



Justice Brian Hagedorn:

Lawyer Regulation, Politicization, and Threats to the Constitutional Order





The State Bar of Wisconsin's Board of Governors invited Wisconsin Supreme Court Justice Brian Hagedorn to give opening remarks at its meeting on April 11, 2025. This is a lightly edited and abridged transcript of his remarks highlighting what he sees as three challenges to our legal system.

Well, it's great to be with you today. I want to thank you for your work in working to strengthen the legal profession. I know all of you are busy, and you have jobs. And you're here because you care about our legal system, you care about the rule of law, and you're here to try to make the system better.

So, thank you for your time and effort to do that. As Larry Martin talked about when I came here a few years ago, I talked about my philosophy and also what I saw as maybe a precarious time for our democracy and for our constitutional order. And I'm not sure that we are in a less precarious moment than we were several years ago. There are threats all around.

I said to the leadership group on Saturday that lawyers are leaders. Wherever you are in your communities, you all have an opportunity and are asked to step up and take leadership. You all have a sphere of influence that extends far beyond your legal work. And I think that attorneys have a unique opportunity to speak into the world in a way that few other professions and few other professionals do. And so, with that in mind, what I want to do today is briefly highlight what I see as three challenges to our legal system.

Lawyer Regulation

The first thing that I want to talk about is the high cost, over-regulated legal monopoly we all have.

We live in an interesting system; it's kind of unusual if you sit back and think about it. Becoming a lawyer is very time-consuming and it's extremely expensive, right? Far more expensive than other places around the world, where often you can get a legal education through your undergraduate years where it's far cheaper. So, we make legal

education very expensive. We make it a graduate program. We do it for three years. And I'm not just denigrating law schools at all, but I think I learned most of what I need to know in the first year and then probably learned the rest of it when I actually began to practice law. And it's not that I didn't take other interesting classes or expand my knowledge, but three years is a huge investment of time. The longer it is, the more expensive it is.

And then because it's expensive, the federal government subsidizes it with student loans. And it's extremely expensive to gain admission into the bar. And of course, we impose a bar exam. And by the way, by "we," I kind of mean me, because it's our court that has done all this – though it's happened over the course of decades, along with other bars and supreme courts around the country which regulate the practice of law.

So we have large fees for admission, and once you become a lawyer, we have regular bar dues and CLE fees. So, it's quite an expensive system. It's a closed system where only licensed lawyers can do legal work. The state bars oftentimes have been vigorous in protecting its boundaries there.

On the flip side of that, people complain about the fact that there aren't enough lawyers. People say we don't have lawyers in rural areas or serving the poor. Yet we've created a system that actually makes being a lawyer expensive. It's kind of like housing, right? Why is housing so expensive in California or in other places? Well, you have really complicated zoning laws and really thick regulations. So, it makes building houses really expensive, really time-consuming. And when you make it expensive, you increase the cost. If you have constant demand, it becomes more expensive because there's less supply. On the flip side of that, you have people arguing for subsidies for housing for the poor.

One of the things I want to encourage all of you to begin to think about is: are there new ways that we can think about structuring this system? For example, there's increasing evidence that there are some places in the practice of law where nonlawyers are just as good – if not better – than lawyers. Some areas are highly specialized where other professionals could do some work. If we are committed to providing, for example, legal aid to those who need it – I know there are many people in this room who do that professionally and are committed to that, and we've had petitions before our court on that – what if there are other ways of thinking about it other than having a closed system of just lawyers doing everything? It's time for us to think outside the box a little bit, not just to take the system that we created and structured in the mid-20th century and say that's how the legal system and legal services always need to be delivered.

The principal reason we're doing all this, by the way, is to protect the public. And I think there are reasons for us to be concerned about that. But we need to always assess the costs and benefits of the regulations we have. If you have a highly regulated and highly expensive system, in a closed system that doesn't let anybody do any legal work unless they go through this system at great cost to themselves, you're going to have big consequences for that. You're going to have fewer lawyers and you're going to have a smaller supply of legal services. Is it worth the cost? Are we protecting the public? Do we need to rethink the way we're doing these things? I don't know the answers to those questions.

I'm not suggesting to you that we blow up the whole system. But I am suggesting that perhaps we do need to think outside the box and start asking some tougher questions. Simply having government subsidies fill the back end of the problem probably isn't enough of a solution. So, let's think

outside the box. I also wonder about AI and technology. That's going to dramatically change the profession of law in ways that may be a real opportunity for us to provide far lower cost legal services to people who need it if done the right way.

So, my first charge to all of you is let's think outside the box about how we deliver and license and provide legal services in the state of Wisconsin. I think there's potential for us to do some great work there.

Politicization of the Bar

The second challenge I want to talk about briefly is – and this is more tailored to the folks in this room – is the politicization of the bar and other institutions like it.

Let me give you an example of something that has shaped the comments that I want to share with you. I was Governor Walker's chief legal counsel. I was involved in the drafting of Act 10. I was involved in litigation over Act 10, all of it. And in the first case, there was a challenge to Act 10.

We were in Dane County Circuit Court. And in the end, there was a decision from that court that prohibited the publication of Act 10, and concluding that the legislature ran its own internal processes and open meetings illegally. It went up to the [Wisconsin] Supreme Court and the Supreme Court overturned it. And the Supreme Court held that it was a violation of clear precedent that you cannot prohibit publication of a law, and that the judiciary had invaded the province of the legislature in telling the legislature how to do its job. You can agree or disagree with that. I'm just telling you what the court held, okay?

A few months after that, the State Bar's Bench and Bar Committee gave that judge the Judge of the Year Award. In the legal counsel's office to the governor, I was involved in all manner of legal policy questions affecting the state. I recognize, by the way, the

Bench and Bar Committee isn't controlled by the State Bar. In fact, I later joined the Bench and Bar Committee to stop those very things from happening moving forward. But there was a real loss of credibility. And I hope you can see that.

The risk is an organization that becomes so insular that it doesn't have enough diversity to recognize that it's a little anomalous that somebody who gets the most important case of their career wrong, according to the Supreme Court, and then gets an award for modeling judicial independence from the State Bar. You can see how that doesn't lend credibility to the organization.

And we've seen some hits to credibility because certain organizations have at times become captured by certain smaller groups. Let's talk about the American Bar Association, for example. The American Bar Association used to have a significant role in the vetting of federal judges, but with regard to at least Republican administrations right now, it does not. And the reason it does not is because it's perceived as being a biased organization that has engaged in political advocacy for one side, not the other, on a regular basis. You can think that's true, you can think it's not true, but that is the perception. And that is why it doesn't really have any weight when it speaks to these situations. I just read in the last couple of days that the Supreme Courts of Florida and Texas are considering eliminating any state bar certification for its law schools by the ABA because it's perceived that the ABA is a political organization that has a bias.

One of the reasons we have such a loss of trust of institutions is because sometimes our institutions have become insular. The crisis we're seeing in higher education and in the media, there's a reason why there's criticism of those organizations. There's a reason why there's criticism, for example, of the American Bar Association. And by the way, with regard to this bar,

I'm really grateful for the leadership of Larry Martin and others because I think this bar has done a good job of moving away from that. It has made some real progress.

But I do think there is always a risk for organizations like this to be captured by a certain viewpoint. And some of the issues that this organization faces are criticism because of what is perceived as political positions it takes that might continue to align more traditionally with one political movement over another. And those are risks to this organization's credibility to doing its main mission well. Again, I will tell you when I was in the governor's office, my general view was the State Bar was at times a slanted organization. It didn't have a lot of credibility. And I hope none of you want that. I hope all of you want the State Bar to be perceived as a place where people – no matter your political philosophy – can come into the room and engage and debate and that it has credibility to speak. I think all of you want that. I want to encourage you to continue to fight for that in this room and in this organization.

Threats to the Constitutional Order

The final thing I want to mention, as a challenge, is threats to our constitutional order.

When you became a lawyer, you all swore an oath to uphold and support the Constitution of the United States and the Constitution of the State of Wisconsin. What an incredible and solemn oath you took – a promise that you are going to defend our constitutional order. And I hope for all of us, that means defending our constitutional order even when that goes against my personal political priorities at times.

I have real concern that we increasingly see in our political divides, including among attorneys, more loyalty to tribe and to party than to truth and principle. And this is a bipartisan comment. I see risks on all sides.

We have a constitutional order that says that the judiciary is there to not be political. I hope that's my reputation because that's what I'm striving to do. My job isn't political at the end of the day, even though I have my personal politics just like all of you do. But we need to fight for that. It's not a given.

We recently had the most expensive election in American history again for the Supreme Court of Wisconsin – \$110 million or whatever the final number is going to end up being. Regardless of who

you supported in that race – and I don't fault the candidates for working with the system we have – but in some ways, it's a vote of no confidence in the judiciary.

It's a perception that the judiciary is going to do the bidding of one side or another, which is why money flows from political interests. They think they will get what they're paying for. I don't mean anybody's being bought off. I'm not disparaging Judge Crawford or Judge Schimel at all. What I'm saying is that political interests feel they're



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going to get political outcomes, and so they invest.

To me the problem with our elections is not that the money is there. The money is there because there's a problem. Money follows power. Money follows influence. When the perception is that courts are not going to call it straight but are going to be advocates for one side or another, the money will flow and support that. That's something we need to do better as a court. We need to earn that.

But I also think this extends to other issues. We have Congress and the legislature that are there to make the law and decide what policy should be. Sometimes, when presidents of both parties over the last few years have issued orders that take power from the legislature, one side seems to remain strangely silent, their own side. It's important that we speak up. It's important that we vindicate the idea that the

executive branch is there to execute the law and not just do whatever it wants to do. Whether it is orders on national policy or tariffs or student loans or whatever they may be, it's important that Congress and the legislature take its rightful role, and not abdicating that or giving it to the executive branch. It's important for attorneys to speak up and recognize that even if its outcomes I don't like, even when my tribe and my side does something I don't want, it's important to speak up. Because if you throw the flag against the other team, then each side ratchets up, right?

Increasingly we see people willing to dispense with the system we have in order to get the outcomes because they think it's an existential crisis. But you realize all the while it would tear up the road that we've been on. What we have been given in this country, this constitutional order that we have, is a precious gift. America has its problems,

for sure. It's always had its problems. But what we have is beautiful. We have the most successful system in the world that's based in part on the separation of powers in our constitutional order.

All of us have an obligation to vigorously defend it and to stand up for it. And I trust many of you have been doing that in your own lives, in your own sphere of influence. I'm not saying you all need to save the world or the State Bar needs to do anything new that it hasn't been doing. But what I am saying is all of you should use your influence to stand up and to speak out and to vindicate our constitutional order, particularly when the tribe that you might align yourself with crosses the line.

That's how we maintain principle. If people think that the ends that they are pursuing are more important than the means, we're going to destroy the structure of government that we have. And that's the genius of the American system. The genius of the American system is that our founders recognized we are all flawed and none of us are worthy of trust. And so we need to divide power into different branches in order to make sure that nobody and no branch has dominance over the others. It's this system of disagreement. It's a pluralistic society. We can disagree about important things. But let's agree about how we make these kinds of decisions. And that's an obligation for each of us to step up and do.

So, I want to thank again each of you for your work here for the State Bar. I want to thank each of you for the work you've already done. Many of you are involved in so many different places. You are speaking up. You are working to solve some of these problems. There are real challenges ahead, but there are also real opportunities ahead. And I want to again sincerely say thank you. It's a privilege to be here. **WL**

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CASE OF THE MONTH



Medical Marijuana, Inc. v. Horn, 145 S. Ct. 931 (Apr. 2, 2025). Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO) creates a cause of action for "[a]ny person injured in his business or property" by reason of a violation of section 1962. Months after Horn had sustained personal injuries in a truck crash, he was still suffering from chronic pain and sought relief from a product infused with CBD sold by Medical Marijuana. Horn was wary of any product that might contain THC; Medical Marijuana represented its product was THC free. When Horn later tested positive for THC in a random drug screening, his employer fired him. Horn alleged that Medical Marijuana was a RICO enterprise, that its false and misleading advertisements satisfied the elements of mail and wire fraud, and that those crimes constituted a pattern of racketeering activity. RICO implicitly excludes recovery for harm to one's person. The Court expressed no view whether Horn suffered an antecedent personal injury when he consumed THC and proceeded on the understanding that he did. Because Medical Marijuana did not challenge the Second Circuit's interpretation that "business" included "employment," the Court left the issue for another day. Also, because the Second Circuit expressly reserved the question "whether Horn suffered an injury to property when he lost his job," the Court followed suit. The only question the Court addressed is whether civil RICO bars recovery for all business or property harms that derive from a personal injury. The Court held that a person has been "injured in his business or property" if the business or property has been harmed or damaged." The Court rejected Major Mechanical's argument that "injured in his business or property" carried a specialized meaning referring to "invasion of a legal right." When a word carries both an ordinary meaning and a specialized meaning, the Court looks to context to choose between them, and the Court decided that context cuts decisively in favor of ordinary meaning. The Court differentiated between "damages" and "damage," – a distinction that matters – because "damages" has a specialized legal meaning referring to monetary redress. Plaintiffs cannot easily transform garden-variety personal-injury claims into RICO suits for three reasons: first, RICO's direct relationship requirement; second, a plaintiff must first establish a pattern of racketeering activity, and third, the reach of 1964(c) turns on more than the meaning of "injured." "Business" may not encompass every aspect of employment, and "property" may not include every penny in the plaintiff's pocketbook. Not every monetary harm – be it lost wages, medical expenses, or otherwise – necessarily implicates RICO.

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