

**BEFORE THE CHARACTER AND FITNESS BOARD  
WASHINGTON STATE BAR ASSOCIATION**

IN RE:     **ERIC SHANE BRITTAIN,**                     )  
                    **Bar Applicant**                     )  
   )  
   )

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND RECOMMENDATION**

**APPEARANCES:**

Applicant, Eric Shane Brittain per  
Timothy K. Ford of  
MacDonald Hoague and Bayless

Washington State Bar Association, per  
Thomas P. Rowan, Regulatory Services Counsel

**INTRODUCTION**

Eric Shane Brittain is applying for admission to the Washington State Bar. Mr. Brittain's application was referred to the Board for a hearing after Bar Counsel conducted its own investigation. The Character and Fitness Board (the "Board") held a hearing on Mr. Brittain's application on April 25, 2014.

The following Board members were present at the hearing:

Knowrasa Patrick, Chair  
Barbara Peterson, Attorney Member  
Pamela Anderson, Attorney Member  
Karen Galipeua-Forner, Attorney Member  
Norma Jean Hanson, Non-Attorney Member  
Amea Tilger, Attorney Member  
Barry Johnsrud, Attorney Member  
Robert Bertsch, Non-Attorney Member  
Chrishendra Tucker, Attorney Member

**RECOMMENDATION**

The Board recommends, by an 8 to 1 vote, that the Supreme Court grant Mr. Brittain's application for admission.

1 **FINDINGS OF FACT**

2 The applicant, Eric Shane Brittain, is 43 years old. Mr. Brittain earned an M.S. in Counseling  
3 from Central Connecticut State University in June 1999, an M.A.L.S. in American Political Science  
4 from Wesleyan University in June 1997, a B.A. in Theatre and Political Science from Colorado  
5 College in June 1994, and a J.D. from the University of Wisconsin Law School in December 2002.  
6 Mr. Brittain was admitted to practice law in Wisconsin on July 14, 2003.

7 From July 2006 through May 2012, Mr. Brittain worked in private practice, at his home firm,  
8 and handled criminal defense matters. For the period of July 1, 2007 through June 30, 2009, Mr.  
9 Brittain was a flat fee contractor for the Wisconsin State Public Defender's Office.<sup>1</sup> This contract  
10 was granted after many positive letters of support for Mr. Brittain to hold this position.<sup>2</sup> From  
11 January 2003 through June 2006, Mr. Brittain worked for the Wisconsin State Public Defender's  
12 Office. Mr. Brittain appeared in 772 criminal cases, before 53 judges or other court officials for the  
13 period of January 2003 through May 2012.<sup>3</sup>

14 In August 2003, Mr. Brittain spoke up about the ACE program<sup>4</sup>, which he believed was  
15 illegal. During a hearing, he would not enter a stipulation for his client to choose the ACE program.  
16 At the time, his employer agreed the program was illegal.<sup>5</sup> During the hearing, the client wanted to  
17 terminate Mr. Brittain's representation so she could freely enter into the stipulation with the  
18 prosecutor. Instead of allowing the termination of representation, Judge Barry decided to ban Mr.  
19 Brittain from the court in matters in which the ACE program would be a potential resolution.<sup>6</sup>

20 Mr. Brittain testified he was eventually talked into agreeing to the ACE program by his  
21 employers. In 2005, Mr. Brittain again began to speak out against the ACE program. Mr. Brittain  
22 wrote a letter to the local Racine community about the ACE program, and an email to the State  
23 Public Defender's Office about his local office's handling of the ACE program.<sup>7</sup> While other  
24 agencies were condemning the ACE program, and specifically the shackling of juvenile offenders,  
25 Mr. Brittain's office was asking him to curb his advocacy against the program, particularly in his role  
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28 <sup>1</sup> Materials at 305.

29 <sup>2</sup> Id. at 306-309

30 <sup>3</sup> Supplemental Materials at 8.

31 <sup>4</sup> A controversial alternative corrections program.

32 <sup>5</sup> Materials at 269.

<sup>6</sup> Materials at 279 and 289.

<sup>7</sup> Materials at 208 and 210.

1 as a public defender. The office also withdrew permission Mr. Brittain believed he had previously  
2 obtained to draft a writ regarding the shackling of juveniles.<sup>8</sup>

3        Shortly thereafter, in November 2005, Mr. Brittain's employer, Wisconsin State Public  
4 Defender, found Mr. Brittain violated work rules regarding insubordination, neglect or failure to  
5 perform work duties, failure to provide accurate information, failure to arrange proper coverage,  
6 malicious, false, or reckless statements, and discourtesy toward others.<sup>9</sup> Mr. Brittain was  
7 suspended for one week without pay for this behavior. Mr. Brittain filed a union grievance regarding  
8 this disciplinary action. In April 2006, an offer was made to reduce the suspension to two days if Mr.  
9 Brittain dropped the union grievance.<sup>10</sup> On July 26, 2006, Mr. Brittain resigned from the public  
10 defender's office.<sup>11</sup>

11        In November 2008, Mr. Brittain represented Mr. Kostopoulos before Judge Davis. On  
12 November 25, 2008, Mr. Brittain was held in contempt of court. In his bar application, Mr. Brittain  
13 stated the contempt finding was for "suggesting the judge was an obstacle".<sup>12</sup> The Court of Appeals  
14 upheld the contempt finding and found Mr. Brittain's "behavior was a direct imputation on the  
15 integrity of the court".<sup>13</sup> Judge Davis interrupted Mr. Brittain during his opening arguments for  
16 making inappropriate statements.<sup>14</sup> Judge Davis requested Mr. Brittain lower his voice because he  
17 was being impolite, stop sticking his finger in opposing counsel's face, and sit down to get control of  
18 himself.<sup>15</sup> Mr. Brittain felt Judge Davis was being biased due to making *sua sponte* objections and  
19 acting as an advocate. Mr. Brittain apologized for some of the comments he made in his opening,  
20 but believe he should be able to speak in the narrative form.<sup>16</sup> When Judge Davis explained what  
21 was inappropriate about the opening statements, instead of noting he understood the judge, Mr.  
22 Brittain responded "I will advocate for my client in a way that I believe I have to."<sup>17</sup> Mr. Brittain  
23 continued to make inappropriate statements during his opening, including looking at the judge when  
24 stating that he was under a lot of "obstacles" in proceeding with the case.<sup>18</sup> Judge Davis felt Mr.

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26 <sup>8</sup> Materials at 236-260.

27 <sup>9</sup> Materials at 1002-1013.

28 <sup>10</sup> Materials at 1015.

29 <sup>11</sup> Materials at 1016

30 <sup>12</sup> Materials at 821.

31 <sup>13</sup> Materials at 1071.

32 <sup>14</sup> Materials at 435.

<sup>15</sup> Materials at 437.

<sup>16</sup> Materials at 438 and 441.

<sup>17</sup> Materials at 444.

<sup>18</sup> Materials at 448-453.

1 Brittain was implying that Judge Davis was interfering with fair trial rights, and found Mr. Brittain in  
2 contempt of court and levied a \$50 fine.<sup>19</sup> Mr. Brittain obtained numerous affidavits from witnesses  
3 who did not agree with Judge Davis' interpretation of Mr. Brittain's "obstacles" remark.<sup>20</sup>

4 In December 2009, Mr. Brittain was representing a Mr. Carter before Judge DiMotto. Judge  
5 DiMotto became frustrated with Mr. Brittain, and he responded in a manner which showed he too  
6 was frustrated. Mr. Brittain repeatedly interrupted Judge DiMotto.<sup>21</sup> Judge DiMotto noted her  
7 frustration and that Mr. Brittain was engaging in a pattern of behavior she had seen in other  
8 transcripts. Mr. Brittain noted he felt things were getting ridiculous and requested that Judge  
9 DiMotto recuse herself.<sup>22</sup> Judge DiMotto took a recess for the morning and had everyone return in  
10 the afternoon with the belief that time would diffuse the situation. While back on the record in the  
11 afternoon, Mr. Brittain again requested Judge DiMotto recuse herself and suggested that she had a  
12 physical issue or other health problem that affected her ability to act appropriately.<sup>23</sup> Mr. Brittain  
13 obtained affidavits from witnesses to Judge DiMotto's behavior who felt Mr. Brittain's version of the  
14 events was more accurate.<sup>24</sup>

15 In 2010, Mr. Brittain represented a Mr. Echols before Judge Dallet. Despite repeated  
16 corrections from the judge, Mr. Brittain continued to refer to his client by his first name.<sup>25</sup> The judge  
17 noted Mr. Brittain continually disrespected the court in ways the judge had never seen, and found  
18 Mr. Brittain in contempt and fined him \$100.<sup>26</sup> On July 9, 2010, Mr. Brittain was held in contempt of  
19 court. In his bar application he stated the contempt finding was due to him calling his client by his  
20 first name.<sup>27</sup>

21 In 2011, Mr. Brittain represented a Mr. Donald before Judge Martens. On April 11, 2011, Mr.  
22 Brittain was held in contempt of court. In his application to the state bar, he noted the finding was  
23 because he stated the "prosecutor should know better than to violate the Brady rule." <sup>28</sup> Judge  
24 Marten found Mr. Brittain was in contempt because he failed to acknowledge the Court, forcing the  
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26 <sup>19</sup> Materials at 454-457.

27 <sup>20</sup> Materials at 458-463.

28 <sup>21</sup> Materials at 312-314 and 327..

29 <sup>22</sup> Materials at 317-319.

30 <sup>23</sup> Materials at 331.

31 <sup>24</sup> Materials at 479-489.

32 <sup>25</sup> Materials at 659.

<sup>26</sup> Materials at 661-669.

<sup>27</sup> Materials at 822.

<sup>28</sup> Materials at 822.

1 judge to raise his voice to be heard.<sup>29</sup> Judge Martens felt Mr. Brittain was argumentative and  
2 behaved inappropriately when he made a personal attack against the prosecutor.<sup>30</sup> A week later,  
3 Judge Martens again found Mr. Brittain in contempt for inappropriate behavior during voir dire,  
4 being sarcastic, and being condescending. Judge Martens felt his prior admonishment clearly was  
5 not sufficient, so he fined Mr. Brittain \$250.<sup>31</sup>

6 In August 2011, Mr. Brittain was cited for failure to adhere to airport security directions in  
7 accordance with municipal code. In his bar application, Mr. Brittain explained that he declined a  
8 scan and requested a pat down from airport security. He felt the pat down and search violated his  
9 Fourth amendment rights, and implied that his complaints that the procedure was unnecessarily  
10 intrusive led to the citation. The citing authority stated Mr. Brittain failed to comply with TSA  
11 screening, refused to listen to screening procedures, and refused to present his identification.<sup>32</sup> Mr.  
12 Brittain paid a \$220.50 fine for this citation.

13 In February 2001, Mr. Brittain and his wife filed a chapter 7 bankruptcy due to mounting debt  
14 for living expenses while seeking higher education. In 2012, Mr. Brittain and his wife had their  
15 home damaged in a flood. They decided to "walk away" from the condo because the resulting  
16 damage made it impossible to sell the residence. The condo was foreclosed on thereafter.<sup>33</sup>

17 On March 9, 2010, the Office of Lawyer Regulation received a grievance from Judge  
18 DiMotto.<sup>34</sup> On June 5, 2012, the Office of Lawyer Regulation filed a complaint against Mr. Brittain  
19 for four counts of violating Supreme Court Rules in the Kostopoulos and Carter matters, with  
20 Judges Davis and DiMotto.<sup>35</sup> On January 10, 2013, a referee found by clear, satisfactory and  
21 convincing evidence that Mr. Brittain committed the violations alleged by the Office of Lawyer  
22 Regulation.<sup>36</sup> The Wisconsin Supreme Court upheld the referee's findings, and ordered a public  
23 reprimand of Mr. Brittain for professional misconduct, and assessed costs of \$3348.31.<sup>37</sup>

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27 <sup>29</sup> Materials at 700.

28 <sup>30</sup> Materials at 686-700.

29 <sup>31</sup> Materials at 763-791.

30 <sup>32</sup> Materials at 828.

31 <sup>33</sup> Materials at 808.

32 <sup>34</sup> Supp. Materials at 16.

<sup>35</sup> Materials at 938.

<sup>36</sup> Materials at 954.

<sup>37</sup> Materials at 978.

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Good moral character is "a record of conduct manifesting the qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibilities, adherence to the law, and a respect for the rights of other persons and the judicial process." APR 21. Fitness is "the absence of any current mental impairment or current drug or alcohol dependency or abuse which, if extant, would substantially impair the ability" of the Applicant to practice law. APR 22.

a. *Unlawful conduct.*

b. *Academic misconduct.*

c. *False statements/omitting material information in connection with a bar application.*

d. *Misconduct in employment.*

Mr. Brittain's employer found he violated work rules regarding insubordination, neglect or failure to perform work duties, failure to provide accurate information, failure to arrange

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1 proper coverage, malicious, false, or reckless statements, and discourtesy toward others.  
2 Mr. Brittain believes this action was in retaliation for his involvement with advocating against  
3 the ACE program, and the shackling of juveniles. The timing of the discipline and the prior  
4 positive evaluations give credibility to Mr. Brittain's theory. However, Mr. Brittain knew his  
5 actions regarding the ACE program would come with a price and chose to make the  
6 sacrifice. His sacrifice may not have been so great had he taken a different approach and  
7 not directly called out his supervisors and local judges when writing to the greater  
8 community.<sup>39</sup> Overall, the record shows Mr. Brittain is a good lawyer and even if the  
9 allegations that he violated work rules are true, the behavior is due to the circumstances and  
10 likely do not represent Mr. Brittain's work ethic and employment conduct. This is further  
11 shown by the fact that although his prior employer would likely not re-hire him, he was  
12 awarded a public defender contract as a private attorney.<sup>40</sup>

13 e. *Acts involving dishonesty, making false statements, fraud, deceit or*  
14 *misrepresentation.*

15 There is no evidence of misconduct regarding acts of dishonesty, etc and this is not a factor  
16 utilized by the Board.

17 f. *Abuse of legal process.*

18 Between November 2008 and April 2011, Mr. Brittain was found in contempt of court four  
19 times by three judges. Each time the contempt was overall due to disrespect toward the  
20 court and/or judicial process. The Board recognizes Mr. Brittain's argument that he appeared  
21 before at least 53 judges, in over 700 cases. His contempt findings represent less than 10  
22 percent of the judges and less than one percent of the cases. The Board also recognizes  
23 many, if not most, attorneys are never found in contempt in their entire career. We also  
24 recognize Mr. Brittain was not found in contempt for his first five years of practice or after  
25 these few incidents.

26 g. *Neglect of financial responsibilities.*

27 Although Mr. Brittain has previously filed a bankruptcy and has a foreclosure on his record,  
28 the Board does not believe this is evidence of a neglect of financial responsibilities.  
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31 <sup>39</sup> Materials at 208-210.

32 <sup>40</sup> Materials at 1039.

1 i. *Disregard of professional obligations.*

2 The employment misconduct discussed above could also apply to a concern regarding  
3 disregard of professional obligations.

4 j. *Violation of a court order*

5 There is no evidence that Mr. Brittain has violated a court order. Mr. Brittain has paid all fines  
6 related to his contempt findings.

7 k. *Evidence of a current substantial mental impairment.*

8 There is no evidence that Mr. Brittain has a mental impairment and this is not a factor utilized  
9 by the Board.

10 l. *Denial of admission to the bar in another jurisdiction on character and fitness grounds.*

11 Mr. Brittain has not been denied admission to the bar in another jurisdiction.

12 m. *Disciplinary action by any professional disciplinary agency of any jurisdiction.*

13 In June 2012, the Office of Lawyer Regulation filed a complaint against Mr. Brittain for  
14 violating four Wisconsin Supreme Court Rules. The complaint was related to Mr. Brittain's  
15 conduct in the Kostopoulos and Carter matters. The Supreme Court upheld a finding that  
16 agreed with the OLR complaint. Mr. Brittain was publicly reprimanded for professional  
17 misconduct.

18  
19 The Board evaluated Mr. Brittain's application in light of the following mitigation/aggravation  
20 factors set forth in APR 24.2(b), to determine whether he has good moral character:

21 a. *Applicant's age at the time of the conduct.*

22 Mr. Brittain was 38 to 41 years old during the most worrisome misconduct, the contempt  
23 findings. This is an aggravating factor as Mr. Brittain should have been too mature at this  
24 point to engage in this type of misconduct.

25 b. *Recency of conduct.*

26 Mr. Brittain's misconduct was over three years ago. He has had at least one other major  
27 case that had the potential for Mr. Brittain to express his frustrations as he did in the past,  
28 and the record shows he remained professional throughout the trial and obtained a positive  
29 result for his client. This is a mitigating factor.



1 c. *Reliability of the information concerning the conduct.*

2 The information regarding the misconduct is from court records, and Mr. Brittain himself.  
3 There is no concern regarding reliability of the information.

4 d. *Seriousness of the conduct.*

5 Contemptuous behavior and disrespect of the court is a serious matter. The remaining  
6 issues are less serious. Overall, this is an aggravating factor.

7 e. *Factors or circumstances underlying the conduct.*

8 Mr. Brittain's behavior stems from what he describes as insecurity, and is fueled by his  
9 successes, bad advice from mentors, and misguided beliefs about what it means to be a  
10 "zealous advocate". In each of the cases with contempt charges, Mr. Brittain's clients  
11 ultimately had a "successful" outcome. Mr. Brittain and some of his circle of friends believe  
12 these successes justify or mitigate his misconduct. Mr. Brittain also repeatedly used the  
13 excuse of being a zealous advocate each time he was engaging in misconduct, and instead  
14 of accepting correction he requested recusal of the judge and accused the judge of  
15 misconduct.<sup>41</sup>

16 Mr. Brittain is an intelligent man, and a strong advocate for his clients, but instead of seeing  
17 himself as better than the circumstances in which he was raised, he continues to look up to  
18 and/or try to emulate people who may not be the best examples; or at least he is not able to  
19 pull off their tactics with as much success. The Board believes Mr. Brittain has made  
20 progress over the past years in finding a proper way to advocate for his clients. We wish him  
21 continued success in finding his way and hopes he continues to grow and gain self-  
22 confidence, which should allow him to serve his clients in a much more efficient and less  
23 self-destructive manner. Overall, this is a mitigating factor.

24 f. *Cumulative nature of the conduct.*

25 Although there were multiple instances of contempt findings, they were a small percentage  
26 of Mr. Brittain's cases, and more likely related to numerous circumstances. There has not  
27 been any behavior to suggest Mr. Brittain will continue to behave the way he did during the  
28 cases in which he was found in contempt. This is neither a mitigating nor an aggravating  
29 factor.

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32 <sup>41</sup> Materials t 318-319, 331, 438, 444, 454, 660, 663, 688-691, and 792.

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3 g. *Candor in the admissions process and before the Board.*

4 Mr. Brittain was candid during the admissions process and before the Board. Although he  
5 may not agree with the rulings that were against him, he was open about each of the  
6 circumstances. This is a mitigating factor.

7 h. *Materiality of any omissions or misrepresentations.*

8 Considering how much information Mr. Brittain freely sent to the bar association, the failure  
9 to disclose the work discipline at the public defender's office is not substantially material.  
10 This is neither a mitigating nor an aggravating factor.

11 i. *Evidence of rehabilitation.*

12 Mr. Brittain seems to have paid all fines assessed against him, or is at least in good  
13 standing with any payment arrangements. Mr. Brittain has not failed to comply with any  
14 orders resulting from his misconduct. The fines assessed against Mr. Brittain seem low, and  
15 they clearly were not a deterrent to his misconduct. However, the fines seem to be standard  
16 practice in his area, and thus the punishment was sufficient. Mr. Brittain seems to have  
17 better insight into his past and ways to avoid such misconduct in the future. He is maturing  
18 and accepting responsibility for his actions. Mr. Brittain and his witnesses have indicated he  
19 will no longer return to his behavior exhibited in 2008 through 2011. Mr. Brittain has had only  
20 one case to show he has improved his behavior, but the Board believes Mr. Brittain will  
21 maintain professionalism as he did so far in more cases than the ones in which he did not  
22 behave professionally.

23  
24 The record does not suggest that Mr. Brittain does not possess the requisite fitness to  
25 practice law, due to substance abuse or mental health impairment. Therefore, the Board did not  
26 perform an analysis under APR 24.2(c) or APR 24.2(d).

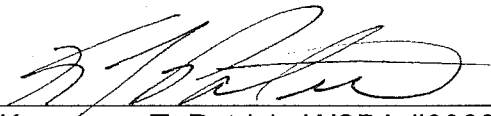
27 Mr. Brittain has provided a valuable service to his clients and the Milwaukee community as a  
28 whole. He is present today because of his self-described insecurity and likely a little arrogance. The  
29 Board does not believe this rises to the level of a finding that he lacks good moral character. Mr.  
30 Brittain has established by clear and convincing evidence that he is of good moral character and  
31 has the requisite fitness to practice law.  
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1 Although most of the Board members would not want to have opposing counsel who  
2 behaved as Mr. Brittain did in the cases discussed above, he has overall good moral character. Mr.  
3 Brittain has a passion for the law, but has often had problems with appropriately handling  
4 frustrations. In 2003, Mr. Brittain's supervisor noted he could be very direct and come across as  
5 "insulting", and that although Mr. Brittain is overall respectful, courteous, and professional, he  
6 needed to be consistent when frustrated.<sup>42</sup> In January 2004, his supervisor was impressed with his  
7 courage and tenacity, but felt Mr. Brittain needed to pick his battles cautiously.<sup>43</sup> In June 2004, Mr.  
8 Brittain's supervisor noted Mr. Brittain's biggest challenge occurs when he is stressed out.<sup>44</sup> Mr.  
9 Brittain's own character witnesses, some of whom did not meet him until 2008 or later, noted that  
10 although he is passionate, Mr. Brittain can respond inappropriately, particularly when he is  
11 stressed.<sup>45</sup>

12 Mr. Brittain seems to have better mentors who are candid with him about his behavior, and  
13 he has stated that he is learning to listen and watch for signals that he should step back and re-  
14 assess the situation. He has also taken professional growth seminars with Dr. O'Donnell. Hopefully  
15 he has matured enough that his misconduct will not rise to the level of contemptuous courtroom  
16 behavior in the future.

17 The Board concludes that Mr. Brittain's past conduct as a whole supports a showing that he  
18 has good moral character and the requisite fitness to practice law. For the foregoing reasons, the  
19 Board recommends by 8 to1 vote that the Supreme Court grant Mr. Brittain's application for  
20 admission to the Washington State Bar Association.

21  
22 DATED this 11th day of August 2014

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27 Knowrasa T. Patrick, WSBA #30338

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30 <sup>42</sup> Materials at 998.

31 <sup>43</sup> Materials at 995.

32 <sup>44</sup> Materials at 179.

<sup>45</sup> Materials at 1058 and Tr. at 31.

