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FILED

Florida Board of Bar)
Examiners re Amendment)
of Rules of the Supreme)
Court of Florida Relating)
to Admissions to the Bar)

Case No. 89,187 SID J. WHITE

FEB 24 1997

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

REPLY TO COMMENTS OF GERALD T. BENNETT

The Florida Board of Bar Examiners, by and through its undersigned attorney, replies to the Comments on Proposed Rules of Gerald T. Bennett and states:

In his comments, Professor Bennett expresses his concern about the Board's failure to provide for procedural rights and due process to applicants appearing for formal hearings. Specifically, Professor Bennett would like the proposed rules to contain the following provisions:

1. Only evidence produced at the formal hearing may be considered by the Board in rendering its decision.
2. Evidence to be considered by the Board at the formal hearing must be disclosed prior to the hearing.
3. Applicants must be granted the rights to appear, to present evidence and to be represented by counsel.
4. The administrative hearing fee should be refunded to applicants who are acquitted of the charges.

As the Court knows, the Board does provide an applicant with all of the procedural safeguards requested by Professor Bennett in items 1, 2 and 3 listed above. In a 1991 opinion, the Court identified those specific safeguards:

There is a two-step hearing process that must occur before the board can make an adverse recommendation. The first step is an investigative hearing, and the second step is a

formal adjudicatory hearing held in response to the filing of specifications. Considerations of fair play are not involved in the investigative hearing because the board is still exercising an investigative function at that stage. The board cannot recommend that an applicant's admission be denied following just an appearance at an investigative hearing. Such a recommendation can only be based on record evidence produced at a formal adversary hearing held in response to the filing of specifications. At this point, an applicant is entitled to a formal hearing before the board, representation by counsel, cross-examination of witnesses, presentation of witnesses and evidence on the applicant's behalf, access to the board's subpoena powers, timely release of witness and exhibit lists by the board attorney, disclosure to the applicant of any exculpatory information in the board's possession, and disclosure of any prior statement of the individual appearing on the board's witness list.

Florida Board of Bar Examiners re Article I, 581 So.2d 895, 897 (Fla. 1991). See also Pobjecky, "The Demands of Due Process in Bar Admissions Proceedings," 65 *The Bar Examiner* 43 (February 1996).

Furthermore, every set of specifications served upon a bar applicant includes an attachment titled "PROCEDURES FOR FORMAL HEARINGS BEFORE THE FLORIDA BOARD OF BAR EXAMINERS." A copy of that four page set of procedures is attached to this reply. Such procedures describe in detail the rights of a bar applicant when appearing before the Board for a formal hearing. Such procedures also affirm that "[t]he Board's findings shall be based solely upon the record made at the formal hearing." (Attached Procedures at page 4, paragraph 4). The presiding officer at a formal hearing also announces to the parties that the issues drawn under the pleadings will be decided solely upon the record made at the formal hearing. See also *Coleman v. Watts*, 81 So.2d 650, 655 (Fla. 1955) ("[I]t is incumbent upon the Board to sustain its ruling by record evidence....").

In that Professor Bennett does not practice before the Board, it is understandable that he is unfamiliar with the case law and Board's practice of providing applicants with a detailed set of formal hearing procedures. Although the Board is unaware of any problems in this area, the Board will consider at its next policy session whether a listing of or a reference to its formal hearing procedures should be incorporated into the Court's Rules of Admission to The Florida Bar.

As to Professor Bennett's last comment, the administrative fee for a formal hearing was approved by the Court in 1996. *Florida Board of Bar Examiners re Amendments*, 676 So.2d 372 (Fla. 1996). Such fee represents only a portion of the actual cost associated with conducting a formal hearing. Such fee is part of the Board's ongoing effort to apportion more fairly the Board's increased costs among those applicants whose background investigations have prompted such costs.

Even where an applicant was admitted after a formal hearing due to mitigating circumstances or rehabilitation, a formal hearing was still necessary. In such case, the applicant must produce satisfactory evidence of his or her character and fitness in light of allegations of misconduct or unfitness revealed during the Board's background investigation. Fla. Bar Admiss. R., art. III, sec. 2.a.

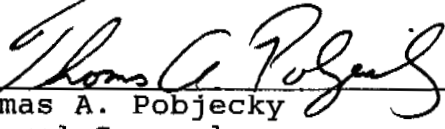
WHEREFORE, the Board respectfully requests the entry of an order amending, confirming and adopting all of the amendments to the Rules as reproduced in the Appendix to the Board's petition dated October 23, 1996.

DATED this 21st day of February, 1997.

Respectfully submitted,


FLORIDA BOARD OF BAR EXAMINERS
LEIGHTON D. YATES, JR., CHAIR

Kathryn E. Ressel
Executive Director

By: 
Thomas A. Pobjecky
General Counsel
Florida Board of Bar Examiners
1891 Eider Court
Tallahassee, FL 32399-1750
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply has been served by U.S. Mail this 21st day of February 1997 to Gerald T. Bennett, Esquire, Holland Law Center, University of Florida, College of Law, Gainesville, Florida 32611.


Thomas A. Pobjecky

Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

TIPPIN-MOORE BUILDING
1891 EIDER COURT
TALLAHASSEE, FLORIDA 32380-1750



Kathryn E. Ressel
Executive Director

PROCEDURES FOR FORMAL HEARINGS BEFORE THE FLORIDA BOARD OF BAR EXAMINERS

Designation as Applicant/Student Registrant:

Where ever in these procedures the term "Applicant" is used, the term "Student Registrant" may be substituted in the appropriate case.

Representation by Counsel:

1. The Applicant has the right to be represented by counsel. Board policy prohibits certain attorneys as outlined below from representing applicants before the Board. "Member" shall include Board Members Emeritus as provided by Article I, Section 1.c. of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar (hereinafter designated as the "Rules"):

- a. Members, former members, employees or former employees of the Board may not represent any applicant in proceedings before the Board until at least three years after becoming disassociated with the Board.
- b. Partners, associates or shareholders of any Board or Emeritus member's law firm may not represent any applicant in proceedings before the Board.
- c. Former members of the Supreme Court of Florida may not represent any applicant in proceedings before the Board until at least two years after becoming disassociated with the Court.
- d. Current members of The Florida Bar Board of Governors may not represent any applicant in proceedings before the Board.
- e. Florida Bar members who have performed services for the Board such as special counsel in hearing proceedings, lobbying, etc., may not represent any applicant in proceedings before the Board until at least three years after completion of the last project for the Board.

2. Direct or cross-examination of any witness at a formal hearing or a deposition may be conducted personally by the applicant or such examination may be conducted by counsel for the applicant. However, only one individual may question a witness on behalf of the applicant.

Answer to the Specifications:

1. Upon the filing of Specifications by counsel for the Board, the Applicant must file an original and seven copies of an Answer to the Specifications within twenty days from receipt of the Specifications or within such extension of that period as may be allowed by the Board. Failure to file an Answer within the required time will result in the Specifications being deemed admitted, and the Board shall enter findings of fact that the Specifications are proven, and appropriate conclusions of law, which may include a recommendation that the Applicant not be admitted to The Florida Bar.

2. The Answer must either admit or deny in whole or in part the allegations of each Specification. All allegations contained in the Specifications shall be deemed to be admitted unless specifically denied in the Answer.

3. The Answer must be signed and sworn to by the Applicant personally. If the Applicant has counsel, the counsel must likewise sign the Answer, giving counsel's name, address and telephone number.

4. If affirmative defenses to the Specifications are alleged, including rehabilitation pursuant to the provisions of Article III, Section 4.e. of the Rules, the general nature of the evidence intended to be presented in support of the defense must be set forth.

Exchange of Witness and Exhibit Lists:

1. The General Counsel shall disclose a list of witnesses, if any, who may be called to testify and a list of the exhibits to be offered into evidence at the formal hearing. This Witness and Exhibit List shall be furnished to the Applicant after receipt of the Answer to the Specifications. Evidence which may be offered in rebuttal of the Applicant's evidence need not be disclosed.

2. The following documents shall automatically be received into evidence as General Counsel's Exhibits as part of the record of the formal hearing:
 - a. Specifications;
 - b. Answer to the Specifications;
 - c. Application for Admission to The Florida Bar and Amendments thereto filed by the Applicant;
 - d. Transcript of the Applicant's investigative hearing;
 - e. The record of any prior proceeding held before the Board pursuant to Article III, Section 3.a.; Article II, Section 5; or Article III, Section 4.d. of the Rules.
3. The General Counsel shall disclose any prior sworn statement in the Board's possession of any person whose name is listed on the General Counsel's Witness List. "Sworn statement" means a written statement executed under oath or a recorded statement or testimony offered under oath.
4. The General Counsel shall disclose any exculpatory evidence within the Board's possession. "Exculpatory evidence" is defined as any evidence which tends to negate the Applicant's culpability as to the specific allegations set forth in the Specifications.
5. Within fifteen days of receipt of the General Counsel's Witness and Exhibit List, the Applicant shall submit to the Executive Director a list of witnesses who may be called to testify at the formal hearing (either by way of live testimony or deposition) and a list of the exhibits the Applicant intends to offer.
6. Parties are under a continuing duty to disclose promptly any supplemental exhibits which the party intends to offer into evidence at the formal hearing and to provide notice of any additional witnesses who may testify at the formal hearing. The Witness and Exhibit Lists may be supplemented by filing additional lists not less than twenty days prior to the formal hearing. Exhibits not timely filed with the Board shall be admitted at the formal hearing only upon a showing of good cause.
7. All written documents to be entered as exhibits should be on letter size paper (8.5" x 11"). No exhibits should exceed 8.5" x 14" in size.
8. A copy or inspection of any exhibit will be made available to the opposing party upon request. The Board reserves the right to charge reasonable costs for providing copies of exhibits.
9. The Board's staff shall pre-mark for identification all filed exhibits in the numerical order indicated by the respective parties.

Filing of Objections:

1. Written objections to the admissibility of documents shall be filed with the Executive Director and served upon the opposing party within ten days of receipt of the notice of such documents. Within ten days of receipt of a written objection, the opposing party may file with the Executive Director and serve upon the objecting party a written response to the objection.
2. Within three days of receipt of the response to an objection, the Executive Director shall forward to the Board's Chair or the Chair's designee copies of such documents and written objection thereto along with any written response and the Chair or designee shall rule on the admissibility of such documents and promptly communicate the ruling to the parties.
3. The ruling by the Chair or designee shall be subject to review by the Board at the formal hearing upon oral motion by either party or upon request by any member of the Board.

Request for the Issuance of Subpoenas:

1. The Board will cause subpoenas to be issued for such witnesses or the production of such documents located within the State of Florida as the Applicant in good faith and for good cause requests.
2. If the Applicant desires the issuance of a subpoena, the Applicant must make written application to the Executive Director. The application must include a brief statement of the reasons, including the substance of the testimony and/or document, for requiring the subpoena.
3. The Board's Chair or the Chair's designee shall rule upon the sufficiency of the application. The ruling by the Chair or designee shall be subject to review by the Board at the formal hearing upon oral motion by either party or upon request by any member of the Board.

Depositions:

1. The deposition (including video deposition) taken of any witness with adequate notice to the other party or the transcript of testimony of any person other than the Applicant given under oath at the investigative hearing may be used by either party for any lawful purpose at a formal hearing.
2. Such deposition or transcript of testimony or any part thereof may be published by the party offering the deposition or transcript of testimony at the formal hearing; provided, however, that if only a part of a deposition or transcript of testimony is published by a party, the adverse party may publish any other part that in fairness ought to be considered with the part introduced.
3. Objections to the competency of a witness or to the competency, relevancy or materiality of testimony taken by deposition are not waived by failure to make them before or during the taking of the deposition unless the grounds for the objection might have been obviated or removed if presented at that time.
4. Errors and/or irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation or in the conduct of parties and errors of any kind that might be obviated, removed or cured if promptly presented are waived unless timely objection to them is made at the taking of the deposition.
5. At any time during the taking of a deposition, on motion of either party and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, any member of the Board may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

Scheduling and Appearance at the Formal Hearing:

1. Upon receipt of the Answer, the Executive Director shall notify the Applicant of the dates and locations available for the formal hearing and will attempt to reach an agreement with the Applicant on the date and location for the formal hearing.
2. Written requests for a hearing date must be accompanied by \$300.00 administrative cost pursuant to Article V, Section 17 of the Rules.
3. If the Applicant and the Executive Director are unable to agree on the date and location for the formal hearing, the Executive Director shall set the date and location for the formal hearing.
4. Postponement of a previously scheduled formal hearing shall be for good cause only and shall be subject to the fees as specified under Article V, Section 19 of the Rules.
5. If the Applicant fails to attend the formal hearing without good cause, the Specifications shall be deemed admitted and the Board will enter Findings of Fact and Conclusions of Law on that basis, which may include a recommendation that the Applicant not be admitted to The Florida Bar.

Formal Hearing Procedures:

1. The provisions of Article III, Section 3 of the Rules shall apply. The technical rules of evidence do not apply at a formal hearing before the Board.
2. The Applicant may move in writing to disqualify any member(s) of the Board from sitting on such Applicant's formal hearing panel. The written motion to disqualify shall allege the facts relied on to show grounds for disqualification and shall be verified by the applicant. The Chair or the Chair's designee will rule upon the sufficiency of the motion.
3. The Applicant's failure to answer candidly and without evasion any questions propounded by the Board at the formal hearing relating to the Applicant's character, fitness or qualifications may constitute grounds for the Board to withhold its recommendation for admission to The Florida Bar.

4. The Board's findings shall be based solely upon the record made at the formal hearing. The Board will consider in its findings and conclusions the testimony given by the Applicant during the hearing, along with the other evidence received. The weight to be given all testimony and exhibits received in evidence at a formal hearing shall be considered and determined by the Board.

Responsibility for Transcript Costs:

The Board regularly obtains transcripts of formal hearings to assist in the preparation of its Findings of Fact and Conclusions of Law. If a transcript of the formal hearing is required by the Board, the Applicant will be responsible for the cost of such transcript pursuant to the provisions of Article V, Section 30 of the Rules.