

RECEIVED

MAR 03 2009

**CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN
IN SUPREME COURT

In the Matter of the Petition to Create Supreme Court Rule
SCR 40.075 Relating to Conditional Admission to the Bar

08-13

On March 9, 2009 the Court will hold hearing into a petition by the Board of Bar Examiners (BBE) proposing a rule for conditional admission to the bar. I strongly support the petition, with one exception. The purpose of this statement is to provide the court with some background into the reasons for the proposed rule, the process that led to its proposal, and the one change which I suggest as a necessary improvement to the rule.

PURPOSE OF THE RULE. Conditional bar admission is an idea which is spreading across the country. It is the subject of an ABA model rule and in one form or another has been adopted in 21 states (as of 2008). The purpose of the rule is to allow the BBE to conditionally recommend for admission to practice an applicant whom the board concludes “may have substantial difficulties in performing the essential responsibilities of a lawyer due to the applicant’s circumstances, including but not limited to alcohol or other drug abuse, criminal record, financial mismanagement, mental or emotional instability.”

Conditional admission allows the Board to recommend admission of an applicant who presents problems which give the Board reasons for concern -- under conditions which protect the public -- so that the applicant is given the opportunity to demonstrate his or her fitness to practice. The rule benefits all parties involved. At present, the BBE is presented with a difficult either/or situation. In the case of an applicant about whom the BBE has concerns, the Board must either recommend admission without the authority

to impose conditions which protect the public, or deny a recommendation for admission, which imposes a great burden on the BBE,¹ the Court, and the applicant. The Court is required to undertake a meticulous, time-consuming *de novo* review -- as occurred in such cases as *In the Matter of Bar Admission of Vanderperren*, 2003 WI 37, 261 Wis. 2d 150, 661 N.W.2d 27; *In the Matter of Bar Admission of Littlejohn*, 2003 WI 36, 261 Wis. 2d 183, 661 N.W.2d 42; and *In Matter of Bar Admission of Rippl*, 2002 WI 15, 250 Wis.2d 519, 639 N.W.2d 553 -- while the applicant is required to hire a lawyer. The cost of that legal representation in addition to law school loans may be crushing. (A successful applicant with whom I spoke described the process as a gut-wrenching ordeal which imposes a lifelong psychological and financial burden.) By eliminating the necessity for this process, the conditional bar admission rule benefits everyone, while protecting the public.

PROCESS OF THE RULE. The proposed rule was developed as a joint project of the State Bar Board of Bar Examiners Review Committee and the BBE. Director John Kosobucki, BBE member Tom Boykoff, BBE Review Committee members Tim Edwards, Larry Schifano, and Steve Levine drafted the rule based on the ABA Model Rule. The draft rule contains all of the substantive portions of the ABA rule, but condensed into a much shorter, less complex version. The rule was then presented to the BBE Review Committee, Wisconsin Lawyers Assistance Program (WisLAP), State Bar Board of Governors, and the BBE for their input and approval. The rule was also run by Keith Sellen for his suggestions. All groups approved the rule draft.² (However, after

¹ The delicate and difficult position of the BBE was recognized in the concurring opinion of Mr. Justice Prosser in *In the Matter of Bar Admission of Vanderperren*, 2003 WI 37, ¶ 61, 261 Wis. 2d 150, 181, 661 N.W.2d 27.

² Mr. Sellen did not take a position pro or con.

initially approving the rule as drafted, the BBE voted to eliminate a confidentiality provision, which was a part of the original draft. This will be discussed below.) In my years as a BBE Review Committee member and State Bar officer, I believe the drafting and consideration of this proposed rule resulted from the most cooperation that I have ever seen.

SUBSTANCE OF THE RULE. The rule submitted to the Court contains six subsections. Sub. (1) Authorizes the BBE to recommend conditional bar admission “if it concludes that an otherwise qualified applicant may have substantial difficulties in performing the essential responsibilities of a lawyer due to the applicant’s circumstances, including but not limited to: alcohol or other drug abuse, criminal record, financial mismanagement, mental or emotional instability.”

Sub. (2) authorizes the BBE to impose any “reasonable conditions upon a conditionally admitted applicant that will address the applicant’s individual circumstances and the board’s concern regarding the performance of those essential responsibilities of the applicant to a client or the public.” These include: professional medical, psychological, or other treatment; prohibiting the use of alcohol or other drugs; random alcohol or other drug testing; supervision; periodic reporting; financial, business, or law office management counseling or supervision (including inspection of records); and any other condition tailored to meet the circumstances of the applicant.

Sub. (3) provides for a written agreement incorporating all terms of the conditional bar admission, to be signed by the BBE and applicant. If the applicant does not agree to conditional admission, he or she may request the BBE to proceed with a decision on unconditional admission.

Sub. (4), monitoring. This subsection provides for supervision of the applicant by the BBE, State Bar, or another appropriate person, if the conditional admission agreement contains a supervision provision.

Sub. (5) provides that all costs of conditional admission are to be borne by the applicant.

Sub. (6), Length of Conditional Admission, provides for an initial conditional bar admission period of one year, with the possibility of a one year extension for good cause. At the end of the initial or extended period of supervision, the BBE may either certify the applicant for unconditional admission or issue an “intent to deny” letter to the applicant.

CONFIDENTIALITY. Originally, the draft of proposed SCR 40.075 also contained a sub. (7): “Confidentiality. The fact of conditional bar admission and the written agreement required by sub. (3) shall be confidential.” All of the groups which had input into and voted in favor of the proposed rule also favored this confidentiality provision. The ABA model rule contains such a provision, and 18 of the 21 state conditional bar admission rules (including Minnesota) contain confidentiality provisions.³ In its original vote, the BBE also favored this provision, but the board re-voted just prior to petitioning the Court and reversed itself by a one vote margin.

The argument against confidentiality is that a member of the public should know and be able to take the fact of conditional bar admission into account when choosing a lawyer. The argument for confidentiality is that it is absolutely necessary in order to persuade applicants to accept conditional bar admission – that without confidentiality, conditional bar admission would be the equivalent of wearing a scarlet letter. Also,

³ Arizona, Connecticut, Florida, Idaho, Indiana, Kentucky, Montana, Nebraska, Nevada, New Jersey, Oregon (no confidentiality), New Mexico (no confidentiality), North Dakota, Texas, West Virginia, Colorado (no confidentiality), Minnesota, Missouri, Puerto Rico, South Carolina, South Dakota.

public knowledge of the conditional admission is not necessary, as the proposed rule contains adequate measures to protect the public – such as monitoring, periodic reporting, and supervision. Confidentiality is also consistent with SCR 40.12: “The application files of an applicant and all examination materials are confidential. The supreme court or the board may authorize the release of confidential information to other persons or agencies.”

I am convinced that the confidentiality provision is necessary for the proposed conditional bar admission rule to work. I join the Board of Governors, BBE Review Committee, and WisLAP in urging the court to adopt the rule with sub. (7) included.

Respectfully submitted,

/s/ Steven Levine

Steven Levine
5010 Buffalo Trail
Madison, WI 53705
608 661-4427
steven.levine@charter.net
February 27, 2009