Making the Mark -- Character and Fitness for Admission to the Bar

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We all know that lawyers must pass a bar examination in order to practice law. However, future lawyers must first receive Certification of Fitness to Practice Law before they are eligible to sit for the Georgia bar examination. The responsibilities of ensuring that all who practice law are both competent and qualified by character and fitness rest with two separate boards appointed by the Supreme Court of Georgia and staffed by the Office of Bar Admissions. The Board of Bar Examiners evaluates competence, and the Board to Determine Fitness of Bar Applicants has the daunting task of determining whether each bar applicant possesses the requisite character and fitness to be admitted to the practice of law in Georgia.

The Fitness Application Process

The Board to Determine Fitness of Bar Applicants (Fitness Board) was established in 1977 by the Supreme Court of Georgia with the charge to "inquire into the character and fitness of applicants for admission to the practice of law and shall certify as fit those applicants who have established to the Board's satisfaction that they possess the character and fitness requisite to be members of the Bar of Georgia." [1] The Board is composed of ten members, seven lawyers and three members of the public, all appointed by the Supreme Court.

The Board adopted a Policy Statement Regarding Character and Fitness Reviews, which states that the burden is on the applicant to establish and document his or her current good character and fitness for admission,[2] following the holding of the Supreme Court of Georgia in *In re Beasley*, 243 Ga.134 (1979). The statement explains that "a person with a record showing a deficiency in honesty, trustworthiness, diligence, reliability, or judgment might not be recommended by the Fitness Board to the Supreme Court for admission." The Supreme Court and the Board view character as

exemplified by honesty and trustworthiness, while fitness comprehends diligence, reliability, and good judgment. In *In re Payne*, 289 Ga.746, 749 (2011), the Court explained that the applicant's record revealed that he had "an inclination for misleading and evasive behavior . . . 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 Policy Statement describes the elements of current good character and lists the areas of conduct which are the bases of further inquiry by the Board. These "problem areas' include, but are not limited to, unlawful conduct; academic misconduct; any act involving dishonesty, fraud or deceit; abuse of the legal process; neglect of financial or other legal obligations; violation of a court order; evidence of drug or alcohol dependency; disciplinary action in another jurisdiction regarding any professional license; and denial of admission to another jurisdiction on character and fitness grounds. [3]

The Board processes between eighteen hundred and two thousand fitness applications each year. The majority of these applications reveal no problem areas, as defined by the Board in the Policy Statement. Historically, 10% of the applications either reveal fitness issues or such issues are discovered in the investigation. Since the inception of the Board in 1977, it has received 46,950 Applications for Certification of Fitness to Practice Law. 97% of those applications have eventually resulted in Certification of Fitness to Practice Law.

To initiate the process, the applicant completes an Application for Certification of Fitness to Practice Law, which is now submitted online. This application requests personal information, including residential and employment history, education, military service, driving and criminal records, credit experience, litigation, and mental health. The information on the application is verified by the application analysts on the staff of the Office of Bar Admissions, and inquiries are sent to personal references, educational institutions, employers and other individuals familiar with the applicant.[4] All requested information and documentation must be received by an applicant's analyst before the file can be presented to the Board for a certification decision.

In reviewing all of this information, the Board focuses primarily on candor, financial responsibility, criminal activity, alcohol and drug abuse,

mental and emotional stability, and compliance with court orders. In evaluating current good character and fitness of an applicant whose file shows misconduct in the past, the Board considers the seriousness and recency of the misconduct, as well as the applicant's age at the time. In addition, the Board looks at patterns of misconduct and evidence of rehabilitation from the misconduct. [5]

Applicants must be completely candid in filling out the Application and answering follow-up questions by the Board. While the application asks for sensitive information, the Board's files are completely confidential and not subject to public disclosure.[6] Confidentiality is an essential feature of the process.

The determination of an applicant's character and fitness requires the Board to examine an applicant's "innermost feelings and personal views on those aspects of morality, attention to duty, forthrightness and self-restraint which are usually associated with good character." [7] The Board's "primary responsibility is to the public to see that those who are admitted to practice are ethically cognizant and mature individuals who have the character to withstand the temptations which are placed before them as they handle other people's money and affairs." This is to protect the public as the bar holds lawyers out as worthy of trust and confidence. If the Board is not "reasonably convinced" that the applicant could not handle such temptations; the Board may deny him or her certification for fitness. [8]

The Supreme Court has held:

> [B]ecause the Board's and this Court's primary concern in admitting persons to the practice of law is the protection of the public, any doubts must be resolved against the applicant and in favor of protecting the public.[9]

Upon reviewing a file, if the Board harbors concerns about an applicant's character and fitness that are not resolved through correspondence between the applicant and the application analyst, it may table the application for further investigation or invite the applicant to meet with the Board in an informal conference. [10] If the concerns are about substance abuse or mental stability, further investigation may take the form of a request by the Board that the applicant undergo an independent medical

evaluation with a licensed psychiatrist or psychologist recommended by the Board at the Board's expense. [11]

The informal conference is a discussion between the applicant and the Board. It is transcribed by a court reporter but does not rise to the level of a formal proceeding. In the conference, the Board asks questions of the applicant regarding the areas of concern and affords the applicant the opportunity to resolve any concerns the Board may have. An applicant may bring counsel to the conference, but the applicant must answer the Board's questions directly, not through his or her attorney. The Board averages between forty and fifty conferences per year out of the applications filed. In many cases, the informal conference allays the concerns of the Board and the applicant is granted Certification of Fitness to Practice Law.

After the investigation of a file is completed, the Board's options are to certify, table for rehabilitation or treatment, or issue a Tentative Order of Denial of Certification of Fitness to Practice Law. There are no "conditional" admissions made in Georgia. No applicant is tentatively denied fitness certification before meeting with the Board in an informal conference. Each year on average, four to six applicants are issued Tentative Orders of Denial of Certification of Fitness to Practice Law. If the Board issues a Tentative Order of Denial, the applicant may request a formal evidentiary hearing before an independent hearing officer appointed by the Supreme Court. [12] Historically, three to four hearings are held each year.

The Hearing Process

If the applicant requests a hearing, the Board makes the initial presentation of the reasons for the Tentative Order of Denial by issuing Specifications to the applicant, who then files an Answer to the Specifications. [13] The burden is on the applicant at all times to prove that he or she possesses the requisite character and fitness required for certification.[14]

The hearing officer is not strictly bound to observe the rules of evidence but considers all evidence deemed relevant to the proceedings.[15] After hearing the evidence, the hearing officer makes findings of fact and recommendations to the Board. These recommendations are not binding upon the Board or the Georgia Supreme Court. In fact, no other previous findings or recommendations on the ultimate issue are binding on the Board or the Supreme Court, including those made by a law school or the Judicial

Qualifications Commission. [16] The Georgia Supreme Court will uphold any final decision of the Board if there is any evidence to support it. However, the ultimate decision always rests with the Supreme Court. [17]

Grounds for Denial of Certification

Applicants have been denied certification of fitness based on seven general categories of behavior.

1. Lack of candor, in all aspects including the application process;
2. Financial irresponsibility ,with regard to consumer debt, repayment of student loans, and compliance with court orders;
3. Improper conduct in court;
4. Substance abuse or addiction;
5. Mental or emotional instability;
6. Unlawful/criminal conduct,;
7. Academic misconduct and/or dishonesty.

Lack of Candor

The number one reason for denial certification of fitness of applicants nationally and in Georgia is lack of candor or a pattern of dishonesty. The hallmark of a person of trust and character who is fit to practice law is honesty in every situation. Lack of candor encompasses a plethora of behavior including, but not limited to, providing false or misleading answers in making applications, committing fraud or deceit on any court, abusing the legal process, unscrupulous business practices, and academic misconduct, including plagiarism. [18] Keep in mind that even if the applicant's law school or employer makes findings that the applicant did not commit fraud, deceit or plagiarism; these findings are not binding on the decision of the Board as to these matters. [19] Giving false, evasive and misleading answers to the Board during the application process is a ground for denial of certification in itself. The rule to follow is, "when in doubt, disclose" or at the very least contact the Office of Bar Admissions for clarification. [20]

In recent years, a number of applicants have been found to have been less than candid on their applications to law school regarding past unethical or criminal behavior. This may also be grounds for a denial of certification if the omission is not corrected promptly and a credible, reasonable explanation is not proffered as to the original non-disclosure. [21]

Financial Irresponsibility

Neglect of financial obligations and other legal obligations are also common grounds for tabling or denying fitness applications. The Board views defaulting on student loans, consumer debt, and other financial obligations as evidence of financial irresponsibility. The Supreme Court has emphasized the importance of demonstrating stability in meeting financial obligations in a number of cases. [22] Defaulted student loans and failure to pay child support are of particular concern to the Board. The Policy Statement explains that if an applicant currently has an unsatisfactory credit record, especially unpaid collections, judgments, liens, or charged off accounts, the Board will table the application until the applicant has provided proof of six current consecutive months of payments in the monthly amount as agreed to by the creditor(s) in order for the applicant to demonstrate a good faith effort to exhibit financial responsibility.

However, the Georgia Supreme Court has made it clear that one isolated incident does not amount to a showing of financial irresponsibility. In *In the Matter of Harold Wayne Spence*, the Supreme Court reversed the Board's decision to deny certification of fitness. [23] Mr. Spence had been disbarred and accumulated a number of debts. He worked several jobs to repay his debts and then applied for readmission. The Board revoked his certification for failure to make payment on his law school loans for several months. Mr. Spence explained that he had stopped making payments for a period of months in order to fund his daughter's study abroad program. Spence admitted that it was a lapse of judgment and paid off his student loans. The Supreme Court held that this was an isolated incident showing a lapse of judgment but did not show a pattern of dishonest conduct or financial irresponsibility. The Court reversed the Board's denial and certified Spence to sit for the bar examination.

Improper Conduct in Court

The Board takes abuse and disrespect of the legal process very seriously. Applicants have been denied for filing frivolous complaints, making threatening comments to attorneys and judges or others involved in their cases, and sending disrespectful emails using profanity to those involved in a court action. [24] An extreme example is *In re: Richard Barrett* where an applicant licensed to practice law in another state appeared pro hoc vice in the United States District Court for the Northern District of Georgia.

The trial judge held that the applicant attempted to perpetrate a fraud upon the court by attempting to present a false appearance of competency for a witness to testify. [25] This conduct before the Northern District alone justified denial of certification. In another case, the court found that the applicant was properly denied certification as the applicant's conduct during his worker's compensation cases was "inappropriate, threatening and an abuse of the legal process" which included filing frivolous complaints. [26]

The Supreme Court has also upheld the Board's decision where an applicant was intoxicated and insubordinate during an unpaid internship. While this applicant had other troubling factors, part of the denial was based on applicant's conduct at his internship in refusing to sit by the senior attorney in court, leaving the courtroom without permission, and sending insulting emails to the senior attorney which contained profanity. [27]

This is not to say that being incompetent during a court proceeding (prior to being a licensed attorney) is a basis for denial. The Supreme Court reversed the Board's decision to deny an applicant based on her actions during the prosecution of her traffic charge. The applicant had represented herself during her first year of law school. The applicant demonstrated a total lack of understanding of the judicial process. Furthermore, the applicant had stated to the Board that she believed the police officers lied during her trial and that the district attorney and judge knew it. Based on this belief, the applicant concluded that there had been a great miscarriage of justice. The Supreme Court found that the applicant's statements and beliefs went to her competence to try a case rather than her character and fitness. It should be noted that the Board found no dishonesty on the part of the applicant, only a misguided understanding of the law and a lack of judgment and professionalism.[28]

Substance Abuse

Chemical dependency or abuse, if left untreated, is an area of particular concern for the Board due to the potential to impact one's ability to practice law. The Board strongly encourages any applicant who has an issue with drugs or alcohol to obtain the counseling and treatment needed as soon as possible. The Board also has the option of requiring an applicant to obtain a drug or alcohol evaluation from a licensed psychiatrist or psychologist recommended by the Board. The Board understands that other types of misconduct can arise from chemical dependency and focuses on the

applicant's recognition and acceptance of responsibility for any problem, obtaining proper treatment, and, as discussed in depth below, showing rehabilitation from any past misconduct associated with a drug or alcohol problem.

Mental or Emotional Instability

Emotional and mental health is an area where the Board must make inquiry. The preamble to the questions regarding substance abuse and mental health states that "The mere fact of treatment for mental health problems or addictions is not in itself a basis on which an applicant will be denied admission. To date, the Board to Determine Fitness of Bar Applicants has never denied an applicant based soley on this information. Further, the Board has routinely certified individuals for admission who have demonstrated personal responsibility and maturity in dealing with mental health and addiction issues."[29] The Board understands that law school and life in general can be stressful and may result in an applicant's seeking counseling or other treatment. This treatment is not necessarily viewed as evidence of a mental or emotional problem. The Board encourages any applicant to obtain such treatment if the treatment will be helpful to the applicant. Only where an applicant has serious mental or emotional health issues will the Board conduct an in-depth inquiry in order to ensure that those issues will not affect the ability of an applicant to practice law in a competent and professional manner.

Unlawful or Criminal Conduct

Unlawful or criminal conduct is of paramount concern to the Board but may not necessarily result in an automatic denial of certification. However, the Supreme Court has held that where an applicant has a criminal background, he must prove "full and complete rehabilitation by clear and convincing evidence." [30] The Board may consider all unlawful acts committed by the applicant. There is no requirement that the act resulted in a conviction. This includes any arrests and actions adjudicated without guilt pursuant to the Georgia First Offender Act. [31]

The Board will not consider an applicant's file if a criminal charge is pending against the applicant or if the applicant is currently serving a term of probation. In such cases where an applicant has had the term of probation terminated early, the Board will adhere to the court's original sentence of

probation in determining when the applicant will be eligible for consideration for Certification of Fitness.[32] Where the applicant has a felony conviction, the Board expects that the applicant will apply for a pardon prior to filing his fitness application. Because the Board believes that restoration of civil rights is critical to an applicant's ability to function as a lawyer, restoration of civil rights, at a minimum, is required. Conduct that involves theft, fraud, deceit, or unscrupulous business practices raises a presumption that the applicant does not posses the fiduciary responsibility necessary to meet the requisite character and fitness standard. However, depending on the facts of the case, even someone with a criminal background may carry the burden of demonstrating character and fitness through showing, by clear and convincing evidence, "rehabilitation," as discussed below.

Academic Misconduct

The Board recently added a section to its Policy Statement to address Academic Misconduct. In summary, the Board believes that misconduct such as plagiarism is indicative and predictive of untrustworthiness in the practice of law. The Board is particularly concerned when academic misconduct occurs in law school. [33]

Rehabilitation

The Fitness Board takes the position that there is no conduct that automatically excludes an applicant from admission, that an applicant can be rehabilitated regardless of the seriousness of the conduct; however the burden is on the applicant to demonstrate full rehabilitation. Evidence of rehabilitation is the most crucial factor the Board uses to determine whether past problems should lead to denial of fitness certification. To make this determination, the Board looks carefully at the applicant's conduct, particularly as it relates to honesty, trustworthiness, diligence, reliability, and judgment. Generally, the Board will assess whether the problems of the past continue, and, if they do not, whether the applicant's life has changed in ways that suggest the problems of the past are unlikely to recur.

The Georgia Supreme Court was one of the first courts to issue a decision on the issue of rehabilitation for character and fitness purposes. In *In re Cason*, 249 Ga. 806 (1982), the Court defined rehabilitation as "the re-establishment of the reputation of a person by his or her restoration to a useful and constructive place in society." [34] The Georgia Supreme Court has

further added that merely showing that one has complied with his obligations and not been into further trouble is not proof of rehabilitation. [35] The applicant must take full responsibility for any past misconduct, and show by positive action that he has restored himself to a useful place in the community. This is usually shown through one's "occupation, religion, or community service." [36]

The very important first step is for the applicant to fully accept responsibility for his or her conduct and show understanding and remorse. Simply admitting the conduct happened is not enough. In *In Re White*, the Court upheld the Board's final decision denying an applicant where the applicant admitted that he turned in a wholly plagiarized paper during law school but "was either unwilling or unable to admit that he deliberately" plagiarized and was not able to offer any credible explanation. [37] Similarly, in *In re Terry Glenn Lee*, the applicant pled guilty to six counts of the unauthorized practice of law but continually tried to minimize or justify his "technical" violations of the law to the Board. [38] Lee, like White, showed no remorse for his conduct in his refusal to assume full responsibility for it.

The second step is providing evidence of community service in order to restore the applicant's reputation in the community. The Board has found rehabilitation where an applicant involved himself in various civic, youth, and religious activities and associations that serve the community. Some examples are applicants who are heavily involved in various civic and youth groups, performing over fourteen hundred hours of service at homeless shelters, religious non profit organizations, including taking a leadership role in some of those activities. [39] However, self-serving activities, such as legal externships where the applicant receives law school credit, will not count toward rehabilitation. [40]

Rehabilitation is the most critical element that the Board considers when making a determination as to whether past misconduct should be the basis for a denial of certification. The Board will certify those applicants with current good character and fitness.

The Supreme Court

Once the Board issues a Final Order of Denial of Certification of Fitness to Practice Law, the applicant has the right to appeal the denial to the Supreme Court. As stated above, the Supreme Court will uphold a final

decision if there is any evidence to support it, but the ultimate decision always rests with the Court. While all applicant files on appeal are sealed, the Supreme Court will use the full name of the applicant in published opinions "because public access to the decisions of this Court is essential to our role in establishing and interpreting the law."[41] The applicant's file remains confidential. [42]

Character and Fitness is ultimately based on our choices

In the popular Harry Potter series of fantasy novels, author J.K. Rowling uses her characters and stories to teach basic moral values. In one instance, Harry asks Professor Dumbledore what is the difference between himself and the villain of the series, Lord Voldemort, since they both possess the same powerful talents and abilities. The very wise head master answers "*It is our choices, Harry, that show what we truly are, far more than our abilities."* J.K. Rowling, *Harry Potter and the Chamber of Secrets*. The Board to Determine Fitness takes an in-depth look at all choices made both past and present by applicants in defining an applicant's current character and fitness. As case law on character and fitness continue to evolve, one thing remains certain: honesty and responsibility will almost invariably carry the day.

Endnotes

[1] Rules Governing Admission to the Practice of law, Part A, Sec.2.
[2] Policy Statement of the Board to Determine Fitness of Bar Applicants.
[3] Policy Statement of the Board to Determine Fitness of Bar Applicants.
[4] Rules Governing Admission to the Practice of Law, Part A, Sec. 6.
[5] Policy Statement of the Board to Determine Fitness of Bar Applicants.
[6] Rules Governing Admission to the Practice of Law, Part F, Sec. 4 (b).
[7] *In re Lubonovic*, 248 Ga. 243, 246(1981).
[8] *In re Lubonovic*, 248 Ga. 243, 245(1981).
[9] *In re Cook*, 284 Ga. 575, 576 (2008).
[10] Rules Governing Admission to the Practice of Law, Part A, Sec. 7.
[11] Policy Statement of the Board to Determine Fitness of Bar Applicants, Sec. F.
[12] Rules Governing Admission to the Practice of Law, Part A, Sec. 8 (a).
[13] Rules Governing Admission to the Practice of Law, Part A, Sec. 8 (a).
[14] *In re Beasley*, 243 Ga. 134 (1979).
[15] Rules Governing Admission to the Practice of Law, Part A, Sec. 8 (c).
[16] Rules Governing Admission to the Practice of Law, Part A, Sec. 8 (c); *In re K.S.L.*, 269 Ga. 51, 52 (1998); *In re Jenkins*, 278 Ga. 529 (2004).
[17] *In re Spence*, 275 Ga. 202 (2002).
[18] *In re Payne* 2011 Ga. LEXIS 656 (Ga. Sept. 12, 2011); *re Cook*, 284 Ga. 575(2008*); In the Matter of White*, 283, Ga. 74 (2008); *In re: K.S.L.*, 269 Ga. 51 (1998); *In re: R.M.C.*, 272 Ga. 99 (2000*); In re: J.W.N.*, 266 Ga. 58 (1995).
[19] *In re Jenkins*, 278 Ga. 529 (2004); *In re K.S. L.*, 269 Ga. 51 (1998).
[20] *In re Payne* 2011 Ga. LEXIS 656 (Ga. Sept. 12, 2011).
[21] *In re Payne* 2011 Ga. LEXIS 656 (Ga. Sept. 12, 2011).
[22] *In re C.R.W.*, 267 Ga. 534 (1997*); In re Johnson*, 259 Ga. 509 (1989); *In re Adams*, 273 Ga. 333(2001).
[23] *In re Spence*, 275 Ga. 202 (2002).
[24] *In re Yunker*, 2011 Ga. Lexis 662 (Ga. Sept. 12, 2011), *In re D.K.M.*, 271 Ga. 473 (1999).
[25] *In re Barrett*, 260 Ga. 903 (1991).
[26] *In re D.K.M.*, 271 Ga. 473 (1999).
[27] *In re Yunker*, 2011 Ga. Lexis 662 (Ga. Sept. 12, 2011).
[28] *In re Ringstaff*, 288 Ga. 21(2011).
[29] Application for Certification of Fitness to Practice law, Preamble to Questions 24-26.
[30] *In re Cason*, 249 Ga. 806 (1982); *In re J.W.N.*, 266 Ga. 58 (1995).
[31] *In re Lee*, 275 Ga. 763 (2002).
[32] Policy Statement of the Board to Determine Fitness of Bar Applicants, Sec. A.
[33] Policy Statement of the Board to Determine Fitness of Bar Applicants, Sec.B.
[34] *In re Cason*, 249 Ga. 806, 808 (1982).
[35] *In re Lee, 275 Ga. 763, 764 (2002).*
[36] *In re Cason*, 249 Ga. 806, 808 (1982).
[37] *In re White*, 283 Ga. 74, 75 (2008).
[38] *In re Lee*, 275 Ga. 763, 765 (2002).
[39] *In re Friedberg*, 286 Ga. 472 (2010);*In re Calhoun*, 286 Ga. 417 (2010),
[40] *In re Payne* 2011 Ga. LEXIS 656 (Ga. Sept. 12, 2011).
[41] *In re Johnson*, 272 Ga. 444 (2000).
[42] Rules Governing Admission to the Practice of Law, Part F, Sec. 4 (b).