

IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HALL
AUG 06 2012

CLERK, SUPREME COURT
BY _____

Florida Board Of Bar Examiners)
Re: Question as to Whether Undocumented)
Immigrants Are Eligible for Admission to)
The Florida Bar)
_____)

Case No. SC11-2568

RESPONSE TO APPLICANT'S MOTION FOR AN ORDER
DIRECTING THE BOARD TO CONCLUDE ITS INVESTIGATION AND
NOTICE OF OTHER PROCEEDINGS

The Florida Board of Bar Examiners, by and through its undersigned attorney, responds to the Applicant's Motion. The Response is divided into two sections, with section one addressing the first section of the Applicant's Motion, and section two addressing the last two sections of the Applicant's Motion.

JURISDICTION

The board acknowledges that the Court has jurisdiction of this matter pursuant to Article V, Section 15 of the Florida Constitution and Rule 3-40.2 of the Rules of the Supreme Court Relating to Admissions to the Bar (hereinafter referred to as "Rules").

I. RESPONSE TO MOTION FOR AN ORDER DIRECTING THE BOARD TO CONCLUDE ITS INVESTIGATION

Statement of the Case and the Facts

The Applicant executed his Florida Bar Application on March 15, 2011, and the application was received in the board's office on March 17, 2011.

On March 4, 2011, the Applicant filed with the board a Petition for Waiver of Rule Requiring Immigration Status. On April 28, 2011, the Applicant was advised by the board that his petition had been granted.

By Notice of Board Action dated November 23, 2011, the Applicant was notified that the board was deferring further consideration of his qualifications for admission to the Bar in order for the board to request an advisory opinion from the Supreme Court of Florida regarding immigration and naturalization status of applicants and bar admissions.¹

On December 13, 2011, the board filed a Petition for Advisory Opinion in this Court in the present matter. After an extension of time to file a response was

¹ Certain correspondence between the Applicant and the board may impact the Court's decision on the issues raised in the Applicant's motion. With the Supreme Court's designation of this case as a high profile case, pleadings filed are part of the public record. Therefore, in light of the provisions of rule 1-60 *et seq.* of the Rules that information maintained by the board in the discharge of its responsibilities is confidential, copies of the correspondence referenced in this Response have not been attached in an appendix. If directed by the Court, the board will provide copies of the referenced correspondence.

granted, the Applicant filed a Response to this Petition on March 7, 2012. After being granted an extension of time, the board filed a Reply on March 29, 2012.

In addition to the pleadings outlined above filed by the board and the Applicant, several Amicus Curiae briefs have been filed.

In a letter dated March 23, 2012, the applicant's counsel requested copies of documents received by the board with regard to the Applicant since November 17-19, 2011. In this letter, the Applicant also requested that the board continue to investigate the new information received that reflected on the Applicant's character and fitness, and not wait for the Court's decision on the Petition for Advisory Opinion.

By letter dated March 28, 2012, the board advised the Applicant that the board was not waiting for a decision from the Supreme Court in this matter before considering any new documents related to the Applicant's character and fitness. Copies of certain documents from the Applicant's file were provided to the Applicant's counsel.

On April 6, 2012, the Applicant submitted a sworn amendment to his bar application. In this amendment, the Applicant addressed certain issues raised in the documents he had been provided by the board that might impact on the evaluation of his character and fitness. This amendment prompted the board to ask for further information from the Applicant.

The Applicant's counsel sent an email to the board's executive director on May 7, 2012. The email contained the following question: "Can you give us some idea of where you are with the investigation of this matter? We do not want to cramp a full investigation but we also do not want this to go on without end." By letter dated May 10, 2012, the board reminded the Applicant's counsel of the request for information sent to the Applicant on April 6, 2012, and advised the Applicant's counsel that a timely response to that inquiry was necessary for completion of the board's investigation. The board further advised in this letter that the information received from the applicant may cause further investigation, and therefore it was not possible to predict when the board's investigation would be completed.

As of June 1, 2012, the board had received all requested information from the Applicant. In an email dated June 20, 2012, the Applicant's counsel advised the board's general counsel of information he planned to provide to this Court, and also stated the following:

Before doing that, I thought that it would be prudent to check with the Board to see if there is any chance that the Board will reach an early decision on [the Applicant's] file. Given the position taken by the California board, we hd [sic] hoped that the Florida board would reach a similar decision.

In any event, we would appreciate having some sense of when the Board will compete [sic] the investigation.

In response, in a June 21, 2012, email, the board's general counsel advised the Applicant's counsel of the following:

At this point, we anticipate the board will be considering your client's file at the board's next meeting scheduled for July 12-14, 2012. If the board does consider the file at that meeting, a Notice of Board Action informing you of the board's decision will be sent to you the week after the board meeting.

On July 5, 2012, the Applicant filed his Motion for an Order Directing the Board to Conclude Its Investigation and Notice of Other Proceedings. The board considered the Applicant's file at the board meeting held July 12-14, 2012. In a Notice of Board Action dated July 20, 2012, from the board, the Applicant was advised that the board had "determined that nothing presently contained in the investigation file will, in and of itself, be considered disqualifying." The notice also informed the Applicant that the board's final action would be taken after the Supreme Court of Florida rendered a decision on this pending petition for an advisory opinion.

Argument

Rule 3-40.2 of the Rules reads as follows:

3-40.2 Dissatisfied with Length of Board's Investigation. Any applicant or registrant whose character and fitness investigation is not finished within 9 months from the date of submission of a completed bar application or student registration may petition the Supreme Court of Florida for an order directing the Board to conclude its investigation. 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.

As observed by this Court, the purpose of the character and fitness investigation along with the bar examination "is to protect the public." *Florida Board of Bar Examiners re G.W.L.*, 364 So.2d 454, 458 (Fla. 1978). For many bar applicants, the Board completes its character and fitness investigation well under six months. However, there are many variables that may result in a particular investigation consuming additional time.

As noted above, after the original petition for advisory opinion was filed in this case, the board received information that reflected on the Applicant's character and fitness. This required further investigation by the board. That investigation was conducted in a timely manner, and included obtaining necessary information from the Applicant. Once the necessary information was accumulated, the board considered the Applicant's file at its next board meeting, and advised the Applicant of the board's decision within a week of that meeting.

In his petition, the Applicant asserts that "the Applicant has continued to provide the Board with requested information and has asked the Board when it plans to complete its investigation." (Motion, pages 2-3) In addition, Applicant asserts that "[t]he Board has not responded to those requests." (Motion, page 3).

To the contrary, the board has been very responsive when asked the status of the Applicant's investigation.

For example, as noted above, when the Applicant asked on May 7, 2012, of the status, a response was sent three days later reminding the Applicant of a pending request for information from the Applicant. At that point, the completion of the investigation depended in part on the timing of the Applicant's response to requests for information.

When asked on June 20, 2012, for "some sense" of when the investigation would be completed, the next day the Applicant was advised that the board anticipated consideration of his file at the board's next meeting in July. That, in fact, is what happened, and the Applicant was promptly notified of the board's decision.

The board has conducted the investigation of this Applicant in a timely manner, while taking the time necessary to consider all of the potential character and fitness issues raised. The Applicant has been fully apprised of the status of that investigation, to the extent allowed under the Rules, and was aware of the issues that were being investigated.

As this matter stands now, the issue raised in the Applicant's motion is moot. The board has completed its investigation and determined that, based on the information presently known, the applicant is not disqualified from a character and

fitness standpoint for admission to the bar. Absent subsequent discovery of other character and fitness issues not presently known, the board's final action depends on the Court's decision in the underlying petition for an advisory opinion.

Certainly, the possibility exists for the board to become aware of additional information that might change that status. While the board does not anticipate that will be the case, the possibility does exist. However, as things stand now, the Applicant's motion for an order directing the board to conclude its investigation is moot as the board's investigation has been completed.

II. RESPONSE TO NOTICE OF OTHER PROCEEDINGS

While the Applicant has captioned this part of his motion as a notice of other proceedings, in effect, what the Applicant has filed is a Notice of Supplemental Authority. Rule 9.225 of the Rules of Appellate Procedure provides the following:

Notices of supplemental authority may be filed with the court before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after the last brief served in the cause. The notice may identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain argument. Copies of the supplemental authorities shall be attached to the notice.

The motion filed by the Applicant violates the provisions of the applicable rule.

With regard to the proceedings in California cited by the Applicant, even though the Applicant states in his motion that he is "submitting as supplemental

authority the decision of the California Board of Bar Examiners to recommend the admission of an applicant who is an undocumented immigrant,” the Applicant does not provide the Court with a copy of the recommendation cited as required by rule 9.225 of the Rules of Appellate Procedure.

In a footnote, the Applicant provides this Court a website where the Applicant suggests the Court “may want to register with the California Courts Case Information for news of the *Garcia* case. (Motion, pages 5-6, footnote 4) The board submits this does not comply with the requirements of the Rules of Appellate Procedure.

Additionally, the recommendation of another state’s board of bar examiners in a case involving an undocumented immigrant where the facts are different from the case at bar does not provide much, if any, guidance to the issues to be decided in this case.

The Applicant also runs afoul of the requirements of rule 9.225 of the Rules of Appellate Procedure by including almost eight pages of argument trying to distinguish one of the issues in the California case from the case at bar. As quoted above, the rule requires that “[t]he notice may identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain argument.” Providing eight pages of argument as to why a particular issue in the

California case does not apply to the Florida case does not comport with the requirements of the rule.

With regard to the Applicant's citation to the recently announced policy of the Department of Homeland Security for individuals who came to the United States as children, the board acknowledges that this supplemental authority is relevant to the case at hand. In this case, as required by the rules, the Applicant did provide the Court with a copy of a memorandum from the Secretary of Homeland Security which describes their recent actions.

However, once again, in violation of the rule, which provides that "[t]he notice may identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain argument." (rule 9.225 of the Rules of Appellate Procedure), the Applicant inserts argument as to why this announcement from the federal government should be considered.

The board therefore requests that the portion of the Applicant's motion providing notice of developments in the California case be stricken from the record because of non-compliance with rule 9.225 of the Rules of Appellate Procedure. The board further requests that the Court strike from the record that portion of the Applicant's motion that contains argument with regard to the new policy from the Department of Homeland Security.

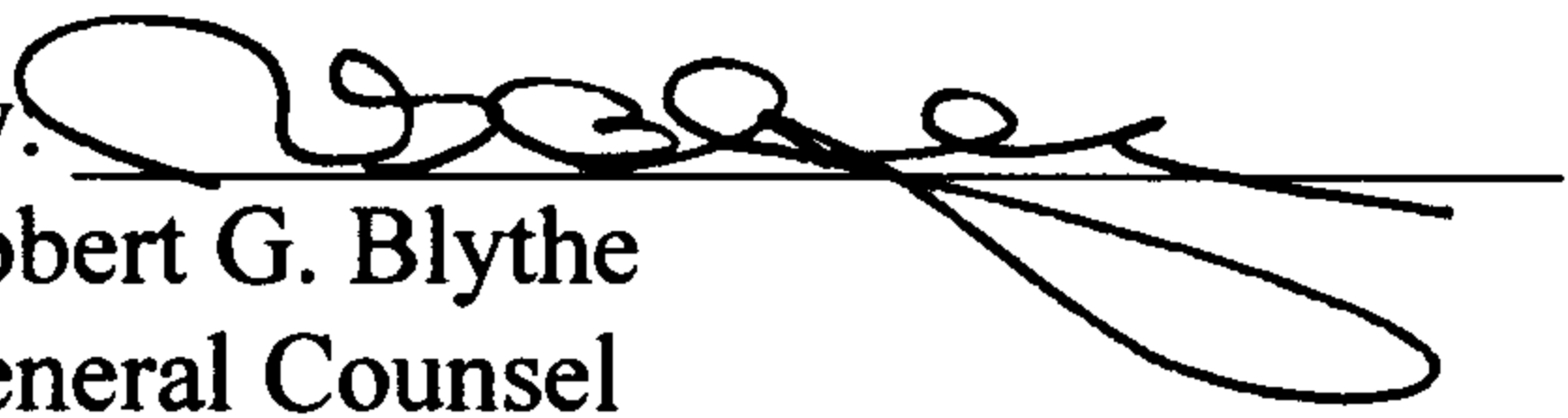
CONCLUSION

The Applicant states in his motion that he “does not know why the Board of Bar Examiners have had reservations about going forward with the Applicant’s admission to the Bar.” (Motion, page 13) The issues raised in this case are clear, and are appropriate to cause concerns, even if the decision is ultimately made that the concerns would not be disqualifying for admission to the bar.

The Applicant has been kept apprised of the progress of the board’s investigation of the applicant’s background, including the recently investigated character and fitness issues discussed above. The fact that the board ultimately determined that those issues would not be disqualifying for admission to the bar does not somehow render them inappropriate for the board’s consideration. The Board has acted responsibly and in keeping with the best interest of the people and judicial system of Florida.

The board respectfully requests an order: 1) dismissing the motion for an order directing the board to conclude its investigation as moot; 2) dismissing and striking from the record the notice of supplemental authority with regard to the California proceedings for non-compliance with the Rules of Appellate Procedure; and 3) striking from the record that portion of the notice of supplemental authority with regard to the Department of Homeland Security policy which contains argument.

Dated this 31st day of July, 2012.

By. 
Robert G. Blythe
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Tallahassee, FL 32399-1750
(850) 487-1292
Florida Bar #353061

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Response has been served by U.S. Mail this 31st day of July, 2012 to:

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Florida Board of Bar Examiners

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July 31, 2012

FILED

THOMAS D. HALL

AUG 06 2012

CLERK, SUPREME COURT

BY _____

Thomas D. Hall, Clerk
The Supreme Court of Florida
Office of the Clerk
500 South Duval Street
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Dear Mr. Hall:

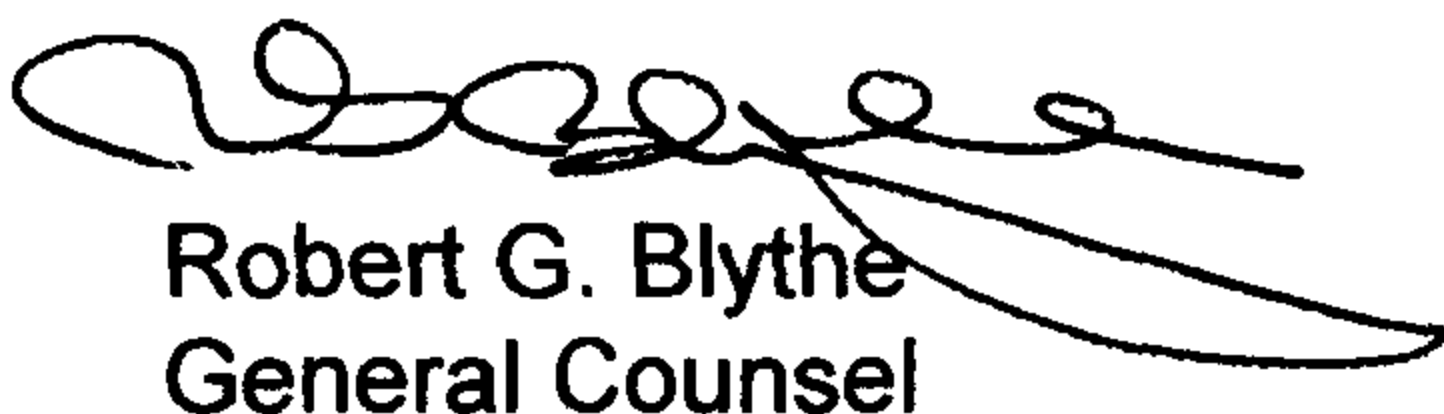
FBOBE Re: Florida Board of Bar Examiners
Re: Question as to Whether
Undocumented Immigrants are
Eligible for Admission to The
Florida Bar

Case No.: SC11-2568

Please accept the Florida Board of Bar Examiner's Response to Applicant's Motion for an Order Directing the Board to Conclude its Investigation and Notice of Other Proceedings along with 7 copies and the record of the formal hearing.

Pursuant to the Court's Administrative Order No. AOSC04-84, the Board's Response will be attached to an e-mail that will be sent this date to the following e-mail address: e-file@flcourts.org.

Sincerely,



Robert G. Blythe
General Counsel

MC: Talbot D'Alemberte, Esq.
Ms. Amy R. Pedersen
Ms. Martha W. Barnett
Mr. Stephen N. Zack
Ms. Cheryl Little
Ms. Cecilia M. Olavarria
Mr. William Reece Smith, Jr.

Enclosure: Response (original plus 7 copies)

RGB:tm