BEFORE THE
DISTRICT OF COLUMBIA COURT OF APPEALS

COMMENTS OF THE SECTION ON COURTS, LAWYERS, AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR REGARDING PROPOSED AMENDMENTS TO COURT OF APPEALS RULE 46

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* Did not participate in the preparation of these comments.

† Agrees with the Section's recommendations, but not with the reasoning associated with the comment on Rule 46(e).

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STANDARD DISCLAIMER

"The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors."

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SUMMARY

The D.C. Court of Appeals has published for comment proposed amendments to Rule 46, governing admission to the Bar. The proposed amendments are extensive, and the Section on Courts, Lawyers, and the Administration of Justice has no comment on most of them. However, Rules 46(d) and 46(e), concerning moral character and general fitness to practice law, and quantum and burden of proof thereof, have been amended to place the burden of proof upon the applicant of demonstrating good moral character by clear and convincing evidence.

The Section recommends that Rule 46(d) be amended to include language requiring the Committee on Admissions to conduct an independent examination of the fitness of any applicant who has previously been convicted of a serious crime. We believe that this requirement is consistent with the decision of the Court of Appeals in In re Manville, 494 A.2d 1289 (D.C. 1985).

The Section also recommends that the proposed amendments to Rule 46(e) be adopted with an explanatory comment expressly linking issues of "moral character" to an applicant's capacity to practice law. We recognize that "good moral character" is a desirable attribute in members of the Bar, but are concerned that, without explanation, this phrase is so ambiguous as to allow inquiries into an applicant's private life beyond what is necessary or sufficient to establish whether the applicant is fit to practice law.

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The D.C. Court of Appeals has published for comment proposed amendments to Rule 46, governing admission to the Bar. The proposed amendments are extensive, and the Section on Courts, Lawyers, and the Administration of Justice has no comment on most of them, believing them to be noncontroversial. However, Rules 46(d) and 46(e), concerning moral character and general fitness to practice law, and quantum and burden of proof thereof, have been amended materially. Where Rule 46(d) previously required the Committee on Admissions to inquire into and report on an applicant's moral character and general fitness to practice law, the proposal requires the applicant to demonstrate character and fitness. Where Rule 46(e) previously required the applicant to demonstrate that he or she was "qualified and fit to practice law" by a preponderance of the evidence, the proposal requires the applicant to demonstrate "good moral character and general fitness" by clear and convincing evidence. The Section on Courts, Lawyers, and the Administration of Justice respectfully submits these comments on those proposed amendments.

Rule 46(d) - Background Investigation

In In re Manville, 538 A.2d 1128 (D.C. 1988), the Court of Appeals reaffirmed en banc that the good character requirement in Rule 46 does not preclude a person previously convicted of a serious crime from becoming a member of the Bar. The Section on Courts, Lawyers, and the Administration of Justice submitted an amicus brief advocating this result. Our brief also urged the Court to require that the Committee on Admissions conduct an independent investigation of all applicants previously convicted of serious crime. In such cases, the Section argued, it was insufficient to rely solely on the sources of information included in the application, which may be confined to the most favorable. Applicants may not wittingly identify references who have advers views of their honesty and integrity. Yet such independent perspectives may be critical to the determination whether an applicant with a criminal record has in fact been completely rehabilitated.

Indeed, the Court of Appeals in an earlier opinion in the Manville case, 494 A.2d 1289, 1293 (D.C. 1985), noted that an independent investigation is one of the "basic tools an admissions committee has." The Court remanded Mr. Manville's application with instructions that the Committee undertake such an inquiry. The investigation the Court contemplated

> would inquire of public authorities, and also colleagues, acquaintances and neighbors, both present and past. It would extend to at least a few persons

> who knew him before his imprisonment. It would ascertain whether the applicant has the qualities of personality and behavior that bespeak rehabilitation and good moral character. It would provide the Committee with an independent look at the applicant's conduct since his release from prison.

Manville, 494 A.2d at 1294. The Court in the first Manville opinion recommended that the Committee on Admissions consider independent investigations whenever an applicant has committed a felony or other serious crime, and that the Committee invariably conduct such an inquiry when the crime is as serious as homicide. Id.

In accordance with the Court's instructions, the Committee on Admissions conducted an investigation regarding the application of Daniel Manville, hiring a private investigator. However, no independent inquiry was undertaken for two other applicants previously convicted of a felony, whose cases were consolidated in the en banc appeal along with Mr. Manville's. The Court of Appeals in its recent decision approved the admission of these two applicants, but found:

> [I]t would have been preferable for the Committee to have made independent investigations of Strauss and Brooks as well as of Manville in light of the seriousness of the offenses Strauss and Brooks committed. The Committee risked causing additional delay to applicants in our consideration of their applications by failing to conduct independent investigations of their backgrounds. . . . [I]t is a close question whether the Strauss and Brooks cases should be remanded for further investigation . . . .

Manville, 538 A.2d at 1133.

The Section believes that the Court's admonitions in the two Manville opinions should be formalized in Rule 46. If the good character requirement is not to disqualify convicted felons from the practice of law, as the Court has ruled, the Court should mandate the highest level of vigilance by the Committee on Admissions. Accordingly, we propose the following amendment to Rule 46(d):

> (d) Moral character and general fitness to practice law. No applicant shall be certified for admission by the Committee until the applicant demonstrates good moral character and general fitness to practice law. The Committee may, in its discretion, give notice of the application by publication in a newspaper or by posting a public notice. Before recommending admission of any applicant previously convicted of a serious crime, the Committee shall conduct an independent investigation that seeks information beyond that identified in the application.

Rules 46(d) & 46(e) - "Good Moral Character"

The proposed amendments to Rule 46(e) change the standard for admission to the Bar from proof by a preponderance of the evidence that the applicant "is qualified and fit to practice law" to proof by clear and convincing evidence that the applicant "possesses good moral character and general fitness to practice law." The elevated standard of proof combined with the undefined and subjective substantive test of "good moral character" raise troubling questions about the potential for discriminatory or inconsistent review of applications for the Bar. We would

stress, however, that these questions are not based on any concerns about the motives or judgment of the current Committee on Admissions, but on the difficulty of assuring the consistent and fair application of this standard in the future.

There is no question that "good moral character" in the sense of honesty, integrity, and decency is relevant to an applicant's fitness to practice law. Existing Rule 46 requires the Committee on Admissions to inquire into and determine an applicant's moral character and general fitness. See Rules 46(d), 46(f). But it is possible that the proposed amendment to Rule 46(e), which changes the standard for admission, could be interpreted to authorize a more searching inquiry into an applicant's private life. In view of the Manville Court's emphasis on the importance of a thorough investigation of applicants, and the Section's recommendation for an inquiry into the fitness of applicants previously convicted of a serious crime, the Section is concerned that an applicant's views on abortion, religion, or other controversial issues not be linked to "good moral character" in a sense unintended by the present Court.

We are concerned about the subjectivity of the "good moral character" standard, and emphasize that any test of character should be linked to an applicant's fitness to practice law. "General fitness to practice law" necessarily includes an element

of good character; but it depends upon the relationship between something in the applicant's character and his or her ability to function as a lawyer. Rule 46 must be applied scrupulously to avoid inquiries into "good moral character," when those inquiries involve the private life of the individual rather than the applicant's professional capacity.

The elevated standard of proof in the proposed amendments to Rule 46(e) increases our concerns over the fair application of the rule. In many instances, the "proof" of good moral character will appear in the negative: the absence of unfavorable information about an applicant who is too young or inexperienced to have established much of a track record for good, or bad, character. In effect, the standard may function as a de facto presumption of good character which disappears when the Committee on Admissions learns of negative information. Otherwise, the Committee on Admissions would have to conduct a costly, time-consuming, and intrusive investigation of an applicant's personal life, credit history, business dealings, and the like.

The Section on Courts, Lawyers, and the Administration of Justice shares the concerns of the Committee on Admissions and of the profession as a whole for the integrity of the Bar and its public image. We would note that this can also be accomplished by more vigilant enforcement of disciplinary rules against practicing attorneys. Too often, once past the threshold of the

Bar, an attorney may carry on a neglectful, abusive, or dishonest practice without detection by Bar Counsel. Attorneys are reluctant to report unethical conduct, in part because it sometimes arises in the course of litigation; there is a natural hesitancy to accuse a former or current adversary of improprieties, because the accusation may adversely affect a client. Nevertheless, more vigorous policing of Bar members by other lawyers and judges is an appropriate way to maintain high professional standards.

Our concern is that the proposed rule, although well intended, may be misapplied. "Good moral character" is so broad and subjective a label that it can be invoked to describe almost any kind of inquiry, or justify almost any kind of decision on an application. This is especially true when it is the applicant who must satisfy the Committee on Admissions "by clear and convincing evidence." Accordingly, we urge the Court of Appeals either to incorporate the following comment into the rule, to protect against abuse:

> The requirement of good moral character should not be applied in a manner that discriminates on the basis of race, sex, creed, religion, sexual preference, or political belief. Further, the rule ought not to authorize investigations into private areas of an applicant's life unrelated to his or her fitness to practice law.