 2d 632, 629 N.W.2d 277 (landlord-tenant dispute); Flynn v. DOA, 216 Wis. 2d 521, 576 N.W.2d 245 (1998) (propriety of legislative action lapsing three million dollars from court automation fund); Joni B. v. State, 202 Wis. 2d 1, 549 N.W.2d 411 (1996) (parent's right to counsel in CHIPS proceedings) (ACLU filed a separate amicus brief); Rent-A-Center Inc. v. Hall, 181 Wis. 2d 243, 510 N.W.2d 789 (1993) (rent-to-own industry practices); Pliss v. Peppertree Resort Villas, Inc., 2003 WI App 102, 264 Wis. 2d 735, 663 N.W.2d 851 (unfair trade practices); Dawson v. Goldammer, 2003 WI App 3, 259 Wis. 2d 664, 657 N.W.2d 432 (landlord-tenant dispute); Blumer v. DHFS, 2000 WI App 150, 237 Wis. 2d 810, 615 N.W.2d 647 (method of determining medical assistance eligibility); Gorchals v. DHFS, 224 Wis. 2d 541, 591 N.W.2d 615 (Ct. App. 1999) (undue hardship waiver in medical assistance claims).

Legal Action of Wisconsin also filed amicus briefs in Wisconsin DHFS v. Blumer, 534 U.S. 473 (2002) and Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987).

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¶11 WisTAF itself recently supported a petition for an original action seeking a determination that the Wisconsin Constitution provides a right to counsel for indigent litigants in civil cases. See Kelly v. Circuit Court for Brown County, et al., No. 04-0999-OA.

¶12 The issue is not whether Legal Action of Wisconsin or the Wisconsin Coalition for Advocacy (another frequent appellate litigant), or other WisTAF grant recipients, are delivering important legal services, acting responsibly and lawfully, or performing at a high level. These organizations do excellent and necessary work. The issue is whether this court may compel members of the State Bar of Wisconsin to support these organizations by mandatory assessments for WisTAF. After all, by urging the adoption of a mandatory assessment and advocating mandatory pro bono reporting requirements,[4] some of these organizations are, in effect, lobbying against positions taken by the State Bar of Wisconsin.

¶13 Advocates of the new assessment contend that mandatory assessments of this sort are commonplace in other states. This is not correct. Thirty-two states plus the District of Columbia have unified bars. In only 2 of these states is there a mandatory non-refundable assessment of bar members to support legal services. In Texas, the legislature, not the court, imposed a $65 mandatory assessment to fund both civil and

[4] Petition 04-07 (In the Matter of the Amendment of Supreme Court Rules, Chapter 20, Rules of Professional Conduct for Attorneys), pending before this court.

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criminal legal services. The Texas legislation is scheduled to sunset. In Missouri, the Board of Governors of the Missouri Bar increased mandatory bar dues by $20 to support civil legal services. This action was preceded by a study conducted by the Missouri Bar Foundation, a study conducted by the University of Missouri, and a legislative resolution asking the bar to show what Missouri lawyers were doing to help meet the legal service needs of the poor.

¶14 The truth is, there is no other state in which a supreme court has unilaterally imposed a mandatory non-refundable assessment on members of a unified bar. Wisconsin is unique.

II

¶15 The WisTAF petition made a pro forma effort to distinguish the new charge from bar dues. It labeled the charge an "assessment," and did not propose amending SCR Chapter 10 entitled "Regulation of the State Bar," to include the "assessment" in bar dues. Nonetheless, the petition asked that the "assessment" be collected with bar dues ("The annual assessments shall be collected at the same time and in the same manner as the annual membership dues for the State Bar are collected," SCR 13.045(2)), and incautiously earmarked the assessment for a "public interest legal service fund of the State Bar."

¶16 When the court was confronted with the implications of the Keller decision, however, it scurried to rewrite the proposed rule in an attempt to remove evidence of the many ties

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between the WisTAF assessment and the State Bar. After scrubbing down the rule, the court effectively maintains the ties because WisTAF needs the Bar to collect money from its members, to enforce discipline against its members, and ultimately to reinstate its members once they pay up. Failure to pay the WisTAF assessment to the State Bar will result in suspension of an attorney's license to practice law in the same manner as a failure to pay membership dues, irrespective of how euphemistically the new rule portrays the assessment.

¶17 Ironically, the court's effort to distance the WisTAF assessment from the Bar could be counterproductive in a legal sense, inasmuch as a court-imposed mandatory assessment on Bar members to support a private charity is no more viable than a court-imposed mandatory assessment to support political or ideological activities. The court must try to defend its assessment as of value to Bar members.

III

¶18 If the "assessment" is construed as something other than a component of membership dues, the question arises as to what the assessment is. The State Bar's "WisTAF Petition Study Committee" (2004) discussed this question, namely, whether the assessment is a tax or a licensing fee, and implied that the assessment could easily be seen as a tax.

¶19 The Wisconsin Constitution gives the legislature exclusive power to levy taxes. Wis. Const. art. XIII.

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> The legislature has plenary power over the whole subject of taxation. It may select the objects therefor, determine the amount of taxes to be raised, the purposes to which they will be devoted, and the manner in which property shall be valued for taxation. It may exempt property from taxation and limit the exercise of the taxing power of municipal corporations. These rules are subject only to constitutional restrictions and limitations.

State ex rel. Thomson v. Giessel, 265 Wis. 207, 213, 60 N.W.2d 763 (1953). See also Bryant v. Robbins, 70 Wis. 258, 271, 35 N.W. 545 (1887) ("the laying of taxes is properly the exercise of a legislative, as distinguished from a judicial, function").

¶20 The Wisconsin Constitution gives the legislature authority to delegate its taxing power in certain circumstances. It may delegate the power to tax property to municipal governments. Wis. Const. art. VIII, § 1. It may also delegate the taxing power, like its other powers, to administrative agencies. Clintonville Transfer Line v. PSC, 248 Wis. 59, 78, 21 N.W.2d 5 (1945). It may not delegate a taxing power to the judiciary.

¶21 Nothing in the Wisconsin Constitution gives this court the authority to impose a tax directly. The proper function of the court is to apply tax law set out by the legislature. Marina Fontana v. Village of Fontana-On-Geneva Lake, 107 Wis. 2d 226, 240, 319 N.W.2d 900 (Ct. App. 1982).

¶22 The mandatory state bar assessment has always been denominated a fee, not a tax, because bar dues are "in the same category as an annual license fee imposed upon any occupation or

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profession which is subject to state regulation." Lathrop v. Donohue, 10 Wis. 2d 230, 238, 102 N.W.2d 404 (1960).

¶23 This court has identified a distinct difference between license fees and taxes. State v. Jackman, 60 Wis. 2d 700, 211 N.W.2d 480 (1973). In Jackman, we stated: "A tax is one whose primary purpose is to obtain revenue, while a license fee is one made primarily for regulation and whatever fee is provided is to cover the cost and the expense of supervision or regulation." Id. at 707, (citing State ex rel. Attorney General v. Wisconsin Constructors, Inc., 222 Wis. 279, 268 N.W. 238 (1936)).

¶24 In Jackman, the amount collected by the government in fees was roughly equal to the cost of a motorboat licensing program along with two related enforcement and boat safety programs. The court found that a surplus of $200,000 over 10 years (out of total revenues of more than $3 million) indicated that the primary purpose of the fee was not to raise revenue. Id. at 710. Instead, the fee was intrinsically related to the goal of boating safety.

¶25 Until now, the fees or assessments imposed on the State Bar were consistent with Jackman. Like the boat registration fee, the State Bar's dues go beyond the administrative cost of licensing Wisconsin lawyers. They help fund various services, such as lawyer referral, committee activity, and the lawyers assistance program, for State Bar members. The State Bar also uses the dues to publish the

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Wisconsin Lawyer magazine and a variety of other bar publications.

¶26 However, as in Jackman, the scope of activities funded by the Bar was limited to activities designed to benefit the payors. In Jackman, that benefit came in the form of increased boat safety——both from the State's control over the number of licensed boats and the State's ability to provide increased safety patrols. In the same way, the State Bar's fees have benefited the lawyers who paid the fees.

¶27 The $50 assessment does not operate similarly. New revenue is not being generated for the primary purpose of paying the "cost and the expense of supervision or regulation" of the Bar's members. It is being generated for the socially desirable objective of providing civil legal services for persons who cannot afford an attorney. The assessment is rationalized as necessary to fill a serious hole in legal services funding.

¶28 Raising questions about the nature of the mandatory assessment is not intended to discredit the importance of providing civil legal services to the poor. It is intended to spotlight the precedent being set by this rule because there is no clear stopping point. The Texas legislature assessed members of the Texas Bar for criminal defense services as well as civil legal services. Experience in Texas and Minnesota reveals that mandatory assessments need not be limited to $50 per year. In fact, WisTAF acknowledges in a statement supporting the Kelly original action petition that the $50 assessment "will not completely meet the need of poor people in Wisconsin for the

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assistance of counsel." The court's own order now says the same thing.

IV

¶29 In my view, the court has not given sufficient consideration to the potential adverse effects of this rule. First, the assessment may affect bar membership by prompting some active members to move to emeritus or inactive status, or to drop their membership entirely. Second, some members may shift contributions from the Wisconsin Law Foundation to payment of the mandatory assessment. Third, some members may divert section dues to payment of the mandatory assessment. Fourth, some members may reduce their pro bono service contribution because of the mandatory assessment, inasmuch as an attorney who contributes 100 hours of pro bono work must pay the same $50 flat fee as an attorney who does nothing.

¶30 Undoubtedly, some members will resent the fact that their financial contributions to the Law Foundation and their pro bono contributions of time and talent receive no credit whatsoever under the new rule. The rule thus creates a perverse incentive for an attorney to pay the $50 and stop contributing. This reaction would not be noble, but a court that exacts a mandatory assessment instead of working to inspire or credit voluntary contributions and service can have no complaint.

¶31 The court also fails to recognize the uneven impact of the assessment on Wisconsin attorneys. More than 80 percent of the law firms in Wisconsin have less than three attorneys. Many are solo practitioners. Some of these attorneys do very well

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but others are marginal. What is nearly certain is that most attorneys in these small firms pay their own bar dues. This contrasts with the attorneys in many large law firms whose bar dues are paid by the firm.

¶32 In the abstract, $50 is not a large amount of money, but the new $50 assessment will arrive in the mail at the same time as state bar membership dues, section dues, supreme court assessments for the Office of Lawyer Regulation and the Board of Bar Examiners, the mandatory contribution to the Clients' Security Fund, and requests to assist the Law Foundation. Consequently, the assessment should not be evaluated in isolation because it arrives as part of a much bigger bill.

V

¶33 The court rushed to approve the WisTAF petition within hours of the public hearing. Its debate on the issues was incomplete. It has been trying to patch up its defective product ever since. Unlike the Washington Supreme Court, this court did not contribute any money for a study of legal services for the poor in civil cases. Unlike several courts, this court did not work with the legislature to leverage additional public funding for legal services. Unlike some other courts, this court rejected an opt-out provision to protect constitutional rights. It bluntly rejected a voluntary check off.

¶34 The majority resents any disagreement with this rule as uncaring and uninformed, viewing it as a frivolous snit about $50. I disagree. This court's action is unprecedented and carries serious constitutional implications for attorneys

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throughout the United States. A remedy this drastic should have been preceded by judicial education, heartfelt persuasion, and a serious effort to obtain public funding. Because it was not, I respectfully dissent.

¶35 I am authorized to state that JUSTICE JON P. WILCOX joins this dissent.

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