

**EMERGENCY REQUEST FOR MODIFICATION OF SUPREME COURT RULE 40.03**  
**DUE TO COVID-19 PANDEMIC**

**PROBLEM**

The COVID-19 pandemic has created unique challenges for the legal profession. It makes administering a July bar examination—currently scheduled for July 28–29, 2020 in Wisconsin—impractical and extremely unsafe. It is unclear when COVID-19 will subside, and there is research to suggest COVID-19 will come in waves. The Supreme Court has already recognized this “extraordinary situation” in modifying the requirement that qualified applicants take the Attorney's Oath in-person under SCR 40.02(4).<sup>1</sup>

Without a July 2020 bar examination, graduates of out-of-state law schools who intend to practice in Wisconsin will be unable to gain admission under the current Wisconsin Supreme Court Rules. This will adversely affect the Wisconsin legal community. If these graduates are unable to be admitted to practice, they will not be able to begin their jobs and serve their clients, who are also affected by the COVID-19 pandemic. Even if the Board of Bar Examiners were to postpone the July 2020 exam, postponement still calls for graduates to sit in large groups for two days, placing them at completely undue risk of contracting or spreading COVID-19.

Postponing the bar exam will also postpone these graduates' ability to begin their jobs, essentially rendering them unemployed until an exam can be safely administered. For those graduates with limited financial means, it is unclear how they will financially support themselves and their families if their employment is postponed. For all, it is unclear if they will be expected to begin making payments on their student loans this year.

Other alternatives are not much better. Online test administration would disadvantage those students who lack access to a quiet place to take the exam and an adequate internet connection, while administration in small groups would still put test takers, exam administrators, and their families at needless risk of exposure to COVID-19.

This is an existing problem, as the Wisconsin Board of Bar Examiners is currently examining the situation and is likely to make a decision within the next two to three weeks. Additionally, out-of-state law graduates will begin graduating from their respective law schools in less than a month and will need to know how to gain admission to the Wisconsin Bar. We respectfully request the relief below by May 1, 2020, so as to ensure that out-of-state bar admission applicants and the Wisconsin Board of Bar Examiners have adequate time to prepare for such changes to the bar admission process.

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<sup>1</sup> Order, In re the Matter of Admission to the Bar During the COVID-19 Pandemic (Mar. 25, 2020), <https://www.wicourts.gov/news/docs/baradmissions.pdf>.

## **RELIEF REQUESTED**

We respectfully request an emergency, temporary modification of Supreme Court Rule 40.03 to grant Qualified Recent Law School Graduates, as defined herein, a modified diploma privilege to gain admission to the Wisconsin Bar. Such modified diploma privilege would grant temporary, conditional bar admission to Qualified Recent Law School Graduates and would grant full bar admission upon the completion of 360 hours of Supervised Practice and State Law Education requirements as to be determined by the Court. We also respectfully request that the diploma privilege granted under the emergency, temporary modification of Supreme Court Rule 40.03 satisfy the legal competence requirement in Supreme Court Rule 40.02(2).

This proposed, modified diploma privilege would extend only to “Qualified Recent Law School Graduates”: those that will graduate between May 1, 2020 and June 30, 2020, with a first professional degree in law from an ABA-approved law school outside of Wisconsin with a 2019 first-time taker bar examination passage rate of 80% or greater. “Qualified Recent Law School Graduates” would not include those who have previously taken a bar examination or will take a bar examination in another state or territory in July 2020.

Under the emergency, temporary modification of SCR 40.03, conditional bar admission would be temporarily granted to Qualified Recent Law School Graduates prior to their completion of the 360 hours of supervised practice and state law education requirements in the mandatory subject matter areas listed in SCR 40.03(2)(b).<sup>2</sup> Upon completion of the supervised practice and state law education requirements, such Qualified Recent Law School Graduates shall be granted full admission to the Bar.

The state law education requirement could be met by CLEs in the mandatory subject matter areas listed in SCR 40.03(2)(b) or by an online state law course similar to the New York Law Course.<sup>3</sup> Due to the complex nature of planning such a state law education requirement, the draft language for the proposed, temporary modification of SCR 40.03 does not specify exactly how this state law education requirement is to be fulfilled. The authors of this proposed modification believe the Supreme Court and Board of Bar Examiners are best qualified to determine the structure of the state law education requirement.

## **THE COURT HAS THE AUTHORITY TO GRANT THE RELIEF REQUESTED**

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<sup>2</sup> SCR 40.03(2)(b) lists the following subject areas as mandatory for diploma privilege for Wisconsin law school graduates under 40.03: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates.

<sup>3</sup> See New York Law Course (NYLC), New York State Board of Law Examiners, <https://www.newyorklawcourse.org> (last visited Apr. 16, 2020).

The Wisconsin Supreme Court exercises “an inherent supervisory power over the practice of law” and has the “ultimate responsibility for regulating admission to the Wisconsin bar.” See Wis. Const. Art. VII, §§ 3–4; Herro, McAndrews & Porter v. Gerhardt, 62 Wis. 2d 179, 184 (1974); State ex rel. Reynolds v. Dinger, 14 Wis. 2d 193, 201, 206 (1961); In re Bar Admission of Rippl, 250 Wis. 2d 519, 523 (2002); see also SCR 40.10 (stating that the board may waive any of the requirements for admission to the bar “in exceptional cases and for good cause where to do otherwise would be unjust”). “[W]henever the court's view of the public interest requires it[,] the court has the power to make appropriate regulations concerning the practice of law in the interest of the administration of justice, and to modify . . . any such rule, law or regulation by whomever promulgated, which appears to the court to interfere with the court's control of such practice for such ends.” Dinger, 14 Wis. 2d at 206.

## MEMORANDUM IN SUPPORT OF REQUEST

### I. Reason Change Requested

The current COVID-19 pandemic is an extraordinary situation which creates unique challenges for the legal profession. One of the immediate challenges is that faced by graduating law school students who are required to take a July bar examination. Under the current Wisconsin Supreme Court rules, it would be impossible for out-of-state law school graduates to obtain admission to the bar without taking an examination. COVID-19 makes administering a July bar examination impractical and extremely unsafe. Administering the bar examination requires a large gathering of individuals. Large gatherings are currently prohibited under the Wisconsin Safer at Home Order (Emergency Order #26) and bans on large gatherings will likely extend through the summer of 2020. Administering the bar examination in July 2020 will put the physical health of test-takers, test administrators, and their families at risk.

Delaying the July 2020 bar examination without granting out-of-state recent graduates admission will negatively impact both the graduates and the Wisconsin legal market. Delaying the July bar examination will effectively leave out-of-state law school graduates unemployed until the examination can be safely administered. At this time, no one can anticipate when that will be. Such delays could delay employment until late winter 2020, if not spring 2021. This places recent graduates in a precarious financial situation. A majority of law school students face student debt repayment. For those who have federal student loans, repayment will likely begin in November–December 2020. Those graduates who have private loans, repayment may not be deferred. A delay in employment means that those graduates will likely have to take out additional loans to cover living expenses while waiting for an uncertain period of time for the bar to be safely administered. There is even a possibility that employers will not wait for these graduates to become bar certified, instead rescinding their offers of employment.

A delay will also adversely affect the Wisconsin legal industry as a whole. A delay in the examination will prevent firms and other legal organizations from being able to effectively and fully serve their clients. This is true for both private employers and those who work in the justice system, as it prevents out-of-state graduates from starting their jobs at a public defender or district attorneys offices. Wisconsin graduates may also be impacted by the decision to postpone the bar examination. In firms where many incoming attorneys will be out-of-state graduates, firms may decide to hold off on starting all incoming attorneys until everyone is bar certified, as this is the standard practice of most national firms.<sup>4</sup> This means the Wisconsin law school graduates working at these same firms may be prevented from starting their jobs in the fall even though they will be licensed to practice under the existing diploma privilege program.

Finally, postponing the bar examination is unsafe and constitutes a public health risk. As stated earlier, administration of the bar examination necessitates a large gathering. This runs the risk of COVID-19 spreading. There is research to suggest COVID-19 will come in waves.<sup>5</sup> As such, it will not be truly safe to administer a bar examination until a vaccine is widely available.<sup>6</sup> This is not expected to happen in 2020.<sup>7</sup>

The other alternatives to postponing the bar examination also pose significant problems. Administering an online July 2020 bar examination assumes that all test-takers have access to a strong internet connection and a quiet place to take the exam. That may not be the case. Not all

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<sup>4</sup> National firms—which include nearly all large firms in Wisconsin—delay their start dates for incoming associates until everyone’s bar exam results have been received. The California bar exam results typically aren’t released until after September, so all incoming attorneys will start in October even if they received the passing score in August. With the ongoing pandemic and variety in bar exam administration across jurisdictions, the more likely result is that firms will wait to start all incoming associates in a specific office until all of those associates have gained admission to the bar.

<sup>5</sup> See Sam Whitehead & Carrie Feibel, CDC Director On Models For The Months To Come: ‘This Virus Is Going To Be With Us’, NPR (Mar. 31, 2020), <https://www.npr.org/sections/health-shots/2020/03/31/824155179/cdc-director-on-models-for-the-months-to-come-this-virus-is-going-to-be-with-us> (quoting CDC Director, Dr. Robert Redfield, in an interview with NPR as he discussed preparing “most likely, for another wave that we would anticipate in the late fall, early winter where there will still be a substantial portion of Americans that are susceptible”).

<sup>6</sup> See Kristen V. Brown, Coronavirus Survivors Hope for Immunity—The Reality Is More Complicated, Bloomberg (Apr. 14 2020), <https://www.bloomberg.com/news/articles/2020-04-14/do-coronavirus-survivors-have-immunity-from-reinfection-maybe> (explaining that studies on whether surviving COVID-19 patients have permanent immunity is inconclusive, but that data from viruses closely related to that which causes COVID-19, such as SARS and MERS, show that antibodies to those viruses typically dissipate after an average of only two years, sometimes longer; also citing research from the South Korea’s Centers for Disease Control and Prevention which “reported that 91 infected patients tested negative for the virus and then later tested positive again,” though acknowledging there may have been causes for this other than a lack of a protracted immune response).

<sup>7</sup> Joe Palca, Coronavirus Vaccine? Two Pharmaceutical Giants Collaborating To Develop One, NPR (Apr. 14, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/14/834160187/coronavirus-vaccine-two-pharmaceutical-giants-collaborating-to-develop-one> (discussing pharmaceutical companies GlaxoSmithKline and Sanofi’s joint development of a vaccine, and quoting GSK CEO Emma Walmsley: “[W]e aim to complete the development required to make the vaccine available in the second half of 2021”; also quoting Johnson & Johnson Chief Scientific Officer Paul Stoffels on J&J’s vaccine’s possible “availability under emergency use authorization by 2021”).

recent graduates may have the advantage of a strong internet connection at their home. It is not the fault of the recent graduate if their internet were to glitch or fail. If the internet went out during the exam, it would be almost impossible to make up the time lost and greatly disadvantage that student. Small group in-person bar exam administration still creates a physical risk for contracting COVID-19 for recent graduates and their families. It also creates a greater logistical problem for the Board of Bar Examiners, as the state would need to locate dozens of separate testing sites. These sites may not be available this summer (either voluntarily or due to an extended Safer at Home order).

The proposed modification is the best solution to adapt to the challenges posed by the COVID-19 pandemic. Wisconsin has long been the leader in terms of diploma privilege—recognizing that law school graduates do not need to take a bar exam to become competent attorneys. The proposed modification eliminates the uneven playing field inherent in the administration of an online-only July 2020 bar examination. But more importantly, it eliminates the physical risk of contracting COVID-19 while taking the intensive, in-person, two-day bar examination. Recent graduates should not be asked to risk their physical health and safety to take this examination when there are safer and better alternatives available. Courts across the country, including the Wisconsin Supreme Court, have recognized that physical safety is of utmost importance during this time. The Utah Supreme Court has proposed a similar rule modification to that which is proposed here—granting diploma privilege to graduates of any ABA-approved law school with a first-time taker bar examination passage rate of 86% or greater upon completion of 360 hours of supervised practice.<sup>8</sup>

Further, the proposed modification provides for education of Wisconsin state law to recent out-of-state graduates in the absence of preparing for and taking the Wisconsin Bar Examination. The proposed Wisconsin state law educational requirement allows recent out-of-state graduates to demonstrate the same essential knowledge as in-state graduates who are granted diploma privilege. Finally, the proposed modification reduces, if not eliminates, the administrative and logistical burden on law firms and other legal institutions in: (1) coordinating varying employment start dates for recent out-of-state and in-state graduates; and (2) distributing workload to current employees and recent in-state graduates given delayed start dates for out-of-state graduates. The authors of this proposed modification understand that it (and its requirements) may not be perfectly comparable to traditional diploma privilege under SCR 40.03, but in light of the COVID-19 pandemic, it is the most equitable solution.

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<sup>8</sup> Proposed Order for Temporary Amendments to Bar Admission Procedures During Covid-19 Outbreak, In re: Matter of Emergency Modifications to Utah Supreme Court Rules of Professional Practice, Rules Governing Admission to the Utah State Bar (Apr. 9, 2020), <https://www.utcourts.gov/utc/rules-comment/2020/04/09/matter-of-emergency-modifications-to-utah-supreme-court-rules-of-professional-practice-rules-governing-admission-to-the-utah-state-bar-comment-period-closes-april-16-2020/>.

Thus, in light of this extraordinary situation, there is good cause for the Court to temporarily modify Supreme Court Rule 40.03 and grant Qualified Recent Law School Graduates a modified diploma privilege that would grant temporary conditional admission to the bar until such Supervised Practice and State Law Education requirements are met. Upon completing those requirements, full admission to the bar would be granted.

## **II. Other Rules/Statutes Implicated**

The proposed modification has the largest impact on SCR 40.03. The proposed modification directly affects this rule by allowing students who graduated from a law school out of state to be conditionally accepted to the Wisconsin Bar without passing a bar examination.

The proposed modification also implicates SCR 40.02(2). SCR 40.02 currently states “[a] person who meets all of the following qualifications shall be admitted to practice law in this state by order of the supreme court: . . . (2) Satisfies the legal competence requirements by diploma privilege (SCR 40.03), bar examination (SCR 40.04 or SCR 40.055) or practice elsewhere (SCR 40.05).” The proposed modification will meet the legal competency requirement through a modified diploma privilege under SCR 40.03. Similar to what is currently required of Wisconsin law school graduates, Qualified Recent Law School Graduates will show legal competency through the proposed Wisconsin state law education requirement and 360 hours of supervised practice.

The proposed modifications will allow Qualified Recent Law School Graduates to be active members of the Wisconsin Bar under SCR 10.03(4). Such graduates will not be engaged in the unauthorized practice of law under SCR 23.

## **III. Legality of the Request**

As stated above, the Wisconsin Supreme Court exercises “an inherent supervisory power over the practice of law” and has the “ultimate responsibility for regulating admission to the Wisconsin bar.” See Wis. Const. Art. VII, §§ 3–4; Herro, McAndrews & Porter v. Gerhardt, 62 Wis. 2d 179, 184 (1974); State ex rel. Reynolds v. Dinger, 14 Wis. 2d 193, 201, 206 (1961); In re Bar Admission of Rippl, 250 Wis. 2d 519, 523 (2002); see also SCR 40.10 (stating that the board may waive any of the requirements for admission to the bar “in exceptional cases and for good cause where to do otherwise would be unjust”). “[W]henver the court's view of the public interest requires it[,] the court has the power to make appropriate regulations concerning the practice of law in the interest of the administration of justice, and to modify . . . any such rule, law or regulation by whomever promulgated, which appears to the court to interfere with the court's control of such practice for such ends.” Dinger, 14 Wis. 2d at 206. Therefore, the proposed modification and the execution thereof by the Wisconsin Supreme Court is entirely in accordance with Wisconsin state law.

#### **IV. Impact of the Request**

No rights of any party or institution will be negatively impacted by the proposed modification should it be executed. Rather, the modification can only have positive effects on such rights. First, current and potential litigants will not suffer from overburdened, thinly spread institutions that would otherwise result from delaying employment for recent out-of-state graduates. Rather, the modification would eliminate any such delay, and in turn would allow litigants to receive full and fair representation by legal institutions. Given the supervised practice and Wisconsin state law education requirements, litigants would not be disadvantaged by inexperienced representation. Second, the rights of recent in-state graduates would not be negatively impacted given the requirements imposed upon recent out-of-state graduates the modification proposes. Specifically, the supervised practice and Wisconsin state law education requirements balance the requirements of recent out-of-state graduates with those of recent graduates from the University of Wisconsin Law School and Marquette University Law School who are granted diploma privilege upon matriculation.

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## I. Definitions

- a. Unless otherwise defined in this Order, all terms defined in Rule 40.01 of the Supreme Court Rules are hereby incorporated into this Order.
- b. “Qualified Recent Law School Graduate” or “Recent Graduate” means a person who:
  1. Has graduated between May 1, 2020 and June 30, 2020, with a first professional degree in law from
    - A. A law school not in this State;
    - B. That is fully, not provisionally, approved by the American Bar Association; and
    - C. That had a first-time taker bar examination passage rate in 2019 of 80% (rounded to the nearest whole number) or greater;<sup>1</sup>
  2. Has not previously sat for any bar examination in any state or territory in the United States and will not be taking the bar examination in any state or territory in the United States in July 2020; and
  3. Submitted an application for the Wisconsin Bar Examination on or before June 1, 2020, in accordance with the information and instructions on the admissions website, including all fees and necessary application forms, along with any required supported documentation, character references, and a photo. Late or incomplete applications will not be accepted.
- c. “State Law Education” means the Wisconsin state law educational materials that a Qualified Recent Law School Graduate must complete in the subject matter areas of constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates. Such State Law Education must be completed by December 31, 2020.
- d. “Supervised Practice” means the 360 hours of supervised legal practice that a Qualified Recent Law School Graduate must complete under the supervision of one

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<sup>1</sup> The passing rate for first-time Wisconsin bar exam test-takers from ABA approved law schools was 75% for July 2018 and 78% for February and July 2018 combined. See Wisconsin 2018 First-Time Exam Takers and Repeaters from ABA-Approved Law Schools, The Bar Examiner, <https://thebarexaminer.org/statistics/2018-statistics/2018-first-time-exam-takers-and-repeaters-from-aba-approved-law-schools/> (last visited on Apr. 16, 2020).

or more Wisconsin licensed and qualified attorneys in accordance with and under the provisions of Section III of this Order. Such Supervised Practice must be completed by December 31, 2020.

## **II. Emergency Admission of Qualified Recent Law School Graduates Through a Modified Diploma Privilege**

- a. Conditional bar admission shall be temporarily granted to Qualified Recent Law School Graduates prior to their completion of the Supervised Practice and State Law Education requirements in accordance with and under the provisions of Sections III and IV of this Order. Upon completion of the State Law Education and Supervised Practice requirements, such Qualified Recent Law School Graduates shall be granted full admission to the Bar.
- b. Temporary Conditional Bar Admission of Qualified Recent Law School Graduates. Qualified Recent Law School Graduates shall be granted conditional bar admission until December 31, 2020 and upon meeting all of the requirements below. This temporary conditional admission will be effected as soon as practically possible. The burden of proof is on the Qualified Recent Law School Graduate to establish by clear and convincing evidence that she or he:
  1. Is a Qualified Recent Law School Graduate as defined in Subsection I(b);
  2. Meets all of the qualification requirements found in SCR 40.02 other than SCR 40.02(2);<sup>2</sup> and
  3. Has submitted proof of law school graduation by July 1, 2020.
- c. Full Bar Admission of Qualified Recent Law School Graduates. Qualified Recent Law School Graduates who meet all the requirements below by no later than December 31, 2020 shall be admitted to the Wisconsin Bar. This admission will be effected as soon as practically possible. The burden of proof is on the Qualified Recent Law School Graduate to establish by clear and convincing evidence that she or he:
  1. Is a Qualified Recent Law School Graduate as defined in Subsection I(b);
  2. Was granted temporary conditional bar admission under Subsection II(b);
  3. Has completed the State Law Education requirement in accordance with and under the provisions of Section IV of this Order; and
  4. Has completed 360 hours of Supervised Practice by no later than December 31, 2020.

## **III. Supervised Practice Requirement**

- a. The purpose of the Supervised Practice requirement is to provide eligible Qualified Recent Law School Graduates with supervised training in the practice of law and to ensure the competency of conditionally admitted Qualified Recent Law School Graduates.

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<sup>2</sup> SCR 40.02 (2) shall be fulfilled by the modified diploma privilege granted to Qualified Recent Law School Graduates under this proposed modification to SCR 40.03.

- b. Subject to the inherent power of each judge to have direct control of the proceedings in court and the conduct of attorneys and others who appear before the judge, the courts of Wisconsin are authorized to allow eligible Recent Graduates to participate in matters pending before the courts consistent with this Order.
- c. All time spent in any activity related to developing the Recent Graduate's legal competence including but not limited to all activities related to the representation of clients, professional trainings or workshops, and meetings with the supervising attorney shall be counted toward the 360-hour requirement.
- d. Subject to all applicable rules, regulations, and statutes, a Recent Graduate may engage in any appropriate legal services during the 360 hours of Supervised Practice, but only after prior consultation with the supervising attorney, and so long as the client and supervising attorney consent in writing to each activity, and the supervising attorney remains fully responsible for the manner in which the activities are conducted. The court may at any time and in any proceeding require the supervising attorney to be personally present for such period and under such circumstances as the court may direct. Such proceedings might include any court appearance, mediation, settlement negotiations, depositions, and any other proceeding or activity defined by the court.
- e. The supervising attorney is responsible for ensuring that the Supervised Practice of the eligible Recent Graduate complies with this Order.
- f. Prior to beginning the 360 hours of Supervised Practice, the Recent Graduate must:
  - 1. Obtain the consent of a Wisconsin licensed and qualified attorney to act as a supervising attorney;
  - 2. Provide the Board of Bar Examiners with the name(s) of the supervising attorney(s); and
  - 3. Provide the Board of Bar Examiners with a signed and dated letter from the supervising attorney(s) stating that the attorney is qualified and willing to serve as a supervising attorney and has read this Order and agrees to comply with its conditions.
- g. Qualifications to serve as a supervising attorney include the following:
  - 1. An active Bar license;
  - 2. A minimum of 7 years of practice as a licensed attorney in any U.S. state or territory;
  - 3. A minimum of 2 years of practice as a licensed attorney in the State of Wisconsin; and
  - 4. No record of public discipline in any jurisdiction in the United States.
- h. A Recent Graduate's 360 hours shall be recorded in one-tenth hour increments and submitted pursuant to the requirements set forth by the Board of Bar Examiners.
- i. Upon completing 360 hours of Supervised Practice, the Recent Graduate must provide the Board of Bar Examiners with a statement from the supervising

attorney(s) attesting to the veracity of the Recent Graduate's submitted record. If the Recent Graduate has more than one supervising attorney, each supervising attorney shall sign the portion of the record that he or she supervised.

**IV. State Law Education Requirement**

- a. The purpose of the State Law Education requirement is to provide eligible Qualified Recent Law School Graduates with educational training on Wisconsin state law in the mandatory subject matter areas listed in SCR 40.03(2)(b).
- b. The State Law Education requirement shall be fulfilled by completing [type of educational training, such as CLEs or an online state law course] covering all of the mandatory subject matter areas listed in 40.03(2)(b).
- c. A Recent Graduate's completion of such State Law Education training(s) shall be recorded and submitted to the Board of Bar Examiners pursuant to the requirements set forth by the Board of Bar Examiners. The Board of Bar Examiners shall determine if the Recent Graduate has met this State Law Education requirement before granting such Recent Graduate full admission to the Wisconsin Bar under Subsection II(c).

**V. The July 2020 Bar Examination**

- a. No Bar Examination shall be administered in Wisconsin in July 2020 for Recent Graduates.
- b. For persons who do not qualify for admission under the emergency modifications outlined in Section I, the Wisconsin Supreme Court intends that the Bar Examination be scheduled at the earliest possible date after the public health crisis abates and the Bar Examination can be administered safely.
- c. Persons who are currently scheduled to sit for the July 2020 Bar Examination in Wisconsin who do not qualify for admission under the emergency modifications outlined in Section I may elect one of the following options for proceeding with their application:
  1. Withdraw the application for a full and complete refund of all application fees paid; or
  2. Transfer the application and fees, without further charge, to the February 2021 Bar Examination or the July 2021 Bar Examination.