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BOARD OF BAR EXAMINERS  
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## **VIA ELECTRONIC COPY ONLY**

Chief Justice Patience D. Roggensack  
Justice Ann Walsh Bradley  
Justice Annette Kingsland Ziegler  
Justice Rebecca G. Bradley  
Justice Daniel Kelly  
Justice Rebecca F. Dallet  
Justice Brian Hagedorn  
16 East, State Capitol  
P.O. Box 1688  
Madison, WI 53701-1688

Dear Chief Justice and Justices:

At the Court's request, the Board of Bar Examiners (Board) reviewed the emergency request for a modification to Supreme Court Rule 40.03 due to the COVID-19 pandemic. After having reviewed the proposed amendment to SCR 40.03, the Board does not support its modification.

## **Current Situation**

Because of the COVID-19 pandemic, the State of Wisconsin is currently subject to a "safer at home" order that, among other things, restricts gatherings to ten or fewer people. That Order remains in effect until April 24, 2020, and has recently been extended to May 26, 2020. The "Badger Bounce Back" plan has also been introduced recently as a means of reducing the safer at home restrictions by eventually utilizing a phased-in approach that would allow for larger gatherings in public spaces.

## **Options for the Wisconsin Bar Exam**

The Wisconsin Bar Examination is next scheduled to be administered the Week of July 27<sup>th</sup>. Given the current restrictions and the phased re-opening plan intended to ease them, it is uncertain whether the July bar exam could actually be administered then.

Several large jurisdictions have now canceled their July bar exam (*e.g.*, New York, Massachusetts, the District of Columbia, and New Jersey) and have rescheduled them to the Fall of 2020. The National

**Board:** Marc A. Hammer, Chairperson, Green Bay; Blake J. Duren, Vice Chairperson, Reedsburg; Daniel D. Blinka, Milwaukee; Samuel Christensen, Racine; Patrick Delmore, Madison; Blake J. Duren, Reedsburg; Timothy D. Edwards, Madison; Jesus G. Q. Garza, Madison; Kevin Kelly, Madison; Kyle J. Sargent, Appleton; Sally M. Younger, Madison

Conference of Bar Examiners has indicated that they will offer jurisdictions test materials for two dates in the fall (September 9-10; and September 30-October 1).

We have sought potential venues for the test administration proposed for September 9-10 and believe that we can secure space for those dates. This is the preferred course rather than planning for a July exam only to have it canceled at the last minute with no option for candidates to sit elsewhere. It would also mitigate the possibility of applicants having to cancel travel plans on short notice and to incur added costs for those changes. Given the level of uncertainty pervading the measures and/or guidelines that will be required for large-group gatherings, and without an effective vaccine in place (which is estimated to be at least a year away) it seems prudent to postpone the July exam until the Fall of 2020.

Supreme Court Rule §40.04 addresses the bar examination. Specifically, SCR §40.04 (2) provides that the Board shall administer the Multistate Bar Exam (MBE) and an essay exam, while SCR §40.04 (3) sets forth the dates by which applicants must file their materials with the BBE, including those for the July exam. SCR §40.10 also provides that the Board may waive certain requirements in Chapter 40 in exceptional cases and for good cause shown where to do otherwise would be unjust.

While postponing the July exam until the Fall of 2020 would be unprecedented, it appears to be the best option at the moment given the seriousness of the COVID-19 outbreak. The Board unanimously supports postponing the July 2020 exam until September 9-10, 2020, and seeks the Court's support for doing so under SCR §40.10.

### **Why SCR 40.03 Should Remain Intact**

An alternative to administering the July bar exam has been proposed. The proposal seeks to modify Supreme Court Rule 40.03, commonly known as the "diploma privilege" provision. The Board does not support that proposal and believes that SCR 40.03 should remain intact and should not be modified.

The state's longstanding diploma privilege provision enables graduates of Wisconsin's two law schools, Marquette and the University of Wisconsin-Madison, who take a specific core curriculum and whose deans certify that they have successfully completed them, to apply for admission without having to take the bar exam. All diploma privilege applicants must also undergo a character and fitness investigation and satisfy those requirements prior to admission.

Under the proposed amendment, a new applicant category would be created allowing those who graduate between May 1, 2020, and June 30, 2020, with a first degree in law from an ABA-approved law school outside of Wisconsin that has a 2019 bar passage rate of 80% or greater for first-time takers to gain admission. In addition to that criteria, the proposal also requires would-be applicants to complete an unspecified number of state law educational requirements along with 360 hours of supervised practice. Graduation from one of the approved law schools would immediately enable an applicant's temporary admission.

There are several practical impediments inherent in this proposal. To begin, this scheme would require the creation of a new application and necessitate an unknown number of hours for required programming changes in order for CCAP to modify the BBE's existing database. This added programming expenditure is not part of the BBE's current budget and it is wholly unclear how costly such changes would be.

Additionally, this proposal not only envisions the creation of a curriculum but also requires applicants to have completed it by December 31, 2020. While certainly aspirational, such a proposal is unrealistic. The curricula set forth in SCR 40.03 (2) (a) defines specific subject-matter criteria required for the diploma privilege. Yet the proposal only requires the completion of those topics found in SCR 40.03 (2) (b).

Each of those courses, whether found in SCR 40.03 (2) (a) or (b), are designed to be one or more semesters in length and are taught by faculty at each of the respective law schools. To expect the development of a comparable curriculum in the suggested timeframe is simply not plausible. The proposal further fails to address who would pay to develop that coursework or where and how it would be taken or who would teach it. It also fails to consider the manner in which an applicant's competency with regard to that curriculum would be established. Would testing be required, for instance? And, if so, how would that be administered? How would the scoring be established?

The proposed modification also includes a requirement for 360 hours of supervised practice. Again, this poses logistical challenges and concerns for the BBE. Supervising attorneys, for example, are only required to have had two years of practice experience in Wisconsin, but are not required to hold an active Wisconsin law license. Applicants would be able to work without first having completed the "core" curriculum while under the supervision of attorneys who may or may not be familiar with Wisconsin law and its proper application.

Also unclear under this proposal is what happens to those who fail to complete all of the requirements for "full" admission. Is their "conditional admission" rescinded automatically? If so, by whom? And precisely when would such rescission occur and would there be an avenue for appeal should someone wish to contest the rescission? The proposal addresses none of those issues.

Presumably, the character and fitness requirement remains as a gate-keeping component of this proposal. Yet it is uncertain what, if any, appeal rights such applicants would have if they fail to meet those requirements.

More importantly, if the bar exam is able to be administered in September as is the goal, there is no need for this modification. In the event the bar exam is unable to be administered in September, it is equally unrealistic to expect or believe that this new category of admission would be operational by then. And should the COVID-19 pandemic result in a further postponement of the exam, it would necessarily enable *all* those eligible to sit for the exam to do so at once, rather than taking a piecemeal approach, as this modification does, allowing the admission of some out-of-state law school graduates rather than all those who take and successfully pass the exam.

While undoubtedly well intended, this proposal is short-sighted, favoring some law school graduates over others, while simultaneously undermining the existing diploma privilege. It purports to create another avenue for admission while excluding those who would otherwise be eligible provided they took and passed the Wisconsin bar exam. And it implies that applicants from certain law schools would necessarily pass the exam upon their first attempt, which certainly would not be true for every applicant. In short, it fails to provide a legitimate and even-handed approach for assessing the competency for those seeking admission to the Wisconsin bar.

A failure to ensure the competency of those entering the bar also serves to erode an essential and fundamental underpinning of licensure, namely, that the public is adequately protected. The Board of Bar Examiners is charged with the responsibility of ensuring those entering the Wisconsin bar are both competent, and have met the character and fitness requirements.

The Wisconsin bar exam is designed, in part, to assess an applicant's knowledge of Wisconsin law. Without first having passed the Wisconsin bar exam, there is no means by which we can determine whether that requirement has been met before someone begins practicing. In the absence of such assurances, the public remains at risk and cannot be assured adequate protection. Because this proposal cannot ensure a uniform approach for assessing competency, it is yet another reason to reject the proposed modifications.

### **Conclusion**

Petitioners seek to amend SCR 40.03 so that they are able to gain admission to the bar without first having to take and pass the Wisconsin bar exam. The Board of Bar Examiners has identified a host of substantive and pragmatic reasons why the proposed modifications should be rejected, chief among them being its inability to protect and safeguard the citizens of this state. Closely tied to that concern are those surrounding the implementation of the proposal's primary components including, but not limited to, the educational requirements and the supervisory provision, along with their associated costs, which, at this point, remain completely unknown. Furthermore, if the bar exam is, in fact, able to be administered in September petitioners will not be unreasonably delayed by having to take it then. However, if circumstances require a further delay of the exam beyond September, leaving the existing examination requirement intact is still the preferred and better option as it provides a more even-handed, consistent approach to admissions while safeguarding the public.

Thank you for the opportunity to respond to this request. If I may provide additional information or clarify an item, kindly contact me.

Very truly yours,

Jacquelynn B. Rothstein  
Director

cc: Sheila Reiff, Clerk of the Supreme Court and Court of Appeals  
Julie Anne Rich, Supreme Court Commissioner