STATE OF MINNESOTA

IN SUPREME COURT

Rules for Admission to the Bar

File No. ADM-10-8008

Formerly 98C5-84-2139

This Written Statement is offered in response to the Minnesota Supreme Court's order of October 26, 2010 inviting written statements on proposed amendments to the rules for admission to the State Bar of Minnesota.

Also pursuant to the Court's order, the authors Lee McGrath and Anthony Sanders of the Institute for Justice Minnesota Chapter request leave to make an oral presentation, based on this Written Statement, at the hearing to be held in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judiciary Center, on January 26, 2011 at 2:00 p.m.

Backgrounds and Interests of the Authors

The authors are attorneys for the Institute for Justice ("IJ"), a non-profit public interest law firm founded in 1991. IJ is headquartered in Arlington, Virginia and has state chapters across the country, including the Minnesota Chapter which opened in 2005. IJ has litigated over 25 cases on behalf of aspiring entrepreneurs who have been unable to pursue the occupation of their calling because of arbitrary and anticompetitive occupational licensing laws. The authors, Lee McGrath and Anthony Sanders, have both litigated on behalf of entrepreneurs against occupational licensing boards. In addition, Mr. McGrath has lobbied in the Minnesota legislature, and in other legislative bodies across the country, for less intrusive occupational licensing rules, and Mr. Sanders has authored several law review articles addressing occupational licensing and labor markets.

I. THIS COURT SHOULD ADOPT PETITIONERS' PROPOSED RULE AND REJECT THE BOARD'S ANTICOMPETITIVE ALTERNATIVE.

The Minnesota Board of Law Examiners ("Board") has proposed an anticompetitive rule that will continue to fence out qualified attorneys from Minnesota's legal marketplace. The proposed rule appears to allow some graduates of law schools not accredited by the American Bar Association ("ABA") to sit for the Minnesota bar exam if they are already licensed in another state. But, because the proposed rule would apply only to attorneys with more than 10 years experience—and even then place the burden on licensed attorneys to prove their competence before sitting for the exam—it would essentially keep the existing system in place, requiring examinees for the bar exam to graduate from an ABA-accredited law school.[1]

Instead of adopting the Board's proposed rule, this Court should adopt the rule that the four Petitioners have recommended. That rule, which the State of Wisconsin has successfully employed since 1998, allows attorneys who are licensed in another state to sit for the Wisconsin bar exam even if they have not graduated from an ABA-accredited law school. The Petitioners' proposed rule (hereinafter the "Wisconsin rule") would enrich Minnesota through allowing more qualified attorneys to come to and practice in the state with the security that those attorneys have already met the high standards of another state.

The Petitioners have already submitted persuasive documentation of why this Court should adopt the Wisconsin rule. In support, IJ submits this Written Statement to emphasize a fundamental point the Board has missed defending the present system: **Occupational licensing has costs.**

[1] An exception to this rule is available where an individual is licensed to practice in another country, has at least five years experience, and is solely employed as in-house counsel for a corporation or governmental entity. Rule 11 of the State of Minnesota Rules for Admission to the Bar.

We ask this Court to view the proposed rules in light of the reality of how occupational licensing works, and how the costs of an occupational licensing rule must be considered when the government makes it illegal for certain classes of people—such as graduates of non-ABA-accredited law schools—to work.

The following first addresses the specifics of the Board's proposed rule and the Wisconsin rule and how each rule should be addressed. Then, we review how occupational licensing functions, and how licensing rules are frequently instituted to protect established interests from competition, not to enhance public welfare. Much of this discussion relies on the work of Professor Morris M. Kleiner, the AFL-CIO Chair of Labor Policy at the University of Minnesota's Humphrey Institute of Public Affairs and one of the foremost authorities on occupational licensing in the world.[2] Finally, we discuss cases that IJ has litigated where established interests fought to protect occupational licensing rules even though the benefits to public welfare were nonexistent. Our analysis will demonstrate that if the Court views the Board with a healthy skepticism while scrutinizing the costs and benefits of the Board's proposed rule and of the Wisconsin rule, it will conclude that the Board's proposed rule is anticompetitive and will not enhance public welfare, and that it should instead adopt the Wisconsin rule.

II. THE COSTS OF THE BOARD'S PROPOSED RULE OUTWEIGH ITS BENEFITS AND THE BOARD'S FAILURE TO ASSESS THE COSTS SHOULD NOT BE SURPRISING GIVEN THE SELF-INTERESTED NATURE OF THE BOARD.

This Court's regulation of admission to the bar is an example of occupational licensing. In licensing an occupation, the government excludes certain prospective practitioners from that occupation. Public welfare suffers costs because of this exclusion, as do the excluded

[2] Professor Kleiner has authored over twenty books and articles on occupational licensing. *See, e.g.*, Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (2006); Morris M. Kleiner & Alan B. Krueger, *The Prevalence & Effects of Occupational Licensing*, 48 Brit. J. Indus. Rel., No. 4, 2010; Morris M. Kleiner, *Occupational Licensing*, 14 J. Econ. Persp., No. 4, 2000, at 189.

practitioners themselves, such as the Petitioners. Therefore, in assessing whether to adopt an occupational licensing rule, the rule maker must assess the benefits *and* the costs to public welfare of the proposed rule.

The Board has failed to do this. The Board discusses only the present system's benefits. It does not even acknowledge the costs that the system has on public welfare, such as higher prices for consumers, lower rates of competition, and talented individuals choosing to not enter the Minnesota bar. Further, the Board has failed to produce any evidence that its proposed rule, when compared to the Wisconsin rule, would lead to any benefits to public welfare. The Petitioners, however, have demonstrated that the costs of adopting the Wisconsin rule, *vis-à-vis* the present system, are negligible while the benefits are substantial. Therefore, in assessing the costs and benefits of the proposed rules this Court has an easy choice.

The direct cost of only allowing graduates of an ABA-accredited law school to sit for the Minnesota bar exam is that fewer lawyers will practice in Minnesota than otherwise would be the case. In turn, limiting the supply of practitioners will keep legal fees higher, and will discourage competent, and perhaps uniquely talented, lawyers, such as the Petitioners, from practicing in Minnesota. By contrast, the benefit to public welfare, if any, will be to exclude some individuals who might provide substandard or incompetent service.

The costs of refusing to adopt the Wisconsin rule, and instead adopting the Board's proposed rule, can be conceptualized by looking to the experience in Wisconsin. There, as the Petitioners point out, the state supreme court adopted a nearly-identical rule in 1998. Based on Wisconsin's experience, Petitioners estimate four to six attorneys would annually sit for the Minnesota bar exam under the Wisconsin rule.[3] As approximately 1,000 individuals sit for the

[3] Petition of Four Licensed Attorneys, C5-84-2139, p. 17 n.22.

exam in any one year,[4] exam takers like Petitioners would account for approximately a half percent increase in the number of Minnesota attorneys. Although modest, this would provide competitive pressure on billing rates and—especially over the course of several years—license more attorneys to whom Minnesota residents can turn when in need of legal services. This is not a large change, but enough to increase competitive pressures in Minnesota's legal services market. Adopting the Board's proposed rule—again, basically preserving the status quo—foregoes most of this improvement.

In addition to the costs to consumers, adopting the Board's proposed rule and rejecting the Wisconsin rule will impose high costs on individual attorneys. Lawyers who did not attend ABA-accredited law schools will be discouraged from moving to Minnesota, even if they are skilled and experienced attorneys. Attorneys who have already moved to Minnesota will be forced to work outside their chosen profession. For these individuals, the costs are profound.

Those are the costs of adopting the Board's proposed rule instead of the Wisconsin rule. The benefits are not as obvious. In theory, under the Wisconsin rule some individuals could graduate from a non-ABA-accredited law school, pass another state's bar exam, pass the Minnesota bar exam, and then commit malpractice, or at least provide substandard service. But the Board offers no evidence on how likely this is, such as what the nationwide rate of malpractice is for graduates of non-ABA-accredited law schools compared with the rate for graduates of ABA-accredited law schools, or customer service surveys on quality of service for the different categories. The Petitioners, however, do offer such a statistic. Of the 22 attorneys who have passed the Wisconsin bar exam since 1998 under the new rule, none have received discipline from Wisconsin's licensing authorities.[5] The Board does not dispute this and does not

[4] See statistics at Minnesota State Board of Law Examiners, *Bar Results*, http://www.ble.state.mn.us/bar-results/.
[5] Petition of Four Licensed Attorneys, C5-84-2139, p. 17.

offer any comparable statistic, let alone compare it with the costs of the present regime, despite its hours of public testimony and research.

Given Wisconsin's experience, the Board should demonstrate why Minnesota is so different from Wisconsin that the Court should not adopt the Wisconsin rule. It, of course, cannot. But, the Board's reticence to address the costs of licensing should not surprise the Court. The Board's proposal and behavior must be viewed in the context of the Board—and the ABA upon whom it relies for assurances of attorney quality—as a group of self-interested actors. The Board is an unelected body of seven lawyers and two others, all appointed by this Court. These members, especially the attorneys, have their own interests as established insiders. This is not to single-out the Board, its members, or the ABA as peculiar in this regard, or to use "self-interested" or "unelected" in a pejorative sense.[6] It is merely to state that these individuals and groups have an interest in proposing regulations that limit the entrance of new practitioners beyond what is optimal for public welfare. As John Dewey—no champion of limited government—observed: "Those concerned in government are still human beings. They still have private interests to serve and interests of special groups, those of the family, clique, or class to which they belong."[7] As self-interested actors their recommendations should not be given deference, but treated with the healthy skepticism that should be applied to any interest group.

---

[6] One of the many insights of public choice theory is that a governmental body, like any body of individuals, has its own particular interests and agenda which are not necessarily in line with the welfare of the general public. *See generally* James M. Buchanan & Gordon Tullock, *The Calculus of Consent* (1962), *full text available at* http://www.econlib.org/library/Buchanan/buchCv3Cover.html. The same is true, of course, of the ABA, a private body which, like the Board, may act on the tendency to advance its members' interests even though they do not reflect that of the general public.

[7] John Dewey, *The Public & Its Problems* 76 (1927).

III. OCCUPATIONAL LICENSING IS A RAPIDLY EXPANDING PHENOMENON THAT IS GENERALLY DRIVEN BY INDUSTRY GROUPS, NOT CONSUMERS, AND OFTEN HAS NO POSITIVE EFFECTS ON PUBLIC WELFARE.

Occupational licensing has been around for centuries but has only become a wide-spread phenomenon in this country over the last few decades. For example, in the early 1950s only about 4.5 percent of workers in the United States required a license to work.[8] Now the number is approximately 29 percent.[9] Over 800 different occupations are now licensed by at least one state.[10] Attorneys, of course, have been licensed for well over a century, but barriers to entry in the legal profession were not always as high as they are now. For example, lawyers in the nineteenth century generally apprenticed instead of having to attend school, let alone four years of undergraduate work plus three years of law school.

Licensing laws are usually justified as needed to protect public health and safety. This would lead one to assume that consumer groups, or similar bodies, advance licensing restrictions. Generally, however, the impetus for new licensing laws comes not from consumers, i.e. those wronged by shoddy practices, but from professional groups asking the government to regulate them.[11] This should not be surprising. Stronger licensing rules allow established practitioners to derive economic rents from consumers, i.e. charge higher prices, because of a more limited labor supply.[12] Licensing causes wages for licensees, and therefore costs to consumers, to rise about 15 percent on average.[13] A regulated profession can suppress competition against established practitioners by using "political institutions such as state legislatures or city councils to control

---

[8] Kleiner, *Licensing Occupations*, *supra* note 2, at 1.
[9] Morris M. Kleiner & Charles Wheelan, *Occupational Licensing Matters: Wages, Quality & Social Costs*, CESifo DICE Report, Mar. 2010, at 3, 3.
[10] *Id.*
[11] *Id.*
[12] *See* Kleiner, *Licensing Occupations*, *supra* note 2, at 9-10 ("The dominant view among economists is that occupational licensing restricts the supply of labor to the occupation and thereby drives up the price of labor and services rendered.").
[13] *See* Kleiner & Krueger, *supra* note 2, at 676.

initial entry and in-migration, thereby restricting supply and raising the wages of licensed practitioners."[14] Regulators can then further restrict entry controls, such as through tightening examination passage rates.[15] A result of this may be that less people enter an occupation and instead enter an unlicensed occupation requiring similar skills. This drives down wages in the unlicensed occupation through increasing supply, even though the more economically efficient result might be for more practitioners to enter the licensed profession.[16] Occupational licensing, therefore, leads to higher wages for licensed practitioners, higher prices for customers of licensed practitioners, less opportunity for would-be licensed practitioners to work, and lower wages and more competition for similar unlicensed occupations, all at inefficient levels from the standpoint of public welfare.

Balanced against the monopolistic profits and higher prices that occupational licensing creates must be set any gains in quality that licensing brings to consumers. However, evidence for such gains in quality is sparse. "The quality improvements of licensure are often overstated and may even lower the quality of service provided."[17] Various studies have found that, when scrutinized, licensing regimes often have no impact on quality of service. For example, more restrictive licensing laws for dentists had no impact on the quality of dental care as measured by that received by Air Force recruits who received their care under different dental licensing regimes around the country.[18] Similarly, tougher licensing laws for mortgage brokers had no impact on foreclosure rates.[19] Further, sometimes licensing requirements may even drive service

---

[14] *Id.* at 10.
[15] *Id.*
[16] *See id.*
[17] Kleiner & Wheelan, *supra* note 9, at 3.
[18] Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & Econ. 548 (2000).
[19] Morris M. Kleiner & Richard M. Todd, *Mortgage Broker Regulations that Matter: Analyzing Earnings, Employment, & Outcomes for Consumers*, in *Studies of Labor Market Intermediation*, 183 (David H. Autor, ed., 2009).

quality down by dissuading "highly productive individuals (with the highest opportunity cost of time) from entering the profession or if the training mandated by lawmakers has no meaningful relationship to performance on the job."[20]

The consequence of having less professionals in a field can be that consumers, such as homeowners, attempt to perform the work themselves, resulting in higher rates of injury or even fatalities. In one study, researchers found that in areas where there were fewer electricians because of tougher electrician licensing laws there were statistically significant higher rates of deaths from electrocution.[21]

This is not to say that licensing never has a positive effect on quality of service. But, when it does it often constitutes a reverse "Robin Hood Effect" where higher income individuals receive better service and moderate and lower income individuals may not be able to afford service at all.[22] In short, as Milton Friedman famously observed, not every consumer wants to buy a Cadillac. When the law requires a consumer to purchase a Cadillac if she wants to buy a car, even when she would rather buy a Chevy, consumers will suffer through not being able to afford a car at all.[23] For example, the Federal Trade Commission found the cost of eye exams and eyeglass prescriptions was 35 percent more expensive in cities with more restrictive licensing for optometrists,[24] inevitably pricing some consumers out of needed services.

An example of how licensing laws deter individuals from entering the legal profession—and thus restrict the supply of lawyers and increase consumer costs—is the requirement that

---

[20] Kleiner & Wheelan, *supra* note 9, at 3.
[21] Sidney L. Carroll & Robert J. Gaston, *Occupational Restrictions & the Quality of Service Received*, 47 S. Econ. J. 959 (1981).
[22] Kleiner & Wheelan, *supra* note 9, at 5.
[23] Milton Friedman, *Capitalism & Freedom* 153 (3rd ed. 2002).
[24] Ronald S. Bond, et al., Federal Trade Commission, *Effects of Restrictions on Advertising & Commercial Practice in the Professions: The Case of Optometry* (1980).

lawyers attend three years of post-graduate law school.[25] The mandate has been required by the ABA for decades despite repeated calls for reform.[26] It requires potential lawyers to pay 50 percent more in tuition and defer another year of income in return for completing the education necessary to become licensed. It undoubtedly dissuades many productive individuals from entering the legal profession, limits the supply of lawyers, and increases the debt burden of lawyers who do enter the bar, thus raising the cost of legal services for the general public. The rule at issue in this matter—forbidding licensed attorneys from being able to take the bar exam—similarly dissuades productive individuals, such as the Petitioners, from entering the Minnesota legal market and thereby raises costs for Minnesota consumers.

IV. AS THE INSTITUTE FOR JUSTICE'S EXPERIENCE DEMONSTRATES, ESTABLISHED INTERESTS WILL DEFEND OCCUPATIONAL LICENSING RULES EVEN WHEN THERE UNDENIABLY ARE COSTS TO PUBLIC WELFARE WITH NO BENEFITS.

The Institute for Justice has litigated numerous cases involving occupational licensing regimes that protect established insiders from competition with little or no discernable public benefit. Two examples of these cases are offered here, not for the legal implications of the cases but as case studies of how industry groups will defend occupational licensing rules even in the face of overwhelming evidence that the only reason for the rule is to protect established practitioners. These experiences concretize the academic research discussed above by illustrating that licensing rules often have costs with little benefit to public welfare. They also support the case for a healthy skepticism toward the Board's recommendations.

---

[25] *See, e.g.*, Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 Alb. L. Rev. 85, 102-04 (1997) (contrasting the weakness of justifications for requiring a third year of law school with the large financial costs borne by law students for the third year).
[26] *Id.* at 87-94.

IJ represented retail entrepreneurs in Tennessee in *Craigmiles v. Giles*.[27] IJ's clients owned stores that sold caskets. They did not provide any funeral services, such as embalming bodies, holding wakes, etc., but merely sold caskets that their customers could then use for their deceased loved ones at separate locations. The law in Tennessee, however, required a funeral director's license to sell a casket.[28] To receive a funeral director's license an individual had to pass an exam and spend either two years apprenticing to a licensed funeral director, or one year apprenticing plus another year of education at a mortuary school.[29] Almost all of the classes taught at school, and questions on the exam, did not concern selling caskets.[30] These high barriers to the simple act of selling caskets had the effect of limiting the supply of persons licensed to sell caskets, and thus drastically increasing the cost of caskets.[31] The Sixth Circuit found the law to unreasonably violate the right to earn a living and struck it down as unconstitutional.

The Tennessee Board of Funeral Directors and Embalmers vigorously defended the law. Although the board arguably felt it had a duty to defend the law in court even if it thought the law was bad policy, it is instructive to ask why the board defended the law in any other context. And yet it did, stating when the lawsuit was filed, "Funeral directors have the best knowledge of the trade and can help buyers the most. A licensed funeral director is more educated about funeral merchandise than anyone else."[32] Although such a statement is defensible as a slogan in a competitive market—where casket stores compete with funeral directors for consumers and those consumers can evaluate such a claim—the statement is outrageous when non-funeral

---

[27] 312 F.3d 220 (6th Cir. 2002).
[28] *Id.* at 222.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 224.
[32] Dave Flessner, *Casket Monopoly Under Attack*, Chattanooga Times/Chattanooga Free Press, June 6, 1999, at A1 (as quoted in IJ's backgrounder for the lawsuit, *available at* http://ij.org/about/component/content/836?task=view).

directors are banned outright from selling caskets, thereby drastically raising the cost of caskets for the general public. The Tennessee board was transparently not considering the cost of the law on the public, but instead merely protecting established funeral directors' economic rents. Similarly, the Board in the present matter is not considering the cost of excluding attorneys such as Petitioners.

Similar incentives were at play in *Cornwell v. Hamilton*.[33] There, the State of California restricted the braiding of hair to licensed cosmetologists. To acquire a cosmetology license, California law required individuals to complete 1,600 hours of education. Of that training time, very little had any relevance to what hairbraiders do, and no classes on hairbraiding itself were available.[34] IJ represented a hairbraider, JoAnne Cornwell, who wanted to offer hairbraiding services without wasting over a thousand hours in school, and spending thousands of dollars in tuition, learning skills irrelevant to her trade. As in *Craigmiles*, the state board vigorously resisted this effort to allow hairbraiders to work without a license. Cornwell prevailed, with the court finding the licensure rule an unconstitutional infringement on her right to earn a living.

In each of these cases the motivations of the licensing boards were clear: Established professionals resisted attempts to allow more competition even though the licensing rules clearly did not promote public welfare. We are not claiming that the exact motivations of the Board and the ABA are the same as the boards in these cases, but that as groups composed of established practitioners they have the same motivation to limit competition and preserve economic rents, public welfare notwithstanding. More importantly, just like the actors in these cases, the Board has not considered the cost to the public of excluding attorneys such as Petitioners in its calculus.

[33] 80 F. Supp. 2d 1101 (S.D. Cal. 1999).
[34] *Id.* at 1109-1111.

That calculus, plus a healthy skepticism of the Board's analysis, is something the Court should engage in before it adopts a final rule.

V. CONCLUSION.

As Petitioners have demonstrated in their filings in this matter, graduates of non-ABA-accredited law schools who are licensed in other states can add to the public welfare of Minnesota. They have in Wisconsin. Does that mean that if the Petitioners' proposed rule were adopted no such attorney would ever provide substandard service to a Minnesotan in need of legal services? Of course not. But, it does mean that the cost of not adopting the Wisconsin rule will outweigh the benefit of adopting the Board's proposed rule. The research on, and experience with, occupational licensing substantiates this claim. In short, the Board's proposed rule is transparently anticompetitive and does not benefit the people of Minnesota. Instead, this Court should adopt Petitioners' proposed Wisconsin rule.

Dated: December 27, 2010

Respectfully submitted,

By _____
Lee U. McGrath (Minn. Reg. No. 0341502)
Executive Director Minnesota Chapter

By _____
Anthony B. Sanders (Minn. Reg. No. 0387307)
Staff Attorney

INSTITUTE FOR JUSTICE
1600 Rand Tower
527 Marquette Avenue
Minneapolis, Minnesota 55402-1330
(612) 435-3451 Telephone
(612) 435-5875 Facsimile
Email: lmcgrath@ij.org, asanders@ij.org