

# ARE WE GATEKEEPERS?

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DISCUSSIONS between law schools and lawyers about bar admissions, when such discussions occur, almost always get around to the question of whether or not law schools are or should be gatekeepers for entry to the legal profession. Most practicing lawyers with whom I have discussed bar admissions assume that law schools are, since the J.D. we grant is a prerequisite to admission. Some think we just are not very good at gatekeeping, that we should have admissions standards that screen for character as well as academic potential, or at least that we should use the three years we have the students to weed out the morally as well as the intellectually deficient.

Some lawyers assume that law faculty are diametrically opposed to character-related gatekeeping and focus only on the intellectual achievement of students. Candidly, I do not know what most faculty think about this issue. Some are apathetic, others are as concerned about character issues as any practicing lawyers, and some take the position that legal education is just that, education that should be divorced from the issue of bar admission.

From various discussions of this issue with deans, it is my impression that most law deans recognize that law schools are *de facto* gatekeepers. While I suspect all of us claim that a legal education is great whether or not a student plans to practice law, most of us recognize that the vast majority of our students will in fact seek to be admitted to the bar. Thus most deans take seriously their responsibility to certify the good character of graduates who sit for the bar. As lawyers, most of us are subject to some version of Rule 8.1 of the ABA Model Rules of Professional Conduct, which states: “[A] lawyer in connection with a bar admission application ... shall not ... knowingly fail to respond to a lawful demand for information from an admissions ... authority ....”<sup>1</sup> Beyond that, we are genuinely concerned about the profession of law and the clients our graduates serve.

Those of us whose schools produce most of the lawyers for a jurisdiction are likely to be particularly aware of our bar admissions responsibilities. We recognize that the citizens of our state will be directly affected, negatively or positively, by the quality of our graduates. We do not have the luxury of hoping that our problem students will be absorbed into the million or so lawyers nationally. We know they will be conspicuous members of the few thousand lawyers practicing in our state.

In this essay, I will describe briefly a few things that we have done at the University of South Dakota to improve our ability to discharge this responsibility effectively. I will also indicate a few areas in which bar admissions authorities might assist law schools in carrying out this responsibility.

We introduce the bar admission process to students at the earliest opportunity, during orientation of first-year students. I suspect most law schools do so, but I

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1. MODEL RULES OF PROF'L CONDUCT R. 8.1.

believe our approach is particularly effective because the messenger is the chief justice of our state's supreme court. In our students' second year, I teach the professional responsibility course mandated by ABA accreditation Standard 302(b), and the first topic we cover is bar admissions. I find the class discussion in which we apply the factors considered by bar admission authorities to hypothetical fact patterns to be some of the liveliest of the course. I also find that individual students approach me privately to discuss concerns about incidents in their past that they are sure will keep them from being admitted to the bar; in almost all cases, I can reassure them that this will not be the case. In the third year, before students begin work on the bar application, a member of the board of bar examiners meets with students to discuss the bar admission process.

One of the first things we did after I became dean was review the character-related questions on our law school application and compare them to the questions on the South Dakota bar application. I was inspired to do this by the work of Cornell's associate dean Anne Lukingbeal, who has spoken and written on the various ways in which various jurisdictions' bar admissions authorities ask about applicants' character. This is a real burden for a truly national law school such as Cornell. For USD, where the majority of graduates sit for the South Dakota bar, we only had to look at one set of bar admissions questions to address the problem of inconsistent questions for most of our graduates.

The problem we were addressing is the apparent lack of candor if a graduate's answer to a bar admissions question seems inconsistent with that graduate's answer to a similar question on the law school application. This is a problem for the graduate because candor is an important character trait considered by bar admissions authorities. If there is a question about the bar applicant's candor, then answers to other questions become suspect. The bar admissions authority may reasonably begin to doubt that the applicant's court filings, trust account compliance reports, and dealings with clients will be as candid as the ethical practice of law requires. As a result, bar admissions authorities often request a copy of the applicant's law school application if other sources have called into question information in the bar application.

Given the sensitivity of character information, questions that seek the same information but with different wording may create a trap for the applicant. Applicants to either a law school or the bar are understandably reluctant to divulge embarrassing personal information. In my opinion, they are entitled to withhold this information except in response to a well-crafted question. It is not reasonable to ask an applicant to either law school or the bar to determine what sensitive information the decision-maker wants and then volunteer it. It is, however, reasonable to ask an applicant to answer well-crafted questions truthfully.

Even if the questions on the law school application and the bar application are identical, it is not inconceivable that the same person may answer the question differently as a law school applicant and as a bar applicant. We spend a lot of time teaching our students to understand and answer questions. We also teach them about the ethical requirements of the legal profession. As a result, we should expect them to answer character-related questions on the bar application with more care and a greater appreciation of their importance than they did similar questions on the law school application.

If, as I am suggesting, an applicant might answer law school application questions differently than identical bar application questions, it is even more likely that this might occur if the questions are not identical but seek similar information with different wording. Because the bar application can be longer and more detailed than the character portion of the law school application, it is difficult to make the two sets of questions identical. In our review, however, we did find it possible to modify our law school application questions to reduce the likelihood of inconsistent answers.

A second change I instituted requires students to update annually their answers to the character-related questions in the law school application. This gives students who, as a result of their legal education, know how to answer questions better and appreciate the ethical requirements of the legal profession an opportunity to correct their pre-admission answers well before a bar admissions authority sees the law school application. In rare cases, the new information may lead to a reconsideration of the admissions decision or disciplinary action against a student. Even in these cases, this is preferable to the bar admissions authority's discovery of an inconsistency that would disqualify a graduate who had spent three long years in law school.

This annual update process also requires students to reveal any conduct that occurs during law school that should have been disclosed if it had occurred before law school admission. To use a too-frequent example, since the law school application requires disclosure of convictions for driving under the influence, students must report DUI convictions that occur during law school. This provides us a more reliable basis for accurate character reports to the bar admissions authority than the court reports in the local newspaper or the school rumor mill, allows us to assist students in addressing the underlying problems, and allows students to demonstrate candor, which should be at least somewhat helpful in the bar admission process.

One additional change in which I was involved was our state's adoption of a conditional admission option for bar applicants. Through my service on the ABA's Standing Committee on Lawyer Competence, I had learned that a few states permitted conditional admission. Typically, conditional admission allows the applicant to practice law but postpones the final determination on character and fitness. The result is that the burden of proof remains on the applicant rather than shifting to a disciplinary entity that seeks to remove an admitted lawyer from practice. Without the option of conditional admission, a bar admission authority is required to roll the dice if an application raises serious doubts and either admit or deny admission. Conditional admission is particularly valuable for the applicant who has a dependency problem but is now in treatment. The applicant may proceed with a legal career, while the bar admissions authority may monitor the new lawyer's conduct for the protection of the public.

Effective fulfillment of a law school's responsibilities related to bar admission requires a cooperative working relationship with bar admissions authorities. Unfortunately, this cooperative relationship is complicated by bar admission authorities' legitimate concerns for the privacy interests of bar applicants.

Bar admissions authorities rarely give law deans any feedback about the use of the information they provide about the character of applicants. This is to some

degree understandable, because bar admissions authorities should protect the privacy interests of applicants. This legitimate concern, however, makes it difficult for deans to determine what information to provide and to assist the bar admissions authorities by explaining the process accurately to faculty and students.

A new provision of the ABA Model Rules of Professional Conduct, which permits lawyers to seek ethical guidance from other lawyers, provides a useful analogy for cooperation between deans and bar admissions authorities. Rule 1.6(b)(2) legitimizes a long-standing practice by which one lawyer poses an ethical issue involving protected client information to another lawyer in hypothetical form. Any lawyer who has been engaged in one of these hypothetical discussions, either as the seeker or giver of advice, knows that confidential information may be divined by the advice-giver, even though the facts are nominally hypothetical.<sup>2</sup> The information is, in reality, protected not by the hypothetical construct but by the advice-giver's professional commitment to the protection of confidential information. Because a dean, as a lawyer, shares this professional commitment to confidentiality, a bar admissions authority should be able to provide a dean feedback on the use of information disclosed by the dean without excessive concern that the information will be used to the detriment of an applicant. The bar admissions authority may choose to provide the feedback in a form that does not overtly identify an applicant, but it should not be overly concerned if the dean is, in fact, able to make a connection between the feedback and a specific applicant.

I offer another unrelated suggestion to bar admissions authorities. That is a modification of the release form signed by applicants to address the requirements of the Family Educational Rights and Privacy Act (FERPA), often referred to as the Buckley Amendment.

Bar admissions authorities routinely have applicants sign a release of information held by a laundry list of agencies, including the applicant's law school. When bar admissions authorities request a copy of an applicant's law school application or other information from a law school, they accompany the request with a copy of the applicant's signed release. I have yet to see a bar admissions release that, in my

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2. A new comment to Rule 1.6 contains the following limitation: "A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved." It is unclear whether or not this limitation applies to disclosure of confidential information in order to obtain ethical guidance. A new comment specifically related to the new Rule 1.6(b)(2) denotes the ethical guidance as "confidential legal advice," indicates that "[i]n most situations, disclosing information to secure legal advice will be impliedly authorized for the lawyer to carry out the representation," and permits disclosure even when not impliedly authorized "because of the importance of a lawyer's compliance with the Rules of Professional Conduct." The recognition that the ethical guidance provided by another lawyer is itself "confidential," the fact that "impliedly authorized" disclosures need not be in hypothetical form and thus are not limited by the new comment on hypotheticals, and the emphasis on compliance with the Rules combine to support the proposition that a lawyer may pose a hypothetical to another lawyer to seek ethical guidance, even if the advice-giver may divine protected client information. In fact, it appears that the lawyer seeking advice need not use the hypothetical construct under the new Rule 1.6(b)(2) and its specific comment. Most lawyers are accustomed to this convention, however, and should continue using it, since it reminds the advice-giver of the importance of protecting confidential information that may be revealed by the hypothetical.

opinion, satisfies FERPA's release requirements. This puts the law school in the position of choosing between its obligation to assist the bar admissions authority and its obligations under FERPA, a violation of the latter can conceivably result in loss of federal funds for the school's parent institution.

I have mentioned this problem at national meetings on bar admission, but as yet to no avail. In order to protect my law school, I now have matriculants sign a form during orientation that releases the school from any liability under FERPA for providing information to bar admissions authorities. Because professional licensing of various types is extremely important to the protection of society, an amendment to FERPA to protect institutions that provide information to professional licensing entities is advisable. Absent that, bar admissions authorities should be able to develop a release form that would protect law schools from FERPA claims.

The bar admissions process is vitally important to the legal profession. As deans, we should take seriously our role in this gatekeeping process, and I believe we do. Better cooperation between law schools and bar admissions authorities and more attention to specific details of our interrelationship would benefit both and, in turn, the legal profession and the public we serve.