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Character And Fitness Requirements For Bar Admission In New York

Avrom Robin

CHARACTER AND FITNESS REQUIREMENTS FOR BAR ADMISSION IN NEW YORK

INTRODUCTION

Every state bar requires certification of a bar candidate's moral character as a prerequisite for practice. The goal of this policy requirement is to protect the public from unscrupulous or unethical practices.[1] Protecting the administration of justice and the public image of the legal profession are additional goals.[2]

Professor Deborah Rhode has examined character requirements for admission to the bar.[3] In her article, she found that "the moral fitness requirement has functioned primarily as a cultural showpiece . . . [and] although the number of applicants formally denied admission has always been quite small, the number deterred, delayed, or harassed has been more substantial."[4] Since only a small number of cases are appealed to the state courts, very few are a matter of public record, and, therefore, it is difficult to compile meaningful statistics.

The problematic nature of character and fitness requirements stems from an inherent difficulty in defining precisely what constitutes sufficient moral character for admission to the bar.

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1. Debran Rowland, *The Difficulty of Defining an Effective Requirement of Fitness and Character*, 64 BAR EXAMINER 36, August 1995.

2. Jennifer C. Clarke, *Conditional Admission of Applicants to the Bar: Protecting Public and Private Interests*, 64 BAR EXAMINER 53, 54, May 1995.

3. Deborah L. Rhode, *Moral Character As A Professional Credential*, 94 YALE L.J.491 (1985).

4. *Id.* at 493-94.

Although this is not a problem for applicants with "clean" records, that is, those with no arrests and no convictions; it is a problem for applicants with police records. While applicants with police records have been rejected, some have been admitted in spite of them. However, the lack of meaningful standards addressing specific criteria to gauge fitness of character has rendered "the filtering process . . . inconsistent, idiosyncratic, and needlessly intrusive."[5] Moreover, there is no professional consensus on a definition of fit character. "Even the drafters of the *Bar Examiners' Handbook* concede that '[n]o definition of what constitutes grounds for denial of admission on the basis of faulty character exists.'"[6]

Matters are further complicated by the fact that grounds for withholding admission to the bar have changed over time. Women were systematically denied admission to the bar at one time.[7] Jews and African-Americans also suffered systematic exclusions in the early 1900's.[8] During the 1950's, political beliefs and associations became a potentially disqualifying issue. The Supreme Court ruled that an applicant who had been denied admission to the bar in New Mexico due to membership in the Communist Party had been deprived of due process.[9] In *Konigsberg v. State Bar of California*,[10] an applicant was denied admission because he "failed to show that he did not advocate the overthrow of the Government . . . by force, violence or other unconstitutional means."[11] The United States Supreme Court reversed the California state court's decision.[12] The Supreme Court noted that although the standard of "good moral character" has historically been a prerequisite for admission to the bar, the

5. *Id.* at 494.

6. Rowland, *supra* note 1 at 39 (citing BAR EXAMINER'S HANDBOOK, 123 (Stuart Duhl. 2d ed., 1980)).

7. Rhode, *supra* note 3 at 499.

8. Rhode, *supra* note 3 at 493, 499-501.

9. Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 246-47 (1957).

10. Konigsberg v. State Bar of California, 353 U.S. 252, 274-74 (1957).

11. *Id.* at 274-75.

12. *Id.*

term itself is ambiguous.[13] The Court notes that the term is inherently subjective and may be affected by the "attitudes, experiences and prejudices of the definer."[14]

However, in 1961, after the state of California had denied Konigsberg admission to the bar for the second time, the Supreme Court affirmed the state's decision, holding that the Fourteenth Amendment does not forbid a state from denying admission to a bar applicant who refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications for admission to the bar.[15]

Even though a set of factors to help guide the committees has emerged from the case law, no firm test exists in any jurisdiction. This has led to divergent opinions in recent years, involving borderline cases where applicants to the bar have criminal records.

This Comment will survey character and fitness requirements with respect to an applicant's criminal record. In addition to national case law, this Comment will focus on New York law.

A SURVEY OF THE STATUTORY LAW

In New York, the laws governing admission to the bar are found in the Judiciary Law, the Civil Practice Law and Rules [hereinafter CPLR], and in the New York Codes, Rules and Regulations [hereinafter NYCRR].

The power to make rules regulating admission was delegated to the court of appeals in 1870.[16] The appellate division of the supreme court was given the power to admit applicants who possess the character and general fitness required of lawyers. Immediate disbarment for a felony conviction is mandated, as

13. *Id.* at 262-63.

14. *Id.*

15. Konigsberg v. State Bar of California, 366 U.S. 36, 43-45 (1961).

16. N.Y. JUD. LAW § 53.1 (McKinney 1983). The statute states: "The Court of Appeals may from time to time adopt, amend, or rescind rules not inconsistent with the constitution or statutes of the state, regulating the admission of attorneys and counsellors of law, to practice in all the courts of record of the state." *Id.*

well as a waiting period of seven years until such persons can reapply. All records concerning admission, investigation, suspension or disbarment are sealed and deemed private. However, the appellate division may divulge such records upon good cause, with or without notice. Where the decisions of the committee are appealed, attorney disciplinary records become public if the charges are sustained.[17] To effectuate the foregoing process, the appellate division is required to appoint a character and fitness committee for each department. The members of this committee serve until death, resignation or the appointment of a successor.[18] Applications for admission must be referred to the

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17. N.Y. JUD. LAW § 90(1)(a) (McKinney 1997):

> Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, . . . shall admit him to practice as such attorney and counselor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

Id.

N.Y. JUD. LAW § 90(4)(a) (McKinney 1983). "Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such." *Id.* N.Y. JUD. LAW § 90(5)(b) (McKinney 1983). "If such removal or debarment was based upon conviction for a felony as defined in subdivision four of this section, the appellate division shall have power to vacate or modify such order or debarment after a period of seven years provided that such person has not been convicted of a crime during such seven-year period." *Id.*

18. N.Y. CIV. PRAC. L. & R. 9401 (McKinney 1981):

> The appellate division in each judicial department shall appoint a committee of not less than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state. Each member of such committee shall serve until his death, resignation or the appointment of his successor. A lawyer who has been or who shall be appointed a member of the committee for one district may be appointed

committee for the district in which the applicant resides,[19] and no applicant will be admitted without the committee first certifying his eligibility for admission.[20] Further, each applicant must furnish satisfactory proof that he supports the state and federal constitutions.[21]

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a member of the committee for another district within the same department. *Id.*

19. N.Y. CIV. PRAC. L. & R. 9402 (McKinney 1981):

Every application for admission to practice pursuant to the provisions of paragraph a of subdivision one of section ninety of the judiciary law by a person who has been certified by the state board of law examiners, in accordance with the provisions of section four hundred sixty-four of said law, shall be referred to the committee for the district in which such person actually resided at the time of his application to take the bar examination or to dispense with such examinations, as the case may be. Every application for admission to practice, which is made on motion without the taking of such examination, pursuant to the provisions of paragraph b of subdivision one of section ninety of the judiciary law by a person already admitted to practice in another jurisdiction, shall be referred to the committee for the district in which such person actually resided at the time of such application.

Id.

20. N.Y. CIV. PRAC. L. & R. 9404 (McKinney 1981):

Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation, the justices of the appellate division are authorized to prescribe and from time to time to amend a form of statement or questionnaire to be submitted by the applicant, including specifically his present and such past places of actual residence as may be required therein, listing the street and number, if any, and the period of time he resided at each place.

Id.

21. N.Y. CIV. PRAC. L. & R. 9406 (McKinney 1996):

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

1) that he supports the Constitution of the United States and of the state of New York; and
2) that he has complied with all the requirements of the applicable statutes of this state, the applicable rules of the court of appeals

The New York Court of Appeals has also set forth rules for the admission of attorneys and counselors-at-law.[22] A person shall only be admitted by an order of the appellate division of the supreme court.[23] Every applicant is required to file affidavits of reputable persons that the applicant possesses the good moral character and general fitness requisite for an attorney and counselor-at-law. [24] However, "[s]uch affidavits shall not be conclusive proof as to character and fitness, and the Appellate Division to which the applicant has been certified may inquire further through its committee on character and fitness or otherwise."[25]

Each appellate division has additional rules. The four departments have separate statutes, but they track each other almost word for word. All departments require that every application be referred to a character and fitness committee.[26] All departments set out the rules for hearings on applications that are not approved. The applicant may be represented by an attorney.[27] Further, the committee need not adhere strictly to rules of evidence and may consider hearsay when making a

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and the applicable rules of the appellate division in which his application is pending, relating to the admission to practice as an attorney and counselor at law.

Id.

22. These rules are set forth in Title 22, Subtitle B, Chapter 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York [hereinafter "NYCRR" in text].

23. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.1(a) (1995).

24. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.12 (1995).

25. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.12(b) (1995).

26. N.Y. COMP. CODES R. & REGS. tit. 22, § 602.1(b), § 690.6, § 805.1(b), § 1022.34(b) (1995). All sections state:

Every completed application shall be referred for investigation of the applicant's character and fitness to a committee on character and fitness designated by the Appellate Division of the department to which the applicant is eligible for certification by the State Board of Law Examiners after passing the bar examination, or to which the applicant is applying for admission without examination in accordance with the rules of the Court of Appeals for the admission of attorneys and counsellors at law. *Id.*

27. N.Y. COMP. CODES. R. & REGS. tit.22 § § 602.1(g), 690.11 (1995).

determination.[28] As a preliminary measure, a matriculated law student with a criminal conviction may petition the appellate division for an advance ruling on whether his criminal background would preclude admission to the bar.[29]

A SURVEY OF THE CASE LAW

A survey of the relevant cases reveals a finite list of factors that screening committees consider in their evaluation of an applicant's moral character and fitness. Several tests have emerged over the years, although standards of proof vary among jurisdictions. The New York Court of Appeals, has long recognized the necessity of protecting the public from the practice of law by unqualified individuals.[30] As a result, the court found it necessary to limit the practice of law to those who were specifically trained and qualified;[31] to those persons who would owe a "duty of loyalty to the client alone."[32]

Therefore, the character and fitness committee emerges as the public's guardian. The District of Columbia Court of Appeals stated the concept more precisely. The court found the "principal aims in regulating bar admission [are]. . . the protection of prospective clients, and the assurance of the ethical, orderly, and efficient administration of justice."[33]

By admitting a candidate to the bar, the court certifies to the public at large that this is an individual who may be safely entrusted with the affairs of others.[34] Certification of good moral

28. N.Y. COMP. CODES R. & REGS. tit. 22, § § 602.1(o), § 690.19(a) (1995).

29. N.Y. COMP. CODES R. & REGS. tit. 22, § 602.1(o); § 690.19(a) (1995).

30. New York County Lawyers' Association v. Standard Tax and Management Corp., 181 Misc. 632, 634, 43 N.Y.S.2d 479, 481 (Sup. Ct. N.Y. County 1943).

31. *Id.*

32. *Id.*

33. *In re* Manville, 494 A.2d 1289,1298 (D.C. Cir.. 1985).

34. *In re* A.T., 408 A.2d 1023,1030 (Md. 1979).

character is a condition precedent to admission. Judge Cardozo wrote that "[m]embership in the bar is a privilege burdened with conditions . . . [a] fair private and professional character is one of them . . . [c]ompliance with that condition is essential at the moment of admission; but it is equally essential afterwards."[35] Implicit in this statement is the idea that the requisite moral character and fitness to practice law can change over time. This theme has become central to the analysis of many committees: the applicant, regardless of his past, must be of good moral character at the time of application. Three years later Judge Cardozo stated, "[w]henever the condition is broken, the privilege is lost."[36]

Although good moral character is a prerequisite to admission to the bar, it is difficult to formulate a definition of the term. Justice Black, noting the inherent ambiguity of the term stated, "[i]t can be defined in an almost unlimited number of ways . . .[and] can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law."[37] Justice Frankfurter agreed, stating that "[t]he application of a conception like that of 'moral character' . . . has shadowy rather than precise bounds."[38]

Although character committees lack a litmus test to determine an applicant's good moral character, the term does possess "a core of meaning."[39] In a widely quoted opinion, Justice Frankfurter described that core of meaning as "those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'"[40] The *Manville* court defined that core of meaning as respect for the law and respect for others' rights, trustworthiness, reliability and a sense of professionalism and

35. Rouss v. Ass'n of the Bar of the City of N.Y., 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917).

36. *In re* Popper, 193 A.D. 505, 511, 184 N.Y.S. 406 (1st Dep't 1920).

37. Konigsberg v. State Bar of California, 353 U.S. 252, 263 (1957).

38. Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232,249 (1957).

39. *In re* Manville, 494 A.2d 1289, 1297 (D.C. Cir. 1985).

40. *Schware*, 353 U.S. at 247.

commitment to the administration of justice.[41] These are character traits which are sought in applicants for bar admission as they assure "the ethical, orderly and efficient administration of justice."[42] Although good moral character is a concept which is multifaceted, honesty, reliability, trustworthiness and truthfulness remain the cornerstones of good character.[43]

Several tests to gauge moral fitness have been proposed. The Supreme Court suggested that "the question is whether on the whole record a reasonable man could fairly find that there were substantial doubts about [the applicant's] honesty, fairness and respect for the rights of others and for the laws of the state and nation."[44] However, the Court also cautioned that while a state can require high standards of character in order to qualify for bar admission, such standards must bear a rational connection to the applicant's fitness to practice law.[45] Arbitrarily refusing an applicant admission to the bar may violate Due Process.[46]

A primary indication of fitness is the applicant's present moral character. A Maryland court held, "the ultimate test of present moral character . . . is whether, viewing the applicant's character in the period subsequent to his misconduct, he has so convincingly rehabilitated himself that it is proper that he become a member of a profession which must stand free from all suspicion."[47]

The same court noted that "the cardinal principle governing applications for original admissions to the Bar is that absence of good moral character in the past is secondary to the existence of good moral character in the present."[48] Similarly, in *Schware,* the Supreme Court concluded "that [the candidate's] past membership in the Communist Party does not justify an inference

41. *Manville*, 494 A.2d at 1298.
42. *Id.*
43. *In re* Strait, 577 A.2d 149, 156 (N.J. Sup. Ct. 1990).
44. *Konigsberg*, 353 U.S. at 264.
45. *Schware*, 353 U.S. at 239.
46. *Id.* at 249.
47. *In re* A.T., 408 A.2d 1023, 1027. (Md. 1979).
48. *Id.* at 1027-28.

that he presently has bad moral character."[49] Conversely, some courts look for signs of change in the applicant's moral character as a true measure of fitness to practice law.[50]

The *Manville* court sets forth the factors to be considered in the assessment of the moral fitness of applicants whose backgrounds are tainted by criminal convictions.[51] The nature of the offense,

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49. *Schware*, 353 U.S. at 246. The applicant had been a member of the Communist Party at a time when the party was legal and on the ballot in many states. *Id. See also In re* Kimball, 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973) (holding that the applicant's past conduct was violative of accepted norms, but not controlling where the Committee on Character and Fitness found applicant presently to be of good character and qualified); *Manville*, 494 A.2d at 1295 (applicant pled guilty to voluntary manslaughter twelve years before his application was admitted); *In re* of Rowell, 754 P.2d 905 (Or. 1988) (applicant with a history of misdemeanor and felony drug possession in college found to be presently of good moral character); *In re* Strait, 577 A.2d 149 (N.J. Sup. Ct. 1990) (applicant showed present fitness to practice law notwithstanding prior history of criminal conduct and addiction,).

50. *See Rowell*, 754 P.2d 905, 909 (Or. 1988) ("Perhaps most convincing is the fact that there has been a slow, steady change in applicant's activities. The pattern of behavior exhibited by applicant shows a maturation process that started in 1978 or 1979 and has steadily continued."); *see also Strait*, 577 A.2d at 157 (productive use of one's time subsequent to the misconduct will be credited); Short v. Jaffe, 691 P.2d 163 (Wash. 1984) (whether applicant's moral character has changed sufficiently that he should be admitted to the practice of law); *In re* Blair, 665 A.2d 969, 973 (D.C. Cir. 1995) (applicant not able to demonstrate a substantial change in character and a recognition of his ethical responsibilities).

51. *Manville*, 494 A.2d at 1296-97. The court set out the following criteria to be considered, noting that the list is intended to be illustrative and not exhaustive:

1. The nature and character of the offenses committed.
2. The number and duration of offenses.
3. The age and maturity of the applicant when the offenses were committed.
4. The social and historical context in which the offenses were committed.
5. The sufficiency of the punishment undergone and restitution made in connection with the offenses.
6. The grant or denial of a pardon for offenses committed.
7. The number of years that have elapsed since the last offense was committed, and the presence or absence of misconduct during that period.

the amount of time since the offense, and the applicant's character following the incident of misconduct are also considerations.[52] The seriousness of an applicant's misconduct can prevent admission to the bar. Such was the case in New York where a candidate who had been convicted of bank robbery and first degree murder was precluded from admission to the bar on the basis of the convictions.[53] However, another applicant for an advance ruling was told that his plea of guilty to criminal sale of a controlled substance (a felony) seven years earlier, would not, in and of itself, prevent admission to the bar if all other prerequisites were met.[54] Similarly, a conviction of assault in the second degree, would not, by itself, preclude admission to the bar.[55] Additionally, an applicant was admitted although he had been reprimanded by the grievance committee of another state a year before.[56] Each of the applicants who were admitted in *Manville* had been convicted of a felony over ten years prior to application.[57] The applicant in *Rowell* was admitted based on a finding that he had not used any illegal substances for four years.[58]

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8. The applicant's current attitude about the prior offenses (e.g., acceptance of responsibility for and renunciation of past wrongdoing and remorse).

9. The applicant's candor, sincerity and full disclosure in the filings and proceedings on character and fitness.

10. The applicant's constructive activities and accomplishments subsequent to the criminal convictions.

11. The opinions of character witnesses about the applicant's moral fitness.

Id.

52. *In re* A.T., 408 A.2d 1023, 1027 (Md. 1979).

53. *In re* Roger MM, 96 A.D.2d 1133, 466 N.Y.S.2d 873 (3d Dep't 1983).

54. *In re* Kesselman, 100 A.D.2d 606, 473 N.Y.S. 2d 826 (2d Dep't 1984).

55. *In re* Newhall, 143 A.D.2d 293, 532 N.Y.S.2d 179, (3d Dep't 1988).

56. *In re* Overman, 97 A.D.2d 557, 558, 467 N.Y.S.2d 289, 290 (3d Dep't 1983).

57. *In re Manville*, 494 A.2d at 1294.

58. *In re* Rowell, 754 P.2d 905, 908 (Or. 1988).

The lack of financial responsibility, as shown by an applicant's bankruptcy petition, can be another determinative factor.[59] Similarly, courts have looked to the totality of the circumstances in evaluating the applicant.[60] The candidate's efforts and success towards rehabilitation, especially in cases where the applicant has a history of drug abuse, is considered important.[61] The *Manville* court said, "[t]he more serious the misconduct, the greater the showing of rehabilitation that will be required . . . ."[62]

It is generally held that "views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law."[63] However, an applicant who believed in maintaining a private army was found to be unfit to become a member of the Bar.[64] The statutory requirement[65] relating to loyalty to the state and federal constitutions has been held by the Supreme Court to be constitutional where long usage had "given well defined contours to this requirement which the [committee has] construed narrowly. . . ."[66]

A candidate's lack of candor is a factor which by itself can sink an application. The Supreme Court of New Mexico found that the applicant's refusal to testify candidly before the character and fitness committee adversely reflected on her fitness to practice

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59. *See In re* Anonymous, 74 N.Y.2d 938, 549 N.E.2d 472, 550 N.Y.S.2d 270 (1989).

60. *See Kimball*, 40 A.D.2d at 253, 339 N.Y.S.2d at 304 ("[T]he total background of the applicant may be viewed to determine his character and fitness."); *Manville*, 494 A.2d at 1295 ("[C]ourts tend to consider the facts of each case in light of the totality of the circumstances surrounding an application for bar admission.").

61. *See A.T.*, 408 A.2d at 1026 (applicant with five drug related criminal offenses who served several terms in prison, and eventually was drug-free, a bookkeeper in a law firm, and was granted full executive pardon, was fully and totally rehabilitated from his prior activities).

62. *Manville*, 494 A.2d at 1296 (citing *Matthews*, 462 A.2d at 176).

63. Baird v. State Bar of Arizona, 401 U.S. 1,8 (1971).

64. *In re* Cassidy, 268 A.D. 282, 285, 51 N.Y.S.2d 202, 205(2d Dep't 1944).

65. *See supra* note 20 and accompanying text.

66. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 159 (1971).

law.[67] In *Overman,* the applicant was admitted after the court noted that he had "been scrupulously cooperative and painfully honest with the committee in the course of its investigation and has promptly provided all information required of him."[68]

The standard of proof in a character and fitness investigation varies from jurisdiction to jurisdiction. In Maryland the applicant has to prove fitness by a preponderance of the evidence.[69] In Oregon, proof is by clear and convincing evidence.[70] In New York, the decision appears to be entirely discretionary.[71]

REINSTATEMENT

67. Nall v. Bd. of Bar Examiners, 646 P.2d 1236, 1238 (Sup. Ct. N.M. 1982).

68. *Overman*, 97 A.D.2d at 587, 476 N.Y.S.2d at 291. *See also Rowell*, 754 P.2d at 908 (Applicant was candid with the committee "in admitting his past convictions, . . . behavior and activities. Most of the evidence of applicant's prior bad character was supplied by applicant's own statements and probably would not have been discovered if it were not for applicant's candor." *Id.*); *In re* Strait 577 A.2d 149, 156 (N.J. Sup. Ct. 1990) ("Candor throughout the admission process is critical to a finding of fitness to practice law.")*Id.*; *In re* Blair, 665 A.2d at 969, 971 (D.C. Cir. 1995) (explaining that the committee found repeated indication that he had not been candid in his testimony; and thus his application was denied); *In re* Mendoza, 167 A.D.2d 658, 659, 573 N.Y.S.2d 922 (3d Dep't 1990) ("Candor and the voluntary revelation of negative information by an applicant are the cornerstones upon which is built the character and fitness investigation of an applicant . . . to the New York State Bar." The court concluded that the application "revealed a lack of candor by [the] applicant upon which the Committee could . . . find . . . he does not possess the character and general fitness requisite for an attorney . . . ."). *Id.*

69. *Manville*, 494 A.2d at 1289. *See also Blair* 665 A.2d at 971.

70. *See In re* Rowell, 754 P.2d 905, 907 (Or. 1988).

71. *See Overman*, 97 A.D.2d at 558, 467 N.Y.S.2d at 290 ("[T]he question squarely presented . . . is whether he can be said to possess the character and general fitness requisite for an attorney. . . . such an inquiry is a most difficult one and reasonable men and women may differ in their opinions . . . ."). *Id.*

Are criteria for reinstatement to the bar different than those for admission? In some jurisdictions, they are not. In Oregon, the applicant for admission is in the same position as a similarly situated individual applying for reinstatement. In *Jaffe*, the disbarred attorney could not reapply for admission until five years after the date on which his probation was revoked.[72] In the District of Columbia, however, the court applied a higher standard for reinstatement, reasoning that crimes of moral turpitude perpetrated by a lawyer should be viewed very seriously in light of the lawyer's duty to uphold the law as an officer of the court.[73]

Two prominent New York cases demonstrate that New York follows the Oregon model. Joseph Margiotta, former Republican leader of Nassau County, was disbarred in 1982 following a federal felony conviction.[74] He is now practicing law in Nassau County, having been reinstated approximately five years ago. Likewise, Francis X. Smith, a former administrative judge was convicted in 1987 of lying to a grand jury that was investigating corruption.[75] He was also recently reinstated. [76]

ASSESSING REHABILITATION

There is a conflict between the protection of the public against unscrupulous lawyers and the individual right of a person to

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72. *Jaffe*, 691 P.2d at 165.

73. *Manville*, 538 A.2d at 1136 (citing DISTIRICT OF COLUMBIA CODE OF PROFESSIONAL RESPONSIBILITY EC-15).

74. *In re* Margiotta, 87 A.D.2d 336, 451 N.Y.S.2d 454 (2d Dep't 1982), *aff'd*, 60 N.Y.2d 147, 456 N.E.2d 798, 468 N.Y.S.2d 857 (1983). Joseph Margiotta was found guilty of mail fraud and unlawfully affecting commerce by extortion. *Id.* The court held that the felony conviction for extortion required automatic disbarment. *Id.* at 337, 451 N.Y.S.2d at 454.

75. Joseph P. Fried, *1980's Graft and 1990's Change - For Players in Scandal, Life is Far From the Same*, N.Y. TIMES, March 28, 1996 at B1, B4 (referring to *In re* Smith, 132 A.D.2d 64, 522 N.Y.S.2d 7 (2d Dep't 1987)).

76. *Id.*

practice law.[77] The aspect of rehabilitation is increasingly emphasized by the courts in considering whether applicants with criminal convictions are worthy of admission to bar. Normally, the applicant is expected to not only lead a crime free life, but also to demonstrate "that he has become a useful and significant member of society by some positive action . . . for the betterment of both the applicant and the community."[78] Some courts focus the inquiry on the applicant's future ability to function effectively in the practice of law.[79]

The Georgia Supreme Court defines rehabilitation as "the re-establishment of the reputation of a person by his or her restoration to a useful and constructive place in society."[80]

Ultimately, courts look for the applicant to prove that he has been rehabilitated. To that end, courts focus on the applicant's current mental state. Factors which are considered are the applicant's age at the time of the offense and the likelihood that the applicant will repeat the behavior in the future.[81] This analysis necessarily involves a subjective determination by the Committee.[82] Further complicating the committee's task is the difficulty of predicting the future behavior of a person in a situation he or she has not yet experienced.[83] This task is difficult at best, as "[e]mpirical research suggests that the idea of a consistent moral character, the focus of character and fitness review, is a 'figment of our aspirations.'"[84] Because human behavior is highly situational and may be affected by any one of a number of variables, the probability of predicting future behavior is almost zero.[85]

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77. Stuart Duhl, *Character and Fitness - The Rehabilitation Factor*, 52 BAR EXAMINER 11 (Feb. 1983).

78. *Id.* at 12.

79. *Id.* at 16.

80. *Id.* at 17 (quoting *In re* Carson, 294 S.E.2d 520, 522-23 (Ga. 1982)).

81. *Id.* at 17.

82. *Id.* at 18.

83. Clarke, *supra* note 2 at 58.

84. *Id.* at 59 (citing D.L. Rosenhan, *Moral Character*, 27 STAN L. REV. 925, 934 (1975)).

85. *Id.* (citing D.L. Rosenhan, *Moral Character*, 27 STAN. L. REV. 925, 932-33 (1975)).

The original motive for committing the offense is another factor which is considered in evaluating whether an applicant will commit similar offenses in the future.[86]

There seems to be little correlation between traits which are generally considered elements of a good moral character such as honesty, self-control, or helpfulness, and instead, each of these traits seems to be affected by situational pressures.[87] "The human mind, rather than improving predictions of behavior, actually decreases the accuracy of a prediction."[88] Even trained psychologists cannot predict future misbehavior based on prior acts.[89]

REFORM

Is there a way to ease the task of the committees and the courts in determining whether applicants with questionable past conduct are presently qualified to practice law? In a response to the conflicting interests facing the committees (protecting the public vs. an individual's right to the profession of his choice) several states have adopted a conditional admission program.[90] A borderline applicant is conditionally admitted, and, depending on the nature of his problem, agrees to terms such as counseling, medication, and supervision for a period of years.[91] "If the applicant violates a condition, his or her license is suspended or

86. *Id.* (citing D.L. Rosenhan, *Moral Character*, 27 STAN. L. REV. 925, 932-33 (1975); Alan M. Dershowitz, *Preventive Disbarment: The Numbers are Against It*, 58 A.B.A.J. 815, 816 (1972)).

87. *Id.* (citing D.L. Rosenhan, *Moral Character*, 27 STAN. L. REV. 925, 926 (1975)).

88. *Id.* (citing Alan M. Dershowitz, *Preventive Disbarment: The Numbers Are Against It*, 58 A.B.A.J. 815, 819 (1972)).

89. *Id.* (citing Alan M. Dershowitz, *Preventive Disbarment: The Numbers Are Against It*, 58 A.B.A.J. 815, 819 (1972); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 559 (1985)).

90. *Id.* at 53.

91. *Id.*

revoked. Once the probationary period has ended, the applicant is issued a permanent license to practice law."[92]

Conditional admissions programs allow the applicant to "prove" him or herself capable of ethically practicing law under the watchful eye of the state. This procedure offers a less drastic and more equitable means of protecting the interests of both the public and the individual.[93]

It is suggested that conditional admission is a better solution than trying to determine whether an applicant with a questionable past is presently qualified, given that he has never practiced law before. "Conditional admission allows the state to observe the applicant in the element it is concerned with: the practice of law. . .it actually tests the person in the conditions of a law practice, and does not force the individual to wait for a period of years before again facing the same undefined standard and unnamed and tangled impressions of the board."[94]

CONCLUSION

Modern lawyers are charged with an important and powerful responsibility. The lawyer is the client's sword and shield in the legal arena. The rules of the contest are beyond the understanding of many clients whose fate lies in the hands of their lawyer.

The lawyer is thus in a position of trust. Clearly, there is a need to determine that the aspiring lawyer is worthy of that trust. The character and fitness committees are charged with making this determination.

The decision whether an individual has good moral character necessarily involves some discretionary judgment because moral character can't be measured absolutely. Over the years the committees and the courts have developed certain criteria to estimate moral fitness to practice law. Even so, the increasing number of post-admission disciplinary problems suggests that the pre-admission screening process is not working. While it is true

92. *Id.*
93. *Id.* at 58.
94. *Id.*

that questionable applicants are being screened out, many individuals who will develop problems later are slipping through the process and being admitted.

Perhaps the screening process is not the answer, and instead a focus needs to be placed on training law students to be ethical lawyers. In this vein, it has been suggested that apprenticeships would be a valuable way to teach aspiring lawyers what is really involved in the practice of law, and allow them to learn first hand the problems and pitfalls of the profession. This was the custom in the past. In 1797 a rule was adopted by the Supreme Court in New York that "no person should be admitted to practice as an attorney unless he shall have served a regular clerkship of seven years with a practicing attorney of the court . . . ."[95]

It is difficult, if not impossible, to predict future behavior. Where does this leave the committee member charged with protecting the public from unscrupulous individuals? She must rely on her judgment. The discussion has come full circle; ultimately, the committee must be satisfied that the person possesses the character and general fitness requisite for an attorney.

*Avrom Robin**

95. *In re* Brennan, 230 A.D. 218, 243 N.Y.S. 705, 707 (2d Dep't 1930).

* The author is a 1996 graduate of Touro College Jacob D. Fuchsberg Law Center.