IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Case No. 90,527

RE: PATRICIA A'' ASH

_____/

ON APPEAL FROM THE FLORIDA BAR *BOARD* OF GOVERNORS

ANSWER BRIEF OF BOARD OF LEGAL SPECIALIZATION & EDUCATION

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STANDING POLICIES OF THE BOARD OF LEGAL SPECIALIZATION AND EDUCATION CITED:

STATEMENT OF THE CABE AND FACTS

This is an appeal of denial of certification as a "Board Certified Appellate Lawyer." See appellant's Exhibit 22. The denial of Appellate Law Certification was affirmed below by the Certification Plan Appeals Committee (CPAC) of the Board of Governors of The Florida Bar. Appellant's Exhibit 36. The denial of Appellate Law Certification was then affirmed by the Board of Governors of The Florida Bar. Appellant's Exhibit 38. Appellant Ash now seeks review in this Court.

Appellant Ash was denied Appellate Law Certification because of her failure during the application process to disclose a "show cause" order issued May 17, 1993, by the District Court of Appeal, Third District of Florida, in Mark Johnson v. Harry Singletary, et al. (Case No. 93-334). The subject "show cause" order appears as appellant's Exhibit 26.

On December 8, 1993, the initial application of appellant Ash for Appellate Law Certification was received. Question III. F. 4. on that application and appellant's answer, were as follows:

> 4. List and explain all cases in which your competence or conduct was raised as a basis for a relief requested by opposing counsel or by the court including but no (sic) limited to a new trial, new appeal, dismissal or reversal. Enclose a copy of relevant documents in these cases.
>
> N/A

Appellant's Exhibit 2, p. 3.

Question III F. 5. on that application, and appellant's answer, were as follows:

5. List and explain all cases in which your conduct was adversely commented upon in writing by a judge or determined to be error whether harmless or not.

N/A

Appellant's Exhibit 2, p. 3.

The application for Appellate Law Certification submitted by appellant Ash concluded with the following required certification and acknowledgment by all applicants:

> I, _____, being duly sworn, have carefully read the foregoing application and certify the information herein is true. I fully understand failure to make a truthful disclosure of any fact or item of information required may result in the denial of my application, revocation of my Board Certified Appellate Lawyer Certificate if granted, or disciplinary action by The Florida Bar.
>
> _____
> Signature of Applicant

Appellant's Exhibit 2, p. 6.

The undisclosed "show cause" order of the District Court of Appeal, Third District of Florida, issued on May 17, 1993, seven months prior to appellant's above-quoted application answers, provided as follows, in pertinent part:

> Upon review of the State's Response to Petition for Writ of Habeas Corpus served March 25, 1993 by Patricia Ash, it appears to this court that:
>
> (a) The State placed its reliance on Robins V. State, 587 So. 2d 581 (Fla. 1st DCA 1991), without disclosing that Robins was quashed by Robins V. State, 602 So. 2d 1272 (Fla. 1992).
>
> (b) The State failed to disclose decisions of this district which are in

conflict with Robins, even though the First District Robins decision specifically states that conflict exists. 587 So. 2d at 583.

(c) The State failed to discover or disclose that one of the above-mentioned conflicting decisions of this court, State v. Rodriguez, 582 So. 2d 1189 (Fla. 3d DCA 1991), was approved by the Florida Supreme Court in State v. Rodriguez, 602 So. 2d 1270 (Fla. 1992), even though the First District Robins decision discussed Rodriguez and the fact that the Rodriguez certified question was then pending in the Florida Supreme Court. 587 So. 2d at 583.

(d) The State argued that Hall v. State, 517 So. 2d 678 (Fla. 1988), was superseded by section 775.021(4), Fla. Stat. (1991) (amended effective Oct. 1, 1988, by ch. 88-131, Laws of Fla.). A review of the subsequent history of Hall would have disclosed Cleveland v. State, 587 So. 2d 1145 (Fla. 1991), in which the Florida Supreme Court rejected this precise argument and held that Hall is still good law.

(e) The State argued that the controlling version of section 775.021(4) is determined by the date of conviction. The Florida Supreme Court has held that the relevant date is the date of the offense, not the date of the conviction. State v. Smith, 547 So. 2d 613 (Fla. 1989).

Upon consideration of the foregoing it is ordered that:

1. The Response to Petition for Writ of Habeas Corpus is stricken and a new Response shall be filed within 20 days by such counsel as the Attorney General may designate.

2. Patricia Ash shall show cause in writing within 20 days why sanctions should not be imposed on her for the above-mentioned deficiencies in the Response served March 25, 1993.

3. Except for the response required in paragraph 2, any further filing by Patricia Ash in the present case must also be signed by a supervising attorney.

4. The Clerk shall furnish this order to Honorable Robert Butterworth and Richard L. Polin, Esq., in addition to those who previously appeared in this proceeding. BASKIN, FERGUSON and COPE, JJ., concur.

Appellant's Exhibit 26.

Exhibit A to appellant's December, 1993, initial application also required the listing of 25 appellate cases "in reverse chronological order." The second case listed therein by appellant Ash was as follows:

2. Style of Case: Johnson v. Singletary
Case Number: 93-334
Court: Third District Court of Appeal

Approximate Time Preparing and Presenting Appeal: 10 hours
Which Party Did You Represent: State of Florida
Your Role (lead counsel, co-counsel, etc.): lead counsel
Did you present the oral arguments: no argument
Nature of Proceeding (If other than appeal): petition for writ of habeas corpus

Please attach a copy of the opinion if rendered.
Name(s) of Co-Counsel: N/A

Name(s) of Opposing Counsel: pro se

Appellant's Exhibit 2, p. 7.

Appellant did not attach a copy of the May 17, 1993, "show cause" order to her response requesting credit for Johnson v. Singletary as an appeal performed by appellant Ash as "lead counsel." The ultimate opinion of the district court, which appears as Johnson v. Singletary, 625 So. 2d 1251 (Fla. 3d DCA 1993), did not reference or otherwise give notice of the previously issued "show cause" order of May 17, 1993.

In February, 1994, while the initial application of appellant Ash was still under review, she was authorized to take the March, 1994, Appellate Law Certification Examination as an unapproved applicant. Appellant's Exhibits 6 and 7.

Appellant Ash took the March 9, 1994, Appellate Law Certification Examination and was thereafter advised that, although her initial application had been approved, she had failed to achieve a passing grade on the examination for board certification in appellate practice. Appellant's Exhibit 9 and 11. At the time of the referenced initial application "approval," the Appellate Practice Certification Committee was unaware of the undisclosed "show cause" order issued on May 17, 1993.

In August, 1994, appellant Ash filed her new "short form" reapplication which is made available to those applicants who took, and failed, the preceding year's certification examination. Appellant's Exhibit 12. The "short form" reapplication did not include questions III. F. 4. and III. F. 5. as appearing on the initial application, but did again include the certification and acknowledgment as follows:

> I, Patricia Ann Ash, being duly sworn, have carefully read the foregoing application and certify the information herein is true. I fully understand failure to make a truthful disclosure of any fact or item of information required may result in the denial of my application, revocation of my Board Certified Appellate Lawyer Certificate if granted, or disciplinary action by The Florida Bar.
>
> /s/ Patricia Ann Ash
> Signatureof Applicant

Appellant's Exhibit 12, p. 3.

Appellant Ash did not, by answer or attachment, disclose the May 17, 1993, "show cause" order in her August, 1994, short form reapplication. Appellant's Exhibit 12.

By letter of January 19, 1995, prior to the second examination, appellant Ash was given notice that the Appellate Practice Certification Committee recommended, and the Board of Legal Specialization and Education (BLSE) affirmed, that her application be denied on the basis of adverse peer review. Appellant's Exhibit 14. At the time of this advice both the Appellate Practice Certification Committee and BLSE were unaware of the previously undisclosed "show cause" order of May 17, 1993.

By letter dated January 25, 1995, appellant Ash gave notice of her intention to challenge, or appeal, her disqualification on the announced basis of adverse peer review, and requested that she be allowed to sit for the March, 1995, appellate practice certification exam as an "unapproved" applicant. Appellant's Exhibit 15. The request to take the certification examination as an unapproved applicant was granted, Appellant's Exhibits 16 and 16a.

By letter of August 1, 1995, appellant was advised, through counsel, that her application was still under review, but that she had attained a passing score on the 1995 certification examination. Appellant's Exhibit 20.

Thereafter, the Appellate Practice Certification Committee first learned of the previously undisclosed "show cause" order of the District Court of Appeal, Third District of Florida, dated

May 17, 1993. After this discovery, by letter of January 12, 1996, Chairman John Beranek of the Appellate Practice Certification Committee notified appellant Ash, through counsel, that her application for certification was denied on this newly discovered (and previously undisclosed) ground. Appellant's Exhibit No. 22. Chairman Beranek's letter-notice to appellant's counsel was as follows:

> Re: Patricia Ann Ash; Application for Appellate Certification
>
> Dear Mr. Ullman:
>
> The Appellate Certification Committee hereby advises of our denial of the application by Patricia Ann Ash for certification. This decision is based upon our conclusion that the applicant lacks sufficient appellate competence and expertise to warrant certification. Further, Patricia Ann Ash did not disclose all cases in which her competence or conduct was adversely commented upon in writing by a Judge. We call attention to question F-4 and F-5 of the application. Johnson v. Singletary, Case No. 93-00334 in the Third District Court of Appeal has been relied upon by the committee. If you have questions, you may contact me.
>
> Sincerely,
>
> /s/ John Beranek
>
> John Beranek
> Chairman
> Appellate Certification Committee

By letter of January 23, 1996, appellant Ash gave notice of her intent to challenge the disqualification announced by Chairman Beranek's letter of January 12, 1996, and that she sought to pursue that challenge by procedures under Policy 2.09(c)(1) respecting peer review disqualification. Appellant's Exhibit 23. Appellant

Ash was thereafter advised that because her disqualification by letter of January 12, 1996, was based upon failure to disclose all cases in which her competence or conduct was adversely commented upon in writing by a judge, the "peer review" process under Policy 2.09 was inapplicable.

No rule regulating The Florida Bar expressly states that an application for certification shall be rejected or denied for a false statement or misstatement of material fact. However, Rule 6-3.5(c)(6), Rules Regulating The Florida Bar, provides as to all applications for certification, in pertinent part, that:

> the board of legal specialization and education and its area committees shall review an applicant's professional ethics and disciplinary record. Such review shall include both disciplinary complaints and malpractice actions against an application. An applicant otherwise qualified may be denied certification on the basis of this record.

and Rule 6-3.7(a)(1) specifically authorizes revocation of the certification of any lawyer upon a determination of:

> any false statement or misstatement of material fact to the certification committee or the board of legal specialization and education.

As noted earlier, the initial application filed by appellant Ash included her full acknowledgment and agreement that "failure to make a truthful disclosure of any fact or item of information required may result in denial of my application." Appellant's Exhibit 2, p. 6.

Appellant's appeal of her disqualification, or denial, for nondisclosure of Appellant's Exhibit 26 proceeded to the

Certification Plan Appeals Committee. During those proceedings BLSE acknowledged that procedurally the disqualification announced by Chairman Beranek by letter of January 12, 1996, should have been submitted to BLSE for approval before becoming final. Appellant's Exhibit 34, pp. 6-7. As to this "procedural error," BLSE announced that it would not object if appellant elected to request a stay of CPAC proceedings until the matter was submitted to BLSE for cure of the procedurally omitted intermediate consideration. Appellant's Exhibit 34, pp. 11-12.

Appellant Ash did not elect to request BLSE review as proposed, and the proceedings before the Certification Plan Appeals Committee proceeded to conclusion. The Certification Plan Appeals Committee ruled as follows:

> **IN RE:**
>
> **The Appeal of Applicant AP95-024**
> Patricia Ann Ash
> Appellate Law Certification
>
> **ORDER**
>
> **THIS CAUSE came before the Certification** Plan Appeals Committee of the Board of governors of **The** Florida Bar **on September** 19, **1996.** The **Appeals Committee** thoroughly reviewed the briefs. The Appeals Committee **unanimously affirms** the **decision of the Board of Legal Specialization and Education to** deny applicant certification in the area of **Appellate Law.**
>
> DATED this 10th day of October, 1996.
>
> **/s/ John C. Patterson, Jr., Vice-chair**
> Certification **Plan Appeals** Committee

Appellant's Exhibit **36.**

Appellant Ash then appealed the denial of certification to the full Board of Governors of The Florida Bar. After consideration by the full Board of Governors, at its meeting of March 21, 1997, the decision of the Board was as follows:

> **IN RE:**
>
> The Appeal of **Applicant AP95-024**
> **Patricia Ann Ash**
> **Appellate Law Certification**
>
> **DECISION**
>
> **THIS CAUSE came before the Board of Governors of The Florida Bar on March 21, 1997. Having thoroughly reviewed the briefs, the Board of Governors hereby AFFIRMS the decision of the Certification Plan Appeals Committee of the Board of Governors to deny Applicant certification in the area of Appellate Law.**
>
> **DATED this 3rd day of April , 1997.**
>
> /s/ John W. Frost, II
> **John W. Frost, 11**
> **President**
> The **Florida Bar**

Appellant's Exhibit 38.

Appellant Ash now seeks review in this Court. Appellant's "Notice of Administrative Appeal," reciting appeal of the order of the Board of Governors "rendered on April 3, 1997" certifies service of the notice of appeal on May 8, 1997, or 35 days after rendition. The said notice of administrative appeal was actually received by The Florida Bar, and thereby "filed," on May 12, 1997, or 39 days after rendition.

SUMMARY OF ARGUMENT

There was no error, or denial of due process or right of review, in the denial of appellant's application for appellate law certification. Questions III. F. 4. and 5. on the initial application filed by appellant clearly and unmistakably required disclosure and attachment of a show cause order directed to appellant on May 17, 1993, by the District Court of Appeal, Third District of Florida. Instead of making the required disclosure, appellant falsely answered "N/A," or "not applicable," to each question.

The undisclosed order of May 17, 1993, was highly critical of appellant's misuse or misrepresentation of pertinent authority in proceedings involving a pro se adversary. The order not only directed appellant to show cause why further sanctions should not be imposed, but also struck the prior response she had submitted on behalf of the State of Florida and required that further filings by appellant in that proceeding also be signed by a supervising attorney. Appellant's Exhibit 26. This order was issued only seven months before appellant submitted her initial December, 1993, application for certification.

Appellant, by her initial application, had certified under oath that her answers were true and acknowledged that failure to make truthful disclosure of required information could result in denial of her application, or revocation of certification, if granted. Appellant's Exhibit 26, p. 2.

Upon discovery of the May 17, 1993, undisclosed order, appellant was advised by letter notice of January 12, 1996, that her application was denied. Appellant's Exhibit 22. Appellant thereafter enjoyed full right of review through the Certification Plan Appeals Committee and the Board of Governors of The Florida Bar, both of which affirmed the denial of appellant's application because of her improper answers and nondisclosure of the order of May 17, 1993. Appellant's Exhibits 36 and 38.

The denial of appellant's application should be affirmed by denial of this appeal. The Appellate Practice Certification Committee and BLSE were fully authorized to pose questions III. F. 4. and 5. The questions were clear and the duty of disclosure was unmistakable. The denial was fully justified and legally authorized. See Rule 6-3.7(a)(1), Rules Regulating The Florida Bar, and application acknowledgment at Appellant's Exhibit 2, p. 6.

Appellant has failed to show any denial of due process or right of review. The panel review process for adverse peer review denial was not employed because appellant's application was ultimately denied for untruthful answers and improper nondisclosure, not adverse peer review evaluation. Intermediate BLSE review was inadvertently omitted, but appellant did not elect or accept the offered opportunity for stay and cure of the omission. Appellant's Exhibit 34, pp. 11-12. Appellant elected instead to proceed with review before the Certification Plan Appeals Committee, which affirmed the application denial, and then before the full Board of Governors, which also affirmed.

This Court should now deny this appeal and affirm the denial. The denial of this untruthful application, with nondisclosure of a clearly required judicial order, is the only appropriate disposition. The requirement and expectation of truthfulness and candor of certification applicants permit no less.

No entitlement has been denied or removed from appellant. She is free to reapply for appellate certification by a new, and truthful application. She is entitled to continue her practice of appellate law in the interim, with no restriction whatsoever because of her failure to attain certification upon her flawed and untruthful initial application. The denial of her present application, and the thwarting of her prior efforts to attain certification, are not error or injustice in prior proceedings, but the reasonable and appropriate consequence of appellant's decision to answer clear application questions untruthfully and thereby effectively conceal (through two application review and exam cycles) the highly pertinent and critical order of May 17, 1993.

ARGUMENT

POINT I

THE FLORIDA BAR ACTED PROPERLY, *AND* WITHOUT ERROR, IN DENYING APPLICANT ASH APPELLATE CERTIFICATION BECAUSE OF HER IMPROPER ANSWERS TO APPLICATION QUESTIONS III. F. 4. AND 5.

Appellant Ash has misquoted application question 111. F. 4. on page 7 of her Initial Brief. Appellant quotes question 4 as follows:

> 4. List and explain all cases in which your competence or conduct was raised as a basis for relief requested by the court including but not limited to a new trial, new appeal, dismissal or reversal.

Initial Brief of Appellant, p. 7.

The quotation by appellant fails to indicate any omissions, or the adding of emphasis.

The actual question, which appears in Appellant's Exhibit 2, page 3, is as follows:

> 4. List and explain all cases in which your competence or conduct was raised as a basis for a relief requested by opposing counsel or by the court including but no (sic) limited to a new trial, new appeal, dismissal or reversal. Enclose a copy of relevant documents in these cases.

The actual question, as asked, included the phrase "by opposing counsel or" which appellant omitted; did not include the emphasis added by appellant; and included a final sentence requiring attachment of relevant documents. Appellant's answer to the question as asked was "N/A."

Appellant's argument before this Court (as before CPAC and the Board of Governors below) appears to be that she did not understand

question F. 4. to call for or require disclosure of the May 17, 1993, order of the district court of appeal (Appellant's Exhibit 26).

Appellant's argument, and suggestion that nondisclosure was an inadvertent product of misunderstanding or misinterpretation, are simply not plausible or worthy of serious consideration. As to whether appellant's "conduct or competence was raised as a basis," the order of May 17, 1993, recited on its face that the offending response was served by appellant Ash, and then stated as its basis:

> (a) The State placed its reliance on Robins v. State, 587 So. 2d 581 (Fla. 1st DCA 1991), without disclosing that Robins was quashed by Robins v. State, *602* So. 2d 1272 (Fla. 1992).
>
> (b) The State failed to disclose decisions of this district which are in conflict with Robins, even though the First District Robins decision specifically states that conflict exists. 587 So. 2d at 583.
>
> (c) The State failed to discover or disclose that one of the above-mentioned conflicting decisions of this court, State v. Rodriquez, 582 So. 2d 1189 (Fla. 3d DCA 1991), was approved by the Florida Supreme Court in State v. Rodrisuez, 602 So. 2d 1270 (Fla. 1992), even though the First District Robins decision discussed Rodriquez and the fact that the Rodriquez certified question was then pending in the Florida Supreme Court. 587 So. 2d at 583.
>
> (d) The State argued that Hall v. State, 517 So. 2d 678 (Fla. 1988), was superseded by section 775.021(4), Fla. Stat. (1991) (amended effective Oct. 1, 1988, by ch. 88-131, Laws of Fla.). A review of the subsequent history of Hall would have disclosed Cleveland v. State, 587 So. 2d 1145 (Fla. 1991), in which the Florida Supreme Court rejected this precise argument and held that Hall is still good law.

> **(e) The State argued that the controlling version of** section 775.021(4) is determined by the date of **conviction.** The Florida Supreme **Court has held that the relevant date is the date of the** offense, not the **date** of **the conviction.** State v. Smith, **547 So. 2d 613 (Fla. 1989).**

Surely and clearly any lawyer **who** had authored, served **and filed a** pleading which was thereafter **described in such a** manner by **the court** should **and would realize that the lawyer's** "conduct **or competence** was **raised" by** the court, **as included in question 111. F. 4.**

Appellant's alternative argument appears to be that even if **her** "conduct **or competence was raised" by the** Court in **the order** of **May 17, 1993, she did** not understand it to be **as a basis for** any **"relief" contemplated** by **the question. By quotational emphasis and argument (see Initial Brief, pp. 8, 16), appellant** attempts **to restrict her** reading **of "relief"** to new trial, new appeal, dismissal or **reversal. This** court **will note,** however, that while question 111. F. 4. mentions such **forms** of relief, the mention is directly and **immediately preceded** by the **phrase** or terms **"including but** not limited **to." Appellant's** Exhibit **2, p. 3. Thus, the** question clearly **asks** about any **form** of **relief,** not **just** those **mentioned.**

It is equally **clear that** the **order of** May 17, 1993, **on** *sua sponte* **action** of the **court, directed "relief" based upon the described** conduct **of appellant Ash. It did not merely order** appellant **to show** cause why further sanctions should not be imposed

for her pleading conduct; it directed and ordered, in pertinent part:

> Upon consideration of the foregoing it is ordered that:
>
> 1. The Response to Petition for Writ of Habeas Corpus is stricken and a new Response shall be filed within 20 days by such counsel as the Attorney General may designate.
>
> 2. Patricia Ash shall show cause in writing within 20 days why sanctions should not be imposed on her for the above-mentioned deficiencies in the Response served March 25, 1993.
>
> 3. Except for the response required in paragraph 2, any further filing by Patricia Ash in the present case must also be signed by a supervising attorney.

Surely and clearly any lawyer who was so ordered to show cause to avoid further sanctions, whose prior pleading on behalf of the State of Florida was stricken, and who was required to thereafter be joined in further filings by a supervising attorney, would understand this to be "relief" triggering disclosure in response to question III. F. 4.

Even if, somehow, appellant's argument as to question 111. F. 4. could be accepted as plausible, there remains question 111. F. 5. That question was as follows:

> 5. List and explain all cases in which your conduct was adversely commented upon in writing by a judge or determined to be error whether harmless or not.

Appellant's Exhibit 2, p. 3.

It is truly absurd to suggest that appellant did not realize that her "conduct was adversely commented upon" by the order of May 17, 1993, and that, therefore, disclosure was required. The

question precedes the "determined to be error" criterion with the disjunctive word "or." One need not even be a practicing lawyer to understand and interpret this language to mean that disclosure is required if one's "conduct was adversely commented upon in writing" or if one's "conduct was . . . determined to be error whether harmless or not." A functional knowledge of plain English permits no other interpretation.

Appellant, throughout her Initial Brief, has emphasized that in her listing of appellate "credits" she included Johnson V. Singletary, the proceeding in which the order of May 17, 1993, was entered. See Initial Brief of Patricia Ann Ash, pp. 8, 10. Appellant even asserts at page 10 that in response to another question she provided the Appellate Practice Committee with "the petition and the response" in Johnson v. Singletary.

What is most important, however, is what appellant did not provide. Despite seeking "credit" for Johnson V. Singletary and submitting the petition for habeas corpus and State's response, she omitted to provide with those items any copy, notice or disclosure of the order of May 17, 1993. It is inescapable that appellant desired and sought to receive affirmative credit for handling the appeal as "lead counsel," but to avoid disclosure and consideration of her conduct as "adversely commented upon" in the case by the district court. See Appellant's Exhibit 2, p. 3, Question 111. F. 5.

Appellant has argued at page 10 of her Initial Brief that since her answers to questions 111. F. 4. and 5. were "N/A," or

"not applicable" rather than "none," it is somehow established that there was no attempt to deceive or falsely answer on her part. See also Initial Brief, page 17. BLSE respectfully submits that the answer "not applicable" to the two questions as Dosed is equally deceptive or misleading as would have been the answer "none." Either answer represents intentional nondisclosure to the Appellate Practice Certification Committee.

Appellant cites The Florida Bar V. Temmer, 632 So. 2d 1359 (Fla. 1994), at page 17 of her Initial Brief and attempts to analogize her deceptive answer of "not applicable" to a "categorical denial" of bar discipline charges by a lawyer who is required to respond. The cited case is clearly inapplicable in that it involved a disciplinary proceeding and suspension fromthe practice of law, and involved a disciplinary rule which, while making response mandatory, also expressly authorized the accused to deny the charges against him. This Court held that under these circumstances, the denial of the charges could not be a proper basis for enhanced or more severe discipline.

Moreover, what appellant did in the instant case was not an authorized or "categorical" denial of charges against her; it was a deceptive and misleading answer of "not applicable" to questions III. F. 4. and 5., where an affirmative answer, and disclosure, was called for under any reasonable and plausible interpretation.

Appellant has also cited a number of "bar admission" cases, including two decisions which authorized admission to the Bar despite a lack of full candor in the admission process. Florida

Board of Bar Examiners Re J.A.S., 658 So. 2d 515 (Fla. 1995); Application of VMF far Admission to The Florida Bar, 491 So. 2d 1104 (Fla. 1986).

These cited decisions, representing case-by-case review of individual circumstances in Bar admission proceedings, do not support appellant's demand for certification in the present proceedings. In this respect it is pertinent that certification does not require or turn upon a demonstration of ordinary competence or proficiency in the law, but upon establishment of "special knowledge, skills and proficiency" in the area of practice involved. Rules 6-1.2, 6-13.1, Rules Regulating The Florida Bar. Moreover, while denial of admission as considered in the above-cited cases precludes one from all practice of law in Florida, the absence or denial of certification imposes no restrictions whatsoever on the practice of law in any area. Rule 6-3.4 (b), Rules Regulating The Florida Bar.

If further distinction is required, it is further noted that in the J.A.S. proceeding, supra, this Court described the testimonial discrepancies as "not significant." 658 So. 2d. 516. In the VMF proceeding this Court noted that the applicant relied upon advice of counsel in not disclosing his prior "expunged" record, regarding a matter ten years earlier. This Court also noted at page 1107, in pertinent part, that:

> We also wish to stress the fact that we expect no less than absolute candor from a Bar applicant in his dealings with the Board.

Application of VMF for Admission To The Florida Bar, 491 So. 2d 1104, 1107 (Fla. 1986).

This Court has noted, time and again, in the context of Bar admission proceedings, that candor of an applicant is essential, and that no moral character qualification for Bar membership is more important than truthfulness and candor. This Court has held that a lack of candor on the part of an applicant is intolerable and disqualifying for membership in the Bar. Florida Board of Bar Examiners Re C.A.M., 639 So. 2d 612, 613 (Fla. 1994); Florida Board of Bar Examiners Re M.R.I., 623 So. 2d 1178, 1180 (Fla. 1993); Florida Board of Bar Examiners Re J.H.K., 581 So. 2d 37, 39 (Fla. 1991) (denial based in part on improper or misleading use of answer "N/A," and rejection by Board of implausible explanation).

BLSE respectfully submits that decisions of this Court regarding Bar admissions, while not directly applicable to certification proceedings, serve as sound collateral or parallel authority for the denial of certification based upon lack of candor by an applicant in the application process. This is particularly clear where Rule 6-3.7 (a)(1), Rules Regulating The Florida Bar authorizes revocation of previously issued certification for any false representation or misstatement of material fact to the certification committee, and the application signed by appellant expressly noted that failure to make truthful disclosure may result in denial of the application. Appellant's Exhibit 2, p. 6.

At page 11 of her Initial Brief appellant Ash argues that the certification committee changed its decisions, reciting that the committee approved her first application, initially announced it would deny her second application on peer review grounds, and

finally or ultimately denied her second application because of non-disclosure of the order of May 17, 1993.

The simple, but correct, answer to this entire line of argument is that because of appellant's non-disclosure and lack of candor, the certification committee was unaware of the existence of the May 17, 1993, order at the time of the first "approval" (Appellant's Exhibits 9 and 11) and at the time of the initial determination to deny her second application on peer review grounds (Appellant's Exhibit 14).

When the certification committee finally discovered the existence of the May 17, 1993, order, and of appellant's improper nondisclosure and lack of candor by use of the deceptive answer "N/A," the committee promptly advised appellant of denial of her application on this newly discovered and separate around. Appellant's Exhibit No. 22.

Appellant Ash also appears to argue that she has been denied procedural rights because proceedings below did not follow the "panel review" process for peer review denial. Again, the simple but correct answer to this argument is that appellant Ash was not entitled to peer review panel procedures because her application was not denied on the basis of adverse peer review. Appellant Ash's application was denied because of her failure on the application to answer questions 111. F. 4. and 5. truthfully and candidly by disclosure of the order of May 17, 1993.

Appellant also argues that her right to review of the denial has somehow been abridged. In this respect it is pertinent that

during proceedings before the Certification Plan Appeals Committee BLSE acknowledged that intermediate consideration of the Certification Committee's denial by BLSE had inadvertently been omitted. BLSE expressly advised that it would not object to a request for stay by appellant for BLSE consideration and cure of this procedural oversight. Appellant's Exhibit 34, pp. 11-12. Appellant chose not to make such a request and, in so doing, clearly waived any such basis for her present appeal.

It is also pertinent that appellant has now already had the benefit of two separate levels of review of the denial of certification. She has placed her full "explanation" of nondisclosure before the Certification Plan Appeals Committee which, after full consideration, unanimously affirmed the denial of certification. Appellant's Exhibit 36.

She thereafter received another level or review when she placed her full "explanation" of her nondisclosure before the full Board of Governors of The Florida Bar which, after full consideration, also affirmed the denial of certification. Appellant's Exhibit 38.

Appellant clearly has been afforded full right of review and procedural due process in the proceedings below. She was offered the opportunity for stay and providing of the first inadvertently omitted BLSE step of review, and did not elect to accept this offer. She has since been afforded two more, separate levels of review, in each of which she submitted her full argument or "explanation." Now she is in the process of review by this Court.

To suggest that all of this entire process of review of a denial of certification (which does not restrict the full right of practice one iota) is an inadequate providing of due process or right of review is simply untenable.

Appellant has also cited decisions holding that prior to professional discipline there must be adequate notice to the licensee of the conduct to which he or she must adhere. Breesman v. Dept. of Prof. Regulation, 567 So. 2d 469 (Fla. 1st DCA 1990). Aside from the fact there these are neither "licensure" nor "disciplinary" proceedings, BLSE respectfully submits that questions III. F. 4. and 5. were quite adequate in their respective terms to give clear notice that disclosure of the order of May 17, 1993, was required, and that Rule 6-3.7(a)(1), as well as the application form and acknowledgement were quite adequate to give clear notice that failure to disclose could result in application denial. See Appellant's Exhibit 2, p. 6.

Recent precedent exists for denial of certification on the basis of misrepresentation on an application for certification. With respect to applicant No. CTR 83-072, the BLSE denied recertification for application misrepresentation of involvement in a case listed for trial credit. On a tie vote, under a predecessor rule respecting tie votes, the Certification Plan Appeals Committee reversed. On further review, the Board of Governors reversed, thereby denying certification. In subsequent proceedings this Court denied the applicant's petition for review, thereby allowing

the denial of recertification to stand. Supreme Court Case No. 86,039; October 30, 1995; unpublished Order.

BLSE respectfully submits that appellant Ash has shown no basis for reversal of the denial of her application for certification. The two application questions clearly called for, and required, disclosure of the order of May 17, 1993, which had issued only months before appellant's application. No excuse for non-disclosure other than a strained and totally implausible interpretation of the clear questions has ever been offered by appellant. The subject of the non-disclosed order of May 17, 1993, and the conduct ascribed to appellant Ash therein, clearly related to the issue of qualification for certification in appellate practice. Under any reasonable interpretation of questions 111. F. 4. and 5., appellant's answer of "N/A" was not only incorrect, but also misleading and deceptive.

For the foregoing reasons, the denial of appellant's application was proper and should be allowed to stand. This is a proper and necessary present consequence of appellant's failure to fully and truthfully answer the questions on the application she signed and submitted. It is a present consequence only, in that appellant is fully eligible to apply again for certification, fully and truthfully answer the questions, and present any explanation she may choose regarding the occurrence of the order of May 17, 1993. In the interim, she may continue her practice of appellate law without any restriction whatsoever.

POINT II

TEE DENIAL OF CERTIFICATION WAS NOT BEYOND TEE PROPER SCOPE OF INQUIRY AND AUTHORITY.

BLSE will not belabor this point. Appellant's primary argument appears to be that the Certification Committee and BLSE had no delegated authority to ask questions 111. F. 4. and 5.; therefore, her application may not be denied on the basis of her improper answers to same.

Rule 6-3.1(c), Rules Regulating The Florida Bar, authorizes and provides that BLSE shall have the authority and responsibility for administering the certification plan, including:

> (c) providing procedures for the investigation and testing of the qualification of applicants and certificate holders;

Rule 6-3.3(b) vests in certification committees the duty of reviewing applications for certification.

Rule 6-3.5(c)(6) provides, in pertinent part, that:

> As part of the peer review process, the board of legal specialization and education and its area committees shall review an applicant's professional ethics and disciplinary record. Such review shall include both disciplinary complaints and malpractice actions against an applicant. An applicant otherwise qualified may be denied certification on the basis of this record, Certification may also be withheld pending the outcome of the disciplinary complaint or malpractice action.

(Emphasis supplied.)

BLSE respectfully submits that the foregoing authorization extends to inquiry about ethics-related conduct or occurrences beyond an applicant's prior, formal record of Bar disciplinary proceedings.

As to appellate practice, Rule 6-13.1 provides as to standards for appellate certification, in pertinent part, that:

> The purpose of the standards is to identify those lawyers who engage in appellate practice and have the special knowledge, skills, and proficiency to be properly identified to the public as certified appellate lawyers.

(Emphasis supplied.)

BLSE respectfully submits that this general statement of the purpose of the standards is sufficient authorization for inquiry regarding prior judicial criticism of an applicant's performance or conduct.

Finally, BLSE notes that Rule 6-3.7 (a)(1) expressly authorizes revocation of a previously issued certification upon a determination of:

> any false statement or misstatement of material fact to be certification committee or the board of legal specialization and education.

It seems clear that the grant of power to revoke certification because of a false statement or misstatement of material fact in an application carries with it the power to deny the application for such misstatement.

It is also pertinent, as to this argument, that appellant did not, upon application, object to questions III. F. 4. and 5. or refuse to answer them. Instead, she answered them "N/A," thereby effectively answering that no such instances or occurrences existed, and did so on an application form that included her express acknowledgment and understanding that @@failure to make a truthful disclosure of any fact or item of information required may

result in the denial of my application." Appellant's Exhibit 2, p. 6.

In the instant case the order of May 17, 1993 (Appellant's Exhibit 26) did not involve some minor issue of brief length, or record reference deficiency, or defect of form. The order was of such a nature as to be a prime demonstration of why certification committees and BLSE must be authorized to make such inquiry, if the certification program is to retain its public utility, integrity and credibility.

The order recited five different forms of misuse or misleading use of authority, including citation and reliance upon a district court decision which had been quashed by this Court, and failure to disclose conflicting decisions of the district court in which the offending response was filed. The order not only struck the response appellant Ash had filed, and directed her to show cause why further sanctions should not be imposed, but also ordered that:

> 3. Except for the response required in paragraph 2, any further filing by Patricia Ash in the present case must also be signed by a supervising attorney.

Appellant's Exhibit 26.

It is, with all due respect, absurd to suggest that inquiry regarding, and requiring disclosure of, such an order of court entered only a few months before application for certification was beyond the authority of the certification committee or BLSE.

Neither the instant rules and standards for certification, nor their application in the instant case, are properly viewed as "penal" in nature. They are, rather, proper and appropriate

criteria for attainment of special or privileged recognition within an area of practice. Appellant, who has failed to meet the criteria, has had no right of practice removed, or even diminished. Rule 6-3.4 (b), Rules Regulating The Florida Bar. She has only been denied the special recognition of expertise by certification because she chose, in the application process, to improperly answer questions 111. F. 4. and 5., and thereby effectively conceal the existence of the pertinent and adverse order of May 17, 1993.

Appellant has also argued that her right to confidentiality under Rule 6-3.11 was breached because Chairman Beranek issued Appellant's Exhibit No. 22 from his law office rather than through The Florida Bar office. Appellant's Initial Brief, p. 13.

This Court will note, however, that Appellant's Exhibit No. 22, the letter-notice from Chairman Beranek, was clearly marked "confidential." It was directed to appellant's then-attorney, Mr. Ullman, who had previously forwarded two letters regarding the matter from his own private office. Appellant's Exhibits 19 and 21. The only person indicated to have been copied with Chairman Beranek's letter-notice was Michelle Lucas of The Florida Bar staff. Clearly, no breach of confidentiality is demonstrated by the mere fact that Chairman Beranek chose to prepare and forward the letter-notice through his law office rather than through Bar staff.

Appellant's final argument appears to be that denial of her application is excessive or overly harsh punishment. Initial Brief, pp. 17, 18, 19. BLSE respectfully disagrees. In the

instant matter the Certification Committee, after discovery of the undisclosed order of May 17, 1993, had before it more than ample justification for denial of appellant's application. It had before it improper answers of "not applicable" to questions 111. F. 4. and 5., on an application wherein appellant certified under oath that "the information herein is true," and acknowledged that failure to make truthful disclosure could result in application denial. Appellant's Exhibit 26.

It also had before it failure to attach a copy of the order of May 17, 1993, in response to and as required by question 111. F. 4., even though the very appeal in which the order of May 17, 1993, was issued was listed elsewhere for appellate "credit," with attachment of other documents from that appeal. Appellant's Exhibit 2, p. 7.

It also had before it a second, short-form reapplication of August, 1994, in which appellant again chose not to disclose or attach the order of May 17, 1993. Appellant's Exhibit 12.

It also had before it appellant's conduct in requesting and securing admission to the 1994 and 1995 certification examinations (as an "unapproved" applicant), when appellant full well knew of the existence of the May 17, 1993, order and of her prior nondisclosure through two sets of applications. See Appellant's Exhibits 15, 16, 16a.

Finally, the Certification Committee had before it the actual order of May 17, 1993, which recited on its face conduct in the use and misuse of authority that was far outside or below the standards

expected of any attorney who is an officer of the Court, much less one who seeks the special recognition of certification in appellate law. In this respect, it is noted that the appellant's conduct described in the order of May 17, 1993, occurred in a proceeding with a pro *se*, non-lawyer adversary.

BLSE respectfully submits that, under these clearly established circumstances, it is not overly severe or harsh that appellant's instant application was denied. If truthfulness and candor are to be expected and required of certification applicants, then no lesser result can be warranted.

Moreover, even in these proceedings, appellant still contends there was no real or intentional wrong in her nondisclosure by forwarding a totally unreasonable and implausible interpretation of questions 111. F. 4. and 5. She does not merely demand reversal and certification by this Court, but certification retroactive to 1995. Indeed, in proceedings below, appellant even demanded that, in addition to retroactive certification, she be granted a "public apology" from the Appellate Practice Certification Committee and the Board of Legal Specialization and Education. Appellant's Exhibit 35, pp. 5-6.

Appellant Ash is entitled to apply anew for appellate certification if she so chooses. She may then answer all questions properly and fully, with whatever explanation of adverse comments or rulings upon her conduct she chooses to include, and with whatever intervening indicia of qualification she may choose at that time to offer. If she then demonstrates that, at that time,

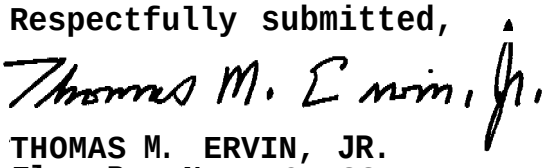
she meets the requisite criteria, she may achieve certification. In the meantime, she may continue her practice of appellate law without restriction.

She is not, however, entitled to certification in appellate law at this time on this record and establishment of improper and misleading application. No basis is shown for overruling the proper decision and judgment of the Appellate Practice Certification Committee, the Board of Legal Specialization and Education, the Certification Plan Appeals Committee, and the Board of Governors of The Florida Bar.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that certification was properly denied below, and the instant appeal should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVI

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail this 7th day of July, 1997, to the following:

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Thomas M. Ervin, Jr.
ATTORNEY