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. **75,075**
Florida Board of Bar Examiners
File **No. 48166**

IONER'S REPLY TO BOARD'S RESPONSE

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IN PROPER PERSON

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PETITIONER'S REPLY TO RESPONSE

Petitioner, Fred Parker Bingham, II [hereinafter "Bingham"], hereby enters this Reply to the Florida Board of Bar Examiner's Response to Petition for Writ of Certiorari and Petition for Review. In reply thereto, Bingham provides the following:

ARGUMENT

A. Tenure as a Full-Time Subordinate Judicial Officer Constitutes the "Practice of Law", or Justifies an Exception to the Usual Meaning of Practice, Under Article 111, Section 1(c), Subsection (1) of the Rules.

The Board continues to assert that tenure as a judicial officer does not constitute the "practice of law," and therefore Bingham has failed to meet the ten year practice of law requirement of Article 111, Section 1(c), subsection I of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar [hereinafter the "Rules"]. The Board's position that a practicing attorney, duly admitted to the Bar of another state, who accepts appointment to judicial office [or is elected] and who honorably discharges the burdens and responsibilities of that office, is not to be credited with his time in service, while other attorneys admitted to the Bar of another state who were not appointed to judicial office, or declined, or otherwise did not provide such public service, are to be credited with an equal amount of time in the "practice of law." Such an inequitable position is a disservice to those who serve as a judicial officer, and unfairly penalizes such judicial officer. Those accepting the burdens and responsibilities of public service after admission to the Bar in such an honored position deserve equal treatment. The Board has provided no rational basis to exclude service as a judge or service as a subordinate judicial officer from consideration by the Board as having engaged in the practice of law for the purposes of Section 1(c)(1). If the intent and desire of the Board, and the purpose of the Rule, 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, then 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) equal to that exercised by an ordinary lawyer.

The only previous "decisions" relied upon by the Board in support of its position are Florida Board of Bar Examiners re: Woodrow W. Hatcher, No. 70,578 (Fla. Sept. 28, 1987), and Florida Board of Bar Examiners re: Milton, No. 58, 440 (Fla. Dec. 17, 1981), both of which are easily and distinctly distinguishable from Bingham's application. Hatcher's Petition was denied in an Order by this Court without opinion. While the Order denying Hatcher's Petition left standing the decision of the Board, the case does not constitute authoritative precedent on the issue of whether or not judicial service constitutes the practice of law. Hatcher was a Florida county court judge who had never graduated from any law school, and who had never been admitted to the Bar in any jurisdiction. He sought admission to The Florida Bar under Article 111, Section 1(c), solely upon his ten years of service as a nonlawyer Florida county court judge. Hatcher had never taken any Bar examination nor had he graduated from any law school, whether accredited or not accredited.

Bingham, however, was a member of the California Bar during his entire tenure as a judicial officer, has been a member of the California Bar almost continuously since 1971, has sat for and passed both the California Bar examination and the Florida Bar examination, and has not only graduated from Pepperdine University School of Law cum laude, but also from the University of Miami in an LLM degree program at the summa cum laude level.

By the Board's own admission in its Response, the Milton decision involved a sitting Florida county court judge who "wished to submit a work product in lieu of the law school requirement." Milton had not attended any law school, and wanted to utilize his work

product as a county court judge to satisfy the law school requirement. Bingham, by contrast, has not only graduated from law school, from a graduate law program at University of Miami, and taken two (2) Bar examinations, but seeks to properly have his tenure as a judicial officer qualify as the "practice of law." Bingham has additionally, separate and apart from his tenure as a judicial officer, provided voluminous work product to the Board to evidence his legal ability, character and fitness.

In sum, the Board has provided no rational basis nor legal precedent to preclude Bingham's tenure as a judicial officer from consideration by the Board as the practice of law. As such, the Board's decision is an abuse of its discretion and must be reversed.

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 has now receded from its previous position that it did not have discretion in considering tenure as a judicial officer in applying the ten year practice of law requirement under Section 1(c) subsection (1) of the Rules. The Board now takes the position that it has properly exercised its discretion in determining that judicial service does not qualify as the practice of law. Bingham assumes, therefore, that the Board has also accepted argument presented in Bingham's initial Petition that In Re: Crowne, 276 So.2d 477 (Fla. 1973), cert. denied, 414 U.S. 1000 (1973) ["...the Rule is detailed and clothes the Board with broad discretion in evaluating applicants seeking admission thereunder." Id. at 478] and Petition of Klein, 259 So.2d 144 (Fla. 1972) ["the Board may ...determine if these ...experiences either constitute practice, or occur with a frequency sufficient to justify an exception to the usual meaning of practice." Id. at 1451, such that certain flexibility is afforded the Board in applying the requirements of Section 1(c) subsection (1). Thus, Bingham submits that the Board's determination that

judicial service does not quality as the practice of law was and continues to be an abuse of discretion.

The Klein court stated that "...demonstration of practice [is] a relatively flexible requirement. It is not designed to thwart an application, but rather to establish assurance of an applicant's ability and capacity to function as a lawyer." Petition of Klein, 259 So.2d 144, 145 (Fla. 1972), citing Diaz v. Florida Board of Bar Examiners, 252 So.2d 366 (Fla. 1971). The intent and purpose of Section 1(c) is not to preclude qualified applicants from admission to the Bar but, instead, is to include qualified applicants. Due to the Board having presented no rational basis for precluding those who have served as a judicial officer, the Board, in exercising its discretion, has chosen to denigrade judicial service, and place such service in a category "beneath" a lawyer not serving the public. Judicial office is generally considered to be an honor and a significant advancement in one's profession, and not a decision for which he should later be penalized.

The Board also relies upon the Florida Code of Judicial Conduct and the Florida Constitution as authority supporting the notion that judicial service is not the practice of law, and thereby no matter how exemplary the applicant, the Board's discretion would be properly exercised in denying the applicant's admission to the Florida Bar. Both the Florida Code of Judicial Conduct and Article V, Section 13 of the Florida Constitution, however, are clearly intended to prevent conflicts of interest and to prevent judges from using their status as a judge to gain inappropriate or unfair advantage by representing private parties and acting as an advocate for a client. Thus, "a judge should not practice law" [Canon 5F of the Florida Code of Judicial Conduct], and "they shall not engage in the practice of law or hold office in any political party" [Article V, Section 13, of the Florida Constitution]. The Board then concludes that service as a judge is separate and apart from the practice of law, and therefore the Board chooses not to consider service as a judge as the practice of law.

If the Board is indeed accepting its own discretion in this and similar matters, then the Board must also accept that Article 111, Section 1(c) of the rules 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. 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. The Board, therefore, is authorized to determine whether Bingham's judicial experience constituted the practice of law; the Board has decided that judicial experience does not constitute the practice of law as an across the board application, without assessing each individual case.

The Board's position, when considered on a case-by-case method, may be valid in denying an applicant where the applicant relies only upon his previous ten years service as a judge, and is unable to provide any other evidence of his ability and capacity to function as a lawyer. If, for example, the applicant was admitted to the bar of another state, and immediately thereafter appointed to the bench, and then served in excess of ten years as a judge. Upon moving to Florida, if the judge applies to the Florida Bar, the Florida Board of Bar Examiners may properly consider the applicant as never having "practiced law." On the contrary, however, Bingham was engaged in the private practice of law, both before his tenure as a judicial officer and following his tenure as a judicial officer. In point of fact, Bingham's private practice experience encompasses approximately three years preceding his experience as a judicial officer and approximately three years [up to the date of the hearing before the Board] following his experience as a judicial officer. The entirety of Bingham's submitted work product to

the Board was comprised of work product from his most recent three years of practice.[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.

Pursuant to the Board's proposed amendment to Article III, Section 1(c) of the rules, filed with this Court on February 21, 1990, further argument by Bingham may be moot. The amendment would allow an applicant to qualify under the ten years of practice provision if he practiced law in any foreign jurisdiction regardless of the location of the applicant's residence [i.e., practice "within" the jurisdiction, whether in Florida or not]. As such, it appears the Board has receded from its previous position, and Bingham provides no additional argument at this time, other than to request for the proposed amendment to be accepted by this Court, and that the amendment be applied in both the Florida Board of Bar Examiners re: Richard A. Culbertson, No. 74,837 (Fla. Jan. 22, 1990), but also to Bingham in his application herein [and accepted by the Board on page 11 of its response: "Bingham could then rely upon his practice in Florida since 1987"].

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1 Bingham submitted voluminous representative compilation of work product, none of which included any work product from his tenure as a judicial officer, as that period of service was prior to his most recent ten years. The Board incorrectly, or inaccurately "found" that his "representative compilation of work product was insufficient to meet the requirements of subsection (2) of that rule since a significant portion of his compilation invoked employment as a judicial officer which the Board does not deem to be the practice of law." [November 21, 1989 Board letter, Appendix 23 to Petition, emphasis added]

California juvenile court records, as in Florida, are by law confidential and available only to the minor, the minor's counsel, and the court. Bingham, therefore, does not have legal access to the juvenile records, and due to the confidential nature of the records, Bingham feels it would be improper to violate confidentiality for his own personal gain or use.

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

The Board suggests in its response that Bingham could "elect" to comply with Article 111, Section 1(b) by obtaining a Bachelor of Laws or Doctor of Jurisprudence from a full-time accredited law school. Further, the Board provides inappropriate argument regarding Bingham's having "elected" to graduate from an unaccredited law school, and "electing" to leave the private practice of law to become a full-time California juvenile traffic hearing officer, and Bingham having "elected" to disassociate himself from the field of law during the period of 1980-1987, and finally, Bingham having "elected" to become employed in Florida as a legal assistant when he could have practiced law as an attorney in California.

Bingham accepts responsibility for each twist and turn down life's road, just as each of us accepts where we are and who we are. The issue here is the proper construction or application of a rule, not Bingham's acceptance of responsibility for career choices made long ago. The Board's assertion of Bingham refusing to accept responsibility implies wrongful conduct on the part of Bingham, and something for which he must admit responsibility. Bingham unequivocably denies any wrongful conduct. Bingham attended Pepperdine University School of Law where he received a quality legal education, and where he graduated cum laude, following which he successfully passed his first California general bar examination, was admitted to the California Bar and, 17 years later, passed his first Florida general bar examination. Bingham accepted the responsibility of judicial office in California and honorably accepted the burdens of public service, including the relative low pay compared to practicing attorneys as well as a heavy caseload. Bingham honorably discharged the responsibilities of his office, and accepts the consequences of that tenure.

11. 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 111, Section 1(c).

In Bingham's initial petition, extensive argument is presented that this Court's decision in In re: Hale, 433 So.2d 969 (Fla. 1983), does not preclude the Board from granting a waiver of the requirements of Article 111, Section 1(c). Bingham's position has been and is that the Hale decision applies only to the requirements of Section 1(a) and Section 1(b), and that the Board has broad discretion regarding 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. Implementation of Section 1(c) by the Board, therefore, requires flexibility.

The Board, however, contends that due to its position that judicial service does not fall within the purview of the "practice of law," the Board should therefore adhere to its position in a consistent fashion, as opposed to an ad-hoc approach.

Perhaps the Board finds the word "waiver" to be unacceptable, and is fearful that such a characterization would lead to the appearance of unfairness and discrimination. Due to the requirements of Section 1(c), however, such that the Board must determine whether the applicant is a lawyer of high character and ability, whose professional and legal scholarship conform to approved standards, and further due to the flexibility afforded the Board by this Court through its decisions in Klein, Crowne, and Diaz, it is incumbent upon the Board to examine each application on its own merits, as opposed to an across the board denial if that person served as a judicial officer. Here, Bingham's application, when taken as a whole, affords the Board with ample evidence regarding

Bingham's ability and competency separate and apart from his tenure as a judicial officer.[2]

In reply to the Board's argument that the "practice of law" requirement under Section 1(c) must be applied in a consistent fashion, as opposed to an ad-hoc approach, permitting the inclusion of a period of judicial service, either as the "practice of law" or as an exception to its usual meaning [whatever that may be], in meeting the ten year requirement, does not require an ad-hoc approach which would appear discriminatory. Service as a judicial officer is susceptible to precise and certain definition, unlike the term or phrase "practice of law". [See, argument presented in Bingham's initial petition]. Judicial service could easily be defined as service as a judicial officer in a court of record in either State or Federal Court, and thereby credit for the time of service could be easily computed. No justification or basis has been presented by the Board to prevent clearly defined judicial service as being included within the ten year requirement.

Flexibility is mandated, and an exception or "waiver" being granted in this case by the Board is proper given the Board's authority to grant such an exception is provided under Klein, Diaz and Crowne.

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2 Bingham's application is distinguishable from Hatcher, Milton, and any other reported decision involving tenure as a judicial officer, in that Bingham has taken and passed both the California and the Florida Bar examinations, graduated from an accredited law school in an L1M. degree program over and above his J.D. degree, has been engaged in private practice both before and after his judicial tenure, and has compiled examples of work product in numerous jurisdictions outside the state in which he is licensed. [Federal courts throughout the eastern United States and California.]

III. The Board is Equitably Estopped from Deciding and Recommending that Bingham has Not Met the Requirements of Article 111, Section 1(c), Subsection (1) of the Rules.

Bingham reasserts and re-adopts his arguments presented in the initial petition and provides no additional argument at this time.

A. The Board's Proceedings Failed to Meet the Requirements of Procedural Due Process.

Bingham re-asserts and re-adopts his arguments presented in the initial petition and provides no additional argument at this time.

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

Bingham re-asserts and re-adopts his arguments presented in the initial petition and provides no additional argument at this time.

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 Conforms to Approved Standards and Sums up to the Equivalent to that Required of Other Applicants, as Required by Article 111, Section 1(c), Subsection **(2).**

Bingham re-asserts and re-adopts all argument presented in the initial petition, and provides no additional argument at this time.

CONCLUSION

Tenure as a judicial officer must not be considered a handicap when such judicial officer from another state applies to the Florida Bar. Such a policy decision by the Florida Board of Bar Examiners unduly and inappropriately penalizes judicial officers and discriminates against them. This Court is requested to address the Florida Board of Bar Examiners' policy decision and recommendation regarding Bingham's application, to determine that Bingham has met the requirements for admission, and to certify him as having met all the requirements for admission to the Florida Bar.

WHEREFORE, Petitioner, FRED PARKER BINGHAM, 11, respectfully requests for this petition to be granted, for his application for admission to the Florida Bar be accepted, and that he be admitted to the Florida Bar.

Respectfully submitted,

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In Proper Person

CERTIFIC OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail/~~Hand Delivery~~ this 16th day of MARCH, 1990 to 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.

LORENCE JON BIELBY

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