# Litigation Update

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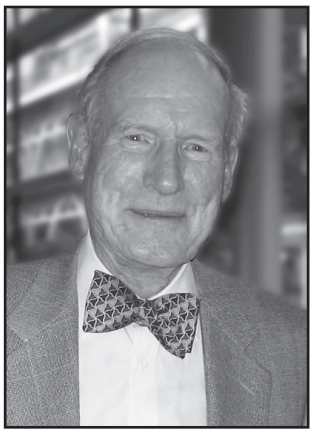

## ABA-Approved Law Schools

**Online correspondence schools**

*Bazadier v. McAlary*, 464 Fed.Appx. 11, 2012 WL 495435 (C.A. 2 (N.Y.))

Frank Bazadier filed a complaint in the Northern District of New York challenging the constitutionality of New York regulations prohibiting graduates of correspondence law schools from sitting for the New York State Bar Examination. Bazadier graduated in 1999 from Northwestern California School of Law, an exclusively online correspondence school not accredited by the ABA. He claimed that the New York regulations violated his First Amendment rights of free speech and free association.

The District Court stated that the challenged regulations "are not based upon the content of the instruction provided by a law school and do not favor or disfavor any form of speech . . . ." The

court dismissed Bazadier's complaint for failure to state a claim based on an infringement of his First Amendment rights and held that the New York rules are "rationally related to the State's legitimate interest in maintaining a competent bar." Bazadier appealed to the Second Circuit.

In the State of New York, an individual is not eligible to take the bar exam if his or her law degree is from an online correspondence school. 22 N.Y.C.R.R. § 520.3 provides that individuals may qualify to take the New York State Bar Examination if they earned a first degree in law from an approved law school. An "approved law school" is defined as one that is approved by the ABA and that provides a program of instruction that consists of a specified number of classroom hours. No credit is allowed for "correspondence courses."

22 N.Y.C.R.R. § 520.3 PROVIDES THAT INDIVIDUALS MAY QUALIFY TO TAKE THE NEW YORK STATE BAR EXAMINATION IF THEY EARNED A FIRST DEGREE IN LAW FROM AN APPROVED LAW SCHOOL. AN "APPROVED LAW SCHOOL" IS DEFINED AS ONE THAT IS APPROVED BY THE ABA AND THAT PROVIDES A PROGRAM OF INSTRUCTION THAT CONSISTS OF A SPECIFIED NUMBER OF CLASSROOM HOURS. NO CREDIT IS ALLOWED FOR "CORRESPONDENCE COURSES."

The Court of Appeals affirmed the decision of the District Court and held that New York regulations prohibiting graduates of correspondence law schools from sitting for the New York bar exam do not infringe on the fundamental rights to freedom of speech and freedom of association. Rather, the court found that the rules are "occupational regulations that express a preference for one form of legal pedagogy over another."

The court also agreed with the New York Board of Law Examiners' argument that "correspondence-based study offers less assurance that a graduate has received a legal education that is adequate for [bar] membership . . . ." Therefore, the court found that "the Rules have a rational relation to the State's legitimate interest in protecting the public from an incompetent bar."

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## ADA

**Reasonable accommodations; learning disability**

*Shannon Kelly v. West Virginia Board of Law Examiners, et al.,*
418 Fed.Appx. 203, 2011 WL 940299 (C.A. 4 (W.Va.)), unpublished

This is a decision from the Fourth Circuit Court of Appeals. The District Court case was reviewed in an earlier issue of the *Bar Examiner* (Vol. 77, No. 4, November 2008). The following is a summary of the Findings of Fact and Conclusions of Law of the District Court and a summary of the latest developments in the case.

Shannon Kelly sued the members of the West Virginia Board of Law Examiners for not granting the special accommodations he requested on the West Virginia Bar Examination. In May 2001, Kelly began attending the Thomas M. Cooley Law School in Michigan. During orientation he took a Nelson-Denny reading test and was informed that his score was at or below

the 25th percentile. Kelly was referred for psychological testing, after which he was informed that he had a permanent learning disability with severe processing deficits. It was recommended that he receive time and a half to complete his law school exams, and Cooley provided that accommodation.

Kelly transferred to Barry University School of Law in Florida, and after he failed a final exam, he underwent a psychological assessment by a licensed school psychologist who concluded that Kelly's processing speed had deteriorated further and that he should receive double time on his tests, take the exams in a separate room, use tests formatted in 18-point font, and be given breaks during major exams. Barry provided Kelly with double time for his exams, and Kelly graduated from Barry University in January 2007.

The accommodations that Kelly received at Cooley and Barry were the only accommodations he had received to that point. He did not receive any accommodations as an undergraduate nor when he took the entrance exams to enter college and law school.

In April 2007, Kelly submitted a petition for special accommodations to the West Virginia Board of Law Examiners in anticipation of taking the July 2007 bar examination. He requested test booklets with an 18-point font, a distraction-reduced testing environment, and double testing time. Along with his petition, he submitted the required documentation. In the meantime, Kelly took the MPRE without receiving any additional time. Kelly was informed in May 2007 that the board would provide large-print examination booklets, a private testing room, and time and a half for the exam. Kelly took the July 2007 West Virginia bar examination and failed.

In November 2007, Kelly again requested double time to take the July 2008 examination. The board responded to his second request that it would again provide him with time and a half as well as the other accommodations he had received on the July 2007 examination.

On July 18, 2008, Kelly filed a complaint in federal court along with a motion for a preliminary injunction alleging that the board had violated the Americans with Disabilities Act (ADA) and Kelly's rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments by its denial of his request for double time. Kelly's motion for a preliminary injunction was denied by an order dated July 24, 2008. Kelly took the July 2008 examination and failed.

Then Kelly applied to take the July 2009 Kentucky bar examination and requested double time. The Kentucky board initially denied Kelly's request for double time, but following an appeal, his request was granted in full.

A bench trial in Kelly's lawsuit against the West Virginia Board of Law Examiners was held on August 25, 2009. At the trial, West Virginia board member Ancil Ramey testified that the West Virginia Bar Examination consisted of the MPT, the MEE, and the MBE, all produced by the National Conference of Bar Examiners (NCBE), and that in using NCBE's testing products the board was required to follow strict security guidelines, including the time constraints placed on the examination. Ramey stated, "NCBE has spent large amounts of money to develop professional tests that are valid and reliable, and being able to work under a time constraint is part of how the test measures an applicant's fitness to practice law. The fact that the examination is timed is an important component of the examination process, (and not timing it) . . . would be like giving a typing test and not timing it . . . ."

Ramey further testified that board members had received thorough training from NCBE on special testing accommodations required by the ADA and that he himself had attended some 10 to 15 workshops on accommodating disabilities. He stated that board members had also received training on changes and amendments to the ADA so that members would understand the board's legal obligations. Ramey also testified that the board had reviewed the documentation that Kelly submitted in support of his first request for accommodations and had considered the nature and extent of Kelly's disability and the history of the accommodations he had received in the past to arrive at its decision. "Based on the information submitted by the [p]etitioner [Kelly], the [b]oard concluded that time and a half was a reasonable accommodation."

Ramey also testified that it was common for applicants to ask that the board reconsider its decisions and that if additional information or documentation was submitted, the board would reconsider the applicant's request. In Kelly's second request for accommodations, he stated that he was relying on the same documentation he had submitted with his first request. Since no additional information or documentation had been submitted, the board's response was to provide Kelly with the same accommodations it had provided for the earlier exam.

Dr. Nancy Cruce, a clinical psychologist licensed in Florida, appeared as an expert witness for Kelly. She had conducted a psychoeducational evaluation of Kelly in November 2008. She stated that even though Kelly's WAIS-III scores were within one standard deviation of the mean, the test showed that he had disabilities in reading and written expression and that he was severely learning disabled. She further testified that Kelly's learning disabilities substantially limited his ability to take the test required for him to become a lawyer, which constituted a major life activity. She recommended extended time up to 200%, as well as other accommodations. In regard to her recommendation for double time, she testified, "[I]f he hasn't studied and doesn't know the law, he's not going to pass no matter how much time you give him. So let's give him the amount of time so that the learning disability does not come in to essentially compromise the findings where we all come back here again and try to hash this out[;] . . . give him the time that he needs . . . and see if he passes."

> RAMEY STATED, "NCBE HAS SPENT LARGE AMOUNTS OF MONEY TO DEVELOP PROFESSIONAL TESTS THAT ARE VALID AND RELIABLE, AND BEING ABLE TO WORK UNDER A TIME CONSTRAINT IS PART OF HOW THE TEST MEASURES AN APPLICANT'S FITNESS TO PRACTICE LAW. THE FACT THAT THE EXAMINATION IS TIMED IS AN IMPORTANT COMPONENT OF THE EXAMINATION PROCESS, (AND NOT TIMING IT) . . . WOULD BE LIKE GIVING A TYPING TEST AND NOT TIMING IT . . . ."

The board's expert was Dr. Bobby Miller, a board-certified forensic psychiatrist licensed in West Virginia, Kentucky, and Pennsylvania. He testified that Kelly had a right-brain disorder which entitled him to reasonable testing accommodations, and that his condition was static and would not worsen over time. Dr. Miller stated that in determining whether an individual has a learning disability, a comparison should be made to the average person or average population. While Kelly did have certain deficits, these deficits were not severe given that his lowest testing scores only put him in the low average range. Dr. Miller disputed Dr. Cruce's conclusion that Kelly was "severely disabled" and stated that Dr. Cruce had apparently compared Kelly's scores to those of

an average individual with a postgraduate degree, not to those of an average individual in the general population.

Dr. Miller opined that Kelly had received reasonable accommodations for the July 2007 and July 2008 examinations, and that one of Kelly's greatest deficits was his inattentiveness, which could not be accommodated with extended time but only with a distraction-reduced environment.

THE COURT SAID THAT GIVING KELLY MORE TIME THAN REQUIRED TO ACCOMMODATE HIS DISABILITY WOULD GIVE HIM AN UNFAIR ADVANTAGE OVER OTHER APPLICANTS, WHICH IS NOT WHAT IS REQUIRED UNDER THE ADA . . .

The District Court stated that time and a half was a reasonable accommodation for Kelly's disability, placing him on an equal footing with other applicants sitting for the bar exam, and that his request for double time was not reasonable. The court pointed out that Kelly had taken the ACT, the LSAT, and the MPRE without the aid of extended time. The court stated that Dr. Cruce's opinion that Kelly's learning disability was severe was undermined by her own testing data, and that therefore her recommendation that Kelly have as much time as he needed to complete the exam was not reasonable. The court said that giving Kelly more time than required to accommodate his disability would give him an unfair advantage over other applicants, which is not what is required under the ADA, and it pointed out that Dr. Miller's opinion was more persuasive because it was supported by his own testing data as well as that of Dr. Cruce.

The Fourth Circuit Court of Appeals reviewed the record and, finding no reversible error, affirmed for the reasons stated by the District Court. Kelly petitioned the United States Supreme Court for certiorari in October 2011 and again in February 2012; both petitions were denied.

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## BAR DISCIPLINE

**Failure to disclose material facts on the bar application**

*North Carolina State Bar v. Nikita Mackey*, 09 DHC (2010)

Nikita Mackey was admitted to the North Carolina Bar in 2003. On his bar application, dated December 2003, he answered falsely that he had not failed to file state or federal income tax returns; that he had paid his federal income taxes for several years between 1997 and 2002; that he had paid his state income taxes for the years 1999 to 2002; and that no complaint had been filed against him alleging fraud, deceit, or misrepresentation.

From 1989 to 2003, Mackey had been employed by the Charlotte Police Department. In December 1991, Mackey had been suspended by the Charlotte Police Department for being untruthful during an administrative hearing regarding his improper conduct as an off-duty security guard. He was later disciplined for his abuse of comp time and for filing false information on the daily duty status reports. The Charlotte Police Department suspended

him with the recommendation that his employment be terminated in February 2003. He resigned before the Civil Service Board could act on this recommendation.

Mackey had also failed to timely file federal and state income tax returns for the years mentioned in his application, even though he had earned sufficient income to require filing.

The Disciplinary Hearing Commission of the North Carolina State Bar found that Nikita Mackey's conduct constituted grounds for discipline pursuant to North Carolina General Statute 84-24 (the statute that created the Board of Law Examiners), and he was suspended from practicing law in North Carolina for three years for violating the Rules of Professional Conduct.

There was no appeal to the North Carolina Court of Appeals. Mackey was also suspended by the United States Supreme Court in October 2010 and disbarred in November 2010.

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## Character and Fitness

**Permanent denial of admission**

*In re Marcia Denise Jordan on Application for Admission to the Bar,*
Supreme Court of Louisiana No. 12-OB-0551 (LA 2012)

In an opinion issued on April 9, 2012, the Supreme Court of Louisiana denied Marcia Jordan's fourth application for admission to the bar. The Court also went one step further, permanently prohibiting her from applying in the future.

Jordan graduated from Loyola University New Orleans College of Law in 1996, and she passed the Louisiana Bar Examination in February 1997. However, one day prior to the admissions ceremony, the law school rescinded her Dean's Certificate—a written certificate issued by the dean certifying an individual's graduation and fitness to practice law. Loyola had discovered that Jordan had embezzled student funds while serving as president of the Student Bar Association.

As a result of the investigation into the embezzlement allegations, the Court denied Jordan's admission in 1999. The Court determined that Jordan had, in fact, misappropriated student funds to her own use. Additionally, the Court found that she had destroyed financial records, failed to cooperate with the investigation, and forged the signature of her attorney on a letter directing her bank not to comply with a subpoena.

Jordan reapplied in 2000, then again in 2004. Her 2000 application was denied for the same reasons as her first application; in 2004, Jordan claimed that she had demonstrated "a significant change in circumstances," including her payment of "remuneration" to the law school and her receipt of a new Dean's Certificate in 2003. In the course of investigating Jordan's third application, the Court discovered that she had been engaged in the unauthorized practice of law since 1999 and had participated in a fee-sharing arrangement with a New Orleans attorney for whom she was working as a legal assistant. As

a consequence, not only was Jordan denied admission to the bar, but the attorney she was working for was disbarred for facilitating Jordan's conduct. This case was reported in the August 2009 issue of the *Bar Examiner* (Vol. 78, No. 3).

Jordan petitioned the Court for the fourth time on March 8, 2012. However, the Court denied her application based on the conclusion that she possessed "serious and fundamental character flaws." The Court stated: "Given the egregious nature of [Jordan's] wrongdoing, as well as her pattern of conduct occurring over many years, we can conceive of no circumstance under which we would ever grant her admission to the practice of law in this state."

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