

IN THE SUPREME COURT OF FLORIDA

Florida Board of Bar Examiners re)
Consideration of the Final Report of the)
Character and Fitness Commission)

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The Florida Board of Bar Examiners (Board) files this response concerning the Board’s consideration of the Final Report of the Character and Fitness Commission.

Background

By his June 2008 administrative order, Chief Justice R. Fred Lewis of the Supreme Court of Florida convened the Character and Fitness Commission (Commission). The Commission’s primary purpose was the submission of recommendations pertaining to the character and fitness standards used in Florida’s bar admission process. The Commission submitted its report to the Court on March 2, 2009.

Board’s Response

The Board has considered the Commission’s report and recommendations. The Board commends the Commission for its comprehensive and thoughtful review of the bar admission process in Florida. The Board endorses each of the following recommendations of the Commission:

- The Commission believes as a general rule, and in all stages of the admission and disciplinary process, increased emphasis should be given to protection of the public with the understanding that the practice of law is a privilege, not a right.
- Inasmuch as the current application is thorough and comprehensive, the Commission recommends no changes at this time to the Florida Bar Application.
- The Commission recommends that the Supreme Court of Florida's Commission on Professionalism create a committee to ensure that Florida law schools achieve the following goals: a) Require attendance by all law students at orientation including the presentation of the Florida Board of Bar Examiners Law School Orientation PowerPoint Presentation. b) Encourage early student bar application, registration, and processing. c) Notify students who have potential character "flags" on their law school applications that it would be most appropriate for them to engage in early application, registration, and processing. d) Notify all students that acceptance by and graduation from law school does not necessarily require that a person will be entitled to the privilege of membership in The Florida Bar. e) Impress upon all students that, if otherwise unqualified, merely undertaking the time, effort, and expense of law school will not assist them in the admissions process. f) Engage law school faculty members who teach courses on professionalism to further emphasize the importance of full disclosure and cooperation in the bar admissions process. g) Increase awareness of professionalism in the law school community.
- The Commission does not recommend any changes to the Florida Board of Bar Examiners' current standards for flagging files with potential character and fitness issues.
- The Commission supports the Florida Board of Bar Examiners' petition for changes to Rules 2-13.1 and 2-13.2 of the Rules of the Supreme Court Relating to Admissions to the Bar (Rules), which would require readmission to their home state by

attorneys who have been suspended or disbarred in another jurisdiction.

- The Commission supports the Florida Board of Bar Examiners' petition for rules change, which would allow the Board to recommend to the Supreme Court of Florida permanent denial of admission to The Florida Bar in the most egregious of character and fitness cases.
- The Commission recommends no changes to the standards set forth in Rule 3-12-Determination of Present Character and Rule 3-13- Elements of Rehabilitation of the Rules.
- The Commission recommends that the Board continue to be permitted to recommend to the Supreme Court of Florida the conditional admission of an applicant, provided that rehabilitation under Rule 3-13 has been fully established for otherwise disqualifying conduct.
- The Commission recommends that no change be made to Rule 3-23.6 of the Rules, as it relates to providing the Board an option to recommend conditional admission, including cases involving disbarred or resigned attorneys, when appropriate.
- The Commission recommends no change to the Court's current practice of issuing confidential orders of conditional admission, except in cases involving, disbarred and resigned attorneys.
- The Commission recommends that The Florida Bar and Florida Lawyers Assistance, Inc. (FLA) implement changes to the monitoring system to adopt a zero-tolerance policy for noncompliance with any of the terms of the order of conditional admission. If The Florida Bar and FLA are unable to enforce this policy effectively, the Commission further recommends that the monitoring function be transferred to the Florida Board of Bar Examiners.
- The Commission supports the work currently being undertaken by the Supreme Court of Florida's Commission on

Professionalism with regard to focusing on professionalism in law schools and newly-admitted attorneys and recommends that the Bar, the Judiciary, the Florida Board of Bar Examiners, and the law schools work with the Commission on Professionalism in support of its goals.

Character and Fitness Commission, Final Report to Supreme Court of Florida (March 2009) at 8-11 (report available on the Court's website at: http://www.floridasupremecourt.org/pub_info/documents/2009_FBBE_Character_Fitness_Report_Short_Version.pdf)

The other recommendations of the Commission are discussed below.

Investigation of Personal Websites

The Commission recommended the following:

Investigation of Personal Websites

The committee considered the expanded use of personal websites such as "Facebook" and "MySpace" and how items posted on personal websites may reflect an applicant's character and fitness. The Board does not currently request information on the Florida Bar Application regarding personal websites, although staff reports that these websites may be evaluated during the course of the background investigation as deemed necessary. The committee recommended that the Board consider expanding its current review of personal websites in order to determine whether information should be examined in all investigations; whether access to limited-access websites, such as "Facebook," should or should not be sought; and whether a question should be added to the Florida Bar Application to require that all such sites be listed and access granted to the Board. The committee determined that any such decision regarding these matters should be made by the Board after thorough review and consideration.

Commission's Final Report, *supra*, at 16-17.

The Board recently followed the recommendation of the Commission and considered the expanded use of personal websites during its background investigation of bar applicants. Following this consideration, the Board decided not to require all bar applicants to provide access to their Facebook and/or MySpace websites. The Board adopted the policy that the investigation of social networking websites be conducted on a case-by-case basis for the following bar applicants: applicants who are required to establish rehabilitation under rule 3-13; applicants with a history of substance abuse/dependence; applicants with significant candor concerns, including lack of candor in employment applications or resumes; applicants with a history of UPL allegations; applicants who have worked as a Certified Legal Intern, reported self-employment in a legal field, or reported employment as an attorney pending admission; and applicants who have positively responded to Item 27 of the bar application (regarding involvement in an organization advocating the overthrow of the government of the United States or of any state or political subdivision).

In reaching this policy, the Board reasoned that if applicants are required to provide access to their social websites, they are likely to delete any derogatory material before staff has the opportunity to review it. In

determining which applicants should be the subject of this additional level of investigation, the Board considered the following factors.

The Board should investigate the websites of applicants who are required to establish rehabilitation so as to ascertain whether they displayed any malice or ill feeling towards those who were compelled to bring about the proceeding leading to the need to establish rehabilitation. The Board should also investigate the websites of applicants with a history of substance abuse/dependence so as to ascertain whether they discussed or posted photographs of any recent substance use. The Board should also investigate the websites of applicants with candor issues, prior UPL allegations, or those who are employed in a legal job in a state in which they are not yet admitted to ensure that these applicants are not holding themselves out as attorneys. Lastly, the Board should investigate the websites of applicants who have disclosed involvement in an organization advocating the overthrow of a government in the United States to find out if they are still involved in any related activities.

Ineligibility of Convicted Felons

The Commission recommended the following:

The committee also reviewed the Board's current Rule 2-13.3 as it applies to convicted felons. Currently, if convicted of a felony, an applicant may apply for admission to The Florida Bar if his or her civil rights have been restored. The committee,

after reviewing the standards for admission to other licensed professions, found this threshold to be too low. It was compelling to the committee that someone with a felony conviction is precluded from seeking to be a state law enforcement officer, pursuant to section 943.13(4) of the Florida Statutes; however, that person could apply for admission to The Florida Bar and serve as an officer of the courts. The Florida Fish and Wildlife Conservation Commission and the Federal Bureau of Investigation also have an employment disqualification for a felony conviction. Section 1012.315 of the Florida Statutes disqualifies individuals from education-related positions of employment if convicted of a felony under one of over 45 listed statutes.

The committee was unable to reconcile these contrasting standards and thus recommends a change to the bar admission standards. The committee recommended that Rule 2-13.3 be changed to preclude persons who have been convicted of a felony from eligibility for admission to The Florida Bar. If adopted by the Supreme Court of Florida, a person convicted of a felony would not be eligible to apply for admission to The Florida Bar.

Commission's Final Report, *supra*, at 22-23.

As to the Commission's recommendation, the Board has a longstanding policy that recognizes the gravity of a felony conviction for individuals seeking admission to The Florida Bar. The current policy (adopted by the Board in 1995) provides that bar applicants who are convicted felons should be the subject of additional inquiry due to the seriousness of their past misconduct. The Board has pending before the Court a proposed rule amendment that would codify the Board's policy in this area. *In re Amendments to the Rules of the Supreme Court Relating to*

Admissions to the Bar, Case No.: SC08-2296 (Fla., pending) (Original petition filed with the Court on Dec. 10, 2008).

The Board's existing policy and proposed rule amendment require all convicted felons to provide to the Board a detailed sworn written statement describing the scope and character of the applicant's evidence of rehabilitation as set forth in the provisions of the bar admission rule on rehabilitation. *See Fla. Bar Admiss. R. 3-13.* Convicted felons must also appear before the Board for an investigative hearing, a formal hearing, or both, to allow the Board to determine if the applicant's evidence of rehabilitation is clear and convincing as required by Florida Bar Admission Rule 3-13. The pending proposed rule amendment and rationale are reproduced at **Attachment 1** to this response.

In deciding the Board's current policy on convicted felons is preferred over an absolute disqualification of unpardoned convicted felons, the Board considered a number of factors. First, there is the large disparity in criminal conduct that results in a felony conviction. This disparity can be produced by jurisdictional differences in the prosecution of particular crimes. The disparity can also be caused by societal changing views regarding certain illegal acts. Thus, an illegal drug possession charge that resulted in a felony

conviction 30 years ago may result today in a misdemeanor charge or pretrial diversion.

The criminal justice system also contains discretion at the stages of the initial arrest by law enforcement, the filing of charges or referral to a diversionary program by the prosecution, and the sentencing by the court. For example, one law enforcement officer might arrest an individual for misdemeanor resisting arrest without violence whereas another officer might arrest the same individual for felony battery of an officer. In the later scenario, the prosecutor might subsequently refer the case to a pretrial diversionary program, or reduce the felony charge to a misdemeanor in the charging document, or reduce a charged felony to a misdemeanor during plea negotiations. Lastly, even if the defendant were to plead guilty to the felony charge, the trial court must decide whether to adjudicate the defendant guilty (resulting in a felony conviction) or to withhold adjudication (resulting in no felony conviction).

The Board also considered the fact that the granting of a pardon is an executive function. The reasons for granting pardons differ based on the policies of the presidents and governors who grant the pardons. The granting of a pardon need not be based on a showing of rehabilitation. *See, e.g.,* Art. IV, sec. 8(a), Fla. Const. The Board concluded that the eligibility

and admission of convicted felons should continue to be decided solely by the Court as set forth in Article V, section 15 of the Florida Constitution (“The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.”). *See also* Fla. Bar Admiss. R. 1-11 (“The admission of attorneys to the practice of the profession of law is a judicial function.”). The Commission’s proposal would, however, relinquish some of the Court’s decision-making authority in the bar admissions area to the chief executive officers of the state and federal governments.

During the last fourteen years, the Board has relied on its current policy in recommending the admission of convicted felons. Under its policy, the Board evaluated firsthand each of those applicants at an investigative hearing or a formal hearing or both. Those applicants would have been recommended for admission only upon a clear and convincing demonstration of rehabilitation following the completion of the Board’s background investigation and the applicants’ appearance before the Board.

Following consideration of this issue, the Board concluded that its current policy for convicted felons will continue to protect the public and to safeguard the judicial system without permanently barring all convicted felons from the practice of law in Florida. Although the Board does not

support the Commission's recommendation that would bar convicted felons, the Board has set forth proposed rule amendments implementing the proposal at **Attachment 2** of this response should the Court wish to consider further this issue. Although the Board reaffirms its current policy on convicted felons, the Board also offers for the Court's consideration three modifications to that policy at **Attachment 3** that would require public formal hearings for all convicted felons, formal hearings for all convicted felons, and formal hearings for convicted felons with aggravating factors.

Permanent Disbarment

The Commission recommended the following:

1. Disbarment, under the existing bar discipline guidelines, should be permanent in the state of Florida.
2. The Florida Bar discipline guidelines should be revised to allow for suspension from the practice of law for up to five years.
3. The Rules of the Supreme Court Relating to Admissions to the Bar should be changed to require attorneys who have been suspended from the practice of law in Florida or any other jurisdiction for three years or more to reapply for admission to The Florida Bar (as is currently required for disbarred attorneys).

Commission's Final Report, *supra*, at 28 (footnote omitted).

In that these recommendations are primarily applicable to the policies, procedures, and rules of The Florida Bar, the Board defers to the Bar as to

the appropriateness of these recommendations pertaining to disbarred and suspended attorneys.

Conclusions

The Board approves each of the recommendations of the Commission with the following exceptions. As to the recommendation that would bar the admission of convicted felons, the Board opposes the Commission's recommendation. The Board favors the continuation of its existing policy that recognizes the seriousness of a felony conviction by imposing additional requirements in the admission process for convicted felons. As to the recommendations concerning disbarred and suspended attorneys, the Board defers to The Florida Bar.

Dated this 21st day of July, 2009.

Respectfully submitted,

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Attachment 1

Pending proposed rule amendment filed in *In re Amendments to the Rules of the Supreme Relating to Admissions to the Bar*, Case No.: SC08-2296 (Fla., pending) (Original petition filed with the Court on Dec. 10, 2008).

Text of Proposed Rule Amendment (Legislative Format)

2-13.35 Application for Admission for Convicted Felon. Any applicant or registrant who was previously convicted of a felony may apply for admission by filing a Bar Application on the form available on the board's website with current references, submission of fingerprints in the format required by the board, the applicable fee, and a detailed written statement describing the scope and character of the applicant's evidence of rehabilitation as required by rule 3-13. The statement must be sworn and may include corroborating evidence such as letters and affidavits. Thereafter, the board will determine at an investigative hearing, a formal hearing, or both, if the applicant's evidence of rehabilitation is clear and convincing and will make a recommendation as required by 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.

Reasons for Change

Since 1992, the Board has required all convicted felons to appear before the Board for an investigative or formal hearing, or both. The Board's practice recognizes the seriousness of the applicant's past misconduct that resulted in a felony conviction. The proposed rule amendment reaffirms the Board's longstanding practice. The proposed rule codifies the Board's practice and treats the processing of a convicted felon in the same manner as a previously denied bar applicant.

Attachment 2

Proposed rule amendments in legislative format implementing the recommendation of the Character and Fitness Commission that would bar convicted felons from seeking admission to The Florida Bar.

2-13.3 Convicted Felon. A person who has been convicted of a felony is not eligible to apply for admission to The Florida Bar. ~~until the person's civil rights have been restored.~~

~~**2-13.4 Serving Felony Probation.** A person who is serving a sentence of felony probation, regardless of adjudication of guilt, is not eligible to apply until termination of the period of probation.~~

Rationale

By administrative order issued June 2008, Chief Justice R. Fred Lewis convened the Florida Board of Bar Examiners Character and Fitness Commission (Commission). The Commission's primary purpose was the submission of recommendations pertaining to the character and fitness standards used in Florida's bar admissions process. In its report dated March 2, 2009, the Commission made several recommendations including the following: "The Commission recommends that Rule 2-13.3 of the Rules

be changed to preclude persons who have been convicted of a felony from being eligible to apply for admission to The Florida Bar.” The proposed rule amendments implement the recommendation of the Commission by making convicted felons ineligible to apply for admission to The Florida Bar.

Attachment 3

Possible modifications to the Board's existing policy on convicted felons.

Modification A

Require all convicted felons to appear for a public formal hearing as currently required of disbarred/resigned attorneys. *See* rules 2-13.15, 3-22.7, and 3-23.6(d) of the Rules.

Modification B

Require all convicted felons to appear for a formal hearing. This modification was used by the Board during the period of 1992-1995. In July 1995, the Board reconsidered the policy and modified it to require that convicted felons be required to appear for either an investigative or formal hearing or both.

In revising its policy in 1995, the Board considered cases where the requirement of a formal hearing had been waived by the Board. For example, one of the waived cases involved a felony conviction for possession of LSD 20 years earlier. The Board concluded that a better policy would be to require the convicted felon to appear for an investigative hearing or a formal hearing or both.

Modification C

Require all convicted felons with two of the following aggravating factors to appear for a formal hearing:

- ✓ Conviction of a felony that occurred within a certain period of time from the filing of the bar application (e.g., within the last five years);
- ✓ Conviction of a felony that resulted in imprisonment of more than one year; or
- ✓ Conviction of a felony involving particular crimes (e.g., homicide, embezzlement from an employer, aggravated child abuse, perjury).

Most, if not all, of the above-listed factors would likely result in a formal hearing under the Board's existing policy on convicted felons. This modification would, however, mandate a greater level of inquiry for particular convicted felons, and would, thereby, create a fail-safe procedure for the handling of the most serious felony convictions.