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PROFESSIONAL RESPONSIBILITY

AN OPEN-SOURCE CASE-BOOK

ELON UNIVERSITY SCHOOL OF LAW

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https://github.com/EricMFink/PRcasebook/

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1. Law as a Profession

What Makes Law a Profession?

Work, Jurisdiction, & Competition

Andrew Abbott, The System of Professions [1]

[1] Abbott, 1988, 33-114

[…] Each profession is bound to a set of tasks by ties of jurisdiction, the strengths and weaknesses of these ties being established in the processes of actual professional work. Since none of these links is absolute or permanent, the professions make up an interacting system, an ecology. Professions compete within this system, and a profession's success reflects as much the situations of its competitors and the system structure as it does the professions own efforts. From time to time, tasks are created, abolished, or reshaped by external forces, with consequent jostling and readjustment within the system of professions. […]

[…]

Jurisdiction is a more-or-less exclusive claim. One professions jurisdiction preempts another's. Because jurisdiction is exclusive, every move in one profession's jurisdictions affects those of others. […]

[***]

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2. Professional Work

[…]

Objective and Subjective

The tasks of professions are human problems amenable to expert service. They may be problems for individuals, like sickness and salvation, or for groups, like fundraising and auditing. They may be disturbing problems to be cured, like vandalism or neurosis, or they may be creative problems to be solved, like a building design or a legislative program. The degree of resort to experts varies from problem to problem, from society to society, and from time to time.

[…]

Some problems are close to others. […] For example, we think that fixing a broken thumb is "closer" to curing typhoid fever than it is to building a bridge, because of the common object of the first two tasks, the human body. But in purely theoretical terms, broken bones are close to bridges because both involve the science of mechanics. Indeed, the physicians who handled the fever and the surgeons who fixed the thumbs had little to do with one another before the nineteenth century. […]

[…]

[J]urisdictional claims […] have three parts: claims to classify a problem, to reason about it, and to take action on it: in more formal terms, to diagnose, to infer, and to treat. Theoretically, these are the three acts of professional practice. Professionals often run them together. They may begin with treatment rather than diagnosis; they may, indeed, diagnose by treating, as doctors often do. The three are modalities of action more than acts per se. But the sequence of diagnosis, inference, and treatment embodies the essential cultural logic of professional practice. It is within this logic that tasks receive the subjective qualities that are the cognitive structure of a jurisdictional claim.

Diagnosis

[…]

[…] Diagnosis not only seeks the right professional category for a client, but also removes the client's extraneous qualities. If the client is an individual, such extraneous qualities often include his or her emotional or financial relation to the "problem." If the client is a group, they include irrelevant internal politics, financial difficulties, and so on. (A diagnosed prob-

lem may still be ambiguous, but the ambiguity will be profession-relevant ambiguity—ambiguity within the professional knowledge system.) Thus, diagnosis first assembles clients' relevant needs into a picture and then places this picture in the proper diagnostic category.

[…]

Diagnosis, then, begins to assign subjective properties to the objective problems with which professions work. The problems become more than simply objective tasks. They are related to various underlying conceptual dimensions, guarded by rules of evidence and of relevance, and located at the ends of various diagnostic chains. The clarity, the strictness, and the logic of these subjective definitions of the problem make it more-or-less open to the intervention of other professions. […]

Treatment

[…] Like diagnosis, treatment imposes a subjective structure on the problems with which a profession works. Like diagnosis, treatment is organized around a classification system and a brokering process. In this case brokering gives results to the client, rather than takes information from the client; colligation is replaced by prescription.

[…]

The treatment classification not only lumps together problems with similar treatments, it also associates with each problem a likelihood of successful outcome under a given treatment. […] A good lawyer has a[] […] sense of the probabilities associated with settling a case or trying it, often specified by which side he is on, which judge he is likely to get, and how proficient the opposing counsel is, as well as by the facts and legal merits of the case.

[…]

Treatments, like diagnoses, can range from very general to very specific, and this too influences the amenability of the jurisdiction to seizure. […] Normally, the more specialized a treatment is, the more a profession can retain control of it. Control over certain kinds of treatment may be central to a professions jurisdiction, as law and medicine's monopolies of litigation and drugs make very clear. That control of treatment may be central and that specialized treatments are easier to protect suggests

that professions may defend jurisdiction by specifying treatments even where the results of specification may be unmeasurable and where general treatments in fact suffice. […]

The professional interested in effective treatment must worry about many client characteristics that influence treatment efficacy. Just as the diagnostic system removes the human properties of the client to produce a diagnosed case, so also the treatment system must reintroduce those properties to make treatment effective for real clients, human or corporate; this is the process of prescription. […] The same decisions must be made by a lawyer who knows what his client will look like "in the box" or by the architect who knows how his client is likely to alter the building after it is designed. Who the client is thus determines much of what he or she gets. And most professions […] have treatment cost as a central problem in prescription. Each treatment fits uniquely into the life of a particular client, and that in part must determine whether it is preferred.

The impact of client characteristics on prescription and treatment is felt both within the profession itself and in its relations with competitors. Within the profession, the ability of clients to handle prescriptions is an important stratifying mechanism […]. One factor that makes certain clients more attractive to professionals is their ability on the one hand to pre-diagnose their problems and on the other to understand their treatment in relatively professional terms. For example, this quality makes upper class people more attractive clients for psychotherapists. A similar difference makes corporations more attractive than individuals as clients for lawyers. Brokering, whether in diagnosis or prescription, is a dirty business, and intraprofessional status often reflects the amount of it a professional must do.

But client ability to handle prescription also has effects on interprofessional competition. These effects are analogous to the effects of rules of relevance in diagnosis. A profession clearly derives general social prestige from meeting clients on *its* own, rather than on *their* own, grounds, just as it derives prestige from strictly enforced rules of relevance. But a profession that forces clients to take treatment completely on its own terms risks heavy competition from those who talk to the clients in their own language. […] Only when a profession possesses absolute monopoly can it afford to ignore this arena of competition. Even the British barristers, whose clogged courts monopolize legal dispute settlement, have seen administrative tribunals emerge to handle disputes to the expeditious liking of corporations, unions, and other social groups. So it is that many professions meet clients on their own grounds—phrasing their treatments in common language, offering advice on professionally irrelevant issues,

indeed promising results well beyond those predicted by the treatment structure itself. If they didn't do it, clients would take their problems to someone who would. A similar process forces professions to keep a weather eye to treatment costs. Professions can easily price themselves out of markets, as psychoanalysts have discovered over the last few decades.

[…]

Inference

[…]

Inference is undertaken when the connection between diagnosis and treatment is obscure. The composite of diagnostic and treatment classification cannot narrow the range of outcomes acceptably. Acceptability depends, of course, on the costs and reversibility of failure on first trial. […]

[…]

The most important aspect of professional inference in determining jurisdictional vulnerability is actually external to inference itself; it is the degree to which inference predominates, rather than the routine connection of diagnosis and treatment without inference. Any profession has rules dictating when a professional must resort to complex inference, and learning these rules is central to learning the profession. Yet whatever these rules may be, either too little or too much use of inference will ultimately weaken jurisdiction.

[…]

Academic Knowledge

Diagnosis, treatment, and inference are aspects of professional practice. In most professions, that work is tied directly to a system of knowledge that formalizes the skills on which this work proceeds. […]

A profession's formal knowledge system is ordered by abstractions alone. Like any knowledge it is organized into a classification system and an inferential system. The classification, however, is quite unlike the diagnostic and treatment classifications. It is not organized from common to esoteric or from treatable to recalcitrant. Rather it is organized along logically consistent, rationally conceptualized dimensions. […] In law

there are rights, duties, procedures, and so on. While these resemble the dimensions of the diagnostic classification, they are in fact more formal and rationalized.

Within this academic sector of the profession, entities are defined not in little bundles, like the syndromes of the diagnostic classification system, but rather as disassembled pieces. […] Thus, in academic library studies, indexing can be seen as independent of the thing to be indexed, and more importantly, of accessibility or collection structure. A working librarian knows that indexing must reflect collection structure to be of use, and that many published indexes are so thorough as to obscure the information they would retrieve. But that is not the problem of the indexing theorist. […] Professional knowledge exists, in academia, in a peculiarly disassembled state that prevents its use.

The ability of a profession to sustain its jursidictions lies partly in the power and prestige of its academic knowledge. This prestige reflects the public's mistaken belief that abstract professional knowledge is continuous with practical professional knowledge, and hence that prestigious abstract knowledge implies effective professional work. In fact, the true use of academic professional knowledge is less practical than symbolic. Academic knowledge legitimizes professional work by clarifying its foundations and tracing them to major cultural values. In most modern professions, these have been the values of rationality, logic, and science. Academic professionals demonstrate the rigor, the clarity, and the scientifically logical character of professional work, thereby legitimating that work in the context of larger values.

[…]

That abstract knowledge serves to legitimate professional work should not belittle its other functions. The most important of these is the most familiar, the generation of new diagnoses, treatments, and inference methods. Academic knowledge excels at invention precisely because it is organized along abstract lines, rather than syndromic ones. It can make connections that seem nonsensical within practical professional knowledge, but that may reveal underlying regularities that can ultimately reshape practical knowledge altogether. Examples from medicine are legion, but the importance of law review articles in reshaping legal doctrine is equally evident in the citations of appellate court reports. […]

The academic, abstract knowledge system is thus universally important throughout the professions. It is therefore not surprising that jurisdictional assaults are often directed at the academic level. For example, the

attempt of psychiatry to take over criminality in the twenties was a largely academic assault on the concept of responsibility. The attack had then, as it has now, very little to do with defense counsels treatment question—is the insanity defense a good gamble? Rather it was a general assertion that the whole category system by which crime is classified, the typology of personal responsibility for action, was in fact a system about which psychiatrists knew more than lawyers. The psychiatrists actually won a number of intellectual battles in this conflict, but ultimately lost the jurisdictional war, partly because they didn't have the numbers to turn every criminal court into a psychiatric clinic and partly because the public believed too deeply in the lawyers' version of personal responsibility. But the case illustrates that the academic level of professional knowledge is by no means invulnerable. Indeed its very strain towards clarity makes it one of the more vulnerable parts of a professions knowledge structure. As Weber argued, the British lawyers protected their jurisdictions effectively indeed with the antirational procedure of founding law on cases rather than on formally constructed statutes.

[…]

Finally, the clarity with which professional borders are defined towards other professions may affect the jurisdictions' vulnerability. Under some conditions, clarity is a good defense. Certainly it has served lawyers well against psychiatry's attacks on the notion of responsibility. […] At the same time, clarity does give an easy target for attempts at "seizure by absorption." […]

[…]

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3. The Claim of Jurisdiction

Diagnosis, treatment, inference, and academic work provide the cultural machinery of jurisdiction. They construct tasks into known "professional problems" that are potential objects of action and further research. But to perform skilled acts and justify them cognitively is not yet to hold jurisdiction. In claiming jurisdiction, a profession asks society to recognize its cognitive structure through exclusive rights; jurisdiction has not only a culture, but also a social structure. These claimed rights may include absolute monopoly of practice and of public payments, rights of self-discipline and of unconstrained employment, control of professional training, of recruitment, and of licensing, to mention only a few. Which of them are

actually claimed depends in part on the audience. Claims made in the political and legal systems generally involve much more than do those in public media. The claims also depend on the professions own desires; not all professions aim for domination of practice in all their jurisdictions. Finally, they depend on the social organization of the professions themselves. This indeed was the focus of the professionalization literature. To understand the actual claims, then, it is less important to analyze their particular content than their location, their general form, and the social structure of the claiming professions themselves.

Audiences

Jurisdictional claims can be made in several possible arenas. One is the legal system, which can confer formal control of work. Another is the related arena of public opinion, where professions build images that pressure the legal system. An equally important, but less studied, arena is the workplace. Claims made in the workplace blur and distort the official lines of legally and publicly established jurisdictions; an important problem for any profession is the reconciliation of its public and its workplace position.

[…]

Authority often confers obligation. But jurisdictional claims entail only secondarily an obligation to in fact accomplish the work claimed. Lawyers have a right to perform legal work as they wish, but only a hazy obligation to guarantee that all the needs of justice are served. Such general social obligations are more formal among continental professions than among Anglo-American ones. The relative power of continental governments has allowed them to place and enforce such obligations on the professions; in America these obligations are merely paraded in the preambles to codes of professional ethics. The different relation between authority and obligation is one of the profound differences between continental and Anglo-American professions.

[…]

Contests for legal jurisdiction occur in three places. The first of these is the legislature, which in America […] grants statutory rights to certain professional groups. The second is the courts, where such rights are enforced and the actual boundaries of loose legislative mandates specified. The third is the administrative or planning structure, which has always dominated the legal structuring of professions in France, and which in-

creasingly does so in England and America. […] In England and America, legislatures have traditionally dominated in the legal establishment of professional rights, the American legislatures having been considerably more profligate in the number of rights so established. […]

[…] The other, and equally important, arena is the workplace itself. In the workplace, jurisdiction is a simple claim to control certain kinds of work. There is usually little debate about what the tasks are or how to construct them. There is normally a well-understood and overwhelming flow of work—alleged criminals waiting to be processed, buildings to be designed, welfare clients to be handled. The basic question is who can control and supervise the work and who is qualified to do which parts of it. My example implicitly (and correctly) assumes that the typical professional worksite is an organization, although in some cases, professionals work in solo or small group practices in open markets.

Professionals in open markets and in organizations control jurisdictional relations in different ways. In open markets, jurisdictional boundaries between competing professions are established by referral networks and similar structures. Occasionally, advertisements are used, either by official groups or by individuals, to establish for the public and for the referral sources the exact contribution of this or that profession. "Let the financial planning professionals at XYZ Bank help you find the money you need." More often, professionals simply establish rules for the kinds of things they do and the kinds of things they don't do, and refer the latter out. Small-town attorneys and accountants, for example, generally operate this way. They are enmeshed in a referral network maintained by club life, personal acquaintance, and a constant flow of business. Since such networks draw so directly on personal relations in fairly tight social systems, interprofessional relations in small towns have a fixed, enduring quality. In large cities, by contrast, several excellent studies have shown that interprofessional relations in open markets range from chaos to open warfare.

Within an organization the situation is quite different. […] The standard interprofessional division of labor is replaced by the intraorganizational one. More often than not, this locates professionals where they must assume many extraprofessional tasks and cede many professional ones. To be sure, the organizational division of labor may be formalized in job descriptions that recognize professional boundaries, but these have a rather vague relation to reality. In most professional work settings, actual divisions of labor are established, through negotiation and custom, that embody situation-specific rules of professional jurisdiction. These actual divisions of labor exist over relatively short time periods—perhaps a few

months to a couple of years. They are extremely vulnerable to organizational perturbations. Professional staff are often replaced by paraprofessional or untrained staff without corresponding change of function. The division of labor must then be renegotiated, with the common result that boundaries of actual professional jurisdiction change to accommodate organizational imperatives.

It is in the workplaces, then, that the actual complexity of professional life insists on having its effect. […] If a professional is incompetent, organizational function demands that his or her work be done by someone else who is probably not officially qualified to do it. Or if there is too much professional work, nonprofessionals do it. Boundaries between professional jurisdictions therefore tend to disappear in worksites, particularly in overworked worksites. There results a form of knowledge transfer that can be called workplace assimilation. Subordinate professionals, nonprofessionals, and members of related, equal professions learn on the job a craft version of given professions' knowledge systems. While they lack the theoretical training that justifies membership in that profession, they generally acquire much of the diagnostic, therapeutic, and inferential systems discussed in the preceding chapter. This assimilation is facilitated by the fact that professionals are not in reality a homogeneous group. In the jurisdictional system of the workplace, it is the real output of an individual, not his credentialed or noncredentialed status, that matters. Since some professionals are much more talented than others, the best of the subordinates often excel the worst of the superordinates; certain individuals in closely related professions end up knowing far more about a profession's actual work than do a fair number of its own practitioners.

The reality of jurisdictional relations in the workplace is therefore a fuzzy reality indeed. To be sure, in the elite workplaces—the university teaching hospitals, the Wall Street law firms, the leading architectural houses—the blurring is minimized. Since each group is represented by its best members, vertical and horizontal assimilation can be minimized. […] But in most professional worksites, the mix of workers is so broad that assimilation is considerable. It reaches its maximum in publicly funded worksites specializing in pariah clients—mental hospitals, jails, criminal courts—where few elite professionals venture, and where attendants, guards, and clerks effectively conduct such professional work as is done. […]

[…]

Dominant professions also form setting-based associations within themselves—for example, the American Academy of Matrimonial Lawyers, the American Society of Hospital Attorneys—while undermin-

ing interprofessional societies that are based on particular settings of work, such as the American Orthopsychiatric Association. Yet another strategy for maintaining the publicly clear picture of jurisdictional relations is media manipulation […].

[…]

Since the advent of associational professionalism in the nineteenth century, the claim to full jurisdiction is nearly always made by a formally organized group. Certainly this has been true since the advent of the formally organized profession in the later nineteenth century. […]

[…]

Claims of full jurisdiction are maintained by a variety of means. Once successful, they are backed by legal rules prohibiting either work with the claimed task or the collection of fees for such work. Within organizations, they are backed by organizational rules. Professions particularly sensitive about professional invasion may maintain vigilante groups to guard the borders—the "unauthorized practice of law" committees of Americas bar associations being the best examples. The lawyers, of course, also directly control the means of enforcement, which may explain why they get away with such groups. Other professions have to depend on the law to back up their claims of full jurisdiction.

[…]

Internal Structure

[…]

A professions social organization has three major aspects—groups, controls, and worksites. Professional groups have diverse forms and functions. Local groups usually emerge early in professional history and later amalgamate into larger ones. Some groups are lobbying groups, some informational ones, still others aim at practitioner control. Some are organized around mere professional membership, while others embody a wide variety of special interests within that membership. The mature profession typically has hundreds of professional associations, many or most of which are open only to members of some large, dominant association.

Under the heading of professional controls can be placed the schools that train practitioners, the examinations that test them, the licenses that identify them, and the ethics codes they are presumed to obey. There are in addition a wide variety of informal controls, usually specific to various professional worksites. Empirical studies of professions show that attempts at licensure seem to come early and ethics codes late in professional development. Examinations and formal schooling tend to come in the middle of professional development. Once begun, however, all develop continually. The typical profession has one ethics code, but usually dozens or hundreds of schools. Although recent years in America have seen consolidated licensure structure across state lines, licensure and examination have characteristically been state based in America, and the politics of license maintenance consequently continuous and complex. […] It is important to note that licensure alone, of these controls, has direct implications for others beyond the profession involved. Licensure normally carries certain preemptive rights over outsiders, particularly in the United States and France. That a profession has an ethics code does not keep another closely related profession from having one. With licenses, the reverse is generally true; where one profession has a licensed right to do certain work, others are excluded.

Professions operate in a bewildering variety of worksites. Some professions have consolidated, exclusive worksites whose divisions of labor they dominate. The hospital is the most familiar, but large law, accounting, and architectural firms are also examples. […]

A profession normally has some worksites that are not involved in practice, but only in the purely professional work of maintaining and furthering professional knowledge. These include not only the academic settings discussed before, but also journals, research institutes, and other such organizations. In the United States, such cultural organizations are nearly all affiliated with universities, with a few journals and research institutes being tied to the larger professional associations (e.g., the American Bar Foundation), to industry, or to government agencies. […]

The strength with which individual professionals are tied to this organized structure varies considerably. Some are central members tying elite worksites to elite schools and dominating major professional associations. Others are totally peripheral, passing their entire careers without contacting any of the central institutions of professional life beyond a few journals. This internal stratification of professions is often confounded with specialization. Often professional tasks are so complex as to require considerable specialization, and individual professionals develop enduring

identification with specialty work. […]. These specializations generally fall in a status order of their own, although there is within each an internal hierarchy.

[…]

The extent of structuring […] affects a profession's ability to deal with attack. Thus it is common in professions to create rigid entry standards, coupling extensive education with several levels of examination prior to formal entry into the profession. This is part of a structure of control that seems utterly advantageous to the profession. It protects recruitment, controls professional numbers (and consequently professional rewards), and guarantees a minimum standard of professional ability. This strategy seems perfectly monopolistic in effect. Yet it is clear that several professions have nearly lost jurisdictions because sudden expansions in demand found them committed to standards that would not permit rapid expansion. […] The only defense in such conditions is rapid and effective creation of subordinate groups to handle the business, the strategy that led solicitors to develop the managing clerks' role in conveyancing […]. But […] this has not been a terribly effective strategy. The British lawyers have in fact lost jurisdiction over many of the important aspects of dispute settlement in Britain precisely because they are too few to service demand and their divisions of labor have not been sufficient[…].

The social structure of professions is thus neither fixed nor uniformly beneficial. […] [T]he mature profession is constantly subdividing under the various pressures of market demands, specialization, and interprofessional competition. Some competitive conditions favor the less, some the more organized.

The central organizing reality of professional life is control of tasks. The tasks themselves are defined in the professions' cultural work. Control over them is established, as we have seen, by competitive claims in public media, in legal discourse, and in workplace negotiation. […]

Emergence of the Modern Legal Profession

Lawyers and Their Competitors

Andrew Abbott, The System of Professions [2]

[2] Abbott, 1988, 247-279

2. Regulation of Legal Practice

Multiple sources and institutions …

The American Bar Association and Professional Standards

The Canons of Legal Ethics (1908)

The American Bar Association, founded in 1878, advanced its first attempt at a uniform standard of conduct for lawyers in 1908. The Canons of Professional Ethics were intended to be a general guide for lawyers, based on existing professional norms expressed in legal ethics scholarship and some state bar association literature. The ABA acknowledged the idealistic nature of the Canons, and did not intend for them to be enforceable. For an overview of the Canons, see the Preamble and the list of Canons, below, from the Final Committee Report on 1908 ABA Ethics Rules.

Canons of Ethics

Preamble

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

19. Candor and Fairness.
20. Attitude Toward Jury.
21. Right of Lawyers to Control the Incidents of the Trial.
22. Taking Technical Advantage of Opposite Counsel; Agreements with Him.
23. Professional Advocacy Other Than Before Courts.
24. Advertising, Direct or Indirect.
25. Stirring Up Litigation, Directly or Through Agents.
26. Upholding the Honor of the Profession.
27. Justifiable and Unjustifiable Litigations.
28. Responsibility for Litigation.
29. The Lawyer's Duty in Its Last Analysis.

Questions:

- Do you see evidence of dual-role model of lawyers' responsibilities in the Canons? Where?
- What does the adoption of the Canons tell us about the state of the profession in 1908?

Although the Canons were general statements of profession norms, they included some explanatory content. For example, see Canons 4, 17, and 29.

Canon 4 - When Counsel for an Indigent Prisoner. A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

Canon 17- III Feeling and Personalities Between Advocates. Clients, not lawyers, are the litigants. Whatever may be the ill feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

Canon 29 - Upholding the Honor of the Profession. Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and citing authorities. The lawyer should aid in guarding the Bar against admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

Questions:

- Are the Canons useful for navigating professional ethical dilemmas?
- How helpful is the explanatory content? Does it answer all your questions about how to apply the Canons? Can you think of a situation in which lawyers might reasonably disagree about what conforming professional conduct might look like?

The ABA Canons of Professional Ethics were an important step towards professionalizing lawyers' work. While no longer in force, the Canons guided lawyers' professional standards for a sixty year period in which the modern profession emerged. Judicial opinions and state bars often referred to the text of and principles in the Canons. Attempts to apply the Canons revealed some challenges with moving from generalized principles to enforceable boundaries, prompting the ABA to work towards the Model Code of Professional Responsibility.

Model Code of Professional Responsibility (1969)

The ABA House of Delegates approved the Model Code of Professional Responsibility , a comprehensively revised set of rules, on August 12, 1969. The Model Code marked a significant shift from the Canons in its organization and scope. Where the Canons were idealistic and relied on external judgments to clarify conflicting priorities and refine broad goals, the Model Code contained three distinct but interrelated parts: canons, ethical considerations, and disciplinary rules. The canons stated the general rules which led to the ethical considerations and disciplinary rules. The ethical considerations were the aspirational principles. The disciplinary rules were mandatory statements about the minimum standards

of conduct lawyers must adhere to in order to not face disciplinary action. Each canon might contain a dozen (or more!) ethical considerations and disciplinary rules.

For Example, explanatory content for Canon 6 includes six ethical considerations and two disciplinary rules.

CANON 6: A Lawyer Should Represent a Client Competently ETHICAL CONSIDERATIONS EC 6-1

Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC 6-2

A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC 6-3

While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC 6-4

Having undertaken representation, a lawyer should use proper care to safeguard the Interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC 6-5

A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC 6-6

A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

DISCIPLINARY RULES

DR 6-101-Failing to Act Competently.

A. A lawyer shall not:

1. Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
2. Handle a legal matter without preparation adequate in the circumstances.
3. Neglect a legal matter entrusted to him.

DR 6-102-Limiting Liability to Client.

A. A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice. — lang: en title: "Questions:" —

Questions:

- How useful is the Model Code for making decisions about professional conduct? Is the clarification between canons, ethical considerations, and disciplinary rules an improvement on the 1908 Canons?
- Is it necessary to have canons, ethical considerations, and disciplinary rules? Consider each statement's or rule's usefulness in lawyers' various roles and practice settings.

The Model Code, in various forms and versions, was the ABA's central document on professional responsibility from 1970 through 1981. While no longer in use, it's important to know about the Model Code. Many important cases decided during this time and some states' rules still contain references to and evidence of the influence of the Model Code.

Model Rules of Professional Conduct (1983)

The shift from idealistic Canons to boundary rules in the Model Code created the need for specificity the Model Code did not always address. To deal with this challenge, the ABA tasked a lawyer named Robert Kutak with chairing a commission to study the problem. The Kutak Commission focused on developing the minimum standards of conduct for lawyers into a series of black-letter rules. The resulting Model Rules, adopted in 1983, are the basis of the current Model Rules of Professional Conduct. The Model Rules have a regulatory structure, with a statement of minimum conduct and explanatory comments. The official comments are similar to other regulatory comments, in that they might content information about the reasoning behind a rule or examples to guide application. Like other model rules, the Model Rules of Professional Conduct are not themselves binding. They are designed to be examples a state may choose to adopt into law. For an example from the Model Rules, see the Rule 1:1 on Competence, below.

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment:

Legal Knowledge and Skill

1. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

2. A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

3. In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for illconsidered action under emergency conditions can jeopardize the client's interest.

4. A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

1. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

1. Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

2. When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

1. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Adoption of the Model Rules

States adopted the structure of the model rules fairly quickly. Today, almost all states' disciplinary rules follow the numbering system of the Model Rules. The content of state rules varies, so it's important to follow the law of your jurisdiction. Since the Model Rules of Professional Conduct have been so influential, lawyers can look to these Model Rules just like they might look to other uniform laws or model acts.

Questions:

- In Rule 1.1 above, do the comments change your understanding of the rule? How? Do you have remaining questions about what the rule means or how it might work in application?
- Compare the usefulness of the Model Rules to the Model Code and the Canons. Consider the regulatory structure of the Model Rules, the distinction between ideals and boundaries, and the content in the examples above.

Judicial Regulation of Attorney Conduct

Legislative Regulation of Attorney Conduct

3. Bar Admission

It's nice to be liked, but it's better by far to get paid. I know that most of the friends that I have don't really see it that way. But if you can give 'em each one wish, how much do you want to bet they'd wish success for themselves and their friends, and that would include lots of money. 107

In the United States, admission to the bar and the regulation of attorneys is governed primarily by state law. Specifically, the highest court of each state establishes the standards for admission to the state's bar and the rules of professional responsibility regulating the conduct of the members of the state's bar. Courts uniformly delegate those responsibilities to administrative organizations. Typically, courts delegate admission to the bar to a board of bar examiners and delegate the regulation of the bar to a disciplinary board. But the court always retains the ultimate authority over both admission to the bar and regulation of the bar.

Historically, the practice of law was primarily local. The overwhelming majority of attorneys and law firms practiced law only in one state and were members of only one state bar. But as the practice of law has become increasingly national and international and law firms open offices in multiple states and even foreign countries, the localized regulation of the bar has come into tension with the non-local practice of law. Members of the state bar may have an incentive to discourage non-members from joining their bar or practicing in their state. While the desire to reduce competition is understandable, it can harm the consumers of legal services, by reducing their options and increasing the price.

Admission to the Bar

Originally, the qualifications for bar membership were quite relaxed. In 18th and 19th centuries, there were few law schools, and few attorneys attended or graduated from them. The majority of attorneys qualified for the bar by apprenticing or "reading law" in a law office. Examination for admission was typically oral and often cursory. But legal education and admission to the bar gradually became more formalized in the 20th century.

Today, most states have adopted similar requirements for admission to the state bar. The overwhelming majority of states require applicants to the state bar to have graduated from a law school accredited by the American Bar Association, passed the state's bar examination and professional responsibility examination, and demonstrated good moral character. But there are exceptions. Some states offer independent accreditation of law schools. Some states still allow applicants to qualify for the bar by "reading law" for prescribed period of time, rather than attending law school. Some states allow the graduates of certain law schools to qualify for the

bar without taking a bar exam. And some states do not require a professional responsibility exam. But all states require a showing of good moral character.

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Liz Phair, Shitloads of Money, whitechocolatespaceegg (1998).

Residency Requirements

Until relatively recently, many states imposed explicit residency requirements for bar membership. This enables the members of the state bar to limit or prevent competition, by preventing attorneys from practicing in multiple states. But in Supreme Court of NH v. Piper, 470 U.S. 274 (1985) , the Supreme Court invalidated many of those residency requirements, holding that they violated the Privileges and Immunities Clause of the Constitution, unless a state can show "substantial" reasons for discriminating against nonresidents.

Notably, the federal courts have their own bars. The Supreme Court, each federal circuit and district court, and the District of Columbia, all maintain their own independent federal bars. Their bars have different requirements. District court bars typically requirement membership in the bar of the state in which the district court sits, and circuit courts typically require membership in any state bar. Some have even had residency requirements, but the Supreme Court invalidated those residency requirements in Frazier v. Heebe, 482 U.S. 641 (1987).

An attorney who is not a member of the bar of a court but wishes to represent a client in that court may petition to appear pro hac vice or "for this turn only." The court is not required to grant a motion to appear pro hac vice and each new action requires a separate application. In many jurisdictions, an attorney may appear pro hac vice only if they affiliate with a member of the court's bar as co-counsel. In theory, this requirement ensures compliance with local rules, but it also provides employment to the members of the bar.

Barnard v. Thorstenn, 489 U.S. 546 (1989)

Summary: The Bar of the District Court of the Virgin Islands has a residency requirement for admission, providing that applicants must have resided in the Virgin Island for one year and intend to continue residing

in the Virgin Islands. Thorstenn and DeVos of New York applied for the bar examination, but were rejected for failure to satisfy the residency requirement. The District Court allowed them to take the bar examination, which they passed, but upheld the residency requirement. The Third Circuit reversed, and the Supreme Court affirmed, holding that the District Court provided no substantial or legitimate reason for excluding nonresidents.

JUSTICE KENNEDY delivered the opinion of the Court.

In order to be admitted to the Bar of the District Court of the Virgin Islands, an otherwise qualified attorney must demonstrate that he or she has resided in the Virgin Islands for at least one year and that, if admitted, the attorney intends to continue to reside and practice in the Virgin Islands. The question before us is whether these residency requirements are lawful.

Local Rule 56(b) of the District Court of the Virgin Islands provides that before an otherwise qualified attorney is admitted to the Virgin Islands Bar, he must "allege and prove to the satisfaction" of the Committee of Bar Examiners that he has "resided in the Virgin Islands for at least one year immediately preceding his proposed admission to the Virgin Islands Bar," and that, "if admitted to practice, he intends to continue to reside in and to practice law in the Virgin Islands." The rule applies not only to practice before the District Court, but also to practice before the local territorial courts.

Respondents Susan Esposito Thorstenn and Lloyd DeVos are attorneys who are members in good standing of the Bars of the States of New York and New Jersey, and who practice law in New York City. Neither respondent resides in the Virgin Islands. In the spring of 1985, respondents applied to take the Virgin Islands bar examination, but their applications were rejected by the Committee of Bar Examiners because they did not satisfy the residency requirements of Local Rule 56(b). Respondents filed this suit in the District Court against petitioner Geoffrey W. Barnard, the Chairman of the Committee of Bar Examiners, seeking a declaration that the residency requirements of Rule 56(b) violate the Privileges and Immunities Clause of Article IV of the Constitution, as interpreted by our decision in Supreme Court of New Hampshire v. Piper. Respondents also sought to enjoin the enforcement of Rule 56(b) against them.

On June 21, 1985, while reserving a decision on the merits, the District Court ordered that respondents be allowed to take the bar examination. They took the examination and passed. Petitioner Virgin Islands Bar

Association intervened, and all parties submitted motions for summary judgment with supporting affidavits. The District Court granted summary judgment for petitioners, concluding that the reasons offered for Rule 56(b)'s residency requirements, grounded in the unique conditions in the Virgin Islands, were substantial enough to justify the discrimination against nonresidents.

While the District Court's decision was pending on appeal in the Third Circuit, we decided Frazier v. Heebe , where we invoked our supervisory power to invalidate certain residency requirements contained in the local rules of the United States District Court for the Eastern District of Louisiana. A divided panel of the Court of Appeals reversed the District Court's judgment for petitioners, concluding that the reasons given for Rule 56(b) were in essence the same as those we rejected in Heebe. The case was reheard en banc, and a majority of the full Court of Appeals agreed with the original panel decision that the residency requirements of Rule 56(b) were invalid under Heebe. The en banc court emphasized that alternative and less restrictive means, short of a residency requirement, were available to the District Court to assure that nonresident bar members would bear professional responsibilities comparable to those imposed on resident attorneys. In view of its determination that Heebe controlled the case, the Court of Appeals did not address respondents' claim under the Privileges and Immunities Clause.

We granted certiorari and now affirm.

II

In Heebe, we invoked supervisory power over district courts of the United States to invalidate discriminatory residency requirements for admission to the Bar of the United States District Court for the Eastern District of Louisiana. The Court of Appeals in the case now before us expressed "no doubt" that our supervisory power extends to the bar requirements of the District Court of the Virgin Islands.

Without attempting to define the limits of our supervisory power, we decline to apply it in this case. Both the nature of the District Court of the Virgin Islands and the reach of its residency requirements implicate interests beyond the federal system. As to the former, the District Court, which was given its current form and jurisdiction by Congress in the Revised Organic Act of 1954, is not a United States district court, but an institution with attributes of both a federal and a territorial court. Although it is vested with the jurisdiction of a United States district court, the District Court also has original jurisdiction over certain matters of

local law not vested in the local courts of the Virgin Islands, as well as concurrent jurisdiction with the local courts over certain criminal matters. It also serves as an appellate court for decisions rendered by the local courts. In fact, Congress provides in the Revised Organic Act that, for certain purposes, the District Court "shall be considered a court established by local law." The application of Rule 56(b) itself similarly extends beyond practice in the federal system. Unlike the rule in Heebe, which was confined to practice before the United States District Court, Rule 56(b) applies to admission to the Bar of the Virgin Islands, and so governs practice before the territorial courts.

Because these territorial interests are intertwined with the operation of Rule 56, we decline to examine this case as an issue of supervisory power.

Respondents also contend that Rule 56(b) violates the Privileges and Immunities Clause of Article IV of the Constitution, which Congress has made applicable to the Virgin Islands in the Revised Organic Act. Petitioners concede that the District Court is an instrumentality of the Government of the Virgin Islands and is subject to the Privileges and Immunities Clause through the Revised Organic Act.

Article IV, § 2, of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." When a challenged restriction deprives nonresidents of a privilege or immunity protected by this Clause, it is invalid unless "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." In deciding whether the discrimination bears a substantial relation to the State's objectives, we consider, among other things, whether less restrictive means of regulation are available.

It is by now well settled that the practice of law is a privilege protected by Article IV, § 2, and that a nonresident who passes a state bar examination and otherwise qualifies for practice has an interest protected by the Clause. We need consider here only whether there are substantial reasons to support treating qualified nonresident attorneys differently, and whether the means chosen by the District Court, total exclusion from the Bar, bear a close or substantial relation to the Territory's legitimate objectives.

Petitioners offer five justifications for the residency requirements of Rule 56(b), which track the reasons recited by the District Court. First, petitioners contend that the geographical isolation of the Virgin Islands, together with irregular airline and telephone service with the mainland

United States, will make it difficult for nonresidents to attend court proceedings held with little advance notice. Second, petitioners cite the District Court's finding that the delay caused by trying to accommodate the schedules of nonresident attorneys would increase the massive caseload under which that court suffers. Third, petitioners contend that delays in publication and lack of access to local statutes, regulations, and court opinions will prevent nonresident attorneys from maintaining an adequate level of competence in local law. Fourth, petitioners argue that the Virgin Islands Bar does not have the resources for adequate supervision of a nationwide bar membership. Finally, petitioners exert much energy arguing that the residency requirements of Rule 56(b) are necessary to apply Local Rule 16 in a strict and fair manner. That Rule requires all active members of the Bar to represent indigent criminal defendants on a regular basis. We find none of these justifications sufficient to meet the Virgin Island's burden of demonstrating that the discrimination against nonresidents by Rule 56(b) is warranted by a substantial objective and bears a close or substantial relation to that objective.

The answer to petitioners' first justification, based on the geographical isolation of the Virgin Islands and the unreliable airline and telephone service, is found in Piper. In that case, as here, the Bar argued that "even the most conscientious lawyer residing in a distant State may find himself unable to appear in court for an unscheduled hearing or proceeding." We did not find this a sufficient justification for a residency requirement for two reasons. First, we found it likely that a high percentage of nonresidents who took the trouble to take the state bar examination and to pay the annual dues would reside in a place convenient to New Hampshire. Although that observation is not applicable here, we went on to hold in Piper that, for lawyers who reside a great distance from New Hampshire, the State could protect its interests by requiring the lawyer to retain a local attorney who will be available for unscheduled meetings and hearings. The same solution is available to the Virgin Islands. The exclusion of nonresidents from the bar is not substantially related to the District Court's interest in assuring that counsel will be available on short notice for unscheduled proceedings.

Petitioners' second proffered justification is similar to their first. The District Court found that because of its unusually large and increasing caseload, it could not countenance interruptions caused by nonresident lawyers attempting to reach the Virgin Islands from the mainland, or conflicts with their appearances on the mainland. To the extent this justification reiterates the point we have addressed above, the same response applies. Any burden on the Virgin Islands court system to accommodate travel schedules of nonresidents can be relieved in substantial

part by requiring nonresidents to associate with local counsel. The large caseload of the Virgin Islands District Court does not alter the analysis. Quite aside from the paradox in citing extreme caseload as the reason to exclude more attorneys, it is clear that a State, or a Territory to which the Privileges and Immunities Clause applies, may not solve the problem of congested court dockets by discriminating against nonresidents. Nor do we see the problem of conflicting court appearances as justifying the exclusion of nonresidents from the bar. The problem is not unique to the Virgin Islands. A court in New Jersey may be inconvenienced to some extent by a request to accommodate the conflicting court appearances of a nonresident attorney in New York. But that does not justify closing the New Jersey Bar to New York residents. Further, the District Court may make appropriate orders for prompt appearances and speedy trials.

Nor are we persuaded by petitioners' claim that the delay in publication of local law requires exclusion of nonresidents because they will be unable to maintain an adequate level of professional competence. As we said in Piper, we will not assume that "a nonresident lawyer — any more than a resident — would disserve his clients by failing to familiarize himself with the local law." We can assume that a lawyer who anticipates sufficient practice in the Virgin Islands to justify taking the bar examination and paying the annual dues will inform himself of the laws of the Territory. And although petitioners allege that the most recent legal materials, such as District Court opinions and local statutes and regulations, are not available on a current basis, this does not justify exclusion of nonresidents. If legal materials are not published on a current basis, we do not see how this is more of a problem for nonresidents than residents. All that petitioners allege on this point is that residents can review slip opinions by visiting the offices of the law clerks for the District Court judges. We do not think it either realistic or practical to assume that residents resort to this practice with regularity, or that nonresidents, faced with the occasional need to do so, cannot find some adequate means to review unpublished materials. We note, moreover, that the record discloses that after the initial affidavits were submitted by petitioners in this case, the Virgin Islands Bar Association Committee on Continuing Legal Education began a subscription service for all opinions of the District Court and the territorial courts, available to all members of the bar.In short, we do not think the alleged difficulties in maintaining knowledge of local law can justify the drastic measure of excluding all nonresidents as a class.

Petitioners' fourth contention, that the Virgin Islands Bar Association does not have the resources and personnel for adequate supervision of the ethics of a nationwide bar membership, is not a justification for the discrimination imposed here. Increased bar membership brings increased

revenue through dues. Each lawyer admitted to practice in the Virgin Islands pays an initial fee of $200 to take the bar examination, annual bar association dues of $100, and an annual license fee of $500. There is no reason to believe that the additional moneys received from nonresident members will not be adequate to pay for any additional administrative burden. To the extent petitioners fear that the Bar will be unable to monitor the ethical conduct of nonresident practitioners, respondents note that petitioners can, and do, rely on character information compiled by the National Conference of Bar Examiners. In this regard, the monitoring problems faced by the Virgin Islands Bar are no greater than those faced by any mainland State with limited resources.

The final reason offered by petitioners for Rule 56(b)'s residency requirements is somewhat more substantial, though ultimately unavailing. Under District Court Rule 16, each active member of the Virgin Islands Bar must remain available to accept appointments to appear on behalf of indigent criminal defendants. According to the affidavit of the President of the Virgin Islands Bar Association, each member can expect to receive appointments about four times per year. Once appointed, it is the duty of the lawyer "to communicate with the defendant at his place of incarceration as promptly as possible and not later than five days from the date of the clerk's mailing of the order of appointment." Although the statute does not specifically so provide, the District Court interprets Rule 16 to require that only the appointed attorney may appear on behalf of the criminal defendant. The District Court found that, in light of this individual appearance requirement and the strict time constraints imposed by the Speedy Trial Act, it would be virtually impossible for this system of appointed counsel to work with nonresident attorneys.

In Piper , we recognized that a State can require nonresidents to share in the burden of representing indigent criminal defendants as a condition for practice before the Bar. That, however, is not quite what is at issue here. The question in this case is whether bar admission can be denied to a nonresident because at times it may not be feasible for him to appear personally to represent his share of indigent defendants. We determine that this requirement is too heavy a burden on the privileges of nonresidents and bears no substantial relation to the District Court's objective. Petitioners offer no persuasive reason why the strong interests in securing representation for indigent criminal defendants cannot be protected by allowing an appointed nonresident attorney to substitute a colleague in the event he is unable to attend a particular appearance. Further, contrary to the District Court's characterization of the personal appearance requirement as a hard and fast rule, we must assume that in some circumstances it would in fact be detrimental to the goal of competent representation

for criminal defendants to require the appointed attorney, whether a resident or nonresident, to appear personally. For instance, where the bar member is an expert in trusts and estates, but has no prior experience in criminal procedure, it would seem counterproductive to the interests that Rule 16 is designed to serve to require the appointed attorney to make an individual appearance. The text of Rule 16 appears to recognize as much in its explicit provision that, where the interests of justice so require, the District Court may substitute one appointed counsel for another.

Petitioners' only effort to explain why this seemingly more sensible and less intrusive alternative would not work is to predict that resident attorneys would not be willing to make the additional appearances required where nonresidents are unavailable. Such speculation, however, is insufficient to justify discrimination against nonresidents. As respondents point out, if handling indigent criminal cases is a requirement of admission to the Bar, a nonresident knows that he must either appear himself or arrange with a resident lawyer to handle the case when he is unavailable. If the nonresident fails to make all arrangements necessary to protect the rights of the defendant, the District Court may take appropriate action. This possibility does not, however, justify a blanket exclusion of nonresidents.

IV

In sum, we hold that petitioners neither advance a substantial reason for the exclusion of nonresidents from the Bar, nor demonstrate that discrimination against nonresidents bears a close or substantial relation to the legitimate objectives of the court's Rule. When the Privileges and Immunities Clause was made part of our Constitution, commercial and legal exchange between the distant States of the Union was at least as unsophisticated as that which exists today between the Virgin Islands and the mainland United States. Nevertheless, our Founders, in their wisdom, thought it important to our sense of nationhood that each State be required to make a genuine effort to treat nonresidents on an equal basis with residents. By extending the Privileges and Immunities Clause to the Virgin Islands, Congress has made the same decision with respect to that Territory.

The residency requirements of Rule 56(b) violate the Privileges and Immunities Clause, as extended to the Virgin Islands. Accordingly, the judgment of the Court of Appeals is affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, dissenting.

In Supreme Court of New Hampshire v. Piper , the Court held that a rule of the New Hampshire Supreme Court which limited bar admission to state residents violated the Privileges and Immunities Clause. Today the Court extends the reasoning of Piper to invalidate a Virgin Islands rule limiting bar admission to attorneys who demonstrate that they have resided in the Virgin Islands for at least one year and will, if admitted, continue to reside and practice there. I agree that the durational residency requirement is invalid under our prior cases dealing with the "right" of interstate travel. But I cannot agree with the Court's conclusion that the simple residency requirement is invalid under the Privileges and Immunities Clause. Accepting Piper's view of the Privileges and Immunities Clause, I think the unique circumstances of legal practice in the Virgin Islands, as compared to the mainland States, could justify upholding this simple residency requirement even under that view. Because the record reveals the existence of genuine factual disputes about the nature of these circumstances and their relationship to the challenged residency requirement, I would reverse the judgment below and remand for trial on those issues. — lang: en title: "Questions:" —

4. Questions:

1. The majority held that the District Court Bar's residency requirement was unconstitutional because it demonstrated neither a substantial reason for discriminating against nonresidents, nor a substantial relationship to any legitimate purpose. The dissent argued that the might be a legitimate purpose for the restriction. Do any of the reasons provided by the District Court Bar seem legitimate to you?

2. Are residency restrictions ever legitimate? When and why should a state bar be able to limit the membership of non-resident attorneys, if ever? What standard should courts apply in evaluating residency requirements?

3. Could requirements for state bar membership that do not explicitly require residency effectively discriminate against out-of-state attorneys? When are such requirements legitimate, if ever? How should courts review those requirements, if at all?

5. Character and Fitness

All states limit bar admission to candidates of "good moral character," but the contours of the requirement can vary widely from state to state and examiner to examiner. The substance of the good moral character requirement are vague - perhaps deliberately vague? - but typically include honestly, respect for the law, and respect for the rights of others. Typically, applicants are rejected for failing to satisfy the requirement on the basis of failure to disclose material facts on the bar exam application, criminal conduct or convictions, and fraudulent or dishonest behavior.

In theory, applicants who have engaged in past disqualifying conduct may qualify for admission by proving their rehabilitation. But historically, many bar examiners have rejected applicants based on criminal convictions, irrespective of any evidence of rehabilitation. In recent years, this tendency has begun to change. Among other things, the Washington Bar Association approved the admission of Shon Hopwood , who pled guilty to bank robbery in 1998 and served 10 years in federal prison, where he taught himself the law and drafted a successful petition for certiorati to the Supreme Court for one of his fellow inmates, in Fellers v. United States, 540 U.S. 519 (2004). After his release from prison, Hopwood graduated from the University of Washington School of Law and clerked on the D.C. Circuit. He is currently an Associate Professor of Law at Georgetown University Law Center. You can read more about Hopwood's story in his book Law Man: My Story of Robbing Banks, Winning Supreme Court Cases, and Finding Redemption (2012).

In 1996, when he was 16 years old, Reginald Dwayne Betts participated in a carjacking. He was convicted and served 8 years in prison, where he finish high school and began writing poetry. Betts was released from prison in 2005, and immediately enrolled in community college. Two years later he received a full scholarship from the University of Maryland. After graduating, he received a poetry fellowship from Harvard's Radcliffe Institute for Advanced Study, before enrolling in Yale Law School. After graduation, he passed the Connecticut bar examination, but was initially denied admission to the Connecticut bar because of his criminal record. On appeal, the Connecticut Bar Examining Committee reversed itself and granted Betts's application for admission. He is currently completing a Ph.D. in Law at Yale and plans to become a law professor.

Other formerly incarcerated people have also rehabilitated themselves and become lawyers, including Cleodis Floyd , Allan P. Haber , and Tarra Simmons. Jarrett M. Adams was wrongfully convicted of sexual assault at 17 and served 10 years in prison before he was exonerated. He graduated from the Loyola University Chicago School of Law and is currently practicing law in Chicago.

Other formerly incarcerated people have graduated from law school, but been denied bar admission for poor moral character, based on their conviction. Bruce Reilh pled guilty to second-degree murder in 1993, when he was 20, and served 12 years in prison, where he became a jailhouse lawyer. Upon release, he applied to 30 law schools before being admitted at Tulane Law School. But after graduation, the bar refused to admit him, based on his conviction. Similarly, Guy Hamilton-Smith pled guilty to possession of child pornography in 2006, when he was 22, and was placed on the Kentucky Sex Offender Registry. He graduated from the University of Kentucky College of Law, but was denied admission to the Kentucky bar, based on his conviction and registration status. He is currently a legal fellow at the Mitchell-Hamline School of Law Sex Offense Litigation and Policy Resource Center.

6. Questions:

1. When should state bar associations be permitted to refuse admission based on an applicant's moral character? What factors should they be permitted to consider in evaluating an applicant's moral character?

2. Should state bar associations be permitted to refuse admission based on criminal convictions, if the applicant has shown compelling evidence of rehabilitation?

3. Why do state bar examiners refuse admission to applicants with criminal records who have demonstrated compelling evidence of rehabilitation? Are they trying to protect the integrity of the profession, or the appearance of the integrity of the profession?

4. Courts routinely readmit attorneys who have been disbarred for crimes like tax evasion and defrauding their clients. Should state bar associations evaluate applications for readmission more or less strictly than initial applications for admission?

7. In re Glass, 316 P. 3d 1199 (Cal. 2014)

Summary: Stephen Glass was a journalist for several national magazines, including the New Republic. Between 1996 and 1998, he wrote dozens of articles that consisted in part or whole of fabrications. He also fabricated evidence to substantiate his reporting. At the same time, he was a student at Georgetown University Law Center. After graduation, he applied for membership in the New York bar, but his application was rejected for poor moral character. In 2006, he applied for membership in the California bar. The State Bar Court ultimately recommended admission, but the California Supreme Court reversed, based on poor moral character.

Stephen Randall Glass made himself infamous as a dishonest journalist by fabricating material for more than 40 articles for The New Republic magazine and other publications. He also carefully fabricated supporting materials to delude The New Republic's fact checkers. The articles appeared between June 1996 and May 1998, and included falsehoods that reflected negatively on individuals, political groups, and ethnic minorities. During the same period, starting in September 1997, he was also an evening law student at Georgetown University's law school. Glass made every effort to avoid detection once suspicions were aroused, lobbied strenuously to keep his job at The New Republic, and, in the aftermath of his exposure, did not fully cooperate with the publications to identify his fabrications.

Glass applied to become a member of the New York bar in 2002, but withdrew his application after he was informally notified in 2004 that his moral character application would be rejected. In the New York bar application materials, he exaggerated his cooperation with the journals that had published his work and failed to supply a complete list of the fabricated articles that had injured others.

Glass passed the California Bar examination in 2006 and filed an application for determination of moral character in 2007. It was not until the California State Bar moral character proceedings

that Glass reviewed all of his articles, as well as the editorials The New Republic and other journals published to identify his fabrications, and ultimately identified fabrications that he previously had denied or failed to disclose. In the California proceedings, Glass was not forthright in acknowledging the defects in his New York bar application.

At the 2010 State Bar Court hearing resulting in the decision under review, Glass presented many character witnesses and introduced evidence regarding his lengthy course of psychotherapy, along with his own testimony and other evidence. Many of his efforts from the time of his exposure in 1998 until the 2010 hearing, however, seem to have been directed primarily at advancing his own well-being rather than returning something to the community. His evidence did not establish that he engaged in truly exemplary conduct over an extended period. We conclude that on this record he has not sustained his heavy burden of demonstrating rehabilitation and fitness for the practice of law.

I. FACTS

A. Committee of Bar Examiners's evidence

Stephen Glass was born in September 1972, in a suburb of Chicago, Illinois. After early success as a journalist in college and a developing interest in the law, in 1994 Glass was admitted to New York University School of Law but deferred his intended legal training to accept a position in Washington, D.C., with Policy Review magazine.

In September 1995 Glass accepted a position at The New Republic magazine. In early June 1996 he began fabricating material for publication. The fabrications continued and became bolder and more comprehensive until he was exposed and fired in May 1998.

Glass's fabrications began when an article entitled The Hall Monitor was published containing a fabricated quotation from an unnamed source disparaging United States Representative Pete Hoekstra for behaving in Congress like an elementary school "super hall monitor." He started by fabricating quotations or sources, and ended by publishing wholesale fictions. He testified that "all but a handful" of the 42 articles he published in The New Republic contained fabrications or were entirely fabricated. He also routinely prepared elaborate reporter's notes and supporting materials to give the false impression to the magazine's fact checkers that he had done all the background work for each article and that his informants had spoken words he falsely attributed to them.

Glass testified at the State Bar Court hearing that he "wrote nasty, mean-spirited, horrible" things about people: "My articles hurt, and they were cruel." He testified that the fabrications gave him "A-plus" stories that afforded him status in staff meetings and also gave particular enjoyment to his colleagues. He said: "Overwhelmingly, what everyone remembers about my pieces are the fake things."

A notable 1996 article was entitled Taxis and the Meaning of Work. It was Glass's first cover article and one he viewed as "key" to his successful period of writing for The New Republic. Its theme was that Americans, and in particular, African-Americans, were no longer willing to work hard or to take on employment they consider menial. The article falsely recounted as factual supposed encounters between Glass and three entirely fabricated characters, one a limousine driver, one a taxicab driver, and one a criminal. The limousine driver was depicted as an African-American man who had driven a cab at one time, but now drove a limousine instead because he was "sick of those curry people" and found that limousines attracted beautiful women, or, in the purported words of the driver, gave him "the woo quotient." The author went on to say that he had been permitted to ride along for journalistic purposes with a taxi driver of Middle Eastern descent. The article recounted that the driver stopped for a young AfricanAmerican passenger—"the type of fare Imran would normally refuse" but felt he had to accept because of nearby police observation. The article describes the pounding music audible from the young fare's headphones, and claims that as they neared his destination, the young AfricanAmerican man threatened the driver with a knife, hurled coarse abuse at him, and took his wallet. According to the article: "These things happen,' Imran said coldly on the drive back downtown. 'I give them whatever they want. I just want my life.' "

Spring Breakdown, published in March 1997, was another example of Glass's fabrications. The theme of the article was that young, conservative Republicans had given up on electoral politics and had turned to drugs and sex. Glass invented a fictional group of male college students attending the Conservative Political Action Conference. To convey the young men's view that conservatives had lost their direction, he attributed to one of them the comment that conservatives were "like a guy who has to pee lost in the desert, searching for a tree." Glass described the young men using marijuana for an hour, then embarking on a search for a young woman to humiliate. The plan was "to choose the ugliest and loneliest they can find," a person the young men described as "a real heifer, the fatter the better, bad acne," for a few of them to lure to their hotel room and persuade to undress. At that point, the remaining men would emerge from under the bed, shout "we're beaching. Whale spotted!" and photograph the woman. After turning to a discussion of asserted losses in popularity experienced by the conservative movement, the article went on to recount the execution of the plot described above. It asserted that a woman in fact emerged from the young men's room unclothed and in tears, while the perpetrators congratulated each other. The article went on: "This repellent scene was only a little beyond the norm of the con-

ference. A wash of despair and alcohol and brutishness hung over the whole thing." More examples of drug use ensued, along with examples of shameless sexual behavior. All of this was fabricated.

In another article, entitled Deliverance , published in November 1996, Glass recounted receiving unsatisfactory service from a named computer company, and claimed that his complaints to a telephone customer service representative were met with an anti-Semitic slur. In truth, no such slur ever was uttered. Glass also wrote a letter to the president of the company, repeating the accusation, and sent a copy to the Anti-Defamation League.

Glass also engaged in fabrications in freelance articles published by other magazines. An example was Prophets and Losses, an article published in Harper's Magazine in February 1998, at which time Glass was also a law student. In that article, Glass represented that he had worked for a telephone psychic service for a time, and recounted fabricated conversations with management, represented as mercenary and either stupid or cynical, and also fabricated conversations with callers, who were depicted as ignorant and desperate. In one case a caller, a fabricated character to whom Glass had attributed an African-American dialect, could not be persuaded to use his money to feed and clothe his seven children by five different mothers instead of buying VCRs and calling telephone psychics for advice on lottery numbers. The article was almost entirely a fabrication. Glass explained at the hearing that his intent was to expose "how the telephone psychic industry preys on minorities. It uses minority celebrities to advertise and shows that are watched predominantly by minorities to lure them into paying insane amounts of money. I was angry about that, and I wanted to attack that, and I used terrible, horrible stereotypes to create, essentially, straw men to knock down."

In another example, Glass wrote an article entitled The Vernon Question for George magazine. The lengthy article, published in April 1998, concerned Vernon Jordan, an advisor to then President Clinton during the then emerging Monica Lewinsky scandal. In two paragraphs, Glass used nonexistent sources to describe Jordan's supposed reputation as a "boor" and attributed various fictitious statements to "political operatives," "socialites," "political hostesses" and officials. These persons assertedly stated that Jordan was well known for sexually explicit comments, unwanted sexual advances, and crude stares, and added that he was known in their circles as "Vern the Worm" or "Pussyman," and that young women needed protection against him. Another paragraph attributed to a fictional "watchdog" group contained certain claims about Jordan's asserted conflicts of interest and questionable corporate ethics along with statements attributed to fictional "senior officials" at compa-

nies on whose boards Jordan sat, saying that Jordan is "totally unaware of the issues" but "we get what we want, access, and he gets what he wants, cash." These were all fabrications.

Charles Lane, who was the editor of The New Republic at the time of Glass's exposure, testified for the Committee of Bar Examiners that he had received an early complaint about Glass concerning an article entitled Boys on the Bus, depicting the actor Alec Baldwin and his brother as silly celebrities whose efforts during a bus tour to campaign on the issue of campaign finance reform were based on ignorance. A representative of Baldwin's disputed the assertion in the article that the actor had been giving out autographs during the bus tour, but Glass repudiated the accusation in print in The New Republic. It was not until Glass prepared his application to the California State Bar that he acknowledged that this article contained fabricated evidence to the effect that interest in the bus tour came from movie fans seeking autographs and referred to a fabricated person who opined that Baldwin lacked real understanding of campaign finance reform.

Although at the time, the Boys on the Bus incident seemingly was resolved in Glass's favor, Lane's suspicions were aroused in May 1998 when a journalist employed by Forbes Digital Tool telephoned to warn him that factual assertions in Glass's recent article for The New Republic

magazine, Hack Heaven, did not seem to be true. The article had described a teenager hacking a California software company and extorting money to stop the intrusion. The article described a convention in Bethesda, Maryland, where some of the events occurred, and when Lane challenged Glass, the latter journeyed with Lane to Bethesda, purporting to identify the building where the convention had been held. A person working in the building denied such a convention had occurred, and Lane became persuaded that Glass was lying. Lane pressed Glass about the factual basis for the article, and although Glass was evasive, he insisted the article was accurate. Glass spent the night at home fabricating what he would assert were his reporter's notes from interviews, fake business cards, a voicemail box, a website, and newsletters. He also induced his brother to impersonate a source.

Upon their return to the office from Bethesda, Glass lobbied the executive editor and others to intervene on his behalf with Lane, urging that he was being treated unfairly. Lane, now suspecting that other fabrications may have occurred, wanted to fire him, but in response to the lobbying, suspended him. The next day, a Saturday, Lane was surprised to discover Glass at the office. Thinking Glass had been told not to return, Lane

suspected he had altered his computer files. He confronted Glass with evidence that Glass had used his brother as a false source in the Hack Heaven piece. Ultimately, during this exchange Glass admitted the article was fabricated, and Lane fired him. Lane found on Glass's desk a letter Glass had written to his landlord, falsely stating he had been transferred by The New Republic to New York and needed his security deposit refunded. Lane also found the letter Glass had written to the chief executive of Gateway computers, again stating the falsehood that a customer service employee had used an anti-Semitic slur against Glass.

Lane reviewed all of Glass's articles over the course of the following three or four weeks. He received a letter from Glass apologizing and saying he had instructed his lawyers to cooperate with The New Republic. Lane compiled a summary of the material in Glass's articles that he found suspicious and submitted the summary to Glass's counsel, who it was agreed would stipulate to those findings of Lane's that Glass believed to be correct. At the time, Lane concluded that 27 of the 42 articles Glass had written for the magazine contained fabrications, and Lane wrote two editorial articles informing the magazine's readership to this effect.

Lane was very surprised to learn for the first time in the California State Bar proceeding that there were four articles Glass identified in his California Bar application as fabrications that he, Lane, had not even suspected were flawed. Lane was also surprised that four of the articles he had identified to Glass's counsel as suspicious, but which Glass had declined to stipulate contained fabrications, were now admitted in the California State Bar application to involve fabrications—including the disturbing Taxis and the Meaning of Work , along with Deliverance, with its false claim of anti-Semitism, and Boys on the Bus, which had involved the magazine in a dispute over authenticity even before Glass's exposure.

Lane testified that he thought Glass had perpetrated an elaborate hoax on readers and was engaged in a con game, not journalism. He testified that Glass's case had been highlighted at the Newseum, a Washington, D.C., museum of journalism, as one of the worst examples of

misconduct in journalistic history. Lane noted that The New Republic was put to the expense of hiring a private investigator to analyze Glass's articles and incurred legal fees in the tens of thousands of dollars. He testified that Glass had not offered him reimbursement for the magazine's expenses, nor did he offer to refund any portion of the salary he had been paid. Lane added that the fabrications hurt the magazine's reputation, relationships between employees, and of course hurt those maligned in the articles. Lane was not mollified by a letter of apology he received from

Glass in August 2003, around the time Glass's novel, The Fabulist, was published. Lane considered the letter fawning. Lane considered Glass "flagrantly incapable of producing honest journalism," and concluded that his record of systematic deception and lack of thorough confession made him unemployable as a journalist.

Richard Bradley, who was Washington affairs editor for George magazine and Glass's editor for his freelance articles for that magazine, testified on behalf of the Committee. Bradley stated that when he learned of the scandal involving Glass at The New Republic, he investigated the background for the three freelance articles Glass had published, as well as a fourth article that Glass had submitted and that was being edited. On investigation, the article on Vernon Jordan "blew apart like a dandelion in a strong wind." Assertions in the other articles were difficult to substantiate. When, within a week of learning there were problems with Glass's work, Bradley contacted Glass for help in identifying problems in the articles, Glass responded that he was psychologically incapable of doing so and that he was suicidal, and hung up. The magazine published an editorial indicating that significant portions of the Vernon Jordan article appeared to be false, and that the fabrications were woven into reliable reporting so that it was difficult to distinguish them. Glass never contacted Bradley to tell him what was true or false in his articles in George magazine, nor was Bradley contacted by Glass's lawyer. (Glass did send a letter of apology to the magazine's editor-in-chief.) Bradley believed that Glass had discredited journalism, contributing to the misconception that journalists are "craven and dishonest."

Bradley commented that Glass's articles "caricatured and mocked their subjects and I felt that the perceptions promoted by Glass's fabrications, in these examples of African-American people and conservatives, could not be corrected as easily as a factual mistake could be." Because he would not be credible, Bradley would not hire Glass as a journalist.

Joseph Landau, who later became a law professor at Fordham University Law School, was a fact checker at The New Republic while Glass worked there. He testified that Glass had a superior reputation for accuracy among fact checkers because his notes were so thorough and he was apparently so forthcoming, but he tended to push the fact-checking process to the last minute so that it was rushed and could not be done face-to-face. At times Glass could not verify certain facts but would promise Landau to telephone the source. Glass would soon return with confirmation and updated material, a process that reaffirmed the witness's sense

that the fact checking was working. Landau had trusted him. Landau received a letter of apology from Glass in the summer of 2004, some six years after Glass had been exposed, and found it to be general and vague.

Louis Miller, a lawyer and chairperson of the board of D.A.R.E., testified that Glass published falsehoods in articles in The New Republic in March 1997 and Rolling Stone in March 1998 that

impaired the organization's reputation, because the articles claimed D.A.R.E. was ineffective. According to Miller, the articles contained fabricated "evidence" that the organization had engaged in a widespread campaign of heavyhanded and even violent criminal tactics to counter academic and journalistic criticism of the program. D.A.R.E. sued Glass for libel and settled after Glass agreed the challenged information was fabricated, issued a retraction, and paid the organization's legal expenses of between $25,000 and $50,000. D.A.R.E. did not receive a letter of apology from Glass before it filed suit. D.A.R.E. sued Rolling Stone for defamation but lost on the ground that D.A.R.E. had failed to establish actual malice.

Glass graduated from law school in 2000, when he also took and passed the New York bar examination. He applied to become a member of the New York bar in 2002. After an evidentiary hearing before a subcommittee of a committee on character and fitness, and pursuant to apparent custom, in September 2004, a representative of that committee informed Glass informally that his application would be rejected, so he withdrew it. The record does not disclose the reason for the tentative decision.

In his application to the New York bar, Glass described his misconduct and firing. His application and supporting materials included only 20 articles containing fabrications. Glass wrote that he had apologized to the editor of The New Republic, saying, "I also worked with all three magazines (referring to The New Republic, Harper's, and George magazines) and other publications where I had written freelance articles to identify which facts were true and which were false in all of my stories, so they could publish clarifications for their readers."

At the hearing, Lane challenged the quoted statement as untrue. Lane believed that Glass had failed to come forward to actively assist The New Republic in identifying his fabrications, and instead had placed the entire burden of identifying his errors on Lane. Lane testified: "Well, he didn't work with us. The effort we went through, over the course of nearly a month, to investigate all those stories would have been unnecessary if he had worked with us, and simply come forward and laid bare every-

thing that was untrue in his stories. Instead, he sought legal counsel and, in effect, clammed up. When I read the statement that he's laid out in this proceeding, I discovered that, even to this day, he has not—or had not—come clean about everything. So I'm a little amazed to see that he was representing to somebody that he worked with The New Republic to separate fact from fiction in his articles. That was definitely not my experience."

B. Applicant's evidence

According to Glass, during his childhood and young adulthood his parents exerted extremely intense and cruel pressure upon him to succeed academically and socially. Glass felt that The New Republic offered an extremely competitive atmosphere and that his journalistic efforts there failed to make a mark sufficient to ensure his retention after his year term had elapsed. It was after a visit to the family home, when his parents berated him for his apparent failure even in what they considered the worthless career of journalism, that he began fabricating material for publication. He also fabricated reporter's notes and supporting materials for his articles. His aim was to impress his parents and colleagues.

Once he was fired from The New Republic, Glass was distraught, suicidal, and unable to focus, almost immediately entering therapy. He nonetheless hired counsel whom he directed to "work with The New Republic." Glass testified that he believed that The New Republic wanted to conduct its own investigation because it did not trust him and testified that "I came to understand that they were going to provide me with a list of fabricated articles, and that I was to affirm whether or not the article was fabricated that they showed me or that they listed." He had fabricated more than The New Republic had discovered in its investigation, although he testified that due to his distress he did not realize this when he reviewed the list or later when he glanced at The New Republic's editorials listing his fabrications. Four of his articles containing fabrications were not on the list and he had erroneously denied there were fabrications in four articles that were on the list, including Boys on the Bus , Deliverance , and Taxis and the Meaning of Work. He did not read the editorials—incomplete, as it turned out—that Lane published listing his fabricated articles. In fact, he closely read those articles for the first time when the California State Bar asked him to list all of his fabricated articles. Glass testified that he had "no information" indicating that his lawyers had failed to convey information to The New Republic.

Glass did well in law school. Within a few days of his firing, he rescheduled an exam and within a week, managed to earn a B-plus grade on an exam. He explained, however, that this was a poor grade for him.

Members of Georgetown University's law school faculty testified on his behalf at the hearing. Professor Susan Bloch telephoned him when the scandal first broke and asked if he needed someone to talk to. She appointed him as her research assistant, praising him as one of the brightest and best workers she ever had encountered. She found him to be honest and developed complete trust in him. She recommended him for a judicial internship during law school and a clerkship after graduation. Bloch maintained friendly contact with Glass over the years, including after he moved to California, and testified on his behalf when Glass applied for admission to the New York bar. She testified that she believed Glass had learned from his wrongdoing, that the trauma of his exposure would keep him from ever repeating such behavior, and that she had never observed any dishonesty on his part. She did not read his fabricated articles but was generally aware of their content.

Professor Stephen Cohen, also of the Georgetown law school, testified that Glass took full responsibility for his misconduct. They became friends and Glass was a welcome visitor with Cohen's family. Cohen believed Glass would be honest and ethical as an attorney; in sum, he believed Glass to be fully rehabilitated. Cohen deemed it "presumptuous" and "offensive" when counsel for the Committee of Bar Examiners asked him whether the Georgetown law school application should be read to have required Glass to notify the school that the journalistic honors he listed in his application may have been based in part on fabricated journalism.

In 2001, at the end of his clerkship, Glass moved to New York to be with his girlfriend, and underwent psychoanalysis on a four-day-a-week basis. In June 2001 Glass entered into a

contract to write a novel based on his experiences at The New Republic, testifying that his psychiatrists advised him that it would be therapeutic to write the book, which he hoped would serve as a warning to young journalists. He was paid an advance of $175,000 and sold subsidiary rights for $15,000. He wrote the novel, The Fabulist , and appeared on the television program 60 Minutes in May 2003 (just prior to the date of publication) to discuss his experiences. He claimed that it was not his intent to use the appearance to sell his book, but rather to offer a public apology.

During his residence in New York, and mostly between 2001 and 2004, Glass also undertook to handwrite approximately 100 letters of apology to journalists affected by his fabrications, as well as to the persons who were injured by his articles. He also spoke at a journalism forum at George Washington University in 2003, where he was loudly berated by other journalists. He spoke at a journalism class at Columbia and to a civics organization for high school students. In addition, he worked at a senior center on a regular basis for approximately one year in New York.

Concerning the questions that had arisen about the accuracy of his New York bar application, specifically his assertion that he had "worked with" the affected magazines "to identify which facts were true and which were false in all [his. stories, so they could publish clarifications," Glass testified that perhaps he should have written that he "offered to work with all three magazines," or in fact, that he "offered to work through counsel," but added that he did not intend to make any misrepresentation or exaggeration. He testified that he assumed his lawyer had contacted George magazine, as Glass had instructed him to do, and that he did not prepare a list of fabrications for George magazine. He explained that he attached to his New York bar application the editorials The New Republic had published incompletely listing his fabrications, but he did not read them, or at least did not read them carefully at that time. He also attached the notice that George magazine had published about his work—an article that did not refer to two of his three articles for George that contained fabrications. He reviewed these carefully for the first time in preparation for the California State Bar hearing.

When asked at the hearing in the present matter whether it would be accurate to say that he offered to work with The New Republic to identify which facts were true and which were false in all of his stories, he answered, "I believe that was my intention at the time, yes, and I believe I tried to do that." He explained that what he meant by this was that he asked his counsel to offer to go through the articles to identify fabrications, and then a "joint defense agreement was entered into, proposed by The New Republic, and we entered into a joint defense agreement that constructed this system."

Similarly, Glass explained, he did not actually undertake any work with Harper's Magazine to identify what was true and what was false in his articles, but "offered to work with them, or asked counsel to offer." He did not "have a memory of asking" his attorney whether counsel had contacted Harper's. When asked whether, when he prepared his New York

bar application, he noticed or was troubled by the absence of any article from Harper's about his fabrications, he testified that he still assumed counsel had offered to exchange information or to enter into an

agreement with Harper's. When pressed on his failure to confirm counsel's contact with Harper's, he testified: "I confirmed—well in my head I asked counsel to do something and he didn't tell me otherwise, I believed it to have occurred."

Concerning his decision to list only 20 articles containing fabrications in his New York bar application materials, Glass emphasized that he had not been asked for a complete list of articles containing fabrications, but rather in a telephone conversation, an employee of the committee on character and fitness asked for "a list of articles that contained a statement about a real person or real entity, as opposed to a fake person or a fake entity, that reflected something negative upon that real person or real entity." He wrote a letter to that committee memorializing this telephone conversation, saying he had been asked to list instances in which his fabrications "had a harmful impact on real persons. In response, I've gone back through all of my articles to identify those in which potentially harmful false statements were made about actual persons and actual organizations," and also warning that there might be inadvertent omissions. He did not list Deliverance , Boys on the Bus, or an article concerning Ted Turner entitled Gift of the Magnate , although these contained fabrications. He explained at the California hearing that the customer service agent to whom he attributed the anti-Semitic slur in Deliverance was a "made-up character," and so, he insisted, the article did not harm a real person. When pressed, he admitted that the article could have caused harm to the customer service agent the company determined had assisted him, and to the company.

Similarly, he did not include the Boys on the Bus article in his New York bar materials because the person to whom he attributed the statement that Alec Baldwin did not know much about campaign finance reform was fake, and he had created some "fake fans." When asked whether the article harmed Alec Baldwin, a real person, he responded that "Alec Baldwin, truth be told, did not know much about campaign finance reform." When pressed, he conceded that there was a potential for injury to Baldwin.

Glass testified that he moved to California in the fall of 2004. He was hired by the Carpenter, Zuckerman and Rowley law firm as a law clerk. The firm has many homeless clients, and in addition to the legal work he does on their cases, he has helped them with their personal problems, even with regard to matters of personal hygiene.

Originally Glass undertook volunteer work in Los Angeles, but because his law firm encouraged him to stop taking time off during the workday, he arranged to work extra hours for deserving clients on matters for which his firm had no expectation of collecting fees.

California Attorney Paul Zuckerman testified that he decided to give Glass a chance as a law clerk. After initially assigning Glass minor projects and exercising close oversight, Zuckerman became convinced that Glass was one of the best employees in the firm, with a fine intellect, a good work ethic, and reliable commitment to honesty. Glass exhibited great compassion, assisting at a personal level with difficult clients and helping to find resources and social services for some of the firm's many homeless clients. Other lawyers who had worked for or with the firm confirmed Zuckerman's view of Glass as an employee who conducted excellent

legal research, was assiduous and hyperscrupulous about honesty, and stopped to think about ethical issues.

Also offered in support of Glass's application were affidavits that had been submitted in support of his New York bar application from the judges for whom Glass had worked during and immediately after completing law school. Both found him highly competent and honest at that time. Additional declarations from attorneys and friends that had been submitted with the New York bar application were offered in support.

Dr. Richard Friedman, a psychiatrist, testified that he had treated Glass since 2005, and believed he had developed good judgment, scrupulous honesty, and the ability to handle difficult situations well. Dr. Friedman reported that he would be astonished if Glass committed misconduct as he had in the past, both because of the growth of character and moral sense the doctor had observed, but also because of a strong instinct to protect himself from the traumatic results of his prior misconduct. He reported that Glass had no sociopathic personality traits.

Dr. Richard Rosenthal, a psychiatrist and psychoanalyst who is known for treating gamblers and those with impulse control disorders, was approached by Glass's attorney in 2005. Rosenthal had an evaluative as well as therapeutic relationship with Glass that began in 2005 and continued with meetings once or twice a month until the time of the hearing.

Dr. Rosenthal identified Glass's underlying psychological issues as a need for approval, a need to impress others, and a need for attention, and pointed also to Glass's fear of inadequacy, rejection, and abandonment. Rosenthal testified that when they met in 2005, Glass needed to overcome enormous shame and learn to forgive himself. Through therapy, Glass learned to be realistic about family issues and to set boundaries. Rosenthal believed that Glass had grown up in a family that exerted tremendous pressure on him to succeed yet always made him feel like a failure. In Rosenthal's opinion, Glass was rehabilitated, meaning that he was extremely conscientious and honest, avoided the appearance of impropriety, had reasonable goals and expectations, had gained empathy and tolerance, and would not allow himself to be overwhelmed by stress. The doctor saw no evidence that Glass was a sociopath.

Glass himself described his therapy, which had commenced very shortly after his exposure and continued to the time of the 2010 hearing, that is, for 12 years. Through therapy he had learned to separate his feelings about his family from the work environment and to "set boundaries within my family." He testified that he believed the most important thing he could do to make amends was to change himself.

Martin Peretz, who owned and managed The New Republic at the time of the fabrications, testified on Glass's behalf and had developed a charitable view of his misconduct by the time of the California State Bar hearing. He blamed himself and, even more, the magazine's editors for encouraging Glass to write zany, shocking articles and for failing to recognize the improbability of some of Glass's stories. He found the harm of the scandal to the magazine to be minimal. He had renewed social contact with Glass in the past few years and believed that Glass had been

harshly treated. He would not rule out hiring Glass again as a journalist. He explained that in his experience as a professor "the most brilliant students plagiarize," complaining to the Committee's counsel, "I actually find your pursuing him an act of stalking."

Additional character witnesses included Melanie Thernstrom, a journalist, memoirist, and friend who testified that she had known Glass for more than a decade because she was a close friend of his girlfriend, Julie

Hilden. Her initial skepticism about him dissolved soon after she met him and she believed he had become kind, generous, loyal, responsible, empathetic and above all, honest. Thernstrom witnessed Glass during the period he wrote letters of apology and said that each letter required considerable work and caused him anguish. She found him to be very sorry for the deceptions, and believed that he had taken responsibility for his past acts and would never deceive again. She had observed that Glass was intelligent, hardworking, and empathetic with clients who were injured. She thought the Committee was "picking on" irrelevant issues— that is, the exact number of Glass's deceptive articles and whether or when he had disclosed them all. She believed the Committee's position was "sophistic." In her view, it was enough that he had admitted his misconduct and apologized for it, and she believed that there was no current, ongoing damage from his fabricated articles because Glass's work had been entirely discredited.

Lawrence Berger, a friend, testified on Glass's behalf, saying that Glass immediately told him about the scandal when they met. He testified that Glass is especially committed to being a good person now, being remarkably ethical and a devoted friend. According to Berger, Glass's efforts during the period he wrote the letters of apology were never perfunctory.

Julie Hilden, a freelance lawyer and aspiring scriptwriter and Glass's longtime live-in girlfriend, also testified on his behalf. He took good care of her during a prolonged, serious illness, even though she lived in New York and he was completing law school and doing his clerkship in Washington, D.C., at the time. She testified that he immediately demonstrated that he was very serious about being completely honest in every detail, and honesty is still an overriding concern. She observed the great effort he put into writing letters of apology during a prolonged period between 2002 and 2004. She explained that he takes a personal interest in clients, works very hard for them, and accepts their telephone calls at all hours, including nights and weekends.

C. California State Bar proceedings

Glass took and passed the California Bar examination in 2006 and in July 2007 filed an application for determination of moral character as part of his bar application. The Committee of Bar Examiners denied the application, but on Glass's request a moral character hearing was conducted in the State Bar Court in April and May of 2010.

The State Bar Court's hearing judge found that Glass had established good moral character. The Committee sought review. The State Bar Court Review Department independently reviewed the record, and a majority of the three-judge panel agreed with the hearing judge that Glass had established good moral character.

The Review Department majority acknowledged that Glass's misconduct had been "appalling" and "egregious," but believed that Glass had satisfied his "heavy burden of proof" and established his rehabilitation. The majority stated that Glass's burden of proof as a first-time applicant was "substantially less rigorous" than it would have been for an attorney seeking reinstatement after disbarment. Moreover, the majority declared, its "task here is not to dwell on his past misdeeds, but to determine his present moral fitness." It added that because the "policy of the state favors admission of applicants who have achieved reformation," the majority resolved any reasonable doubt concerning Glass's rehabilitation in his favor and "gave him the benefit of any conflicting but equally reasonable inferences flowing from the evidence." The majority concluded that "cumulatively, Glass's legal employment history, community service, character witnesses, progress in therapy, remorse and acceptance of responsibility" provided a more accurate picture of his moral character than his misconduct of many years ago.

The majority acknowledged that Glass had not fully identified his fabrications until the California Bar proceedings, but observed that Glass had not asked the bar to excuse that failure. The majority also expressed some concern regarding Glass's New York bar application, observing that he had "mischaracterized the degree to which he cooperated with the magazines to identify the fabricated articles." On the other hand, in the majority's view, Glass's careful review of his prior articles in connection with the California State Bar proceedings indicated that he had fully acknowledged his wrongdoing, an "essential step towards rehabilitation." In addition, the majority concluded that Glass had left it to his attorneys to work with the magazines because of his emotional turmoil, and "the State Bar did not prove whether Glass's attorney failed to 'work with' some of the publishers and neither did Glass establish that his attorney had completed the task as requested."

The majority commented upon Glass's excellent reputation with law professors and judicial employers, and observed that Glass's rehabilitation seemed to have occurred over a number of years. The majority recounted the course of Glass's therapy and his therapists' testimony on his behalf in support of the view that he was rehabilitated. The majority further re-

ferred to Glass's community service in New York and commented that his work commitments rendered him unable to continue non-work-related community service in Los Angeles, where he had resided since 2004.

The majority placed great emphasis on Glass's character witnesses, saying: "We afford great weight to Glass's character witnesses, who were community leaders, employers, judges, and attorneys, and all of whom spoke with the utmost confidence in Glass's good moral character and rehabilitation."

The majority declined to believe restitution was required of Glass. "We consider his present character in light of his previous moral shortcomings citation, and we are at a loss to understand how monetary restitution would mitigate the reputational harm that Glass had caused." The majority found more significant evidence that he has made amends both to the journalistic

community in his public admissions concerning his fabrications and to his victims in the letters he sent them.

The majority concluded that "even those who have committed serious, indeed egregious, misconduct, are capable of overcoming their past misdeeds" and that persons who had reformed should be rewarded with an opportunity to serve as lawyers.

The Review Department panel's dissenting opinion concluded that Glass had not proven full rehabilitation, pointing to his "staggering" two-year period of "multi-layered, complex and harmful course of public dishonesty." The dissenting judge found especially troubling Glass's omissions and misstatements in his application to the New York bar. "To gain admission to practice law in New York, Glass understated the number of articles he had fabricated and exaggerated his efforts to help the magazines identify those articles. At a time when he should have been scrupulously honest, he presented an inaccurate application because it benefitted him—the same behavior as his earlier misconduct." The dissenting opinion concluded: "Given the magnitude of his misconduct and his subsequent misrepresentations on his New York bar application, Glass has not shown proof of reform by a lengthy period of exemplary conduct which 'we could with confidence lay before the world' to justify his admission."

Is. DISCUSSION

A. Applicable Law

(1. To be qualified to practice law in this state, a person must be of good moral character. Good moral character includes "qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process." "Persons of good character do not commit acts or crimes involving moral turpitude—a concept that embraces a wide range of deceitful and depraved behavior." A lawyer's good moral character is essential for the protection of clients and for the proper functioning of the judicial system itself.

(1. When the applicant has presented evidence that is sufficient to establish a prima facie case of his or her good moral character, the burden shifts to the State Bar to rebut that case with evidence of poor moral character. Once the State Bar has presented evidence of moral turpitude, the burden "falls squarely upon the applicant to demonstrate his or her rehabilitation."

Of particular significance for the present case is the principle that "the more serious the misconduct and the bad character evidence, the stronger the applicant's showing of rehabilitation must be." "Cases authorizing admission on the basis of rehabilitation commonly involve a substantial period of exemplary conduct following the applicant's misdeeds."

Moreover, "truly exemplary" conduct ordinarily includes service to the community.

(1. We independently weigh the evidence that was before the State Bar Court, recognizing that the applicant bears the burden of establishing good moral character. We ask whether the

applicant is fit to practice law, paying particular attention to acts of moral turpitude and prior misconduct that bears particularly upon fitness to practice law.

In reviewing moral fitness findings made by the State Bar, we accord significant weight to the State Bar Court hearing judge's findings of fact to the extent they are based on witness demeanor and credibility. Although "the moral character determinations of the Committee and the State Bar Court play an integral role in the admissions decision, and both bear substantial weight within their respective spheres," we are not bound by the determinations of the Committee or the State Bar Court. Rather, we "independently examine and weigh the evidence" to decide whether the applicant is qualified for admission.

(1. Contrary to the Review Department majority's view that Glass's burden was significantly lighter than it would be for an attorney seeking readmission because he was a first-time applicant, in many respects the difference between admission and disciplinary proceedings is "more apparent than real." "Because both admission and disciplinary proceedings concern fitness to practice law as evidenced by acts of moral turpitude, this court routinely consults its disciplinary cases in deciding whether applicants for admission possess, at the outset, the requisite moral character." At both admission and disciplinary proceedings, "the common issue is whether the applicant for admission or the attorney sought to be disciplined 'is a fit and proper person to be permitted to practice law, and that usually turns upon whether he has committed or is likely to continue to commit acts of moral turpitude," particularly misconduct that bears upon the applicant's fitness to practice law.

"However, unlike in disciplinary proceedings, where the State Bar must show that an already admitted attorney is unfit to practice law and deserves professional sanction, the burden rests upon the candidate for admission to prove his own moral fitness."

B. Analysis

(1. The Review Department majority believed it was reasonable to draw all inferences in favor of Glass, failing to be constrained by our discussion in Gossage , as we shall explain. Although an applicant ordinarily receives the benefit of the doubt as to "conflicting, equally reasonable inferences" concerning moral fitness, the State Bar Court majority failed to recognize that this rule does not materially assist applicants who have engaged in serious misconduct. This is because "where serious or criminal misconduct is involved, positive inferences about the applicant's moral character are more difficult to draw, and negative character inferences are stronger and more reasonable." When there have been very serious acts of moral turpitude, we must be convinced that the applicant "is no longer the same person who behaved so poorly in the past," and will find moral fitness "only if he or she has since behaved in exemplary fashion over a meaningful period of time."

Applying the Gossage standard in this case of egregious malfeasance, we begin our own independent review of the record with a focus on Glass's many acts of dishonesty and professional misconduct, and then ask whether he has established a compelling showing of

rehabilitation and truly exemplary conduct over an extended period that would suffice to demonstrate his fitness for the practice of law.

Glass's conduct as a journalist exhibited moral turpitude sustained over an extended period. As the Review Department dissent emphasized, he engaged in "fraud of staggering proportions" and he "used his exceptional writing skills to publicly and falsely malign people and organizations for actions they did not do and faults they did not have." As the dissent further commented, for two years he "engaged in a multi-layered, complex and harmful course of public dishonesty." Glass's journalistic dishonesty was not a single lapse of judgment, which we have sometimes excused, but involved significant deceit sustained unremittingly for a period of years. Glass's deceit also was motivated by professional ambition, betrayed a vicious, mean spirit and a complete lack of compassion for others, along with arrogance and prejudice against various ethnic groups. In all these respects, his misconduct bore directly on his character in matters that are critical to the practice of law.

Glass not only spent two years producing damaging articles containing or entirely made up of fabrications, thereby deluding the public, maligning individuals, and disparaging ethnic minorities, he also routinely expended considerable efforts to fabricate background materials to dupe the fact checkers assigned to vet his work. When exposure threatened, he redoubled his efforts to hide his misconduct, going so far as to create a phony website and business cards and to recruit his brother to pose as a source. In addition, to retain his position, he engaged in a spirited campaign among the leadership at The New Republic to characterize Lane's obviously well-founded concerns as unfair and to retain his position.

Glass's conduct during this two-year period violated ethical strictures governing his profession. Believing that "public enlightenment is the forerunner of justice and the foundation of democracy," the Code of Ethics of the Society of Professional Journalists provides that "the duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues, striving to serve the public with thoroughness and honesty. Deliberate distortion is never permissible." Glass's behavior fell so far short of this standard that Lane recounted seeing Glass featured in an exhibit in the Newseum, a Washington, D.C., museum dedicated to journalism, as embodying one of the worst episodes of deceit in journalistic history.

Glass's misconduct was also reprehensible because it took place while he was pursuing a law degree and license to practice law, when the importance of honesty should have gained new meaning and significance for him.

Moreover, Glass's lack of integrity and forthrightness continued beyond the time he was engaged in journalism. Once he was exposed, Glass's response was to protect himself, not to freely and fully admit and catalogue all of his fabrications. He never fully cooperated with his employers to clarify the record, failed to carefully review the editorials they published to describe the fabrications to their readership, made misrepresentations to The New Republic regarding some of his work during the period he purported to be cooperating with that magazine, and

indeed some of his fabrications did not come to light until the California State Bar proceedings. He refused to speak to his editor at George magazine when the latter called to ask for help in identifying fabrications in the articles Glass wrote for that magazine.

(1. The record also discloses instances of dishonesty and disingenuousness occurring after Glass's exposure, up to and including the State Bar evidentiary hearing in 2010. In the New York bar proceedings that ended in 2004, as even the State Bar Court majority acknowledged, he made misrepresentations concerning his cooperation with The New Republic and other publications and efforts to aid them identify all of his fabrications. He also submitted an incomplete list of articles that injured others. We have previously said about omissions on bar applications: "Whether it is caused by intentional concealment, reckless disregard for the truth, or an unreasonable refusal to perceive the need for disclosure, such an omission is itself strong evidence that the applicant lacks the 'integrity' and/or 'intellectual discernment' required to be an attorney."

Our review of the record indicates hypocrisy and evasiveness in Glass's testimony at the California State Bar hearing, as well. We find it particularly disturbing that at the hearing Glass persisted in claiming that he had made a good faith effort to work with the magazines that published his works. He went through many verbal twists and turns at the hearing to avoid acknowledging the obvious fact that in his New York bar application he exaggerated his level of assistance to the magazines that had published his fabrications, and that he omitted from his New York bar list of fabrications some that actually could have injured real persons. He also testified that he told his lawyer to work with Harper's Magazine to identify his fabrications, yet evaded questions concerning whether his lawyer had done so, while insisting that he took responsibility for an inferred failure to follow what obviously were significant instructions. He asserted that he had been too distraught to recognize that the list of fabrications The New Republic gave his lawyer was incomplete—or that in his response he had denied that articles including the egregious Taxis and the Meaning of Work were in fact fabricated—while acknowledging that

within a few days of his firing he made arrangements to reschedule a final examination for the end of the exam period and did well on the exam he took within a week of his exposure. Indeed, despite his many statements concerning taking personal responsibility, and contrary to what he suggested in his New York bar application, it was not until the California Bar proceedings that he shouldered the responsibility of reviewing the editorials his employers published disclosing his fabrications, thus failing to ensure that all his very public lies had been corrected publically and in a timely manner. He has "not acted with the 'high degree of frankness and truthfulness' and the 'high standard of integrity' required by this process."

(1. Honesty is absolutely fundamental in the practice of law; without it, "the profession is worse than valueless in the place it holds in the administration of justice." "Manifest dishonesty provides a reasonable basis for the conclusion that the applicant or attorney cannot be relied upon to fulfill the moral obligations incumbent upon members of the legal profession." As the dissent in the Review Department pointed out, "if Glass were to fabricate evidence in legal matters as readily and effectively as he falsified material for magazine articles, the harm to the public and profession would be immeasurable."

We also observe that instead of directing his efforts at serving others in the community, much of Glass's energy since the end of his journalistic career seems to have been directed at advancing his own career and financial and emotional well-being.

(1. As Justice Kennard did in her concurring opinion in Kwasnik, we do well to repeat Justice Felix Frankfurter's "eloquent description" of the moral character required of lawyers: "It is a fair characterization of the lawyer's responsibility in our society that he or she stands"as a shield" in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."

(1. As for Glass's case for admission, although he points to his youth at the time of his employment as a journalist and an asserted period of rehabilitation of 12 years (measured between the time he was fired and the hearing in the State Bar Court), we have outlined instances of dishonesty and disingenuousness persisting throughout that period, including at the California State Bar evidentiary hearing. In addition, Glass's behavior was under the scrutiny of first the New York bar from 2002 to 2004, and then the California Bar from 2007 to 2010, reducing the probative value

of the evidence of his good conduct during those periods. "Good conduct generally is expected from someone who has applied for admission with, and whose character is under scrutiny by, the State Bar."

(11. The Review Department majority relied heavily on the testimony of Glass's character witnesses, but the testimony of character witnesses will not suffice by itself to establish rehabilitation. Moreover, stressing that Glass's reputation as a journalist had been exploded and that so many years had passed, some of the character witnesses did not sufficiently focus on the seriousness of the misconduct, incorrectly viewing it as of little current significance despite its lingering impact on its victims and on public perceptions concerning issues of race and politics. They also did not take into account, as we do, that the misconduct reflected poorly on the particular commitment to honesty that Glass might have been expected to have had as a law student. For these reasons we believe the Review Department majority accorded too much probative value to the testimony of Glass's character witnesses.

(11. Glass emphasized the remorse he expressed through his letters to victims, and characterized his novel and his appearance on 60 Minutes as efforts to make amends. Remorse does not establish rehabilitation, however, and in any event, the weight of this evidence is diminished because the letters were not written near the time of his misconduct and exposure, when they might have been most meaningful to the victims, but rather seemed timed to coincide with his effort to become a member of the New York bar. The novel served Glass's own purposes, producing notoriety and a fee of $175,000, and the appearance on 60 Minutes was timed to coincide with the release of the novel. Glass did not offer any restitution to Lane or Bradley. It was not until approximately 2008 that he made an offer to the then friendly Peretz— who roundly disclaimed any interest in restitution—to repay his salary. This offer was made after

Glass applied to the California Bar and was another oddly belated and, we believe, disingenuous effort at making his victims whole.

The record of Glass's therapy does not represent "truly exemplary conduct in the sense of returning something to the community." To be sure, through therapy he seems to have gained a deep understanding of the psychological sources of his misconduct, as well as tools to help him avoid succumbing to the same pressures again. His treating psychiatrists are plainly highly competent and well regarded in their field, and they are convinced that he has no remaining psychological flaws tending to cause

him to act dishonestly. Glass believed that he could best make amends by changing himself. But his 12 years of therapy primarily conferred a personal benefit on Glass himself.

(11. Glass points to the pro bono legal work he does for clients of his firm as evidence of sustained efforts on behalf of the community, but we observe that pro bono work is not truly exemplary for attorneys, but rather is expected of them.

(11. Glass and the witnesses who supported his application stress his talent in the law and his commitment to the profession, and they argue that he has already paid a high enough price for his misdeeds to warrant admission to the bar. They emphasize his personal redemption, but we must recall that what is at stake is not compassion for Glass, who wishes to advance from being a supervised law clerk to enjoying a license to engage in the practice of law on an independent basis. Given our duty to protect the public and maintain the integrity and high standards of the profession, our focus is on the applicant's moral fitness to practice law. On this record, the applicant failed to carry his heavy burden of establishing his rehabilitation and current fitness.

IIs. CONCLUSION

For the foregoing reasons, we reject the State Bar Court majority's recommendation and decline to admit Glass to the practice of law.

Questions

1. Stephen Randall Glass (1972-) is currently working at a Beverly Hills law firm as a paralegal. He was the subject of the motion picture Shattered Glass (2003). Excellent journalistic accounts of the Glass affair are available from Vanity Fair , Forbes , The Los Angeles Times , and The New Republic. The New Republic's original corrections are available here and here. Links to several of Glass's fabricated articles are available on his Wikipedia page.
2. Did the court provide a fair assessment of Glass's fitness to practice law? Do you agree with the court's conclusion that he failed to rehabilitate himself? Do you agree with the courts assessment of his disclosures in his applications for bar membership in New York and California?
3. The court described Glass's fabrications as acts of moral turpitude. "Moral turpitude" is generally defined as "an act or behavior that gravely violates the sentiment or accepted standard of the community." More specifically, the California Supreme Court has observed, "The concept of moral turpitude escapes precise definition. Moral turpitude has been described as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. It has been described as any crime or misconduct without excuse or any dishonest or immoral act. The meaning and test is the same whether the dishonest or immoral act is a felony, misdemeanor, or no crime at all." Chadwick v. State Bar, 776 P.2d 240 (Cal. 1989). Is this a helpful definition? Do you agree with the court that Glass committed acts of moral turpitude?
4. Was the problem with Glass's articles the fabrications, the content, or both? If Glass had not fabricated any of the facts reported in the articles, would they reflect on his moral character?
5. Was it proper for the court to reverse the State Bar Court's assessment of Glass's rehabilitation, moral character, and fitness to practice?
6. What standard of proof did the court apply to Glass's claim of rehabilitation? Was it higher, lower, or the same as the standard applied to attorneys applying for readmission? What standard should courts apply to new applicants for bar admission, as opposed to applicants for readmission?
7. Many prominent people testified in favor of Glass and his rehabilitation, including some of the people he directly harmed. Should that count in his favor? How seriously did the court take their testimony?
8. If the court granted Glass's application for admission to practice, do you think it is likely that he would engage in fraudulent or misleading conduct?

Andrew Abbott. 1988. *The System of Professions: An Essay on the Division of Expert Labor*. University of Chicago Press.