IN THE SUPREME COURT OF THE STATE OF FLORIDA

In the Matter of the Application of:

FRED PARKER BINGHAM, II,

For Admission to the Florida Bar

_____/

CASE NO. _____
Florida Board of Bar Examiners
File No. 48166

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA BOARD OF BAR EXAMINERS;
and
PETITION FOR REVIEW

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IN PROPER PERSON

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CASES:

PETITION FOR WRIT OF CERTIORARI;
PETITION FOR REVIEW BY THE FLORIDA SUPREME COURT

The Petitioner, FRED PARKER BINGHAM, II [hereinafter "Bingham"], hereby Petitions the Florida Supreme Court for an issuance of Writ of Certiorari to review the recommendation and decision of the Florida Board of Bar Examiners, denying Bingham's application for admission to the Florida Bar. Specifically, Petitioner provides the following:

I
BASIS FOR JURISDICTION

This Petition for the issuance of a Writ of Certiorari and/or Petition for Review is brought pursuant to Article III, Section 4, of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar, or alternatively, Article IV, Section 13, of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar, and also pursuant to Rule 9.030, and Rule 9.100, Florida Rules of Appellate Procedure. Due to the Board's decision and recommendation on this application being issued September 29, 1989, and due to the Board's ruling on Bingham's Petition for Clarification being issued on November 22, 1989 [the clarification effectively "reconsidering" certain aspects of Bingham's application], Bingham is uncertain as to whether Article III, Section 4 or Article IV, Section 13, provides the appropriate basis for jurisdiction in this Court. In an abundance of caution, and in order for Bingham to fully exhaust his remedies below, Bingham has contemporaneously filed a Petition for Reconsideration with the Board under Article III, Section 4, Subsection (a), and filed a Petition for Waiver of the

requirements of Article 111, Section 1(c). All petitions have been timely filed, and Bingham respectfully requests that if reconsideration has not already occurred by the Board's November 22, 1989 clarification, for this Petition for Certiorari and/or Review to be stayed pending the Board's reconsideration of all issues raised by the Petition for Reconsideration.

II
THE NATURE OF THE RELIEF SOUGHT

Bingham respectfully requests for this Court to issue an Order to Show Cause to the Florida Board of Bar Examiners, and respectfully requests this court to issue its Writ of Certiorari to the Board, and ultimately allow Bingham to be admitted to the Bar of the State of Florida.

III
STATEMENT OF PRIOR PROCEEDINGS BEFORE THE FLORIDA BOARD OF BAR EXAMINERS

1. In July, 1987, Bingham sat for and completed the State of Florida Bar Examination, passing both parts of the examination with a score of 151 on each part. [Appendix 1]. Bingham subsequently sat for and passed the multi-state professional responsibility examination in August, 1987.

2. On or about August 13, 1987, Bingham filed an application for admission to the Florida Bar.

3. By letter dated March 10, 1988, the Florida Board of Bar Examiners (hereinafter "Board") informed Bingham that he did not meet the educational requirements of Article III, Section 1(b) of the Rules of the Supreme Court of Florida relating to Admissions to the Bar (hereinafter "Rules"), and allowed Bingham to respond in writing to the Board's position that he was not educationally qualified [Appendix 2].

4. By letter dated March 21, 1988, Bingham responded to the Board's March 10, 1988 letter, requesting that if he was deemed not educationally qualified under Article III, Section 1(b), his application be considered under Article III, Section 1(c) of the Rules [Appendix 3].

5. By letter dated June 14, 1988, the Board allowed Bingham to establish his qualifications under Article III, Section 1(c), "... through the filing of a representative compilation of work product ..." (compilation of work product is addressed under Article III, Section 1(c)(2) of the Rules) [Appendix 4].

6. On or about July 1, 1988, and again on or about October 1, 1988, Bingham submitted representative compilations of work product pursuant to Article III, Section 1(c)(2) of the Rules, in response to the Board's June 14, 1988 letter. Both representative compilations of work product were supported by affidavits [July 1, 1988, and October 1, 1988, submissions (absent the corresponding work product), Appendix 5 and 6].

7. By letter dated October 25, 1988, The Board informed Bingham that "... the representative compilation of work product filed and information in your application complementing your representative work product, ..." did not reflect his engagement in the practice of law to the extent required by Article III, Section 1(c). The decision was without prejudice to Bingham submitting additional work product or requesting an appearance before the Board [Appendix 7].

8. By letter dated May 25, 1989, Bingham requested an appearance before the Board, and additionally notified the Board of his intent to file additional representative compilation of **work** product [Appendix 8].

9. By letter dated June 9, 1989, Bingham requested information from the Board concerning the length of time his passing score on the general bar examination would remain valid [Appendix 9].

10. By letter dated June 19, 1989, The Board informed Bingham that the Rules contained no requirement that Bingham be re-examined following his passing both parts of the bar examination, except that "... if the educational question is not resolved within five or ten years from the date of passing of both parts of the bar examination, the Board might want the applicant to again demonstrate minimum technical competence through the bar examination." [Appendix 10].

11. By letter dated August 22, 1989, Bingham informed the Board that he required approximately two and one-half hours at the hearing before the Board, to present testimony on his behalf, and to review the representative compilation of **work** product. Bingham also requested guidance or clarification regarding the Board's October 25, 1988 letter, as to which matters under Article III, Section 1(c) were deemed insufficiently established by Bingham's prior work product submission. [Appendix 11].

12. By letter dated August 24, 1989, the Board informed Bingham that he would be allotted one hour at the Board's September, 1989 Board Meeting. In response to Bingham's request for further information about the Board's October 1988 decision and the issues remaining, the Board recited most of Article III, Section 1(c), and added "Based upon its review and consideration of your client's submitted work product, The Board concluded that his submission failed to satisfy the requirements of Article III, Section

1(c), noted above." [Appendix 12]. By letter dated September 1, 1989, the Board related that "... the staff anticipates receipt of supplemental material to Mr. Bingham's representative compilation of work product and will forward the material to the Board in advance of the appearance." [Appendix 13].

13. On September 1, 1989, and again on September 7, 1989, Bingham submitted to the Board his third and fourth representative compilations of work product, together with indexes. [September 1, 1989 index and September 7, 1989 index attached hereto as Appendix 14 and 15, respectively].

14. On September 16, 1989, Bingham appeared before the Board. Early in the hearing, the members of the Board stated that it had been previously decided that the policy of the Board was not to include any time spent by an applicant in a judicial position in computing the requisite ten years in the "practice of law," under Article III, Section 1(c) [Transcript, at 5-81. The Board further orally stated that it had no discretion [Transcript, at 33]. Bingham submitted as exhibits a Memorandum of Law, with the Affidavit of Dean Ronald Phillips of Pepperdine University, and the Affidavit of Susan Kohn Ross, of Herrick & Ross, attached. [Affidavits of Phillips and Ross attached as Appendix 16 and 17, respectively].

15. By letter dated September 29, 1989, [received by Bingham on October 2, 19891 the Board issued its letter of decision and recommendation, adverse to Bingham. Bingham had not previously requested a waiver of Article III, Section 1(c) of the Rules, but now requests such a waiver as an alternative relief [Appendix 18].

16. By Amendment dated November 28, 1989, Bingham filed Certificates of Good Standing in the following federal courts:

(a) The U. S. Court of Appeal for the Ninth Circuit, San Francisco, California, August 31, 1987.

(b) The U. S. Court of International Trade, New York, New York, September 30, 1987.

(c) The U. S. Court of Appeal for the Eleventh Circuit, Atlanta, Georgia, March 28, 1988.

(d) The U. S. Claims Court, Washington, D.C., July 21, 1988.

(e) The U. S. Court of Appeals for the Federal Circuit, Washington, D. C., December 12, 1988.

(f) The U. S. District Court for the Southern District of California, San Diego, California, May 2, 1989.

Bingham also filed a photocopy of his appointment as a Juvenile Traffic Hearing Officer in California [Appendix 19].

17. On October 3, 1989, Bingham filed with the Board a Petition for Clarification of the Board's decision letter of September 29, 1989 [Appendix 201.

18. On November 2, 1989, Bingham filed with the Board a formal petition for waiver of any Rule(s) which would time limit his retention of passing status and scores on the 1987 General Bar Examination [Appendix 21].

19. On November 22, 1989, Bingham filed with the Board the original transcript of the September 16, 1989, appearance before the Board [Appendix 22].

20. By letter dated November 21, 1989 [received by Bingham on November 27, 19891, the Board ruled on Bingham's Petition for Clarification of the Board's September 29, 1989 Decision [Appendix 23].

FACTUALBACKGROUND

1. Bingham entered law school in California in September 1966 as an evening student while concurrently employed as a Deputy Superior Court Clerk with the Superior Court of Orange County, California.

2. Following the completion of his first year of law school, as a student in an unaccredited California law school, Bingham was required to take and pass the 1967 First year Law Student's Bar Examination administered by the California Committee of Bar Examiners. Passing this examination is a condition precedent to continuing the further study of law. This full-day examination consisted of eight one-hour essay examination questions covering torts, contracts, criminal law and criminal procedures (including Constitutional issues). Of the approximately **2000** examinees, approximately 1400 passed the examination. The examination was graded A, B, C, D and F. Bingham was one of seven persons who received a grade of **A** from the California Committee of Bar Examiners on that examination.

3. Bingham graduated with a Juris Doctor degree cum laude, 6th in a class of 51[1], from Pepperdine University School of Law on July **3,** 1970, at a time when the school was not then accredited by the American Bar Assocaition ("ABA"). Pepperdine University School of Law had been provisionally accredited by the State Bar of California effective July **1,** 1970, which, among other things, obviated the requirement that its students thereafter take the California First year Law Student's Bar Examination.

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1 The entering Class of 1970 numbered approximately **200.**

4. Bingham is informed and believes that Pepperdine University School of Law met all of the requirements for provisional approval by the ABA within the twelve (12) months following Bingham's graduation, and formally requested inspection and provisional approval by the ABA during this period [See Dean Ronald Phillips' Affidavit, Appendix 16].

5. Inspection of Pepperdine University School of Law, conducted by the ABA on December 13-15, 1971, confirmed that Pepperdine had met the requirements for ABA provisional approval, with provisional approval being formally granted by the ABA in August, 1972. [See Dean Ronald Phillips' Affidavit, Appendix 161.

6. Following graduation in 1970, Bingham took and passed the California Bar Examination, with results being received on December 4, 1970. The grades of passing examinees were not reported by the California Committee of Bar Examiners. This examination was given over a period of two and a half days, and consisted of 20 one-hour essay examination questions covering twenty areas of law. These essay questions were "cross-over" questions, each question involving issues in more than one area of law.

7. Bingham was admitted to the California Bar on January 7, 1971. He was, at the same time, admitted to the Bar of the U. S. District Court for the Central District of California.

8. Bingham was engaged in the private practice of law in Santa Ana, California from the date of his admission on January 7, 1971, to December 20, 1973. His practice consisted primarily of criminal, juvenile and civil litigation cases.

9. Concurrent with his practice, between January 1973 and December 20, 1973, Bingham was appointed and served as a compensated part-time, temporary Juvenile

Traffic Hearing Officer with the Juvenile Court Division of the Superior Court of Orange County, California.

10. Bingham was engaged in the private pactice of law in California for a period of **two years, eleven months and thirteen days,** during which time Bingham was an active member, in good standing, of the California Bar.

11. In December, 1973, the Superior Court of Orange County authorized a permanent, full time position of Juvenile Traffic Hearing Officer in the Juvenile Division of that court, and on December 20, 1973, Bingham was appointed a compensated full-time, permanent Juvenile Traffic Hearing Officer, [Appendix 19].[2]

12. (a) A Juvenile Traffic Hearing Officer has been held by the California Supreme Court to be a subordinate judicial officer. In re: Kathy P., 599 P.2d 65 (Cal. 1979).

(b) The Superior Courts of the State of California are courts of record, and are the jurisdictional equivalent of the Circuit Courts of the State of Florida.

13. As a Juvenile Traffic Hearing Officer, Bingham conducted arraignments, hearings of uncontested cases, trials of contested cases, and made and entered findings and orders in the cases within his statutory jurisdiction [Transcript, P. 9-11].

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2 Judges of the Municipal Courts of the South and Harbor Judicial Districts of Orange County also held appointments as Juvenile Traffic Hearing Officers. When sitting as a Juvenile Traffic Hearing Officer, the judicial powers of those judges were no greater than that exercised by Petitioner. Even the Presiding Judge of the Juvenile Court, a Superior Court Judge, when hearing a case on a copy of a citation, could exercise no greater powers than provided by statutes for Juvenile Traffic Hearing Officers.

Bingham's cases included all citations issued in the North, Central and West Judicial Districts, the most populous districts of the county, plus all contested cases from the South Judicial District.

14. (a) While serving as a Juvenile Traffic Heraing Officer, Bingham additionally was appointed, from time to time, as a Superior Court Judge Pro Tem to hear and determine cases within the jurisdiction of the Juvenile Court of Orange County, California, in misdemeanor, felony and dependent child proceedings [Transcript, P. **9-11].**

(b) **As** a Superior Court Judge Pro Tem, Bingham conducted arraignments and detention hearings, heard non-contested cases, conducted non-jury trials and contested cases, conducted disposition (sentencing) hearings, and entered findings and orders. Petitioner had the authority to, and did as necessary, order the removal of minors from the custody of their parents/guardians and order their commitment to state and local facilities pending trial or for definite or indeterminate periods of time as provided by law as part of the disposition of cases [Transcript, P. **9-11].**

15. **As** a Juvenile Traffic Officer, and as a Superior Court Judge Pro Tem, Bingham was required to rule on the admissibility of evidence; weigh and decide conflicting facts; determine the credibility of witnesses and other evidence; research, determine and apply the applicable law; determine and control the course of the proceeindgs; make findings of fact and conclusions of law, and render judgments and orders accordingly.

16. While serving as a Juvenile Traffic Hearing Officer, Bingham was admitted to the Bar of the **U.S.** Supreme Court in July, **1974.** Bingham was an active member in good

standing of the California Bar during his entire tenure as a subordinate judicial officer. [3]

17. Bingham served continuously as a full-time Juvenile Traffic Hearing Officer until August 29, 1979, at which time the office was eliminated by the Superior Court as part of a reorganization of the Orange County Juvenile Court.

18. The period of Bingham's service as a Juvenile Traffic Hearing Officer (including service as a Superior Court Judge Pro Tem) was **five years, eight months and nine days,** during all of which time Bingham was an active member in good standing of the California Bar and legally authorized to practice law in the jurisdictions to which admitted.

19. Bingham was subsequently employed by the Academy of Defensive Driving in Newport Beach, California, as an attorney. Bingham's responsibilities included, among others, the handling of legal matter relating to the corporation's acquisition of real property and concerning the corporation's **D.U.I.** violators' program conducted for the Municipal and Juvenile Courts in Orange County. Bingham was employed as an attorney from late September or early October, 1979, until February 1, 1980, a period of approximately **five months,** during which time Bingham was an active member in good standing of the California Bar.

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[3] Bingham testified before The Board that, as a condition of his employment, he was not to engage in the private practice of law, [Tr. at 9]. This was at the request of Judge Samuel Dreizen, then the presiding Superior Court Judge of the Juvenile Court. Bingham was permitted by the Superior Court, however, during the early period of his tenure (approximately six months or more), to wind up his practice, to make Court appearances and to otherwise handle and dispose of remaining cases from his private practice which, for a variety of reasons, were not assumed by other attorneys by substitutions of attorneys.

20. On February **1, 1980,** Bingham began a "sabbatical" from the active practice of law, taking his boat to the East coast, cruising the Bahamas and coastal waters of the United States. Intended originally to be for a period of approximately one year, Bingharn extended the period and was self-employed managing a fleet of charter boats, making deliveries of boats and operating charter boats as a Coast Guard Licensed Captain.

21. During this period, which continued until January, **1987,** Petitioner was not actively engaged in the practice of law[4] although he was an active member in good standing during most of this period.[5]

22. On February **2, 1987,** and continuing thereafter up to the present, Bingham was employed by Peter *S.* Herrick, an attorney admitted to practice law in the State of Florida. Concurrently, he was employed by the law firm of Herrick & Ross, a partnership consisting of Peter *S.* Herrick and Susan Kohn Ross, Ross being an attorney admitted to the practice of law in the State of California Herrick and Ross maintain offices in Los Angeles, California, and in Miami, Florida. [Affidavit of Susan Kohn Ross, Appendix **17;** Testimony of Peter *S.* Herrick and Fred P. Bingham, II]. Peter **S.** Herrick, individually, and the law firm of Herrick & Ross, are primarily engaged in the practice of Customs and International Trade Law involving matters of Federal and International Law.

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4 Bingham from time to time rendered legal counsel and advise to his brother and father on contract and financial matters during the periods he was an active member, in good standing, of the California Bar.

5 Bingham was suspended from July **6, 1981,** to April **6, 1982,** for non-payment of fees, and was reinstated to active membership, in good standing, of the California Bar upon payment of the fees on the latter date. This was not a disciplinary suspension.

Bingham was voluntarily enrolled as an inactive member of the California Bar from January **1, 1985,** to February **13, 1987,** on which date he was enrolled as an active member, in good standing, of the California Bar.

23. Since February **1987,** in addition to previous admissions to the State Bar of California, the U. S. District Court for the Central District of California, and the U. S. Supreme Court, Bingham has also been admitted to, and is a member in good standing of the Bars of:

(a) The U. S. Court of Appeal for the Ninth Circuit, San Francisco, California, August **31, 1987;**

(b) The U. S. Court of International Trade, New York, New York, September **30, 1987;**

(c) The U. S. Court of Appeal for the Eleventh Circuit, Atlanta, Georgia, March **28, 1988;**

(d) The U. S. Claims Court, Washington, D.C., July **21, 1988;**

(e) The **U. S.** Court of Appeals for the Federal Circuit, Washington, D. C. **,** December **12, 1988;**

(f) The **U. S.** District Court for the Southnern District of California, San Diego, California, May **2, 1989.**

24. To the date of the informal hearing before the Board on September **16, 1989,** Bingham has been continuously employed by Herrick & Ross for a period of **two years, seven months and fourteen days,** as an associate attorney in matters before federal administrative agencies', and federal courts to which Bingham is admitted to practice, in particular the U. S. Court of International Trade, the U. S. Claims Court and the U. S. Court of Appeals for the Federal Circuit.

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6 Such federal agencies include, but were not limited to, the U. S. Customs Service, the U. S. Food & Drug Administration, the U. S. Consumer Products Safety Commission, the U. S. Department of Agriculture and the U. S. Fish & Wildlife Service.

Simultaneously, Bingham has also been employed during the same period as a legal assistant to Mr. Herrick in Customs law, international trade law, and federal administrative law before a variety of federal courts and agencies. His legal work has included cases being litigated by Mr. Herrick in the state courts of Florida, and before other federal courts to which Petitioner has not been admitted.[7]

Bingham, as a legal assistant, prepared essentially the same or similar kinds of legal work product in Federal matters for Mr. Herrick's use as were produced by him as an associate attorney with the law firm of Herrick & Ross.

25. While continuing employment with Herrick & Ross, Bingham prepared for the summer 1987 Florida Bar Examination, including taking a bar review course.

26. Bingham took and passed the summer 1987 Florida Bar Examination, and scored 151 on both parts of the examination. Bingham also took and passed the August 1987 Multi-state Professional Responsibility Examination.

27. Between September, 1987 and May, 1988, while continuing employment with Herrick and Ross, Bingham attended the University of Miami School of Law, an ABA accredited school, in the Ocean & Coastal Law LL.M. degree program.

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7 These federal courts are the U. S. District Courts of the Southern and Middle Districts of Florida.

As an attorney admitted to the California Bar, Petitioner was admitted pro ~~hac vice~~ on motion as associate counsel for Plaintiff in the U. S. District Court of the Southern District of Florida pursuant to the rules of admission of that court, and pajrticipated as associate counsel in the oral arguments of Motions for Summary Judgment and in the trial of Arca Airlines, Ltd. v. U. S. Customs Service, et al., Consolidated Case Nos. 87-2050-CIV-SCOTT and 88-0430-CIV-SCOTT [various pleadings and documents included in compilations of work product].

28. Bingham graduated from the University of Miami School of Law in May, **1988,** and was awarded in LL.M. degree. Petitioner earned a grade point average of **2.9** on a scale of **3.0** in the graduate degree program.[8]

29. The total period during which Bingham was engaged in the private practice of law as a sole practitioner, with the Academy of Defensive Driving, and as an attorney employed by Herrick & **Ross,** is **five years, eleven months, and twenty-seven days** to the to the date of the Board's hearing on September **16, 1989.** Bingham's period of service as a California Judicial Traffic Hearing Officer [and while a member in good standing of the California Bar) was **five years, eight months, and nine days.**

30. The sum total period of time during which Petitioner has been engaged in the practice of the field of law is **eleven years, eight months and six days** to September **16, 1989** (either as practice, or subordinate judicial officer).

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8 LL.M. degrees at University of Miami are not conferred with an indication of honors. However, a **2.9** G.P.A. on a scale of **3.0** (which is the equivalent of a **3.9** on a scale of **4.0)** is at the level of summa cum laude honors in the J. D. degree program.

ARGUMENT

A. Tenure as a Pull-Time Subordinate Judicial Officer Constitutes the "Practice of Law," or Justifies an Exception to the Uusual Meaning of Practice, Under Article III, Section 1(c) Subsection (1) of the Rules.

The Board's September 29, 1989 decision and recommendation wherein Bingham was deemed not to have engaged in the practice of law as required by Article 111, Section 1(c) subsection (1) of the Rules, failed to consider Bingham's service as a full-time California Juvenile Traffic Hearing Officer as the "practice of law." Thus, that service would not count toward the ten (10) year requirement under Section 1(c). During Bingham's service as a hearing officer, however, he was continuously a member in good standing of the California Bar, as well as a member of the District Court for the Southern District of California, and, during his service as a hearing officer, he applied for and was admitted to the United States Supreme Court.

Article III of the Rules is divided into two distinct sections, Part A relating to educational requirements, and Part B relating to character and fitness. Section 1(c) of Part A, under which Bingham's application was considered, is also divided into two distinct sections, to-wit:

> For those applicants not meeting the requirements of Article 111, Section 1(a) or (b), the following requirements shall be met:
>
> 1. Such evidence as the Board may require that such applicant **was engaged in the practice of law** in the District of Columbia, or in other states of the United States, or in practice in federal courts in territories, possessions or protectorates or the United States **for at least ten (10) years,** and was in good standing at the bar of the District of Columbia, the territory, posession or protectorate, or of the state in which such application practiced; **and**

> 2. **A representative compilation of the work product** in the field of law showing the scope and character of the applicant's previous experience and practice at the bar, ... which the applicant considers illustrative of such applicant's expertise and academic and legal training .... If a thorough consideration of such representative compilation of the work product shows that the applicant is a lawyer of the highest character and ability, whose professional conduct has been above reproach, and whose academic and legal scholarship conform to approved standards and sum up to the equalivent of that required of other applicants .... In **evaluating academic and legal scholarship the Board is clothed with broad discretion.** (Emphasis added).

The Bar Admission Rules, do not define the meaning "practice of law," as that term is to be applied under Section 1(c) subsection (1). Rule **6-3.5(c)(1),** of the Rules regulating the Florida Bar, however, contains a definition of "practice of law", in relating to the Florida designation and certification programs for admitted members of the Florida Bar. Rule **6-3.5(c)(1)** provides:

> The "practice of law" means full-time legal work performed primarily for purposes of rendering legal advice or representation. **Service as a judge of any court of record shall be deemed to constitute the practice of law.**

For approximately five years and eight months, Bingham served as a California Juvenile Traffic Hearing Officer, and, additionally was appointed, from time to time, as a Superior Court Judge Pro Tem. A Juvenile Traffic Hearing Officer has been held by the California Supreme Court to be a subordinate judicial officer. In re: Kathy P., 599 P.2d 65 (Cal. 1979).

The Board's decision below conflicts with the Florida Designation and Certification Program Rules, and also places a restrictive definition on "the practice of law," as only applying to a person whom represents clients. [Transcript, P. 6].

As early as 1962, this Court defined, in addressing whether certain acts constitute the unauthorized practice of law, that:

> ... If the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advise and the performance of such services by one for another as a course of conduct constitutes the practice of law.

State v. Sperry, 140 So.2d 587 (Fla. 1962), vacated on other grounds, 373 U.S. 379 (1963).

Each and every act and order by a judge and/or hearing officer affects important rights of a person under the law, and such rulings require legal skill and a knowledge of the law greater than that possessed by the average citizen. Sperry has been followed in subsequent Supreme Court matters to determine the unauthorized practice of law. The Florida Bar v. American Legal and Business Forms, Inc., 274 So.2d 225 (Fla. 1973); The Florida Bar v. Town, 174 So.2d 395 (Fla. 1965). Subsequent decisions admit difficulty in defining the "the practice of law." The Florida Bar in re: Advisory Opinion, HRS - Non Lawyer Counselor, 518 So.2d 1270 (Fla. 1988) [the practice of law is an amorphous term, not susceptible to precise definition]; Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978) [... it is somewhat difficult to define exactly what constitutes the practice of law in all instances."]; The Florida Bar in re: Advisory Opinion - Non Laywer Preparation of Notice to Owner and Notice to Contractor, 544 So.2d 1013 (Fla. 1989) [... any attempt to formulate a lasting, all encompassing definition of "practice of law" is doomed to failure for the reason that under our system of jurisprudence such practice must necessarily change with the ever changing business and social order. (citing Florida Bar v. Brumbaugh)].

Here we are concerned with the demonstration of practice of law to show that the applicant is a lawyer of the highest character and ability, and, due to this particular applicant not having graduated from an accredited law school [18 years ago], he must now provide such evidence as the Board may require that he has been engaged in the practice of law for at least ten (10) years. No rational basis exists to exclude service as a judge or subordinate judicial officer, if the intent and desire of the Board is to examine an applicant's background to determine whether his character and ability, his professional conduct, and his academic and legal scholarship conform to approved standards. No rational argument can be presented that a judge or subordinate judicial officer is not exercising legal skill and knowledge of the law (academic and legal scholarship) greater than that of the average citizen, or that a judge or subordinate judicial officer (absent evidence of impropriety in office) fails to exhibit the highest character and ability our legal system has to offer. No evidence has been presented by the Board contravening Bingham's character and ability while a subordinate judicial officer. Thus, Bingham's tenure as a subordinate judicial officer should have been considered by the Board as the "practice of law" in meeting the requirement of Section 1(c).

In the Board's letter to Bingham regarding clarification of its September 29, 1989 decision and recommendation [November 21, 1989 letter attached as Appendix 23], the Board refers to Florida Board of Bar Examiners re: Woodrow W. Hatcher; No. 70,578 (Florida Supreme Court, 9/28/87), as the "similar case" upon which the Board relied in denying Bingham's application for admission to the bar. The Hatcher decision, however, is factually and logically distinguishable from Bingham's application.

Hatcher had been a sitting non-lawyer Florida county court judge from 1977 to 1987, in Jackson County, Florida. During Hatcher's tenure as a county court judge, however,

he was not a member of *any* state bar; he was not a member of the Florida Bar, nor was he a member of any other state bar. Further, Hatcher had never been a member of any state bar, nor had Hatcher **ever** taken any bar examination. In fact, Hatcher had not graduated from *any* law school, whether accredited or not accredited.

Bingham, by contrast, was a member of the California Bar during his entire tenure as a judicial officer, he has been a member of the California Bar since 1971, he sat for and passed the California Bar Examination, and he sat for and passed the Florida Bar Examination [with a passing score of 151 on both parts of the Florida Bar examination]. Further, Bingham was a graduate of Pepperdine University School of Law which became accredited by the ABA within two years following Bingham's graduation.

Two additional factors or noteworthy: Bingham was an out-of-state judge, while Hatcher was a sitting judge in Florida, and therefore Hatcher additionally was disqualified under Article 111, Section 1(c), which requires, as the Board has applied to Bingham, the out-of-state "practice of law." Bingham provided work product from his practice of law subsequent to his tenure as a judicial officer, **and** Bingham has graduated with an LL.M. degree from the University of Miami, graduating at the summa cum laude level. Thus, in light of these clear distinctions between Hatcher's application and Bingham's application, this court should grant Bingham's application for admission to the Florida Bar.

B. Article III, Section 1(c) is a Flexible Requirement and The Board has Discretion to Include Tenure as a Judicial Officer in Computing "Practice of Law," Either as Practice, or as a Justified Exception to the Usual Meaning of Practice.

The Board, in its September 29, 1989 decision and recommendation, failed to

consider, or was unaware, of its discretion in applying the ten (10) year practice of law requirement required under Section 1(c) subsection (1). In fact, the Board found that it did not have discretion. [Transcript, P. 33].

In Petition of Klein, 259 So.2d 144 (Fla. 1972), the applicant was a graduate of an unaccredited law school who had been a member of the Illinois Bar for more than ten (10) years, but who "entered the U. S. Air Force as a career officer shortly after his admission. He was not assigned to the legal services division, and therefore, would not normally be considered as having been in the practice of law. This is the position taken by the Board." Id. at 145. Klein asserted, however, that "he was required on numerous occasions to act as defense attorney and also as judge in military courts during his air force career." Id.

The Klein Court stated, in reference to Klein's experience in the field of law,

> ... [D]emonstration of practice was a relatively flexible requirement. It is not designed to thwart an applicant, but rather to establish assurance of an applicant's ability and capacity to function as a lawyer. For this reason, Section 22(c)(3) [now Article 111, Section 1(c)], which governs this route to the bar examination, states that in evaluating the work of an applicant, '[T] he Board is clothed with broad discretion.'

Petition of Klein, 259 So.2d 144, 145 (Fla. 1972), citing Diaz v. Florida Board of Bar Examiners, 252 So.2d 366 (Fla. 1971).

In In Re: Crowne, 276 So.2d 477 (Fla. 1973), cert. denied, 414 U.S. 1000 (1973), this Court examined former Section 22(c)(3) [now Article 111, Section 1(c), and virtually unchanged], and found that "the rule is detailed and clothes the Board with broad discretion in evaluating applicants seeking admission thereunder." Crowne, 276 So.2d at 478. It is noteworthy that this comment by the Court, indicating that the Board has broad discretion, applies to the entire Section 1(c) [both subsections (1) and (2)], as the

comment appears prior to the Crowne court's recitation of the rule. The Crowne court quoted the passage from Klein regarding demonstration of practice being a relatively flexible requirement with evident approval, and therefore affirmed the Court's interpretation of flexibility and discretion stated in Klein.[9] The Klein court added that:

> The Board may ... determine if these ... experiences either constitute practice, or occurred with a frequency sufficient to justify an exception to the usual meaning of practice.

Petition of Klein., 259 So.2d at 145.

The Board's reliance upon In re: Hale, 433 So.2d 969 (Fla. 1983), as to precluding any discretion by the Board regarding the requirements of Section 1(c)(1), is misplaced. The Hale decision, as outlined under issue II, below, is that this Court would no longer grant waivers of the requirements of Section 1(b), and will only grant a waiver of Section 1(a) if the applicant has graduated from an accredited law school with a J.D. or LL.B degree. The Hale decision did not address nor consider any issue relating to Section 1(c), and therefore, the Hale decision does not preclude consideration of an exception to the usual meaning of "practice of law," under Section 1(c)(1).

Bingham has affirmatively established that his service in California as a subordinate judicial officer and as a superior court judge pro tem occurred while he was a member in good standing of the California Bar; that his service was continuous for a period of

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[9] In most of the reported cases under Article III, Section 1(c) [or its predecessor, Article IV, Section 22(c)(2), which was virtually identical in language to the present rule], the applicants failed to produce any work product. See Diaz; Klein; Crowne; In re: Agar, 283 So.2d 361 (Fla. 1973). The issue of sufficiency of work product submitted has only been addressed in one reported case, In re: The Application of Burkman, 171 So.2d 7 (Fla. 1964). [A three page abstract listing one probate and four domestic relations cases found inadequate]. In Bingham's case, however, voluminous work product has been provided to the Board for consideration.

almost six years; and that his service was full-time employment. His judicial service, therefore occurred with a frequency sufficient to justify an exception to the usual meaning of practice, if such judicial service does not constitute the "practice of law," within the usual meaning of that term. Thus, pursuant to Florida Supreme Court authority regarding flexibility and discretion in applying Section 1(c), and especially in light of the Florida Bar Designation and Certification Rules including service as a judge constituting the practice of law, Bingham's tenure as a hearing officer qualifies for the "practice of law" under Section 1(c) subsection (1).

C. **Practice of Law Before Federal Courts to Which Bingham is Admitted, While Bingham was Physically Located in Florida, Constitutes the "Practice of Law", or Justifies an Exception to the Usual Meaning of Practice, Under Article III, Section (1)(c), Subsection (1) of the Rules.**

The Board's September 29, 1989 decision and recommendation failed to consider Bingham's active practice before federal courts to which he is admitted, while Bingham was physically located in Florida, as the "practice of law," as that term is applied under Article III, Section 1(c) subsection (1). In the decision and recommendation letter, the Board refers to practice "outside of the state of Florida," as the *only* practice which would qualify for consideration under Section 1(c).[10] [September 29, 1989 letter

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[10] The Board's November 21, 1989 response to Bingham's Petition for Clarification advised that: "The Board found that your client did not meet the requirements outlined in Article III, Section 1(c) subsection (1) of the Rules of the Supreme Court of Florida Relating to the Admissions to the Bar, which requires the applicant to engage in the practice of law for a period of ten years. Such practice must occur in the foreign jurisdiction where the applicant was duly admitted and "in good standing." [Appendix 23].

attached as Appendix 18]. The Board clearly stated during the hearing that Bingham's practice with Herrick and Ross, while Bingham was physically located in Florida, did not constitute the "practice of law," within the meaning of Section 1(c), as that practice was performed within the State of Florida. [Transcript, P. 29].

The Rule requires evidence that the applicant was "in good standing at the bar ... of the state in which such applicant practices ...." Once this condition precedent has been satisfied, evidence of practice before federal courts [to which admission is obtained based upon the underlying state bar admission] is entitled to equal consideration under Section 1(c). The period of time the Board failed to consider regarding Bingham is two years, seven months and fourteen days, up to the date of the hearing.

Bingham has been employed by a multi-state California-Florida law firm as an attorney in good standing of the California Bar. Bingham can and has, appeared before federal courts to which he is admitted. While physically in the State of Florida, his practice, in accordance with established procedure with the firm, is to prepare legal documents and memoranda for the use of the partners of the firm, these documents and memoranda bearing the address of the primary office, and Bingham's work product is filed by that office. [Transcript, P. 22-25]. Bingham's practice thereunder does not involve either Florida or California law, but solely federal law relating to customs and international trade. Bingham's activities constitute the active practice of law in those federal jurisdictions to which he was admitted during this period.

The Board has applied Section 1(c) subsection (1) to Bingham such that only time engaged in practice, and the work product prepared, while physically in the State in which admitted [California], will qualify in meeting the requirements of the Rule. Such a ruling is unduly restrictive and not in step with the 1980's. Additionally, considering the

flexibility required by Klein, Diaz, and Crowne, Bingham's activity, under these circumstances, is the practice of law under Section 1(c), subsection (1), or justifies an exception to the usual meaning of practice.

Article 111, Section 1(c), does not specify practice in federal courts, except in territories, possessions or protectorates of the United States, in order for that practice to qualify towards the ten year requirement. The Rule otherwise requires evidence that the applicant was engaged in the practice of law in other states of the United States [which Bingham unquestionably was], or the District of Columbia [Bingham was also admitted to, and practiced before, several federal courts, supra, P. x]. Although the Board's September 29, 1989 letter was not clear as to practice outside the State of Florida,"[11] surely the Board has not taken the position that only practice in a federal court located in territories, possessions or protectorates will qualify under Section 1(c). If that is its position, any lawyer who, while a member of a bar of a certain state, practices in a federal court located within another state, is not "practicing law," as that phrase is applied by the Board under Section 1(c). Such a limited application of the Rule impacts severely upon freedom of movement among our several states, and would be violative of constitutional equal protection safeguards, as well as constitutional privileges and immunities safeguards.

The flexibility requirement under Klein permits and requires the inclusion of practice before federal courts in the several states, in addition to practice before federal

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11 A Petition for Clarification of the Board's September 29, 1989 letter and recommendation was filed on October 3, 1989 [Exhibit "S"], resulting in a clarification that: "such practice must occur in the foreign jurisdiction where the applicant was duly admitted and "in good standing." [Appenidx 23].

courts in territories, possessions and protectorates enumerated in the Rule, to which an applicant is admitted, provided the applicant has established his underlying admission and good standing in a state of the United States. Admission to the bar of a state is the predicate to admission to federal courts such as the U. S. Supreme Court, the U. S. Court of International Trade, the U. S. Claims Court, and the U. S. Court of Appeals [in each of which Bingham is admitted]. [12]

Assuming, therefore, the Board's decision is based upon Bingham being physically located in Florida, and that only the "practice of law" while performed outside of the State of Florida is allowed under Section 1(c) subsection (1), then this strict territorial notion of the practice of law is not in step with modern practice today. Modern practice of law today is not, in most cases, bounded by or limited by the physical territorial boundaries of the state in which admitted. It is common for attorneys in Florida in state court litigation, or U. S. District Court litigation, to depose witnesses or perform related legal activities physically in other states in connection with such cases. Such activities constitute practice "within the state," and within the jurisdictions to which the attorney is admitted. To hold otherwise would suggest that any time spent by a Florida attorney in his practice which is performed outside of Florida's state boundaries doesn't count toward his "practice of law," and every day that a member of a sister state's bar enters the State of Florida to perform legal activities relating to a matter emanating from within his state, is not "practicing law," on that particular day.

The development of modern interstate and multi-state law practices, and

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[12] Underlying admission and good standing to a state bar is also a requirement for admission to practice in most U. S. District Courts.

particularly interstate federal practices, such as Herrick and Ross, departs from traditional concepts of state practice physically limited by state boundaries. An attorney, for example, employed by a California-Florida law firm who is assigned to a Florida office, while admitted in California, and who will practice in areas of Florida law, in Florida courts, is, of course, required to be admitted in Florida before undertaking such activities in Florida. When, however, the activities undertaken while physically in Florida neither implicate Florida courts nor Florida law, but involve exclusively federal law before federal courts and federal agencies not physically located in Florida, such practice is normally "within" the jurisdiction to which the attorney is admitted [i.e. California].

As a further example, an attorney admitted in California, and thereafter employed solely by the Department of Justice in the International Trade field office, which is located in New York City, who practices for more than ten (10) years before the U. S. Court of International Trade (C.I.T.) in New York, and the U. S. Court of Appeals, Federal Circuit in Washington D.C., would not be "practicing law." If the attorney is not admitted in the State of New York, nor in the District of Columbia, but is only admitted to practice in California, the Board's ruling finds this attorney not practicing law for the purposes of Section 1(c), subsection (1). Practice with the federal government as opposed to practice with a non-governmental law firm does not change the results. Both the governmental and non-governmental attorneys practice before federal courts to which they are admitted. Regardless of the location where work product is physically prepared, it is prepared "within" the jurisdiction to which they are admitted.

In practice before the U. S. Court of International Trade, common in Bingham's practice, depositions are usually taken anywhere in the United States or territories. It is

also common for the cases to be tried in states other than where the Court of International Trade normally sits. See, Rule 77(c), Rules of the Court of International Trade. Trials, under this rule, may also be conducted in foreign countries. Under the Board's restrictive ruling, even if an attorney is a member of the New York Bar, and practicing before the U. S. Court of International Trade in New York, any trial conducted in a foreign country would not qualify as the "practice of law."

It is also common for law firms practicing in Federal Customs and International Trade Law to represent out-of-state clients concerning customs transactions which occurred within states other than the state in which the law firm is located, and within states other than the home state of the client. Samples of such matters are found in Bingham's submited work product. See, e.g., CTC International [client in California; Customs and U. S. Consumer Products Safety Commission Transactions in Seattle, Los Angeles and Washington, D.C.; firm's offices in California and Florida]; Interocean & Minerals & Chemicals Corp. v. United States, [client in New York; customs transactions in Boston; suit in New York and appeal in Washington, D.C.; law firm located in Florida]. Interstate aspects of federal practice, in particular, and certain interstate aspects of state practice, mentioned above, conflict with parochial ideas of strict physical territorial boundary limitations and bring broad meaning to what constitutes practice.

A more rational approach would be the relationship of the activities to the jurisdiction of the courts involved in determining whether such activities constitute

"practice;" it is not the physical location where work product is actually prepared which is determinative. [13]

The facts in Frazier v. Heebe, 482 U.S. 641 (1987), illustrate the point. Frazier was an "attorney who maintained his residence and law office in Mississippi and who was a member of the Mississippi and Louisiana State Bars. He sought admission to the Bar of the U. S. District Court, Eastern District of Louisiana." It is fair to assume Frazier, because of his residency and location of his office, would perform substantial work in his cases before the Louisiana courts, and involving Louisiana law, physically in the State of Mississippi. Was the work performed in Mississippi relating to such cases the practice of law in Mississippi or Louisiana?

Assume Frazier was handling a case in the eastern Louisiana U. S. District Court involving only issues of federal law, and did his work, and prepared the work product, while physically located in his office in Mississippi. Is this the practice of law in Mississippi, or Louisiana, or is it practice of law in a federal jurisdiction?

Because the work product in a federal case was prepared other than in the same state in which the court is located, should such work product and practice be excluded from Section 1(c) consideration? Under the Board's decision, the work product prepared by Frazier in Mississippi in cases pending in Louisiana does not qualify. Bingham's

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[13] Even though proceedings before the Board are judicial, and technically not administrative, Florida law is clear that administrative regulations must be reasonable to be valid and enforceable. Bailey v. Van Pelt, 82 So. 789, rehearing denied, 82 So. 794 (Fla. 1919); State ex. rel. Paoli v. Baldwin, 31 So.2d 627 (Fla. 1947). This requirement of reasonableness for administrative regulations is a constitutional requirement. State ex. rel. Burr v. Jacksonville Terminal Company, 106 So. 576 (Fla. 1925).

situation is similar, in that his work product was prepared "in" a federal jurisdiction to which he is admitted, even though the physical work was prepared in Florida.

Under the rationale and holding in Klein, supra, practice before the bar of such federal courts, predicated upon admission and good standing before the bar of a state, is the practice of law, or justifies an exception to the usual meaning of practice, and such practice should be included as qualifying time and work product under Article 111, Section 1(c).

The Board, however, has excluded from Bingham's qualifying time and work product under Section 1(c), all of Bingham's federal practice, performed while employed as an attorney with Herrick and Ross, because his work product was not physically prepared outside the State of Florida. [Transcript, P. 29; September 29, 1989 decision and recommendation - Appendix 18, November 21, 1989 letter, Appendix 23]. Regardless of where Bingham's work product was physically prepared, however, his time and work product is "within" the jurisdiction of the related federal courts, and, therefore, was the practice of law.[14]

D. Public Policy Considerations Regarding the "Practice of Law".

The period of time of Bingham's practice clearly shows that without the inclusion of his time of service as a judicial officer towards the ten year practice requirement of Article 111, Section 1(c), he will be required to accumulate more than four additional

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[14] The territorial jurisdiction of federal courts, especially of those of multi-state and national territorial subject matter jurisdiction, could be viewed and treated as, within the context of Section 1(c), a 51st "state."

years in the practice of law [non-judicial practice] to meet the ten year requirement, and that practice, under the Board's ruling, must be physically performed outside the State of Florida.

Bingham, however, has demonstrated a firm commitment to the State of Florida. His residence is here, and he graduated with an advanced law degree from a Florida accredited law school. He has practiced his profession since February, 1987 while employed as an attorney by Herrick & Ross in its Miami office [federal law].[15] Bingham's residence in Florida, his application for admission to the Bar of this State, and his successful passing of the Florida Bar examination, all evidence his dedication and committment to the State of Florida. Cf. In re: Diez - Arguelles, 401 So.2d 1347 (Fla. 1981).

Bingham's work in the field of Florida law as a legal assistant to Mr. Herrick, among other things, has provided him, and continues to provide him, with the opportunity to obtain technical competence in, and to keep abreast of, Florida Law. See, Florida Board of Bar Examiners re: Kwasnik, 508 So.2d 338 (Fla. 1987); and Article VI, Section 3(c), of the Rules. To require Bingham to leave Florida to establish "qualifying" practice would severely inhibit Bingham's opportunities to remain current with Florida law, a matter which this court considers to be significant under Kwasnik. Such an onerous result warrants the inclusion of Bingham's tenure as a judge in calculating his period of practice under Section 1(c) subsection (1), and also the inclusion of his work in federal courts

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15 At no time has Bingham suggested that he has practiced law such that his work in Florida would be construed as the unauthorized practice of law in Florida. All of his work has been carefully performed to avoid even the appearance of the unauthorized practice of law.

while located in Florida. Failing such inclusion, an exception or waiver being granted in this cause is warranted, and the Board's authority to grant such an exception is provided under Klein, Diaz, and Crowne.

II. ASSUMING, ARGUENDO, THAT THE BOARD'S POLICY DECISION IS NOT AN ABUSE OF DISCRETION, NO COMPELLING REASON EXISTS TO DENY BINGHAM A WAIVER OF ARTICLE III, SECTION 1(c).

During Bingham's appearance before the Board, the Board indicated that it did not have discretion to "waive" the requirements of Section 1(c) subsection (1), concerning what activities constituted the practice of law [Transcript, P. 51, due to In re: Hale, 433 So.2d 969 (Fla. 1983), thereby precluding such consideration. The Board's position was affirmed in its letter of decision and recommendation dated September 29, 1989 (Appendix 18)], and its November 21, 1989 clarification [Appendix 23]. The Board members present at the hearing seemed to suggest that they perceived the Hale decision as precluding "waiver" of bar admission rules in general.

The Hale Court, however, held that this court would no longer grant waivers of the requirements of Section 1(b), and will only grant a waiver of Section 1(a) if the applicant has graduated from an accredited law school with a J.D. or LL.B. degree. In re: Hale, at 973. In view of the previous discussion of the limits of the Hale decision, and in view of the clear holding in Klein, that the Board has broad discretion and may determine whether an applicant's activities constitute the practice of law, or occur with sufficient frequency to justify an exception to the usual meaning of practice, the Board is empowered, upon request [or on its own initiative], to waive Section 1(c) subsection (1), as to the usual meaning of "practice of law."

The Hale decision, however, did not address nor consider any issue relating to Section 1(c). Article 111, Section 1(c) is a flexible requirement, and the Hale decision does not preclude consideration of an exception to the usual meaning of "practice of law" under Section 1(c)(1), either as compliance with the rule or as a waiver of the rule. Hale did not overrule Klein or Crowne, referenced above, nor did the Hale decision signal a retreat from the policy of this court, which regarded Section 1(c) as a flexible requirement and also found that the Board had broad discretion in determining what constituted practice. At the very least, under Klein, Crowne, and under Hale in that Hale did not address it, exceptions would be allowed.

The rationale underlying Hale's policy of no waivers of Section 1(b), was the confessed inability of the court, and the Board, to adequately assess on a case-by-case basis the quality of legal education provided by unaccredited law schools. In re: Hale, at 972, citing LaBossiere v. Florida Board of Bar Examiners, 279 So.2d 288,(289) (Fla. 1973), and In re: Hansen, 275 N.W.2d 790, appeal dismissed, 441 U.S. 938 (1979).

The Board failed to consider the underlying rationale for the Hale decision, and therefore reconsideration of Bingham's application is warranted. Because of the rationale underlying the decision, Hale does not apply to Section 1(c); Article 111, Section 1(c) imposes upon the Board the duty to determine on a case-by-case basis the quality and sufficiency of an applicant's academic and legal scholarship upon thorough consideration of his work product in the field of law and upon other evidence presented. This case-by-case determination under Section 1(c) is to establish assurance of an applicant's ability and capacity to function as a lawyer. In Petition of Klein, 259 So.2d 144 (Fla 1972). Implementation of Section 1(c) therefore requires flexibility, as this court has recognized in Klein and Crowne, not Hale's rigidity, in addressing the varied

forms which the practice of the legal profession may take today. To apply the Hale standard to the 1(c) requisite case-by-case determination, eviscerates the intent and spirit of the rule, thwarting admission to the bar, rather than facilitating admission to the bar, quite the opposite effect of the holding in In re: Klein. Thus, contrary to the position taken by the Board, the Board was and is fully authorized in this case to determine whether Bingham's judicial experience constituted the practice of law, and to determine whether his practice while physically located in Florida constituted the practice of law. Relying on Hale, however, the Board refused to consider Bingham's period of judicial service as either the practice of law, or whether it qualified as a justified exception under Klein, and refused to consider Bingham's physical presence in Florida as the practice of law, or an exception under Klein.

If this Board maintains its position that Bingham's judicial experience does not qualify as the practice of law, Bingham requests that an exception or waiver to the ten year requirement under Article III, Section 1(c) be granted, and that his tenure as a judicial officer be substituted for the actual practice of law. The rules regulating the Florida Bar allow for service as a judge of any court of record to be deemed to constitute the practice of law for purposes of certification. Several of the standards for certification in a particular area, however, additionally allow service as a judge to substitute for at least a portion of the time requirement for the practice of law. Rule 6-8.3, Criminal Trial Minimum Standards allows for three years of service as a judge to qualify towards the requisite five years of the actual practice in the field of criminal law, as does marital and family law certification. Bingham requests that an exception or waiver be allowed for his tenure as a judicial hearing officer to be substituted for the requisite ten years of practice.

The Board further did not consider Bingham's physical presence in Florida to constitute the actual practice of law in another state [argument presented above]. Bingham, therefore, requests an exception and a waiver to the ten year requirement under Article III, Section 1(c), to be granted, so that his practice of law before federal courts to which he was admitted, and while an active member in good standing of the California Bar, but which practice was physically performed while in Florida, be allowed as credit towards the ten year requirement.

It is interesting to note that under the rules regulating the Florida Bar standards for Certification, two areas of certification allow the receipt of an LL. M. degree to qualify for at least a portion of the requisite minimum time qualifications for "practice of law." Rule **6-5.3** of the Rules, applying to Board certified tax lawyers, allows the receipt of an LL. M. degree in taxation to be deemed to constitute one year of the practice of law for purposes of the five year tax practice requirement. Further, Rule **6-7.3** of the Rules relating to certified estate planning and probate lawyers, allows for the receipt of an LL. M. degree in taxation or estate planning and probate to be deemed to constitute one year of the practice of law for purposes of the five year estate planning and probate practice requirement. Thus, Bingham respectfully requests a waiver or exception to the ten year time requirement of Article 111, Section 1(c), and requests that he be granted a credit for one year, due to his receipt, while a member in good standing of the California Bar, of an LL. M. degree from the University of Miami.

III. THIS BOARD IS EQUITABLY ESTOPPED FROM DECIDING AND RECOMMENDING THAT BINGHAM HAS NOT MET THE REQUIREMENTS OF ARTICLE III, SECTION 1(c) SUBSECTION (1).

Florida law recognizes that a person may be precluded by his previous act or conduct, or silence when it is his duty to speak, from asserting a later position which he

otherwise would have had. Taylor v. Kenco Chemical & Mfg. Corp., 465 So.2d 581 (Fla. 1st DCA 1981). Where representations of one party reasonably lead another to believe in a certain state of affairs and in reliance thereon the latter changes his position, the first party will be estopped from asserting a position other than the one represented. Yorke v. Noble, 466 So.2d 349 (Fla. 4th DCA 1985); AETNA Casualty & Surety Company v. Simpson, 128 So.2d 420 (Fla. 1st DCA 1961).

This Board's September 29, 1989 decision and recommendation that Bingham has not been engaged in the practice of law as required by the provisions of Article III, Section 1(c) is contrary to all indications previously communicated to Bingham. Article III, Section 1(c), as outlined above, is divided into two distinct sections, Section 1(c)(1), regarding engagement in the practice of law for at least ten years, and Section 1(c)(2), regarding a representative compilation of work product in the field of law. Prior to the September 16, 1989 hearing before the Board and prior to this Board's September 29, 1989 written decision, Bingham had not been placed on notice regarding his application being deficient as to Section 1(c) subsection (1), regarding the engagement in the practice of law for at least ten years.

By letter dated March 10, 1988, the Board informed Bingham that he did not meet the educational requirements of Article III, Section 1(b), and, by letter dated June 14, 1988, following Bingham responding to the March 10, 1988 letter, the Board by letter dated June 14, 1988, allowed Bingham to establish his qualifications under Article III, Section 1(c), "... through the filing of a representative compilation of **work** product ..." [June 14, 1988 letter to Bingham, Appendix 4]. The representative compilation of work product is addressed under Article III, Section 1(c)(2) of the Rule. Accordingly, Bingham submitted four separate compilations of work product pursuant to Article III, Section 1(c)

subsection (2) of the Rule [July 1, 1988; October 1, 1988; September 1, 1989; and September 7,1989; Appendix 5, 6, 14, 15, respectively].

By letter dated October 25, 1988, the Board informed Bingham that "... the representative compilation of work product filed and information in your application complimenting your representative work product, ..." did not reflect his engagement in the practice of law to the extent required by Article 111, Section 1(c). The decision was without prejudice to Bingham submitting additional work product. [October 25, 1988 letter attached as Appendix 7]. Bingham, in response, requested an appearance before the Board, and additionally notified the Board of his intent to file additional work product. [Appendix 8]. On August 22, 1989, Bingham informed the Board that he required approximately two and one-half hours at the hearing to present testimony on his behalf, and to review his representative compilation of work product. In the August 22, 1989 letter, Bingham specifically requested guidance or clarification regarding which matters under Article III, Section 1(c) were deemed insufficiently established by Bingham's prior work product submission. [Appendix 11].

On August 24, 1989, the Board responded to Bingham's request for further information and the issues remaining, and stated that "based upon its review and consideration of your client's submitted work product, the Board concluded that his submission failed to satisfy the requirements of Article 111, Section 2(c). [Appendix 12]. In fact, by letter to Bingham one week later, the Board related that "... staff anticipates receipt of supplemental material to Mr. Bingham's representative compilation of work product ..." [Appendix 13"]. At the September 16, 1989 hearing, the Board stated that it had been previously decided that the policy of the Board was not to include any time spent by an applicant in a judicial position in computing the requisite ten years in the

"practice of law," under Article 111, Section 1(c)(1). (Transcript, P. 5-8). This was the first indication provided to Bingham that his application was deemed insufficient under Article 111, Section 1(c), subsection (1), regarding the ten year practice of law requirement, as all previous notification to Bingham had evidenced concern for his work product under Article 111, Section 1(c), subsection (2). The "previous decision" of the Board had not been previously communicated to Bingham.

It is the recognized law in Florida that actions of one party, upon which the other party relies to his detriment, will equitably estop the first party from asserting rights contrary to the first party's actions. Commerce National Bank v. Van Denburg, 252 So.2d 267 (Fla 4th DCA 1971). As a matter of equity, the first party is prevented from changing its position, if its earlier position had been communicated to the other party and the other party had relied upon same. The Board of Bar Examiners is an arm of the Florida Supreme Court, and therefore technically not an "administrative body," but the procedures encountered by applicants to the Florida Bar are closely akin to administrative procedures. Equitable estoppel issues are handled routinely in the administrative process in Florida. Occidental Chemical Agricultural Products, Inc. v. State of Florida Department of Environmental Regulation, 501 So.2d 674 (Fla. 1st DCA 1987) [see, e.g., Kuge v. State of Florida Department of Administration, Division of Retirement, 449 So.2d 389 (Fla. 3d DCA 1984)]. Equitable estoppel issues are appropriately decided in an administrative forum, even when the agency itself is called upon ultimately to decide whether it should be estopped from taking a certain position because of its earlier actions or conduct. Id.

During the time between the Board's letter of June 14, 1988, allowing Bingham to file a representative compilation of work product, and the date of the hearing,

September **16, 1989,** Bingham proceeded under the assumption that his compilation of work product under Section 1(c), subsection **(2)** was inadequate. In fact, all correspondence from the Board lead Bingham to that conclusion, especially after Bingham requested a clarification of the Board's later October 25, **1988** letter, to which the Board responded by stating "consideration of your client's submitted work product." In reliance upon the Board's actions, Bingham submitted four separate compilations of work product, which, when taken together, comprise a voluminous cornpilation.[16] Additionally, a witness accompanied Bingham to the September **16, 1989** hearing for the exclusive purpose of testifying regarding Bingham's compilation of work product, as well as Bingham submitting an affidavit at the hearing regarding the compilation of work product.[17]

It now appears that, prior to the hearing and prior to at least some of the correspondence to Bingham, the actual determinative issues and the position of the Board on these issues, were well defined and relatively narrow. The actual factual and legal issues to be determined did not concern, as stated in the Board's August **24, 1989** response to Bingham's request for further identification, the sufficiency of the work

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[16] No documents submitted by Bingham in his representative compilation of work product were taken from his tenure as a judicial officer. The Board's November **21, 1989** clarification letter [Appendix **23]** advised that Bingham's work product submission was deemed insufficient due to his inclusion of his time as a judicial officer. This position by the Board is not supported by the work product, and could be construed as an attempt to avoid due process difficulties.

[17] There are no procedures in the rules regarding admission to the bar which permit an applicant to request a more definite statement, to compel definition and clarification of issues through interrogatories or requests for admissions. The purposes of discovery under the Florida Rules of Civil Procedure are to define and narrow issues; such discovery, in the circumstances of this case, is not available to Bingham.

product, the time governing work product, or whether the work product established the academic and legal scholarship of Bingham. The real issues were whether judicial service constitutes the practice of law, and work physically performed while in Florida. Bingham was not given notice of these issues, nor, based upon the Board's communications, could he have reasonably anticipated that the legal and factual issues to be considered were as later identified by the Board at the hearing. Bingham was affirmatively and materially misled by the Board's correspondence, and in direct reliance thereon, Bingham expended a great deal of time, effort and preparation towards only the work product submission. The Board is therefore equitably estopped from disallowing Bingham's admission to the bar based upon Article 111, Section 1(c) subsection (1) of the Rules.

A. The Board's Proceedings Failed to Meet the Requirements of Procedural Due Process Under the Florida and United States Constitutions

Procedural due process requires reasonable notice and a reasonable opportunity to be heard, as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, Section 9, of the Florida Constitution. No federal interest arises except when federal guarantees of due process and equal protection appear to be thwarted by particular admission rules adopted by the state or by the manner in which these rules are applied. Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); In re: Russell, 236 So.2d 767 (Fla. 1970).

Procedural due process requires reasonable notice and a reasonable opportunity to be heard. The actions of the Board in inadequately providing notice regarding any purported

deficiencies under Section 1(c), subsection (1), constitutes a failure to provide reasonable notice and reasonable opportunity to be heard. Thus, Bingham was deprived of a fair opportunity to meet the issues that the Board was considering and the legal position taken by the Board as a basis for its decisions. See, e.g., State ex. rel. Murphy - McDonald Builder's Supply Company v. Parks, 43 So.2d 347 (Fla. 1949); State Department of Transportation v. Plunske, 267 So.2d 337 (Fla. 4th DCA 1972).

B. Reliance by the Board Upon Unidientified Decisions of the Board, Without Providing access to Bingham, Violates Due Process Guarantees.

A secondary due process issue is raised in the Board's use and reliance upon unidentified prior decisions of the Board, or upon unpublished case law promulgated by this court, to support the Board's decision and recommendations regarding Bingham's application. The Board's September 29, 1989 letter stated:

> "in a similar case, the Board observed that the provisions of the above-referenced rule [Article III, Section1(c)] are only applicable to practicing attorneys who engaged in the practice of law outside the State of Florida. Since the decision of the Supreme Court in Florida Board of Bar Examiners in re: Hale, the Board and the court have consistently denied requests for waivers under both Sections 1(b) and 1(c) of Article III of the rules." [Appendix 18].

On October 3, 1989, Bingham filed with the Board a Petition for Clarification of the Board's decision letter of September 29, 1989 [Appendix 20], requesting the "similar case," and further requesting any decisions by either the Board or the Supreme Court regarding the denial of requests for waivers. By letter dated November 21, 1989, the Board referred Bingham to the "similar case," as the decision upon which the Board relied. [Appendix 23]. Florida Board of Bar Examiners re: Woodrow W. Hatcher; No.

70,578 (Florida Supreme Court, 9/28/87), the "similar case," is merely a denial by this Court of Hatcher's Petition for Review, without opinion. In fact, the Hatcher decision is an unpublished and therefore unreported decision, relied upon by the Board without providing notice of same to Bingham until after his hearing before the Board.

In preventing Bingham access to the "controlling law," Bingham has been denied a fair opportunity to fully present his case and to refute the applicability of such ostensible authority to the facts of his application. Cf., Coleman v. Watts, 81 So.2d 650 (Fla. 1955). The application of certain law to a given case is often fact dependent, and, it is common for a rule of law to be applicable to one set of facts, but not to another. Without equal access to the facts of these decisions or cases, the rule of law applied to those facts, and the rationale for the decisions, creates a one-sided proceeding with Bingham placed at a material and prejudical disadvantage. Proceedings before the Board may not be generally viewed as adversarial, but due process and equal protection of the law nonetheless require that Bingham be permitted to participate in the proceedings on a fair and equal footing, as guaranteed by the Florida Constitution and the Fourteenth Amendment to the United States Constitution.

In Florida Board of Bar Examiners re: Woodrow W. Hatcher; No. 70,578 (Florida Supreme Court, 9/28/87), the "similar case" upon which the Board relied in denying Bingham's application for admission to the bar, Hatcher had been a sitting non-lawyer Florida county court judge from 1977 to 1987, in Jackson County, Florida. During Hatcher's tenure as a county court judge, however, he was not a member of the Florida Bar, nor was he a member of *any* other state bar. Further, Hatcher had never been a member of any state bar, nor had Hatcher ever taken any bar examination. In fact, Hatcher had not graduated from *any* law school, whether accredited or not accredited.

Bingham, by contrast, was a member of the California Bar during his entire tenure as a judicial officer, he has been a member of the California Bar since 1971, he sat for and past the California Bar Examination, and he sat for and passed the Florida Bar Examination [with a passing score of 151 on both parts of the examination]. Further, Bingham was a graduate of Pepperdine University School of Law which became accredited by the ABA within two years following Bingham's graduation.

Two additional factors or noteworthy: Bingham was an out-of-state judge, while Hatcher was a sitting judge in Florida, and therefore Hatcher additionally was disqualified under Article 111, Section 1(c), which requires, as the Board has applied to Bingham, the out-of-state "practice of law;" Bingham additionally provided work product for his practice of law subsequent to his tenure as a judicial officer, and Bingham has graduated with an LL.M. degree from the University of Miami, graduating at the summa ~~cum laude~~ level. Thus, in light of these clear distinctions between Hatcher's application and Bingham's application, this court should grant Bingham's application for admission to the Florida.

Proceedings before the Board, and certain matters before this court, are, for obvious reasons, maintained as confidential. Copies of relevant decisions and case law, however, which have been properly redacted to maintain confidentiality [but discussing the controlling facts, legal analysis and rules of law], must be made available to an applicant if due process is to be satisfied. To do otherwise would allow this Board, and not the applicant, access to and knowledge of the relevant law being applied to that applicant.

The Board of Bar Examiners is an arm of the Florida Supreme Court, but proceedings conducted by the Board are closely associated with administrative proceedings under the Florida Administrative Procedures Act. The Administrative Procedures Act clearly

directs that all proceedings conducted by any state agency, board, commission or department for the purpose of adjudicating any party's legal rights, duties, privileges or immunities, must be conducted in a quasi-judicial manner in which the basic requirements of due process are accorded and preserved. Such proceeding contemplates that the party to be affected by the outcome of the proceeding will be given reasonable notice of the hearing, and an opportunity to appear in person or by attorney and to be heard on the issues presented for determination. Deel Motors, Inc. v. Department of Commerce, 252 So.2d 389 (Fla. 1st DCA 1971). The Board's use and reliance upon unidentified prior decisions of the Board, or upon unpublished case law promulgated by this court, denied Bingham a fair opportunity to fully present his case, and denied him an opportunity to be heard on the issues presented for determination.

IV. BINGHAM HAS SUFFICIENTLY DEMONSTRATED THROUGH HIS SUBMISSION OF REPRESENTATIVE WORK PRODUCT THAT HE IS A LAWYER OF HIGH CHARACTER AND ABILITY, WHOSE ACADEMIC AND LEGAL SCHOLARSHIP CONFORM TO APPROVED STANDARDS AND SUM UP TO THE EQUALIVENT OF THAT REQUIRED OF OTHER APPLICANTS, AS REQUIRED BY ARTICLE III, SECTION 1(c)(2).

Bingham, in submitting four separate sets of representative compilation of work product, has adequately demonstrated that he is a lawyer of high character and ability, whose academic and legal scholarship conforms to approved standards, and he has therefore met the requirements of Article III, Section 1(c) subsection (2). The scope of Bingham's work product during the most recent ten years include, but is not limited to, substantive petitions and related documents in administrative proceedings before federal agencies; pleadings, briefs, motions, discovery requests, and a variety of litigation

related documents in cases in federal and Florida State Courts, a majority of which concerns sophisticated and complex legal matters.[18] Additionally, the scope includes research papers produced in the LL.M program, two of which are substantial works in admiralty and international law. **A** majority of this work product was performed while employed as a senior associate attorney with Herrick and **Ross,** and as a legal assistant with Peter Herrick. Herrick testified at the hearing that it is the policy of both Herrick and Ross and Peter Herrick, individually, for all documents, including pleadings, motions, memoranda, and correspondence, to be signed by a partner in the firm. Thus, a large amount of Bingham's work product is under cover of Herrick's signature. [Transcript, P. **23-24].** Herrick testified, however, that Bingham's work product, while reviewed by Herrick or Ms. Ross, is entirely Bingham's work product, with the exception of the partner's signature [Transcript, P. 23]. Further, Herrick testified that Bingham performed exceptional work, and, in fact:

> Some of the work product has been totally original, no precedent cases, starting from scratch, and he's [Bingham] done a superb job and has always been timely on his work product, and his work product has enabled our clients to prevail in many cases because of his efforts."[Transcript, P. 261.

In comparing, under Article III, Section 1(c) subsection (2), whether Bingham's academic and legal scholarship conforms to approved standards and sums up to the equalivent of that required of other applicants, an examination of Bingham's research papers done while in the LL. M. program at the University of Miami School of Law (an ABA accredited law school), provides objective and substantial evidence regarding legal

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18 Bingham's representative compilation of work product did not include his tenure as a judicial officer, as that period of service was prior to his most recent ten years, as required under Section 1(c), subsection (2).

scholarship. These papers, tested against approved ABA Scholastic Standards, show that Bingham's academic and legal scholarship conforms to, and exceeds, the minimum level of confidence required of other applicants who are graduates of ABA accredited law schools.[19] Further objective evidence regarding academic and legal scholarship equal to that required of other applicants is evidenced by Bingham's bar examinations in California and Florida. In California, Bingham sat for and completed the first year law school examination by the California Committee of Bar Examiners, being one of only seven examinees awarded an "A" on this examination.[20] He was thereafter examined by the California Committee of Bar Examiners in August, 1970, passing the California Bar examination on his first effort.[21]

Bingham's success on his first effort at the Florida Bar Examination is both remarkable and reflects his academic and legal scholarship. More than seventeen years after graduation from law school and after his first bar examination, and following a seven year hiatus from the practice of law, Bingham scored 151 on both parts of the examination. Bingham's scores on the Florida Bar Examination, when compared with the statistical information available to the Board and this court, is relevant objective evidence of the strength of Bingham's academic and legal scholarship in comparison to other examinees. To re-enter the field of law after a seven year absence and then, five months after re-entry, to score 151 on the general bar examination, followed by

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19 Bingham's 2.9 GPA on a scale of 3.0 while at University of Miami is at the level of summa cum laude honors in the JD degree program.

20 Approximately 1,400 out of 2,000 passed.

21 Bingham graduated ~~cum~~ l~~aude~~ from Pepperdine University School of Law, 6th in a Class of 51.

graduation with a LL.M. from the University of Miami School of Law at the summa cum laude level, demonstrates academic and legal scholarship credentials of high caliber. Bingham's submitted work product, his academic performance in the LL.M. degree program, and his three bar examination results, individually and cumulatively clearly show he has the academic and legal scholarship required to satisfy Section 1(c) subsection (2), and for admission to the Florida Bar. Bingham has established his ability and capacity to function as a lawyer.

CONCLUSION

For the reasons presented, this court should address the Board's policy decision and recommendation regarding Bingham's application; Bingham's tenure as a California hearing officer, while an active member of the California Bar, constitutes the "practice of law," as that term appears in Article III, Section 1(c)(1), and, further, Bingham's physical presence in Florida while practicing law as a member in good standing of the California Bar, constitutes the "practice of law," as that term appears in Article III, Section 1(c)(1) of the Rules. This court should overrule the Board's decision and recommendation wherein the Board held that it was restricted and unable to exercise discretion under Article III, Section 1(c); the Board, under Klein, Diaz, and Crowne, is indeed clothed with broad discretion, and the Board, and consequently this court, is free to determine whether Bingham's practice constitutes the "practice of law," or, whether Bingham's practice was of such frequency as to justify an exception or waiver to the usual meaning of practice, for the purposes of meeting the requirements of Article III, Section 1(c). This court should further determine that Bingham has met the requirements

General Counsel, Florida Board of **Bar Examiners, 1300 East Park Avenue, Tallahassee, Florida 32399-1750.**

LORENCE JON BIELBY

LJB:bdc/Binghm-11

VERIFICATION OF PETITION

I, FRED P. BINGHAM, II, having been first duly sworn, depose and state that I am the Petitioner in this matter, that I have read the foregoing Petitions and that the facts set forth therein are true to the best of my own knowledge and belief.

Fred P. Bingham II

STATE OF FLORJDA)
) ss:
COUNTY OF DADE)

Before me this day personally appeared FRED P. **BINGHAM, II**, who, being duly sworn, deposes and says that the foregoing is true to the best of his knowledge and belief.

SWORN TO AND SUBSCRIBED before me this 27th day of November, 1989.

Notary Public
State of Florida

NOTARY PUBLIC, STATE OF FLORIDA.
MY COMMISSION EXPIRES: APRIL 23, 1993.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.

My commission expires _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by ~~United States Mail~~/Hand Delivery upon JOHN H. MOORE, Executive Director, Florida Board of Bar Examiners, 1300 East Park Avenue, Tallahassee, Florida 32399-1750, and **THOMAS** A. POBJECKY, General Counsel, Florida Board of Bar Examiners, 1300 East Park Avenue, Tallahassee, Florida 32399-1750, on November 28th, 1989.

LORENCE JON BIELBY