

In the Matter of the Petition to Amend
 Supreme Court Rule SCR 40.08 Relating to
 Adverse Determinations of Bar Applicants'
 Character and Fitness

PETITION
 08-11

To: Chief Justice Shirley S. Abrahamson
 Justice Ann Walsh Bradley
 Justice N. Patrick Crooks
 Justice David Prosser, Jr.
 Justice Patience D. Roggensack
 Justice Annette Kingsland Ziegler
 Justice Michael J. Gableman

Filed with the Clerk of Court David R. Schanker
 Clerk of Supreme Court Office
 110 East Main Street, Suite #215
 Madison, WI 53703

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**COMMENTS, RESPONSE AND OBJECTIONS TO THE PRESENT AND
 PROPOSED RULE SCR 40.08, INTER ALIA, AND HEREIN PROPOSES THE
 FOLLOWING MODIFICATIONS TO THE PRESENT RULE:**

- (1) Before declining to certify an applicant's satisfaction of requirements under this chapter, the board shall notify the applicant in writing of the basis for its ~~decision~~ interim determination that the application applicant is at risk of being denied and, except as to failure of the bar examination under SCR 40.04, the applicant shall have the opportunity to ~~respond in writing within 20 days~~ request an evidentiary hearing [hearing] within 30 days of the mailing notification of the board's ~~decision~~ interim determination to the applicant and counsel at the last address furnished by the applicant in writing to the board.
- (2) ~~Upon receipt of applicants' request, the board shall grant a hearing to an the applicant, only upon a showing that there are facts bearing on the applicant's case that cannot be presented in writing. The board shall not grant a hearing on its decision on waiver under SCR 40.10.~~
- (3) Not less than 30 days prior to the hearing the board shall notify the applicant in writing of the date, time and place thereof, the issues to be considered and that the applicant may be represented by counsel and present evidence via witness testimony or deposition transcripts. [See BA 16.05.]

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(4) All board members agreeing to participate in such hearing shall do so until the Board's Chairperson concludes the hearing.

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(5) If the determination of the board following a hearing is adverse to the applicant, the board shall mail a copy of the board's findings of facts and conclusions of law to the applicant and counsel at the last address furnished by the applicant in writing to the board.

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(6) A petition to the supreme court for review of an adverse determination of the board under this rule shall be filed with the clerk of the supreme court within 30 days of the date on which written notice thereof was mailed to the applicant and counsel and a copy shall be filed with the board promptly thereafter. However, if the applicant petitions the board for reconsideration of an adverse determination, the deadline for seeking supreme court review shall be 30 days after written notice of the board's disposition of the petition for reconsideration was mailed to the applicant and counsel.

COMMENTATOR'S UNDERLYING PRESUMPTIONS

(1) Under SCR 30.02 Official Duties:

“Board members, board, board staff and board counsel acting in a course of their official duties under the statutes and SCR chapter 30, 31 and 40 in Supreme Court orders are acting on behalf of the Supreme Court.”

(2) The Supreme Court and Board of Bar Examiners acknowledges bar applicants are entitled to receive some degree of due process.

Application for admission to the Bar of Douglas Childs, 101 Wis. 2d. 159, 303 N.W.2d. 663 (1981) which quoted several United States Supreme Court cases including Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) at pg. 13:

“The function of legal process, as that concept is embodied in the Constitution, and in the realm of fact findings, is to minimize the risk of erroneous decisions. Because of broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.”

(3) That the rules promulgated by the Supreme Court and the BBE with regard to bar applications should reflect the environment that serves the Supreme Court, the State Bar of Wisconsin, the Board of Bar Examiners, the public and the applicant when such rule attempts to minimize the risk of erroneous decisions

- (4) Commentator's representation of applicants or attorneys with Supreme Court regulatory agencies for over twenty-five years hopefully bears some experience and insight.

It is with the greatest respect to the Supreme Court and its Justices as well as to the Board of Bar Examiners and its Director, commentator respectfully believes that if the Court and BBE do not address and resolve compelling issues listed below, amending SCR 40.08 will be as if we were rearranging the deck chair on the Titanic.

UNADDRESSED COMPELLING BBE ISSUES

- (1) Exculpatory or explanatory documents and information, having been received by BBE, being intentionally or otherwise withheld by BBE staff when presenting information to the Board for its determinations in withholding such documents and information prior to any hearing allowed thus resulting in a "record" that consists of either neutral information or culpatory information for the Board and the Supreme Court.**
- (2) The applicant is unaware of when or what documents or information are being forwarded to the Board regarding any culpatory documents or information being presented to the Board prior to any hearing.**
- (3) That more likely than not, when the BBE staff reaches a conclusion that an applicant should not be licensed to practice law, such attitude and all negative inferences are transmitted to the Board without the exculpatory or explanatory information that has been provided by applicants to the BBE.**
- (4) The present rule BA 6.045 allows for the practice where BBE staff can virtually control the decision regarding what is and is not forwarded to the Board for its consideration of the alleged culpatory conduct of the applicant's character and fitness.**
- (5) The Board hearing should be on a date and time that the Board members will not be rushed and have sufficient time to hear the applicant's formative testimony but also hear the applicant's response to the questions raised directly by the eleven board members and the board chair. At the present time, commentator believes that there are no printed rules that address the sequence of procedure other than indicating a fifteen minute hearing time limitation and that the beginning of the hearing will involve any and all of the board members who have questions and accusations against the applicant. Clearly, when exculpatory or explanatory evidence, documents or information is withheld from the Board, it is clear that the board members questions are not merely inquisitive but hostile.**

(6) The present BA appendix should be revised to conform to the Supreme Court Rules in SCR chapter 40.

I thank the Court and its Justices for this opportunity to express the above opinions and concerns and look forward to an opportunity to discuss this matter with you further on April 27, 2010.

Dated Milwaukee, Wisconsin, this 16 day of April, 2010.

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Respectfully submitted by


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