

## Chapter 2

# Judicial and Professional Regulation of Lawyers

This chapter focuses on two aspects of the inherent power of the judicial branch of government to regulate the practice of law: admission to practice and professional discipline.

Few give a second thought to the special power that a law license provides. Yet only lawyers can “practice law,” by launching lawsuits, issuing subpoenas, demanding documents and testimony and appearing in courts on behalf of clients, drafting legal opinions and legal documents without which transactions would not be consummated and the wheels of commerce would not turn smoothly, and by giving legal advice and offering moral suasion that promotes private respect for the law and its requirements. The fact that lawyers regularly exercise all these powers—and others—should enhance our appreciation and respect for the fact that a law license grants these powers exclusively to members of our profession.

### A. Bar Admission

#### Problem

2-1. Martyn & Fox represent Mary Moore, who is about to graduate from law school.

- (a) Should Moore be denied admission to the bar because she included as text, and without attribution, seven direct quotations, three from cases and four from law review articles in a seminar paper in law school?
- (b) What if Moore pleaded guilty to drunk driving five years ago and again last year?
- (c) What if Moore owes \$250,000 in student loans, has \$25,000 in credit card debt, and has no job?

(d) What if Moore believes in Aryan supremacy and has announced plans to become General Counsel to the KKK White Council?

Consider: Model Rules 8.1, 8.4

### In re Application of Converse

602 N.W.2d 500 (Neb. 1999)

PER CURIAM.

Paul Raymond Converse appeals a decision of the Nebraska State Bar Commission (Commission) denying his request to take the July 1998 Nebraska bar examination. Converse claims that the decision of the Commission should be reversed because the Commission rested its denial of Converse's application, at least in part, upon conduct protected by the First Amendment to the U.S. Constitution and, in the alternative, that Converse's conduct did not constitute sufficient cause under Nebraska law for denying his application on the ground of deficient moral character. For the reasons that follow, we affirm the decision of the Commission. . . .

[As part of the application process, Converse's law school dean certified that he had completed law school and checked "yes" when asked whether the Bar Examiners should inquire further regarding his moral character, which triggered a Commission hearing revealing the following facts.]

After the completion of his first semester at the University of South Dakota Law School, Converse sent a letter to then assistant dean Diane May regarding certain issues . . . that he had had with his fall classes, closing that letter with the phrase, "Hope you get a full body tan in Costa Rica." . . .

After he received a grade he believed to be unjustified by his performance in the appellate advocacy course, Converse wrote letters to May and to the USD law school dean, Barry Vickrey, requesting assistance with an appeal of that grade. In addition to writing letters to Vickrey and May, Converse also sent a letter to the South Dakota Supreme Court regarding the appellate advocacy course professor's characterization of his arguments, with indications that carbon copies of the letter were sent to two well-known federal court of appeals judges. . . . Despite all such correspondence, Converse testified at the hearing that no formal appeal of the grievance was ever filed. Converse's grade was never adjusted.

The evidence showed that following the grade "appeal," Converse prepared a memorandum and submitted it to his classmates, urging them to recall an "incident" in which yet another professor lashed out at him in class, and to be cognizant of the image that incident casts "on [that professor's] core professionalism" prior to completing class evaluations. Converse also wrote a letter to a newspaper in South Dakota, the Sioux Falls Argus Leader, regarding a proposed fee increase at the USD law school. Converse immediately began investigating the salaries of USD law professors and posted a list of selected

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Bar forced  
out

Complaint  
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professors' salaries on the student bulletin board, as well as writing a letter that accused Vickrey of trying to pull a "fast one."

Converse's next altercation at the USD law school involved a photograph of a nude female's backside that he displayed in his study carrel in the USD law library. The picture was removed by a law librarian. In response to the removal of this photograph, Converse contacted the American Civil Liberties Union (ACLU) and received a letter indicating that his photograph might be a protected expression under the First Amendment. Once again, Converse went to the student newspaper to alert the student body of the actions of the law school authorities, accusing them of unconstitutional censorship.

Converse redisplayed the photograph once it was returned by the law librarians. Vickrey received several complaints about the photograph from other students, classifying Converse's behavior as "unprofessional and inappropriate." Upon Converse's redisplay of the photograph, Vickrey sent him a memorandum explaining that the picture would not be removed only because Vickrey did not want to involve the school in controversy during final examinations. Converse testified that he redisplayed the photograph in order to force the alleged constitutional issue. . . .

The Commission also heard testimony regarding Converse's attempt to obtain an internship with the U.S. Attorney's office in South Dakota. Converse arranged for the internship on his own, only to have his request subsequently rejected by the law school. Upon receiving his denial, Converse sent a complaint to all of USD's law school faculty members. Vickrey testified that Converse's internship was rejected because he failed to comply with the law school's procedures regarding internships. Converse then contacted the chairperson of the law school committee of the South Dakota State Bar Association with his complaint, expressly referring to Vickrey as being "arrogant." There is no indication of a response from the chairperson in the record.

The issue next considered by the Commission was that of various litigation threatened by Converse. Converse indicated that he would "likely" be filing a lawsuit against Vickrey for violations of his First Amendment rights. Converse was also involved in a dispute with other law students, in which he threatened to file a lawsuit and warned the students that all lawsuits in which they were involved would need to be reported to proper authorities when they applied to take a bar examination. Further, Converse posted signs on the bulletin board at the law school denouncing a professor, in response to the way in which Converse's parking appeal was handled, and then went to the student newspaper to criticize the process and those involved in that appeal.

One of the final issues addressed by the Commission in its hearing was that of a T-shirt Converse produced and marketed on which a nude caricature of Vickrey is shown sitting astride what appears to be a large hot dog. The cartoon on the shirt also contains the phrase "Astride the Peter Principle," which Converse claims connotes the principle that Vickrey had been promoted past his level of competence; however, Converse admits that the T-shirt could be construed to have certain sexual overtones. Converse admitted that the creation of this T-shirt would not be acceptable behavior for a lawyer.

*Inappropriate photo*

*16*

In response to not being allowed to post signs and fliers at the law school, Converse sent a memo to all law students in which he noted to his fellow students that his "Deanie on a Weanie" T-shirts were in stock. In that same memo, Converse included a note to his schoolmates:

So far 4 causes of action have arisen, courtesy Tricky Vickrey. [He then listed what he believed the causes of action to be.] When you pass the SD Bar, if you want to earn some atty [sic] fees, get hold of me and we can go for one of these. I've kept evidence, of course.

Vickrey asked Converse not to wear his T-shirt to his graduation ceremony, and Converse decided that "it would be a better choice in [his] life not to go to that commencement." Converse acknowledges that Vickrey's request was made in a civil manner.

The evidence also revealed that prior to law school, Converse, in his capacity as a landlord; sued a tenant for nonpayment of rent and referred to the tenant as a "fucking welfare bitch." At the hearing, in response to questioning from the Commission, Converse testified at great length as to how he tends to personally attack individuals when he finds himself embroiled in a controversy.

After the Commission notified Converse on December 18, 1998, that he would not be allowed to sit for the Nebraska bar examination, Converse appealed the adverse determination to this court pursuant to Neb. Ct. R. for Adm. of Attys. 15 (rev. 1996). . . .

Converse first assigns as error that the Commission's determination should not stand because it is based in large part upon speech that is protected by the First Amendment. Thus, the threshold question we must answer is whether conduct arguably protected by the First Amendment can be considered by the Commission during an investigation into an applicant's moral character and fitness to practice law. We answer this question in the affirmative.

There are four U.S. Supreme Court cases that provide particular guidance with respect to this issue. In *Konigsberg v. State Bar*, 366 U.S. 36 (1961), the bar applicant argued that when the California bar commission forced him to either answer questions about his affiliation with the Communist Party or to face the repercussions of not being certified as possessing the required moral character to sit for the bar, the commission violated his First Amendment rights. The Supreme Court disagreed, [and] . . . balanced the effect of allowing such questions against the need for the state to do a complete inquiry into the character of an applicant and concluded that questions about membership would not chill association to the extent of harm caused by striking down the screening process. *Id.* The Court held that requiring the applicant to answer the questions was not an infringement of the applicant's First Amendment rights. . . .

Converse conceded at oral argument that the Commission's decision cannot be based solely on an applicant's exercise of First Amendment freedoms but that it is proper for the Commission to go behind the exercise of those freedoms and consider an applicant's moral character. That is exactly what was done by the Commission in the instant case. An investigation of Converse's moral character is not a proceeding

pre-law  
school  
bad conduct

Can ask re:  
member of  
Communist  
party

in which the applicant is being prosecuted for conduct arguably protected by the First Amendment, but, rather, "an investigation of the conduct of [an applicant] for the purpose of determining whether he shall be [admitted]." . . .

Conduct not speech?

Were we to adopt the position asserted by Converse in this case, the Commission would be limited to conducting only cursory investigations of an applicant's moral character and past conduct. [I]n *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971), [the majority] noted that the implications of such an attack on a bar screening process are that no screening process would be constitutionally permissible beyond academic examination and an extremely minimal check for serious, concrete character deficiencies. "The principal means of policing the Bar would then be the deterrent and punitive effects of such post-admission sanctions as contempt, disbarment, malpractice suits, and criminal prosecutions." . . .

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We conclude that the Commission properly considered Converse's conduct as it reflects upon his moral character, even if such conduct might have been protected by the First Amendment. . . .

Converse next contends that the Commission violated his due process rights by not making him aware of all of the "charges" against him in these proceedings. . . .

There is no question that "[a] state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar . . . ." *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 239 (1957). The Court has also stated that it must be "kept clearly in mind . . . that an applicant for admission to the bar bears the burden of proof of 'good moral character' a requirement whose validity is not, nor could well be, drawn in question here." *Konigsberg v. St. Bar*, 366 U.S. 36, 40-41 (1961). "If at the conclusion of the proceedings the evidence of good character and that of bad character are found in even balance, the State may refuse admission . . . ."

With that in mind, we commence our analysis with the standards for moral character required for admission to the Nebraska bar as set out in our rules governing the admission of attorneys. *Neb. Ct. R. for Adm. of Attys.* 3 (rev. 1998) governs this situation, which provides in pertinent part:

An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission. In addition to the admission requirements otherwise established by these Rules, the essential eligibility requirements for admission to the practice of law in Nebraska are:

// Test

(a) The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations; . . .

(c) The ability to conduct oneself with respect for and in accordance with the law and the Code of Professional Responsibility; . . .

(j) The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

Under rule 3, Converse must prove that his past conduct is in conformity with the standards set forth by this court, and the record in this case compels the conclusion that he has failed to do so.

We considered an appeal of a similarly situated bar applicant in *In re Appeal of Lane*, 544 N.W.2d 367 (Neb. 1996). *Lane* involved an individual seeking readmission to the Nebraska bar whose past included confrontations with law school faculty, the use of strong and profane language with fellow students at his bar review course, the use of intimidating and rude conduct directed at a security guard at the place where he was taking his bar review course, and some controversial interactions with females. We held that, taken together, "these incidents show that Lane is prone to turbulence, intemperance, and irresponsibility, characteristics which are not acceptable in one who would be a counselor and advocate in the legal system," and we upheld the denial of his application.

We explained in . . . *Lane* that the "requisite restraint in dealing with others is obligatory conduct for attorneys because 'the efficient and orderly administration of justice cannot be successfully carried on if we allow attorneys to engage in unwarranted attacks on the court [or] opposing counsel. . . . Furthermore, "an attorney who exhibits [a] lack of civility, good manners and common courtesy . . . tarnishes the . . . image of . . . the bar . . . ." . . . We held in . . . *Lane* that "abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar." . . .

The evidence in this case shows that Converse's numerous disputes and personal attacks indicate a "pattern and a way of life which appear to be [Converse's] normal reaction to opposition and disappointment." See *Lane*. The totality of the evidence clearly establishes that Converse possesses an inclination to personally attack those with whom he has disputes. Such inclinations "are not acceptable in one who would be a counselor and advocate in the legal system."

In addition to Converse's tendency to personally attack those individuals with whom he has disputes, his pattern of behavior indicates an additional tendency to do so in arenas other than those specifically established within the legal system. This tendency is best exemplified by observing Converse's conduct in situations where there were avenues through which Converse could have and should have handled his disputes, but instead chose to mount personal attacks on those with whom he had disputes through letters and barrages in the media. . . .

Converse is 48 years old, and his actions cannot be excused as isolated instances of youthful indiscretions.

Taken together with the other incidents previously discussed, the evidence clearly shows that Converse is prone to turbulence, intemperance, and irresponsibility; characteristics which are not acceptable in one seeking admission to the Nebraska bar. . . . In light of Converse's admission that such conduct would be inappropriate were he already an attorney, we reiterate that we will not tolerate conduct by those applying for admission to the bar that would not be tolerated were that person already an attorney. . . .

The record before us reflects that the Commission conducted such an inquiry and, at the conclusion thereof, correctly determined that Converse possessed a

(1)  
Personal  
attacks

(2)  
goes outside  
of standard  
procedures

moral character inconsistent with one "dedicated to the peaceful and reasoned settlement of disputes," *see* 401 U.S. at 166, but, rather, more consistent with someone who wishes to go outside the field of law and settle disputes by mounting personal attacks and portraying himself as the victim and his opponent as the aggressor. Such disruptive, hostile, intemperate, threatening, and turbulent conduct certainly reflects negatively upon those character traits the applicant must prove prior to being admitted to the Nebraska bar, such as honesty, integrity, reliability, and trustworthiness.

The result might have been different if Converse had exhibited only a "single incident of rudeness or lack of professional courtesy," *see* *In re Snyder*, 472 U.S. 634, 647 (1985), but such is simply not the case. The record clearly establishes that he seeks to resolve disputes not in a peaceful manner, but by personally attacking those who oppose him in any way and then resorting to arenas outside the field of law to publicly humiliate and intimidate those opponents. Such a pattern of behavior is incompatible with what we have required to be obligatory conduct for attorneys, as well as for applicants to the bar. . . .

We conclude that the Commission's determination to deny Converse's application was correct. . . .

## B. Professional Discipline

### Problems

- 2-2. Martyn discovers that a valuable and brilliant associate has been charging a client for phantom travel expenses, thereby generating money that he has used to fund a gambling addiction. To make matters worse, the client has filed a bar complaint against Associate. Martyn tells Fox not to worry because Associate has repaid the money and joined Gambler's Anonymous. May Fox accept Martyn's advice?
- 2-3. Fox told Associate, who was counsel of record in a matter, not to appear in court because he wanted to "take care of the matter," even though Fox was not admitted to practice in the state in question. When the judge questioned Associate's absence, Fox replied that Associate had a medical emergency that prevented her appearance. The next day, Fox told Associate: "The judge wants to verify your absence. Just send a letter to the court backing me up—nobody has to know."
- 2-4. Client hires Martyn & Fox to get back her \$25,000 retainer from her former lawyer. Client explains: "That bum charged me \$10,000 for incompetent work and won't refund the rest of my \$15,000." Martyn writes a demand letter to client's former lawyer that includes the following:

"My hope is to avoid an ethics investigation for you. If you do not return my client's \$25,000 within 14 days, it is likely my client will file a disciplinary complaint."

Consider: Model Rules 5.1, 5.2, 8.3, 8.4  
RLGL § 5