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Details:

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2007-08

(session year)

Assembly

(Assembly, Senate or Joint)

Committee on ... Elections and Constitutional Law (AC-ECL)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**
- Record of Comm. Proceedings ... **RCP**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt**
- Clearinghouse Rules ... **CRule**
- Hearing Records ... bills and resolutions
 - (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
 - (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

Jan 8
2007

ASSEMBLY COMMITTEE ON ELECTIONS AND CONSTITUTIONAL LAW

TESTIMONY OF ATTORNEY STEVEN LEVINE IN SUPPORT OF AJR 56, WHICH PROHIBITS THE SUPREME COURT OF WISCONSIN FROM ASSESSING FEES ON LAWYERS, JUDGES OR JUSTICES WITHOUT STATUTORY AUTHORITY

My name is Steve Levine, an attorney residing in Madison, and Past-President of the State Bar of Wisconsin. I am pleased and thankful to be able to testify in favor of Assembly Joint Resolution 56. I do so on my own behalf and not on behalf of the State Bar.

AJR 56 prohibits the Supreme Court from assessing a fee on any attorney, judge, or justice without statutory authority. AJR 56 is necessary to protect attorneys and judges, because in recent years the Supreme Court has expanded its authority into a number of areas which are essentially legislative in character rather than judicial and for which there exists no explicit authority in the Wisconsin constitution.

At present, the Supreme Court assesses fees on lawyers and/or judges to pay for the expenses of the State Bar of Wisconsin, Office of Lawyer Regulation (OLR), Board of Bar Examiners (BBE), Fund for Client Protection, and Wisconsin Trust Account Foundation (civil legal services for the poor). Pending before the Supreme Court are proposals to assess lawyers for the cost of enforcing rules against the unauthorized practice of law and to assess nonresident lawyers who appear in Wisconsin courts a (\$250) fee to support the Wisconsin Trust Account Foundation. The future is certain to see more fee proposals.

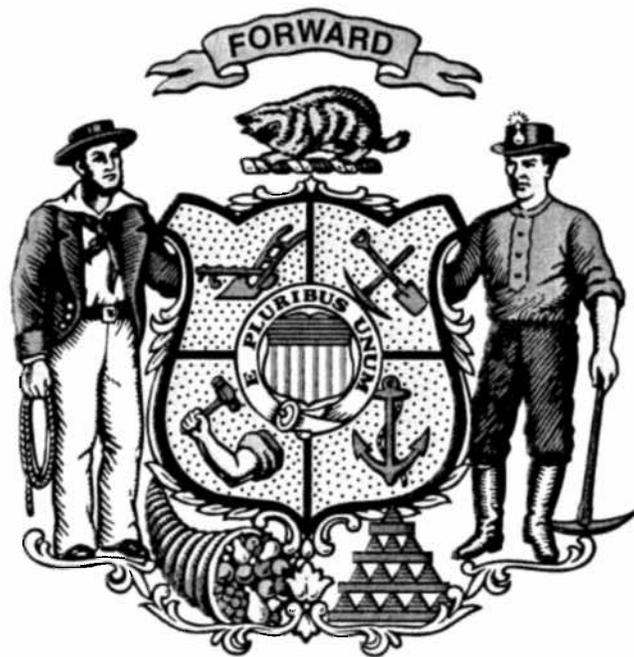
None of the fees imposed by the Supreme Court are explicitly authorized by the Wisconsin constitution. The Supreme Court justifies these fees on the basis of "inherent authority" – authority which has no specific basis. "Inherent authority" essentially means "the authority to do whatever we want to do."

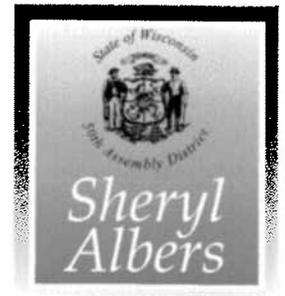
For example, nowhere is the Wisconsin Supreme Court authorized to impose an assessment on lawyers to pay the cost of providing civil legal services for the poor. Article 7 of the state constitution contains no express authority authorizing the court to tax or assess lawyers to fund legal services programs. Civil legal services programs are social programs which are within the jurisdiction of the legislature to fund through taxes or assessments. As the more democratic branch of government, the legislature is better able to make findings of fact and weigh the conflicting factors which are relevant to the funding of civil legal services programs. Yet, without any express constitutional authority, the Supreme Court has imposed a fee for this purpose.

Some fees imposed by the Supreme Court are reasonable regulatory fees to which no one would object – such as the fees paid to the OLR and BBE for the enforcement of legal ethics and educational requirements. Other fees are for social programs for which the Supreme Court has no express authority to assess and which usurp the legislature's prerogative. Assembly Joint Resolution 56 would prevent these abuses, which should be corrected by a constitutional amendment.

Respectfully submitted,

Steven Levine, 5010 Buffalo Trail, Madison, WI 53705, January 8, 2007





Rep. Albers Testimony on AJR 56
To the Assembly Committee on Elections & Constitutional Law
January 10, 2008

Members of the Committee, earlier this session I introduced Assembly Joint Resolution 30, which would prohibit the Supreme Court from assessing a fee on attorneys licensed to practice law in Wisconsin for the purposes of funding indigent legal aid. Subsequent to a public hearing in this committee last spring, Representative Gundrum and I discussed ways in which to improve the draft, with our goal being to preclude the Court from circumventing the State Constitution by levying surcharges, imposing “taxes” or other fees given other names. Therefore, I, along with Representative Gundrum, today offer AJR 56, which, as drafted and if approved by the public at referendum, would prohibit the Supreme Court from assessing fees without first obtaining the statutory authority to do so.

The issue is the clear separation of powers, and as delineated in Article Seven of the Wisconsin Constitution, the Judiciary has no express authority to levy taxes or fees for services such as legal defense funds for the poor. The public deserves the opportunity to vote on this matter; more particularly, the legal community and we as members of the Legislature, deserve the opportunity to educate the media and the public as to the boundaries of powers which have been overstepped by the Wisconsin Supreme Court. This is not the first instance of such overstepping, and surely, it will not be the last, but it is time to send a strong message, as to where the lines as to power and authority lie.

Currently, each attorney seeking to practice in this state must pay annually \$50 per year for indigent legal defense and it is collected at the same time that mandatory bar assessments are collected. Both of these fees are collected by the State Board of Bar Examiners office, and \$50 indigent legal fee assessment is then deposited in the WISTAF Account, which in turn is redistributed to others who provide indigent legal defense. Traditionally, all licensing fees imposed were used only to regulate the body of licensed professionals and for no other purpose.

WisTAF is a Foundation -- the Wisconsin Trust Account Foundation. This particular foundation is not authorized by statute, and it exists only under court order. However, the court order is not the result of a lawsuit, or other case, but is the creation of the Supreme Court's own initiative. This Foundation administers the fund known as the Interest of Lawyer Trust Accounts, which in turn redistributed funds collected from lawyers and judges to other groups which provide legal services to the indigent/low-income individuals, as their income is deemed too low to obtain services of an attorney.

This mandatory assessment came into existence by order of the Supreme Court, and at the time was claimed to be temporary. The Court, however, later voted to permanently extend the WisTAF assessment. Furthermore, the Court has voted to expand the assessment to judges, and the order now under consideration by the Court would give attorneys and judges an option of sending their assessments to a legal services organization of their choosing instead of WisTAF. This option has

yet to be implemented by written order, which must be approved by only a majority of the court.

I want to make one thing absolutely clear: I am in no way opposed to legal aid to the indigent or any other segment of our society. Access to competent legal counsel and equal access to the justice system are fundamental rights of every American. However, I believe that Justice Prosser was correct when he said in his dissent to the Supreme Court order mandating this assessment that “a laudatory end does not justify an illegitimate means.”

Clearly, the most glaring illegitimacy in this Supreme Court assessment is that it basically amounts to a tax, for it is collected from a particular group, and then redistributed to another group, and it is not used strictly to regulate or investigate licensed attorneys.

The Wisconsin Constitution gives but one branch power to levy taxes -- and that one branch is the Legislature. Neither the Judiciary, nor the Governor, has authority to levy taxes/fees. For that very reason, agencies must come to the Legislature for approval of any fees they may have authority to impose, or the statutes directly set the fee which may be imposed.

The Legislature may delegate its taxing power to others, and has given such power to local governments and executive agencies, but the Legislature has not given such authority to the judicial branch. Furthermore, this assessment is a tax because

it goes beyond the cost of regulation and exists to raise revenue for a socially desirable program.

Another consideration for this committee is: if the Court believes that this assessment is proper and serves a legitimate purpose, what is to keep the Court from imposing even broader and larger assessments – for desirable computer technology, for needed interpreters, for forms, for other worthwhile, meritorious needs?

Wisconsin is recognized as a high tax state, and fees added to the mix unlawfully do not improve our tax status in anyone's perception. The best way to stop this illegitimate tax by the judicial branch, and to prevent a future court from imposing other taxes in the future, is passage of a constitutional amendment.

If this proposal is approved by citizens at referendum, the Legislature needs to be prepared to appropriate additional funding for indigent legal services. Wisconsin is behind neighboring states like Minnesota, Michigan, Illinois and Ohio who have appropriated general purpose funds for indigent legal services. While the 2007-09 state budget included \$1 million for indigent legal aid, that amount only begins to address actual need. State Bar President Thomas Basting recently said, "As the Bar's *Bridging the Justice Gap* report documents, more than 500,000 low-income Wisconsin residents experience an unmet legal need each year that would benefit from some degree of legal assistance. Pro bono contributions by Wisconsin

lawyers are a vital part of the response to addressing the unmet legal needs facing low-income families.”

Today, however, this committee should focus on the goal of giving the public the opportunity to tighten up constitutional language, which has apparently lead the Supreme Court to conclude that it can levy fees or other charges.

This is the strongest message we can put forth, although another means of achieving the same end would be for a lawsuit to be brought. Nonetheless, the Judicial Branch needs to be sent the message that we—the Legislature - do NOT appreciate their overstepping of boundaries, their usurpation of authority not granted.

A vote of passage is the first step to put the power of the purse back where it rightfully belongs.





STATE BAR of
WISCONSIN

**WISCONSIN
LAWYERS**

EXPERT ADVISERS.
SERVING YOU.

MEMORANDUM

To: Assembly Committee on Elections and Constitutional Law
From: Atty. Thomas Basting, President
State Bar of Wisconsin
Date: January 10, 2008
Re: State Bar of Wisconsin opposition to AJR 56

The State Bar of Wisconsin opposes Assembly Joint Resolution 56, which would amend the Wisconsin Constitution to prohibit the Wisconsin Supreme Court from assessing fees on attorneys, judges or justices without statutory authority.

The State Bar reiterates its opposition to this legislation for the same reasons that it opposed AJR 30 and AJR 31 earlier this session. Assembly Joint Resolution 30 would have amended the Wisconsin Constitution to prohibit the Wisconsin Supreme Court from assessing a fee to licensed attorneys to fund either civil or criminal legal services for the poor, while AJR 31 would have amended the Wisconsin Constitution to prohibit the Supreme Court from requiring licensed attorneys to join the State Bar of Wisconsin or pay dues to any bar association.

Rather than reiterate the arguments here for opposing those proposed amendments, I have attached to my statement copies of our testimony relating to those matters.

The current iteration of these proposals would prohibit the court from assessing any "fee" upon licensed attorneys without statutory approval enacted by the legislature and the governor. I should note that the proposal before you does not define "fee," but I think it can be safely assumed that this proposal is intended at the very least to achieve the same objectives as AJR 30 and 31, although it is actually even more far-reaching. At the very least, it would effectively end both the mandatory Bar and the current \$50 WisTAF assessment, unless the other two branches of government gave permission to the Supreme Court to assess fees for those purposes.

This proposal, however, in addition to ending the mandatory Bar and the current WisTAF assessment, would also effectively end the regulation of attorneys as we know it. In addition to assessing dues for Bar membership and the WisTAF assessment, the Supreme Court also assesses Bar members fees for the support of the Office of Lawyer Regulation – which investigates and prosecutes lawyer misconduct; the Board of Bar Examiners, which administers matters related to attorney licensing and monitors compliance with continuing legal education; and the Fund for Client Protection, which makes whole clients who have been victimized by dishonest attorneys. It is inconceivable that the legislature actually thinks that eliminating these programs is a salutary goal.

State Bar of Wisconsin

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What is striking in this proposal is the complete absence of any apparent need for upsetting the existing constitutional relationship between the various branches of government. Since the founding of our state, the regulation of the practice of law has been vested in the judicial branch of government. Today, Article VII, Section 3 of the Wisconsin Constitution grants to our Supreme Court superintending and administrative authority over all courts in our state. The regulation of the practice of law has always been vested in the judicial branch. That authority should be respected as fundamental to our tripartite and republican form of government, in which the judiciary is a separate but fully equal branch of government.

Let's not fool ourselves. This legislation, if enacted, would benefit only a small number of attorneys in Wisconsin who are opposed to mandatory Bar membership and/or the \$50 WisTAF assessment. As with AJR 30 and 31, it is unnecessary and inappropriate to amend the State Constitution for the benefit of such a small number of people.

On this note, I would like to briefly update the committee on the progress the State Bar has made in seeking meaningful modifications to the WisTAF assessment. In November, the Supreme Court tentatively approved a State Bar petition to extend the assessment to all judicial members. In addition, at the State Bar's request the Court tentatively approved a form of "charitable choice" that will allow State Bar members to designate the legal services organization which they would like to receive their \$50, if they do not want it to go to WisTAF. My point is bringing this to your attention is that it is not necessary to resort to the sledgehammer of a constitutional amendment to seek changes in our system. In this case, the State Bar acted upon the wishes of its members, and the Supreme Court heard our concerns and acted positively upon them.





Supreme Court of Wisconsin

DIRECTOR OF STATE COURTS

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Date ?

Shirley S. Abrahamson
Chief Justice

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A. John Voelker
Director of State Courts

The Honorable Sheryl Albers
Chair, Assembly Committee on Elections
and Constitutional Law
Room 115 West, State Capitol
Madison, Wisconsin

RE: Assembly Joint Resolution 56, Prohibiting the Supreme Court From Assessing Fees Without Statutory Authority

Dear Representative Albers:

I regret that I will be unable to be present today to testify on Assembly Joint Resolution 56 that would amend the Wisconsin Constitution to prohibit the Supreme Court from assessing any fees on lawyers or judges without statutory authority. I would like to submit this written testimony for the committee's consideration.

Earlier this session I testified to your committee on AJR 30, a somewhat similar proposal. AJR 30 would have prohibited the Supreme Court from assessing any fees on lawyers to pay the cost of indigent legal services. The prohibition contained in AJR 56 is broader and more far-reaching than the earlier joint resolution heard by this committee.

The concerns I raised about AJR 30 are equally applicable to AJR 56. Therefore, I have attached my testimony from March 22, 2007 as a part of this submission. AJR 56 also "amounts to an unnecessary attempt to undercut the state Constitution's grant of superintending and administrative authority of all courts to the judicial branch." I would urge the committee to reject this approach.

Thank you.

Sincerely,

A. John Voelker
Director of State Courts

Attachment

cc: Members, Assembly Committee on Elections and Constitutional Law

TESTIMONY ON AJR-30
A. JOHN VOELKER, DIRECTOR OF STATE COURTS
BEFORE THE ASSEMBLY COMMITTEE ON ELECTIONS AND CONSTITUTIONAL LAW
MARCH 22, 2007

Thank you for the opportunity to address the state court system's concerns about Assembly Joint Resolution 30.

This resolution amounts to an unnecessary attempt to undercut the state Constitution's grant of superintending and administrative authority of all courts to the judicial branch. This is obviously a delicate balance between the branches.

The Court concluded that the issue of legal representation was critical to the administration of justice.

As you may know, Wisconsin has a proud tradition of helping some of its poorest citizens find legal representation.

This assistance is not only in the interest of society at large; it's in the interest of the effective administration of justice. This fact has long been recognized by the courts and stakeholders in justice, including lawyers.

Allow me to provide a little historical perspective and bring you up to date.

The Interest of Lawyer Trust Accounts (IOLTA) program was established by the Court in 1986 to help people who otherwise couldn't afford it to have legal representation in civil cases.

For years, the account provided much needed help. But in 2004, when interest rates hit a 45-year low and funding dipped, the Wisconsin Trust Account Foundation (WisTAF) asked the Supreme Court to step in.

WisTAF petitioned the Court in its rulemaking authority to approve a \$50 fee from each active lawyer in the state, as well as Supreme Court justices, to help offset the reduced funding.

Without the additional support, many of the state's poorest residents would have been left without legal representation, and therefore without access to justice. Even with the fee, the legal needs of the poor have not been met.

Testimony provided during consideration of WisTAF's petition showed Wisconsin's poorest citizens increasingly lacked access to representation for basic civil legal services in critical areas, such as custody matters, domestic violence, housing, government benefits and health care.

The results of not being able to afford legal representation can be tragic, as individuals attempt to pursue their own rights and remedies without understanding the legal system. In turn, this presents a challenge for the courts in terms of staff time, administrative costs and decreased efficiency.

State and federal courts have affirmed that lawyers are more than just bystanders in a courtroom. As officers of the court, they have an obligation to help the Court ensure the effective administration of justice.

In 1902, the Wisconsin Supreme Court in *Green Lake County v. Waupaca County*, concluded: "(Lawyers) 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."

WisTAF asked the Supreme Court to use its constitutional authority to approve the petition.

The state Constitution is a principled document that should not be misused as a forum to settle this issue.

Thank you.

Contact: A. John Voelker
Director of State Courts
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