Order

Michigan Supreme Court
Lansing, Michigan

January 23, 2019

ADM File No. 2016-46

Special Administrative Inquiry
Regarding Questions Relating to
Mental Health on the Michigan
Bar Examination Application

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering whether questions regarding mental health should be included on the personal affidavit that is part of the application for the Michigan Bar Examination, and if so, what form those questions should take. Before making a final decision on this question, this notice is given to afford interested persons the opportunity to comment generally on the issue or to suggest specific language for the Court's consideration. The Court welcomes the views of all. This matter will be considered at a public hearing following the close of the public comment period. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

The Court's solicitation for public comment in this matter does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of any particular action.

The Issue

Pursuant to MCL 600.934, "[a] person is qualified for admission to the bar of this state who proves to the satisfaction of the board of law examiners that he or she is a person of good moral character, is 18 years of age or older, has the required general education, learning in the law, and fitness and ability to enable him or her to practice law in the courts of record of this state, and that he or she intends in good faith to practice or teach law in this state." The Board of Law Examiners establishes the policies and procedures for admission to the State Bar of Michigan. In addition to passage of the Michigan Bar Examination, an applicant must be recommended for admission on the basis of the applicant's background, which process is conducted by the State Bar of Michigan through its Character and Fitness investigation procedure.

As part of the bar application process, an applicant must submit an affidavit that provides information about the applicant's life prior to taking the bar examination, including information about the applicant's mental health and treatment history. Question 54a asks:

> Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life? If yes, provide the names and addresses of all involved agencies, institutions, physicians or psychologists or other health care providers and describe the underlying circumstances or the diagnosis, treatment or hospitalization.

Further, question 54b states:

> Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?

In addition, the BLE recently added some clarifying language as a preamble to these questions as follows:

> Pursuant to MCL 600.934(1), "A person is qualified for admission to the bar of this state who proves to the satisfaction of the board of law examiners that he or she is a person of good moral character, is 18 years of age or older, has the required general education, learning in the law, and fitness and ability to enable him or her to practice law in the courts of record of this state…" The Michigan Board of Law Examiners (Board), as part of its responsibility to protect the public, must assess whether an applicant manifests any mental health or substance abuse issue which impairs or could impair an applicant's ability to meet the essential eligibility requirements to practice law. The Board does not seek medical records as part of this initial application. If it is later determined that medical records are required to assist in any admission decisions, they will be subsequently requested. This information is treated confidentially under State Bar Rule 15(7) and Board of Law Examiners Rule 2.
>
> The Board supports applicants seeking mental health and/or substance abuse treatment, and views effective treatment by a licensed professional as enhancing an applicant's ability to meet the essential eligibility requirements.
>
> In answering the questions below, you do not need to provide information that is reasonably characterized as situational counseling. Examples of

situational counseling include stress counseling, grief counseling, and domestic relations counseling.

The Court is considering whether these questions should continue to be included on the affidavit, and if so, whether they should be revised.

This issue has been considered in the context of the Americans with Disabilities Act, 42 USC 12101 *et seq*., by the United States Department of Justice Civil Rights Division. In response to a complaint filed on behalf of a bar applicant in Louisiana (which contracted with the National Conference of Bar Examiners to conduct a preliminary investigation and produce a report for each applicant), the DOJ conducted an investigation into the bar application process in that state, focusing on several specific instances in which some individuals with certain diagnoses (but without evidence of conduct that required continued monitoring) were required to agree to terms of conditional admission for five years.[1] The DOJ concluded that Louisiana should modify its application to focus on an applicant's conduct, not diagnoses or treatment for such diagnoses [DOJ report].

As a result of the DOJ report, the NCBE revised its standard questions related to mental health to focus on the applicant's conduct. The NCBE form, used by nearly half of the states, now inquires:

25. Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?

26(A). Do you currently have any condition or impairment (including, but not limited to, substance abuse, or a mental emotional, or nervous condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?

26(B). If your answer to Question 26(A) is yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?

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[1] Conditional admission typically requires appointment of an attorney practice monitor, mandatory consultation with the mental health care provider at least every three months, mandatory health status updates from the mental health care provider, agreement to participate in and pay for consultations with an independent medical professional, and full access to the applicant's medical records.

Further, some states that do not use the NCBE form have revised their questions to focus on conduct as opposed to diagnoses. And some states have eliminated the questions about mental health altogether, including Alaska, Arizona, California, Illinois, Maine, Massachusetts, New Mexico, Pennsylvania, and Tennessee.[2] The court seeks input on whether Michigan should continue to ask about an applicant's mental health history, or ask different questions related to this topic.

Please submit any written materials to the Office of the Administrative Counsel by May 1, 2019, and reference ADM File No. 2016-46. This issue also will be considered at a public hearing, which notice will be posted and circulated at least four weeks before the hearing. You may submit comments or materials electronically to ADMcomment@courts.mi.gov or by regular mail at 925 W. Ottawa St., Lansing, Michigan, 48915.

BERNSTEIN, J. (*concurring*). I strongly support this Court's invitation for public comment on this issue. Whether questions inquiring into an applicant's mental health should be included on the application for the Michigan Bar Examination is a significant question that not only affects law school graduates aspiring to enter the legal profession, but also one that asks us to fundamentally examine the consideration and accommodations our state is providing to those with disabilities.[3] I hope that public comment will, at a minimum, address and clarify the following questions:

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[2] In some cases, the state eliminated the specific mental health question and replaced it with a more general inquiry, such as "Is there any other information, incident(s), or occurrence(s) which … may have a bearing, either directly or indirectly, positively or negatively, upon your ability to practice law actively and continuously?" (Arizona) and "Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?" (Alaska).

[3] Federal courts have consistently held that Title II of the Americans with Disabilities Act, 42 USC 12131 *et seq*., applies to state bar associations and that bar applicants with a history of mental health diagnosis or treatment are "qualified individual[s] with a disability" under 42 USC 12132. See, e.g., *ACLU of Ind v Ind State Bd of Law Examiners*, unpublished opinion of the United States District Court for the Southern District of Indiana, issued September 20, 2011 (Case No. 1:09-cv-842-TWP-MJD), pp 9-10; *Ellen S v Fla Bd of Bar Examiners*, 859 F Supp 1489, 1491-1493 (SD Fla, 1994). Further, federal regulations prohibit eligibility criteria "that screen out or tend to screen out an individual with a disability . . . unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered," 28 CFR 35.130(b)(8) (2018), and prohibit "policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others," 28 CFR 35, Appendix B.

(1) How, if at all, is inquiring into the state of an applicant's mental health an effective or appropriate way of assessing an applicant's "good moral character"? See MCL 600.934(1).

(2) How, if at all, is inquiring into an applicant's mental health status an effective way of assessing an applicant's "fitness and ability" to practice law? See MCL 600.934(1).

> To provide greater context for this question, in its investigation into the Louisiana bar application, the United States Department of Justice (DOJ) cited substantial research indicating that "a history of mental health diagnosis or treatment does not provide an accurate basis for predicting" future professional misconduct. United States Department of Justice, *The United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act (ADA)*, DJ No. 204-32M-60, 204-32-88, 204-32-89 (*DOJ Investigation*), p 5, available at <https://www.ada.gov/louisiana-bar-lof.pdf> (accessed January 15, 2019) [https://perma.cc/5WAP-UK6F].[4] Similarly, in *In re Petition & Questionnaire for Admission to the RI Bar (Rhode Island)*, 683 A2d 1333, 1336 (RI, 1996), the Rhode Island Supreme Court, after receiving extensive public input, found: "Research has failed to establish that a history of previous psychiatric treatment can be correlated with an individual's capacity to function effectively in the workplace," and that "there is no empirical evidence demonstrating that lawyers who have had psychiatric treatment have a greater incidence of subsequent disciplinary action by the bar or by any other regulatory

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[4] The *DOJ Investigation* cited various authorities to substantiate this point. E.g., *DOJ Investigation* at 23, quoting American Bar Association Commission on Mental and Physical Disability Law, *Recommendation to the House of Delegates*, 22 Mental & Physical Disability L Rep 266, 267 (1998) (" 'Research in the health field and clinical experience demonstrate that neither diagnosis nor the fact of having undergone treatment support any inferences about a person's ability to carry out professional responsibilities or to act with integrity, competence, or honor.' "); *DOJ Investigation* at 23, quoting Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L Rev 93, 141 (2001) (" '[T]here is simply no empirical evidence that applicants' mental health histories are significantly predictive of future misconduct or malpractice as an attorney[.]' "); *DOJ Investigation* at 23, quoting Bauer, 49 UCLA L Rev at 141-142 n 153 ("observing that the only small retrospective study of attorneys 'provides no support at all for the notion that individuals with mental health treatment histories are more likely than others to engage in misconduct as attorneys' ").

> body in comparison with those who have not had such treatment."[5] In our consideration of this issue, evidence that bears on the connection, or lack thereof, between a person's mental health status and his or her ability to practice law would be invaluable.

(3) What standards or guidelines are used in: (a) evaluating an applicant's initial answers to the mental health questions on the bar application, (b) regulating any subsequent investigation into an applicant's mental health history, and (c) determining whether an applicant's mental health history should preclude his or her acceptance into the bar?

(4) Does asking mental health questions actually deter prospective applicants, such as law students, from seeking rehabilitative counseling and treatment, or detract from the effectiveness of such professional help?

> In its aforementioned investigation, the DOJ cited evidence that confidentiality is a critical element of the treatment relationship and that fears of disclosure could discourage individuals from seeking professional help. *DOJ Investigation* at 23.[6] In *Rhode Island*, the court noted that, in the substance abuse

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[5] See also *Clark v Va Bd of Bar Examiners*, 880 F Supp 430, 436, 446 (ED Va, 1995) (finding that expert testimony failed to show either "a correlation between mental health questions and an inability to practice law," or that obtaining evidence of mental health counseling or treatment is effective in guarding against a threat to public safety).

[6] The *DOJ Investigation* cited various authorities to substantiate this point. E.g., *Jaffee v Redmond*, 518 US 1, 10-11 & n 10 (1996) (recognizing a federal psychotherapist-patient privilege based on the view that confidentiality of psychotherapy sessions is crucial to their success and serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem); United States Department of Health & Human Services, *Mental Health: A Report of the Surgeon General*, p 441 (1999) (observing that "evidence also indicates that people may become less willing to make disclosures during treatment if they know that information will be disseminated beyond the treatment relationship"); American Psychiatric Association, *Resource Document on Recommended Guidelines Concerning Disclosure and Confidentiality* (1999), p 1, available at < https://www.psychiatry.org/psychiatrists/search-directories-databases/library-and-archive/resource-documents> (accessed January 15, 2019) (finding that disclosure policies "inhibit individuals who are in need of treatment from seeking help"); Association of American Law Schools, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J Legal Educ 35, 54-55 (1994) (finding that a much higher percentage of law students would seek treatment for substance abuse problems or refer others to treatment if they were assured

context, a significant portion of surveyed law students indicated that "if they suffered from a substance-abuse problem, they would seek assistance . . . if they were assured that bar officials would not have access to the information." *Rhode Island*, 683 A2d at 1336, citing Association of American Law Schools, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J Legal Educ 35, 55 (1994). This response led the court to conclude that mental health questions could unwittingly dissuade a person in need of treatment from seeking assistance. *Id*. I welcome input on whether requiring disclosure of one's mental health status actually discourages individuals from seeking helpful treatment, or possibly reduces the effectiveness of any treatment sought.

(5) What purpose is served by asking mental health questions that is not already served by other questions asked on the bar application?

In addition to an applicant's mental health status, the bar application probes into many other areas of a person's life, including his or her criminal history, employment background, academic record, professional licensures, financial history, involvement in civil litigation, and residential past. In many of these areas, an applicant is required to disclose instances of misconduct, disciplinary action, termination, or other adverse actions taken against the applicant. Are these questions and answers sufficient to assess an applicant's fitness and ability to practice law? Said differently, what do mental health questions add to the bar application that is not already covered in this already intensive inquiry?

(6) Multiple states have entirely eliminated mental health questions from their bar applications (Alaska, Arizona, California, Illinois, Maine, Massachusetts, New Mexico, Pennsylvania, and Tennessee). What effect, if any, has eliminating these questions had on the effective functioning of the legal systems in these states? In other words, have the legal systems in these states been negatively affected in any way by eliminating such questions?

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that bar officials would not have access to that information); *Bauer*, p 150 (describing how disability-related questions can discourage applicants from obtaining treatment and undermine its effectiveness).

(7) Does answering affirmatively to the mental health questions impose any additional burdens on an applicant, or cause delays in the processing of an applicant's application? Do these burdens or delays occur even if the applicant is ultimately admitted to the bar?[7]

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[7] Here, I note that several courts have found that mental health questions impose additional and discriminatory burdens on applicants with disabilities. See, e.g., *Clark*, 880 F Supp at 442 ("Unlike other applicants, those with mental disabilities are required to subject themselves to further inquiry and scrutiny. The Court finds that this additional burden discriminates against those with mental disabilities."); *Ellen*, 859 F Supp at 1494 (finding that Florida's mental health questions "discriminate against Plaintiffs by subjecting them to additional burdens based on their disability"); *Med Society of NJ v Jacobs*, unpublished opinion of the United States District Court of New Jersey, issued October 5, 1993 (Case No. 93-3670-WGB) (concluding that mental health questions imposed extra burdens on qualified persons with disabilities in violation of the ADA); *In re Applications of Underwood and Plano*, unpublished opinion of the Maine Supreme Judicial Court, issued December 7, 1993 (Case No. BAR-93-21) (finding that requiring applicants to answer mental health questions discriminates on the basis of disability and imposes eligibility criteria that unnecessarily screen out individuals with disabilities).

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 23, 2019

Clerk