IN THE SUPREME COURT OF FLORIDA

RE: AMENDMENTS TO RULES OF THE SUPREME COURT OF FLORIDA RELATING TO ADMISSIONS TO THE BAR

Case No. 89,187

COMMENTS ON PROPOSED RULES

Gerald T. Bennett, Florida Bar #098982, a twenty-nine year member of The Florida Bar, files the following comments to the Rules of Admission to The Florida Bar as promulgated in The Florida Bar News of November 15, 1996.

The rules proposed by the Board of Bar Examiners raise two areas of difficulty with regard to decisions of the Board regarding character and fitness and appeals from those decisions to the Supreme Court. First, the proposals are deficient in failing to provide even the most rudimentary of due process protections to the applicant. Second, the proposals are deficient in that they fail to provide to this court a sufficient record on which to base its review of the action of the Board. The result of the first of these deficiencies has in the past and, under the proposals, will continue in the future to give the Board a reputation with many members of the Bar and with most law students to be, in effect, a Star Chamber proceeding, one in which the rights of the accused applicant are nonexistent. While the fear engendered by this kind of one-sided process may be salutary in that it fosters applicant disclosure of even the most minute peccadillos, it gives a reputation for unfairness to the Board, the Bar and the entire system of attorney admission and regulation.

A. Proposed rules 3-23 and 3-23.1: The Formal Hearing

1. "Confidential" evidence: The major deficiency of the proposals is that they do not limit the evidence that the Board may consider in determining the fitness of the applicant to that evidence produced by the Board at the Formal Hearing. The question is whether the Board may consider only evidence that is produced publicly at the hearing and thereby made a part of the record, or whether the Board may consider other, "confidential," evidence. Obviously, the consideration of evidence not made known to the accused, and therefore evidence which the accused cannot contest is, quite simply, unfair.

In the case of Richard Bach (this court's case #77,370), "confidential" evidence was considered by the Board, although the proceeding involved was not a formal hearing on the applicant's character. The issue was the adequacy of the applicant's undergraduate institution as one equivalent to an institution regionally accredited. The Board obtained an evaluation of the applicant's credentials by someone unnamed upon which they relied. The applicant was informed that the evidence existed and was given the conclusion reached, but was never permitted to examine the evidence itself in any way. The evaluation substance was never disclosed to the applicant, nor, to the applicant's knowledge, was it even disclosed to this Court on the applicant's subsequent petition for redress. As will be

mentioned later, such a process also vitiates the ability of this Court to review adequately the Board's decision. Indeed, in that case, the Board also received evidence which had been presented to the Board in a prior case (an evaluation by the same evaluator of a prior candidate for admission to the Bar), one in which the applicant had not been in any way involved. The applicant was informed only of one paragraph of that evaluation and that only upon appeal to this Court. That kind of process is not fair.

2. Notice: Although the rules provide for the filing of "Specifications," defined as "a formal charging document," there is no statement of what the "Specifications" should contain, not even that there be a plain statement of the charges of deficiency of character and fitness. Ironically, the "Specifications" provision contains no requirement that the "Specifications" be specific.

3. Disclosure: There is no provision for prehearing discovery of any kind by either the applicant or the Board. The difficulty here, of course, is to attempt to keep the proceedings relatively free of unnecessary delaying procedures while at the same time being fair to both parties. Under this rule, however, with no disclosure of any kind prior to the hearing, the applicant is operating at an intense disadvantage. The applicant does not know what specific charges he or she is to meet, nor does the applicant have any idea of what material will be received by the Board against him or her.

4. Right to be heard and to present evidence: There is no provision in the rule giving the applicant either the right to be heard or the right to present evidence. There is no indication of the kind of evidence that may be considered by the Board, other than the statement that rules of evidence will not apply. At the least, the rules should provide that the applicant has the right to be heard at the hearing, either in person or through counsel, and that the applicant should have the right to present evidence. These rights may be presumed and they may in practice exist, but they should be formally included to insure the appearance as well as the actuality of fairness.

5. Right to Counsel: Already mentioned in paragraph 3, above, the rules do not provide that the applicant should have the right to be represented at the formal hearing through counsel.

6. Fee for hearing: Once "Specifications" are filed, the applicant must pay a fee of $300.00. There may be some provision for refund of this fee if the "Specifications" are found unsubstantiated, but, if so, I did not find it. Certainly, if the applicant is required to go through such a hearing and the "Specifications" are not shown to be true, the applicant should not be penalized for someone else's wrongful action.

B. Proposed Rule 3-40: Appeal from a decision of the Board

1. Transcript of proceedings and applicability of Rules of Appellate Procedure:

The problem with this rule is that of adequacy of the record on appeal. It relates back to the paragraph 1 of Section A, above. If the applicant is given the right and the opportunity to present his or her case fully to the Board, and if the record of the hearing contains <u>all</u> of the evidence considered by the Board, then it will be sufficient for the court to review the case.

a. If the Board considers any evidence other than that submitted at the formal hearing, then one of two things will have to occur:

1) The record before this Court on review will be necessarily inadequate, since it will not give this Court the information considered by the Board.

2) The Board will send the "confidential" material to this Court, and will not disclose it to the applicant. In that situation, the applicant is again placed in the position of being required to defend, in this Court, against evidence of which the applicant is unaware.

b. If the applicant has discovered the evidence against him or her only at the formal hearing, and is unable to contest it at that hearing, then either the applicant must forgo the opportunity to contest evidence that may be incorrect, or must concoct some way in which to initially contest that evidence in this Court. Either way, the system is deficient.

CONCLUSION

The proposed rules should contain the following to avoid both the appearance and, more important, the actuality of unfairness:

1. The rules should provide that only evidence produced at the formal hearing may be considered by the Board in rendering its decision. This provision is most important both for the fairness of the hearing itself and for later appellate review of the Board's decision.

2. The rules should provide for pre-hearing disclosure of the evidence to be considered by the Board at the formal hearing. They should also provide that the applicant disclose thereafter evidence that the applicant wishes to introduce at the hearing.

3. The rules should provide that the applicant have the right to appear, the right to present evidence, the right to be represented by counsel.

4. An applicant who is "acquitted" of the charges against him or her should not be assessed the $300.00 fee.

Respectfully submitted,

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