

In partial response to F.J.L.'s argument, the Board stated the following in its

Answer Brief:

Furthermore, F.J.L.'s argument as to the privacy of his remarks appears to be disingenuous. As mentioned above, "[t]he admission of attorneys to the practice of the profession of law is a judicial function." Rule 1-10. The Board "is an administrative arm of the Supreme Court of Florida created by the Court to handle matters relating to bar admission." Rule 1-12. The bar admission rules "are reviewed, approved and promulgated by the Supreme Court of Florida." Rule 1-13. Thus, F.J.L.'s unfounded accusations of corruption, discrimination, and unlawful practices in Florida's bar admission process are directed not only at the Board but at the Court.

F.J.L. has recently corresponded with the Board on a letterhead for an entity known as FloridaBarWatch. (*See, e.g.* F.J.L.'s letter to the Board dated February 9, 2005 at Exhibit CC at the Board's Response in Opposition to Motion to File a Reply filed in this case) F.J.L. lists himself as the founder of FloridaBarWatch on this letterhead. The letterhead contains the web site address for FloridaBarWatch and lists F.J.L.'s mailing address as the address for FloridaBarWatch.

The web site for FloridaBarWatch contains the following background information that reiterates baseless accusations previously made by F.J.L.:

FloridaBarWatch was created in 2004 by Frank Lawrence, Jr., who is committed to educating the public about the *dishonesty and bias within the Florida attorney licensing system.*

In 2001 Frank Lawrence submitted his application for a license to practice law in Florida. During his "character and fitness" process, Lawrence became keenly aware of a *practice by the Florida Board of Bar Examiners of retaliating against applicants who peacefully criticize the system. The most commonly utilized method of punishing those who speak-out is subjecting applicants to lengthy and unconstitutional delays in processing applications for*

admission. In Lawrence's case, after more than three years, his application is still pending.

No one disputes that lawyers, as well as any licensed professionals, should possess good character. However, *the Florida Board of Bar Examiners uses its unbridled discretion to punish those who complain of constitutional infirmities in the system.* Since the Board is authorized to deny admission for "any other conduct which reflects adversely upon the character or fitness of the applicant" (Rules of the Supreme Court Relating To Admissions To The Bar, 3-11(n)), no one can legitimately dispute that the Board has been vested with unbridled discretion.

The unbridled discretion possessed by licensing officials is, quite frankly, a national problem and FloridaBarWatch has been created to educate the public and create a dialogue that will hopefully lead to change.

<http://www.floridabarwatch.org/> at About FloridaBarWatch (emphasis supplied). Contrary to his argument before the Court, some of F.J.L.'s disparaging and unfounded accusations directed at the judicial system have gone far beyond privately held beliefs and are, in fact, in the public domain.

Board's Answer Brief at 33-34; footnote omitted.

References to sources outside the record in bar admission cases should generally be disallowed. In this case, however, an exception to this general prohibition is warranted due to the following circumstances.

The Board initially notes that it is unable to find where F.J.L. presented his "private v. public" argument to the Board. On the contrary, F.J.L. repeatedly argued before the Board that his statements (alleged in Specification 4) were "openly and honestly held views." Board Exhibit 3 at F.J.L.'s Answer to Specifications at 12 at affirmative defense 4. *See also* Board Exhibit 8 at F.J.L.'s

Objections at 9 at Legal Argument (“The above statements were openly and honestly held views....”); transcript of formal hearing at 52 at F.J.L.’s opening statement (“[Y]ou will conclude that my statements were openly and honestly-held beliefs.”); and transcript of formal hearing at 130 at F.J.L.’s direct testimony (“I’ve made statements critical of the Board. They were openly and honestly-held views.”). The Board’s reliance on F.J.L.’s web site simply confirms his position before the Board that his statements about the bar admission process are openly-held beliefs.

If F.J.L. now wishes to take a contrary position before the Court by making his “private v. public” argument, then he should not be allowed to do so with impunity. Thus, if it can be conclusively establish that F.J.L.’s statements are openly-held views (as evidenced by statements posted on his web site) and not privately-held views as F.J.L. now asserts before the Court, then the Board should be allowed to do so.

Furthermore, F.J.L.’s argument about the private nature of his statements is conclusively refuted by established facts. The fact that F.J.L. is the founder of the web site known as FloridaBarWatch is part of the record in this proceeding and is beyond dispute. *See* Applicant’s Motion to Stay Proceedings dated March 14, 2005 filed in this proceeding before the Court at attached Exhibit 1, First Amended Complaint at 4, paragraph 3 (“Plaintiff [F.J.L.] is the founder of State Bar Watch....

Plaintiff also operates Florida Bar Watch, a registered web site at <http://www.floridabarwatch.org>,...)." See also Board's Response in Opposition to Motion to File a Reply dated April 14, 2005 filed in this proceeding before the Court at attached Exhibit CC, F.J.L.'s letter to the Board dated February 9, 2005 (F.J.L. uses a FloridaBarWatch letterhead to correspond with the Board and in this letter, he identifies himself as the "Founder" of FloridaBarWatch.").

The fact that F.J.L.'s web site contains the statements quoted by the Board in its argument is also beyond dispute because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." §90.202 (12), Fla. Stat. Here, the source is F.J.L.'s own FloridaBarWatch web site that establishes that his statements in issue are not just privately held beliefs. Quite the contrary and as readily seen on his web site, F.J.L.'s statements about the bar admissions process in Florida are, in fact, in the public domain.

Furthermore, in his brief filed with the Court, F.J.L. relied on the web sites of the Michigan Bar and The Florida Bar in support of arguments that he presented to the Court. F.J.L.'s Initial Brief at footnotes 8 and 10. Downloaded information from these web sites was not, however, introduced into the record as exhibits at

F.J.L.'s formal hearing.¹ See Board's Exhibits 1-8; Office of General Counsel Exhibits 1-23,² and Applicant's Exhibits 1-27.

The Board did not object to F.J.L.'s reliance on these web sites in his initial brief filed with the Court. The existence of these web sites is "capable of accurate and ready determination." §90.202 (12), Fla. Stat.

F.J.L.'s positions in his brief and his motion to strike are incompatible. If it is *proper for F.J.L.* to rely upon and cite web sites in his brief that are not part of the formal hearing record, then it should not be *improper for the Board* to do the same in its brief.

¹ F.J.L. testified during his formal hearing to the following: "[W]hen you have four or 500 lawyers a year who get disciplined in the licensing process, I have a hard time believing the Board is protecting the public. * * * I'm just saying that how could somebody tell me that they're protecting the public when we've got 500 lawyers who were disciplined last year who ranged in punishment from admonishment to disbarment, all of whom passed the character test here." (T 130-131) The Board was unable to find any reference in the formal hearing record to The Florida Bar's web site as the source for F.J.L.'s testimony as to the number of disciplined Florida attorneys. In fact, F.J.L.'s testimony as to 500 lawyers being disciplined last year is in disagreement with the information available on The Florida Bar's web site cited by F.J.L. in his argument before the Court. F.J.L.'s Initial Brief at footnote 8. The Florida Bar's web site (cited by F.J.L.) states that 384 lawyers were disciplined in 2002-2003 and 331 lawyers were disciplined in 2003-2004.

² F.J.L. referenced a Florida Bar "Reporter's Handbook" in a letter to the Board. OGC Exhibit 15. The handbook was not offered into evidence at F.J.L.'s formal hearing.

By not objecting to F.J.L.'s references to the two web sites in his brief, the Board allowed him the opportunity to present his arguments to the Court in a full and reasonable manner. The Board requests the opportunity to do the same.

Lastly, in addressing this particular issue, the principle of "opening the door" is persuasive. The Court explained this principle in the following manner:

As an evidentiary principle, the concept of "opening the door" allows the admission of otherwise inadmissible testimony to "qualify, explain, or limit" testimony or evidence previously admitted. *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986); see *Huff v. State*, 495 So. 2d 145, 150 (Fla. 1986). The concept of "opening the door" is "based on considerations of fairness and the truth-seeking function of a trial." *Bozeman v. State*, 698 So. 2d 629, 631 (Fla. 4th DCA 1997). "For example, in *McCrae v. State*, 395 So. 2d 1145, 1151 (Fla. 1980), defense counsel through his questions on direct examination 'tactfully attempted to mislead the jury into believing that [the defendant's] prior felony was inconsequential.'" *Bozeman*, 698 So. 2d at 631 (quoting *McCrae*, 395 So. 2d at 1151). In *McCrae*, this Court held that to negate the misleading impression given by defense counsel's question, the prosecutor was entitled to elicit the nature of the prior felony conviction on cross-examination. 395 So. 2d at 1152. The Court held that the defendant's

line of questioning could have deluded the jury into equating appellant's conviction of assault with intent to commit murder with his previous misdemeanors. Consequently, the state was entitled to interrogate [the defendant] regarding the nature of his prior felony in order to negate the delusive innuendoes of his counsel.

Id.

Rodriguez v. State, 753 So. 2d 29, 42 (Fla. 2000).

F.J.L. opened the door by asserting for the first time in his appeal that his statements were "private criticism." F.J.L.'s Initial Brief at 13. The Board should

be allowed to rely upon a source outside the record “to negate the misleading impression” that was left by F.J.L.’s argument.

B. Court Decisions in the Stoddard and Day-Petrano Cases

As charged in Specification 4, it is undisputed that F.J.L. made the following statement in a letter to the Board dated April 30, 2003: “The Board’s character analysis is simply being used as a ‘gatekeeping’ analysis to determine whether the Board members like or dislike an applicant.”

During his formal hearing, F.J.L. offered the experiences of the following three individuals as the grounds for his statement: himself, Stoddard and Petrano. Transcript of formal hearing at 172. In his brief, F.J.L. also asserts that his statements about the bar admissions process “were all true.” F.J.L.’s Initial Brief at 21.

In response to F.J.L.’s formal hearing testimony and his argument before the Court, the Board argued the following:

Philip J. Stoddard sued the Board and other parties in federal court complaining about his treatment as a bar applicant. The federal district court granted the defendants’ motions to dismiss. The United States Court of Appeals for the Eleventh Circuit affirmed the lower court’s dismissal reasoning that the Stoddard did “not have standing to pursue this action.” (Appendix at 35)

Although not a bar applicant in Florida, Mary Katherine Day-Petrano sued the Board and other parties in federal court alleging violations of various laws and treaties. Her claims against the Board were dismissed by the federal district. Day-Petrano

appealed and requested leave to proceed *in forma pauperis*. Her initial request and her request for reconsideration were denied by the United States Court of Appeals for the Eleventh Circuit “because the appeals are frivolous.” (Appendix at 36) Her appeal was subsequently dismissed. (Appendix at 38) According to his testimony at the formal hearing, these cases formed the basis for F.J.L.’s indictment that the Board is corrupt and misuses its powers to keep out of the bar those individuals that Board members dislike. (T 172)

Board’s Answer Brief at 30.

The Board’s argument is intended to show that F.J.L. had no objectively reasonable basis to support his statement about the Board. Specifically, the Board’s argument is intended to show that F.J.L.’s reliance on the experiences of Stoddard and Day-Petrano was unreasonable and incompatible with his claim before the Court “that the statements made by Applicant were all true.” F.J.L.’s Initial Brief at 21.

In support of its argument, the Board relied on public court decisions involving those individuals. The Board properly supplied the Court and F.J.L. with copies of these decisions in that they were not published. Appendix to Board’s Answer Brief at 23-38. The Board’s reliance on these judicial authorities is similar to F.J.L.’s reliance on law review articles in his brief that were never introduced into the formal hearing record. *See* F.J.L.’s Initial Brief at 21-22 at citations to articles by Rhode and Ritter.

C. Availability of Correspondence for the Court's Review

In his brief, F.J.L. claimed that "the substantial delay in processing Applicant's application is punishment enough." F.J.L.'s Initial Brief at 32. In response, the Board argued:

As to F.J.L.'s allegation of "substantial delay," F.J.L.'s dealings with the Board's staff throughout his bar admission process are well documented in extensive correspondence. Portions of that correspondence were introduced into the record by the OGC in support of the allegations of Specification 4. (OGCEs 13, 14, 15, 16, 18, 19) The best evidence as to the reasons for the length of F.J.L.'s bar admission process would be this correspondence.

Although the OGC waived any objection to F.J.L.'s introduction of the entire set of correspondence from his bar application file into the record at his formal hearing (Appendix at 15), F.J.L. declined to do so. Furthermore, after having his bar application on file with the Board for nine months, F.J.L. could have petitioned this Court for review of the length of Board's investigation which he was expressly authorized to do. Rule 3-40.2. F.J.L. failed to avail himself of this right of review by this Court.

Board's Answer Brief at 43-44.

If F.J.L. wants the Court to admit him because the Board has punished him by delaying his admission, then he should be required to support such assertion. F.J.L. failed to do so. In its brief, the Board only informed the Court that the entire set of correspondence from F.J.L.'s bar application file is readily available in the event "the Court wishes to make an independent review of the written communications in F.J.L.'s file." Board's Answer Brief at 13.

WHEREFORE, the Board requests the entry of an order denying F.J.L.'s pending motion to strike without prejudice to F.J.L. to serve a reply brief within 14 days of the Court's denial of the motion as alternatively requested by F.J.L.

Alternatively, as to F.J.L.'s specific request to strike the Board's reference in its Answer Brief to the web site known as FloridaBarWatch (located at <http://www.floridabarwatch.org>), the Board requests the Court to strike F.J.L.'s references to web sites (F.J.L.'s Initial Brief at footnotes 8 and 10) as outside the formal hearing record and to strike F.J.L.'s "private v. public" argument (F.J.L.'s Initial Brief at 13-14) as misleading and/or as not preserved in the record below.

Alternatively, as to F.J.L.'s specific request to strike the Board's reference in its Answer Brief to the web site known as FloridaBarWatch (located at <http://www.floridabarwatch.org>), the Board requests the Court to remand this case to the Board for the purpose of taking the following action and such other action as the Court may direct:

- F.J.L.'s formal hearing panel will reconvene to consider the contents of the web site known as FloridaBarWatch;
- At the reconvened formal hearing, the Board will provide a full and fair opportunity to both F.J.L. and the Office of General Counsel to address the impact, if any, of such web site on F.J.L.'s character and fitness for membership to The Florida Bar; and

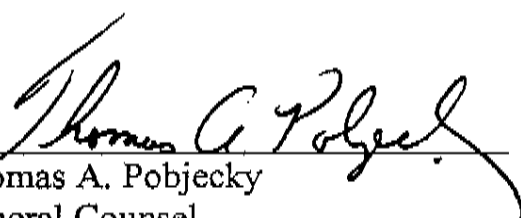
- Following the reconvened formal hearing, the Board will file with the Court supplemental findings of fact, conclusions of law and recommendation.

DATED this 21st day of July 2005.

FLORIDA BOARD OF BAR EXAMINERS
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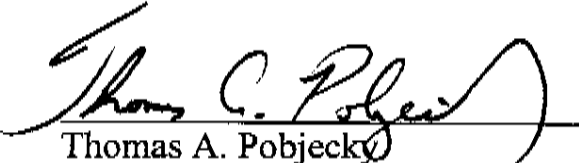
Certificate of Service

I hereby certify that a true and correct copy of the foregoing Response to Motion to Strike has been served by U.S. Mail this 21st day of July 2005 to F.J.L., 941 Westview Road, Bloomfield Hills, MI 48304.


Thomas A. Pobjecky

Certificate of Type Size and Style

I hereby certify that the size and style of type used in this Response are 14 Times New Roman.


Thomas A. Pobjecky