

In The
Supreme Court of Florida

Case No: 05-459

In Re: The Florida Board of Bar Examiners
Re: F.J.L.

**APPLICANT'S MOTION TO STRIKE THE
FLORIDA BOARD OF BAR EXAMINERS' ANSWER BRIEF**

CERTIFICATE OF SERVICE

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Pursuant to this Court's inherent authority, art. V, § 15, Fla. Const, and Rule 3-40.1 of the Rules of The Supreme Court Relating To Admissions To The Bar, Applicant requests that this Court strike the Answer Brief of the Board. In support of his request, Applicant states:

1. This motion seeks to strike the Florida Board of Bar Examiners' Answer Brief on the grounds that it contains multiple references to matters that are not part of the Board's formal hearing record. In violation of established appellate procedural rules, the Board included in its Answer Brief:

- a) Information pertaining to Applicant's participation in FloridaBarWatch (Answer Brief, p. 33). This information is not part of the record.
- b) Two pages of block quotes from the FloridaBarWatch website (Answer Brief, p. 33-34). This information is not part of the record.
- c) Information directing the Court to the web address of FloridaBarWatch (Answer Brief, p. 34). This information is not part of the record.
- d) Information relating to, and a discussion of, the Bar application process of Philip J. Stoddard (Answer Brief p. 30 and Appx. p. 23-35). This information is not part of the record. Further, if the

Board were to now contend that the case of Stoddard v. Florida Supreme Court constitutes supplemental authority, it would still be subject to a motion to strike. See, e.g., Department of Health & Rehabilitative Servs. v. Martin, 563 So. 2d 1124 (Fla. 1st DCA 1990) (Where employee's notice of supplemental authority contained a case to the court for its attention, as well as comments on what the court held in that case, such information constituted improper argument under Fla. R. App. P. 9.210, and was therefore subject to state agency's motion to strike.)

- e) Information relating to, and a discussion of, the legal affairs of Mary Petrano (Answer Brief p. 30 and Appx. pp. 36-38). Again, if the Board now asserts that the Petrano case is supplemental authority, it still should be stricken for the reasons stated in Martin, supra.
- f) Improperly indicating the availability of documents not part of the record, and noting “the Board can promptly provide those documents to the Court upon request” (Answer Brief p. 13, 44). This dubious assertion creates suspicion and innuendo. If the documents were of any relevance to this matter, then the Board at its formal hearing would have introduced them.

2. Attaching or discussing information outside the record is improper and violates the Rules of Appellate Procedure. Slizyk v. Smilack, 734 So. 2d 1166 (Fla. 5th DCA 1999) (striking non-record evidence); Rivard v. Grimm, 621 So. 2d 580, fn1 (Fla. 4th DCA 1993) (“we strike plaintiff’s reference to the tape-recorded statement because it was not part of the record on appeal and a clear violation of the Florida Rules of Appellate Procedure”); Ours v. Ours, 522 So. 2d 29, 30, fn3 (Fla. 1st DCA 1986) (“we point out that the proper forum for making a record is in the trial court prior to the taking of an appeal, not in the appellate court afterwards”). Here, the Board’s General Counsel had to have known that what he was doing was improper and in violation of the Rules, especially since his brief repeatedly cites evidence not part of the record. The Board’s General Counsel has been licensed to practice law since 1976 and as recent as March 4, 2004, his office moved this Court to strike filings in a Bar admission case that it alleged were improperly submitted. See, Florida Board of Bar Examiners Re: Allan B. Marks, SC03-2210. There is no excuse for this type of misconduct.

3. The appropriate sanction here is for the Court to strike the Board’s Answer Brief in its entirety. This is particularly appropriate given the frequent improper references contained therein. As noted above, the Board’s brief improperly creates suspicion and innuendo, and the evidence complained of herein was designed to prejudice Applicant with non-record support. In Peterson v. State, 376 So.2d 1230,

1234 (Fla. 4th DCA 1979), cert. denied, 386 So.2d 642 (Fla. 1980), the prosecutor argued “extra-testimonial” information that was not part of the record, in an attempt to influence the fact finders. Id. at 1232. Although Peterson was a criminal case involving a jury, the Court’s admonishment should equally be applicable to the Board’s General Counsel:

The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo. If his case is a sound one, his evidence is enough. If it is not sound, he should not resort to innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client.

Peterson, supra, at 1235.

5. On July 12, 2005, Applicant requested that the Board’s General Counsel concur in the relief sought herein. Concurrence was denied.

WHEREFORE, Applicant respectfully seeks an order from this Court striking the Board’s Answer Brief in its entirety. In the alternative, Applicant requests that this Court allow Applicant to file a reply to the Board’s Answer Brief within 14 days following the Court’s denial of this motion.

Dated: July 13, 2005

Respectfully submitted:

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