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THE GOOD CHARACTER REQUIREMENT: A PROPOSAL FOR A UNIFORM NATIONAL STANDARD

I. INTRODUCTION

"The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character."1

In the United States today there exists what may be referred to as the unknown requirement for admission to the bar. While it is true that most entering law students know that at some point in the future they will be required to prove their knowledge on the bar exam, many of these students do not realize that they will also have to prove the fitness of their character before being admitted to the practice of law. However, unlike the bar exam, this character test is not one for which an applicant can study, and it is not a subject taught by a distinguished professor in an elegant lecture hall. In some instances, it is the character test, a mysterious concept that is not easily defined, which acts as the overwhelming obstacle that blocks admission to the bar for those applicants with blemished records.

Clearly there is a need for a high level of ethical standards in the professional society of lawyers. In a profession that largely governs itself and is dependant on the public’s perception of trustworthiness, requiring good character in each bar applicant becomes essential. However, the current process of screening for good character, or more appropriately screening for bad character, in bar applicants2 is substantially inadequate to accomplish its primary purpose.3

Why is the current process inadequate? The first problem that exists in the character screening procedure is the timing of the evaluation.4 An equally serious problem is the lack of adequate resources to complete a thorough character investigation.5

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1. Baird v. State Bar of Ariz., 401 U.S. 1, 13 (1971); see also Schware v. Bd. of N. M., 353 U.S. 232, 239 n.5 (1957) ("We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons.").
2. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 858 (1986).
3. See generally Deborah L. Rhode, Moral Character as a Professional Credential, 94 YALE L.J. 491 (1985) (discussing the structure of the character screening process along with the inadequacies of the current methods used by bar examiners).
4. See id. at 515.
5. See id.
Two other serious problems in the character screening process, the ambiguity in the concept of good character and the application of character judging standards, cannot be solved by simply restructuring the process. A brief review of the historical use of the character requirement shows that it is firmly entrenched in the American legal system, yet there seems to be little attention devoted to the problems in this area. Character screening, like science, deals with ascertaining certain variables, placing these variables into a formula and obtaining a result. Unlike an absolute that may be found in science, the concept of character has no universally accepted definition; thus, a major problem arises. Ambiguous notions of good character coupled with vague tests for judging an applicant's character, have resulted in inconsistent results in bar admission cases.

What should be done to correct the problem? To correct the current problems in evaluating character, there is a need to move toward a more appropriate uniform standard in the area of character evaluation. Better defined national standards will not necessarily solve the ambiguous nature of evaluating good character, but it will certainly promote more consistent results.

In an attempt to better understand the problems and to find a workable solution, this comment will first make an attempt at offering a definition of "good character." Next, section III will present a brief exploration of the historical role of the character requirement, looking at the past discriminatory use of the character requirement. In section IV, the present day rationale for maintaining the good character requirement will be considered. Sections V and VI will discuss the process and timing of the good character requirement. The relevant factors in determining good character will be detailed in section VII. Section VIII will present illustrative cases concerning common issues that often arise in bar admission cases. Section IX will outline the current problems involved in the character screening process, and section X will offer a conclusion with a proposed solution to the character requirement problem.

II. A Definition of Good Character

What exactly is the good character requirement? As the name suggests, the good character requirement imposes on each applicant seeking admission to the bar the burden of demonstrating to the appropriate body in charge that he or she possesses the character needed to successfully and ethically practice law.

6. See id. at 517-18.
7. See id. at 493.
8. Every state has a good character requirement. See Konigsberg v. State Bar, 353 U.S. 252, 262-63 (1957) [hereinafter Konigsberg I] ("The term 'good moral character' has long been used as a qualification for membership in the Bar . . . .") (footnotes omitted). See also OKLA. STAT. ANN tit. 5, Ch. 1 app. 5 (West Supp. 2000) ("To be admitted to the practice of law in the state of Oklahoma, the applicant: Section 1. shall have good moral character, due respect for the law, and fitness to practice law."). Oklahoma law also states:

When a person applies to the Supreme Court . . . or by a commission appointed by the Court, under such rules and regulations as the Court may provide, touching his fitness and qualifications; and if, on such examination the Court is satisfied that he is of good moral character, and has competent knowledge of the law, and sufficient general learning, an oath
Although this may seemingly be a simple requirement, it is plagued with problems.

There are generally two situations in which the character of an applicant becomes an issue. First, an applicant may be initially denied admission to the bar under the good character requirement because the applicant failed to disclose information the committee considered relevant to the applicant’s fitness to practice law. Second, an applicant may be denied admission to the bar because the applicant disclosed damaging information that the committee considered relevant to the issue of good character.

III. HISTORICAL BACKGROUND OF THE GOOD CHARACTER REQUIREMENT

In order to better understand the present purpose of the good character requirement, it is necessary to understand the historical development of the good character requirement. However, history by itself will not adequately explain the current application of the good character requirement. Like any area of the law, cases are necessary to fully understand its application. A look at some notable bar admission cases which deal with the character requirement will reveal the uncertainty involved in applying the character test while also demonstrating the need for a better-defined national guideline.

For those wishing to enter the legal profession, strict educational requirements have been established. Although it is true that there has generally been some form of training required for one wishing to practice law in the United States, formalization of educational requirements is a relatively recent development. For example, in the early years of the post revolutionary United States, the period of training for one wishing to become an attorney might have been as long as eleven years. However, during “the wave of Jacksonian democracy,” the United States experienced a decrease in the requirements to practice law, with Indiana going so far as to place in its constitution that “every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice.”

Although the formal educational requirements for those wishing to practice

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of office shall be administered to him, and an order shall be made on the journal that the applicant be admitted to practice as an attorney and counselor at law in all courts of record of this state; provided, that said Court may appoint, to serve for one or more years, a commission composed of not less than five (5) persons learned in the law to assist in such examination.

Id. §14.
10. See MORGAN & ROTUNDA, supra note 9, at 7.
11. See Stevens, supra note 9, reprinted in MORGAN & ROTUNDA, supra note 9, at 7-8 (discussing the evolution of the legal training in the United States).
13. Id.
14. Id.
law have changed over the course of history in the United States, the character requirement for admission to the bar, by contrast, has been "a fixed star in an otherwise unsettled regulatory universe." With the good character requirement tracing its origins to ancient Rome, it seems that it is an important part of the legal profession's history. However, only in the last century has the character requirement frequently been exercised in excluding bar applicants from entering the legal profession.

Although the good character requirement may have initially been created for a noble purpose, in recent times, it has been called a "cultural showpiece" existing as a means to exclude certain groups of people which society has deemed as undesirable to practice law. For example, in the United States women have been the targets for exclusion under the good character requirement more than any other group. Other groups of people who have been excluded from admission to the bar for lack of good character include Jews and Eastern Europeans. Although it can be argued that the character requirement does not serve this discriminatory purpose today, it is still a powerful tool with the potential to be used to exclude unpopular groups who do not measure up to the current standards that society imposes.

IV. PURPOSE OF THE GOOD CHARACTER REQUIREMENT

As history has demonstrated, the good character requirement has not always been used as a means to promote the ethical practice of law. With this in mind, it is important to consider the purpose of the good character requirement in today's society.

There are two main theories which have been advanced as to the purpose the good character requirement serves in today's legal society. The first and perhaps of the most concern to the states is the protection of the public. The second and less-frequently cited rationale for the good character requirement is the protection of the legal system.

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15. See Stevens, supra note 9, reprinted in MORGAN & ROTUNDA, supra note 9, at 7, 9. For example, compulsory attendance at a law school was not required until 1928. See id. Between 1929 and 1943 each state began to follow the compulsory law school trend, partly in an effort to raise standards, but also because of anticompetitive reasons.

16. Rhode, supra note 3, at 496.

17. See id. at 493; see also R. J. Gerber, Moral Character: Inquiries Without Character, 57 THE BAR EXAMINER 2, 15 (1988).

18. See Rhode, supra note 3, at 497 (explaining that prior to the twentieth century a few states excluded individuals that were convicted of certain crimes, but due to the fact that records were not easily obtainable, the standards were difficult to enforce).

19. See id.; Gerber, supra note 17.

20. See id. at 497.

21. See id. at 499-501.

22. See generally Rhode, supra note 3 at 508; WOLFRAM, supra note 2.

23. See Rhode, supra note 3, at 507.

24. See Section of Legal Education and Admission to the Bar, American Bar Association, National Conference of Bar Examiners, Comprehensive Guide To Bar Admission Requirements vii (Margaret Fuller Cornellie & Erica Moeser eds., 1999) [hereinafter Comprehensive Guide To Bar Admission Requirements].
A. Protection of the Public

In the United States, the role of the attorney is essential in maintaining the free society that Americans enjoy. Lawyers play a vital role in protecting the liberties of people, ensuring the free flow of commerce and helping to establish the laws and rules by which this country is governed. Thus, the argument for maintaining the good character requirement is based on the power attorneys have over people. One commentator expresses this idea by stating "the necessity of good moral character originates in the peculiar fiduciary nature of the practice of law." As Justice Frankfurter stated in his concurring opinion in Schware v. Board of New Mexico, "[A]ll the interests of man that are compromised under the constitutional guarantees given to 'life, liberty and property' are in the 

The primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice. The lawyer licensing process is incomplete if only testing for minimal competence is undertaken. The public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers.

Rhode, supra note 3, at 507-10 (detailing the most commonly cited reasons for the character requirement). Regarding this topic, the Wisconsin Supreme Court stated:

An attorney occupies a fiduciary relationship towards his client. It is one of implicit confidence and trust; and, in harmony with the vastly increasing complexity of our industrial and commercial interest, such trust and confidence have maintained an equal pace, so that specialization in the various fields of the profession has become necessary and common, resulting, however, in a broader and enlarged dependence of the client upon the lawyer. There is no field of human activity which requires a fuller realization with respect to fiduciary relationship than that which exist between the lawyer and his client. Therefore, the law requires of a candidate for admission to the bar not only knowledge and intelligence, but also a high moral character for honesty and integrity, and without honesty and integrity the primary purpose of an attorney at law, by which he is charged to aid in the administration of justice, is liable to be frustrated. It can also be truthfully said that there exists nowhere greater temptations to deviate from the straight and narrow path than in the multiplicity of circumstances that arise in the practice of the profession. For these reasons, the wisdom of requiring an applicant for admission to the bar to possess a high moral standard therefore becomes clearly apparent, and the board of bar examiners, as an arm for the court, is required to cause a minute examination to be made of the moral standard of each candidate for admission to practice.

In re Law Examination of 1926, 210 N.W. 710, 711 (Wis. 1926).

25. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 2 cmt. d (Proposed final draft no.2, 1998). That copy of the section stated:

A license to practice law confers great power on lawyers to do good or wrong. Lawyers practice an occupation that is complex and often, particularly to non-lawyers, mysterious. Clients and others are vulnerable to wrongdoing by corrupt lawyers. Hence, as far back as the first bars in Medieval England efforts have been made to screen candidates for the bar with respect to their character. The process has occasionally been controversial because of the difficulty of defining the standards of character thought to be minimal, the difficulty of ensuring fair application of any standards that may be agreed upon, the risk of invasive inquiry or invidious application of standards under the claim of rigorous examination, and the overriding difficulty of predicting future professional conduct from a necessarily abbreviated personal history and the committee's access to such past activities as are sufficiently public to be checked.

Id.

26. See Gerber, supra note 17.
professional keeping of lawyers.” 27 Therefore, as the argument goes, screening an applicant’s character before granting a license to practice law may help eliminate a bad element before any serious problems may arise.

B. Protecting the Image of the Bar

Aside from protecting the public, another less frequently cited rationale for requiring an applicant to prove the worth of his or her character is protecting “the bar’s own interest in maintaining a professional community and public image.” 28 By excluding applicants early, a state bar can maintain control and hopefully avoid the problems that unfit attorneys may cause. However, a strong argument can be made that character screening bar applicants has little practical effect on attorney misconduct. 29

V. HOW THE PROCESS WORKS

Every state requires that a law student be of “good moral character and general fitness to practice law.” 30 Each state individually determines whether an applicant has the requisite character and moral fitness to practice law by conducting character investigations. 31 Although the legislature may also enact laws affecting the practice of law, 32 the power to admit or deny an applicant to the bar rests in the judiciary system of each state. 33

The character investigation itself will usually begin in the form of questions on a questionnaire that each applicant must answer, but in some states may also include an interview with the committee in charge of the character review process. 34 At least seventeen states have a separate agency which evaluates an applicant’s character and moral fitness. 35

Typically, bar examiners will inquire into an applicant’s past with questions concerning “criminal and civil misconduct, mental health problems, physical addictions . . . educational [history], [past] employment [history], and financial

29. See id. at 512 (“[A]s an empirical matter, it is questionable whether the certification process as currently administered inspires public confidence, and whether the system defines a moral character consistent with the profession’s most enlightened instincts and ideals.”).
30. THE BAR EXAMINERS’ HANDBOOK, supra note 12, at 122.
31. See id.
32. See Archer v. Ogden, 600 P.2d 1223, 1226 (Okla. 1979).
33. See OKLA. STAT. ANN. tit. 5, § 12 (West 1999).

The Supreme Court of the State of Oklahoma shall have exclusive power and authority to pass upon qualifications and fitness of all applicants for admission to practice law in the State of Oklahoma, and the qualifications of such applicants shall be those which are now or may be hereafter prescribed by the statutes of Oklahoma and the rules of the Supreme Court.

Id.; see also WOLFRAM, supra note 2, at § 2.2.
34. See Rhode, supra note 3, at 514 (observing that “ten states supplement[] investigations with mandatory interviews”).
35. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, supra note 24, at 6-7.
background." Depending on the jurisdiction this may be a relatively informal process.37

When an applicant seeks admission to the bar, that applicant has placed his or her character in issue.38 Therefore, "the burden of proving good moral character and due respect for the law will be upon the applicant."39 The bar applicant "must initially furnish sufficient evidence of good moral character and due respect for the law in order to establish a prima facie case."40 Once the applicant presents all evidence that tends to establish his or her good character, the character examination committee has the opportunity to rebut the showing made by the applicant with "evidence of bad moral character and lack of respect for the law."41 Once the committee has made a determination as to the fitness of the applicant, it will make a recommendation to the court. The court is not bound by any recommendation made by the character committee, but it has generally been held that absent an abuse of discretion on the part of the character committee, the recommendation made by the committee will stand.42 Some courts have concluded that in cases where the evidence can be interpreted both for and against the applicant, the committee must find in the applicant's favor.43

VI. TIMING OF THE CHARACTER INVESTIGATION

The beginning of the character screening process differs from state to state. The character screening process may begin while the applicant is in law school, directly before taking the bar exam, or after successful completion of the bar exam.44

In some states, the student must begin the application process as early as the first year.45 The student must answer questions concerning past employment, criminal behavior, and drug and alcohol abuse.46 Other states, such as New York,

37. See Rhode, supra note 3, at 513 (explaining that in some rural areas the process may end with residency verification).
38. See THE BAR EXAMINERS' HANDBOOK, supra note 12, at 103.
39. Appeal of Evinger, 629 P.2d 363, 367 (Okla. 1981). See OKLA. STAT. ANN. tit. 5, rule 11, §7 (West 1999) ("The burden of establishing eligibility for admission to the Bar of this state, to registration as a law student, or to take an examination, shall rest on the applicant at all stages of the proceedings."). See also THE BAR EXAMINERS' HANDBOOK, supra note 12, at 103; COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, supra note 22, at viii ("The bar examining authority may appropriately place on the applicant the burden of producing information.").
40. Evinger, 629 P.2d at 367.
41. Id. at 367.
42. See Rhode, supra note 3, at 507.
43. See id.
44. See THE BAR EXAMINERS' HANDBOOK, supra note 12, at 125.
45. See id. ("The purpose of such early registration is to identify problems that might otherwise delay or adversely affect licensing after law school graduation, or to expedite processing of bar examination applications by completing preliminary work in applicants' law school career.").
46. See NATIONAL CONFERENCE OF BAR EXAMINERS, REQUEST FOR PREPARATION OF A CHARACTER REPORT (1998) [hereinafter REQUEST FOR PREPARATION OF A CHARACTER REPORT]. The National Conference of Bar Examiners character report includes questions concerning the
conduct the character investigation after an applicant has successfully completed the bar examination. The remainder of states begin the character screening process immediately before the applicant takes the bar exam.

However, registration as a law student is currently used in approximately sixteen jurisdictions. This is the timing process used in Oklahoma. In Oklahoma, an entering first-year student who plans on practicing in Oklahoma must register with the Oklahoma Board of Bar Examiners. Oklahoma currently uses the National Conference of Bar Examiners character report in assessing each applicant. Regarding the timing of this method, the National Conference of Bar Examiners points out:

Law student registration often serves to eliminate matters of concern to law students, who may incorrectly presume that some matter may present an obstacle to obtaining a law license. For others whose applications present issues of concern to bar examiners, early registration allows the applicant to make better informed decisions about whether to proceed with law school, or how to demonstrate that he or she has learned from past mistakes. Applicants gain because they can obtain a decision before completing the expenditure of time and money in completing a law degree. Bar admission agencies gain because they are allowed the time to thoughtfully evaluate candidates.

applicant's use of aliases; place of birth; residences for the past ten years; information regarding colleges and universities attended; information regarding any disciplinary action, including warnings issued by the college or universities attended by the applicant; information regarding prior registration as a law student; military service information regarding past employment for the last ten years; questions concerning any denials for licensing in a business, trade or profession, including questions concerning any suspension, complaints, or grievances (formal or informal) filed against the applicant; and information regarding the applicants financial history, criminal history, and mental and physical health. See id.

47. See N.Y. JUDICIARY LAW § 90 (West 1999).
48. See THE BAR EXAMINERS' HANDBOOK, supra note 12, at 125.
49. See NATIONAL CONFERENCE OF BAR EXAMINERS, LAW STUDENT REGISTRATION A GUIDE FOR LAW STUDENTS 1 (1996) [hereinafter LAW STUDENT REGISTRATION A GUIDE FOR LAW STUDENTS].

Law student registration is a screening procedure used in approximately sixteen jurisdictions, which include Alabama, California, Florida, Illinois, Iowa, Kentucky, Maryland, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, Texas, Virginia, and Wyoming, as part of their licensing procedures. Some states require [this while] others simply permit prospective applicants to file an application early in the law students career for the purpose of identifying issues that may present a problem at the time of licensing, or in order to speed the licensing process at the time of the bar examination.

Id.

50. In Oklahoma, the duty to register is on the law student. See OKLA. STAT. ANN. tit. 5, Rule 11 (West 1999).
52. See REQUEST FOR PREPARATION OF A CHARACTER REPORT, supra note 46 (1998). Through National Conference of Bar Examiners' Law Student Registration Program, the law student obtains the forms to be filled out through the student's law school or from the appropriate jurisdiction. The application is then filled out by the law student and mailed to the appropriate state bar. The jurisdiction may then request the National Conference of Bar Examiners to prepare a confidential report for the jurisdiction regarding the applicant. This report however does not evaluate the character and fitness of the applicant to practice law. Each individual state makes its own determination regarding the applicant's fitness to practice law. See id.
53. See LAW STUDENT REGISTRATION A GUIDE FOR LAW STUDENTS, supra note 49, at 1.
Although the method employed by Oklahoma and other states that use the early registration method is an improvement over screening after the applicant has taken the bar exam or immediately before taking the bar exam, it does not mean that the early registration method is without its share of problems.54

VII. RELEVANT FACTORS USED IN SCREENING CHARACTER

There are serious problems with the character requirement as it is currently being administered by states today. The problems with administering the character requirement involve timing issues, the lack of a solid definition of “good character,” and the lack of an appropriate standard by which to judge an applicant’s character.

As the Supreme Court has articulated, the definition of character is “usually ambiguous [and] necessarily reflect[s] the attitudes, experiences, and prejudices of the definer.”55 To compensate for the prejudices that may play a role in the decision making, some states have published guidelines that list the relevant character traits considered to show good character in an applicant.56 Among the traits listed by the various states that offer guidance as to what constitutes good character are such subjective terms as honesty, trustworthiness, diligence, reliability, respect for the law, integrity, candor, discretion, observance of fiduciary duty, respect for the rights of others, fiscal responsibility, physical ability to practice law, knowledge of the law, mental and emotional stability, and a commitment to the judicial process.57 However, at least seventeen states avoid the problems involved in describing the relevant character traits that make up good character by not publishing guidelines.58

While these factors are stated as being relevant in the assessment of character in many jurisdictions, how each individual jurisdiction follows these considerations differs substantially. There is no consensus among jurisdictions as to what type of conduct bar examiners may find relevant in assessing an applicant’s character.59 Just as some states have published guidelines as to what

54. Rhode, supra note 3, at 515.

An inherent inadequacy in the certification process stems from the point at which oversight occurs. In essence the current process is both too early and too late. Screening takes place before most applicants have faced situational pressures comparable to those in practice, yet after candidates have made such a significant investment in legal training that denying admission becomes extremely problematic.

Id.; see also Gerber, supra note 17, at 2, 22 (arguing that an investigation of the character of an applicant should logically come after the law school graduate has completed an internship and several years of supervised practice).


56. See CAL. ATTORNEYS AND STATE BAR RULES REGULATING ADMISSION TO PRACTICE LAW IN CALIFORNIA RULE X ("Good moral character includes qualities of honesty, fairness, candor, trustworthiness . . .").


58. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS supra note 24, at 6-7 Chart II.

59. See Gerber, supra note 17, at 18.
traits show evidence of good character, some have also published guidelines as to what traits are evidence of bad character or cause for further investigation. Among the traits and conduct that these states have identified as cause for further investigation include unlawful conduct, academic misconduct, making a false statement or omission, misconduct in employment, dishonesty, abuse of legal process, neglect of financial responsibility, and substance abuse.\(^{60}\)

The old saying that beauty is in the eye of the beholder can certainly be applied to the character screening process. Good character is in the eye of the beholder, with the beholder being each individual state. As a review of the cases will demonstrate, each state looks for common notions of what may be considered good character, but the results from the cases show the uncertainty involved in the character screening process.

VIII. CATEGORIES OF BAR ADMISSION CASES

Bar admission cases that involve denying an application based on a finding of lack of character can generally be classified within the following categories: "[p]ast illegal conduct; misconduct in the bar admission process; emotional and mental instability; and unpopular and controversial political beliefs."\(^{61}\)

A. Prior Illegal Acts

A bar admission committee or court may deny an applicant admission to the bar due to past criminal behavior; however, in some states, a criminal conviction or guilty plea does not necessarily mean an automatic denial of an application.\(^{62}\) In some circumstances, an applicant may be denied admission to the bar even though the applicant has never been convicted of a crime.\(^{63}\) Even if the applicant is granted a full pardon in a criminal matter, some courts have held that it is justifiable to deny admission to the bar based on the applicant’s record.\(^{64}\) In at least four states, a felony conviction will bar an applicant from admission to the bar.\(^{65}\) In other states, a felony conviction will not operate as an automatic denial; however, there are strict requirements placed on the applicant of what must be proven to the appropriate agency.\(^{66}\)

Today, a majority of the states operate under a presumption of disqualification when faced with an applicant who has engaged in prior unlawful

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62. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS supra note 24, at 6-7.
64. See generally Richard R. Arnold, Jr., Comment, Presumptive Disqualification and Prior Unlawful Conduct: The Danger of Unpredictable Character Standards for Bar Applicants, 1997 UTAH L. REV. 63 (1997) (discussing the current state of character evaluations as it applies to applicants who have committed prior unlawful acts).
65. See Arnold, supra note 63; Rhode, supra note 3, at 573.
66. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, supra note 24, at 6-7 Chart II.
67. See id. at 8.
conduct.67 This standard places on the applicant a rebuttable presumption that an applicant with a record of prior unlawful conduct lacks the requisite character to practice law.68 Although this standard is the majority view, it has been criticized for its level of vagueness and the unpredictable outcomes that may occur using this approach.69

Vaughn v. Board of Bar Examiners for the State of Oklahoma Bar Association70 is an excellent example of how a state may exclude an applicant from being admitted to the bar even in the absence of a criminal conviction. In this case, Vaughn presented evidence of good character in the form of witness testimony and affidavits of fourteen people.71 The court also acknowledged Vaughn’s academic and professional accomplishments in other fields, but said “these per se are irrelevant whether Vaughn is ethically fit for bar admission.”72 In the character hearing, Vaughn invoked his Fifth Amendment privilege against self-incrimination73 and refused to answer any questions concerning his involvement with two female students during his employment as a public school teacher.74 By invoking this privilege the board maintained that an adverse inference could be drawn where probative evidence is offered against him.75 However, without addressing this position, the court simply held: “[T]he evidence produced against Vaughn demonstrates Vaughn did not possess the ethical fitness at the time of the application for admission to the Bar.”76 The court concluded by stating: “We do not perceive Vaughn as having been rehabilitated in view of the lack of evidence concerning rehabilitation. . . . [W]e find his ethical value system deplorable.”77

B. Lack of Candor

As one commentator has observed, the most frequently litigated issue in bar admission cases that deal with the good character requirement is a lack of candor with the bar examining committee.78 In most cases, an applicant is more likely to be denied admission for concealing past actions, even when the past action would not on its own have resulted in a denial by the bar committee.79 During the character investigation process, a duty is imposed on applicants to answer all

67. See Arnold, supra note 63, at 74.
68. See id.
69. Id. at 75 ("The flexibility for which the presumptive disqualification approach receives support is accompanied by a level of vagueness, which can undermine some of its benefits and leave applicants with a record of unlawful conduct vulnerable to unclear standards and unpredictable outcomes.").
70. 759 P.2d 1026 (Okla. 1988).
71. See id. at 1028.
72. Id.
73. See id.
74. See id.
75. See Vaughn, 759 P.2d at 1029.
76. Id. at 1030.
77. See id.; cf. In the Matter of Conn, 715 N.E.2d 379 (Ind. 1999) (involving an attorney who was suspended for two years after being criminally convicted of sexual exploitation of minors).
78. Rhode, supra note 3, at 534.
79. MORGAN & ROTUNDA, supra note 9, at 38.
questions truthfully and completely in connection with the application process.\footnote{80} The Model Rules of Professional Conduct,\footnote{81} which has been adopted by Oklahoma Rule 8.1,\footnote{82} states the following:

An applicant for admission to the bar, or a lawyer in connection with a bar admission application . . . shall not: (a) knowingly make a false statement of material fact; or (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority . . . .\footnote{83}

C. Making a False Statement

Rule 8.1 requires that an applicant not make a knowingly false statement in the bar admission process.\footnote{84} The term "knowingly" has been interpreted by most courts to include the element of scienter; thus, a statement must be known by the applicant to be false at the time it was made and the applicant must make the statement in an attempt to deceive the character committee to fall within the strictures of Rule 8.1.\footnote{85}

In cases that deal with concealing information from bar examiners, there is a wide variety of inconsistent results. At least one court, in Seigel v. Committee of Bar Examiners,\footnote{86} has held that a denial for admission to the bar due to lack of good moral character can only be upheld if the court can conclude beyond a reasonable doubt that the applicant's response to a question was objectively false and was advanced by the applicant with an intent to deceive the character examining committee.\footnote{87}

Similarly, in Petition of Waters,\footnote{88} a bar applicant failed to completely answer a character investigation question that asked if the applicant had "ever been dropped, suspended, disciplined, or expelled by any college, university or other

\footnote{80}{See MODEL CODE OF PROF'L RESPONSIBILITY DR 1-101 (A) (1982). Rule 8.1 of the Model Rules states:

Each applicant for admission to the bar has a duty to be candid and to make full, careful and accurate responses and disclosures in all phases of the application and admission process. Each applicant must respond fully to all inquiries. It is not proper for an applicant to give either a highly selective or sketchy description of past events reflecting on the applicant's qualifications for admission to the bar. An applicant who violates this duty may be denied admission to the bar.


81. The Model Rules of Professional Conduct were adopted by the House of Delegates of the American Bar Association on August 2, 1983. MODEL RULES OF PROF'L CONDUCT vii (1996). Many states have adopted, in part or in whole, the provisions of the Model Rules. For example, Oklahoma has adopted Rule 8.1 in whole, without modification. See OKLA. STAT. ANN. tit. 5, Ch. 1 App. 3-A (West 1999).

82. See OKLA. STAT. ANN. tit. 5, App. 3-a, Rule 8.1.


84. See id.

85. See id.

86. 514 P.2d 967, 983 (Cal. 1973).

87. See id.

88. 447 P.2d 661 (Nev. 1968).}
law school.” The applicant answered the question with a “yes” and when questioned as to the details of an incident which occurred during law school, responded by giving the name of the school, date of the incident, and further added “now in good standing with the University of Texas.” In responding in this manner the applicant failed to disclose another incident involving a dismissal from another school. The court, however, concluded that the applicant's failure to answer did not amount to an intentional deception.

D. Failure to Correct False Information

Rule 8.1 also imposes a duty on the applicant to correct any statement of “misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand from an admissions or disciplinary authority.” The language of this provision also seemingly implies the knowingly standard. Often failing to correct false information will be closely related to making a false statement. Logically, these two provisions are connected.

E. Rehabilitation

Another issue that arises in many of these cases is the issue of an applicant's rehabilitation, or lack thereof. This issue will arise whenever a bar applicant has committed an act or acts that the bar committee considers relevant as an indicator of character. Often the issue will arise if the applicant has been involved in a criminal matter, but rehabilitation issues are certainly not limited to these.

The burden of proving good character rests on the applicant. When the issue in an admission investigation is whether or not an applicant has been rehabilitated, the burden faced by the applicant in overcoming the adverse inference of past mistakes may indeed be greater on the applicant than the ordinary burden of showing good character. “The more serious the misconduct, the greater the showing of rehabilitation that will be required.” It has been held:

[A] fundamental rule in bar admission cases is that evidence of reform and rehabilitation is relevant to the assessment of an applicant's moral character. Rehabilitation is pertinent because the Court is interested in an applicant's present fitness to practice law. Where evidence convincingly demonstrates reform and rehabilitation, it can overcome the adverse inference of unfitness arising from past misconduct and, if persuasive, present fitness may be found.

However, proving rehabilitation is often difficult and may be impossible for

89. Id. at 663.
90. Id.
91. See id.
92. See id.
96. Id. at 176.
some applicants. For example, criminal convictions may operate as a complete bar to an applicant in some states, while in other states, the applicant may seek admission to the bar despite such a conviction.

In *Appeal of Estes*, an applicant to the Oklahoma board was initially denied admission by the Oklahoma Board of Bar Examiners because of a prior conviction for conspiracy to import marijuana into the United States. Estes was sentenced to five years on each count of conspiracy and was incarcerated in Indiana. After a recommendation by the warden of the Indiana facility, Estes was resentenced under the Federal Youth Corrections Act (the “Act”). Estes was then sent to a youth facility in Texas and began working under a work program. In 1975, a Texas federal court unconditionally set aside his conviction, and Estes was discharged. Estes was readmitted into law school and graduated in 1977. After his application was initially denied by the Oklahoma Board of Bar Examiners, Estes requested a hearing before the Board to present evidence of his character. The Oklahoma Board of Bar Examiners refused again to admit Estes, finding that the applicant “failed to sustain his burden of proving that he has at this time the requisite good character and due respect for the law required for admission to the bar in Oklahoma.” Estes appealed to the Oklahoma Supreme Court.

The court found that Estes had carried his burden of proving good character. The Oklahoma Board of Bar Examiners challenged Estes’ right to protest its decision because in his application he informed the Board of his conviction, thereby, according to the Board, waiving his right to object to its consideration of the former conviction.

In deciding this case, the court made clear that “the Board had a right and a duty to consider all aspects of an applicant’s character including the special circumstances of the crime, conviction, discharge and certification.” The court concluded, based on the evidence of good character presented by Estes and the resentencing and discharge of his sentence under the Act, that there was sufficient

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97. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS *supra* note 24, at 6-7 Chart II.
98. See Arnold, *supra* note 63, at 74.
100. See id. at 977-79.
101. 580 P.2d 978.
102. See id.
103. See id.
104. See Estes, 580 P.2d at 978 (stating that Estes’ conviction was set aside under 18 U.S.C. § 5021).
105. See id.
106. See id.
107. See id.
108. Id.
109. See Estes, 580 P.2d at 978.
110. See id. at 980.
111. See id. at 979. It is interesting to note the Board’s position. If Estes would have failed to disclose the fact of his conviction, he would have been found unfit due to his lack of candor. See id.
112. Id.
evidence of his rehabilitation.113

In In re Manville,114 a case involving the application of a convicted felon to the District of Columbia Bar, the District of Columbia Court of Appeals held that despite an unfavorable finding by the Committee on Admissions, the applicant presented sufficient evidence of rehabilitation to overcome the burden of proving good character.115

The applicant in Manville was convicted of a felony ten years prior to applying for bar admission in Washington D.C..116 Manville was convicted of voluntary manslaughter while assisting in the recovery of drugs and money from an apartment.117 While in the apartment, two unexpected visitors arrived, which led Manville to use chloroform to render the apartment owner and the visitors unconscious.118 Due to an adverse reaction to the chloroform, one of the visitors died.119 Manville, subsequently pled guilty to manslaughter.120

In deciding Manville, the court reaffirmed the rule that its evaluation of bar applicants who have previously been convicted of felonies is done through a case by case determination of whether the applicant possesses good moral character at the time of the application.121 The court applied the facts presented in Manville to a non-exhaustive list in making its determination.122 Under this test the court looked at (1) the nature and character of the offense committed, (2) the number and duration of the 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 the offenses committed, (7) the number of years 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, (9) the applicant's candor, sincerity and full disclosure in filings and proceedings on character and fitness, (10) the applicant's constructive activities and accomplishments

113. See id. at 978.
115. See id. at 1133.
116. See id. at 1129.
117. See id. at 1130.
118. See id.
119. See Manville, 538 A.2d at 1130.
120. See id. at 1132.
121. See id. (citing Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 246 (1957)) Relying on the Schware decision, the court states,

[G]ood character at the time of application is the appropriate test, a rule denying bar admission to all applicants who have felony convictions might contravene constitutional guarantees of due process or equal protection of the laws. But it is not necessary for us to define the boundaries of constitutional rights in this area because we affirm our adherence to individualized determinations of the moral fitness of applicants to join the bar on policy, as distinguished from constitutional grounds. (Footnote omitted)

See id. at 1132 n.3 (arguing that placing on the applicant an irrebuttable presumption has been held unconstitutional in other cases and similarly may be overinclusive and not sufficiently related to legitimate state ends).
122. See id. at 1133 n.4.
subsequent to the criminal convictions, and (11) the opinion of character witnesses about the applicant’s moral fitness.\textsuperscript{123} The court held that under these factors, Manville had presented sufficient evidence to overcome the adverse effect of his prior conviction.\textsuperscript{124}

In the case of \textit{In re Polin},\textsuperscript{125} an applicant to the bar was initially recommended for admission by the Committee on Admissions, despite having been convicted for conspiracy to possess cocaine with intent to distribute.\textsuperscript{126} After the Committee conducted a full hearing, it “found by clear and convincing evidence that Polin now is of good moral character and fit to practice law.”\textsuperscript{127} However, the District of Columbia Court of Appeals felt that the serious nature of the offense and the “relatively short duration of his period of rehabilitation” were sufficient enough reasons for the court to deny Polin’s application to the bar.\textsuperscript{128}

In deciding \textit{Polin}, the court said that it will “accept findings of fact made by the Committee unless they are unsupported by substantial evidence of record . . . [and that it will] afford] the Committee’s recommendation some deference . . . nevertheless, the ultimate decision regarding admission or denial of admission remains for this court to make.”\textsuperscript{129} Although the Committee relied on a non-exhaustive list of eleven factors set forth by the court in a previous decision in evaluating Polin’s character,\textsuperscript{130} the “applicant with a background of a conviction of a felony or other serious crime must carry a very heavy burden in order to establish good moral character.”\textsuperscript{131} Polin, in the Court’s opinion, did not carry this burden.\textsuperscript{132}

In the case of \textit{Application of Matthews}\textsuperscript{133} the applicant, Matthews, was involved in fraudulent investment schemes while attending law school, which resulted in a criminal conviction of Matthews’ partner. However, Matthews was never convicted of a crime.\textsuperscript{134} The Committee on Character initially determined that Matthews had knowingly participated in the investment scheme, but that determination was ultimately set aside because the evidence was found to be insufficient to prove

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See id. at 1134.
\item 596 A.2d 50 (D.C. 1991).
\item See id. at 52.
\item Id.
\item See id. at 51.
\item See id. at 52 (quoting \textit{In re Manville}, 494 A.2d 1289, 1293 (D.C. 1989)).
\item See \textit{In re Polin}, 596 A.2d 50, 52 (D.C. 1991) (relying on the factors set forth in \textit{In re Manville}, 494 A.2d 1289 (D.C. 1985)).
\item See id. at 53.
\item See id. It is interesting to compare the decision in \textit{Manville} with that of \textit{Polin}. In \textit{Manville}, the applicant was convicted of voluntary manslaughter. See \textit{Manville}, 538 A.2d at 1130. In \textit{Polin}, the applicant was convicted of a felony drug charge. See \textit{Polin}, 596 A.2d at 52. Both crimes are admittedly serious offenses but the outcome in each case differs substantially. One explanation for the differing results is the period of time between the commission of the crime and the filing of the application. See id. at 51-52. It could be argued that this test seems to place too much emphasis on time. The problem with such a test is determining what should be considered an appropriate amount of time.
\item 462 A.2d 165 (N.J. 1983).
\item See id. at 166.
\end{enumerate}
\end{footnotesize}
actual knowledge on the part of Matthews. The Committee on Character concluded that although the actions taken by Matthews were serious, in its opinion, Matthews' character "had changed over the six intervening years, and that the six-year delay in admission had been sufficient discipline." On review of the Committee’s decision, the New Jersey Supreme Court refused to admit Matthews to the practice of law despite the recommendation of the Committee’s hearing panel. In making its determination that Matthews did not possess the necessary character, the court focused on the issue of Matthews’ rehabilitation. The court detailed certain types of evidence that has been shown as probative of reform and rehabilitation. According to the court, the applicant must first express complete candor in the admission process. Second, heavy weight will be placed on the applicant’s attitude as expressed in the admission process, and evidence of renunciation of past misconduct will be looked for by the courts and review boards. Third, the absence of misconduct and productivity in the applicant in the intervening years subsequent to the occurrence of the misconduct will be noted by the court or character review board. And last, evidence of affirmative recommendations from people who have knowledge of the misconduct and who have specifically considered the applicant’s fitness in light of such misconduct may be probative evidence of the applicant’s present good character. However, the court also stated that “in the case of extremely damning past misconduct, a showing of rehabilitation may be virtually impossible to make.”

Application of Dortch presents an unusual rehabilitation issue. In Dortch, the Maryland Court of Appeals decided whether to admit an applicant to the bar who was presently on parole for second-degree murder.

The applicant, John Curtis Dortch, and a co-conspirator undertook a plan to rob a bank. The robbery was unsuccessful and resulted in the death of a police officer. Although Dortch was not present during the murder of the officer, he was charged with first-degree felony murder and attempted armed robbery. Dortch was sentenced to fifteen years to life in prison, and was paroled after

135. See id.
136. Id.
137. See id. at 177.
138. See Matthews, 462 A.2d at 176.
139. See id.
140. See id.
141. See id.
142. See id.
143. See Matthews, 462 A.2d at 176; see e.g., In re Manville, 538 A.2d 1128, 1137 (D.C. 1988) ("[W]e believe that a few persons who have been convicted of felonies may become sufficiently rehabilitated to meet the demanding ethical requirements of the legal profession.").
144. 687 A.2d 245 (Md. 1997).
145. See id. at 245.
146. See id.
147. See id. at 246.
148. See id.
serving fifteen years.149

Although the evidence of Dortch's rehabilitation was overwhelming, the
court refused to decide the case in favor of Dortch, holding that his application to
the bar was premature and

that a candidate to the Maryland Bar who has been convicted of a crime that would
clearly necessitate disbarment must have as a threshold requirement, at least served
his or her sentence and must have been released from parole supervision for the
offense before this court will even consider his or her application.150

F. Political Questions

"Throughout this century, the moral character requirement has placed a
price on nonconformist political commitments."151 There have been important
constitutional issues raised by applicants who were denied admission based on a
committee's finding of lack of good character. Many of these cases dealt with
considering what the permissible constitutional limits are on the committee's
power to compel an applicant to answer questions concerning the applicant's
political or associational ties. The most noteworthy of these cases arose in the
context of the Cold War and the McCarthy era and deal with a bar examiner's
attempts to exclude individuals based on their political beliefs.152

How much power does each state have in asking questions concerning an
applicant's political beliefs? Unlike the practice of investigating past criminal
activity, emotional stability, and civil misconduct, the line drawn between
protecting a legitimate state interest and invasion of constitutional rights is not so
clear in bar admission cases that concern an applicant's political or religious
beliefs. In a line of cases decided by the United States Supreme Court beginning
in 1957, the Court examined the constitutionality of the character requirement
and the constitutional limits of certain questions being posed by states.

1. The Schware, Konigsberg I and II, and Anastaplo Decisions

In Schware v. Board of Bar Examiners,153 Schware, a University of New
Mexico Law School graduate, was not allowed to take the bar examination
because of answers he submitted to the New Mexico Board of Bar Examiners,
where in detail, he had described his use of aliases and also disclosed that he had
been arrested on several occasions.154 Schware requested a formal hearing
concerning his application from the Board of Bar Examiners.155 The Board of Bar
Examiners informed Schware of the reasons it denied his application, stating that
through his use of aliases, arrest record, and connection with subversive activities,

149. See Dortch, 687 A.2d at 246.
150. See id. at 245.
151. Rhode, supra note 3, at 566.
152. See id.
154. See id. at 234.
155. See id.
Schware had failed to satisfy the Board that he possessed the requisite moral character for admission to the Bar of New Mexico.156 At the hearing on Schware's application, Schware presented evidence of his good character in the form of witness testimony, letters from law school classmates, and personal letters written by Schware to his wife while he was serving in the military.157

In reviewing Schware, the United States Supreme Court reaffirmed the notion that, "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."158 In this case, the Court found that Schware had presented a "forceful showing of good moral character," which overcame the evidence relied on by the state so that there was no substantial doubt about his present moral character.159

In 1957, the Supreme Court of the United States decided the case of Konigsberg I.160 In Konigsberg I, the applicant was questioned by the California State Committee of Bar Examiners on his political affiliations and beliefs.161 Konigsberg refused to answer these questions, arguing that the questions were an intrusion on his constitutional rights.162 Subsequently, Konigsberg's application to the California bar was denied.163

In reviewing this case, the United States Supreme Court declined to decide the constitutionality of the questions asked by the Committee. Instead, the Court considered the issue of whether Konigsberg's failure to answer the Committee's questions was sufficient to prove that Konigsberg lacked the good character required by the state to practice law.164 The evidence presented by Konigsberg consisted of testimony from individuals including a priest, a rabbi, lawyers, doctors and professors.165 Konigsberg's military record was offered as further proof of his good character.166 The State of California, however, argued that despite the evidence offered by Konigsberg, there was other evidence which raised substantial doubts about his character.167 The State relied on testimony from an ex-Communist who stated that Konigsberg had attended meetings held by the Communist Party and had criticized certain public officials.168 Furthermore, the Committee offered the evidence that Konigsberg refused to answer questions concerning political associations and beliefs, and failed to prove that he did not

156. See id. at 234-35.
157. See id. at 235-36.
158. Schware, 353 U.S. at 239.
159. See id. at 246.
161. See id. at 258.
162. See id.
163. See id. at 259.
164. See id. at 273.
165. See Konigsberg I, 353 U.S. at 264.
166. See id. at 266.
167. See id.
168. See id.
advocate the overthrow of the government by unlawful means.\textsuperscript{169}

However, a narrow majority of the Supreme Court agreed with Konigsberg's argument that the evidence in the record did not rationally support a finding of doubt about Konigsberg's character; thus, California's decision was offensive to the due process clause of the Fourteenth Amendment.\textsuperscript{170} The Court remanded the case to the California Supreme Court to be reconsidered in light of its opinion.\textsuperscript{171}

On rehearing by the California Supreme Court, Konigsberg's application was sent back to the Committee for further consideration.\textsuperscript{172} The Committee again asked Konigsberg about his membership in the Communist party.\textsuperscript{173} Konigsberg stated to the Committee that he did not believe in the violent overthrow of the United States Government and that he had never knowingly been a member of any organization that advocated the overthrow of the Government.\textsuperscript{174} However, Konigsberg refused to answer questions concerning his membership in the Communist party.\textsuperscript{175} Based on Konigsberg's refusal to answer the Committee's questions, Konigsberg's application was denied on the grounds that his refusal to answer had obstructed the Committee's investigation.\textsuperscript{176}

The case was again appealed to the United States Supreme Court. In \textit{Konigsberg II}, the United States Supreme Court focused on the State's power to deny an applicant admission to the bar for failure to answer an unprivileged question and on whether the line of questioning from the Committee violated the Constitution.\textsuperscript{177} The Court found that California had the power to deny admission to the bar when Konigsberg refused to answer a question that had substantial relevance to the applicant's qualifications to practice law and that the refusal to answer such a question obstructed the Committee's investigation.\textsuperscript{178} The Court found, in this instance, that Konigsberg's refusal to answer a question that had substantial relevance to his qualifications could be viewed by the Committee as an unfavorable answer to the question.\textsuperscript{179} The Court's holding in \textit{Konigsberg I} was that the evidence of Konigsberg's participation in the Communist Party and his refusal to answer questions concerning his membership in the Communist Party could not rationally support any substantive adverse inferences about Konigsberg's character.\textsuperscript{180} In \textit{Konigsberg II}, the fact that the Committee gave

\textsuperscript{169} See id. at 266-67.
\textsuperscript{171} See \textit{Konigsberg II}, 353 U.S. at 274.
\textsuperscript{172} See \textit{Konigsberg II}, 366 U.S. at 38.
\textsuperscript{173} See id. at 39.
\textsuperscript{174} See id.
\textsuperscript{175} See id.
\textsuperscript{176} See id. at 39 n.2. The Committee stated in its findings that affiliation with the Communist Party was material to a proper and complete investigation of his qualifications for admission to practice law in the state of California and refusal to answer has obstructed a proper and complete investigation of the applicant's qualifications for admission to practice law in the State of California. See id.
\textsuperscript{177} See \textit{Konigsberg II}, 366 U.S. at 49.
\textsuperscript{178} See id. at 44.
\textsuperscript{179} See id. at 44-45.
\textsuperscript{180} See \textit{Konigsberg I}, 353 U.S. 252, 262 (1957).
Konigsberg adequate warning concerning the consequences of his refusal to answer the question was sufficient to comply with the Fourteenth Amendment Due Process Clause. 181

In the same year that the United States Supreme Court decided Konigsberg II, the Court decided In re Anastaplo, 182 which presented an identical issue as that presented in Konigsberg II. In this case, the applicant refused to answer questions concerning his affiliation with the Communist Party. 183 Like the factual situation presented in Konigsberg I, the applicant in Anastaplo had presented to the Illinois Committee evidence that showed his good character. 184 Also, like Konigsberg, Anastaplo refused to answer questions concerning his association with the Communist party. 185 The Illinois Committee issued a report to the Supreme Court of Illinois stating that no inference of disloyalty was drawn by Anastaplo’s refusing to answer the Committee’s questions concerning any affiliation with the Communist Party, but because of the strong public interest in questioning bar applicants on their belief in the United States Government, any private interest against answering such a question is overcome. 186 In the Committee’s view, by refusing to answer questions upon which such a high public interest is placed, the applicant obstructed the investigative functions of the Committee. 187 The Illinois Supreme Court agreed with the Committee’s findings and refused to certify Anastaplo, reasoning that when an applicant refuses to answer questions as to whether the applicant is a member of a group that is dedicated to the overthrow of the United States Government, that applicant cannot “in good conscience take the attorney’s oath to support and defend the constitutions of the United States and the State of Illinois . . . .” 188 The United States Supreme Court, referring back to its earlier decision in Konigsberg II, stated that it is:

not constitutionally impermissible for a State legislatively, or through court-made regulation as here and in Konigsberg, to adopt a rule that an applicant will not be admitted to the practice of law if, and so long as, by refusing to answer material questions, he obstructs a bar examining committee in its proper functions of interrogating and cross-examining him upon his qualifications. 189

The Court’s focus next turned to whether Anastaplo received adequate warning from the Committee regarding the consequences of not answering the questions posed by the Committee. 180 The Court in reviewing the record of the Committee’s investigation concluded that Anastaplo had received adequate

181. See Konigsberg II, 366 U.S. at 59.
183. See id. at 83-84.
184. See id. at 85-86. The Supreme Court noted that the committee had before it uncontested evidence of good moral character which could not have properly reflected adversely on Anastaplo’s character. See id.
185. See id. at 86.
186. See id. at 86-87.
187. See Anastaplo, 366 U.S. at 87.
188. Id. at 88.
189. Id.
190. See id. at 90.
warning.  

2. The Baird, Stolar and Wadmond Decisions

In 1971, the United States Supreme Court decided three cases that add confusion to the seemingly clear decisions issued by the court in Schwars, Konigsberg I and II, and Anastaplo. Viewing the Schwars, Konigsberg I and II, and Anastaplo decisions together, the United States Supreme Court seemed to suggest that a state may inquire into the political beliefs of an applicant but cannot deny admission to the bar exclusively because of the applicant's political views. If an applicant refuses to answer a question concerning political affiliation and the refusal to answer obstructs the state's investigation of the applicant then admission to the bar could be denied. However, the question must have some rational connection with the applicant's fitness to practice law.  

In the case of Baird v. State Bar of Arizona, the issue was whether Arizona could deny an applicant admission to the bar for refusing to answer questions about the applicant's personal beliefs or affiliations with organizations that advocate the overthrow of the United States Government. In Baird, the applicant, Sara Baird graduated from law school and passed the Arizona Bar. When asked by the Arizona Bar Committee whether she had ever been a member of the Communist Party or any other organization that advocated the overthrow of the United States Government, she refused to answer; thus, the Committee declined to recommend that she be approved for the Arizona Bar. The Supreme Court in this case agreed with Baird stating that Arizona could not inquire into a person's political beliefs. The Court said, "Without detailed reference to all prior cases, it is sufficient to say we hold that views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law."

In Law Students Civil Rights Research Council, Inc. v. Wadmond, the Supreme Court of the United States upheld the New York rule that allowed the Committee of Character and Fitness not to certify an applicant for admission to the bar unless the applicant proved to the Committee the applicant's loyalty to the United States Government. The appellants claimed that the New York system created a chilling effect on the free exercise of the rights of speech and association

191. See id.
192. See Konigsberg II, 366 U.S. 36, 44 (1961) ("Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications.").
194. See id. at 2.
195. See id. at 4.
196. See id. at 4-5.
197. See id. at 8.
200. See id. at 161.
of the students who must anticipate having to meet its requirements.201 The Supreme Court held that although the burden of establishing good moral character is on the applicant, in this case, the New York statute placed no burden of proof on the applicant, but instead placed a burden on the applicant of going forward with the evidence by making the applicant complete written questionnaires and submit to oral interrogations.202

In the case of In re Stolar,203 the Supreme Court of the United States held that a state law requiring an applicant to the bar to list all organizations to which the applicant had belonged was impermissible under the Constitution.204 In Stolar, the applicant applied to the Ohio Bar, making available to the Ohio Bar information which he had previously supplied the New York Bar.205 During an interview by the Ohio Committee, Stolar testified that he had never been a member of the Communist Party,206 but refused to answer questions on the Ohio application, claiming the questions violated his First and Fifth Amendment rights.207 The Committee then recommended that Stolar's application be denied, and the Ohio Supreme Court approved the Committee's recommendation.208 When arguing before the Supreme Court of the United States, Ohio defended the questions on the application by arguing that "listing [such a] question serves a legitimate interest because it needs to know whether an applicant has belonged to an organization which has espoused illegal aims and whether the applicant himself has espoused such aims."209 The United States Supreme Court relied on its holding in Baird when it rejected Ohio's argument.210

3. The Aftermath of the Supreme Court Decisions

The Supreme Court's decisions on the issue of how far a bar committee can go in questioning an applicant as to the applicant's membership in organizations seem to conflict with each other.

The decisions of the Court show that there is unanimous agreement that states may legitimately require applicants to demonstrate good moral character and that mere membership in a subversive organization would not support a conclusion of bad character, however, the decisions left ambiguous the permissible range of inquiry for determining moral fitness.211

201. See id. at 159.
202. See id.
204. See id. at 27-28.
205. See id. at 26.
206. See id.
207. See id. at 27.
208. See Stolar, 401 U.S. at 27.
209. Id. at 28 (internal quotes omitted).
210. See id. at 28-29 ("[T]he First Amendment prohibits Ohio from penalizing an applicant by denying [the applicant] admission to the Bar solely because of his membership in an organization. Nor may the State penalize petitioner solely because he personally, as the committee suggests, espouses illegal aims.") (internal quotes omitted) (citations omitted).
211. Scope of Character Investigations for Admission to the Bar, 85 HARV. L. REV. 212, 216 (1971)
It should be remembered that the cases mentioned so far came to the Court during a time in the history of the United States when Communist hunting was at its peak. Concern over national security and the American system of government was of great importance. Today, it can be argued that the threat of a Communist take-over is no longer a concern. But, is it possible for the United States to experience something similar in terms of the political and social climate that the country began to experience during the 1950's?

There are problems present today that can potentially have a significant impact on character screening. For example, the recent bar admission case of Matt Hale presents an interesting issue for bar examiners and for the legal community in general. Hale, leader of the World Church of the Creator, a white separatist organization, was denied admission to the Illinois Bar for "gross deficiency in moral character"212 in early 1999.213 Hale argued that the decision of the character committee violated his constitutional right to free speech.214 However, the Illinois Supreme Court apparently rejected Hale's argument and refused to review the case.215 This seems to leave open questions concerning how far an applicant can go in promoting his or her religious and political beliefs.

The overwhelming force of political correctness in this country today should not be the deciding factor in character screening. But it is difficult to consider the concept of character without relying on one's own personal beliefs and life experiences. When committees engage in evaluating an applicant's moral character, it can be argued that they do so under the current standards of society, whether those standards are based in the law or in personal experiences. What is considered morally acceptable today may not have been morally acceptable twenty or thirty years ago. After all, the committees' members may not be as skilled as judges in placing aside personal beliefs and prejudices when evaluating an applicant. The same problem may be said to exist with a judge in a court of law, but at least one important distinction can be made. A judge may be inclined to decide one way based on personal beliefs and values; however, a judge has legal guidelines to follow in most instances. A bar committee, although subject to rules, has discretion to deny an applicant admission under the ambiguous notion of unfit character. This is where the real problem lies.

IX. PROBLEMS IN THE CURRENT PROCESS

The current process of character screening is substantially inadequate to accomplish its primary purpose in many states for various reasons.216 One major

(footnotes omitted).


214. See id.

215. See id.


[T]he most commonly cited problem in the certification process is the inadequacy of time,
problem is the timing of the investigation, while an even more serious problem is lack of adequate resources to complete a thorough character investigation.

Traits such as honesty, integrity, and trustworthiness should be traits required of people in every profession, but clearly the need for these traits to be present in those people working in the legal system is of great concern. It is easy to require good character in a bar applicant, but evaluating character in a manner that is fair, effective, and consistent is a perplexing problem.

X. CONCLUSION

The need to require good character in those wishing to practice law is justifiably an important concern for all jurisdictions. It can hardly be argued that character is of little importance in the law. There are convincing reasons why states should exclude applicants on the basis of bad character; however, an argument for totally abandoning character screening has been made which is equally compelling.

The problem is not in requiring good character but in the evaluation of character in the bar applicant. Depending on numerous factors such as location, timing, and the gravity one wishes to place on an act, what may be considered an offense worthy of denying an application in one jurisdiction, may not necessarily result in a denial in a neighboring state. Although there are situations which will most likely result in a decision of denial in every state, such as failure to be candid, a review of the cases offers support for the proposition that results will vary depending on the jurisdiction. So what, if anything, should be done to remedy the problems posed by the character requirement?

The American Bar Association has offered some guidance in determining what conduct bar examination committees should view as cause for further investigation. The Code of Professional Responsibility prohibits lawyers from engaging in illegal conduct and “moral turpitude.” Without more practical

resources, staff, and sources of information to conduct meaningful character inquiries. Compounding those inadequacies is the unevenness of screening within and across jurisdictions. Some jurisdictions invest ‘minimal’ effort in the enterprise . . . others involve the equivalent of five full-time employees and thousands of hours of volunteer effort.

Id. at 515.

Id.

Id. at 589-90.

See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, supra note 24, at viii.

The revelation or discovery of any of the following should be treated as cause for further inquiry before the bar examining authority decides whether the applicant possesses the character and fitness to practice law: unlawful conduct; academic misconduct; making false statements including omissions; misconduct in employment; acts involving dishonesty, fraud, deceit or misrepresentation; abuse of legal process; neglect of financial responsibilities; neglect of professional obligations; violation of an order of a court; evidence of mental or emotional instability; evidence of drug or alcohol dependancy; denial of admission to the bar in another jurisdiction on character and fitness grounds; disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction.

Id.

See MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(3); see also Clark v. Ala. State Bar, 547 So.2d 461, 463 (Ala. 1989) (defining moral turpitude as “an act of baseness, vileness, or
guidelines, these sweeping statements arguably offer very little guidance and no definitive solution.

The Bar Examiners’ Handbook candidly admits that “no definition of what constitutes grounds for denial of admission on the basis of faulty character exist[s].”

Although some states have attempted to describe the standards and factors, a finding of lack of good moral character is not limited to acts that involve moral turpitude.

The United States Supreme Court has determined that for any character test, there must be a rational connection to the applicant’s ability to practice law. This test offers very little, if any, practical guidance. It has been argued that what may be considered a rational connection by some states, may not be considered a rational connection by others. In essence, the rational connection test is as subjective as the good character requirement.

This comment is an attempt to outline the bar admission process as it applies to character screening. Clearly, a strong argument can be made for the need to move toward a uniform national standard in the initial evaluation of an applicant and in the cases that require a subsequent review by a court.

The National Board of Bar Examiners’ character report is a good attempt to provide a fair evaluation of an applicant’s character; however, it is far from being free of the inherent ambiguities that plague the entire character evaluation process. First, the national conference report utilizes questions that may force the applicant to interpret the call of the question in an incorrect manner, thus causing the applicant to commit the ultimate sin of not exercising complete candor with the bar examining officials.

Perhaps the best solution to the problem posed by the character screening process can be found in other areas of the law. For example, in the area of criminal law, judges have guidance in sentencing criminal defendants through the use of model sentencing guidelines. In the areas of tort and contract law, the Restatement of Laws often guides courts. Applying this concept to character evaluations might lead to more consistent and predictable results. If an applicant with a felony conviction applies to the bar, maybe the character examining committee could refer to “The Model Rules on Character Screening” as a reference tool to see what the suggested time between pardon or parole and bar admission should be. Preparing model rules would greatly benefit those in charge of administering the character evaluation test if illustrative examples are utilized.

As the preface to the American Lawyer’s Code of Conduct states: “When you
write a new code, you have to be careful not just about what you are putting in, but also about what you are leaving out." If such a nationally accepted code could be agreed upon and adopted by the states, character evaluations would result in more predictable outcomes. This would benefit both those applicants who may have a problem and the individual states by conserving time, judicial energy, and economic resources.

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