Past Crimes and Admission to the Bar

[N]o man can ever be a truly great lawyer, who is not in every sense of the word, a good man . . . . There is no profession in which moral character is so soon fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public . . . . From the very commencement of a lawyer's career, let him cultivate, above all things, truth, simplicity, and candor: they are the cardinal virtues of a lawyer.¹

Although this statement was written over 100 years ago, today it is still one of the basic tenets of the ABA Code of Professional Responsibility. This comment will explore the question faced by bar admissions boards of almost every state: How far in the past can a lawyer commit a crime and still be admitted to the bar of a particular state?

Good Moral Character

The ABA Code of Professional Responsibility requires that a lawyer neither engage in illegal conduct involving moral turpitude, nor in conduct involving dishonesty.² These two simple requirements, however, have amassed a multitude of cases reflecting the difficulty in interpreting the definition of what is, in fact, “good moral character” of a bar applicant. Should an applicant who has been charged with five criminal offenses, four of which involved theft, be allowed to practice law,³ or should another charged with

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 1-102(A):
   A. lawyer shall not:
   (1) Violate a Disciplinary Rule.
   (2) Circumvent a Disciplinary Rule through actions of another.
   (3) Engage in illegal conduct involving moral turpitude.
   (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation
   (5) Engage in conduct that is prejudicial to the administration of justice.
   (6) Engage in any other conduct that adversely reflects on his fitness to practice law.
only two petty theft offenses, be denied the privilege? Do the facts that an applicant has been involved in civil rights "sit-ins" and has a propensity to engage in physical violence, (nine fights to be exact), mean he will be a less effective attorney than one who attempted to smuggle marijuana in from Mexico, or one who was arrested in a bastardy proceeding? A prospective lawyer's career, in most instances, is determined by the board's initial decision, but the problem facing admissions boards and courts is evident—how to formulate a set rule of law applicable to an infinite variety of situations.

The standard employed in all states for admission to the bar is the simple requirement of "good moral character," and the burden is upon the applicant to establish his good moral character according to the definition and interpretation of the term. Justice Frankfurter described the phrase "moral character" as containing, "shadowy rather than precise bounds," and Justice Black declared:

The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer.

8. See West Publishing Co., Rules for Admission to the Bar (1979); Survey of the Legal Profession, Reports of Consultant and the Advisory and Editorial Committee on Bar Examinations and Requirements for Admission to the Bar (1952); Jackson, Character Requirements for Admission to the Bar, 20 FORDHAM L. REV. 305 (1951); Annot., 64 A.L.R. 2d 301 (1959).
9. See Ex parte Montgomery, 249 Ala. 378, 31 So. 2d 85 (1947); In re Stephenson, 243 Ala. 342, 10 So. 2d 1 (1942); Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1957); In re O'Brien's Petition, 79 Conn. 46, 63 A. 777 (1906); Coleman v. Watts, 81 So. 2d 650 (Fla. 1955); Gordon v. Clinkscales, 215 Ga. 843, 114 S.E.2d 15 (1960); In re Latimer, 11 Ill. 2d 327, 143 N.E.2d 20 (1957); In re Keenan, 313 Mass. 186, 47 N.E.2d 12 (1943); In re Weinstein, 150 Or. 1, 42 P.2d 744 (1935).
Courts, in attempting to ascertain the relationship between good moral character and criminal behavior have generally utilized "moral turpitude," another phrase cloaked in shrouds of vagueness, as the standard upon which an applicant is admitted or denied admission to the bar. Moral turpitude, however, is not always the key; as one court observed, "The test is whether that behavior truly portrays an inherent and fixed quality of character of an unsavory, dishonest, debased and corrupt nature." Ultimately, the board of admissions decides cases on an ad hoc basis viewing each particular set of circumstances, because "there is no litmus test by which to determine whether an applicant for admission to the Bar possesses good moral character . . . ." This ad hoc characteristic makes it extremely difficult to formulate a hard and fast rule on the length of time a board conceptualizes as necessary to elapse between an applicant's past criminal behavior and admission to the bar. A brief overview of several cases will exemplify the subjective nature of the decision which a board must ultimately make, but a general guideline of the factors courts consider may also emerge.

**Surrounding Circumstances**

The landmark case in this area of the law is *Schware v. Board of Bar Examiners,* in which an applicant was denied admission to the New Mexico Bar stemming from his arrests on several occasions (although he was never tried or convicted), and his former membership in the Communist Party. The United States Supreme Court stated a proposition that courts have since then often quoted, requiring any standard of qualification set out by a Bar, such as good moral character, to have "a rational connection with the applicant's fitness or capacity to practice law." The court rationalized that the mere fact that a man has been arrested is not a conclusive statement of his lack of good moral character until the circumstances surrounding the arrest are considered. This guide-
The line has been followed by the majority of courts and is especially important in situations in which the arrest does not involve a crime of moral turpitude. The California Supreme Court has recognized that in cases not involving moral turpitude, "investigation into the circumstances surrounding the commission of the act must reveal some independent act beyond the bare fact of a criminal conviction to show that the act demonstrates moral unfitness and justifies exclusion or other disciplinary action by the bar." Expanding this concept, the United States Supreme Court suggested that, in determining character the nature of the alleged offense also must be taken into account.

The Court of Appeals of Maryland, attempting to follow the Supreme Court's guidelines, came to differing conclusions in two 1978 cases. In *In re David H.*, the applicant had been charged with five criminal offenses between 1968 and 1972, four of which involved theft. In three of the offenses, however, the charges were later dropped. Following his last offense in 1973, he was admitted to law school and graduated with honors in 1976. He was president of the Student Bar Association, and was given the highest honor bestowed by the school. Upon application to take the bar, the State Board of Bar Examiners recommended his admittance because of his candidness and forthrightness in admitting his criminal conduct was the result of his "stupidity and immaturity." The Court, however, evaluated his application differently. Following *Schware*, the court considered the nature of the offenses, but recognized that a prior conviction did not necessarily evidence lack of good moral character, especially where the offenses occurred a number of years in the past, though the requisite number of years was not specified. The crux of the matter, stated the court, was "whether, viewing the applicant's character in the period sub-

20. Id.
24. Id. at 85.
sequent 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.” The Court felt that five years was not a sufficient lapse of time to prove complete rehabilitation, and therefore David H. had not fully demonstrated his rehabilitation to the Court.

Conversely, the applicant in In re Allan S., 28 was admitted to the Maryland Bar even though he had been convicted of two theft offenses one of which postdated his graduation from law school. The Maryland State Board of Bar Examiners did not recommend his admittance, as they did in David H., but the court believed that the lapse of time between the offenses and application demonstrated that there had been a decided improvement in the applicant’s behavior.

The distinction between the cases does not appear to be the length of time which had passed, but instead the fact that the Court viewed David H’s criminal conduct as continuous and aggravated while Alan S’s actions were depicted as isolated criminal transgressions. Ironically the court notes, in David H., 29 that the two offenses for which the applicant was prosecuted postdated his decision to apply to law school, but it fails to mention that one of Allan S’s offenses postdated his graduation from law school. Judge Digges, concurring in David H., 30 recognized this discrepancy and felt Allan S’s application should be denied, because his character lacked the moral fitness that Digges believed all lawyers should possess. He felt that since both David H’s and Allan S’s last transgressions were committed only two years prior to their applications, Allan S. should also be denied admission.

Subjective Aspect

If these decisions seem confused and irreconcilable, a further study only highlights the discrepancies which appear to be due to the great amount of subjectivity inherent in the decision making process. This arbitrariness is exemplified in David H., because the

30. Id. at 88-89.
court admitted that they did not believe he had ceased his criminal activity because of an inborn resolve to change his moral character, but rather because of his prosecution.\textsuperscript{31} Judge Digges recognized the problem and felt the Board’s vague role in the decision to admit a prospective attorney cried out for immediate clarification.\textsuperscript{32} The United States Supreme Court noted the problem of utilizing a qualification as vague as moral character because it “is easily adopted to fit personal views and predilections [and] can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.”\textsuperscript{33} The Florida Bar even extended the subjective aspect further by not using moral turpitude as a standard of good moral character, but instead using a reasonable man standard which denies admittance whenever a reasonable man would have doubts about an individual’s character in relation to honesty, fairness and respect for the rights of others and for the law.\textsuperscript{34} The California Bar approaches the question from a different angle by asking whether the applicant is likely to commit further acts of moral turpitude,\textsuperscript{35} and assuring itself that if admitted the applicant will not obstruct justice or otherwise act unscrupulously.\textsuperscript{36} Subjectivity taints even the California Bar, however, as exemplified by their language in one case where they decided that participation in a brawl did not indicate an “abandoned or malignant heart,”\textsuperscript{37} or such “baseness, vileness, and depravity.”\textsuperscript{38}

In spite of the grotesque nature of the ideas these words conceptualize, the California Supreme Court admirably attempted to analyze all the relevant surrounding circumstances in their 1966 decision to admit an applicant, though only two years had passed since his last fight. His last brawl occurred while he was in law school (he had been involved in eight others), and he had participated and been arrested in acts of civil disobedience to further the cause of civil rights for minorities. He had also been made a ward

\textsuperscript{31} Id. at 87-88.
\textsuperscript{32} In re Allan S., 282 Md. 683, ---, 387 A.2d 271, 281 (1978).
\textsuperscript{33} Konigsberg v. State Bar of Cal., 353 U.S. 232, 262-63. See In re Florida Bd. of Bar Examiners, 358 So. 2d 7 (Fla. 1978).
\textsuperscript{34} Florida Bd. of Bar Examiners, 364 So. 2d 454 (Fla. 1978).
\textsuperscript{36} Id. at ---, 421 P.2d at 87, 55 Cal. Rptr. at 233.
\textsuperscript{37} Id. at ---, 421 P.2d at 92, 55 Cal. Rptr. at 244.
\textsuperscript{38} Id. at ---, 421 P.2d at 93, 55 Cal. Rptr. at 245.
of the juvenile court when he was younger. The court recognized and gave credence to his physical condition of hypothyroidism, and the fact that his father had been a controversial political figure causing the applicant to experience social ostracism and unpopularity when in elementary school. The question as always, the court noted, is whether the applicant presently possesses good character to practice law, and though only two years had elapsed between his last fight and his application the court ordered admittance. At this point, it does not appear to be the number of years that predominate in reaching a decision because fewer years had elapsed in this case than in the David H. case. Instead, the nature of the offense appears determinative when coupled with the applicant's propensity toward criminal behavior.

Nature of Offense v. Time Elapsed

A survey of the cases brings forth one apparent general guideline in that they appear to allow admission when the nature of the offense amounts to something less than moral turpitude, and to deny admission when the crime is inherently corrupt or the time lapse has been short. Consideration of the nature of the offense led the Nevada Supreme Court to deny admission to an applicant who made false statements on his application. He failed to reveal his attempt to coerce a woman to sign a prepared affidavit by threatening to have her arrested for prostitution. Though the incident had occurred over five years prior to his application, the court held that "such a lack of moral perception of careless indifference to the rights of others was shown as to render the court unable to say that the applicant possessed the necessary and upright character..."

In a similar situation, the California Supreme Court believed that good moral character had not been established by an applicant where it was revealed that twenty years prior to his application for admission he had been charged with receiving and aiding in the concealment of stolen property and with forgery, and that in the past ten years he had been charged with misappropriation of guardianship funds, violation of the Mann Act, and issuing a ficti-

39. Id.
41. Id. at --, 447 P.2d at 660; In re Farmer, 191 N.C. 235 (1926).
42. Spears v. State Bar, 211 Cal. 183, 294 P. 697 (1930).
tious check. The applicant asserted that all these charges had been dropped or reversed, but the court answered:

The requirement on his admission is to prevent the accrediting of untrustworthy persons as fit to receive the confidence attending upon the relation of attorney and client. The inquiry may extend to his general character as well as to particular acts. It is broader in its scope than that in a disbarment proceeding.  

Courts appear, on occasion, to use the nature of the offense test to deny admission, not because of any moral depravity on the applicant's behalf, but because the courts and admissions boards view the purpose of the character requirement as a protection of future clients and as a means to safeguard the entire judicial system. An example of this protective nature of the courts was demonstrated by the California Supreme Court. It refused admission to an applicant because two years earlier his co-partner had filed suit against him for profits; he had tried to short-change a restaurant cashier; and he was known to the police generally as a "dice shark." The court recognized that this behavior did not demonstrate a vileness or depravity of character but felt it indicated in the applicant a "want of sincerity and integrity which the law demands of those who are to be allowed the privilege of practicing law."  

Another recent example of utilization of the nature of the offense test was a case involving investigation of the applicant by the Oregon Supreme Court, because they gleaned an impression of the applicant as emotionally immature. The nature of the offenses considered was somewhat general. The applicant was divorced from his first wife because of misconduct with a third person, and he had married this third person, but was involved in getting a divorce from her. He had three traffic offenses and had failed to respond, and it appeared he excessively used intoxicants in public.

46. Id. at —, 224 P. at 772; In re Wells, 174 Cal. 467, —, 163 P. 657, 661 (1917).
He had been charged with disorderly conduct and criminal trespass, and he had general financial trouble. Upon these facts the court said they would normally recommend probation, but felt this case warranted further investigation. Once again, no real depravity or vileness of character was exemplified, just a lack of integrity which was inferred from the nature of the transgressions committed.

In contrast to the above cases, a number of cases may be reviewed in which the court’s decision seems to rest on the length of time elapsing after the criminal act. Applicants bearing past records involving acts of moral turpitude were admitted because the courts believed they presently possessed the requisite good moral character required of every lawyer. The general proposition followed by the majority of courts is that, “every intentional violation of the law is not, ipso facto, grounds for excluding an individual from membership in the legal profession.”

A clear example of this proposition was evidenced by the Vermont Supreme Court, wherein an applicant was allowed admission because four years had passed between the last offense and his request for admission. Prior to his application for admittance he had been charged with intoxication, assaulting and beating his wife, intentionally pointing a firearm at his son, driving while intoxicated, and careless and negligent driving. The court posited the test as questioning whether the applicant’s behavior portrayed an “inherent and fixed quality of character of an unsavory, dishonest, and debased and corrupt nature.” The court noted the absence of dishonesty or corruption in the applicant’s behavior, and the applicant’s proof of his abstinence from intoxicating liquors for four years convinced the court that he now possessed the requisite good moral character. An applicant’s former character is only relevant as it bears on his present fitness, concluded the court, and a reasonable time had elapsed to convince a majority of court of his present fitness.

48. Since the applicant had already lost two years of practice due to previous denials of his application, the court stated that they would investigate further and if there was no new evidence of further deterioration, they would allow admittance.
51. Id. at 671.
Similarly, the Louisiana State Bar was approached by an applicant who had been charged with a crime involving moral turpitude, and had served one-third of his sentence in prison.\textsuperscript{52} He had been charged and convicted with attempting to transport marijuana from Mexico to the United States without paying the transfer tax. He was placed on probation but violated his probation, and was sent to prison to serve the minimum one-third before he was paroled. The court denied his application because only four and a half years had elapsed since the offense, but ordered the Bar to admit the applicant in the next year when five years would have passed, provided no new transgressions had been committed. The Commissioner had recommended that the application process be analogized to reinstatement proceedings, thereby requiring a five year lapse between the last transgression and admission, just as is required in reinstatement.\textsuperscript{53} The court, however, rejected a rigid time rule and opted instead to continue considering the facts of each case on the basis of the totality of the circumstances. Essentially this appears to be the crux of the difficulty in ascertaining a clear rule as to how much time must elapse before an applicant will be admitted. Cases are decided on an ad hoc basis, depending upon the board or court's degree of persuasion as to the applicant's present moral fitness.

Conclusion

The subjective aspect of the admissions process has been repeatedly reiterated, perhaps selfishly, to justify the apparent failure of the goal of this comment. The formulation of a clear cut rule is utterly impossible because so many divergent circumstances are presented, allowing courts to consider different factors in each case. The California Committee of Bar Examiners formulated a general list of characteristics that they consider when the good moral character of an applicant is at issue, and it is likely that some, or all of these, are considered whenever a decision must be made on an applicant:

1. The number of offenses, \textit{i.e.}, whether single, sporadic or repeated,
2. The seriousness of the offenses and the degree of moral

\textsuperscript{52} \textit{In re Dileo}, 307 So. 2d 362 (La. 1975).
\textsuperscript{53} Id. at 364.
turpitude involved;
3. The time of commission, e.g., whether recent or remotely past;
4. The age of the applicant at the time of committing the offense;
5. Any and all mitigating circumstances;
6. Evidence of rehabilitation;
7. The opinion of others as to applicant's moral character;
8. Activities jobs, and civic services;
9. Any other pertinent information. 54

Although it appears that the subjective nature of these decisions will never be entirely eliminated, the admission process cries out for clarification. Future applicants have a need to know, with some assurance, the effect their past behavior may have on their admittance to the bar. Certainly few persons would complete three years of legal studies with the knowledge that they would never be admitted to the bar, or that some set number of years must elapse before they reapply. The unfairness is evident, and some definite rules would be a step in the right direction to remedy the arbitrariness which presently pervades the entire procedure.

Laura Gunn