

The Litigation Update has been revised on May 22, 2009, to reflect the following correction:
Erratum: The February 2009 Litigation Update, page 53, incorrectly identified Alameda County Superior Court as the appellate court in *Turner v. Association of American Medical Colleges*. Alameda County Superior Court was the trial court in this case. The California Court of Appeal, First District, Division 5, should have been identified as the appellate court that issued the decision.

LITIGATION UPDATE

by Fred P. Parker III and Jill J. Karofsky

CASES REPORTED:

AMERICANS WITH DISABILITIES ACT

Mental fitness; psychological evaluation; diploma privilege

*Brewer v. Wisconsin Board of Bar
Examiners*, 2008 WL 687315, 270
Fed.Appx. 418 (7th Cir. 2008); cert.
denied 129 S.Ct. 507 (Nov. 3, 2008)

Reasonable accommodations; state law

*Turner v. Association of American
Medical Colleges*, 167 Cal. App. 4th
1401, 85 Cal. Rptr. 3d 94, 2008 WL
4741737 (Cal. App. 1st Dist., 2008)

BAR EXAMINATIONS

Nonresident aliens

LeClerc v. Webb; *Wallace v. Calogero*,
419 F.3d 405 (5th Cir. 2005)

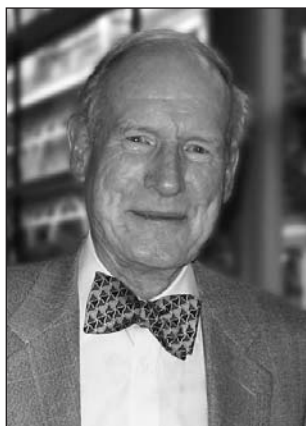
CHARACTER AND FITNESS

Misleading answers on law school and bar applications; lack of candor

In re Bitter, 2008 WL 4756889, 2008
VT 132 (Vt. 2008)

Questionable accusations and legal claims; abuse of legal process

In re Mitchell, 891 N.E.2d 732, 119
Ohio St. 3d 38 (Oh. 2008)



NON-ABA-APPROVED ONLINE LAW SCHOOL

Mitchell v. Board of Bar Examiners,
452 Mass. 582, 2008 WL 4937520
(Mass.)

AMERICANS WITH DISABILITIES ACT

Mental fitness; psychological evaluation; diploma privilege

*Brewer v. Wisconsin Board of Bar Exam-
iners*, 2008 WL 687315, 270 Fed.Appx.
418 (7th Cir. 2008); cert. denied 129
S.Ct. 507 (Nov. 3, 2008)

This case was reported in earlier issues
of THE BAR EXAMINER (Vol. 75, No. 2,
May 2006; Vol. 76, No. 2, May 2007).

Marsha Brewer, a graduate of the University of Wisconsin Law School, was denied admission to the Wisconsin Bar under Wisconsin's diploma privilege because the Wisconsin Board of Bar Examiners declined to certify her mental fitness. This decision was based on Brewer's certification by the Social Security Administration as disabled, which signified that the federal government considered her unable to pursue gainful employment, and on Brewer's refusal to undergo a psychological evaluation. Brewer then sued the state, the

Wisconsin Supreme Court, the Board, and various other persons, claiming that they had violated her constitutional rights under 42 U.S.C. §§ 1983 and 1985 as well as claims under Title II of the Americans with Disabilities Act (ADA) and the Vocational Rehabilitation Act of 1973. The district court judge dismissed all of the claims except those seeking relief under the ADA. The Board then told Brewer that if she reapplied for admission she would retain her diploma privilege and would not be required to undergo a psychological evaluation. The district court then dismissed her remaining claims as moot. Brewer appealed the dismissals, including the dismissal of her claims for damages.

The Seventh Circuit Court of Appeals reviewed Brewer's allegation that the Board's requests for a psychological evaluation and access to her medical records violated her Fourth Amendment rights and stated that a psychological evaluation was not a "search" for Fourth Amendment purposes and that in any case the Board did not obtain the records. Brewer also alleged that the Board deprived her of a property right and liberty interest in pursuing her chosen profession. The Court said that this claim failed because any constitutional interest that she may have had in pursuing her desired profession was "subject to reasonable governmental regulation." The Court said that Brewer's claim that her right of equal protection was violated did not pass muster because "[t]he Board is to license

only persons whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them. . . . Given Brewer's disabling mental-health condition, the Board's request for a psychological evaluation was rationally related to its interest in ensuring that only competent persons are admitted to practice law in Wisconsin."

THE COURT SAID THAT BREWER'S CLAIM THAT HER RIGHT OF EQUAL PROTECTION WAS VIOLATED DID NOT PASS MUSTER BECAUSE "[T]HE BOARD IS TO LICENSE ONLY PERSONS WHOSE RECORD OF CONDUCT JUSTIFIES THE TRUST OF CLIENTS, ADVERSARIES, COURTS AND OTHERS WITH RESPECT TO THE PROFESSIONAL DUTIES OWED TO THEM. . . . GIVEN BREWER'S DISABLING MENTAL-HEALTH CONDITION, THE BOARD'S REQUEST FOR A PSYCHOLOGICAL EVALUATION WAS RATIONALLY RELATED TO ITS INTEREST IN ENSURING THAT ONLY COMPETENT PERSONS ARE ADMITTED TO PRACTICE LAW IN WISCONSIN."

The Court also rejected Brewer's claims under the ADA, stating that the Board was immune from suit because the ADA does not abrogate state immunity for claims challenging attorney-licensing practices. In regard to her Rehabilitation Act claims, the Court said that Brewer presented no competent evidence that the Board receives federal assistance as is required under the Rehabilitation Act. The Court concluded that the Board had offered all the relief that the courts could provide for Brewer. The decision of the district court was affirmed.

Brewer then filed a motion for a rehearing and a rehearing en banc with the Seventh Circuit, and both motions were dismissed. In November 2008 her petition for writ of certiorari was denied by the Supreme Court of the United States.

Brewer also appeared before the Wisconsin Board of Bar Examiners, and her application was denied. She then filed a petition for review with the Supreme Court of Wisconsin, which was denied.

Reasonable accommodations; state law

Turner v. Association of American Medical Colleges, 167 Cal. App. 4th 1401, 85 Cal. Rptr. 3d 94, 2008 WL 4741737 (Cal. App. 1st Dist., 2008)

The plaintiffs in this case, Andres Turner, Anne Cashmore, Brendan Pierce, and David Lebovitz, are all California residents with reading-related learning disabilities and/or attention deficit hyperactivity disorder (ADHD). In 2004 they each applied to take the Medical College Admission Test (MCAT) in California and requested accommodations of extra time and/or a private room in which to do so.

The Association of American Medical Colleges (AAMC), the nonprofit organization responsible for developing and administering the MCAT, reviewed the accommodations requests under the standards set by the Americans with Disabilities Act (ADA). The ADA standards require an individual who is claiming a right to a reasonable accommodation for a disability to demonstrate “a physical or mental impairment that substantially limits one or more of the major life activities.” In the context of the MCAT, an applicant suffering from ADHD or a reading disability “would have to demonstrate that the disability or condition substantially limits the major life activities of reading or test taking.” The AAMC concluded that the plaintiffs did not meet the requisite standards set forth in the ADA and denied their requests for accommodations.

The plaintiffs filed a class action lawsuit against the AAMC alleging that the AAMC should have reviewed the accommodations requests under the standards outlined in California law rather than those in the ADA because the MCAT was administered in California. More specifically, the plaintiffs argued that their requests for accommodations should have been considered under the California Unruh Civil Rights Act (Unruh Act) and the California Disabled Persons Act (DPA). Both of these California statutes define “disability” more broadly than does the ADA, because they do not require evidence of a *substantial* limitation prior to the individual being granted an accommodation. To be granted an accommodation under the California statutes, an individual needs to show that a mental, psychological, or physical condition limits a major life activity (i.e., “makes the achievement of the major life activity difficult”).

At the conclusion of a five-day court trial, the judge ruled in favor of the plaintiffs and ordered that the AAMC must apply the Unruh Act and the DPA to California residents applying for accommodations; the AAMC must provide accommodations to individuals with disabilities as defined by the Unruh Act and the DPA, as long as the accommodations do not fundamentally alter the MCAT; and the AAMC must develop procedures for complying with accommodations requests under the Unruh Act and the DPA. The AAMC appealed the trial court’s decision.

[T]HE PLAINTIFFS ARGUED THAT THEIR REQUESTS FOR ACCOMMODATIONS SHOULD HAVE BEEN CONSIDERED UNDER THE CALIFORNIA UNRUH CIVIL RIGHTS ACT (UNRUH ACT) AND THE CALIFORNIA DISABLED PERSONS ACT (DPA). BOTH OF THESE CALIFORNIA STATUTES DEFINE “DISABILITY” MORE BROADLY THAN DOES THE ADA, BECAUSE THEY DO NOT REQUIRE EVIDENCE OF A *SUBSTANTIAL* LIMITATION PRIOR TO THE INDIVIDUAL BEING GRANTED AN ACCOMMODATION.

The California Court of Appeal, First District, Division 5, began its review of the case by considering the Unruh Act, which “prohibits discrimination based on a person’s membership in a particular group.” The court noted that although the Unruh Act has broad application, it “does not extend to practices and policies that apply equally to all persons.” The court found no Unruh Act violation in this case, because “AAMC has established certain standards for the administration of the MCAT, including a time limit for each section of the test. These standards are neutral and extend to all applicants regardless of their membership in a particular group.”

The court noted that its ruling did not mean that disabled individuals in California could not seek accommodations for their learning and reading-related disabilities when taking standardized tests, because the Unruh Act indirectly penalizes a failure to grant reasonable accommodations pursuant to California Civil Code section 51(f). Civil Code section 51(f) “incorporates otherwise relevant ADA standards as a ‘floor’ under state law.” The court reasoned that because the ADA requires reasonable accommodations on standardized tests for those with qualifying disabilities, “[a]ny violation of this ADA requirement would also be a violation of the Unruh Act by virtue of Civil Code section 51[(f)].”

The court determined that in this case there was no allegation that the AAMC failed to comply with the standards set forth in the ADA in considering

the plaintiffs’ accommodations requests. Consequently, the plaintiffs were not entitled to relief under the Unruh Act.

The court concluded its analysis of the Unruh Act by dismissing the plaintiffs’ argument that the AAMC used criteria that were discriminatory and arbitrary in denying their accommodations requests. The court ruled that there was no evidence that “AAMC applied its facially neutral policy in an intentionally discriminatory manner.”

Next the court considered the DPA, which grants individuals with disabilities or medical conditions “the same right as the general public to the full and free use” of facilities open to the public. The court determined that although the facilities used by the AAMC to administer the MCAT constitute “public places,” the DPA was not controlling in this case because there was no evidence that “AAMC has denied any person with a disability access to those facilities.”

The court found that, similar to the Unruh Act, the DPA incorporates the ADA because a violation of the ADA constitutes a violation of the DPA. In this case there was no evidence that the AAMC violated the ADA, so this provision did not apply.

In conclusion, the court found that “AAMC is not required to utilize the more inclusive standard for assessing disabilities under the Unruh Act and DPA.” The court reversed the rulings of the trial court.

BAR EXAMINATIONS

Nonresident aliens

LeClerc v. Webb; *Wallace v. Calogero*, 419 F.3d 405 (5th Cir. 2005)

These cases were reported in earlier issues of THE BAR EXAMINER (Vol. 73, No. 1, February 2004; Vol. 75, No. 2, May 2006). In both cases, nonimmigrant aliens were denied permission to take the Louisiana Bar Examination because of their alien status and claimed that the Louisiana rule violated the Equal Protection Clause of the United States Constitution.

In 2005 the Fifth Circuit Court of Appeals ruled that “nonimmigrant aliens—who ordinarily stipulate before entry to this country that they have no intention of abandoning their native citizenship, and who enter with no enforceable claim of establishing permanent residence or ties here—need not be accorded the extraordinary protection by virtue of their alien status alone.” The Fifth Circuit affirmed *LeClerc v. Webb*, in which the district court had denied plaintiffs the right to take the Louisiana Bar Examination, and reversed *Wallace v. Calogero*, in which the district court had allowed plaintiffs to take the bar examination.

In November 2008, the Louisiana Supreme Court reversed its long-standing policy and decided that lawyers from foreign countries who are on temporary legal visits to the United States may practice law in Louisiana. This amended rule took effect

IN NOVEMBER 2008, THE LOUISIANA SUPREME COURT REVERSED ITS LONG-STANDING POLICY AND DECIDED THAT LAWYERS FROM FOREIGN COUNTRIES WHO ARE ON TEMPORARY LEGAL VISITS TO THE UNITED STATES MAY PRACTICE LAW IN LOUISIANA. THIS AMENDED RULE TOOK EFFECT IN JANUARY 2009. IT ALLOWS ADMISSION TO THE STATE BAR OF “[A]N ALIEN LAWFULLY ADMITTED FOR PERMANENT RESIDENCE, OR AN ALIEN OTHERWISE AUTHORIZED TO WORK LAWFULLY IN THE UNITED STATES.”

in January 2009. It allows admission to the state bar of “[a]n alien lawfully admitted for permanent residence, or an alien otherwise authorized to work lawfully in the United States.” The rule also includes some educational requirements, including a minimum of 14 semester hours of education from an American law school.

CHARACTER AND FITNESS

Misleading answers on law school and bar applications; lack of candor

In re Bitter, 2008 WL 4756889, 2008 VT 132 (Vt. 2008)

Richard Bitter attended college after high school but did not finish. He held several jobs, and after his children were grown he went back to school and obtained an undergraduate degree and then attended Thomas M. Cooley Law School, graduating in September 2001. He then attended American University Washington College of Law, where he received an LL.M. degree in May 2002. He

applied to the Vermont Bar in January 2005.

Investigation by the Vermont Board of Bar Examiners revealed that Bitter as a juvenile pled guilty to two charges of possession of a dangerous substance and one violation-of-probation charge in New Jersey. When Bitter was a young adult, he was charged in New Jersey with possession of marijuana and given a conditional discharge. After he had completed his probation, the charge was dismissed without an adjudication of guilt. In 1988, he pled

guilty to felony theft in the third degree and was sentenced to five years' probation and ordered to pay restitution. After paying restitution, he was discharged from probation. In 1989, in New York, Bitter was charged with aggravated harassment of his estranged wife; he pled guilty to harassment and received a conditional discharge. In 1994, he was charged with grand larceny and pled guilty to a reduced charge—a disorderly person violation—and paid restitution. He was prosecuted for writing bad checks in New York in 1995 and 1996, and was convicted once. Bitter also had five civil judgments entered against him between 1992 and 2001, including one in which a default was entered for his failure to appear.

In May 1999, Bitter applied to the Cooley Law School and was required to answer a number of questions about his past. In response to the question of whether he had been convicted, pled guilty or no contest, or otherwise admitted responsibility, he answered "Yes" to a felony offense, revealed his 1988 guilty plea, and attached an explanation. He also answered "Yes" to traffic offenses, indicating that he had several traffic tickets. He answered "No" to the questions regarding misdemeanors, violations, and other offenses. Bitter made two late disclosures to the law school regarding his criminal record. In October 1999, he disclosed his 1989 plea of harassment, explaining that he thought a conditional discharge was the same as a dismissal. He was placed on administrative probation for his initial faulty answer. Then in 2000 he disclosed a juvenile conviction for possession of a controlled

substance, explaining that he originally believed that his juvenile record was sealed and not subject to disclosure. The school accepted this explanation. Although Bitter apparently believed that he was required to disclose his juvenile convictions and conditional discharges, he did not inform the school of his two other juvenile offenses, his 1980 conditional discharge for marijuana possession, his 1994 plea to a disorderly person violation, or the 1996 bad-check

ALTHOUGH BITTER APPARENTLY BELIEVED THAT HE WAS REQUIRED TO DISCLOSE HIS JUVENILE CONVICTIONS AND CONDITIONAL DISCHARGES, HE DID NOT INFORM THE SCHOOL OF HIS TWO OTHER JUVENILE OFFENSES, HIS 1980 CONDITIONAL DISCHARGE FOR MARIJUANA POSSESSION, HIS 1994 PLEA TO A DISORDERLY PERSON VIOLATION, OR THE 1996 BAD-CHECK CONVICTION.

conviction. In his application to American University in 2001, he answered "No" to the question of whether he had ever been placed on academic or conduct probation or subjected to any disciplinary action by his law school. He did not disclose his juvenile convictions, the marijuana conditional discharge, his 1994 conditional discharge for harassment, or his 1996 bad-check conviction.

In 2002 Bitter applied for admission to the New York Bar and disclosed all of his juvenile convictions and his criminal convictions and pleas. He also disclosed his administrative probation at Cooley Law School. Although he passed the New York Bar Examination, the New York Character and Fitness Committee found that he failed to qualify based on his "criminal record, lengthy delay in satisfying a judgment, and lack of candor on his law school applications."

In 2005 Bitter submitted an application to the Vermont Bar in which he disclosed his three juvenile convictions and listed all of his adult offenses. In his description of his criminal history, he explained that the 1994 grand larceny charge was dismissed, but not that he pled guilty to a disorderly person violation.

On the Vermont Bar application, in response to a question about application to other bars he answered “New York—passed July ‘01 exam—Not Admitted,” without mentioning that he was *denied* admission for lack of character and fitness. He also answered “No” to the question about whether he had ever been disbarred, suspended, reprimanded, censured, or otherwise disciplined as a student. Bitter did not mention his administrative probation from Cooley on the Vermont Bar application.

At the end of the application he certified that he had “answered all questions fully and frankly.”

Following a hearing, the Character and Fitness Committee declined to certify Bitter’s moral character. The Court then assigned a Commissioner to conduct a *de novo* hearing. The Commissioner recommended that Bitter not be admitted to the Bar because he had failed to demonstrate good moral character. The Commissioner found that Bitter had exercised poor financial oversight, noting the several civil judgments against him, his delinquencies in fulfilling judgments, the default judgment against him, and his \$220,000 student loan debt. The Commissioner was most concerned, however, about Bitter’s evasive and false answers on the law school applications because they were the most recent expressions of his character. While Bitter did submit character testimony and the Commissioner found Bitter’s witnesses to be credible, he gave their testimony little weight because the witnesses did not have a full account of Bitter’s history and because all of their information about Bitter had been furnished by Bitter. Bitter appealed.

The Vermont Supreme Court agreed with the Commissioner that Bitter had failed to demonstrate that he possessed the necessary moral character to be admitted to the Vermont Bar, but for different reasons. The Commissioner based his decision in part on Bitter’s past legal troubles, both civil and criminal, and his financial difficulties. Because Bitter’s last criminal charge was over 10 years old and his civil judgments had been resolved for almost

5 years, the Court was more concerned about Bitter’s present character. In the Court’s opinion, the incomplete and evasive answers to questions on the Cooley and American applications “demonstrate[d] a pattern short of complete honesty.” While the Court was impressed with Bitter’s rehabilitation since his past criminal infractions, it could not ignore his inability to

be honest and completely answer questions about his past. His answers on his law school applications were incomplete and lacking in candor and there was no explanation for his failure to disclose these infractions after he discovered that he did have a responsibility to do so. The Court was not persuaded by Bitter’s excuses since, having been chastened once for nondisclosure, he should have “err[ed] on the side of full disclosure, rather than parceling out information according to his own technical interpretation of the question being asked.” Even after he encountered problems resulting from his lack of candor on his law school applications, he continued to be less than forthright in his Vermont Bar application. The Court stated that “[e]vasive or incomplete answers, although arguably not incorrect, do not fulfill an applicant’s responsibility to be truthful and

THE COURT STATED THAT “[E]VASIVE OR INCOMPLETE ANSWERS, ALTHOUGH ARGUABLY NOT INCORRECT, DO NOT FULFILL AN APPLICANT’S RESPONSIBILITY TO BE TRUTHFUL AND HONEST. NOR DO SUCH ANSWERS GIVE US CONFIDENCE IN THE APPLICANT’S ABILITY TO BE HONEST AND TRUSTWORTHY IN THE PRACTICE OF LAW.”

honest. Nor do such answers give us confidence in the applicant's ability to be honest and trustworthy in the practice of law." Bitter's repeated nondisclosures of his past and his continuing insistence that he had acted properly did not give the Court confidence that he understood the importance of honesty and the gravity of his behavior. His application to the Vermont Bar was denied.

Questionable accusations and legal claims; abuse of legal process

In re Mitchell, 891 N.E.2d 732, 119 Ohio St. 3d 38 (Oh. 2008)

Geoffrey Mitchell, M.D., entered Capital University Law School in 2003 after a long career in medicine. He applied for admission to the Ohio Bar in 2005 and the Columbus Bar Association's Admissions Committee provisionally approved his character and fitness and moral qualifications. Mitchell applied to take the July 2007 bar examination. Before he could qualify to sit for the exam, he had to obtain the Admissions Committee's final approval. During this process, a lawyer complained to the Committee that Mitchell had lodged false claims against him, his associates, and his clients—a doctors' group under contract to provide hospital emergency-room service—after the clients were successful in their defense against Mitchell's tort claims. An investigation followed, and the Admissions Committee expressed concern about Mitchell's judgment and recommended that his bar application not be approved. Mitchell appealed, and a panel of the Board of Commissioners on Character and Fitness conducted a hearing.

Mitchell formerly practiced as a physician at Riverside Hospital in Columbus, Ohio, in affiliation with Mid-Ohio Emergency Services (MOES). MOES was under the oversight of MedPartners, a physician

management company. MOES took over at Riverside after Riverside and Grant Medical Center merged and became part of OhioHealth. Mitchell opposed OhioHealth's decision to have MedPartners oversee emergency-room services at Riverside. During negotiations between OhioHealth and MedPartners, Mitchell circulated memos suggesting that the partnership would not be in the best interest of the emergency-room physicians. The deal was finalized and Mitchell continued to work in the emergency room as a MOES employee. He was dismissed shortly thereafter for allegedly having disclosed confidential patient information. Mitchell claimed that his dismissal was unjust and filed suit. Summary judgment was granted for the defendants and the District Court of Appeals affirmed.

After the loss on appeal, Mitchell's counsel withdrew from the case. By the time of the Court of Appeals' decision, Mitchell was a second-year law student. He proceeded pro se and filed numerous motions with the court along with discovery requests in response to the defendants' motions for sanctions. He then started filing claims against opposing counsel in the MOES litigation, trying to show that there was a conspiracy between MOES and a former chairman of MedPartners, Richard Scrushy, who had been indicted on federal bribery charges. He accused opposing counsel of engaging in fraud and unethical conduct. He repeatedly attacked opposing counsel in pleadings and letters sent to various governmental agencies, including a grievance filed against one of the opposing attorneys as well as a letter to a county prosecutor. Mitchell also wrote a letter to the managing partner of one of the firms representing the defendants accusing the law firm of engaging in fraudulent and illegal conduct.

The panel found that Mitchell's course of conduct following the loss of his appeal was "unprofessional and illogical" and that his repeated unwarranted acts against opposing counsel and others showed that he currently lacked the qualifications to practice law in Ohio. The panel felt that Mitchell did not understand that he could not make serious allegations of misconduct against opposing counsel and parties without evidence to support the allegations. Because Mitchell had apparently begun to understand his errors in judgment and to accept the Board's assessment of his behavior, the panel recommended that he be permitted to apply for the February 2009 bar examination after further instruction in legal ethics and professionalism. The Board adopted the panel's findings and recommendations.

The Ohio Supreme Court reviewed the Board's recommendation and stated that "[a]n applicant's tendency to abuse the legal process is one of the factors upon which we may rely in disapproving his or her qualifications for taking the bar examination." The court stated that Mitchell's "unwarranted attacks against opposing counsel and repeated and unfounded contentions in the MOES litigation revealed a singular lack of the good judgment necessary to the practice of law." The court stated that Mitchell appeared to acknowledge his failing at the hearing and thus he would be considered acceptable for reapplication. The court accepted the Board's recommendation, did not approve

Mitchell's application, but added that he may apply to take the February 2009 examination provided that he first completes a legal ethics and professionalism course at an ABA-accredited law school.

NON-ABA-APPROVED ONLINE LAW SCHOOL

Mitchell v. Board of Bar Examiners, 452 Mass. 582, 2008 WL 4937520 (Mass.)

In July 2004, Ross E. Mitchell received his law degree from Concord Law School, an entirely online law school owned by Kaplan, Inc. Concord is authorized by the state of California to grant the degree of juris doctor, but it is not an ABA-approved law school.

Mitchell graduated with "highest honors" and as class valedictorian. After graduation, he sat for and passed the California bar exam and was admitted to practice law in California. Mitchell was also admitted to practice before the United States Court of Appeals for the First Circuit and the United States District Court for

the Central District of California.

In October 2005, Mitchell wrote to the chair of the Massachusetts Board of Bar Examiners to ask how he could be granted permission to sit for the Massachusetts bar examination, because the Massachusetts Supreme Court requires graduation from an ABA-approved law school as a condition for taking its bar exam (Sup. Jud. Ct. R. 3:01 § 3.3).

The chair responded that the board had no authority to waive the requirement.

Mitchell then wrote to the court's rules committee requesting permission to sit for the bar exam based on his law school education and admission to the California bar. The committee denied his request. Mitchell asked the committee to reconsider and, in the alternative, requested an amendment to Rule 3:01 § 3.3 to allow attorneys who had graduated from domestic, state-authorized law schools and had been admitted to practice in other states to sit for the Massachusetts bar exam.

The rules committee denied Mitchell's motion but convened a working group comprising law school faculty, administrators, and a member of the board to consider Mitchell's request to amend the rule. The working group recommended that no changes be made to the court's bar exam admission rules, and the court accepted the group's recommendation. The court, however, did request the ABA "to give attention to the issue of distance learning, with a view towards incorporating online methodologies into the [ABA's] Standards for Approval of Law Schools."

In November 2007, Mitchell filed suit against the Massachusetts Board of Bar Examiners challenging the constitutionality of Rule 3:01 § 3.3 and, in the alternative, seeking an amendment to the rule or a waiver of the rule in his case. In its decision, the court did not reach Mitchell's constitutional arguments or consider amending the rule. Instead, the court considered whether it should waive the rule for Mitchell.

The court first reviewed the record to see what courses Mitchell had taken as a law student at Concord and found "Mitchell's core course of study, and legal research resources, were substantively very similar to the core content offered by ABA-approved law schools." The court was also impressed because Mitchell had "achieved an exemplary degree of success as a law student." Other significant factors for the court were (1) California's


authorization to allow Concord to confer the degree of juris doctor, (2) Mitchell's success in passing the California bar examination his first time, (3) Mitchell's strong performance on the Multistate Professional Responsibility Examination, (4) Mitchell's admittance to practice in California and before

the U.S. Court of Appeals for the First Circuit, and (5) Mitchell's performance in representing himself in the present case, which provided the court with "a concrete and positive illustration of his skills in legal analysis, legal writing, and advocacy." According to the court, "In sum, we are persuaded that in Mitchell's case, the underlying purpose of our ABA approval requirement—to insure an appropriate level of legal education—has been met."

The court also examined the current status of the ABA approval standards, noting that Mitchell's personal record alone was an insufficient reason to waive the ABA approval requirement, because "if it were [sufficient], the exception might well swallow the rule." The court received information from the ABA indicating that the ABA Section of Legal Education and Admissions to the Bar was undertaking a comprehensive review of its approval

standards, including consideration of the use of online distance learning schools and programs.

The court concluded that because the ABA's review was in its infancy, there was no way to predict what recommendations may or may not result. Consequently, equitable considerations weighed in favor of the rule being waived for Mitchell because, although Concord cannot qualify under the current ABA standards, "the situation with respect to online

programs may change in the reasonably near future," and Mitchell provided evidence that he satisfied the educational intent of the rule. In conclusion, the court referred Mitchell's application to the board with directions that he be allowed to sit for the bar examination. 

FRED P. PARKER III is the Executive Director of the Board of Law Examiners of the State of North Carolina.

JILL J. KAROFKY is the Director of Human Resources and Counsel at the National Conference of Bar Examiners.