
NOTES

ARE YOU IN OR ARE YOU OUT? THE EFFECT OF A PRIOR CRIMINAL CONVICTION ON BAR ADMISSION & A PROPOSED NATIONAL UNIFORM STANDARD

I. INTRODUCTION

After completing law school, an aspiring attorney must face one of the most stressful events of his or her young career: the bar exam. Along with the written portion of the test, the state examines the recent graduate's moral character and fitness before granting him the right to practice law within its jurisdiction.¹ A state will fail an applicant if it believes he does not "possess the 'requisite character' needed to 'protect the public' from dishonest lawyers and incompetent legal services."² Yet, instead of having admission based on a clear set of nationally defined criteria, the attorney licensing process has been left up to the determination of each state.³ As a result, some states have passed specific guidelines and requirements for judging an applicant's moral character, while others deny "admission based on subjective personal feelings, beliefs and attitudes of the Bar Examiners."⁴ While there are many separate areas taken into consideration during the character and fitness review, this Note focuses on an applicant's past criminal conduct

1. See NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, at viii (Erica Moeser & Margaret Fuller Corneille eds., 2008) [hereinafter COMPREHENSIVE GUIDE], available at http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/2008CompGuide.pdf.

2. EVAN GUTMAN, STATE BAR ADMISSIONS AND THE BOOTLEGGERS SON ch. 6 (Bar Admission Publishing 2005), available at www.baradmissions.com/BARADMISSION%20BOOK.htm.

3. COMPREHENSIVE GUIDE, *supra* note 1, at viii.

4. GUTMAN, *supra* note 2, at ch. 6; see COMPREHENSIVE GUIDE, *supra* note 1, at 6-7 chart II.

and how that affects his ability to become a lawyer—a critical element in the moral character and fitness evaluation process.⁵

This Note begins with an analysis of the overall effect a person's past criminal conduct has on employment opportunities, in general. This establishes a foundational background of how criminal conduct is viewed and applied during the regular hiring process. The section highlights the different practices of specific states and then compares those to the federal law.

Next, the Note describes why states evaluate an applicant's prior criminal conduct during the character and fitness portion of the bar exam. The Supreme Court has acknowledged the importance of good moral character in future attorneys because, ultimately, lawyers are the "guardians of our fundamental liberties."⁶ To demonstrate the purpose of including a person's criminal conduct in the evaluation process, the American Bar Association's ("ABA") interpretation is set forth along with the reasoning of two other states.

From there, the Note compares the requirements each state uses to evaluate an applicant's moral character and fitness. Because there is no national standard, most jurisdictions have different processes, guidelines, and requirements a candidate must fulfill. This Note contrasts states that have adopted guided standards against those that apply purely subjective ones. Additionally, there is a large discrepancy between the individual states when determining the impact people's past criminal conduct will have on their admission into the state's bar. As evidence, the Note discusses an automatic approach and various presumptive disqualification approaches. These procedures can produce inconsistent decisions when an applicant is evaluated under two different states' character and fitness standards.

In continuing to highlight the discrepancies between the states' inconsistent evaluation processes, the Note describes different ways an applicant may be admitted to practice law in a state without passing its moral character and fitness requirements. Examples include situations where a currently practicing attorney is admitted into another state's bar through reciprocity or by taking an attorney's exam.

Finally, a National Uniform Standard is proposed, providing guidelines for all character committees to follow and applicants to fulfill. A uniform standard will give each candidate a consistent and predictable

5. See COMPREHENSIVE GUIDE, *supra* note 1, at viii-ix.

6. Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*, 39 CAL. W. L. REV. 1, 3 (2002).

means of evaluating how his past criminal conduct will impact his chances of gaining admission to the bar. Furthermore, it will help cure the inconsistent decisions between the states and make the level of accountability equal for all candidates, regardless of the reviewing state.

II. THE EFFECT OF A PRIOR CRIMINAL CONVICTION ON AN INDIVIDUAL'S APPLICATION FOR EMPLOYMENT, IN GENERAL

Before beginning to describe the heightened ethical standards of the legal profession, and the need to factor prior criminal conduct into an applicant's admission to the bar, it is necessary to briefly outline how a prior criminal conviction may legally affect a layman's employment application. Doing so establishes a ground level as to what actions an employer is legally permitted to take when it is informed of an applicant's previous criminal conviction. Additionally, this section helps to reveal the justification as to why criminal convictions may be taken into account when hiring. As each state creates their own laws with respect to employment hiring procedures, this section compares different state practices, as well as delineates the federal standard.

A. State Standards

1. New York

New York has codified the employer's permissible response to an applicant's criminal record.⁷ During the hiring process, an employer may inquire into an applicant's criminal convictions,⁸ but may not deny his employment based upon his criminal history unless "there is a direct relationship between" the criminal conviction "and the specific license or employment sought,"⁹ or if "the employment would involve an unreasonable risk . . . to the safety or welfare of specific individuals or

7. N.Y. CORRECT. LAW §§ 750-755 (McKinney 2003 & Supp. 2008).

8. *See id.* § 752. An offense is considered a crime if it is a misdemeanor or a felony. N.Y. PENAL LAW § 10.00(6) (McKinney Supp. 2008).

9. N.Y. CORRECT. LAW § 752(1); *see, e.g.*, *Rosa v. City Univ. of N.Y.*, 789 N.Y.S.2d 4, 5-6 (N.Y. App. Div. 2004) (holding that an individual's discharge was appropriate where his criminal actions were directly connected to his employment as a teacher). A "[d]irect relationship means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question." N.Y. CORRECT. LAW § 750(3).

the general public.”¹⁰ In assessing whether there is a direct relationship between the employment sought and the crime of which the applicant was convicted, or whether the employment would pose an unreasonable safety risk, the employer may consider:

- (a) The public policy of [the] state . . . to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license or employment sought
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of the occurrence of the criminal offense.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.¹¹

New York passed these laws to eliminate the bias against ex-convicts, which was consequently preventing them from securing employment after they served their debt to society.¹² When the ex-offenders could not obtain employment upon release, such rejection

10. N.Y. CORRECT. LAW § 752(2).

11. *Id.* § 753(1).

12. *Bonacorsa v. Van Lindt*, 523 N.E.2d 806, 808-09 (N.Y. 1988).

inhibited their rehabilitation into society and “contribut[ed] to a high rate of recidivism.”¹³ Therefore, the New York legislature enacted these statutes to “remove this obstacle to employment by imposing an obligation on employers and public agencies to deal equitably with ex-offenders while also protecting society’s interest in assuring performance by reliable and trustworthy persons.”¹⁴

2. California

California has no such statute directly prohibiting denial of employment based on an applicant’s prior criminal convictions.¹⁵ It has, however, enacted a per se bar of employment as a peace officer if one “has been convicted of a felony.”¹⁶ As for other types of employment, California has submitted itself to the federal standard when determining whether an employer’s denial of employment based on the applicant’s criminal record was legal.¹⁷

B. Federal Standards

The federal standards are issued by the Equal Employment Opportunity Commission (“EEOC”), which have deemed that it is unlawful for an employer to have a per se policy rejecting an applicant based on the fact that he has a prior criminal conviction without a justifying business necessity, pursuant to Title VII of the Civil Rights Act of 1964.¹⁸ When an applicant accuses an employer of having such a policy, and that policy has an adverse impact on a protected class of which the applicant belongs, the employer must show that it considered (1) the nature and gravity of the offense or offenses; (2) the time that has passed since the conviction and/or completion of the sentence; and (3)

13. *Id.* at 809.

14. *Id.*

15. *See* *Hetherington v. Cal. State Personnel Bd.*, 147 Cal. Rptr. 300, 307 (Cal. Ct. App. 1978) (“The status of being an ex-felon has nothing to do with [California’s] equal opportunity laws.” (referring to CAL. GOV’T CODE §§ 19702.1-.2 (West 1995))).

16. CAL. GOV’T CODE § 1029.

17. *Id.* § 19702.1; *Hetherington*, 147 Cal. Rptr. at 307.

18. 42 U.S.C. § 2000e-2(k) (2005); *Criminal Conviction Policy Racially Biased*, CCH EEOC Decisions (1973) ¶ 6352 (Mar. 30, 1972); *Non-Hire of Negro Draft Evader Indicated Race Bias*, CCH EEOC Decisions (1983) ¶ 6418 (Feb. 12, 1974); *Rejection of Bus Driver Applicant for Conviction Unjustified*, CCH EEOC Decisions (1983) ¶ 6715 (Dec. 15, 1977); *Criminal Convictions Justify Rejection of Black Applicant*, CCH EEOC Decisions (1983) ¶ 6720 (June 8, 1978).

the nature of the job held or sought when proving their decision was based on a business necessity.¹⁹ A business necessity is defined as follows:

It is likewise apparent that a neutral policy, which is inherently discriminatory, may be valid if it has overriding business justification. . . . However, this doctrine of business necessity, which has arisen as an exception to the amenability of discriminatory practices, “connotes an irresistible demand.” The system in question must not only *foster* safety and efficiency, but must be *essential* to that goal. . . . In other words, there must be no acceptable alternative that will accomplish that goal “equally well with a lesser differential racial impact.”²⁰

These standards were enacted due to the adverse impact on African-Americans and Hispanics when an employer’s hiring practice automatically excluded convicted offenders.²¹ Statistics have shown that those races are convicted at a disproportionate rate, greater than their representation in the population, and therefore, they are being discriminated against when such employment practices are implemented.²²

III. THE EFFECT THAT PRIOR CRIMINAL MISCONDUCT MAY HAVE ON AN APPLICANT’S ABILITY TO SECURE LEGAL EMPLOYMENT

While non-legal employers, in some states, are prohibited from refusing to employ potential candidates based on their past criminal misconduct, prospective attorneys may not be afforded the same luxury.²³ As a result, it is necessary to evaluate how the legal profession itself may view a potential associate’s failure to be admitted to the bar,

19. *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977).

20. *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1297-98 (8th Cir. 1975) (citing *United States v. St. Louis-S.F. Ry. Co.*, 464 F.2d 301, 308 (8th Cir. 1972)).

21. *See, e.g.*, *Criminal Conviction Policy Racially Biased*, ¶ 6352; *Non-Hire of Negro Draft Evader Indicated Race Bias*, ¶ 6418; *Rejection of Buss Driver Applicant for Conviction Unjustified*, ¶ 6715; *Criminal Convictions Justify Rejection of Black Applicant*, ¶ 6720; *Possession of Weapon Conviction Not Related to Rubber Work*, CCH EEOC Decisions (1983) ¶ 6822 (Aug. 1, 1980); *Application Demanding Arrest Record Information Results in Bias*, CCH EEOC Decisions (1983) ¶ 6714 (Nov. 7, 1977).

22. *Criminal Conviction Policy Racially Biased*, ¶ 6352; *Non-Hire of Negro Draft Evader Indicated Race Bias*, ¶ 6418; *Rejection of Buss Driver Applicant for Conviction Unjustified*, ¶ 6715; *Criminal Convictions Justify Rejection of Black Applicant*, ¶ 6720; *Possession of Weapon Conviction Not Related to Rubber Work*, ¶ 6822; *Application Demanding Arrest Record Information Results in Bias*, ¶ 6714.

23. *See supra* Part II.A.1.

and the affect that will have on various employment offers. An aspiring attorney not only has to pass the state's written examination, but must also pass the state's moral character and fitness requirements before becoming a licensed attorney.²⁴ Private firms, public legal employers, and federal agencies may have policies that will negatively affect employment offers, if one is unable to secure admittance to the state bar.²⁵

Many private firms extend fulltime employment offers to summer associates who have not been admitted to the bar, or even graduated from law school.²⁶ As a result, many of these offers are contingent upon the applicant fulfilling the above two requirements.²⁷ For example, Latham & Watkins, a prominent international law firm,²⁸ includes the following policy in all offer letters given to prospective associates:

Any attorney who is not admitted to practice in the jurisdiction in which his or her office is located within a reasonable time of joining the firm, generally within six months after results of the Bar exam are announced, will be placed on an unpaid leave of absence until the firm receives confirmation from the state Bar²⁹

Because of clauses like these, an associate's past criminal misconduct may make him ineligible to retain employment, if he failed to fulfill his bar's moral character and fitness requirements.³⁰

Additionally, public legal employers, such as the King's County District Attorney's Office, have comparable policies.³¹ However, unlike some private firms, the King's County District Attorney's Office will not extend employment offers to those who are not first admitted to the bar.³² Consequently, employment opportunities may be forgone because an applicant is unable to fulfill and pass the necessary bar

24. See COMPREHENSIVE GUIDE, *supra* note 1, at vii-ix.

25. See *Summary of General Policies and Benefits for US-Based Summer Associates & Associates*, (Latham & Watkins LLP, New York, N.Y.) Mar. 19, 2008 [hereinafter *Latham & Watkins General Policies*] (on file with authors); Press Release, Fed. Labor Relations Auth., Career Opportunity Announcement (July 16, 2008) (on file with authors); Brooklynda.org, Employment Opportunities, <http://www.brooklynda.org/office/employment.htm> (last visited Oct. 14, 2008).

26. See *Latham & Watkins General Policies*, *supra* note 25.

27. See *id.*

28. Latham & Watkins, LLP., About Latham, About the Firm, <http://www.lw.com/AboutLatham.aspx?page=About> (last visited Oct. 14, 2008).

29. See *Latham & Watkins General Policies*, *supra* note 25.

30. See *id.*

31. See Brooklynda.org, *supra* note 25.

32. See *id.*

requirements.³³

Finally, federal agencies, such as the Federal Labor Relations Authority, have similar policies for their attorneys.³⁴ Within their employment requirements for a general labor attorney, “[a]pplicants must have earned their first professional law degree (LL.B. or J.D.) from an accredited law school and must have been admitted to the Bar.”³⁵ Like both the private firms and the public legal employers, an applicant applying to this federal agency would be unable to apply for the position if he failed to fulfill the necessary moral character and fitness requirements, as this would prohibit admission to the bar.³⁶

As a result of these policies, the failure to pass the moral character and fitness portion of the bar may have detrimental effects on an applicant’s employment options, as he may be placed on unpaid leave or prevented from even applying for a potential legal position.³⁷ Consequently, having a consistent national uniform standard will enable potential candidates to foresee how their individual case will be examined, and how any prior criminal misconduct may affect their legal employment opportunities.

IV. REASONS WHY AN APPLICANT’S PRIOR CRIMINAL CONDUCT IS A NECESSARY INQUIRY FOR THE MORAL CHARACTER AND FITNESS PORTION OF THE BAR

The United States Supreme Court has indicated that attorneys are to be the “guardians of our fundamental liberties.”³⁸

All the interests of man that are comprised under the constitutional guarantees given to “life, liberty, and property” are in the professional keeping of lawyers. From a profession charged with such responsibility there must be exacted 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.”³⁹

33. *See id.*

34. *See* Press Release, Fed. Labor Relations Auth., *supra* note 25.

35. *Id.*

36. *See id.*

37. *See* Latham & Watkins General Policies, *supra* note 25; Brooklynda.org, *supra* note 25; Press Release, Fed. Labor Relations Auth., *supra* note 25.

38. Ritter, *supra* note 6, at 3.

39. *Id.* (citing *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 247 (1957) (Frankfurter, J.,

When assessing one's character,⁴⁰ criminal acts are reviewed because "[w]here serious or criminal misconduct is involved, positive inferences about the applicant's moral character are difficult to draw, and negative character inferences are stronger and more reasonable."⁴¹ Unlawful acts tend to imply a "pattern of antisocial behavior," which consequently calls into question the applicant's moral character.⁴² This section discusses why the several states and the ABA find it necessary to consider an applicant's prior criminal conduct when determining whether he possesses the requisite character and fitness to become an attorney and why states are cautious to allow those with a record of unlawful activity to practice within their borders.

A. American Bar Association's Purpose

Every state requires bar applicants to fulfill some kind of moral character and fitness standard before being admitted to practice in its jurisdiction.⁴³ Although most have different standards and guidelines, all states factor in a person's prior criminal activity in their decision.⁴⁴ According to the National Conference of Bar Examiners and the ABA, "[t]he . . . purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice."⁴⁵ Because attorneys are in a fiduciary position and trusted to provide accurate guidance and advice, it is essential the public can faithfully depend on the practice of law as a whole.⁴⁶ As a result, a "lawyer should be one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant may constitute a basis for denial of admission."⁴⁷ Criminal or unlawful acts are seen as relevant conduct when determining moral character and fitness because,

concurring)).

40. Character includes the applicant's past and present behavior in conjunction with the views and opinions of people in their surrounding community. George L. Blum, Annotation, *Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar*, 3 A.L.R.6th 49, 49 (2005).

41. *Id.*

42. *Id.*

43. See COMPREHENSIVE GUIDE, *supra* note 1, at viii, 6-9.

44. See *id.* at 6-9.

45. *Id.* at vii.

46. See *id.*

47. *Id.* at viii.

at some point, the applicant was acting against the laws of justice: the laws which he now seeks to uphold.⁴⁸ Since the individual states are not required to adopt the ABA's standards, most have their own reasons for applying certain standards or guidelines in their decisions.

B. California's Purpose

The State of California considers prior criminal activity in the moral character and fitness portion of the bar because it may show that an applicant does not have "respect for the law and the rights of others," which is an integral part of upholding and enforcing the justice system.⁴⁹ It determined that an applicant who has been "convicted of violent felonies, felonies involving moral turpitude and crimes involving a breach of fiduciary duty are presumed not to be of good moral character."⁵⁰ However, committing these crimes does not automatically prohibit a person's admission to the California bar.⁵¹

The California Supreme Court held that not every criminal act is an automatic ground for exclusion.⁵² "There is certain conduct involving fraud, perjury, theft, embezzlement, and bribery where there is no question but that moral turpitude is involved."⁵³ Nevertheless, because there are laws that do not reflect the "principles of morality," there are crimes that would not necessarily involve moral turpitude.⁵⁴ As a result, California conducts an "investigation into the circumstances surrounding the commission of the [unlawful] act[, which] 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."⁵⁵ These individual investigations help provide reassurance to the profession and community that licensed attorneys will not "obstruct the administration of justice or otherwise act

48. *See id.* at vii-ix.

49. State Bar of California, Statement on Moral Character Requirement for Admission to Practice Law in California, <http://calbar.ca.gov> (follow "About the Bar" hyperlink; then follow "Bar Exam" hyperlink; then follow "Moral Character" hyperlink; then follow "Statement on Moral Character Requirement for Admission to Practice Law in California" hyperlink) (last visited Oct. 14, 2008).

50. *Id.*

51. *See id.*

52. *Hallinan v. Comm. of Bar Exam'rs*, 421 P.2d 76, 85 (Cal. 1966) (citing *In re Rothrock*, 106 P.2d 907, 910 (Cal. 1940); *Baker v. Miller*, 138 N.E.2d 145, 147 (Ind. 1956)).

53. *Hallinan*, 421 P.2d at 85 (quoting *Baker*, 138 N.E.2d at 147).

54. *Id.* (quoting *Baker*, 138 N.E.2d at 147).

55. *Id.*

unscrupulously in his capacity as an officer of the court.”⁵⁶

C. New York’s Purpose

New York’s Rules of Professional Conduct reveal that it places a high regard on the integrity and competence of attorneys in the field.⁵⁷ The State requires aspiring attorneys to possess “the character and general fitness requisite for an attorney and counsellor-at-law,”⁵⁸ which has been held as “encompassing no more than ‘dishonorable conduct relevant to the legal profession.’”⁵⁹ It is the duty of the State (and the members of its bar) to keep out applicants who may not uphold these standards, as it puts its citizens at risk of obtaining sub-par representation if it fails to do so.⁶⁰ Recognizing this concern, New York’s rules establish that a person who has “engage[d] in illegal conduct that adversely reflects on [his] honesty, trustworthiness or fitness as a lawyer” may not possess the necessary integrity and competence to practice law in its jurisdiction.⁶¹

D. The Common Thread

After comparing California, New York, and the ABA’s reasons for addressing criminal conduct within the moral character and fitness requirements, a similar theme arises. Each state holds the protection of its citizens and the public interest in high regard and will take precautionary measures to protect those concerns. Attorneys are placed in a position of upholding the laws and regulations of the state, as well as the nation as a whole. Those who have breached this duty in the past may have a higher percentage of engaging in similar unprofessional conduct in the future. As a result, each state requires new members to

56. *Id.* at 87.

57. N.Y. RULES OF PROF’L CONDUCT R. 1.1, pmb. ¶ 1 (2009).

58. N.Y. JUD. LAW § 90 (McKinney 2002).

59. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 159 (1971) (citing *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117, 144 n.20 (S.D.N.Y. 1969) (Motley, J., concurring)), *cited with approval in In re Anonymous*, 577 N.E.2d 51, 54 (N.Y. 1991) (citations omitted).

60. *See* N.Y. RULES OF PROF’L CONDUCT R. 8.1, pmb. ¶¶ 1, 4-5 (2009). *See generally* N.Y. JUD. LAW §§ 53, 90 (McKinney 2002) (specifying the New York Court of Appeal’s authority to formulate rules with respect to bar admission of attorneys and counselors at law, detailing the New York Appellate Division’s process for admitting or removing attorneys or counselors at law from practicing, and also discussing the function of its character committee).

61. N.Y. RULES OF PROF’L CONDUCT R. 8.4(b) & cmt. 2, pmb. ¶ 1 (2009).

reveal prior criminal acts in order to preserve the integrity and ethical responsibility of the profession.

V. THE SYSTEM AS IT IS APPLIED TODAY

The underlying assumption of this Note is that each state's individual determination of the impact of a prior criminal conviction on a bar applicant's present moral character leads to many inconsistencies when looked at on a national level. Although the ABA has issued guidelines for states to consider when forming their respective standards of character and fitness, those standards have not been universally adopted and are vague in key areas of the assessment process.⁶²

It is logical to assume that an applicant who has a prior criminal conviction could take state *A* and state *B*'s bar exams within a short period of time, pass state *A*'s character and fitness exam, but fail state *B*'s on the basis that state *B*'s determination of good moral character is more heavily affected by a criminal conviction. This leads to a seemingly illogical result: permitting the applicant to practice law in the former's jurisdiction but not in the latter's, even though his personal moral character was no different when he applied to practice in both. Such inconsistencies are even more apparent when one considers alternate means of admission to state bars, such as admission to practice on motion, attorney exams administered to currently practicing lawyers, certain reciprocity agreements between states, and *pro hac vice* admission.

A. The ABA's Suggested Character and Fitness Standards

The ABA proposes that a bar applicant's record of conduct should "justif[y] the trust of clients, adversaries, courts and others with the respect to the professional duties owed to them," and that a record that demonstrates "a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant may constitute a basis for denial of admission."⁶³ It then distinguishes "unlawful conduct" as a factor that requires further inquiry when assessing an applicant's present character.⁶⁴ If such conduct is revealed or discovered during the process, the bar examining authority should weigh the significance of such

62. COMPREHENSIVE GUIDE, *supra* note 1, at viii.

63. *Id.*

64. *Id.*

conduct by considering:

- the applicant's age at the time of the conduct
- the recency of the conduct
- the reliability of the information concerning the conduct
- the seriousness of the conduct
- the cumulative effect of conduct or information
- the evidence of rehabilitation
- the applicant's positive social contributions since the conduct
- the applicant's candor in the admissions process
- the materiality of any omissions or misrepresentations.⁶⁵

The ABA makes no suggestion as to the weight each factor should receive when determining the applicant's present moral character.⁶⁶

B. States Application of Suggested Standards

Presently, states are not required to adopt the ABA's standards.⁶⁷ As a result, different states have set different standards in this area, some adhering closely to the ABA's recommendations while others give them

65. *Id.*

66. *See generally id.* (emphasizing no one factor over another).

67. *See, e.g., In re Dortch*, 486 S.E.2d 311 (W. Va. 1997). State's Constitution vests in the highest court of the state the power to determine the standards of admission for the practice of law, and consequently, their character and fitness standards. *Id.* at 317 (quoting *Lane v. W. Va. State Bd. of Law Exam'rs*, 295 S.E.2d 670, 673 (W. Va. 1982)).

virtually no credence. To demonstrate these inconsistencies, California's and New York's approaches of assessing the applicant's present moral character are compared. California has an extremely guided approach, adopting the ABA's standards and adding some of their own to the assessment process, while New York's standards are very subjective, leaving the applicant with almost no insight on how his review will be determined.

1. Guided Approach

California is an example of a state with very detailed guidelines to assess the negative impact of a prior criminal conviction on bar admission.⁶⁸ These guidelines were created in order to help determine whether or not a person has satisfied the state's moral character and fitness requirements.

The following factors, although not inclusive, may be considered in

68. See California State Bar, Factors Regarding Moral Character Determination, <http://calbar.ca.gov> (follow "About the Bar" hyperlink; then follow "Bar Exam" hyperlink; then follow "Moral Character" hyperlink; then follow "Factors that May be Taken into Consideration When Evaluating the Rehabilitation of an Applicant Seeking a Moral Character Determination" hyperlink) (last visited Oct. 8, 2008). Other jurisdictions that use a guided approach are Alaska, Arkansas, Arizona, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming. ALASKA BAR R. 2, § 1(d) (2007); RULES GOVERNING THE ADMISSION TO THE BAR OF ARK. app., Reg. 8 (2008); RULES FOR ADMISSION OF APPLICANTS TO THE PRACTICE OF LAW IN ARIZ. R. 36(b)(2) (2005); REGULATIONS OF THE CONN. BAR EXAM'G COMM. Art. VI-5(c) (2008), available at <http://www.jud.state.ct.us/cbec/regs.htm>; RULES OF THE SUP. CT. RELATING TO ADMISSION TO THE BAR OF FLA. R. 3-12 (2008); HAW. BD. OF BAR EXAM'RS R. § 2.6(d) (2004); ILL. COMP. STAT. ANN. BAR ADMISSIONS R. 6.5 (West Supp. 2008); LA. SUP. CT. R. XVII, § 5(D) (2008); MINN. RULES FOR ADMISSION TO THE BAR R. 5(B)(4) (2007); RULES OF PROCEDURE OF THE COMM'N ON CHARACTER & FITNESS OF THE SUP. CT. OF MONT. § 4(c) (2007), available at <http://www.montanabar.org> (follow the "Admission to the Bar" hyperlink, then follow "Board of Examiner's Rules" hyperlink); NEB. CT. R. app. A (2008); NEV. SUP. CT. R. add. 1, § IV(21)-(25) (2008); N.J. REGULATIONS GOVERNING THE COMM. ON CHARACTER Reg. 303:6 (2002); N.M. RULES GOVERNING THE ADMISSION TO THE BAR R. 15-103 (2008); N.C. Bd. of Law Exam'rs Character & Fitness Guidelines, <http://www.ncble.org> (follow the "Character & Fitness" hyperlink) (last visited Oct. 23, 2008); N.D. ADMISSION TO PRACTICE R. 1(A)(2)(c) (2007); SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO R. 1, § 11(D)(4) (1993); RULES GOVERNING THE UTAH STATE BAR R. 14-708 (2008); RULES OF THE VA. BD. OF BAR EXAM'RS, tit. 54.1, § III(2); WASH. ADMISSION TO PRACTICE R. 24.2(b) (2007); RULES FOR ADMISSION TO THE PRACTICE OF LAW IN W. VA. R. 5.0, <http://www.state.wv.us/wvsca> (follow the "Board of Law Examiners" hyperlink; then follow "Rules for Admission to Practice of Law" hyperlink); RULES AND PROCEDURE GOVERNING ADMISSION TO THE PRACTICE OF LAW IN WYO. R. 40.1 (2007); *In re Dortch*, 860 A.2d 346, 356 (D.C. 2004).

determining whether an applicant has the good moral character required for admission to practice law in California:

1. The nature of the act of misconduct, including whether it involved moral turpitude, whether there were aggravating or mitigating circumstances, and whether the activity was an isolated event or part of a pattern.
2. The age and education of the applicant at the time of the act of misconduct and the age and education of the applicant at the present time.
3. The length of time that has passed between the act of misconduct and the present, absent any involvement in any further acts of moral turpitude. The amount of time and the extent of rehabilitation will be dependent upon the nature and seriousness of the act of misconduct under consideration.
4. Restitution to any person who has suffered monetary losses through related acts or omissions of the applicant.
5. Expungement of a conviction.
6. Successful completion or early discharge from probation or parole.
7. Abstinence from the use of controlled substances or alcohol for not less than two years if the specific act of misconduct was attributable in part to the use of a controlled substance or alcohol. Abstinence may be demonstrated by, but is not necessarily limited to, enrolling in and complying with a self-help or professional treatment program.
8. Evidence of remission for not less than two years if the specific act of misconduct was attributable in part to a medically recognized mental disease, disorder or illness. Evidence of remission may include, but is not limited to, seeking professional assistance and complying with the

treatment program prescribed by the professional and submission of letters from the psychiatrist/psychologist verifying that the medically recognized mental disease, disorder or illness is in remission.

9. Payment of the fine imposed in connection with any criminal conviction.
10. Correction of behavior responsible in some degree for the act of misconduct.
11. Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.
12. Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.
13. Change in attitude from that which existed at the time of the act of misconduct in question as evidenced by any or all of the following:
 - a. Statements of the applicant.
 - b. Statements from family members, friends or other persons familiar with the applicant's previous conduct and with subsequent attitudes and behavioral patterns.
 - c. Statements from probation or parole officers or law enforcement officials as to the applicant's social adjustments.
 - d. Statements from persons competent to testify with regard to neuropsychiatric or emotional

disturbances.⁶⁹

These standards help limit subjective decisions and provide applicants with the ability to fairly predict the outcome of their character exam. Yet, these guidelines might be so detailed that they hand-cuff the state's Board of Examiners into making purely systematic decisions.

2. Unguided Approach

On the other hand, New York is an example of a state whose guidelines are extremely subjective.⁷⁰ Its determination of an applicant's character and fitness is controlled by the state's judiciary laws,⁷¹ which gives the State's high court the power to "adopt, amend, or rescind rules not inconsistent with the constitution or statutes of the state, regulating the admission of attorneys and counsellors at law, to practice in all the courts of record of the state."⁷² With this power, the court enacted the rule that:

Every applicant for admission to practice must file with a committee on character and fitness appointed by the Appellate Division of the Supreme Court affidavits of reputable persons that applicant possesses the good moral character and general fitness

69. California State Bar, *supra* note 68.

70. See N.Y. COMP. CODES R. & REGS. tit. 22, § 520.12 (2007). Other states that use an unguided approach are Alabama, Colorado, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, and Wisconsin. See RULES GOVERNING ADMISSION TO THE ALA. STATE BAR R. V (2008); RULES GOVERNING ADMISSION TO THE BAR OF THE STATE OF COLO. R. 201.6-7 (1998); DEL. SUP. CT. R. 52 (2008); SUP. CT. OF GA. RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW Part. A, § 6 (2005); IDAHO BAR COMM'N R. 208, available at <http://www2.state.id.us/isb/PDF/IBCR.pdf>; IND. RULES OF CT. RULES FOR ADMISSION TO THE BAR & THE DISCIPLINE OF ATTORNEYS R. 12 (2007); IOWA CT. R. 31.9 (2008); KAN. SUP. CT. R. 702 (2004); KY. SUP. CT. R. 2.011 (2008); ME. BAR ADMISSION R. 5, 9 (2007); RULES GOVERNING ADMISSION TO THE BAR OF MD. R. 5 (2005); MASS. SUP. CT. R. 3:01, § 1.1 (2008); STATE OF MICH. BD. OF LAW EXAM'RS R. 2(C) (2008); NEV. SUP. CT. R. 51(4) (2008); N.H. SUP. CT. R. 42 (2008); RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF OKLA. R. 1, § 1 (2008); R.I. SUP. CT. R. Art. II, R. 3 (2008); S.C. APP. CT. R. 402 (2008); TENN. SUP. CT. R. 6, 7 (2008); RULES OF ADMISSION TO THE BAR OF THE VT. SUP. CT. § 3 (2008); WIS. SUP. CT. R. 40.06 (2006).

71. See generally N.Y. JUD. LAW §§ 53, 90 (McKinney 2002) (specifying the New York Court of Appeal's authority to formulate rules with respect to bar admission of attorneys and counselors at law, detailing the New York Appellate Division's process for admitting or removing attorneys or counselors at law from practicing, and also discussing the function of its character committee); N.Y. COMP. CODES R. & REGS. tit. 22, § 520.12 (specifying the process by which an applicant sets forth proof of his moral character).

72. N.Y. JUD. LAW § 53(1).

requisite for an attorney- and counselor-at-law as required by section 90 of the Judiciary Law. The number of such affidavits and the qualifications of persons acceptable as affiants shall be determined by the Appellate Division to which the applicant has been certified.

....

. . . The Appellate Division in each department may adopt for its department such additional procedures for ascertaining the moral character and general fitness of applicants as it may deem proper, which may include submission of a report of the National Conference of Bar Examiners.⁷³

This rule makes reference to New York Judiciary Law section 90, but that law also provides no substantive qualification, merely stating that that an applicant shall be admitted to practice in the state if he passes the written bar examination and the examining board is “satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law.”⁷⁴

Section 90(4)(a) goes on to state that “[a]ny person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph (e) of this subdivision,⁷⁵ shall upon such conviction, cease to be an attorney and counsellor-at-law, *or to be competent to practice law as such.*”⁷⁶ Subsection (4)(g) then states, “[u]pon a judgment of conviction against an attorney becoming final the appellate division of the supreme court shall order the attorney to show cause why a final order of suspension, censure or removal from office should not be made.”⁷⁷ This section of the Judiciary Law has allowed courts to deny admission to the New York state bar based solely upon the applicant’s prior criminal conviction.⁷⁸ Additionally, these vague and unguided standards make no mention as to what type, and the

73. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.12(a), (c).

74. N.Y. JUD. LAW § 90(1)(a).

75. Paragraph (e) states:

For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.

Id. § 90(4)(e).

76. *Id.* § 90(4)(a) (emphasis added).

77. *Id.* § 90(4)(g).

78. *In re Anonymous*, 42 A.D.3d 656, 657 (N.Y. App. Div. 2007).

amount of, evidence the applicant has to provide to “show cause” why he should not be prohibited from practicing law within the state. They give the applicant no realistic opportunity to determine whether he possesses the requisite moral character to practice in New York.⁷⁹

C. Weight Given to a Prior Criminal Conviction During a State’s Character and Fitness Determination

One of the biggest inconsistencies of each state’s determination of an applicant’s character and fitness is the degree of impact a prior criminal conviction has on admissibility. Some states will automatically prohibit an applicant from entering the bar if the individual has been convicted of certain crimes,⁸⁰ while others merely require the applicant to establish present “good moral character,” and do not specifically mention a prior criminal conviction as a determining factor.⁸¹ In this section, the different approaches of each state are discussed.

1. Automatic Rejection

A minority of states employ a per se disqualification approach when determining whether an applicant has the requisite moral character to practice law.⁸² Mississippi is the only state to set forth a rule absolutely disqualifying an applicant if the individual has been convicted of a felony.⁸³ Missouri and Texas use a limited per se bar approach, prohibiting an applicant from practicing law within their jurisdiction for “five years after the date of successful completion of any sentence or

79. *Cf. id.*; *Wiesner v. Rosenberger*, No. 98 Civ. 1512(HB), 1998 WL 695927, *4-5 (S.D.N.Y. 1998). New York’s character requirements are not so vague as to be deemed unconstitutional. *Id.* at *5.

80. RULES GOVERNING ADMISSION TO THE MISS. BAR R. VIII, § 6(I) (1991). Mississippi mandates that anyone “who has been . . . convicted of a felony, [not including] manslaughter, or a violation of the Internal Revenue Code . . . , shall be incapable of obtaining a license to practice law.” *Id.*

81. *E.g.*, KAN. SUP. CT. R. 702 (2004).

82. Maureen M. Carr, *The Effect of Prior Criminal Conduct on the Admission to Practice Law: The Move to More Flexible Admission Standards*, 8 GEO. J. LEGAL ETHICS 367, 381-83 (1995).

83. RULES GOVERNING ADMISSION TO THE MISS. BAR R. VIII, § 6(I). Mississippi prohibits anyone “who has been . . . convicted of a felony, . . . manslaughter, or a violation of the Internal Revenue Code excepted, shall be incapable of obtaining a license to practice law.” *Id.* *But see* Carr, *supra* note 82, at 382 n.78 (“[T]he Committee on Character and Fitness and the Board of Bar Examiners may nevertheless consider the ‘character of the applicant surrounding the commission of the criminal act and what steps have been taken by the applicant for rehabilitation.’”) (citation omitted).

period of probation [for a felony conviction].”⁸⁴ After the five-year prohibition period, Texas requires an applicant to prove “present good moral character and fitness” by a preponderance of evidence,⁸⁵ and Missouri mandates the applicant affirmatively prove a number of additional requirements including that “[t]he cause has abated; . . . [all victims, if any,] ha[ve] received restitution [and have been notified that the applicant has filed an application]; . . . [a]ll special conditions, if any, imposed have been accomplished; and . . . [t]he best interest of the public will be served if the applicant receives a license.”⁸⁶

Oregon will deny admission to any applicant “having been convicted of a crime, the commission of which would have led to disbarment in all the circumstances present, had the person been an Oregon attorney at the time of conviction,”⁸⁷ defining such crimes as those “that reflect[] adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”⁸⁸ Finally, Indiana automatically rejects any applicant “who advocates the overthrow of the government of the United States or [Indiana] by force, violence or other unconstitutional or illegal means.”⁸⁹

These states represent the “traditional view that ‘certain illegal acts—regardless of the likelihood of their repetition in a lawyer-client relationship—evidence attitudes toward law that cannot be countenanced among its practitioners; to hold otherwise would demean the profession’s reputation and reduce the character requirement to a meaningless pretense.’”⁹⁰ But as will be shown, most states use a more flexible standard when determining the effect of a prior criminal conviction on an applicant’s present moral character.⁹¹

84. RULES GOVERNING THE MO. BAR & THE JUDICIARY R. 8.04(a) (2008); RULES GOVERNING ADMISSION TO THE BAR OF TEX. R. IV(d)(2) (2006).

85. RULES GOVERNING ADMISSION TO THE BAR OF TEX. R. IV(f)(2).

86. RULES GOVERNING THE MO. BAR & THE JUDICIARY R. 8.04(b).

87. RULES REGULATING ADMISSION TO PRACTICE LAW IN OR. R. 3.10 (2008), available at http://www.osbar.org/_docs/rulesregs/admissions.pdf.

88. OR. RULES OF PROF’L CONDUCT R. 8.4(a)(2) (2006), available at http://www.osbar.org/_docs/rulesregs/orpc.pdf.

89. IND. RULES OF CT., RULES FOR ADMISSION TO THE BAR & THE DISCIPLINE OF ATTORNEYS R. 12, § 3 (2008).

90. Carr, *supra* note 82, at 383 (quoting Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 537 (1985)).

91. *See id.* at 383-84.

2. Presumptive Disqualification

Although the vast majority of states do not automatically disqualify an applicant for a prior criminal conviction, there still is a disparity between those states as to how heavily impacted the applicant will be if the individual has previously acted unlawfully.⁹²

At all times, the burden is on the applicant to establish present good moral character.⁹³ If an applicant's character is questioned, virtually all states greatly emphasize proof of rehabilitation to overcome such an inquiry.⁹⁴ Additionally, a majority of states heavily consider "the applicant's candor [during] the admissions process" when determining present moral character.⁹⁵ "While prior criminal conduct is not necessarily an automatic bar, in many states 'if an applicant does not disclose prior criminal conduct, the non-disclosure is typically considered fraudulent, and will typically result in a negative recommendation of the candidate's admission to the state supreme court.'"⁹⁶

a. Criminal Conduct "Affects" a Finding of Good Moral Character

One of the more vague approaches used dictates that a prior criminal conviction "affects" the state's finding that an applicant possesses the necessary moral character to practice law in its jurisdiction.⁹⁷ States implementing such an approach include Alabama,⁹⁸

92. See *infra* Part V.C.2.a-b.

93. E.g., HAW. SUP. CT. R. 1.3(c)(2) (2004).

94. Carr, *supra* note 82, at 386. A Georgia court established the rehabilitation requirements as follows:

For bar fitness purposes, rehabilitation is the reestablishment of the reputation of a person by his or her restoration to a useful and constructive place in society Payment of the fine or service of the sentence imposed, and not committing further crimes, standing alone do not prove rehabilitation. Merely showing that an individual is now living as and doing those things he or she should have done throughout life, although necessary to prove rehabilitation, does not prove that the individual has undertaken a useful and constructive place in society. Positive action showing rehabilitation may be evidenced by such things as a person's occupation, religion, or community service. The requirement of positive action is appropriate for applicants for admission to the bar because service to one's community is an implied obligation of members of the bar.

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

95. See *id.* at 386-87.

96. *Id.* at 387 (citation omitted).

97. See COMPREHENSIVE GUIDE, *supra* note 1, at 8.

98. See RULES GOVERNING ADMISSION TO THE ALA. STATE BAR R. V (2004). Additionally,

Alaska,⁹⁹ Arkansas,¹⁰⁰ California,¹⁰¹ Colorado,¹⁰² Delaware,¹⁰³ Hawaii,¹⁰⁴ Idaho,¹⁰⁵ Indiana,¹⁰⁶ Kentucky,¹⁰⁷ Louisiana,¹⁰⁸ Maine,¹⁰⁹ Michigan,¹¹⁰ Minnesota,¹¹¹ North Dakota,¹¹² Pennsylvania,¹¹³ Tennessee,¹¹⁴ Washington,¹¹⁵ West Virginia,¹¹⁶ and Wyoming.¹¹⁷ Little guidance is given to the state's character committees, and as such, these committees have a lot of discretion when making their determinations.

b. Heavy Burden of Producing Clear and Convincing Evidence of Full and Complete Rehabilitation and Present Good Moral Character

Other states weigh unlawful conduct more heavily and require the applicant to "prov[e] full and complete rehabilitation subsequent to

Alabama requires an applicant who has been convicted of a crime to have been granted a full pardon and have all civil rights restored before consideration. COMPREHENSIVE GUIDE, *supra* note 1, at 8.

99. See ALASKA BAR R. 2, § 1(d)(1) (Supp. 2007).

100. See RULES GOVERNING ADMISSION TO THE BAR OF ARK. app., Reg. 8 (2008). The applicant must establish present good moral character by a preponderance of the evidence. *Partin v. Bar of Ark.*, 894 S.W.2d 906, 908 (Ark. 1995).

101. See California State Bar, *supra* note 68.

102. See RULES GOVERNING ADMISSION TO THE BAR OF THE STATE OF COLO. R. 201.9(4)(a) (2007). The applicant must establish present good moral character by a preponderance of the evidence. *Id.* R. 201.10(3).

103. See BD. OF BAR EXAM'RS OF THE DEL. SUP. CT. R. 7.

104. See HAW. BD. OF BAR EXAM'RS RULES OF PROCEDURE R. 2.6(c), (d) (2004).

105. See IDAHO BAR COMM'N R. 208, available at <http://www2.state.id.us/isb/PDF/IBCR.pdf>.

106. See IND. RULES OF CT., RULES FOR ADMISSION TO THE BAR & THE DISCIPLINE OF ATTORNEYS R. 12, § 2 (2008). Although Indiana holds that an applicant with a prior felony conviction "prima facie shall be deemed lacking the requisite of good moral character," the state does not indicate the applicant's burden of proof to rebut such presumption. *Id.* Because of the ambiguity of the applicant's burden of proof, it appears that a prior criminal conviction *affects bar admission* in Indiana.

107. See KY. SUP. CT. R. 2.011 (2008).

108. See LA. SUP. CT. R. XVII, § 5(C)(19), (D) (2008). "[T]he applicant must affirmatively show that his/her character has been rehabilitated and that such inclination or instability is unlikely to recur in the future." *Id.* § 5(D).

109. See ME. BAR ADMISSION R. 5(b) (2007).

110. See STATE OF MICH. BD. OF LAW EXAM'RS R. 2(c) (2008).

111. See MINN. STATE BD. OF LAW EXAM'RS, CHARACTER & FITNESS FOR ADMISSION TO THE BAR §§ 9, 11 (2007), available at http://www.ble.state.mn.us/character_and_fitness.html.

112. See N.D. ADMISSION TO PRACTICE R. 1 (2007).

113. See PA. BD. OF LAW EXAM'RS BAR ADMISSIONS INFORMATION HANDBOOK 8, 10 (2008).

114. See TENN. SUP. CT. R. 7, § 6.01, R. 8.4 (2008).

115. See WASH. ADMISSION TO PRACTICE 24.2 (2008).

116. See RULES FOR ADMISSION TO THE PRACTICE OF LAW IN W. VA. R. 5.0 (1995).

117. See RULES & PROCEDURES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN WYO. R. 401, 402(d) (2007).

conviction . . . by clear and convincing evidence.”¹¹⁸ These jurisdictions include Arizona,¹¹⁹ Connecticut,¹²⁰ Georgia,¹²¹ Florida,¹²² Illinois,¹²³ Maryland,¹²⁴ Ohio,¹²⁵ District of Columbia,¹²⁶ Virginia,¹²⁷ South Dakota,¹²⁸ Utah,¹²⁹ Ohio,¹³⁰ North Carolina,¹³¹ New Mexico,¹³² New Jersey,¹³³ and Montana.¹³⁴ Furthermore, many of these states give the committee’s recommendations extreme deference, holding it will not reverse their findings unless they are arbitrary.¹³⁵

Four states, Arizona, Connecticut, Indiana, and Utah, went one step further and declared that an applicant with a prior felony conviction is presumed not to have the necessary moral character to practice law.¹³⁶ The candidate must then rebut such presumption with evidence to prove

118. *In re Cason*, 294 S.E.2d 520, 522 (Ga. 1982) (citations omitted).

119. RULES FOR ADMISSION OF APPLICANTS TO THE PRACTICE OF LAW IN ARIZ. R. 36(b) (2005).

120. REGULATIONS OF THE CONN. BAR EXAMINING COMM. Art. VI-3, VI-5(b)(vii) (2006).

121. *In re Cason*, 294 S.E.2d at 522 (citations omitted). Additionally, Georgia requires either a full “pardon or restoration of civil rights” after conviction to be considered. *See* COMPREHENSIVE GUIDE, *supra* note 1, at 8.

122. RULES OF THE SUP. CT. RELATING TO ADMISSION TO THE BAR OF FLA. R. 3-13 (2008). Additionally, Florida requires restoration of civil rights after conviction to be considered. *See* COMPREHENSIVE GUIDE, *supra* note 1, at 8.

123. *In re Krule*, 741 N.E.2d 259, 260 (Ill. 2000).

124. *In re James G.*, 462 A.2d 1198, 1200-01 (Md. 1983) (citing *In re Allan S.*, 387 A.2d 271, 275 (Md. 1978)).

125. *In re Davis*, 313 N.E.2d 363, 364-65 (Ohio 1974).

126. *In re Dortch*, 860 A.2d 346, 354 (D.C. 2004) (citing R. D.C. CT. APP. 46(e)).

127. RULES OF THE VA. BD. OF BAR EXAM’RS § 3(1), (3)(vii) (2006), *available at* <http://www.vbbs.state.va.us/barrules.html>.

128. RULES & REGULATIONS FOR ADMISSION TO PRACTICE LAW IN S.D. § 16-16-2.2 (2008).

129. RULES GOVERNING THE UTAH STATE BAR R. 14-708(a) (2008).

130. OHIO SUP. CT. RULES FOR THE GOV’T OF THE BAR R. 1, § 11(D) (2008).

131. N.C. Bd. of Law Exam’rs Character & Fitness Guidelines, *supra* note 68.

132. N.M. RULES GOVERNING ADMISSION TO THE BAR R. 15-103(D) (2008).

133. REGULATIONS GOVERNING THE COMM. ON CHARACTER R. 303:6 to :7 (2002), *available at* <http://www.njbarexams.org/commchar/char.htm>.

134. RULES OF PROCEDURE OF THE COMM’N ON CHARACTER & FITNESS OF THE SUP. CT. OF MONT. § 4(a) (2007), *available at* <http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=6>.

135. *See, e.g., In re Krule*, 741 N.E.2d 259, 260 (Ill. 2000) (citing *In re Glenville*, 565 N.E.2d 623, 627 (Ill. 1990)).

136. RULES FOR ADMISSION OF APPLICANTS TO THE PRACTICE OF LAW IN ARIZ. R. 36(b)(2)(A) (2005) (including convictions for “misdemeanor[s] involving a serious crime” into the presumption of lack of good moral character as well); REGULATIONS OF THE CONN. BAR EXAMINING COMM. Art. VI-11(i) (2006); IND. RULES FOR ADMISSION TO THE BAR & THE DISCIPLINE OF ATTORNEYS R. 12, § 2 (2008) (“Anyone who has been convicted of a felony prima facie shall be deemed lacking the requisite of good moral character . . .”); RULES GOVERNING THE UTAH STATE BAR R. 14-708(f)(3) (2008).

otherwise.¹³⁷ A felony conviction “may result, in the absence of evidence to the contrary, in a finding of lack of good moral character and/or fitness to practice law.”¹³⁸ Therefore, in these jurisdictions, a prior felony conviction may, in and of itself, disqualify a candidate.

c. Subjective Standards

Twelve jurisdictions give their respective committees on character and fitness almost unfettered discretion on whether to grant an applicant’s admission into its bar. Since most states have different subjective requirements, it is necessary to briefly describe each state’s approach.

Massachusetts and Oklahoma have the most subjective standards, both giving their Board of Bar Examiners complete discretion when determining whether an applicant should be admitted to the bar.¹³⁹ Neither state sets forth any guidelines for their committees to follow, and neither mention prior criminal convictions as a factor to be considered when making their determination.¹⁴⁰ Massachusetts merely requires that “[a]ll petitions for admission shall be referred to the Board of Bar Examiners for a report as to the character, acquirements and qualifications of the applicant.”¹⁴¹ Almost as vague, Oklahoma requires an applicant to “have good moral character, due respect for the law, and fitness to practice law” to be admitted to the bar.¹⁴²

Similarly, Vermont, Iowa, and Nebraska do not specifically factor in prior criminal convictions when assessing an applicant’s moral character.¹⁴³ But unlike Massachusetts and Oklahoma, these states have

137. See sources cited *supra* note 136.

138. REGULATIONS OF THE CONN. BAR EXAMINING COMM. Art. VI-11.

139. See MASS. R. SUP. JUD. CT. 3:01, § 1.3 (2008); RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF OKLA. R. 11 (2008); OKLA. STAT. ANN. tit. 5, § 14 (West 2001).

140. See generally MASS. BD. OF BAR EXAM’RS, INFORMATION RELATING TO ADMISSION OF ATTORNEYS IN MASSACHUSETTS, 1-2 (2006), available at <http://mass.gov/bbe/barapprulesaug2002.pdf> (setting forth the Rules of the Supreme Judicial Court of Massachusetts without providing guidelines for a determination of what constitutes “good moral character”); RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF OKLA. R. 1, 3, 11 (outlining ambiguous requirements for admission to the bar in Oklahoma, but providing no guidance or standards for those requirements and making no reference to the impact of an applicant’s past criminal conduct).

141. MASS. R. SUP. JUD. CT. 3:01, § 1.3.

142. RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF OKLA. R. 1, § 1.

143. RULES OF ADMISSION TO THE BAR OF THE VT. SUP. CT. § 11(b)(1) (2008); IOWA CT. R. 31.9(1) (2008); NEB. CT. R app. A (2008).

rules in place that may allow them to indirectly consider unlawful conduct when making their determinations.

Iowa's Supreme Court allows its Board to "procure the services of any bar association, agency, organization, or individual qualified to make a moral character or fitness report" when assessing its applicants.¹⁴⁴ These services may have an expressed standard as to the negative weight given to a prior criminal conviction, but the Iowa Board is not required to utilize these services.¹⁴⁵ Even if it does, the Board has the discretion, subject to the review of the Iowa's Supreme Court, to ignore the outside service's recommendation.¹⁴⁶

Nebraska will consider an applicant's "denial of admission to the bar in another jurisdiction on character and fitness grounds" when making its determination.¹⁴⁷ Therefore, if an applicant applied to another jurisdiction's bar and, based on the applicant's prior criminal convictions he was denied admission to its bar, the applicant's prior unlawful conduct could indirectly affect his chances of obtaining admission into Nebraska's bar.¹⁴⁸

Vermont considers "other character traits that are relevant in the admission process, but such traits must have a rational connection with the applicant's present fitness or capacity to practice law and accordingly must relate to the state's legitimate interests in protecting prospective clients and the system of justice."¹⁴⁹ This "catch-all" phrase encompasses prior unlawful acts, but the Board may only evaluate such acts if the conduct is rationally related to the applicant's present ability to practice law and the state's legitimate interest in preserving the integrity of the justice system.

A slightly more direct system of factoring prior criminal convictions into the assessment of moral character and fitness is used by Kansas, Rhode Island, and South Carolina.¹⁵⁰ Although none of these

144. IOWA CT. R. 31.9(1).

145. *See id.*

146. *See id.* Iowa's Law Student Registration Form for applicants planning on applying for admission to its bar has the applicant disclose whether he has been "formally or informally investigated, reprimanded, disciplined, discharged, or asked to resign by an employer or educational institution for misconduct including . . . theft." Law Student Registration 11 (2009), available at http://www.judicial.state.ia.us/wfdata/frame7871-1600/law_student_registration_updated_01-27-09.pdf. This may show that the board of examiners only considers a conviction for *theft* as evidence of lacking good moral character, but the Supreme Court's rule does not require them to consider such an act when making their determination. *See* IOWA CT. R. 31.9.

147. NEB. CT. R. app. A.

148. *See id.*

149. RULES OF ADMISSION TO THE BAR OF THE VT. SUP. CT. § 11(b)(1) (2008).

150. *See* KAN. STAT. ANN. § 7-127(a) (West 2006); R.I. SUP. CT. R. Art. II, R. 3(e) (2008);

states specifically mention prior criminal convictions as a factor in its determination, all may impose some sort of criminal history check.¹⁵¹ Rhode Island and South Carolina require applicants to fully disclose their criminal history.¹⁵² However, neither state pronounces what effect a criminal conviction will have on admittance.¹⁵³

Likewise, the Kansas Supreme Court has the authority to require an applicant to submit to fingerprinting and a national criminal history check prior to its Board's determination.¹⁵⁴ The Court, or the Board, "may use the information obtained from fingerprinting and the applicant's criminal history . . . in the official determination of character and fitness of the applicant for admission to practice law in this state."¹⁵⁵ Yet the rules governing admission to the bar or the statute authorizing fingerprinting and a criminal history check do not tell the applicants the potential effect a prior criminal conviction will have on their application.¹⁵⁶

Finally, Wisconsin, Nevada, New Hampshire, and New York expressly consider prior criminal convictions when determining an applicant's moral character and fitness.¹⁵⁷ Wisconsin requires applicants to establish to the satisfaction of the state's board of examiners that they have "the qualities of character and fitness needed to assure to a reasonable degree of certainty the integrity and the competence of services performed for clients and the maintenance of high standards in the administration of justice."¹⁵⁸ Although prior unlawful conduct is a factor to be considered when assessing the applicant's present moral character, the rules do not establish how much such conduct will affect the applicant's chances of admission.¹⁵⁹

Similarly, Nevada expressly mentions that unlawful conduct may be considered by the character and fitness committee when determining

S.C. APP. CT. R. 402(e) (Supp. 2007).

151. KAN. STAT. ANN. § 7-127(a); R.I. SUP. CT. R. Art. II, R. 3(e); S.C. APP. CT. R. 402(e). See also Petition/Questionnaire for Admission to the Rhode Island Bar 14 (2007), available at http://www.courts.state.ri.us/supreme/bar/Bar-07order_revised_application_and_forms.pdf [hereinafter R.I. Questionnaire]; S.C. Application 7 (2007), available at <http://www.judicial.state.sc.us/bar/BarWord2000.doc> [hereinafter S.C. Application].

152. R.I. Questionnaire, *supra* note 151, at 14; S.C. Application, *supra* note 151, at 7.

153. See R.I. SUP. CT. R. Art. II, R. 3; S.C. APP. CT. R. 402(e).

154. See KAN. STAT. ANN. § 7-127(a).

155. *Id.*

156. See *id.*; KAN. SUP. CT. R. 702 (2004).

157. NEV. SUP. CT. R. add. 1, § IV(22) (2008); N.H. SUP. CT. R. 42B, § VII(6) (2008); N.Y. JUD. LAW § 90(4)(a) (McKinney 2002); WIS. SUP. CT. R. ch. 40, app. BA 6.02 (2008).

158. WIS. SUP. CT. R. 40.06(1), (3), app. BA 6.01.

159. *Id.* at ch. 40, app. BA 6.02-.03.

the applicant's character and fitness to practice law.¹⁶⁰ When making its determination, Nevada places a lot of weight on the rehabilitation of the applicant after he was convicted of a crime, stating it is "an important factor [to use when determining] whether past problems should lead to denial of admission. Generally, the [committee] will assess whether the problems of the past continue and, if they do not, whether the applicant's life has changed in ways that suggest the problems are unlikely to recur."¹⁶¹ In order to "prove rehabilitation, an applicant must show "some positive contribution to society; in most cases it is not enough that an applicant led a blameless life since the prior problems."¹⁶²

New Hampshire also places a lot of emphasis on rehabilitation, but unlike Nevada, a criminal conviction may, in and of itself, disqualify the applicant.¹⁶³ If the committee does not find the prior criminal conviction warrants per se disqualification, the applicant must prove that he has been rehabilitated to the extent that "the public interest will not be jeopardized by his or her admission."¹⁶⁴ "The more serious the [crime], the greater the showing of rehabilitation that will be required."¹⁶⁵ Ultimately, it is the committee who assesses the applicant to determine whether he has been "sufficiently rehabilitated to remove the serious taint of the applicant's prior unfitness."¹⁶⁶

Comparable to New Hampshire's permissive per se disqualification are New York's judiciary laws, which allow the Character Committee to summarily dismiss an applicant if the applicant has previously been convicted of a felony, as defined under New York law.¹⁶⁷ Nevertheless, the law adds an exception, stating that if the applicant can "show cause" as to why he should be admitted, the appellate division may grant admission if it is persuaded.¹⁶⁸ Unfortunately, the law does not define "cause."¹⁶⁹

These more flexible standards indicate that the majority of states

160. NEV. SUP. CT. R. add. 1, § IV(22).

161. *Id.* at add. 1, § IV(24).

162. *Id.*

163. N.H. SUP. CT. R. 42B, § VII(6) (2008).

164. *Id.* § XVII.

165. *Id.* § XIV.

166. *Id.* § XII.

167. N.Y. JUD. LAW § 90(4)(a) (McKinney 2002).

168. *See id.* § 90(4)(g).

169. *See generally id.* § 90 (setting forth bar admission requirements, but never describing what constitutes sufficient "good cause" to rebut the presumption of incompetency to practice law upon felony conviction).

believe “rehabilitation is always possible.”¹⁷⁰ In light of such belief, the standards attempt to “strike a balance among several competing concerns: protecting the public, safeguarding the image of the legal profession, and allowing a fully rehabilitated individual the opportunity to serve the community in the capacity of his or her choice.”¹⁷¹ But as shown, states have little in common in the methods they use to strike that balance.

D. Reciprocity

Reciprocity is broadly defined as “[t]he mutual concession of advantages or privileges for purposes of commercial or diplomatic relations.”¹⁷² In the context of bar admissions, reciprocity occurs when states admit outside attorneys to its bar without requiring them to take its bar exam because the particular attorney is formally licensed in a different jurisdiction.¹⁷³ The ABA supports reciprocity, but acknowledges that many states will have, and want, specific requirements for new applicants to fulfill in order to be granted the right to practice law within their jurisdictions.¹⁷⁴

In the context of this Note, reciprocity becomes problematic when states grant outside attorneys the right to practice within their borders without re-evaluating them under their own character and fitness guidelines. For example, in New York, outside licensed attorneys may be granted admission to the state bar without undergoing a formal moral character evaluation.¹⁷⁵ Title 22, section 520.12 of New York’s Compilation of Codes, Rules, and Regulations specifically states that “every applicant for admission to practice, *other than applicants for admission without examination* . . . shall file the affidavits required [with the committee on character and fitness] within three years” of passing the bar.¹⁷⁶ This practice can produce inconsistencies when applicants are granted admission through reciprocity to practice law in a state that does not have similar moral character and fitness requirements to the state

170. Kathryn L. Allen & Jerome Braun, *Admission to the Bar – Character and Fitness Considerations*, 22 GA. ST. BAR J. 90, 95 (1985).

171. Carr, *supra* note 82, at 383-84.

172. BLACK’S LAW DICTIONARY 1298 (8th ed. 2004).

173. Nikki LaCrosse, *Reciprocity Laws Among the States*, LAW CROSSING, Sept. 9, 2005, <http://www.lawcrossing.com/article/1084/Reciprocity-Laws-Among-the-States/>.

174. *See id.*

175. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.10 (2007).

176. *Id.* § 520.12(d)(1) (emphasis added).

from which they were originally admitted. As a result, outside attorneys are held to different standards (either more lenient or more difficult) than those seeking initial admittance into the same state's bar. This discrepancy helps to illustrate the need for a national uniform standard.

Despite the potential inconsistencies, some level of reciprocity is granted by the majority of the states.¹⁷⁷ A number of states will only admit outside attorneys if there is a reciprocity agreement between the two states,¹⁷⁸ while others will grant reciprocity to any state, regardless of an agreement.¹⁷⁹ In contrast, however, there are a select group of states that prohibit reciprocity altogether.¹⁸⁰

1. Requires a Reciprocity Agreement

More than half of the states allow direct reciprocity; i.e., granting reciprocity to practicing attorneys that come from a state in which there is a reciprocity agreement between itself and the outside attorney's licensed state.¹⁸¹ When states engage in direct reciprocity, both mutually agree to afford practicing attorneys from the other state similar rights and benefits.¹⁸² This type of reciprocity is usually granted through an "admission on motion."¹⁸³ If outside attorneys are admitted on motion, they are not required to take any type of bar exam in order to have the privilege of permanently practicing in the new state.¹⁸⁴ Alternatively, some states limit admission on motion to only those licensed attorneys who are involved in a governmental agency, the military, are part of a judicial court, practice as in-house corporate counsel, or teach law.¹⁸⁵

Of the states that allow for direct reciprocity, a large majority grant it to all jurisdictions that return similar benefits to their own lawyers.¹⁸⁶ For example, New York has a broad standard for allowing applicants into its bar, as it grants admittance if "at least one such jurisdiction in which the attorney is so admitted would similarly admit an attorney or counselor-at-law admitted to practice in New York State to its bar

177. COMPREHENSIVE GUIDE, *supra* note 1, at 28 chart IX.

178. *See infra* Part V.D.1, app. I.

179. *See infra* Part V.D.2, app. I.

180. *See infra* Part V.D.3, app. I.

181. *See* COMPREHENSIVE GUIDE, *supra* note 1, at 28 chart IX.

182. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 520.10(a)(1)(iii) (2007).

183. LaCrosse, *supra* note 173.

184. *See* COMPREHENSIVE GUIDE, *supra* note 1, at 25 chart VIII.

185. *See id.*

186. *See id.* at 29.

without examination.”¹⁸⁷ Other states that have reciprocity agreements that are similarly wide in scope include Alabama, Alaska, Arkansas, Colorado, Connecticut, Georgia, Idaho, Illinois, Kansas, Kentucky, Missouri, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.¹⁸⁸ In contrast, there are a small number of states that limit reciprocity to a few jurisdictions.¹⁸⁹ For example, Oregon only allows practicing attorneys from Alaska, Idaho, Washington, or Utah to practice law within its borders without taking its formal bar exam.¹⁹⁰ In addition, Maine only extends its reciprocity agreement to those who practice in the state of New Hampshire or Vermont.¹⁹¹

2. Reciprocity Granted to All States

Although many states will only grant reciprocity to those that have a mutual agreement, there are a handful of jurisdictions that extend reciprocity to all. These states do not require a reciprocity agreement with the practicing attorney’s original state, and usually only require a potential applicant to have previously practiced for a certain amount of time (typically ranging between one to seven years) and to be in good standing in their licensed state.¹⁹² For example, in Massachusetts “[a] person who has been admitted as an attorney of the highest judicial court of any state, district or territory of the United States may apply to the Supreme Judicial Court for admission on motion as an attorney in this Commonwealth.”¹⁹³ Absent an express reciprocity agreement, this state merely requires that the potential applicant is in good standing and has been admitted in their previous jurisdiction for at least five years.¹⁹⁴ Other jurisdictions that follow a similar rule include the District of Columbia, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Tennessee, Texas, and Vermont.¹⁹⁵

187. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.10(a)(1)(iii).

188. See COMPREHENSIVE GUIDE, *supra* note 1, at 28 chart IX.

189. See, e.g., RULES REGULATING ADMISSION TO PRACTICE LAW IN OR. R. 15.05 (2008); ME. BAR ADMISSION R. 11A(a) (2007).

190. RULES REGULATING ADMISSION TO PRACTICE LAW IN OR. R. 15.05.

191. ME. BAR ADMISSION R. 11A(a).

192. LaCrosse, *supra* note 173.

193. MASS. BD. OF BAR EXAM’RS, *supra* note 140, at 3.

194. *Id.*

195. See COMPREHENSIVE GUIDE, *supra* note 1, at 25-26.

3. Reciprocity is Strictly Prohibited

Finally, there are a few states that do not grant reciprocity to any other jurisdiction. For example, Louisiana's statute on reciprocity states, "[n]o person shall be admitted to the Bar of this state based solely upon the fact that such person is admitted to the Bar of another state or because the laws of another state would grant admission to a member of the Bar of this state."¹⁹⁶ Similarly, Nevada's Supreme Court Rules state, "an attorney admitted to practice in another jurisdiction shall not be admitted to practice law in the State of Nevada by motion or on the basis of reciprocity."¹⁹⁷ Other states that do not grant reciprocity include California,¹⁹⁸ Delaware,¹⁹⁹ Florida,²⁰⁰ Maryland,²⁰¹ Montana,²⁰² New Mexico,²⁰³ Rhode Island,²⁰⁴ and South Carolina.²⁰⁵

E. Attorney Exam

Attorney's examinations consist of a shorter assessment, which usually requires only the written portion of the general bar.²⁰⁶ If the state does not offer admittance through admission on motion, it will typically offer outside lawyers the opportunity to take such an exam to gain admission to its bar.²⁰⁷ In addition, several states that do not grant direct reciprocity to other jurisdictions, or those states that grant only

196. LA. SUP. CT. R. XVII, § 11 (2008).

197. NEV. SUP. CT. R. add. 1, § III(16) (2008).

198. See RULES REGULATING ADMISSION TO PRACTICE LAW IN CAL. R. IV, § 2-3 (2008).

199. Bd. of Bar Exam'rs of the Sup. Ct. of Del., Frequently Asked Questions, <http://courts.state.de.us/bbe/faq.htm> (last visited Oct. 8, 2008).

200. Fla. Bd. of Bar Exam'rs, Frequently Asked Questions, <http://www.floridabarexam.org/> (follow "FAQ" hyperlink; then follow "Does Florida have reciprocity with any jurisdiction?" hyperlink) (last visited Oct. 8, 2008).

201. Md. State Bd. of Law Exam'rs, Frequently Asked Questions – Out of State Attorneys, <http://www.courts.state.md.us/ble/pdfs/osfaq.pdf>.

202. State Bar of Mont., Admissions Reciprocity, <http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=8> (last visited Oct. 14, 2008).

203. Bd. of Bar Exam'rs State of N.M., FAQs, <http://www.nmexam.org/faqs.html#reciprocity> (last visited Oct. 8, 2008).

204. See R.I. SUP. CT. R. Art. II, R. 2 (2008).

205. See S.C. APP. CT. R. 402(c) (Supp. 2007).

206. See, e.g., State Bar of Cal. Comm. of Bar Exam'rs, Admission to Practice Law in California by Attorneys Admitted to Practice in the United States 1 (2005), <http://www.calbar.ca.gov/calbar/pdfs/admissions/75sf.pdf>; see also BarExamCafe.com, California, http://www.barexamcafe.com/california_bar_info.html (last visited Oct. 14, 2008).

207. See COMPREHENSIVE GUIDE, *supra* note 1, at 25 chart VIII, 29.

limited reciprocity, will also provide a licensed lawyer the opportunity to take an attorney's exam.²⁰⁸ All in all, seven states offer these abbreviated exams: California, Georgia, Maine, Maryland, Mississippi, Rhode Island, and Utah.²⁰⁹ Yet, many of these states do not re-evaluate the applicant under their own moral character and fitness guidelines.²¹⁰ California, for example, only requires that an outside licensed attorney be in good standing within the person's initial jurisdiction.²¹¹ This, like reciprocity, also promotes discrepancies in individual state's moral character and fitness evaluations, which exemplifies the need for a uniform national standard providing an equal playing field for all applicants.

VI. NATIONAL UNIFORM STANDARD

As shown, each state has its own rules, standards, and guidelines to follow during its moral character and fitness evaluation. Because of the differences in each state's standards, future applicants are unable to confidently predict and independently evaluate how they will be scrutinized by any state's character committee.²¹² To further complicate the situation, attorneys are granted the right to practice in states by means of reciprocity agreements,²¹³ attorney's exams,²¹⁴ and *pro hac vice*²¹⁵ without being re-evaluated under that state's moral character and fitness requirements. As a result, outside attorneys are held to different standards than those who seek initial admittance to the same state's bar. In order to eliminate these inconsistencies, it is essential to implement a national uniform standard for committees to follow when evaluating whether a candidate is of good moral character and fit to practice law.

When writing the proposal for a national uniform standard, many states' approaches were considered in conjunction with the ABA's perspective. In doing so, guidelines were developed that provide a reasonable standard to follow, without completely eliminating the subjective reasoning necessary to determine whether a candidate

208. *Id.* at 28 chart IX.

209. *Id.*; see generally *infra* app. II.

210. *E.g.*, State Bar of Cal. Comm. of Bar Exam'rs, *supra* note 206, at 1.

211. *Id.*

212. See *supra* Part V.B-C.

213. See *supra* Part V.D.1-3.

214. See *supra* Part V.E.

215. *Pro hac vice* "refers to a lawyer who has not been admitted to practice in a particular jurisdiction but who is admitted there temporarily for the purpose of conducting a particular case." BLACK'S LAW DICTIONARY 1248 (8th ed. 2004).

possesses the requisite character and fitness to practice law. Finally, the proposed uniform standard is based on the concept that an applicant's *present* moral character is the most important aspect of the evaluation; therefore, a *per se* disqualification based on the applicant's prior unlawful conduct was rejected. Such a standard is not an accurate indicator of a candidate's present moral character and only serves to punish what may be an otherwise qualified applicant.

A. *The Proposal: A Step-By-Step Approach*

1. Applicants must disclose all unlawful misconduct to the state's examining committee.²¹⁶ Additionally, they should submit affidavits and other documents to rebut any indication that they do not possess the present moral character to practice law.²¹⁷

2. After the applicant's initial disclosure, the burden is on the committee to review the applicant's record and determine whether a *prima facie* case exists demonstrating that the candidate lacks the necessary moral character and fitness required for admission into the state's bar. If the committee determines the applicant's moral character is questionable, they must notify the applicant of their findings.²¹⁸

3. If the examining committee determines there is *prima facie* evidence indicating the applicant does not possess the necessary moral character and fitness to practice law in its state, the burden shifts to the applicant to prove by clear and convincing evidence that he does possess the requisite good moral character.²¹⁹

4. While reviewing such evidence submitted by the candidate, the committee must apply the following factors, giving greater weight to an applicant's rehabilitation and his or her good faith candor during the admissions process, to determine if the applicant has met the burden.

1. Rehabilitation

The committee shall look for an applicant's change in attitude from

216. See RULES & REGULATIONS FOR ADMISSION TO PRACTICE LAW IN S.D. § 16-16-2.1 (2008).

217. See, e.g., NEB. CT. R. § 3-102 (2008).

218. RULES OF PROCEDURE OF THE COMM'N ON CHARACTER & FITNESS OF THE SUP. CT. OF MONT. § 5(b)(1) (2007), available at <http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=6>.

219. RULES & REGULATIONS FOR ADMISSION TO PRACTICE LAW IN S.D. § 16-16-2.2.

that which existed at the time he committed the unlawful act.²²⁰ Such a change can be evidenced by any or all of the following:

- statements of the applicant;²²¹
- statements from family members, friends or other persons *familiar* with the applicant's previous conduct and with subsequent attitudes and behavioral patterns;²²²
- statements from family members, friends, or other persons *unfamiliar* with the applicant's previous conduct and their observations of the applicant's present attitude and behavioral patterns;²²³
- statements from probation or parole officers or law enforcement officials as to the applicant's social adjustments;²²⁴ and
- conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.²²⁵

2. Applicant's good faith candor during the admission process

Any material omissions or misrepresentations in the admission process shall weigh negatively against a candidate's moral character.²²⁶

By emphasizing the above factors, a committee ensures its decision is based on the applicant's present moral character, rather than prohibiting admission to the bar because of prior conduct. After applying the above two factors, the committee should then consider the

220. See California State Bar, *supra* note 68.

221. See *id.*

222. See *id.* (emphasis added).

223. See *id.*

224. See *id.*

225. See *id.*

226. See COMPREHENSIVE GUIDE, *supra* note 1, at viii.

following before making its decision:

- The nature and severity of the unlawful act, including whether it was an act of moral turpitude, whether there were aggravating or mitigating circumstances, and whether the activity was an isolated event or part of a pattern.²²⁷
- Whether the conduct was classified under state law as a felony or misdemeanor is irrelevant, the commission should look to the underlying severity of the crime committed (i.e., moral turpitude).
- Crimes of untruthfulness should negatively affect the applicant's character determination greater than other crimes not based on truthfulness.
- The candidate's age at the time of conduct.²²⁸
- The amount of time that has lapsed between the unlawful act and the application for bar admission.²²⁹
- Completion of any sentence imposed, including parole; probation; restitution paid to injured parties, if any; and payment of imposed fines, if any.²³⁰

The preceding guidelines are subordinate to the applicant's rehabilitation and good faith candor during the admission process. Additionally, they are not listed in any particular order and should be evaluated equally amongst themselves. Finally, the list is not exhaustive and other factors a committee feels are relevant should be considered when making its determination.

After the committee has applied the above factors, it must determine whether or not the applicant proved by clear and convincing

227. See California State Bar, *supra* note 68.

228. See COMPREHENSIVE GUIDE, *supra* note 1, at viii.

229. See *id.*

230. See California State Bar, *supra* note 68.

evidence that he has the required good moral character to practice law.²³¹ If the committee concludes the applicant has successfully met the burden, the person shall be admitted to the bar. If however, the committee determines that the applicant has failed to demonstrate that he has the requisite good moral character, it shall have the option to either: (a) grant a probationary acceptance, or (b) completely reject the applicant.²³²

a. Probationary Acceptance

If the committee believes the applicant has just marginally missed proving his good moral character by clear and convincing evidence, it may grant the candidate a one year probationary acceptance.²³³ At the completion of the probationary period, the person must submit affidavits showing his or her continued good standing within the profession. If such can be shown, the applicant will be granted permanent admission to the bar. If however, the probationally accepted attorney fails to meet this good standing requirement, the person will not be permanently admitted to the bar, the probationary status will be revoked, and the person will have to reapply for admission.

b. Rejection

If the committee believes the applicant's evidence does not rebut the prima facie case against the applicant's lack of moral character, it may also completely reject admission to the state's bar.²³⁴ The committee should do so when it believes the applicant has not just marginally missed the requisite standard, but believes the applicant is plainly not qualified.

This proposal should be implemented because it provides clear guidelines for the committees to apply and applicants to rely upon, while still requiring a high moral character requirement. The proposal is intended to provide guidance for committees to follow, while still

231. See *In re Cason*, 294 S.E.2d 520, 522 (Ga. 1982) (citing *In re Davis*, 313 N.E.2d 363, 364-65 (Ohio 1974)).

232. RULES OF PROCEDURE OF THE COMM'N ON CHARACTER & FITNESS OF THE SUP. CT. OF MONT. § 5(b) (2007), available at <http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=6>.

233. See *id.* § 5(d).

234. *Id.* § 5(b).

allowing some subjective reasoning in the process. By doing this, it addresses the many different needs of each state, along with ensuring that an equal moral character and fitness requirement is used across the nation.

B. Justification for a National Uniform Standard

“The evolving practice of law has taken on a national and interstate character.”²³⁵ Therefore, creating a national uniform standard is necessary to ensure that all applicants are held to the same moral character and fitness requirements, regardless of the state in which they are applying. Many attorneys no longer practice within one state or community.²³⁶ In fact, several work with clients, companies, or offices in various areas of the country.²³⁷ For example, Skadden, Arps, Slate, Meagher & Flom L.L.P. (“Skadden”) is one of the world’s largest law firms, with over 2000 attorneys and twenty-four offices around the globe.²³⁸ In the United States alone, it has offices in Boston, Chicago, Houston, Los Angeles, New York, Palo Alto, San Francisco, and Washington, D.C.²³⁹ As a result, Skadden’s attorneys often serve clients located in different jurisdictions, and each jurisdiction’s character and fitness standards may be inconsistent with one another.²⁴⁰ This type of situation highlights the need for a national uniform standard because attorneys are providing legal assistance and counsel to clients in various states, even though they may not meet a particular client’s state’s moral character and fitness criteria.

Additionally, multi-state collaboration is further enhanced by the rapid development of technology and the ability to quickly communicate from state to state with the touch of a button.²⁴¹ “Technology . . . enable[s] diverse cultures to collaborate more efficiently, in every

235. Michael J. Thomas, *The American Lawyer’s Next Hurdle: The State-Based Bar Examination System*, 24 J. LEGAL PROF. 235, 248 (2000).

236. *See id.* at 248-49.

237. *See id.* at 249.

238. Skadden.com, Contact Us, <http://www.skadden.com/index.cfm?contentID=10> (last visited Oct. 12, 2008).

239. Skadden.com, Offices, <http://www.skadden.com/Index.cfm?contentID=5> (last visited Oct. 12, 2008).

240. *See id.*; *supra* Part V.B-C.

241. *See* Kunal Sinha, *The Future of Technology and its Impact on Our Lives*, Business World, Apr. 11, 2005, available at <http://www.wpp.com/wpp/marketing/digital/the-future-of-technology.htm>.

sphere. It . . . bring[s] people and organizations together, closer.”²⁴² The ability to momentarily transcend state lines is in stark contrast to what people were able to achieve in 1866, the year the Supreme Court ruled each state had the right to determine its own moral character and fitness qualifications.²⁴³ In today’s world, people can easily communicate through e-mail, web casts, cell phones, fax machines, and instant messaging. If a person carries a BlackBerry, laptop, or cell phone, he can be in contact with almost anybody, at any time of the day, regardless of where the person is presently located.²⁴⁴ Consequently, a national uniform standard is necessary to ensure that the legal profession is represented throughout the nation by attorneys who have good moral character, no matter what state they are in or where their client is located.

As attorneys continue to expand and represent multi-state clients, corporations, and businesses, a national uniform standard becomes critical to achieve equal and consistent moral character and fitness requirements throughout the country. Because practitioners are granted the right to practice in outside jurisdictions through reciprocity, attorney’s exams, and *pro hac vice* admission, it is crucial that each person admitted to the bar is judged on a fair set of requirements, governing all applicants, regardless of their licensing state. A national uniform standard will ensure that all practicing attorneys equally satisfy a common character standard and will eliminate any moral discrepancies that could result when a single attorney works across jurisdictional lines.

Although there are many clear benefits from enacting a national uniform standard, it may be argued that such a standard would deny each state the freedom to decide what is in its best interest, a right given to them by the United States Supreme Court²⁴⁵ and the Tenth Amendment of the Constitution.²⁴⁶ Critics of a national uniform standard may contend that a uniform code will violate each state’s constitutional right

242. *Id.*

243. *Cummings v. Missouri*, 71 U.S. (1 Wall.) 277, 318-19 (1866); *cf.* *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (holding the district court violated the defendant’s Sixth Amendment right when it denied his attorney’s *pro hac vice* application because it denied the defendant the right to be represented by the counsel of his choice).

244. *See generally* Sinha, *supra* note 241 (outlining the effect of technology, including instant communication across geographical boundaries).

245. *Cummings*, 71 U.S. (1 Wall.) at 319.

246. U.S. CONST. amend. X. The text of the Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Id.*

to determine what is best suited for its residents.²⁴⁷ They may argue that priorities will vary from state to state and only each individual jurisdiction is equipped to determine what is right for those who live within its borders.²⁴⁸

Since 1866, the Supreme Court has examined when an attorney may practice law in different jurisdictions and has recently made such admission mandatory in the criminal context.²⁴⁹ In 2006, the Court, in *United States v. Gonzalez-Lopez*, held that a defendant's Sixth Amendment right to counsel was violated when his preferred attorney's *pro hac vice* application was erroneously denied.²⁵⁰ The Court did establish limitations, holding that unless the person requested was not an attorney, had a conflict of interest, or had a predetermined scheduling conflict, the court must allow him to represent his client in a criminal matter.²⁵¹ Although the Court expressed that its decisions did not "cast[] any doubt or place[] any qualification upon . . . the authority of trial courts to establish criteria for admitting lawyers to argue before them," it does show its willingness to look past federalism concerns in some situations, and require a state to allow an attorney to practice within its jurisdiction.²⁵²

Furthermore, national uniform standards have been implemented and applied in other areas of the law where similar issues were in dispute. For example, the Uniform Commercial Code ("UCC") is a widely accepted national standard that has transformed the sale of goods across jurisdictions.²⁵³ The motivations for creating and adopting the UCC highlight why a uniform moral character and fitness standard is necessary. The UCC was formulated to eliminate "scattered legislation or decisional law" and to create a complete and feasible set of guidelines to manage the sale of goods.²⁵⁴ One of the UCC's main objectives was "[t]o make uniform the law among the various jurisdictions."²⁵⁵ Doing this gave participating parties the ability to predict how their transactions

247. See *Cummings*, 71 U.S. (1 Wall.) at 318-19; Thomas, *supra* note 235, at 247.

248. See *Cummings*, 71 U.S. (1 Wall.) at 318-19; Thomas, *supra* note 235, at 244-45.

249. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

250. *Id.*

251. *Id.* at 151-52.

252. *Id.*

253. See Uniform Law Commission, Introduction, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited Oct. 14, 2008).

254. Susan A. Wegner, *Section 1-208: "Good Faith" and the Need for a Uniform Standard*, 73 MARQ. L. REV. 639, 659-60 (1990).

255. *Id.* at 658 (citing U.C.C. § 1-102(2)(c) (1998)).

would transpire, even if done across state lines.²⁵⁶ This was considered an essential motivating factor because “commercial transactions are no longer restricted to jurisdictional boundaries, but often extend from state to state. As one commentator has noted: ‘with increased speeds of communication and transportation, the world grows smaller every day. So also do[es] the United States and the several states in the United States.’”²⁵⁷

Similarly, practitioners of the law no longer confine their practice to one state or community. Like the UCC, “[the legal market is] no longer restricted to jurisdictional boundaries, but often extend[s] from state to state.”²⁵⁸ It is essential to pass a uniform national standard for the moral character and fitness portion of the bar because the legal market will continue to grow, within and across state lines. Additionally, as with the UCC, a national uniform character and fitness standard is crucial to “make uniform the law among the various jurisdictions.”²⁵⁹ Finally, because many states determine whether or not an applicant fulfills its moral character and fitness requirement through a heavily subjective process, candidates are unable to predict how their specific case will be judged. This continues to create inconsistencies, further highlighting the need for a national uniform standard. Without equal and set guidelines, conflicting decisions will result between jurisdictions, and may even occur within a single state.

VII. CONCLUSION

The purpose of having a moral character and fitness requirement is to ensure the protection of society and to preserve the integrity of our justice system. As a result, screening applicants for their good moral character is an important step in the admission process. Specifically, an applicant’s past criminal conduct is a crucial part of the evaluation, as it provides insight into how a candidate may represent themselves in the future. Because of the significant impact this process can have on an applicant, as well as the legal profession, a national uniform standard is necessary to ensure that the underlying purpose of the character and fitness requirement is upheld.

The current trend is to allow each state to determine its own method

256. *Id.* at 659.

257. *Id.* at 658-59.

258. *Id.*

259. *Id.*

and criteria for evaluating a candidate's good moral character. This has inevitably led to major inconsistencies when applicants are reviewed for admission. These inconsistencies are further perpetuated by the admission of outside attorneys through reciprocity, attorney's exams, and *pro hac vice*, without reevaluation under the incoming state's moral character and fitness requirements. Additionally, the ease of communication and transportation has made it possible for attorneys to provide legal advice and assistance to those outside its jurisdiction with little, if any, difficulty. In fact, the legal profession often deals with clients and businesses throughout the United States, often in other states that have different moral character and fitness requirements. As a result, a national uniform standard is necessary to ensure that all practicing attorneys possess good moral character, throughout the nation, as defined by the same standard.

To cure the problem of inconsistent and unpredictable decisions, a proposal has been created for all states to adopt, ensuring that candidates are evaluated on an equal playing field. The evaluation process takes into account various states' approaches, while still allowing committees to use their reasoned knowledge and discretion in the process. Finally, the proposal takes the position that people have the ability to rehabilitate. As a result, the applicant's subsequent rehabilitation and candor in the admissions process are given the most weight when determining whether or not he possesses good moral character *at the time of application*. Although many may fear that a national uniform standard will circumvent a state's ability to determine what is in its best interest, such a standard is necessary if the moral character and fitness test is to maintain its significance in light of a growing legal practice and shrinking jurisdictional boundaries. Therefore, a national uniform standard is essential to a fair admissions process and will ensure every attorney possesses the requisite moral character when practicing in *any* jurisdiction.

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APPENDICES

APPENDIX I

RECIPROCIITY[†]

State or Jurisdiction	Is Admission Based on Reciprocity [agreements between states]?		If State of Initial Admission Requires Examination of All Applicants, Do You Require Examination of Attorney Applicants?	
	Yes	No	Yes	No
—				
Alabama	X		X	
Alaska	X		X	
Arizona				
Arkansas	X			X
California		**	X	
Colorado	X		X	
Connecticut	X		X	
Delaware		**		
Dist. of Columbia		X		X
Florida		**		
Georgia	X			X
Hawaii		**		
Idaho	X			
Illinois	X		X	
Indiana		X		X
Iowa		X		X
Kansas	X		X	
Kentucky	X		X	
Louisiana		**		
Maine	X*			
Maryland		**		
Massachusetts		X		X
Michigan		X		X
Minnesota		X		X
Mississippi				
Missouri	X			X

State or Jurisdiction	Is Admission Based on Reciprocity [agreements between states]?		If State of Initial Admission Requires Examination of All Applicants, Do You Require Examination of Attorney Applicants?	
	Yes	No	Yes	No
—				
Montana		**		
Nebraska		X		X
Nevada		**	X	
New Hampshire	X		X	
New Jersey		**		
New Mexico		**		
New York	X		X	
North Carolina	X		X	
North Dakota		X		X
Ohio		X		X
Oklahoma	X		X	
Oregon	X*			
Pennsylvania	X			X
Rhode Island		**		
South Carolina		**		X
South Dakota	X		X	
Tennessee		X		X
Texas		X		X
Utah	X		X	
Vermont		X		X
Virginia	X		X	
Washington	X		X	
West Virginia	X		X	
Wisconsin	X		X	
Wyoming	X		X	

† COMPREHENSIVE GUIDE, *supra* note 1, at 28.

* State only grants a few specific states reciprocity. See RULES REGULATING ADMISSION TO PRACTICE LAW IN OR. R. 15.05 (2008); *see also* ME. BAR ADMISSION R. 11(A) (2007).

** State does not grant reciprocity to other jurisdictions. See *supra* Part V.D.3.

APPENDIX II

ATTORNEY EXAMS^x

State or Jurisdiction	Does Your Jurisdiction Offer an Attorneys Exam?		To Qualify For Attorneys Exam, Must an Applicant be a Graduate of an ABA Approved School?	
	Yes	No	Yes	No
—				
Alabama		X		
Alaska		X		
Arizona		X		
Arkansas		X		
California	X			X
Colorado		X		
Connecticut		X		
Delaware		X		
Dist. of Columbia		X		
Florida		X		
Georgia	X		X	
Hawaii		X		
Idaho		X		
Illinois		X		
Indiana		X		
Iowa		X		
Kansas		X		
Kentucky		X		
Louisiana		X		
Maine	X			X
Maryland	X			X
Massachusetts		X		
Michigan		X		
Minnesota		X		
Mississippi	X			X
Missouri		X		
Montana		X		
Nebraska		X		

State or Jurisdiction	Does Your Jurisdiction Offer an Attorneys Exam?		To Qualify For Attorneys Exam, Must an Applicant be a Graduate of an ABA Approved School?	
	Yes	No	Yes	No
—				
Nevada		X		
New Hampshire		X		
New Jersey		X		
New Mexico		X		
New York		X		
North Carolina		X		
North Dakota		X		
Ohio		X		
Oklahoma		X		
Oregon		X		
Pennsylvania		X		
Rhode Island	X			X
South Carolina		X		
South Dakota				
Tennessee		X		
Texas		X		
Utah	X		X	
Vermont		X		
Virginia		X		
Washington		X		
West Virginia		X		
Wisconsin		X		
Wyoming		X		

‡ COMPREHENSIVE GUIDE, *supra* note 1, at 28.