

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR
SUBCHAPTERS 6-27 EDUCATION
AND 6-28 ADOPTION

CASE NO. SC08-1981

THE FLORIDA BAR'S REPLY TO COMMENTS

THE FLORIDA BAR hereby submits its consolidated reply to comments filed in response to its petition to amend the Rules Regulating The Florida Bar and to add new subchapter 6-27, Standards for Certification of a Board Certified Education Lawyer, and new subchapter 28, Standards for Certification of a Board Certified Adoption Lawyer, as follows:

I

Rosemary N. Palmer filed commentary regarding the proposed education law certification on November 23, 2008.

Ms. Palmer observes that “there has been no data collection that she is aware of about whether certification in any practice area improves effective representation, increases client satisfaction, reduces client costs, reduces litigation, improves the rate at which issues are resolved, prompts clients to select firms or attorneys, increases professionalism, or improves the rate at which problems are prevented.”

Respectfully, an objection on this basis is not relevant and suggests a standard different from the standard that is actually applied under the rules of this court. Nowhere in the Rules Regulating The Florida Bar is there any requirement that a study assure in advance that a certification area will result in any particular level of future “client satisfaction” or a reduction in litigation or litigation costs.

Rule 6-1.2, Rules Regulating The Florida Bar, provides notice to the public that a certified lawyer is recognized by The Florida Bar as having “special knowledge, skills, and proficiency” in the area of practice certified, and the attorneys so certified are “evaluated by the Bar as to their character, ethics, and reputation for professionalism.” The certification standard in proposed rule 6-27.1 is consistent with that standard, and assures the public that a board certified education lawyer will be one who practices education law and has the requisite knowledge, skills, character, and reputation to earn certification. And, this standard is consistent with that applied by this court for all other areas of the law previously certified. It would be inappropriate to apply to this proposal a standard that has never been applied to any other area of specialization. The standard espoused by Ms. Palmer is simply inconsistent with this court’s rules.

This court and other respected jurists have otherwise commented favorably on the merits of board certification and specialization as it has been conceived and operated. *Amendments to the Rules Regulating The Florida Bar*, 763 So. 2d 1002, 1005-6 (Fla. 2000); Chief Justice Anstead, “Message from the Florida Supreme Court”, 77 *Florida Bar Journal* 12 (April 2003); Judge George Maxwell, III, “Board Certification: The View From the Bench and Beyond”, 77 *Florida Bar Journal* 34 (April 2003). Given the success of the certification program, there is no occasion now to change existing practices or standards. Education law should be evaluated using the same standard applied to all other certified practice areas.

Ms. Palmer’s second issue is her concern that certification in education law may mislead the public and contribute to discrimination. However, there is nothing in the proposed certification that will cause the harm she mentions.

While developing this proposal, The Florida Bar’s Education Law Committee responded to input received from a number of persons, including Ms. Palmer, and

revised the standards for certification set forth in proposed rule 6-27.3 in response to those concerns. It is the express intention of this certification proposal that there will be a “diversity of experience and involvement in the area of Education Law.” Precisely because of input from people like Ms. Palmer the Education Law Committee revised the minimum standards to allow for points to be awarded for diverse activities in addition to litigation, including attempts to resolve education law disputes through mediation or negotiation. *See* proposed rule 6-27.1(c)(3)(F). The minimum standards as proposed will make it possible for all persons practicing in education law (whether they represent educational institutions or private parties) to participate in the program.

Ms. Palmer also complains that litigation, arbitration, and administrative hearings allow for 5 points for each litigation of an education law related case. Proposed rule 6-27.3(c)(1) does allow 5 points for administrative and court litigation that is completed. However, the maximum points allowable for litigation is 30. Experienced practitioners understand the degree to which substantive law is assimilated in the caldron of a lawsuit tried to completion, and that accounts for the grant of 5 points for each lawsuit. A diversity of experience is assured because 50 points are required during the 5 years preceding the date of application. Therefore, an applicant must gain points from work other than litigation to qualify because the maximum points allowed for litigation is 30.

The suggestion by Ms. Palmer that there is an impermissible bias in the standards in favor of school attorneys is incorrect because attorneys representing parents and students have the same opportunity to qualify as those attorneys representing educational institutions.

Although not framed as an “issue,” Ms. Palmer further suggests that there is no need for certification in education law because The Florida Bar “already provides certification in Administrative Law and Government [*sic*] Law.”¹ Ms. Palmer points out that those who represent educational institutions “need to know public records and meeting laws, public financing, public contracting, public

¹ The Bar provides certification in State and Federal Government and Administrative Practice, and City, County and Local Government Law.

employment, and administrative law in order to give competent counsel to their public clients.” Again, Ms. Palmer is requesting that this court apply a standard to this petition that has not previously been applied to other certification proposals.

There is often some degree of overlap among the areas of law that are certified. For example, real estate, probate, and construction matters are frequently litigated, yet there is a separate certification in civil trial law as well as in each of these other distinct practice areas. Probate and real estate issues frequently intertwine with tax questions, yet these are three different areas of certification.

To support her argument Ms. Palmer refers specifically to the public records law. But the case law shows that there are concerns unique to education within the law regarding public records. *See e.g., WFTV v. The School Board of Seminole County*, 874 So. 2d 48 (Fla. 5th DCA 2004); *Johnson v. Deluz*, 875 So. 2d 1 (Fla. 4th DCA 2004); *Fla. State University v. Hatton*, 672 So. 2d 576 (Fla. 1st DCA 1996). Similarly, cases such as *Altee v. Duval Co. School Board*, 990 So. 2d 1124 (Fla. 1st DCA 2008), show that there are administrative law cases that concern education issues that may not be within the normal scope of an administrative law practice.

The subtext to Ms. Palmer’s comments seems to be that persons representing educational institutions are inclined towards impermissible bias or the violation of student rights. Ms. Palmer states her fear “that approval of this Education Law Certification proposal will help maintain the current system of discrimination, deliberate indifference to the civil rights of students, and arbitrary and capricious educational institutional actions to the detriment of students with disabilities and students of color, who are disproportionately disciplined and who disproportionately fail to benefit from current educational services.” That is simply not the case, and Ms. Palmer does not show how this area of certification will harm the public interest in any way. To the contrary, the standards and requested certification, as proposed, are consistent with the purposes of certification.

II

Peggy Clarie Senentz filed commentary regarding the proposed adoption law certification on November 20, 2008.

The argument espoused in Ms. Senentz's commentary seems to ignore the purpose and intent of the proposed standards for adoption law certification and the critical differences between a stepparent/close relative adoption and the more complex "stranger" adoption procedure.

The Florida Bar elected to pursue adoption law certification to protect the interests of children, adoptive parents, and parents placing children for adoption. In its petition, the Bar recognized that "[m]ishandled adoptions can and do create devastating consequences for children and their families. Board certification in adoption law will enable the public to identify those lawyers who have met high standards of professionalism, who have knowledge, skill and experience, and who are recognized by their peers as qualified and capable of handling adoptions in a professional competent manner."

The Board of Legal Specialization and Education evaluated the proposed standards for adoption law certification through its extensive process to assure that the public can rely upon these standards. The Board considered whether a lawyer's experience in stepparent and close relative adoptions should qualify to meet the minimum number of cases requirement and determined that it should except from this requirement these type of adoptions because the knowledge that a lawyer must exhibit in these cases would not establish whether the lawyer had the experience necessary to show a broad knowledge of Florida's adoption laws.

Chapter 63 of the Florida Statutes (2008) authorizes a simplified and condensed adoption procedure for a stepparent/close relative adoption. In these adoptions, the petitioner/lawyer is not required to comply with many of the following elements essential in the more complex adoption practice.

A. All adoption placements are reported to the Florida Department of Children and Families. §63.022(4)(d), Fla. Stat. (2008).

B. "[A] sufficient period of time elapses during which the minor has lived within the proposed adoptive home under the guidance of an adoption entity." §63.022(4)(e), Fla. Stat. (2008).

C. All expenditures, including legal fees and costs and birth mother expenses are approved by and reported to the court presiding over the adoption. §63.022(4)(f) & 63.132(4), Fla. Stat. (2008).

D. The social and medical history of the biological parents is reported to the court prior to termination of parental rights. §63.022(4)(g) & §63.082(3)(a), Fla. Stat. (2008).

E. Certain custodial grandparents are entitled to notice of the adoption proceeding. §63.0425(3), Fla. Stat. (2008).

F. Prior to executing an adoption consent, the parent shall be interviewed by a representative of the adoption entity. §63.082(3)(b), Fla. Stat. (2008).

G. The consenting parent or person shall be given a statement of their rights under Florida's adoption law and this statement shall be included within the language of the adoption consent. §63.082(4)(e), Fla. Stat. (2008).

H. A petition for adoption may not be heard by the court before the 30-day appellate period on the judgment terminating parental rights expires. §63.087(3), §63.112(2)(a), & §63.102(1) & (6), Fla. Stat. (2008).

I. All adoption placements shall be reported to the court within 2 business days of the placement. §63.092(1), Fla. Stat. (2008).

J. The prospective adoption parent(s) must be the subject of a favorable home study prior issued prior to the date the child is placed in their home. §63.092(3) & §63.112(2)(b) Fla. Stat. (2008).

Pursuant to Chapter 63 of the Florida Statutes, a lawyer handling a stepparent/close relative adoption is not necessarily an adoption entity held to the increased standard mandated by section 63.039, Duty of Adoption Entity to the Prospective Adoptive Parents; Sanctions. The purpose and intent of this proposed certification area is to assure that each certified lawyer has lived up to these and

other standards in the minimum number of adoption cases. The certification program cannot assure that each certified lawyer has demonstrated compliance with the highest ethical standards in the adoption practice when the stepparent/close relative adoption cases are included in the minimum number.

The Florida Bar recognizes that a stepparent/close relative adoption may be complex when the adoption is contested. Thus, these adoptions are not excepted from the minimum case requirement for lawyers who have participated in contested adoption litigation.

III

All proposals for new certification areas must meet minimum standards set forth in rules 6-3.5 and 6-3.6. The standards proposed for education law and adoption law comply with these rules. Upon approval by this court, area standards may be amended by the Board of Governors of The Florida Bar as authorized by rule 6-3.13, consistent with notice and publication requirements set forth in rule 1-12.1. While every effort is made to ensure that standards for any new certification area fairly represent the actual practice, amendments to those standards upon implementation of any new certification are an available option and, if sought, are fully vetted through the revision process. Upon review of commentary filed in response to a proposal to establish a new certification in labor and employment law, this court in *Amendments to the Rules Regulating The Florida Bar*, 763 So.2d 1002 (Fla. 2000), stated:

The Florida Bar Board of Legal Specialization and Education does an outstanding job in administering and overseeing Florida's Lawyer Certification Plan. As part of the Board's ongoing duties, at least annually it must review the status and conditions of the plan and report its conclusions to the Board of Governors. See R. Reg. Fla. Bar 6-3.1(h). The credibility of the certification program depends on the quality of the standards and testing employed in each certification area. In this regard, both the Board of Legal Specialization and Education and the

Labor and Employment Law Certification Committee have a continuing obligation to review the minimum standards and testing procedures for certification to ensure that the certification process can be relied upon by the public. We are confident that, under the procedures for reviewing the certification plan, any inadequacies with the standards for this or any other certification area will be readily identified and corrected...

The Florida Bar submits that the proposed standards for specialization in education law and adoption law will serve to advance the concept of board certification by offering qualified lawyers the opportunity to demonstrate and further develop their special knowledge, skills, and proficiency in their practice area and enhance overall their professionalism in the practice of law.

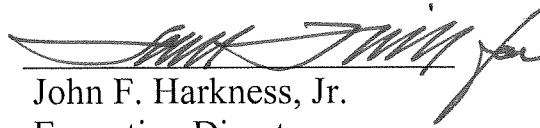
For the public, educational institutions, governmental bodies, and administrative and judicial officers, certification in education law offers unparalleled assurance as to the qualifications of those who attain board certification. Similarly, a means to identify experienced and knowledgeable practitioners in adoption law is particularly critical because the lives of children and families are directly affected by the manner in which these matters are handled.

Expansion of the certification program benefits both the profession and legal consumers and, as proposed, the certification standards for education law and adoption law are consistent with the overall purpose of the program.

IV

WHEREFORE, The Florida Bar respectfully requests that this court enter an order amending the Rules Regulating The Florida Bar in the manner sought in its original petition, and that this court further reject the comments of Rosemary Palmer and Peggy Clarie Senentz as they relate to the proposed new certification areas therein.

Respectfully submitted,

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John F. Harkness, Jr.

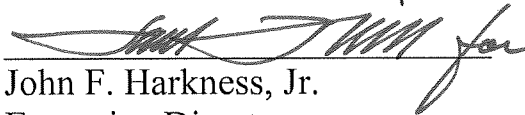
Executive Director

The Florida Bar

Florida Bar Number 123390

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply has been sent by United States mail to the following individuals on this 11th day of December, 2008.



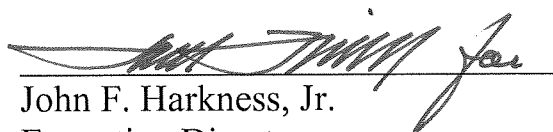
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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this Reply is typed in 14 point Times New Roman Regular type.

A handwritten signature in cursive script, appearing to read "John F. Harkness, Jr.", written over a horizontal line.

John F. Harkness, Jr.
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