

LITIGATION UPDATE

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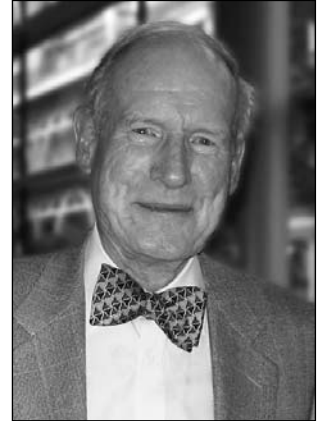
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BAR ADMISSION

Failure to cooperate with investigation; unpaid debts

In the Matter of the Application for Admission to Practice Law [of] Justin Robert Steffen,
351 Or. 106, 2011 WL 4389895 (OR 2011)

Justin Robert Steffen sought admission to the Oregon State Bar in November 2010. The Board of Bar Examiners recommended that Steffen's application be denied for failure to cooperate with its investiga-

tion relating to unpaid debts. The Oregon Supreme Court agreed and found that an applicant's handling of his debts and unpaid judgments was well within the scope of the board's investigatory mandate.

On his application, Steffen indicated that he had past-due debts and judgments. When pressed for further information by the board, Steffen responded that he had filed for bankruptcy. However, when the board attempted to investigate further, Steffen took the position that further inquiries regarding his past-due financial obligations were in violation of federal law. Steffen relied on 11 USC § 525(a), which prohibits a licensing body from denying a license to a person solely because the person has filed for bankruptcy or failed to pay an obligation that was discharged in bankruptcy.

In its letter to the Court explaining its recommendation, the board stated:

The Board is not recommending that [applicant] be denied admission because he filed bankruptcy or failed to pay a dischargeable debt. The Board would have made its inquiry regarding [applicant's] finances regardless of whether he invoked bankruptcy protection. In fact, the Board commenced its inquiry before it even learned that [applicant] had filed a bankruptcy petition.

The Court held that an applicant's handling of his or her financial affairs is appropriate to consider in determining the applicant's fitness to practice law. The fact that an applicant has filed for bankruptcy is not in and of itself disqualifying. However, the circumstances surrounding a bankruptcy may reflect

upon an applicant's judgment in handling serious financial obligations. Therefore, while a bankruptcy that results from extraordinary hardship will generally not reflect adversely on an applicant, a bankruptcy arising from selfishness or irresponsible conduct generally will.

The Court noted that Steffen did not dispute his failure to cooperate with the investigation. When given a chance to respond to the board's recommendation, he waived filing a brief and chose to rest on his earlier communications to the board protesting the board's requests for information. His argument rested solely on his assertion that the board was not entitled to ask him about the circumstances of his past-due financial obligations.

The Court stressed that bankruptcy alone is not sufficient reason to deny admission. However, the circumstances of an applicant's financial dealings may be sufficient to conclude that the applicant does not possess the requisite character and fitness to practice law. In this case, the board was not able to evaluate the weight of the circumstances because Steffen failed to comply with the investigation.

The board's recommendation was not based on the fact that Steffen filed for bankruptcy; it was based on his noncompliance with the board's investigation of his character and fitness. The Court concluded that it was appropriate to deny Steffen admission to the Oregon Bar based on his failure to cooperate.

CHARACTER AND FITNESS

Alleged sexual misconduct; lack of candor

In the Matter of Michael P. Nash, Applicant to the Alaska Bar Association, 2011 WL 3241874 (AK 2011)

On January 9, 2009, the Board of Governors of the Alaska Bar Association denied the application of Michael Nash based on allegations of sexual mis-

conduct while serving as a priest, destruction of evidence in church files, and lack of candor. Nash appealed the board's decision to the Alaska Supreme

Court, alleging multiple misstatements of the record and multiple violations of Alaska Bar Rules.

The Alaska Supreme Court vacated the decision of the Board of Governors and found that the record contained no confirmed instances of Nash lying, committing illegal acts, omitting information, or otherwise behaving dishonestly. The Court found no evidence of any acts justifying the denial of Nash's application.

Michael Nash was a priest in Alaska from 1980 to 2005. During that time, he took boys on trips to locations in Alaska, California, and Hawaii. Nash had inappropriate contact with some of the boys on these trips. It involved tickling the boys, having them do calisthenics in their underwear, spanking them, and receiving foot and neck massages from them. However, none of the boys alleged that Nash touched their genitals or engaged in sexual activity with them. The church looked into this behavior and concluded that it was "horseplay."

Nash's youth trips ended after a 1989 complaint about his behavior, after which Nash sought counseling at the Jemez Springs rehabilitation center. Nash took part in a five-month renewal program called "Foundation House." Nash told the Alaska Bar that his treatment addressed burnout, not pedophilia. The facility closed in 1995, and records pertaining to Nash's stay were destroyed.

On December 3, 2007, Nash, a member of the Iowa bar (*see In re Nash, The Bar Examiner*, Vol. 76, No. 4, November 2007), applied for admission to the Alaska Bar. A hearing master was appointed, who conducted a two-day hearing. The hearing master issued a proposed decision to the Alaska Bar Association Board of Governors recommending that the board conclude that Nash met the standards for

character and fitness. The board rejected the hearing master's recommendation and denied Nash's application. The denial was primarily based on the fact that the board felt that Nash had been untruthful and incomplete in his responses regarding his treatment at Jemez Springs.

The standard for character and fitness in Alaska is set forth in Alaska Bar Rule 2(1)(d), which states that each applicant for examination shall be "one whose conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them. Conduct manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant is a basis for denial of admission."

The board was not satisfied with Nash's explanation that he was being treated for burnout at Jemez Springs. The key issue for the board was Nash's apparent lack of candor regarding a discharge report. The board stated, "It is uncontested that Mr. Nash received a report upon discharge from the facility. It is also uncontested that the report was destroyed. This report effectively ended Mr. Nash's pastoral career. However, neither Mr. Nash, nor his counsel, claims to have any clue as to the report's contents, conclusions, or recommendations. This lack of recollection lacks credibility and appears to be a deliberate, material lack of candor with this tribunal."

In support of its decision to deny Nash's application, the board stated that "Mr. Nash is likely the only individual alive with direct knowledge and recall of the report's contents. Under these circumstances, his claimed lack of memory is even more damning and incredible The Board can come to no other conclusion than [that] there is something in the report that Mr. Nash does not want the Board to learn."

However, the Supreme Court of Alaska found that the board's decision was based on factual assertions that had no basis in the record. The Court noted that the board's references to a discharge report were not supported and that the board's analysis demonstrated a "conclusory slant that is contrary to the record." The Court said that "[m]ost notably, it is not clear [that] there was any such thing as a discharge report that contained final results. And if such final results existed, there is no evidence that Nash reviewed such a report or denied knowledge of it." In fact, the Court found that Nash was never questioned on the subject and that "[t]his mistake is extremely prejudicial, since Nash's purported failure to remember the purported discharge report was the basis for finding that Nash lacks candor." In addition, the board's statement that the purported discharge report "effectively ended Mr. Nash's pastoral career" was "simply wrong." If any report existed, it would have corresponded to Nash's time at Jemez Springs, which was from January 1990 to May 1990. Nash's career as a priest continued for 15 years after that time.

The Court further stated that the fact that a portion of the Jemez Springs center treated priests with sexual disorders neither proved nor implied that Nash attended the facility for treatment of a sexual disorder. Absent a presupposition by the board that Nash attended the facility for treatment of a sexual disorder, Nash's answers did not demonstrate the propensity for lying that the board's decision attributed to him.

In sum, the Court found that "the Board's conclusion that Nash lied because he could not remember a career-ending discharge report—when it is not certain that a discharge report ever existed, when it is not certain that Nash received it if it did exist, and when it is clear that any such report did not end his career—is simply not supported." The Court found Nash to have the requisite character to satisfy the requirements of the Alaska Bar Rules and ordered the board to process Nash's application in a manner consistent with this opinion.

Failure to cooperate in the character and fitness review; irresponsible and unprofessional conduct

In re Wintering, 129 Ohio St. 3d 505, 954 N.E.2d 124 (OH 2011)

Todd Wintering graduated from the Cleveland-Marshall College of Law in May 2008. His first application to register as a candidate for admission to practice law in Ohio was in August 2008. The Cleveland Metropolitan Bar Association's Bar Admissions Committee interviewed him and investigated his self-disclosed criminal charges between 1997 and 2004 and two employment terminations in 2000. The committee noted that Wintering had failed to respond to its letters and e-mails over a number of months and that he stated he had resigned from

a law firm in 2008. Wintering denied that he had ever received any correspondence from the committee, and the law firm reported that it had fired Wintering after he failed to appear for work for two weeks, left assignments unfinished, did not return portions of clients' files, and failed to return phone calls and e-mails. In April 2009, the Bar Admissions Committee recommended that Wintering not be approved on character and fitness grounds. There was no appeal, and Wintering was notified by the

Admissions Office that his application to register was considered withdrawn.

Wintering's second application to register as a candidate for admission was in January 2010, and in May he filed an application to take the July 2010 Ohio bar examination. The Board of Commissioners on Character and Fitness decided to conduct an investigation and hearing on his character and fitness. A panel was appointed, and the hearing was set for January 2011. Wintering was notified of the hearing by a letter dated October 1, 2010; however, 13 days later the Admissions Office received a letter from Wintering containing a notice of a change of address and a request for an update on his admission application, about which he had heard nothing. Wintering did not attend the January hearing. He later stated that he had not received notice of the hearing, even though he confirmed that the address to which the notice was sent was correct. Since his October letter he had made no effort to contact anyone in connection with his character and fitness hearing or the upcoming bar examination.

The panel found that Wintering's letter lacked credibility and that he had exhibited a pattern of

irresponsible and unprofessional conduct, and it recommended that his application be disapproved. The board agreed and recommended that Wintering be permitted to apply for the February 2014 bar examination provided he submit to a full character and fitness investigation, including an investigation and report by NCBE.

On review, the Ohio Supreme Court stated, "A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for disapproval of the applicant." It added that an applicant's failure to cooperate in proceedings before the Admissions Committee may also result in disapproval. The Court found that Wintering had repeatedly failed to cooperate with the Admissions Committee and the panel of the Board of Commissioners on Character and Fitness. The record also showed that he had a history of unprofessional conduct and an ongoing pattern of failing to take responsibility for his own actions and inactions. Wintering's application was disapproved, but he was permitted to reapply for the February 2013 examination, at which time he would undergo a full character and fitness investigation.

**Felony and DUI convictions; nondisclosure on law school and bar applications;
substance abuse; rehabilitation**

In re Payne, 289 Ga. 746, 715 S.E.2d 139 (GA 2011)

John Payne filed an application for a certificate of fitness to practice law in Georgia in June 2009. His application revealed that he had an extensive criminal background with multiple felonies and other crimes from 1975 to 1983. He also had six DUI convictions and an arrest from 1981 to 1995. In December, Payne had an informal conference with

the Board to Determine Fitness of Bar Applicants. After the informal conference, the board issued a tentative order of denial of certification citing lack of rehabilitation and candor. At Payne's request, the board also issued specifications.

In September 2010, a formal hearing was held before a hearing officer. The evidence showed that

Payne's criminal history included numerous arrests, felony and misdemeanor convictions, and six DUI convictions spanning almost 30 years from his youth to his mid-forties. The last illegal act occurred only seven years prior to the formal hearing. The record also revealed that Payne was not completely candid regarding his criminal history. When he filed his law school application, he provided only a short summary of his criminal past. After a request for more information, he submitted information regarding his multiple property crime and theft convictions in 1976 but did not list his extensive criminal conduct prior to 1976 and after 1981. The law school again requested more information, and Payne submitted another supplemental response setting out more of his criminal history but again left off many of his arrests, charges, and convictions. He disclosed one DUI conviction from 1995 but failed to disclose five other DUI convictions and one other DUI arrest that was nolle prossed. Payne was still amending his law school application in the spring of 2010, after filing his fitness application. A question arose as to whether these errors and omissions were willful in order to conceal or were inadvertent. Since Payne admitted that he remembered at least some of these criminal instances, including most of the DUIs, at the time he was completing his law school application, the omissions were not inadvertent. He gave no explanation for their omission except to concede that they were improperly withheld.

The board was also troubled about Payne's response to the fitness application question which asks if an applicant has any condition or impairment, including substance abuse, which if left untreated could affect his ability to practice law. Payne had responded "no"; yet he was a recovering alcoholic who regularly attended a 12-step program and had been diagnosed with bipolar disorder that required

periodic visits to a psychiatrist for monitoring. His explanation was that he did not think that the alcoholic recovery programs and non-medication therapy for bipolar disorder constituted "treatment." The board felt that if Payne did not understand exactly what the question required, he should have contacted the bar admissions office for clarification. The board found that Payne's negative response to whether he needed ongoing treatment amounted to an evasive if not intentionally misleading answer. In December 2010, his certification was denied, and Payne appealed.

The Georgia Supreme Court stated that if there was any evidence to support the board's decision regarding the fitness of a bar applicant, the decision would generally be upheld. The Court said that Payne's "lengthy and substantial history of criminal conduct, coupled with his lack of complete candor during the law school application process and the bar application process, evidenced a lack of judgment and a failure of integrity, character, professionalism, and the requisite moral fitness required of prospective members of the Bar." The Court added that Payne's negative response to whether he needed ongoing treatment for certain illnesses was evasive if not intentionally misleading and that the board was well within its judgment to reject his excuse of misunderstanding the question.

Payne contended that he had carried his burden of proving rehabilitation because he has successfully held positions of trust in his career, has been happily married to his current wife for over 20 years, has children whom he supports, attends church regularly, and performs various services for his community. However, the Court stated that "[m]erely showing that an individual is now living as and doing those things he or she should have done throughout life,

although necessary to prove rehabilitation, does not prove that the individual has undertaken a useful and constructive place in society.” Much of Payne’s community service was in the form of legal externships for which he received law school credit, and while he did perform diligently, these activities were not undertaken purely for philanthropic reasons. The Court concluded that “[a]lthough Payne has made remarkable advances in his life in the past seven

years, the record reveals that he still has an inclination for misleading and evasive behavior regarding inquiries into his criminal past and his medical issues which, at best, shows a complete lack of diligence and judgment, which goes to his fitness, and, at worst, a lack of candor, which goes to his character.” The Court held that the board had properly denied Payne’s application for certification of fitness to practice law.

Misdemeanor convictions; nondisclosure on law school and bar applications; rehabilitation

In re Yunker, 289 Ga. 636, 715 S.E.2d 92 (GA 2011)

Roy Yunker applied to John Marshall Law School in July 2005. In answer to the question on the law school application about whether he had ever been charged with or convicted of a crime other than a minor traffic offense, he answered “no” even though he had been convicted of misdemeanor offenses in three separate instances. When Yunker completed his application for certification of fitness to practice law in Georgia, he also failed to completely disclose his criminal convictions. The Board to Determine Fitness of Bar Applicants tentatively determined not to certify Yunker as fit. It was concerned about his failure to disclose his criminal history, his discharge from the military after an alcohol-related incident, his law school’s withdrawal of its recommendation of trust following his post-graduation amendment of inaccuracies on his law school application, his intoxication and insubordination during a legal internship, and his responses during an informal interview with the board.

A hearing officer was appointed to conduct a hearing prior to a final decision by the board. The hearing officer found that Yunker had pled guilty


to driving under the influence in North Carolina in 1988, had pled *nolo contendere* to disorderly conduct and damage to property in Pennsylvania in 1989, and had pled *nolo contendere* to family violence battery in Georgia in 2000, stemming from an incident in which he had choked his then wife. Yunker said that these incidents occurred because he had been drinking. In May 2007, Yunker served as an unpaid intern with the Atlanta Metro Conflict Defender’s Office. He had a disagreement with a senior staff attorney in that office whom he was assigned to assist, and he refused to sit next to the attorney in court and left the courtroom without asking permission. Later that day and the day after, he sent the attorney e-mails in which he used veiled and actual profanity. Yunker was directed to disconnect his laptop computer from the office network, and following another argument with the senior attorney, Yunker’s internship was terminated.

In his application for certification of fitness to practice law in Georgia, Yunker failed to disclose his family violence battery conviction and his DUI conviction. His explanation to the board for lack of

disclosure of the DUI conviction was that he “must have done something wrong when [he] transferred the files to the CD-ROM,” and he blamed his computer for the error. His explanation for nondisclosure of the family violence battery plea was that he had filled out his application too hastily. In amending his law school application to correct his inaccurate responses after he had graduated, Yunker stated that “I can only believe that at the time, when I read the word ‘crime[,]’ I wasn’t thinking of the sorts of arrests I experienced, but was thinking of crimes like robbery, murder, or other actions that I know now as felonies.” In regard to the choking incident, Yunker explained that he had been arguing with his then wife and put his hands over her mouth and choked her because he wanted her to stop yelling at him. He added that he had not wanted to seriously hurt her but “knew that she had a phobia about not being able to breathe.” He said that she stopped talking and that when he left the room and went to bed, she left the house and called the police from a neighbor’s house, after which the police arrested him. In further questioning, Yunker was asked how he could be trusted not to similarly exploit a client’s vulnerability, and his initial response was, “Probably because I am not going to marry them.”

The hearing officer concluded that Yunker’s failure to adequately and fully disclose his previous charges and convictions evidenced a present lack of candor and honesty, that his various explanations for

his inaccurate responses strained credibility, and that his abrupt separation from his internship revealed his lack of maturity, poor judgment, and failure to take appropriate responsibility for his actions. The hearing officer concluded that Yunker’s lack of candor regarding his submission of incorrect information to his law school and to the board had not been credibly explained and that his conduct as a whole could not be justified. The Board to Determine Fitness of Bar Applicants denied Yunker’s application, and Yunker appealed to the Georgia Supreme Court.

The Court pointed out that it was “the burden of an applicant to demonstrate that he or she possesses the requisite character and moral fitness to practice law” and that “when an applicant has a criminal record, the applicant must prove by clear and convincing evidence that, following any conviction, the applicant has fully and completely rehabilitated himself.” The Court stated that the hearing officer’s findings were supported by the record and justified the conclusion that Yunker had failed to carry his burden of demonstrating his rehabilitation and current moral fitness. The Court affirmed the decision of the board to deny Yunker’s application for certification of the requisite character and fitness to practice law. 

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