January 28, 2013

Re: Proposed APR Rule 9(d)(5)

The proposed rule, as it applies to the character and fitness hearing process, violates both federal and state law. This also obviously applies to the character and fitness hearing process as it is used for applicants for full licensure and the right to take the bar exam as well.

If a Washington State Bar Association (WSBA) licensure applicant's fitness is questioned, an applicant ever has been convicted of a "serious crime," or the WSBA has "substantial questions" regarding an applicant's moral character, the WSBA may refer the matter to the Character and Fitness Board for investigation and hearing. Proposed APR Rule 9(d)(5), APR 3(c), APR 23(c). At the hearing the applicant must establish requisite fitness clearly and convincingly. APR 24.3(c). However, while each state has wide discretion in determining applicant requirements, the requirements must be evenly applied. *Hackin v. Lockwood*, 361 F.2d 499 (C.A.Ariz 1966). Furthermore, the process cannot contravene constitutional guarantees. *Chaney v. State Bar of California*, 386 F.2d 962 (1967); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957); *Brown v. Board of Examiners of State of Nevada*, 623 F.2d 605 (1980). Due process always is required. Article I, § 3, Washington State Constitution. Law licensure—and of course the licensure of legal interns as well—is conferred for the public's benefit. *State ex. rel. Oklahoma Bar Ass'n v. Patterson*, 2001 OK 51, 28 P.3d 551 (2001). The WSBA is an "agency of the state." RCW 2.48.010. The WSBA serves at the public's pleasure through the elected Washington state Supreme Court. Article IV, § 3, Washington State Constitution. (Justices Elected); *Graham v. Washington State Bar Association*, 86 Wn.2d 624, 628, 548 P.2d 310 (1976)(Washington state Supreme Court administers WSBA); APR 1(a). The public is harmed when the character and fitness process both lacks due process and discriminates.

Due process and non-discrimination are not present when those with established or suspected present or past disabilities are arbitrarily referred to character and fitness hearings. Practices that discriminate against those with disabilities are prohibited, as are arbitrary classifications that adversely affect those with disabilities. RCW 49.60.030. The defacto result of those with current or past suspected or real disabilities being arbitrarily referred to character and fitness hearings is that those referred confront, on its face, a poorer chance of passing smoothly and essentially unnoticed through the admission process, including the court's "review." This affects licensure. Furthermore, the state Supreme Court has done nothing to contradict the proposition that it overwhelmingly adheres to WSBA recommendations. Rather, the court has stated that is affords "considerable weight" to WSBA admissions recommendations. *In re Belsher*, 102 Wn.2d 844, 854, 689 P.2d 1078 (1984).

However, it has been stated that there is "no right" to practice law. Along those lines, there is no "right" to practice any profession or job. Every job is privilege. It is worth

noting, however, that by the time an applicant has reached the point of being segregated into the character and fitness hearing process, the applicant has invested tremendous amounts of resources over many years. Regardless, the "right" to practice any profession, including the law, is irrelevant to the matters at issue. What is relevant is that there is a process for bar licensure and thus it must be evenly applied. *Hackin v. Lockwood*, supra. Furthermore, discrimination is illegal in the employment or career context. RCW 49.60.030; Americans with Disabilities Act. Applicants for bar licensure are seeking licensure, overwhelmingly, for reasons related to employment purposes.

The WSBA has not indicated it consistently, or ever, uses personnel with medical training of any kind to determine whom to segregate into fitness hearings. Furthermore, the WSBA also has not indicated that character and fitness panel members have any medical knowledge. While APR 22(c) allows the Character and Fitness Board to refer an applicant for further medical examination if information is felt lacking, this is where the process falls down even further. APR 22(c) is guaranteed, at best, to be haphazardly and discriminatorily applied because, in a rather circular fashion, those being asked if they have enough knowledge often are those who do not have enough knowledge, and thus they have no way of measuring if they have enough knowledge.

There also are financial effects from the discrimination emitting from the character and fitness hearing process. Besides the potentially long-term career financial effects of being referred to the character and fitness hearing process, the segregated applicants are required, unless arbitrarily waived, to present live expert testimony. APR 24.3(e)(4)(Experts testify in person unless waived by WSBA). Experts arguably are a necessity when an applicant's fitness already has been labeled suspect to the point that fitness must be established clearly and convincingly. The costs incurred by an applicant under such circumstances are akin to a disability, or health-based, penalty.

Representation costs are another segregation effect. An applicant who must clearly and convincingly establish fitness is probably smart to hire representation if they have that luxury. The WSBA provides no counsel. However, the WSBA appoints counsel when a WSBA member's fitness is challenged and the privilege to practice is at issue. ELC 8.2(c)(2). And this appointment of counsel occurs even when the burden is on the WSBA to establish lack of fitness, unlike the application process where the burden is on the applicant. ELC 8.7 (Burden on WSBA to establish lack of fitness or incapacity). In fact, the WSBA even provides counsel for members at disciplinary hearings where fitness is at issue. ELC 8.3(d)(3). The issue here is not the difference between how the process addresses a WSBA member versus a prospective member, the issue is that the WSBA clearly recognizes, as evidenced by the Enforcement of Lawyer Conduct rules, that counsel is appropriate when a real or suspected disability calls fitness into question implicating a hearing process.

It also much be pointed out that an applicant is required to demonstrate fitness by clear and convincing evidence, while the WSBA is only required to demonstrate by a preponderance of the evidence the unfitness of an existing lawyer. ELC 8.7. Once again,

no attention is actually given to the rights of the disabled, or the conflicts between these two standards, but rather attention is given just to what suits WSBA purposes.

In addition, the character and fitness hearing process also violates due process with regard to the issue of "serious offenses" and "substantial questions" about moral character. What defines a "serious offense?" What warrants a "substantial question?" The character examination part of the process is entirely arbitrary. For example, who is to say the WSBA cannot make its determination that there should be no "substantial questions" based upon the recommendation of, for example, an ethics professor at Seattle University School of Law? What if the professor is, or has been, close to the character and fitness hearing process? And what grounds is the professor using to make such a recommendation?

What brings about a "substantial question" regarding an applicant's moral character? Whether the applicant worked for the mob, or whether they shoplifted? What really is a "serious offense?" Armed robbery? A sexual offense? Shoplifting? Or perhaps, even inadvertently, certain things are considered "serious offenses" or bring about a "substantial question" on Mondays in April when it is raining. Perhaps at times the admissions' staff feels an obligation to parties outside the admissions' office, parties also with their own agendas as well, to refer an applicant to a character and fitness hearing. The process really is almost akin to a lottery.

It also should be emphasized, almost as an aside, that the WSBA makes almost no substantive effort to make those who are referred to the Character and Fitness hearing process aware of exactly how a hearing unfolds. It is hard to imagine society tolerating it if members of society, or their attorneys, were expected to appear at hearings where perhaps an entire future career is at stake with absolutely no real knowledge of the procedure around what is about to take place.

Lastly, it is my understanding that during the Character and Fitness hearings that the individual representing the WSBA meets, and spends time, privately with the Character and Fitness panel in the hearing room prior to the hearing, including when the WSBA is recommending against admitting the applicant, although this latter point is immaterial to the overarching issue. Furthermore, if a hearing goes past lunch, apparently the WSBA representative also partakes, together with the Character and Fitness panel, in the lunch provided. Then when the entire hearing is over the WSBA representative spends more time alone with the Character and Fitness panel; quite the clubby atmosphere, in a best-case scenario.

Almost all of the issues presented in this letter were presented in writing several years ago to WSBA General Counsel/Chief Regulatory Counsel Jean McElroy. I find it very troubling—both morally and legally—that the WSBA now seeks to expand its use of the Character and Fitness hearing process without even a nod to the serious issues brought to its attention.

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