Supreme Court of Florida

No. SC96869

AMENDMENTS TO RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR.

[March 20, 2003]

CORRECTED REVISED OPINION

LEWIS, J.

The Florida Board of Bar Examiners petitions this Court to consider amendments to the Rules of the Supreme Court Relating to Admissions to the Bar. We have jurisdiction. See art. V, § 15, Fla. Const.

The Board has petitioned to amend or create these rules: rule 1-14.1 (purpose of background investigations); rule 1-65 (disclosure of information); rules 1-70, 1-71, and 1-72 (immunity and privilege); rule 2-10 (application qualifications); rules 2-11, 2-11.1, and 2-11.2 (technical competence, education qualification, and alternative method of educational qualification); rule 2-13.25 (satisfaction of court-ordered restitution and disciplinary costs); rule 2-13.5 (finding applicant or registrant unqualified); rule 2-14 (petitions for rehabilitation); rule 2-22 (deadline for

filing bar application); rule 2-28 (rehabilitation application fee); rules 2-30.1 and 2-30.2 (petitions relating to administrative hearings filed with the Board and with the Court); rule 3-10.2 (essential eligibility requirements); rule 3-17.3 (fee for extraordinary expenses); rule 3-23.6 (Board action following formal hearing); rule 3-23.7 (findings of fact and conclusions of law); rule 4-13 (educational qualifications); rules 4-13.1 (educational qualifications); rule 4-13.3 (definition of degree requirements); rule 4-13.4 (alternative method of educational qualification); rules 4-17, 4-17.1, and 4-17.2 (special testing accommodations); rule 4-26.2 (pass/fail line); rule 4-41 (exam application and supporting documents); rules 4-42.3 and 4-42.4 (deadline and cut-off for special testing accommodations); rule 4-52 (consequences of violation of rules); rule 4-64 (invalidation of examination results); and rule 4-65 (invalidation of exam scores).

The proposed amendments were published in The Florida Bar News on January 15, 2000, with an invitation for comments. Comments were submitted concerning rules 1-70 and 4-26.2. After consideration of the Board's petition and the comments received concerning the amendment to rule 1-70, we agree with the Board's rationale and adopt that amendment as proposed. For the reasons stated below, we also adopt the amendment to rule 4-26.2.

We have received comments and recommendations from many individuals

and groups concerning the Board's suggested amendment to rule 4-26.2, including the deans of six Florida law schools;[1] the Florida Chapter of the National Bar Association; the Florida State Conference of NAACP Branches; the George Edgecomb Bar Association; the Society of American Law Teachers; Testing For the Public; attorneys Kevin C. Frein, Harley Scott Herman, David W. Langham, Kimberly M. Reid, Henry T. Sorensen II, and Wilfred C. Varn; and Mr. Tom Swavely. Additionally, Board Member Noel G. Lawrence filed a "minority report."

In the course of the life of any institution or professional organization with acknowledged mandatory evaluation for membership and minimum requirements for admission necessary to protect the citizens of Florida, the entity must pause and evaluate its participation prerequisites to ensure that the conditions operate to adequately protect the public and also work to fulfill the overall goals and aspirations of the organization or profession itself. Reexamination of this type is necessary and essential to avoid the possibility that apathy or passiveness take root and undermine the laudable goals of the organization by allowing unqualified

---

1. Dean Donald E. Lively, Florida Coastal School of Law; Dean Joseph D. Harbaugh, Nova Southeastern University Shepard Broad Law Center; Dean John Makdisi, St. Thomas University School of Law; Dean W. Gary Vause, Stetson University College of Law; Dean Jon L. Mills and Associate Dean George L. Dawson, University of Florida College of Law; and Dean Dennis O. Lynch, University of Miami School of Law.

applicants to be admitted, although posing unacceptable and unnecessary risks to society. Nowhere is this principle more important than in the process of examining the standards for admission to The Florida Bar and its testing and certification process.

The Florida Board of Bar Examiners, as the administrative arm of this Court charged with the task of establishing and maintaining responsible admissions requirements, see Fla. Bar Admiss. R. 1-14.2, has been delegated the important responsibility of safeguarding the interests of all Floridians. This serious responsibility stems from the recognized principle that an attorney licensed to practice law in this state is capable of both rendering tremendous good, but is also in a position to inflict harm if care and caution are not implemented. The members of The Florida Bar, by their very nature as attorneys, are licensed to become intimately involved in the lives and matters of clients, and anything less than exacting standards of admission exposes Floridians to unacceptable risks. Thus, before the Board can recommend to this Court that an applicant be admitted to the Bar, it must be confident that the person is qualified with regard to both character and fitness, and also possesses a certain minimum technical and educational competence. See Fla. Bar Admiss. R. 1-16.

In 1998, because it had been almost twenty years since the last inquiry

toward any examination or adjustment of the pass/fail line had been considered or performed, the Board began to reevaluate the standards underlying the current pass/fail line of 131. The Board retained Dr. Stephen P. Klein, the preeminent national expert on the psychometric characteristics of bar examinations,[2] to perform a comprehensive review of the bar examination pass/fail line. Based upon interaction with Dr. Klein, the Board conducted two independent studies to evaluate whether the bar examination score acceptable for admission should be increased, lowered, or remain the same.

In the first of two studies, Dr. Klein requested the actual graders of essay questions from the February and July 1999 Florida Bar examinations to assign passing scores to particular essay responses. These passing scores were then used to determine the acceptable passing level--the percentage of applicants attaining scores at or above the average of the graders' individual passing scores. When total bar exam scores for the February exam were scaled and placed along the spectrum of passing rates, Dr. Klein calculated that an average score of 133.5 would have been the proper passing rate. Application of the same criteria resulted in an average total scaled score of 141 for the July 1999 exam. These studies

---

2. See generally DeRolph v. Ohio, 712 N.E.2d 125, 134-35 (Ohio Ct. Com. Pl. 1999) (detailing the qualifications of Dr. Klein, as well as a selection of the psychometric studies he has designed and conducted).

alerted the Board to and demonstrated problems with the current Florida standards.

The second study involved the implementation of six panels comprised of four to five members. Each panel included a Florida Circuit Judge, an associate dean or professor from a Florida law school, a Board of Bar Examiners member, and members of The Florida Bar engaged in the practice of law. After proper preparation, each panelist was given a set of forty exam answers and asked to place each answer in one of the following categories: clear fail, marginal fail, marginal pass, or clear pass. Upon analysis, the results of this grading and evaluation process resulted in the conclusion that average pass/fail lines of 139.5 for the July 1998 exam, and 135 for the February 1999 exam should be implemented. Indeed, the undoubtable final conclusion was that each of the panels clearly condemned the current pass/fail line. Clear evidence--in fact, the only evidence before this Court, persuasively reveals that the current 131 pass/fail line is unacceptable.

Based upon these studies, Dr. Klein reported to the Board that an averaging of each of the panels' standards resulted in a scaled score of 137. After months of study and following thorough discussion and consideration of the issue at its October 1999 meeting, the full Board voted twelve to two to recommend that this Court increase, through a two-stage process, the pass/fail line from the present 131 to 136. It is also interesting to note, however, that one of the Board members

casting a vote against the proposed change from 131 to 136 did so because the member was of the opinion that 136 was not high enough to protect the public.

It is imperative to note multiple important facets of the process undertaken by the Board here. First, all of the institutions and actors in the current system of legal education and practice were represented in these studies. The interaction of these educators, judges, bar examiners, and attorneys produced a clear determination that the current standard does not reflect the level of competence which should be expected of a practicing attorney in Florida to adequately protect the public. Indeed, the studies produced an explicit call to elevate the standard for admission to the Bar in an attempt to protect the public from possible exposure to harm created by incompetent attorneys. Thus, the Board responded by urging this Court to increase the pass/fail line to a proper level, as demonstrated by the evaluations.

Second, the current pass/fail line of 131 does not have, and never has had, any empirical or justifiable relationship for its existence or to ensure minimum competence to practice law. Prior to 1961, an applicant was required to answer seventy percent of the questions correctly to achieve a passing score, and for the twenty years following the discontinuation of this method in 1961, the pass/fail line varied from one examination to the next because the pass/fail line was established

by averaging the top ten scores on the exam and subtracting twenty points from this average score. In 1981, however, this Court changed the grading method to a scaled procedure, and adopted a pass/fail score of 133--a level not justified by any empirical studies or verifiable standards and without any qualitative foundation. See Petition of the Florida Board of Bar Examiners for Amendment of the Rules, 397 So. 2d 627 (Fla. 1981). Then, without any explanation, this Court sua sponte reduced the pass/fail line from 133 to 131 in 1982. See Florida Board of Bar Examiners re Amendment to Rules, 416 So. 2d 803 (Fla. 1982). Clearly, an examination of the lifeline of the Florida pass/fail score, as well as the studies commissioned by the Board highlight the utterly baseless nature of the current standard historically applied.[3] Additionally, each and every study underwritten by the Board reveals that the current Florida Bar admission standard does not adequately reflect the minimum skills required for the competent practice of law.

---

3. It is telling that under the current 131 pass/fail line, examinees only need to answer fifty-six percent of the total questions correctly to achieve a passing score. Indeed, increasing the standard to 136 would only require applicants to answer fifty-nine percent of questions correctly. Obviously, both of these standards fall far below the seventy percent correct answer rate required of applicants prior to 1961.

Additionally, it is worth noting that thirty-three jurisdictions presently have higher pass/fail standards than Florida, and this state's 131 pass/fail line is even three points lower than the national average.

This action does not encompass a debate over whether the current Florida bar exam format is the ideal tool for measuring attorney competence. Indeed, we are not opposed to considering additional testing methodologies and expanding the testing required for admission if such is advisable. In sum, we must accept for the purposes of today's decision that the bar exam format as it exists now is an accurate system of measuring competence, because we are not prepared to shift to a system of open admission without testing which would be the result of accepting the opposition's arguments. Criticism of the current testing method is inapposite and does not address the issue before us today. Therefore, there is absolutely no reason to grant admission to applicants who do not possess the body of knowledge necessary to adequately represent the citizens of Florida under the proper standards for the testing now administered. The bar exam is in place to protect Floridians from incompetent lawyers, and any disagreement over the actual composition of the test, which we are always open to consider, does not change the clear indication of Dr. Klein's studies: that the current pass/fail score for the examination must be raised.

The competent, verified empirical evidence compiled by Dr. Klein and the Board reveals that the current standard for admission has absolutely no relationship whatsoever to ensuring the minimum competency of those admitted to the Florida

Bar. This Court acts today to rectify the situation. In essence, all of the credible data and conclusions presented to this Court by the Board illuminate that the present standard at this time is invalid and totally without foundation. It is nothing more than a number picked from the air. Because it is without validity, the people of Florida would be placed at risk if we fail to approve the higher standard. The situation presented to this Court is simple: While the studies performed by the Board working with experts and all segments of the Bar direct that we should raise the pass/fail line, there is simply no rational, objective basis for leaving the admission score at its current low level.

It is certainly worth noting that the Board and Dr. Klein have thoroughly defended their studies against attack by opponents to the increase of the pass/fail standard, and repelled all criticism. Indeed, the law school deans, as opponents to the Board's pass/fail line recommendations, relied upon the critique of Dr. Klein's studies that Dr. Michael Kane provided to the Minnesota Board of Law Examiners in August 2000. However, it is more important to note that upon receiving Dr. Klein's response to his comments, Dr. Kane admitted and concluded that "the general approach taken in the 1997 study was appropriate. My objections are to the implementation." Thus, even an expert employed specifically to impeach Dr. Klein's methodology could not take issue with his techniques. Kane's only

continuing objection to Dr. Klein's usual standard-setting method was to an asserted graders' lack of instruction on the proper setting of pass/fail standards, without a factual basis for such objection. Because the participants in Dr. Klein's Florida studies were in fact fully briefed and informed on the purposes and goals of the bar examination prior to their involvement, this complaint is of questionable validity at best. Indeed, in light of the final exchange between Drs. Klein and Kane, the points of criticism presented by Dr. Kane which caused Minnesota to delay the increase of its pass/fail standard are both entirely unpersuasive and not controlling here.

Based upon the information presented to this Court, it can only be concluded that the Board properly engaged in a scientifically reliable method of evaluating the pass/fail line by gathering a cross-section of the legal community, providing these participants with thorough guidance on how to establish passing scores, and evaluating the resulting data in a manner entirely consistent with and totally within testing and measurement norms. A comparison of Dr. Klein's study performed in the instant action with some of his past studies reveals that he has not been biased in favor of arbitrarily increasing pass/fail lines, and he has consistently applied respected methods. Indeed, when his procedures were used in Pennsylvania and Puerto Rico, the results revealed that these jurisdictions had

pass/fail lines that were artificially high. It is clear that the studies performed for the Board by Dr. Klein were a scientifically valid, responsible method of objectively analyzing the basis for Florida's pass/fail line. Because the studies clearly reveal that the line is incorrect and that a responsible cross-section of the legal community is of the objective view that the present scale is unacceptable, it must be changed and it would be irresponsible for this Court to simply ignore the empirical data presented.

Hypothetical application of the proposed new passage score has made clear that increasing the pass/fail line would impact all applicants evenly, regardless of gender, race, or ethnicity. Indeed, despite many allegations of such, and our keen attention to the possibility of such, no data before this Court supports the contention that raising the pass/fail score will adversely impact minority applicants in a manner any different from other applicants. While it is acknowledged that certain current disparities between racial groups may remain, facts demonstrate to us that such are not a product of the examination or its scoring, and it must be clear to all that the key to diversity and equality in bar admissions is not to be accomplished by promoting unqualified persons to be certified competent contrary to evaluation--indeed, the hallmark of fairness and egalitarianism has always been a commitment to ensuring the recognition of all those who have proven their

capabilities, regardless of ethnicity or background.

The record shows that the Board of Bar Examiners has continuously probed and evaluated the examination for testing bias, a practice that is to be commended and which must be continued in a manner forever vigilant. Indeed, we certainly acknowledge the concerns of those responding to our call for comments who urged this Court to examine the putative discriminatory effects of increasing the pass/fail line. We have exhaustively done so, and have found none. The contention that an increase in the pass/fail line will disproportionately adversely affect minority applicants is simply opinion contrary to present fact. The empirical studies contained in the record before this Court which project the impact of an increase in the admission standard have generated clear statistical data which refutes the claim that minorities will be disproportionately affected, and simply saying that minorities will be adversely affected does not serve to contradict this data in any cognizable fashion. The hypothetical application of the proposed new passing level to recent bar examinations presents facts to us which demonstrate beyond dispute that the only people disadvantaged by an increase in the pass/fail line would be those who are not qualified to become practicing members of The Florida Bar in the first place, which crosses all populations equally, and there is no evidence of

disparate gender, racial, or ethnic impact.[4]

If the opponents to the Board's proposal could, in some fashion, factually demonstrate that the bar examination is a discriminatory tool, then this Court would certainly be required to address the problem and take corrective action. Indeed, the Court should give, and has given, serious consideration to the comments of the Board's opponents here, and must continue to determine whether future bar examination results, without regard to any particular passage line, reflect any possible bias or unfairness to any group. However, there is absolutely no evidence before this Court showing that the proposed bar examination scheme would discriminate in its purpose or application against any group. The only discrimination occurring here is that which should occur--differentiation between those candidates qualified to serve the public and those who do not possess the minimum competence to practice law, so that we may fulfill our obligations to the citizens of this state.

---

4. Indeed, an examination of the predicted results reveals that an increase in the pass/fail line would result in a higher percentage of the black University of Miami law students passing the bar examination than their white classmates (133 pass/fail line: white--80% passage, black--89% passage; 136 pass/fail line: white--70% passage; black--78% passage), and a higher percentage of the Hispanic graduates of Florida State University College of Law passing the bar examination than white FSU examinees (133 pass/fail line: white--84% passage, Hispanic--91% passage; 136 pass/fail line: white--80% passage; Hispanic--91% passage).

Based upon the foregoing, we conclude that the Board's justifications for the proposed amendments are sound and adopt them as reflected in the appendix to this opinion. As noted in the appendix, the amendments to rule 4-26.2 shall occur in the two-stage process advocated by the Board. The pass/fail line is increased to 133 effective July 1, 2003, and raised further to 136 on July 1, 2004. We have edited the rules for style and grammatical accuracy. The new language is indicated by underscoring; deletions are indicated by struck-through type. These rules shall take effect immediately.

It is so ordered.

ANSTEAD, C.J., and WELLS, J., and HARDING, Senior Justice, concur.
PARIENTE, J., concurs in part and dissents in part with an opinion, in which QUINCE, J., and SHAW, Senior Justice, concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

PARIENTE, J., concurring in part and dissenting in part.

I concur with much of the majority opinion, and echo its commendation of the Florida Board of Bar Examiners ("Board") for its ongoing efforts to ensure the competency of attorneys that we admit into The Florida Bar. I agree with the amendments to all of the proposed rules except for rule 4-26.2 regarding raising the passing score. I support the important work of the Board in ensuring that attorneys

licensed in this State demonstrate competence upon their initial entry to practice, as well as the important work of The Florida Bar, which provides the continuing education and monitoring of all attorneys necessary to ensure the high quality of an increasingly diverse Bar.

I certainly agree with the majority that the Board has "the important responsibility of safeguarding the interests of all Floridians," majority op. at 4, and I am certain that the Board's intent is to improve the quality of those attorneys licensed in this State. When all is said and done, however, the buck stops with this Court. With all due respect for the views of my colleagues, I disagree with the majority's statement that without raising the pass/fail score of the Bar examination, "the people of the State of Florida would be placed at risk." Majority op. at 10. Accordingly, I write separately to express my serious reservations about the necessity of raising the passing score from 131 to 136 at this time.

My concerns are threefold. First, there is no indication that increasing the score to 136 will lead to higher attorney performance or proficiency. Correspondingly, there is no indication that the current passing score is not an appropriate passing score to ensure minimum qualifications.

Second, I am concerned that we are placing too much reliance on the 1999 studies performed by Dr. Klein, the expert hired by the Board, as the justification

for setting a new and significantly higher passing score. Commentators have observed that the Klein methodology has a "fundamental flaw that produces an arbitrary passing score" in that it confuses the percentage of passing essays with the percentage of passing test takers. See Deborah J. Merritt et al., Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam, 69 U. Cin. L. Rev. 929, 931, 950-65 (2001). Recently, after the Minnesota Board of Law Examiners received a critique by another expert of a study done by Dr. Klein, the Minnesota Board withdrew its recommendation to the Minnesota Supreme Court to raise the passing score. Although I would not want to make this a battle of the experts, the fact that other experts have called into question aspects of the Klein study suggests to me an additional reason to proceed cautiously before raising the passing score.

Third, like many of those who filed comments opposing an increase in the passing score, including Board Member Noel G. Lawrence, the Society of American Law Teachers, the Florida Chapter of the National Bar Association, the George Edgecomb Bar Association, and six Florida law school deans, I am very concerned about the potential adverse effect this change could have on minorities. Indeed, it is not clear what effect an increased passing score will have upon varying minority groups, nor is it clear how this will affect racial disparities in the passing

scores. In this regard, I cannot agree that the majority's hypothetical application of the new standards to examination results by test-takers from only two of the state's law schools demonstrates that the increase will have no adverse racial impact. See majority op. at 14 n.4. Confining results to examinees from individual law schools creates an unreliably small sample size.

In fact, applying the new standards to statewide results from the February 2000 and July 2000 examinations would have increased the already existing disparity in the pass rates between minority first-time test takers and all first-time test takers generally. On the February 2000 examination, minority pass rates for first-time test takers would have declined by 10 percent at a score of 133 and by 16 percent at a score of 136, compared to declines of 5 and 13 percent for all first-time test-takers. On the July 2000 examination, minority pass rates for first-time test takers would have declined by 5 and 12 percent at the new passing scores, compared to 4 and 10 percent declines for all first-time test takers. Even at a passing score of 131, first-time minority test-takers passed these examinations at much lower percentages than all first-time test takers, 58 to 71 percent on the February 2000 examination and 68 to 79 percent on the July 2000 examination. Combined results for first-time test takers in the two examinations administered in 2001 reflect greater declines for black first-time test takers than for whites. The

pass rate for blacks would have declined by 6 percent at a passing score of 133 and 14 percent at a passing score of 136, compared to a 4 percent decline at a score of 133 and a 11 percent decline at a score of 136 for white test-takers.

As stated in the law review article cited above,

> [T]here is substantial reason to fear that raising bar passing scores will, in fact, have a disproportionate impact on minority members. In general, increased passing scores on the bar exam affect minority applicants more than white ones. In other words, the gap in passing rates between minority and white applicants is likely to grow as passing scores go up and passing rates fall. As Klein himself has recognized, "[t]he size of the difference in bar passage rates between whites and minority applicants depends on several factors," and one of these factors is "the relative stringency of the state's pass/fail standard." In particular, "[s]tates that have relatively high passing rates tend to have smaller differences among groups than other states (because all groups have high rates when standards are low)." As a general matter, therefore, raising the bar passing score (and decreasing the passing rate) is likely to increase the gap between whites' and minorities' success rates.

Merritt et al., supra, at 966-67 (footnotes omitted). The authors conclude that an increase in the passing score will extend existing discrepancies, a result which is contrary to public policy at a time when the profession has embraced the need for diversity. Id. at 967.

In sum:

> The basic issue is the choice of an appropriate passing score. Raising the passing score is very likely to increase failure rates and to have some adverse impact on groups with relatively lower scores. If the

> change is necessary in order to ensure that new lawyers are minimally qualified, the change seems justified. If the change is not necessary, it does not seem justified.

Michael T. Kane, Review of the Standard-setting Study of the July 1997 Minnesota Bar Exam 25 (August 2000) (emphasis supplied). I see no indication that changing the passing score from 131 to 136 is necessary to ensure that new lawyers are minimally qualified. Thus, I dissent from the raising of the passing score at this time and urge that this matter be returned to the current Board for further review, including a determination as to whether the current Bar examination testing procedures in fact measure the skills necessary to competently and professionally represent the citizens of this State.

QUINCE, J., and SHAW, Senior Justice, concur.

Original Proceeding - Rules of the Supreme Court Relating to Admissions to The Florida Bar

Michael J. Keane, Chair, St. Petersburg, Florida, C. Jeffrey McInnis, Immediate Past Chair, Fort Walton Beach, Florida, Fernando S. Aran, Former Chair, Coral Gables, Florida, Randall W. Hanna, Former Chair, Tallahassee, Florida, Franklin R. Harrison, Former Chair, Panama City, Florida, Kathryn E. Ressel, Executive Director, and Thomas A. Pobjecky, General Counsel, Tallahassee, Florida, on behalf of the Florida Board of Bar Examiners,

Petitioner

John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida, on behalf of the Board of Governors of The Florida Bar; Thomasina H. Williams of the Law Offices of Williams & Associates, Miami, Florida, Daryl D. Parks of Parks & Crump, LLC, Tallahassee, Florida, and Craig A. Gibbs of the Law Offices of Craig A. Gibbs, Jacksonville, Florida, on behalf of the Florida Chapter of the National Bar Association; Harley Scott Herman of De Beaubian, Knight, Simmons, Mantzaris & Neal, Orlando, Florida, on behalf of the Florida State Conference of NAACP Branches; Dean Don Lively, Florida Coastal School of Law, Jacksonville, Florida, Dean Joseph D. Harbaugh, Nova Southeastern University Shepard Broad Law Center, Fort Lauderdale, Florida, Dean W. Gary Vause, Stetson University College of Law, St. Petersburg, Florida, Dean John Makdisi, St. Thomas University School of Law, Miami, Florida, Dean Jon L. Mills and Associate Dean George L. Dawson, University of Florida, College of Law, Gainesville, Florida, and Dean Dennis O. Lynch, University of Miami School of Law, Coral Gables, Florida, on behalf of the Florida law schools; Noel G. Lawrence, member of the Florida Board of Bar Examiners, Jacksonville, Florida; Professor Elizabeth M. Iglesias, University of Miami School of Law, Coral Gables, Florida, on behalf of the Society of American Law Teachers; Donald R. Odom, President and Elita D. Cobbs, Secretary, Tampa, Florida, on behalf of the George Edgecomb Bar Association; attorneys Kevin C. Frein, Plantation, Florida, Wilfred C. Varn, Tallahassee, Florida, Kimberly M. Reid, Winter Park, Florida, David W. Langham, Pensacola, Florida, Henry T. Sorensen, II, Clearwater, Florida., and Gail E. Dawson, Tampa, Florida, members of The Florida Bar, and David M. White, Testing for the Public, Berkeley, California; and Tom Swavely, Miami Springs, Florida,

Responding with comments

APPENDIX

1-14.1 Purpose. The primary purpose of the character and fitness screening before admission to The Florida Bar ~~are~~is to protect the public and safeguard the judicial system.

1-65 Disclosure of Information. Unless otherwise ordered by the Supreme Court of Florida, the Chair of the Board, or the presiding officer at a hearing before the Board, nothing in these rules shall prohibit any applicant or witness from disclosing the existence or nature of any proceeding under rule 3 or from disclosing any documents or correspondence served on, submitted by, or provided to the applicant or witness.

1-70 Immunity and Privilege

1-71 Board and Employee Civil Immunity. The Board of Bar Examiners and its members, employees, and agents are immune from all civil liability for damages for conduct and communications occurring in the performance and within the scope of their official duties relating to the examination, character and fitness qualification, and licensing of persons seeking to be admitted to the practice of law.

1-72 Immunity and Privilege for Information. Records, statements of opinion, and other information regarding an applicant for admission to the Bar, communicated without malice to the Board of Bar Examiners, its members, employees, or agents by any entity, including any person, firm, or institution, are privileged, and civil suits for damages predicated thereon may not be instituted.

2-10 Application Qualifications. To seek admission to The Florida Bar, a person must meet the ~~eligibility~~application qualifications~~and~~, file the appropriate applications and fees as set out in this rule, and comply with ~~Rules~~rules 3 and 4.

~~**2-11 Technical Competence**. All applicants seeking admission to The Florida Bar shall produce satisfactory evidence of technical competence through successful completion of the Florida Bar Examination as described in Rule 4.~~

~~**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:

(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.

2-11.2 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.

(a) Deadline for Filing Work Product. To be considered timely filed, the work product shall be complete with all supplemental documentation as required and filed by the filing deadline of the General Bar Examination as set out in Rule 4. Work Products initially filed incomplete and perfected after the deadline shall not be considered as timely filed. Late or incomplete work products will be given consideration for admission into the next administration of the bar examination for which the deadline has not passed.

~~**(b) Acceptance of Work Product**. If a thorough review of the representative compilation of the work product and other materials submitted by the applicant shows that the applicant is a lawyer of high ability and whose reputation for professional competence is above reproach, the Board may admit such applicant to the General Bar Examination and accept score reports from the National Conference of Bar Examiners or its designee.~~

2-13.25 Satisfaction of Court-Ordered Restitution and Disciplinary Costs. A person who was disbarred, resigned with pending disciplinary proceedings, or was suspended from a foreign jurisdiction shall not be eligible to apply except on proof of payment of any restitution and disciplinary costs imposed by a court in its order of disbarment, resignation, or suspension. Any request for relief from the terms of the order must be granted by the court that ordered the payment of restitution and disciplinary costs.

2-13.5 Found Unqualified by Board. An applicant or registrant who has been refused a favorable recommendation by the Board through the filing of Findings of Fact and Conclusions of Law which ~~has~~have not been reversed by the Supreme Court of Florida shall not be eligible to seek admission to The Florida Bar until 2 years after the date that the Board delivered its adverse findings or such~~longer~~ other period as may be set ~~by~~in the ~~findings~~Findings.

2-14 ~~Petitions for Rehabilitation~~Reapplications for Admission. Any applicant or registrant who ~~was refused a favorable~~received an unfavorable Board recommendation~~by the Board~~ that has not been reversed by the Court may~~, after 2 years or such longer period as may be set in the findings, file~~ reapply for admission by filing a new Bar Application after 2 years or such other period as may be set in the Findings. The new application shall answer each item for the period of time from the filing of the original application and shall include current references, a fingerprint card, ~~and~~ the applicable fee~~. Following the completion of the Board's new background investigation, all previously denied applicants shall appear before a quorum of the Board for a formal hearing to present~~ and a detailed written statement describing the scope and character of the applicant's evidence of rehabilitation ~~pursuant to the provisions of~~ as required by Rule 3-13~~. and~~ The statement shall be sworn and may include corroborating evidence such as letters and affidavits. Thereafter, the ~~formal hearing panel~~Board shall determine at an investigative hearing, a formal hearing, or both, if the applicant's evidence of

rehabilitation ~~was~~is clear and convincing and shall make a recommendation ~~pursuant to~~as required by ~~Rule~~rule 3-23.6. In determining whether an applicant should appear before an investigative hearing panel, a formal hearing panel, or both, the Board is clothed with broad discretion.

2-22 Deadline for Filing a Bar Application. The Bar Application must be filed not later than 90 days from the date of notice that success has been attained on all parts of the Florida Bar Examination (General Bar Examination and Multistate Professional Responsibility Examination ~~—~~(MPRE)). Failure to comply with the filing deadline will result in required reapplication for admission to the Florida Bar Examination and successful completion of all of the examination.

2-28 ~~Rehabilitation~~ Application Fee for Reapplication for Admission Based on Rehabilitation. Applicants or registrants who are reapplying for admission and asserting rehabilitation from prior conduct that resulted in an adverse recommendation through Findings of Fact and Conclusions of Law~~,~~ shall file with the application the fee of $1800.00.

2-30.1 Filed with the Board. Any applicant or registrant who is dissatisfied with an administrative ruling of the Board that does not concern~~ing~~ character and fitness matters may petition the Board for reconsideration of the ruling. Applicants also may petition the Board for a suspension or waiver of any Bar admission rule or regulation. Petitions seeking a suspension or waiver of any ~~Board~~ rule~~,~~ or regulation or ~~order~~ seeking review of an administrative ruling or action not related to a character and fitness recommendation ~~should~~ may be presented in the form of a letter, shall be filed with the Board within 60 days after receipt of written notice of the Board's action complained of and shall be accompanied by a fee of $50.00.

2-30.2 Filed with the Court. Any applicant or registrant who is dissatisfied with ~~an~~a Board administrative ruling ~~of the Board~~ that does not concern~~ing~~ character and fitness matters may, within 60 days after receipt of written notice of ~~the Board's action complained of~~ that ruling, file an appropriate petition with the Clerk of the Supreme Court of Florida for review of the Board's action. If not inconsistent with these rules, the Florida Rules of Appellate Procedure shall be applicable to all proceedings filed in the Supreme Court of Florida. A copy of ~~any such~~the petition shall be served ~~up~~on the Executive Director of the Board. The

Board shall have 25 days after the service of ~~said~~the copy on the Executive Director in which to file a response to the petition and shall serve a copy of its response ~~u~~pon the applicant or registrant. The matter shall be disposed of as the Court directs.

3-10.1 Essential Eligibility Requirements. The Board considers the following attributes to be essential for all applicants and registrants seeking admission to The Florida Bar:

(a) Knowledge of the fundamental principles of law and their application.

(b) The ability to reason logically and accurately analyze legal problems.

(c) The ability to and the likelihood that, in the practice of law, one will:

(1) Comply with deadlines.

(2) Communicate candidly and civilly with clients, attorneys, courts, and others.

(3) Conduct financial dealings in a responsible, honest, and trustworthy manner.

(4) Avoid acts that are illegal, dishonest, fraudulent, or deceitful.

(5) Conduct oneself in accordance with the requirements of applicable state, local, and federal laws, regulations, and statutes; any applicable order of a court or tribunal; and the Rules of Professional Conduct.

~~**3-17.3 Fee for Extraordinary Expenses.** If the Board is required to make further inquiry into the character and fitness of a registrant as provided by Rule 3-11, then a fee of $125.00 shall be assessed.~~

3-23.6 Board Action Following Formal Hearing. Following the conclusion of a formal hearing, the applicant or registrant shall be notified promptly by the Board of its decision, which shall include one of the following recommendations:

(a) that the applicant or registrant has established his or her qualifications as to character and fitness;

(b) that the applicant be conditionally admitted to The Florida Bar in exceptional cases involving drug, alcohol, or psychological problems ~~upon such~~the terms and conditions ~~as are~~ specified by the Board;

(c) that the applicant's admission to The Florida Bar be withheld for a specified period of time not to exceed 2 years. At the end of the specified period of time, the Board shall recommend the applicant's admission ~~providing~~if the applicant has complied with all special conditions outlined in the Findings of Fact and Conclusions of Law;

(d) that the applicant or registrant has not established his or her qualifications as to character and fitness. In cases of denial, a 2-year disqualification period shall be presumed to be the minimum period of time required before an applicant or registrant may reapply for admission and establish rehabilitation. In cases involving significant mitigating circumstances, the Board shall have the discretion to recommend that the applicant or registrant be allowed to reapply for admission within a specified period of less than 2 years. In cases involving significant aggravating factors (including but not limited to material omissions or misrepresentations in the application process), the Board ~~may within its~~shall have the discretion ~~further~~to recommend that the applicant or registrant be disqualified from ~~filing for rehabilitation~~reapplying for admission for a specified period greater than 2 years ~~up to~~but not more than 5 years.

3-23.7 Findings of Fact and Conclusions of Law. In cases involving a recommendation other than under rule 3-23.6(a) ~~above~~, the Board shall expeditiously issue its written Findings of Fact and Conclusions of Law. The Board's findings shall be supported by competent, substantial evidence in the formal hearing record. The Board's findings, conclusions, and recommendation shall be subject to review by the Court as specified under ~~Rule~~rule 3-40.

The Board's findings, conclusions, and recommendation shall be final if not appealed except in cases involving a favorable recommendation for applicants seeking readmission to the practice of law after having been disbarred or having resigned pending disciplinary proceedings. In those cases, the Board shall file a report containing its recommendation with the Court for final action by the Court.

Admission to The Florida Bar for ~~such~~those applicants shall ~~only~~ occur only by public order of the Court. All reports, pleadings, correspondence, and papers received by the Court in ~~such~~those cases shall be public information and exempt from the confidentiality provision of ~~Rule~~rule 1-61.

4-13 ~~Educational Qualifications~~Technical Competence. ~~In order to submit to any part of the General Bar Examination an applicant must be able to provide evidence at the time of submission to the General Bar Examination of receipt of, or completion of the requirements for, the degree of Bachelor of Laws or Doctor of Jurisprudence from an accredited law school or be found educationally qualified under the alternative method of educational qualification as provided in Rule 2-11.2. The law degree must have been received from an accredited law school or within 12 months of accreditation. An applicant may sit for the MPRE prior to graduation from law school; however, the requirements of Rule 4-18.1 are applicable.~~ All applicants seeking admission to The Florida Bar shall produce satisfactory evidence of technical competence through successful completion of the Florida Bar Examination.

~~**4-13.1 Definition of Degree Requirements.** The term "completion of the requirements for the degree" refers to the time when completion of the requirements for graduation is recorded in the office of the law school dean or administrator.~~

4-13.1 Educational Qualifications.

(a) Eligibility. To be eligible to submit to any portion of the Florida Bar Examination, an applicant must either

(1) complete the requirements for graduation or receive the degree of Bachelor of Laws or Doctor of Jurisprudence from an accredited law school or within 12 months of accreditation; or

(2) be found educationally qualified under the alternative method of educational qualification provided in rule 4-13.4.

(b) Proscribed Substitutions. Except as provided in rule 4-13.4, none of the following shall be substituted for the required degree from an accredited law school:

(1) private study, correspondence school, or law office training;

(2) age or experience;

(3) waived or lowered standards of legal training for particular persons or groups.

4-13.3 Definition of Degree Requirements. The term "complete the requirements for graduation" refers to the time when completion of the requirements for graduation is recorded in the office of the law school dean or administrator.

4-13.4 Alternative Method of Educational Qualification.

(a) Applicants Not Meeting Educational Qualifications. For applicants not meeting the educational qualifications in rule 4-13.1, the following requirements shall be met:

(1) such evidence as the Board may require that the applicant was engaged in the practice of law for at least 10 years in the District of Columbia, in other states of the United States of America, or in federal courts of the United States or its territories, possessions, or protectorates, and was in good standing at the bar of the 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.

(b) Deadline for Filing Work Product. To be considered timely filed, the work product shall be complete with all required supplemental documentation and filed by the filing deadline of the General Bar Examination as set out in rule 4. Work product initially filed incomplete and perfected after the deadline shall not be

considered timely filed. Late or incomplete work product will be given consideration for admission into the next administration of the bar examination for which the deadline has not passed.

(c) Acceptance of Work Product. If a thorough review of the representative compilation of the work product and other materials submitted by the applicant shows that the applicant is a lawyer of high ability whose reputation for professional competence is above reproach, the Board may admit the applicant to the General Bar Examination and accept score reports from the National Conference of Bar Examiners or its designee.

(d) Board Discretion. In evaluating academic and legal scholarship under subdivision (a), the Board is clothed with broad discretion.

4-17 ~~Special Testing~~Test Accommodations

4-17.1 Accommodations. ~~Special testing~~Test accommodations are provided by the Board at no additional cost to applicants.

4-17.2 Requests for ~~Special Testing~~Test Accommodations. Applicants seeking test~~ing~~ accommodations ~~due to~~because of disability must file a written petition for accommodations accompanied by supporting documentation or such additional information as may be reasonably required on the forms supplied by the Board. The forms are available ~~up~~on written request. Receipt of requests for ~~special testing~~test accommodations and supporting documentation are subject to the deadline and late filing fees applicable to all examinees.

4-26.2 Pass/Fail Line. Effective from July 1, 2003 until June 30, 2004, ~~E~~each applicant must attain a scaled score of ~~131~~ 133 or better on Part A and on Part B under the individual method and an average of ~~131~~ 133 or better under the overall method, or such scaled score as may be fixed by the Court.

Effective July 1, 2004, each applicant must attain a scaled score of 136 or better on Part A and on Part B under the individual method and an average of 136 or better under the overall method, or such scaled score as may be fixed by the Court.

4-41 Exam Application and Supporting Documents. ~~In order to be considered complete each~~The Exam Application (Form 1-A)~~,~~ must be complete,

sworn to, ~~and~~ notarized, and accompanied by:

~~1)~~(a) the appropriate applicant filing fee (application fee, postponement fee, or reapplication fee);

~~2)~~(b) a current 2" x 2" photograph;

~~3)~~(c) one complete set of fingerprints taken on a card provided by the Board and certified by an authorized law enforcement officer; and

~~4)~~(d) other supporting documents or additional information as may be required on ~~the~~ Form 1-A.

4-42.3 Deadline for ~~Special Testing~~Test Accommodations. Petitions for accommodations and supporting documentation are subject to the examination filing deadline~~s~~. Applicants seeking ~~special testing~~test accommodations are encouraged to file the examination application, petition, and supporting documents by the examination filing deadline to avoid examination late filing fees.

4-42.4 ~~Cut-off~~Cutoff for ~~Special Testing~~Test Accommodations. To avoid an undue burden ~~u~~pon the Board while it is making final preparations for the administration of the bar examination, a minimum amount of time is required for the orderly processing of a request for accommodations. Except for emergency petitions as designated by the Board, no request for ~~special testing~~test accommodations ~~shall~~will be processed if postmarked or received after February 1 for the February Examination or after July 1 for the July Examination.

~~**4-52 Consequences of Violation of Rules.** If the Board has cause to believe that an applicant has violated any of the rules set forth above, then such applicant's examination grades shall be impounded at the direction of the Supreme Court of Florida pending a full investigation by the Board. The Board's investigations shall be conducted under the provisions of Rule 3.~~

~~**4-53**~~**4-52 Examination Proctors.** The Board may ~~from time to time elicit~~seek the assistance of other members of The Florida Bar in proctoring the bar examination.

4-64 ~~Invalidation of Examination Results~~Investigation of Exam-Related Conduct. ~~Results of the General Bar Examination shall be invalidated if the applicant fails to establish that the law school graduation requirements were completed before the applicant submitted to the General Bar Examination.~~ If the Board has cause to believe that an applicant has violated any of the eligibility or conduct rules relating to the Bar Examination, the Board may conduct an investigation, hold hearings, and make findings under the provisions of rule 3.

4-65 Invalidation of Exam Scores. If an applicant is found by the Board after an investigation under rule 3 to be in violation of rule 4-13.1, to have made a material misstatement or omission under rule 4-13.4, or to have violated the rules of conduct in rule 4-51, the results of the Florida Bar Examination shall be invalidated. The applicant shall not be eligible to submit another work product (if in violation of rule 4-13.4) or submit to another examination for a period of 5 years from the date that the Board delivered its adverse findings or such other period of time as may be set in the Findings.