IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-SA-01610

EARL STEPHEN DEAN — APPELLANT

V.

MISSISSIPPI BOARD OF BAR ADMISSIONS — APPELLEE

APPEAL FROM THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI,
FIRST JUDICIAL DISTRICT

BRIEF OF THE APPELLEE

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ORAL ARGUMENT NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

The Mississippi Board of Bar Admissions, Appellee herein, respectfully submits that there exists sufficient authority on point to resolve the issues presented in this case. Moreover, the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

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preparation of specific findings of fact and conclusions of law due to the complexity, seriousness, and number of issues involved. (*Id.*). The Board accepted the recommendation of the Committee and denied Dean's application at the next regular meeting on January 30, 2003. (*Id.*). Dean filed a petition for reconsideration and personally appeared before the Board to present his arguments on April 17, 2003. (C.P. Vol. 1, pp. 117-18; C.P. Vol. 3, Ex. C, p. 2).

Before the Board reached a decision on Dean's petition, Dean filed a petition for a writ of mandamus with this Court seeking review of the Board's process. (C.P. Vol. 1, p. 118; C.P. Vol. 3, Ex. C, p. 3). The Board stayed its action on the application pending resolution of Dean's writ petition. (*Id.*) After this Court denied the writ request, the Board granted Dean's petition for reconsideration and remanded his application to the Committee for further investigation. (C.P. Vol. 1, pp. 118-19; C.P. Vol. 3, Ex. C).

Following a formal hearing on August 25, 2005, at which Dean was present, testified, and had the opportunity to present evidence, the Committee determined that Dean had failed to fulfill his burden to establish that he possesses the requisite character and qualifications for admission. (C.P. Vol. 1, p. 119; C.P. Vol. 3, Ex. A). Using the standards set forth in Bar Rule VIII, § 6, the Committee concluded that Dean had been dishonest, irresponsible in business and professional matters, engaged in the unauthorized practice of law, violated reasonable rules of conduct, failed to exercise substantial self-control, and was emotionally unstable to the extent not fit for the practice of law. (*Id.*). The Board accepted the Committee's recommendation and denied Dean's application on September 22, 2005. (C.P. Vol. 1, p. 119, C.P. Vol. 3, Ex. B).

Dean appealed from the Board's decision to the Chancery Court of Hinds County, Mississippi. (C.P. Vol. 1, p. 119). After conducting a hearing on the matter on July 13, 2006, and

considering the arguments presented by the parties, the chancery court entered its Order and Opinion of the Court affirming the Board's decision. (C.P. Vol. 1, pp. 117-26). The chancery court concluded that there was substantial evidence in the record to support the Board's finding that Dean failed to meet his burden under Bar Rule VIII, § 7 to establish that he possesses the character and qualifications to justify admission to the Bar. (*Id.* at p. 125).

In addition to this direct appeal from the Board and chancery court decisions, Dean has filed two separate actions arising from his bar application process in the United States District Court for the Southern District of Mississippi alleging violation of various constitutional and federal statutory rights by James R. Mozingo, Chairman of the Board, (*Dean v. Mozingo*, Civil Action No. 3:06-CV-00068-HTW-JCS), and by the Board, its members, and Committee members (*Dean v. Miss. Bd. of Bar Admissions*, Civil Action No. 2:06-CV-00046-LG-RHW). The action against Chairman Mozingo is pending before United States District Judge Henry T. Wingate, following a hearing on the defendant's motion to dismiss and motion for summary judgment. Dean's action against the Board, Board members, and Committee members is currently pending on appeal before the Fifth Circuit Court of Appeals, Docket No. 07-60110, following dismissal of the action by United States District Judge Louis Guirola, Jr.

SUMMARY OF THE ARGUMENT

The Board denied Dean's application for admission to the Mississippi Bar on six separate grounds: that Dean exhibited conduct substantially evidencing an inclination 1) to be dishonest 2) to be irresponsible in business or professional matters, 3) to unlawfully engage in the practice of law while not licensed, 4) to violate reasonable rules of conduct, 5) to fail to exercise self-control, and 6) to be mentally or emotionally unstable to the extent that he is not suited to the practice of law. Bar Rule III, § 6 (A), (D), (F), (G), (H), and (I). Pursuant to Bar Rule III, § 6, any one of these bases alone would require the Board to deny Dean's application. The record before the Board presented substantial evidence supporting each of these findings by the Committee and the Board, and Dean cannot meet his burden on appeal to demonstrate that the denial of his application was arbitrary, capricious, or malicious.

Dean's appeal addresses four primary legal contentions: 1) the Committee and Board violated his First Amendment right to file lawsuits by examining whether Dean's conduct in prior litigation constituted the unauthorized practice of law or otherwise demonstrated irresponsible and irrational behavior; 2) the Committee and Board violated his due process right to cross-examine witnesses by relying in part on documents rather than exclusively on live testimony; 3) the Committee and Board violated Bar Rule VIII, § 6 by considering incidents "remote in time," from 1987 and 1992; and 4) the Committee and Board's determination that Dean is emotionally unstable is arbitrary and capricious because the Committee did not basis the decision on medical evidence. The chancery court carefully reviewed each of Dean's arguments and concluded that they lacked merit.

The Board has clear authority to consider an applicant's misconduct during litigation and abuse of the legal system in its character and fitness review. Dean was notified in advance of the Committee hearing of the issues and evidence that would be presented, and he was afforded the opportunity to testify and present evidence at the hearing. The Bar Rules allow consideration of conduct "remote in time" if it is part of a continuing pattern of misconduct or if it is not the sole evidentiary basis for the Board's decision. Finally, the Board not only is qualified to review an applicant's mental fitness to practice law, but is charged with the duty to do so in order to protect the general public. None of the actions of the Committee or the Board violated Dean's First Amendment or due process rights, and the final decision of the Board was supported by substantial evidence in the record. As a result, this Court should affirm the chancery court's decision upholding the Board's denial of Dean's application for admission to the Mississippi Bar.

ARGUMENT

I. STANDARD OF REVIEW

This Court generally conducts a *de novo* review of the chancery court's action on appeal from a decision of the Board of Bar Admissions. *Watkins v. Miss. Bd. of Bar Admissions*, 659 So.2d 561, 567 (Miss. 1995); *Miss. Bd. of Bar Admissions v. Applicant F.*, 582 So.2d 377, 379 (Miss. 1991). In so doing, this Court employs the "familiar standard used in judicial review of other administrative licensing decisions." *Applicant F.*, 582 So.2d at 379. Factual findings and decisions on the merits of an applicant's fitness to practice law are reviewed under the traditional deferential standard–this Court will modify the Board's decision only if it was arbitrary, capricious, or malicious. *Id.*; *Watkins*, 659 So.2d at 567. Purely legal issues, including constitutional questions, are reviewed *de novo*. *Watkins*, 659 So.2d at 567-68.

II. THE BOARD'S FINDING THAT DEAN WAS DISHONEST WAS NOT ARBITRARY OR CAPRICIOUS AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Pursuant to the requirement of Bar Rule VIII, § 6(A) the Board accepted the Committee's recommendation that Dean not be admitted to the Mississippi Bar because he "has exhibited conduct substantially evidencing an inclination . . . [t]o be dishonest." "Truthfulness, honesty, and candor are 'necessary characteristics for establishing a candidate's good moral character and hence his or her fitness to practice law." *Shochet v. Arkansas Bd. of Law Examiners*, 979 S.W.2d 888, 894 (Ark.1998). There is "no place in the law for men or women who cannot or will not tell the truth." *Id.* "An applicant must 'respond fully and accurately'" to questions on the bar application and the applicant has a "unremitting duty of candor" in responses. *Shochet*, 979 S.W.2d at 894. The

Committee and Board found specific dishonest and evasive acts by Dean as indicators of his lack of respect for the law and inability to act honestly if he were to practice law.

Although he did not assert it as one of his "Issues for Review" before the chancery court, (C.P. Vol. 1, pp. 7-8), Dean complains that the chancery court failed to address the Board's finding that Dean had been dishonest and asks this Court to review the Board's findings. "It is well-settled that an issue not raised before the lower court and only raised for the first time on appeal is deemed waived and procedurally barred." *Leiden v. Leiden*, 902 So.2d 582, 585 (Miss. App. 2004); *see also Truax v. City of Gulfport*, 931 So.2d 592, 598 (Miss. App. 2005) (same); *LaFoe v. Miss. Employment Sec. Comm'n*, 909 So.2d 115, 119 (Miss. App. 2005) (same). Because Dean did not challenge this portion of the Board's decision before the chancery court, he is procedurally barred from raising it for the first time on appeal to this Court.

Moreover, without waiving the procedural bar, the Board's determination under Bar Rule VIII, § 6(A) was supported by several specific actions which the Committee and the Board found as evidence of Dean's character. For example, Dean indicated on his Mississippi bar application that he had never been "suspended, placed on disciplinary probation, . . . or otherwise subjected to discipline" by a law school. (C.P. Vol. 3, Ex. E.1, Question 18). Dean failed to disclose that he had been placed on probation by Thomas Cooley Law School for failing to disclose a prior criminal conviction. (C.P. Vol. 3, Ex. D, pp. 18-21). Also, Dean indicated on his bar application that he attended only Thomas Cooley Law School. (C.P. Vol. 3, Ex. E.7, Question 10). Dean failed to disclose that he also studied at William Howard Taft University Law School. (C.P. Vol. 3, Ex. D, pp. 27-28).

At the Committee hearing and on appeal, Dean glosses over these omissions, claiming that they were inadvertent due to a lapse in memory. However, contrary to Dean's assertion otherwise, it is not necessary that the Board find an intent to deceive in order to find that an applicant's conduct exhibits dishonesty; "an applicant who recklessly fills out an application, as the consequence of which the application contains false answers, is just as culpable of lacking candor in the application process as is the applicant who intends to deceive." *In re Appeal of Lane*, 544 N.W.2d 367, 376-77 (Neb. 1996). Moreover, when considered in combination as a series of discrepancies, the Board's finding that Dean exhibited a tendency to be dishonest was not arbitrary or capricious. *See In re Application of Panepinto*, 704 N.E.2d 564, (Ohio 1999) (applicant's "false and incomplete answers in his application, his continued dishonesty during part of the admissions process, and his attempts to excuse or minimize his conduct at the hearing establish that he does not presently possess the integrity to be admitted to practice law").

In addition, Dean indicated on his bar application that had been employed by Illinois Mutual, Midland National Life Insurance, and Massachusetts Mutual Life Insurance. (C.P. Vol. 3, Exs. E.10, E.11, E.12). Dean further indicated on the application that he had never been discharged or asked to resign from any employment. (C.P. Vol. 3, Ex. E.9, Question 28). Dean failed to disclose that he had been terminated from each of these three companies he listed as employers. (C.P. Vol. 3, Ex. D, pp. 31-38) At the hearing Dean evasively answered that he was an independent contractor but felt compelled to list Illinois Mutual, National Life, and Massachusetts Mutual as "employers" but did not feel that he was in their "employment" for purposes of Question 28 regarding termination. (*Id.*). Dean could not explain this discrepancy, and his evasive testimony compounded his dishonest bar application answers. These inconsistencies in Dean's bar application responses support the

Board's decision regarding his lack of fitness to practice law. *See In re Application of Cvammen*, 806 N.E.2d 498, 501-03 (Ohio 2004) (applicant's "hedging and inconsistencies" regarding the circumstances of his prior employment termination confirmed applicant's lack of candor and integrity); *In re E.L.D.*, 494 S.E.2d 317, 318-19 (Ga. 1998) (lack of candor regarding circumstances surrounding departure from former employment warranted denial of certification to practice law).

Dean also made inconsistent statements regarding his picketing of the private residence of John Nussbaumer, Dean of Thomas Cooley School of Law. The timing of this picketing incident was a critical issue in Dean's lawsuit against Thomas K. Byerley, the Regulation Counsel and Director of Professional Standards Division for the State Bar of Michigan. *See Dean v. Byerley*, 2005 WL 1993435 (6th Cir. 2005); *Dean v. Byerley*, 354 F.3d 540 (6th Cir. 2004). Dean claimed that Byerley chilled his First Amendment rights by threatening him when Dean picketed Byerley's home. *See id.* Byerley presented evidence, including testimony from Dean's co-picketer, demonstrating that, rather than being in emotional distress following the confrontation with Byerley, Dean continued his picketing at Nussbaumer's home on that same day. *Dean*, 2005 WL 1993435 at *5. During the hearing before the Committee, Dean adamantly denied that he had picketed Dean Nussbaumer's residence on March 27, 2001; however, Dean previously admitted to picketing Nussbaumer's home on that date in a letter to the Committee. (C.P. Vol. 3, Ex. D, pp. 184-87, Ex. E.47, p. 8). An e-mail memo from Dean Nussbaumer also confirmed that Dean had picketed Nussbaumer's home on the morning of March 27, 2001. (C.P. Vol. 3, Ex. E.45). This evidence and conflicting testimony from Dean provided the Board with substantial evidence that Dean demonstrated dishonesty in his statements during the litigation against Byerley and during the hearing before the Committee. *See In re Application of Bernath*, 962 P.2d 685, 688 (Or. 1998)

(applicant's failure to provide convincing explanations for misrepresentations during course of prior litigation constituted sufficient grounds for denial of application to practice law).

Morever, even if this Court finds that any one of these incidents cited by the Committee and Board is insufficient evidence of dishonesty, the findings viewed in the aggregate provide a substantial basis for determining Dean's lack of candor. *See In re Legg*, 386 S.E.2d 174, 183 (N.C. 1989) (while findings taken singly might not be sufficient to disqualify applicant, when considered together they revealed a pattern of "carelessness, neglect, inattention to detail and lack of candor"). As a result, this Court should not overturn the Board's findings on this issue.

III. THE BOARD DID NOT VIOLATE DEAN'S FIRST AMENDMENT RIGHTS BY REVIEWING HIS CONDUCT IN LITIGATION.

Dean asserts that by reviewing his conduct as a *pro se* plaintiff and defendant the Board impermissibly placed his "First Amendment practices and personal views on trial," and that "the Chancery Court found that there was nothing wrong with that." Brief of Appellant, p. 15. The Committee's recommendation to the Board clearly states that it was not "influenced by any religious views or Mr. Dean's tendencies to picket or otherwise exercise any of his constitutional rights." (C.P. Vol. 3, Ex. A, p. 1). Committee Chairman Larry Gunn explained to Dean during the hearing that "[n]o one in this room will ever dispute your right to file civil lawsuits either representing yourself or you're [sic] an attorney representing clients. It's the validity of the lawsuits that causes concern, not the right to file lawsuits." (C.P. Vol. 3, Ex. D, p. 91).

It is neither unusual nor improper for boards of bar admissions to review an applicant's conduct in litigation and other confrontations. States have recognized that an applicant's conduct during litigation and statements to public officials or others are reliable indicators of how the

applicant would behave as an attorney. Conduct in previous litigation is properly considered to determine whether the applicant has a "sense of reality" in dealing with the legal system. *In re Admission to the Bar*, 828 N.E.2d 484, 494 (Mass. 2005). Confrontational and irrational letters to law school faculty and others can be considered evidence of "turbulence, intemperance, and irresponsibility." *In re Application of Converse*, 602 N.W.2d 500, 509 (Neb. 1999). An applicant's threatening and irrational actions are relevant and may disclose a "pattern and a way of life" regarding the applicant's "normal reaction to opposition and disappointment." *In re Appeal of Lane*, 544 N.W.2d 367, 376 (Neb. 1996).

Consistent with their constitutional authority, the Committee and Board reviewed Dean's conduct during his Michigan litigation in *(Dean v. Byerley)* in concluding that Dean was dishonest in his testimony to the Committee regarding the events underlying the litigation. (C.P. Vol. 3, Ex. A, pp. 3-4). Dean's dishonest statements were addressed more fully in Section II, *supra*. Further, in arriving at the conclusion that Dean handled disagreements in an irresponsible manner and in violation of reasonable rules of conduct, the Committee and Board considered Dean's threatening and irrational statements to law school faculty, threats to witnesses appearing before the Committee, and his settlement with the Missouri Attorney General regarding allegations of fraud. (C.P. Vol. 3, Ex. A, pp. 4-7). The Committee and Board also considered Dean's admitted unauthorized practice of law, his retaliatory conduct in initiating litigation, and his use of arguments found frivolous by courts. (*Id.*).

In reviewing the Committee and Board's consideration of Dean's activities, the chancery court noted the distinction between concerns regarding Dean's inappropriate conduct during previous litigation and encounters with public officials, as opposed to any encroachment on his right to engage

in protected First Amendment activities. (C.P. Vol. 1, p. 122). The court held that inquiry into an applicant's pattern of litigation was relevant to the Board's character and fitness review, because public statements and actions when dealing with the legal system may be indicators of how the applicant will conduct himself as an attorney. (*Id.*). Upon review of the evidence, the chancery court concluded that the Board did not violate Dean's First Amendment rights, and "that Dean's unauthorized practice of law, frivolous legal arguments and retaliatory conduct are all highly relevant and permissible inquiries when determining whether Stephen Dean has the requisite character to practice law in Mississippi." (*Id.* at p. 123).

The findings by the Committee and Board, affirmed by the chancery court, are supported by substantial evidence in the record before the Board. For example, Dean's pattern of litigation demonstrated that he files meritless suits in retaliation against persons who prevailed against Dean in previous lawsuits. (C.P. Vol. 3, Ex. A, pp. 4-5; Ex. A). Dean sued the presiding circuit judge and the prosecuting attorney at the conclusion of a criminal trial. (C.P. Vol. 3, Ex. D, pp. 96-97, Ex. E.15). The judge and prosecutor were dismissed on the basis of immunity. (*Id.*). After the Missouri Conservation Commission secured a preliminary injunction prohibiting Dean from constructing a road, Dean filed a separate suit against two Commission employees alleging illegal trespass and an unreasonable search. (C.P. Vol. 3, Ex. D, pp. 100-102, Ex. E.17). Dean's suit was dismissed on summary judgment. (*Id.*). After the Missouri Attorney General's Office obtained a "consent injunction" against Dean and a charity he directed regarding allegations of deceptive practices, Dean sued the two Assistant Attorney Generals involved in the case in state and federal court. (C.P. Vol. 3, Ex. D, p. 132, Exs. E.23-E.24). The federal court dismissed its case and Dean withdrew the state court complaint after the defendants moved to dismiss. (*Id.*).

While Dean asserts that no court has sanctioned him for baseless legal arguments, the Eighth Circuit Court of Appeals found his arguments to be "frivolous" and the Sixth Circuit found his arguments to be "improbable" with "no meaningful authority." *See Dean v. Byerley*, 2005 WL 1993425, at *3 (6th Cir. Aug. 17, 2005), C.P. Vol. 3, Ex. I; *Dean v. Duckworth*, No. 03-2424, slip op. at 2 (8th Cir. April 26, 2004) (C.P. Vol. 3, Ex. J). The Committee reviewed pleadings from the many lawsuits initiated by Dean and concluded that "most of the litigation, if not all of it, has been frivolous in nature." (C.P. Vol. 3, Ex. A, p. 5).

Dean challenges the Committee's consideration of the Missouri Attorney General's suit against him. The Attorney General brought a civil action against Dean and his charity alleging false advertising and other unlawful acts. (C.P. Vol. 3, Ex. E.25). Dean entered into a "consent injunction" with the Attorney General in which he agreed not to engage in fraud, to notify the Attorney General if he ever solicited charitable funds again in Missouri, to pay $1.00 in restitution, and to pay the costs of the civil action. (*Id.*). Dean cites *Schware v. Board of Bar Examiners*, in which the Supreme Court stated that an applicant could not be deemed to have poor character based solely on an arrest when the applicant was released without being charged and never indicted. 353 U.S. 232, 241, 77 S.Ct. 752 (1957). Unlike *Schware*, Dean was the subject of a civil action that was litigated to a conclusion unfavorable to Dean. The "consent injunction" placed restrictions on his actions within Missouri and required him to pay nominal restitution and court costs. (C.P. Vol. 3, Ex. E.25). There is no constitutional prohibition against the Committee considering a consent injunction agreed to by Dean.

The Committee also considered Dean's litigation history to establish that Dean committed the unauthorized practice of law in Missouri. Dean represented a corporation in litigation in

Missouri before Dean was even admitted to law school. Sara Writman, counsel to the Missouri legal ethics agency, testified at the Committee hearing that Dean's representation of the corporation constituted the unauthorized practice of law because (as is the case in Mississippi) "if a person is not licensed as an attorney in Missouri or admitted pro hoc vice that person cannot represent a corporation in Missouri." (C.P. Vol. 3, Ex. D, pp. 67-71).

The Committee and Board's review of Dean's unauthorized practice of law, frivolous legal arguments, retaliatory conduct in litigation, and restrictions placed on Dean's activities in Missouri are all plainly relevant and permissible inquiries when determining whether Dean has the requisite character to practice law. *See generally Darby v. Miss. State Bd. of Bar Admissions*, 185 So.2d 684 (Miss. 1966) (prohibition against practice of law without a license is to protect the public); *In re Application of Monaco*, 856 P.2d 311 (Or. 1993) (unauthorized practice of law contributed toward finding that applicant lacked requisite moral character for admission to practice); *In re Admission to the Bar*, 828 N.E.2d at 494 (conduct in previous litigation is properly considered; *In re Application of Converse*, 602 N.W.2d at 509 (confrontational and irrational letters to law school faculty and others can be considered); *In re Appeal of Lane*, 544 N.W.2d at 376 (applicant's threatening and irrational actions are relevant). This Court should affirm the chancery court's opinion holding that the Committee and Board's review did not violate Dean's First Amendment rights.

IV. THE COMMITTEE'S FORMAL HEARING SATISFIED ALL DUE PROCESS REQUIREMENTS AS DEAN WAS NOTIFIED IN ADVANCE OF THE ISSUES, TESTIFIED BEFORE THE COMMITTEE, AND HAD THE OPPORTUNITY TO PRESENT EVIDENCE.

The Committee conducted a formal, on-the-record hearing during which Dean was present and had the opportunity to introduce evidence regarding his good character. At the hearing, the Committee heard testimony from two witnesses via telephone and heard Dean testify regarding more than 50 exhibits. (C.P. Vol. 3, Exs. D, E). Dean asserts that he was denied due process when the Committee considered letters from Illinois Mutual (Dean's former employer), the testimony of David Storlie (vice president and general counsel of Illinois Mutual), and the documentation related to the Missouri Attorney General's suit against Dean.

Dean relies on *Wilner v. Committee on Character & Fitness*, 373 U.S. 96, 99-100, 83 S.Ct. 1175, 1179 (1963), in which the Supreme Court held that New York's admission procedures failed to afford due process when no hearing was provided and the applicant was denied an opportunity to even look at the report of the character committee. Obviously, this was not the case with Dean. Dean was notified in writing in advance of the hearing that correspondence regarding his employment with Illinois Mutual and live testimony from the general counsel of Illinois Mutual would be part of the hearing. (C.P. Vol. 3, Ex. F). Dean was also advised by that same correspondence that documents and relevant pleadings related to his involvement in the Missouri Attorney General's case against him would be considered. (*Id.*). Dean had the opportunity to address this evidence at the hearing and could have, but did not, call any witnesses on his behalf.

While the Mississippi Supreme Court has not cited *Wilner*, courts of other states have interpreted *Wilner* to require that "the applicant must be adequately informed of the nature of the

adverse character information and must be given an opportunity to answer and refute accusations." *In re Peterson*, 439 N.W.2d 165, 170 (Iowa 1989). The Committee's consideration of correspondence does not violate due process when the applicant was aware of the statements; "had an opportunity to examine all letters, documents, and reports;" and had the "right to present additional evidence, including the sworn testimony of witnesses, at the hearing." *Id.* The use of documentary evidence does not deny an applicant due process. *In re Tobin*, 628 N.E.2d 1273, 1279 (Mass. 1993).

Dean had notice that the general counsel for Illinois Mutual would testify and notice of the correspondence from Illinois Mutual and documents and pleadings from the Missouri Attorney General's litigation that would be discussed at the Committee hearing. (C.P. Vol. 3, Ex. F). This notice, coupled with Dean's right to address these issues during the hearing and his right to present his own evidence, satisfied applicable due process requirements. *See In re Peterson*, 439 N.W.2d at 170. This Court, therefore, should affirm the chancery court's opinion holding that the Committee and Board did not violate Dean's due process rights. (C.P. Vol. 1, pp. 120-22).

V. THE BOARD DID NOT VIOLATE BAR RULE VIII, § 6 BY CONSIDERING DEAN'S UNAUTHORIZED PRACTICE OF LAW IN 1987 OR THE 1992 CORRESPONDENCE TO ILLINOIS MUTUAL.

Bar Rule VIII, § 6 states that the "following conduct, while not proper, will not in and of itself be considered as indicating a lack of moral or ethical qualification: . . . Misconduct remote in time unless felonious in nature or recently repeated in similar acts." In reviewing the Board's application of its rules, courts "generally accord great deference to the agency's interpretation of its owns rules." *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid*, 853 So.2d 1192, 1202 (Miss. 2003). Pursuant to the Rule, the Committee may consider the prior misconduct which is "remote in time"

but may not use it as the sole basis (i.e., "in and of itself") to recommend against admission. Accordingly, the Committee noted Dean's unauthorized practice of law as one of the six reasons to deny Dean's application. (C.P. Vol. 3, Ex. A, pp. 1-2, 7).

Moreover, misconduct recently repeated may be considered. *See Layon v. North Dakota State Bar Bd.*, 458 N.W.2d 501, 510 (N.D. 1990) (value in consideration of remote conduct is diminished in the absence of similar, more recent misconduct). "In reviewing a denial of certification to practice law, this court may consider any acts or conduct occurring at any time, provided they have a legal tendency to prove the applicant's present conduct." *Id.* Consideration of the belligerent and threatening language used by Dean in his letters to Illinois Mutual was therefore appropriate in light of his use of similar language on other occasions as well. (C.P. Vol. 3, Ex. A, p. 5). For example, the Committee reviewed correspondence from Dean to Nussbaumer in 1999 in which Dean threatened, "you are getting precariously close to finding out how the real world actually works, a world where you are on an even playing field with the rest of us. . . . I should mention that my wife has suffered greatly and is angrier at Professor Glickman and you than I am. . . . Well, gentlemen, when your wife is heir to a part of a Colgate fortune, her backing can mean a very great deal." (C.P. Vol. 3, Ex. D, pp. 123-124, Ex. E.43).

Further threatening, irrational, and unreasonable behavior was demonstrated by Dean in the days before the hearing. When Dean was informed that Illinois Mutual counsel Mr. Storlie would testify at the hearing, Dean telephoned Mr. Storlie's home identifying himself as a reporter and stated that he was considering "an editorial on Illinois Mutual." (C.P. Vol. 3, Ex. D, pp. 53-58). Dean contends that his telephone call was an act protected by the First Amendment and could not be considered by the Committee and Board. Brief of Appellant, p. 24-25. To the contrary, the

Committee and Board reasonably interpreted this less than forthright action and explanation by Dean as an attempt to intimidate Mr. Storlie and Illinois Mutual. (C.P. Vol. 3, Ex. A, p. 6). Dean's appellate brief supports this conclusion as Dean's stated intention was to "publicize" Mr. Storlie's actions before he testified. Brief of Appellant, p. 25.

Contrary to Dean's assertion, Rule VIII, § 6 does not require the Committee and Board to wholly ignore misconduct that may be more remote in time. The incidents considered by the Committee and Board demonstrated a continuing pattern of conduct reflecting upon his current character and fitness to practices law. As a result, this Court should not overturn the Board's decision based on this assignment of error.

VI. THE BOARD'S CONCLUSION THAT DEAN IS "EMOTIONALLY UNSTABLE" AND UNABLE TO "EXERCISE SELF-CONTROL" WAS NOT ARBITRARY OR CAPRICIOUS, AND DID NOT VIOLATE DEAN'S RIGHT TO DUE PROCESS.

Dean contends that the Committee and Board violated his right to due process when they performed "an illegal mental examination" of him and "illegally made a medical determination without being licensed by the state to do so" by concluding that he engaged in conduct exhibiting a lack of self-control and emotional instability. Brief of Appellant, p. 28. Dean misunderstands the role of the Committee and Board. The Committee and Board's investigation and decision were not based on a determination or perception that Dean has a medically diagnosed mental impairment. Rather, the Board made a determination, based upon an individualized examination of specific instances of Dean's conduct, that he demonstrates an inclination to lack mental or emotional stability such that he is unfit to practice law. *See* Bar Rule VIII, § 6(I).

As noted by the chancery court in its review, the Board and its Committee on Character and Fitness need not reach a conclusion as to an applicant's mental fitness based on a medical diagnosis, but instead based on "a rational observation made by practicing attorneys" whether the applicant has the requisite emotional capacity to practice law. (C.P. Vol. 1, p. 124). The Board has clear legal authority to inquire into and assess an applicant's current mental and emotional fitness to practice law. *See Doe v. Judicial Nominating Comm'n*, 906 F.Supp. 1534, 1541 (S.D. Fla. 1995) (citing *Applicants v. Tex. State Bd. of Law Examiners*, 1994 WL 776693 (W.D. Tex. Oct. 11, 1994)); *Clark v. Va. Bd. of Bar Examiners*, 880 F.Supp. 430, 436 and 443 (E.D. Va. 1995). In fact, the Board has an affirmative duty to evaluate and screen out those applicants lacking the mental and emotional stability requisite to the practice of law in order to protect the general public. *Id.* Dean cites no relevant authority for his argument that the Board is unqualified to make this determination.

As to the sufficiency of evidence before the Board to support its conclusion, the Board's decision may be reversed only if the applicant proves by a preponderance of the evidence that the denial of his application was arbitrary, capricious, or malicious. Bar Rule VIII, § 10; *see also Applicant F.*, 582 So.2d at 379. Dean fails to meet this heavy burden on appeal. Supporting its determination that Dean failed to exercise self-control and lacked emotional stability sufficient to practice law, the Committee and Board relied on several objectively observable actions by Dean: his conduct in his various lawsuits, his public statements attacking public officials and alleging conspiracies, the statements made about Dean by a law school faculty member with intimate knowledge of Dean's actions, and Dean's paying members of the public to attend his Committee hearing. (C.P. Vol. 3, Ex. A, pp. 8-9). After reviewing the evidence, the chancery court concluded that the Committee and the Board appropriately reviewed Dean's emotional temperament, and that

there was substantial evidence in the record to indicate that Dean does not possess the requisite character to practice law in the state. (*Id.*).

The emotional temperament of applicants is a subject appropriate for review by boards of bar admission. "Abusive, disruptive, hostile intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar." *In re Appeal of Lane*, 544 N.W.2d 367, 375 (Neb. 1996). In this respect, rude and confrontational letters to law school faculty and others can be considered evidence of "turbulence, intemperance, and irresponsibility." *In re Application of Converse*, 602 N.W.2d 500, 509 (Neb. 1999).

The Committee reviewed letters to Dean's former employer Illinois Mutual in which Dean threatened, "[y]ou are about to be torn from what seemingly to you is your natural autonomous position in life and slammed into the twentieth century with a force and clarity that you will never again forget. It will be an expensive awakening." (C.P. Vol. 3, Ex. E.27). David Storlie, vice president and general counsel for Illinois Mutual, testified that he viewed Dean's actions in this regard to be irrational.[1] (C.P. Vol. 3, Ex. D, pp. 147-48). Further troubling about this incident is that just one month after sending threatening letters to Illinois Mutual and receiving a reply from Mr. Storlie, Dean responded in a letter to Mr. Storlie that he was unaware of any correspondence sent by him to Illinois Mutual. (C.P. Vol. 3, Exs. E.27-E.30).

As discussed in Issue V, *supra*, Dean's threatening and irrational behavior was not limited to this 1992 correspondence. The Committee and Board also reviewed the correspondence from Dean to Nussbaumer in 1999, and considered the threatening, irrational, and unreasonable behavior

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[1] Dean argues that Mr. Storlie should not have been allowed to testify because he had no firsthand knowledge of Dean's actions. In fact, it was Mr. Storlie who as general counsel to Illinois Mutual responded to Dean's letters threatening litigation. (C.P. Vol. 3, Exs. E.27-E.29).

demonstrated by Dean in contacting Mr. Storlie's home after being informed that Mr. Storlie would testify at Dean's Committee hearing. *See supra.*

The Committee and Board also took note of Dean's unsupported–and frankly senseless–conspiratorial accusations leveled at the Committee, the Board, and this Court. In a letter to this Court regarding his application, Dean threatened that "substantial segments of the Christian public in the future will likely apply the same methods of measuring the credibility of what you justices say you are, when you campaign before us, with what you have demonstrated through your actions that you actually are." (C.P. Vol. 3, Ex. E.50, p. 2). Dean attacked this Court again by alleging on his website that the justices are "so busy with their official duties that they have not had time to familiarize themselves with the word of God." (C.P. Vol. 3, Ex. D, p. 207). Dean also contends that the Committee and Board have discriminated against him because he is Christian and alleged that a Muslim or Buddhist would have been treated better. (Brief of Appellant, pp. 5-6, 13, 36; C.P. Vol. 1, pp. 15, 17, 22, 37; C.P. Vol. 3, Ex. D, p. 210).

Dean argues that the Board should not be allowed to consider public statements attacking Mississippi officials, including members of the Board and of this Court, in reaching its decision regarding his character and fitness to practice law. However, Dean's actions in this regard raise two troubling emotional issues highly relevant to his fitness to practice law. First, his irrelevant and unsupported attacks on the judiciary do "not comport with the professionalism that is required of an attorney" and are grounds for denying admission. *See In the Matter of Admission to the Bar*, 828 N.E.2d at 498. "Repeated, unsupported, ad hominem attacks on the ethics, integrity, and motivations of others involved in the process do, however, reflect adversely on the applicant's fitness to practice law." *Id.* Further, conspiracy theories raise additional concerns. "The practice of law requires the

ability to discriminate between fact and faith, evidence and imagination, reality and hallucination." *In re Appeal of Lane*, 544 N.W.2d 367, 375 (Neb. 1996). Applicants must have a "sense of reality" in dealing with the legal system. *In the Matter of Admission to the Bar*, 828 N.E.2d at 494. *See also In re Martin-Trigona*, 302 N.E.2d 68, 71-72 (Ill. 1973) (charges made by applicant against character and fitness committee that were "untrue, scurrilous and defamatory" demonstrated lack of responsibility rendering him unfit to practice law).

In sum, there is ample substantive evidence to support the Committee and Board's conclusion that Dean fails to exercise self-control and that he is emotionally unstable to the extent that he is not suited for the practice of law. (C.P. Vol. 3, Ex. A, pp. 7-9). Dean has failed to demonstrate on appeal "by a preponderance of the evidence in the record before the Board that the denial of his application was arbitrary, capricious, or malicious." Bar Rule VIII, § 10; *see also Applicant F.*, 582 So.2d at 379. As a result, this Court should affirm the Board's denial of Dean's application to practice law in this State.

CONCLUSION

Based on the foregoing arguments and authorities, the Mississippi Board of Bar Admissions respectfully requests that this Court affirm the chancery court's decision upholding its denial of Dean's application for admission to the Mississippi Bar.

Respectfully submitted,

FOR THE APPELLEE
MISSISSIPPI BOARD OF BAR ADMISSIONS

BY: JIM HOOD, ATTORNEY GENERAL
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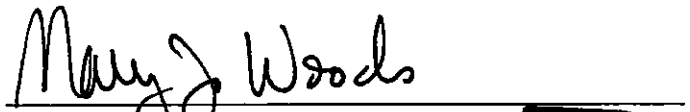
BY: 

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CERTIFICATE OF SERVICE

I, Mary Jo Woods, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing *Brief of the Appellee* to the following:

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THIS the 6th day of August, 2007

Mary Jo Woods