IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Case No. 92,133

RE: VICTOR D. INES

_____/

ON APPEAL FROM THE FLORIDA BAR BOARD OF GOVERNORS

ANSWER BRIEF OF BOARD OF LEGAL SPECIALIZATION & EDUCATION

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STATEMENT OF THE CASE AND FACTS

This Answer Brief is submitted on behalf of appellee Board of Legal Specialization and Education (hereinafter "BLSE"). This full statement is presented pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure. It is necessitated by the absence of any corresponding statement in the initial brief of appellant.

This is an appeal of a decision of a Grade Review Panel, subsequently affirmed by the Certification Plan Appeals Committee (hereinafter "CPAC") and the Board of Governors, whereby Bar certification in the area of marital and family law was denied because of examination failure.

Appellant Ines sat for, and failed, the 1995 family law certification examination (R 13-23). No appeal was taken from that examination failure, and grading of the 1995 examination and its result are not issues herein.

Appellant Ines then sat for, and failed, the 1996 family law certification examination. He then availed himself of initial examination review, as provided for in Policy 2.08(e). Thereafter, he submitted his petition for grade review, as authorized by Policy 2.08(f). His petition for grade review appears as part of Composite Exhibit "1" of the record herein (R 8-12).

An independent Grade Review Panel was duly appointed, as provided in Policy 2.08(f)(3), and reviewed appellant's grade in the manner provided in Policy 2.08(f)(4).

Appellant Ines, in the grade review process, requested review of the scores initially assigned to his answers on four essay

questions (Nos. 1, 2, 3 and 4) (R 8-12). The written decision of the Grade Review Panel, dated November 13, 1996, was as follows:

DECISION OF GRADE REVIEW PANEL

> THIS CAUSE came on for consideration on October 28, 1996, of a Petition for Grade Review filed by Applicant FL 96-007. After having reviewed the Petition for Grade Review, Petitioner's exam answers, exam, the model answers, and range finders, the panel unanimously concludes as follows:
>
> 1. Essay #1 score should be increased from 4 to 4.5;
>
> 2. Essay #2 score should be increased from 4 to 4.5;
>
> 3. Essay #3 score should be increased from 2.5 to 3;
>
> 4. Essay #4 score should remain as originally graded; and,
>
> 5. Multiple choice grading is deemed correct.
>
> Respectfully submitted this 13th day of November, 1996.
>
> /s/ Ann Loughridge Kerr
> Ann Loughridge Kerr, Panel Chair
> Curtis Witters
> Barbara Taylor
> Jerome Novey

(R 1)

Appellant was thereafter notified of the decision of the Grade Review Panel and that, because the increase in scores awarded did not adjust or elevate his score to a passing score, certification was denied (R 2).

As to the effect and finality of decisions of such Grade Review Panels, Standing Policy 2.08(f)(5) commands that:

(5) Panel decisions shall close the grade review process.

Appellant Ines then filed his appeal of the decision of the Grade Review Panel to the Certification Plan Appeals Committee (R 3-26). Appellee BLSE submitted its response in the proceedings before the Certification Plan Appeals Committee (R 27-40).

The right of further review (before CPAC) is as provided, and limited, by Policy 2.08(g), as follows:

> (g) Upon completion of the grade review, either the petitioner or the committee may elect to proceed with an appeal, to the AC, pursuant to the appeal procedures set out in the 400 series of the BLSE policies. Such appeal shall be limited to the procedural issues set forth in this review and petition process and to clear and unequivocal allegations of fraud, discrimination, arbitrary or capricious action.

(Emphasis supplied.)

As to the scope and standard of review in proceedings before CPAC, Policy 4.03(a) provides and restricts as follows:

> 4.03 Standard of Review
>
> (a) Appeals from Review Panels.
>
> The AC shall limit its consideration to the procedural issues set forth in the BLSE policies and to clear and convincing allegations of fraud, discrimination, or arbitrary or capricious action.

Appellant Ines contended below that the uniform Holistic Rating Scale is "inherently arbitrary and capricious." The full "Essay Scoring" guidelines, including the full "Holistic Rating Scale," and guidelines respecting its use and application appear in the record (R 38-40).

In proceedings below appellant Ines argued that he was told his answer to essay No. 4 was a "rangefinder 3" grade, and that it was arbitrary or capricious for a "rangefinder" answer to be, or be awarded, only a score of "3," or 50%. In response, BLSE notes the guidelines (R 38-40) provide, in pertinent part under "Selection of New Rangefinders," that:

> An essay that typifies the essays in each score category is selected as a rangefinder and labeled. These rangefinders serve as the point of comparison for the remaining essays.

(Emphasis supplied.)

Thus, selection of an answer as a "rangefinder" does not denote superiority of the answer, but that it typifies the essay answers falling within the assigned score category.

Appellant Ines also argued that where 70% was required for a passing score on the overall certification examination, it was arbitrary and capricious to award only a "4," or 67%, score to an adequate answer.

The standard for certification announced by this Court in Rule 6-6.1 states:

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

(Emphasis supplied.)

Rule 6-6.3(d) provides as to the examination process or requirements that:

> **(d) Examination.** The applicant must pass an examination applied uniformly to all applicants, to demonstrate sufficient knowledge, proficiency, and experience in marital and family law to justify the representation of special competence to the legal profession and the public.

(Emphasis supplied.)

BLSE notes that the passing standard of 70% is with reference to answers to the entire examination, not to individual questions and answers. BLSE further notes that the full description of the "4" holistic scoring category is as follows:

> Score of 4. A 4 answer demonstrates competence in response to the question. A 4 answer demonstrates an adequate understanding of the facts, an adequate recognition of most of the issues and law, and adequate ability to reason to a conclusion.

(R 39) (Emphasis supplied.)

This "4" category of mere "competence" or adequacy is contrasted with the "high degree of competence" required for a "6" category answer, and "clear competence" required to be demonstrated for a "5" category answer (R 38-39).

Appellant also argued that his 1995 and 1996 Grade Review Panels were chaired by Ann Loughridge Kerr, and cites to a January 2, 1996, letter from Ms. Kerr regarding the 1995 examination (R 23).

The subject letter expressly confirms (as to the 1995 exam, which is not an issue herein) that Ms. Kerr did not know the identity of appellant Ines at the time of her 1995 Grade Review

Panel service. This lack of knowledge of identity of the examinee is as required by Policy 2.08(f)(4), to wit:

> (4) The responsibility of each panel shall be to review the substantive basis for each petition filed. All information submitted to said panel shall be 'in blind' form, so as to delete all information that would identify the examinee. It shall be the responsibility of the legal specialization and education ('LSE') director to ensure the grade review is accomplished anonymously.

(Emphasis supplied.)

As to the 1996 Grade Review Panel process, not only was the required anonymity observed, but Ms. Kerr merely served as Chair of the Grade Review Panel and was, therefore, restricted in her participation in accordance with recently revised Policy 2.08(f)(3), which commands that:

> (3) Within 90 days of notification of exam results, grade review panels shall convene and issue a written opinion on each petition filed. Each panel shall consist of 3 ad hoc appointees certified in the relevant area and be chaired by a member of the BLSE. The BLSE member shall oversee and coordinate the activity of the panel, but shall not vote on the decision. All appointments shall be made by the BLSE chair and no member of the panel shall have had prior involvement with that examination either as a committee member, drafter or grader.

Thus, as to the 1996 Grade Review Panel, Ms. Kerr did not serve as a voting member.

Finally, appellant Ines noted that, having failed to receive a passing grade on two consecutive certification examinations (1995 and 1996), he will be compelled to sit out two years before he may

again apply. This is a product of established and approved policy, as expressly stated in Policy 2.08(c)(2), to wit:

> (2) An applicant who does not obtain a passing score on the exam after 2 consecutive attempts is ineligible to reapply for 2 consecutive years following the second failure.

Appellant contended that this policy was arbitrary and capricious.

In proceedings before CPAC, appellant presented his reply to the response of BLSE (R 41-45). He asserted therein that certification exams should not be graded by certified lawyers, but by Family Law Professors or Florida law schools (R 44). The appeal of appellant was heard by CPAC on July 24, 1997, and by order July 30, 1997, CPAC affirmed the denial of certification (R 46).

Appellant Ines then filed his appeal to the full Board of Governors of The Florida Bar (R 47-48). Appellee BLSE filed its response (R 49-50). Oral argument before the full Board of Governors was heard on November 21, 1997. By order of December 2, 1997, the Board of Governors affirmed the denial of certification (R 51). This appeal by appellant Ines followed.

SUMMARY OF ARGUMENT

Appellant Ines has failed to demonstrate any basis for reversal of the denial of certification below. He was not granted certification in family law because he failed to pass the required certification examination. R. Regulating Fla. Bar 6-6.3(d).

Appellant has now had the benefit of extensive right of appeal or review. He has had the grading of his answers by the initial certification committee reviewed, and actually adjusted to his benefit, by an independent Grade Review Panel. Unfortunately, he did not secure a passing score even after the adjustment.

Appellant has, thereafter, secured full review of the Certification Plan Appeals Committee and the full Board of Governors regarding his contentions of arbitrary and capricious actions by the certification committee and Grade Review Panel.

Now appellant has instituted these proceedings. The record reflects that the Holistic Grading Scale which appellant criticizes provides ample standards and guidelines for grading and is entirely consistent with this Court's direction that certification be predicated upon demonstration of "special" knowledge, skills and proficiency and "special" competence in the field of marital and family law. R. Regulating the Fla. Bar 6-6.1; R. Regulating the Fla. Bar 6-6.3(d).

Appellant also argues that it is arbitrary to have one-half of the certification score based upon answers to essay questions. Such a balance of objective and essay questions is entirely

reasonable and serves the purpose of measuring and determining **"special"** competence in the subject field of practice.

Appellant also argues that it is arbitrary or unfair to have the initial grading and grade review process performed by certified lawyers. This system, however, is in accord with this Court's directions as to conduct of the certification program. See R. Regulating Fla. Bar 6-3.2; R. Regulating Fla. Bar 6-3.3. This same announced policy of this Court supports the limitation of review before the Certification Plan Appeals Committee and Board of Governors so as to exclude or prohibit continuation of the grading, or grade review, process on further appeal.

Appellant's other arguments are equally without merit. Disappointing though it surely is, appellant has been denied certification because he has not yet met the announced criteria for same. He has not had any right or **"property"** taken. He may continue his practice of marital and family law without restriction. If he so chooses, he **may** again apply for certification in the 1998-1999 application/examination cycle.

The decision below, and denial of certification, should be affirmed.

ARGUMENT

APPELLANT HAS FAILED TO DEMONSTRATE TEAT THE CERTIFICATION EXAMINATION AND GRADING SYSTEM WERE ARBITRARILY OR CAPRICIOUSLY APPLIED TO DENY HIM CERTIFICATION, OR TO DEMONSTRATE ANY BASIS FOR GRANT OF RELIEF HEREIN.

Because appellant's argument is, essentially, a broad attack on the certification examination system which was adopted pursuant to this Court's announced criteria, it is first appropriate to look at the overall system.

During the first eleven years of The Florida Bar Certification Plan (1983 through 1993), the number of "grade" appeals to the Certification Plan Appeals Committee was comparatively small, and the number of appeals to the Board of Governors was even smaller.

A consistent general understanding of proper operation of the "grade" system during that period was that test scoring in any area of certification should be performed by lawyers who had demonstrated special competence by prior certification in the area at issue, and that review at the level of the Certification Plan Appeals Committee and the Board of Governors should not extend to regrading or rescoring of exam answers.

In the early 1990's, in what might properly be described as maturation of the process, the Board of Legal Specialization and Education, with the concurrence of the Board of Governors, took appropriate steps to further enhance consistency and reliability in the development and grading process of certification exams. These steps included engagement of outside expertise on the subject of test development and scoring, development of a standardized

Technical Manual for training and use by the various area certification committees, and adoption of the **"holistic"** scoring method as **a** superior measure of grading, and consistency in grading.

During this same early **1990's** period, though grade review appeals remained infrequent, a recurring suggestion was that it was inappropriate (in appearance, if not in fact) to have the same certified lawyers who developed the certification exam, and Model Answers to questions thereon, be the **"final word"** on grading or scoring of applicant answers. This suggestion was most often heard from unsuccessful applicants who, on review, sought to have the members of the Certification Plan Appeals Committee or the Board of Governors undertake regrading of individual examination answers.

In an effort to respond to this suggestion, or occasional criticism, a system of independent Grade Review Panels was created and implemented to review **"grade"** appeals from the 1994 Certification Examination, and thereafter. The system authorizes any disappointed applicant in any area of certification to have the grade awarded on any certification examination question reviewed (and increased if found appropriate) by an independent three-lawyer Grade Review Panel, made up of lawyers certified in the subject area who had **no** involvement in the development of the subject examination or its grading.

After appellant failed to secure a passing grade on the 1995 Family Law Certification Examination, this system of independent Grade Review Panel review was available, and was invoked by

appellant Ines. When the independent Grade Review Panel affirmed the initial grading, appellant Ines did not seek further review as to the 1995 exam and scoring. In essence, the denial of certification for that 1995 exam year became "final."

Under applicable certification system policies, appellant Ines was eligible to retake the Family Law Certification Examination in 1996 upon filing a "short form" application and request, which he filed. Upon taking the 1996 certification exam, he again failed to secure a passing score, and again requested and secured review by an independent Grade Review Panel. In the ensuing review, the independent Grade Review Panel increased the awarded score on several of appellant's answers, but a passing score was still not attained by appellant and certification was again denied.

Thereafter, appellant sought and secured review before the Certification Plan Appeals Committee and the full Board of Governors, both of which affirmed the denial of certification. Appellant has now sought review in this Court.

Before turning to appellant's specific arguments, it is appropriate to further note that the three-year experience (1994-1996) with the independent Grade Review Panel reflects a high degree of success or acceptance within the overall group of unsuccessful certification applicants.

During the past three certification exam years for which full statistics are available (1994, 1995 and 1996), a total of 1,173 lawyers sat for certification exams, and 840 attained certification either by initial grading (820), or by action of independent Grade

Review Panels (20). Of 333 unsuccessful "grade" applicants during those three years, only eight have sought further review before the Certification Plan Appeals Committee, and only three of those sought further review before the full Board of Governors. Only two, including appellant Ines, have sought review in this Court.

Even if the fact that 325 of 333 unsuccessful examinees over the past three years accepted the result of grading without further appeal to even the Certification Plan Appeals Committee is not conclusive proof, it is very strong indication that the certification plan is functioning properly and well.

In this respect it is pertinent that each of the 333 unsuccessful examinees is a lawyer who has been practicing at least five years. Each has substantial experience in the area of practice at issue. Each has been, annually, provided with the Directory September issue of The *Florida Bar Journal* wherein the right of, and procedures for, further appeal is spelled out. Each was individually advised of the availability of opportunity for further review at the time of being advised of failure to attain a passing score. In short, this is an informed group of unsuccessful examinees quite capable of understanding the availability of further review, of evaluating any potential basis for review, and of asserting any perceived claim of procedural error or arbitrary or capricious action.

That 325 of this group, or almost 98%, have elected to accept initial grading or Grade Review Panel action, and voluntarily forego all further available review, is strong indication that the

certification examination system **is** functioning properly and well (i.e., without perceived procedural inequity or arbitrary and capricious denial of certification).

Specific response to "Appellant Brief & Argument" herein is difficult in that appellant has not truly filed a **"brief."** He has, instead, filed a three-page document (without index, points or issues presented, statement of case and facts, etc.) which generally **"adopts"** arguments made below and **"summarizes"** his complaints about the system in six (6) numbered paragraphs.

Appellant's first argument, or contention, appears to be that the scoring guide criteria provided to graders is insufficient to **"insure"** that grading of essay exam answers was not "inherently arbitrary and **capricious."** For the convenience of the Court, appellee BLSE includes in the Appendix to this brief the three-page **"Essay Scoring"** guidelines which include the **"Holistic** Rating **Scale"** applicable to scoring of certification exam essay answers.

The "Holistic Rating **Scale"** establishes six score scale points, as follows:

> Score of 6. A 6 answer demonstrates a high degree of competence in response to the question. While not reserved for a perfect answer, a 6 answer demonstrates a full understanding of the facts, a complete recognition of the issues presented and the applicable principles of law, and a good ability to reason to a conclusion. A 6 answer is clear, concise, and complete.

Score of 5.	A 5 answer demonstrates clear competence in response to the question. A 5 answer demonstrates a fairly complete understanding of the facts, recognizes most of the issues and applicable law, and reasons fairly well to a conclusion.
Score of 4.	A 4 answer demonstrates competence in response to the question. A 4 answer demonstrates an adequate understanding of the facts, an adequate recognition of most of the issues and law, and adequate ability to reason to a conclusion.
Score of 3.	A 3 answer demonstrates some competence in response to the question but is inadequate. A 3 answer demonstrates a weak understanding of the facts, misses significant issues, fails to recognize applicable law, and demonstrates inadequate reasoning ability.
Score of 2	A 2 answer demonstrates only limited competence in response to the question and is seriously flawed. A 2 answer demonstrates little understanding of the facts or law and little ability to reason to a conclusion.
Score of 1	A 1 answer demonstrates fundamental deficiencies in understanding facts and law. A 1 answer shows virtually no ability to reason or analyze.

(Appendix, pp. 1-2.)

The above-quoted Holistic Rating Scale of 1 to 6 does not reflect any "inherent" arbitrariness or capriciousness, merely because it sets out in descriptive form the various levels or

degrees of competence and adequacy required for each category of answer. Specific guidance is provided as to each separate category or score. Lawyers are, and are expected to be, able to interpret and apply guidelines or standards stated in descriptive terms. The Holistic Rating Scale, which is applied throughout the certification system, provides the necessary standards and guidance. Appellant has made no showing whatsoever that the scale was not properly applied in grading of his exam answers.

Appellant's next argument or contention appears to be that the grading process is a "curved" grading process which presumes failure by a proportion of examinees who have already demonstrated or established "special competence" in the field prior to examination,

Appellee BLSE first notes that the grading procedures and guidelines do not "presume" or require failure on the part of any applicant or proportion of applicants. While there are six available or potential scores on the Holistic Rating Scale, there are no requirements or guidelines that answers be divided or assigned equally, or in any preordained proportion, to each or any of the discrete scores. If all answers demonstrate the high level of competence and adequacy called for, all may be awarded a score of 5 or 6, as appropriate.

Appellant has also argued that to assign a holistic score of 4, or 67%, to an answer which demonstrates "competence" and "adequate understanding," is unfair or arbitrary in a system where a 70% overall score on the exam was required for a passing grade

and certification. Appellant argues that this somehow indicates an intent on the part of the Bar, or appellee BLSE, to unfairly restrict the availability of certification.

In response, appellee BLSE notes that under the criteria established by this Court, an answer which demonstrates only **"competence"** and **"adequate"** understanding is properly assigned a grade of 4, or 67%. This Court, by adoption of Rule 6-6.1, Rules Regulating The Florida Bar, has restricted family law certification to those lawyers who have **"special"** knowledge, skills and proficiency. As to examination, this Court has expressly directed in Rule **6-6.3(d)** that:

> **(d)** Examination. The applicant must pass an examination applied uniformly to all applicants, to demonstrate sufficient knowledge, proficiency, and experience in marital and family law to justify the representation of **special** competence to the legal profession and the public.

(Emphasis added.)

Where this Court's established announced standard for certification is demonstrated "special competence," it is certainly appropriate (if not generous) to award an answer which demonstrates only **"competence"** a 4, or 673, score. Again, appellant fails to demonstrate arbitrariness or unfairness.

Appellant next argues that persons who are eligible and admitted to take the certification exam have, by non-exam credentials, already demonstrated **"special competence"** in the field. It is true that persons admitted to certification examinations have met the preliminary requirements of substantial

involvement, peer review and approved continuing education. See Rule 6-6.3(a)-(c). It is, however, equally true that this Court has clearly and exsresslv required that the demonstration of requisite "special competence" for certification must be established by and predicated upon successfully passing the appropriate certification examination. Rule 6-6.3(d).

Appellant also argues that it is arbitrary or unfair to base 50% of the certification examination score on the "subjective" grading of answers to essay questions. This contention simply fails to recognize the different functions of the types of questions within an entire examination.

While multiple choice, or very short answer, questions are satisfactory methods of testing specific knowledge of discrete items within a core body of law or area of practice, they are less effective or appropriate as a means of testing a lawyer's ability to analyze and apply the law in a skillful and proficient manner to a factual circumstance or situation. The latter is the proper function of the essay question, and answer. Both forms of question are appropriate and necessary where the overall, assigned task is to establish the presence of "special knowledge, skills and proficiency" among practicing lawyers. See R. Regulating Fla. Bar 6-6.1.

Appellant has also argued the Grade Review Panel members are not given sufficient guidance in the performance of their review function. That adequate guidance, however, is provided in Standing Policies of appellee BLSE. Under those policies the applicant

first files a written petition "detailing the claimed grading error(s)." Policy 2.08(f)(1). The applicant may submit to the Grade Review Panel "any additional supporting authority" regarding the claim of incorrect grading. Policy 2.08(f)(2). The Grade Review Panel is thereafter required to perform as follows, in pertinent part:

> (4) The responsibility of each panel shall be to review the substantive basis for each petition filed.

Policy 2.08(f)(4).

In the instant case the Grade Review Panel performed its function and issued its written decision as required by Policy 2.08(f)(3). Upon the issuance of the Grade Review Panel's decision, the grade review process was "closed." Policy 2.08(f)(5).

This Court may note from the record that appellant Ines did secure meaningful review from the Grade Review Panel. Appellant, in those proceedings, challenged the correctness of grading of all four of his essay answers. As to Essay No. 1, the Grade Review Panel increased his awarded score from 4 (67%) to 4.5 (75%). As to Essay No. 2, the panel increased his score from 4 (67%) to 4.5 (75%). On Essay No. 3, the panel increased his score from 2.5 (42%) to 3 (50%). On Essay No. 4 the panel affirmed the original score of 3. Thus, appellant actually received an increase of score on three out of four essay answers. He did not, however, attain an overall passing score even with the increases awarded by the Grade Review Panel,

Appellant has complained in his initial brief that the grade Review Panel made adjustments of .5 increments, rather than whole numbers. This is, in essence, an argument that if, for example, a Grade Review Panel found an answer to be just slightly better than an initially awarded 4 score, then it must jump the score all the way to a 5, whether or not the answer satisfied the criterion for a 5 score. Appellee BLSE respectfully submits that Grade Review Panels are not restricted to use of such a "blunt instrument" as whole numbers in grade review, and no arbitrariness or capriciousness is demonstrated by use of one-half increments to assign the answer the final score it merits.

Appellant has also argued below that it is arbitrary or unfair to have certified lawyers involved in grading of certification examinations. He has suggested that this function might be better performed by "Family Law Professors" or @'Florida Law schools."

Appellee BLSE first notes that appellant's suggestion is more in the nature of a quasi-legislative (i.e., program revision) issue than a ground for appeal. This Court, in establishing and approving the certification plan has expressly directed that area certification committees shall be composed of lawyers certified in the subject area, Rule 6-3.2, Rules Regulating The Florida Bar, and shall be responsible for performance of the certification examination process (R. Regulating the Fla. Bar 6-3.3).

This court-approved system is clearly appropriate where that which is to be measured is "special knowledge, skills and proficiency" and "special competence" among experienced lawyers in

the practice area of family law. With no disrespect intended to Family Law professors or law schools, there is a distinct difference between academically teaching a subject, and evaluating **"special competence"** in the practice of law within that area of law.

Appellant has also argued below that the grading system must be changed or fewer and fewer lawyers will sit for the exam. This is pure speculation and conjecture. Moreover, the pertinent records reflect that, disregarding the first year of Family Law certification **(1985),** over the next eight years (1986-1993) the average number of lawyers who sat for the Family Law certification exam annually was 20 lawyers, Over the past four exam years (1994-1997), the average number who sat for the exam annually was 26 lawyers. Thus, though the number of lawyers sitting will vary from year to year, overall experience over the last twelve years does not support appellant's contentions of decline.

As to this argument or contention of appellant, it is also pertinent that essentially the same examination and grading system (by previously certified lawyers) is used for all areas of certification. It is pertinent, therefore, that in the three-year **"examination"** period from 1994 through 1996 a total of 1,173 lawyers sat for certification examinations, as compared to only 732 in the immediately preceding 1991 through 1993 period. This increase of over 60% in the number of lawyers sitting belies any contention of widespread disillusionment or program decline, as

does the increase of 54% in the number of lawyers attaining certification during latter three-year period.

Appellant also argues that at the level of review by the Certification Plan Appeals Committee and the Board of Governors his exam and answers were not allowed to be part of the **"record."** In fact and practice, such material is often included in the record, and is **always** included in the record if it is incorporated in appellant's Petition for Grade Review before the Grade Review Panel, and then attached to or incorporated in an applicant's appeal to CPAC.

What **is** proscribed at the level of review by the Certification Plan Appeals Committee and the Board of Governors is continuation of the grading, or grade review process.

That the grade review process does not continue beyond the Grade Review Panel decision is made perfectly clear by Policy **2.08(f)(5),** which commands that:

> (5) Panel decisions shall close the grade review process.

That further review by the Certification Plan Appeals Committee is of a restricted nature is made perfectly clear by Policy **4.03(a),** which instructs that:

> (a) Appeals from review Panels.
>
> The AC shall limit its consideration to the procedural issues set forth in the BLSE policies and to clear and convincing allegations of fraud, discrimination, or arbitrary or capricious action.

That the function at the Certification Plan Appeals Committee level is a review, rather than de novo, proceeding is made further clear by Policy 4.07, which provides:

> 4.07 EVIDENCE
>
> No evidence shall be presented on appeal that was not presented to the . . . RP [Review Panel].

(Bracketed information supplied.)

In the final analysis, what appellant has sought to do is continue the grade review process beyond the Grade Review Panel level by urging to CPAC, the Board of Governors, and now this Court, that his answers were of such a quality as to make it arbitrary and capricious to award scores of 4.5, 4.5, 3.0 and 3.0, respectively. This is nothing more than clothing continuation of the closed grade review process in the cloak of "arbitrary and capricious" terminology.

Appellant's other arguments are not properly in the area of review. They are system-revision arguments wherein appellant disagrees with the fundamentals and operations of the existing system (whereunder approximately 3,000 lawyers have earned certification) and urges that the system be revised to fit his view of a better way.

Finally, appellant argues that it is arbitrary and unfair that, having failed the 1995 and 1996 certification examinations, he is not permitted to sit for examinations in 1997 and 1998. This is the policy set forth in Policy 2.08(c)(2), to wit:

> (2) An applicant who does not obtain a passing score on the exam after 2 consecutive attempts is ineligible to reapply for 2 consecutive years following the second failure.

The reasons for this policy are not any exclusionary purpose or any "attempt to presume failure" as appellant argues. While certification examinations evolve, they are not wholly "reinvented" every year. An applicant who fails a first year's exam is entitled (even if the applicant does not formally appeal) to review the exam, the model answers, and the applicant's own answers. Policy 2.08(e)(1) and (2). If the applicant fails a second consecutive year, the applicant is, again, entitled to such review. Thus, an applicant who has failed two consecutive years has twice reviewed the correct and model answers to every question asked during that two-year period.

The challenged policy is, therefore, not based solely on the view that two consecutive failures indicate a need for further experience, study and skills enhancement. It is also based on the premise that a person who has reviewed all questions and <u>all</u> answers two years in a row has an unfair advantage over other applicants. It is based on the premise that such an applicant may well attain an undeserved higher score in the third consecutive year not by the possession of "special competence," or "special knowledge, skills and proficiency" in the area of practice, but by answer recollection (as to information, issues <u>and</u> format) and superficial test "savvy" as a product of consecutive review.

Appellee BLSE, therefore, respectfully submits that the challenged two-year rule has a sound basis in public and professional policy, and serves compliance with this Court's direction that certification be restricted to those who, by successful examination completion, have demonstrated "special competence" in the field of marital and family law. R. Regulating Fla. Bar 6-6.3(d).

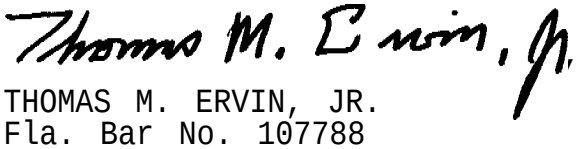
Appellant has also argued that the Bar is "using my dues each year" to educate the public and promote certification. Appellant is simply wrong as to the use of Bar dues revenue. All such notices, advertisements and other public statements regarding Bar certification are funded from program revenues, not from member dues paid to The Florida Bar.

Finally, and perhaps unnecessarily, appellee BLSE notes that nothing has been "taken" from appellant by the failure to attain certification. Appellant is fully entitled to continue the unrestricted practice of marital and family law. R. Regulating Fla. Bar 6-3.4(b). Certainly, certification in one's area of practice is desirable and professionally beneficial when attained in the manner prescribed by this Court. It is equally certain, however, that grant of certification to those who have not attained same in that manner would soon dilute, if not destroy, the professional and public benefit from the program.

CONCLUSION

For the foregoing reasons, appellee Board of Legal Specialization and Education respectfully submits that the appeal of appellant Ines should be denied and the action of the Board of Governors of The Florida Bar should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Board of Legal Specialization & Education and attached Appendix have been furnished by U.S. mail this 24th day of February, 1998, to the following:

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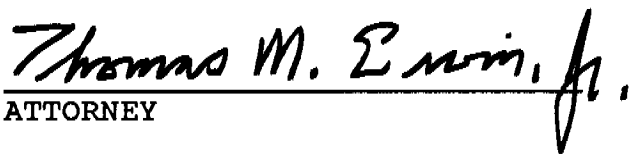

ATTORNEY