

FLORIDA BOARD OF BAR EXAMINERS

**CHARACTER AND FITNESS COMMISSION**

FINAL REPORT  
TO THE  
SUPREME COURT OF FLORIDA

SUBMITTED MARCH 2, 2009

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## Acknowledgements

The Florida Board of Bar Examiners Character and Fitness Commission would like to acknowledge and extend its appreciation to the Third District Court of Appeal, the law firm of Baker and Hostetler, LLP, the law firm of Holland and Knight, LLP, and The Florida Bar for their generous assistance in hosting the Florida Board of Bar Examiners Character and Fitness Commission meetings.

The Commission is especially indebted to the members and staff of the Florida Board of Bar Examiners who provided the support needed for completion of the Commission's work in an outstanding fashion. Michele Gavagni, Mark Huntsberger, and Thomas Pobjecky are entitled to particular commendation.

## Chair's Remarks

It is my privilege to present the final report of the Florida Board of Bar Examiners Character and Fitness Commission. It has been an honor to chair this Commission and to work with the members of the Commission over the past eight months.

## Executive Summary

By administrative order, Chief Justice R. Fred Lewis convened the Florida Board of Bar Examiners Character and Fitness Commission (Commission). The Commission's primary purpose is the submission of recommendations pertaining to the character and fitness standards used in Florida's bar admissions process. The full Commission met on four occasions. The Commission divided its work among three committees.

Committee I studied the background investigation for bar applicants conducted by the Florida Board of Bar Examiners (Board). This committee reviewed the bar application, the length of time for completing an investigation, and the involvement of law schools in the admissions process. Committee I recommended a set of goals for achieving a greater involvement by the law school community in the bar admissions process of law students including an increased emphasis on professionalism. The Commission adopted the recommendations of Committee I.

Committee II evaluated the Board's character and fitness standards. This committee initially approved the Board's current procedures for reviewing files that have potential character and fitness concerns. Committee II recommended the following changes to the current standards: convicted felons should be ineligible for admission and disbarment in Florida should be permanent. The committee supported the Board's pending rule amendment that would allow the Board to recommend permanent exclusion in cases involving egregious misconduct. The Commission adopted the recommendations of Committee II.

Committee III considered the program of conditional admission of bar applicants with drug, alcohol, or psychological problems. Committee III recommended the continuation of the program in its current format, including the issuance of confidential orders by the Court. As to the monitoring of conditionally-admitted attorneys, the committee recommended that compliance with the conditions of admission be strictly enforced by The Florida Bar and Florida Lawyers Assistance, Inc. If these agencies are unable to achieve the policy of strict enforcement, then the Court should transfer the monitoring function to the Board. The Commission adopted the recommendations of Committee III.

## Summary of Recommendations

- 1) 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.
- 2) Inasmuch as the current application is thorough and comprehensive, the Commission recommends no changes at this time to the Florida Bar Application.
- 3) The Commission recommends that the Florida Board of Bar Examiners consider expanding its current review of online personal websites, including whether a question should be added to the Florida Bar Application to require that all such sites be listed and that access be granted to the Florida Board of Bar Examiners.
- 4) 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.
- 5) 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.
- 6) 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.
- 7) 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.

- 8) 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.
- 9) 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.
- 10) The Commission recommends that the following changes be considered by the Supreme Court of Florida regarding disbarment:
  - a) Disbarment, under the existing Bar discipline guidelines, should be permanent in the State of Florida.
  - b) The Florida Bar discipline guidelines should be revised to allow for suspension from the practice of law for up to five years.
  - c) The Rules should be amended to require attorneys who have been suspended from the practice of law in Florida for three years or more to reapply for admission to The Florida Bar.
- 11) 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.
- 12) 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.

- 13) 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.
- 14) 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.
- 15) 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.

## Purpose of the Florida Board of Bar Examiners Character and Fitness Commission

Chief Justice R. Fred Lewis appointed the Florida Board of Bar Examiners Character and Fitness Commission (Commission) by Administrative Order No. AOSC08-21 dated June 17, 2008. The Florida Board of Bar Examiners is an administrative agency of the Supreme Court of Florida and is charged with making recommendations for admission to The Florida Bar to the Supreme Court of Florida. The essential functions of the Florida Board of Bar Examiners are to protect the public and to safeguard the judicial system of the State of Florida (Rule 1-14.1 of the Rules).

The Administrative Order created the Commission to review the current standards of character and fitness. The Administrative Order further charged the Commission to review and evaluate any data, information, and materials necessary for an informed decision, and to formulate and submit recommendations to the Florida Board of Bar Examiners and the Supreme Court of Florida.

The Commission met on August 8, 2008, October 7, 2008, November 20, 2008, and January 30, 2009. The Commission established three committees to consider specific issues and to make recommendations for the full Commission's consideration. These committees met between each of the full Commission's meetings to prepare their reports and recommendations.

## Background Information on Florida Board of Bar Examiners Character and Fitness Process

In 1955, the Supreme Court of Florida created the Florida Board of Bar Examiners (Board), which was set up as an agency of the Supreme Court of Florida to administer the admissions process for applicants to The Florida Bar. Pursuant to Rule 1-13, the Board was created by the Supreme Court of Florida to implement the Rules relating to bar admission. To be recommended for admission to The Florida Bar, an applicant for admission must have successfully completed the Florida Bar Examination and must have demonstrated satisfactory character and fitness.

The underlying principle that has guided the work of the Commission, and which the Commission believes should be given increasing emphasis at all stages of the admission and discipline process, is set forth in Rule 1-14.1 of the Rules, which provides:

**The primary purposes of the character and fitness investigation before admission to The Florida Bar are to protect the public and safeguard the judicial system.**

In pursuit of that goal, the Board conducts a background investigation on each applicant for admission to The Florida Bar. The Board receives approximately 3,400 applications for bar admission each year. The background investigation is initiated by receipt of a completed Florida Bar Application, with the necessary supplemental forms and fees. The initial background investigation is based on the information reported on the Florida Bar Application and received from multiple outside sources. The majority of the Board's resources are utilized to conduct the thorough background investigation of each applicant.

The Board's background investigation takes approximately six to eight months.<sup>1</sup> The Board is to be commended for each step taken to decrease the amount of time necessary to complete the background investigation, provided that the quality of the background investigation remains constant.

The Florida Board of Bar Examiners maintains a student registration program that allows students to file a Registrant Bar Application in the first year of law school at a discounted application fee. Applicants may reduce the application fees by 46% by filing a timely student registration. The benefits of this student registration program are very significant. In addition to the substantial cost savings, students may be alerted to potential character and fitness issues early in their law school careers and make future decisions having that knowledge. Students with a background that includes disqualifying conduct under the Rules have additional time while still in law school to document evidence of rehabilitation. Student registrants who apply with the Board and receive a notice of initial registrant clearance from the Board have the opportunity to participate in the Certified Legal Internship program while in law school. This program also benefits the public by ensuring that certified legal interns meet the requisite character and fitness guidelines of attorneys practicing in the State of Florida.

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<sup>1</sup> The background investigation is usually completed within six to eight months. Depending on the complexity of the individual investigation, it can be completed in a much shorter period of time or can extend well beyond that time-frame. For all investigations completed in the Board's 2007-08 fiscal year, the average amount of time to complete the investigation was 136 days, substantially less than the six- to eight-month average.

## Review of Florida Bar Application and Background Investigative Process

Committee I of the Commission reviewed the Florida Bar Application and the Board's background investigative process. The committee looked at the scope of the Board's background investigation to make any recommendations for changes. The committee reviewed the current Florida Bar Application, and the depth and breadth of the background investigation completed on each applicant and student registrant. The committee also reviewed the Board's communications with law schools in Florida with regard to the background investigation and the necessity of full disclosure by applicants for admission to The Florida Bar in order to make any recommendations for changes.

The Board provided the following reference materials to this committee:

- Rules of the Supreme Court Relating to Admissions to the Bar
- Florida Board of Bar Examiners Summary of Published Opinions in Applicant Cases
- "The Florida Board of Bar Examiners: The Constitutional Safeguard Between Attorney Aspirants and the Public," Thomas A. Pobjecky, *Nova Law Review*, Winter 1994
- "Character and Fitness Process Before the Florida Board of Bar Examiners," Richard C. McFarlain, *The Florida Bar Journal*, January 1989
- Confidential Report "Predicting Disciplinary Problems Using Character and Fitness Issues of Florida Bar Applicants," Chad W. Buckendahl, Ph.D., Rebecca L. Norman, B.A., Brett P. Foley, M.S.
- ABA Standards for Approval of Law Schools

- Memo of General Investigative Steps completed by Senior Analysis Supervisor Melissa A. Benn of the Florida Board of Bar Examiners
- Florida Bar Application Items
- Florida law school Admission Applications
- “Introduction to the Bar Admissions Process” PowerPoint presentation by the Florida Board of Bar Examiners for first-year Florida law school students

#### Review of the Florida Bar Application

The committee reviewed the Florida Bar Application and concluded that the current application is thorough and comprehensive, and recommended no changes unless the Florida Board of Bar Examiners determines that a change is required as it relates to the investigation of personal websites such as “Facebook” and “MySpace.”

#### 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.

#### Length of Application Processing Time

The committee requested additional information regarding perceived delays in the processing of individual background investigations. Although the average time for completing investigations in 2007-08 was 136 days, the committee reviewed an extensive report that is completed every six months on the progress on each outstanding application that is either older than six months or the applicant has passed all parts of the examination.<sup>2</sup> The report pointed out a limited number of instances where delay resulted from human error. The committee was satisfied that the Board has instituted new procedures and training to further reduce such instances, which will provide for increased supervision and an expedited process on the rare occasion when an application has been delayed through no fault of the applicant. The committee believes that, in the vast majority of instances, review of applications and completion of the background investigations are completed promptly, as demonstrated by the average processing time in 2007-08 of 136 days per file.

#### Law Schools' Role in the Bar Admissions Process

The committee reviewed the first-year PowerPoint presentation that is currently presented at each of the Florida law schools. A copy of the PowerPoint presentation

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<sup>2</sup> Rule 4-62.3 of the Rules requires the Board to advise the status of the background investigation for all applicants who have passed all parts of the examination, but have not been recommended to the court for admission at the time of grade release. The file of each applicant whose file is more than six months old or who has passed all parts of the examination is individually reviewed to determine why the investigation is not complete.

has also been added to the Board's website in PDF format. The PowerPoint presentation is designed to introduce first-year law students to the bar admissions process. The presentation outlines the character and fitness issues the Board most frequently encounters—lack of candor, financial irresponsibility, criminal history, and untreated substance abuse or untreated mental health issues. Students are advised that these issues do not constitute an exhaustive list of disqualifying conduct and refers students to Rule 3-11 of the Rules for a more inclusive list. The presentation highlights published cases from the Supreme Court of Florida where disqualifying conduct resulted in denial of admission to The Florida Bar.

The first-year orientation program also makes law students aware of the benefits of filing a student registration in the first year of law school. Students are provided with a significant discount of the application fees by applying in the first year of law school as well as the ability to receive a preliminary determination of their character and fitness in the first two years of law school.

Members of the committee contacted law school deans and faculty members to discuss Florida law schools becoming more involved in character and fitness issues related to the Florida Bar Application and the investigative process of the Florida Board of Bar Examiners. Without exception, the committee members found enthusiasm in the law school community for an increased role. The committee commends the law schools for making professionalism part of their orientation program at each Florida law school.

The committee therefore recommends that the Supreme Court of Florida's Commission on Professionalism create a committee consisting of several members of the Commission on Professionalism, several members of the Board, and all or several deans of the Florida law schools to work out the details and implement the following goals:

- (a) Ensure that attendance is required at the Florida Board of Board Examiners' Law School Orientation PowerPoint Presentation.
- (b) Work together to encourage early student Bar application, registration, and processing.
- (c) Discuss the possibility of notifying 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, as they will gain no advantage in delaying the application process.
- (d) Formally notify all students that acceptance to and graduation from law school does not indicate that a person will be entitled to the privilege of membership in The Florida Bar.
- (e) 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.
- (f) 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.
- (g) Otherwise promote the law schools' role in the shared goal of increasing professionalism.

The Commission reviewed and adopted each of the committee's recommendations related to the Florida Bar Application and the investigative process.

## Consideration of Standards of Character and Fitness

Committee II of the Commission considered the Board's current character and fitness standards in order to make recommendations for changes deemed necessary. Committee II considered whether there are applicants being recommended for admission who should not be admitted, or applicants not being admitted who should be; whether there is any character and fitness issue that is so egregious that it should be an automatic bar to admission to The Florida Bar; whether the Board's current rule on rehabilitation should be revised; and whether the current standards for flagging files for potential character and fitness issues should be revised.

The Board provided the following reference materials to this committee:

- Rules of the Supreme Court Relating to Admissions to the Bar
- Florida Board of Bar Examiners Summary of Published Opinions in Applicant Cases
- "The Florida Board of Bar Examiners: The Constitutional Safeguard Between Attorney Aspirants and the Public," Thomas A. Pobjecky, *Nova Law Review*, Winter 1994
- "Character and Fitness Process Before the Florida Board of Bar Examiners," Richard C. McFarlain, *The Florida Bar Journal*, January 1989
- Confidential Report "Predicting Disciplinary Problems Using Character and Fitness Issues of Florida Bar Applicants," Chad W. Buckendahl, Ph.D., Rebecca L. Norman, B.A., Brett P. Foley, M.S.

- Excerpts from the Board’s confidential policy manual regarding Character and Fitness Processing Guidelines
- “Beyond Rehabilitation: Permanent Exclusion from the Practice of Law,” Thomas Arthur Pobjecky, The Bar Examiner, February 2007
- Memo to the Florida Board of Bar Examiners Character and Fitness Commission re: Minimum Employment Qualifications and Employment Disqualifiers, dated August 19, 2008, by Thomas Arthur Pobjecky, General Counsel of the Florida Board of Bar Examiners
- Florida Board of Bar Examiners Confidential Character and Fitness Guidelines regarding the items for which an applicant investigation is flagged for additional Board review

The committee initially considered whether the issues the Board flagged for additional review should be revised. This list identifies different responses, either revealed on the Florida Bar Application or from outside sources, which require Board review and clearance. Following this review, the committee recommended no changes to the current standards for flagging files with potential character and fitness issues that may be found disqualifying for admission to The Florida Bar.

Disqualifying Conduct that Should Preclude Application to The Florida Bar

The committee then considered whether there should be any conduct that is a complete bar to applying for admission to The Florida Bar. The Rules currently preclude persons in one of the following categories from applying for admission to The Florida Bar:

**2-13.1 Disbarred or Resigned Pending Disciplinary Proceedings.** A person who has been disbarred from the practice of law, or who has resigned pending disciplinary proceedings, will not be eligible to apply for a period of 5 years from the date of disbarment, or 3 years from the date of resignation, or such longer period as is set for readmission by the jurisdictional authority.

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**2-13.2 Suspension for Disciplinary Reasons.** A person who has been suspended for disciplinary reasons from the practice of law in a foreign jurisdiction is not eligible to apply until expiration of the period of suspension.

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**2-13.3 Convicted Felon.** A person who has been convicted of a felony is not eligible to apply 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.

The committee supported the decisions of the Supreme Court of Florida, which require readmission to their home state by attorneys who have been disbarred in another jurisdiction. The committee supported the Board's pending rules petition which seeks to incorporate these rulings into Rule 2-13.1. The committee also supported the Board's pending rules petition which will extend this principle to suspended attorneys. The proposed amendment to Rule 2-13.2 will require reinstatement of suspended attorneys in their home states in order to be eligible for admission to The Florida Bar. The committee would encourage the Supreme Court of Florida to adopt the proposed changes to Rules 2-13.1 and 2-13.2.

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.

#### Rehabilitation Standards of the Florida Board of Bar Examiners

The committee also reviewed the Board's standards for determination of present character and elements of rehabilitation, as set forth in Rules 3-12 and 3-13 of the Rules:

**3-12 Determination of Present Character.** The board must determine whether the applicant or registrant has provided satisfactory evidence of good moral character. The following factors, among others, will be considered in assigning weight and significance to prior conduct:

- (a) age at the time of the conduct;
- (b) recency of the conduct;
- (c) reliability of the information concerning the conduct;
- (d) seriousness of the conduct;
- (e) factors underlying the conduct;
- (f) cumulative effect of the conduct or information;
- (g) evidence of rehabilitation;
- (h) positive social contributions since the conduct;
- (i) candor in the admissions process; and,
- (j) materiality of any omissions or misrepresentations.

**3-13 Elements of Rehabilitation.** Any applicant or registrant who affirmatively asserts rehabilitation from prior conduct that adversely reflects on the person's character and fitness for admission to the bar must produce clear and convincing evidence of rehabilitation including, but not limited to, the following elements:

- (a) strict compliance with the specific conditions of any disciplinary, judicial, administrative, or other order, where applicable;
- (b) unimpeachable character and moral standing in the community;
- (c) good reputation for professional ability, where applicable;
- (d) lack of malice and ill feeling toward those who, by duty, were compelled to bring about the disciplinary, judicial, administrative, or other proceeding;
- (e) personal assurances, supported by corroborating evidence, of a desire and intention to conduct one's self in an exemplary fashion in the future;
- (f) restitution of funds or property, where applicable; and,
- (g) positive action showing rehabilitation by occupation, religion, or community or civic service. Merely showing that an individual is now living as and doing those things he or she should have done throughout life, although necessary to prove rehabilitation, does not prove that the individual has undertaken a useful and constructive place in society. The requirement of positive action is appropriate

for applicants for admission to The Florida Bar because service to one's community is an implied obligation of members of The Florida Bar.

The committee also reviewed Rule 3-23.6 of the Rules:

**3-23.6 Board Action Following Formal Hearing.** Following the conclusion of a formal hearing, the board will promptly notify the applicant or registrant of its decision. The board may make any of the following recommendations:

- (a) The applicant or registrant has established his or her qualifications as to character and fitness.
- (b) The applicant be conditionally admitted to The Florida Bar in exceptional cases involving drug, alcohol, or psychological problems on the terms and conditions specified by the board.
- (c) The applicant's admission to The Florida Bar be withheld for a specified period of time not to exceed 2 years. At the end of the specified period of time, the board will recommend the applicant's admission if the applicant has complied with all special conditions outlined in the Findings of Fact and Conclusions of Law.
- (d) The applicant or registrant has not established his or her qualifications as to character and fitness. In cases of denial, a 2-year disqualification period is presumed to be the minimum period of time required before an applicant or registrant may reapply for admission and establish rehabilitation. In cases involving significant mitigating circumstances, the board has the discretion to recommend that the applicant or registrant be allowed to reapply for admission within a specified period of less than 2 years. In cases involving significant aggravating factors (including but not limited to material omissions or misrepresentations in the application process), the board has the discretion to recommend that the applicant or registrant be disqualified from reapplying for admission for a specified period greater than 2 years, but not more than 5 years.

The Board has petitioned the Supreme Court of Florida to change Rule 3-23.6(d) of the Rules to allow the Board the discretion to recommend an applicant's permanent denial of admission to The Florida Bar in the most egregious of cases. Under the Board's current rules, the Board may recommend a denial of admission, typically for

a two-year period, be extended to up to five years for egregious misconduct, including but not limited to lack of candor in the bar admission proceedings. Both the Supreme Court of Florida and the Ohio Supreme Court have ruled in bar admission matters that there is conduct for which no amount of rehabilitation would be sufficient to demonstrate the requisite character and fitness to be admitted to the practice of law.

The Ohio Supreme Court, *In re Application of Cvammen*,<sup>3</sup> reasoned:

Evidence of false statement, including material omissions, and lack of candor in the admissions process reflect poorly on an applicant's character, fitness, and moral qualifications. Where, as here, these ethical infractions so permeate the admissions process that the applicant's honesty and integrity are shown to be intrinsically suspect, our disposition must be to permanently deny his application to register as a candidate for admission to the Ohio bar.

The Supreme Court of Florida, in the case of *Florida Board of Bar Examiners re: W.F.H.*,<sup>4</sup> held:

Upon consideration of W.F.H.'s Petition for Review filed in the above cause, based on the totality of the circumstances, the findings of fact and conclusions of law, the recommendation of the Florida Board of Bar Examiners that W.F.H. not be admitted to the Florida Bar is approved. This Court concludes that the total circumstances and underlying facts of the instant case, which involve misconduct by a sworn law enforcement officer, are so egregious and extreme, and impact so adversely on the character and fitness of W.F.H., that the recommendation of the Florida Board of Bar Examiners must be approved. We further conclude that under the totality of the circumstances, the grievous misconduct mandates that W.F.H. not be admitted to the Bar now or at any time in the future. Accordingly, W.F.H.'s petition is hereby denied.

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<sup>3</sup> *In re Application of Cvammen*, 806 N.E.2d 498, 503 (Ohio 2004).

<sup>4</sup> *Florida Board of Bar Examiners re: W.F.H.*, 933 So. 2d 482 (Fla. 2006), *cert. denied*, 549 U.S. 1020 (2006).

One justice (with two justices concurring) concurred in the result only and filed the following opinion:

I concur only with this result. However, I believe that the Board erred and we erred in not making this decision at the time of W.F.H.'s first petition, rather than allowing W.F.H. to reapply when reapplication was futile. I regret this for reasons of fundamental fairness.

In 2007, the Court again reached the same result.<sup>5</sup> In the Helmich case, the Court held:

Upon consideration of Bruce L. Helmich's petition for review filed in the above cause, we approve the Florida Board of Bar Examiners' findings of fact, conclusions of law, and recommendation that Helmich not be admitted to The Florida Bar. We further conclude that under the totality of the circumstances, the seriousness of Helmich's prior disqualifying conduct mandates that he not be admitted to the Bar now or at any time in the future. See Fla. Bd. of Bar Exam'rs re W.F.H., SC04-185 (Fla. order filed April 20, 2006). Accordingly, Helmich's petition is hereby denied, and he may not reapply for admission to The Florida.

The committee supports the Board's petition for rules changes that would allow the Board to recommend to the Supreme Court of Florida permanent denial in the most egregious of character and fitness cases.

After review of the standards for determination of present character (Rule 3-12) and rehabilitation (Rule 3-13), the committee recommended no changes to the standards set forth in these rules. It was the committee's finding that the Board is tasked with an enormous responsibility to protect the public of Florida and that this task is not taken lightly by the Board. The committee commended the Board for the work that it does and encourages the Board to continue to apply the standards of character and fitness as set forth in the Rules.

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<sup>5</sup> *Florida Board of Bar Exam'rs re: Helmich*, No. SC07-255 (Fla. Order filed September 11, 2007).

One of the factors considered by the committee was the relationship between applicants who had identified character and fitness issues in their bar admissions process, and subsequent bar discipline. After reviewing the confidential report provided by Chad W. Buckendahl, et al. titled “Predicting Disciplinary Problems Using Character and Fitness Issues of Florida Bar Applicants,” the committee considered the issue of disbarment. It was the committee’s recommendation that the following changes be also considered by the Supreme Court of Florida:

1. Disbarment, under the existing bar discipline guidelines, should be permanent in the state of Florida.<sup>6</sup>
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).

Each of these recommendations related to character and fitness standards were adopted by the Commission.

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<sup>6</sup> As of 2005, five states had permanent disbarment: New Jersey, Ohio, Oregon, Kentucky, and Indiana. Several other states, including Florida, have permanent disbarment as an option. Inter-Office Communication from Scott J. Drexel, Chief Trial Counsel, to Members of the Bd. Comm. on Regulation, Admissions & Discipline Oversight (Nov. 7, 2005), available on the Cal. Bar website at [http://calbar.ca.gov/calbar/pdfs/public-comment/2006/Perm-Disbar-RAD-Memo\\_C.pdf](http://calbar.ca.gov/calbar/pdfs/public-comment/2006/Perm-Disbar-RAD-Memo_C.pdf)

## Standards for Conditional Admission

Committee III of the Commission reviewed the issue of conditional admission to The Florida Bar. The committee considered the following issues: whether conditional admission should continue to be an option for bar admission; whether there should be more specific standards concerning conditional admission; whether the conditional admission program should remain confidential; and whether the current process of monitoring conditionally-admitted attorneys is sufficient.

The Board provided the following reference materials to this committee:

- Rules of the Supreme Court Relating to Admissions to the Bar
- Florida Board of Bar Examiners Summary of Published Opinions in Applicant Cases
- “The Florida Board of Bar Examiners: The Constitutional Safeguard Between Attorney Aspirants and the Public,” Thomas A. Pobjecky, *Nova Law Review*, Winter 1994
- “Character and Fitness Process Before the Florida Board of Bar Examiners,” Richard C. McFarlain, *The Florida Bar Journal*, January 1989
- Confidential Report “Predicting Disciplinary Problems Using Character and Fitness Issues of Florida Bar Applicants,” Chad W. Buckendahl, Ph.D., Rebecca L. Norman, B.A., Brett P. Foley, M.S.
- Confidential Discipline Cases After Conditional Admission for July 2005 through June 2008.

The first issue considered by the committee was whether conditional admission should continue to be an available option in the bar admissions process. Since its

inception in 1986, over 580 attorneys have been admitted conditionally to the practice of law in Florida.

The chart below outlines the number of applicants who were conditionally admitted from 1998 to 2008. The chart reflects the number conditionally admitted each year, the number involved in an incident<sup>7</sup>, the number disciplined<sup>8</sup>, the number with pending incidents (who were not previously disciplined), and the total number of incidents reported by The Florida Bar with regard to those conditionally admitted.

Year Admitted	Number Conditionally Admitted	Number Involved in an Incident	Number Disciplined	Number with Pending Incidents (not previously disciplined)	Number of Incidents Reported
1998	20	6	4	2	18
1999	24	6	6	0	29
2000	43	13	8	0	24
2001	34	9	4	1	17
2002	36	10	3	0	13
2003	35	10	7	0	22
2004	37	10	7	0	12
2005	22	7	2	0	16
2006	39	1	0	0	1
2007	26	0	0	0	0
2008	19	0	0	0	0
<b>Total</b>	<b>335</b>	<b>72</b>	<b>41</b>	<b>3</b>	<b>152</b>

The committee also reviewed confidential information regarding individuals who were conditionally admitted and twenty-one disciplined between July 1, 2005, and June 30, 2008. During the three-year period, twenty-one individuals received discipline from The Florida Bar ranging from an admonishment to permanent

<sup>7</sup> An incident includes, but is not limited to, an inquiry, complaint, or self-reported misconduct made to The Florida Bar.

<sup>8</sup> We have reported as discipline any action taken by The Florida Bar, except those that resulted in an inquiry, closed at the staff level, or were dismissed.

disbarment. Of the twenty-one individuals who received discipline, six individuals received discipline twice. Of the twenty-one individuals, seven received discipline during the conditional admission period as summarized in the following chart:

Year	Admonishment	Public Reprimand	Suspension	Felony Suspension	License Revoked	Disbarred	Permanently Disbarred
07/05 to 06/06					3	1	
07/06 to 06/07		1			2		
07/07 to 06/08							1 <sup>9</sup>
<b>Total</b>		<b>1</b>			<b>5</b>	<b>1</b>	<b>1</b>

The chart below reflects the discipline received by the fourteen individuals disciplined after the completion of their conditional admission period:

Year	Admonishment	Public Reprimand	Suspension	Felony Suspension	License Revoked	Disbarred	Permanently Disbarred
07/05 to 06/06	1	1	2	1 <sup>10</sup>		1	
07/06 to 06/07	2	2					
07/07 to 06/08	1	4 <sup>11</sup>	2 <sup>12</sup>	1 <sup>13</sup>			
<b>Total</b>	<b>4</b>	<b>7</b>	<b>4</b>	<b>2</b>		<b>1</b>	

After discussion, the committee recommended that conditional admission remain an option for the Board to recommend to the Supreme Court of Florida, provided that rehabilitation under Rule 3-13 has been established for otherwise disqualifying

<sup>9</sup> This individual was permanently disbarred for continuing to practice law after revocation of his license in 2006-07.

<sup>10</sup> This individual was subsequently suspended for eighteen months in 2006-07.

<sup>11</sup> One individual was reprimanded in 2005-06. One individual was admonished in 2006-07. One individual was reprimanded in 2006-07.

<sup>12</sup> This individual was admonished in 2006-07.

<sup>13</sup> This individual was subsequently suspended for eighteen months in October 2008.

conduct. The committee recommended that applicants who have not otherwise demonstrated rehabilitation from prior disqualifying conduct should not be recommended for admission, on a conditional basis or otherwise.

Following consideration of this issue, the committee recommended no change to the current rules authorizing the conditional admission of bar applicants in appropriate cases. In reaching this recommendation, the committee acknowledged that the disposition of any particular hearing before the Board must be made on a case-by-case basis.

The committee also noted that over the years, the Board has adopted policy positions pertaining to conditional admission. For example, in recent years, the Board has approved and implemented policies that required documented sobriety before conditional admission and a minimum of five years of sobriety before conditionally-admitted attorneys should be allowed to practice unconditionally. The committee believes that the specifics of the program of conditional admission are best achieved through the Board's continuing use of its policymaking powers.

The second issue the committee considered was whether conditional admission should be available to disbarred and resigned attorneys seeking admission or readmission to The Florida Bar. The committee observes that should disbarment become permanent for Florida attorneys, this issue would be moot as to those individuals.

Conditional admission following a formal hearing is authorized by Rule 3-23.6:

**3-23.6 Board Action Following Formal Hearing.** Following the conclusion of a formal hearing, the board will promptly notify the applicant or registrant of its decision. The board may make any of the following recommendations:

- (a) The applicant or registrant has established his or her qualifications as to character and fitness.
- (b) The applicant be conditionally admitted to The Florida Bar in exceptional cases involving drug, alcohol, or psychological problems on the terms and conditions specified by the board.
- (c) The applicant's admission to The Florida Bar be withheld for a specified period of time not to exceed 2 years. At the end of the specified period of time, the board will recommend the applicant's admission if he or she has complied with all special conditions outlined in the Findings of Fact and Conclusions of Law.
- (d) The applicant or registrant has not established his or her qualifications as to character and fitness. In cases of denial, a 2-year disqualification period is presumed to be the minimum period of time required before an applicant or registrant may reapply for admission and establish rehabilitation. In cases involving significant mitigating circumstances, the board has the discretion to recommend that the applicant or registrant be allowed to reapply for admission within a specified period of less than 2 years. In cases involving significant aggravating factors (including but not limited to material omissions or misrepresentations in the application process), the board has the discretion to recommend that the applicant or registrant be disqualified from reapplying for admission for a specified period greater than 2 years, but not more than 5 years.

As set forth above, Rule 3-23.6 does not bar any class of individuals from being eligible for conditional admission.

Following consideration of this issue, the committee recommended no changes to Rule 3-23.6. The committee concluded that the tool of conditional admission should continue to be available to the Board in all appropriate cases, including cases

involving disbarred or resigned attorneys. In reaching this conclusion, the committee recognized that conditional admission has been an effective program in protecting the public by monitoring newly admitted or readmitted attorneys who have had past difficulties in the areas of drugs, alcohol, or mental health.

The third issue the committee considered is whether orders of the Supreme Court of Florida granting conditional admission should remain confidential.

Currently, the Board is permitted to recommend to the Supreme Court of Florida the conditional admission of a bar applicant. If the Court approves the Board's recommendation, the Court issues a confidential order granting conditional admission. The only exception to this rule concerns disbarred and resigned attorneys. In those cases, Rule 3-23.7 provides: "All reports, pleadings, correspondence, and papers received by the court [in cases involving disbarred and resigned attorneys] are public information and exempt from the confidentiality provision of rule 1-60."

Following consideration of this issue, the committee by majority vote recommended no change to the Court's current practice of issuing confidential orders of conditional admission, except in cases involving disbarred and resigned attorneys. In reaching this recommendation, the committee noted that the Model Rule on Conditional Admission to Practice Law adopted by the House of Delegates for the American Bar Association in February 2008 contains a confidentiality provision. The Commentary to that provision in the ABA model rule states in part "confidentiality will promote early disclosure and treatment of impairments."

The committee then considered whether the current monitoring function of the conditional admission program should be changed.

Regarding this issue, the committee considered concerns expressed by the Board as to the level of monitoring of conditionally-admitted attorneys by FLA. These concerns arose out of the dual roles of FLA to support the recovering conditionally-admitted attorney and to enforce the provisions of the Court's order granting conditional admission. It was unclear whether the Board's concerns gave rise to a level of significant problems for conditionally-admitted attorneys. The committee did not believe an additional level of review should be established at this time.

The committee, however, did recommend that the standards of monitoring applicant compliance with an order of conditional admission should be increased. When a person is admitted to The Florida Bar on a conditional basis, it is paramount that compliance with the terms of admission be strictly monitored. To that end, the committee recommended that The Florida Bar and FLA adopt a zero-tolerance policy for noncompliance with any of the terms of the consent agreement concerning the conditions for admission. If The Florida Bar and FLA are unable to enforce this policy effectively, the committee further recommended that the monitoring function be transferred to the Board.

The Commission unanimously approved each of the recommendations of Committee III, with the exception of the continuance of the confidentiality of conditional admission status, which was instead recommended by majority vote.

## Presentation from The Florida Bar's Commission on Professionalism

At the Florida Board of Bar Examiners Character and Fitness Commission meeting in October, 2008, John Berry, Legal Division Director of The Florida Bar, sought the support of the Character and Fitness Commission for the work of the Supreme Court of Florida's Commission on Professionalism. Mr. Berry reported that the Commission on Professionalism had reviewed the Carnegie Report entitled "Educating Lawyers," which references that the responsibility of law schools should be threefold: knowledge, skills, and character/values. The Commission on Professionalism is changing goals to focus on professionalism as a priority in law school. Mr. Berry asked that the Character and Fitness Commission support the Commission on Professionalism's goals: 1) to investigate curriculum opportunities to enhance professionalism in law school; 2) to locate faculty who are supportive of enhanced professionalism opportunities and involve them in Bar committees and research; 3) to look at practice management and how it is taught in law schools; and 4) to encourage schools to get students involved in pro bono work/clinics.

The goal of the Commission on Professionalism is to make character and fitness the priority of every aspect of becoming and remaining a lawyer in Florida. Mr. Berry asked for the Commission's support of the focus and work of the Commission on Professionalism, particularly as it relates to working with law schools to increase focus on the professionalism of law students.

The Commission considered Mr. Berry's presentation and reviewed the following materials provided by the Commission on Professionalism:

- PowerPoint Presentation
- “The Way Ahead” Executive Summary
- Five Votes of Commission on Professionalism from 2008 Spring Retreat
- Action Items of Commission on Professionalism from 2006 and 2007 Spring Retreats
- Grant Proposal
- Carnegie Report - Educating Lawyers Summary

After Mr. Berry’s presentation and review of the materials provided for the Florida Board of Bar Examiners Character and Fitness Commission’s review, the Commission agreed that the work of the Supreme Court of Florida’s Commission on Professionalism is commendable. The Character and Fitness Commission supports the goals of the Commission on Professionalism in focusing on professionalism in law schools, and finds that any program that increases professionalism beginning with law school students is of benefit to the character and fitness aspect of the Florida Board of Bar Examiners and ultimately, a benefit to the public of Florida and Florida’s judicial system.

## Appendix

1. Administrative Order No. AOSC08-21
2. Rules of the Supreme Court Relating to Admissions to the Bar
3. Florida Board of Bar Examiners Summary of Published Opinions in Applicant Cases
4. "The Florida Board of Bar Examiners: The Constitutional Safeguard Between Attorney Aspirants and the Public," Thomas A. Pobjecky, *Nova Law Review*, Winter 1994
5. "Character and Fitness Process Before the Florida Board of Bar Examiners," Richard C. McFarlain, *The Florida Bar Journal*, January 1989
6. "Beyond Rehabilitation: Permanent Exclusion from the Practice of Law," Thomas Arthur Pobjecky, *The Bar Examiner*, February 2007
7. Memo to the Florida Board of Bar Examiners Character and Fitness Commission re: Minimum Employment Qualifications and Employment Disqualifiers dated August 19, 2008, by Thomas Arthur Pobjecky, General Counsel of the Florida Board of Bar Examiners
8. Report to Character and Fitness Commission Outlining the Work of the Supreme Court of Florida's Commission on Professionalism from John Berry, Legal Director of The Florida Bar