Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 19, 2016 3:22 PM
To: Tracy, Mary
Subject: FW: Revisions to Admission to Practice Rules 20 to 25 and the Bar Application
Attachments: DRW and Supporters Letter to the Supreme Court 4-19-16.pdf; AG Ferguson Letter to WSBA_9.9.2014.pdf; ACLU-WA Comments to WSBA_7.15.2014.pdf; DRW and Supporters Letter to WSBA 7-15-14.pdf

Supreme Court Clerk's Office

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From: Emily Cooper [mailto:emilyc@dr-wa.org]
Sent: Tuesday, April 19, 2016 3:21 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Revisions to Admission to Practice Rules 20 to 25 and the Bar Application

Dear Honorable Justices:

Attached you will find a letter and three enclosures regarding the proposed revisions to Admission to Practice Rules 20 to 25 and the Bar Application. The letter has been signed by the deans of two of our law schools, fifteen firms or organizations, twenty-seven Washington State Bar Association members, and forty-seven individual advocates. If you have any difficulty opening the attachments, please do not hesitate to let me know.

Thank you for taking the time to review a proposal that not only has broad support in our legal community but also ensures that state and federal protections against discrimination are upheld.

Emily

Emily Cooper
Attorney

Disability Rights Washington
315 5th Avenue S, Suite 850 | Seattle, WA 98104

voice: 206.324.1521 or 800.562.2702 | fax: 206.957.0729
www.disabilityrightswa.org | www.rootedinrights.org| www.donatetodrw.org

Disability Rights Washington (DRW) is a private non-profit organization that protects the rights of people with disabilities statewide. Our mission is to advance the dignity, equality, and self-determination of people with disabilities. We work to pursue justice on matters related to human and legal rights.

confidential nature of the communication. If you have received this message by mistake, please do not review, disclose, copy, or distribute the email. Instead, please notify us immediately by replying to this message or phoning us.

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Disability Rights
WASHINGTON
Washington's protection and advocacy system

April 19, 2016

Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Re: Revisions to Admission to Practice Rules 20 to 25 and the Bar Application

Dear Honorable Justices:

We, the undersigned, support an inclusive bar that represents the diversity of our state, including ensuring protections for individuals with mental health disabilities. We applaud the Washington State Bar Association's ("WSBA") leadership in submitting the proposal and urge the Washington State Supreme Court to take the recommended actions to revise the rules and remove bar application questions that target applicants who have sought mental health treatment.

We support these amendments because both the Washington Law Against Discrimination and the Americans with Disabilities Act make clear that we cannot treat people with disabilities differently based on assumptions or bias. Instead, amending the application and rules to ask about an applicant's conduct rather than disability status sends a critical message that the legal profession upholds the law in its own application process. These amendments come in response to strong and broad based calls for action.

In June 2014, Disability Rights Washington ("DRW") interviewed national and local disability rights experts and presented the resulting video to educate the public about the current bar application process that target applicants who sought treatment. The response was overwhelming. On July 15, 2014, DRW sent a letter to WSBA that was signed by the deans of all three law schools as well as over a hundred law firms, agencies, attorneys, and advocates. See enclosure. Similarly, Attorney General Robert Ferguson and the ACLU of Washington sent their own letters. See enclosures. Cumulatively, these letters cited to both state and federal law and recent Department of Justice enforcement in other states who had similar questions. Together, we asked WSBA to eliminate all discriminatory questions and instead focus on conduct or the applicant's ability to practice law in a competent and professional manner. In August 2014, WSBA convened a workgroup to review the rules and application. After a thorough and extensive review, including a review of states who focus on conduct rather than disability status, the group reached consensus. We agreed that WSBA defining an applicant's character and fitness based on health diagnosis is wrong and instead the focus should be on whether the applicant has the essential eligibility requirements based on their actual conduct. On May 14, 2015, the WSBA Board of Governors submitted the agreed upon proposal for your review.

Please adopt the proposed revisions. The revisions reveal that the bar is accepting of people with mental illness, whether they be lawyers or our clients.

Enclosures: DRW Bar Association Letter, ACLU Bar Association Letter, Attorney General Letter

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Washington State Law Schools:

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Seattle University School of Law

Jane Korn, Dean
Gonzaga University School of Law

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Disability Rights Washington

Toby Olson
Governor's Committee on Disability Issues and Employment

Conrad Reynoldson
Washington Attorneys with Disabilities Association

Kathleen Flattery
Connecticut Legal Rights Project, Inc.

Jennifer Shaw
American Civil Liberties Union of Washington

James Bamberger, Director
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Center for Independent Living

Robert Blumenfeld
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Trisha Wolf WSBA No. 48118	Eli Jacobson WSBA No. 49883	Laura Martin WSBA No. 32897
Rachel Berry WSBA No. 45258	Cherann Porter WSBA No. 41900	Jennifer McAuliffe WSBA No. 39587
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ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

September 9, 2014

Members of the Board of Governors
Paula Littlewood, Executive Director
Jean McElroy, General Counsel
Washington State Bar Association
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539

Dear Members of the Board of Governors, Ms. Littlewood and Ms. McElroy:

I write to support the WSBA's review of any barriers to the admission of qualified candidates who have, or may have, a disability.

I applaud the WSBA's longstanding commitment to diversity and inclusion in the legal profession. I also appreciate the vital work the WSBA does to protect the public by determining whether individuals possess the necessary qualifications to enter the legal profession.

I am aware of concerns raised by Disability Rights Washington and others that the current bar admission questionnaire asks candidates questions about mental health counseling and treatment. I am pleased that you have established a working group to examine this issue. As Attorney General, authorized by law to enforce civil rights laws, and as a leader in our honorable profession, I take a keen interest in this question.

As you know, the Washington Law Against Discrimination prohibits discrimination based on the "presence of any sensory, mental, or physical disability." RCW 49.60.010. Similarly, the Americans with Disabilities Act prohibits state and local governments from denying qualified persons with disabilities the benefit of government services because of a disability. 42 U.S.C. § 12132. Legal requirements aside, I feel strongly that our profession is made stronger and richer by allowing all qualified individuals to gain admission to the bar.

Accordingly, I encourage you to eliminate any requirements that may directly or indirectly discriminate against qualified individuals because of a physical or mental disability. Further, I encourage the WSBA to follow the lead of the U.S. Department of Justice and other state bars that judge candidates for bar admission on their conduct rather than their status in a protected class.

Thank you for your consideration.

Sincerely,

BOB FERGUSON
Attorney General

RWF/jlg

JENNIFER SHAW
DEPUTY DIRECTOR

July 15, 2014

VIA ELECTRONIC MAIL

Ms. Paula Littlewood
Executive Director
And Members of the Board of Governors
Washington State Bar Association
1325 Fourth Avenue, Ste. 600
Seattle, WA 98101-2539

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LIBERTIES UNION
OF WASHINGTON
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WWW.ACLU-WA.ORG

JEAN ROBINSON
BOARD PRESIDENT

KATHLEEN TAYLOR
EXECUTIVE DIRECTOR

Re: Mental health disability discrimination in questions 24 and 25 of the Washington state bar exam

Dear Ms. Littlewood,

The American Civil Liberties Union of Washington (ACLU-WA) appreciates the opportunity to comment on the Washington State Bar Association's (WSBA) bar exam application. The ACLU-WA is a statewide, non-partisan, non-profit, organization with over 20,000 members, dedicated to the preservation and defense of civil liberties.

The WSBA has an important role in protecting the public and our system of justice by determining whether applicants to the Washington state bar are fit to practice law. However, questions 24 and 25 of the "character and fitness" section of the Washington State Bar exam application do not further this goal. An applicant's response to these questions may subject that applicant to unnecessary intrusions based on his or her status as an individual with a mental health disability. As a result, these questions violate the Americans with Disabilities Act (ADA) and the Washington Law Against Discrimination (WLAD). We strongly urge the WSBA to remove questions 24 and 25 from the bar exam application.

Questions 24 and 25 are directed toward applicants who currently have or previously had mental health disabilities. In answering the questions, an applicant is required to state whether in the past two years they have experienced, been diagnosed with or undergone treatment for a mental health condition or impairment, which "substantially impairs your ability to practice law in a competent and professional manner." *See* Question 24(A); *accord* Question 25 (defining fitness to practice law as the absence of "any current mental impairment ... which, if extant, would

substantially impair the ability of the applicant, bar association member, or petitioner to practice law"). Qualified applicants with psychiatric disabilities are put in a no-win situation. An applicant may answer, "No," reasoning that the condition is controlled and does not substantially impair his or her ability to practice law. But that answer may subject the applicant to an allegation of lack of condor, particularly given the content of question 24(B), which asks about ameliorating treatments. An applicant that answers, "Yes," is subject to a WSBA investigation into the details of the applicant's disability. These targeted applicants are then required to provide private information about past conduct, medical records and detailed information about their diagnosis, treatment and prognosis in order to gain admission to the bar.

Both state and federal law prohibit the use of criteria that screen out or tend to screen out applicants based on their status as an individual with a disability. The United States Department of Justice (DOJ) recently issued two opinion letters regarding the use of similar applicant screening questions by the bar associations in Louisiana and Vermont. In those letters, the DOJ concluded that "Title II [of the ADA] prohibits eligibility criteria that screen out or tend to screen out people with disabilities 'unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.'" 28 C.F.R. § 35.130(b)(8).[1] Similar to question 24 on the Washington state bar exam application, the National Conference of Bar Examiners (NCBE) report, required for bar applicants in both Louisiana and Vermont, screens out applicants on the basis of an applicant's "condition or impairment" that could affect his or her "ability to practice law in a competent and professional manner."[2] The DOJ determined that these inquiries were not necessary to making the determination of whether an applicant was fit to practice law because they do not effectively identify unfit attorney applicants. The DOJ also determined that alternative, non-discriminatory methods for effectively identifying unfit attorney applicants exist, such as utilizing conduct based inquiries.[3]

Subjecting applicants to further investigation based on their status as individuals with a mental health disability also violates the WLAD. RCW 49.60.010 declares that the purpose of the WLAD is to prohibit practices of discrimination against any of its inhabitants based upon "any sensory, mental, or physical disability" because such discrimination "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free and democratic state." Furthermore, RCW 49.60.030 declares the civil right to "the full enjoyment of any accommodation, advantages, facilities, or privileges of any place of public resort,

[1] Letter from Jocelyn Samuels, Assistant Attorney General, U.S. Dep't of Justice, to The Honorable Bernette J. Johnson, Chief Justice, La. Sup. Ct. at 18 (Feb. 5, 2014).
[2] *Id.* at 5.
[3] *Id.* at 19.

accommodation, assemblage, or amusement" free from discrimination based upon "any sensory, mental, or physical disability."

Broad inquiries into mental health disabilities and treatment are also inappropriate on privacy grounds. The vague and potentially confusing wording of questions 24 and 25 may result in applicants divulging to the WSBA excessive amounts of sensitive, personal information about his or her mental health history and treatment. Since the preamble to questions 24 and 25 admonishes applicants that they may be denied licensure for "lack of candor" in their responses,[4] applicants may feel compelled to provide information that is well beyond what is necessary for the WSBA to make its fitness determination. Furthermore, without clear guidance on what might "substantially impair" an applicant's ability to practice law, bar applicants cannot be certain as to what information the WSBA is seeking.[5] Therefore, applicants may provide information well beyond what is needed for WSBA to make a reasonable determination of an applicant's fitness to practice law under the belief that a violation of their privacy interests is less burdensome than the prospect of being denied admission into the bar for "lack of candor."

The WSBA has an interest in protecting the public by only admitting applicants who are fit to practice law. However, the WSBA must comply with both state and federal laws and avoid discriminatory practice while working to achieve this goal. The ADA and WLAD require the WSBA to refrain from using methods such as status-based inquiries that discriminate against those with mental health disabilities. Because questions 24 and 25 subject applicants to additional burdens based on their status as an individual with a mental health disability, we urge the WSBA to remove questions 24 and 25 from the bar exam application.

We look forward to your swift action on this important matter.

Sincerely,

Jennifer Shaw
Deputy Director

Cc: Board of Governors

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[4] *Application For the Washington State Bar Examination*, Washington State Bar Association, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Admissions/Application-and-Exam-Information (last visited July 10, 2014).
[5] *Id.*

Disability Rights
WASHINGTON
Washington's protection and advocacy system

July 15, 2014

Sent Via Electronic Mail Attachment

Paula Littlewood
Executive Director
Washington State Bar Association
1325 4th Ave #600
Seattle, WA 98101
paulal@wsba.org

Dear Ms. Littlewood,

We, the undersigned, support an inclusive bar that represents the diversity of our state, including diversity regarding individuals with mental, physical, and sensory disabilities. For this reason, we urge the Washington State Bar Association (WSBA) to take action to address discriminatory inquiries into applicants with mental health issues. Specifically, we respectfully request WSBA take the following steps:

1. Tailor Questions 24 and 25 to remove any inquiry into an applicant's mental health disability;
2. Remove Form 8 that requires applicants to share protected health information regarding accessing mental health treatment;
3. Amend Admission to Practice Rule (APR) 22(a) by striking the definition of fitness to include "the absence of any current mental impairment";
4. Amend APR 24.2 by striking 24.2(a)(10) and 24.2(d) in their entireties, and inserting in 24.2(e) all protected classes referenced in the Washington Law Against Discrimination in the explicit list of factors that will not be considered, including the addition of mental disability, as well as the additional protected statuses of sensory disability, whether an individual has a child, and honorable military discharge status.

Our support is based on the basic fact that there is absolutely nothing inherently wrong with a person's character and fitness to practice law simply because he or she has a mental health disability. The bar association should focus its attention on facts, not stereotypes, by asking about actual conduct, not mental health treatment history. Both state and federal governments have recognized that relying on stereotypes is wrong and have made it illegal to treat people differently based on their disability status alone.

The Washington Law Against Discrimination's (WLAD) purpose is to prohibit discrimination in Washington based on "the presence of any sensory, mental, or physical disability" as such discrimination of protected classes "threatens not only the rights and proper privileges of [the state's] inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. WLAD goes on to provide individuals with mental health issues with the civil right "to the full enjoyment of any accommodations, advantages, facilities, or privileges

of any place of public resort, accommodation, assemblage, or amusement." RCW 49.60.030. Further, Washington provides greater privacy protection to Washington residents then the federal standard and mandates. Const. Art. 1, § 7; *see, e.g., State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73, 78 (1999) (stating "it is now axiomatic that article I, section 7 provides greater protection to an individual's right to privacy than that guaranteed by the Fourth Amendment [of the US Constitution]."); *see also* RCW 18.83.110.

Our support is also consistent with the Americans with Disabilities Act (ADA) and the recent guidance from the Department of Justice (DOJ) stating that evaluating applicants based on their mental health status alone discriminates against individuals on the basis of disability. As noted in the DOJ letters, singling out applicants with mental health conditions violates Title II of the ADA, which provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. A "qualified individual" is "one who, with or without reasonable modifications . . . , meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Pursuant to the regulations implementing Title II, , "a public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(6). Recently, in response to the DOJ guidance, several states (including Tennessee and California) no longer ask questions about the mental health diagnosis and treatment of individuals seeking to practice law.

As a matter of state and federal law, it is inappropriate to use mental health diagnosis or treatment, without more, as a basis for concern about an applicant's character and fitness to practice law. Such an approach reflects the very prejudices and stereotypes that the WLAD and ADA prohibit and are designed to eliminate. Instead, as the DOJ suggests, the WSBA admission process should focus on an applicant's conduct and capabilities to practice law, not on an applicant's status alone. If the applicant has passed the bar exam and past conduct provides no basis for concern, there is no legitimate reason to inquire into the applicant's mental health condition or treatment.

WSBA has a legitimate interest in assuring the character and fitness of its members. However, WSBA's goal of protecting the public against unfit practitioners and preserving the integrity of the profession is served by targeting questions to a person's conduct rather than protected status. Several states including Illinois and Pennsylvania have bar applications that do not ask a single question regarding mental illness nor any information regarding membership in any protected class. Instead, the inquiries focus on conduct. The approach that Washington has taken fails to sufficiently address the protections afforded under the WLAD and ADA as well as the well-established fact that a mental health condition or history of treatment does not in itself preclude an individual from a successful and responsible life as an attorney.

There are many exceptional members of the bar who have a mental illness. None of them should have to experience such unfair treatment. Bar applicants have expressed that these inquiries into their mental health history are traumatizing and invasive of their privacy. Additionally, such inquiries deter aspiring attorneys from seeking treatment for mental health conditions for fear of

possible exclusion from the bar. It is perverse to incentivize forgoing treatment in order to avoid scrutiny into a person's character and fitness and ultimately chills applicants from seeking treatment they need. These individuals have sought treatment and actively managed their conditions. It is tragic and wrong to admit a person into the competitive environment of a law school, have them succeed, and then subject them to screening, an invasive process, and possible exclusion on the basis of prior diagnosis and treatment alone.

Mental health inquiries compromise the profession. There is a great disparity between the number of people with mental illness in our society compared to our legal profession as evidenced by federal statistics showing over 20% of Washingtonians have a mental illness and the 2012 WSBA Membership Study which indicates that only 1.3 % of responding lawyers identified as having a mental illness. It is conceivable that WSBA's examination of mental illness as a character and fitness issue chills applicants with mental illnesses from pursuing a legal career or promotes an environment that is hostile to practicing attorneys publicly identifying their mental health status.

The WSBA's Membership Study findings also include that disability status is the second highest factor leading to attorneys experiencing professional barriers. Notably, this population ranks the highest in overall intensity regarding "social" barriers or incidents when attorneys with disabilities widely reported being treated differently or excluded due to being a person with a disability. The WSBA's study concludes with the following recommendation, "These results [regarding the frequency and intensity of barriers for attorneys with disabilities] are troubling and further targeted study will be needed to ascertain fully the sources and causes of barriers to the legal profession for this group and to identify steps to reduce the incidence." We agree with this recommendation and urge WSBA to respond to these documented disability barriers to the legal profession by addressing the barrier it has placed at the front door. There is no more concrete barrier in this profession than impeding the ability to actually apply and become a member of WSBA. Also, this barrier at admission signals to those practicing law and those seeking legal representation that having a mental health disability causes the legal system to look at them with suspicion.

WSBA is in a position to become a leader in removing barriers attorneys with mental illness face in the legal profession. Ending the unfair practice of singling out applicants with mental health issues will enrich the diversity of the legal profession in Washington State and signal to practicing attorneys with disabilities to come out of the closet. Amending the application and rule will be a big step in expressing to the bar and the general public that our profession is accepting of people with mental illness, whether they be lawyers or our clients.

Accordingly, we join Disability Rights Washington, the Washington Attorneys with Disabilities Association, and the Governor's Committee on Disability Issues and Employment in their request for the Washington State Bar Association to:

1. Tailor Questions 24 and 25 to remove any inquiry into an applicant's mental health disability;
2. Remove Form 8 that requires applicants to share protected health information regarding accessing mental health treatment;

3. Amend Admission to Practice Rule (APR) 22(a) by striking the definition of fitness to include "the absence of any current mental impairment";
4. Amend APR 24.2 by striking 24.2(a)(10) and 24.2(d) in their entireties, and inserting in 24.2(e) all protected classes referenced in the Washington Law Against Discrimination in the explicit list of factors that will not be considered, including the addition of mental disability, as well as the additional protected statuses of sensory disability, whether an individual has a child, and honorable military discharge status.

We look forward to WSBA's swift action in this matter.

If you have any questions or concerns about this letter, please contact Emily Cooper at Disability Rights Washington at 206-324-1521. Thank you.

Sincerely,

Washington State Law Schools:

Annette Clark, Dean
Seattle University School of Law

Kellye Testy, Dean
University of Washington School of Law

Jane Korn, Dean
Gonzaga University School of Law

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Disability Rights Washington

Karla Zabel
BRIDGES Mental Health Ombudsman

Stuart Pixley and Noel Nightingale, Co-Chairs
Washington Association of Attorneys with Disabilities

Michaelene Manion
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Toby Olson, Executive Secretary
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James Bamberger, Director
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