

In the Matter of the Petition to  
Repeal & Recreate  
Supreme Court Rule SCR 40.08  
Relating to Adverse Determination

MEMORANDUM  
No. 08-11

---

The petitioner, the Wisconsin Board of Bar Examiners, seeks to repeal and recreate Supreme Court Rule 40.08 regarding adverse determination. This petition was initially filed on April 1, 2008, and was amended on July 24, 2008. A public hearing on the petition was held on April 27, 2010, and the court held an open administrative conference regarding the petition on the same day. The purpose of this petition is to improve both the manner in which the Board of Bar Examiners communicates adverse determinations to applicants and the process by which applicants can appeal those determinations. During the court's open administrative conference, the justices indicated that the expectations for applicants and the board should be clearly set forth in the rule. Specific steps have therefore been incorporated into the rule to accomplish that goal. Those steps outline the process by which applicants are notified of adverse determinations as well as the way in which those determinations can be appealed both to the Board and to the supreme court. The rule has been amended as follows:

Section 40.08 (1) requires that before the Board declines to certify an applicant for admission it must first notify the person in writing, including the basis for the determination. The notice must indicate that the applicant is at risk of being denied admission and inform the applicant that he or she has a right to a hearing before the Board. In addition, the notice must identify the date of mailing. Notice must be served to the applicant by mail and will be sent to the last address furnished by the applicant.

Section 40.08 (2) provides that within 30 days of the Board's mailing of the at risk determination notice the applicant may challenge it. A challenge may be made either by filing a written request for a hearing before the Board setting forth the grounds for reversal or by providing a written supplement to the record with the Board. In the event the applicant fails to request a hearing or fails to file a written supplement within the 30 days, the Board's adverse determination becomes final and non-appealable.

Section 40.08 (3) requires the Board to grant a hearing provided the applicant makes a timely and written request for one.

Section 40.08 (4) sets forth the notice of hearing requirements. The notice must be provided at least 30 days prior to the hearing date. It must also state the time and place of the hearing, and the issues to be considered. Additionally, it must advise the applicant that he or she may be represented by counsel and present evidence.

Section 40.08 (5) provides that after the hearing, the Board must notify the applicant of its determination by mailing a copy to the applicant to the last address furnished to the Board and

must include the date of mailing. The decision must also set forth the Board's findings of fact and conclusions of law, and is final unless the applicant properly appeals.

Section 40.08 (6) sets forth how an applicant can seek review of an adverse determination from the Board. The applicant must file a written request within 30 days of the mailing of the decision. Such requests will only be granted on the basis of a material error of law or fact, or the discovery of new evidence sufficiently strong to reverse the adverse determination.

Section 40.08 (7) identifies the process for appealing an adverse determination to the supreme court. Applicants have 30 days in which to file an appeal with the court. However, the time for filing can be extended if the applicant has first filed a timely request for review with the Board (*i.e.*, under 40.08 (6)).

Attached for the court's review are two versions of the proposal. One includes the deleted portions and the new text. The other version includes only the new text.