

## APPENDIX

[Additions are underlined; deletions are ~~struck through~~.]

Rule 1-14.1 as it will appear if amended:

**1-14.1 Purpose.** The primary purpose of the character and fitness screening before admission to The Florida Bar ~~are~~ is to protect the public and safeguard the judicial system.

RATIONALE:

Housekeeping change to correct the grammatical error that was included in the June 1997 proposed rules revision.

Rule 1-65 as it will appear if enacted:

**1-65 Disclosure of Information.** Unless otherwise ordered by the Supreme Court of Florida or the Chair of the Board or the presiding officer at a hearing before the Board, nothing in these rules shall prohibit any applicant or any witness from disclosing the existence or nature of any proceeding under Rule 3 or from disclosing any documents or correspondence served on, submitted by or provided to such persons.

RATIONALE:

Under the current rules of confidentiality (Rules 1-63 and 1-64), applicants are not authorized to release to third parties any information pertaining to their bar admissions process. Applicants who appear before the Board with character witnesses routinely advise such witnesses of the nature of the proceeding and often provide them with documents (e.g. transcript of a hearing, Specifications, bar application) to familiarize them with the concerns of the Board. Such disclosure has been done with the tacit approval of the Court and the Board. See Florida Board of Bar Examiners re J.C.B., 655 So.2d 79, 82 (Fla. 1995)("[W]e share the Board's concern that most of J.C.B.'s character witnesses did not know why he was disbarred.").

The proposed rule is patterned after Rule 3-7.1(e) of the Rules Regulating The Florida Bar. In that the unnecessary hardship created by an absolute rule of secrecy applies to all parties appearing before the Board, the proposed rule amendment authorizes disclosure for both applicants and witnesses. The proposed rule will not affect the Board's current practice of sequestering formal hearing witnesses at the request of either party. In cases involving sensitive subject matters, the proposed rule authorizes the Court or the Board to restrict disclosure.

Rule 1-70 as it will appear if enacted:

**1-70 Immunity and Privilege Rule.**

**1-71 Board and Employee Civil Immunity.** The Board of Bar Examiners, and its members, employees and agents are immune from all civil liability for damages for conduct and communications occurring in the performance of and within the scope of their official duties relating to the examination, character and fitness qualification, and licensing of persons seeking to be admitted to the practice of law.

**1-72 Immunity and Privilege for Information.** Records, statements of opinion and other information regarding an applicant for admission to the Bar, communicated by any entity, including any person, firm or institution, without malice, to the Board of Bar Examiners, or to its members, employees or agents, are privileged, and civil suits for damages predicated thereon may not be instituted.

**RATIONALE:**

Whenever the Board takes action adverse to the interest of a Bar applicant, concern about liability exposure on the part of those involved in that decision has the potential for affecting the central goal of the admissions process: protection of the public and support of the judicial system. Those familiar with case law should take comfort in the history of protection from personal liability by application of the law on privilege and qualified immunity and judicial immunity. See, e.g., *Bougere v. City of Harahan*, 978 F.2d 193 (5th Cir. 1992)(Holding that absolute privilege applies to statements to the Board by an applicant's former employer); *Diaz v. Moore*, 861 F.Supp. 1041 (N.D.Fla. 1994)(Holding that absolute judicial immunity and qualified immunity apply to claims filed against Board's executive director and Board member in their individual capacities). Adoption of this rule will provide a ready reference for Board members and third parties (such as employers, coworkers, mental health professionals, law school deans and faculty members) who furnish information to the Board.

The proposed rule amendment is based on a model rule developed by the Bar Admissions Committee of the American Bar Association Section of Legal Education and Admissions to the Bar. Such model rule was endorsed by the House of Delegates of the

American Bar Association in February 1998.

Rule 2-10 as it will appear if amended:

**2-10 Application Qualifications**

To seek admission to The Florida Bar, a person must meet the ~~eligibility~~ application qualifications and file the appropriate applications and fees as set out in this rule and comply with Rules 3 and 4.

**RATIONALE:**

Housekeeping change to clarify better what is necessary to file an application for admission to the Bar in Florida.

Rules 2-11, 2-11.1 and 2-11.2 to be deleted and relocated to Rule 4 if approved:

~~**2-11 Technical Competence.** All applicants seeking admission to The Florida Bar shall produce satisfactory evidence of technical competence through successful completion of the Florida Bar Examination as described in Rule 4.~~

~~**2-11.1 Educational Qualification.** To be admitted into the Florida Bar Examination and ultimately recommended for admission to The Florida Bar, an applicant must have received the degree of Bachelor of Laws or Doctor of Jurisprudence from an accredited law school (as defined in 4-13.2) at a time when the law school was accredited or within 12 months of accreditation or be found educationally qualified by the Board under the alternative method of educational qualification. Except as provided in Rule 2-11.2, none of the following shall be substituted for the required degree from an accredited law school:~~

- ~~(a) private study, correspondence school or law office training;~~
- ~~(b) age or experience;~~
- ~~(c) waived or lowered standards of legal training for particular persons or groups.~~

~~**2-11.2 Alternative Method of Educational Qualification.** For applicants not meeting the educational qualification above, the following requirements shall be met: (1) evidence as the Board may require that the applicant was engaged in the practice of law in the District of Columbia or in other states of the United States of America, or in practice in federal courts of the United States or its territories, possessions or protectorates for at least 10 years, and was in good standing at the bar of said jurisdictions in which the applicant practiced; and (2) a representative compilation of the work product in the field of law showing the scope and character of the applicant's previous experience and practice at the bar, including samples of the quality of the applicant's work, such as pleadings, briefs, legal memoranda, contracts or other working papers which the applicant considers illustrative of the applicant's expertise and academic and legal training. The representative compilation of the work product shall be confined to the applicant's most recent 10 years of practice and shall be complete and include all supplemental documents requested. In evaluating academic and legal scholarship the Board is clothed with broad discretion.~~

~~**(a) Deadline for Filing Work Product.** To be considered timely filed, the work product shall be complete with all supplemental documentation as required and filed by the filing deadline of the General Bar Examination as set out in Rule 4. Work Products initially filed incomplete and perfected after the deadline shall not be considered as timely filed. Late or incomplete work products will be given consideration for admission into the next administration of the bar examination for which the deadline has not passed.~~

~~(b) **Acceptance of Work Product.** If a thorough review of the representative compilation of the work product and other materials submitted by the applicant shows that the applicant is a lawyer of high ability and whose reputation for professional competence is above reproach, the Board may admit such applicant to the General Bar Examination and accept score reports from the National Conference of Bar Examiners or its designee.~~

RATIONALE:

Housekeeping change to relocate provisions regarding the bar examination from Rule 2 (application requirements) to Rule 4 (bar examination). See proposed amendments under Rule 4-13 below.

Rule 2-13.25 as it will appear if enacted:

**2-13.25 Satisfaction of Court-Ordered Restitution and Disciplinary Costs.** A person who was disbarred, resigned with pending disciplinary proceedings or was suspended from a foreign jurisdiction shall not be eligible to apply except upon proof of payment of any restitution and/or disciplinary costs imposed by a court in its order of disbarment, resignation or suspension. Any request for relief from the terms of the order must be granted by the court that ordered the payment of restitution or disciplinary costs.

RATIONALE:

The current provisions of the Rules do not address whether court-imposed restitution and disciplinary costs contained in orders of disbarment, resignation or suspension should be made prior to filing an application with the Board or prior to any favorable recommendation of admission by the Board. In several disbarment decisions, this Court has made it clear that eligibility to file an application with the Board should be conditioned upon satisfaction of such items.

For example, in the case of *The Florida Bar v. Wilson*, 643 So.2d 1063, 1065 (Fla. 1994), the Court held: "Wilson may apply for readmission to the Bar at the end of five years, provided that he has made full restitution to the State of New York." Similarly, in the case of *The Florida Bar v. Loebel*, 526 So.2d 65, 66 (Fla. 1988), the Court held: "No application for his readmission to The Florida Bar will be considered until he has made full restitution of the funds misappropriated in this case."

The current Rules contain several prerequisites for individuals wishing to apply for admission to The Florida Bar including the following: restoration of civil rights for a convicted felon (Rule 2-13.3); and completion of a criminal sentence of felony probation (Rule 2-13.4). The proposed rule would add to the list of prerequisites the following: satisfaction of restitution and disciplinary costs imposed by this Court or a foreign court in its order of disbarment, resignation or suspension.

In the case of *In re Dawson*, 131 So.2d 472, 474 (Fla. 1961), the Court observed the importance of payment of restitution by one wishing to be reinstated to membership in the

Bar:

While restitution alone will not ordinarily justify reinstatement, it is only under exceptional circumstances that reinstatement should be allowed in the absence of restitution, or an extremely diligent effort to accomplish it. This should be the rule because restitution is symbolic of repentance, honesty and a desire to do the right thing under the circumstances.

See also *In re Hessler*, 493 So.2d 1029, 1030 (Fla. 1986) ("If a suspended attorney wants to enjoy the privilege of practicing law after having been convicted of thievery, he should settle the debt created by his dishonest acts in full before readmission.").

It is reasonable to require a former attorney to pay any outstanding disciplinary costs assessed at the time of disbarment, resignation or suspension before incurring new fees associated with an application for readmission to the practice of law. In cases involving suspended attorneys, the Court has regularly required that reinstatement be conditioned upon payment of the costs of the disciplinary proceeding resulting in the suspension. See, e.g., *The Florida Bar v. Canto*, 668 So.2d 583, 585 (Fla. 1996); *The Florida Bar v. Blalock*, 325 So.2d 401, 404 (Fla. 1976).

The proposed rule would also provide for consistent and equal treatment for all similarly situated bar applicants. Lastly, the Board's proposal would underscore the importance of payment of restitution and disciplinary costs by individuals wishing to regain the privilege of practicing law after having lost such privilege by disbarment, resignation with pending disciplinary proceedings or suspension.

Rule 2-13.5 as it will appear if amended:

**2-13.5 Found Unqualified by Board.** An applicant or registrant who has been refused a favorable recommendation by the Board through the filing of Findings of Fact and Conclusions of Law which has not been reversed by the Supreme Court of Florida shall not be eligible to seek admission to The Florida Bar until 2 years after the date the Board delivered its adverse findings or such ~~longer~~ other period as set by the findings.

RATIONALE:

Housekeeping change to conform this rule to the proposed rule amendment under Rule 3-23.6 below.

Rule 2-14 as it will appear if amended:

**2-14 Petitions for Rehabilitation Reapplications for Admission.** Any applicant or registrant who was refused a favorable recommendation by the Board not reversed by the Court may, after 2 years or such ~~longer~~ other period as may be set in the findings, ~~file reapply for admission by filing a new Bar Application.~~ The new application shall answer each item for the period of time from the filing of the original application and shall include current references, a fingerprint card, and the applicable fee; ~~and Following the completion of the Board's new background investigation, all previously denied applicants shall appear before a quorum of the Board for a formal hearing to present a detailed written statement describing the scope and character of the applicant's evidence of rehabilitation pursuant to the provisions of Rule 3-13. and The statement shall be sworn and may include corroborating evidence such as letters and affidavits. Thereafter, the Board formal hearing panel shall determine at an investigative hearing or a formal hearing or both if the applicant's evidence of rehabilitation was is clear and convincing and shall make a recommendation pursuant to Rule 3-23.6. In determining whether an applicant should appear before an investigative hearing panel or a formal hearing panel or both, the Board is clothed with broad discretion.~~

## **RATIONALE**

Pursuant to the current Rules, all previously denied applicants must appear before a quorum of the Board for a formal rehabilitation hearing. The proposed rule amendment deletes such mandatory requirement and authorizes the Board to hold an investigative hearing in lieu of such formal hearing. To assist the Board in deciding what type of hearing(s) should be held, all previously denied applicants will be required to submit a sworn written statement setting forth in detail their efforts of rehabilitation. It is anticipated that the proposed rule amendment will make the reapplication process less time consuming and less costly for some applicants by eliminating the need to appear at a formal rehabilitation hearing.

The proposed renaming of a Petition for Rehabilitation to a Reapplication for Admission is housekeeping only in that the actual filing of a petition with the Court alleging rehabilitation has not been required since the June 5, 1997 amendments to the Rules. Under the current Rules, a bar applicant only needs to file a new bar application with the Board to begin the rehabilitation process.



Rule 2-22 as it will appear if amended:

**2-22 Deadline for Filing a Bar Application.** The Bar Application must be filed not later than 90 days from the date of notice that success has been attained on all parts of the Florida Bar Examination (General Bar Examination and Multistate Professional Responsibility Examination-- MPRE). Failure to comply with such filing deadlines will result in required reapplication for admission to the Florida Bar Examination and successful completion of all of the examination.

RATIONALE:

Prior to June 1997, Article VI, section 9.b. contained the language that is being added by the proposed rule amendment. Such language was inadvertently deleted by the June 1997 reconfiguration of the Rules. This housekeeping change will reinstate the provision setting forth the consequence of failing to file the bar application in a timely manner.

Rule 2-28 as it will appear if amended:

**2-28 Rehabilitation Application Fee for Reapplications for Admission Based on Rehabilitation.** Applicants or registrants who are reapplying for admission and asserting rehabilitation from prior conduct that resulted in an adverse recommendation through Findings of Fact and Conclusions of Law; shall file with the application the fee of \$1800.00.

RATIONALE:

The proposed changes are housekeeping only to conform to the changes being recommended under Rule 3-23.6.

Rule 2-30.1 it will appear if amended:

**2-30.1 Filed with the Board.** Any applicant or registrant who is dissatisfied with an administrative ruling of the Board not concerning character and fitness matters may petition the Board for reconsideration of the ruling. Applicants may also petition the Board for a suspension or waiver of any Bar admission rule or regulation. ~~Petitions seeking a suspension or waiver of any Board rule; or regulation or seeking review of order of an administrative ruling or action not related to a character and fitness recommendation should~~ may be presented in the form of a letter, ~~shall be filed with the Board within 60 days after receipt of written notice of the Board's action complained of and shall be accompanied by a fee of \$50.00.~~

## **RATIONALE**

The proposed rule amendment deletes the 60-day deadline for an applicant to petition for reconsideration of an administrative ruling or to petition for waiver of a Bar admission rule. Such deadline is often impossible to ascertain and would be administratively burdensome to enforce. The Board finds that such deadline is unnecessary to ensure the orderly processing of applicant files. The proposal conforms the rule to the Board's current practice of not enforcing such deadline. Other 60-day deadlines pertaining to review in the Court and reconsideration of findings of fact remain unchanged and will continue to be strictly applied by the Board.

Rule 2-30.2 as it will appear if amended:

**2-30.2 Filed with the Court.** Any applicant or registrant who is dissatisfied with an administrative ruling of the Board not concerning character and fitness matters may, within 60 days after receipt of written notice of ~~the Board's action complained of~~ such ruling, file an appropriate petition with the Clerk of the Supreme Court of Florida for review of the Board's action. If not inconsistent with these rules, the Florida Rules of Appellate Procedure shall be applicable to all proceedings filed in the Supreme Court of Florida. A copy of any such petition shall be served upon the Executive Director of the Board. The Board shall have 25 days after the service of said copy on the Executive Director in which to file a response to the petition and shall serve a copy upon the applicant or registrant. The matter shall be disposed of as the Court directs.

RATIONALE:

The proposed rule amendment is housekeeping only and is intended to improve the wording of such provision.

Rule 3-10.1 as it will appear if enacted:

**3-10.1 Essential Eligibility Requirements.** The Board considers the following attributes to be essential for all applicants and registrants seeking admission to The Florida Bar:

(a) Knowledge of the fundamental principles of law and their application.

(b) The ability to reason logically and accurately analyze legal problems.

(c) The ability to, and the likelihood that in the practice of law one will:

Comply with deadlines.

Communicate candidly and civilly with clients, attorneys, courts and others.

Conduct financial dealings in a responsible, honest and trustworthy manner.

Avoid acts that are illegal, dishonest, fraudulent or deceitful.

Conduct oneself in accordance with the requirements of applicable state, local and federal laws, regulations and statutes; any applicable order of a court or tribunal; and the Rules of Professional Conduct.

**RATIONALE:**

In 1996, the Board created a task force to review and revise its mental health guidelines to insure continuing compliance with the Americans with Disabilities Act (ADA) and continuing protection of the public from unqualified bar applicants. The task force first met on January 16, 1997. During the next year and a half, the task force held meetings and consulted with and obtained the advice of several mental health professionals. The efforts of the task force culminated at the Board's June 1998 meeting at which time the Board adopted the proposed Essential Eligibility Requirements for the practice of law in Florida.

In drafting the proposed essential eligibility requirements, the task force considered input from many sources, and sought to reduce the requirements to only those things that are, indeed, essential to discharging the obligations and responsibilities of an attorney. The task force initially relied upon essential eligibility requirements developed by bar examiners in Ohio and Minnesota.

After consideration and revision, the task force's initial draft of essential eligibility requirements was mailed to emeritus Board members, Florida law school deans and associate deans, the chief judge of each Florida Judicial Circuit, attorneys who routinely

represent applicants before the Board, Board consultants and outside counsel, the presidents of the various specialty groups within The Florida Bar, and the president, executive director and individuals involved with lawyer regulation at The Florida Bar. In all, 106 persons were invited to comment.

The comments received from those persons were reviewed by the task force and further revisions were made to the essential eligibility requirements. This revised draft was then provided to attorneys who practice in the area of rights of the disabled and their comments were considered by the task force.

Several of the current Rules also guided the Board in determining the essential eligibility requirements. For example, Rule 2-12, Proof of Character and Fitness, provides in pertinent part:

All applicants seeking admission to the Florida Bar shall produce satisfactory evidence of good moral character, an adequate knowledge of the standards and ideals of the profession, and proof that the applicant is otherwise fit to take the oath and perform the obligations and responsibilities of an attorney.

Another example is Rule 3-10, Standards of an Attorney. This rule states: "An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to professional duties owed to them."

Lastly, Rule 3-11, Disqualifying Conduct, provides: "A record manifesting a deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant or registrant may constitute a basis for denial of admission." Rule 3-11 continues by listing fourteen categories of conduct that may be treated as cause for further inquiry before the Board recommends whether the applicant or registrant possesses the character and fitness to practice law.

In summary, the proposed essential eligibility requirements are those traits that are necessary to the practice of law and that cannot be modified without fundamentally altering the obligations and responsibilities of persons admitted to The Florida Bar. The proposed essential eligibility requirements will assist the Board in determining whether an applicant with any particular disability is a "qualified individual with a disability" as that phrase is used in the ADA. In conjunction with the rule provisions quoted above, the proposed essential

eligibility requirements will also provide additional guidance to the Board in performing its evaluation of the character and fitness of each bar applicant.

Rule 3-17.3 to be deleted if approved:

~~**3-17.3 Fee for Extraordinary Expenses.** If the Board is required to make further inquiry into the character and fitness of a registrant as provided by Rule 3-11, then a fee of \$125.00 shall be assessed.~~

RATIONALE:

Housekeeping change only in that Rule 3-17.3 has become obsolete and the Board requests that it be deleted. The fee authorized by Rule 3-17.3 has not been imposed during the last five years. Such rule has been superseded by Rules 3-22.1 (fee for investigative hearing) and Rule 3-23.3 (fee for formal hearing).

Rule 3-23.6 as it will appear if amended:

**3-23.6 Board Action Following Formal Hearing.**

Following the conclusion of a formal hearing, the applicant or registrant shall be notified promptly by the Board of its decision which shall include one of the following recommendations:

(a) that the applicant or registrant has established his or her qualifications as to character and fitness;

(b) that the applicant be conditionally admitted to The Florida Bar in exceptional cases involving drug, alcohol or psychological problems upon such terms and conditions as are specified by the Board;

(c) that 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 shall recommend the applicant's admission providing the applicant has complied with all special conditions outlined in the Findings of Fact and Conclusions of Law;

(d) that 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 shall be presumed to be the minimum period of time required prior to reapplying for admission and establishing rehabilitation. In cases involving significant mitigating circumstances, the Board may within its discretion recommend that the applicant or registrant be allowed to reapply for admission within a specified period 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 may within its discretion further recommend that the applicant or registrant be disqualified from filing a petition for rehabilitation reapplying for admission for a specified period greater than 2 years up to 5 years.

**RATIONALE:**

The current provisions of the Rules provide that a bar applicant is disqualified for a period of two years following an unfavorable recommendation by the Board. Under the current Rules, the disqualification period can only be aggravated.

The proposed rule amendments would deem the current two-year disqualification period as presumptively correct absent significant mitigating or aggravating factors. The proposal was suggested by the Florida Standards for Imposing Lawyer Sanctions and will provide the Board with greater flexibility in tailoring its recommendation to the Court based upon the unique facts of each particular case.

As to the proposed deletion of the reference to a petition for rehabilitation, such

change is housekeeping only. See the rationale under Rule 2-14 above.

Rule 3-23.7 as it will appear if amended:

**3-23.7 Findings of Fact and Conclusions of Law.** In cases involving a recommendation other than from (a) above, the Board shall expeditiously issue its written Findings of Fact and Conclusions of Law. The Board's findings shall be supported by competent and substantial evidence in the formal hearing record. The Board's findings, conclusions and recommendation shall be subject to review by the Court as specified under Rule 3-40. The Board's findings, conclusions and recommendation shall be final if not appealed except in cases involving a favorable recommendation for applicants seeking readmission to the practice of law after having been disbarred or having resigned pending disciplinary proceedings. In those cases, the Board shall file a report containing its recommendation with the Court for final action by the Court. Admission to The Florida Bar for such applicants shall only occur by public order of the Court. All reports, pleadings, correspondence, and papers received by the Court in such cases shall be public information and exempt from the confidentiality provision of Rule 1-61.

**RATIONALE:**

The proposed rule amendment incorporates into the Rules the standard of review for the Board's findings announced by the Court in several published decisions. See, e.g. Florida Board of Bar Examiners re D.M.J., 586 So.2d 1049, 1050 (Fla. 1991) ("The Board's determination that the petitioner knowingly participated in the drug conspiracy is supported by competent, substantial evidence."); Florida Board of Bar Examiners re M.R.I., 623 So.2d 1178, 1179-1180 (Fla. 1993) ("After reviewing the record, we conclude that the Board's findings are supported by competent and substantial evidence."); and Florida Board of Bar Examiners re: G.J.G., ("Upon review, we find that Specification 1, charging that G.J.G. cheated on the July 1988 Multistate Bar Examination, was proven by competent substantial evidence.").

The proposed rule amendment does not change the substantive law in this area. The proposal is intended to inform bar applicants of the Court's standard.

Rule 4-13 as it will appear if amended:

~~**4-13 Educational Qualifications.** In order to submit to any portion of the Florida Bar Examination an applicant must provide evidence of receipt of or completion of the requirements for the degree of Bachelor of Laws or Doctor of Jurisprudence from an accredited law school or be found educationally qualified under the alternative method of educational qualification as provided in Rule 2-11.2. The law degree must have been received from an accredited law school or within 12 months of accreditation.~~**Technical Competence.**  
All applicants seeking admission to The Florida Bar shall produce satisfactory evidence of technical competence through successful completion of the Florida Bar Examination.

RATIONALE:

Housekeeping changes only. The deleted language will be incorporated into the proposed amendment to Rule 4.13.1. below. The added language is taken from Rule 2-11 which is to be deleted and relocated to Rule 4.

Rule 4-13.1 as it will appear if amended:

~~**4-13.1 Definition of Degree Requirements.** The term "completion of the requirements for the degree" refers to the time when completion of the requirements for graduation is recorded in the office of the law school dean or administrator.~~

~~**4-13.1 Educational Qualifications.** To be eligible to submit to any portion of the Florida Bar Examination an applicant must either complete the requirements for graduation or receive the degree of Bachelor of Laws or Doctor of Jurisprudence from an accredited law school or be found educationally qualified under the alternative method of educational qualification as provided in Rule 4-13.4. The law degree must have been received from an accredited law school or within 12 months of accreditation. Except as provided in Rule 4-13.4, none of the following shall be substituted for the required degree from an accredited law school:~~

~~(a) private study, correspondence school or law office training;~~

~~(b) age or experience;~~

~~(c) waived or lowered standards of legal training for particular persons or groups.~~

RATIONALE:

The proposed amendment consists of housekeeping and substantive changes. The housekeeping change relocates the provisions of Rule 2-11.1 (to be deleted) to the proposed rule amendment.

The substantive change deletes the language that the applicant "must provide evidence of receipt" of a J.D. degree before submitting to the examination. The Board does not require that an applicant provide a Certificate of Dean or final law school transcript prior to submitting to the examination.

The proposed change will clarify that admission into the General Bar Examination can be gained by the applicant's self-certification that he or she has or will complete the graduation requirements prior to submitting to the General Bar Examination. Admission into the General Bar Examination is granted based upon the applicant's notarized statement on the Application for Admission into the General Bar Examination regarding completion of the requirements for graduation. The proposed amendment will conform the Rule to the Board's current practices.



Rule 4-13.3 as it will appear if enacted:

**4-13.3 Definition of Degree Requirements.** The term "complete the requirements for graduation" refers to the time when completion of the requirements for graduation is recorded in the office of the law school dean or administrator.

RATIONALE:

The proposed rule amendment adds a definition for the phrase "complete the requirements of graduation." Such phrase is used in the proposed amendment to Rule 4-13.1. The proposed definition will conform the Rule to the Board's current practices.

Rule 4-13.4 as it will appear if enacted:

**4-13.4 Alternative Method of Educational Qualification.** For applicants not meeting the educational qualification above, the following requirements shall be met: (1) evidence as the Board may require that the applicant was engaged in the practice of law in the District of Columbia or in other states of the United States of America, or in practice in federal courts of the United States or its territories, possessions or protectorates for at least 10 years, and was in good standing at the bar of said jurisdictions in which the applicant practiced; and (2) a representative compilation of the work product in the field of law showing the scope and character of the applicant's previous experience and practice at the bar, including samples of the quality of the applicant's work, such as pleadings, briefs, legal memoranda, contracts or other working papers which the applicant considers illustrative of the applicant's expertise and academic and legal training. The representative compilation of the work product shall be confined to the applicant's most recent 10 years of practice and shall be complete and include all supplemental documents requested. In evaluating academic and legal scholarship the Board is clothed with broad discretion.

**(a) Deadline for Filing Work Product.** To be considered timely filed, the work product shall be complete with all supplemental documentation as required and filed by the filing deadline of the General Bar Examination as set out in Rule 4. Work Products initially filed incomplete and perfected after the deadline shall not be considered as timely filed. Late or incomplete work products will be given consideration for admission into the next administration of the bar examination for which the deadline has not passed.

**(b) Acceptance of Work Product.** If a thorough review of the representative compilation of the work product and other materials submitted by the applicant shows that the applicant is a lawyer of high ability and whose reputation for professional competence is above reproach, the Board may admit such applicant to the General Bar Examination and accept score reports from the National Conference of Bar Examiners or its designee.

RATIONALE:

The proposed rule amendment is housekeeping in nature. The proposed change relocates the provisions of Rule 2-11.2 (to be deleted) to Rule 4 regarding the bar examination.

Rule 4-17, 4-17.1 and 4-17.2 as they will appear if amended:

**4-17 Special Testing Accommodations**

**4-17.1 Accommodations.** ~~Special Testing~~ accommodations are provided by the Board at no additional cost to applicants.

**4-17.2 Requests for ~~Special Testing~~ Accommodations.** Applicants seeking ~~testing~~ accommodations due to disability must file a written petition for accommodations accompanied by supporting documentation or additional information as may be reasonably required on the forms supplied by the Board. The forms are available upon written request. Receipt of requests for ~~special testing~~ accommodations and supporting documentation are subject to the deadline and late filing fees applicable to all examinees.

**RATIONALE:**

The proposed rule amendments are housekeeping only and are intended to improve the wording of such provisions.

Rule 4-26.2 as it will appear if amended:

**4-26.2 Pass/Fail Line.** Each applicant must attain a scaled score of ~~131~~ 136 or better on Part A and on Part B under the individual method and an average of ~~131~~ 136 or better under the overall method, or such scaled score as may be fixed by the Court.

**RATIONALE:**

Currently, a bar applicant must obtain a scaled score of 131 or better to pass Parts A and B of Florida's bar examination. The proposed rule amendment will increase the pass/fail line from 131 to 136. The Board recommends that the increase be done in a two-step process. The first step will raise the pass/fail line to a scaled score of 133 to be effective one year from the date of approval by the Court. The second step would take place one year after the effective date of 133 and would increase the pass/fail line to 136.

Prior to 1961, an applicant was required to get 70 percent of the answers correct to achieve a passing score. Between 1961 to 1981, the pass/fail line varied from one bar exam administration to the next. During that 20-year period, the pass/fail line was established by averaging the top ten scores on the particular bar examination being graded and then subtracting 20 points from that average score.

In 1980, the Board recommended to the Court significant changes to the structure of the bar examination. *Petition of the Florida Board of Bar Examiners for Amendment of the Rules*, 397 So.2d 627 (Fla. 1981). Such changes included the following: reduction of the number of exam administrations during a year from four to two; replacement of the Florida Ethics portion of the exam with the Multistate Professional Responsibility Examination (MPRE); adoption of a scaling procedure to the Multistate Bar Examination to ensure a consistent standard of measurement of competence from examination to examination; and adoption of a pass/fail line of 133 scaled score or better. The changes were approved by the Court in 1981.

In making such changes in 1981, the Court and the Board were assisted by Stephen P.

Klein, Ph.D., a nationally recognized expert on the psychometric characteristics of bar examinations. In addition to Florida, Dr. Klein has done research and has consulted on a wide range of issues for the National Conference of Bar Examiners, over 20 state boards of bar examiners, the Association of American Law Schools, and several law schools.

In 1982, the Court *sua sponte* reduced the pass/fail line from 133 to 131. Florida Board of Bar Examiners re Amendment to Rules, 416 So.2d 803 (Fla. 1982). The pass/fail line has remained at 131 since 1982.

In that it had been nearly 20 years since the Board last recommended a change to the pass/fail standard and 17 years since the last time the pass/fail line was adjusted by the Court, the Board decided it was time to undertake a comprehensive review of such issue. In October 1998, under the leadership of incoming Chair Franklin Harrison, a task force was formed with senior Board member Valerie Davis serving as Chair.

In November 1998, the Board's staff presented an educational session to the Board. Such session addressed the different components of the current bar examination in Florida along with a history of the pass/fail line in Florida. Such history suggested the basis for the setting of the pass/fail line at 133 in 1981 and the subsequent decrease to 131 in 1982 was a desire to have a comparable percentage of individuals pass the exam as in preceding years.

In January 1999, Dr. Klein presented an educational session to the Board as to the different approaches available to the Board in conducting a review of its pass/fail standard. Dr. Klein has assisted other jurisdictions (most recently, Ohio and Minnesota) in conducting reviews of their pass/fail lines. He has also authored an article on the subject. Klein, Establishing Pass/Fail Standards, *THE BAR EXAMINER* 18 (August 1986).

Based upon the session with Dr. Klein, the Board decided to conduct two studies to evaluate whether the pass/fail standard should be raised, should be lowered or should remain the same. The first study (hereinafter referred to as the Readers Study) involved the use of the actual graders of the essay questions from a particular bar examination. Graders of the bar examination are Florida attorneys who performed extremely well on the bar examination and who have outstanding law school credentials.

The Readers Study was conducted with the graders from the February and July 1999 administrations of the bar examination. In his initial report to the Board dated August 12, 1999, Dr. Klein explained the methodology and results of the Readers Study:

The readers who graded the essay answers on the February 1999 exam were asked what raw score (on the 100-point scale) they felt most closely coincided with "passing." These standards were then compared to the score distribution on their assigned question. For example, the readers on Question #3 said a score of 41 or higher was passing and 61% of the applicants had a score of 41 or higher on this question. Thus, the "passing rate" for this question was set to 61%. The average of the passing rates over the three essay questions also was 61%. An inspection of the distribution of February 1999 total scores found that a total scale score of 133.5 would produce a 61% passing rate. Thus, the average of the readers' pass/fail standard was about a 133.5.

Klein, Panelist and Reader Judgments Regarding the Passing Score on the Florida Bar Exam 2 (Report dated August 12, 1999). A copy of Dr. Klein's report is attached to this petition as Exhibit A (hereinafter referred to as Klein's Report).

Dr. Klein performed the same study for the graders of the essay questions used on the recent July 1999 administration of the bar examination. In a letter dated October 19, 1999, Dr. Klein reported that the pass/fail standard established by the July 1999 readers "corresponded to an average total scale score of 141." A copy of Dr. Klein's letter is attached to this petition as Exhibit B (hereinafter referred to as Klein's Letter).

The second study (hereinafter referred to as the Lawyers Study) is explained in detail by Dr. Klein in his aforementioned published article. Klein, *supra* at 26-29. The desirable features of this study consist of the following:

It permits a large and diverse group of lawyers to participate in the standard-setting process. Moreover, these attorneys focus on the proficiency required for minimal competency because they cannot tell how their decisions will affect the passing rate.

Id. at 29.

The Lawyers Study consisted of six panels (one panel for each essay question used on the preceding two bar examinations) with four to five members on each panel. With the assistance of Justice R. Fred Lewis in soliciting volunteers from the judiciary, each panel included a state circuit judge as a representative of the trial courts. Each panel also included an associate dean or professor from a Florida law school. All of the accredited Florida law

schools were requested to provide a representative and five of the schools responded with one school providing two professors. Practicing Florida attorneys (including representatives from the Virgil Hawkins Bar Association and the Central Florida Association of Women Lawyers) and Board members completed the composition of each panel. See Klein's Report at Appendix B for a listing of all attendees.

Prior to the actual standard setting session, panelists were provided a copy of their assigned question to enable them to construct their own criteria or scoring guide for determining what would be a satisfactory response to the question. The session was subsequently held in Orlando on June 17, 1999.

The methodology of the standard setting session consisted of the following:

Each panelist was then given a set of 40 answers and asked to place each answer in one of the following four categories: 1 = clear fail, 2 = marginal fail, 3 = marginal pass, or 4 = clear pass. Panelists were told to make their judgments independently and they could put as many papers as they wished in each category. There was no limit on the number they could classify as passing or failing. All the members of a team evaluated the same set of 40 answers, but in different sequences. These answers were spread evenly across the range of reader assigned scores on the question (i.e., there were about four answers from the bottom 10% of the distribution of scores on the question, four from the next 10%, and so on). The panelists did not see the score assigned by the regular reader to each answer nor did they know the distribution of the reader scores in their set of 40 answers.

Klein's Report at 2-3.

The evaluation by the panelists reviewing the three July 1998 essays resulted in a pass/fail line corresponding to a total score of 139.5. For the panelists reviewing the three essay questions from the February 1999 bar examination, their judgment showed a pass/fail standard coinciding with a total score of 135. *Id.* at 4.

Based upon the results of the two studies conducted by the Board, Dr. Klein concluded:

The mean of the panelists' standards across exams was **137** (or 138 if results are weighted by the number of applicants taking each test). In short, the reader and panelist standards (and those used by most other jurisdictions) are clearly well above Florida's current standard. Moreover, the standards employed by both the regular readers and the panelists are much more consistent with the standards that are now used in other states than they are with Florida's current standard of 131.

The results above provide a reliable basis for setting Florida's passing score

because they were derived from six replications of the same basic study design, involved a large group of panelists from different branches of the legal community, and used two different analytic methods. In addition, the panelists' judgments were based solely on their evaluations of answer quality. They were not asked to recommend a passing score or a passing rate and they could not determine what this rate would be for the standard they used.

It is not possible to confidently forecast what would happen to Florida's bar passage rate if the score required for passing is raised 4 or 5 points. One reason it is not clear what would happen is that other states have found that applicants respond to an increase in standards by improving their preparation for the exam. Thus, the passing rate under a higher standard is greater than what would be expected on the basis of current data.

In the unlikely event that Florida applicants did not respond to a change in standards by improving their preparation for the exam, then a 5 point increase in the total scale score required for passing would lead to about a 11-percentage point drop in the passing rate.

\* \* \*

Analyses of data from the bar exams given in Florida in 1991 and from other states suggest that this change in rates would apply equally to minority and non-minority applicants. In other words, raising the score required for passing by 5 or even 10 points would have no measurable effect (in either direction) on the disparity in bar passage rates that currently exists among racial/ethnic groups.

Taken together, the findings above suggest that Florida should consider raising the score it currently requires for passing. This adjustment could be done at one time or gradually. Raising standards does not affect what courses applicants take in law school or what topics they study for the exam. Thus, they need only about 6 to 12 months notice of a change.

Id. at 4-5.

During the course of its yearlong review of the pass/fail standard, the Board has kept the Court, Bar officials, law school administrators and the membership of The Florida Bar fully advised. Articles on the subject were published in the following issues of The Florida Bar News: December 1, 1998; April 30, 1999; and August 15, 1999. Franklin Harrison, the Board's Chair, addressed the Board of Governors of The Florida Bar at their February 1999 meeting. An educational presentation by the Board and Dr. Klein on the pass/fail standard was made at the Bar's annual meeting in June 1999 in Boca Raton. The presentation was videotaped and a copy of such tape is available through the Board's administrative office in Tallahassee.

Recognizing the special interest of the law school community in the Board's review, the Board has been especially diligent in keeping deans of Florida's law schools informed of

the Board's review. The deans were initially advised of the study by a December 1998 letter from Chair Harrison. The deans were also invited to socialize with the Board on Friday evening of the Board's Coral Gables meeting in April 1999.

Additionally, representatives from Florida's law schools participated in the Lawyers Study held on June 17, 1999 in Orlando. The participants of the Lawyers Study along with the deans of the Florida law schools were invited to attend the Board's presentation on June 24, 1999 at the Bar's annual meeting in Boca Raton. Several deans attended such presentation and made comments and posed questions for Dr. Klein. The deans were also invited to attend the annual meeting of the Liaison Bar Admissions Committee at the Bar convention. Such meeting (held on June 25, 1999) was chaired by Justice Lewis with the Board's Chair and Executive Director in attendance.

The Board also provided the deans with a copy of Dr. Klein's August 1999 report and solicited their comments. The Board received written comments from the following: Dean W. Gary Vause of Stetson College of Law; Dean Joseph D. Harbaugh of the Shepard Broad Law Center at Nova Southeastern University; and Dean Dennis O. Lynch of the University of Miami School of Law.

None of the responding deans favored the raising of the passing standard for the bar examination in Florida. Dean Vause felt that "raising the passing standard is potentially enormous, and the burden of the proposed changes will fall upon persons who are already economically disadvantaged." Dean Harbaugh is unconvinced "that the imposition of a higher passing grade on the Florida Bar Examination would provide any meaningful benefit to the citizens of the State." Dean Harbaugh provided his reasoning as to why an increase of five points "will have a devastating effect on law school graduates." Dean Lynch questioned the need for raising the pass/fail standard in Florida and commented that more information and study of the issues related to such a change are needed. All of these deans expressed an interest in meeting with the Board on this issue.

At its September 1999 meeting, the Board postponed final consideration of action on the pass/fail standard. Based on the requests of above-referenced deans, the Board decided

to set up a meeting with all of the deans of Florida's accredited law schools.

The meeting with the deans was held on October 7, 1999 in Tampa. Deans and associate deans from Florida's seven accredited law schools were in attendance at the meeting or participated by telephone. Dr. Klein appeared live from California via a video conference. The deans from the five private law schools reiterated the concerns expressed in the written comments discussed above. Such deans voiced the need for further study before making a decision to raise the pass/fail line.

While in session during its October 1999 meeting, the full Board considered the issue of raising the pass/fail standard. Following thorough consideration and discussion of the issue, the Board voted 12 to 2 (with one member absent) to recommend to the Court the proposed rule amendment increasing the pass/fail line from 131 to 136 in a two step process. One of the two dissenting Board members was Noel G. Lawrence who has indicated that he will be filing a minority report with the Court. The other dissenting member was Antonia Williams-Gary who opposed the recommendation because she felt the pass/fail line should be increased higher than the recommended 136.

In reaching its recommendation, the Board found that the results of the Readers Study and the Lawyers Study were compelling factors. This was the first time in the history of Florida's bar examination that such studies were undertaken. Such studies involved a large number of individuals including trial judges, academicians and practicing attorneys. The results of such studies provide the Board with a reasonable and reliable basis for establishing a pass/fail standard.

The results of both the February 1999 Readers Study and the Lawyers Study establish that the pass/fail line should be set at 137-138. Klein's Report at 4. If the recent results of the July 1999 Readers Study were factored in (Klein's Letter), the pass/fail standard based on the results of all three studies would be even higher.

The Board appreciates the concerns expressed by the deans of Florida's private law schools. The Board fully considered such concerns before reaching its recommendation. The interests of the deans as expressed in their written and oral comments to the Board

must, however, be balanced against the Board's mandate to protect the public.

In addition to the results of the Readers and Lawyers Studies, the Board is influenced by the fact that examinees under the current 131 pass/fail standard only have to get 56 percent of the total questions correct to achieve a passing score. An increase to 136 would only require examinees to get 59 percent of the questions correct to pass the bar examination. The Board observes that even the higher rate of 59 percent is still far below the 70 percent rate required of bar applicants in Florida prior to 1961.

The Board also observes that the proposed increase to 136 is far from being a dramatic change when compared to the historical practices of the Board and the current standards of other jurisdictions. In fact, the initial increase to 133 will merely return the pass/fail line to the place where it was in 1981-1982. Even at the eventual 136, there are currently 12 jurisdictions that have a pass/fail line higher than that with California and Delaware topping the list at 144. At 136, Florida would join three other jurisdictions: Iowa, Maryland and North Carolina. Five other jurisdictions including Georgia are currently at 135. See Klein's Report at Appendix A for a complete ranking of all of the jurisdictions; since the compilation of such exhibit, South Carolina has announced that it has increased its required minimum scaled score for the MBE to 125.

In conjunction with its recommendation on increasing the pass/fail line, the Board reconsidered its previous position on the collection of demographic information on bar applicants. The Board ruled to request permission from the Court to begin immediately to collect information on the race or ethnicity of bar applicants.

If granted by the Court, the requested data will be used solely by the Board to analyze the performance of the different minority and non-minority groups on Florida's bar examination. Specifically, such information will be used initially to identify a baseline passing rate for each of the different groups. Secondly, the information will be used to analyze the impact, if any, on the different groups should the Court approve the Board's recommended two-step increase to the pass/fail line. The Board's statistical analysis of such data will also rely upon each applicant's LSAT score and grade point average during law

school.

In recommending an increase to the pass/fail line, the Board has full confidence in the opinion of its expert that such increase will have no measurable effect on existing differences among the passing rates on Florida's bar examination for the minority and non-minority groups. The Board concluded, however, that it would be reasonable to confirm such opinion by collecting and analyzing the requested information after each bar examination. The Board will provide the Court with the results of such analysis following each administration of the bar examination. Such results and the underlying data will be confidential pursuant to Rule 1-61 of the Rules of the Supreme Court Relating to Admissions to the Bar and will not be released by the Board except as directed by the Court.

The Board's use of information related to an applicant's race or ethnicity will be used only to conduct a post-bar examination analysis as described above. The Board's decision as to each applicant's character and fitness will continue to be made without any reference to such applicant's race or ethnic background.

As has always been the Board's practice, demographic information pertaining to bar applicants will be unavailable to the graders of the bar examination. The Board's anonymous grading of the bar examination will continue unchanged should the Court grant the Board's request to collect information pertaining to the race or ethnicity of bar applicants.

For the reasons set forth above, the Board requests that the Court approve the proposed amendment to Rule 4-26.2 raising the pass/fail line from a scaled score of 131 to a scaled score of 136. The Board further requests that such increase be done in a two-step process with the first step to raise the pass/fail line to 133 to be effective one year from the date of approval by the Court. The second step would take place one year after the effective date of 133 and would increase the pass/fail line to 136. This gradual process of implementation over a two-year period will provide abundantly fair notice and reasonable preparation time to the law schools and their students.

If the proposed increase is approved by the Court, the Board will provide specific notice to future applicants for the bar examination as to the different implementation dates

for the initial increase to 133 and the final increase to 136. The Board will also insert a Note setting forth the implementation dates immediately below Rule 4-26.2 of the Rules of the Supreme Court Relating to Admissions to the Bar as reproduced in the Board's printed rules pamphlet (available upon request) and on the Board's web site ([www.barexam.org/florida](http://www.barexam.org/florida)).

Rule 4-41 as it will appear if amended:

**4-41 Exam Application and Supporting Documents.** ~~In order to be considered complete each~~ The Exam Application (Form 1-A); must be complete, sworn to, ~~and~~ notarized and accompanied by:

- 1) the appropriate applicant filing fee (application fee, postponement fee or reapplication fee);
- 2) a current 2" x 2" photograph;
- 3) one complete set of fingerprints taken on a card provided by the Board and certified by an authorized law enforcement officer; and
- 4) other supporting documents or additional information as may be required on the Form 1-A.

RATIONALE:

The proposed rule amendment is housekeeping only and is intended to improve the wording of such provision.

Rules 4-42.3 and 4-42.4 as they will appear if amended:

**4-42.3 Deadline for Special Testing Accommodations.**

Petitions for accommodations and supporting documentation are subject to the examination filing deadlines. Applicants seeking special testing accommodations are encouraged to file the examination application, petition and supporting documents by the examination filing deadline to avoid examination late filing fees.

**4-42.4 Cut-off for Special Testing Accommodations.**

To avoid an undue burden upon the Board while making final preparations for the administration of the bar examination, a minimum amount of time is required for the orderly processing of a request for accommodations. Except for emergency petitions as designated by the Board, no request for special testing accommodations shall be processed if postmarked or received after February 1 for the February Examination or after July 1 for the July Examination.

**RATIONALE:**

The proposed rule amendments are housekeeping only and are intended to improve the wording of such provisions.

Rule 4-52 as it will appear upon deletion of Rule 4-53:

~~**4-52 Consequences of Violation of Rules.** If the Board has cause to believe that an applicant has violated any of the rules set forth above, then such applicant's examination grades shall be impounded at the direction of the Supreme Court of Florida pending a full investigation by the Board. The Board's investigations shall be conducted under the provisions of Rule 3.~~

~~**4-53 4-52 Examination Proctors.** The Board may from time to time elicit the assistance of other members of The Florida Bar in proctoring the bar examination.~~

RATIONALE:

The proposed rule amendment deletes Rule 4-52 and renumbers Rule 4-53 to Rule 4-52. The provision of the current Rule 4-52 (to be deleted) will be addressed by the proposed amendments to Rules 4-64 and 4-65 below.

Rule 4-64 as it will appear if amended:

~~**4-64 Invalidation of Examination Results.** Results of the Florida Bar Examination shall be invalidated if the applicant fails to establish that the law school graduation requirements were completed before the applicant submitted to the Florida Bar Examination~~ **Investigation of Exam-Related Conduct.** If the Board has cause to believe that an applicant has violated any of the eligibility or conduct Rules relating to the Bar Examination, then the Board may conduct an investigation, hold hearings and make findings under the provisions of Rule 3.

RATIONALE:

The proposed revision of Rule 4-64 along with the proposed deletion of Rule 4-52 will make the investigative and adjudicative procedures under Rule 3 applicable to the eligibility and conduct rules relating to Florida's bar examination. The proposed changes will also provide applicants and examinees for the bar examination with all of the rights and procedural due process contained in Rule 3. The proposal will cover an allegation of misconduct as to the following areas: the representative compilation of work product; the Application for Admission into the Examination; circumstances surrounding the submission to the examination; and conduct during the administration of the examination.

With the adoption of the proposed rule amendment, it will no longer be necessary to ask the Supreme Court to impound examination scores except in situations where the applicant has not yet paid the full examination fee. Adverse findings and an unfavorable recommendation by the Board under the proposed rule amendment will be reviewable by the Court as provided by Rule 3.

Rule 4-65 as it will appear if enacted:

**4-65 Invalidation of Exam Scores.** If an applicant is found by the Board after an investigation pursuant to Rule 3 to be in violation of Rule 4-13.1, to have made a material misstatement or omission in Rule 4-13.4 or to have violated the rules of conduct in Rule 4-51, the results of the Florida Bar Examination shall be invalidated. The applicant shall not be eligible to submit another work product (if in violation of Rule 4-13.4) or submit to another examination for a period of 5 years from the date the Board delivered its adverse findings or such other period of time as set by the findings.

RATIONALE:

The proposed rule creates a new provision to implement the proposed amendment to Rule 4-64 above. It provides a penalty for violation of any of the stated rules and sets a specific time-frame as to how long an applicant must wait in order to retake the examination. If an applicant falsifies his or her work product or violates the eligibility or conduct rules pertaining to the bar examination, then it is reasonable to impose the recommended sanctions of invalidating such applicant's bar examination scores and prohibiting such applicant's re-submission for five years.