

SUPREME COURT OF WISCONSIN

NOTICE

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No. 23-04

**In the Matter of Modification of SCR Chap. 10,
Regulation of the State Bar.**

FILED**MAY 2, 2024**

Samuel A. Christensen
Clerk of Supreme Court
Madison, WI

On June 27, 2023, the State Bar of Wisconsin, by then-president Margaret W. Hickey, filed this rule petition to amend Supreme Court Rule 10.05(1). The State Bar seeks to add a voting representative to its Board of Governors from its Section Leaders Council.

A letter soliciting public comments was sent to interested persons on October 31, 2023. The court received a comment from Attorney Nicholas C. Zales opposing the petition. The State Bar filed a response to Attorney Zales' comment.

A public hearing notice was issued on December 21, 2023, and the court held a public hearing on January 25, 2024. Attorney Margaret W. Hickey presented the petition to the court. At the ensuing open administrative conference, the court voted 5-2 to grant the petition and to revise the rules as requested.

Therefore,

IT IS ORDERED that, effective July 1, 2024:

SECTION 1: Supreme Court Rule 10.05 (1) is amended to read:

(1) Composition of board. The affairs of the association shall be managed and directed by a board of governors consisting of ~~the~~ 6 officers of the association, all of whom shall be ex officio members-at-large of the board, not fewer than 34 members elected from the state bar districts established under sub. (2), one member selected by the young lawyers division pursuant to its bylaws, one member selected by the government lawyers division pursuant to its bylaws, ~~five~~5 governors selected by the nonresident lawyers division pursuant to its bylaws, one governor selected by the senior lawyers division pursuant to its bylaws, one member selected by the section leaders council pursuant to its bylaws, and ~~three~~3 nonlawyers appointed by the supreme court for staggered two-year terms. No person appointed by the supreme court shall serve more than ~~two~~2 consecutive full terms. The rights and powers of the ex officio members of the board are the same as those of elected members. All past-presidents of the Wisconsin bar association or of the state bar of Wisconsin, the Wisconsin state delegate to the American Bar Association house of delegates and the deans of the Marquette university and university of Wisconsin law schools are entitled to floor privileges, but without voting privileges.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's website. The State Bar of Wisconsin shall provide notice of this order.

Samuel A. Christensen
Clerk of Supreme Court

¶1 REBECCA GRASSL BRADLEY, J. (*dissenting*). A majority of this court grants the State Bar of Wisconsin's petition to modify Supreme Court Rule ("SCR") Chapter 10 to add a voting representative of the Section Leaders Council to the Board of Governors ("BOG"). Although opposed by some members of the BOG, the substance of this structural change in governance of the State Bar did not trigger much concern on the part of the court. The process by which the State Bar presents the petition for court approval of this change, however, raises multiple red flags meriting its rejection.

¶2 For starters, the State Bar offers no reasonable explanation for first filing this petition nearly twenty years after the BOG approved it. The BOG first passed this proposal, among other amendments to SCR Chapter 10 and the State Bar bylaws, in 2004. At that time, Attorney Nick Zales, a member of the BOG, opposed the addition of a voting Section Leaders Council member to the BOG, and moved to remove the provision from the BOG's consideration; his motion garnered 15 votes but ultimately failed, and the BOG approved the proposed amendments. Letter from State Bar, Rule Petition 23-04, at 2 (Filed on Dec. 27, 2023). Under SCR 10.01, this court "by appropriate orders shall provide for the organization and government of the" State Bar; therefore, any "[p]roposals for amendment or abrogation of provisions of [Chapter 10]" require supreme court approval after a hearing. SCR 10.13(1). With no explanation whatsoever, the State Bar failed to submit the modifications for court consideration in 2004 when the BOG approved them.

¶3 Ten years later, in 2014, a State Bar task force formed and eventually recommended the addition of a representative of the Section Leaders Council to the BOG as a voting member. The proposal to add a Section Leaders Council representative to the BOG was considered by the BOG again in 2016 and in 2017, with the recommendation of the BOG's Committee on Governance. State Bar Letter, Rule Petition 23-04, at 3 (Filed Dec. 27, 2023). The State Bar again reports that Attorney Zales attended those BOG meetings too. The State Bar did not submit the proposal to the court at that time either, ostensibly because a former Bar president "filed a petition to change the nature of the integrated bar association[.]" Id. Why the filing of one petition somehow precluded the filing of another is left unexplained. Although the State Bar submitted other petitions to the court in 2019, 2020, and in 2021, the subject of the current petition was not among them. The State Bar has not explained why.

¶4 In 2020, the State Bar again undertook to update its bylaws as well as SCR Chapter 10. Although the State Bar acknowledges "[a] substantial portion of the amendments proposed in 2020-21 included typo corrections, correcting the use of hyphens" and the removal of gender references, among other mundane modifications, "the provision to permanently add a practice section representative as a voting member" of the BOG "remained throughout the 19-year history of the revision of rules and bylaws." Id. Apparently, 19 years' worth of revisions were approved in 2020. And again in 2021. Once again, the State Bar

failed to submit the proposals to this court for consideration and provided no reasonable explanation for its inaction.

¶5 Two more years came and went. In June 2023, the State Bar finally filed this petition, on which the court held a hearing in January 2024. At that hearing, I asked the former State Bar President why the rule petition was filed in 2023 rather than when it was first approved in 2004. She responded:

That is an excellent question, your honor, and I think the problem is that other things intervened. We were involved in litigation. . . . Boards change. Timing is important. Sometimes we have other things before you that we don't want to just send a million things up before the court. Sometimes ourselves as a Board of Governors [were] very involved in litigation and were focusing on that.¹

In a letter responding to the letter of opposition submitted by Attorney Zales, the current State Bar President likewise had mentioned "the State Bar was managing multiple federal lawsuits and petitions for the dissolution of the State Bar" during the 2017-18 timeframe but acknowledged the State Bar submitted "several petitions addressing significant matters of importance" in 2019, 2020, and in 2021. State Bar Letter, Rule Petition 23-04, at 3 (Filed Dec. 27, 2023). The State Bar offered no explanation for omitting a proposal the BOG approved in 2004 from the petitions that were submitted. It seems rather incongruous

¹ Margaret Hickey at 15:00-15:39, Wisconsin Supreme Court Rule Petition Hearing, Jan. 25, 2024 available at <https://wiseye.org/2024/01/25/wisconsin-supreme-court-rules-petition-hearing-5/>.

for lawyers to cite litigation as an excuse for not timely filing a petition with the court.

¶6 Only one of the seven justices currently on the court was serving on the court in 2004 when the BOG first passed the rules modifications addressed by this petition. The members of the BOG, who serve two-year terms and no more than two consecutive terms, have come and gone during that 19-year period—with some, like Attorney Zales, returning to serve again. His service on the BOG having coincided with the lifespan of the proposal before this court, Attorney Zales supplies useful institutional knowledge and perspective.

¶7 In his letter to the court objecting to this rule petition, Attorney Zales, a current member of the BOG, asserts that he and his fellow members did not receive proper notice of this substantive change. Because the Bar buried this proposal in a 345-page "consent agenda" of overwhelmingly technical amendments, the proposal did not attract the attention of the BOG. The consent agenda is reserved for "innocuous matters . . . no reasonable BOG member would oppose" while substantive changes are first placed on the agenda for "discussion" and later for "action," thereby being subjected to a full vetting by the BOG before a vote occurs. Letter from Attorney Zales, Rule Petition 23-04, at 1 (Filed Dec. 8, 2023). Attorney Zales submitted a portion of the June 9, 2021 BOG agenda, noting that "nothing in the description of the items on the consent agenda" identified "a change in BOG composition The summary of changes does not mention it. There had been no discussion of this the entire bar year. It was

not mentioned at the meeting." Id. Attorney Zales contends the decision of the Bar's Executive Committee to bypass standard procedures precluded the BOG from meaningfully considering, discussing, or debating this change, much less voting on the matter with any awareness of its existence. Attorney Zales maintains a change to the structure of the State Bar's governing body does not belong on the consent agenda, as evidenced by the prerequisite of this court's approval.

¶8 Attorney Zales urges the court to reject this petition and give the BOG an opportunity to discuss the proposal and then vote on it. In response, the Bar claims that process would be perfunctory and the BOG would likely approve the proposed change unanimously. The record suggests otherwise. As the Bar acknowledged in its written submissions in support of this petition, when the BOG discussed and debated the proposed change in 2004 more than one third of the BOG voted against it. I agree with Attorney Zales and would deny the petition to afford the current BOG the opportunity to properly consider and vote on the Bar's proposal to add a voting member from the Section Leaders Council. The Bar claims the matter is urgent because section members lack representation on the BOG, but this is not true; every section member is also a Bar member with representation on the BOG. Regardless, if the matter were truly urgent the Bar would not have waited 19 years before seeking this court's approval and would not have prioritized other petitions over this one.

¶9 On the same day the State Bar filed this rule petition—June 27, 2023—the State Bar also filed a certificate of amendment

of Article VI of its bylaws. Like the proposal embodied in this petition, the BOG approved those bylaw amendments on June 9, 2021. SCR 10.13(2) says, "[w]hen any change in the bylaws has been made by the [BOG] the executive director shall publish notice of the change, including a copy of the amendatory resolution, in an official state bar publication . . . and shall file a certified copy thereof with the clerk of the supreme court." The State Bar published notice of this amendment to its bylaws on July 19, 2023. This two-year delay in notifying the members of the Bar and this court of the changes does not satisfy SCR 10.13(2), which contemplates contemporaneous notice. The delay is concerning given the State Bar's prompt filing—on June 18, 2021—of a separate Certificate of Bylaw Amendment with respect to other changes to the bylaws the BOG approved the same day.

¶10 Typically, bylaw amendments are subject to court review only if "25 or more active members" of the Bar file a petition for review within 60 days after publication of notice. SCR 10.13(2). No such petition for review has been filed. The BOG, however, conditioned its approval of the amendments to the bylaws on this court's approval of the petition adding a representative of the Section Leaders Council to the BOG. The conditional nature of the BOG's passage of the bylaw amendments means the majority also approves the bylaws. The bylaw amendments significantly change the structure and activities of State Bar practice sections. No longer limited to particular fields of law, sections may now be dedicated to any "interest related to the practice of law that is consistent with the purposes of the State Bar." Although the

meaning of this broad language is unclear, it is conceivably nebulous enough to permit sections dedicated to political advocacy. The bylaws amendments expressly recognize a newly established section may be "a lobbying section." No longer may "any member of the State Bar" be "entitled at the member's election to enroll in any section." Now, membership in each section shall be "subject to membership requirements imposed by the section." Although the requirements could be as minimal as being a member of the Bar in good standing, this modified provision gives sections free rein to exclude members of the bar from participation on any conceivable ground, provided the member does not meet criteria devised by the sections in their sole discretion. These problematic changes provide another basis for denying the petition.

¶11 The procedural missteps associated with this petition as well as the bylaws amendments, coupled with the State Bar's inability to explain them, warrant rejection of both. Denying this petition would return the matter to the BOG for discussion followed by a fully informed vote. Mismanagement of governance matters by the Bar's leadership poorly serves the attorneys whose membership in the organization this court mandates. Viewed

collectively, certain of the Bar's actions² continue to erode the trust of its members and call into question the prudence of compelling attorneys to associate with the organization as a condition of practicing law in this state.

¶12 I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

² Karen Sloan, Discrimination Lawsuit Prompts Wisconsin Bar to Modify Diversity Program, Reuters (Apr. 5, 2024), <https://www.reuters.com/legal/legalindustry/discrimination-lawsuit-prompts-wisconsin-bar-modify-diversity-program-2024-04-05/>; Steve Schuster, UW-Madison Law School Professor Gashes State Bar, Law School DEI Efforts in Scathing Email, Wis. L. J. (Jan. 22, 2024), <https://wislawjournal.com/2024/01/22/uw-madison-law-school-professor-tears-apart-state-bar-of-wisconsin-dei-program-in-scathing-email/>; Martin Kady II, State Bar leaders Remain Deeply Divided over Special Purpose Trust, Wis. L. J. (Apr. 24, 2024), <https://wislawjournal.com/2024/04/25/bar-leaders-deeply-divided-over-special-purpose-trust/>.

