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IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

MAY 20 1991

CLERK, SUPREME COURT

By DA
Chief Deputy Clerk

FLORIDA BOARD OF BAR EXAMINERS)
RE: Interpretation of Article)
I, Section 14.d. of the)
Rules of the Supreme Court)
Relating to Admission to)
the Bar)

Case No. _____

PETITION FOR EMERGENCY RELIEF

The Florida Board of Bar Examiners, by and through its undersigned attorney, petitions the Court for an expedited order setting forth the Court's interpretation of Article I, Section 14.d. of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar (hereinafter referred to as the "Rules"). In support of its petition for this emergency relief, the Board would show:

1. Gary Michael Bougere was admitted to The Florida Bar on December 22, 1989 pursuant to the recommendation of the Board.

2. Prior to his admission, Bougere appeared before a division of the Board for an investigative hearing held November 17, 1989 as authorized by Article III, Section 3.a. of the Rules. Following a review of additional items received from Bougere after his investigative hearing, the Board recommended his admission to this Court on December 18, 1989. The Board never voted to file Specifications against Bougere and, therefore, a formal, adjudicatory hearing was never held.

3. Subsequent to his admission, Bougere filed suit in federal district court in Louisiana against the City of Harahan, Louisiana and several individuals for defamation. Bougere

alleges that the defendants defamed him by providing the Board with false charges of misconduct.

4. On March 20, 1990, the Board was served with a subpoena issued upon application of Bougere in connection with his federal suit in Louisiana. The subpoena commanded the Board to produce in part all documents and information supplied by any person or entity which caused the Board to request Bougere's appearance for an investigative hearing.

5. In response to the aforementioned subpoena, the Board filed a motion for a protective order and a motion to quash the subpoena in the United States District Court for the Northern District of Florida. The Board's motions were initially granted by the federal district court "without prejudice to plaintiff's right to seek another more particularized subpoena upon a clear showing of need."

6. In response to Bougere's motion for reconsideration of the federal district court's order, a Report and Recommendation was issued by the U.S. Magistrate. A copy of the magistrate's Report and Recommendation is attached as Exhibit "A." In his report, the magistrate focused upon Article I, Section 14.d. of the Rules and especially the following phrase: "...copies of any documents or exhibits tendered to the Board at an investigative or formal hearing before the Board and the transcript of such hearings." Based upon considerations of fair play, the magistrate found that the above-quoted language authorized disclosure to a bar applicant of "the documents relied upon by the Board" at an investigative hearing.

7. The Board filed a response and objections to the magistrate's report. A copy of the Board's Response and Objections to Report and Recommendation is attached as Exhibit "B."

In its response, the Board advised the federal court that it had provided Bougere with a copy of the transcript of his investigative hearing along with the exhibit offered into the record at such hearing.

In its response, the Board further advised the federal district court that it was the Board who drafted the language of Section 14 and petitioned this Court for inclusion of this new section in the Rules. The Board also stated that it has consistently interpreted the phrase "documents or exhibits tendered to the Board at the investigative or formal hearing" to mean any documents or exhibits offered into the record at such hearing.

In its response, the Board further advised the federal district court of the two step hearing process which must occur before the Board can make an adverse recommendation: the first step, an investigative hearing; and the second step, a formal, adjudicatory hearing held in response to the filing of Specifications. The Board also stated that considerations for fair play are not involved at the investigative hearing since the Board is still exercising an investigative function at that stage. The Board also advised the federal district court that considerations of fair play including confrontation of a bar

applicant's accusers are fully recognized by the Board as to all applicants against whom Specifications have been filed.

In its response, the Board also observed that this Court could have modified the Board's suggested language at the time of adoption of Section 14. if the Court had truly intended for an applicant appearing at an investigative hearing to have access to any documents or exhibits relied upon by the Board in conducting such investigative hearing.

8. By order dated May 7, 1991, the federal district court rejected the Board's objections and adopted the magistrate's report. A copy of the court's order is attached as Exhibit "C." The order of the federal district court included the following interpretation of this Court's rule provision:

The magistrate judge did not confine the scope of disclosure to items formally introduced or admitted into the record. Indeed, neither did the Florida Supreme Court. The supreme court made provision for disclosure of documents or exhibits "tendered to the Board" at a hearing, either formal or investigative. This court concludes that the supreme court's language encompasses any documents or exhibits which are before the Board and which are used by the Board at, or as a basis for, an investigative hearing.

9. The Board respectfully disagrees with the order of the federal district court. The federal district court's order requires disclosure of the character and fitness report prepared by the Board's staff and relied upon by Board members at Bougere's investigative hearing. That report contains raw investigative materials including statements from confidential sources. That report also contains the opinions, observations and impressions by the Board's staff and a special investigator

retained by the Board to assist in a particular area of Bougere's background investigation.

10. In conjunction with the filing of this emergency petition, the Board is seeking a rehearing of the order of the federal district court whereby the Board is requesting that the court stay its order pending a decision by this Court in response to this petition. The language of Article I, Section 14.d. of the Rules has not previously been interpreted by this Court.


WHEREFORE, the Board prays for the entry of an order interpreting the phrase "tendered to the Board" as contained in Article I, Section 14.d. of the Rules.

DATED this 20th day of May, 1991.

Respectfully submitted,

FLORIDA BOARD OF BAR EXAMINERS
WAYNE THOMAS, CHAIRMAN

John H. Moore
Executive Director

By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition has been served by U.S. Mail this 20th day of May 1991 to Regal L. Bisso, Esquire, Hulse, Nelson & Wanek, Attorney for Plaintiff Bougere, 610 Baronne Street, New Orleans, Louisiana 70113 and by hand delivery to C. Graham Carothers, Attorney for the Board, Post Office Box 391, Washington Square Building, Tallahassee, Florida 32302.


Thomas A. Pobjecky