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April 30, 2019

Larry Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2016-46 – Special Administrative Inquiry Regarding Questions Relating to Mental Health on the Michigan Bar Examination Application

Dear Clerk Royster:

At its April 12, 2019 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the issues proposed in the above-referenced special inquiry. As part of its review, the Board considered recommendations from the Character & Fitness Committee, Lawyers & Judges Assistance Committee, Young Lawyers Section, and Elder & Disability Rights Section.

After this review, the Board voted unanimously, with one abstention, to replace Questions 54a and 54b on the current Affidavit of Personal History with the National Conference of Bar Examiner’s (NCBE) questions 29 and 31,¹ but expand the scope of time in Question 31 from 5 years to 10 years. The NCBE questions are more objective and better balance the need to protect the public and regulate the legal profession with the applicant’s privacy rights than the questions currently on the Affidavit of Personal History.

Pursuant to MCL 600.934, the Board of Law Examiners (BLE) must determine, among other things, whether an applicant to the State Bar of Michigan (SBM) has the “fitness and ability to enable him or her to practice law.” The current mental health questions focus on whether an applicant has ever received or refused treatment or counseling for a “mental, emotional, or nervous condition” that impairs an applicant’s ability to practice law. While these questions were intended to help determine whether an applicant is mentally and emotionally capable to handle the demands of legal work, they are flawed for a number of reasons.

First, the focus on treatment and counseling deters law students and other future applicants from seeking mental health treatment. The 2014 Survey of Law Student Well-Being found that “a significant percentage” of students experienced mental health issues, including substance abuse; however, “[l]aw students were reluctant to seek the help they need due to the misperception that it may cause them difficulties with bar admission or may be a potential threat to job or academic status.”² Indeed, when the SBM Lawyers & Judges Assistance Program (LJAP) presents to law schools, students often express anxiety and ask questions

¹ The question numbering is based on the sample NCBE Character & Fitness application, available at <http://www.ncbex.org/dmsdocument/134>.

² Coyle, J.C., *The Report of the National Task Force on Lawyer Well-Being and the Role of the Bar Admissions Community in the Lawyer Well-Being Movement*, The Bar Examiner, at 9 (Summer 2018).

concerning how mental health issues will impact their Character & Fitness application. Based on LJAP's experience, the anxiety motivates students with a latent or diagnosed mental health condition in one of two ways:

1. Some concerned law students request assessment by LJAP in order to demonstrate to the BLE that they are addressing a condition that may be of concern. Where appropriate, students will enter into monitoring agreements.
2. Other law students avoid LJAP and other mental health professionals, concerned that any interaction with mental health professionals will subject their application to heightened scrutiny during the Character & Fitness review process.

Second, the current questions only uncover mental health treatment and counseling and do not extend to undiagnosed and untreated mental health conditions. An applicant suffering from a serious mental health condition but who has never sought treatment would be able to honestly answer "no" to the mental health questions, whereas, an applicant who has sought treatment would be required to answer "yes" and become subject to greater scrutiny through the Character & Fitness review process.

Third, to the extent that question 54b is not subsumed by question 54a, the former is even more problematic because it asks applicants whether their condition *may* interfere with the competent practice of law. This question presents applicants with the speculative task of trying to predict how their current mental health condition could potentially affect their conduct in the future.

To improve the mental health questions on the Affidavit of Personal History, the Board recommends that the BLE follow the guidance provided by the Louisiana Bar settlement; in determining an applicant's character and fitness to practice law, the BLE should:

Refrain from inquiring into mental health diagnosis or treatment, unless (1) an applicant **voluntarily discloses this information to explain conduct or behavior that may otherwise warrant denial of admission . . . [or]** (2) the Committee learns from a third-party source that the applicant **raised a mental health diagnosis or treatment as an explanation for conduct or behavior that may otherwise warrant denial of admission.** [Emphasis added.]

By focusing on conduct rather than diagnosis, treatment, or counseling, the NCBE questions 29 and 31 better balance the responsibility of assessing applicants' fitness to practice law and applicants' privacy rights.

NCBE Question 29 provides:

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?

NCBE Question 31 provides:

Within the past five years, have you ever asserted any condition or impairment as a defense, in mitigation, or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority, or in connection with an employment disciplinary or termination proceeding?

The Board, however, recommends that the time frame for Question 31 be extended from 5 years to 10 years. Given that some unmanaged mental health conditions are cyclical in nature, extending the time frame will allow the BLE to better assess patterns of concerning conduct, which may suggest that mental health concerns have not been adequately managed over a period of time. Conversely, this would also allow the BLE to better assess whether a condition was situational and non-recurring.

The Board was unable to identify any social science research indicating the effectiveness of the NCBE questions in determining applicants' prospective ability to practice law. To better understand the effectiveness of the NCBE questions, the Board recommends that the Court maintain and monitor data for 5 years and after that time assess what impact, if any, the NCBE questions have on prospectively assessing applicants' fitness to practice law.

Finally, the Court and the BLE should consider the potential benefits of requiring the use of an independent health professional, when appropriate, to help ensure that mental health information is being properly handled and considered.

We thank the Court for the opportunity to convey the Board's position on this special administrative inquiry.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President, State Bar of Michigan