IN THE SUPREME COURT OF FLORIDA

FLORIDA BOARD OF BAR EXAMINERS)
RE RULE 2-11.1 OF THE RULES)
OF THE SUPREME COURT RELATING TO)
ADMISSIONS TO THE BAR)
_____)

REPORT AND RECOMMENDATION

Submitted by:

FLORIDA BOARD OF BAR EXAMINERS
MICHAEL J. KEANE, CHAIR

Kathryn E. Ressel
Executive Director

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

Comes now the Florida Board of Bar Examiners, by and through its undersigned attorney, and files this Report and Recommendation to the Court relating to Rule 2-11.1 of the Rules of the Supreme Court Relating to Admissions to the Bar (hereinafter the Rules).

REPORT

Background

On behalf of the Supreme Court of Florida, Chief Justice Harry Lee Anstead asked the Board to examine Rule 2-11.1 of the Rules and determine if an amendment to such rule should be considered by the Court. In his letter, the Chief Justice directed the Board to advise the Court if a revision is unnecessary. If the Board determines that a revision is appropriate, then the Chief Justice directed the Board to file a petition with the Court seeking adoption of the Board's proposed amendment. Chief Justice Anstead requested that the Board complete its study and make its recommendation by the end of February, 2003.

On October 23, 2002, the Orange County Bar Association (OCBA) served a petition containing two proposals to amend Rule 2-11.1 that would expand the current 12-month accreditation provision of such rule. On November 5, 2002, the Board served a Motion to Dismiss the petition of OCBA due to the Board's ongoing study of such rule at the Court's direction. On January 7, 2003, the Court abated the proceedings involving OCBA's petition until the Board's filing of this report.

Rule 2-11.1 of the Rules provides:

> **2-11.1 Educational Qualification**. To be admitted into the General Bar Examination and ultimately recommended for admission to The Florida Bar, an applicant must have received the degree of Bachelor of Laws or Doctor of Jurisprudence from an accredited law school (as defined in 4-13.2) at a time when the law school was accredited or within 12 months of accreditation or be found educationally qualified by the Board under the alternative method of educational qualification. Except as provided in Rule 2-11.2, none of the following shall be substituted for the required degree from an accredited law school:
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> (a) private study, correspondence school or law office training;
>
> (b) age or experience;
>
> (c) waived or lowered standards of legal training for particular persons or groups.

The ABA Accreditation Process for Law Schools

The law school accreditation process of the American Bar Association (ABA) has gone through significant changes during the last several years. The need for change in the ABA accreditation process was discussed by the court in Staver v. American Bar Association, 169 F.Supp.2d 1372 (2001):

> The current accreditation decision-making structure is the result of the ABA's efforts to comply with the U.S. Department of Education's regulations regarding nationally recognized accrediting agencies. These regulations require that a trade association wanting to be a recognized accrediting agency have a "separate and independent" body that makes accreditation decisions.

Id. at 1375 (citation omitted).

Under the old process, the ABA's full House of Delegates approved the accreditation decisions. As discussed by the court in United States v. American Bar Association, 135 F.Supp.2d 28 (D.D.C. 2001)(Granting uncontested Motions to Modify 1996 Final Judgment):

> Under the new process, the ABA House of Delegates would review accreditation-related decisions made by the Council, and, if found to be questionable, remand the decision to the Council for further consideration. The House of Delegates may remand a Council decision twice, but must accept it the third time it is submitted for review. Under no circumstances may the House reverse a Council decision on accreditation.

Id. at 30 (footnote omitted).

The ABA Standard on Provisional Approval states:

> (a) A law school is granted provisional approval if it establishes that it is in substantial compliance with each of the Standards and presents a reliable plan for bringing the law school into full compliance with the Standards within three years after receiving provisional approval.

Standard 102.

The ABA has issued several Interpretations of the above-quoted Standard including the following:

> Interpretation 102-3: A student at a provisionally approved law school and an individual who graduates while the school is provisionally approved are entitled to the same recognition given to students and graduates of fully approved law schools.
>
> Interpretation 102-4: An approved law school may not retroactively grant a J.D. degree to a graduate of its predecessor unapproved institution.
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> Interpretation 102-6: An unapproved law school seeking provisional approval must include the following language in its bulletin: The Dean is fully informed as to the Standards and Rules of Procedure for the Approval of Law Schools by the American Bar Association. The Administration and the Deans are determined to devote all necessary resources and in other respects to take all necessary steps to present a program of legal education that will qualify for approval by the American Bar Association. The Law School make no representation to any applicant that it will be approved by the American Bar Association prior to the graduation of any matriculating student.
>
> Interpretation 102-7: In most jurisdictions an individual cannot sit for the bar examination unless he or she has graduated from a law school fully or provisionally approved by the American Bar Association. However, the determination of qualifications and fitness to sit for the bar examination is made by the jurisdiction's bar admission authorities.
>
> Interpretation 102-8: A law school seeking provisional approval shall not delay conferring a J.D. degree upon a student in anticipation of obtaining American Bar Association approval.

Copies of the Foreword (containing a historical summary of the ABA accreditation process), Preamble and ABA Standards 101, 102, 103 and 104 along with their Interpretations from the ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2002-2003 are attached to this report as Attachment 1.

Florida Case Law on ABA Accreditation Process

The only exception to the 12 month provision of Rule 2-11.1 is the one contained in the Court's 1973 decision in Florida Board of Bar Examiners re Eisenson, 272 So.2d 486 (Fla. 1973). In that case, petitioner had graduated from the Baltimore School of Law in June 1971. Such school was not accredited at the time of petitioner's graduation. In November 1971, or some five months after petitioner's graduation, the ABA evaluating committee conducted its examination and investigation of the school. At the ABA's next yearly meeting in August 1972, the school was approved by the ABA.

The rule in effect in 1973 at the time of the Eisenson decision provided that graduation must occur "in the same calendar year in which such school was so accredited." Id. at 487. As observed by the Court in Eisenson, "[t]he total time span between petitioner's graduation and provisional accreditation by the ABA covers a period of approximately fourteen months." Id. Thus, petitioner was unable to comply with the rule.

In granting the petition for waiver, the Court in Eisenson reasoned:

> To deny to petitioner the opportunity to seek admission to The Florida Bar merely because the ABA chose to vote on accreditation in August, 1972, rather than in May or June of the same year, would in our view violate the spirit, if not the letter, of the Rules....Thus, we conclude that where, as here, the requirements for provisional accreditation are met during the calendar year following the applicant's graduation, but the American Bar Association fails to act on its findings within the 12 months period provided by the Rules, a waiver of the Rule is permissible.

Id.

In 1983, the Court issued its landmark decision in In re Hale, 433 So.2d 969 (Fla. 1983). In that case, the Court addressed the issue of waivers of the law school accreditation requirement for individual applicants.

After acknowledging that it had only granted nine of the last 55 petitions in this area, the Court in Hale concluded "that a seeming ad-hoc approach in

the granting of waivers bears within it the appearance of discrimination." Id. at 971. The Hale Court, therefore, issued the following ruling: "This Court will no longer favorably consider petitions for waiver of [the ABA law school accreditation requirement] of the Rules." Id. at 972.

In Hale, the Court specifically noted the inherent unfairness with an ad-hoc approach:

> In each of these exceptional situations, this Court deliberatively decided that the exigencies of these particular cases merited waiver of the appropriate rule. Disappointed petitioners, however, have questioned our discretion in granting the above waivers while not granting their petitions.

Id. at 971.

The Florida Supreme Court relies upon the ABA for accreditation because such process "provide[s] an objective method of determining the quality of the educational environment of prospective attorneys." La Bossiere v. Florida Board of Bar Examiners, 279 So.2d 288, 289 (Fla. 1973). The Court has acknowledged that it is "unequipped to make such a determination ... because of financial limitations and the press of judicial business." Id.

The Hale Court also considered and dismissed the argument that the Court was abdicating its responsibility by relying upon ABA accreditation:

> Some may argue that by this Court's adherence to the requirement of ABA or AALS law school approval, we are abdicating our supervisory responsibility over bar admission and unlawfully delegating our constitutional function to a private authority. This is simply not true. As stated by the Supreme Court of Minnesota when it faced the same argument:
>
> > It is ... rational for a state supreme court to conclude that the ABA is best equipped to perform the function of accrediting law schools....
> >
> > We have not delegated our authority to the ABA but, instead, have simply made a rational decision to follow the standards of educational excellence it has developed.
>
> In re Hansen, 275 N.W.2d 790, 794, 796 (Minn. 1978), appeal dismissed, 441 U.S. 938, 99 S.Ct. 2154, 60 L.Ed.2d 1040 (1979).

Id. at 972.

In Florida Board of Bar Examiners re Amendments, 603 So.2d 1160 (Fla. 1992), the Court considered various proposals concerning the then existing additional requirement of an undergraduate degree from an accredited college. In ruling to dispense with the undergraduate degree requirement, the Court held "that the sole educational requirement of an applicant should be graduation with a J.D. or LL.B. degree from a law school approved by the American Bar Association." Id.

In 1998, the Court reaffirmed its policy against granting waivers of the ABA accreditation requirement in the case of Florida Board of Bar Examiners re Massachusetts School of Law, 705 So.2d 898 (Fla. 1998). There, the Massachusetts School of Law (MSL) requested the Court to consider its non-accredited law school on an ad-hoc basis and to decide whether its school provides a legal education that is substantially equivalent to an ABA-accredited law school.

In rejecting the relief sought by MSL, the Court reaffirmed its decision in Hale and reaffirmed its "policy ... against granting waivers of the ABA accreditation requirement." MSL, supra at 899. In response to criticism of the ABA accreditation process voiced by MSL, the Court expressed its confidence in such process noting "that the ABA is best equipped to evaluate the quality of education received at the many law schools throughout the nation." Id. at 899 (footnote omitted).

The ABA Accreditation Process for Recent Florida Law Schools

The most recent Florida law school to achieve provisional accreditation from the ABA was Barry University School of Law (hereinafter Barry) in Orlando. Prior to Barry, Florida's most recent schools to achieve accreditation were St. Thomas University School of Law and Florida Coastal

School of Law. Both of these schools were able to achieve such accreditation while complying with the 12 month requirement of Rule 2-11.1.

The ABA granted provisional accreditation to Barry on February 4, 2002. In April 2002, Barry petitioned the Court for relief on behalf of its January, June, and July 2000, and January 2001 students who graduated outside the 12-month requirement of Rule 2-11.1. Barry asked the Court to release the impounded scores of those graduates and to allow the unsuccessful graduates to retake the bar examination.

Barry sought relief on behalf of 111 past graduates of which 69 had already taken the bar exam but their scores were impounded. Briefs as amicus curiae in support of Barry's petition were filed by the Orange County Bar Association and the Attorney General of Florida.

In its response to Barry's petition, the Board argued that the granting of the relief requested by Barry would violate the express language of Rule 2-11.1 that requires that graduation occur "within 12 months of accreditation." The Board further argued that the 12 month provision of Rule 2-11.1 is a reasonable one and provides sufficient time to complete successfully the ABA provisional accreditation process.

In its response, the Board also pointed out that obtaining a legal education at an unaccredited law school involves a risk especially if one desires to practice law in Florida. The Board argued that it was a risk knowingly assumed by the Barry graduates who sought a waiver of Rule 2-11.1.

The Court published its decision in Florida Board of Bar Examiners re Barry University School of Law, 821 So.2d 1050 (Fla. May 16, 2002) rehearing denied July 3, 2002. The Court unanimously denied Barry's petition (with Justice Lewis recused).

In its opinion, the Court detailed the history of Barry and the special

exceptions granted by the Court allowing graduates of Barry to sit for the bar examination in Florida prior to the granting of provisional accreditation by the ABA in February 2002. The Court also discussed the Eisenson case. The Court observed that when Eisenson was decided, the rule requiring graduation from an ABA accredited law school contained language providing that "graduation must occur 'in the same calendar year in which such school was so accredited.'" Id. at 1055-1056.

The Court went on to state in its opinion that the existing language of Rule 2-11.1 "unambiguously requires that an individual who seeks to become a member of the Florida Bar must satisfy the educational qualifications of being a graduate from an accredited law school, or a law school that has been accredited within twelve months of graduation." Id. at 1053. The Court further reasoned that the facts in Eisenson differed from those presented by Barry's situation. The Court then "conclude[d] that Eisenson does not control the outcome of this case." Id. at 1056.

Lastly, the Court "note[d] that all students who enrolled at Barry University while it was unaccredited were on notice of the risk in attending an unaccredited law school when they began their studies at Barry University." Id. The Court "conclude[d] that the twelve-month window must be measured from the date the ABA actually awards provisional accreditation to a law school." Id. In denying Barry's petition, the Court specifically affirmed its prior decisions in Hale and Florida Board of Bar Examiners re Massachusetts School of Law. Id.

Barry sought rehearing of the Court's May 16, 2002 decision. The Court denied the motion for rehearing without discussion on July 3, 2002.

The Board has been advised that Barry has established a special program for any of its graduates who were denied relief by the Court. The Board has

been further advised that Nova Southeastern Law School has made available a program to accommodate any of the 111 Barry students. These programs will provide the Barry students with additional classes to allow them to graduate in the future from an accredited law school.

Even if the 111 Barry graduates elect not to take additional classes, there is an additional method by which those graduates could eventually obtain admission to The Florida Bar. As observed by the Court: "[I]n an effort to be fair to those applicants who have graduated from unaccredited law schools, [this Court has] provided an alternative method by which such applicants may qualify for the Florida Bar Examination." La Bossiere v. Florida Board of Bar Examiners, supra at 290.

This alternative method is set forth in Rule 2-11.2 of the Rules which provides:

> **Alternative Method of Educational Qualification**. For applicants not meeting the educational qualification above, the following requirements shall be met: (1) evidence as the Board may require that the applicant was engaged in the practice of law in the District of Columbia or in other states of the United States of America, or in practice in federal courts of the United States or its territories, possessions or protectorates for at least 10 years, and was in good standing at the bar of said jurisdictions in which the applicant practiced; and (2) a representative compilation of the work product in the field of law showing the scope and character of the applicant's previous experience and practice at the bar, including samples of the quality of the applicant's work, such as pleadings, briefs, legal memoranda, contracts or other working papers which the applicant considers illustrative of the applicant's expertise and academic and legal training. The representative compilation of the work product shall be confined to the applicant's most recent 10 years of practice and shall be complete and include all supplemental documents requested. In evaluating academic and legal scholarship the Board is clothed with broad discretion.

Such method is available to all graduates of unaccredited law schools including the 111 graduates of Barry.

The Board's Study of Rule 2-11.1

Pursuant to Chief Justice Anstead's request for the Board to study Rule 2-

11.1, a report was prepared and forwarded to the Committee on Rules and Board Policy. At its November 2002 meeting, the full Board considered the recommendations of the Committee. Following such consideration, the Board directed its staff to conduct a survey of other jurisdictions and to gather information on the experiences of other law schools that have been provisionally accredited by the ABA during recent years.

At the Board's direction, staff forwarded a survey to 56 jurisdictions that are members of the Council of Bar Admission Administrators. Forty-four jurisdictions responded. A blank copy of the survey and a chart detailing the responses of the responding jurisdictions are located at Attachment 2.

Forty of the responding jurisdictions indicated that they have a provision requiring graduation from an ABA accredited law school. Thirty-six of those forty jurisdictions indicated that the law school must be accredited at the time of graduation. Nevada requires accreditation within three years of graduation and Virginia (like Florida) requires accreditation within 12 months of graduation.

A few of the responding jurisdictions commented that they have a provision for seeking a waiver of the requirement of ABA accreditation at the time of graduation. New Jersey and West Virginia have granted waivers to allow applicants to sit for the bar exam if accreditation occurred within three years of graduation. Missouri will not grant waivers unless accreditation was achieved within a reasonable time of the applicant's graduation while Ohio granted waivers in two cases when accreditation occurred within a short period after graduation.

Staff also contacted John A. Sebert, the Consultant on Legal Education to the ABA. Staff requested Mr. Sebert to provide information as to the experiences of law schools that have sought ABA provisional accreditation

within the last few years. Staff also requested Mr. Sebert to respond to the claim by the Orange County Bar Association that the ABA accreditation process has recently been lengthened from one year to almost three years.

Mr. Sebert provided a chart detailing the experiences of the last eight law schools to seek ABA accreditation. Applications for such law schools were submitted to the ABA during the period of 1996 to 2001. Mr. Sebert responded that the allegation "that it now takes three years from the time of application for a school to obtain provisional approval is inaccurate."

Mr. Sebert elaborated:

> As the attached chart indicates, in all but two instances since the fall of 1996, provisional approval was granted within ten months of the application upon which provisional approval was based. Since the role of the ABA House of Delegates was changed in 1999 from that of actually granting provisional or full approval to that of concurring in or remanding a decision of the Council, the House has never failed to concur in a Council decision concerning provisional or full approval.

Copies of the staff letter and Mr. Sebert's response with enclosures are located at Attachment 3.

RECOMMENDATION

During its January 2003 meeting, the full Board considered the results of the survey of the other jurisdictions conducted by staff as to this issue and the written response with attachments from the ABA Consultant on Legal Education. Members of the Board's Committee on Rules and Board Policy presented arguments both in favor of maintaining the present rule provision of 12 months and in favor of extending such provision to 30 months.

The following arguments were advanced in support of maintaining the present 12-month provision of Rule 2-11.1:

* The ABA accreditation process is relevant to the quality of legal education. Such process ensures that law schools seeking

accreditation must meet a minimum set of standards promulgated by the ABA. Florida's 12-month provision reasonably requires that the ABA accreditation of a particular law school must occur within reasonable proximity to the graduation of students from such law school.

* The 12-month provision of Rule 2-11.1 already is more generous than the rule in the vast majority of the jurisdictions responding to the Board's survey. Thirty-six of those jurisdictions specifically indicated that their bar applicants must be graduates of a law school that was accredited by the ABA at the time of graduation. If Florida's 12-month provision were to be extended to 30 months, then Florida would reposition itself as having one of the most lenient rules on this issue (second only to Nevada's rule among the responding jurisdictions). The need for Florida to lower its existing reasonable standard has not been demonstrated.

* The response of the Consultant on Legal Education to the ABA establishes that any new law school that pursues its application in a diligent manner should have no difficulty in achieving provisional accreditation well within the 12-month provision of Rule 2-11.1. The Consultant reported that the claim that it now takes three years for a law school to achieve provisional ABA approval is inaccurate and would only occur in a highly unusual scenario.

* Florida law schools have had no difficulty in complying with the 12-month provision of Rule 2-11.1. with the sole exception of Barry University School of Law. Prior to Barry, Florida's most recent schools to achieve accreditation were St. Thomas University School of Law and Florida Coastal School of Law. Both of those schools

were able to achieve provisional accreditation while meeting the 12-month requirement for their first classes of graduates.

* Barry's delays in achieving ABA accreditation sprung from circumstances unique to that institution. Barry was originally chartered in 1993 as Florida Technical University School of Law and was later renamed University of Orlando School of Law. It had no affiliation with a recognized university and its founder and financier had a long history of operating proprietary schools. The Orlando School of Law began admitting part-time, extended division students in 1995. In the Fall of 1996, the first full-time class was enrolled at the law school.

  Only in March, 1999, after its ABA accreditation problems became known, was the Orlando School of Law sold to Barry University, an established university located in Miami Shores, Florida. By that time, however, many of the law students at Barry had already completed significant portions of their legal education.

* Barry's past difficulties with ABA accreditation are in no way predictive of future ABA accreditation problems for Florida's two newest law schools: Florida A&M University College of Law and Florida International University College of Law. Both of these law schools are state supported and are affiliated with well-established and respected educational institutions. Prior to Florida A&M and Florida International, the last public law school to open in Florida was Florida State University College of Law. Such law school uneventfully achieved ABA accreditation in 1968.

* In its petition before the Court, the Orange County Bar Association (OCBA) recommends that its suggested revisions be limited to Florida

law schools only. OCBA's proposals would maintain the status quo for out-of-state law schools. Inclusion of such a parochial limitation favoring Florida schools is reminiscent of the days of diploma privilege and is contrary to the Court and Board's efforts to treat all bar applicants in a fair, equal and consistent manner.

The following arguments were advanced in support of extending the present 12-month provision of Rule 2-11.1 to 30 months:

* Circumstances surrounding delays in achieving provisional accreditation are varied and may be unrelated to the actual quality of the legal education being provided by a particular law school to its students.
* Students attending a law school seeking provisional accreditation must defer to the administration of their law school to achieve provisional accreditation in compliance with Rule 2-11.1; if the administration fails to achieve timely accreditation, then such failure is through no fault of the students and the students should not suffer the negative consequences including financial hardships of such noncompliance.
* There has been no demonstration that law students who graduated outside the 12-month ABA accreditation at a particular law school are less able to practice law than those who graduated within 12 months of ABA accreditation.
* Law students who graduate outside the 12-month ABA accreditation must demonstrate their technical competency to practice law by passing the bar examination prior to being admitted to The Florida Bar.

* The chart of the accreditation experiences of the most recent eight law schools submitted by the Consultant on Legal Education to the ABA shows that two of those schools (School #1 and School #3) would not have been able to comply with Rule 2-11.1 for one or more of their graduating classes.
* Three jurisdictions responding to the Board's survey indicated that they have a rule (Nevada) or procedures (New Jersey and West Virginia) that allow bar applicants who graduated within 3 years of ABA accreditation to sit for their bar examinations.
* Two additional jurisdictions indicated that relief has been granted to applicants whose law schools were not accredited until after their graduation. Specifically, Missouri stated that a waiver would be available if accreditation were achieved within a reasonable time period while Ohio indicated that waivers have been granted where provisional accreditation was obtained shortly after the degrees were awarded.

Following further discussion of the issue including the opportunity for Board members to express their personal opinions, it was moved, seconded and duly carried by a vote of 10 to 3 to recommend to the Court that the current 12-month provision of Rule 2-11.1 be left unchanged.

Accordingly, pursuant to the request of the Court and the Board's study of this issue, the Board reaffirms the current language of Rule 2-11.1 and advises the Court that no changes to such Rule are necessary or desirable at this time.

DATED this 25th day of February, 2003.

Respectfully submitted,

FLORIDA BOARD OF BAR EXAMINERS
MICHAEL J. KEANE, CHAIR

Kathryn E. Ressel
Executive Director

By:_____
Thomas A. Pobjecky
General Counsel
Florida Board of Bar Examiners
1891 Eider Court
Tallahassee, FL 32399-1750
(850) 487-1292
Florida Bar #211941

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Report and Recommendation has been served by U.S. Mail this 25th day of February, 2003 to Mathew D. Staver (Attorney for the Orange County Bar Association in Case No.: SC02-2354), 210 East Palmetto Avenue, Longwood, Florida 32750.

_____
Thomas A. Pobjecky

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this response is 10 spaces per inch Courier.

_____
Thomas A. Pobjecky