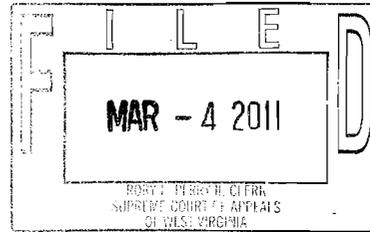


11-0660

IN THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA



IN RE: WOODIE KEVIN DEAN,
 Petitioner for membership in the
 West Virginia Bar.

PETITIONER'S BRIEF AND
EXCEPTIONS TO THE RECOMMENDATION
OF THE WEST VIRGINIA BOARD OF
LAW EXAMINERS

Submitted By:

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Table of Contents

Statement of Case.....	1
Summary of Exceptions.....	3
Statement Regarding Oral Argument and Decisions.....	5
Argument.....	5
The Claimed Lack of Candor.....	7
The Battery and Brandishing Charges.....	9
Character References.....	9
Conclusion.....	10
Certificate of Service.....	11

Table of Authorities

The Matter of John Curtis Dortch, 486, S. E. 2d, 311, 199 W.Va. 571 (1997) syl. pt. 4.

Exceptions

The Board Erred In Finding That Mr. Dean Lacked Candor During His November 2009 Interview.....	3
Mr. Dean Adequately Addressed This Court’s Stated Concern About The Dismissed Charges.....	4
The Board Erred In Failing To Address The Dismissed Charges In Its Decision.....	4
The Board Erred In Failing To Identify A Specific Time for Refiling His Application For Bar Admission.....	4
The Board Did Not Timely Advise The Applicant Of Its Decision As Required By Rule 6.0(e).....	4

Statement of The Case

Woodie Kevin Dean is a 39 year old resident of Varney, Mingo County, West Virginia. He successfully passed this State's bar examination given in February, 2009. Mr. Dean was scheduled for a personal interview with the Board of Law Examiners on November 11, 2009 at which time he discussed with the Board a prior drug conviction. Specifically, on December 14, 2004 Mr. Dean, representing himself, entered a plea of guilty in the Magistrate County of Cabell County, West Virginia to a charge of cocaine possession. Mr. Dean was fined \$100 and ordered to pay court costs which he satisfied by personal check in the amount of \$243.50 on March 9, 2005. Due to his conviction for cocaine possession Mr. Dean's character was subject to being considered under the factors contained in The Matter of John Curtis Dortch, 486, S. E. 2d, 311, 199. W.Va. 571 (1997) syl. pt. 4.

The Board directed Mr. Dean to undergo an evaluation by psychiatrist Dr. Bobby L. Miller. In his report of December 8, 2009 Dr. Miller concluded:

- a. "Mr. Dean presently possessed the intellectual and psychological capacities to practice law in the State of West Virginia."
- b. "Mr. Dean met DSM-IV criteria for Stimulant Abuse (cocaine) in sustained remission."
- c. "It is likely that Mr. Dean's description of favorable effects from cocaine is related to his untreated Adult Attention Deficit Disorder (ADD)."
- d. "Treatment (optional) of his ADD would be predicted to reduce his risk of stimulant abuse relapse."

The Board then recommended Mr. Dean's conditional admission to practice by a vote of 6-1. The recommended conditions were:

- During a two-year conditional period, a Board approved attorney will supervise your employment and send quarterly reports to the Bar Admissions Office regarding your status and job performance;

- Continuous treatment of your adult ADD with a licensed psychiatrist or psychologist with quarterly reports for the two-year period;
- Random drug screens set up through the psychiatrist or psychologist; and
- Continuous participation in AA or NA meetings on a least a weekly basis for the two-year period with self-certification to supervising attorney of participation.”

This Court deferred ruling on the Board’s recommendation and by correspondence dated February 11, 2010 the Court requested that the Board obtain “more information about [Mr. Dean’s] 2005 battery charge and the 2008 brandishing charge” and directing that “once you have more information on these charges, please forward the entire matter to the Court...”

The Board again interviewed Mr. Dean on May 4, 2010. On May 18 the Board forwarded the following in a letter to Mr. Dean:

“The Board.....voted to deny your applicationwithout prejudice and with leave to reapply after one year. During the one-year period...you should be in compliance with Dr. Bobby Miller’s recommendation....and, in addition, you should submit to random drug screening in accordance with the directions of your treating physician.”

Mr. Dean thereafter requested a hearing pursuant to Rule 6 of the Rules for Admission. Evidence was received at hearings held on June 15 and August 18, 2010. In a recommended decision which is dated November 30, 2010 hearing examiner Michael J. DelGuidice found that Mr. Dean had proven his good moral character and should therefore be granted a conditional license to practice law. The Board however rejected the recommended decision, stating in a letter dated February 2, 2011 **which was received on February 4th** that:

“Having considered the entirety of the record in this matter, the Board has again voted to deny your application to practice law, with leave to refile the application after one year. The Board bases its decision on your lack of candor during your November 2009 interview regarding your use of cocaine after your April 2004 arrest for cocaine possession.”

Summary of Exceptions

THE BOARD ERRED IN FINDING THAT MR. DEAN LACKED CANDOR DURING HIS NOVEMBER 2009 INTERVIEW.

Candor or the lack thereof is largely fact-driven. However in this context any analysis of the question necessarily draws from the law of false swearing and perjury. Mr. Dean last addressed the accusation that he had not been forthright with the Board during his testimony at the August 18, 2010 hearing before the Hearing Examiner, T37-42 (direct examination) and T70-72 (cross examination). Mr. Dean also responded to counsel for the Bar on this subject at the June 15, 2010 hearing, T25-30, 33-35.

The dispute about candor centers around alleged disparities about Mr. Dean's use of cocaine. The disparities are alleged to have surfaced from statements referred to in the report of Dr. Bobby Miller sent to the Board in which Dr. Miller recommended Mr. Dean for admission. The Board then agreed with Dr. Miller and recommended a conditional admission. Later, the Board claimed that the account of drug usage contained in Dr. Miller's interview differs from Mr. Dean's account to the Board. The Board has interpreted the statement to be that after Mr. Dean's arrest he never again used cocaine.

Webster's defines "candor" as "honesty or frankness in expressing oneself." Both perjury and false swearing require the intent to deceive together with a false statement. A statement which results from confusion, mistake, faulty memory or uncertainty in expressing oneself and which is not made to deceive the listener is not considered to be perjury or false swearing. Nor should it be considered a lack of candor. An examination of the statements of Mr. Dean in November, 2009 do not reflect the absence of frankness or his dishonesty.

**MR. DEAN ADEQUATELY ADDRESSED THIS
COURT'S STATED CONCERN ABOUT
THE DISMISSED CHARGES.**

In light of the Court's letter which returned the matter to the Board Mr. Dean made a concerted effort to address the concerns therein identified. His testimony on the subject appears in the transcript T 8-18-10 pp. 51-55 (brandishing) and T 8-18-10 pp. 55-59 (battery). The charges were dismissed and more recently they have been ordered expunged from the public record.

**THE BOARD ERRED IN FAILING TO
ADDRESS THE DISMISSED CHARGES
IN ITS DECISION.**

This Court in its letter of February 11, 2010 was specific as to its interest in knowing more about the dismissed charges which accused Mr. Dean of brandishing and with battery. However, when the Board issued its recommendation on February 2, 2011 there was no mention whatsoever of those two matters.

**THE BOARD ERRED IN FAILING TO
IDENTIFY A SPECIFIC TIME FOR REFILEING
HIS APPLICATION FOR BAR ADMISSION.**

The Board's letter of February 2, 2011 informs Mr. Dean that he may "refile the application after one year." One year from when? This may be an unintended consequence, otherwise the Board is punishing Mr. Dean for appealing.

**THE BOARD DID NOT TIMELY ADVISE
THE APPLICANT OF ITS DECISION AS
REQUIRED BY RULE 6.0(e).**

Rule 6.0(e) of the Rules for admission to the Practice of Law requires the Board to advise the applicant of his/her eligibility within 45 days from receipt of the hearing examiner's written report. The report is dated November 30, 2010. Its actual receipt by the Board is unrecorded.

The Board sent its determination to Mr. Dean on February 2, 2011, apparently some 60+ days after receipt of the report. He received the determination on the 4th of February.

Statement Regarding Oral Argument and Decision

Oral argument is necessary. The considerations set forth in Rule 19 apply in that the Board's decision is against the weight of the evidence. A memorandum decision is appropriate.

Argument

The decision In the Matter of John Curtis Dortch holds the following:

“When assessing the moral character of an applicant whose background includes a criminal conviction, the following factors should be considered: (1) The nature and character of the offenses committed; (2) The number and duration of offenses; (3) The age and maturity of the applicant when the offenses were committed; (4) The social and historical context in which the offenses were committed; (5) The sufficiency of the punishment undergone and restitution made in connection with the offenses; (6) The grant or denial of a pardon for offenses committed; (7) The number of years that have elapsed since the last offense was committed, and the presence or absence of misconduct during that period; (8) The applicant's current attitude about the prior offenses (e.g., acceptance of responsibility for and renunciation of past wrongdoing, and remorse); (9) The applicant's candor, sincerity and full disclosure in the filings and proceedings on character and fitness; (10) The applicant's constructive activities and accomplishments subsequent to the criminal convictions; and (11) The opinions of character witnesses about the applicant's moral fitness. These factors are intended to be illustrative rather than exhaustive.”

Mr. Dean addressed these factors on August 18. The offense of which he was convicted was a misdemeanor drug offense in April of 2004 when he was age 33 ½, T-32. He entered his plea in December of that year paying a fine and costs totaling \$243.50, T 33-34. There were other accusations of criminal conduct which did not result in conviction. The cocaine use began

in a social environment, however the charge of possession for which he entered his plea rose as the result of a controlled buy in Huntington, T 35-36. He pled guilty because of his conscience as he was guilty, T 36-37. As is discussed herein, he did use after he was arrested, but quit shortly thereafter. His drug testing has consistently been negative. The candor issue is discussed more thoroughly herein as are the seven character witnesses including a former Justice of this Court who has known Mr. Dean and his family for many years as well the Prosecuting Attorney in his home county.

The Hearing Examiner at his hearings obviously believed in Mr. Dean's sincerity as do those community leaders who provided letters on his behalf. He has worked in a law office, in his family's business and as a community college instructor, T 22-23. Mr. Dean rejects substances which might be harmful to him as he is an avid body builder, T 24-25.

Woodie Kevin Dean sought admission to the Bar after passing the February, 2009 bar exam. The Board of Law Examiners then recommended a conditional admission which included a two year period of supervision. He has now effectively participated in two years of supervision, albeit not under the supervision of a Board approved attorney. Mr. Dean has persevered in his pursuit of practicing law despite the setbacks.

Mr. Dean has now answered questions about his past in two appearances before the Board, two appearances before the hearing examiner and one time in response to questions by the Board's hand-picked psychiatrist. Not only is it not terribly surprising that there exist some perceived differences in Mr. Dean's accounts of events which occurred some 6 to 7 years previously, but it also can be reasonably expected given the circumstances in which the questions were asked. No reason exists to conclude that Mr. Dean purposely tried to mislead the Board as he obviously spoke candidly to the psychiatrist to whom the Board sent him.

The history of the treatment by the Board of Mr. Dean's efforts to be admitted to the Bar is frankly unique when considered in its totality. He deserves a better fate than what the Board has recommended. In 2009 he was recommended for conditional admission. The very reason that the Board now raises as the basis for denial i.e. allegedly different accounts about when he last used drugs, was before the Board's when they voted 6-1 in Mr. Dean's favor. The Board clearly then possessed Dr. Miller's report.

This Court sought further development not about the cocaine conviction, but about two incidents which led to accusations of crimes for which there was no conviction. The Board did not deem these incidents sufficient to merit any mention when the Board returned this matter to this Court. The Board also failed to observe the time requirements of the governing rules. The frank truth is that the Board's handling of Mr. Dean's case has been shabby and arguably it reflects a desire to achieve a certain result even when the result is not supported by the evidence.

The Claimed Lack of Candor

What follows is lifted from the transcript of the November 11, 2009 appearance of Mr. Dean before the Board, p. 10:

Mr. Dean: "You would say a nefarious looking place, if you will. Now, but back to the thing is some months later, I was watching the news, and the first thing I see is that lady's picture, the individual who I purchased it from.

She had been found dead on the streets of Huntington at five o'clock that morning, and, you know, a drug deal gone bad or she informed on somebody, but they came down here from, I think it was Detroit and killed her. Then the story came out, and so I knew she was an informant after the fact.

Speaker 2: Right, I see, Well, I am assuming after that, you haven't?

Mr. Dean: No, that's it. That was it. I guess it was kind of a hard lesson learned.

Speaker 2: Well, I mean, you weren't a young person. I mean, you obviously--

Mr. Dean: Absolutely."

The foregoing passage is what the Board has asserted demonstrates Mr. Dean's lack of candor. The Board continues to claim that when he told Dr. Miller that he had used cocaine after the time of his arrest that account differed from the foregoing testimony. The Board argues that the above passage shows that Mr. Dean was then affirming to the Board that he did not use cocaine at any time after the time of his arrest. The reference however about the "lesson learned" appears in the transcript to be to the news of the girl's death. To get to the Board's asserted conclusion one must comb the transcript back some seven pages and then interpret various answers to questions posed by different speakers.

The record does not reflect an absence of candor. On the contrary, Dr. Miller was selected by the Board. Mr. Dean obviously knew that, and was well aware that what he told to Dr. Miller was going to the Board in a report. This circumstance absolutely does not suggest an intent to mislead. Instead the record reflects responses made to imprecise, disjointed questions from different sources.

Mr. Dean has however accepted the interpretation that the Board could in fact believe that he meant to tell them that he last used cocaine when he was arrested, or at a time before then, T 8-18-10 pp. 38-40. He explained that the questions which came from six people were kind of "haphazard" in presentation thereby hindering the ability "to finish a train of thought," p. 40. By contrast the environment in Dr. Miller's office was "much less stressful," T 8-18-11 p. 41. It was as Mr. Dean said an "entirely different environment," p. 42. The ability to respond in a relaxed environment to questions posed by one person is the difference in the clarity of the response given.

The Battery and Brandishing Charges

In 2005 Mr. Dean was accused of battery. Mr. Dean was attempting to assist his girlfriend's sister who was being physically abused by a man who was then intoxicated. This occurred in the rural community of Ragland in Mingo County. When Mr. Dean was leaving the scene with his girlfriend and her sister the alleged victim jumped in the path of Mr. Dean's vehicle. Although a criminal complaint was made, neither the complainant nor the policeman who took the report appeared in Magistrate Court. The charge was dismissed and has been expunged, T 8-18-11 pp. 55-58.

The brandishing charge was made in 2008 by Mr. Dean's fiancé's ex-brother in law. The accuser was drunk. The fiancé received a phone call from her daughter who was distraught because her father was drunk and was beating up her grandfather(his father) in the backyard. This occurred in the Mingo County community of Red Jacket. Dean and the fiancé called 9-1-1, then proceeded to go pick up the daughter. Mr. Dean never got out of his car, spoke with a police officer near the scene, and had no gun. Nevertheless, the drunks accused him of brandishing. These accusers never appeared in court or spoke with the policeman to whom they initially complained. The case was dismissed and later expunged from the record, T 8-18-11 pp. 51-55.

The fiancé fully corroborated the foregoing account in her testimony given at the last hearing, T 8-18-11 pp. 76-80.

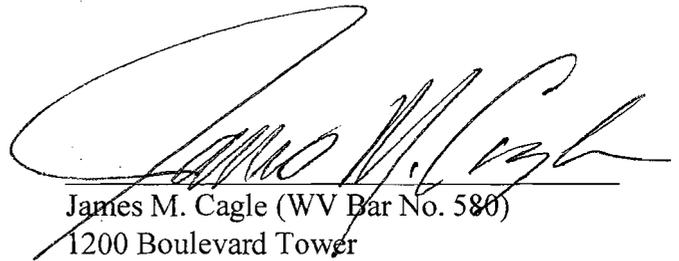
The Character References

Mr. Dean has been supported by many of the leading members of his community. There include former Justice Elliot E. Maynard, Prosecuting Attorney Michael Sparks, Sheriff Lonnie Hannah, County Clerk Jim Hatfield, County Commissioners David L. Baisden and John Mark

Hubbard, Board of Education member William D. Duty and attorney Tonya Mounts Hatfield for whom Mr. Dean has worked. Their letters of support are exhibits presented at the August hearing. Little reason exists to believe that these community leaders would know less about Mr. Dean's fitness and his character than the Board of Law Examiners who saw him for a couple of hours over a period of many months.

Conclusion

It is understood that honestly and candor are essential character traits for those who practice law. Our system depends upon it. The leaders of Mingo County clearly believe that Mr. Dean possesses the requisite character traits. Moreover, the record supports their conclusion. The record also supports a finding that Mr. Dean has met his burden as defined in the Dortch opinion. Consequently, this Honorable Court is respectfully requested to order the admission of Mr. Dean as a member of the West Virginia Bar effective no later than May, 2011 which would be consistent with the period originally recommended by the Board of Law Examiners.



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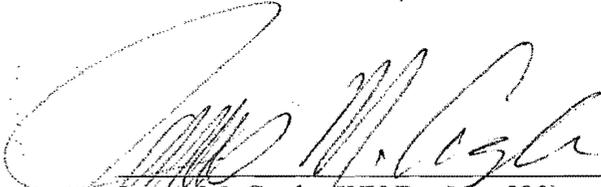
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CERTIFICATE OF SERVICE

TO: John M. Hedges, Esquire
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The undersigned, Counsel for Woodie Kevin Dean, does hereby certify that a true and correct copy of the **Petitioner's Brief and Exceptions to the Recommendation of the West Virginia Board of Law Examiners** was served by regular United States mail, postage prepaid to John M. Hedges, Esquire, 141 Walnut Street, Morgantown, West Virginia 26505, on this the 4th day of March, 2011 and also by fax to (304) 296-0713 on the same date.



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