2009 WI 3

SUPREME COURT OF WISCONSIN

NOTICE
This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 08-07

In the matter of amendment to Supreme Court Rule (SCR) 40.05 relating to admitting lawyers upon proof of practice elsewhere.

FILED

JAN 6, 2009

David R. Schanker
Clerk of Supreme Court
Madison, WI

On April 1, 2008, the Board of Bar Examiners, by its director, John E. Kosobucki, petitioned this court to amend Supreme Court Rule 40.05 relating to admitting lawyers upon proof of practice elsewhere. On July 24, 2008, an amended petition was filed to show a marked version of the proposed amendments to SCR 40.05. A public hearing was conducted on November 18, 2008. At the ensuing open administrative conference the court voted to adopt the petition as set forth herein. Therefore,

IT IS ORDERED that effective January 1, 2009, Supreme Court Rule 40.05 is amended as follows:

SECTION 1. SCR 40.05 (title) and (1)(b) of the Supreme Court Rules are amended to read:

SCR 40.05 (title) **Legal competence requirement: Proof of practice ~~elsewhere~~.**

40.05 (1) (b) Proof that the applicant has been ~~primarily~~ substantially engaged in the ~~active~~ practice of law in ~~the courts of the United States or another~~ a state or territory, the federal government or the District of Columbia for 3 years within the last 5 years prior to filing application for admission. A lawyer may satisfy this requirement by proof of practice in more than a single jurisdiction and under more than one provision of this rule.

SECTION 2. SCR 40.05 (1) (c) and (1m) of the Supreme Court Rules are repealed.

SECTION 3. SCR 40.05 (2) of the Supreme Court Rules is amended to read:

40.05 (2) Legal service as corporate counsel or legal service as a trust officer, or lawfully before the courts or administrative agencies of a state or territory, the federal government or the District of Columbia, if conducted in ~~a state~~ compliance with the rules where the applicant was admitted to practice law, ~~may be deemed to be~~ is the practice of law for the purposes of ~~sub. (1)(b) and (c)~~ this section.

SECTION 4. SCR 40.05 (2m) of the Supreme Court Rules is created to read:

40.05 (2m) Legal service as corporate counsel in Wisconsin under SCR 10.03(4)(f) is the practice of law for the purposes of sub. (1)(b). Provided a timely registration is filed, all such service conducted prior to filing the registration may be counted for purposes of sub. (1)(b).

SECTION 5. SCR 40.05 (3) (intro.) of the Supreme Court Rules is amended to read:

40.05 (3) (intro.) The following activities, whether or not conducted in a state or territory, the federal government or the District of Columbia where the applicant was admitted to practice law, may be deemed to be the practice of law for the purposes of sub. (1)(b) ~~and (c)~~:

SECTION 6. SCR 40.05 (6) of the Supreme Court Rules is repealed.

IT IS ORDERED that notice of this amendment of Supreme Court Rule 40.05 be given by 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 6th day of January, 2009.

BY THE COURT:

David R. Schanker
Clerk of Supreme Court

¶1 DAVID T. PROSSER, J. *(concurring in part, dissenting in part).* In approving this petition, the Wisconsin Supreme Court adopts the most liberal standards in the United States for the admission of attorneys based on proof of practice in other American jurisdictions. The court repeals completely the longstanding reciprocity provisions in SCR 40.05(c) and (1m); and it trumpets this repeal as fair to bar applicants from states that set up barriers to the admission of Wisconsin attorneys, and beneficial to Wisconsin consumers. Because I believe the case for total repeal of reciprocity is meager and misleading, and because the consequences of this repeal may be adverse to Wisconsin law schools, members of the Wisconsin bar, and Wisconsin consumers, I respectfully dissent. As will be explained below, there are parts of Petition 08-07 that I support.

I

¶2 The essence of Petition 08-07 is to amend SCR 40.05 by repealing reciprocity in the admission of attorneys on motion by proof of practice elsewhere. The petition also facilitates easier admission of corporate counsel and trust officers to the Wisconsin bar. I support the easier admission of corporate counsel and trust officers and will not discuss this element of the rule change. Other changes are discussed below.

A.

¶3 The court modifies the title of SCR 40.05 so that it reads, "Legal competence requirement: Proof of practice." The

word "elsewhere" is eliminated from the title. I support this change.

B.

¶4 The court modifies subsection (1)(b) of SCR 40.05 by substituting the word "substantially" for the word "primarily." The court also strikes the word "active" in the phrase "active practice of law." These changes will reduce the practice requirements for attorneys in other jurisdictions seeking to qualify for admission to our bar. In general, I support these changes.

¶5 The revised SCR 40.05(1) will now read as follows:

> 1. An applicant shall satisfy the legal competence requirement by presenting to the clerk certification of the board [Board of Bar Examiners] that the applicant has provided all of the following:
>
> (a) Proof of admission to practice law by a court of last resort in any other state or territory or the District of Columbia.
>
> (b) Proof that the applicant has been substantially engaged in the practice of law in the United States or another state or territory or the District of Columbia for 3 years within the last 5 years prior to filing application for admission. A lawyer may satisfy this requirement by proof of practice in more than a single jurisdiction and under more than one provision of this rule.

C.

¶6 The court repeals all reciprocity requirements in the former rule by striking out (1)(c) and (1m). Subsection (1m) is the more important provision. Former (1m)(a) provided:

> (1m) <u>Eligibility</u> for admission under this rule <u>shall be limited</u> as follows:

> (a) An applicant who proposes to satisfy sub. (1)(b) by practice in a jurisdiction that does not grant bar admission to attorneys licensed in Wisconsin on the basis of practice in Wisconsin shall not be eligible for admission on proof of practice elsewhere. (Emphasis added.)

¶7 What paragraph (a) addressed was the prohibition in some jurisdictions against admitting Wisconsin attorneys to practice except by way of a bar examination in those jurisdictions. A Wisconsin attorney could be admitted to practice here——for many years——by qualifying for the diploma privilege (SCR 40.03), by taking a Wisconsin bar examination (SCR 40.04), or by satisfying the requirements for proof of practice elsewhere (SCR 40.05), see SCR 40.02, but these indicia of competence are deemed insufficient in 17 jurisdictions.[1] The discriminating jurisdictions are Arizona, California, Delaware, Florida, Hawaii, Louisiana, Maine, Maryland, Mississippi, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, and Puerto Rico. The former (1m)(a) required attorney applicants from these jurisdictions to satisfy the same requirements for admission to the Wisconsin bar as these

[1] Statements in this opinion describing the bar admission requirements of other American jurisdictions are based on the Comprehensive Guide to Bar Admission Requirements 2008, published by the National Conference of Bar Examiners. National Conference of Bar Examiners & American Bar Association Section of Legal Education and Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements 2008, http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/CompGuide.pdf [hereinafter Comprehensive Guide]. The National Conference of Bar Examiners is headquartered in Madison, Wisconsin.

jurisdictions impose on Wisconsin attorneys. In short, it afforded equal treatment.

¶8 Former subsection (1m)(b) read:

> (b) An applicant who proposes to satisfy sub. (1)(b) by practice in a jurisdiction that does not grant bar admission on the basis of practice to attorneys licensed in Wisconsin under SCR 40.03 shall not be eligible for admission on proof of practice elsewhere.

¶9 Paragraph (b) addressed jurisdictions that admit attorneys on proof of practice elsewhere——except attorneys from Wisconsin who were admitted under the diploma privilege. The following states have rules that discriminate against graduates of Marquette University Law School and the University of Wisconsin Law School: Alabama, Alaska, Georgia, Idaho, Kansas, New Hampshire, Ohio, Tennessee, Utah, Virginia, and Wyoming. These states will now be able to discriminate freely against Wisconsin diploma privilege attorneys with no consequences to their own attorneys and law school graduates.

¶10 I strongly oppose these changes. The free movement of attorneys from one jurisdiction to another might be a desirable objective if every jurisdiction played by the same rules. But they do not. This court gave no consideration to any strategy or plan to attack existing barriers to Wisconsin attorneys set up by other jurisdictions.

D.

¶11 The court also repeals subsection (1)(c). This subsection read as follows:

> (c) If any state, territory or the District of Columbia practice in which is proposed to satisfy the requirement of sub. (b) has, as of the date of the filing of the application, requirements for bar admission in that jurisdiction on the basis of practice in Wisconsin other than those set forth in subs. (a) and (b), proof that the applicant has satisfied those requirements of that state, territory or the District of Columbia. (Emphasis added.)

¶12 Paragraph (c) imposed an additional requirement for admission to our bar. The best example of an additional "requirement" is the requirement that an attorney admitted on proof of practice elsewhere has practiced 5 years, instead of "3 years within the last 5 years." See SCR 40.05(1)(b). The following states admit out-of-state attorneys on motion but they require 5 years of practice: Alabama, Alaska, Arkansas, Colorado, Connecticut, the District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wyoming. Of course, nine of these states will not admit a diploma privilege graduate from Marquette or Wisconsin no matter how long the attorney has practiced unless the attorney takes and passes a bar exam.

¶13 Two states, North Carolina and North Dakota, require four years of practice instead of "3 years within the last 5 years." This leaves only two states——Michigan and Washington——that have roughly the same requirements for admission on motion by proof of practice as Wisconsin. Attorneys from these two

states seeking admission to the Wisconsin bar will gain nothing from the repeal of reciprocity.

¶14 The number of years of practice in another jurisdiction is only one of the numerous qualifications that states can impose on admission by motion. For instance, Illinois requires an applicant to provide proof of definite plans to practice law for a minimum of 500 hours per year on an ongoing basis while physically in Illinois. Iowa requires a certificate showing that an applicant has practiced "five full years while licensed" and still holds a license as well as an affidavit "showing a bona fide intent to practice law in Iowa." Minnesota requires applicants to have taken a multistate bar examination within 24 months of applying in Minnesota. Michigan demands that motion applicants be graduates of an ABA-approved law school.

¶15 Wisconsin has traditionally imposed on motion applicants the same requirements that other states have imposed on Wisconsin attorneys. By the repeal of (1)(c), all such additional requirements are eliminated. I support this change but not the repeal of subsection (1m). Because Washington maintains reciprocity provisions that do not affect Wisconsin attorneys and Michigan admits on motion only graduates of ABA-approved law schools, Wisconsin now has the most liberal admission standards in the United States.

II

¶16 Proponents of these changes made a number of arguments to support the repeal of reciprocity. In his filing on behalf

of the Board of Bar Examiners, the Director of the Board, John Kosobucki, wrote:

> Wisconsin welcomes competent lawyers from twenty states and the District of Columbia upon proof that they have practiced elsewhere.[2] Lawyers from other states and territories are not eligible for admission here unless they first pass the Wisconsin bar examination. The disparate treatment of foreign lawyers . . . depends not on their competence or their usefulness to Wisconsin consumers of legal services, but on whether their home jurisdictions admit Wisconsin lawyers without examination.
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> . . . .
>
> SCR 40.05(1m) and (1)(c) should be repealed because Wisconsin consumers of legal services are better served where there are no artificial barriers to the admission of capable lawyers. If competent lawyers from California or Ohio (states that do not admit foreign lawyers without examination) are welcomed here on the same basis as those from Illinois and Indiana (states that do), Wisconsin residents will have wider choices when they need legal services.

¶17 There are a lot of holes in this explanation. First, the explanation fails to acknowledge that some states refuse to admit any attorneys without a bar examination, regardless of their competence, and that this barrier discriminates against Wisconsin attorneys. The explanation fails to acknowledge that

[2] Based on information from the National Conference of Bar Examiners, Wisconsin should presently admit attorneys from the following states on motion by proof of practice: Arkansas, Colorado, Connecticut, the District of Columbia, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Vermont, Washington, and West Virginia. Comprehensive Guide, supra note 1.

11 states discriminate directly against diploma privilege attorneys from Wisconsin. The explanation also fails to acknowledge that attorneys from 47 states, the District of Columbia, and Puerto Rico will now be treated more favorably here than those jurisdictions treat Wisconsin attorneys.

¶18 Second, the explanation makes an argument for "wider choices" for Wisconsin residents who need legal services. Given the fact that there are already more than 18,500 active members of the Wisconsin bar able to practice law——more than 14,000 of whom live in Wisconsin——the "need" for more choices, on any widespread basis, has not been made.[3] In any event, individual attorneys from outside Wisconsin are often admitted here pro hac vice. SCR 10.03(4).

¶19 Under the old reciprocity provisions, attorneys from only Michigan and Washington were admitted on motion based upon three years of practice. When the new rule takes effect, however, attorneys from 49 states, the District of Columbia, and Puerto Rico will be admitted on motion after three years of practice. This could produce a flood of new attorneys and damage the job market for recent graduates of Marquette and Wisconsin law schools.

¶20 Clearly, attorneys who practice in Wisconsin courts practice Wisconsin law. A lawyer who has practiced three years in another jurisdiction may know nothing about Wisconsin law

[3] The statistics cited in this sentence were obtained from the State Bar of Wisconsin.

when he or she is admitted here on motion.[4] An experienced lawyer is likely to know how to make the adjustment to a new system; an inexperienced lawyer may not. Flooding Wisconsin with inexperienced attorneys may not work to the benefit of consumers, but it will likely affect the practice of law.

¶21 Third, the explanation implies that bar examinations are "artificial barriers" to the admission of "capable lawyers." If this were true, then recent law graduates from out-of-state law schools should be admitted immediately without bar examinations. However, such openness would seriously undermine Wisconsin's two law schools and completely disregard the valuable study of Wisconsin law in those two law schools.

¶22 Attorney Steve Levine offered additional reasons for the change in the rule. Mr. Levine said that reciprocity provisions penalize individual attorneys who have no control over the bar admission rules of their states. He claimed the reciprocity provisions did not accomplish the purposes they were theoretically intended to accomplish. He asserted that the old rule hurt the Wisconsin bar and the Supreme Court, and that the rule was probably unconstitutional.

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[4] For what it is worth, some states have no mandatory continuing legal education (CLE) requirements for their attorneys. According to the Comprehensive Guide to Bar Admission Requirements 2008, Alaska, Connecticut, the District of Columbia, Hawaii, Maryland, Massachusetts, Michigan, Nebraska, and South Dakota have no mandatory CLE. Comprehensive Guide, supra note 1.

¶23 Arguments that focus on the hardships faced by individual out-of-state attorneys who are required to take a Wisconsin bar examination apply to recent law graduates as well as attorneys who have practiced for three to five years or more. Those hardships would be eliminated only if Wisconsin never required a bar exam. This appears to be Mr. Levine's ultimate goal. However, like the Board of Bar Examiners, Mr. Levine's narrow focus fails to discuss the hardships on Wisconsin attorneys who might like to practice in states other than Michigan or Washington. He offers no plan to address the disparate treatment of Wisconsin attorneys. He also fails to address the effect that opening the floodgates to out-of-state attorneys will have on Wisconsin practice.

¶24 Mr. Levine's argument that "Wisconsin loses the contributions of . . . lawyers who want to join and participate in the Bar, want to pay Bar dues, and want to pay Supreme Court assessments" is more amusing than persuasive. His claim that present rules are "probably unconstitutional" disregards more stringent barriers in other states and fails to address how to ameliorate those barriers for Wisconsin attorneys.

¶25 The Director of the Board of Bar Examiners tantalizes the court with the proposition that additional attorneys would mean additional trust accounts earning additional interest for the Wisconsin Trust Account Foundation (WisTAF). The problem with this theory is that attorneys who practice from border states are not required to maintain a trust account in Wisconsin so long as the financial institution that holds the account

agrees to the overdraft notification requirements in Wisconsin's trust account rule. In other words, deposits from Wisconsin in the trust accounts of non-resident bar members may enrich the trust account foundations of states other than Wisconsin.

¶26 In my view, the change in the reciprocity provisions was pushed through without adequate documentation and without serious consideration of the consequences. The fact that the petition was formally supported by the State Bar of Wisconsin raises questions about whether the bar leadership has lost touch with its members. At the risk of offending political correctness, I respectfully dissent.