2010 WI 126

SUPREME COURT OF WISCONSIN

No. 09-09

In the matter of the petition to amend or repeal Supreme Court Rule 40.03, Diploma Privilege.

FILED

NOV. 4, 2010

A. John Voelker
Acting Clerk of
Supreme Court
Madison, WI

On September 28, 2009, Attorney Steven Levine and 71 other members of the State Bar of Wisconsin petitioned this court to amend Supreme Court Rule (SCR) 40.03 by extending diploma privileges to graduates of all ABA-approved law schools, or in the alternative, to repeal SCR 40.03 in its entirety.

The court held a public hearing and administrative conference on September 30, 2010. The court continued to discuss the petition at an administrative conference on October 4, 2010. Upon consideration of the matters presented at the public hearing and submissions made in response to the proposed amendments, the court voted unanimously that the petition to amend or repeal Supreme Court rule 40.03 be denied. IT IS ORDERED the petition is denied.

IT IS ORDERED that notice of this order be given a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 4th day of November, 2010.

BY THE COURT:

A. John Voelker
Acting Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, C.J. *(concurring).* Neither graduating from law school nor passing a bar examination guarantees that a person will be a competent or trustworthy lawyer. These two methods, although not perfect, are the only ones that have been developed that give some protection to the public, which is a fundamental purpose of educating and licensing lawyers.

¶2 The 50 states should find a way to allow lawyers to practice across state borders without the costs lawyers presently incur. Our 50-state bar admission system should give us pause when we see the European Union, which is made up of 27 different countries with different languages and different legal systems, possibly allowing more cross-border practice than our states do.[1]

¶3 Nevertheless I would neither abandon nor extend the Wisconsin diploma privilege. I favor the diploma privilege for

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[1] See, e.g., Christine R. Davis, Approaching Reform: The Future of Multijurisdicitonal Practice in Today's Legal Profession, 29 Fla. St. U. L. Rev. 1339, 1357-58 (2002):

> [The European Union] model permits lawyers from any of the EU's . . . member states to cross jurisdictional borders and practice within another EU country. . . . The attorney is required only to register in the member country. . . . The EU adopted this directive after recognizing the dramatic increase in cross-border activity similar to that of the U.S. (footnotes omitted).

the two Wisconsin law schools.[2] It has worked well in Wisconsin. With only two law schools in the state, the Wisconsin Supreme Court is in an excellent position to monitor and evaluate the content and quality of the legal education received by the law students of these two universities.

¶4 Thirty-two states have granted the diploma privilege at one time or another,[3] and all but Wisconsin have abandoned the practice. The fact that "everyone else is doing it" is not a reason for Wisconsin to abandon the diploma privilege. As Justice Brandeis wrote, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[4]

¶5 I do not, however, favor extending the diploma privilege to all graduates of all ABA-accredited law schools. Law schools have varied requirements for entry, for curriculum, and for grading. Extending the diploma privilege would place on the Court too great a burden of monitoring the standards of law

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[2] Wisconsin apparently has "the most restrictive diploma privilege statute ever written." Thomas W. Goldman, Use of the Diploma Privilege in the United States, 10 Tulsa L.J. 36, 42-43 (1974-75) (referring to Wis. Stat. § 256.28(1)(1971), the provisions of which are now contained in SCR ch. 40).

[3] Beverly Moran, The Wisconsin Diploma Privilege: Try It, You'll Like It, 2000 Wis. L. Rev. 645, 646 (quoting George Neff Stevens, Diploma Privilege, Bar Examination or Open Admission: Memorandum Number 13, 46 Bar Examiner 15, 17 (1977)).

[4] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (footnote omitted).

schools across the country. We can keep tabs on the two Wisconsin law schools.

¶6 The only alternative suggested to the diploma privilege over these many years has been a bar examination.

¶7 Although I believe the Wisconsin bar examination is as good as any other state's professional qualifying instrument, I have doubts whether bar examinations in general truly measure an applicant's competence to practice law. I am not alone in expressing these doubts.

¶8 In 2002, the Society of American Law Teachers (SALT) issued a "Statement on the Bar Exam,"[5] in which it expressed its belief that bar examinations, as currently administered, fail to adequately measure professional competence to practice law.[6]

¶9 The SALT statement asserts that "[t]he bar examination does not even attempt to screen for many of the skills" that a competent lawyer should possess, such as the ability to perform legal research, investigate facts, communicate orally, interact with clients, and negotiate.[7] SALT further criticizes the bar exam's overemphasis on memorizing legal principles, and points out that practitioners who rely on their memory of the law instead of conducting legal research may find themselves subject to disciplinary complaints and malpractice claims.[8]

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[5] Society of American Law Teachers Statement on the Bar Exam, 52 J. Legal Educ. 446 (2002).

[6] Id. at 446.

[7] Id. at 447.

[8] Id.

¶10 In addition to concerns about whether a bar examination actually accomplishes its purpose, I am concerned, as is Attorney Steven Levine, one of the petitioners, about the financial burden bar examinations place on law school graduates from law schools around the country who wish to practice in Wisconsin and on Wisconsin law graduates who wish to practice in other states.

¶11 The American Bar Association reports that the average amount borrowed by a student at a public law school for the 2007-08 academic year was $59,324.[9] For private law school students, the average for that year was $91,506.[10] On top of this debt (and any undergraduate debt), a law graduate must pay a filing fee to take the exam, which ranges from $150 to upwards of $1,000.[11] In Wisconsin, the fee to sit for the bar examination is $450.[12] A law graduate is likely to take a bar

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[9] American Bar Association, Average Amount Borrowed for Law School 2001-2008, available at http://www.abanet.org/legaled/statistics/charts/stats%20-%2020.pdf (last visited Oct. 25, 2010).

[10] Id.

[11] National Conference of Bar Examiners & American Bar Association Section of Legal Education and Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements 2010 35 (2010), available at http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/CompGuide_2010.pdf (last visited Oct. 25, 2010).

[12] See Information and Filing Instructions: 2011 Wisconsin Bar Examinations, available at http://wicourts.gov/formdisplay/BE-170.pdf?formNumber=BE-170&formType=Form&formatId=2&language=en (last visited Oct. 25, 2010).

review course, which may cost well over $2,000.[13] And the law graduate will spend several weeks studying for an examination, rather than being productively employed. I do not relish the idea of adding these costs of a bar examination to the already enormous debt load carried by many law school graduates.

¶12 I have searched for a method other than the bar examination or extended diploma privilege to ensure competence and protect the public, and I have not found one. I do suggest, however, that the current admission system of 50 state bar examinations, with varying rules and requirements, might at least be simplified, and perhaps made less costly, through a uniform bar exam.[14] An examinee taking a uniform bar examination in one jurisdiction would receive a score that would be transferrable to other jurisdictions that use the UBE.[15]

¶13 I agree with the resolution adopted by the Conference of Chief Justices on July 28, 2010, Endorsing Consideration of a Uniform Bar Examination, which reads as follows:

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[13] See, e.g., http://www.barbri.com/wps/portal/barbri/courseInfo/barReviewCourse/pricing?linktype=barbriLink&sitearea=breeze_barbri_library/barbri.com/anonymous%20visitor/WI&pubarea=breeze_barbri_library/barbri.com/anonymous%20visitor/WI&escrightbararea=null (last visited Oct. 25, 2010) (stating $2,625 price for BARBRI's 2010 Wisconsin bar exam review course).

[14] Susan M. Case, The Uniform Bar Examination: What's In It For Me?, Bar Examiner, Feb. 2010, at 50.

[15] Id.

Resolution 4: Endorsing Consideration of a Uniform Bar Examination

WHEREAS, the states' highest courts regard an effective system of admission and regulation of the legal profession as an important responsibility for the protection of the public; and

WHEREAS, the increased demand for lawyer mobility results in greater multijurisdictional practice and increased access to admission on motion; and

WHEREAS, the increasing use of uniform, high quality testing instruments has rendered most jurisdictions' bar examinations substantially similar; and

WHEREAS, law is the only major profession that has not developed a uniform licensing examination; and

WHEREAS, a uniform licensing examination for lawyers would facilitate lawyer mobility and enhance protection of the public; and

WHEREAS, state bar admission authorities and state supreme courts would remain responsible for making admission decisions, including establishing character and fitness qualifications and setting passing standards, and enforcing their own rules for admission; and

WHEREAS, issues relating to knowledge of local law can be addressed through a mandatory educational component, a separate assessment, or a combination thereof;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices urges the bar admission authorities in each state and territory to consider participating in the development and implementation of a uniform bar examination.[16]

[16] The Council of the American Bar Association Section of Legal Education and Admissions to the Bar adopted a similar resolution on August 6, 2010 (available at http://www.abajournal.com/files/Uniform_Bar_Exam_2010_Council_(9-14)_v2.pdf (last visited Oct. 25, 2010)).

¶14 In the interest of protecting the public and law graduates and allowing persons to prosecute or defend their suits by attorneys of their choice,[17] I write separately to urge the Wisconsin Board of Bar Examiners to explore ways of reducing the costs of the Wisconsin bar examination to graduates of law schools outside Wisconsin, to explore the use of a uniform bar examination for graduates of law schools outside Wisconsin, and to be open to new ways of unlocking state borders to competent attorneys.

¶15 I am authorized to state that Justices ANN WALSH BRADLEY and N. PATRICK CROOKS join this concurrence.

[17] Wis. Const. Art I, § 21: "In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice."