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STATE OF WISCONSIN

IN SUPREME COURT

CLERK OF SUPREME COURT
OF WISCONSIN

In the Matter of the Amendment of

PETITION

SCR 40.04 Legal Competence Requirement: Bar Examination

SCR 40.04(5) An applicant who has failed the Wisconsin bar examination three times is ineligible to write the Wisconsin bar examination unless special permission is given by the board under reasonable conditions as it may require.

TO: Chief Justice Shirley S. Abrahamson

Justice Jon P. Wilcox

Justice Ann Walsh Bradley

Justice N. Patrick Crooks

Justice David T. Prosser, Jr.

Justice Patience D. Roggensack

Justice Louis Butler

Filed with Cornelia G. Clark, Clerk of Supreme Court

Office of Clerk of Supreme Court
110 E. Main Street, Suite 215
Madison, WI 53703

BACKGROUND

In January, 2003, the petitioner, Arnold A. Moncada Jr. graduated from Thomas Cooley Law School in Lansing, Michigan. In April, 2003, the petitioner endured a personal tragedy with the death of his son; Richard, who was an attorney and graduated from the University of Wisconsin Law School. The petitioner's goal was to go to law school after retirement and then practice with his son. During the grieving process the petitioner had taken the bar exam four times. Petitioner also took the exam a 5th time and failed. On the fourth and fifth time the Board of Bar Examiners (hereinafter the Board) advised that he would not be allowed to take the exam again. This created more stress to

the exam process. Petitioner admits taking the exam during the grieving process was a mistake.

On June 14, 2006, the petitioner requested the Board to reconsider his request for a waiver of his 4th bar exam in which petitioner received a score of 142 on the MBE (Multistate Bar Exam) and a score of 127 on the subjective essay portion of the state exam. Petitioner's score was 59.5. If petitioner would have received a score of 60.0 he would have passed the exam. Petitioner passed 6 of the 8 essay questions. The petitioner requested the Board to waive the requirements because of exceptional circumstances. The petitioner requested a hearing, an appearance before the Board, and the opportunity to take the essay portion separately. These requests were denied.

In June, 2006, the petitioner requested a copy of the agenda for the June Board meeting from the new director. However, petitioner was told that the Board does not give out agenda's. Petitioner asked if they had received his request for reconsideration. The new director stated he had received the request. Petitioner advised the new director that he was going to attend the June open meeting session.

On June 14, 2006, the petitioner attempted to attend the board meeting with his attorney. On the morning of the Board meeting while outside, petitioner observed two Capitol Police squad cars with lights flashing pull up to the 110 E. Main St. address. It was later learned that the Board Chairman Charles Constantine requested that the Capitol police be called. The petitioner went upstairs to the third floor to enter the Board meeting. As petitioner approached the meeting room he heard an individual ask if anyone knows what this Moncada looks like. Petitioner explained that he was in fact Arnold Moncada and asked what the problem was. At this time there were three Capitol police standing in the hallway and the sergeant was talking with a female member of the Board. Petitioner advised them that he was a retired Sheriff, attorney, and wanted to attend the open meeting. The sergeant of the Capitol police stated he was called to remove a party from the third floor, he would not give specifics. The petitioner asked to attend the meeting, the chairman advised he decided to close the meeting and the petitioner would not be allowed to attend the meeting.

Petitioner explained that he had attended another Board meeting in December, 2004, when all the Justices were in attendance. At that time petitioner was introduced by the Chief Justice. There was never an issue mentioned attending the open session of the meeting. Petitioner asked why the police were called. The chairman stated that the petitioner has a fixation with the process and continued to verbally go through petitioner's file in the hallway in front of the officer's, a female member of the board, and the petitioner's attorney. The Chairman explained how many times the petitioner had taken the exam and the failures of the exams and percentages. The female Board member that was standing in the hallway suggested the chairman stop the conversation and start their meeting. We exited the building and petitioner later requested open records information from the Capitol police.

In October, 2006, the petitioner requested the Board to allow him to take the bar exam again for a 6th time. The Board denied the request. The petitioner can never take the bar exam again in Wisconsin.

GENERAL COMMENTS

The current rule is inherently discriminatory and grossly unfair. The Board arbitrarily and capriciously decides who may or may not take an exam when an applicant fails the bar examination three times. We have no idea what criteria is used to allow an applicant to retake the exam. The Board goes into closed session. Neither the public, nor the applicant is allowed to hear how the board decides these issues. There is no hearing or appeal process available to the applicant.

The Board's actions are inherently discriminatory and grossly unfair against individuals by limiting how many times they can take a bar exam. Graduates from University of Marquette and University of Wisconsin Law School do not have to take a bar exam. Wisconsin is the only state in the union that allows this procedure. As a result of the limitation on the times an applicant can take the exam, the Rule discriminates against graduates from law schools outside the state, in relation to graduates from the University of Marquette and University of Wisconsin Law School.

ANALYSIS

The attached proposal concerning the amendment to **SCR 40.04(5)** amends the existing rule that will allow an eligible applicant to participate in the bar examination and not place a limitation on the number of times a person can sit for the Wisconsin Bar.

It also includes a new proposal that would allow an appeal. There shall be at least a right of appeal offered to each person taking the examination if the applicant's score is within a certain range of the passing score. The Board will determine the scope of the appeal. Based upon rules approved by the Supreme Court. The proposed rule would have retroactive application.

The Board asserts that its purpose is to protect the public. The public is not protected by putting a limitation on the number of times an applicant may take the exam. Many other professionals, such as accountants do not have a limitation on the number of times an applicant can take a licensing exam. The purpose of a license exam is to ensure a minimal level of competence. It should not matter how many times an applicant takes the exam. The National Conference of Bar Examiners (NCBE) identifies thirty (30) states that allow unlimited opportunities to take the bar exam. (Exhibit #1)

The Wisconsin Supreme Court rules do not have an appeal process for failed exams. There should be at least a minimum right of appeal offered each person taking the exam within a certain score. The question to be determined by an appeal would be whether a mechanical error had been made in computing the grade or the grade given by the examiner was arbitrary, capricious and without foundation. Many states have an appeal process especially when the failing score is within a certain range. Our judicial system allows an appeal process for administrative claims, civil claims, and criminal prosecution. However, when comes to taking a bar exam there is no appeal process.

The Wisconsin Supreme Court rules do not allow any other person to review the subjective essay exam other than the examinee, even if the examinee gives permission. The examinee may not have his attorney or a law professor review the exam, or make copies. An applicant may look at their exam. However, there is no feedback. This process has no educational benefit whatsoever.

The Wisconsin Supreme Court rules do not allow the public or an applicant to review the policy and procedures for correcting the subjective exams.

The Wisconsin Supreme Court rules do not allow the public or an applicant to review the policy and procedures for training and instructing the examiners how to correct the subjective exams.

Members of the Board are vested with a wide range of discretion in the methods of grading applicants for admission. A holistic grading method, in which the graders read essay answers and rate them for overall impression of quality rather than analytically, is arbitrary. Moreover, we do not know how these graders scoring tendencies were standardized.

The former director of the Board, Gene Rankin stated that “Wisconsin is **psychometrically superior** to other jurisdictions when it comes to grading bar exams”. (Exhibit # 2) Yet, how can this statement be accurate when the applicant and the public are afforded no opportunity to review the policy and procedures for correcting the exam.

As stated previously, the purpose of the bar exam is to protect the public, not to limit the number of licensed attorneys. Yet, the passing score was raised several times and the percentage of those passing decreased. (Exhibit #3, #4) Rather, the limitation on the number of times an applicant can take the exam only protects law school graduates from the University of Wisconsin Law School and University of Marquette who do not have to take a bar exam.

KEY PROPOSAL

The petitioner recognizes that this proposal involves a significant change that should be specifically brought to the court's attention. Petitioner submits the following proposals.

SCR 40.04(5) The number of times an applicant may be examined for admission to Wisconsin State Bar shall be unlimited.

SCR 40.04(5) There shall be at least a minimum right of appeal offered to each person taking the examination if the failed exam is within a certain scaled score or range of points. The Board of Bar Examiners will determine the scope of the appeal. They will promulgate rules to be approved by the Supreme Court.

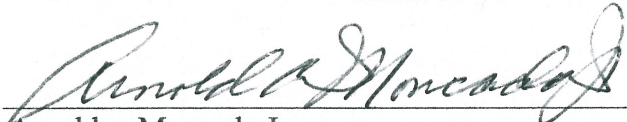
If adopted, petitioner submits these proposed rules shall be retroactive.

CONCLUSION

Attached to this Petition is the Proposed Amendment to Supreme Court Rule 40:04(5).

Respectfully submitted this 23rd day of March, 2007.

By:



Arnold a. Moncada Jr.
W276 N2177 Spring Creek Drive
Pewaukee, WI 53072
Telephone: 262-691-0660

SUPREME COURT OF WISCONSIN
AMENDMENT OF SUPREME COURT RULE 40.04(5)

PROPOSED

**ADOPTING A RULE, THAT PERMITS APPLICANTS UNLIMITED
OPPORTUNITIES TO RETAKE THE BAR EXAMINATION**

RETROACTIVE APPLICATION OF THIS PROPOSED AMENDMENT

SCR. 40.04(5) No limitation on Examination:

The number of times an applicant may be examined for admission to the Wisconsin State Bar shall be unlimited.

SCR 40.04(5) There shall be at least a minimum right of appeal offered to each person taking the examination if the failed exam is within a certain scaled score or range of points. The Board of Bar Examiners will determine the scope of the appeal. They will promulgate rules to be approved by the Supreme Court.

EXH. #1

CHART V: Application Dates & MBE Requirements

CHART V

STATE OR JURISDICTION	HOW SOON PRIOR TO THE FIRST DAY OF THE BAR EXAM MUST APPLICANT SUBMIT A COMPLETED APPLICATION?		DO YOU ADMINISTER THE MULTISTATE BAR EXAMINATION (MBE)?		DO YOU ACCEPT MBE SCORES TRANSFERRED FROM OTHER JURISDICTIONS?		DO YOU ADMIT AN APPLICANT SOLELY ON THE BASIS OF AN MBE SCORE FROM AN EXAM TAKEN IN ANOTHER JURISDICTION?		HOW MANY TIMES MAY EXAM BE TAKEN WITHOUT SPECIAL PERMISSION?
	FEBRUARY	JULY	YES	NO	YES	NO	YES	NO	
Alabama	Oct. 1	Feb. 1	X		X			X	no limit
Alaska	Dec. 1	May 1	X			X		X	no limit
Arizona	Sept. 1	Feb. 1	X		X			X	3
Arkansas	Nov. 15	April 1	X		X			X	no limit
California	Nov. 1	April 1	X			X		X	no limit
Colorado	Dec. 1	May 1	X			X		X	no limit
Connecticut	Dec. 31	May 31	X		X			X	no limit
Delaware		April 15	X			X		X	no limit
Dist. of Columbia	Jan. 4	May 23	X		X		X		no limit
Florida	Nov. 15	May 1	X			X		X	no limit
Georgia	by first Friday in Jan.	by first Friday in June	X			X		X	3
Hawaii	Nov. 20	April 20	X			X		X	no limit
Idaho	Oct. 1	March 1	X		X			X	3
Illinois	Sept. 1	Feb. 1	X		X			X	no limit
Indiana	Nov. 15	April 1	X		X			X	no limit
Iowa	Oct. 1	March 1	X		X			X	2
Kansas	Oct. 15	March 15	X		X			X	4
Kentucky	Oct. 1	Feb. 1	X		X			X	no limit
Louisiana	Nov. 1	Feb. 1		X		X		X	no limit
Maine	Dec. 20	May 20	X		X			X	no limit
Maryland	Dec. 20	May 20	X		X			X	3
Massachusetts	75 days	75 days	X		X			X	no limit
Michigan	Nov. 1	March 1	X		X*			X	no limit
Minnesota	Oct. 15	March 15	X		X		X		no limit
Mississippi	Sept. 1	Feb. 1	X		X			X	3
Missouri	Oct. 15	March 15	X		X			X	no limit
Montana	Oct. 1	March 1	X		X			X	3
Nebraska	Nov. 1	April 1	X			X		X	no limit
Nevada	Dec. 1	May 1	X			X		X	no limit
New Hampshire	Dec. 1	May 1	X		X			X	2
New Jersey	Nov. 1	April 1	X		X			X	no limit
New Mexico	Sept. 10	Jan. 10	X		X			X	no limit
New York	90 days	90 days	X		X			X	no limit
North Carolina	by first Tuesday in Nov.	by first Tuesday in March	X			X		X	no limit
North Dakota	See remarks	90 days	X		X		X		no limit
Ohio	Nov. 1	April 1	X			X		X	no limit
Oklahoma	Sept. 1	Feb. 1	X			X		X	no limit
Oregon	Oct. 31	March 31	X			X		X	no limit
Pennsylvania	Oct. 30	April 15	X			X		X	no limit
Rhode Island	Dec. 1	May 1	X		X			X	5
South Carolina	Aug. 1	Dec. 1	X		X			X	3
South Dakota	Nov. 1	April 1	X		X			X	3
Tennessee	Nov. 15	April 15	X		X			X	3
Texas	Aug. 30	Jan. 30	X			X		X	5
Utah	Oct. 1	March 1	X		X			X	6
Vermont	Jan. 15	June 15	X		X			X	4
Virginia	Dec. 15	May 10	X			X		X	5
Washington	Student applicant, 90 days Attorney applicant, 120 days			X		X		X	no limit
West Virginia	Nov. 1	April 1	X		X			X	4
Wisconsin	Dec. 1	May 1	X		X			X	3
Wyoming	Nov. 15	April 15	X		X			X	4
Guam	Dec. 1	May 1	X			X		X	no limit
N. Mariana Islands	60 days	60 days	X		X			X	no limit
Palau	45 days	45 days	X		X			X	no limit
Puerto Rico	45 days	45 days		X		X		X	6
Virgin Islands	30 days	30 days	X		X			X	3

See supplemental remarks.



Supreme Court of Wisconsin

EXH. # 2

Rec'd
9-25-04

BOARD OF BAR EXAMINERS
110 EAST MAIN STREET, SUITE 715
MADISON, WISCONSIN 53703-3328
TELEPHONE: (608) 266-9760
FAX: (608) 266-1196
bbe@wicourts.gov

September 24, 2004

Arnold A. Moncada
W276 N2177 Spring Creek Drive
Pewaukee, WI 53072

Dear Mr. Moncada:

I have your letter dated September 22, 2004 seeking a waiver of the requirement set by SCR Chapter 40 Appendix BA 4.01. Your letter will be placed before the Board at their next meeting.

Your letter contains a number of misapprehensions. First, you are wrong to say that Wisconsin has no review or reconsideration process. In point of fact, I have told you on no fewer than six separate occasions, at each of four orientation sessions and at each of three exam review sessions, precisely how Wisconsin deals with failing exam papers, that it re-grades them on the same day as they were initially graded, to ensure that the graders remain calibrated when they re-grade. Furthermore, I have explained (as is routine for me) at each exam review precisely why our re-grading process differs from those of other jurisdictions who provide for re-grading at an examinee's request, and precisely why our re-grading procedure is psychometrically superior.

- * Second, you should research the applicability of equal protection and due process rights, both state and federal, to the states' power to regulate the courts and, consequently, the practice of law. You will find that your arguments are not relevant.
- * Third, the reason you are not being admitted to the practice of law in Wisconsin is because you have failed to attain a minimal passing score on the Wisconsin essay exam three out of four times, and that you have failed to attain a passing score on the combined essay and multistate scores four out of four times. This has nothing whatever to do with your age, your public service, or the sort of law school you attended; it has everything to do with your performance on the bar examination.

Cordially yours,

BOARD OF BAR EXAMINERS

Gene R. Rankin
Director

grr

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4 Board: John O. Olson, Chairperson, Lake Geneva; Joseph D. Kearney, Vice-Chairperson, Milwaukee; Mark J. Baker, Chippewa F.
Glenn E. Carr, Chicago; Charles H. Constantine, Racine; Dennis A. Danner, Franklin; Carolyn Milanés Dejoie, Madison
Robert J. Janssen, DePere; Kevin M. Kelly, Madison; Mary Beth Keppel, Madison; Catherine M. Rottier, Madison

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12
Director: Gene R. Rankin

EXH. # 3

National Conference of Bar Examiners

	Taking Feb	Passing Feb	Percent Passing	Taking July	Passing July	Percent Passing	Total Taking	Total Passing	Percent Passing
2004	89	64	72%	167	138	83%	256	202	79%
2003	91	63	69%	206	157	76%	297	220	74%
2002	116	70	60%	181	151	83%	297	221	74%
2001	121	87	72%	188	145	77%	309	232	75%
2000	81	71	88%	165	122	74%	246	193	78%
1999	83	75	90%	161	140	87%	244	215	88%
1998	100	82	82%	190	161	85%	290	243	84%
1997	110	97	88%	177	150	85%	287	247	86%
1996	96	81	84%	212	193	91%	308	274	89%
1995	95	82	86%	166	136	82%	261	218	84%
1994	98	80	88%	175	162	93%	273	248	91%
1993	120	101	84%	198	170	86%	318	271	85%

Admissions by Diploma Privilege No Exam

1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
416	489	413	426	457	441	410	398	382	418
2000	2001	2002	2003	2004					
356	422	463	425	412					



Supreme Court of Wisconsin

BOARD OF BAR EXAMINERS
110 EAST MAIN STREET, SUITE 715
MADISON, WISCONSIN 53703-3328
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bbe@wicourts.gov

EXH.
4

Director: Gene R. Rankin

November 9, 2005

Arnold A. Moncada
W276 N2177 Spring Creek Drive
Pewaukee, WI 53072

Dear Mr. Moncada:

I have your several requests, which I will answer in the order you have made them.

1. Pass rates of past examinations are as follows:

Year	February	July
1994	88	93
1995	86	82
1996	84	91
1997	88	85
1998	82	85
1999	90	87
2000	88	74
2001	72	77
2002	67	83
2003	69	76
2004	72	83
2005	78	76

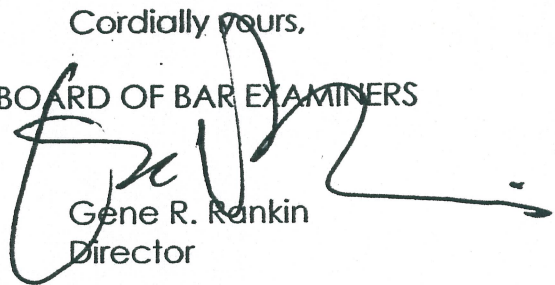
2. The minimum passing scaled essay score was 127 from 1994 through 1999. For the 2000 examinations it was raised to 128. From February 2001 and thereafter it was raised to 129. The passing score has been constant through each examination you have taken.
3. I became Director in December 1994.
4. It is not known when the new Director will take the position I vacate.
5. The Board's 2006 schedule has not been set yet and will not be until the December 7 2005 meeting.

Board: John O. Olson, Chairperson, Lake Geneva; Joseph D. Kearney, Vice-Chairperson, Milwaukee; Mark J. Baker, Chippewa F
Glenn E. Carr, Chicago; Charles H. Constantine, Racine; Dennis A. Danner, Franklin; Carolyn Milanés Dejoie, Madi
Kevin M. Kelly, Madison; Mary Beth Keppel, Madison; James A. Morrison, Marinette; Catherine M. Rottier, Madison

6. If you wish to address the Board, you must make a written request to do so. Note that SCR 40.08 provides for hearing only on adverse determinations and your desire to speak to the Board clearly does not fall under that rule. Consequently, you must make a case for the Board to exercise its discretion to allow you to address them by providing your remarks in advance and in writing with your request.
7. The Director does not ever grade the examination.
8. I provide the Board with copies of communications relevant to their decisions. Should you make a request of the Board and should I deem the several letters I have sent in response to your questions to be relevant, then they will receive the letters you send and my responses to them. On occasion I provide the Board with correspondence that I believe is useful to them for informational purposes.

Cordially yours,

BOARD OF BAR EXAMINERS



Gene R. Rankin
Director

grr