

**IN THE SUPREME COURT OF FLORIDA**

**Case Number: SC10-1328**

**IN RE ELDER LAW RECERTIFICATION  
APPLICATION EDR08-013,**

**JOHN DOE,**

**Petitioner,**

**v.**

**THE FLORIDA BAR,**

**Respondent.**

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**RESPONSE OF THE FLORIDA BAR  
BOARD OF LEGAL SPECIALIZATION AND EDUCATION (BLSE)  
TO ATTORNEY JOHN DOE’S PETITION FOR REVIEW OF  
SPECIALTY RECERTIFICATION DENIAL**

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Respectfully submitted by:

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COMES NOW, The Florida Bar Board of Legal Specialization and Education BLSE, (hereinafter referred to as “BLSE”), and RESPONDS to that certain Petition for Review of Recertification Denial filed by Petitioner John Doe as follows:

**I. JURISDICTION**

BLSE concurs that this Court has jurisdiction pursuant to BLSE Policy 4.11 and Rule 6-3.10, Rules Regulating The Florida Bar.

## II. FACTS AND PROCEDURAL HISTORY

The denial of recertification to Mr. Doe was based upon adverse peer review after he had notice and a full opportunity to submit additional materials and information to the BLSE. (Doe's Appendix, Exh. 11). This Court, in approving the Certification Program, has expressly directed that peer review is mandatory and may not be eliminated by equivalents. *See* Rule 6-3.5(c)(6). This Court has directed that the applicant:

shall also be evaluated as to character, ethics, and reputation for professionalism" and that "[a]n applicant otherwise qualified may be denied certification on the basis of peer review. *Id.*

Mr. Doe filed his application for recertification as a board-certified elder lawyer on May 15, 2008 (Doe's Appendix, Ex. 2, p.1). In said application for board recertification appeared the following paragraph, signed, acknowledged and sworn to by Doe.

**I FURTHER UNDERSTAND THAT THE PEER REVIEW PROCESS IS UNABLE TO SERVE ITS PURPOSE UNLESS THE INDIVIDUALS FROM WHOM INFORMATION IS REQUESTED ARE GUARANTEED COMPLETE CONFIDENTIALITY. BY APPLYING FOR RECERTIFICATION, I EXPRESSLY AGREE TO THE CONFIDENTIALITY OF THE PEER REVIEW PROCESS AND EXPRESSLY WAIVE ANY RIGHT TO REQUEST ANY INFORMATION OBTAINED THROUGH PEER REVIEW AT ANY STAGE OF THE CERTIFICATION PROCESS.** (Doe's Appendix, Ex. 2, p.4). (Emphasis and capitalization in original.)

After consideration of his application and peer review received by the Elder Law Certification Committee, Doe was given notice by letter dated February 6, 2009, that the Certification Committee had under consideration a recommendation to BLSE of denial of recertification. (Doe's Appendix, Ex. 4).

As the basis for recommendation of denial which was under consideration, Doe was advised, in pertinent part, that:

It is the Committee's determination that your peer review does not meet the high standards of competence and professionalism articulated by The Supreme Court of Florida in Rule 6-3.5(c)(6), Rules Regulating The Florida Bar:

"Peer review shall be used to solicit information to assess competence in the specialty field and professionalism and ethics in the practice of law." Further, the rule states that, "To qualify for board certification, an applicant must be recognized as having achieved a level of competence indicating special knowledge, skills and proficiency in handling the usual matters in the specialty field. The applicant shall also be evaluated as to character, ethics and reputation for professionalism. An applicant otherwise qualified may be denied certification on the basis of peer review."

The Elder Law Certification Committee, pursuant to the above-cited rule, policies, and the reference requirement for recertification under Rule 6-20.4(c), solicited and evaluated the peer review statements received in connection with your application. Of particular concern to the Committee were the poor and below average ratings as to your reputation in the legal community for ethical conduct and professional behavior. Below average ratings were also received regarding your technical knowledge, application of technical knowledge and completion of matters taken on, and efficiency in the practice of law.

Responses to the question as to whether the individual providing the reference was aware of “any facts or circumstances which indicate the applicant is not presently able to represent clients with the competency and professionalism expected for a board certified attorney” were affirmative. As explanation, your work product was described as mediocre, your billing practices were described as questionable, and overall, you were characterized as not having the special knowledge, skills or proficiency in handling the usual matter in the specialty field. In addition, responses to the question regarding “incidents in the applicant’s law practice which, in your opinion, reflect insufficient skills, knowledge, proficiency or ethics in the practice of elder law” were affirmative and indicated you are more interested in fees than representing your client’s best interests. In addition, reviewers responded to the final question on the reference statement that reads: “Do you recommend this applicant for board certification in elder law, thereby affirming his or her special knowledge, skills and proficiency in elder law as well as good character, ethics and reputation for professionalism in the practice of law”, by declining to recommend you for recertification.

Please understand that a recommendation to deny a candidate for recertification is not based upon an isolated statement or incident. All of the peer review received is carefully evaluated and the totality of the comments, from a qualitative rather than a quantitative perspective, determines whether an applicant satisfies this component required for recertification. (Doe’s Appendix, Ex. 4).

Doe was advised of his right to submit additional information he would like considered by The Certification Committee prior to its reaching a final recommendation. (Doe’s Appendix, Ex. 4, p.2).

In response, Doe, through counsel, submitted additional information to The Certification Committee on March 13, 2009. (Doe’s Appendix, Exh. 6, ¶1). After consideration of the additional information, The Certification Committee advised

Doe, through counsel, by letter dated June 1, 2009, that it would recommend to BLSE that recertification be denied on the basis set forth in the above-quoted letter of February 6, 2009. (Doe's Appendix, Ex. 6). Doe was therein advised that BLSE would consider The Certification Committee's recommendation and that he would be given notice of BLSE's decision. *Id.*

After review of Doe's entire application file, including supplemental materials, BLSE advised him, through his counsel, by letter dated July 10, 2009 (Doe's Appendix, Ex. 9) of its initial decision to deny recertification for the reasons set forth in The Certification Committee's letters of February 6, 2009 and June 1, 2009. (Doe's Appendix, Ex. 4 and Ex. 6). Doe was advised therein of his right to request an appearance in further consideration before BLSE. (Doe's Appendix, Ex. 6). Doe requested such an appearance which was ultimately scheduled for September 11, 2009 at which time he appeared before BLSE with counsel.<sup>1</sup> (Doe's Appendix, Ex. 10).

Thereafter, by letter of September 18, 2009, Doe was advised of the decision of BLSE to uphold its prior decision to deny recertification. (Doe's Appendix, Ex. 11). On November 3, 2009, Doe filed an appeal of the decision of BLSE to The Appeals Committee ("AC") of the Board of Governors of The Florida Bar pursuant to BLSE standing policy 2.12(e). (Doe's Appendix, Ex. 12). Said appeal to the

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<sup>1</sup> The undersigned, BLSE Chair on September 11, 2009, did recuse himself from participation in all underlying proceedings and voting. (Doe's Appendix Ex. 10, p.4, ¶3).

AC included a copy of the September 11, 2009 transcript of the appearance before BLSE. (Doe's Appendix, Ex. 12, p.5, ¶3).

On January 28, 2010, Doe appeared with counsel before the AC at its scheduled meeting in Tallahassee. Thereafter, the AC affirmed the decision of BLSE to deny recertification for the reasons set forth in The Certification Committee's letters of February 6, 2009 and June 1, 2009. (Doe's Appendix, Exh. 15). Further, the AC stated:

As required within the scope of its review set forth in BLSE Policy 4.03(a), [AC] (Appeals Committee) considered whether appellant [Doe] was provided the procedural rights set forth in the two hundred series of the BLSE policies and whether BLSE applied the correct procedural standards. Based upon the record, [AC] finds that BLSE complied with the procedural requirements of BLSE Policy 2.13 given the mandated objectives of Rule 6-3.6(b)(3) and Rule 6-3.5(c)(6), Rules Regulating The Florida Bar. [AC] further finds that appellant's burden under BLSE Policy 4.03(b) has not been met as appellant has failed to make a clear and convincing showing of arbitrary, capricious, or fraudulent denial of procedural rights or misapplication of BLSE policies or The Rules Regulating The Florida Bar. (Doe's Appendix, Ex. 15, p.2).

Doe filed his petition for review of the AC's decision by the full Board of Governors of The Florida Bar (BOG) on February 18, 2010. (Doe's Appendix, Ex. 16). In addition, on March 24, 2010, Doe filed a motion for the BOG to stay further consideration of his request for review pending resolution of a federal court action in the United States District Court for the Middle District of Florida for

declaratory relief against, among other defendants, The Florida Bar's Board of Governors. (Doe's Appendix, Ex. 18).

By Order dated June 10, 2010, the BOG denied Doe's motion to stay and in the same Order, denied Doe's request for review before the full BOG.

[T]he BOG hereby affirms and adopts The Certification Plan Appeal Committee's February 3, 2010, decision to affirm BLSE and deny the Petitioner's application for recertification in Elder Law. (Doe's Appendix, Ex. 21).

Thereafter, Doe timely filed this petition pursuant to BLSE Policy 4.11 and pursuant to Rule 6-3.10, Rules Regulating The Florida Bar.

### **III. RELIEF SOUGHT**

BLSE requests that this Court deny Doe's Petition for Writ of Certiorari and Request for Relief and uphold the decision of the Board of Governors of The Florida Bar, The Appeals Committee [AC], The BLSE and The Elder Law Certification Committee to deny Doe's request for recertification. Further, BLSE requests this Court to uphold the confidentiality of peer review and deny Doe's request that he be provided with peer review materials and deny his request to proceed *de novo* before BLSE.

### **IV. ARGUMENT**

#### **A. MR. DOE WAS NOT DEPRIVED OF HIS PROCEDURAL DUE PROCESS RIGHTS.**

- 1. Doe voluntarily waived access to confidential peer review materials.**



Initially, Doe claims he did not waive his procedural due process rights when he signed his application for recertification. Doe asserts that he was “coerced into signing the purported ‘waiver,’ [of access to peer review materials] for it was embedded in the [recertification] application, and he could not apply for recertification without signing the application.” (Petition for Review, pp.10, 11).

Doe expressly agreed to the confidentiality provisions by signing his recertification application wherein, after swearing under oath that he had carefully read the application “in its entirety” he agreed as follows:

**I FURTHER UNDERSTAND THAT THE PEER REVIEW PROCESS IS UNABLE TO SERVE ITS PURPOSE UNLESS THE INDIVIDUALS FROM WHOM INFORMATION IS REQUESTED ARE GUARANTEED COMPLETE CONFIDENTIALITY. BY APPLYING FOR RECERTIFICATION, I EXPRESSLY AGREE TO THE CONFIDENTIALITY OF THE PEER REVIEW PROCESS AND EXPRESSLY WAIVE ANY RIGHT TO REQUEST ANY INFORMATION OBTAINED THROUGH PEER REVIEW AT ANY STAGE OF THE CERTIFICATION PROCESS.** (Doe’s Appendix, Ex. 2, p.4). (Emphasis and capitalization in original.)

Doe is bound by this waiver. *Quality Foods, Inc. v. E.S. Fire Insurance Co.*, 715 F.2d 539, 542 (11th Cir. 1983) (“a person who executes a written document in ignorance of its contents cannot plead ignorance in order to avoid the effect of the document.”); *Rocky Creek Retirement Properties, Inc. v. Estate of Fox, ex rel. Bank*, 19 So.3d 1105, 1108 (Fla. 2nd DCA 2009) (“[a] party normally is bound by a contract that the party signs unless the party can demonstrate that he or she was

prevented from reading it or induced by the other party to refrain from reading it.”).

As an attorney with twenty-eight years experience, Doe cannot seriously contend that he was unaware of the waiver and did not intend to be bound by it. In fact, this identical issue was recently considered in an unpublished order on Defendant’s Motion to Dismiss Amended Complaint in *Petersen v. The Florida Bar*, 2010 WL 4275312 (M.D. Fla. June 28, 2010) (BLSE App, Ex 1). There, the plaintiff advanced the same arguments as Doe. In commenting upon an identical petition for specialty recertification, the Honorable William H. Steele, Chief United States District Judge, opined:

Insofar as Petersen seeks to transform The Florida Bar’s withholding of confidential peer review materials from him into Constitutional violations, defendants argue that his claims should be dismissed on principles of waiver. The recertification application that Petersen signed included a prominent, unambiguous waiver of his right to obtain that information. In particular, Petersen “expressly agree[d] to the confidentiality of the peer review process and expressly waive[d] any right to request any information obtained through peer review at any stage of the certification process.” (Citation to document omitted). Defendants maintain that Petersen’s waiver is binding and effective to bar all of his claims predicated on the withholding of peer review information. Petersen reports that this waiver is unenforceable and ineffectual because he entered into it involuntarily. (*Petersen* at 6.)

Under Florida law, as elsewhere, a waiver is defined as "the voluntary and intentional relinquishment of a known right." *Raymond James Financial Services, Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla. 2005). With respect to waivers of

constitutional rights, Florida courts perform two inquiries. "First, the court must determine if the waiver was voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. ... Second, the court must determine whether the waiver was executed with a full awareness of the nature of the rights being abandoned and the consequences of their abandonment." *Sliney v. State*, 699 So.2d 662, 668 (Fla. 1997) (citations omitted); *see also Hunter v. Moore*, 304 F.3d 1066, 1071 (11<sup>th</sup> Cir. 2002) ("Waiver of a constitutional right will only be found if the record discloses its intentional relinquishment or abandonment.") (citation and internal quotation marks omitted). The validity of a waiver must be ascertained by consideration of the totality of the circumstances. *See Jean-Louis v. Forfeiture of 8203,595.00 in U.S. Currency*, 767 So.2d 595, 598 (Fla. 4th DCA 2000). (*Petersen* at 6, 7)

After analyzing Florida law on waiver, Judge Steele concluded that:

The law is quite clear that contract terms are not automatically stripped of validity when the drafter proffers them on a take-it or leave-it basis. To the contrary, Florida courts have routinely upheld and enforced waivers contained in such agreements in analogous circumstances. (*Petersen* at 8)

## **2. Doe's procedural due process rights have not been violated.**

Doe contends that his due process rights have been violated because he "has never been provided with the peer review -- either negative or positive." (Doe's Petition at 23).

This question was recently answered in two decisions from the United States District Court, Middle District of Florida *Zisser v. The Florida Bar, et al.*, 2010 WL 4282103 (M.D. Fla., March 29, 2010) (BLSE App, Ex 2) and *Petersen v. The Florida Bar, et al.*, 2010 WL 4275312 (M.D. Fla., June 28, 2010). (BLSE App, Ex.

1.)

Doe cites the United States Supreme Court's Decision in *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 909, 47 L. Ed. 2d 18 (1976) for the proposition that his due process rights were not heard "at a meaningful time and in a meaningful manner." (Doe's Petition at 24).

The essence of procedural due process is notice and an opportunity to be heard. See, *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 909, 47 L. Ed. 2d 18 (1976). The basic purport of due process is that, before a deprivation of either property or liberty takes place at the hands of the state, the effected person must be forewarned and afforded an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). As the rubric's name implies, "procedural due process" is simply a "guarantee of fair procedure." *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990). (*Zisser* at 20).

After concluding that *Zisser* did not have a protected property or liberty interest, Judge Howard examined *Zisser's* claim, not unlike Doe's, that when an attorney is denied board certification, a stigma is imposed upon the attorney so grievous as to damage the attorney's standing in the legal field or the broader legal community.

Preliminarily, the court finds nothing in the record to support *Zisser's* contention that the absence of board certification, imposes a stigma so grievous as to damage an applicant's standing in the legal field or the broader community. A denial of certification does not imply that a candidate is incompetent, unethical or otherwise incapable of discharging her duties as an attorney. (Citation omitted.) The Florida Bar designed the certification program to identify those members of the Bar who practice law at the highest level and demonstrate exceptional

‘character, ethics, and reputation for professionalism.’ (Citation omitted.) In short, the program seeks to honor and identify to the public the most exceptional attorneys practicing in their chosen field. A denial of certification, at most, denotes that the candidate, in the eyes of The Florida Bar, does not fall within this select group. Nothing more. Surely, not all can claim the vestiges of the elite...The absence of certification communicates nothing derogatory about the level of competence of such persons. Simply put, a denial of certification, while perhaps disappointing to the applicant, is not accompanied by any stigma, much less a stigma so serious as to damage one’s reputation in the community or foreclose a range of employment opportunities.

The absence of continuing certification for one previously board certified in a particular area of law discloses nothing about the applicant’s competence. The absence of continued certification could simply reflect an individual’s decision not to seek certification for any number of reasons. (*Zisser* at 33, n. 15).

The Constitution does not guarantee everyone a blue ribbon. (Citation omitted.) (*Zisser* at 33, 34.)

The *Zisser* Court concluded that because Zisser had failed to identify any constitutionally protected property or liberty interest of which she had been deprived, she could not satisfy the requisite elements of a procedural due process violation. (*Zisser* at 39). Doe cannot meet the elements of a procedural due process violation.

**B. DOE DOES NOT HAVE A PROTECTED INTEREST  
IN HIS ELDER LAW RECERTIFICATION.**

Doe claims that he has been deprived of a liberty or property interest without due process of law, claiming that he has protected property and liberty interest in his elder law recertification.

In both *Zisser* and *Petersen, supra*, Florida board certified attorneys challenged denial of re-certification and alleged, *inter alia*, a denial of due process and a denial of allegedly constitutionally protected rights of property and liberty.

*Zisser* was resolved after a bench trial. In a well-reasoned decision, Judge Howard considered Zisser's contention that The Florida Bar deprived her of a property and liberty interest without due process of law and that BLSE Policy 2.13(a), which provides confidentiality of peer review, violated due process because it failed to sufficiently provide notice of the content of the peer review statements and the makers of the statements, thereby depriving a re-certification applicant the opportunity to challenge an adverse finding. (*Zisser* at 19).

In ruling for The Florida Bar, Judge Howard stated in her opinion that:

At bottom, Zisser's property interest argument is based on the misguided belief that state law creates a property right in board certification, but the clear text of The Florida Bar rules contradict that belief." (*Zisser* at 28).

Moreover:

Preliminarily, the court finds nothing in the record to support Zisser's contention that the absence of board certification imposes a stigma so grievous as to damage an applicant's standing in the legal field or the broader community. A denial of certification does not imply that a candidate is incompetent, unethical or otherwise incapable of discharging her duties as an attorney. (Citation omitted.) The Florida Bar designed the certification program to identify those members of the Bar who practice law at the highest level and demonstrate exceptional 'character, ethics, and reputation for professionalism.' (Citation omitted.) In short, the program seeks to honor and identify to the public the most exceptional attorneys practicing in their chosen field. A denial of certification, at most, denotes that the candidate, in the eyes of The Florida Bar, does not fall within this select group. Nothing more. Surely, not all can claim the vestiges of the elite...The absence of certification communicates nothing derogatory about the level of competence of such persons. Simply put, a denial of certification, while perhaps disappointing to the applicant, is not accompanied by any stigma, much less a stigma so serious as to damage one's reputation in the community or foreclose a range of employment opportunities. (Citation omitted.) (*Zisser* at 33, 34.)

Moreover, as pointed out in a footnote in Judge Howard's opinion:

The absence of continuing certification for one previously board certified in a particular area of law discloses nothing about the applicant's competence. The absence of continued certification could simply reflect an individual's decision not to seek certification for any number of reasons. (*Zisser* at 33, n. 15).

Last, the court concluded that Zisser sustained no due process violation, as she failed to identify any Constitutionally protected property or liberty interest of which she had been deprived.

Similar issues were raised in the *Petersen* case which was decided by way of an order dismissing Petersen's Amended Complaint with prejudice. (Appendix 1.)

Like Zisser, Peterson challenged his denial of elder law re-certification by way of a Section 1983 action asserting violations of alleged Constitutional rights, including procedural due process, substantive due process, freedom of speech, access to the courts, and denial of property and liberty interests.

Petersen also claimed that his procedural and substantive due process rights were violated based upon his contention that the criteria needed for re-certification was vague and arbitrary and without meaningful standards. Judge Steele held that Petersen had no property or liberty interests citing, *inter alia*, *Zisser, supra*. (*Petersen* at 14.)

The court then noted that Petersen failed to establish a substantive due process claim because he had failed to allege violation of a fundamental right. Moreover, even if he could have brought such a claim in the absence of a fundamental right, he failed to show deprivation of a protectable interest in life, liberty or property. (*Petersen* at 16.)

Petersen alleged that his free speech had been violated in contending that the peer review rules were "fuzzy and far reaching" and that "it is impossible to determine what communicative speech or conduct will subject an applicant to negative peer review." (*Petersen* at 17.)



In ruling against Petersen on this issue, Judge Steele held:

As an initial matter, it must be emphasized that the peer review rules and standards governing The Florida Bar's voluntary re-certification and specialization program do not purport to punish, regulate, restrain or chill any protected speech. At most, they simply provide that a lawyer who chooses to apply for re-certification must submit to peer review, which is conducted for the stated purpose of 'assess[ing] competence in the specialty field, and professionalism and ethics in the practice of law.' (Rule 6-3.5(c)6). Thus, these rules are directed not at speech, *per se*, but at conduct by an officer of the court bearing on his or her expertise as an elder lawyer, in his or her professionalism and ethics in the practice of law. Plainly, these rules have no more than a remote and conjectural impact on speech protected by the First Amendment. Petersen's argument to the contrary is so speculative and attenuated that it strains credulity. (*Petersen* at 17.)

In pursuing this argument, Petersen, like Doe, contended that the rules and policies pertaining to recertification were vague and secret. In addressing this argument, Judge Steele commented:

As for vagueness, the court finds the terms "professionalism and ethics in the practice of law" are not so vague to be inscrutable to the class of attorneys to whom they apply, particularly given the commonly understood meaning of such terms within the legal profession, where attorneys receive both law school training and continuing legal education in the very fields of professionalism and ethics...It is frankly unconceivable that The Florida Bar's rules providing for inquiry into a board certification applicant's 'professionalism and ethics in the practice of law' will chill a substantial amount of legitimate speech; therefore, the objected-to rules and regulations are not void for vagueness. (*Petersen* at 19, 20.)

In granting The Florida Bar's motion to dismiss Petersen's Amended Complaint with prejudice, Judge Steele concluded that:

In short, the elder law certification rules challenged by Petersen do not have a sufficiently substantial impact on conduct protected by the First Amendment to render them unconstitutional, they are not overbroad because they do not punish a substantial amount of protected free speech relative to their legitimate sweep, and they are not so vague that attorneys of common intelligence could not understand their meaning or that a substantial amount of free speech would be chilled. (*Petersen* at 20).

In large part, like *Zisser* and *Petersen*, Doe's position that the confidentiality of peer review set forth in Rule 6-3.12 must give way to "due process [and] basic fairness principles", hinges on his position that he has a constitutionally protected property or liberty interest in his status as a board-certified lawyer. As a corollary, he suggests his interest in being recertified is constitutionally protected because he has a "legitimate claim of entitlement" to it. (Doe's Petition at 20).

### **C. NO LAWYER HAS A CLAIM OF ENTITLEMENT TO RECERTIFICATION.**

Mr. Doe has no constitutionally protected interest in recertification. To show a constitutionally protected interest, one must identify an interest to which he or she is legitimately entitled. *See, Troup v. Fulton County, Ga.*, 297 Fed. Appx. 934, 935 (11th Cir. 2008) (affirming denial of disability retirement benefits; "applicants for benefits do not have a legitimate entitlement to those benefits that triggers due process protection"). Doe undoubtedly is not "legitimately entitled" to recertification in light of his failure to meet the minimum requirements. Moreover, he is not even "legitimately entitled" to practice law. *See, The Florida Bar v. Tipler*, 8 So.3d 1109,

1116 (Fla. 2009) (“[a] license to practice law confers no vested right to the holder,” citing Rules Regulating The Florida 3-1.1); *Kaimowitz v. Eighth Judicial Circuit Bar Ass’n*, 2008 WL 780743, \*3 (N.D. Fla. 2008) (“there is no ‘right’ to practice law”).

Doe has cited *Cornelius v. LaCroix*, 838 F. 2d 207 (7th Cir. 1988), apparently in support of his position that he has a legitimate claim of entitlement to his status as a board certified lawyer. (Doe’s Petition, at 18) But *Cornelius* provides no support for the petition. The court held the plaintiff had no legitimate claim of entitlement to status as a minority business enterprise (MBE), and therefore no constitutionally protected property interest in retaining M.13E status, because that status did not “securely belong” to it under state law. *Id.* at 210.

Because Doe’s certification unequivocally terminated after five years, he cannot claim that recertification securely belongs to him under Florida law.<sup>2</sup>

*Club Misty, Inc. v. Laski*, 208 F. 3d 615 (7th Cir. 2000) cited in the petition (p. 13) (R230) is also inapplicable. That case addressed a liquor license that was revocable only for good cause during its one year term and renewable as a matter of right when the term expired unless the licensee was shown to be unqualified or his premises unsuitable. *Id.* at 616.

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<sup>2</sup> Certification in Elder Law expires by Its terms after five years and recertification may only be granted if the applicant satisfies the minimum standards for proficiency, including satisfactory peer review. Rules 6-3.6(a)-(c), and 6-20,1(c), Rules Regulating The Florida Bar.

**D. DOE IS NOT FORECLOSED FROM HIS EMPLOYMENT.**

While federal law recognizes that one has a property interest in his or her employment, *see, Greene v. McElroy*, 360 U.S. 474, 492 (1959), a state rule or practice infringes constitutionally on that interest only when it precludes or forecloses the employment altogether. *See, Conn v. Gobbert*, 526 US, 286, 291-92 (1999).

For example in *Slummy v. Harrison*, 875 F. 2d 1529 (11th Cir. 1989) the court found the plaintiff physician had a "legitimate claim of entitlement to a continuation of medical staff privileges" (without which he could not work in a hospital lab) because the "medical staff bylaws establish specific standards of procedures to be applied in considering the suspension, denial, or revocation of the staff privileges of any member." *Id.* at 1532. In the present case, Doe can point to no such standard or procedure that gives him any expectation or claim of entitlement to continued certification status after his initial certification expired.

The BLSE's decision to deny recertification to Doe (affirmed by the AC) does not preclude or foreclose his employment as an attorney.

Participation in the certification program of The Florida Bar is not a requirement to practice law. Any doubt in this regard is removed by Rule 6-3,4 which provides in subparts (a), (b), and (d) that:

(a) Limit on Right to Practice. No standard shall be approved that shall, in any way, limit the right of a certificate holder to practice law in all areas.

(b) Certification Not Required to Practice. No lawyer shall be required to be certified before practicing law in any particular area.

(d) Voluntary Nature of Plan. Participation in the plan shall be on a voluntary basis.

#### Rule 6-3.4

Denial of recertification to Doe does not implicate any loss of a constitutionally protected right to employment. *See, Reis v. Texas Bd. of Legal Specialization*, 2002 WL 32126265 (W.D. Tex. 2002) (holding that Texas attorney had "no constitutionally protected liberty or property interest in sitting for the Estate Planning and Probate exam or certification in her specialty by the TBLS.").

In both *Zisser* and *Petersen*, the United States District Court for the Middle District of Florida recognized that the denial of Florida Bar Board Certification does not foreclose an attorney from employment.

The court also considers whether a denial of certification would foreclose an applicant's "range of opportunities" in the legal field. *See, Roth*, 408 U.S. at 574, 92 S.Ct. at 2707.) As previously noted, the Rules provide that the absence of board certification does not in any way limit an attorney's ability to practice in the state or to practice in any area of the law. For her part, Zisser provided no evidence suggesting that an applicant denied certification can no longer practice in a particular forum or practice area or that she will have any difficulty obtaining future employment. *See, Id.* at 575, 29 S.Ct. at 2708 ("It stretches the concept too far to suggest a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another"). In fact, there exists not a scintilla of evidence that the absence or loss of board certification has any negative reputational effect at all. No evidence was even offered demonstrating that a client was more likely to retain a board certified attorney than a non-certified attorney or that the legal community would ostracize an attorney who was not board certified. All that was offered

were conclusory statements by counsel that Zisser had held herself out to the public as being board certified on her website and letterhead and that attorneys who have and will do likewise in the future will suffer reputational harm if forced to remove the designation. This contention, in addition to being overstated, is unsupported by the record as there is no indication that any opportunity will be foreclosed as a result of being forced to remove the phrase “Board Certified” from one’s website or letterhead. (Footnote omitted.) *Zisser* at 34, 35.

Denial of board certification, however, does not exclude an individual from the practice of law. Indeed, it imposes no restriction whatsoever on a licensed attorney’s ability to practice law in the state. The Rules relating to board certification specifically address this issue:

#### **Rule 6-3.4**

**(a) Limit on right to practice.**

No standard shall be approved that shall, in any way, limit the right of a certificate holder to practice law in all areas.

**(b) Certification not required to practice.**

No lawyer shall be required to be certified before practicing law in any particular area.

...

**(d) Voluntary nature of plan.**

Participation in the plan shall be on a voluntary basis.

R. Regulating Fla. Bar 6-3.4. The record before the Court affirmatively establishes that an attorney’s inability to obtain board certification does not in any way prevent the attorney in engaging in her occupation. Indeed, the absence of board certification does not prevent an attorney from appearing before any court or from accepting any particular client or cause of action. *Zisser* at 22, 23.

Like *Zisser*, the only support provided by Doe other than argument is his conclusory affidavit (Doe’s Appendix, Ex. 1). Generally, conclusory allegations in affidavits are

insufficient to establish a material fact. *See, e.g., Candler Holdings Ltd. I v. Watch Omega Holdings, L.P.*, 947 So.2d 1231, 1235 (Fla. 1<sup>st</sup> DCA 2007) and *Alvarez v. Florida Insurance Guaranty Association*, 661 So.2d 1230, 1232 n.2 (Fla. 3d DCA 1995). In addition to being conclusory, ¶5 contains an impermissible hearsay statement. *See, Candler Holdings, and Alvarez, supra.*

A similar conclusion was reached in *Petersen*.

It is not, however, mandatory for Petersen to maintain a certification as an elder law specialist in order to practice elder law in the state of Florida. To the contrary, the Rules Regulating the Florida Bar unambiguously provide that "[n]o lawyer shall be required to be certified before practicing law in any particular area" and that "[p]articipation in the [certification] plan shall be on a voluntary basis." Rule 6- 3.4(b),(d). Thus, with or without certification, Petersen remains a licensed Florida attorney who is free to engage in the unfettered practice of his specialty of elder law throughout Florida, representing any clients and appearing before any courts in the state as he may see fit with no substantive restrictions on his ability to practice law. The difference is, apparently, that the certification is useful to Petersen in marketing himself, developing clients, and attracting referrals. *Petersen* at 2.

Certainly, certification is not required in order to practice law, or even Petersen's chosen specialty of elder law, in the State of Florida. The Rules Regulating the Florida Bar make clear that "[p]articipation in the [certification] plan shall be on a voluntary basis." Rule 6-3.4(b),(d). No alleged facts suggest otherwise. Even if the waiver of his right to see peer review materials was unpalatable to Petersen at the time of his application (which he has not alleged in his pleading), and even if his recertification application would have been summarily rejected without a waiver (which he has not alleged any specific facts to demonstrate), Petersen still had a choice: (A) sign the

recertification application and forego his right to access the peer review materials, or (B) refrain from applying for recertification, and continue to earn a living practicing law without a certification just as thousands of other lawyers in the State of Florida do successfully every single day. Just because Petersen may not have been thrilled with these options does not imply that he lacked meaningful choice. Ultimately, Petersen elected the first option, rather than the second, without any hint of interference or undue influence from anybody. Therefore, his waiver of his right to obtain peer review information was the product of free and deliberate choice, rather than intimidation, coercion or deception. *Petersen* at 10.

#### **E. DOE'S OTHER CASE AUTHORITIES ARE OFF POINT.**

In support of his argument that the Appeals Committee [AC] and the Board of Governors misconstrued applicable rules, Doe has also cited a number of decisions and articles dealing with licensing, license revocation, discipline and medical certification. These are inapplicable because the elevated level of due process was in each case based on a demonstrated constitutionally protected interest.

In *Green v. Brantley*, 719 F. Supp. 1570 (N.D. Ga. 1989), the court determined that the FAA's revocation of plaintiff's license as a flight examiner "totally foreclose[d] the plaintiff's opportunity to be a flight examiner" and, consequently, plaintiff was entitled to a Fifth Amendment due process hearing prior to the license termination. *Id.* at 1577.<sup>3</sup>

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<sup>3</sup> The court's decision was also based on the applicability of certain provisions of the federal Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1977, 1986 supp.), which required a hearing for license revocation. 719 F. Supp. at 575. The Administrative Procedure Act has no bearing on Florida Bar board certification.



The petition also contains an extensive discussion of the U.S. Supreme Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and the three-prong analysis articulated there to determine the sufficiency of administrative proceedings. But *Mathews* dealt with the termination of an individual's Social Security disability benefits which the court and the litigants acknowledged to be a "statutorily created 'property' interest protected by the Fifth Amendment." 424 U.S. at 332. There is no such statutorily-created property interest in board certification. Moreover, the first factor described in *Mathews* — the "private interest at stake" — is asserted by Doe to be the right to earn his living. (Doe's Petition at 24). Because Rule 6-3.4 makes clear that Doe may continue to practice law and earn a livelihood without certification, there is no private interest such as described in *Mathews* at issue here.

Finally, in his assertion that in administrative proceedings, a party "facing a deprivation is entitled to review the actual evidence to be considered" (Petition at 29), Doe relies on authorities in which the aggrieved party had a clear right to continued participation in the benefit or program at issue. *Goldberg v. Kelly*, 397 U.S. 254 (1970) involved a state's efforts to terminate public assistance benefits to particular recipients. *Id.* at 256. In the absence of termination, the recipients would continue to enjoy the benefits. *Id.* *Garvey v. Freeman*, 397 F.2d 600 (10th Cir. 1968) addressed an administrative proceeding to determine per acre wheat yields on the plaintiff's land for purposes of calculating his participation in a government subsidy program. *Id.* at 603.

These cases are inapplicable because, again, Doe's status as a board certified Elder Lawyer expired at the end of his initial certification. Rule 6-3.6(a).

**F. THE BLSE AND BOARD OF GOVERNORS APPLIED THE CORRECT LAW.**

Doe argues that the BLSE and BOG misconstrued the application of Rule 6-3.12 of The Rules Regulating The Florida Bar and BLSE Policy 2.13(a). Rule 6-3.12 provides in relevant part that:

[A]ll matters including but not limited to applications, references, tests and test scores, files, reports, investigations, hearings, findings and recommendations shall be confidential so far as consistent with the effective administration of this plan, fairness to the applicant and due process of law.

BLSE Policy 2.13(a) provides in relevant part:

Any [certification or recertification] materials obtained by The Committee consisting of or containing comments by members of the bench and/or bar shall be treated as confidential.

Doe claims that confidentiality must yield, in appropriate cases, to due process and fairness principles. As pointed out above, Doe does not have a constitutionally protected liberty or property interest and therefore cannot establish a due process violation. In fact, Doe has had the benefit of every procedural entitlement arising from the applicable rules and policy. In short, he has received “due process and [basic fairness].”

He was advised of the basis of the recommendation of denial under consideration by The Certification Committee (Appendix at 4) and was afforded an opportunity to respond and submit additional evidence, which he did (Appendix at 6). He was advised of BLSE's decision to approve the recommendation and deny recertification and of his right to request an appearance before the BLSE, which he requested. He appeared before BLSE, with counsel, and addressed BLSE. He was advised of the ultimate decision of BLSE to deny recertification and the basis of that decision.

He filed an appeal of the decision of BLSE to the AC, including a transcript of the appearance before BLSE. He then appeared before the AC, again with counsel, and was given a full opportunity to present his arguments. Lastly, he petitioned the full BOG for a review, which review was denied.

Doe has not cited or referenced a single policy or procedure to which he was entitled but was denied.

The effective administration of the certification plan can only be served by confidentiality.

Doe contends that the effective administration of the certification plan is not served by reviewing and relying "solely on secret evidence." (Doe's Petition at 33).

This Court has held contrary to Doe's position by the Rule 6-3.12

#### CONFIDENTIALITY:

All matters including but not limited to, applications, references and test scores, files, reports, investigations,

hearings, findings, and recommendations shall be confidential so far as consistent with the effective administration of this plan, fairness to the applicant and due process of law.

Although not specifically addressing the confidentiality issue, this Court has previously upheld and affirmed the denial of recertification.<sup>4</sup> Moreover, Policies 2.13(a) and 2.13(d)(1) specifically and expressly provide that all materials and peer review comments and statements by members of the bench and/or Bar shall be maintained as confidential. This Court and the BLSE have determined that the effective administration of the certification plan necessarily depends upon the confidentiality of peer review.

### **CONCLUSION**

Doe's petition and all relief sought therein should be denied.

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<sup>4</sup> (BLSE Appendix, Ex. 3.) *See, The Florida Bar Re Raymond A. Haas*, Case No. SC00-1382 (Fla. March 19, 2001), *Re Jeanne L. Coleman*, Case No. SC05-2181 (July 19, 2006) (recertification specifically denied based upon unsatisfactory peer review) and *Jane Doe v. The Florida Bar*, Case No. SC08-904 (September 25, 2008) (denial of petitioner for review of denial of recertification *citing, inter alia*, Rule 6-3.12 confidentiality).

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. mail, postage prepaid, upon: LESLIE A. DAVIS, ESQ. and DOUGLAS R. BEAM, ESQ., attorneys for Petitioner, 25 West New Haven Avenue, Suite C, Melbourne, FL 32902, this 12<sup>th</sup> day of November, 2010.

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## **CERTIFICATE OF COMPLIANCE**

**I HEREBY CERTIFY** that the Petitioner's Respondent's Petition for Review of Specialty Recertification Denial has been typed in Times New Roman 14 point font, double spaced, and contains margins no less than one inch pursuant to the requirements of Fla. R. App. P. Rule 9.210(a)(2).

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