

LITIGATION UPDATE

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In re Grossman, 853 N.Y.S.2d 333 (N.Y. 2008)

ADMISSION ON MOTION

J.D. from non-ABA-approved law school

In re Doering, 275 Neb. 1004, 751 N.W.2d 123 (2008)

In 1982 David Doering graduated from Western State University College of Law in Fullerton, California.

At the time of his graduation, Western

State was not an ABA-approved law school. After graduation, Doering sat for the Montana and California bar examinations and did not pass. In 1992 Doering passed the Georgia bar examination and was admitted to the Georgia State Bar. From 1995 to 2006, Doering practiced law in Georgia as a defense attorney for indigent clients.

In 2006 Doering moved to Nebraska to be closer to his parents, who were in poor health. In

April 2007, Doering submitted a Class 1-A application to the Nebraska State Bar Commission seeking admission to the Nebraska bar without examination. The Commission denied Doering's application because he had not received his law degree from an ABA-approved law school. Doering appealed the Commission's decision.

At the hearing on his appeal, Doering offered evidence that although at the time of his attendance Western State was not an ABA-approved law school, it was accredited by both the Committee of Bar Examiners of the State of California and the Western Association of Schools and Colleges. In addition, Western State became an ABA-approved law school in the mid-1990s, temporarily allowed its accreditation to lapse, reacquired provisional accreditation in 2005, and maintained accredited status since that time. Doering also argued that in 1982 Western State met various accreditation requirements set forth by the ABA at the time. Additional evidence came from one of Doering's expert witnesses, an associate dean and law professor at Western State, who testified that based on a review of Doering's transcript, Doering's academic experience and course study from 1979 to 1982 was essentially the same as that of law students who graduated from Western State in 2007. The expert witness also testified that Western State was not accredited in 1982 primarily because at the time the ABA required accredited law schools to be organized and operated as nonprofit institutions.

After considering Doering's arguments, the Commission denied Doering's application because he lacked a law degree from an ABA-approved law school. Doering appealed the Commission's decision to the Nebraska Supreme Court.

In its opinion, the court noted that exceptions and waivers to its rules regarding attorney

admissions were appropriate "whenever it can be demonstrated that the rules operate in such a manner as to deny admission to a petitioner arbitrarily and for a reason unrelated to the essential purpose of the rule." Doering noted that the court had granted waivers in the past to foreign-educated applicants who were able to prove that their law school education was equivalent to that found in an ABA-approved law school and argued that he should be afforded the same waiver opportunity. The court disagreed with Doering, noting the "critical" distinction that "[t]he ABA does not evaluate foreign law schools for accreditation; thus, there is no way for citizens of foreign countries to attend an ABA-accredited school in their own country."

The court drew a bright line for U.S.-educated law school graduates in ruling that, "[f]or applicants who graduate from U.S. law schools, we have chosen, as reflected in rule 5C, to rely upon the ABA accreditation process as an objective determination of the educational environment for prospective attorneys."

The court concluded that an unreasonable and unnecessary burden would be imposed upon it should the court begin evaluating "nonaccredited U.S. law schools on a case-by-case basis to determine whether a particular school, at a certain point in time, provided a legal education that was substantially equivalent to that from an ABA-accredited law school." Finding the ABA best equipped to perform the accreditation function, the court affirmed the Commission's denial of Doering's bar application.

AMERICANS WITH DISABILITIES ACT

Reasonable accommodations; learning disability

Kelly v. West Virginia Board of Law Examiners, 2008 WL 2891036, ___ F. Supp. 3d ___ (S.D. W.Va.)

Shannon Kelly graduated from law school in 2007. Prior to sitting for the West Virginia Bar Examination in July 2007, Kelly requested accommodations, pursuant to the Americans with Disabilities Act (“the ADA”), because he had been diagnosed with a learning disability. Kelly requested that the West Virginia Board of Law Examiners provide him with large-print (18-point font) test questions, a distraction-reduced testing environment, and double time to complete the examination.

The Board allowed Kelly to have large-print questions with an 18-point font and a private room for testing. The Board also extended the amount of time for Kelly to finish the exam to time and a half, rather than double time as he had requested. Kelly sat for the July 2007 exam and did not pass.

Kelly reapplied to sit for the July 2008 West Virginia Bar Examination. He requested the same accommodations that he had sought in 2007 and supplied the Board with the same information regarding his disability. The Board again denied Kelly’s request for double time, instead allowing him time and a half.

On July 21, 2008, eight days before the bar exam, Kelly filed a motion for a preliminary injunction in federal district court. In his motion, Kelly sought to compel the Board to allow him double time to complete the exam. Kelly also complained that he had been denied due process in violation of the United States and West Virginia constitutions. The court held a hearing on the request for a preliminary injunction on July 23, 2008.

In its decision, the court reviewed the four standards to be considered in granting a motion for a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff if the injunction is

denied, (2) the likelihood of harm to the defendant if the injunction is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest, and noted that the first two concerns were the most important.

In balancing the likelihood of irreparable harm to the plaintiff and the defendant, the court decided that a denial of preliminary injunction would not cause Kelly irreparable harm, because Kelly had been successful on past exams when he had not been granted double time. In addition, the court noted that should Kelly fail the July 2008 examination, he could sit for the bar again in February 2009, “cut[ting] against the notion that any harm he will suffer is irreparable.”

In contrast, the court found that the harm to the West Virginia Board if the injunction were granted would be irreparable. The court reasoned that “it is crucial that any accommodations given to applicants to the Bar be uniformly applied and fairly administered.” Should the accommodations be granted when unnecessary, the harm to other applicants and the examination process could not be undone.

The court next assessed the likelihood that Kelly would succeed on the merits of his claim by examining whether Kelly could show that his request for double time was reasonable. The court found that Kelly had not shown a substantial likelihood (or even a likelihood) of success on the merits, because one doctor testified that Kelly was successful when only receiving time and a half, a second doctor had recommended only time and a half for testing, and Kelly had been successful on the MPRE without any additional time.

The court did not find it necessary to reach the issue of the public interest because Kelly had not shown a likelihood of success on the merits.

Kelly's motion for a preliminary injunction was denied.

CHARACTER AND FITNESS

Criminal convictions (DWI); substance abuse

In re Morgan, S. Ct. BA 2007-125 (V.I. 2008)

John Morgan was admitted to the Virginia Bar in 1989. After he passed the Virgin Islands essay examination and the MBE in July 2006, the Committee of Bar Examiners for the Virgin Islands had concerns about his character and conducted a hearing. The Committee was concerned about Morgan's past troubles with drugs and alcohol, noting that he had one DWI conviction in 1983, another reckless driving conviction in 1997 where the initial charge was DWI, and a guilty plea for possession of cocaine in 2000 after he attempted to purchase cocaine from a court-appointed criminal defense client. He was suspended from the practice of law in Virginia for three years. During his suspension from the Virginia Bar, he was a real estate agent and did not practice law. In July 2003 he was again charged with DWI. He was reinstated to the Virginia Bar in February 2004. The Committee recommended that the court deny Morgan's admission.

The Supreme Court of the Virgin Islands, in reviewing the matter *de novo*, pointed out that Morgan's felony convictions stemmed from his addiction to cocaine: He had three DWI charges resulting in one conviction, and he enlisted a criminal defendant he was appointed to represent as a conduit to secure cocaine for himself. Although he appeared to be on the road to recovery from his addiction, had a number of letters of support for

his application, and had been attending Alcoholics Anonymous meetings, the Court said that while it recognized that the Virginia Bar had reinstated Morgan, it agreed with the Committee's conclusion that Morgan had not met the burden of establishing good moral character sufficient to practice in the Virgin Islands. He would be on probation until 2011 for his felony drug conviction. In particular, the Court was quite concerned about Morgan's involvement with his criminal defense client who helped him obtain cocaine. "By so doing he not only violated the law himself but also caused the law to be violated by his client." Morgan's application was denied.

Financial irresponsibility; failure to disclose

In re Stern, 943 A.2d 1247 (Md. 2008)

Kevin Stern applied for admission to the Maryland Bar in 2005. The Maryland Character and Fitness Committee conducted an investigation and found that his application revealed that Stern had engaged in a pattern of fiscal irresponsibility relating to his use of credit by running up unpaid credit card balances. A number of these accounts were referred to collection agencies, and judgments were obtained against Stern. Although Stern had sufficient assets to pay the debts, he chose not to. The Committee concluded that Stern only made arrangements to pay the debts when he became aware that they would be an impediment to his bar admission. In addition, Stern failed to fully disclose his debts and judgments on his law school and bar applications.

The Committee was also concerned that Stern had maintained an inappropriate relationship with an emotionally unstable 15-year-old female when Stern was 26 or 27. Stern claimed that the relationship did not become sexual until the girl turned 16,

and he claimed that he was acting as a father figure to the girl at the time he was having the sexual relationship.

The Committee concluded that Stern was not candid at the hearing and recommended that he not be admitted. On review the Court concurred, and Stern's application was denied.

Criminal charges (DUI and sexual imposition); financial irresponsibility; lack of candor

In re Rogers, 119 Ohio St. 3d 43, ___ N.E.2d ___ (Oh. 2008)

Kevin Rogers applied to take the February and July 2007 and February 2008 Ohio bar examinations. Because of his poor credit record and his history of criminal and other transgressions, the Board of Commissioners on Character and Fitness recommended that the Court disapprove his character, fitness, and moral qualifications but allow him to reapply for the July 2008 bar examination.

Rogers was initially interviewed by the Erie County Bar Association Admissions Committee and then by a panel of the Board. The panel was concerned about the applicant's credit problems. At the time of his application, Rogers was in his late twenties, with a credit card debt going back to his college years. In his second year of law school, he obtained employment and tried to locate creditors to pay off these debts, but was not successful. The panel was not impressed with his efforts. The Board concluded that Rogers's credit history warranted initial disapproval but that he should be allowed to reapply for the July 2008 bar examination. The Board stated that "[r]egarding the applicant's unpaid debt, the fact that many of the debts were old and unpaid was of greater concern than the total amount of the debt. The panel concurred with the interviewers that the

applicant seemed to dance around the reasons the debts were not paid and the efforts he had made to pay them."

The applicant also had several criminal charges and other transgressions. In addition to two minor traffic violations, his criminal record included a DUI charge, which was ultimately dismissed. This occurred when Rogers was 19 and had attended a rock concert in Pennsylvania, where he drank as many as 12 beers, according to his testimony. He was stopped at 2:00 A.M. while driving back to Sandusky, Ohio. Although he did disclose this incident on his application, because his breath-alcohol level was still .106 supposedly six hours after his last drink, the panel was concerned about his candor as to how much he had actually had to drink and when. The Board concluded that this drunk-driving charge warranted initial disapproval but should not preclude the applicant from reapplying for the July 2008 bar examination. The Board was also concerned about the fact that, regardless of how much Rogers had had to drink, he drank and intended to drive home. Rogers acknowledged that he was in the wrong state of mind at that time.

Rogers's criminal record also indicated that he pleaded no contest to a charge of sexual imposition and completed a diversion program in lieu of conviction. The event leading to this charge occurred when Rogers was 18 and accompanied two female co-workers to their apartment after having had drinks with a larger group. Although the applicant disclosed this incident and the resulting charge in his application materials, the committee was concerned that he did not fully acknowledge or appreciate the gravity of his wrongdoing. Rogers had disclosed the incident to the law school he subsequently

attended, which put him on immediate disciplinary probation.

The Board concluded that those improprieties warranted initial disapproval but should not preclude Rogers from reapplying for the July 2008 bar examination.

Additional testimony showed that the applicant was not able to manage his behavior in certain situations. "In several instances . . . , the applicant victimized a woman with conduct ranging from loutish to threatening in apparent attempts to keep or regain her affection. In one incident, the applicant went to the woman's apartment at 4:00 A.M. and pounded on her door for 20 minutes while spewing epithets. In another incident, the applicant threw a half-filled can of beer at the woman and had to be escorted away." Despite the applicant's volatility toward her, the woman testified that she had never been afraid of him and harbored no ill will.

On review, the Ohio Supreme Court noted that the panel, the Board, and the parties agreed that the applicant should be permitted to reapply for the July 2008 bar examination. However, the Court was concerned that Rogers had demonstrated two of the specific disqualifying characteristics for bar admission: He had shown reluctance in being forthcoming about his past, and he had neglected his financial responsibilities. He had been involved in serious wrongdoing, as shown by the DUI and sexual imposition charges. The Court said that it continued to have misgivings about Rogers and, rather than allow him to immediately reapply for the bar examination, they would allow him time to show improvement in the areas of candor, financial responsibility, and lawful conduct. While they disapproved his current application, they did permit him to reapply for the February 2009 examination.

READMISSION

Rehabilitation; financial misconduct (felony grand theft, failure to pay federal income taxes)

In re Marks, 959 So. 2d 228 (Fla. 2007)

Allan Marks was admitted to the Florida Bar in 1974. In 1990 the Court approved an uncontested petition for disciplinary resignation, which became effective in April 1991. Marks reapplied for admission in March 1995 and, following an investigation, the Florida Board of Bar Examiners filed specifications against Marks. After a hearing on the specifications, the Board issued its Findings of Fact, Conclusions of Law, and Recommendation, recommending that Marks be denied admission. The Florida Supreme Court concurred.

In January 2001, Marks submitted a new application for admission. Following an updated investigation, the Board conducted hearings in November 2004, and in March 2005 the Board issued its Findings of Fact, Conclusions of Law, and Recommendations. It found that Specification 1—which detailed Marks's trust account violations, resignation in lieu of discipline, and guilty pleas to felony grand theft charges, as well as failure to establish rehabilitation—was proven and was disqualifying for admission. Specification 2, which detailed Marks's failure to pay income taxes for tax years 1996–1999, was found not disqualifying because Marks did eventually pay his taxes late. The Board recommended that Marks's admission be delayed for 12 months from the date of the hearing to give him an opportunity to pursue and submit proof of additional rehabilitation efforts. This documentation was submitted by Marks in November 2005, and the Board recommended that Marks be admitted to the Florida Bar.

The Florida Supreme Court, in reviewing the recommendation, noted that the original discipline came about because Marks had misappropriated approximately \$250,000 in 12 to 15 withdrawals from his trust account over a period of time. He would withdraw money for his personal use and repay some of the money later; he would then withdraw additional funds and repay some of that money later. The Bar began investigating Marks after a complaint following a real estate transaction in which the net proceeds were over \$197,000 but Marks transferred only \$97,000 to the seller's attorney. When contacted about the \$100,000 shortage, Marks replied that it was a bank error and that he would send the money in himself, which was done several days later.

Following his resignation from the Bar in 1990, Marks was criminally prosecuted for felony grand theft for his trust account defalcations. He pled guilty to these charges in 1992 and was sentenced to four years' probation with special conditions of restitution. Marks then borrowed money from family, friends, and other sources to replace the money he had stolen from clients; and then in January 1997 he declared bankruptcy, discharging all the debts he owed to family, friends, and other sources. The amount discharged was over \$463,000, including a debt of \$90,000 he had taken from a trust established by his aunt for the care and maintenance of her severely disabled son. Marks testified that he agreed to repay the \$90,000 debt only if he were readmitted to the practice of law. He argued that it would be financially irresponsible for him to agree to repay this debt without this condition.

The problems with the IRS began before Marks's resignation from the Florida Bar. He had failed to pay federal income taxes for tax years 1985, 1989, 1990, and 1992–1995. In 1996 he owed the IRS over

\$150,000 in delinquent taxes, penalties, and interest. In addition he had not paid federal income taxes for the years 1996–1999 and testified that he used the tax money to pay for his children's college educations.

The Court further noted that Marks's resignation was equivalent to disbarment (because his misconduct would almost certainly have resulted in disbarment) and that the conduct that prompted his resignation presented a significant obstacle to his readmission. After Marks resigned from the Bar and was required to live a life beyond reproach to establish rehabilitation, he willfully refused to pay income taxes for several years and offered the excuse of choosing the benefit of his children above compliance with the law. The Court did not agree with the Board's finding that Specification 2 pertaining to tax matters was not disqualifying, stating that it was disqualifying both individually and collectively.

The Court next reviewed the rehabilitation issue, pointing out that the evidence demonstrated that Marks stole from clients; borrowed money from friends, family, and others to replace that money; and then declared bankruptcy, leaving the family, friends, and others to sustain the loss caused by his extravagant lifestyle. In addition, the other victims of his theft included his own cousin, who now has no money in the family trust to care for his needs. The Court stated that "[i]t is fundamental that an attorney who resigns in the face of disciplinary proceedings must correct the misdeeds of his past before attempting to prove his rehabilitation." It added that Marks appeared to be hostile to the Board and apparently believed that the Board had been unreasonable in requiring that he retake the bar examination when his scores expired. This negated another element of a showing of rehabilitation: lack of malice and ill feeling toward those who by duty were compelled


to bring about the disciplinary, judicial, administrative, or other proceedings against him. The Court did not approve the Board's recommendation and denied Marks's application for admission to the Florida Bar.

**Reinstatement through fraudulent means;
false statements on licensure and reinstatement
applications; securities and mail fraud**

In re Grossman, 853 N.Y.S.2d 333 (N.Y. 2008)

Israel Grossman was originally admitted to the New York Bar in 1979. While employed at a law firm, he gained confidential securities information which he shared with friends and relatives, who used the information and obtained a \$1.5 million illegal profit as a result. In 1987 Grossman was convicted of securities and mail fraud and sentenced to two years in prison; he was disbarred in 1988.

Grossman applied for readmission in 1996, which was denied because he refused to acknowledge his criminal culpability and had failed to disclose three legal actions in which he was a party. He

then reapplied for readmission in 2003, and the Hearing Committee granted his application. Subsequent to his reinstatement, it was discovered that Grossman had made a number of false statements in filling out applications for employment and for licensure as an insurance salesman and as a securities dealer. He consistently responded "no" to questions regarding any criminal convictions. Grossman also furnished false information on his reinstatement application and to the Hearing Committee that recommended his reinstatement. The referee recommended that Grossman's reinstatement be revoked because it had been obtained through fraudulent means. However, the court reviewing the recommendation found that Grossman had "engaged in a pervasive pattern of affirmative misrepresentations" and concluded that disbarment was a more appropriate sanction. 

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