



# THE Bar Examiner

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**Malingered  
ADHD Evaluations:  
A Further Complication for  
Accommodations Reviews**

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## LETTER FROM THE CHAIR

**L**ike many in North Dakota, I love the arrival of fall but dread the first snowfall, which means that, starting in mid-October, I never miss the evening weather report, with one eye on the weather radar and the other on the three-day forecast. Fortunately, we have enjoyed an extended fall this year (and no snow), which has provided me with extra opportunities for jogging around the golf course, catching my limits of walleye, and pheasant hunting with our two labs, Jackson and Charlie.

Fall has also always meant an opportunity to make a fresh start, whether it was moving on to the next grade with a new school wardrobe, clean desk, and fresh notebooks, or moving on to a new job after completing college or law school or the bar exam. With July bar exams now completed and graded, fall is a time for bar examiners, bar administrators, and NCBE to move on and reflect on our roles and future challenges.

My yearlong term as NCBE chair began in earnest this October when the Board of Trustees held its first quarterly meeting in Nantucket, Massachusetts. Luckily, this was a week before the first winter storm in the Northeast, which as I write this still has areas of Connecticut without power. In Nantucket, chair-elect Franklin Harrison and I hosted a one-day retreat attended by current and former Board members and key NCBE management staff. After a brief summary of the history and formation of NCBE, we focused our discussion on the value of the organization, the roles of its Board and committees, and the future challenges facing NCBE, including its function in meeting the current and future needs of jurisdictions.

What became apparent is that NCBE as an organization has significantly changed since it was formed in 1931. It is now a professionally run and professionally staffed corporation, with staff devoted to the business of test development and test administration. These changes require the Board and its committees to take on different roles than in bygone years, when much of NCBE's work was performed by volunteer bar examiners and administrators.

The retreat met all of my expectations. I was very pleased with the sincerity and seriousness of our discussions. While no decisions were made, we reached a consensus that Board agendas need to be more focused on strategic issues, framed by the reports and advice of Erica Moeser and her professional management team. This reframing may also result in refocusing our committees so that time volunteered by committee members is conserved for significant input on major issues.



The other NCBE meetings I attended this fall have also focused on important issues facing NCBE and the bar examining community. On October 2 and 3, I attended the Academic Support Conference in Madison, during which NCBE staff and committee chairs described the development and scoring of the bar exam. The participants gave the program very high marks and particularly enjoyed the interaction with one another as academic support professionals and with the “bar experts” available at the program. As one participant commented, this training “gives me such credibility with my students and some of my faculty.”

In early November, I attended another meeting in Madison about adding the subject of Federal Civil Procedure to the Multistate Bar Examination. This meeting, attended by Civil Procedure experts, included a discussion of content specifications and a drafting exercise in which the participants drafted potential multiple-choice questions based on a content outline. While none of the questions were ready for prime time, the exercise demonstrated that the subject of Federal Civil Procedure could be tested in a multiple-choice format. By the close of the meet-

ing, all participants agreed that it was a fruitful day and that the project should move forward.

My final event of the season was the CBAA Fall Meeting in Providence, Rhode Island. Again, as expected, the program was sensational. Topics included incorporating the study of professionalism and ethics into law school curricula, investigating the character and fitness of foreign attorneys, and conditional admission and licensing of sex offenders. What I found to be even more enjoyable was the esprit de corps of the attendees. The participants were genuinely having fun while at the same time totally engaged in recognizing and meeting the challenges facing bar administrators. Based on our retreat discussions in Nantucket, the NCBE Board of Trustees also models this “can-do” spirit.

I wish you all a mild, fall-like winter and a Happy New Year. Please don’t forget to put Savannah, Georgia, on your calendars for NCBE’s Annual Bar Admissions Conference on April 19–22, 2012. Spring will have arrived by then, at least in Georgia. 📅

Best regards to all.

Sincerely,

A handwritten signature in cursive script that reads "Rebecca S. Thiem".

Rebecca S. Thiem

# PRESIDENT'S PAGE

*by Erica Moeser*

Imagine that lawyers are drawn to news stories about the practice of law (I am!), and so it is likely that bar examiners are aware of the criticisms, some quite harsh, that are being directed these days at legal education, the accreditation of law schools, the job placement performance of law schools, and other such subjects. The troubled economy has been a catalyst for heightened attention to these issues, some of which touch—or will ultimately touch—bar examiners.

The expansion of the number of law schools operating in the United States, coupled with a gloomy hiring picture that has affected several years' worth of graduating classes, has created a frustrated cohort of new lawyers unable to secure work as professionals. Some of those who are not being absorbed into firms, and those who have found work in firms that are unwilling to invest much in training, believe that their law schools failed them when it came to providing practice experiences that would have prepared them to actually work as lawyers. As reported in the press, there has been an outbreak of litigation against certain law schools by students who wish to affix the blame for their predicaments on the law schools.

Student debt is spiraling. A change in the timing of when interest on student debt begins to accrue has heightened what was already a tension between when law graduates are eligible to begin practice as



lawyers and when repayment deferments end. Legal education is an expensive undertaking, and some writers are questioning whether the objectives of particular law schools (attracting eminent scholars or focusing on faculty scholarship, for example) are driving costs in ways that are tangential to the preparation of new practitioners.

Law school deans live and die on law school rankings, and this appears to drive policy decisions at some law schools. This is unhealthy, when even a fine-grained shift in what folks here at NCBE refer to as “decimal dust” puts a law school community into an uproar. (When a school appears to plummet in terms of the numbers—for example, falling in the rankings from 37 to 53—the distinctions in such a shift are essentially meaningless mathematically because it’s decimal dust.)

We know that law school applications are down this year, raising the question of whether law schools will shrink their 2012 entering classes or dip deeper into the applicant pool to fill their seats. Next year’s entering class will graduate in 2015. In that year, if law schools choose the latter scenario, bar exam pass rates will fall, as bar results generally correlate to entering law school credentials.

Finally, the steady—or perhaps accelerating—erosion of ABA accreditation as the entry credential to the bar examination is worthy of a serious longi-

tudinal look by policy makers. The pro-applicant or pro-globalization objectives that are driving this erosion need to be matched against the Courts' enduring objective to screen the unsuspecting consumer from those who are incapable of delivering legal services at the high professional standard that the public expects and deserves.

That brings me to bar examiners. The licensing step for lawyers must remain the bulwark that identifies candidates who demonstrate competence as entry-level lawyers. Licensing in all professions exists to protect those who should be entitled to rely on the members of that profession. The current climate, which is roiling, will undoubtedly create pressure on lawyer licensing, as disgruntled graduates seek entities to blame for bar examination failure.

In other news, NCBE has launched a reconfigured website that should prove to be more user-friendly to applicants, bar examiners, and bar administrators. We have the same URL "home address": [www.ncbex.org](http://www.ncbex.org). It is worth a look for anyone concerned with bar examining.

One highlight worth visiting, for those with responsibilities for giving the bar examination or setting and enforcing policies for test administration, is the new presentation of the Information Booklets for the NCBE tests that are components of many jurisdictions' bar examinations: the MBE, MEE, and MPT. We have departed from the narrow format (3½" x 8") formerly used and created booklets that will print out nicely on standard-sized paper (8½" x 11"). I think every bar examiner should read the Information Booklets that relate to the NCBE tests they are administering.

As an example of information useful to bar examiners as well as applicants, pages 4–5 of the

MBE booklet set forth "What to Bring and What Not to Bring" on test day. Some bar examining boards have been slow to realize the significant harm that can come from permitting the items on the list to come into the examination room. Leading the list of what not to bring are cell phones. Cell phones, and particularly the current crop of smart phones, pose a significant risk. It is essential that they be prohibited, and it is just as essential that firm policies exist for dealing with candidates who, despite warnings, bring them to their seats. I believe that any applicant discovered in possession of a cell phone after fair warning to the group in advance of testing should have his or her test score invalidated. Only a zero tolerance policy will suffice.

As we look back over 2011, one accomplishment that has contributed to the good of the order is the development of model forms by which candidates can request to test under nonstandard conditions. In shorthand, we refer to this packet as the ADA Model Form. Major credit for development of the form goes to Missy Gavagni of the Florida Board of Bar Examiners and Peg Corneille of the Minnesota Board of Law Examiners, both members of the NCBE Board of Trustees, along with Kellie Early and Laurie Elwell of the NCBE staff. The ADA Model Form is now in the hands of all bar admission administrators.

Finally, a word of farewell is in order. Alan Ogden, Executive Director of the Colorado State Board of Law Examiners, retired at the end of November after a career just shy of 30 years with that agency. It is always a little bittersweet to see one of the true veterans go. Best wishes, Alan, as you move on. 🍷

# MALINGERED ADHD EVALUATIONS: A FURTHER COMPLICATION FOR ACCOMMODATIONS REVIEWS

by Lindsey J. Jasinski, Ph.D., and John D. Ranseen, Ph.D.

*Editor's Note: This article is based on Dr. John D. Ranseen's presentation "How to Identify Malingering in ADHD Evaluations" at the 2011 NCBE Annual Bar Admissions Conference held on April 28–May 1 in San Francisco, California. Dr. Ranseen and Dr. Jasinski have collaborated to produce this article for the Bar Examiner.*

**M**ental health evaluations rely heavily on the patient's report of symptoms and thus assume that the patient is honest, forthcoming, and compliant with the process. Yet many patients come to an evaluation with their own agendas, either conscious or unconscious, which may or may not coincide with the ostensible reason for the evaluation or even be known to the health care professional. In some cases, patients may try to appear more impaired or disabled than they truly are, possibly in hopes of securing a tangible benefit such as disability compensation, medication, financial award from a lawsuit, or the avoidance of prosecution. *Malingering*, as a psychiatric concept, is defined as the "intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives."<sup>1</sup> Realistically, the accuracy of many health care evaluations can be influenced or even voided by the motivation and honesty, or lack thereof, of the person being evaluated.

## RECENT DEVELOPMENTS IN THE STUDY OF MALINGERING

There has been an exponential increase in the study of malingering in the last several decades, due pri-

marily to the large increase in neuropsychological evaluations conducted to assess disability eligibility and damages for traumatic brain injury.<sup>2</sup> This work has focused on the development of techniques to best identify those patients who provide inadequate or suboptimal effort on cognitive tests.

On the other hand, evaluators whose work has primarily focused on the identification and treatment of individuals with learning problems, including Attention Deficit Hyperactivity Disorder (ADHD), have had little reason to consider this issue until recently. For years, much of the ADHD and Learning Disability (LD) literature has focused on children and adolescents who were presumed to have little motivation to feign impairment. Further, adults with learning problems were often embarrassed by their disorder and prone to hide the problem rather than seek identification and potential help.

Increasing recognition that learning problems may persist into adulthood has led to identification of young adults with both LD and ADHD for whom medication and/or specialized programs at the university level are accepted as standard treatment strategies. Many adults with these disorders, when

provided appropriate treatment, are more likely to reach goals that might not have been achievable without such assistance.

Yet some have acknowledged the uncomfortable fact that some individuals with no history of learning difficulty may be motivated to seek a diagnosis of ADHD or LD, primarily in the interest of gaining access to stimulant medication and/or academic accommodations at both the undergraduate<sup>3</sup> and postgraduate levels.<sup>4</sup> Stimulant medications are frequently utilized as a study aid and abused recreationally among college students,<sup>5</sup> and the academic accommodations afforded to those with a diagnosis of ADHD or LD (e.g., extra time on exams, a private testing room, tutoring services) would potentially benefit any student looking for a competitive edge.<sup>6</sup> In short, external incentives clearly exist for some students to seek an ADHD diagnosis in order to legally obtain a prescription for stimulant medication and/or access to university disability services, which often include exam accommodations.

## MALINGERING IN THE CONTEXT OF BAR EXAM ACCOMMODATIONS REQUESTS

Those who review documentation for accommodations requests on state bar exams are well aware that one of the most common cases is that of the student who seeks his or her first evaluation of ADHD after struggling on initial law school exams. In some cases, evaluation is sought only after bar exam failure. Many other accommodations requests involve updated evaluations where the initial diagnostic evaluation, perhaps conducted during childhood or adolescence, was far from comprehensive.

The most common request for bar exam accommodations is for extended time to alleviate generic problems with “slow” processing of written material

or the inability to organize a response and provide a coherent, well-reasoned written argument quickly and efficiently.<sup>7</sup> Individuals making such requests likely feel a great deal of stress and may view themselves as having some hidden learning problem that has come to light due to the demands of the environment. Alternatively, they may simply believe that extended time and other accommodations might give them sufficient edge to compete at this level.

In short, there is ample reason for the individual to feign an accepted disorder for which accommodations are now routinely offered in many universities and professional schools. Several researchers have estimated that nearly one-quarter to one-half of students evaluated for ADHD within a university setting may exaggerate or feign symptoms.<sup>8</sup> Unfortunately, there is little indication that most evaluators who submit reports in support of accommodations requests pay any serious attention to this issue.

As will be explained in this article, most of the techniques used to assess ADHD and other learning problems are extremely susceptible to feigned impairment. Identification of those individuals who are feigning impairment on ADHD evaluations is improving yet remains imperfect. Recommendations will be offered for dealing with this issue in reviewing bar exam accommodations requests based on ADHD diagnostic evaluations.

## ADHD EVALUATION: STANDARD PRACTICE

Recommendations for a comprehensive ADHD evaluation involve the following general components:<sup>9</sup>

1. diagnostic interview with behavioral observations

2. psychological testing, including ADHD self-report inventories
3. interviews with and/or symptom ratings from significant others
4. cognitive testing, including IQ tests, academic measures, and tests of specific cognitive functions (e.g., attention, mental flexibility)
5. review of past records: educational records, transcripts, supervisor ratings, etc.

There is no mental health condition, ADHD included, for which a specific, highly reliable biological marker exists. Clinical diagnostic evaluations focusing on ADHD rely heavily on the patient's self-report of past and present symptoms and problems. This is often augmented by psychological testing that includes both self-report inventories and neuropsychological tests to assess cognitive functions. Symptom ratings from a close friend or family member are utilized to corroborate the patient's report of symptoms and may help identify those who seem to be pathologizing normal emotional or academic stressors.

Finally, reviewing past records is recommended in mental health evaluations involving conditions that have been long-standing. ADHD is technically a developmental disorder. Since many of the adult ADHD evaluations involve individuals who were never given the diagnosis in the past, a review of old school records or other information is deemed necessary to establish that the problem is not of recent onset. This is a particular concern in those cases in which a student first finds him- or herself inattentive and distractible under the substantial academic demands of law school. Additionally, inattention is characteristic of a number of psychiatric disorders,

including depression and anxiety, and the lack of a developmental history may lead the clinician to consider alternative explanations for reported symptoms.

Realistically, it should be understood that within the busy clinical environment, many diagnostic evaluations fall short of the recommendations for comprehensive ADHD evaluation. Nevertheless, such evaluations are routinely submitted to support requests for accommodations.<sup>10</sup> Thus, many testing/licensing organizations provide guidelines to encourage evaluators to provide sufficient information by which to conclude that a comprehensive evaluation has been performed. Submitted evaluation reports often indicate that the diagnosis has been made solely based on a psychiatric interview or an interview coupled with an ADHD self-report inventory. Others include brief cognitive testing such as a continuous performance test (CPT) or measures specifically chosen to examine attention, speed of processing, and reading speed in order to provide a rationale for requesting extended time. Research has shown, however, that these diagnostic techniques are quite susceptible to feigned impairment.

## FEIGNING ADHD DURING THE ADHD EVALUATION COMPONENTS

### Feigning during the Interview

Information regarding typical ADHD symptoms can be readily accessed from countless websites and publications, requiring little effort on the part of an individual motivated to appear to have the disorder. Contrary to television shows such as *Lie to Me*, which depicts a mental health professional with highly scientific methods of determining truth based on subtle verbal and nonverbal cues, studies do not support the myth that mental health professionals have

any ability to detect which patients are presenting a true psychiatric disorder as opposed to a feigned disorder.

In fact, while clinicians often believe themselves to be superior predictors of human behavior, numerous studies have demonstrated that their ability to distinguish between a true disorder and malingering is particularly poor, often no better than random guessing.<sup>11</sup> Extensive research and heated debate comparing clinical judgment to statistical prediction models have suggested that clinicians are quite easily fooled when it comes to malingering, and objective data is often better at predicting a feigned disorder.<sup>12</sup> While no study to date has focused specifically on clinician judgment of genuine versus feigned ADHD per se, it is safe to assume that the significant limitations in clinical prediction also apply to this domain.

### **Feigning on Self-Report Inventories**

One of the most commonly used methods for assessing ADHD is the use of self-report ratings, where the individual being evaluated is instructed to rate the severity of various symptoms of the disorder. Inventories such as the Conners' Adult ADHD Rating Scale (CAARS)<sup>13</sup> and Brown Attention Deficit Disorder Scales (BADDS)<sup>14</sup> are used to identify and quantify current symptom complaints, while the Wender Utah Rating Scale (WURS)<sup>15</sup> is often used to retrospectively assess childhood symptoms.

These measures all purport to be valid and objective measures of ADHD; however, they are

valid only if one assumes that a person has no interest in feigning the disorder. Realistically, these scales derive their validity from "face validity," which means that a person marks obvious symptoms of ADHD along some continuum of severity. The CAARS includes an Inconsistency scale, an indicator of whether the individual read and understood the items, which has little relation to whether the person feigned symptoms. More recently, the development

of an Infrequency, or feigning, scale has been promising on the CAARS but awaits further validation.<sup>16</sup> No other ADHD-specific self-report inventories include a validity scale.

Recent studies have demonstrated significant vulnerability to feigning on the self-report ADHD measures. For example, one study found that up to 95 percent of individuals instructed to fake symptoms of ADHD were easily able to produce an ADHD-like profile on several popular self-report measures of the disorder,<sup>17</sup>

and it has been consistently documented that true ADHD and malingered profiles are nearly indistinguishable.<sup>18</sup>

In fact, feigning frequently results in extremely high symptom ratings because the feigning individuals indiscriminately endorse all areas of difficulty, whereas individuals with a prior documented diagnosis of ADHD achieve significantly lower scores.<sup>19</sup> This likely occurs because true ADHD involves only some, rather than all, symptoms, and the level of impairment varies greatly between individuals. Additionally, the current diagnostic nomenclature

[F]EIGNING FREQUENTLY RESULTS IN EXTREMELY HIGH SYMPTOM RATINGS BECAUSE THE FEIGNING INDIVIDUALS INDISCRIMINATELY ENDORSE ALL AREAS OF DIFFICULTY, WHEREAS INDIVIDUALS WITH A PRIOR DOCUMENTED DIAGNOSIS OF ADHD ACHIEVE SIGNIFICANTLY LOWER SCORES. THIS LIKELY OCCURS BECAUSE TRUE ADHD INVOLVES ONLY SOME, RATHER THAN ALL, SYMPTOMS, AND THE LEVEL OF IMPAIRMENT VARIES GREATLY BETWEEN INDIVIDUALS.

may apply more to children than to college students or adults.<sup>20</sup> Moreover, self-report scales of general psychiatric complaints that do include validity scales (e.g., the Minnesota Multiphasic Personality Inventory-2-RF [MMPI-2-RF] and the Personality Assessment Inventory [PAI]) have not fared well at detecting feigned ADHD symptoms.<sup>21</sup> Thus, it is well established that self-report inventories, particularly those without validity scales, are easily feigned, and very high symptom ratings should heighten clinician awareness of possible symptom exaggeration.

### **Feigning on Measures of Observer Symptom Ratings**

Current diagnostic criteria for ADHD require the presence of symptoms during childhood; however, adults are poor historians for youth symptoms.<sup>22</sup> Thus, Barkley et al.<sup>23</sup> encourage the inclusion of symptom ratings from family members or friends who can speak to the impact of the disorder beginning at an early age. Such ratings are typically done using a variant of the self-report inventories (e.g., the CAARS-Observer Rating Scale), allowing for a direct comparison between self and observer ratings of symptom severity.

As with the self-report scales, the lack of validity scales raises concerns about the possible impact of feigning. There is a general assumption that it is more difficult to get other people to feign a disorder for you, making them potentially less vulnerable, although no studies to date have explored this assumption. Furthermore, clinicians are left with a difficult decision in the face of discrepant self and observer ratings: could the observer be lacking in knowledge or awareness of the patient's true symptoms, or is it possible that the observer ratings are accurate, while the self-report may be exaggerated? At present, there is little reason to assume

that observer ratings are any different from their self-report counterparts, and results should be interpreted as only one piece of the puzzle until their validity can be more firmly established.

### **Feigning on Cognitive Measures**

ADHD evaluations may also include tests of intelligence, academic skills, processing speed, memory, attention, and executive functioning to aid in confirming the diagnosis, as well as to direct appropriate interventions based on the individual's personal strengths and weaknesses. These cognitive tests are no less susceptible to feigned symptoms, however, and clinicians who fail to consider effort as part of their evaluations run the risk of using very low scores on cognitive tests to further justify a questionable diagnosis. Several recent studies have documented exceptionally low scores on a wide range of cognitive tests among individuals instructed to feign ADHD, while those with a prior diagnosis of the disorder tended to show significantly fewer cognitive deficits.

### ***Feigning on Tests of Processing Speed and Reading Fluency***

The score disparity between feigning subjects and ADHD subjects has been most evident on tests of processing speed and reading fluency, where individuals who attempt to fake attention problems overestimate the impact of the disorder and perform exceptionally poorly. For instance, individuals instructed to fake having ADHD suppressed their scores on a processing speed index and digit recall subtest far below those of individuals with a well-documented history of ADHD. In fact, ADHD subjects often scored in the average range or higher on such measures, while feigning subjects varied somewhat but typically scored well below average.<sup>24</sup>

Similar results were found on a test of reading fluency, or how quickly a person is able to read short sentences. Again, mean scores for the ADHD sample group typically fell in the average range, while the faking group's mean score fell below average.<sup>25</sup>

### *Feigning on Tests of Memory, Executive Function, and Attention*

Other studies have found evidence of significantly suppressed scores among malingerers on tests of memory, executive function, and attention, with no evidence of problematic scores among the ADHD comparison groups.<sup>26</sup> Anecdotal reports confirm that individuals who fake ADHD utilize a number of strategies to appear impaired by over-reporting typical symptoms of the disorder, completing tasks very slowly, responding incorrectly, or performing carelessly or too quickly.<sup>27</sup>

Overall, while ADHD subjects do not generally show large deficits on many neuropsychological tests, and the tests therefore may not be particularly diagnostic of the disorder, concern should be raised when scores fall well below the average range, particularly among individuals who have successfully navigated a higher education system for several years.

## THE USE OF SYMPTOM VALIDITY TESTS TO IDENTIFY MALINGERING

In an attempt to address the issue of feigned symptom presentations on cognitive tests, several authors have suggested using the widely accepted and well-validated symptom validity tests (SVTs) developed for traumatic brain injury (TBI) and other neurological insults. SVTs have gained substantial attention in recent decades and are able to accurately detect suboptimal effort using tests that appear to rely heavily on complex tasks (e.g., memory). These

tests, however, are actually quite simple, and even severely neurologically impaired patients can pass the tests with very good scores.

## Research and Development of Symptom Validity Tests

Research about and development of SVTs utilize two primary study methodologies: *simulation studies* and *known-groups design studies*. Simulation studies include a group of participants who are instructed to fake symptoms of the disorder and are often provided an incentive for doing so “successfully” (i.e., avoiding being caught by not feigning too obviously). This simulation group is then compared to a group whose members were previously diagnosed with the disorder of interest (e.g., TBI, ADHD), or to a group without any prior diagnoses or conditions.

In a known-groups design study, individuals are selected for inclusion in a group because they are thought to be malingering based on their failure of one or more SVTs. The suspected feigning group is then also compared to a group known to have a history of the condition of interest, or to a group with no prior diagnoses.

Simulation studies are often used because they are easy to conduct and allow the researcher more experimental control. However, they are limited in that they may not capture the “real world” incentives at stake for a person who is motivated to feign symptoms of a disorder.

## Symptom Validity Tests as Applied to ADHD Evaluations

Only recently have these SVTs been applied to ADHD evaluations, in the hope of gaining a repertoire of tests able to detect feigned attention problems. To date, three studies have provided initial support for the inclusion of SVTs in a standard

ADHD test battery. Sollman et al.<sup>28</sup> were among the first to examine SVTs and found good support for use of the Test of Memory Malingering (TOMM),<sup>29</sup> Letter Memory Test (LMT),<sup>30</sup> Digit Memory Test (DMT),<sup>31</sup> and Nonverbal Medical Symptom Validity Test (NV-MSVT).<sup>32</sup>

The NV-MSVT is a computerized test that requires an individual to remember pairs of objects, and it takes approximately 5 to 10 minutes to administer. The TOMM, DMT, and LMT are card forms of memory tests and require a person to recall pictures, a series of digits, or a series of letters, respectively. Each test requires 20 to 30 minutes of administration time and manipulates the apparent level of difficulty by adding more items to recall or extending the length of time before the recognition task. Jasinski et al.<sup>33</sup> provide additional validation for these tests and suggest that failure of two or more of these SVTs provides the best overall prediction of feigning among college students claiming to have ADHD.

In general, these tests demonstrate strong specificity (e.g., the percentage of individuals without ADHD that are correctly identified as honest by the test) and moderate sensitivity (e.g., the percentage of individuals who are feigning ADHD that are correctly “caught” by the test). The statistical properties of the SVTs when used to detect feigned ADHD are very similar to those found when detecting malin-

gered TBI, suggesting that these tests should be routinely used in ADHD evaluations.

Two other validity tests, the b Test<sup>34</sup> and the Dot Counting Test (DCT),<sup>35</sup> are promising for detecting feigned ADHD but await further validation.<sup>36</sup> Additionally, indices embedded within cognitive tests (e.g., the Reliable Digit Span<sup>37</sup> and the Rey Auditory Verbal Learning Test Exaggeration Index<sup>38</sup>) may be useful in examining feigning, although these indices are less powerful in detecting suboptimal effort than the SVTs.<sup>39</sup>

In general, SVTs can be applied to ADHD evaluations with increasing confidence, despite being developed for the assessment of feigned memory impairment. What remains unclear is whether individuals who feign ADHD believe memory impairment to be part of the syndrome, or if they perform poorly on all measures of cognitive ability. In either case, tests developed for malingered TBI are currently the best option for use in detecting suboptimal effort in ADHD evaluations.

## MALINGERING AND THE ACCOMMODATIONS REVIEW PROCESS

### Challenges Posed by the Amended Americans with Disabilities Act

Reviewing requests for accommodations on licensing exams based on mental disorders such as ADHD has always been complicated by the fact that clinicians submitting evaluations on behalf of individuals requesting accommodations often have

limited understanding of the legal basis for their advocacy.<sup>40</sup> State boards are currently struggling to interpret the implications of the amended Americans with Disabilities Act (ADAAA) and the recent regulations provided by the Department of Justice interpreting this law as it currently applies to test accommodations.<sup>41</sup>

Recognition that some, perhaps many, evaluations submitted to state law boards may be tainted by exaggerated symptom reports and feigned impairment on cognitive tests comes at a problematic time. The ADAAA regulations seem to uphold the previous standard of disability (i.e., substantial limitation in a major life activity) while also advising that this standard be applied by testing organizations in a less stringent manner.<sup>42</sup> Thus, these regulations indicate that a history of accommodations should be taken quite seriously when reviewing current requests and that state boards should not make onerous requests for additional diagnostic information. It is presumably not onerous or unreasonable to request a valid evaluation if one does not believe the primary findings upon which the diagnosis of the disabling condition is based.

### **Evaluator Awareness of Malingering**

In past years, it was unusual to review an ADHD evaluation that made any attempt to address the issue of malingering. Currently, some evaluations will address this issue by reporting performance on either a symptom validity measure or a validity scale on a self-report inventory such as the MMPI-2. As previously discussed, there is no adequate self-report validity scale for ADHD measures that has undergone sufficient study to address feigned self-report of symptoms.

Additionally, many evaluators continue to employ outdated symptom validity measures, such as the Rey 15-Item Memory Test, that have limited sensitivity to detecting malingering in TBI populations.<sup>43</sup> This limited sensitivity undoubtedly extends to the ADHD population. Nevertheless, given that so few evaluators provide any discussion of effort in their reports submitted to support requests for accommodations based on ADHD, credit must be given to the fact that an evaluator at least shows some awareness of this concern.

### **Current Research and Conclusions**

The state of current research regarding feigned symptom reports and cognitive test results within ADHD evaluations can be summarized as follows:

1. Studies indicate that some evaluations conducted primarily with college students include a substantial number who do, in fact, feign impairment in order to achieve a desired goal usually involving access to stimulant medication and/or provision of accommodations.
2. ADHD evaluations based solely on symptom reports cannot be reliably considered valid. Particular concern should be noted in evaluations indicating extremely high levels of symptoms that show little or no correspondence to impaired functioning in life.
3. Neuropsychological testing that reveals unusual degrees of cognitive impairment more consistent with severe TBI than with mild deficits in attention or speed of processing cannot be considered valid, particularly if the evaluation has not included any symptom validity testing. ADHD is not characteristically associated with extremely low levels of reading fluency.

4. Evaluations that employ symptom validity testing designed to detect suboptimal effort on memory tests provide some assurance of validity yet do not completely ensure that the impairment on other measures has not been feigned.


The implications of these findings are, in fact, consistent with previous recommendations for comprehensive ADHD evaluation. Although many practitioners seem to rely solely on self-report of symptoms, this has never been considered acceptable practice for comprehensive diagnosis of ADHD, particularly as it applies to supporting accommodations requests.<sup>44</sup> Given that such evaluations are completely susceptible to malingering, they should not be accepted.

Similarly, impaired performance on a continuous performance test or other cognitive measure without other credible indications of impairment in the actual life of the person is not diagnostic of ADHD. Particular importance has always been given to providing a clear developmental history of symptoms and the impairment caused by these symptoms across environments over time. ADHD is not conceived to be either a disorder that first arises under the demands of a challenging academic environment or one that only causes an isolated problem focusing on difficult exams. An individual can feign impairment on all aspects of an ADHD evaluation except for the previous history of problems. For this reason, past performance has always been a better indication of limitation than an isolated weakness on a neuropsychological evaluation.

The implications of the ADAAs notwithstanding, documentation submitted on behalf of an individual requesting accommodations for ADHD needs to include a comprehensive diagnostic evaluation that provides credible evidence of impairment. Some state documentation requirements request that the evaluator address how it was determined that malingering was ruled out. Other states should consider adding this to their documentation requirements. At a minimum, this signals to an evaluator a need to take this issue seriously.

Those providing consultation to state boards should question evaluations that display unusual levels of impairment with no symptom validity testing and no credible evidence of past difficulty on exams. For instance, there is no coherent explanation for a law student claiming a disability in processing speed due to ADHD having a measured reading fluency at the fourth-grade level even though the student achieved an average LSAT score without accommodations. Put simply, the LSAT score is a better indication of limitation in reading fluency than an isolated low score on a test whose validity is completely dependent upon effort.

This is not to imply that all low scores on cognitive tests should be routinely dismissed. Every accommodations request has to be taken on its full merits. Realistically, there is no way to completely ensure that test findings are valid in terms of providing an accurate reflection of the person's full effort. Nevertheless, ongoing research in this area is

improving and will eventually provide a sounder basis for determining which ADHD evaluations truly reflect a person's actual functioning. 

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LINDSEY J. JASINSKI, PH.D., is an assistant professor in the Department of Psychiatry at the University of Kentucky, as well as an adjunct assistant professor in the Department of Psychology. She conducts psychological and neuropsychological evaluations for the outpatient Department of Psychiatry, as well as neuropsychological screenings for both adolescent and adult inpatients at the University of Kentucky's Good Samaritan Hospital. Her primary research interests include the validation of symptom validity tests and embedded indices for malingering traumatic brain injury and adult ADHD. Dr. Jasinski's dissertation involved validation of malingering indices for adult ADHD, a newly developing area of research. She received her M.A. in clinical psychology from the University of Northern Iowa and her Ph.D. in clinical psychology from the University of Kentucky.



JOHN D. RANSEEN, PH.D., is an associate professor in the Department of Psychiatry at the University of Kentucky, as well as an adjunct associate professor in the Department of Neurology and in the Department of Psychology. He is the coordinator of psychological and neuropsychological evaluation services for the Department of Psychiatry. His primary research interests include adult ADHD and personality change resulting from brain injury. Ranseen currently consults with approximately 20 state bar committees, the United States Medical Licensing Examination program, and other testing organizations on the provision of test accommodations for examinees diagnosed with ADHD and learning disabilities. He has written a number of articles concerning the issue of providing test accommodations for persons with ADHD under the Americans with Disabilities Act. Ranseen received his Ph.D. in clinical psychology from Ohio University and a postdoctoral degree in neuropsychology from the University of Virginia Medical Center.

# THE MPT: ASSESSMENT OPPORTUNITIES BEYOND THE TRADITIONAL ESSAY

by Diane F. Bosse

“**F**or the first time, I felt I knew whether or not a candidate was going to be a good lawyer.” So said a longtime grader of the New York bar exam, following his first experience grading the Multistate Performance Test (MPT). His observation reflects the nature of the test: the MPT requires a candidate to do what lawyers do—marshal the facts, master the law, and apply the law to the facts so as to solve a client’s problem.

As those who labor in bar admissions vineyards know, the MPT, currently administered in 36 jurisdictions, is one of the measures available to assess the competence of a candidate to practice law. It is a skills test involving legal analysis, fact analysis, problem solving, resolution of ethical dilemmas, organization and management of a lawyering task, and written communication. The MPT tests a candidate’s ability to complete a task that a beginning lawyer should be able to accomplish.

The candidate is assigned a task that is explained in a memo from a supervising lawyer. The task may be, for example, to draft a memo to the supervising lawyer, a letter to a client, a persuasive brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument. A File of source materials and a closed-universe Library are the tools available to accomplish the task. (See the sidebar on page 18 for brief descriptions of the MPT task, context, and

contents of the File and Library for both MPTs offered in July 2011.)

The candidate reviews the source materials contained in the File to master the facts of the case. The source materials may include the following: transcripts of interviews, depositions, or trial testimony; pleadings; correspondence; contracts; newspaper articles; medical records; police reports—any of the variety of documents that constitute a lawyer’s file. The facts may or may not be complete, and some of the facts provided may be irrelevant. The Library may contain cases, statutes, regulations, or rules, some of which may not be directly on point or controlling. And the clock is ticking—the candidate is expected to complete the assignment in 90 minutes.

## GRADING THE MPT: NEW DOG, OLD TRICKS

Grading the MPT is like grading a traditional essay in many ways. To further assist the jurisdictions in grading the MPT, NCBE provides Point Sheets that describe the factual and legal issues encompassed in the lawyering task to be completed by the candidate. The methodology used by a jurisdiction in grading the MPT can be the same as that used in grading traditional essays, whether the Multistate Essay Examination (MEE) or state-crafted essays.

There are two primary methods of grading the written component of the bar exam. The *holistic approach*, familiar to participants in NCBE grading

## JULY 2011 MPT SUMMARIES

### ***In re Field Hogs, Inc. (MPT-1)***

In this performance test, examinees are employed by the law firm that represents Field Hogs, Inc., a manufacturer of heavy lawn and field equipment for consumer use. The company has been sued four times on various products liability and tort theories; the firm successfully defended two of these cases, but two others resulted in substantial jury awards for the plaintiffs. Field Hogs wants to limit its costs and any unwanted publicity in future litigation. To address these concerns, Field Hogs has asked the law firm to draft an arbitration clause to be added to its sales contracts. Examinees' task is to draft an objective memorandum analyzing whether the proposed arbitration clause would cover tort claims against Field Hogs and whether the allocation of arbitration costs would affect the clause's enforceability. In addition, examinees are asked to draft an arbitration clause that is likely to be enforceable in court and that addresses the client's priorities. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, a memorandum summarizing Field Hogs's litigation history, a copy of the law firm's standard commercial arbitration clause, and the Consumer Procedures of the National Arbitration Organization. The Library contains two cases discussing the standards for enforceable arbitration clauses.

### ***In re Social Networking Inquiry (MPT-2)***

Examinees' supervising partner is the chairman of the Franklin State Bar Association Professional Guidance Committee. The committee issues advisory opinions in response to inquiries from Franklin attorneys concerning the ethical propriety of contemplated actions under the Franklin Rules of Professional Conduct. The committee has received an inquiry from a Franklin attorney asking whether an investigation using the social networking pages (such as Facebook or MySpace) of a nonparty, unrepresented witness in a personal injury lawsuit would violate the Rules. The supervising partner has reviewed the matter and believes that the attorney's proposed course of conduct would be contrary to the Rules. Examinees' task is to prepare a memorandum analyzing the issue with the object of persuading the other committee members that the proposed course of conduct would violate the Rules. This is an issue of first impression in Franklin. Examinees must therefore discern the relevance of, and guidance to be derived from, the three differing applications of those Rules in other states and then apply those differing approaches to the proposed course of conduct. The File contains the instructional memorandum, the letter from the Franklin attorney making the inquiry to the committee, and notes of the committee meeting. The Library contains the applicable Rules of Professional Conduct (including commentary on the Rules) and two cases—one from Olympia and one from Columbia—bearing on the legal issues.

workshops, assigns grades based on an evaluation of the characteristics of the answer against a fixed standard—that is, the grading scale does not change, whatever the item being graded. This approach uses a six-point scale where, for example, a grade of six represents a well-above-average response and a grade of three represents a somewhat-below-average response. The grader will read the essay or MPT answer as a whole and assign a grade, much like a grade of A, B, or C would be given on a law school paper or exam.

An alternative method, the *analytical approach*, assigns grades based on an evaluation of the answer according to an item-driven grading scale. A new grading scale is created for each MPT item or essay question. The model answer is deconstructed, point values are assigned to each issue, and the answer is scored against that rubric. Points are assigned to the independent parts of the answer, and the grader sums the points to determine the grade, like adding up the number of questions answered correctly to get a numerical score.

Whichever method is utilized by a jurisdiction for grading the MPT, rank-ordering is the goal, just as it is when grading traditional essays. Each method should yield the same rank-ordering of the candidates. The scores achieved on the MPT, along with scores on state essays and any other written components like the MEE, are then scaled to the Multistate Bar Examination (MBE) and combined with MBE scaled scores to determine the total score.

## ADDITIONAL ASSESSMENT OPPORTUNITIES PROVIDED BY THE MPT

In grading both essay and MPT answers, we are assessing the candidate's analytical skills and his or her ability to apply the law to a given set of facts

and reach a reasoned conclusion. But if we grade the MPT with a view to assessing only analytical skills, we lose the value of the test instrument in measuring competence in several dimensions. Grading the MPT gives bar examiners the opportunity to assess many more skills than grading a traditional essay, and to do so in a way that draws meaningful distinctions among candidate answers, enabling a finer-grained rank-ordering of candidates' performances.

Among the differences between grading the MPT and grading a traditional essay is, first and foremost, that the MPT does not test a candidate's knowledge of the law. Candidates are given the law in the Library. While some cases, statutes, or regulations may be irrelevant, in whole or in part, to the problem, all the law the candidate needs to solve the problem is provided.

Although not testing specific knowledge of the law, the MPT gives us the opportunity to test a candidate's ability to reason by analogy. Can the candidate take the facts of a case provided in the Library, compare and contrast them with facts in the File, draw appropriate inferences, make cogent arguments or observations, and express a reasoned conclusion? Candidates who parrot back large passages from cases found in the Library without using the filtering processes of analysis and synthesis should be graded accordingly.

The candidate is required to master the File and the Library (typically totaling 12 to 15 pages in length), ascertain what is and is not relevant, and organize and present a cogent response to the task assigned. The traditional essay question, by comparison, spoon-feeds the candidate limited facts (generally all relevant) and requires recitation and application of general principles of law in response to focused queries. How the candidate determines

the relevant facts, applies the appropriate law, and produces a writing that is appropriately responsive to the assigned legal task are important MPT assessments that should factor into the grading of the MPT.

Finally, the MPT offers an opportunity to assess the candidate's understanding of the structure of the judicial system. In the MPT universe, all events take place in the fictional state of Franklin, in the fictional Fifteenth Circuit of the United States. Franklin has an intermediate appellate court (the Court of Appeal) and a Supreme Court and is bordered by the fictional states of Columbia and Olympia. The MPT tests a candidate's ability to recognize what precedent is controlling and what authority may be nonbinding but advisory and perhaps either useful in the analysis or such as to require that it be distinguished. For example, if the task is a persuasive one, the candidate may be required to draw distinctions between a case in the Library which appears to be adverse to the client's position and the facts in the File or to argue that the case is not controlling. Appreciating the applicability of the various legal authorities provided in the Library is a skill that can be demonstrated by the candidate's answer to the MPT item, and one on which the candidate should be graded.

### GRADING THE MPT VERSUS GRADING TRADITIONAL ESSAYS: NEW DOG, NEW TRICKS

Grading the MPT varies most from grading a traditional essay in its assessment of the candidate's performance of the task. For example, if the task includes preparation of a statement of facts, does the candidate include only relevant facts? Does the candidate state only the facts, without argument? Does the statement of facts take into account the purpose of the writing? For instance, does the candi-

date express the facts in an objective fashion for an objective piece, and place the facts in their best light without overstating them if the assignment is to prepare a persuasive writing?

Distinctions may be drawn as to how well the candidate performs the assigned task. First, does the candidate prepare a writing in the form required by the task? Whether the task is to prepare a letter, a brief, or a contract provision, the candidate must produce a document in the requested form.

The task itself gives grist to the grading mill. If the task is to prepare a brief, does the candidate organize the argument into points and include headings that are an application of the law to the facts? If the task is to draft a will provision and the File includes a specimen to follow, does the will provision drafted by the candidate follow form?

Finally, does the candidate follow other directions? If told not to prepare a statement of facts, not to be concerned about a particular issue, or to be sure to anticipate and address contrary views, does the candidate comply? Candidates are instructed not to go beyond the confines of the File and the Library. Failure to follow that direction should be reflected in grading.

### AN OPPORTUNITY TO ASSESS WRITING SKILLS

One criticism often leveled at new lawyers is that their writing does not reflect advocacy. If the MPT assigns a persuasive task, the candidate should be graded on whether the writing is appropriately persuasive. Persuasiveness is not demonstrated by the number of adjectives used or by pronouncing one's position as "clear." Grading an answer for its persuasiveness involves evaluating whether the candidate

presents arguments that are well reasoned and supported by the facts and applicable law.

The audience for the writing must be considered by the candidate in completing the task, and whether the writing is proper in tone, in focus, and in the language used is a valid discriminator in grading the MPT. A candidate should understand, for example, that an opinion letter to a client offers objective counsel and is not the format in which to argue the righteousness of the client's legal position.


Jurisdictions vary on how much or little the quality of the writing counts in grading traditional essays, but writing most assuredly should count in grading the MPT. In explaining the grading of the written component of its bar exam, the New York Board of Law Examiners advises candidates on its website as follows:

The ability to effectively communicate is essential to competent legal practice. In grading, consideration is given to whether the answer is appropriately organized; whether the analysis is expressed with precision, clarity, logic and economy; whether relevant facts are cited and analyzed in support of a stated conclusion; whether appropriate legal terms are incorporated into the analysis; and whether overall the answer reflects an ability to communicate in an effective manner.

The effectiveness of the writing and quality of the analysis should not be overlooked in grading the MPT. When we grade the candidate on the quality of the product he or she produces, we are harnessing the power and a significant purpose of the MPT in the overall assessment of the candidate's competence.

## CONCLUSION

Different components of the bar exam test different, albeit overlapping, aspects of a candidate's readiness for practice. The MPT is a test of skills, including the skills of organization of a legal task and written communication.

Bar examiners have been encouraged, and rightfully so, to increase the range of skills tested on the bar exam; adopting the MPT is one way in which jurisdictions have responded to that call. The MPT provides the opportunity to assess many of the skills that new lawyers need to practice law effectively in a way not available through other components of the bar exam. In grading the MPT, bar examiners should take full advantage of that opportunity. We may even identify who among our candidates will be good lawyers. 

## NOTE

1. The New York State Board of Law Examiners, the New York State Bar Examination, <http://www.nybarexam.org/TheBar/TheBar.htm> (last visited Nov. 14, 2011).



DIANE F. BOSSE is chair of the New York State Board of Law Examiners. She is chair of the Accreditation Committee of the American Bar Association's Section of Legal Education and Admissions to the Bar as well as a former NCBE chair. A graduate of the State University of New York at Buffalo, Bosse is of counsel to the Buffalo law firm of Hurwitz & Fine PC.

# OUR FEDERALISM: THE UNITED STATES AND THE REGULATION OF LAWYERS

by Michael J. Churgin

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*Author's Note:* This article dealing with an aspect of federalism and the regulation of lawyers is dedicated to the memory of Fred Zacharias, Herzog Research Professor of Law at the University of San Diego School of Law. Fred was prescient on the subject of federalism and the regulation of lawyers. Fifteen years ago, he recognized the seriousness of the problem and carefully presented the ramifications of the issue, focused mainly on contrasting rules of professional conduct. Fred's article appeared in the Texas Law Review, the student publication of my own law school,<sup>1</sup> and it was typical of his thoughtful writing. Fred was a remarkable person. We first met 35 years ago while I was a supervising attorney and teaching fellow at Yale Law School and Fred was a second-semester law student, interested in the clinical program at the Federal Correctional Institution at Danbury, then a men's prison. I supervised Fred in some of his early clinic work. He was serious, thoughtful, and thorough—attributes that characterized his later career as an academic. After I joined the Texas faculty that fall, Fred continued his representation of federal inmates under the student practice rule and secured important constitutional rights for his clients.<sup>2</sup> Fred kept me informed about his remarkable, prolific academic career, and along with others, I received offprints of his many publications.

With the expansion of lawyers from the United States practicing elsewhere and with the creation of the World Trade Organization (WTO) and the accompanying negotiation for a General Agreement on Trade in Services (GATS), there has been a call for greater flexibility in the admission of non-United States lawyers in the various bars of the states. Various constituencies within the American Bar Association (ABA) have called for modifications in the qualifications for admission of foreign attorneys and have suggested that the states would have to alter their practices to recognize the globalization of legal practice. There have been some suggestions

that the GATS negotiations would force changes on the states through the actions of the United States Trade Representative (USTR) as part of a resulting international agreement.<sup>3</sup>

Although this drumbeat has been constant, there has been only limited discussion as to whether and under what circumstances the states could be forced to admit foreign lawyers. In addition, states have been moving on their own in the direction of more flexibility in setting forth criteria for admission to the bar, although most of the activity has been to enable lawyers from different states to practice or gain admission in other states. This article will discuss these aspects of the question of the regulation of lawyers.

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A 1971 United States Supreme Court decision, *Younger v. Harris*, breathed life to the term “Our Federalism.”<sup>4</sup>

[It] does not mean blind deference to “States’ Rights” any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments . . . .<sup>5</sup>

Almost 30 years later, the Court noted in the context of the reach of a federal bankruptcy statute: “Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”<sup>6</sup> With the increasing globalization of the legal profession, the question that remains is what is the role of the various states concerning limitations on legal practice and whether certain actions of the federal government might trump the states’ role.

There are those in the organized bar who would wish away the states’ power over the regulation of the admission of lawyers to practice in their respective jurisdictions. The American Bar Association continually has, at a minimum, advocated the control of practice by the states, while exhorting them to adopt model rules to broaden practice rules and maintaining its monopoly on accreditation of law schools in the United States.<sup>7</sup> Some states independently have taken the lead and expanded the ability of nonstate and non-United States lawyers to practice in their jurisdictions.

A series of decisions by the Supreme Court during the last several decades lend support to the basic independence of states in this area, and one might conclude that, if push came to shove, the states might even prevail against GATS and the United States Trade Representative. The starting point is a summary reversal by the Supreme Court in a situation where several prominent New York lawyers were hired by Larry Flynt to defend him against an Ohio criminal prosecution. The difficulty was the fact that these individuals were not admitted to practice in neighboring Ohio, and the Ohio courts had refused *pro hac vice* admission without a hearing. The United States Court of Appeals for the Sixth Circuit had affirmed an order of the federal district court directing such a hearing on their motion. However, the Supreme Court granted certiorari and, without oral argument, reversed the lower federal courts.<sup>8</sup>

The *per curiam* opinion concluded that there was no substantial federal question at issue because there “is no right of federal origin that permits such lawyers to appear in state courts without meeting that State’s bar admission requirements.”<sup>9</sup> The summary nature of the decision is all the more surprising because it involves a criminal defendant’s desire to have particular counsel represent him. The Court shows little sympathy for this position. The Court rejects any notion of a right to cross-jurisdiction practice: “Such an asserted right flies in the face of the traditional authority of state courts to control who may be admitted to practice before them.”<sup>10</sup>

In 1985, the Court reaffirmed the validity of its holding. In striking down New Hampshire’s rules that limited bar admission to residents, thus excluding an adjacent Vermont resident, Justice Powell summarized

the Court's position in *Leis*: "We concluded that the States should be left free to 'prescribe the qualifications for admission to practice and the standards of professional conduct' for those lawyers who appear in its courts. . . . The nonresident who seeks to join a bar . . . must have the same professional and personal qualifications required of resident lawyers."<sup>11</sup>

Fast-forward 20 years to 2006. The Supreme Court was confronted with a situation where both the defendant and the United States agreed that a trial judge had erroneously disqualified pro hac vice counsel; the question was on remedy. The Court majority and dissent emphasized "[n]othing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice . . . . Nor may a defendant insist on representation by a person who is not a member of the bar."<sup>12</sup>

Thus, the Supreme Court has never retreated from its broad deference to the states in the *Leis* case. A decision from 2008 buttresses the role of the states under our federalism.<sup>13</sup> This time the question before the Court involved the purported authority of the President in the field of foreign affairs against the position of a state. There was no question that Texas had violated its obligations under the Vienna Convention on Consular Relations when a non-citizen defendant had not been told of his right to contact a consular official.<sup>14</sup> Ultimately, the defendant had been sentenced to death.<sup>15</sup> The International Court of Justice (ICJ) had ordered the United States to ascertain whether there had been any effect on the conviction and sentence as a result of the violation of the Convention.<sup>16</sup> In a formal Memorandum to the Attorney General, President George W. Bush directed the Department of Justice to secure compliance with the ICJ's judgment.<sup>17</sup> Upon request,

the Texas Court of Criminal Appeals declined to comply, finding that the issue had been procedurally defaulted and that the President had no authority to direct Texas to modify its procedure.<sup>18</sup>

Speaking for the Court, Chief Justice Roberts wrote an opinion that affirmed the Texas court. Noting the broad power the President has in matters of foreign relations, he concluded that "[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."<sup>19</sup> Furthermore:

[T]he Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws. The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.<sup>20</sup>

There are several parallels to the WTO and GATS situation. The WTO dispute mechanism is not a self-executing treaty. Furthermore, Section 102(b) of the Uruguay Round Agreements Act, setting in motion United States participation, states:

No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by

the United States for the purpose of declaring such law or application invalid.<sup>21</sup>

The reference in *Medellin* to “heart of the State’s police powers”<sup>22</sup> finds a ready parallel with many Court statements about the power of states to regulate admission to the bar. It would seem that the USTR could not unilaterally negotiate away the requirements for admission to the bar and independently force implementation on the states.

This is not to suggest that the federal government is impotent when its own interests are at stake. I just suggest that, at minimum, it probably would take an act of Congress to override state authority for a GATS agreement. Congress has evidenced its ability to so act in another context involving cross-jurisdiction practice within the United States. For example, in 2005, Congress passed a measure as part of the Department of Defense Authorization Act that permitted military personnel to provide legal assistance to members of the armed services, their dependents, and their survivors as well as some civilian employees:

(d)(1) Notwithstanding any law regarding the licensure of attorneys, a judge advocate or civilian attorney who is authorized to provide military legal assistance is authorized to provide that assistance in any jurisdiction, subject to such regulations as may be prescribed by the Secretary concerned.

(2) Military legal assistance may be provided only by a judge advocate or a civilian attorney who is a member of the bar of a Federal court or of the highest court of a State.<sup>23</sup>

The Senate report noted that “questions have been raised by some as to whether attorneys pro-

viding such assistance outside the States in which they are licensed are engaging in the unauthorized practice of law. This provision would codify the long-accepted practice with respect to the provision of legal assistance.”<sup>24</sup> The federal interest in the maintenance of its armed services trumped any state rule limiting the practice of attorneys.

The focus has been on the activities of the states in looking at GATS. However, there is another avenue. There is separate admission to the various bars of the federal district courts for each district.<sup>25</sup> Certainly this is an exclusively federal sphere. Just as the Supreme Court has indicated that it is not the business of the states concerning regulation of lawyers who practice exclusively under the rules of the Patent Office,<sup>26</sup> so too would admission to practice before the various federal bars be outside the jurisdiction of the states. The federal government could permit foreign attorney admission to the various federal bars, presumably either through Judicial Conference rulemaking<sup>27</sup> or by statute.

The GATS negotiations traditionally have focused on the use of foreign legal consultants (FLCs)—foreign lawyers in good standing in their home countries.<sup>28</sup> These individuals have a separate status but are not admitted to the bar and are limited in what they can do. They can provide advice on the law of their home countries. They may not appear in state courts—without special permission—and usually may not be involved with real estate transactions or wills.<sup>29</sup> Not surprisingly, despite enactment by more than half of the states, the number of FLCs in most jurisdictions is rather small. Occasionally, there are disciplinary actions where the FLC crosses the line and acts contrary to the rule as a local state lawyer.<sup>30</sup>

There has been a charm offensive by some foreign bars to obtain approval in the United States. For example, the organized bar of Australia, the Law Council of Australia, attended sessions of the Conference of Chief Justices and lobbied heavily to arrange some form of admission, including inviting state judges to Australia for meetings. The conference passed resolutions in 2007 urging state boards of law examiners to consider permitting Australian attorneys to sit for the bar examination in various states and in 2009 to consider some form of reciprocity.<sup>31</sup>

The focus for foreign attorneys and those advocating for them has been to permit temporary practice, to admit to the bar on motion, or to enable individuals to sit for a bar examination. The ABA Commission on Multijurisdictional Practice's 2002 *Report to the ABA House of Delegates* included a model rule for temporary practice by foreign lawyers<sup>32</sup> in addition to a model rule for admission on motion for those within the United States.<sup>33</sup> The latter originated in the Bar Admissions Committee of the Section of Legal Education and Admissions to the Bar, but the former never was vetted to the same extent through that section or that committee. Both passed the House of Delegates, but the former has picked up only a small number of enactments. In contrast, the latter has been approved by an increasing number of jurisdictions approaching 80 percent. Similarly, about 80 percent of the states have enacted ABA-recommended safe harbor provisions for lawyers in the United States engaged in short-term representation of clients in states in which they are not admitted.<sup>34</sup> The safe harbor provision does not extend to non-United States attorneys, and few states permit its application to foreign attorneys.<sup>35</sup>

Sitting for the bar examination has become a cottage industry for foreign attorneys in New York.


About one-third of the applicants in the February 2010 cycle received their legal education outside the United States,<sup>36</sup> while almost 3,000 foreign-educated individuals took the July 2010 exam, representing one-quarter of all examinees.<sup>37</sup> New York permits individuals who have completed a graduate law degree—usually one year of study—from a common law jurisdiction to sit for the bar.<sup>38</sup> The pass rate is considerably lower than that for domestic applicants.<sup>39</sup> Many want the credential and do not follow through with the character and fitness portions of the New York bar, which take place after passage of the examination, rather than prior to the exam as in most states. LL.M. programs generally are cash cows for United States law schools.<sup>40</sup> There is no accreditation of LL.M. programs in the United States. Rather the only interest of the ABA Council of the Section of Legal Education and Admissions to the Bar—the accrediting body—is that the LL.M. program does not adversely affect the Juris Doctor program. There have been some calls for the ABA to accredit these programs, particularly because they have become a vehicle in some states for individuals to sit for the bar examinations.<sup>41</sup> There also has been some interest in the ABA becoming involved in the accreditation of non-United States law schools, and in 2009 the Conference of Chief Justices urged the ABA Section of Legal Education and Admissions to the Bar to consider developing a certification program for legal education providers in common law countries.<sup>42</sup> The ABA has only looked at United States programs abroad, often conducted in concert with non-United States law schools. However, accreditation would be a huge increase in jurisdiction for the ABA and would require extended and increased resources. As a first step, there has been some support for accreditation consideration of a non-United States law school that

claims to be in full compliance with existing ABA standards.<sup>43</sup> The council is currently considering this issue.<sup>44</sup>

Of course, the elephant in the room is how can states adhere to a requirement that United States bar candidates for admission be graduated from ABA-accredited schools and admit attorneys from abroad who do not have a similar accrediting body? Would not a graduate from a non-ABA-accredited school insist that she be treated in the same manner?<sup>45</sup> Would the whole accrediting process collapse if there would be an end run around the process?

The activity that has involved state boards of law examiners recently concerning potential multijurisdictional practice has been an effort to create a uniform bar examination. Without much fanfare, the Bar Admissions Committee of the ABA Section of Legal Education and Admissions to the Bar began discussing the possibility at its meetings in 2006 and 2007, and there was general interest and support.<sup>46</sup> The National Conference of Bar Examiners (NCBE) solicited interest among the states and held a meeting in January 2008 in New Orleans for the 21 jurisdictions that were already using the three components of the proposed Uniform Bar Examination at that time. There also was a presentation to the Conference of Chief Justices and another meeting in Madison, Wisconsin, in June 2009.<sup>47</sup> The catalyst was that increasing numbers of states were using products of NCBE as components of their respective bar exams: the Multistate Bar Examination, the Multistate Essay Examination, the Multistate Performance Test, and the Multistate Professional Responsibility Examination. A committee of NCBE came up with uniform criteria—the MBE would be weighted 50 percent.<sup>48</sup> Nineteen states already use all four NCBE products, and Missouri and North Dakota are in the vanguard.<sup>49</sup> Different states

will have different cut scores, but there should be improved portability.<sup>50</sup>

States have taken the subject of multijurisdictional practice seriously and have taken significant strides in that regard.<sup>51</sup> The question of the admission of foreign lawyers has not yet galvanized the same core support. The failure to date of the Doha round on GATS<sup>52</sup> has lessened the effect of the clarion call for action to open up state bars to non-United States attorneys. However, the drumbeat of particularly the United States international bar has kept the issue front and center.<sup>53</sup> Some in ABA leadership attempted to push multidisciplinary practice a decade ago, but it fell on deaf ears.<sup>54</sup> It will be interesting to see how the call for the admission of foreign attorneys will play. In 2009, the ABA president created a commission, Ethics 20/20, to study globalization, technology, and the *Model Rules of Professional Conduct*. Its report is due in 2012, and it will make recommendations on many of the issues discussed in this article.<sup>55</sup> 

## NOTES

1. Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).
2. See *Moskowitz v. Wilkinson*, 432 F. Supp. 947 (D. Conn. 1977); *Maguire v. Wilkinson*, 405 F. Supp. 637 (D. Conn. 1975).
3. See generally Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001). Professor Terry has been a prolific author on the subject of GATS.
4. *Younger v. Harris*, 401 U.S. 37, 44 (1971).
5. *Id.*
6. *Alden v. Maine*, 527 U.S. 706, 748 (1999).
7. AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201A (2002), <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201a.authcheckdam.pdf> (“[ABA] affirms its support for the principle of state judicial regulation of the practice of law.”). *But see* AM. BAR ASS'N STANDING COMM. ON PROF'L DISCIPLINE, REPORT 105, Recommendation 2 (2006), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/onehundredfive.authcheckdam.doc> (supporting the USTR's participation in developing “additional disciplines on

- domestic regulation that . . . do not unreasonably impinge on the regulatory authority of the states' highest courts of appellate jurisdiction over the legal profession in the United States"). The Conference of Chief Justices unsuccessfully urged that *unreasonably* be stricken from the resolution. *See Resolution 5*, CONFERENCE OF CHIEF JUSTICES (Aug. 2, 2006), <http://ccj.ncsc.dni.us/IndependenceofStateJudicialSystems/resol5GATS.html>.
8. *See* *Leis v. Flynt*, 439 U.S. 438, 438 (1979) (per curiam). Justice White would have set the case for oral argument, and three Justices dissented. *Id.* at 445.
  9. *Id.* at 443.
  10. *Id.* at 444 n.5.
  11. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 283–84 n.16 (1985).
  12. *United States v. Gonzales-Lopez*, 548 U.S. 140, 151–52 (2006); *see also id.* at 160 (Alito, J., dissenting) (citing *Leis*, 439 U.S. at 433).
  13. *See* *Medellin v. Texas*, 552 U.S. 491 (2008).
  14. *Id.* at 501.
  15. *Id.*
  16. *Id.* at 502–03.
  17. *Id.* at 503.
  18. *Id.* at 504.
  19. *Id.* at 525–26.
  20. *Id.* at 532.
  21. 19 U.S.C. § 3512(b)(2)(A) (2006); *see also, e.g.*, JEANNE J. GRIMMETT, CONG. RESEARCH SERV., RS22154, WTO DECISIONS AND THEIR EFFECT IN U.S. LAW 4 (2005). State law “includes any provision of a state constitution, regulation, practice or other state measure.” H.R. DOC. NO. 103-316, at 674 (1994).
  22. 552 U.S. at 532.
  23. 10 U.S.C. § 1044(d)(1)–(2) (2006).
  24. S. REP. NO. 109-69, at 317 (2005) (construing section 553).
  25. Local court rules, which include requirements for admission to each federal court, are collected at the United States Courts website. *Local Rules*, UNITED STATES COURTS, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/LocalCourtRules.aspx> (last visited Jan. 5, 2011).
  26. *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 404 (1963).
  27. 28 U.S.C. § 2072 (2006).
  28. *See* MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., RS22949, LEGAL SERVICES IN THE WORLD TRADE ORGANIZATION (WTO) AND U.S. EFFECT (2008); *see generally* AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201H, at 2 (2002) [hereinafter REPORT 201H], *available at* <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201h.authcheckdam.pdf>; *Foreign Legal Consultant Rules*, AMERICANBAR.ORG (Aug. 24, 2010), [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for\\_legal\\_consultants.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for_legal_consultants.authcheckdam.pdf).
  29. REPORT 201H, *supra* note 28, at 3–4.
  30. *See, e.g.*, *Dep't Disciplinary Comm. v. Antoine*, 899 N.Y.S.2d 41, 44 (N.Y. App. Div. 2010).
  31. *Resolution 7*, CONFERENCE OF CHIEF JUSTICES (Feb. 7, 2007), <http://ccj.ncsc.dni.us/LegalEducationResolutions/resol7AustralianLawyersStateBarExams.html>; *Resolution 13*, CONFERENCE OF CHIEF JUSTICES (Aug. 2009), <http://ccj.ncsc.dni.us/InternationalResolutions/resol13.html>.
  32. AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201J, at 1 (2002), *available at* <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201j.authcheckdam.pdf>.
  33. AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201G, at 1 (2002), *available at* [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/report\\_201g.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/report_201g.authcheckdam.pdf).
  34. *See* AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201B (2002), *available at* <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201b.authcheckdam.pdf>; *see also* *State Implementation of ABA Model Rule 5.5*, AMERICANBAR.ORG (Jan. 25, 2010), [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick\\_guide\\_5\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf).
  35. There has been a new model rule for registration of in-house counsel that originated in the Bar Admissions Committee and was passed by the House of Delegates in 2008; once again the model rule's focus is United States attorneys. AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, INTERNATIONAL REPORT TO THE HOUSE OF DELEGATES 1–3 (2008), *available at* [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/in\\_house\\_registration.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/in_house_registration.authcheckdam.pdf). For adoptions, *see In-House Corporate Counsel Registration Rules*, AMERICANBAR.ORG (Apr. 12, 2010), [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/in\\_house\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/in_house_rules.authcheckdam.pdf).
  36. Conversation with Diane Bosse, Chair, N.Y. Bd. of Law Exam'rs, in Austin, Tex. (April 15, 2010).
  37. Press Release, N.Y. State Bd. of Law Exam'rs, New York Bar Examination Pass Rates July 2010 (Nov. 5, 2010), *available at* <http://www.nybarexam.org/Results710/Jul2010Results.htm>.
  38. N.Y. State Bd. of Law Exam'rs, *Foreign Legal Education*, <http://www.nybarexam.org/Foreign/ForeignLegalEducation.htm> (last visited Jan. 5, 2011).
  39. For example, the July 2010 pass rate was about 30 percentage points lower for foreign-educated exam takers. *See* Press Release, N.Y. State Bd. of Law Exam'rs, New York Bar Examination Pass Rates July 2010, *supra* note 37.
  40. As one commentator has indicated:  
Law schools compete based in part on admission statistics, including LSAT scores and grade point averages, which are collected and publicized with regard to J.D. students but not with regard to LL.M. students. As a result, enrollments in LL.M. programs can contribute much needed tuition dollars without affecting admission statistics.

Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 *FORDHAM INT'L L.J.* 1039, 1053 n.43 (2002); see also *id.* at 1053 n.42 (describing LL.M. programs as “cash cows”).

41. See AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ISSUES 27 (2009), available at [http://apps.americanbar.org/legaled/accreditation/International%20Issues%20Report%20\(final\)%20\(2\).DOC](http://apps.americanbar.org/legaled/accreditation/International%20Issues%20Report%20(final)%20(2).DOC).
42. *Resolution 8*, CONFERENCE OF CHIEF JUSTICES (Feb. 7, 2007), <http://ccj.ncsc.dni.us/LegalEducationResolutions/resol8AccredLegalEducCommonLawCountries.html>.
43. See AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 41, at 28 (referring to Peking University School of Transnational Law).
44. See *Council Adopts Resolution on Accreditation of Foreign Law Schools*, AM. BAR ASS'N, [http://www.americanbar.org/groups/legal\\_education/news\\_announcements.html](http://www.americanbar.org/groups/legal_education/news_announcements.html) (Dec. 2010 resolution) (last visited Jan. 5, 2011).
45. For example, Minnesota currently is studying this question. See MINN. STATE BD. OF LAW EXAM'RS, LEGAL EDUC. COMM. OF THE MINN. BD. OF LAW EXAM'RS, <http://www.ble.state.mn.us/resource-center/legal-education-committee.aspx> (last visited Jan. 5, 2011).
46. The Bar Admissions Committee includes state supreme court justices, heads of boards of law examiners, deans, faculty, and members of the practicing bar. While I was on the committee, we met twice a year and worked well together.
47. [Editor's Note: NCBE held a third meeting about the Uniform Bar Examination in Phoenix, Arizona, in November 2009. It has also since held three regional meetings about the Uniform Bar Examination: in June 2010, in Saratoga Springs, New York, for states in the Northeast; in November 2010, in Salt Lake City, Utah, for western and mountain states; and in September 2011, in St. Louis, Missouri, for states bordering the Mississippi, Ohio, or Missouri Rivers.]
48. Jurisdictions may require a continuing legal education course as a prerequisite, some online training, or perhaps even further examination on state law.
49. [Editor's Note: Missouri and North Dakota first administered the Uniform Bar Examination (UBE) in February 2011. Since then, four more jurisdictions have adopted the UBE: Alabama (July 2011 administration), Colorado and Idaho (February 2012 administration), and Washington (July 2013 administration). The Nebraska Supreme Court has issued an order conditionally granting the Nebraska State Bar Commission's petition to adopt the UBE. The effective date is delayed until January 1, 2013, pending receipt by the Court of proposed rule amendments. The Montana Supreme Court has granted conditional approval of the Montana Board of Bar Examiners' petition to adopt the UBE; final approval is subject to review of an implementation plan to be prepared by the board. An effective date has not been set.]

50. See generally, Susan M. Case, *The Uniform Bar Examination: What's In It for Me?*, *BAR EXAMINER*, Feb. 2010, at 50, 50; *Essays on a Uniform Bar Examination*, *BAR EXAMINER*, Feb. 2009, at 6; see also Leigh Jones, *Uniform Bar Examination Drawing Closer to Reality*, *NAT'L L.J.*, Oct. 12, 2009, at 1, 4. NCBE has a section on its website about the Uniform Bar Examination. See *The Uniform Bar Examination (UBE)*, *NAT'L CONFERENCE OF BAR EXAM'RS*, <http://www.ncbex.org/multistate-tests/ube/> (last visited Jan. 5, 2011).
51. See, e.g., Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5—An Interim Assessment*, 43 *AKRON L. REV.* 729 (2010).
52. Editorial, *Waiting for a Trade Policy*, *N.Y. TIMES*, July 6, 2010, at A22 (“[T]he G-20 leaders dropped their 2009 pledge to finalize the Doha round of trade negotiations this year.”).
53. See, e.g., Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice*, 19 *PROF. LAW*, no. 2, 2009 at 1.
54. See *ABA House of Delegates Revised Recommendation 10 F by Various State and Local Bars*, AM. BAR ASS'N (July 2000), <http://www.abanet.org/cpr/mdp/> (recommending dismantling the ABA Commission on Multidisciplinary Practice).
55. For commission activities to date, see *ABA Commission on Ethics 20/20*, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) (last visited Jan. 5, 2011).



MICHAEL J. CHURGIN is the Raybourne Thompson Centennial Professor in Law at the University of Texas. He served for a decade on the Bar Admissions Committee of the American Bar Association's Section of Legal Education and Admissions to the Bar and was a member of subcommittees that drafted the Model Rule for Admission by Motion, which was adopted by the ABA House of Delegates in 2002; the model rule updating the Model Rule for the Licensing and Practice of Foreign Legal Consultants, which was adopted in 2006; and the Model Rule for Registration of In-House Counsel, which was adopted in 2008. (The author is no longer a member of the Bar Admissions Committee of the ABA's Section of Legal Education and Admissions to the Bar. The views expressed in this article are his own and do not reflect the opinions of the committee or the Section.)

# THE TESTING COLUMN

## IDENTIFYING AND HELPING AT-RISK STUDENTS

*by Susan M. Case, Ph.D.*

Everyone knows that students enter law school with different backgrounds and levels of ability. Fortunately for those committed to helping students progress through law school and ultimately pass the bar exam, there are indicators of probable success that can be used to identify students at risk. While the popular press often condemns these indicators, they may in fact be useful for this purpose.



about 180 while another had an MBE score of about 100. (Please note that the relationship between MBE scores and UGPAs is not as strong as others discussed next.)

It's easy to offer hypotheses about this range of scores. These data include students from schools ranging from very strong to much less strong, and they include students who took the most rigorous to the easiest courses. Despite these variations, these data can be used to identify students at risk to perform poorly in law school and to perform poorly on the bar exam.

### INDICATORS HELPFUL IN IDENTIFYING AT-RISK STUDENTS

#### **Undergraduate GPA**

Let's start with the undergraduate GPA (UGPA). Our data indicate that those students with higher UGPAs tend to have higher MBE scores. (MBE scores are a surrogate for total bar exam scores in the results reported here. MBE scores are highly related to total bar exam scores and are used because we don't typically have access to total bar exam scores.)

Table 1 shows that average MBE scores increase for examinees with higher UGPAs. Figure 1 shows this relationship in a scatter plot format. Each dot represents a person, and while the average MBE score for those candidates with UGPAs of 3.5 is 151, at least one such examinee had an MBE score of

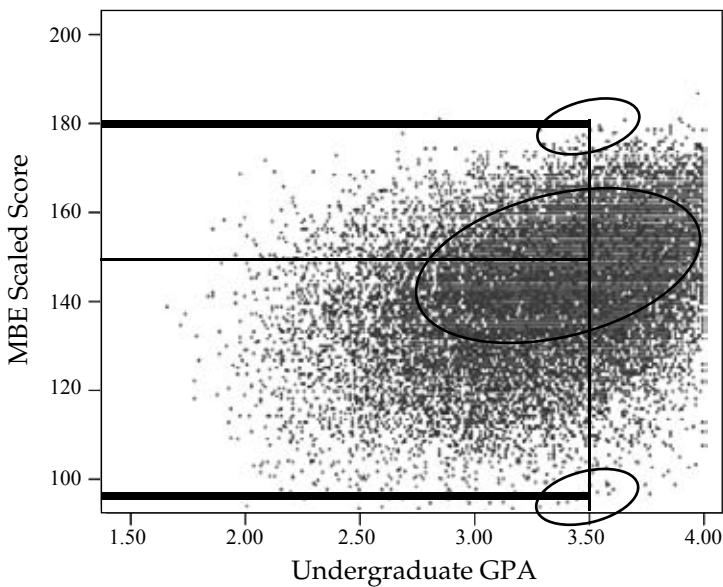
#### **LSAT Score**

The second piece of data that is usually available is the LSAT score. The relationship between the MBE and the LSAT score is stronger than that with the UGPA. One reason for this stronger relationship is that the LSAT is taken closer to entry into law school. The UGPA, on the other hand, covers the previous four years. A second reason is that the LSAT score is comparable for all students; it does not include the complex element of varying quality of schools and courses. Table 2 shows that average MBE scores increase for examinees with higher LSAT scores.

While the relationship to the MBE is stronger with the LSAT (correlation = 0.57) than with the

**Table 1:** Average MBE Scores for Various UGPA Levels

UGPA	2.0	2.5	3.0	3.5	4.0
Average MBE score	136	138	144	151	157



**Figure 1:** Relationship between UGPA and MBE scores

**Table 2:** Average MBE Scores for Various LSAT Levels

LSAT score	130	140	150	160	170
Average MBE score	119	132	143	153	160

UGPA (correlation = 0.36), it is not a perfect relationship. However, it is generally true that examinees who perform better on the LSAT perform better on the MBE than those who show a poor performance on the LSAT.

### Other Indicators

Other indicators that can be used to identify students at risk include law school grades, both first-year grades and others (correlation = 0.55–0.70 depending on the law school). Finally, MPRE scores may also be used to identify students at risk (correlation = 0.58). The MPRE is typically taken late in law school, so while the strength of the relationship is moderately high, it may have less utility because the test is taken too late for early prediction.

Analyses of local data will be more accurate than the data shown here. However, there is no question that UGPAs, LSAT scores, law school grades, and MPRE scores are each helpful in identifying students at risk for failing the bar exam.

### Helping Students Prepare During Law School


Testing students in law school generates grades and determines class rank. Testing can also be used to communicate what the professor views as important and to identify areas of deficiency for remediation. Faculty rarely use tests for these purposes. In order to drive student learning, law school faculty should ask themselves whether their tests assess what they want students to learn and whether their tests are given in time to provide feedback that will enhance student learning.

Tests are a powerful motivator, and testing time is not a waste of instructional time if the tests are focused on important concepts. Likewise, studying

for a test is a good use of learning time if the tests are testing important concepts. Testing early and often is important to provide guidance to students about whether they are on track or whether they need to study more in order to succeed in the course. A quick quiz, perhaps in the last 5 to 10 minutes of each class, would be one way to provide this feedback. The quiz could consist of short-answer or multiple-choice questions, and it could be self-graded. Questions could even be asked orally.

Students should be directed to NCBE's Online Practice Exams for the MPRE and the MBE (MPRE-OPE and MBE-OPE, available at NCBE's Online Store at [www.ncbex.org](http://www.ncbex.org)), which provide samples of very recently administered questions that illustrate the question content, difficulty, and format used on each exam. There are two unique features of these

practice exams. First, they include an explanation of why the correct answers are correct and why the distractors are incorrect. These explanations are written by content experts who are members of the committee that wrote the questions. Second, they provide an indication of what level of performance on the actual bar exam can be expected based on the examinee's performance on the OPE. Students at risk for receiving low scores on the MPRE or the MBE can be identified by their performance on the practice exams.

No predictor of bar performance is perfect. However, there are multiple early indicators of students at risk that can be used to identify these students and help them before they are faced with a failing performance. 

SUSAN M. CASE, PH.D., is the Director of Testing for the National Conference of Bar Examiners.

# LITIGATION UPDATE

by Fred P. Parker III and Brad Gilbert

## CASES REPORTED

### BAR ADMISSION

#### **Failure to cooperate with investigation; unpaid debts**

*In the Matter of the Application for Admission to Practice Law [of] Justin Robert Steffen*, 351 Or. 106, 2011 WL 4389895 (OR 2011)

### CHARACTER AND FITNESS

#### **Alleged sexual misconduct; lack of candor**

*In the Matter of Michael P. Nash, Applicant to the Alaska Bar Association*, 2011 WL 3241874 (AK 2011)

#### **Failure to cooperate in the character and fitness review; irresponsible and unprofessional conduct**

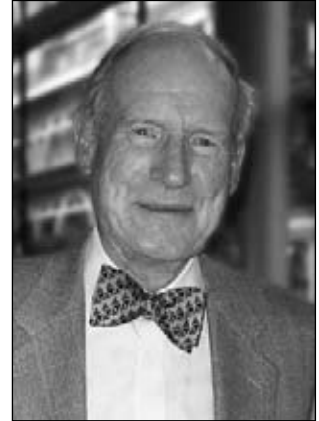
*In re Wintering*, 129 Ohio St. 3d 505, 954 N.E.2d 124 (OH 2011)

#### **Felony and DUI convictions; nondisclosure on law school and bar applications; substance abuse; rehabilitation**

*In re Payne*, 289 Ga. 746, 715 S.E.2d 139 (GA 2011)

#### **Misdemeanor convictions; nondisclosure on law school and bar applications; rehabilitation**

*In re Yunker*, 289 Ga. 636, 715 S.E.2d 92 (GA 2011)



## BAR ADMISSION

### **Failure to cooperate with investigation; unpaid debts**

*In the Matter of the Application for Admission to Practice Law [of] Justin Robert Steffen*,  
351 Or. 106, 2011 WL 4389895 (OR 2011)

Justin Robert Steffen sought admission to the Oregon State Bar in November 2010. The Board of Bar Examiners recommended that Steffen's application be denied for failure to cooperate with its investiga-

tion relating to unpaid debts. The Oregon Supreme Court agreed and found that an applicant's handling of his debts and unpaid judgments was well within the scope of the board's investigatory mandate.

On his application, Steffen indicated that he had past-due debts and judgments. When pressed for further information by the board, Steffen responded that he had filed for bankruptcy. However, when the board attempted to investigate further, Steffen took the position that further inquiries regarding his past-due financial obligations were in violation of federal law. Steffen relied on 11 USC § 525(a), which prohibits a licensing body from denying a license to a person solely because the person has filed for bankruptcy or failed to pay an obligation that was discharged in bankruptcy.

In its letter to the Court explaining its recommendation, the board stated:

The Board is not recommending that [applicant] be denied admission because he filed bankruptcy or failed to pay a dischargeable debt. The Board would have made its inquiry regarding [applicant's] finances regardless of whether he invoked bankruptcy protection. In fact, the Board commenced its inquiry before it even learned that [applicant] had filed a bankruptcy petition.

The Court held that an applicant's handling of his or her financial affairs is appropriate to consider in determining the applicant's fitness to practice law. The fact that an applicant has filed for bankruptcy is not in and of itself disqualifying. However, the circumstances surrounding a bankruptcy may reflect

upon an applicant's judgment in handling serious financial obligations. Therefore, while a bankruptcy that results from extraordinary hardship will generally not reflect adversely on an applicant, a bankruptcy arising from selfishness or irresponsible conduct generally will.

The Court noted that Steffen did not dispute his failure to cooperate with the investigation. When given a chance to respond to the board's recommendation, he waived filing a brief and chose to rest on his earlier communications to the board protesting the board's requests for information. His argument rested solely on his assertion that the board was not entitled to ask him about the circumstances of his past-due financial obligations.

The Court stressed that bankruptcy alone is not sufficient reason to deny admission. However, the circumstances of an applicant's financial dealings may be sufficient to conclude that the applicant does not possess the requisite character and fitness to practice law. In this case, the board was not able to evaluate the weight of the circumstances because Steffen failed to comply with the investigation.

The board's recommendation was not based on the fact that Steffen filed for bankruptcy; it was based on his noncompliance with the board's investigation of his character and fitness. The Court concluded that it was appropriate to deny Steffen admission to the Oregon Bar based on his failure to cooperate.

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## CHARACTER AND FITNESS

### **Alleged sexual misconduct; lack of candor**

*In the Matter of Michael P. Nash, Applicant to the Alaska Bar Association, 2011 WL 3241874 (AK 2011)*

On January 9, 2009, the Board of Governors of the Alaska Bar Association denied the application of Michael Nash based on allegations of sexual mis-

conduct while serving as a priest, destruction of evidence in church files, and lack of candor. Nash appealed the board's decision to the Alaska Supreme

Court, alleging multiple misstatements of the record and multiple violations of Alaska Bar Rules.

The Alaska Supreme Court vacated the decision of the Board of Governors and found that the record contained no confirmed instances of Nash lying, committing illegal acts, omitting information, or otherwise behaving dishonestly. The Court found no evidence of any acts justifying the denial of Nash's application.

Michael Nash was a priest in Alaska from 1980 to 2005. During that time, he took boys on trips to locations in Alaska, California, and Hawaii. Nash had inappropriate contact with some of the boys on these trips. It involved tickling the boys, having them do calisthenics in their underwear, spanking them, and receiving foot and neck massages from them. However, none of the boys alleged that Nash touched their genitals or engaged in sexual activity with them. The church looked into this behavior and concluded that it was "horseplay."

Nash's youth trips ended after a 1989 complaint about his behavior, after which Nash sought counseling at the Jemez Springs rehabilitation center. Nash took part in a five-month renewal program called "Foundation House." Nash told the Alaska Bar that his treatment addressed burnout, not pedophilia. The facility closed in 1995, and records pertaining to Nash's stay were destroyed.

On December 3, 2007, Nash, a member of the Iowa bar (*see In re Nash, The Bar Examiner*, Vol. 76, No. 4, November 2007), applied for admission to the Alaska Bar. A hearing master was appointed, who conducted a two-day hearing. The hearing master issued a proposed decision to the Alaska Bar Association Board of Governors recommending that the board conclude that Nash met the standards for

character and fitness. The board rejected the hearing master's recommendation and denied Nash's application. The denial was primarily based on the fact that the board felt that Nash had been untruthful and incomplete in his responses regarding his treatment at Jemez Springs.

The standard for character and fitness in Alaska is set forth in Alaska Bar Rule 2(1)(d), which states that each applicant for examination shall be "one whose conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them. Conduct manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant is a basis for denial of admission."

The board was not satisfied with Nash's explanation that he was being treated for burnout at Jemez Springs. The key issue for the board was Nash's apparent lack of candor regarding a discharge report. The board stated, "It is uncontested that Mr. Nash received a report upon discharge from the facility. It is also uncontested that the report was destroyed. This report effectively ended Mr. Nash's pastoral career. However, neither Mr. Nash, nor his counsel, claims to have any clue as to the report's contents, conclusions, or recommendations. This lack of recollection lacks credibility and appears to be a deliberate, material lack of candor with this tribunal."

In support of its decision to deny Nash's application, the board stated that "Mr. Nash is likely the only individual alive with direct knowledge and recall of the report's contents. Under these circumstances, his claimed lack of memory is even more damning and incredible . . . . The Board can come to no other conclusion than [that] there is something in the report that Mr. Nash does not want the Board to learn."

However, the Supreme Court of Alaska found that the board's decision was based on factual assertions that had no basis in the record. The Court noted that the board's references to a discharge report were not supported and that the board's analysis demonstrated a "conclusory slant that is contrary to the record." The Court said that "[m]ost notably, it is not clear [that] there was any such thing as a discharge report that contained final results. And if such final results existed, there is no evidence that Nash reviewed such a report or denied knowledge of it." In fact, the Court found that Nash was never questioned on the subject and that "[t]his mistake is extremely prejudicial, since Nash's purported failure to remember the purported discharge report was the basis for finding that Nash lacks candor." In addition, the board's statement that the purported discharge report "effectively ended Mr. Nash's pastoral career" was "simply wrong." If any report existed, it would have corresponded to Nash's time at Jemez Springs, which was from January 1990 to May 1990. Nash's career as a priest continued for 15 years after that time.

The Court further stated that the fact that a portion of the Jemez Springs center treated priests with sexual disorders neither proved nor implied that Nash attended the facility for treatment of a sexual disorder. Absent a presupposition by the board that Nash attended the facility for treatment of a sexual disorder, Nash's answers did not demonstrate the propensity for lying that the board's decision attributed to him.

In sum, the Court found that "the Board's conclusion that Nash lied because he could not remember a career-ending discharge report—when it is not certain that a discharge report ever existed, when it is not certain that Nash received it if it did exist, and when it is clear that any such report did not end his career—is simply not supported." The Court found Nash to have the requisite character to satisfy the requirements of the Alaska Bar Rules and ordered the board to process Nash's application in a manner consistent with this opinion.

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#### **Failure to cooperate in the character and fitness review; irresponsible and unprofessional conduct**

*In re Wintering*, 129 Ohio St. 3d 505, 954 N.E.2d 124 (OH 2011)

Todd Wintering graduated from the Cleveland-Marshall College of Law in May 2008. His first application to register as a candidate for admission to practice law in Ohio was in August 2008. The Cleveland Metropolitan Bar Association's Bar Admissions Committee interviewed him and investigated his self-disclosed criminal charges between 1997 and 2004 and two employment terminations in 2000. The committee noted that Wintering had failed to respond to its letters and e-mails over a number of months and that he stated he had resigned from

a law firm in 2008. Wintering denied that he had ever received any correspondence from the committee, and the law firm reported that it had fired Wintering after he failed to appear for work for two weeks, left assignments unfinished, did not return portions of clients' files, and failed to return phone calls and e-mails. In April 2009, the Bar Admissions Committee recommended that Wintering not be approved on character and fitness grounds. There was no appeal, and Wintering was notified by the

Admissions Office that his application to register was considered withdrawn.

Wintering's second application to register as a candidate for admission was in January 2010, and in May he filed an application to take the July 2010 Ohio bar examination. The Board of Commissioners on Character and Fitness decided to conduct an investigation and hearing on his character and fitness. A panel was appointed, and the hearing was set for January 2011. Wintering was notified of the hearing by a letter dated October 1, 2010; however, 13 days later the Admissions Office received a letter from Wintering containing a notice of a change of address and a request for an update on his admission application, about which he had heard nothing. Wintering did not attend the January hearing. He later stated that he had not received notice of the hearing, even though he confirmed that the address to which the notice was sent was correct. Since his October letter he had made no effort to contact anyone in connection with his character and fitness hearing or the upcoming bar examination.

The panel found that Wintering's letter lacked credibility and that he had exhibited a pattern of

irresponsible and unprofessional conduct, and it recommended that his application be disapproved. The board agreed and recommended that Wintering be permitted to apply for the February 2014 bar examination provided he submit to a full character and fitness investigation, including an investigation and report by NCBE.

On review, the Ohio Supreme Court stated, "A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for disapproval of the applicant." It added that an applicant's failure to cooperate in proceedings before the Admissions Committee may also result in disapproval. The Court found that Wintering had repeatedly failed to cooperate with the Admissions Committee and the panel of the Board of Commissioners on Character and Fitness. The record also showed that he had a history of unprofessional conduct and an ongoing pattern of failing to take responsibility for his own actions and inactions. Wintering's application was disapproved, but he was permitted to reapply for the February 2013 examination, at which time he would undergo a full character and fitness investigation.

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**Felony and DUI convictions; nondisclosure on law school and bar applications;  
substance abuse; rehabilitation**

*In re Payne*, 289 Ga. 746, 715 S.E.2d 139 (GA 2011)

John Payne filed an application for a certificate of fitness to practice law in Georgia in June 2009. His application revealed that he had an extensive criminal background with multiple felonies and other crimes from 1975 to 1983. He also had six DUI convictions and an arrest from 1981 to 1995. In December, Payne had an informal conference with

the Board to Determine Fitness of Bar Applicants. After the informal conference, the board issued a tentative order of denial of certification citing lack of rehabilitation and candor. At Payne's request, the board also issued specifications.

In September 2010, a formal hearing was held before a hearing officer. The evidence showed that

Payne's criminal history included numerous arrests, felony and misdemeanor convictions, and six DUI convictions spanning almost 30 years from his youth to his mid-forties. The last illegal act occurred only seven years prior to the formal hearing. The record also revealed that Payne was not completely candid regarding his criminal history. When he filed his law school application, he provided only a short summary of his criminal past. After a request for more information, he submitted information regarding his multiple property crime and theft convictions in 1976 but did not list his extensive criminal conduct prior to 1976 and after 1981. The law school again requested more information, and Payne submitted another supplemental response setting out more of his criminal history but again left off many of his arrests, charges, and convictions. He disclosed one DUI conviction from 1995 but failed to disclose five other DUI convictions and one other DUI arrest that was nolle prossed. Payne was still amending his law school application in the spring of 2010, after filing his fitness application. A question arose as to whether these errors and omissions were willful in order to conceal or were inadvertent. Since Payne admitted that he remembered at least some of these criminal instances, including most of the DUIs, at the time he was completing his law school application, the omissions were not inadvertent. He gave no explanation for their omission except to concede that they were improperly withheld.

The board was also troubled about Payne's response to the fitness application question which asks if an applicant has any condition or impairment, including substance abuse, which if left untreated could affect his ability to practice law. Payne had responded "no"; yet he was a recovering alcoholic who regularly attended a 12-step program and had been diagnosed with bipolar disorder that required

periodic visits to a psychiatrist for monitoring. His explanation was that he did not think that the alcoholic recovery programs and non-medication therapy for bipolar disorder constituted "treatment." The board felt that if Payne did not understand exactly what the question required, he should have contacted the bar admissions office for clarification. The board found that Payne's negative response to whether he needed ongoing treatment amounted to an evasive if not intentionally misleading answer. In December 2010, his certification was denied, and Payne appealed.

The Georgia Supreme Court stated that if there was any evidence to support the board's decision regarding the fitness of a bar applicant, the decision would generally be upheld. The Court said that Payne's "lengthy and substantial history of criminal conduct, coupled with his lack of complete candor during the law school application process and the bar application process, evidenced a lack of judgment and a failure of integrity, character, professionalism, and the requisite moral fitness required of prospective members of the Bar." The Court added that Payne's negative response to whether he needed ongoing treatment for certain illnesses was evasive if not intentionally misleading and that the board was well within its judgment to reject his excuse of misunderstanding the question.

Payne contended that he had carried his burden of proving rehabilitation because he has successfully held positions of trust in his career, has been happily married to his current wife for over 20 years, has children whom he supports, attends church regularly, and performs various services for his community. However, the Court stated that "[m]erely 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.” Much of Payne’s community service was in the form of legal externships for which he received law school credit, and while he did perform diligently, these activities were not undertaken purely for philanthropic reasons. The Court concluded that “[a]lthough Payne has made remarkable advances in his life in the past seven

years, the record reveals that he still has an inclination for misleading and evasive behavior regarding inquiries into his criminal past and his medical issues which, at best, shows a complete lack of diligence and judgment, which goes to his fitness, and, at worst, a lack of candor, which goes to his character.” The Court held that the board had properly denied Payne’s application for certification of fitness to practice law.

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### **Misdemeanor convictions; nondisclosure on law school and bar applications; rehabilitation**

*In re Yunker*, 289 Ga. 636, 715 S.E.2d 92 (GA 2011)

Roy Yunker applied to John Marshall Law School in July 2005. In answer to the question on the law school application about whether he had ever been charged with or convicted of a crime other than a minor traffic offense, he answered “no” even though he had been convicted of misdemeanor offenses in three separate instances. When Yunker completed his application for certification of fitness to practice law in Georgia, he also failed to completely disclose his criminal convictions. The Board to Determine Fitness of Bar Applicants tentatively determined not to certify Yunker as fit. It was concerned about his failure to disclose his criminal history, his discharge from the military after an alcohol-related incident, his law school’s withdrawal of its recommendation of trust following his post-graduation amendment of inaccuracies on his law school application, his intoxication and insubordination during a legal internship, and his responses during an informal interview with the board.

A hearing officer was appointed to conduct a hearing prior to a final decision by the board. The hearing officer found that Yunker had pled guilty


to driving under the influence in North Carolina in 1988, had pled *nolo contendere* to disorderly conduct and damage to property in Pennsylvania in 1989, and had pled *nolo contendere* to family violence battery in Georgia in 2000, stemming from an incident in which he had choked his then wife. Yunker said that these incidents occurred because he had been drinking. In May 2007, Yunker served as an unpaid intern with the Atlanta Metro Conflict Defender’s Office. He had a disagreement with a senior staff attorney in that office whom he was assigned to assist, and he refused to sit next to the attorney in court and left the courtroom without asking permission. Later that day and the day after, he sent the attorney e-mails in which he used veiled and actual profanity. Yunker was directed to disconnect his laptop computer from the office network, and following another argument with the senior attorney, Yunker’s internship was terminated.

In his application for certification of fitness to practice law in Georgia, Yunker failed to disclose his family violence battery conviction and his DUI conviction. His explanation to the board for lack of

disclosure of the DUI conviction was that he “must have done something wrong when [he] transferred the files to the CD-ROM,” and he blamed his computer for the error. His explanation for nondisclosure of the family violence battery plea was that he had filled out his application too hastily. In amending his law school application to correct his inaccurate responses after he had graduated, Yunker stated that “I can only believe that at the time, when I read the word ‘crime[,]’ I wasn’t thinking of the sorts of arrests I experienced, but was thinking of crimes like robbery, murder, or other actions that I know now as felonies.” In regard to the choking incident, Yunker explained that he had been arguing with his then wife and put his hands over her mouth and choked her because he wanted her to stop yelling at him. He added that he had not wanted to seriously hurt her but “knew that she had a phobia about not being able to breathe.” He said that she stopped talking and that when he left the room and went to bed, she left the house and called the police from a neighbor’s house, after which the police arrested him. In further questioning, Yunker was asked how he could be trusted not to similarly exploit a client’s vulnerability, and his initial response was, “Probably because I am not going to marry them.”

The hearing officer concluded that Yunker’s failure to adequately and fully disclose his previous charges and convictions evidenced a present lack of candor and honesty, that his various explanations for

his inaccurate responses strained credibility, and that his abrupt separation from his internship revealed his lack of maturity, poor judgment, and failure to take appropriate responsibility for his actions. The hearing officer concluded that Yunker’s lack of candor regarding his submission of incorrect information to his law school and to the board had not been credibly explained and that his conduct as a whole could not be justified. The Board to Determine Fitness of Bar Applicants denied Yunker’s application, and Yunker appealed to the Georgia Supreme Court.

The Court pointed out that it was “the burden of an applicant to demonstrate that he or she possesses the requisite character and moral fitness to practice law” and that “when an applicant has a criminal record, the applicant must prove by clear and convincing evidence that, following any conviction, the applicant has fully and completely rehabilitated himself.” The Court stated that the hearing officer’s findings were supported by the record and justified the conclusion that Yunker had failed to carry his burden of demonstrating his rehabilitation and current moral fitness. The Court affirmed the decision of the board to deny Yunker’s application for certification of the requisite character and fitness to practice law. 

FRED P. PARKER III is the Executive Director of the Board of Law Examiners of the State of North Carolina.

BRAD GILBERT is Counsel and Manager of Human Resources for the National Conference of Bar Examiners.