

**STATE OF WISCONSIN
IN THE SUPREME COURT**

**In the Matter of the Petition to Amend
Supreme Court Rule (SCR) Chapter 40,
Regarding Admission to the Bar**

**PETITION 18-____
Memorandum in Support
of Petition**

The Wisconsin Supreme Court, on its own motion, submits this memorandum regarding proposed administrative rule changes to its bar admission rules and procedures.¹

Applicants seeking to practice law in Wisconsin are evaluated by the Board of Bar Examiners (BBE), an 11-member board appointed by this court. The BBE evaluates the skills, character, and fitness of lawyers, and also administers and grades the Wisconsin Bar Examination.

However, this court retains supervisory authority over bar admissions and has the ultimate responsibility for regulating admission to the Wisconsin bar. See In re Bar Admission of Rippl, 2002 WI 15, ¶3, 250 Wis. 2d 519, 639 N.W.2d 553, and In re Bar Admission of Vanderperren, 2003 WI 37, ¶2, 261 Wis. 2d 150, 661 N.W.2d 27.

With respect to the bar examination, the BBE makes reasonable accommodations in testing conditions to qualified applicants with disabilities.² The BBE may also modify testing conditions for individuals who have special circumstances, such as a temporary physical condition. The purpose of test accommodations is to provide equal access to the bar examination. Test accommodation generally means an adjustment or modification to the standard testing conditions that alleviates the impact of the applicant's functional limitation on the examination process, without fundamentally altering the nature of the examination; imposing an undue administrative or financial burden on the board; compromising the security, validity, or reliability of the examination; or providing an unfair advantage to the applicant. The BBE evaluates each applicant's request for testing accommodation on a case-by-case basis. In some cases, as part of its review, the BBE may submit the request to an independent medical expert for review and recommendation, at the BBE's expense.

The BBE's own rule, BA 4.02, presently states: "Testing accommodation requests must be received in writing no later than December 1 for the February examination and May 1 for the July examination. The Board may deny requests that are not in writing or that are filed after the deadline."

¹ There is precedent for the court's motion to amend its own rules and for amending the BBE rules without a public hearing. See, e.g., S. Ct. Order 95-15, In the Matter of the Amendment of Supreme Court Rules: SCR 40.02(4) – Qualifications for Bar Admission (Nov. 3, 1995) (amending, on its own motion and without a public hearing, the requirements for taking the oath under SCR 40.15).

² <https://www.wicourts.gov/formdisplay/BE-170.pdf?formNumber=BE-170&formType=Form&formatId=2&language=en>.

The BBE rules and policies do not clearly inform applicants if there is a procedure whereby an applicant, whose request for testing accommodation is adversely modified or denied, can seek review of that decision. The court has determined that the rules should provide such a procedure.

The proposed amendments in the accompanying rule petition are consistent with procedures adopted in other states. For example, Missouri's bar admission rules advise applicants that if a request for testing accommodation is granted, a letter will issue, detailing the accommodations to be provided. If the request is denied, the letter will explain the reasons and will set out the procedures and time limit for seeking reconsideration. Pennsylvania's bar admission rule also provides detailed information about "Nonstandard Testing Accommodations (NTA)" and provides for full board review of a denial as well as supreme court review.³ New York's rule regarding test accommodation is thorough and informative, providing an insight into a number of issues the reviewing board must consider.⁴

³ http://www.pabarexam.org/bar_exam_information/nta.htm

⁴ <http://www.nybarexam.org/ada/ada.htm>

NY Rule 6000.7 Test Accommodations for Applicants with Disabilities

(a) Purpose. The bar examination is intended to test qualified applicants for knowledge and skills relevant to the practice of law. In accordance with the Americans with Disabilities Act of 1990 as amended (42 U.S.C.S. § 12101 et seq.) (ADA) and applicable regulations and case law, it is the policy of the Board to provide accommodations in testing conditions to applicants with disabilities who are qualified candidates for the bar examination and the NYLE, to the extent such accommodations are timely requested, reasonable, not unduly burdensome, consistent with the nature and purpose of the examination and necessitated by the applicant's disability.

(b) Definitions. For purposes of this Section:

(1) The term "disability" shall mean a disability as that term is defined under the ADA, applicable regulations and case law.

(2) The term "qualified professional" shall mean a licensed physician, psychologist, psychiatrist or other health care provider who has comprehensive training in the field related to the applicant's disability and who conducted an individualized assessment of the applicant.

(c) Application Process

(1) Application Materials. The application materials and Board guidelines for requesting test accommodations shall be available on the Board's website. Applicants who have not previously been awarded test accommodations by the Board must file a signed and notarized application for test accommodations on a form provided by the Board, together with all supporting documentation, by the deadline as set forth herein. Applicants who have previously been awarded test accommodations by the Board must

file a signed and notarized re-application for test accommodations on a form provided by the Board, together with any supporting documentation, by the deadline as set forth herein. Faxed copies of the application or re-application for test accommodations will not be accepted.

(2) Filing Deadline

(i) New York State Bar Examination (UBE). Applications and re-applications for test accommodations for an administration of the New York State Bar Examination, together with all required supporting documentation, shall be received in the Board's office within six months prior to the date of the examination for which accommodations are requested but no later than April 30 for the subsequent July administration, and no later than November 30 for the subsequent February administration. No request for testing accommodations that is received by the Board after the designated deadline will be accepted. No extensions will be granted for accommodation requests, and no late requests will be considered.

(ii) NYLE. Applications and re-applications for test accommodations for an administration of the NYLE, together with all required supporting documentation, shall be received in the Board's office within six months prior to the date of the examination for which accommodations are requested and at least 90 days prior to the date of the administration of the NYLE for which test accommodations are requested. If, however, the re-application is seeking the same test accommodations as previously awarded by the Board for a prior administration of either the New York State Bar Examination or the NYLE with no additional or different accommodations, then the re-application must be received in the Board's office at least 30 days prior to the date of the administration of the NYLE for which the test accommodations are requested. No request for testing accommodations that is received by the Board after the designated deadline will be accepted. No extensions will be granted for accommodation requests, and no late requests will be considered.

(3) Incomplete and Untimely Applications. Applications which are incomplete or not timely filed shall be rejected.

(4) Medical Documentation. All applications must be supported by medical documentation in accordance with the Board's guidelines.

(5) Independent Evaluations. The Board reserves the right to have an application, together with all supporting documentation, evaluated by an expert retained by the Board. The Board may, in its discretion, require the applicant to provide additional information and documentation and may also require the applicant to submit to examination by an expert retained by the Board.

(d) Determinations. The Board shall act upon all applications which are complete, timely and submitted in full compliance with the foregoing provisions of this

This proposal is modeled generally on Minnesota's rule and policy,⁵ which we have previously used for comparison with BBE rule amendments.⁶ See, e.g., S. Ct. Order 08-13, 2011 WI 40, at 1, (issued Jun. 8, 2011, effective Jun. 8, 2011). The proposed rules would permit an applicant to seek review from the BBE and, if necessary, from this court, in the event of an adverse decision on an applicant's request for testing accommodation.

Because most graduates from American Bar Association approved Wisconsin law schools are admitted to practice in Wisconsin under the diploma privilege, SCR 40.03, and many experienced

Section, and shall notify the applicant of its determination no later than twenty (20) days prior to the date of the examination for which such accommodations are requested. If the application is denied in whole or in part, the Board's notification shall state the reason(s) for such denial.

(e) Appeals. Any applicant whose application is denied in whole or in part may appeal the determination by filing a verified petition responding to the Board's stated reason(s) for denial. The petition must attest to the truth and accuracy of the statements made therein, be made under penalty of perjury and be notarized. The petition may be supported by a report from the applicant's examiner clarifying facts and identifying documentation, if any, which the Board allegedly overlooked or misapprehended. The appeal may not present any new diagnosis or disability that was not identified in the applicant's application. Original signed and notarized appeals must be received at the Board's office no later than 14 days from the date of the Board's determination. The Board shall decide such appeal and shall notify the applicant of its decision prior to the date of the examination for which the accommodations were requested.

(f) Delegation. The Board may, in its discretion, delegate to any of its members, or to its Executive Director, Deputy Executive Director or counsel, all or any part of its duties and responsibilities under the foregoing provisions of this Section, other than its responsibilities under subsection (e) in connection with appeals.

⁵ Minnesota's testing accommodations rule, Minn. Rule Bar Admin. 6(F), provides:

An applicant whose disability requires testing accommodations shall submit with the application a written request pursuant to the Board's testing accommodations policy and shall describe: (1) The type of accommodation requested; (2) The reasons for the requested accommodation, including medical documentation in a format set forth in the policy referenced above. The Board shall notify the applicant of its decision. A denial or modification of a request for testing accommodations constitutes an adverse determination of the Board and may be appealed pursuant to Rule 15.

Its detailed policy for conducting a review is set forth here: <https://www.ble.mn.gov/wp-content/uploads/2018/08/Policy-and-Instructions-For-Requesting-Accommodations.pdf>

⁶ <https://www.ble.mn.gov/bar-exam/test-accommodations/>.

lawyers from other states seek admission under the proof of practice rule, SCR 40.05, we estimate that each year, there will be only a handful of appeals relating to test accommodation. Still, these appeals must be considered quickly, if an applicant is to receive an answer before the bar examination. Accordingly, the proposed review process is expedited. This expedited appeal procedure cannot guarantee that a final decision can be made before the scheduled bar exam, but will increase the chances that it can be.

Currently, the BBE requires applicants to file requests for testing accommodation about 2.5 months before the bar exam.⁷ Establishing a review procedure will require the BBE to alter its deadline for making a request for testing accommodations and possibly adjust its annual meeting schedule to accommodate hearings.⁸ An additional two months will be offered to permit an applicant to appeal to the board and to the supreme court and, if possible, receive a decision in advance of the bar exam. The court may direct the BBE to adopt a policy to clarify for applicants the expedited review schedule and to ensure that decisions are made in advance of the bar examination, when possible, as follows:

An applicant whose request for testing accommodation has been adversely modified or denied may appeal to the board by submitting a written request for review within seven (7) business days of receipt of the Director's notice of denial or modification. An expedited hearing before the Chair or designated member of the board will be scheduled in response to applicant's request for appeal. The hearing may be conducted by telephone and will be scheduled within seven (7) business days of receipt of the request. The applicant will receive a notice of the date and time of the hearing. At the hearing, the applicant may be represented by counsel, may call witnesses, and may provide testimony in affidavit form. The expedited hearing will be recorded and a copy of the recording will be provided to the applicant upon request. Upon the conclusion of the expedited hearing, the Chair or designee will prepare brief written findings of fact and a determination and will mail a copy of the findings and determination to applicant by regular U.S. mail and post a copy on the applicant portal within five (5) business days of the hearing. The applicant may appeal the expedited hearing determination by filing a petition for review with the supreme court and serving a copy on the board within seven (7) days of the on-line posting of the board's disposition of the request. The petition for review shall clearly designate if the applicant requests expedited review.

As this would be a recommended BBE policy, it is not part of the accompanying rule petition. See *infra* at p. 6. The most likely impediment to obtaining a final decision before the bar exam will be a need for supplemental documentation to evaluate the request.

In some cases, even with expedited review, it may not be possible to complete an appeal before the bar exam is administered. The court proposes that in such cases the applicant will be given two

⁷ The deadline for requesting test accommodations is December 1 for the bar exam administered on the last Thursday of February, and May 1 for the bar exam administered on the last Thursday in July.

⁸ In 2018, for example, the BBE meets on January 19, March 2, April 13, June 1, July 27, September 14, October 26, and December 3.

options: (1) the applicant may defer testing until the next bar exam date, without penalty, or (2) the applicant may sit for the bar exam under the terms approved by the BBE, and the applicant will reserve the right to seek review of the adverse test accommodation decision after the bar exam, if necessary. If the applicant sits for the bar exam, fails, appeals, and is awarded the accommodations originally sought, the applicant would be credited with the bar exam fee. Again, if this proposal is approved, the BBE would be directed to craft and adopt such a policy.

February bar exam

Proposed Timeframe

October 1:	Deadline for requesting testing accommodation ⁹ .
November 7:	Deadline for BBE decision (30-40 days)
November 14:	Deadline for Applicant to request board review (7 days)
November 21:	Deadline for BBE to schedule hearing (5-7 days)
Nov. 28-Dec. 9	Date Hearing (range) [BBE meeting 12/3]
December 14:	Deadline for Board to mail decision (5 days)
December 21:	Deadline for filing petition for expedited supreme court review (7 days)
December 26:	Supreme court order advising if expedited review granted (5 days)
January 21:	Supreme court decision (4 weeks)
February [21-28]:	Bar examination

July bar exam

March 1:	Deadline for requesting testing accommodation. ¹⁰
April 12:	Deadline for BBE decision (30-40 days)
April 19:	Deadline for Applicant to request board review (7 days)
April 26:	Deadline for BBE to schedule hearing (5 days)
May 1-12:	Hearing (range) [No BBE meeting during this time but could be scheduled]
May 17:	Deadline for Board to mail decision (5 days)
May 24:	Deadline for filing petition for expedited supreme court review (7 days)
May 29:	Supreme court order advising if expedited review granted (5 days)
June 24:	Supreme court decision (4 weeks)
July [24-31]:	Bar examination

Amendment to SCR 40.13

The court also proposes an amendment to SCR 40.13 (Delegation) which currently states that the board "may delegate its authority under this chapter to a committee, a member or its director." The court proposes adding a sentence to confirm that an applicant may seek review from the board of a discretionary decision that the board delegated to a committee, member, or the director. This procedure envisions review of a discretionary decision made by an individual or entity by the full board, but does not permit supreme court review of a non-dispositive decision. The adverse determination rule permits

⁹ The on-line application for the February bar exam typically becomes available on or about October 1.

¹⁰ The on-line application for the February bar exam typically becomes available on or about March 1.

supreme court review if the board declines to certify an applicant's satisfaction of the requirements for admission to the bar under Chapter 40.

BBE Rules and Procedures

As indicated, the BBE itself implements the BA rules that appear in the Appendix to SCR Chapter 40. If the court decides to amend SCR Ch. 40, as set forth in the accompanying petition, the BBE will be instructed to modify or adopt new rules in its appendix, consistent with the court's order.

For example, a detailed explanation of the expedited review procedure, if no decision is rendered in time for the next bar exam may be needed. Modifications to BA 4.02 may also be appropriate, both to alter the deadline for requesting testing accommodation, and to advise applicants of an appeal procedure:

BA 4.02 Testing accommodation requests must be received in writing no later than [October 1] for the February examination and [March 1] for the July examination. The Board may deny requests that are not in writing or that are filed after the deadline. An applicant whose request for test accommodation is adversely modified or denied may request review.

Modifications to BA 16-17-16.20 may also be required, regarding filing deadlines in the event of an expedited review.

Conclusion

The adoption of the amendments will clarify the right of applicants to seek review of certain adverse discretionary decisions that do not clearly fall within the purview of SCR 40.08 (Adverse determination).