# 2018 NCSBN Discipline Case Management Conference - Can I Put My Hat On? I'm a Good Moral Character…Now Video Transcript

**©2018 National Council of State Boards of Nursing, Inc.**

**Event**
2018 NCSBN Discipline Case Management Conference
More info: https://www.ncsbn.org/11053.htm

**Presenter**
Robin K. McKechney, LLB, Partner, Steinecke, Maciura LeBlanc, Barristers & Solicitors

- [Robin] So as Kathleen said, last year, I came into the presentation called Can I Take My Hat Off the Parameters of Off-duty Conduct? And this is the sequel to that presentation, Can I Put My Hat On? And we're going to look at who should be able to have the privilege of putting their hat on.

Who should have the privilege of being able to assume office? What qualifications should they have? What type of person should they be before we can trust them to look out for the public interest above their interest and above all other interests? Because I would venture to say that nobody but nobody since the dawn of time, since the Greeks said you have to take the Hippocratic oath before you can assume the office of doctor, since Emperor Claudius allowed Roman orators to qualify as lawyers, nobody has drawn more attention to the need for entry to practice requirements than this guy.

Now I know what you're thinking. You're thinking, "Who is this Canadian to come in here and criticize our president and tell us that our president's not qualified for the job?" Well, I'm here to tell you the exact opposite. Because the Constitution, the U.S.

Constitution actually has three requirements for entry to the President of the United States. Number one, you have to be at least 35 years of age. Well, this guy has got that times two so he's doing well. You have to be a resident of the United States. He's got that and you have to be a natural born citizen. He's got that. Now some, not me, because I'm here to be neutral but some people might look at the last year and a half and ask whether perhaps more thought needs to go into the entry to practice requirements for the office of the president but I'll leave that to you.

So what are we going to talk about today? We're going to look at the definition of good moral character, the purpose behind why and whether regulators should assess good moral character and the general principles and common risk factors that inform regulator's decisions in this area. Once we've done that, I'm going to make you all part of a registration committee and we're going to see who you would let in and who you would keep out and then we'll take a look at what happened in the actual cases.

After that, I'll finish up with some practical tips of dealing with the common problems in this area. Now you may ask why are we looking at entry to practice at a discipline conference? And I'll tell you why. Because you can draw a direct line from the barriers to entry to a profession to the back-end disciplinary problems in the profession.

And so if careful thought is given at the front-end, significant problems can be avoided at the back-end. So we'll start with trying to figure out what it is that we call good moral character because the requirements are somewhat varied and different terminology is used.

There's good moral character, there's good character, there's good character and reputation. Now a query, are these variations of the same thing or do they mean something different? Is there more than one standard? Is there a difference between good character, for example, and good reputation? Some academics say that those are two different things.

Now, I will return to that later about whether that academic debate is meaningful to us. I'm going to tell you it's not. Because the question we need to ask is what qualities are we looking for in a person who is going to be an effective professional and a person who will maintain the public trust that we have as a self-regulated profession? And that's why I want to explore today what are we actually trying to determine when we ask, what is a good moral character and can it be determined?

And does it matter? Good moral character is an amorphous phrase, and it's one that's not objectively definable. And importantly, it may not capture what's relevant to people who are entering the profession. That should cause us pause because if we cannot actually define what it takes and what qualities we're looking for in an applicant, and what will make them an effective professional, then why are we asking the question at all?

So as we examine this topic today, I would urge you to think about why we as regulators ask about good moral character because every single regulator asks to some degree and in some variation of applicants whether they are good moral characters. It's an amorphous question and when you ask an amorphous question, you will often get an amorphous answer.

As Yogi Berra said, "If you don't know where you're going, you'll be lost when you get there." So what I'm asking you to do is to think carefully about what specific qualities you're looking for and what specific questions will get you to the point where you have the people in your profession that will be effective practitioners and that will protect the public and that will limit your disciplinary costs down the road.

So I'm just going to take a look at a couple different ways that other regulators have gone at this because some people are looking at this in a way to allow a more direct correlation between what they're looking for in terms of character and an effective practitioner.

So other regulators have used the words fitness to practice, suitability, and fit and proper to be admitted. Now, these are variations and standards and the tests are different depending on the terminology but the fitness requirements vary between statutes but there's always this character element to it and there's always a capacity element to it.

Now an applicant's fitness may also be affected by things out of their control like mental health, for example, or various physical conditions. Despite the fact that those are out of their control, it doesn't mean they're irrelevant to your decisions and that is likely a whole other presentation although I will touch on it briefly near the end of the presentation. So let's take a look at how different regulators have tried to define this.

So the engineers in British Columbia ask whether their applicants are of good standing and good repute. I compare that to the pharmacists in Ontario where they ask whether…where they ask a prospective question. The College of Pharmacy in British Columbia must be convinced that he or she will practice pharmacy with decency, honesty, and integrity and there's that prospective question that's a very difficult one to ask.

The Board of Registration in Nursing in Massachusetts has done some hard work on this question and they have tried to define what a good moral character is and they've included things like honesty, trustworthiness, integrity, accountability, reliability, distinguishing between right and wrong, avoidance of aggression to self and others, and taking responsibility for one's own actions and similar attributes found relevant by the Board.

Of course, there must be something more to it than just defining it for the sake of defining it because I'm going to suggest that the question we're actually asking when we're looking at this idea of who is a good moral character is what qualities must a person possess to best ensure the regulator can fulfill its responsibility to protect the public? And I think we're seeing steps towards regulators doing some of that hard work.

Again in Massachusetts, they've defined good moral character as those aspects of morality, attention to duty, forthrightness, and self-restraint that are usually associated with the accepted definition of good moral character. Any conduct which calls in to questions one's fitness or ability to practice medicine or which is antithetical to the promotion of public health, safety, and welfare constitutes a lack of good moral character.

The inclusion of attention to duty, forthrightness, and self-restraint parallels the ability to prioritize, in my view, the duty to patients or clients over the applicant's self-interest. And although it's still somewhat difficult to evaluate, we see here an effort to relate the character requirement directly to the character requirements of that particular profession.

The case in Canada Lum versus Alberta Dental Association said that "Good character connotes moral strength and includes integrity, candor, empathy, and honesty. Good character embodies qualities that are relevant to the particular practice." So the case tries to relate it again, character qualities that are relevant to the particular practice.

Although it doesn't help us out on what those qualities might be, and it didn't do the heavy-lifting of attempting to define those character attributes that are specifically necessary for the practice of the profession, in this case, dentistry. So I'll return to that idea of whether a good reputation is different than being a good moral character. Perhaps sadly, this has actually been the subject of academic debate, trying to pin this down.

And one of the academics is Mary Southin, who's now a judge, and she described character as qualities that entail an appreciation of the difference between right and wrong, the moral fiber to do what is right no matter how uncomfortable and a belief that the law, at least so far as it forbids things which are for the greater public good, must be upheld and the courage to see that it is upheld should distinguish good repute as essentially what other right-thinking members of the community would think of you.

And she said, "If somebody says, 'I don't think much of a fellow like that. I wouldn't want him for my lawyer,'" if that's what the community thinks, that person shouldn't be a lawyer. In my view however, these distinctions between good repute and good moral character are meaningless to the ultimate goal of determining who should have the privilege of practicing a profession. I would leave that debate for Academia.

Don't get me wrong, character is absolutely relevant. However, to be useful, the hard work has to be done of determining specifically what it is you're looking for in a prospective applicant. Because the difficulty of defining what character attributes make you suitable to practice, because of that difficulty, we often default to saying, "Well, we can't tell you…we can't tell if you're a good character but we might be able to tell if you're bad."

Right? So it raises the question of are you good unless proven to be bad? Is that what we're doing here when we're trying to evaluate good moral character? And is that the best we can do? Are we only looking for the absence of any reason to believe that you're a questionable character?

Now, of course, the courts have struggled with this idea and in a case out of, I believe it's California, they define it as "the term good moral character has traditionally been defined as absence of proven conduct or acts which have been historically considered as manifestations of moral turpitude."

I'm going to get to the definition of moral turpitude later. I'm not sure if this is a helpful definition but at least it's an honest definition that we're actually just looking for the absence of proven conduct. This is really saying that when we're trying to determine who's a good character to be admitted to a profession, it's not so much you're good but more we don't know that you're bad.

Of course we're often reluctant to admit that this is what we're doing. Sometimes we don't admit it. A court in Arizona said, "The good moral character required for admission to the bar is something more than an absence of bad character. It requires that the applicant has acted as a person of upright character, ordinarily would, should, or does."

So it's interesting that the court in Arizona said, "We are looking for more than just the absence of bad conduct, we're looking for somebody who has demonstrated that they can act as a person of upright character." Now of course, this case came up in the context of somebody with a checkered past. So the only reason this got to court was because they had identified somebody with a checkered past and so it was nice for the court to say, "Well, we need to do more," but that's not really what was happening here.

The reality is that this elevated onus on an applicant to show good character only applies in cases where the applicant has a concerning history. So this quote, just to give you some background on the case, the applicant sought admission to the bar and, of course, it's funny, you know, I couldn't come up with many nursing cases where there is some sort of disaster in admission.

So perhaps you guys can tell the rest of us how it should be done. You can come up with a plethora of lawyer cases. We're nowhere near as good at it. And there's another reason for that that I'll get to. But in this case, the person had been charged with burglary and sexual assault in 2002. He pled guilty to attempted sexual assault and had essentially a suspended sentence.

So the deal was you go on probation for 10 years and at the end of 10 years, if you've done fine during that 10 years, you will no longer have this conviction on your record and he applies to be a lawyer during that time. And the court noted that the applicants must demonstrate that they are currently of good moral character.

And in evaluating this, the courts consider past misconduct to see what it reveals about the present character of the individual. They also consider the lapse of time since the conduct of issue and evidence of rehabilitation. The court noted that individuals convicted of crimes are usually required to complete their court order supervision before applying to whatever it is they're applying for.

This is necessary because probationers often behave well while they're on probation. Of course, they're being watched. Their behavior is much more likely to stay on the up and up. The court stated it is not enough that the petitioner kept out of trouble while being watched on probation. He must affirmatively demonstrate over a prolonged period his sincere regret and rehabilitation.

Now certainly, this accords with my experience as a criminal defense attorney for 14 years. I got to the point where I could actually say to my assistant, I'd get back from court, I'd say, "Yeah, Peter Copeland just got 12 months probation. Can you book about 12 months and two weeks from now his bail hearing for me if you don't mind.We'll set aside that time now."

I say two weeks because it usually takes two weeks to get caught. And sadly, I was right more often than I was wrong. Having said that, in my view, character can be dynamic, not static. I'm not of the view that character cannot change even into adulthood. To me, that's a very pessimistic view and not one I choose to take of humankind.

People can change. The vexing question is how do we know that they have because change is very hard. And that's what the court was getting at in this case. Well, how do we know people have changed? One thing I can tell you is if you're looking at somebody with a checkered past, it has to be evidence-based in terms of whether they've changed.

There has to be some forthright evidence as opposed to just simply it's been a while. I believe character is dynamic but time without moral will not change character. But why do we or should we assess good moral character? The stated purpose generally, in the case law is that the good character requirement includes the protection of the public, the maintenance of high ethical standards, and the maintenance of the reputation of and confidence in the profession.

So the requirement that members be of good character is preventative in other words, not punitive. And this is certainly a laudable goal. As I said at the outset, there's a direct correlation between effective entry to practice requirements and later, discipline. However, as I will discuss shortly, I think all regulators have to do more heavy-lifting in terms of the specific objective standards that they're looking

at.

It's not enough to just make a guess at character, whatever that is. The overall goal of assessing character should be maintained but the tools used to do so need to be objectively set out for it to be effective. So what is the determination of good moral character intended to do?

As I said, it promotes ethical conduct, protects the public, maintains the profession's reputation by ensuring that applicants with bad character who are more likely to behave badly, are not admitted into the profession. And that reputation piece is important. You know, for example, how many lawyer jokes do you think are out there?

Right? Like hundreds? Thousands maybe? The answer is actually three. The rest are true. But why are lawyers such easy targets? Well, lawyers are easy targets because we haven't done a good enough job at the front-end.

And as a result, we're subject to ridicule. Now here's some good news. Nurses have done a terrific job. This is from an article from Gallup, December 26, 2017. "For the 16th consecutive year, Americans' ratings of the honesty and ethical standards of 22 occupations finds nurses at the top of the list. More than 8 in 10, 82% Americans describe nurses' ethics as very high or high. In contrast, about 6 in 10 Americans rate members of Congress and lobbyists as very low or low when it comes to honesty and ethical standards."

Nobody is going, "Wow, I'm shocked." Now I don't know where lawyers fit in. Thankfully, we had the ballast at the bottom of the curve of the lobbyists and the politicians. So as you heard, I teach Evidence at a law school in Canada and we have to…it's a big class so we have to grade on the curve and I think lawyers benefited from the curve in this case.

And I tell the students that, you know, "The curve is like running from a bear. You don't have to worry about the bear.You just have to be ahead of your friends." And so lawyers, at least, stayed ahead of somebody. But you should be congratulated for that kind of reputation and quite frankly, that's why I think that this organization is and should be one of the leaders in terms of self-regulation.

So I just want to go through some principles that we look at and, in particular, when you have somebody with a checkered past. So past conduct is not generally speaking, an automatic bar to admission. As I said, in my view, a person's character is dynamic and not static.

It's a question of who they are now. The applicant must establish that as of today, he or she is of good moral character. The difficulty is, however, that those who are in charge of making those admission decisions are not given a crystal ball, and they can't look into the deep dark recesses of the applicant's mind. Further, we may think we know what past behavior will predict future conduct but that actually doesn't bear itself out in reality.

And in preparing for this presentation, I found some really interesting social science research. It turns out that humans are much better liars than they are at detecting lying. On the flipside of that, we all vastly overestimate our ability to detect liars. So if that's the case, how good are we at trying to predict behavior based on this idea of character?

6

The social science evidence also shows that…and specifically casts doubt on the existence of character as something that reliably delineates people or that can be used to predict future behavior. A lot of the social science research shows that how an individual react is circumstantially dependent on what is happening in the moment.

So this idea of character may not be as useful as we think it is which is why I urge everybody to drill down on what we're actually looking for. Now ideally, we would have certified fortune tellers and palm readers to take over this job, but short of that, we need that objective criteria. A drug possession conviction is undeniably relevant to somebody who wants to be a nurse.

It may not be relevant to somebody who wants to be a tattoo artist which, by the way, is regulated in some states. What certain commentators are calling for is that regulators should be able to show how a criminal record correlates with a particular and identified risk to the public for a particular profession.

Now this is another interesting thing I learned recently. In Ontario, the province where I'm from, we regulate swine herders. I kid you not. We regulate swine herders. We regulate people who corral pigs. Now, for the life of me, I don't know what kind of criminal record, even significant criminal record, would matter to a swine herder.

Well, I can think of one. Those people who laughed, I know what you're thinking. I mean I suppose if they had a history of being a pig rustler, that would be a problem. And for me, anything that is going to jeopardize my bacon is a problem. But I use that as an example that we need to correlate our entry to practice criteria with our profession and what we require in that profession.

So for applicants with a history of poor conduct, the case laws identified the following factors that are relevant in considering the good character assessment. So the timing of the conduct, the nature and duration of the conduct. Whether the applicant is remorseful, did they disclose it for example?

The evidence of rehabilitation. The applicant's conduct since the proven misconduct and the relevance of the conduct to the profession. Now the case law says, "However that the mere passage of time is insufficient to show that your character has changed. Taking rehabilitative steps at the last minute is insufficient and simply saying sorry for your actions is insufficient."

Now, after reading this case law, I realized that I finally understood Justin Bieber. I mean it became clear to me. He has been writing about professional regulation and, specifically, entry to practice. Now many of you didn't know that but I'm about to show you that it's true. So listen to these lyrics. "You know I try but I don't do too well with apologies. I hope I don't run out of time, could someone call a referee."

Now this is an obvious reference to procedural fairness in registration hearings. But it goes on, "Because I just need one more shot at forgiveness. I know you know that I made those mistakes maybe once or twice." So that's classic minimization. "By once or twice, I mean maybe a couple of hundred times."

Well, that's a late-breaking admission if there ever was one. Right? We're not going to give that any credit. "So let me oh, let me redeem, oh redeem oh myself tonight because I just need one more chance

at second chances. Yeah, is it too late now to say sorry?" It is too late, Justin. Sorry. See, I can make fun of Canadians as well.

We also apologize for Celine Dion and burning down the White House that time. So how can an applicant demonstrate meaningful rehabilitation? Evidence of a long course of good conduct even if it occurs in a different context in the practice, the profession, constructive contributions to society, obtaining counseling or psychological or psychiatric treatment, those types of things.

Again, I keep coming back to Massachusetts because I found as I did my research that they have probably done what I call the most heavy lifting in terms of this idea of trying to relate the character attributes that we're looking for that will specifically apply to our profession. And I don't know if anybody is here from Massachusetts but great job. So one of the things I learned is that in Massachusetts, there's a permanent bar for certain criminal offenses.

So, "Where there's violent crime against any person that involves extreme disregard for human life, trafficking in or legally manufacturing any controlled substance and exploitation or criminal mistreatment of a vulnerable individual including a minor, elder, and/or disabled person." So as you can see, there is a direct correlation between what they have identified as certain criminal convictions that will result in a permanent bar and you can see the direct correlation between that and the practice of nursing.

As you can also see, the absence of attributes of good moral character is most often demonstrated by the presence of certain conduct. So we're relying on this past misconduct to show that you are not a good moral character. So when we look at the type of conduct here, you've got "hostile or destructive conduct that demonstrates a disregard for human life."

You have the idea of trafficking or manufacturing drugs, obviously a huge risk in the nursing profession. And the exploitation of vulnerable individuals, also one of the prime roles as a nurse. Now Massachusetts has a temporary timeout. They don't call it that but I do. If you're convicted of an offense that does not result in a permanent bar as well if you provide false information on your application for licensure, temporary timeout, I got to say, once you're lying on the application, should we be letting you in?

But anyways, at least it's a temporary timeout. And then if you cheat on the National Council licensure examination or any other licensure or certification examination, boy, that should be a tough hurdle to overcome once you've done that. But the temporary bar happens where an applicant has been convicted of an offense that does not result in a permanent bar and it's a temporary sit in the corner and perhaps apply later.

"Where an applicant is not subject to a temporary bar or a permanent bar, the board will still evaluate any conduct demonstrating an absence of the attributes of good moral character. And this includes any conduct that poses a risk or a threat to the public health, public health safety or welfare is of significance to the provision of safe and competent nursing care and is characteristic of conduct that would be inconsistent with an effective nurse."

The question is how does conduct that does not meet the criteria, how do you find out about this conduct

if it's not based on a criminal conviction? And that's a difficult question. I can tell you that the typical ways that regulators get at finding that conduct because the criminal convictions are the easy stuff, finding that conduct that may be red flags is to ask about disciplinary action from another regulator or in another jurisdiction.

Ask about any pending disciplinary action. Ask if an application has ever been denied. Ask if they've ever surrendered a license or a certificate of registration. And ask if they are subject to any open criminal cases or investigations.

It's not enough to just look at the convictions. In the UK, they did some work as well at determining what are the specific attributes we're trying to look at. And this was drafted by the precursor to the Professional Standards Authority, the PSA, which was the council for health and regulatory excellence.

And they said that "for health professionals in UK, there are four key elements to assess good character. First of all, whether there is reason to believe that the applicant's libel in future," so again, this prospective idea, "to act in such a way that puts at risk the health, safety or well-being of a patient or other members of the public in such a way that his or her registration will undermine public confidence in the profession, in such a way that indicates an unwillingness to act in accordance with the standards of the profession and in a dishonest manner."

The approach here emphasizes public protection, public confidence, acting in accordance with professional standards and honesty and trustworthiness. And these were identified as the specific characteristics that they viewed as relevant to the protection of the public for prospective applicants. It's interesting again, because they are taking this prospective idea.

Again, the crystal ball would be helpful, but short of that, the setting down of objective criteria takes you a long ways. So what are the risk factors you should look for? Well, you're probably not surprised. Things like "criminal history, bankruptcy, or insolvency, a litigious history, disregard or disdain for regulations or repeated regulatory disciplinary or problems or violation of municipal bylaws or traffic regulations, mental health issues, turbulent employment history, and academic misconduct."

These have been identified in the literature as common risk factors on the entry to practice stage. I found a study that was done in 2012 in Connecticut. And the study looked at law school applicants…or sorry, people who were admitted to the bar between 1989 and 1992 to see if there's a correlation between the characters that they had at that time, the characteristics they had at that time and future discipline.

So the report looked at various types of prior bad behavior such as criminal convictions, academic misconduct, substance abuse. The study even looked at where people went to law school to see if there's a correlation between that and future disciplinary problems. So a very comprehensive study looked at a lot of factors.

Perhaps not surprisingly, once all these factors were analyzed, the single best predictor of future disciplinary problems is being a man. Being a man. So it turns out that if you just eliminate us, me, your disciplinary problems will almost go away.

Which perhaps, well, I'm not suggesting that's the right solution, but it is a solution. Mental health

issues, pre-application criminal convictions, suspension of a driver's license, and delinquent credit accounts also had a correlation but not as strong as being a man.

Having attended the law school ranked in the bottom quartile, Also had a correlation. That could explain Michael Cohen. I'm not sure. Conversely, bankruptcy, academic misconduct, and substance abuse were not correlated with future discipline. And I'm not saying that those are irrelevant, but they were unable to find a correlation in this study.

And it perhaps, is deserving of further study. The difficulty is that no particular factor was particularly strong. Even the strongest indicator being a male was meant that there was a five percent future likelihood of discipline as opposed to the average of two and a half percent. All right.

So hopefully, I have now equipped you with the criteria that you need to have. We're going to get into the case studies now. I've got four of them to go over and see what you think. Thankfully, we don't have those clickers because every time I use them, they'll be 80 people in the room and I'll get one vote up there and we'll vote three times.

So we're going to do it the old-fashioned way and just raise hands. So, case study number one. "The applicant seeks license as a real estate agent. He was convicted of a sexual offense for having relations with a Grade 12 student when he was a high school teacher. The relationship was consensual and he provided at the admission hearing expert evidence that he was of good character."

So as a regulator, now you're all real estate regulators now which, you know, a little outside your typical bailiwick but nonetheless. So A, grant the license, B, deny the application. Who is granting this guy a license as a real estate agent? Okay.

I'm going to make everybody get their hands up at some point. Who's denying it? We actually have a…I mean more people are denying than granting but a relatively even split. The outcome…the license was granted with restrictions, supervision, limited clients, no further criminal charges.

It was denied initially but on appeal, the Financial Services Tribunal, which is the appeal body for real estate agents, granted it. And I'm going to…if you have a question, I'll be to you right away. The interesting thing is the Financial Services Tribunal criticized the Admissions Committee and said, "You related this criminal offense to the reputation of the profession and you shouldn't have done that.You should have just simply asked whether that offense is relevant to his ability to practice as a real estate agent."

I disagree. I do because reputation is all we have. And the last speaker talked about that. I mean there is…I feel like self-regulating professions are continually defending themselves and to my mind, why would you make your job of defending your profession that much harder when you have a serious red flag here?

This person is out there dealing with the public in private homes. That would be enough for me. But anyways, I wasn't on that Financial Services Tribunal and I picked the case because it was somewhat controversial. Yeah. - [Female] So we have two questions.

- Sure.

- Number one, how old was the Grade 12 student? And number two, how long ago did this offense occur?

- Great questions. Great questions. So the Grade 12 student was 17 and he was 20, mid-to-late 20s. The reason it was a criminal offense was the age difference. It wasn't a predatory offense and it was…I think it was seven to eight years prior that it had taken place.

Does that change anybody's mind? - [Together] No. No? Okay. Actually, does anybody change their mind based on that?

Yeah. - [Female 2] Well, In my opinion, what the issue is, it depends on the age of the student. At the time, they could be in Grade 12 and they could be 20. It just depends. But it also depends on the laws at wherever you are.

- And that's exactly right. And so the law, this was a case out of British Columbia in Canada and the law there, well, across Canada because criminal court is a federal statute is that if you're 17, you can have a relationship with an 18 or 19-year-old but there's a…they've got a bar on the number of years older until you turn 18.

Yeah. - [Male] I think it's five.

- Is it five? Okay. Five years. Yeah. - [Female] But the other aspect of that is that if he was the teacher as well, and if the other person understood that the relationship is [inaudible].

- A hundred percent. You have the power and balance there that is definitely not an irrelevant consideration. In fact, I would say very, very relevant. And additionally, it also shows…I mean you clearly know my feelings on this case but it also shows just a significant lack of judgment that shouldn't go unnoticed by the regulator.

- Okay. I have another question.

- All right.

- Why isn't he still teaching? Why did he change his profession?

- I think he got booted from the teaching profession. Yeah. Right? Thankfully. I'll tell you. He may or may not be able to be a real estate agent, he can't be a teacher. All right.

So case study number two. As I said, there's lots of low-hanging fruit in law. So the applicant in this case was applying for enrollment in the Law Society and he was subject to a good character hearing because of three separate sets of criminal charges, none of which resulted in a criminal conviction.

So let's just go over the background facts. Approximately 10 years before his application to the Law Society, the applicant's on-again off-again girlfriend attended his home when he was not present and

believed she discovered that he was seeing someone else. As a side note by that earlier presentation, she found some text messages.

In a fit of jealousy, she threw his computer and his phone out a closed window. Now I know what you're thinking, "Who has not wanted to throw a computer out the window from time to time." It would be cathartic but, you know, it should be your own computer. But either way, the other thing you're probably wondering is how did he get charged if she threw the computer out the window.

Well, let's just say that his day was about to get a lot worse because there were some helpful neighbors and they understandably, when they saw his items going out the window thought there might be a break in and they called the police. And you would think that that would be the end of it except that he has a grow op in his basement.

And you think that would be enough. So the police find the grow op but for whatever reason, they choose not to charge him but in the meantime, his girlfriend who threw the computer out the window goes to the police and alleges that he had sexually assaulted her and forcibly confined her and he was charged with sexual assault, threatening, and forcible confinement.

At trial, she recanted and said that "I made that up.I was just angry at him because I found those text messages and so I lied." So he doesn't get convicted. Now I don't know about you but once I was got through that, I might get rid of the grow op in the basement but five years later, the police again respond to something at his house and they find another grow operation.

Again, the police didn't charge. So this is his history. No convictions but a lot of unfortunate luck I suppose. And so at the character hearing, he led evidence that he was given an award certificate for his volunteer work with the Salvation Army, as well as for his work with the law students' legal advice program.

He had several character witnesses although they were not fully informed about his past conduct. And that's always…so I do a lot of prosecutions for various regulators and when the member calls the character witnesses, it's like shooting fish in a barrel. I always start with, well, I don't know, did you hear about what this allegation was about? "Well, no, I didn't."

Okay, well, now we're going to talk about that for a little while. And then by the end of that, they're no longer a great character witness. So knowing all this background, you've got some good things about this individual. Do you admit the applicant or deny the application?

Who is admitting this guy I mean as a lawyer so you've got a low bar but…okay. Just to make sure that it's just not acquiescence, who is denying the application? I should see most hands. Almost everybody is going to deny him. So the application was denied. They said that "in order to make a decision on the application for

[inaudible] admission, the panel must resolve the question of whether or not the sexual assault took place." Or sorry, they asked the question whether they have to resolve it. "There is evidence going to both sides of this issue.What would be helpful to come to a conclusion, we find it unnecessary to answer that question. However, we are not prepared to decide that it did not occur. We do conclude that after

considering all of the evidence relating to the sexual assault charges and his overall relationship with Ms.M, the applicant's testimony regarding the 2000 charges is not credible."

The panel also determined based on the evidence they heard that the applicant purposely minimized the extent of his grow operation and his involvement in them. He actually said that it was another tenant that was doing the grow op. Who knows? He might have done better to just own it. And the panel goes on to say, "It's important not to confuse the good character requirement for admission with notions about forgiveness or about giving an applicant a second chance.The admission's panel is not in the forgiveness business.The test to be applied is clear and the admission's panel is to determine if the applicant is of good character today. The Law Society Act does not permit an admission's panel to apply any test other than that relating to the applicant's good character at the time of the hearing. It's good character today and sympathy and forgiveness doesn't enter into the equation."

Now this decision was criticized on procedural fairness grounds which I think is an important takeaway. The panel did seem to ignore the applicant's life including raising two children, going through law school and his achievements in law school. And there was also another procedural fairness issue. The Law Society got to put in all of its evidence through occurrence reports from the police.

Those went in without cross-examination. The applicant, on the other hand, had to testify. And his character witnesses had to testify, and they were subject to vigorous cross-examination by the Law Society Council. Then the panel based on uncontroverted documentary evidence from the Law Society and cross-examined viva voce or live evidence from the applicant, purported to make a credibility decision and found the applicant not to be credible.

And I think that's a consideration that needs to be had. There does have to be fairness as you move through this. All right. Case study number three. "The applicant applied to the Board of Cosmetology and Barber Examiners." I'm amazed sometimes what's regulated. "Six years before application, the applicant pleaded guilty to trafficking and was sentenced to a lengthy prison term. Two years prior to her application while on parole, the applicant pleaded guilty to forgery and stealing a motor vehicle.The applicant was paroled again one year prior to her application and remained on parole when she made her application to the Board of Cosmetology and Barber Examiners."

The regulator, as the regulator, do you admit the applicant or deny the application? So I think here, we have to take into account what she's applying for, and whether these convictions are relevant to that but also to the reputation of the profession.

So who is admitting this applicant the Board of Cosmetology and Barber Examiners? Anybody? One. You're in the forgiveness business. That's good. - [Male 2]

I'm following my state law.

- Pardon me?

- I'm following my state law. We have a criminal offender employment act that prohibits using a felony conviction if there's evidence of rehabilitation and there's a presumption of rehabilitation if they've completed their sentence.

- Isn't that interesting? What state is that?

- New Mexico.

- Well, I probably…it'll probably be unfair to ask you what you think of that.

- Your [inaudible] is okay.

- Okay. I mean completing the sentence is one thing. Whether that's rehabilitation, it's rehabilitation in day to day life. I can accept that. But we're doing something different here in terms of admitting people to a regulated profession.

So as a criminal defense lawyer, I fully believe that once you've done your sentence, you've paid your debt to society but that's not the bar that we're looking at. In this case, the board denied the application initially, and the applicant appealed to the Administrative Hearing Commission and there, it was still denied and they said, "The applicant pled guilty to several felonies including drug trafficking, stealing a motor vehicle and forgery."

The board may deny a license to an applicant who has committed crimes of moral turpitude. Moral turpitude is"…so here's what moral turpitude is. "An act of baseness, violence, or depravity in the private and social duties which a man owes to his fellow man. Now I guess we know from the previous study why they're only referring to men, or to society in general contrary to the accepted and customary rule of right and duty between man and man," and they're really getting to the point here, "done contrary to justice, honesty, modesty, and good morals."

Now the commission did say that a person with a criminal history can show rehabilitation by acknowledging guilt and embracing a new moral code and they did refer to cases that show that people with a criminal history can be admitted but they set out a list of factors that will demonstrate rehabilitation unless you're in New Mexico when you don't need to have these factors.

All you have to do is complete your sentence. The passage of time may be one factor, admissible evidence of progress at work or in school, successful completion of a rehabilitation program, positive references from supervisors, insight into one's prior conduct, truthful disclosure of the conduct, and the Administrative Hearings Commission noted at the end that "the applicant appears to have a sincere desire to rehabilitate herself and the denial today does not necessarily mean denial in the future."

But they did state "that the passage of time during the bad conduct and the license application is one but not the only factor to consider." And that's where I think that I find it interesting that that has been the policy in New Mexico.

And I can say that that likely came from what I'm about to talk about. So there is, has been, a long debate particularly here in the United States on whether ex-cons should be permanently prohibited from entering a regulated profession. Because studies have shown that the recidivism rates for people who have been convicted of criminal offenses are higher in states with higher entry to practice standards.

The reasoning being that they can't get a job, and as a result, they go back to a criminal lifestyle and go back to jail. And this has resulted in pretty specific study on it and it was referenced in the last presentation as well, and when the White House looked at it in 2015, they said that they "recommended adopting standards that require licensing boards to clarify how policies that bar ex-cons from getting a particular license are relevant to that profession."

And I think we see an effort like that in Massachusetts, where they have delineated certain offenses that are a permanent bar, certain offenses that are a temporary timeout, and other factors that may lead to not being admitted based on character. Okay. The last case study. The applicant applies for a license as a pharmacist in 2011 in Missouri.

His past is difficult, to say the least. He was "previously licensed as a pharmacist in three states but has been subject to discipline or denial in all three states.So in 1985 in California, he dispensed aspirin with codeine without a prescription. He also dispensed dangerous drugs 91 times without a prescription and billed insurance companies for them.His license was revoked in 1995. His license was revoked based on the California revocation."

The dangerous drugs by the way, never actually left the pharmacy. They were part of an insurance fraud as opposed to distributing dangerous drugs. To the extent that matters. More previous history. "In 2006 in Kansas, he applied for a license but was denied.He then worked as a pharmacist technician from 2004 to 2010. He reapplied for a license there and it was granted. 2011 in Missouri, he applies for a license and answered no to the question on previous discipline history."

Not good. Agreed. So do you grant the license? Who says, "Yes, this guy gets a license as a pharmacist?" Okay. We have one. Unless everybody is just too tired to raise their hand on Friday afternoon, everybody else says no.

So I'm guessing you give some credit to this idea that he worked for six years as a pharmacist technician without incident. - [Female 3] Well, I also give him time for the fact of the distance between the events that they occurred and as it's noted, I would give him probation because thus far, there haven't been any incidents.

He just didn't identify there and you can forget those things. I know we deal with that at times with people applying, they forget and we clarify. It's an issue of how serious was that that they forgot.

- Right. Well, and I think that is the exact reasoning that this…and there are two levels on this that got the initial level was appealed and I can tell you only one person in the room took the same answer as what ultimately happened. He was granted his license which I'll show you in a second. Yeah.

- [Female 4] I'm thinking this is a different process because we have an automatic if it's been this long or if it was just a misdemeanor, our administrative staff can grant the license. And people like this would have to come before the board and explain themselves before we grant the license. So it's not a yes or no. It's they may have to go through a longer process before they get it.

- Right. And for good reason and in many ways, that's what happened here. And I agree that it needs to be a nuanced approach than just yes or no especially when you're dealing with something like this where

you have had a certain passage of time. Having said that, there's still a lot to explain. So the initial board found that he lacked good moral character but nonetheless, granted and issued a license subject to a five-year probationary period.

The applicant appealed the denial of a non-restricted license and on appeal, the Administrative Hearing Commission also granted a probated license but on different grounds. And the interesting thing that the appeal board said was, "if you find that a person is not of good moral character, you can't make up for that with conditions."

That one is a yes or no. So you can look at his risk factors, you can say he is of good moral character now, and look at his risk factors, and place terms, conditions, or limitations on his license. But you can't…once you've decided he is not of good moral character, it's done and he can't get in.

The lack of good moral character in licensure, in this case, are mutually exclusive under that statutory regime. So the commission that actually granted the license looked at the lapse of time, to your point, 30 and 20 years, respectively between the previous misconduct. They looked at the fact that he'd never had a chemical dependency or alcohol impairment.

They looked at the fact that he had acknowledged the seriousness of his conduct, that he had worked as a pharmacist tech for seven years. He'd had prior successful employment as a pharmacist, he'd done continuing education. Then I think they, to my mind, skirted around the issue. They characterized his answering no as a misrepresentation as opposed to nondisclosure and that's a distinction without a difference in my view.

And I think if I was making the decision, that answering no might have been the straw that broke the camel's back for me. Because all of your evidence of rehabilitation to my mind goes out the window when you lie to me. And so how can I have any trust now that you're a different person?

So this is another case that I wanted to include because the ones where you disagree with the outcome often can create more discussion. Lastly, as I wind down here, I'm not going to talk a lot about the idea of mental health and entry to practice.

As I said, I think that that is deserving of a full presentation in and of itself and that would include things like addictions etc. and if I'm lucky enough to come back, I'd love to do it next year. But having said that, you have to walk a very delicate balance between ensuring protection of the public but also ensuring that you're not denying admission on a discriminatory ground and it is a very, very challenging thing for regulators to do.

So what are the tips I can leave you with? As you can tell, I think you need to define good character. It's not enough to just say, "We look at good moral characters." There needs to be a nexus between the definition and the profession.

Character is static, not fixed, so how will you evaluate someone with a checkered past and determine if they have in fact changed? And remember the principles of natural justice and procedural fairness and when you have somebody who is not going to be administratively admitted, how are you going to deal with that in the most fair manner possible while still protecting the public but giving all due procedural

safeguards to the applicant?

And it sounds like, based on some of the comments, that that work is being done. Lastly, I want to, first of all, thank you again for having me. My exposure to this conference just tells me what a great group it is. It really is an engaging conference to be a part of and it's an honor to be associated with this organization.

And you guys should be proud of the fact that you are leaders in the self-regulation world. I put a lot of stock in that Gallup poll. It's really important and the rest of us should be trying to do what you're doing. So congratulations for that and I have note why…I'll take any questions you want.

I'm impinging on your Friday afternoon now but just before we turn to any questions you might have, Kathleen, Cole, and Bridget, great job. It's such a well-run conference and thank you for having me. So does anybody have the courage to ask a question when everybody is about to go out to 34 degree heat.

Oh, sorry, that's 34 degrees Celsius. I don't know what that is in Fahrenheit. Okay. Well, thank you again. - [Female 5] Wait, wait.

- Yeah. Oh, we do have one question. Good. Okay.

- I'll be quick I promise. Just because I'm from Massachusetts and I'm the staff person responsible for the good moral character evaluation, I mean facilitating that, I just wanted to clarify for the timeout, which you're calling a timeout, which we call a mandatory temporary exclusion, that is for five years but they do have the ability to reapply but they'd be subject to a GMC evaluation.

- Can you reapply within the five years?

- No.

- No. Five years.

- The denial is for five years.

- Well, I mean you have great stuff in terms of your applications process. I was really impressed with it so good job.

- Thank you very much. I appreciate that.