

**FINAL REPORT AND RECOMMENDATIONS OF THE
SUPREME COURT SELECT COMMITTEE
TO STUDY
THE FLORIDA BOARD OF BAR EXAMINERS**

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5. The right to be provided with and respond to evidence

Issue:

Should applicants have the right to be provided with and respond to evidence that may be used against them?

Discussion:

In their discussions of this issue, Supreme Court Select Committee members differed on whether applicants should be given the right to respond to evidence that may be used against them. Proponents of providing applicants with the evidence against them and allowing them to respond to it argued that applicants should have a right to know the allegations the Board is investigating.

Several other issues were involved in the discussion as some members questioned how applicants could resolve invalid complaints against them if they were not allowed to review and respond to the evidence. Others questioned whether opening the records would inhibit persons with knowledge of a problem area that should be investigated from coming forward. Some members questioned the urgency of providing this information to applicants. They said it is important to rely on the good sense of Board members in sorting through invalid complaints. Proponents said opening the process would speed it up by allowing the applicant to quickly dispose of complaints that were false or irrelevant.

The Supreme Court Select Committee's discussion was prompted by Bench/Bar Commission Recommendations 34 and 39. Those recommendations, which were criticized by some members of the committee, provided that all proceedings should be public after the filing of formal specifications and the Board should be required to furnish applicants with copies of complaints, including the name and address of persons commenting adversely on their fitness to practice law. Applicants would be given an opportunity to respond.

In her June 24, 1996, letter to the Supreme Court Select Committee, Mary Piccard said the issue of confidentiality had been considered by the Florida Supreme Court and the Board on several occasions. She quoted from Florida Board of Bar Examiners re Amendment to Rules Relating to Admission to the Bar, 676 So. 2d 372 (Fla. 1996), in which the Florida Supreme Court rejected a proposal by two attorneys who represent applicants before the Board to open all records. Ms. Piccard noted that the recommendation to open the records was inconsistent with the Court's ruling.

Regarding the call in Bench/Bar Commission Recommendation 39 to furnish applicants with copies of complaints, Ms. Piccard wrote: "The need for initial confidentiality of comments from third parties is essential if the Board is to continue to conduct a thorough background investigation for all bar applicants." She said the Florida Supreme Court recognized the need

for confidentiality in Florida Board of Bar Examiners re Interpretation of Article I, Section 14d of the Rules, 581 So. 2d 895 (Fla. 1991). In that case, the Florida Supreme Court held that “The Court is concerned that unless the Board’s investigative files are held in confidence, many of those from whom the Board seeks information concerning applicants would be unwilling to candidly respond. Thus, by its promulgation of Article I, Section 14, the Court made a calculated decision that the Board’s records should be confidential except under certain limited circumstances.”

In 1995, the Florida Supreme Court’s Bench/Bar Implementation Commission recommended that the Court implement Bench/Bar Commission Recommendation 39 by adding the following to Article III, Section 3:

h. The Florida Supreme Court shall direct The Florida Board of Bar Examiners to furnish each applicant with a copy of any complaint, together with the names and addresses, of all persons commenting adversely upon the applicant’s fitness to practice law. The applicant shall thereafter be granted a reasonable opportunity to respond in writing to any such complaint. All persons providing information to The Florida Board of Bar Examiners shall be granted qualified immunity from civil liability arising from any response to a Board inquiry.

Members of the Supreme Court Select Committee noted, but decided that it was beyond their charge to resolve a conflict between this Bench/Bar Commission recommendation and a 1991 opinion of the Florida Supreme Court upholding the confidentiality of such records. The Supreme Court should revisit this issue to consider whether to recede from its opinion in Florida Board of Bar Examiners re Interpretation of Article I, Section 14d of the Rules, 581 So. 2d 895 (Fla. 1991) and implement the recommendation of the Bench/Bar Commission.

See January 14, 1995, and March 31, 1995, minutes in Appendix E; Bench/Bar Commission Recommendations 34 and 39 in Appendix A; Florida Board of Bar Examiners re Amendment to Rules Relating to Admission to the Bar, 676 So. 2d 372 (Fla. 1996); and Florida Board of Bar Examiners re Interpretation of Article I, Section 14d of the Rules, 581 So. 2d 895 (Fla. 1991).

Recommendation:

The Supreme Court Select Committee defers consideration of this issue to the Florida Supreme Court without a positive or negative recommendation.