

# LITIGATION UPDATE

by Fred P. Parker III and Brad Gilbert

## CASES REPORTED

### CHARACTER AND FITNESS

**Criminal conduct; violation of fiduciary duties as a trustee; dishonesty; permanent denial**

*In re Application of Wiseman*, Slip Opinion No. 2013-Ohio-763

**Dishonesty; fraud; deceit; rehabilitation**

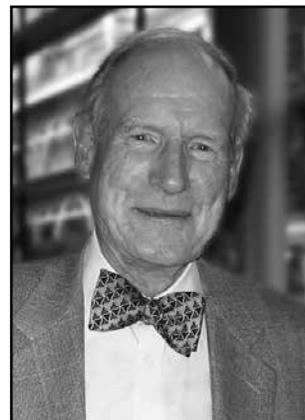
*In re Application of McKinney*, 134 Ohio St. 3d 260, 2012-Ohio-5635

**Lack of candor; false statements and omissions on bar application; neglect of financial responsibilities**

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*Vandrilla v. Connecticut Bar Examining Committee*, Superior Court, Judicial District of Hartford, February 5, 2013



## CHARACTER AND FITNESS

**Criminal conduct; violation of fiduciary duties as a trustee; dishonesty; permanent denial**

*In re Application of Wiseman*, Slip Opinion No. 2013-Ohio-763

Jay Wiseman graduated from law school in 2010 and applied for admission to the Ohio bar and to take the bar exam. The admissions committee of the Columbus Bar Association first interviewed Wiseman on June 30, 2011, and recommended that his character and fitness be approved. However, the Board of Commissioners on Character and Fitness exercised its investigatory authority and appointed a panel to

hear the matter. At the hearing, the panel addressed three primary areas of concern: 1) Wiseman's past criminal conduct (including incidents of underage possession of alcohol, destruction of property, public intoxication, and disorderly conduct), 2) his past-due debts, and 3) his extensive record of traffic violations. Following the hearing, Wiseman submitted an affidavit and a driving abstract that demonstrated that

he had not committed any further traffic offenses. Believing that Wiseman had satisfied his delinquent accounts and corrected his driving habits, the panel approved his application to sit for the February 2012 bar exam.

Prior to the bar exam, the board found out that Wiseman had been charged with receiving stolen property and asked for an explanation. His reply was that he had no duty to report this charge until it had been resolved. The board then reopened the investigation and appointed a panel to conduct a second hearing.

The second panel revisited the issues addressed at the first hearing and found that while Wiseman's testimony at the first hearing had put the best possible construction on his record, the transcript of a character and fitness hearing conducted by the Florida Board of Bar Examiners in March 2012 presented a different perspective. For example, Wiseman testified before the Columbus Bar Association that while working as a contractor for the Toledo *Blade*, he was charged with assault (later reduced to disorderly conduct) after a fight with a competing newspaper carrier, who Wiseman alleged had begun the fight by pushing him. But Wiseman's testimony before the Florida Board of Bar Examiners indicated that Wiseman, who had left his car and followed the other carrier, was the aggressor. In another incident, Wiseman was charged with criminal damaging after he was seen driving very fast across a lawn between two apartment complexes while delivering newspapers; the Florida transcript adds that Wiseman was "flooring it" and nearly hit someone. In a third incident, not addressed by

the Columbus Bar Association, a mother testified that Wiseman was driving recklessly and nearly hit her young son, who was delivering a competing newspaper.

Regarding Wiseman's past-due debts, the panel found that he had reported zero balances on most of his debts but that the NCBE report contradicted his statement. One of the debts had been sold to a collection agency and one had a balance, but no payments had been made.

Wiseman's traffic record included at least 13 citations for speeding, improper lane change, improper turn, reckless operation, failure to control, and driving under suspension. He claimed that this was a time-management issue and that he had taken steps to rectify his problem. Wiseman also became argumentative when the panel suggested that his traffic record showed a lack of concern for the safety of others and a selective disregard for the law.

The affidavit Wiseman had submitted to the first panel stated that he had no additional traffic violations, but he failed to disclose that he had been charged with receiving stolen property after purchasing a faculty parking pass from someone outside the parking office for \$10. He purchased the pass rather than buying a commuter-student pass from the university for \$60. He admitted to the Florida Board that he knew that the passes were not transferable, but he claimed that trading and purchasing parking passes was a common occurrence on campus. However, at his second Ohio panel hearing he testified that he did not discover that his conduct violated university policy until after he was charged. The panel felt that

THE SECOND PANEL REVISITED THE ISSUES ADDRESSED AT THE FIRST HEARING AND FOUND THAT . . . THE TRANSCRIPT OF A CHARACTER AND FITNESS HEARING CONDUCTED BY THE FLORIDA BOARD OF BAR EXAMINERS IN MARCH 2012 PRESENTED A DIFFERENT PERSPECTIVE.

his testimony was not credible, nor did they believe his explanation that he was waiting for the matter to be resolved before disclosing it.

The panel also investigated Wiseman's actions in regard to a life insurance trust established for the benefit of Wiseman and his younger brother, for which Wiseman himself was the trustee, and also in regard to the trust of his deceased mother, for which Wiseman's father was the trustee. When the Toledo *Blade* terminated its contract with Wiseman, leaving him and his wife without income, he asked his father for \$75,000 to support his family of six children while he attended law school. His father denied this request. Wiseman then filed suit seeking an accounting, a distribution, and the removal of his father as trustee of his mother's trust. The father's counterclaim alleged that Wiseman and his wife had accepted a \$160,000 loan from the trust but had not executed a note and mortgage to secure the loan. The probate court refused to remove the father as trustee and granted the trust a judgment against Wiseman and his wife for \$160,000 plus interest at 5.5%. The panel felt that Wiseman's statements during this litigation were not consistent. At one point he challenged the enforceability of the loan agreement, stating that neither he nor his wife had any obligation to repay the money used to buy their home, but at the hearing he acknowledged the need for a note and mortgage and said that he objected only to some of the terms of the loan agreement. Before the Florida Board, he testified that he had filed the probate action because his father had refused his request for money, but before the Ohio panel he said that the impetus to file suit was the father's claim that the sons would receive nothing from the trust until the father died.

When Wiseman's father stopped paying premiums on the life insurance trust, it had a cash value

of \$100,000. Wiseman initially used the cash value to pay the premiums, but when the cash value reached \$75,000 he surrendered the policy. Wiseman and his brother were both beneficiaries of the trust, and any distributions had to be authorized by the next eligible successor trustee—a fact that was repeatedly brought to Wiseman's attention by his father's attorney. Wiseman distributed some of the funds to himself, which he said was for "reinvestment." Wiseman's father filed a motion for an accounting, and Wiseman threatened his father's lawyer with a grievance if he did not withdraw the motion. On March 5, 2012, two weeks before Wiseman's Florida hearing, the probate court ordered Wiseman to provide an accounting to his brother's guardian ad litem by April 4, 2012, which he failed to do. However, Wiseman told the Florida Board that he had presented an accounting that had been accepted by the court but that the court had not yet ruled on all the claims. In responding to this inconsistency, Wiseman claimed that his wife had received the order four days before the Florida Board hearing, but that she had neither opened the envelope nor told him that it had arrived. The panel did not believe this testimony.

Before the Florida Board, Wiseman testified that he had absolute discretion to determine how the money was used and left that Board with the impression that his brother had received his share by referring to his brother's investment portfolio valued between \$120,000 and \$140,000. The evidence is clear, however, that those funds are separate funds belonging to the brother and that none of those funds came from the life insurance trust. Wiseman eventually admitted that he had spent all but \$256 of the \$75,000 trust fund for his own benefit.

Because of Wiseman's less-than-credible testimony, his obfuscation, his inability to be honest, and

his misappropriation of money held in trust for him and his younger brother, the panel and board recommended that the Ohio Supreme Court disapprove his pending application and prohibit him from reapplying as a candidate for the Ohio bar.

The Court agreed that Wiseman had not established, nor would he be able to establish in the

future, that he possesses the requisite character, fitness, and moral qualifications to practice law in the state of Ohio.

Wiseman's application was disapproved, and he was forever barred from applying to practice law in Ohio.

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### **Dishonesty; fraud; deceit; rehabilitation**

*In re Application of McKinney*, 134 Ohio St. 3d 260, 2012-Ohio-5635

Michele McKinney registered in June 2010 to take the February 2011 Ohio bar exam. The admissions committee of the Cincinnati Bar Association, following a hearing, disapproved her application. Following an appeal and her application to take the July 2011 exam, a panel of the Board of Commissioners on Character and Fitness conducted a hearing.

McKinney began law school at Northern Kentucky University in 2007 and shortly thereafter accepted a paralegal position at a Cincinnati law firm. Before deciding to attend law school, she had signed a lease for an apartment in Louisville where she and her sister would reside. The sister had not signed the lease. McKinney's sister began to experience health problems which prevented her from working and paying the rent, and she planned to vacate the premises, which would leave McKinney responsible for the rent. When McKinney inquired about terminating the lease, she was told she could sublet or the lease could be cancelled if she was transferred by her employer.

Instead of subletting, McKinney planned to fake an employment transfer by producing two documents on her employer's letterhead, one verifying a transfer from Louisville to Cincinnati and

the other acknowledging that she had accepted the transfer. Both letters were purportedly drafted by a nonexistent employee of the firm, "Kelly Richards." McKinney then changed the voice mail on her sister's phone to state that the caller had reached "Kelly Richards" in the event the landlord called to verify the move.

The law firm had a strict policy prohibiting employees from using company e-mail for personal purposes. Believing that McKinney was violating the policy, the firm's human resources director began monitoring her e-mail account in real time and found that McKinney was sending e-mails and immediately deleting them from her sent folder. One e-mail indicated that McKinney needed "a contact number for [her] fake human resources person," and another had the falsified letters attached. Based on this information, McKinney was fired.

On her bar application, McKinney stated that her reason for leaving the firm's employment was "terminated/conflicted with school schedule." Later in the same application, she stated, "I was fired [for] using company email for personal reasons." Prior to the panel interview, the Cincinnati Bar Association contacted the law firm seeking addi-

tional information about McKinney's termination and learned about the scheme to defraud the landlord. At McKinney's interview, she was given the opportunity to fully disclose the circumstances of her termination, but she did not disclose the creation of the fictitious letters on her employer's letterhead and was evasive when the interviewers revealed their knowledge of the letters.

When the matter came before the full admissions committee, both McKinney and the committee had obtained copies of McKinney's employment records, which included a memo by the human resources director memorializing McKinney's termination meeting. The memo included information about the e-mail policy violation and the falsified letters. McKinney testified that she did not recall being told that the letters were the reason for her termination. She attempted to excuse her evasiveness, claiming that she had forgotten many of the details. The panel felt that the human resources director's memo was a more credible account of the meeting than McKinney's version.

The panel found the remainder of McKinney's record unremarkable, despite her 2001 conviction for operating a vehicle while under the influence of alcohol and five speeding tickets. Noting that McKinney had not reported two of the speeding tickets on her application, the panel attributed that omission to inattention rather than deliberate misrepresentation. The panel noted that McKinney had volunteered at a domestic violence and sexual assault shelter, a juvenile court diversion program, and an animal shelter. She also presented five character references, including three letters from professors at her law

school and one from a former employer. Her current employer testified that he planned to keep her on after her admission to the bar because he was satisfied with the quality of her work and believed her to be honest.

The panel recommended that McKinney's application be disapproved but that she be allowed to apply for the July 2014 exam. The board adopted the panel's findings of fact, but noting that McKinney was a 30-year-old law student when she engaged in the deceptive behavior and that she had been evasive throughout the admissions process, the board concluded that she would never be able to establish her character and fitness and she should not be permitted to reapply for admission to practice law in Ohio. McKinney appealed this decision to the Ohio Supreme Court.

In arguing before the Ohio Supreme Court, McKinney conceded that disapproval of her current application was fair but objected to the board's recommendation that she be forever barred from reapplying. She contended that she had matured since her first year of law school and that the lengthy admissions process had had a profound impact on her. In her objections, however, she maintained that she had been "honest and forthright" in her character and fitness interview and that the law firm's human resources director's memo of the termination meeting was not credible. The Court disagreed, finding that the memo was more credible than McKinney's self-serving testimony and that the panel was in the best position to assess the credibility of the witnesses. The Court also found that McKinney had not been candid throughout the admissions process and had failed to disclose

IN ARGUING BEFORE THE OHIO SUPREME COURT, MCKINNEY CONCEDED THAT DISAPPROVAL OF HER CURRENT APPLICATION WAS FAIR BUT OBJECTED TO THE BOARD'S RECOMMENDATION THAT SHE BE FOREVER BARRED FROM REAPPLYING.

that she had drafted the false letters to breach her legal obligation to her landlord. The Court noted that McKinney appeared to be “genuinely remorseful” for her conduct in drafting the falsified letters and felt that “[d]espite McKinney’s recent and troubling pattern of dishonest conduct,” she might

one day rehabilitate herself and prove that she possesses the requisite character, fitness, and moral qualifications for admission to the practice of law. The board’s findings were adopted along with the panel’s recommendation that McKinney be permitted to reapply as a candidate for the July 2014 exam.

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**Lack of candor; false statements and omissions on bar application; neglect of financial responsibilities**

*In re Application of Clark, 2013 WL 829100 (Ohio)*

Andrew Logan Clark graduated from the Florida Coastal School of Law in 2010 and applied to register as a candidate for admission to the Ohio Bar. The admissions committee of the Columbus Bar Association initially recommended approval of Clark’s application. However, the Board of Commissioners on Character and Fitness noted Clark’s failure to disclose numerous traffic violations on his application and returned the file to the bar association for further review. On its second review, the bar association recommended disapproval of Clark’s application.

Clark appealed the decision to the board, and a hearing was conducted on November 17, 2011. Clark admitted that he had provided a false answer to the question “Have you been charged with any moving traffic violations that were not alcohol- or drug-related during the past 10 years?” In fact, Clark had at least 14 moving violations, some of which had occurred while he was driving under a suspended license.

Clark provided multiple explanations for falsely answering the question. First, he said, “I did not think the traffic offenses were the kind of thing that had to be disclosed. I did not think it was seri-

ous enough.” Next, he said, “I thought that I had answered the questions the way that they should have been answered. But I knew that I’d also done it with a lot more speed and a lot more brevity than some of the ones we as lawyers should.” Then Clark said, “So as at least a partial explanation, I would say that I always knew that this would be disclosed even if it didn’t appear on my application, that there would be knowledge in the State of Ohio that I did have traffic violations.” And finally, he said, “At the time I believed that I was being honest because I believed that I did not have the responsibility to disclose things that I thought were either not important enough or already disclosed.”

Following the November 2011 hearing, the board discovered that Clark had applied to take the February 2012 bar examination. On that application, Clark disclosed a default judgment related to a tax delinquency which had not been disclosed on his August 2010, September 2010, and March 2011 applications. Clark represented that he was “currently in the process of satisfying” a judgment for failure to pay Columbus city income taxes from 2002 through 2007.

The Board of Commissioners on Character and Fitness appointed a panel to conduct a second hearing. The panel found that Clark's representation that he was "currently" in the process of satisfying the judgment was false. The panel also questioned Clark about why he had not disclosed the tax delinquency on his previous applications. He replied that he had not learned of the delinquency until August or September of 2011. The panel did not find this explanation credible, given that the city had begun sending notices of delinquency in April 2006 to an address at which Clark admitted that he received mail. Additionally, the panel discovered that Clark had falsely answered another question regarding whether he had defaulted on any student loans.

The panel felt that Clark himself best summarized the shortcomings of his character when he explained, "I have a—I have exhibited an inability to be honest when—when there's a gigantic amount of embarrassment involved, when there is nothing I can do. I felt very helpless, and I had difficulty being honest." Despite this admission, however, the panel noted that Clark failed to demonstrate any remorse or appreciation for the seriousness of his misconduct.

Given Clark's numerous attempts to mislead the board, the panel recommended that Clark be permanently prohibited from reapplying for admission to the bar in the future. The board adopted the panel's findings of fact and agreed that Clark did not currently possess the character, fitness, and moral qualifications necessary to practice law. However, in light of Clark's willingness to admit his difficulty in being honest under trying circumstances, the board

expressed a hope that with time and maturity, Clark might one day come to understand the critical role that honesty and forthrightness play in the legal profession. Therefore, the board recommended that Clark be allowed to reapply to take the July 2017 bar exam.

The Supreme Court of Ohio agreed. The Court stated that an applicant to the Ohio Bar must prove by clear and convincing evidence that he or she "pos-

THE COURT STATED THAT AN APPLICANT TO THE OHIO BAR MUST PROVE BY CLEAR AND CONVINCING EVIDENCE THAT HE OR SHE "POSSESSES THE REQUISITE CHARACTER, FITNESS, AND MORAL QUALIFICATIONS FOR ADMISSION TO THE PRACTICE OF LAW."

sesses the requisite character, fitness, and moral qualifications for admission to the practice of law." Gov. Bar R. I(11)(D)(1). "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." Gov. Bar R. I(11)(D)(3).

The Court further noted that, "[b]ased upon Clark's numerous false statements and omissions throughout the admissions process and his neglect of his financial responsibilities, as demonstrated by the default judgment entered against him for delinquent tax obligations, we agree that Clark has failed to sustain his burden at this time. Furthermore, we agree that his belated candor in acknowledging his struggle to be honest when the truth proves to be embarrassing offers a glimmer of hope that he will mature and learn from his past mistakes."

The Court held that Clark could reapply to take the July 2017 bar examination and that he would have to submit a new application and complete a new character and fitness investigation at that time.

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**Submitting a false letter of recommendation; dishonesty**

*Vandrilla v. Connecticut Bar Examining Committee*, Superior Court,  
Judicial District of Hartford, February 5, 2013

David Vandrilla appealed from a decision of the Connecticut Bar Examining Committee (CBEC) entered in February 2012. In his petition, Vandrilla claimed that he had successfully passed the Connecticut Bar Examination on October 15, 2010. He was then notified by the CBEC that it was conducting an inquiry as to his application. The CBEC informed Vandrilla that it was seeking information about a reference letter he had submitted to the Law School Admission Council (LSAC) as part of his law school application process.

Vandrilla received his undergraduate education at Trinity College. In the spring of his sophomore year, he claims that he asked a microeconomics professor to write a recommendation letter on his behalf. He claims that he received the letter and put it away until his senior year, when he began applying to law schools. He then sent it to LSAC with other application materials. LSAC sent a notice to the professor acknowledging receipt of the letter, and the professor then contacted LSAC by phone and fax denying authorship of the letter. Additionally, the professor made a complaint against Vandrilla to the Trinity College Honors Council.

Both LSAC and Trinity investigated and held hearings. The LSAC procedure involved a telephonic

hearing, in which Vandrilla testified that he believed the professor had forgotten writing the letter. He also implied that the professor was suffering from dementia or Alzheimer's disease. In the Trinity hearing, which was more formal, both Vandrilla and the professor gave evidence consistent with their own

versions of events. Trinity's conclusion was that the professor had not written the letter but that it could not be determined whether Vandrilla had written it.

The CBEC held extensive hearings and considered the records of the other proceedings. The professor testified and again asserted that he had not written the letter. In support of his testimony, he cited several factors including his custom not to give a recommendation directly to a student and not to write a recommendation for a sophomore, in

addition to a number of deviations in writing style and the form of the letter itself. A handwriting expert testified that the signature on the letter was not the professor's. Vandrilla testified that the professor had forgotten he had written the letter and was too embarrassed to admit his mistake. The CBEC found that the professor had not written the letter and that Vandrilla had written it himself. Based on this determination, the CBEC further found that Vandrilla lacked good moral character and that it would not recommend him for admission.

Vandrilla appealed, claiming that the CBEC had abused its discretion and that its finding was based on an “ambiguous, isolated single event.” The court found this argument unpersuasive, as it was within the authority of the CBEC to determine the credibility of witnesses and to weigh the evidence presented before it. The CBEC was within its rights to consider Vandrilla’s reaction to the professor’s complaint and his claims that the professor was dishonest, that he suffered from memory lapses, and that his motivation in denying his authorship of the letter was to save himself embarrassment. The CBEC did not find that this event was “ambiguous,” nor did they find it to be “isolated.” It was within their discretion to do so.

Vandrilla also claimed that the CBEC had ignored the results of the other investigations. However, the record shows that the CBEC did consider the other proceedings. The CBEC listened to the recording of

the Trinity College Honors Council proceedings and a number of fact witnesses as well as witnesses who testified in support of Vandrilla’s character. It was not bound by the decision of the Honors Council or by LSAC’s decision. To arrive at a conclusion different from that arrived at by another entity is not an abuse of discretion. Vandrilla claimed that he was unfairly made to carry the burden of proving that he did not write the letter, but the court said his only burden was to prove good moral character. The court said that the CBEC had sufficient evidence to draw its conclusion that Vandrilla did write the letter.

The decision of the CBEC was affirmed. 

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

BRAD GILBERT is Counsel and Manager of Human Resources for the National Conference of Bar Examiners.