BEFORE THE ARBITRATOR

In the Matter of the Arbitration of

STATE BAR OF WISCONSIN
FISCAL YEAR 2009 DUES REDUCTION

Appearances:

Stephen A. Levine, Esq., on behalf of himself, James Thiel, and Jon Erik Kingstad.

Foley & Lardner LLP, by Roberta F. Howell, Esq., on behalf of the State Bar of Wisconsin.

ARBITRATION AWARD

The State Bar of Wisconsin is a "unified" or "integrated" bar, i.e., one to which all Wisconsin attorneys are required to belong. Pursuant to a series of federal court cases, like other unified bar associations the Wisconsin Bar Association is required to maintain a procedure by which members may object to contributing to certain categories of expenditure, and receive a rebate for those expenditures. The procedure, as required by Wisconsin Supreme Court Rule 10.03(5)(b) and the Bar's bylaws, provides for arbitration over disputed categories and/or amounts.

On July 31, 2008 the undersigned was appointed arbitrator in the dispute described below, by the Chief Judge of U.S. District Court for the Western District of Wisconsin, pursuant to the above provisions. The parties agreed to reserve a hearing date in the event that the arbitrator found a hearing necessary, but pursuant to the Bar's bylaws, briefs were to be filed in advance of a hearing, and the parties agreed that the necessary facts might be stipulated, in effect, in the course of filing briefs. In the event, the undersigned determined that the essential facts were not in dispute and had been adequately presented in the briefs, and no hearing was held. Briefs and reply briefs were filed by both parties and the record was closed on October 28, 2008.

The Bar's bylaws call for the arbitration process[1] to be efficient and for the award to be brief. Accordingly, the discussion which follows will be abbreviated, and not all the facts and arguments will be discussed. They have, however, been considered.

[1] The parties waived certain bylaws relating to date of delivery of the arbitration decision and to fees.

Background:

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.

The spate of litigation and arbitration at that time initially revolved around the 1992 reinstitution of the integrated bar by the Wisconsin Supreme Court. The initial proceedings in that era, both in litigation and in the first arbitration, involved a formulation of Wisconsin Supreme Court Rule 10.03(5)(b) which provided in relevant part as follows:

> 1. The State Bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the State Bar. Other activities must be supported by voluntary dues, user fees or other sources of revenue.

In 1992, the first arbitrator to hear a case of this type concluded that under that language, several categories of expenditure could not be charged to objectors, and ordered a rebate. Shortly thereafter, the State Bar petitioned the Wisconsin Supreme Court for a change in the rule, to the following language:

> 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 or revenue.

The Wisconsin Supreme Court adopted the proposed change, and this language is still in effect.

A second rule which is relevant to this proceeding is Supreme Court Rule 10.02, "Organization of the State Bar of Wisconsin", which provides in pertinent part:

> (2) Purpose. 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.

Relevant Facts:

The present case concerns a single type of expenditure, a public relations campaign. Beginning in 2000 with a poll of all State Bar division, section and committee chairs and local bar presidents, which demonstrated that 78.5% were in favor of such a campaign, the Bar determined to create a series of thirty-second TV spots. Under the heading of "branding the profession", these air in a number of Wisconsin television markets. An August 20, 2008 example cited in WisBar.org "identifies some of the challenges facing citizens of our modern society – including natural disasters and domestic violence – and reminds viewers that lawyers are there to help navigate them through life's difficult and important moments by protecting their rights." In the same story, the chair of the Bar's Public Image Committee commented that "most of the ads we have created since 2002 have focused on the community service contributions of local attorneys in specific geographical regions and were aired in targeted media markets..... the new ad is tailored to a statewide audience." The ad was to run more than 700 times on three cable TV channels during the Olympics. In all, of the costs of the public image campaign (based on fiscal year 2007 expenditures) add up to $97,886, or $5.16 for each member of the Bar.

It is clear from documents submitted by the Bar that the public image campaign stemmed from widespread perceptions that the reputation of lawyers has declined in the eyes of the general public. The various statements of the Bar through Wisconsin Lawyer magazine and through Wisbar.org make clear that public trust in lawyers was one of the concerns, and that this was linked to trust and confidence in the justice system as a whole. A second impetus was the perception that a number of public-interest programs performed pro bono by Wisconsin lawyers were unpublicized, with consequently lower rates of both volunteering and usage than might be achievable. Also of concern, however, were more business-oriented aspects, including a perception that people were avoiding using the civil justice system by adopting binding arbitration more frequently, a nearly 70% rate in some Wisconsin counties of litigants representing themselves rather than using a lawyer in family law matters, including some who could

afford counsel, and a hope that through the public image campaign "lawyers will feel better about what they do... and about what the State Bar does."

The Parties' Arguments Summarized:

The objectors begin by arguing that the public image expenditures are not used for the purpose of regulating the legal profession, noting that in Wisconsin, regulation of lawyers is not under the jurisdiction of the State Bar. The public image expenditures, the objectors argue, are also not used for the purpose of improving the quality of legal services, the second of the Keller tests. The objectors note that while the State Bar offers legal publications and courses for lawyers to satisfy continuing legal education requirements, those are financed directly by users, not by State Bar dues, and that the Bar is not the enforcement mechanism for the Wisconsin Supreme Court's continuing legal education requirements. The objectors argue that there is a distinction between improving the competency of the legal profession and improving its image, and that the public image expenditures are clearly geared to the latter. The objectors argue that the legal issue in this matter must be seen in the light of a U.S. Supreme Court case subsequent to Keller, United States v. United Foods, 533 US 405 (2001). The objectors contend that this case means that any State Bar expenditures for "expressive purposes or purposes which involved the conveying of ideas" are subject to review as to whether they were made for purposes of "regulating the legal profession or improving the quality of legal services." The objectors argue that the public image campaign, even if it is not regarded as "political", fails to meet the requirements set forth in both Keller and United Foods.

The objectors further argue that the Bar's public image expenditures are "ideological" even if they are not "political". Noting that if the only meaning of "ideological" was synonymous with "political", the extra term would be surplusage, the objectors argue that one definition of "ideological" is "relating to or concerned with ideas." The objectors contend that the public image expenditures are clearly ideological in that sense because they are intended to convey an idea, i.e. that lawyers "are wonderful people who contribute to their communities."

In their reply brief, the objectors argue that the State Bar's own brief clearly demonstrates that the public image campaign has nothing to do with competency, quoting a number of statements indicating that improving the public perception of lawyers is the sole goal. The objectors contend that there is no clear relationship between improving the image of lawyers and improving the quality of legal services, and that the Bar's argument that the public image advertising is designed to benefit the public is not realistic. The objectors further argue that there is no logical correlation between whether the public feels that lawyers are being sufficiently public-spirited and the public's use of legal services. Similarly, the objectors argue that the purpose of the passing references to various pro bono legal services provided by Wisconsin lawyers is also image improvement, rather than any real effort to educate the public on how to use

those services, or to encourage the public to look for similar services in their own areas. The objectors request an award finding the inclusion of the public image expenditures in dues calculations to be improper, with a remedy totaling $15.48 for the three objectors.

The Bar argues that the focus of what it characterizes as an educational effort is on the expertise, problem-solving skills and commitment to community service of Wisconsin lawyers. The Bar cites different television spots featuring "lawyers involved in a number of local projects improving the lives of senior citizens of the Hmong community, elementary and high school students involved in mock trial efforts.....lawyers volunteering their time to the Dane County Bar Association's family law assistance center.....(and) lawyers using their legal skills to assist the 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', 11 La Crosse School District food pantries" as typical content.

The Bar argues that the controlling rule is Supreme Court Rule 10.03(5)(b)(1), and that this permits the Bar to "engage in and fund any activity that is reasonably intended for purposes of the association." The Bar contends that the objectors appear to be basing their argument on the erroneous assumption that the Bar may only use compulsory dues for activities which are germane to regulating the legal profession or improving the quality of legal services, without regard to whether the activities at issue are political or ideological. The Bar argues that the quoted rule makes clear that the use of compulsory dues is limited only when the activities being funded are political or ideological in nature, and that the requirement of "germaneness" applies only to such activities. The Bar notes that the present rule was adopted in response to a finding of the first post-Keller arbitrator which essentially supported the objectors' view, but that that ruling took place under quite different language. The Bar also argues that some of the same parties to this proceeding have made the same argument in the federal courts, where it was rejected. The Bar notes that subsequent arbitrators have applied SCR 10.03(5)(b)1 consistently with the Bar's position here.

But the Bar also argues that even if the public image campaign could arguably be considered ideological or political, there is an inextricable link between the public's confidence in lawyers and its confidence in the legal system of the whole, such that an attempt to improve public trust in lawyers is necessary for the proper functioning of the legal system, putting the public image campaign well within the germaneness test. Among other arguments, the Bar contends that it is difficult to see how activities designed to improve the public perception of lawyers, and therefore the legal system as a whole, could be more germane to the quality of legal services available when studies show that the negative perception of the profession may lead people with legal needs to avoid the use of professional legal services altogether.

In its reply brief, the Bar contends that the objectors base their position on the concept that all activities must be "germane", contrary to the express intent of the Wisconsin

Supreme Court and contrary to binding Seventh Circuit precedent. The Bar also argues that there is a Ninth Circuit decision assessing the "nearly identical" public relations program of the Nevada Bar and finding it to be chargeable to objectors. The Bar also contends that the germaneness test is met because there is a direct connection between attorney involvement in the community, the public's knowledge of that involvement, public trust and confidence in attorneys as a group, and public trust and confidence in the legal system generally. The Bar argues that the public image campaign is neither political nor ideological, noting that the objectors use a definition of "ideological" which is so broad as to cover virtually every activity. The Bar notes that the Seventh Circuit decision in Thiel v. State Bar of Wisconsin, 94 F.3d 399 (1996), which involved some of the same parties as this matter, found a number of Bar activities to be within the category of nonideological, nonpolitical activities and chargeable to objectors, including the State Bar's Bill of Rights pamphlet, an economics of practice survey, awards to reporters for writing on law-related topics, an assistance program for alcoholic lawyers, local bar grants, a mock trial competition, and the Wisconsin Law Foundation.

Discussion:

The objectors have framed their arguments almost entirely in terms of constitutional principles, but I note that the authority of an arbitrator under one of these proceedings is specified by a Wisconsin Supreme Court rule [Chapter 10 Appendix, State Bar Bylaws, Article I, Section 5(e)vi)], in the following terms: "The arbitrator shall have no authority to add, subtract, set aside or delete from any Supreme Court Rule, or State Bar bylaw." In company with previous arbitrators in this series, I find that my role is to interpret the provisions that are expressly subject to this arbitration procedure, not to attempt definitive interpretations of large constitutional questions. Nevertheless, the relevant federal court rulings are not to be ignored.

I will admit to doubts about the "germaneness" of the public image campaign. While the Bar has drawn a chain of connection which is far from absurd, from the contents of the campaign, back through the intent to improve the public image of lawyers, through public confidence in lawyers, and through public confidence in the legal system, to needs of the public for legal representation, that chain of logic is also far from the whole purpose of the campaign. I believe that based on the evidence presented it is a stretch, in fact, to regard that 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. Mixed motives, however, are not unusual in public matters[2], as elsewhere. Furthermore, there are

[2] For example, Wisconsin has long used the "primarily related" test to determine whether a public body's decision that has labor consequences is a mandatory or permissive subject of bargaining, recognizing that many decisions have elements related to public policy mixed with elements related primarily to wages, hours and conditions of employment. Unified Sch. Dist. No. 1 v. WERC, 81 Wis. 2d 89, 102, 259 N.W. 2d 724 (1977). The same test is instructive here.

several reasons to believe that if the public image campaign were even less motivated by a pure public spirit than it appears to be, it might still be authorized by the applicable Supreme Court rule as well as by the apparent interpretation of the rule by the Seventh Circuit. In the latter context I will note simply that in Thiel, the court was untroubled by, among other elements of that year's activity, the "economics of practice survey." Based on the information available, it appears that survey was of the kind routinely used by many trade or industry associations to assess their members' economic status, with a view to finding strategies for improving it. There is nothing wrong with that; but the apparently distant, and arguably even competing, relationship between such concerns and the concerns of lawyers' clients is indicative of a standard of interpretation that is relatively generous to the Bar's autonomy.

More immediately, however, I am struck by specific language in SCR 10.02 which appears to be quite relevant to the specific objection at issue here. Under (2) Purpose, two of the expressed purposes are "to safeguard the proper professional interests of the members of the bar" and "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....". With all due skepticism towards a PR campaign, I am compelled to the conclusion that to have a good reputation is a proper professional interest of any profession, and for the Bar to float a PR campaign, unless it consisted of outright lies, would appear to find a harbor within that clause. Furthermore, the Public Image Committee's meetings, the survey which initially led to the campaign, the internal publications of the Bar discussing the campaign, and other elements in the record appear to fit the concept of "a forum for the discussion of....the relations of the bar to the public", while the PR campaign itself could be seen as a form of publishing "information relating thereto." Admittedly, the information published is one-sided. But it is difficult to read this rule either as opposing its publication, or as irrelevant.

I gave the "germaneness" discussion the initial consideration above because it is the central argument of the objectors. I am even more convinced, however, that the "germaneness" test does not apply at all. I agree with the Bar (and prior arbitrators since the rule was changed) that the formulation of SCR 10.03(5)(b)1 to the effect that the 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" is a two-part test. Only if a given use is found to be for political or ideological activities is that use then subjected to the "reasonably intended" (or germaneness) test.

Here, there is no serious argument to be made that the PR campaign is "political." Indeed, the objectors do not make such an argument, at least with any conviction. The issue turns, instead, on whether the campaign is credibly to be seen as "ideological." Here, the objectors have some dictionary support for their view – up to a point.

Several dictionaries I have consulted frame the term in slightly different ways, but centering around a choice of two concepts. In one, ideological means something like "of

or concerned with ideas." In the other, unhelpfully, ideological means "of or relating to ideology", but more usefully, while "ideology" is again defined somewhat variously, the definitions center not on just any idea, but on a body of ideas reflecting social needs or aspirations, a set of doctrines or beliefs forming the basis of a political or other system, or similar terms. The objectors can only rely on the first definition, though, because the PR campaign comes no closer to any of the second group of definitions than it does to "political."

Yet to apply "ideological" according to the first definition leads to an absurdity, which in terms of the standards classically applied in arbitration means such an interpretation should be avoided if possible. Virtually all of the everyday work of lawyers is concerned with the creation and management of ideas, in some sense (this contrasts with, for example, surgeons, an elite profession intellectually, but one in which manual dexterity is also a key element.) Such basic lawyer work problems as how to demonstrate that "my witness is credible, yours isn't" or how to write a more persuasive brief are fundamentally problems of the formulation and communication of ideas. Yet no one appears to think that Bar discussions or publications on witness credibility or brief-writing are non-chargeable to objectors. To give "ideological" the meaning implied by the objectors' argument would sweep virtually the entire activity of the State Bar within that term, and there is no support whatsoever in any of the precedent or in common sense for such an interpretation.

I conclude, accordingly, that the public image campaign is neither political nor ideological, and that the germaneness test therefore does not apply. The State Bar, in short, has persuasively demonstrated that the public image campaign is within the language and intent of SCR 10.02 and 10.03, such as to make its costs chargeable to objectors.

For the foregoing reasons, and based on the record as a whole, it is my

AWARD

That the FY 2009 dues reduction was properly set. No further reduction is required.

Dated at Madison, Wisconsin this 12th day of December, 2008

By_____
Christopher Honeyman, Arbitrator