

In the Supreme Court of Ohio

**In re Application of
Rahshann Blackwell**

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Case No. 2007-0441

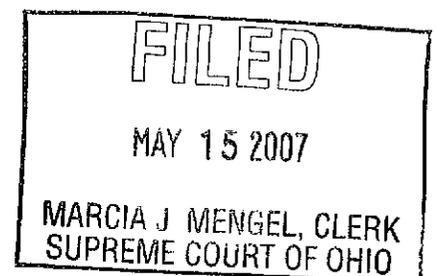
ANSWER BRIEF

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Special Investigator to the
Board of Commissions on Character and
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I. Introduction.

In Gov. Bar Rule I, Secs. 10 - 13, the Court gives its assurance to the public that it will investigate the character and fitness of applicants for admission to the bar, and will deny admission when there is doubt about the applicant's fitness for the profession. Fitness to practice law is not an abstraction. The Board of Commissioners publishes the ten "Essential Eligibility Requirements" that it considers in investigating whether an applicant is fit to practice law. (Appx. at 4.) Where, as here, there is compelling, credible evidence that the applicant fails to satisfy a number of these requirements, the applicant's request to sit for the bar examination must be denied. Admittedly, the decision to deny an application is a hard decision to make because it terminates or delays the applicant's professional aspirations. But in its role as gatekeeper for the profession, the Court's primary duty is to protect the public, which means that it must make that difficult decision when the applicant is unable to demonstrate his fitness to practice.

II. There is compelling credible evidence that the Applicant fails to meet most of the Essential Eligibility Requirements.

In this context, character and fitness is something more than just moral character. Here eligibility turns on the specific traits and characteristics that are most essential in the practice of law. A person can be a good person and still not be fit to practice law. These essential eligibility requirements focus on such factors as the applicant's ability to communicate clearly with others, to exercise good judgment, to conduct oneself diligently and reliably, to be trustworthy in all professional relationships, and to comply with deadlines and time constraints. In this case, there was compelling credible evidence that Applicant failed to meet

most of the eligibility requirements. This evidence included the Applicant's own admissions, as well as the testimony of lay and expert witnesses.

A. Dr. Hustak's testimony establishes that the Applicant has a mental or psychological disorder that impairs his ability to practice law in a competent and professional manner.

Dr. Hustak is a clinical forensic psychologist. (T. at 109.) He examined Applicant, at Applicant's request, specifically to provide an expert opinion in this matter. In his written report and at hearing, Dr. Hustak provided quite chilling testimony about Applicant's psychological status as it relates to his ability to practice law.

Dr. Hustak prepared a written report in which he concluded that:

In my experience as a forensic psychologist, a law practice will require close attention to detail so that his clients can be ethically and fully represented to the best of his ability in the specialty area in which one intends to practice. It is difficult to imagine that he would be efficient in doing this at this time because of the combination of symptoms described above as atypical depression, anxiety, obsessive thinking, and schizoid attachment that seem to be debilitating his ability to concentrate and stay focused on the task at hand.

(Ex. J, p. 9.)

Dr. Hustak was questioned during the hearing about his report and opinion. Dr. Hustak testified about Applicant's "cognitive confusion" and inability to operate and think efficiently. (T. at 131-136.) He opined that, based on his thirty years of experience as a forensic psychologist dealing with attorneys and the courts, he believed the Applicant's "life functioning right now does not fit well with taking on those responsibilities until he can get much more efficient in terms of addressing the clearly identifiable emotional problems that have been

identified.” (T. at 159.) Dr. Hustak was questioned specifically about Applicant’s ability to satisfy the essential eligibility requirements. He testified that in his opinion Applicant was not psychologically competent to satisfy six of the ten eligibility requirements. According to Dr. Hustak, the Applicant did not have the requisite cognitive capacity, ability to communicate clearly, ability to use good judgment, or ability to comply with deadlines or time constraints. Dr. Hustak also believed that the Applicant was deficient in the areas of trustworthiness and reliability. (T. at 160 – 162.)

The Applicant now urges the Court to disregard Dr. Hustak’s testimony, arguing that it is “legally unreliable” and consists of “prejudicial forecasts.” (Applicant’s Brief, p. 20 - 24.) His request cannot be squared with the fact that Applicant chose Dr. Hustak and called him as an expert witness in this case. (Ex. J, Report, p. 1; T. at 112.) And it cannot be squared with the fact that one of the factors to be considered in investigating an applicant’s character and fitness to practice law is “evidence of a mental or psychological disorder that in any way affects or, if untreated, could affect the applicant’s ability to practice law in a competent and professional manner.” Gov. Bar R. I, Sec. 11 (D)(3)(e).

Applicant also urges the Court to give more weight to his lay character witnesses than to Dr. Hustak’s testimony. One lay witness was a former classmate and the other was a client of Applicant’s tax business. The issue here, however, is not whether the Applicant is good person or is capable of functioning in some business or capacity other than the practice of law. The issue here is whether Applicant meets the Essential Eligibility Requirements for the practice of law. As to this issue, Dr. Hustak’s testimony was the more probative. Dr. Hustak spoke

directly to Applicant's ability to meet the demands of the practice law and his testimony was highly credible. It should be given the highest weight.

B. The observable facts are consistent with Dr. Hustak's opinion.

1. Writing after time, again, demonstrates that Applicant cannot conform his behavior even when he knows what is required.

It is an undisputed fact that Applicant wrote after time was called at least once during the July 2005 bar examination. Applicant admits that this occurred despite his best effort not to have it happen again. The Board gave Applicant the benefit of the doubt when he violated this same bar examination rule in July 2003. It did so because it found that "his thoughtless actions at the July 2003 examination appeared to be an aberration" that likely would not happen again. (Report of the Board at 2.) Well it did happen again and we know from Dr. Hustak's testimony that it likely happened because Applicant is incapable of conforming his behavior to what is required. His self-described "perfectionism" is symptomatic of the cognitive confusion and inefficient functioning reported by Dr. Hustak.

Applicant argues that his most recent rule violation was an insignificant infraction and did not warrant disqualification of his examination. That is not the issue in this proceeding. The Board of Bar Examiners disqualified Applicant's 2005 examination, and the wisdom of that decision is not now before the Court. This is an appeal from the decision of the Board of Commissioners on Character and Fitness. What is significant to this inquiry is the rule violation was repeated again in 2005 despite the Applicant's assurance to the Board after the 2003

incident that it would not happen again and despite his best efforts to see that it did not happen again. That is a significant character issue.

The Applicant only admits to the one writing after time violation in 2005, but there is credible testimony that Applicant wrote after time twice during the 2005 examination. Liza Meyers, another applicant at the July 2005 examination, reported that she observed Applicant writing after time during the morning session on the first day. (Ex. A at 3; Ex. E.) It was her observation and report that caused the proctor staff to watch Applicant in the afternoon session. (Ex. A.) Applicant disputes Ms. Meyers' testimony, arguing that it must have been a case of mistaken identity because there are minor errors in Ms. Meyer's physical description of him during her deposition in May 2006. The argument ignores the fact that Ms. Meyer's contemporaneous report of what she observed on the morning of July 26, 2005 referred to Applicant by his assigned examination number - #1177. Ms. Meyer's did report that a "dark skinned man, wearing yellow high tops and blue mesh shorts" wrote after time; she reported that:

Applicant # 1177, sitting opposite me, glanced around after time had been called and papers were being collected, then picked up his pen and quickly wrote something on his answer sheet.

(Ex. A, p. 3.)

Ms. Meyers did not know the Applicant and had no reason to make a false report of what she observed. (Ex. E, p. 12; T. at 206.) Her testimony was credible evidence that Applicant violated the writing after time rule twice in 2005, even though he was fully cognizant of the rule and the serious consequences for violation of the rules.

2. The Applicant's plea to Ms. Mengel demonstrates an inability to communicate clearly and extremely poor judgment.

Even more troubling than Applicant's violation of the rule is his personal appeal to Ms. Mengel not to report the violation to the Board of Bar Examiners. This conduct shows an inability to comply with Eligibility Requirements 3 (good judgment), 4 (integrity) and 10 (professionalism), and magnifies the severity of the rule violation itself.

Applicant testified at the hearing that Ms. Mengel misunderstood him and that he was not asking her not to report the incident to the Board. In his brief, Applicant abandons his denial and argues instead that he "would have been justified in openly requesting that [Ms. Mengel] simply 'take note' of the incident instead of referring his exam to the Board." (Applicant's Brief at 30.)

Ms. Mengel is an officer of the Court and very experienced in dealing with bar examination applicants. She is very precise in her communication skills, both speaking and listening. Ms. Mengel is a highly credible witness and it is improbable that she misunderstood the Applicant's request to her. Even if, however, there was a misunderstanding, that misunderstanding is significant because it corroborates the deficiencies in Applicant's communication skills and judgment. Had Applicant clearly communicated what he sought to accomplish, there could have been no misunderstanding. The ability to communicate clearly is Eligibility Requirement No. 2.

3. The omissions in Applicant's 2005 Re-Examination Application were material omissions that alone would justify the decision to disapprove Applicant.

The instructions for completing the re-examination character questionnaire states:

Any omission, untruthful answer or incomplete answer may result in your being denied the privilege of retaking the bar examination and practicing law in the State of Ohio. Question 5 "must be fully answered regardless of expungements, bond forfeitures, dismissals or similar terminations and must include all actions or legal proceedings occurring in any court including juvenile court." In re Application of Watson, 31 Ohio St. 3d 220, 221. This includes any matter dismissed favorably to you, filed by you or in which you were involved in any manner other than as a witness.

(Ex. F, p. 2.)

This was not the first time Applicant responded to a character and fitness questionnaire; he was fully aware of this disclosure requirement. (T. at 218.) Applicant, however, failed to two disclose two legal proceedings when he submitted his application on March 30, 2005. He failed to disclose that he had been a defendant in an action brought against him by the University of Denver to collect unpaid tuition. (Ex. F; T. at 221-224.) He also failed to disclose that on the very day his application was being mailed to the Court he was in jail in Colorado and charged with four traffic violations. A criminal complaint was served on him on March 22, 2005, which made the arrest a reportable incident. Applicant did not supplement his questionnaire to disclose these facts until May 6, 2005, the day after the criminal case was closed.

These two omissions were material and were responsive to information specifically requested in the Questionnaire. Gov. Bar R. I, Sec. 11(D)(3)(f) states

that the “failure to provide complete and accurate information concerning an applicant’s past” is one of the factors to be considered in a character and fitness investigation. “Neglect of financial responsibilities” is as separate factor to be considered. Gov. Bar. R. I, Sec. 11 (D)(3)(k). A “pattern of disregard of the laws of this state [or] another state” is also a factor to be considered. Gov. Bar R. I, Sec. 11(D)(3)(f). Applicant’s March 22, 2005 arrest was based on the violation of four Colorado traffic laws – driving without a valid driver’s license, operating an uninsured vehicle, operating an unregistered vehicle and driving with an expired temporary permit. (Ex. G.) Applicant had been cited at least twice before in October 2004 for driving without proof of insurance. (Ex. F at response to question 5d.) Charges were filed against Applicant in connection with his March 22, 2005 arrest, and a criminal complaint issued that same day. The issuance of the criminal complaint distinguishes this case from In re Application of Singh (2003), 101 Ohio St. 3d 8. See Exhibit G, “Uniform Summons & Complaint,” (indicating that it was served on the defendant on March 22, 2005).

Applicant argues that these omissions should not reflect on his eligibility to practice law. He argues the omission of the civil collection action should be excused because it was merely negligent. Negligence in attending to one’s professional obligations, however, and particularly an obligation as significant as a sworn statement to the Court, demonstrates a failure to conform to Eligibility Requirements 4 (trustworthiness), 5 (respect for the law), 6 (diligence) and 10 (professionalism). The public is harmed as much and more often by negligent practice as it is by intentional misconduct.

While there may be some discretion as to how quickly an applicant must supplement a character questionnaire, whether that discretion is exercised properly depends on the context. Here the incident required to be reported occurred on the very day Applicant sent in his questionnaire, which means he knew at the time he instructed his subordinate to mail the questionnaire, the information was not complete. The questionnaire he mailed was not only incomplete, it bore an inaccurate attestation. Applicant disclosed during the hearing that the application mailed to the Court on March 22, 2005 was a copy of an application that had been prepared and notarized in October 2004. Applicant testified that he changed some of the information in the application but did not re-sign it or have the updated questionnaire notarized. As a result, Applicant filed with the Court a notarized document which had been altered after-the-fact. It is clearly inappropriate to alter a document by inserting new material after it has been notarized. Indeed Applicant even agrees that what he did “may be” inappropriate. (T. at 231.)

4. Applicant’s actions during this proceeding demonstrate his inability to conduct himself diligently in fulfilling his own professional obligations and an inability to comply with deadlines and time constraints.

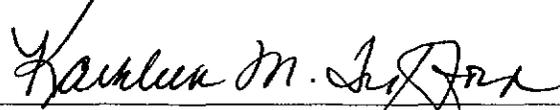
The hearing in this matter had to be continued at the last minute not once but twice. Both delays were caused by Applicant’s failure to diligently proceed and timely accomplish tasks he needed to perform. The hearing had to be postponed in May 2006 because Applicant had not timely secured Dr. Hustak’s evaluation so that his report could be submitted prior to the hearing and he could

be available to testify. The hearing scheduled for October 2006 had to be postponed because Applicant delayed so long in getting information to his new attorney, she declined to represent him and he did not have sufficient time to find another attorney. The history of this proceeding shows that Applicant was unable to act timely and diligently when his own personal interests were on the line. His actions give no comfort that Applicant will be able to act diligently and timely, if entrusted with the interests of others.

III. Conclusion.

An applicant seeking to be admitted to the bar in Ohio carries the burden to prove by clear and convincing evidence that he has the requisite character and fitness to practice law. Gov. Bar R. I, Sec. 11(D). In this case there is substantial, highly credible evidence that Applicant is unable to satisfy most of the Essential Eligibility Requirements for the practice of law, and that his inability to do so may be the result of a significant psychological impairment. The Board's Report appropriately balances the public interest and Applicant's personal interests. It holds the door open for yet another chance for Applicant, but only if he first obtains professional help. The Court should accept the Board's Report. It remains to be seen whether Applicant will seek the psychological help the Board recommends and whether with that help he may be able to satisfy the requirements in the future. The ultimate outcome, however, appropriately depends most on Applicant's initiative and diligence in addressing the issues revealed in this proceeding.

Respectfully submitted,



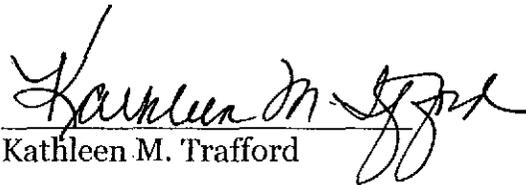
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Certificate of Service

The undersigned counsel certifies that a copy of this Answer Brief was served on Applicant, by regular U.S. Mail, postage pre-paid, and electronically at the following addresses this 15th day of May, 2007.

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APPENDIX

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Rules for the Government of the Bar

Gov. Bar Rule 1, Section 11 (D)

(D)(1) The applicant has the burden to prove by clear and convincing evidence that the applicant possesses the requisite character, fitness, and moral qualifications for admission to the practice of law. An applicant's failure to provide requested information, including information regarding expungements and juvenile court proceedings, or otherwise to cooperate in proceedings before the admissions committee may be grounds for a recommendation of disapproval.

(2) The admissions committee shall determine an applicant's character, fitness, and moral qualifications in accordance with all of the following:

- (a) The provisions of this rule;
- (b) The applicable decisions of the Supreme Court of the United States;
- (c) The applicable decisions of the Supreme Court of Ohio;

(d) Any standards of conduct promulgated by the Board and approved by the Court under Section 10(B)(2)(b) of this rule.

(3) An applicant may be approved for admission if the applicant's record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them and demonstrates that the applicant satisfies the essential eligibility requirements for the practice of law as defined by the Board. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for disapproval of the applicant. Factors to be considered carefully by the admissions committee before making a recommendation about an applicant's character, fitness, and moral qualifications shall include, but are not limited to, all of the following:

- (a) Commission or conviction of a crime, subject to division (D)(5) of this section;
- (b) Evidence of an existing and untreated chemical (drug or alcohol) dependency;
- (c) Commission of an act constituting the unauthorized practice of law;
- (d) Violation of the honor code of the applicant's law school or any other academic misconduct;

(e) Evidence of mental or psychological disorder that in any way affects or, if untreated, could affect the applicant's ability to practice law in a competent and professional manner;

(f) A pattern of disregard of the laws of this state, another state, or the United States;

(g) Failure to provide complete and accurate information concerning the applicant's past;

(h) False statements, including omissions;

(i) Acts involving dishonesty, fraud, deceit, or misrepresentation;

(j) Abuse of legal process;

(k) Neglect of financial responsibilities;

(l) Neglect of professional obligations;

(m) Violation of an order of a court;

(n) Denial of admission to the bar in another jurisdiction on character and fitness grounds;

(o) Disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction.

(4) The admissions committee shall determine whether the present character, fitness, and moral qualifications of an applicant qualify the applicant for admission to the practice of law. In making this determination, the following factors shall be considered in assigning weight and significance to the applicant's prior conduct:

(a) Age of the applicant at the time of the conduct;

(b) Recency of the conduct;

(c) Reliability of the information concerning the conduct;

(d) Seriousness of the conduct;

(e) Factors underlying the conduct;

(f) Cumulative effect of the conduct;

(g) Evidence of rehabilitation;

- (h) Positive social contributions of the applicant since the conduct;
- (i) Candor of the applicant in the admissions process;
- (j) Materiality of any omissions or misrepresentations.

(5)(a) If an applicant has been convicted of a felony under the laws of this state, the laws of the United States, or the laws of another state or territory of the United States, or adjudicated a delinquent child for conduct that, if committed by an adult, would be such a felony, the applicant shall undergo a review by the Board of Commissioners on Character and Fitness in accordance with Section 12 of this rule, and the applicant may be approved for admission only if all of the following apply:

(i) More than five years have passed since the applicant was released from parole, probation, community control, post-release control, or prison if no post-release control or parole was maintained;

(ii) The rights and privileges of the applicant that were forfeited by conviction have been restored by operation of law, expungement, or pardon;

(iii) The applicant is not disqualified by law from holding an office of public trust.

(b) In addition to considering the factors listed in division (D)(3) of this section, the Board in its review may consider how an approval of the applicant would impact the public's perception of, or confidence in, the legal profession.

(c) If the applicant's conviction or delinquency adjudication was for aggravated murder, murder, attempted murder, or rape, and the Board votes to approve the applicant in accordance with this section and Section 12 of this rule, the Board shall make a final report, with its findings of fact and recommendation of approval, for the Supreme Court's review. The Board shall file the report and the record with the Clerk of the Supreme Court. Consistent with the procedures established in Section 12(F) and (G) of this rule, the Court will review the applicant and make the final determination on whether the applicant shall be approved for admission.

(6) In determining an applicant's character, fitness, and moral qualifications for the practice of law, the admissions committee shall not consider factors that do not directly bear a reasonable relationship to the practice of law, including but not limited to the following impermissible factors:

(a) Age, sex, race, color, national origin, or religion of the applicant;

(b) Disability of the applicant, provided that the applicant, though disabled, is able to satisfy the essential eligibility requirements for the practice of law.

DEFINITIONS OF ESSENTIAL ELIGIBILITY REQUIREMENTS FOR THE PRACTICE OF LAW

In fulfilling its obligations for investigating whether an applicant possesses the requisite character, fitness and moral qualifications for admission to the practice of law, the Board of Commissioners on Character and Fitness considers the following to be essential eligibility requirements for the practice of law:

1. The cognitive capacity to learn, to recall what has been learned, to reason and to analyze;
2. The ability to communicate clearly with clients, attorneys, courts, and others;
3. The ability to exercise good judgment in conducting one's professional business;
4. The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;
5. The ability to conduct oneself with respect for and in accordance with the law and the Code of Professional Responsibility;
6. The ability to avoid acts that exhibit disregard for the health, safety and welfare of others;
7. The ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, and others;
8. The ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others;
9. The ability to comply with deadlines and time constraints; and
10. The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.