

In The  
Supreme Court of Florida

Case No: 05-459

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

**APPLICANT'S  
PETITION FOR REVIEW**

**CERTIFICATE OF SERVICE**

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**Oral Argument Requested**

**NOW COMES** Applicant, Frank J. Lawrence, Jr., and he hereby petitions this Court for review of the recommendation issued by the Florida Board of Bar Examiners. In support of this petition, Applicant states:

1. On or about November 19, 2001, Applicant Frank J. Lawrence, Jr. (hereinafter “Applicant”), filed an application with the Florida Board of Bar Examiners (hereinafter “Board”) to practice law in the State of Florida.

2. On or about January 16, 2003, the Board held an investigative hearing concerning Applicant’s application for admission.

3. On or about November 19, 2004, the Board held a formal hearing concerning Applicant’s application for admission.

4. Five Specifications were filed against the Applicant and the Board’s Findings of Fact and Conclusions of law were rendered on February 18, 2005.

5. Specification III, which involved a grievance filed by Applicant against a prosecutor, was found unproven and not disqualifying. Specification I, which involved non-conviction police involvement, an ordinance charge and its surrounding litigation, and Specification V, which involved employment terminations, were found proven but not disqualifying for admission.

6. There were two Specifications found by the Board to be proven and disqualifying. The Board recommended to this Court that Applicant be denied admission to the Florida Bar on account of Specification IV (statements made by

the applicant), and alternatively for the conduct alleged in Specification II (for his lawsuit against another state's attorney licensing officials).

7. As to Specification IV, the formal panel found that Applicant's statements about the Board's practices, the Board's staff and its members, and two federal judges amounted to evidence that Applicant "displayed an inadequate knowledge and/or lack of appreciation of the admissions standards and principles and ideals of the legal profession" and the statements violated Rule 4-8.2(a) of the Rules Regulating The Florida Bar.

8. Alternatively, the formal panel found that Applicant should be denied admission because of comments made by a federal magistrate about a lawsuit Applicant filed in February 2003, which challenged the constitutionality of the Michigan attorney licensing system.

9. The Board's decision finding Specification IV proven and disqualifying is not supported by competent and substantial evidence because, unlike the situation in The Fla. Bar v. Ray, 797 So. 2d 556 (Fla. 2001), the Board failed to produce *any evidence* that the Applicant's statements were not accurate or were not honestly held beliefs. Additionally, unlike the situation in The Florida Bar v. Weinberger, 397 So. 2d 661 (Fla., 1981), the statements were private, and therefore, could not have influenced the public's perception of the judiciary.

10. The Board's decision finding Specification II proven and disqualifying is not supported by competent and substantial evidence because unlike the situation in The Fla. Bar v. Kelly, 813 So. 2d 85 (Fla., 2002), there has been no finding that Applicant filed the suit with the intention to harass or based upon any other improper motive.

11. Applicant made a prima facie case of his good moral character by presenting the telephonic testimony of two witnesses at his formal hearing that attested to his good character, presenting testimony about Applicant's assistance for indigent people to find pro bono attorneys, presenting testimony about Applicant's free piano lessons at Children's Hospital of Michigan, and providing character reference letters from four individuals.

12. Florida law provides that once an applicant makes a prima facie case of his good moral character "it is incumbent upon those making objections to offer evidence to support the same and to overcome the prima facie showing made by the applicant. It is not for the applicant to prove the falsity of the charges made against him. While the burden of proof never shifts, the burden of proceeding does." Florida Bd. of Bar Examiners Re R.D.I., 581 So. 2d 27, 29 (Fla., 1991), citing Coleman v. Watts, 81 So. 2d 650 (Fla. 1955), quoting State ex rel. Bd. of Bar Examiners v. Poyntz, 152 Or. 592, 52 P.2d 1141, 1142 (1935).

13. The Board failed to present *any evidence* whatsoever to show that Applicant's statements were false or made recklessly (Specification IV) or that his litigation against the Michigan licensing officials was brought in bad faith (Specification II). As such, the Board has failed to meet its burden of proceeding. Florida Bd. of Bar Examiners Re R.D.I, supra.

14. The central issue before this Court is not whether the Board's Specifications II and IV have been proven or not. In judging an applicant's character and fitness to be granted admission to the Bar, two questions must be resolved: "First, are the facts in this case such that a reasonable man would have substantial doubts about the petitioner's honesty, fairness, and respect for the rights of others and for the laws of the state and nation? Second, is the conduct involved in this case rationally connected to the petitioner's fitness to practice law?" Florida Bd. of Bar Exam'rs In re Doe, 770 So. 2d 670, 674 (Fla., 2000), citing Florida Bd. of Bar Exam'rs re G. W. L., 364 So. 2d 454, 459 (Fla. 1978).

15. The Board's Findings of Fact and Conclusions of Law completely fail to show how a reasonable man would have substantial doubts about the petitioner's honesty, fairness, and respect for the rights of others or how the conduct alleged could possibly be rationally connected to Applicant's fitness to practice law. Rather, the Board has left it up to its General Counsel to answer this petition with

arguments and reasoning that cannot be found in the Board's February 18, 2005 Opinion.

16. Finally, the Board's General Counsel was unauthorized to bring Specifications II and IV, because the Specifications were never authorized by an investigative hearing panel, as required by Rule 3-23 of the Rules of the Supreme Court Relating to Admissions to the Bar.

17. A brief in support accompanies this petition.

**WHEREFORE**, Applicant requests that this Court grant this petition for review, reject the recommendation of the Board, and grant Applicant's application for admission to practice law.

Dated: June 13, 2005

Respectfully submitted:

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**Supreme Court of Florida**

Case No: 05-459

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

**BRIEF IN SUPPORT OF APPLICANT'S  
PETITION FOR REVIEW**

**CERTIFICATE OF SERVICE**

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**STATEMENT OF RESERVATION  
OF FEDERAL CLAIMS AND DEFENSES**

PLEASE TAKE NOTICE that Applicant hereby completely reserves his federal claims and defenses for adjudication in a federal forum. If Applicant makes any reference to federal law in the proceedings, he will do so merely to inform the state officials of the nature of his federal claims so that state law can be construed in light of those claims. England v. La. State Bd. of Med. Examiners, 375 U.S. 411, 415, 419-420; 84 S.Ct. 461, 464; 11 L. Ed. 2d 440 (1964); Jennings v. Caddo, 531 F.2d 1331, 1332 (5th Cir. 1976); Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299, 1303 (11th Cir. 1992).

Applicant made reference to federal law during the lower administrative proceedings in order to place the state officials on notice of Applicant's federal claims, so that state law could thereby be so construed. See, England, 375 U.S. at 419-420, citing Government & Civic Employees Organizing Committee v. Windsor, 353 U.S. 364; 77 S. Ct. 838; 1 L. Ed. 2d 894 (1957). As evidenced by the Conclusions of Law made by the Florida Board of Bar Examiners, questions of federal law have been reserved. The Board may request that this Court adjudicate federal claims in an effort to thwart any future federal review by the federal courts. Applicant requests that this Court respect his England-Jennings reservation and only adjudicate his state claims, as briefed herein.

## **STATEMENT OF JURISDICTION**

Applicant Frank J. Lawrence, Jr., hereby petitions this Court to review the recommendation of the Florida Board of Bar Examiners that he be denied admission to The Florida Bar. This Court has jurisdiction. See art. V, § 15, Fla. Const; Rule 3-40.1, Florida Rules Of The Supreme Court Relating To Admissions To The Bar.

## STATEMENT OF ISSUES FOR REVIEW

- I. In The Absence Of Any Evidence Placed On The Formal Hearing Record That Applicant's Statements Were False, Or Made With Reckless Disregard As To Their Truth Or Falsity, Does Florida State Law Authorize The Formal Hearing Panel's Finding That Specification IV Was Proven And Disqualifying?

Applicant says, "No"

The Board says, "Yes."

This Court should say "No."

- II. In The Absence Of Any Evidence Placed On The Formal Hearing Record That Applicant's Litigation Against The Michigan Attorney Licensing Officials Lacked A Good Faith Argument For An Extension, Modification, Or Reversal Of Existing Law, Does Florida State Law Authorize The Formal Hearing Panel's Finding That Specification II Was Proven And Disqualifying?

Applicant says, "No"

The Board says, "Yes."

This Court should say "No."

- III. Was The Board's General Counsel Permitted To Bring Specifications II And IV, Given That Those Specifications Were Never Authorized By An Investigative Hearing Panel, As Required By Rule 3-23 Of The Rules Of The Supreme Court Relating To Admissions To The Bar?

Applicant says, "No"

The Board says, "Yes."

This Court should say "No."

## STATEMENT OF THE CASE

On November 19, 2001, Applicant Frank J. Lawrence, Jr. (hereinafter “Applicant”), filed an application with the Florida Board of Bar Examiners (hereinafter “Board”) to practice law in the State of Florida. Applicant is politically active and he holds the openly and honestly held belief that there is widespread dishonesty and bias in the Michigan judiciary concerning the interests of the poor, youth, minorities, persons accused of crimes, and unions.

Five Specifications were filed against the Applicant and the Board held its formal hearing on November 19, 2005. The Board’s Findings of Fact and Conclusions of law were rendered on February 18, 2005, well over three years since the filing of Applicant’s request for admission.

Specification III, which involved a grievance filed by Applicant against a prosecutor, was found unproven and not disqualifying. Specification I, which involved non-conviction police involvement, an ordinance charge and its surrounding litigation, and Specification V, which involved employment terminations, were found proven but not disqualifying for admission.

After what the Board referred to as an “extensive investigation of the applicant’s activities in question” (See Board Opinion, p.2), a formal hearing panel recommended that Applicant be denied admission to the Florida Bar on account of Specification IV (statements made by the applicant), and alternatively for the

conduct alleged in Specification II (for his lawsuit against another state's attorney licensing officials).

As to Specification IV, the formal panel found that Applicant's statements against the Board's practices, the Board's staff and its members, and two federal judges amounted to evidence that Applicant "displayed an inadequate knowledge and/or lack of appreciation of the admissions standards and principles and ideals of the legal profession" and the statements violated Rule 4-8.2(a) of the Rules Regulating The Florida Bar. Alternatively, the formal panel found that Applicant should be denied admission because of comments made by a federal magistrate about a lawsuit Applicant filed in February 2003, which challenged the constitutionality of the Michigan attorney licensing system.

This Petition for Review followed.

## **STATEMENT OF FACTS**

### Evidence of Applicant's Good Moral Character

All applicants seeking admission to The Florida Bar must produce satisfactory evidence of good moral character. Rule 2-12, Rules Of The Supreme Court Relating To Admissions To The Bar (hereinafter "FBBE Rules"). Applicant satisfied this requirement by:

1. Presenting the telephonic testimony of two witnesses at his formal hearing (Board Opinion, p. 15-16). Specifically, Dr. Benedict Go, a board

certified internist and Michigan attorney, “spoke highly of the applicant’s qualifications, both educationally and morally,” Id at 15, and Donna Greene, a former co-worker of Applicant, testified that Applicant worked for the public as an Unemployment Advocate and that “he would make a fine attorney.” Id. at 16.

2. Testifying to Applicant’s positive action in the community, namely:
  1. Helping indigent people to find pro bono attorneys;
  2. Providing pro bono law clerk services for indigent people;
  3. Giving free piano lessons at Children’s Hospital of Michigan;  
and
  4. Visiting nursing homes and providing entertainment for the residents by playing the piano.

Id. at 16.

3. Providing character reference letters from four individuals. Id. at 15
4. Providing the requisite personal references in conjunction with Applicant’s November 19, 2001 application for admission.

### The Specifications

On January 16, 2003, a year and two months from the date of Applicant’s application, the Board held an investigative hearing. Eleven months later, on November 25, 2003, Specifications were filed upon the Applicant, and on

November 19, 2004, exactly three years from the date Applicant filed his request for admission, a formal hearing was held.

On February 18, 2005, the Board issued its Findings of Fact and Conclusions of Law. Specification I (non-conviction police involvement, an ordinance charge and surrounding litigation) and Specification V (employment terminations where Applicant was found not guilty of misconduct in quasi-judicial administrative unemployment proceedings), were found proven, but not disqualifying<sup>1</sup>. Specification III was found unproven.

Only two of the five Specifications filed were found to be proven and disqualifying by the Board. Specification IV was found to be individually disqualifying and Specification II was found to be disqualifying “when considered collectively with other disqualifying conduct.” Board Opinion, p. 17.

Specification IV charged:

During your dealings with the Board, you have displayed an inadequate knowledge and/or lack of appreciation of the admissions standards and the principles and ideals of the legal profession, including specifically the provisions of the Rules of the Supreme Court Relating to Admissions to the Bar and the Rules Regulating The Florida Bar 4-8.2(a), Impugning Qualifications and Integrity of Judges or Other Officers, as evidenced by the following:

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<sup>1</sup> Rule 3-22.5(d) of the Rules of the Supreme Court Relating to Admissions to the Bar requires that the Board bring Specifications “which if proven would preclude a favorable finding by the Board.” Specifications I and V were found proven. However, the Board found that those Specifications were not disqualifying, which is clear and convincing evidence that the Board felt that its General Counsel inappropriately brought those Specifications.

(A) Your letter to the Board dated February 11, 2002, wherein you stated: “My second request surrounds my substantial concern that the Board’s unbridled discretion over character assessment, in its present states, patently violates federal law.”

(B) Your amendment to your Bar Applicant executed April 1, 2003, wherein you stated: “My research of Florida’s attorney licensing system indicates that it scrutinizes First Amendment activities without adequate procedural safeguards, as required by federal law.”

(C) Your letter to the Board dated April 30, 2003, wherein you stated: “The Board’s character analysis is simply being used as a ‘gatekeeping’ analysis to determine whether the Board members like or dislike an applicant.”

(D) Your amendment to your Bar Applicant executed June 7, 2003, wherein you stated:

(i) “I had to laugh when I saw how Ms. Eleanor Mitchell Hunter attempted to transmogrify Bloomfield Township’s ‘interfering’ ordinance into a charge of ‘obstruction.’ I figure that her attempt to put such a spin on this ordinance charge is a harbinger to what the Board has in store for me.”

(ii) “The Florida Board’s practice of using arrest information as a basis to evaluate character has to stop. The Board must acknowledge that when the Supreme Court of the United States speaks, it speaks for the nation.”

(iii) The Florida Board also denies applicants hearings wherein full judicial procedural safeguards are in place (trial-like safeguards where the full Rules of Evidence apply).”

(E) Your amendment to your Bar Application executed June 7, 2003, wherein you suggested that United States Magistrate Joseph G. Scoville in rendering his 48-page Report and Recommendation in your case was improperly influenced by an article in a newspaper and by the appointments of Judge Scoville and United States District Judge McKeague to state bar committees.

(F) Your letter to the Board dated July 6, 2003, wherein you stated:

(i) “The practice of evaluating non-conviction arrest information is so entrenched in Florida, it appears to have been commonplace in the admissions process. The Board of Bar Examiners is not a court of law and has no authority whatsoever to use non-conviction arrest information against a Bar applicant. Any specifications filed in my case, that allege misconduct on

account of non-conviction arrest information, will not be brought in good faith.”

- (ii) “The Board also denies applicant hearings wherein full judicial procedural safeguards are in place (trial-like safeguards where the full rules of Evidence apply). \* \* \* There is no possibly [sic] way I can get a fair hearing before the Florida Board of Bar Examiners.”
- (iii) The Florida Board of Bar Examiners claims that it is ‘protecting the public,’ but I do not believe that for one second.”

(G) Your letter to the Board dated October 10, 2003, wherein you stated: “I intend to appeal Judge McKeague’s decision to the Sixth Circuit Court of Appeals. I have noticed that when it comes to litigation involving the Bar, most plaintiffs seem to lose at the district court level. It is when the issues go up to a federal appellate court that the plaintiff finds justice.”

Applicant testified at the formal hearing that these statements represented his openly and honestly held views. Of particular relevance to this matter is the fact that the Board produced no evidence whatsoever to establish that Applicant’s statements were false, or made with reckless disregard as to their truth or falsity. As discussed in the Argument portion of this brief, this fact is important because Florida law is well established that once an applicant has made a prima facie showing of good moral character, "it is incumbent upon those making objections to offer evidence to support the same and to overcome the prima facie showing made by the applicant. It is not for the applicant to prove the falsity of the charges made against him." Florida Bd. of Bar Examiners Re R.D.I., 581 So. 2d 27, 29 (Fla., 1991).

Despite the above authority, and although the Board produced no evidence to show that Applicant’s statements were false, or made with reckless disregard,

the Board still concluded that Specification IV was proven and disqualifying. Board Opinion, p. 13-14.

### Specification II

Specification II was premised upon a federal lawsuit that Applicant filed against the Michigan attorney licensing officials. Applicant admitted the allegations in Specification II because it exclusively cited selected portions from the Report and Recommendation of Magistrate Joseph Scoville, which is reported at Lawrence v. Chabot, et. al, 2003 U.S. Dist. LEXIS 17894 (W.D. Mich., May 7, 2003). Specification II failed to allege that Applicant did anything improper, other than to repeat the Magistrate's statements.

Similar to Specification IV, the Board failed to produce any evidence pertaining to this Specification, other than produce the opinions of the Magistrate and District Judge. As noted above, it is well established in Florida that "It is not for the applicant to prove the falsity of the charges made against him." Florida Bd. of Bar Examiners Re R.D.I, supra. However, the applicant testified at the formal hearing about how he arrived at his good-faith legal conclusions and Applicant produced evidence that the State Bar of Michigan made false statements that affected the litigation. The Applicant testified that the false statements made by the Michigan Bar were the subject of a Michigan Bar Journal publication reported at *Character and Fitness Review – Is the Process Fit?*, 82 Michigan Bar Journal 9

(December, 2003). (Attached hereto as Exhibit 1). The Board made no reference to any of this troubling information in its Findings of Fact and Conclusions of Law.

Importantly, and to reiterate, the Board completely failed to produce any evidence that Applicant's litigation against the Michigan attorney licensing officials lacked a good-faith argument for an extension, modification, or reversal of existing law.

### **SUMMARY OF ARGUMENT**

The Board alleges that Applicant is unfit to practice law because he made statements critical of the Board, the Florida attorney licensing process, and two Michigan judges. In defending himself, Applicant vehemently maintained that his statements were all true and, therefore, he did not engage in disqualifying conduct. At the Applicant's formal hearing, the Board failed to produce evidence negating the veracity of Applicant's statements. The Board's decision is not supported by competent and substantial evidence because, unlike the situation in The Fla. Bar v. Ray, 797 So. 2d 556 (Fla. 2001), the Board failed to produce any evidence that the Applicant's statements were not accurate or were not honestly held beliefs. Additionally, unlike the situation in The Florida Bar v. Weinberger, 397 So. 2d 661 (Fla., 1981), the statements were private, and therefore, could not have influenced the public's perception of the judiciary.

In the alternative, the Board alleged that Applicant's lawsuit against Michigan attorney licensing officials was disqualifying. The Board cited comments by a magistrate assigned to the case that labeled Applicant's legal position as, *inter alia*, "frivolous." However, unlike the situation in The Fla. Bar v. Kelly, 813 So. 2d 85 (Fla., 2002), there has been no finding that Applicant filed the suit with the intention to harass or based upon any other improper motive. Without producing anything other than the Court's opinion, the Board's decision is not supported by competent and substantial evidence because the Board failed to produce any evidence to overcome Applicant's position that he asserted the claims in good faith to help make the Michigan licensing process better for all applicants. There is no evidence in the record that shows Applicant's litigation lacked a good faith argument for an extension, modification, or reversal of existing law. As such, Applicant did not engage in disqualifying conduct.

This Court should reject the recommendation of the Board and admit Applicant to the practice of law.

## ARGUMENT

- I. **IN THE ABSENCE OF ANY EVIDENCE PLACED ON THE FORMAL HEARING RECORD THAT APPLICANT'S STATEMENTS WERE FALSE, OR MADE WITH RECKLESS DISREGARD AS TO THEIR TRUTH OR FALSITY, STATE LAW DOES NOT AUTHORIZE THE FORMAL HEARING PANEL'S FINDING THAT SPECIFICATION IV WAS PROVEN AND DISQUALIFYING**

### The Board Must Do More Than Simply Allege

The Board's findings are not supported by competent, substantial evidence because, quite simply, there was no evidence introduced by the Board to show that Applicant's statements were false, or made with reckless disregard as to their truth or falsity. As discussed above, Applicant made a prima facie case of his good moral character. Once this is done "it is incumbent upon those making objections to offer evidence to support the same and to overcome the prima facie showing made by the applicant. It is not for the applicant to prove the falsity of the charges made against him." While the burden of proof never shifts, the burden of proceeding does." Florida Bd. of Bar Examiners Re R.D.I., *supra.* at 29, *citing* Coleman v. Watts, 81 So. 2d 650 (Fla. 1955), *quoting* State ex rel. Bd. of Bar Examiners v. Poyntz, 152 Or. 592, 52 P.2d 1141, 1142 (1935).

The only way that Specification VI could have been found proven and disqualifying is for the Board to present specific evidence and then make a specific finding that Applicant's statements were not openly and honestly held views. For example, in The Fla. Bar v. Ray, 797 So. 2d 556 (Fla. 2001), a Florida attorney "made several statements which questioned the veracity and integrity of the immigration judge, as well as his fairness at a hearing for one of Ray's clients." *Id.* at 557. A referee was appointed and following a hearing on disputed factual and legal issues, the referee found that certain statements were false, and that Ray had

made the statements with reckless disregard as to their truth or falsity. Id. 557-558. Unlike the Board in the matter sub judice, the Florida Bar went far beyond simply making accusations, and the Bar presented specific evidence that Ray made improper statements:

The referee in the instant case heard evidence from both the Bar and Ray regarding whether Ray had a reasonable basis in fact to make the statements he made in his letters and determined that Ray did not. Ray's statements that questioned the judge's veracity were found by the referee to be based on statements that the judge never made, and the referee concluded that it was impossible to "call someone a liar for a statement they never made." As to Ray's allegations of the judge's unfairness at a hearing for one of Ray's clients, the referee, after reviewing a tape recording and a transcript from the hearing, found that there was "nothing that transpired in that hearing that would justify such outrageously false accusations," and that the evidence Ray relied upon in making the statement "barely even qualifies as sketchy." The referee concluded that Ray's statements were made "with a reckless disregard for the truth."

Id. at 559.

Generally, in judging an applicant's character and fitness to be granted admission to the Bar, two questions must be resolved: "First, are the facts in this case such that a reasonable man would have substantial doubts about the petitioner's honesty, fairness, and respect for the rights of others and for the laws of the state and nation? Second, is the conduct involved in this case rationally connected to the petitioner's fitness to practice law?" Florida Bd. of Bar Exam'rs In re Doe, 770 So. 2d 670, 674 (Fla., 2000), citing Florida Bd. of Bar Exam'rs re G. W. L., 364 So. 2d 454, 459 (Fla. 1978).

As noted above, by simply filing Specifications in this matter, and by failing to present any evidence that Applicant made statements in bad faith or recklessly, the Board has utterly failed in supporting its Opinion with competent and substantial evidence. Most importantly, the Board's Findings of Fact and Conclusions of Law completely fail to show how a reasonable man would have substantial doubts about the petitioner's honesty, fairness, and respect for the rights of others or how the conduct alleged could possibly be rationally connected to Applicant's fitness to practice law. Rather, the Board has left it up to its General Counsel to answer this petition with arguments and reasoning that cannot be found in the Board's February 18, 2005 Opinion.

Moreover, the Board simply adopted the General Counsel's Specifications and it failed to set forth specific findings of fact on the issue of whether the Applicant's statements were indeed true. This type of written opinion reflects a lack of independent decision-making that has been repeatedly condemned by Florida Courts as highly improper. See Perlow v. Berg-Perlow, 875 So. 2d 383, 388 n.4 (Fla. 2004); Rykiel v. Rykiel, 795 So. 2d 90, 92 (Fla. 5th DCA 2000), quashed on other grounds, 838 So. 2d 508 (Fla. 2003); Waldman v. Waldman, 520 So. 2d 87, 89 (Fla. 3d DCA 1988), receded from on other grounds by Acker v. Acker, 821 So. 2d 1088 (Fla. 3d DCA 2002), review granted, 842 So. 2d 842 (Fla. 2003). Without necessary and specific findings in the Board's Opinion, Appellant

now has to wait for the Board's General Counsel to file the Board's Answer to this Petition in order to see what the Board's arguments are going to be. This, quite frankly, is highly unfair.

#### Private v. Public Statements

Additionally, the cases where this Court found that attorneys engaged in misconduct for making statements critical of the judicial system concern a very important distinction from Applicant's *private* criticisms: the cases involved statements that could *publicly* injure the reputation of the judiciary. See, e.g., The Florida Bar v. Weinberger, 397 So. 2d 661, 662 (Fla., 1981) ("he filed various pleadings and made public statements denigrating the courts and the administration of justice"); The Florida Bar v. Clark, 528 So. 2d 369, 371 (Fla., 1988) (attorney asserted court filings open to the public that certain judges were "corruptly influenced... thus engaging in a pattern of racketeering activity in violation of the RICO statute"); Florida Bar v. Tindall, 550 So. 2d 449 (Fla. 1989) (attorney included in court filings open to the public unsubstantiated allegations that judge accepted bribes); The Florida Bar v. Shimek, 284 So. 2d 686 (Fla., 1973) (attorney included in court filings open to the public allegations that "state trial judge avoided the performance of his sworn duty"); and Ray, 797 So. 2d at 558-559 ("such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice"). Here, there has been no allegation, let alone

suggestion, that Applicant’s statements could have had *any* impact on the public’s perception of the judiciary.

The Board also fails to acknowledge that throughout history, respected members of the legal community have often vented by criticizing the judiciary:

The judge’s opinion is “irrational” and “cannot be taken seriously.”<sup>2</sup>

The Court’s decisions were “outrageous” and the “results were idiotic.”<sup>3</sup>

“Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.”<sup>4</sup>

"It's obvious with this decision that they (the majority members of the Supreme Court) will use any silly reason they can find to avoid letting a death sentence stand . . . . [The] four justices have violated their oaths to uphold the Constitution . . . .”<sup>5</sup>

“Judges determined to nullify statutes customarily feel constrained to ascribe their determination to neutral legal principles. Such constraint is not apparent today.”<sup>6</sup>

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<sup>2</sup> Justice Antonin Scalia, describing the work of Justice Sandra Day O’Connor. Webster v Reproductive Health Svcs, 492 US 490, 532, 536 n \*. No public discipline.

<sup>3</sup> Michigan Justice Patricia Boyle as quoted in McAlpine & Bergen, *Justice Patricia Boyle Leaves a Legacy of Decisions Laced with Principle*, 78 Mich Bar J 404, 408 (May 1999). No public discipline.

<sup>4</sup> Atkins v Virginia, 536 US 304, 338; 153 L Ed 2d 335; 122 S Ct 2242 (2002) (Scalia, J., dissenting). No public discipline.

<sup>5</sup> Ramirez v State Bar of California, 28 Cal 3d 402, 420; 169 Cal Rptr 206; 619 P 2d 399 (1980), dissenting opinion of Justice Newman quoting *Welborn, Prosecutor Plans Recall Drive Over Ruling on Death Penalty*, Santa Ana Register (June 11, 1980) pp. A 1, A 10. No discipline referenced in opinion.

<sup>6</sup> Indiana Chief Justice Randall T. Shepard dissenting in Covalt v Carey Canada, Inc, 543 NE2d 382 (IN, 1989). No reported discipline.

The judge is a “lunatic . . . I think he got his law degree from a mailorder law school.”<sup>7</sup>

### Out-of-State Authority

There are some inapplicable out-of-state cases that address statements by applicants that were characterized as “abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent.” Converse v. Nebraska State Bar Comm'n (In re Converse), 258 Neb. 159, 171; 602 N.W.2d 500 (1999), citing In re Appeal of Lane, 249 Neb. 499, 512; 544 N.W.2d 367, 375 (1996). However, those cases involved extreme and vulgar conduct (i.e., “fucking welfare bitch” Converse, 258 Neb. at 164), as opposed to the private and innocuous criticisms contained in Applicant’s specifications.

In the case of In re La Tourette, 156 N.J. 444; 720 A.2d 339 (N.J., 1998), the New Jersey Supreme Court found that the applicant lacked the character and fitness for admission to the bar based, in part, on “his intemperate exchanges with Bar Examiners personnel and his litigation against the Bar Examiners.” Id. at 340. However, that was not the only reason for Tourette’s denial. The Board found that the applicant had engaged in other significant disqualifying conduct, namely, he:

had made insufficient efforts to reduce arrearages of \$14,000 in child support; had disclosed a client's confidence while working as a law clerk;

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<sup>7</sup> Former Michigan Governor John Engler, describing Ingham County Circuit Judge James Giddings. *15-year state prison-rights suit settled*, Detroit Free Press (November 3, 2003). No discipline.

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and had employed the Fair Debt Practices Act not as a means to avoid collection of monies that he did not owe, but as a means to obtain revenue to support himself.

Id. at 446-447

Perhaps most importantly, Tourette blamed the Bar Examiners for his failing to achieve a passing score on the Bar Exam seven different times and apparently used that as a basis for one of his three separate lawsuits, which “sought injunctive relief to strike down the requirement of passage of a bar examination as a prerequisite for a license to practice law.” Id. at 447-448. Here, the Florida Board may try to cite Tourette in an attempt to justify the Board’s unsupported findings, but as discussed above, there is much more to the Tourette case than simply litigation against licensing officials and “intemperate exchanges.”

Finally, in the case of In re McLaughlin, 675 A.2d 1101 (N.J., 1996), the applicant appeared before a character committee to address three aspects of McLaughlin's application, (1) failure to disclose an arrest in his application paperwork; (2) incomplete and misleading information provided in his application paperwork; and (3) failure to make complete disclosures regarding suspensions of his driver's license. Id. at 1101-1107. During the character evaluation and later judicial proceedings, McLaughlin became “sarcastic, flippant, and snide; his attitude condescending and disrespectful.” For example, McLaughlin, described Samuel Uberman, the Assistant Secretary of the Board of Bar Examiners, as "the

odious Uberman," and "either a liar or an incompetent, perhaps both," adding "though Christian charity demands that I resolve my doubts in [Uberman's] favor, and simply attribute his inaction to mere sloth and an ability deficit, I suspect that his torpor is motivated by ill-disguised hostility towards my application." *Id.* at 1107. These types of vile aspersions ("odious Uberman," "liar," "incompetent," "sloth," and "torpor") are certainly not comparable with Applicants circumstances, particularly since McLaughlin's foremost character problems centered around his lack of disclosure on his application.

The Board will predictably cite out-of-state cases like those discussed above in an attempt to steer this Court away from Florida precedent. Florida precedent suggests that licensing officials must go beyond merely alleging improper conduct, but rather, the officials must present specific evidence that an attorney made statements that were false, or made with reckless disregard as to their truth or falsity, *Ray, supra*. Here, the Board failed to produce any such evidence, and has left its General Counsel to now justify the Board's reasoning to this Court based upon an analysis that cannot be found in the Board's February 18, 2005 Opinion. Additionally, the officials must show that Applicant's statements were *public* and could injure the *public's* perception of the judiciary. *Weinberger, supra*. The Board has failed to make any such showing.

- A. Rule 4-8.2(a) Of The Rules Regulating The Florida Bar Only Applies To Lawyers. In The Alternative, If The Rules Regulating The Florida Bar Apply To Applicants, Then Rule 3-7.16(a) Should Apply To The Board's Specifications

Board Specification IV charged Applicant with violating Rule 4-8.2(a) of The Rules Regulating The Florida Bar. However, this Rule only applies to lawyers. It says:

**RULE 4-8.2 JUDICIAL AND LEGAL OFFICIALS**

(a) Impugning Qualifications and Integrity of Judges or Other Officers. A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.

The Board may attempt to argue that the Rules Regulating The Florida Bar are applicable to applicants, since all applicants are in pursuit of becoming a lawyer. However, Florida law requires that a law be interpreted according to its ordinary and plain meaning. In Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 954 (Fla., 2005), this Court recently stated:

When a term is undefined by statute, one of the most fundamental tenets of statutory construction requires that we give a statutory term its plain and ordinary meaning. When necessary, the plain and ordinary meaning "can be ascertained by reference to a dictionary. Further, it is a well-settled rule of statutory construction that in the absence of a statutory definition, courts can resort to definitions of the same term found in case law.

Id. at 961, (citations and quotes omitted).

Applicant is unable to locate any dictionary or case law definitions that interpret the phrase “A lawyer shall not...” as meaning “a law student shall not...” or “a bar applicant shall not,” as the Board would have this Court find. Therefore, the Board wrongly charged Applicant with violating a Rule that exclusively pertains to lawyers.

Perhaps one of the arguments that the Board may not have considered is that if it is correct that the Rules Regulating The Florida Bar are applicable to bar applicants, than by logical inference, Rule 3-7.16(a) would similarly be applicable, thereby restricting the Board from bringing Specifications based upon outdated information. Rule 3-7.16(a) states:

**RULE 3-7.16 LIMITATION ON TIME TO BRING COMPLAINT**

(a) Time for Inquiries and Complaints. Inquiries raised or complaints presented by or to The Florida Bar under these rules shall be commenced within 6 years from the time the matter giving rise to the inquiry or complaint is discovered or, with due diligence, should have been discovered.

See, also, The Fla. Bar v. Walter, 784 So. 2d 1085, 1086-1087 (Fla., 2001) (discussing applicability of Rule 3-7.16(a) after the Rule’s adoption in 1995)

Here, Board Specification I alleged, inter alia, that Applicant engaged in misconduct in 1986, when Applicant was 13 years old. If the Rules Regulating The Florida Bar are applicable to Bar applicants, then the Board violated Rule 3-7.16(a) by using extremely outdated information as a basis for Specifications.

B. Rule 2-12 Of The Rules Of The Supreme Court Relating To Admissions To The Bar Requires That Applicants Possess “An Adequate Knowledge Of The Standards And Ideals Of The Profession.” It Does Not Require Applicants To Possess An Adequate Knowledge And Ideals Of The “Admission Standards,” As Suggested By The Board

The Board charged Applicant, in part, with being unfit for the practice of law because of his alleged “inadequate knowledge and/or a lack of appreciation of the admission standards...” However, there is no known requirement that an applicant be knowledgeable about and appreciative of the Board’s admission standards. Rule 2-12 only requires that applicants possess “an adequate knowledge of the standards and ideals of the profession.” (emphasis added)

As noted above, the Board failed to produce *any* evidence that Applicant’s statements of opinion were not openly and honestly held beliefs, or based upon the Applicant’s extensive research. See, Specification IV, (A), (B), (E), (F). Further, Applicant requested that the Board’s Executive Director, Eleanor Hunter, provide testimony at the formal hearing, but Applicant’s request was denied by the Board. As such, Applicant was obstructed from having Ms. Hunter questioned about alleged abuses in the system. See, Specification (C), D(i). In this respect, the Board refused to allow Applicant to prove his case. As for Applicant’s statement that he does not “believe for one second” the Board is protecting the public, see, Specification F(iii), anyone familiar with the Florida Bar’s disciplinary statistics could only conclude that the Board is doing a dismal job of protecting the public.

Since 2001, there have been 1129 Florida attorneys who received final orders ranging from a reprimand to disbarment.<sup>8</sup> Finally, Applicant *privately* stated that when it comes to litigation involving the Bar, “most plaintiff’s seems to lose at the district court level. It is when the issues go up to a federal appellate court that the plaintiff finds justice.” However, that is a fact that no one can dispute. Dubuc v. Mich. Bd. of Law Examiners, 342 F.3d 610 (6th Cir. 2003); Centifanti v. Nix, 865 F.2d 1422 (3d Cir. 1989); Roe # 2 v. Ogden, 253 F.3d 1225 (10th Cir. 2001); Dean v. Byerley, 354 F.3d 540 (6th Cir. 2004); Rittenhouse v. Delta Home Improvement (in Re Desilets), 291 F.3d 925 (6<sup>th</sup> Cir. 2002). The point, of course, is that the statements made by Applicant were all true, and that none of them displayed an inadequate knowledge of the standards and ideals of the legal profession. By charging Applicant with being unfit for criticizing the Board’s “admissions standards,” the Board has grossly misinterpreted Rule 2-12.

The Board may try to argue that Applicant is culpable because he continued to hold the belief that the licensing systems are infirm even after being told otherwise by Michigan federal Magistrate Joseph Scoville. However, long before Magistrate Scoville wrote his opinion, prominent and highly respected members of the legal community believed that the character and fitness process violated constitutional rights. See, e.g., Deborah L. Rhode, *Moral Character as a*

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<sup>8</sup><http://www.flabar.org/tfb/TFBLawReg.nsf/e0f40af2c23904c785256709006a3713/f4ab3ff7cb9a5afa85256b2f006c9f09?OpenDocument>

*Professional Credential*, 94 Yale L.J. 491, 496 (1985). And highly prominent members of the legal community, including law professors, continue to hold such beliefs today. Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*, 39 Cal. W. L. Rev. 1, 48-49 (2002) (“The administrative determination of bad moral character on the basis of prior misconduct further presumes that instances of misconduct within one ambit of life augur misconduct in others - to wit, in the future practice of law. No evidence supports this presumption.”); See, also, Exhibit 1, attached hereto. If it were a requirement to worship the Board’s “admission standards,” as the Board suggests is the case, then large numbers of learned members of society would be ineligible to practice law in Florida.

**II. IN THE ABSENCE OF ANY EVIDENCE PLACED ON THE FORMAL HEARING RECORD THAT APPLICANT’S LITIGATION AGAINST THE MICHIGAN ATTORNEY LICENSING OFFICIALS LACKED A GOOD FAITH ARGUMENT FOR AN EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW, FLORIDA STATE LAW DOES NOT AUTHORIZE THE FORMAL HEARING PANEL’S FINDING THAT SPECIFICATION II WAS PROVEN AND DISQUALIFYING**

Board Specification II failed to allege any specific disqualifying conduct. It simply recited select sentences from Magistrate Joseph Scoville’s May 7, 2003, Report and Recommendation, and then noted that the Report was adopted by District Judge David McKeague. The Board failed to mention that its select

sentences were taken from one opinion, among many, rendered by the Court in that particular litigation. For example, the Board's opinion fails to inform this Court that following the May 7, 2003 Report, Magistrate Scoville issued a decision in Applicant's favor that rocked the Michigan Judicial Tenure Commission. Lawrence v. Van Aken, 2004 WL 228989 (W.D.Mich.). The Board did not inform this Court that Magistrate Scoville's decision was affirmed in a precedent setting published opinion, Lawrence v. Van Aken, 316 F.Supp.2d 547 (W.D. Mich. 2004), that opened the door for civil rights plaintiffs to obtain records held by state officials claiming state-created confidentiality rules. The Board did not inform this Court that this litigation was positively featured on the front page of the May 17, 2004 Michigan Lawyer's Weekly.

Contrary to the Board's implications, Applicant's litigation against the Michigan licensing officials benefited society. Applicant's litigation is markedly different from Florida cases where attorneys filed cases without a good faith argument for an extension, modification, or reversal of existing law. See, e.g., Rule 4-3.1 of the Rules Regulating The Florida Bar. Florida precedent does not support the Board's unsupported finding that Specification II is disqualifying<sup>9</sup>.

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<sup>9</sup> There is a case presently pending wherein this Court has been asked to define the extent that a federal district judge's findings of improper attorney conduct is binding on the Florida Supreme Court. The Florida Bar v. Committee, Case No. SC03-1203.

What Specification II is really all about is the Board's retaliation against Applicant for suing a sister-state's licensing officials.

Cases Where Misconduct Was Found: The Kelly Case

In The Fla. Bar v. Kelly, 813 So. 2d 85 (Fla., 2002), the attorney was charged with multiple offenses including filing a frivolous and harassing lawsuit against his former client. The referee found Kelly's suit frivolous because his former client was immune from suit pursuant to this Court's opinion in Tobkin v. Jarboe, 710 So. 2d 975 (Fla. 1998). This Court noted in Kelly:

The Bar provided Kelly with the cite for the Tobkin opinion no later than March 24, 1999, less than two months after Kelly had filed his lawsuit. On March 24, 1999, Kelly acknowledged in a letter to the Bar that he had been informed of the immunity issue and of the Tobkin decision. Although Kelly indicated he would read the decision and determine whether his lawsuit complied with the opinion, he later testified that he was not sure he ever read Tobkin.

Kelly, 813 So.2d at 87

Unlike Kelly, the Board's specifications do not allege that Applicant knew, or had reason to know, that his claims against the Michigan licensing officials lacked merit. Applicant's Michigan lawsuit is now on appeal in the Sixth Circuit Court of Appeals, Applicant has since hired counsel, and he has excellent expectations that the lower court's decision will be reversed.

### Cases Where Misconduct Was Found: The Richardson Case

In The Florida Bar v. Richardson, 591 So. 2d 908 (Fla., 1992), a federal district court found that Richardson's "complaint is both manifestly frivolous and malicious," and imposed sanctions under Rule 11 of the Federal Rules of Civil Procedure. Id. at 910. The Florida Bar filed charges and a referee found that "reasonable inquiry by a graduate of a law school, a certified member of the Florida Bar, or any lay person would clearly show that the lawsuit as filed by . . . Richardson was clearly unwarranted."

Here, a "reasonable inquiry" by a law school graduate, a licensed attorney, or a layperson would not "clearly show" that Applicant's lawsuit was improper, and there has been no similar allegation by the Board in this regard. This is not a situation where a court summarily rejected claims as being unwarranted in existing law. In fact, in the Applicant's case, it took the magistrate 48 pages, including a complicated legal analysis, to explain why he was rejecting Applicant's claims.

### Cases Where Misconduct Was Found: The Thomas Case

In The Florida Bar v. Thomas, 582 So. 2d 1177 (Fla., 1991) the gravamen of the charges against Thomas was that he abused the legal system by filing a frivolous lawsuit to punish an attorney for representing clients who opposed Thomas in other legal action. Id. at 1178. This Court specifically noted:

The referee found that respondent sued Hill to retaliate for Hill's representation of the DeHaans and to get leverage relative to the DeHaans'

grievance and lawsuit against him. The referee concluded that respondent followed through on his threat without any factual or legal basis for naming Hill as a codefendant in the lawsuit against the DeHaans.

Id.

Here, there has been no similar finding by the Board, and there can be no such finding. This is because the Board failed to produce any evidence that Applicant lacked a good faith basis for bringing his claims. Simply quoting from select portions of one of the magistrate's opinions (a Report and Recommendation that is over two years old) is simply not enough to stop Applicant from practicing law.

A. The Board's Opinion Fails To Mention The Evidence Presented At The Formal Hearing, Which Proves That The State Bar Of Michigan Made False Statements To The Federal District Court In Order To Gain Dismissal On Nonmeritorious Grounds

At the formal hearing, Applicant presented evidence that the State Bar of Michigan made false statements in order to induce the Michigan district court into finding that the Michigan licensing officials do not use First Amendment activities as a basis for character rejection (See, Applicant's formal hearing exhibit #9, as compared with #10). However, the Board gingerly omitted any reference in its Opinion to this troubling evidence. For example, the State Bar of Michigan stated to Magistrate Scoville just before he issued the Report and Recommendation in question:

There is no evidence that any applicant to the State Bar of Michigan has been denied admission for exercising her or his First Amendment rights.

(Applicant's formal hearing Exhibit #9)

However, after Magistrate Scoville issued his decision, finding that “Nothing in the statute’s language addresses an individual’s right to free speech or expression, nor do the statute or rules allow, let alone direct, state officers to make their decision on the basis of past expression” (emphasis added), the State Bar of Michigan was forced to make the following embarrassing admission:

Q. Do you admit or deny that the Bar has had several applicants who exercised free speech in a fashion that contributed to a recommendation of denial of admission?

A. Admit

(Applicant's formal hearing Exhibit #10)

This type of dishonest litigation strategy is a good example of why it was extremely difficult for Applicant to litigate his constitutional claims, especially since he was a pro se litigant who was fighting an entire army.

Another important piece of evidence carefully omitted from the Board’s Findings of Fact and Conclusions of Law is the publication by Florida attorney Robert D. Horvath in the Michigan Bar Journal, concerning the State Bar’s false litigation statements in a similar context:

Of further significance is the fact that the State Bar’s litigation statements have not been forthcoming.

\* \* \*

The State Bar did not tell Judge Edmunds that it rejected applicants because of First Amendment activities. Rather, it shaped its arguments to further its

procedural position in order to gain dismissal on non-meritorious grounds, i.e., that plaintiffs lacked standing and the lawsuit was not ripe for judicial review. The Sixth Circuit, unfortunately, affirmed Judge Edmunds in a brief unpublished opinion (*Roe/Doe v State Bar of Michigan*, 2003 WL 219491187), repeating her wrongly induced finding that the State Bar does not scrutinize First Amendment activities. ("Plaintiffs lack standing to challenge the statute because they failed to demonstrate a realistic danger that the statute will be applied so as to compromise their First Amendment rights.") Unfortunately, counsel--the undersigned--did not know of the State Bar's litigation comments in the Dean/Byerley lawsuit until afterwards.

*Character and Fitness Review – Is the Process Fit?*, 82 Michigan Bar Journal 9 (December, 2003)

In an attempt to support the State Bar of Michigan, the Florida Board's General Counsel will probably argue that the above publication was merely the opinion of one attorney. However, the State Bar of Michigan's Bar Journal Advisory Council exercised its discretion to publish this three-page article for the 37,000 attorneys licensed in Michigan. Incidentally, since the publication discussed above was circulated among Michigan's legal community, the employment relationship of the attorney who represented the Michigan licensing officials, (former) Character and Fitness Director Thomas Byerley, abruptly ended. Mr. Byerley is now apparently in private practice, using a P.O. Box at his hometown post office, as his means of contact<sup>10</sup>.

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<sup>10</sup><http://www.michbar.org/memberdirectory/detail.cfm?ID=28908063%2D7126%2D86%2DDETAIL>

- B. The Board’s Opinion Fails To Mention That The Michigan Federal Court Stated That Applicant Was "In The Top 25 Percent Of Lawyers That I See In This Court Day In And Day Out, And Your Ability To Deal With The Facts And The Law, Answer Questions, Synthesize Arguments” Just Days Before It Rendered Its Decision

Not one of the cases that the Board will cite in its answer to this petition for review will concern a situation where a federal magistrate said about a party:

And having heard you today I would say that you’re in the top 25 percent of lawyers that I see in this court day in and day out, and your ability to deal with the facts and the law, answer questions, synthesize arguments...

(Applicant’s Formal Hearing Exhibit #8)

The above statement was made *just days before* the same magistrate said that Applicant’s claims were “utterly frivolous” and he was “guilty of extremely poor scholarship.” As described below, Applicant is justified in feeling that improper influences tilted the scales of justice.

- C. The Board’s Opinion Fails To Mention That The Magistrate And District Judges Concealed Their Relationship With The State Bar Of Michigan, In Violation Of Sixth Circuit Law. The Judges’ Affiliation Required Mandatory Disqualification Pursuant To 28 U.S.C. 455(d)(4) Because The Judges Were “Advisers” Or “Active Participants In The Affairs Of A Party.”

Federal judges involved in a relationship with a party must disclose the relationships at the earliest possible stage of a legal proceeding. In this regard, the Sixth Circuit (the Circuit that has dominion over Michigan) stated:

We believe instead that litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the

judge's private affairs and financial matters. Further, judges have an ethical duty to disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification. Both litigants and counsel should be able to rely upon judges to comply with their own Canons of Ethics. In ATMI's case, Judge Holschuh possibly did not consider the matter sufficiently relevant to merit disclosure, but his nondisclosure did not vest in ATMI a duty to investigate him.

American Textile Mfrs. Inst., Inc. v. Limited, Inc., 190 F.3d 729, 742 (6th Cir. 1999) (internal citations and quotes omitted).

However, in the Applicant's case, the federal court failed to disclose that both the magistrate and the district judge were on the State Bar of Michigan's Standing Committee on United States Courts, a Committee charged with the duty of maintaining the relationship between the State Bar of Michigan and the federal court system.

There are some relationships that require mandatory disqualification. One of those relationships is defined in 28 U.S.C. §455(d)(4). Pursuant to this statute, disqualification was mandatory because the judges were "advisers" or "active participants in the affairs of a party." As such, Applicant was justified in *privately* disclosing to the Board his belief that the judges were improperly influenced. Applicant has excellent expectations that the Sixth Circuit Court of Appeals will be disappointed in the lower court's decision not to disclose its relationship with the State Bar of Michigan.

**III. THE BOARD'S GENERAL COUNSEL WAS UNAUTHORIZED TO BRING SPECIFICATIONS II AND IV, BECAUSE THE SPECIFICATIONS WERE NEVER AUTHORIZED BY AN INVESTIGATIVE HEARING PANEL, AS REQUIRED BY RULE 3-23 OF THE RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR**

A Florida state agency must comply with its own rules. See, e.g., Soto v. Board of County Comm'rs, 716 So. 2d 863 (5<sup>th</sup> DCA, 1998). However, here, the Board's General Counsel filed Specifications (Specifications II and IV) that were never voted on by an investigative panel, as required by Board Rule 3-23.

In those cases where Specifications are to be brought against an applicant, Rule 3-22.5, requires that the "Board" shall make the following:

After an investigative hearing, the Board shall make one of the following determinations:

\* \* \*

(d) that Specifications be filed charging the applicant or registrant with matters which if proven would preclude a favorable finding by the Board.

Thus, it is "the Board" that makes the decision, following an investigative hearing, to file the Specifications. Here, however, the conduct alleged in Specifications II and IV occurred after the Board's investigative hearing. Therefore, it was impossible for "the Board's" investigative panel to vote to file Specification II and IV in this matter. In fact, it was the General Counsel who solely brought those Specifications.

The General Counsel may attempt to argue that Rule 3-23 only requires the Board to decide whether Specifications will be filed or not, and the General

Counsel is free to bring whatever Specifications he later sees fit. However, this argument would run contrary to the Rules, which clearly contemplate that “the Board” is solely in control over which Specifications will be filed. This is further supported by Rule 1-53, which allows “the Board” to “employ an Executive Director and such other assistants as it may deem necessary.” There is nothing in the Rules that permits, let alone suggests, that the power of the Board’s General Counsel is equal to the authority of “the Board” itself.

### **CONCLUSION**

The letter written by Applicant on October 10, 2003, represents the most recent date that he made statements frowned upon by the Board. Even, assuming *arguendo* that the statements were disqualifying for admission, the substantial delay in processing Applicant’s application is punishment enough. However, Specification IV is not proven or disqualifying because the Board failed to produce any evidence whatsoever to show that Applicant’s statements were false or made recklessly. Instead, the Board has left its General Counsel to answer this petition with arguments and reasoning not found in the Board’s Findings of Fact and Conclusions of Law. The same can be said of Specification II, which failed to even allege any disqualifying conduct.

Applicant requests that this Court reject the Board’s Findings of Fact and Conclusions of Law and grant Applicant’s application to practice law.

Dated: June 13, 2005

Respectfully submitted:

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief was typewritten using Times New Roman 14 point, as permitted by Rule 9.120(a)(2), of the Florida Rules of Appellate Procedure.

Dated: June 13, 2005

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a copy of the foregoing has been furnished via U.S. Mail to Eleanor Mitchell Hunter, Executive Director, Florida Board of Bar Examiners and to Thomas A. Probyecky, General Counsel, Florida Board of Bar Examiners, both at 1891 Eider Court, Tallahassee, Florida 32399-1750 on this 13<sup>th</sup> day of June, 2005.

Dated: June 13, 2005

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