IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 11 1997
CLERK, SUPREME COURT
By_____
Chief Deputy Clerk

THE FLORIDA BAR

Re: PATRICIA ANN ASH Case No, **90,527**

ON APPEAL FROM THE FLOFUDA BAR BOARD OF GOVERNORS

INITIAL BRIEF OF PATRICIA **ANN ASH**

PATRICIA ANN ASH
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PALM BEACH GARDENS, FLA. **33418**
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR
RE: PATRICIA **ANN ASH**

Case No. **90,527**

_____/

PRELIMINARY STATEMENT

Patricia **Ann** Ash **,** Appellant, will be referred to herein as "Ash." Appellee, The Florida **Bar,** will be referred to herein **as** "BLSE". Reference to the record on appeal shall be by exhibits attached hereto.

STATEMENT OF THE CASE AND FACTS

This Court approved the area of Appellate Law Certification on July 1, 1993 (Exhibit 1). Ash requested an application pursuant to the encouragement of her employer, the Attorney General of Florida, by his offer of a yearly salary increase for certification. Ash has practiced appellate law full-time as an assistant attorney general since April **17, 1989,** and prior to that, **as** part of a general practice since 1983. The Attorney General's Office is a high-volume appellate practice. Ash carries a heavy case load and is very good at independently managing that caseload. Ash has placed argument before The Third District Court of Appeal, The Second District Court of Appeal, The Fourth District Court of Appeal, The Florida Supreme Court, The United States District Court for the Southern District, The Eleventh Circuit Court of Appeal, and The United States Supreme Court. Her argument on appeal to this Court in State **v.** Schopp, 653 So.2d 1016 (Fla. 1995), successfully persuaded this Court that the harmless error analysis applies where a court fails to conduct an adequate Richardson inquiry, receding fi-om twenty- four years of holding per se fundamental error.

Ash completed the application and submitted it after the deadline with permission of Kristen Darby of the certification department (Exhibit **2).** It was received on December 8, 1993 (Exhibit 3). The application instruction stated that the accuracy of the application would be verified and the Board or Committee may contact an applicant to obtain additional information pertaining to the applicant's qualifications (Exhibit **4, #7, #8**). Further, the instructions stated that identity of applicants and contents of forms would be treated **with confidentiality** by the Board, the Committee and staff (Exhibit 4,#10; Exhibit **5,** standard 6-3.11). Pursuant to Ash's application the following occurred:

1. On February 4, 1994, a letter was written by Kristen Darby on behalf of the Appellate Law Certification Committee, stating that the application was still under review but Ash could request permission to sit for the examination (Exhibit *6)*.

2. On February 11, 1994, Chairman Arthur England, sent a letter stating that Ash would be scheduled to sit for the March 9, 1994 exam. No review course would be provided (Exhibit 7). Ash submitted her exam agreement on February 16, 1994 (Exhibit 8).

3. On May 18, 1994, Kristen Darby sent notification that although **Ash's application had been approved by the Committee,** she had failed to achieve a passing grade on the exam. The next procedure available to Ash was a review of the exam (Exhibit 9). Ms. Darby sent Ash instructions for review on May 24, 1994 (Exhibit 10; 11).

4. Pursuant to notification of application approval, Ash reviewed her exam and applied to re-take the exam (Exhibit 12). The application was received on August 31, 1994 (Exhibit 13).

5. On January 19, 1995, Ms. Darby notified Ash that after **final** review of **Ash's** application for certification **the Committee recommended that the application be denied.** The Board of Legal Specialization had affirmed the Committee's finding in accordance with Rule 6-3.5(c)(6) of the Florida Certification Plan, **peer review** (Exhibit 14).

6. On January **25,** 1995, Ash filed a notice of challenge of **the** disqualification (Exhibit 15).

7. On February **2,** 1995, Ms. Darby acknowledged receipt of the notice of challenge and gave Ash the option of taking the examination on March **8,** 1995, as **an** "unapproved" applicant (Exhibit 16). The **exam** agreement was executed on February **8,** 1995, and Ash again sat for the exam on March **8,** 1995 (Exhibit 16a; 17).

8. After seeing the publication of the list of the passing applicants in The Record and The Florida Bar News (Exhibit 18), and receiving no notification from the Committee, Ash retained Michael Ullman, Esq., to represent her interests. Mr. Ullman communicated Ash's concerns with the certification process to the Committee on July 13, 1995. Ullman requested a time frame for the Committee's decision with regard to Ash's application (Exhibit 19).

9. On August 1,1995, Ms. Darby responded that Ash's application was under review and that Ash had passed the 1995 appellate certification examination (Exhibit 20). The published list stating that 27 of the applicants had passed was not accurate (Exhibit 18).

10, Mr. Ullman again expressed Ash's concerns to the Committee on August 22, 1995 (Exhibit 21).

11. On January 12, 1996, five and a half months after the request for a time frame, the Chairman of the Appellate Certification Committee, John Beranek, through his personal office, rather than through The Florida Bar, communicated to Mr. Ullman that the Appellate Certification Committee denied of Ash's application. The Committee had concluded that Ash lacked appellate competence and expertise to warrant certification. Further, the Committee had concluded that Ash did not disclose all cases in which her competence or conduct was adversely commented upon in writing by a judge, calling attention to questions F-4 and F-5 of the original application filed in December 1993. Johnson v. Singletary, Case No. 93-00334 in the Third District Court of Appeal was relied upon by the Committee (Exhibit 22).

12. On January 23, 1996, Ash timely filed notice of challenge of disqualification with the area committee pursuant to Legal Specialization and Education Programs Policy 2.09(c)(1) (Exhibit 23).

13. On April 22, **1996,** Jenny Lawton, Administrative Secretary Legal Specialization and Education, responded by letter to Ash's challenge stating that a letter had been mailed to her at her home address on March **21,1996.** The March **21** letter was undeliverable and was forwarded to Ash at her office and received on April 29, **1996** (Exhibit **24).** All previous correspondence had been sent to Ash either at the Attorney General's Office, by regular mail, or to Ash's counsel, Mr. Ullman.

14. The letter of March **21, 1996,** (Exhibit 24), from the Board of Legal Specialization, Dawna G. Bicknell, Director, stated that Ash's notice of challenge under Policy 2.09 was procedurally incorrect, in that the alleged failure to disclose was not considered peer review, even though peer review had originally been the reason for denial (see paragraph 5, supra) **.** However, Ash's position was that if her application had been denied for failure to disclose all cases in which her competence had been commented on adversely in writing by a judge (Exhibit 25), then a peer would have had to determine that the omission warranted denial and that determination would therefore be "peer review".

15. On **June 7, 1996, Ash** filed a petition for review of the denial to the Certification Plan Appeals Committee (Exhibit 33). The BSLE filed a response on July 30, 1996 (Exhibit 34). Ash filed a reply on August **16,1996** (Exhibit 35). The Certification Plan Appeals Committee summarily affirmed that denial by the BSLE on October 10, **1996** (Exhibit **36).**

16. Ash filed notice of appeal with this Court on October 25, **1996. The** BSLE, thereafter on November **6, 1996,** informed Ash that Policy 4.1 1 was in error and that she must appeal first to the Board of Governors of the Florida **Bar** (Exhibit **37).** The Board of Governor's summarily affirmed the decision of the Certification Plan Appeals Committee on April **3,** 1996 (Exhibit **38).** Notice of Administrative Appeal was again filed with this Court.

SUMMARY OF THE ARGUMENTS

POINT I

The Florida Bar erred in denying Ash appellate certification. The denial is based on no competent evidence. The rules promulgated for the procedures of certification have not been followed. The denial is arbitrary, capricious and unwarranted.

POINT II

The BSLE's denial of certification is beyond its statutorily delegated powers and is unreasonable and discriminating. There is a lack of factual basis and no argument supported by authority upon which the denial of certification was based the confidentially required by statute

ARGUMENT

POINT I

THE FLORIDA BAR ERRED IN DENYING ASH APPELLATE CERTIFICATION

The Appellate Certification Committee based its denial on a bare conclusion that Ash lacked sufficient appellate competence and expertise to warrant certification without supporting facts. No explanation as to the basis for that decision is offered, This is an arbitrary and capricious decision and can be refuted by **Ash's** record. (Exhibit 31). Breesmen v. Dept. Prof. Regulation, **567** So.2d 469 (Fla. 1st **DCA** 1990)(statute which authorizes revocation or suspension of professional license is penal in nature and must be strictly construed in favor of the licensee and there must be adequate notice to the licensee of standard of conduct to which he or she must adhere); The Florida Bar **v.** Pearce, 631 So.2d 1092 (Fla. 1994)(findings of fact must be supported in the record); The Florida **Bar v.** Wasserman, **654** So.2d 905 (Fla. 1995)(record must support findings).

A. Alleged Failure To Disclose

The denial further states that Ash did not disclose all cases in which her competence or conduct was adversely commented on by a judge in writing, calling attention to the following questions **, F-4** and **F-5.**

> 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.**
> 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.

However, the case of Johnson v. Singletary was disclosed on page 7, #2 of the original application as a most recent case and Ash submitted the petition and response with her application pursuant to the instructions (Exhibit 2). Ash's failure to list the case pursuant to questions **F-4** and **F-5** was because at the time that she made the application, she did not consider that the questions pertained to the court's order of May 17, **1993** (Exhibit 26).. Question **F-4** states "raised as a basis for relief and question **F-5** "determined to be error."Ash took those as the operative words, Ash did not feel that the order to show cause was raised **as** a basis for relief and the cause was not determined to be error **as** the court accepted her explanation (Exhibit 27). **Ash's** response to the order to show cause and subsequent Response to Petition For Writ Of Habeas Corpus was accepted by the court (Exhibit 28, 29,32). Therefore, Ash's failure to submit this order to show cause pursuant to questions **F-4** and **F-5** was not to deceive the Committee about her history. Breesmen, **567** So.2d at **471**(there must be adequate notice of standard of conduct to be followed); Florida **Bd.** of **Bar Exam**iners Re J.A.S., 658 So.2d **5**15 (Fla. 1995)(admission approved based on rehabilitation).

B. Appellate Competence and Expertise

An attorney is first **an** officer of the court, bound to serve the ends of justice with openness, candor and fairness to all. Ash would also point out that Rule 9.410, Florida Rules of Appellate Procedure, provides after ten days notice, the court may impose sanctions for any violation of the rules or for the filing of any proceeding which is frivolous or in bad faith. Ash responded to the court's order to show cause and explained the omissions in her pleading. Ash did not mislead the court in material matters. Ash fulfilled her duty to make full disclosure mandated by Rule 4-3.3(a) and Rule 4-3.3(d), Rules Regulating The Florida **Bar.** The show cause order was notice **and Ash** fully complied. Ash's compliance should not be construed as lacking competence **and** expertise to warrant certification. Compare Hays v. Johnsog, 566 So.2d **260** (Fla. **5th** DCA 1990)(pursuant to

an order to show cause, an attorney who omits material facts **after notice** in a habeas petition will be admonished). The court did not impose sanctions pursuant to Rule 9.410, finding no bad faith or frivolousness. Johnson v. Singletary, 625 So.2d 1251 (Fla. 3rd **DCA** 1993)(Exhibit 32).

The Committee first stated that denial was based on peer review. They later determined that the denial was based upon Ash's alleged failure to disclose. The Committee **allowed** Ash to sit for the first exam and communicated to her on May 18, 1994 that the application had been approved. Ash re-applied to take to take the **exam** in 1995, in **reliance upon the approval,** and spent many hours preparing for the **exam.** Shortly before the exam, Ash was notified of denial. The Committee first stated that denial was based on peer review (Exhibit 14). Regardless, Ash sat for the exam a second time, awaiting reconsideration. Almost one year to the day of taking the second exam, based on the original application, not the subsequent re-application that did not contain questions F-4 and F-5, the Committee gave Ash notice of denial, after approval and reliance thereon, on April 29, 1996. The committee determined that the denial was based on Ash's alleged failure to disclose (Exhibit *25).* The Committee charged lack of candor and gave Ash no opportunity to respond. At no time did the Committee offer Ash the opportunity to explain her alleged omission. The Committee gave no consideration to other mitigating factors that have occurred both before and after her application in December of **1993.** See In re V.M.F., 491 So.2d 1104, 1107 (Fla. 1986)(granting admission to applicant who was not completely candid in **Bar** application about a drug arrest where applicant had no other transgressions and had led **an** exemplary life in the intervening years).

This denial is **very** serious punishment. There has been no showing **of** intent, let alone a showing of **a** pattern of intentional misconduct or deception that would warrant such serious punishment. Ash did not willfully or otherwise deceive the Committee with her application. Ash

had no intent to mislead the Committee. What reasonable person would persevere to achieve certification knowing that they had falsified an application that was being scrutinized by the Committee? Furthermore, Ash provided the Committee with Johnson, the petition and the response, pursuant to another question on the original application. Without proof of intent with clear and convincing evidence, Ash should not be denied certification. The Florida Bar v. Neu, 597 So.2d 266 (Fla. 1992); The Florida Bar v. Cramer, 643 So. 2d 1069 (Fla.1994)(to find that an attorney has acted with dishonesty, misrepresentation, deceit, or fraud, the necessary element of intent must be proven by clear and convincing evidence).

There is no showing of recent, material conduct that impinges on Ash's ability to practice appellate law. This is not a question of Ash's inability to tell the truth. The alleged "misconduct" at issue took place almost four years ago, when Ash first submitted her application. There is nothing else that would evidence unfitness for certification. The discrepancy in the application does not support the Committee's conclusion that Ash is not qualified for certification. The omission in Johnson v. Singletary was an isolated incident. This was corrected to the court's satisfaction. Ash's answer to questions F-4 and F-5 was not an attempt to deceive but a failure to recognize that interpretation would be applied (Exhibit 2 p.7). Ash's responses were not "none" but rather " not applicable" (Exhibit 2 p.7). Florida Bd. of Bar Examiners Re: J.A.S., 658 So.2d 515 (Fla. 1995)(minor testimonial discrepancy does not evidence lack of honesty, truthfulness and candor); The Florida Bar v. Cox, 655 So. 2d 1122 (Fla.1995)(serious punishment is only warranted if the facts reflect a pattern of intentional misconduct and deception).

Ash is very involved in the legal community and works hard to maintain her professional standards (Exhibit 31). Ash is a hard working, competent, honest person and officer of the court. Ash had over 200 published opinions (far more p.c.a.'s) where her competence has never been

challenged. Ash often defends the State against very frivolous appeals filed by pro se defendants, private defense attorneys and public defenders. The appellate court merely affirms the trial court with no comment on the merits of the issues raised by the defense but often the court will question the State for doing its job in defense of the public. The court does not always agree with a position taken or an argument made and usually only one side wins the argument. The order to show cause is something that should not reflect on Ash's appellate competence and expertise. Ash made an omission in filing her original response which was corrected. In consideration of all of the facts, the denial of certification is not appropriate. Several people that have been approved for certification have far less appellate experience than Ash.'

The Committee has not followed its own rules. The Committee changed its decisions. First it approved and then denied the application. The application was denied first on the obsensible basis of peer review, then on alleged failure to disclose a case that was included on the application. Ash has incurred expense in filing applications twice, traveling and sitting for exams twice. Ash studied for the second exam with reliance on the approval and was notified shortly before the 1995 exam of the reversal of the approval, causing the stress of taking the exam without approval. Ash has expended attorney fees for Mr. Ullman, telephone calls and correspondence to the Florida Bar, the preparation and the fee for the filing of the appeals to the BSLE and Certification Plan Appeals Committee, and now this appeal.

Mr. Richard Polin, the Bureau Chief and Ash's supervisor at the time the response was filed, wrote the Committee on Ash's behalf, prior to the final decision. The Committee gave no

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[1] No person who sits on the Committee has met the requirements that the applicants must fulfill.

consideration to mitigating factors or explanation (Exhibit **30). Ash** has never intentionally misrepresented herself or "lied" about anything. The Committee has abused its discretion in denying **Ash** certification based on the non-disclosure they allege but they do not allow **Ash** to defend or explain. This denial is arbitrary, capricious and unwarranted. It should be reversed.

POINT II

BSLE'S DENIAL OF CERTIFICATION IS BEYOND ITS STATUTORILY DELEGATED POWERS

Pursuant to administration of the certification plan, the **BSLE** shall have the authority to promulgate rules and policies to accomplish the responsibilities assigned to it **as described** by establishing **reasonable and nondiscriminating** policies. Policy 1.01(2). The BSLE bears the ultimate responsibility in the certification of applicants. Its involvement, however, **should be no more extensive** than necessary to ensure minimum standards of the plan are met and there is **uniformity** among the committees. Policy 2.01(a). The **BSLE** did **not** ensure uniformity ***among*** **the** committees **as** required. It should be noted that Ash's initial application was approved by the committed which was chaired by **Arthur** England, Esq. The supplemental application, submitted for the purpose of retaking the examination after notice of approval, **was** denied by another committee chaired by John Beranek (who corresponded through his private office rather than through The Florida **Bar office,** as is required for confidentiality by the statute (Rule 6-3.11). Thus, neither did the BSLE insure confidentiality.

Furthermore, after the Appellate Committee notified Ash on January 19,1995, that her application was denied after **final** review, affirmed by the Board of Legal Specialization, in accordance with Rule 6-3.5(c)(6), **peer review.** Pursuant to the process for peer review disqualification, Ash filed a notice of challenge (Exhibit ***6)*** (Policy 2.09(B)). If the applicant continues to challenge the disqualification, the BLSE chair **shall** appoint a peer review panel (PRP) consisting of 1 member of the BSLE, 1 member of the area committee **and** 1 ad hoc appointee. Policy 2.09(d). Upon completion of such investigation, the applicant **shall** be notified of the nature and substance of the adverse peer review responses and **given** the opportunity to present the applicant's position or explanation. Policy 2.09(d)(1)(2). This requirement was not followed. The Chairman, Mr. Beranek's letter of January 12, 1996, did not indicate that any such panel was

appointed, only that the Appellate Certification Committee had decided on denial (Exhibit 11). Ash was given **no** opportunity for presentation of her position or explanation. This procedure is not in compliance with The Rules Governing The Florida **Bar** and is in violation of due process, equal protection and confrontation rights. Mikell v. State. Department of Administration, 305 So.2d **803** (Fla. 1st **DCA** 1975)(elementary concepts of due process violated by disallowing appeal of discharge); The Florida Bar **v.** Cruz, **490** So.2d **48** (Fla. 1986)(respondent has a due process right to explain the circumstances of the alleged offense and to offer testimony in mitigation of any penalty imposed).

The peer review process is quasi-judicial in nature. Policy 2.09(d). Ash's peer review challenge was filed January 25, 1995 (challenge must be filed within a 10 day time limit or is waived. Policy 2.09(b)). One year later, on January 12, 1996, Ash was notified by Chairman Beranek that she allegedly lacked appellate competence and expertise to warrant certification. This notification of the nature and substance of the adverse peer review response was not only untimely but did not afford Ash the opportunity to present her position and confront the "peer" who gave the negative evaluation of her abilities or considered the order to show cause so egregious that he/she felt the need to bring it to the attention of the committee. Policy 2.09(c)(2). This is clearly an untimely, arbitrary and capricious action. Policy 2.09(d).

Rule 6-3.4, Florida Certification Plan, contains the limitations on the powers of the Board of Governors, The Board of Legal Specialization and Education, and The Certification Committee. Rule **6-3.5** sets out the standards for certification. Rule 6-3.5(c)6 states the following:

> As part of the peer review process, the board of legal specialization and education and its area committees shall review the applicant's **professional ethics and disciplinary record.** Such review shall include both **disciplinary complaints** and **malpractice actions** against the applicant. **.....**

Careful reading of these **limitations** and **standards** determines **the** legislative delegation to the BLSE for review of specific areas of the applicant's quality of practice. There is no statement that these specified areas should or could be expanded in scope, i.e., "shall include but not limited to". Disciplinary actions and malpractice actions are to be considered. However, it appears the Committee exceeded that scope of review in choosing to include as show cause where no disciplinary action was taken. If the Third District Court accepted this one inadvertence on Ash's part when considered in the context of the hundreds of other cases successfully handled by Ash, then why not the Committee?

Policy 2.04 sets out the requirements for certification application. The application shall include a record of professional ethics and competence. Review of Policy 2.04(f) clearly requires that an applicant submit information concerning all instances of discipline in which the **sanction imposed was a public reprimand or greater and all disciplinary complaints currently pending. Recommendations of denial based solely upon disciplinary matters shall be related to an applicant's proficiency in the practice of law.** There is no grant of authority to deny application because an attorney made a bad argument or mis-cited case law, Further, no sanctions were imposed in the Johnson case. The Third District Court of Appeal found Ash's response deficient **without prejudice** to refile. They did not find Ash's "conduct" adverse. Using the BSLE's reasoning, **an** attorney who failed to disclose the fact that **a** court had stricken a brief for exceeding the page limitation or for use of typeset not authorized by that particular court would not be qualified for certification. Anyone who regularly practices before the Eleventh Circuit Court of Appeals, with their strict standards, would never qualify for certification, at least not if they apply while this Committee is sitting in judgment.

The BSLE is governed by rules which must be applied without discrimination to applicants. The Florida Bar:In re Dennis I. Holober, 657 So.2d **1143** (Fla. 1995). The statute is penal in nature and should be strictly construed and directly relate to the practice of appellate law. Rush **v.** Dept. of Prof. Rep. Bd. of Podiatry, 448 So.2d 26 (Fla. 1st DCA 1984). The BSLE cannot deny or revoke certification for reasons not

clearly specified in the statute, as the statute must be strictly construed. Rush ; Food 'N Fun. Inc. v. Depot. of Transp., 493 So. 2d 23, 24 (Fla. 1st DCA 1986); State. Dept. of Highway Safety, Etc. v. Meck, 468 So.2d 993 (Fla. 5th DCA 1984).

The language of the statute is mandatory. Each applicant shall submit information concerning all instances of discipline in which the sanction imposed was a public reprimand or greater and all disciplinary complaints currently pending and **recommendations** of **denial based solely upon disciplinary matters shall be related to an applicant's proficiency in the practice of law.** Policy 2.04(f)(1)(a)(b)(4). The BSLE should not frustrate an applicant's attempt to secure certification. City of Panama v. Florida Public Emp., Etc., 364 So.2d 109, 110 (Fla. 1st DCA 1978). This action by the BSLE has caused and continues to cause Ash great prejudice in the practice of her profession, which is 100 percent appellate in nature. Ash has also lost two years of augmented salary. The BSLE has failed to follow the mandatory provisions of the statute and the BSLE must be reversed in the denial of Ash's certification and be required to issue Ash certification. The Florida Bar v. Catalano, 651 So.2d 91, 92 (Fla 1995); City of Panama v. Florida Public Emp. Etc., 364 So.2d 109, 114 (Fla. 1st DCA 1978); The Florida Bar v. Abney, 279 So.2d 834,836 (Fla. 1973).

BSLE's interpretation of questions F-4 and F-5 goes beyond the statutory authorized basis for denial. Furthermore, the term "basis for relief" does not include the striking of a pleading **without prejudice.** "Basis for relief' is claimed where, for example, the prosecutor's closing argument is so prejudicial to the defendant that a new trial is required or the conduct of appellate counsel in failing to raise an issue on direct appeal is the basis for the defendant's habeas corpus claim. Even such examples, where an error is raised as a basis for relief, would not be reason for denial of certification. The statute is clear that the legislature directed the BSLE to consider professional ethics and disciplinary record of an applicant in relation to the applicant's proficiency in the practice of law, not whether the applicant has ever made an error by omission or commission in the applicant's entire career.

Even assuming that the BSLE's action could be construed to be within the statutorily delegated powers, the punishment is not appropriate, i.e. not suitable for the particular person, condition, or place. State, Dept. of Environmental Regulation v. Brown **449 So.2d 908,909** (Fla. 3d **DCA 1984).** There is nothing in evidence that would support **the** conclusion that Ash lacks appellate competence and expertise to warrant denial of certification. The Third District accepted Ash's second response and **did not** sanction her in any manner. The BSLE also failed to consider the extent of Ash's appellate practice and her proficiency in that extensive practice.

In answer to Ash's appeal to the Certification Plan Appeals Committee and Board of Governors, the BSLE failed to address the issue of intent which is a prerequisite to a finding of misrepresentation or lack of candor. It was Ash's good faith belief that the questions asked were not applicable to her. The BSLE's characterization of her response as "false" is incorrect. Ash did not make any false statements in her application, but rather made a categorical denial that she was subject to a response to those questions and such a response is sufficient where there is no intent to misrepresent. The Florida Bar **v.** Cramer **,643** So.2d 1069 (Fla. 1994)(in order to find an attorney has acted with dishonesty, misrepresentation, deceit, or fraud, the necessary element of intent must be proven by clear and convincing evidence); compare The Florida **Bar** ,632 **So.2d** 1359 (Fla. **1994)(** categorical denial of complaint filed with state bar was not "false statement" where rules explain that response is mandatory but lawyer may deny charges).

The BSLE's actions are egregious and warrant reversal. The BSLE has **admitted** failure to follow procedures as directed by statue and the failure to allow Ash a fair opportunity to be heard. The decision must be reversed in its entirety as a derogation of Ash's due process rights, Fickle v. Adkins, 394 So.2d **461** (Fla. 3d **DCA** 1981). The BSLE reliance on the two exhibits attached to its answer to support misrepresentation as a basis for denial is blatantly inadequate. The mere ruling without facts to support that ruling is of no authoritative merit. Rule **6-4,** Standards For Certification Of a Certified Civil Trial Lawyer, which applies to the exhibits, specifically sets out the standards of participation in jury trial cases that an

applicant must have completed for consideration for certification. Intentional misrepresentation of the statutory requirements cannot be compared to unintentional failure to disclose facts that are not required by statute or the wording of the questions in the application.

BSLE's answer states that "petitioner is fully authorized to apply for future cycles of appellate certification; to at that time disclose and explain or mitigate in full the incident in Johnson v. Singletary, supra; and to secure certification at that time if all requisite standards are met", This statement belies the ruling that Ash allegedly lacks appellate competence and expertise to warrant certification. Ash has fully explained the incident which should not have been subject of denial in the first place. The Third District's acceptance of the explanation for the deficiencies in Ash's first response was determinative of the issue. The BSLE's offer of reconsideration shows the import it has mistakenly placed on the incident. Offer of reconsideration merely demonstrates the BSLE's need for applicants to jump through arbitrary and capricious 'hoops" and again pay application fees and sit for examinations. Furthermore, the BSLE's characterization of the incident as an "admonishment" by the court is contradictory (Exhibit 34 at *5)*. Websters Third New World International Dictionary, 1986, defines admonishment as a "gentle or friendly reproof, warning, or reminder, counsel against a fault, error or oversight." Black's Law Dictionary, 6th Edition, 1990, states that admonition was authorized as a species of punishment for **slight** misdemeanors, reprimand or cautionary statement to counsel by judge. This is hardly what could be classified as **material misrepresentation** even if intent to misrepresent had been factually established by the BSLE.

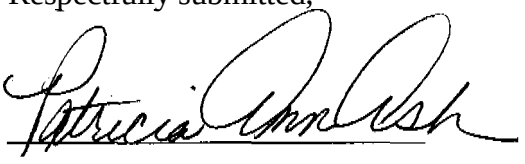
Certification in appellate law should be granted to Ash, retroactive to the notification date of the applicants that passed the 1995 examination. BSLE's denial of certification should be reversed as discriminatory, arbitrary and capricious, in violation of due process, in excess of the statutory delegation of authority for applicant evaluation, inconsistent with the decision of the previous committee, without consideration of Ash's proficiency in all areas of appellate law, and excessive punishment for an unintentional failure to interpret what the BSLE **excessively** required without authority as response to

questions F-4 and F-5 on the original application. There is a lack of factual basis and no argument supported by authority upon which the denial of certification was based and the confidentiality as required by statute was breached.

CONCLUSION

Based on the foregoing argument and authority, Patricia Ann Ash would request that this Court reverse the Committee's denial of appellate certification as the denial is discriminatory, arbitrary and capricious, in violation of Ash's due process rights to present a defense or explanation pursuant to the rules. It is excessive punishment for an unintentional failure to interpret what the Committee required as response to questions F-4 and F-5 on the original application. Further, this Court should approve Ash's application for certification and make the approval retroactive to the date of notification of the other applicants who passed the 1995 examination, and award attorney's fees and costs.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Thomas M. Ervin, **Jr., Attorney** for Board of Legal Specialization & Education, Post Office Drawer 1170, Tallahassee, Florida 32302, this 9th day of June, **1997.**

Patricia **Ann Ash**