Atty Hopefuls With Criminal Records Face Hazy Paths Forward

By Emma Cueto

Law360 (May 21, 2018, 4:40 PM EDT) -- Tarra Simmons — who graduated magna cum laude from Seattle University School of Law, was appointed by Washington’s governor to a statewide commission and received the prestigious Skadden Fellowship — had the sort of resume that might seem like she could sail through the bar application process, but instead her application was nearly denied.

The reason? Simmons also has a criminal record.

Simmons was ultimately cleared to take the bar exam after the Washington Supreme Court, in its first written opinion on an attorney admission since 1984, rejected a negative recommendation by a state bar committee. However, she is far from the only person to ever find herself in this situation.

According to FBI estimates, which include those arrested but not convicted, up to 30 percent of American adults have a criminal record, and other research estimates that about 8 percent of Americans have a felony conviction in their past.

Unsurprisingly, many of the millions of people who have experienced the criminal justice system firsthand develop an interest in law, and some pursue a career in it as well.

Those ambitions, though, can quickly be tripped up by state bar associations, which have a duty to protect the public from unethical lawyers and ensure attorneys meet the profession’s character requirements.

However, different states have a range of views on criminal records, and thanks to a lack of data and lack of transparency, it isn’t always clear for applicants what position a state might take. It’s an issue that’s getting increasing attention and leading some to advocate for reform, such as more transparent standards and better education for examiners.

“I think this is a time when we are recognizing the effects of mass incarceration and recognizing the unique role that formerly incarcerated people can and should be playing in addressing reforms in the criminal justice system,” said Professor Debbie Mukamal, executive director of the Stanford Criminal Justice Center at Stanford Law School.

“So as we’re seeing that these people should be at the table and should be part of creating solutions to fix some of these issues, these questions are coming to the fore.”

Admitting Attorneys With Criminal Backgrounds

Given the damage that an unethical attorney can cause, it can seem risky to admit applicants with criminal records. But some experts say that doing so can actually benefit the profession.

“The practice of law ... would benefit from people who have been through the system,” said John Strait, a professor at University of Seattle who worked on the Tarra Simmons case. “It’s myopic, [and] in the long run, not in the benefit of the public, to exclude everybody who has had the benefit of committing a crime and going through the system.”
Simmons, who turned her life around after serving 20 months in prison for drug-related crimes, said that attorneys who have themselves been convicted of a crime are likely to see the human impact of legal policies and procedures.

Such attorneys are likely to give different advice on plea agreements and potential sentences, she said, because they understand the impact prison has on a person’s life. They are also sensitive to the way in which policies might disproportionately impact certain groups of people.

“The clients that I represent trust me more because they know that I’m driven by personal experience,” Simmons said.

Simmons said that her decision to go to law school was partly because of her experiences in prison and afterward.

“I went to law school to learn how to change the system on a systemic level through policy advocacy — and also to help other people with individual advocacy because I was very lucky to have lawyers who stepped up and helped me with some of the barriers to my re-entry,” Simmons said.

The issue has racial implications as well, as any state bar policies regarding criminal convictions will likely have a disproportionate effect on black and Hispanic applicants — those groups make up 32 percent of the general U.S. population, but 56 percent of the incarcerated population, according to the NAACP.

Meanwhile, 85 percent of active attorneys are white, according to the American Bar Association.

**Policies Vary Widely Across States**

Those with criminal records can face vastly different terrain depending on the state where they're seeking bar admission, and, in some states, Law360 was unable to find any specific policies at all.

Many states include the same or similar language that said the examiners who pore over bar applications may refer — or, in some states, must refer — an applicant to the extra step of a character and fitness review based on a criminal conviction.

In 29 states, the official rules include substantially similar lists of context factors for assessing past misconduct, typically including the applicant’s age at the time, the circumstances surrounding the misconduct, and evidence of rehabilitation, among other factors.

Of these states, 12 also lay out factors as to what exactly constitutes rehabilitation. Typical factors include acknowledging that the conduct was wrong, paying restitution, and actions that have had a positive impact on the community.

In most states, the burden is on the applicant to prove that they have the necessary character to be admitted.

“Anyone who has a significant issue that requires character and fitness review by the character and fitness board has a very high burden to meet,” Strait said.
In addition, some states have far more specific — and strict — policies. Two states — Mississippi and Oregon — both outright ban people with certain criminal convictions from being admitted to the bar.

In Mississippi, anyone convicted of a felony is automatically disqualified, with certain exceptions for manslaughter and tax code violations, as well as a narrow exception for people who can demonstrate they were provoked into a one-time bad act.

State law also includes its own ban on bar admission against anyone convicted of filing a false affidavit and other forms of misrepresentation.

In Oregon, a person is considered ineligible for admission if they have been convicted of a crime that would have grounds for disbarment if they had been an attorney at the time.

Meanwhile, two states, Florida and Georgia, have policies that in practice likely amount to de facto bans for many applicants.

In both states, people convicted of a felony are unable to register to vote. However, in order for a convicted felon to receive a law license, the applicant needs to have his or her civil rights restored. While there are mechanisms for restoring these rights, the process at minimum adds an extra hurdle to these applicants.
Half a dozen other states also say that a criminal conviction creates a presumption against an applicant, which can be a high bar to surmount. The California state bar, for example, says that applicants must show “overwhelming proof of reform and rehabilitation, including at a minimum, a lengthy period of not only unblemished, but exemplary conduct.”

However, Don Lundberg, a former executive director of the Indiana Supreme Court Disciplinary Commission, said that such a presumption can be overcome. Indiana has such a presumption, he said, but he’s seen applicants with criminal pasts be admitted anyway.

“The fact that it is a presumption and not a prohibition is an acknowledgement, philosophically, that redemption or rehabilitation is possible,” he said.

Meanwhile, a few states have policies that seem intentionally friendly to applicants with past convictions.

In North Dakota, for instance, the rules for admission specifically say that a conviction is not a bar to admission “unless ... the offense has a direct bearing upon a person's ability to serve the public as an attorney and counselor at law, or that the person, following conviction of any offense, is not sufficiently rehabilitated.”

And while a felony conviction creates an automatic presumption against a would-be attorney in Connecticut, examiners there must also view an applicant as a “whole person” and consider their
entire history.

The state’s admission regulations also add, “There are no specific incidents, transgressions or misconduct which will result in disqualification.”

A handful of states, including Maine and Louisiana, also allow for conditional admissions. Details vary from state to state, but typically, conditional admission allows a state bar to require an attorney to comply with certain conditions — such as continuing a substance abuse program — to ensure that the applicant maintains his or her current good behavior.

But in virtually all states, the policies on paper are only a starting place. In practice, the members of a state’s character and fitness review committee, or a similar review body, have a great deal of discretion in approving or denying an applicant. And that can be by design.

“This is an art and not a science,” Mukamal said. “That’s how I think most state bars approach this. They’re hesitant to put down a concrete standard.”

Nancy Vincent, the director of administration of the Illinois Board of Admissions to the Bar, said that character and fitness reviews in the state are “very fact-specific and case by case.” What documentation a committee requests and what information it might consider relevant depends on the individual applicant, according to Vincent.

The training that these committee members receive can also vary widely. For instance, Vincent said that committee members in Illinois receive diversity training, including implicit bias training.

However, this is not the case everywhere — for instance, in Washington state, where Simmons applied.

Navigating the Process

For applicants, the lack of clear rules can be frustrating and confusing.

After staying sober for six years and excelling in law school, Simmons submitted more than 100 letters of recommendation to the bar with her application and argued that the bar did not need to refer her to a character and fitness review.

The bar disagreed, however, and the committee voted not to recommend her, saying, among other things, that the attention Simmons’ story and her advocacy had attracted had gone to her head and made her “entitled.”

The decision seemed at odds with other recommendations in Washington, including a unanimous recommendation in 2014 for Shon Hopwood, who had served time for several bank robberies in Nebraska.

Part of the confusion may have come from the fact that the members of the committee serve staggered three-year terms, which Strait says can mean there is very little institutional memory in place.

For Simmons, the decision carried more than a hint of gender bias as well — it seemed to buy into the idea that women should not be proud of their accomplishments. The state’s Supreme also noted the seeming gender bias in its decision ultimately granting Simmons permission to take the bar.

“[Review members] come with their own biases and their own thoughts around whether people should have a second chance,” Simmons said. “There’s very little guidance. They don’t receive training on implicit bias.”

David Ruzumna, head of the Washington state character and fitness board, confirmed that members do not receive implicit bias training, but said there are currently discussions about possibly implementing it in the future.

There is also comparatively little publicly available information to help guide applicants looking to
maximize their chances of getting approval.

Dieter Tejada, a Vanderbilt graduate who is in the process of trying to gain admission to the state bar in New York and Connecticut, said that he’s gotten conflicting advice about the best way to approach the process.

Tejada and several friends were charged during his senior year of high school with beating a fellow student with a baseball bat, and he later accepted a plea deal. He served four and a half months in prison.

"[While in prison] I started to see that there were a lot of people who got screwed over a lot worse than I did," Tejada said. "So I decided I was going to go to law school."

As he was preparing to graduate Vanderbilt, Tejada accepted a job with the public defender’s office in Miami, but when he reached out to a local attorney for advice navigating the bar admission process, he was told that he would likely need to wait over a year for a hearing. As a result, he was unable to take the job and moved back to the northeast to try applying in New York and Connecticut.

Information about the process has been hard to come by, he said. Hiring an attorney to help navigate the process can be very expensive, and he’s gotten conflicting advice from an attorney helping a friend in similar circumstances and from other attorneys who have gone through the process themselves.

“I have some information, but it’s mushy information,” Tejada said.

His alma mater hasn’t been helpful, either, he said. "I don’t want to criticize the administration — they were great with me in a lot of ways. But I don’t think they do know how to help me. ... I don’t know if the schools know what they’re taking on when they take us."

**Possible Reform**

Finding the right balance between judging applicants on their merits and protecting the public is not easy task and those evaluating applications are left trying to find a "Goldilocks solution," according to Lundberg.

“For the system to be fair it should get the ‘just right’ solution,” Lundberg said. “It shouldn’t err on the side of keeping people out who will become great lawyers and never get into trouble, and it shouldn’t err on the side of letting people in who are going to create problems.”

In many ways, the challenges facing the bar in finding the right approach mirror the challenges of other licensing boards, especially in fields like social work that deal with sensitive topics and populations, according to Mukamal. It’s a complicated subject, and no one seems to have perfect answers, she said.

**Connecticut**

"In considering good moral character and fitness the Committee will attempt to view the applicant as a whole person and take into account the applicant's entire life history rather than limit its view to isolated events in his/her life. ... If the applicant establishes present good moral character and fitness despite past conduct, the Committee will certify the applicant. " (Regulations of the Connecticut Bar Examining Committee, Article IV)

**Maine**

"The Board ... may allow an applicant whose record shows (1) a history of acts or omissions constituting a lack of good character and fitness to practice law, and (2) evidence of rehabilitation from the conditions that caused the acts or omissions to current good and trustworthy conduct, to be conditionally admitted to the practice of law." (Maine Bar Admission Rules, Rule 9A)
The search for the best policies is further complicated by the fact that statistics and — in some states — even explanations for committee decisions can be hard to come by.

“Many character and fitness decisions are made in a black box,” said David Drew, treasurer of the Prison Reform and Education Project at NYU.

Most state bars don’t collect statistics, and researchers in turn don’t know how many people referred to a character and fitness review have criminal records or how many are approved, according to Mukamal, who is beginning to study the issue.

In the absence of data, suggesting hard and fast rules is difficult, Mukamal said. However, providing bar examiners with the latest research might go a long way.

“I think there’s a mismatch between some of the decision makers and the researchers who are studying desistance,” she said. “That information isn’t being shared."

For instance, Mukamal said, research shows that age is a major factor in predicting recidivism. In effect, this means that people who have been convicted of more serious offenses are more likely to have “aged out of crime” and are less likely to re-offend than people with recent, less serious crimes on their record.

“I suspect that the average bar committee member is looking at someone convicted of murder and getting quite scared and being pretty conservative in their decision,” she said. “But that doesn’t match with what the science and the criminological literature tells us.”

Nevada

"To prove rehabilitation, an applicant must show some positive contribution to society; in most cases it is not enough that an applicant led a blameless life since the prior problems." (Supreme Court of Nevada Rules Regulating Admission to the Practice of Law, Section IV)

Drew suggested that policies should shift focus.

“The thing that stands out to me is that so few of the rules for bar admission seem to be in line with focusing on things related to consumer protection,” he said.

He cited decisions he’d read in New York that seemed to suggest the courts, which are the ultimate deciders on New York admissions, were particularly harsh on violent offenders. But violent crime, he said, seems largely irrelevant to questions of honesty or financial responsibility, which are much more important if the goal is to protect the public from unethical attorneys.

Lundberg, however, pointed out that even crimes that might not seem relevant still could be a sign that an applicant didn’t have sufficient respect for the law, if they knowingly engaged in illegal activity. Context, he said, was key.

Simmons said that, in her opinion, the state bar should put more resources toward investigating lawyers who have committed transgressions while attorneys. She noted that the same conduct that could cause the bar to deny an applicant wouldn’t cause an attorney to be disbarred.

Mukamal suggested a similar idea, saying that state bars should consider creating more “parity” between disbarment standards and admissions standards. However, she added, there probably isn’t a perfect policy when it comes to balancing the need to protect the public and to allow worthy applicants.

“It’s hard to imagine a line in the sand because you can almost always make an exception,” she said.

As advocates weigh reform ideas, an unknown number of applicants with criminal records continue to try their hand at navigating the process — and many of them are successful.
Vincent said, "In Illinois, a criminal conviction is not an automatic bar in any way, shape, or form," and added that she knows of many applicants who have been admitted. The most important thing for an applicant in her experience, she said, is candor.

"Be honest, be open about it. Don’t try to hide anything," Vincent said.

Simmons, who took and passed the bar in February, said she hopes her case sends a message in Washington that a criminal record is not enough to justify disqualifying an applicant.

Indeed, just after the court decided her case, she said several friends in similar situations were recommended by the committees evaluating their applications.

“That made it all worth it,” she said.

--Editing by Rebecca Flanagan.