BAR APPLICANTS: ARE THEIR LIVES OPEN BOOKS?

I. INTRODUCTION

Carpe diem! This is the anthem for many Americans today. We are taught to live each day to the fullest and to do what our hearts desire. Each day we make decisions, some good and some bad, which affect our lives in one way or another. But what happens when we make a decision in our youth which could possibly be viewed by others as being "immoral" or characteristic of "bad character?" More specifically, what happens when an applicant has done things in the past which may infringe upon his or her right to choose a career. The courts have been faced with the woes of those denied admission to the Bar for lack of "good moral character." One of the most obvious concerns of applicants has been the extent to which Bar Associations probe into past "moral character." For instance, if a person has been of "good moral character" in very recent years, should the Bar be allowed to investigate problems of twenty years ago? The courts' treatment of this issue is discussed, in depth, below.

II. GOOD MORAL CHARACTER AS REQUISITE TO ADMISSION TO THE BAR

_Baird v. State Bar of Arizona_ describes the practice of law as being "not a matter of grace, but of right for one who is qualified by his learning and his moral character." Justice Frankfurter once observed that "all the interests of [humanity] that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers." Thus, for obvious reasons, good moral character is required of those entering the legal profession for "the protection of clients and assurances of orderly and efficient administration of justice." As such, it is generally accepted that a state may set high standards of qualification and, to this end, may investigate an applicant's character and

---

1. Latin phrase for "seize the day."
2. 401 U.S. 1 (1971).
3. Id. at 8.

153
fitness to practice law. It is equally clear that all fifty states and the District of Columbia have set qualifications of moral character as preconditions for admission to the practice of law, with the burden of demonstrating good character borne by the applicant. Thus, it is well established that the highest standards of integrity and conduct must be met before a lawyer can be admitted to the bar.

It is a fair characterization of the lawyer’s responsibility in our society that he stands “as a shield” in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth speaking, of 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.”

It is clear that no matter where a Bar applicant wishes to practice law, there are strict character requirements which he or she must first meet. The Supreme Court of Oregon has stated that an applicant for admission to the state bar must prove that he has the requisite character by clear and convincing evidence. Any significant doubts about a bar applicant’s character should be resolved in favor of protecting the public by denying admission to the applicant.

III. IS THE BAR ADMISSION’S BOARD LIMITED TO “CURRENT” MORAL CHARACTER?

In determining whether an applicant is of good moral character, Bar Associations are not limited to considering the applicant’s “current” moral character without consideration of past behavior. Matter of Legg (Legg II) involved a denial based on a hearing to reopen a prior Board decision that the applicant was not of good moral character. In fact, the court reviewed for the second time the denial of the applicant’s applica-

6. See Schware, 353 U.S. at 239; Martin-Trigona v. Underwood, 529 F.2d 33, 38 (7th Cir. 1975); Hawkins v. Moss, 503 F.2d 1171, 1175 (4th Cir. 1974).
9. See id.
11. Id.
tion for admission to the practice of law in North Carolina. The court used that fact to distinguish the case from other cases upon which the applicant had relied. In those cases, the court held that the appropriate standard of review of the general fitness and good character of a Bar applicant is one concurrent with the date of the applicant’s admission to the Bar. The court in *Legg II* was also able to reconcile its decision with that of *Application of Guberman*. In *Guberman*, the Supreme Court of Arizona stated that a prior incident of improper fee splitting with an attorney, could not, alone, be sufficient to show a present lack of good moral character. *Guberman* stated that the question was “[w]hat does the record show about the intervening period of ten years which, when considered in conjunction with his prior conduct, shows either a present presence or absence of good moral character?” Thus, *Legg II* determined that the court in *Guberman* did not reject consideration of prior conduct in determining moral character. As such, the court in *Legg* rejected the applicant’s argument that the Board’s inquiry must be limited to his “current” moral character without consideration of his past behavior.

Thus, *Legg II* clearly stands for the proposition that in determining whether an applicant is of good moral character, the Bar Admissions Board is not limited to considering the applicant’s “current” moral character without consideration of his past behavior. “Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.” In *In re Rogers*, a prior North Carolina case, the court held that “[c]haracter thus encompasses . . . a person’s past behavior.” Thus, the court in *Legg I* determined that past behavior of that individual is an appropriate subject of inquiry: “To disallow consideration

12. *See id.* at 354.
13. Those cases involved an initial denial of an applicant’s admission to the bar by the respective Boards and not, as in *Legg*, a denial based on a hearing from a petition to reopen a prior Board decision. *See id.* at 355.
15. *See id.*
16. *Id.* at 619.
17. *See Legg*, 447 S.E.2d at 356.
18. At least in the context of reopening and reconsideration of a prior decision by the Board of Law Examiners that an applicant is not of good moral character.
20. *Id.*
21. *Id.*
of past behavior would limit the Board's discretion and hinder the effectiveness of a system which exists to ensure the integrity of the legal profession and to protect the public at large." However, as conceded by the court in Legg I, some jurisdictions which have dealt specifically with an initial denial of admission to the Bar have limited the Board's consideration to "current" moral character. In re Sobin\(^2\) is one such case.

In that case, the court held that the applicant had demonstrated that he had good moral character necessary for admission to the Bar, despite his prior felony convictions for conspiracy to manufacture controlled substances and aiding and abetting both interstate prostitution and interstate transportation in aid of interstate racketeering.\(^3\) The applicant's criminal conduct had occurred over ten years earlier,\(^4\) prior to his admission to law school. Moreover, the applicant had since led a productive adult life.\(^5\) Several years after his conviction, the applicant served as an intern for Judge June L. Green, who presided over his case, and also served as a law clerk in the office of Bar Counsel. As such, the court considered the totality of the circumstances and found that the applicant had established that he had the present good moral character required for

---

22. *In re Legg* (Legg I), 386 S.E.2d at 182 (N.C. 1989).
24. *See id.* at 589.
25. The applicant was twenty at the time of his conviction. He pled guilty in the United States District Court for the Eastern District of California to one felony count of conspiracy to manufacture a controlled substance. He received a suspended sentence, and was placed on probation for five years, with the requirement that he perform 200 hours of community service. Subsequently, after records relating to his mother's escort service were discovered, the applicant was convicted on one count of aiding and abetting in interstate prostitution and four counts of aiding and abetting interstate transportation in aid of racketeering. *See id.* at 590.
26. As a result of the applicant's disclosure of his felony convictions, the Bar Admission's Committee instructed him to attend a meeting of the Moral Character Subcommittee. Subsequently, a formal hearing was held regarding the application. After the Committee issued its finding that the applicant had met his burden of demonstrating present good moral character and recommended his admission to the Bar, the District of Columbia Court of Appeals remanded the application to the Committee with instructions that the applicant address four specific issues surrounding the answers supplied on his application. After a second hearing was held, the Committee issued supplemental findings and once again recommended that the applicant be admitted to the Bar. Subsequently, the court remanded the record to the Committee to include in the record a transcript of the applicant's sentencing in the District Court and his probation records. The court also issued an order directing the applicant to show cause why his application should not be denied. *See id.* at 590.
admission to the Bar. It was not hard for the court to distinguish this case from In re Mustafa, in which the applicant was denied admission to the Bar because he had converted funds of the law school’s moot court team for his personal use.

The court relied on two factors which it felt distinguished the two cases. First, in Mustafa, the applicant was denied admission to the Bar because the court determined that “on the record . . . particularly the short period of time that has elapsed since his misconduct, [the applicant] has failed to establish that he has the good moral character required for admission to the Bar.” Mustafa’s application was considered by the court only two and one-half years after the misconduct occurred, whereas Sobin’s misconduct occurred over ten years before his application was considered. While the court declined to formulate a per se rule as to the length of time that must pass between the applicant’s conduct and the applicant’s admission to the Bar, this was a key factor in the court ruling as it did in both cases. This view also appears to be consistent with the Supreme Court of Nevada’s analysis in In re Birmingham, in which the court ruled that there was “insufficient reason to reject the Board’s favorable recommendation and to exclude Mr. Birmingham solely upon the ground of his past conviction and the dissenting Justices’ perceptions that his admission would substantially diminish ‘public confidence in the bar as a whole.’” The court found that the applicant had clearly and convincingly demonstrated rehabilitation from his prior involvement in and conviction for conspiracy to distribute marijuana. While the court did not minimize the seriousness of the applicant’s past misconduct, it refused to deny admission solely upon that ground.

The second factor which the court felt distinguished the two cases was the fact that unlike the applicant in Mustafa, Sobin’s conduct occurred prior to law school during his teenage years of sixteen and nineteen. While acknowledging that a certain level of awareness of ethical

27. See id. at 592.
29. Id. at 46.
30. See Sobin, 649 A.2d at 592.
32. Ten years earlier, the applicant pled guilty to a federal charge of conspiracy to distribute marijuana and served time in prison. See id.
33. Id. at 1152.
34. See id.
35. See id. at 1151.
obligations of a lawyer should be imputed to a third-year, second-semester law student, that court felt that the same level should not be attributed to a teenager who has not yet begun to study law.\textsuperscript{36}

The court in \textit{Sobin} believed its decision to be "consistent with encouraging individuals who have had past troubles to 'turn over a new leaf' and seek admission to the Bar."\textsuperscript{37} Obviously, the applicant's misconduct in \textit{Mustafa} wasn't considered "past" enough, even though almost three years had elapsed. Where should the line be drawn? If the applicant in \textit{Mustafa} had submitted his application for consideration four years after his misconduct in law school, would the result have been different? The answer to these questions remain unclear and will vary from jurisdiction to jurisdiction.

What appears to be the current trend among jurisdictions is illustrated by \textit{Scott v. Connecticut Bar Examining Committee},\textsuperscript{38} in which the Connecticut Superior Court ruled that consideration should be given to years of good conduct and the applicant's present standards of morals, character and general fitness to become a lawyer. The court went on to say that:

In judging an applicant's moral character, examiners typically look for patterns of conduct that may reflect on the individual's honesty, fairness, or respect for the rights of others, or for the laws of the state and nation. . . . Additionally, because the evaluation is to be made of the applicant's present moral character, any pattern of immoral behavior must be sufficiently continuous or current to permit a reasonable inference that similar conduct can currently occur or may likely occur in the future. . . . Reformation from past immoral acts can be shown by a subsequent history of good behavior . . . Thus in assessing moral character for purposes of bar admission only those factors that have a rational connection with applicant's present fitness or capacity to practice law can be considered.\textsuperscript{39}

Thus, despite the applicant's criminal record,\textsuperscript{40} the court ordered that he be admitted to the State of Connecticut Bar.\textsuperscript{41}

\begin{footnotes}
\item[36] \textit{See Birmingham}, 866 P.2d at 1151.
\item[37] \textit{In re Sobin}, 649 A.2d 589, 592 (D.C. 1993).
\item[38] 1990 WL 274568 (Conn. Super. Ct. 1990).
\item[39] \textit{id.} at *3 (quoting \textit{In re Haukebo}, 352 N.W.2d 752, 754 (Minn. 1984)).
\item[40] The applicant's criminal record included possession of marijuana, attempted burglary, disorderly conduct and five motor vehicle violations. \textit{See id.}
\item[41] \textit{See id.} at *4.
\end{footnotes}
The standard which the court ostensibly considered gives an applicant with even the most shaded past the benefit of the doubt. Only conduct which may reflect upon the applicant’s honesty, fairness or respect for the rights of others is considered. Scott is by no means the only case which tends to take such a position. Consider, for example, Application of Allan S. where the court ruled that

[t]he ultimate test of present moral character to original admission to the Bar is whether viewing the applicant’s character in the period subsequent to his misconduct, he has so convincingly rehabilitated

42. But see In re Cason, 294 S.E.2d 520 (Ga. 1982) (court denied admission, finding that the applicant’s five-year rehabilitative period, without doing more than “those things he or she should have done throughout life” is insufficient to overcome the applicant’s criminal activity over a nine-year period); In re George B., 466 A.2d 1286 (Md. 1983) (court denied admission, finding six-year rehabilitative period “to be insufficient duration” where applicant was convicted of attempted robbery of a bank involving an exchange of gunfire); In re Trygstad, 435 N.W.2d 723 (S.D. 1989) (court denied readmission to attorney convicted of distribution of drugs, finding that his rehabilitative efforts over the past five years were insufficient to overcome the gravity of his past); In re Taylor, 647 P.2d 462 (Or. 1982) (court denied admission to applicant who five years earlier had perjured himself to secure acquittal to a charge of theft and seven years earlier had discharged his student loans in bankruptcy with no extraordinary hardship that would ordinarily compel resort to bankruptcy); Application of David H., 392 A.2d 83 (Md. 1978) (court denied admission to applicant who five years earlier had committed numerous thefts over a four-year period).

43. The court in In re Manville (Manville I), 494 A.2d 1289 (D.C. 1985) set out the following list of eleven factors that may be considered in determining whether an applicant whose background is tainted by a criminal conviction is of good moral character:

1. The nature and character of the offenses committed. 2. The number and duration of offenses. 3. The age and maturity of the applicant when the offenses were committed. 4. The social and historical context in which the offenses were committed. 5. The sufficiency of the punishment undergone and restitution made in connection with the offenses. 6. The grant or denial of a pardon for offenses committed. 7. The number of years that have elapsed since the last offense was committed, and the presence or absence of misconduct during that period. 8. The applicant’s current attitude about the prior offenses (e.g., acceptance of responsibility for and renunciation of past wrongdoing, and remorse). 9. The applicant’s candor, sincerity and full disclosure in the filings and proceedings on character and fitness. 10. The applicant’s constructive activities and accomplishments subsequent to the criminal convictions. 11. The opinions of character witnesses about the applicant’s moral fitness.

See id. at 1296-97.

44. 387 A.2d 271 (Md. 1978).
himself that it is proper that he become a member of a profession which must stand free from all suspicion. . . . That the absence of good moral character in the past is secondary to the existence of good moral character in the present is a cardinal principle in considering applications for original admission to the Bar.⁴⁵ This standard of review perhaps better serves the purpose of "encouraging individuals who have had past troubles to 'turn over a new leaf' and seek admission to the Bar."⁴⁶

Oregon's Supreme Court in In re Rowell⁴⁷ was also willing to consider present character, despite the applicant's blemished past. The court held that the applicant had the requisite good moral character notwithstanding a criminal history which stemmed from drug and alcohol abuse. Of particular importance to the court was the fact that the applicant had not used any illegal substance for the preceding four years, had been in control of his drinking problem for seven years, and was candid with the Bar in admitting his past convictions and past behavior and activities.⁴⁸ Thus, one thing that seems clear, at least in Oregon, is that an applicant who has past run-ins with the law may nevertheless be admitted to practice law. Rowell seems to imply that the result would have been the same, no matter how serious the past crimes had been, if the applicant presently possessed the good moral character that is characteristic of a lawyer. However, in Board of Law Examiners v. Stevens,⁴⁹ the Texas Supreme Court gave little credence to the applicant's evidence of good moral character. The applicant had failed to file and pay taxes for fourteen years and there were also three unsatisfied judgments against him.⁵⁰ Although the Court recognized that "good moral character, standing alone, is easily adapted to fit personal views and predilections, and can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law,"⁵¹ it nevertheless concluded that the applicant did not possess the necessary good character. The Court found that the applicant

demonstrated a marked disrespect for the law as shown by his failure

⁴⁵. Id. at 275.
⁴⁷. 754 P.2d 905 (Or. 1988).
⁴⁸. The applicant was candid with the admission's Committee and listed all of his criminal convictions on his bar application, as well as providing them at the hearing. See id.
⁴⁹. 868 S.W.2d 773 (Tex. 1994).
⁵⁰. See id.
⁵¹. Id. at 776.
to file federal income tax returns for a number of years and by his failure to arrange for satisfaction of three (3) outstanding civil judgments based upon nonpayment of various debts;... demonstrated a longstanding lack of financial responsibility in his dealings with creditors and the Internal Revenue Service; that there is a clear and rational connection between the applicant's disrespect for the law and his lack of financial responsibility on the one hand and the likelihood that he will injure a client, obstruct the administration of justice or fail to carry out his responsibilities if he is licensed to practice law on the other.52

In Stevens, even though the applicant had not been convicted of a crime, he was nevertheless found to lack the necessary good moral character. The Court noted that "[i]t would be small comfort to the public if the only ethical standard for admission to the Texas Bar were an absence of convictions involving serious crimes and crimes of moral turpitude."53 This case can be easily reconciled with cases, such as Scott, where the court allowed applicants with criminal records to be admitted to the practice of law. Most of the cases that have allowed admittance to the Bar, despite the applicant's criminal past, have involved crimes that occurred several years prior to the applicant even beginning law school. The applicants in those cases could demonstrate that he or she had "turned over a new leaf" and was thus "rehabilitated." Also, in most of those cases, the applicants did not try to hide their criminal past when filing out their Bar applications. In Stevens, on the other hand, not only did the applicant fail to reveal his sorted past with the Internal Revenue and his creditors, but he also continued to neglect his obligations for years.

Some jurisdictions have taken what has been coined the "behavioral approach."54 Under the behavioral approach, the focus is on a pattern of immoral conduct, and the applicant is required to overcome the presumption that similar conduct will recur in the future.55 The court in In re Haukebo56 recognized that although good moral character has traditionally been defined as "absence of proven conduct or acts which have been historically considered as manifestations of 'moral turpitude,'"57 the con-

52. Id. at 775.
53. Id. at 776.
55. See Haukebo, 352 N.W.2d at 755.
56. Id.
57. Id. at 754 (quoting Konigsberg v. State Bar of California, 353 U.S. 252, 263
cept has gradually been expanded in the Bar admissions context to include concern for “misconduct clearly inconsistent with standards of a lawyer’s calling.” While an applicant’s moral character is judged on the basis of past and present patterns of conduct or behavior, the court emphasized the importance of the applicant’s current situation. The applicant in Haukebo had been convicted three times for driving while intoxicated over a period of two years. Based upon this, the Admissions Board refused to admit him unless he provided them with a satisfactory chemical dependency evaluation from a Board-approved agency or successfully completed a treatment program with such agency. After the applicant had conformed to the board’s request, based on the chemical dependency evaluations, the board nevertheless denied admission to the applicant. The court was not convinced that the Board focused on the applicant’s pattern of behavior. The court reiterated that “good moral character, for purposes of bar admission, shall be determined from the applicant’s pattern of conduct or behavior.” The court noted that, on remand, the applicant should be able to submit any evidence tending to explain or show reform and rehabilitation from the acts or conduct upon which the negative moral character determination by the Board had been based.

Even under the so called “behavioral approach,” the applicant has an

(1957) (mere fact of membership in the Communist Party does not support an inference that a bar applicant lacks good moral character)).

58. Id. (quoting Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 159 (1971)).

59. The court made it clear that because evaluations are to be made based on the applicant’s present moral character, any pattern of immoral behavior must be sufficiently continuous or current to permit a reasonable inference that similar conduct can currently occur or may likely occur in the future. . . . in assessing moral character for purposes of bar admission, only those factors that have a rational connection with the applicant’s present fitness or capacity to practice law can be considered.

Id. at 754-55.

60. See Haukebo, 352 N.W.2d at 754-55.

61. The court considered the fact that the Board required particular proof by which the applicant could show that he had overcome his past record and could establish his present good moral character. See id. at 756.

62. See id.

63. The applicant testified that he had married and changed his lifestyle and drinking habits since the time of his last conviction. The court considered this evidence of tending to show reform from past immoral acts. See id.
opportunity to overcome past misconduct. There wasn’t a suggestion by the court in *Haukebo* of exactly how “past” the conduct or behavior had to be. However, the applicant’s application for admission to the Bar was first considered in 1982, right after he graduated from law school. His prior convictions for driving while intoxicated occurred between 1979 and 1981. Even though only a year or so had passed since the applicant’s last conviction, the court seemed to be saying that the applicant might nevertheless have been able to show that he possessed the requisite good moral character. Compare the *Mustafa* decision, where emphasis was placed on the fact that only two years had passed since the applicant’s misconduct. If the behavioral approach had been used in that case, the result would likely have been different. The applicant had paid back all of the money and had maintained a clean record since the misconduct. Further, it is doubtful that his conduct or behavior would have been considered a “pattern.” Nevertheless, the cases indicate that the approach taken by the court will make all the difference.

Even though Bar Admissions Boards have broad investigative power and wide discretion, in each case there is still a requirement that the applicant be afforded due process. The court in *Schware v. Board of Law Examiners* held that “[a] State cannot exclude a person from the practice of law . . . in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.”

The issue in that case was whether the applicant had been denied a license to practice law in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The applicant had been a member in the Communist party, had a record of arrests and had used various aliases. The Court conceded that “[a] State may 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 applicant’s fitness or capacity to practice law.” The Court held that the State of New Mexico had deprived the applicant of due process in denying him an opportunity to qualify for the practice of law. The Court concluded that in light of the

---

64. See id.
66. Id. at 238-39.
67. See id. at 236.
68. See id. at 239.
69. Id. at 247.
applicant's forceful showing of present good moral character, the evidence upon which the State relied—the arrests of offenses for which the applicant was neither tried nor convicted, the use of aliases several years earlier, and membership in the Communist Party more than fifteen years earlier—did not justify an inference that he presently had bad moral character.  

IV. CONCLUSION

There are broad considerations when discussing the investigative procedures utilized by Bar Associations to examine the character of applicants. What seems clear, however, when it comes to the determination of what is considered "good moral character," is that the Bar is not limited to current moral character. Questions remain as to how far into an applicant's past the Bar should be allowed to go. The answer will vary from state to state and will largely depend on the approach taken by that particular Bar Association.

Brendalyn Burrell-Jones

70. At the hearing before the Board, the applicant called his wife, the rabbi of his synagogue, a local attorney and the secretary to the dean of the law school to testify about his character. See Schware, 353 U.S. at 247.
71. See id.