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Admissions

Many States Embrace Conditional Admission But Panelists Point Out Difficulties in Process

By Elizabeth J. Cohen

June 2 — Close to half the states (23) have adopted a rule allowing conditional admission to the bar, which permits applicants who would have been denied admission due to past mental, emotional or substance abuse problems to be licensed to practice law on a temporarily conditional basis, with the promise of full admission if the lawyer passes through the trial period without recurrence.

Speakers who addressed this topic May 29 at the 40th ABA National Conference on Professional Responsibility described the conditional admission process as rigorous, daunting and—according to the federal government—crusted with some requirements that are illegal.

The conference, held May 29-30 in Long Beach, Cal., was presented by the ABA Center for Professional Responsibility.

Intersecting Interests

Moderator Tracy L. Kepler explained that conditional admission tries to balance three sets of interests:

- bar examiners' interest in the applicant's complete candor;
- potential applicants' interest in getting treatment without fear of jeopardizing eventual bar admission; and
- the interest of the bar and the public at large in ensuring competent practice.

The ABA adopted a Model Rule on Conditional Admission to Practice Law in 2009, though many jurisdictions were already offering it in some format and sometimes extending it to applicants with other kinds of problems, usually those said to raise questions about "financial responsibility."

Kepler, now with the Office of General Counsel for the U.S. Patent and Trademark Office, formerly served as senior counsel for the Illinois Attorney Registration and Disciplinary Commission, and is president-elect of the National Organization of Bar Counsel.

In the System

Panelist Mistie M. Bauscher, a criminal defense lawyer in Idaho, described for the audience what she has experienced now that she is in the third year of her four-year conditional admission period in that state.

Bauscher said she felt compelled to mention her academic record, "to counter the misconception that conditional admittees are the ones who struggled to get through law school."

She said she got all As during her first year and a half in law school even though she "never drew a sober breath."

It wasn't until she was cited for driving under the influence, she said, and was concerned for her bar admission prospects, that she consulted the dean about her alcohol problem. Eventually, with "kind and loving" support and encouragement, she sought treatment. She even signed a contract with the dean and several of her professors in which she promised to comply with a series of conditions she had negotiated with them. Some were pretty specific, she said. For example, she could not be late for class, and she could only wear sweats one day a week.

But when it came to bar admission, Bauscher said "the only thing anyone ever said to me was 'be completely honest.'" She remembers someone telling her that as long as she was completely honest she'd be fine. "No one said I should try getting drug tests," she remarked.

So after candidly setting forth her history in a rather lengthy application, Bauscher said all she could offer the bar examiners was two years of undocumented sobriety. She had never taken a urinalysis until the bar examiners required her to undergo a substance abuse evaluation the week before the bar exam. Only after she passed the

drug test was she notified she could sit for the exam, which was scheduled the following day. "Why didn't anyone warn me about this?" she asked.

She passed, and was offered conditional admission for four years. (Idaho, joining what appears to be a nationwide trend, had just raised the maximum period to five years from two.)

Rigorous

The conditions were rigorous and expensive. For example, Bauscher recounted, she had to call in every day to see whether she had to report for a drug and alcohol test that day; she had to submit a card with a signature attesting to her attendance at each required meeting of her 12-step program; she was required to see a psychiatrist; and she had to be monitored by a supervising attorney who would file a quarterly report on her compliance.

And she had pay for all this: The testing program alone charged $2,500, up front, for the first year, she said.

Bauscher said she could have contested some of the conditions, but that would have taken two or three months and she would not have been allowed to work while contesting them. So she accepted the conditions.

After two years Bauscher petitioned to discontinue the lab tests, and her petition was granted just last month.

Bauscher told the audience she is "so grateful" that the process was confidential and that she was not set apart from other applicants while she was looking for a job.

Passing the Test

How has Idaho's conditional admission rule addressed the three areas Kepler identified? Bauscher's summation:

1. Was she more honest on her application? She said she would have been honest anyway. "Anyone working a 12-step program knows how important" it is to be completely honest. "My sponsor would have beaten me down," she said.

2. Was the public safer because of the conditional admission process? "Yes," she said. "I'd never want my grandmother going to an attorney who'd done what I'd done, without the conditional admission process."

3. Does conditional admission help people get the treatment they need? "I had to want to get sober,"she said. "I would never have had an incentive to get treatment just because I wanted to be a lawyer. I'd just say it wasn't worth it." But if she should ever need help in the future, she added, she would certainly feel comfortable in calling the Idaho State Bar.

'Supplicant.'

Another speaker emphasized the "huge imbalance of power" in the bar application process and suggested "supplicant"was more apt than "applicant."

"It's the rare supplicant who will push back, in part just because of how daunting it is, and in part because of fear it'll be misread" as disrespect or a lack of cooperation, said Donald R. Lundberg, of Barnes and Thornburg in Indianapolis, who for many years was executive secretary of the Indiana Supreme Court Disciplinary Commission.

"We respect the adversarial system in other areas of law practice," he noted, "but not in the admissions process." As a result, he said, "to bring real advocacy to the process it's almost essential the applicant have counsel, who can distance himself from the applicant." But this isn't "realistically an option" for bar applicants, who "typically can't afford to hire counsel," he stated.

Lundberg said he "passionately believes"the conditional admission process should be confidential. Indiana, he said, has required confidentiality since the late 1990s, and "it would be the death knell if the conditional admission process were not confidential."

But he added "there is a trade-off in the lack of transparency." The bar examiners are "under the same cloak of confidentiality" as the applicant, he explained, so "the decisions themselves aren't put out there so the decisionmakers can get any feedback."

Daunting

Lundberg pointed out that from a bar examiner's vantage point "it's a really daunting task, to look at someone and say 'are you a safe bet.'"

The notion that a panel of eight, 10 or 12 lawyers can gauge someone's moral character is, he said, "a very dicey proposition." There is therefore a temptation to resort to conditional admission too readily, to use it as an added safety measure even if the applicant has actually met the criteria for fitness, he stated.

Lundberg cautioned against using a "What the heck, how could it hurt, let's use it here" approach. Alluding to the expenses Bauscher had to bear and the impracticability of trying to challenge any of the terms of her admission, Lundberg pointed out that if the applicant has already shown fitness to practice, it "does cause harm" to impose conditions.

Uncle Sam Is Watching

Lundberg's comments brought up the issue at the heart of the debate over the conditional admission process: is it a way to let in people who would not otherwise be let in—sort of like making a reasonable accommodation? Or does it merely burden people who have already demonstrated their fitness—and thereby violate the Americans with Disabilities Act?

From the audience, law professor Thomas Morgan of George Washington University noted that the federal government has recently taken the latter position.

On Feb. 5 the Department of Justice notified the Louisiana Supreme Court that its conditional admission rule violates the ADA, notwithstanding changes the state has made since the DOJ began its investigation in 2011.

The Letter of Findings is available on the DOJ Civil Rights Division's website at http://www.ada.gov/enforce_activities.htm.

Morgan noted that the Justice Department took a similar position in a Jan. 21 letter to the Vermont Human Rights Commission, declaring that three mental-health inquiries on the National Conference of Bar Examiners' Request for Preparation of a Character Report violate the Act. (The Vermont letter is available at the same URL, as an attachment to the Louisiana Letter of Findings.)

Lundberg said he doesn't believe that the federal government's position is fatal to the conditional admission process, but he said "it will require some major rethinking."

Lundberg emphasized that it is important not to impose conditions unnecessarily, and that states should tailor any necessary conditions very carefully to the particular applicant's situation. "It's not a one size fits all," he said.

Fellow panelist Edward F. Novak agreed. He said it is particularly difficult to craft conditions when the problems are financial. "We can struggle with the addiction issue,"he said; "we usually have professionals with expertise to help us." But on the financial side, "we don't have expert guidance to help us."

Novak, of Polsinelli P.C. in Phoenix, is a member of the Arizona Supreme Court Committee on Character and Fitness, and a past president of the Arizona bar.

Early Warning

From the audience Ronald Minkoff, who chairs the New York State Bar Association's professionalism task force, thanked Bauscher for her courage in addressing the group. Noting that Bauscher wondered why no one had warned her what she would face, Minkoff emphasized that "the approach must begin while the candidate is still a student." That's why "we try to get the admissions people to go to law schools," said Minkoff, who practices with Frankfurt Kurnit Klein & Selz in New York.

He noted that one of the few correlations Leslie Levin found, in the ground-breaking *Study of the Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline* she co-authored with Christine Zozula and Peter Siegelman (see 28 Law. Man. Prof. Conduct 357), was between problems in law school and problems in practice. "Law school is a gateway," Minkoff, said, but "lots of academics don't feel particularly qualified to make these judgments."

Lundberg pointed out that in Indiana a law student can get an early character and fitness evaluation and, if necessary, referral to a program that will help the student begin making the record Bauscher didn't realize she'd need. "A day of documented sobriety is way better than a day of 'trust me I was sober,'"he said.

Who Does the Talking

While Lundberg emphasized the powerlessness of the unrepresented applicant, Novak said he has seen a lot of applicants who are "very assertive and aggressive, and think they're better than any counsel they could hire."

Novak talked about the "intersection of remorse and candor," raising a number of questions: Is remorse valid absent candor? How does having counsel help or hinder the applicant when it comes to showing remorse? Did counsel encourage the applicant to be remorseful? Did counsel speak more than the applicant spoke? (When this happens, Novak said he feels he is in a better position to consider counsel's fitness than to consider the applicant's fitness.) It's difficult to represent an applicant, he said. "You want your client to become known to the committee, but you want to save your client from embarrassment."

Lundberg agreed that counsel for a bar applicant is in a "very very delicate place." His advice is that the board wants to hear from the client, not from the lawyer. The lawyer helps by getting the client in a position to make available to the board the circumstances that would be probative of remorse, he said.

(Lundberg spoke more about this at last year's conference, on a panel called "Proving Remorse in Bar Application, Lawyer Discipline and Lawyer Reinstatement Settings." See 29 Law. Man. Prof. Conduct 346.)

We Can't Say

Novak described another big problem character and fitness committees face: "law firms who fail to respond to reference checks."

"These are not small firms; these are big Wall Street firms. What you get back is 'We don't answer these questions,'" he said.

Novak said when he gets one of these letters he writes to the firm's managing partner. Sometimes he gets a response, he reported, usually with the completed questionnaire, but sometimes he gets no response. He said he finds this "irresponsible."

He tells law students not to put down the name of a law firm's human resources director as the contact person for a reference. "You'll get dates and nothing else," he said. He advises the student to put down the name of the individual lawyer the student worked with at the firm.

Kepler briefed the audience on *Bd. of Bar Exam'rs v. B.R.C.*, No. 2012XX605-BA, 30 Law. Man. Prof. Conduct 321 (Wis. May 9, 2014), which Lundberg described as "The Unusual Case of the Applicant Who Pushed Back."

B.R.C. was conditionally admitted to the Wisconsin bar in 2012, but he disputed the terms and duration of his monitoring contract and was soon suspended for noncompliance. He was reinstated to his conditional admission status last month. (Recently the Louisiana Supreme Court also reinstated a lawyer whose conditional admission had been revoked. See *In re Easley*, 133 So. 3d 661 (La. 2014).)

Monitors

B.R.C. led neatly into a presentation by Terry Harrell, executive director of the Indiana Judges and Lawyers Assistance Program, about the role of a lawyers' assistance program (LAP) in the conditional admission process.

The problem in that case, she said, was that it was never clear just what conditions B.R.C. was agreeing to. "There must be good communications between the admissions authority and the LAP," said Harrell, who is also a licensed clinical social worker and a clinical addiction counselor.

Harrell described the monitor in a conditional admission as a "friendly probation officer" who very much wants the person to succeed, but has an "absolute responsibility to the court."

The monitor will be a volunteer lawyer trained by her program—ideally a lawyer who has recovered from the same problems the applicant faces, she said, and will stay in at least weekly contact with the applicant.

When it comes to the applicant's demeanor, Harrell offered a variation on Lundberg's supplicant and Novak's swaggerer. "We've observed a certain percentage of applicants who will say to the LAP people 'Yes, I have to accept responsibility' for my conduct,"but who then become defensive and have a "meltdown" when going before the bar examiners. This is another area where counsel can help, she said.

What if an applicant says "I want a monitor in my age group, of my gender, with similar educational credentials, etc."? Novak asked her.

"We do the best we can," Harrell said; "we'll meet as many of the criteria as we can" given the limitations of geography.

If the problem is not substance abuse but, say, debt, or an addiction to pornography or gambling, how do you craft the appropriate conditions, Kepler asked. "The LAP will have ideas," Harrell said; there will be treatment providers who are familiar with the problem and know the warning signs.

She mentioned a recent case involving a lawyer who was viewing Internet pornography while at work. His law partner and his wife knew about it, she added, so the program didn't have a confidentiality problem enlisting their help in monitoring him.

Right to Know?

"Confidentiality is very controversial in New York," according to Minkoff. "If you're a conditional admittee, people feel you have some obligation to notify your clients." The thinking is that "the public—including employers—has a right to know," he said.

The ABA model rule provides that conditional admission "shall be confidential" unless a court orders otherwise "or except as otherwise provided herein."

The comment as originally proposed declared that confidentiality was "key to accomplishing the purposes of conditional admission," but this language was replaced by a statement that the ABA's Commission on Lawyer Assistance Programs "recognizes that there are differences in approaches to confidentiality and defers to state courts of highest appellate jurisdiction to make this ultimate decision." See 24 Law. Man. Prof. Conduct 92; 24 Law. Man. Prof. Conduct 297.

"Admission is admission," Novak said. Like Indiana, he said, Arizona keeps the process confidential.

Novak pointed out that there are a few unique circumstances that implicate confidentiality.

For example, he said, a candidate with a practice monitor would be required—not by the conditional admission process but by the confidentiality obligation of Rule 1.6 itself—to so advise clients.

Novak noted that many people seek accommodations when they take the bar exam, for example extra time or a separate, quiet room. Should they also be admitted on condition? he wondered aloud. "They've already proclaimed they don't do well under stress; should they then have to tell their clients?"

Lundberg said that the board of examiners' view is that "they've made the screening decision that the person is fit." They've said "this is the height of the bar you must cross, and you've crossed it. And there's a safety net underneath."Lundberg said for him this negates any obligation to notify clients.

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For More Information

The *LSAC Research Report: A Study of the Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline*, is available on the website of the Law School Admissions Council at http://www.lsac.org/docs/default-source/research-(lsac-resources)/gr-13-01.pdf.

By the Numbers

Panelist Mistie Bauscher reported that since July 1, 1998, Idaho has had 54 conditional admittees out of an overall total of 3,162 admissions, or 1.7 percent.

Of those 54, she said, 14 had financial issues, and the remaining 40 had substance abuse and/or mental health issues.

Of those 40, six had issues while on conditional admission, and of those 6, two lost their licenses.

Panelist Edward Novak reported that Arizona has had 214 conditional admissions since 1999, out of some 7,000–10,000 lawyers admitted overall. He said 32 percent of these were for financial problems rather than emotional problems or substance abuse.

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