

# LITIGATION UPDATE

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## CASES REPORTED:

### CHARACTER AND FITNESS

#### **Violating examination protocol; mental fitness; failure to disclose**

*In re Blackwell*, 116 Ohio St. 3d 530, 880 N.E.2d 886, 2007-Ohio-6041 (2007)

#### **Substance abuse**

*In re Lynch*, 116 Ohio St. 3d 187, 877 N.E.2d 656, 2007-Ohio-6044 (2007)

#### **Discipline as a member of a profession or professional organization; teacher's inappropriate relationship with a teenage student; failure to disclose**

*In re Creighton*, 117 Ohio St. 3d 253, 883 N.E.2d 433, 2008-Ohio-852 (2008)

#### **Dishonesty; irresponsibility in business and professional matters; unauthorized practice of law; violation of reasonable rules of conduct; failure to exercise substantial self-control; mental and emotional instability**

*Dean v. Mississippi Board of Bar Admissions*, 972 So. 2d 590, 2008 WL 151811 (Miss.)



### CONDITIONAL ADMISSION

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*In re Edwards*, 958 So. 2d 1173 (La. 2007)

#### **AMERICANS WITH DISABILITIES ACT**

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*Jenkins v. National Board of Medical Examiners*, 2008 U.S. Dist. LEXIS 10905, 2008 WL 410237

### CHARACTER AND FITNESS

#### **Violating examination protocol; mental fitness; failure to disclose**

*In re Blackwell*, 116 Ohio St. 3d 530, 880 N.E.2d 886, 2007-Ohio-6041 (2007)

Rahshann Blackwell graduated from law school in May 2000 and took and failed the Ohio bar examinations in July 2000, February 2001, July 2001, July 2003, and July 2005. During the July 2003 and July 2005 examinations, he was charged with violating examination protocol by continuing to write on portions of the examination after the time was called. After the July 2003 examination, the Ohio Board of Bar Examiners conducted a hearing and disqualified his answers on five essay questions because he had answered them after time was called; with the disqualifications, Blackwell was unable to achieve a passing score on the examination. At another hearing before a panel of the Ohio Character and Fitness Board, Blackwell convinced the panel that he

would not repeat the mistakes he had made on the July 2003 examination. He attempted to retake the examination in 2004, but his application was rejected because it was incomplete.

He then applied and sat for the July 2005 examination, but after he took the examination, alleged improprieties were reported to the Board of Bar Examiners. Following that examination, the Character and Fitness Board appointed a panel to conduct a hearing. The hearing was conducted in January 2007 because Blackwell had requested and had been granted several continuances in the meantime. The panel recommended that his application not be approved.

The Character and Fitness Board found that in addition to his problems at the examination, Blackwell had failed to disclose on his latest bar application that he had been arrested, charged with traffic offenses, and detained in jail, and that he had been sued by the University of Denver for past-due tuition.

In regard to the examination violations, the Board found that after the morning session of the first day of the July 2005 examination, another applicant reported Blackwell. A special proctor was assigned to watch Blackwell in the afternoon session and when time was called, Blackwell stopped writing and put down his pen; he then picked up his pen and continued to write for an additional 4.45 seconds timed by a stopwatch. To explain his actions,

Blackwell said that he had gone to the testing site the day before the bar examination and had slept all night in his car in the parking lot because he did not want to be late. He was late in any case, coming in to the testing room during the oral instructions. He also said that he had tried to put his pen down prior to the expiration of time, but when he saw what he perceived to be an error, he had to correct it because he wanted his examination to be perfect.

WHEN TIME WAS CALLED, BLACKWELL STOPPED WRITING AND PUT DOWN HIS PEN; HE THEN PICKED UP HIS PEN AND CONTINUED TO WRITE FOR AN ADDITIONAL 4.45 SECONDS TIMED BY A STOPWATCH. TO EXPLAIN HIS ACTIONS, BLACKWELL SAID . . . HE HAD TRIED TO PUT HIS PEN DOWN PRIOR TO THE EXPIRATION OF TIME, BUT WHEN HE SAW WHAT HE PERCEIVED TO BE AN ERROR, HE HAD TO CORRECT IT BECAUSE HE WANTED HIS EXAMINATION TO BE PERFECT.

To explain his nondisclosure on the application, Blackwell stated that when he had filed his application at the end of March 2005 he had just updated his previously rejected application and resubmitted it, including an invalid notarized signature page, failing to disclose that he had been sued for \$6,200 for past-due tuition and that in March 2005 he had been arrested, charged with four traffic violations, and jailed in Colorado. He

had called from the Colorado jail to tell his secretary to mail the application on March 30. He said that he failed to disclose the lawsuit because he did not have the details of the case and he did not report his arrest because he was in jail and wanted to meet the April 1 application filing deadline.

A clinical and forensic psychologist testified at the hearing that Blackwell had a diminished capacity to concentrate and think efficiently and he probably had been experiencing these symptoms for some time. As for Blackwell's ability to function as an attorney, the psychologist, after having reviewed the

essential eligibility requirements to practice law in Ohio, testified that Blackwell's faculties to comply with six of the ten standards were impaired. The Character and Fitness Board recommended that the Ohio Supreme Court not approve Blackwell because among other reasons he was not mentally fit to practice law.

The Ohio Supreme Court stated that an "applicant must have a record of conduct that 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." The court pointed out that Blackwell had failed to sustain his burden and that "[i]n addition to the manifestations of his inability to comply with time constraints generally, he has demonstrated eccentric and irrational thinking that [the psychologist] attributes to his psychological disorder and abnormal personality traits." The court agreed with the recommendation of the Character and Fitness Board that Blackwell was psychologically unfit for admission to practice in Ohio. He was given the right to apply to take the February 2009 bar examination provided that he had by that time undergone treatment with a licensed professional in psychology or psychiatry and had been reevaluated by a mental health professional approved by the Character and Fitness Board, at his own expense, and that he file with his application a copy of that professional's report.

### Substance abuse

*In re Lynch*, 116 Ohio St. 3d 187, 877 N.E.2d 656, 2007-Ohio-6044 (2007)

Eugene Lynch graduated from law school in May 2007 and filed an application to take the July 2007 Ohio bar examination. The Joint Admissions Committee of the Cuyahoga County and Cleveland Bar Associations conducted a character and fitness interview and recommended that he be approved

with the qualification that he enter a 12-step program to address his use of alcohol and its relationship to his professional responsibilities. The committee was concerned about Lynch's lack of remorse and personal responsibility for two separate alcohol-related convictions: one for assault and one for attempted disorderly conduct. Lynch ap-

LYNCH WAS ARRESTED IN BALTIMORE, MARYLAND, AND CHARGED WITH CARRYING A DEADLY WEAPON WITH THE INTENT TO INJURE AND SECOND-DEGREE ASSAULT. . . . THE POLICE REPORT INDICATED THAT LYNCH HAD STRUCK HIS VICTIM OVER THE HEAD WITH A BEER BOTTLE WHEN THE VICTIM PROTESTED LYNCH'S CUTTING IN FRONT OF HIM IN A LINE TO USE THE RESTROOM.

pealed to the Board of Commissioners on Character and Fitness, which appointed a panel to review his qualifications. The panel recommended that Lynch be allowed to reapply to take the July 2008 examination, noting that he had entered into a contract with the Ohio Lawyers Assistance Program (OLAP).

The Board adopted the panel's report, which found that in 2004 Lynch was arrested in Baltimore, Maryland, and charged with carrying a deadly weapon with the intent to injure and second-degree assault. Lynch stated that this incident involved a bar fight and that he had been defending himself. However, the police report indicated that Lynch had struck his victim over the head with a beer bottle when the victim protested Lynch's cutting in front of him in a line to use the restroom. The

second incident occurred in 2006 in Ohio when Lynch left a bar and tried to reenter to pay his bar tab but was turned away by the police. When he tried to reenter a second time, he was arrested for disorderly conduct after he swore at the police officers. That charge was reduced to attempted disorderly conduct in a plea agreement.

At the hearing, Lynch described his drinking habits as going to a bar twice a week and drinking approximately six alcoholic beverages in a four-hour period. He was assessed at a local hospital and diagnosed as alcohol-dependent. While he received intensive outpatient treatment and seemed to be doing the right things to address his condition, the Board noted that Lynch remained in denial about his alcoholism.

The Ohio Supreme Court agreed with the Board's findings and recommendations, stating that Lynch's dependence on alcohol and his pattern of disregarding the law had shown that he did not yet possess the requisite character, fitness, and moral qualifications to be admitted to the bar. The court stated that Lynch needed further time to show that he had overcome his alcohol dependency and was managing his condition with sufficient treatment and counseling. The court did not approve his pending application but stated that he could re-apply for the July 2008 examination.

**Discipline as a member of a profession or professional organization; teacher's inappropriate relationship with a teenage student; failure to disclose**

*In re Creighton*, 117 Ohio St. 3d 253, 883 N.E.2d 433, 2008-Ohio-852 (2008)

Carroll Creighton accepted a one-year teaching position for the 2003–2004 academic year in a high school in Putnam County, Ohio. In September 2003, a police officer observed Creighton and one of his students talking in the student's car in a parking lot around 11:30 p.m. The police officer reported this incident to the high school principal, who immediately reprimanded Creighton for violating the rules against teachers fraternizing with students. In April 2004, the principal confronted Creighton about

his relationship with a 15-year-old female student and an allegation that he had been visiting her in her home when her parents were not there and kissing her. Creighton denied the accusation. An investigation unearthed a number of complaints from other female students about Creighton's having made excessively complimentary or suggestive remarks to them. Creighton was placed on administrative leave of absence in April 2004 and he resigned his position two weeks later. In July 2006, the Ohio Department of Education notified Creighton that it intended to revoke his teaching permit based on his inappropriate personal contacts and relationships with students.

IN APRIL 2004, THE PRINCIPAL CONFRONTED CREIGHTON ABOUT HIS RELATIONSHIP WITH A 15-YEAR-OLD FEMALE STUDENT AND AN ALLEGATION THAT HE HAD BEEN VISITING HER IN HER HOME WHEN HER PARENTS WERE NOT THERE AND KISSING HER. CREIGHTON DENIED THE ACCUSATION. AN INVESTIGATION UNEARTHED A NUMBER OF COMPLAINTS FROM OTHER FEMALE STUDENTS ABOUT CREIGHTON'S HAVING MADE EXCESSIVELY COMPLIMENTARY OR SUGGESTIVE REMARKS TO THEM.

In July 2004, Creighton applied to law school and in answering the question whether he had been disciplined for unethical conduct as a member of any profession or professional organization, he checked “no.” In his personal statement, he criticized the teaching profession, claimed to have been falsely accused, and reiterated his denial of having been involved with a student. Two years later when he supplemented his law school application to clarify several items, he stated that he had mistakenly answered “no” when asked if he had been disciplined as a member of a professional organization. He revealed details about the parking lot incident and admitted to having been reprimanded. He also mentioned his administrative leave of absence, adding that he had resigned from his teaching position. He did nothing to retract his denial of the kissing incident or to acknowledge the impropriety of his conduct. When he registered for admission to the bar, he answered “yes” to the question of whether he had ever failed to answer fully and truthfully all questions on an application for admission to any educational institution and noted the allegations of his having kissed a female student. Following the hearing before a panel, the Ohio Board of Commissioners on Character and Fitness recommended that Creighton’s application not be approved but that he be allowed to apply to take the July 2008 bar examination.

In reviewing the Board’s recommendation, the Ohio Supreme Court stated that Creighton had failed to demonstrate the trustworthiness that is expected of a professional, whether a teacher or a lawyer, with respect to his conduct with the female students during the 2003–2004 school year. The court pointed out that he was not forthright in disclosing to his law school the circumstances that led to his resignation as a teacher and his personal statement could only be read as a denial that he was guilty of the allega-

tion of kissing a student when he was in fact guilty of that and more. During the character and fitness inquiry process, it became clear that Creighton had engaged in a month-long relationship with the teenage student and had kissed her on several occasions. As the investigation continued, Creighton began divulging more details of his wrongdoing and noted that his answers to some of the questions on the bar application had been intentionally misleading. He had no explanation for denying and shading the truth except that he was ashamed of what he had done.

The court said that given Creighton’s past behavior, he might never be able to produce clear and convincing proof that he was qualified to be a member of the Ohio Bar. He did persuade the panel and the Board to give him a second chance, which they did. The court, while accepting the Board’s recommendation and allowing him to reapply, stated that a longer period of rehabilitation was needed and allowed him to apply for the bar examination in July 2009 if he submitted a favorable psychological assessment prepared by a qualified medical professional.

**Dishonesty; irresponsibility in business and professional matters; unauthorized practice of law; violation of reasonable rules of conduct; failure to exercise substantial self-control; mental and emotional instability**

*Dean v. Mississippi Board of Bar Admissions*, 972 So. 2d 590, 2008 WL 151811 (Miss.)

In early 2001 Earl Stephen Dean graduated from Thomas Cooley Law School and applied for admission with the Mississippi Board of Bar Admissions. The Mississippi Committee on Character and Fitness held a series of hearings concerning Dean’s application. At the conclusion of each hearing, the

Committee recommended that the Mississippi Board of Bar Admissions deny Dean's application.

The Character and Fitness Committee recommended the denial of Dean's application because the Committee found that Dean's conduct included (1) dishonesty, (2) irresponsibility in business and professional matters, (3) engagement in the unauthorized practice of law, (4) violation of the reasonable rules of conduct governing many of his activities, (5) failure to exercise substantial self-control, and (6) mental and emotional instability.

The Board adopted the Character and Fitness Committee's recommendations and denied Dean's admission to the bar in both January 2003 and September 2005. Dean appealed the decision to the Hinds County Chancery Court, which in August 2006 upheld the Board's decision. Dean appealed the Chancery Court's decision to the Mississippi Supreme Court.

The issue for the Mississippi Supreme Court was whether the Board's decision to deny Dean's admission was arbitrary, capricious, or malicious. This standard, said the court, was the familiar one used in judicial review of other administrative licensing decisions in the state.

The court first examined Dean's conduct toward the Board and found that Dean had been dishonest in four instances. Three of the occurrences were false answers to questions on the bar application, where Dean failed to disclose (1) being placed on probation in law school, (2) attending William Howard Taft University Law School, and (3) being terminated from employment three times.

The fourth occurrence of dishonesty arose out of a 2001 incident in which Dean picketed the houses of Thomas Byerley, a Michigan Bar official, and John

Nussbaumer, a dean at Thomas Cooley Law School. After picketing the houses, Dean sued Byerley for damages, claiming that Byerley had threatened Dean and violated his First Amendment rights. In court, Dean denied having picketed Nussbaumer's house but on appeal to the U.S. Court of Appeals for the Sixth Circuit, he admitted it. When appearing before the Character and Fitness Committee, Dean again denied having picketed Nussbaumer's house despite a letter Dean had sent to the Committee admitting otherwise.

The court concluded that Dean had failed to offer evidence to the Board to negate the Board's conclusion that he was dishonest. As a result, the court found that as to the claims of dishonesty, Dean failed to show that the Board's denial of his application was arbitrary, capricious, or malicious.

The court continued by considering Dean's pattern of litigation and found Dean to have demonstrated "a habit of filing meritless and retaliatory suits." As an example, the court noted the lawsuit against Thomas Byerley, in which the Sixth Circuit characterized Dean's arguments as "improbable" with "no meaningful authority." A second example was a lawsuit Dean had filed against two Missouri Conservation Commission employees after the Commission obtained a preliminary injunction prohibiting Dean from improving a road leading to his property, in which the Eighth Circuit rejected his constitutional claim as "frivolous."

Further evidence of Dean's filing retaliatory lawsuits included a suit brought by Dean against a prosecutor and a circuit court judge on the basis of emotional distress when restitution was not paid to Dean at the conclusion of a criminal case even though Dean had rejected the payment of restitution. Dean also sued two assistant attorneys general for

Missouri after they had obtained a consent injunction against Dean and a charity he directed for deceptive practices. The case was dismissed because of prosecutorial immunity.

After considering Dean's litigation history, the court concluded that the Board's denial of his application was not arbitrary, capricious, or malicious.

Next the court examined whether the Board had violated Dean's right to due process. Dean argued that the Board had failed to give him the opportunity to confront and cross-examine witnesses who supplied information adverse to him. The court found that the Board notified Dean of his hearing and identified potential witnesses and that Dean had the opportunity to call witnesses on his behalf, which he declined to do. Consequently, Dean's due process rights were not violated.

The court considered whether Dean's conduct was too remote in time to be considered by the Board. Dean argued that the Board denied his application on the basis of an allegation that Dean had engaged in the unauthorized practice of law in 1987, which was 20 years prior. In discounting this claim, the court noted that the unauthorized practice of law allegation was only one of six reasons the Board relied upon for its decision.

The final issue for the court was whether the Board had properly concluded that Dean was mentally and emotionally unstable. Dean maintained that the Board, by finding him unstable, had made a medical determination without having a medical license. The court ruled that a medical license is not necessary in making such decisions. The Board relied upon the following facts in making its determination: (1) Dean wrote a number of threatening letters to a former employer and the dean of Thomas

Cooley Law School, (2) law school administrators urged Dean to undergo psychiatric examination, and (3) Dean paid members of the public to attend a Character and Fitness Committee hearing. The court found that Dean's repeated actions were sufficient for the Board to conclude that he "'exhibited conduct substantially evidencing an inclination' that he was 'emotionally and mentally unstable to the extent that [he] was not suited for the practice of law.'"

The supreme court affirmed the lower court's decision and Dean was denied admission to the Mississippi Bar.

## CONDITIONAL ADMISSION

### Substance abuse

*In re Edwards*, 958 So. 2d 1173 (La. 2007)

When Thomas Edwards applied to take the Louisiana Bar Examination, he disclosed several arrests and citations for alcohol-related criminal charges. After reviewing this information, the Louisiana Committee of Bar Admissions determined that it was appropriate that he be referred for a substance abuse evaluation. After the evaluation, Edwards completed a six-week outpatient drug and alcohol treatment program. Edwards and the Committee filed a joint petition for conditional admission with the Louisiana Supreme Court asking that Edwards be admitted on a conditional basis for five years subject to the requirements that he comply with all the terms and conditions of his contract with the Lawyers Assistance Program.

In June 2006, the court denied the petition for conditional admission and appointed a Commissioner to take evidence concerning Edwards's character and fitness to practice law. The Office of Disciplinary Counsel was also authorized to conduct an investigation into his qualification to be admitted to the bar.

Following a hearing in January 2007, a report was filed with the Louisiana Supreme Court recommending that Edwards be conditionally admitted to the practice of law. The Committee objected to that recommendation. Following oral arguments, the supreme court concluded that Edwards had failed to meet his burden of proving that he had the good moral character to be admitted to the Louisiana State Bar Association, and his application for admission was denied.

## AMERICANS WITH DISABILITIES ACT

### Impairment vs. disability; major life activities

*Jenkins v. National Board of Medical Examiners*, 2008 U.S. Dist. LEXIS 10905, 2008 WL 410237

Kirk Jenkins brought an action against the National Board of Medical Examiners (NBME) seeking an injunction directing the NBME to grant him time and a half to complete Step One of the U.S. Medical Licensing Examination. Jenkins argued that he suffered from a condition that impaired his ability to read and was therefore entitled to extra time under the Americans with Disabilities Act (ADA).

The court was convinced by extensive evidence of Jenkins's "impairment" because he clearly did not read at the same rate as others and he processed the written word at a slower rate than most. Less clear, said the court, was whether Jenkins's impairment "limit[ed] a major life activity, and d[id] so substantially." Citing *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the court defined "major life activities" as those that are "of central importance to daily life."


In reaching its decision the court made two preliminary determinations. First, the major life activity in this case was reading, not test taking. In addition,

the significance of Jenkins's impairment was to be measured in the context of an average person's life, not the life of a medical student.

The court then turned its attention to which tasks central to the daily lives of most people Jenkins was unable to perform due to his condition. Jenkins complained that he had difficulty reading street signs with similar names if forced to do so quickly, was unable to read aloud in church at the same pace as other congregants, and could not watch a movie with subtitles or most of the text scrolled at the bottom of television broadcasts.

Jenkins admitted being able to perform activities classified by the court as "seemingly more 'central to most people's daily lives,'" such as reading newspapers, food container labels, menus in restaurants, and correspondence from his attorney, although he read more slowly than others.

The court found that while Jenkins's "condition prevent[ed] him from succeeding where success [was] measured by one's ability to read under time pressure," his condition did not preclude him from performing "tasks central to most people's daily lives." Because Jenkins's impairment did not substantially limit any major life activities, the court found it "impossible" to conclude that Jenkins was "disabled for purposes of the ADA" or entitled to the relief he sought.

Jenkins's motion for preliminary injunctive relief was denied and his complaint was dismissed. 

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