IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-850

IN RE: AMENDMENTS TO THE RULES
OF THE SUPREME COURT RELATING TO
ADMISSIONS TO THE BAR - RULES 2-13.1
AND 3-11
_____/

RESPONSE TO AMENDMENTS TO RULE 3-11

COMES NOW, Disability Rights Florida and Disability Independence Group, Inc. (hereinafter Commenters) and respectfully requests this Court allow these interested parties to file a comment suggesting amendments to Rule 3-11.

On June 10, 2020, Florida Bar member James T. Almon, on behalf of the Florida Board of Bar Examiners (the board), filed a petition to request that this Court amend sections (j) and (k) of Rule 3-11, and Rule 2-13.1, as authorized by Rule 1-12.1, Rules Regulating the Florida Bar.

These interested persons have concerns with sections (j) and (k) of Rule 3-11 in both its current version and the board's proposed amended version, and the impact that this rule and any amendments will have on applicants to the Florida Bar with disabilities.

The window for comments on the petition ends on August 31, 2020.

These comments have been timely filed within the window for comments as allowed by this Court.

Comments

The Petition to Amend Rules 2-13.1 and 3-11 of the Rules of The Supreme Court Relating to Admissions to the Bar (Petition) filed on June 10, 2020, proposes an amendment to sections (j) and (k) of Rule 3-11 to replace the outdated terminology pertaining to "mental or emotional stability" and "drug or alcohol dependency" to reflect current medical terminology. Petition p. 2. The amendment would also add the phrase "that may impair the practice of law" to sections (j) and (k) of Rule 3-11 to "reinforce that the board's investigative focus is on conduct that

may relate to the eligibility requirements for practicing law[.]" *Id* at 10. The board's stated purpose in amending Rule 3-11(j) and (k) is to remain "consistent with the board's investigative approach and the purpose for adopting the rule, which was to 'better advise applicants' about what information could require further investigation." *Id*.

These Commenters agree that amendments to Rule 3-11(j) and (k) are necessary to further eliminate the stigma attached to mental illness and past history of drug or alcohol addiction. However, these changes do not accomplish these goals, and do not conform the rule to the requirements of the Americans with Disabilities Act and current best practices from the American Bar Association. The Board's proposed changes to the rule do not focus on disqualifying conduct as a result of a mental illness and past history of drug or alcohol addiction; rather, the proposed changes only update medical terminology and continue to uphold structural barriers that prevent otherwise qualified persons from becoming lawyers simply because of the past or current existence of a disability. In fact, over twelve states that have updated the language from the prior language, which was universally adopted from the National Board of Bar Examiners (NBBE), have conditioned that otherwise disqualifying *conduct* must be at issue when evaluating evidence of a mental disorder or substance abuse.

The language proposed by the Commenters limit the disqualifying actions and investigations of such actions into disqualifying conduct as a result of a disability, and not solely the existence, nature or extent of a disability. The proposed language is as follows:

> **3-11 Disqualifying Conduct.** A record manifesting a lack of honesty, trustworthiness, diligence, or reliability of an applicant or registrant may constitute a basis for denial of admission. The revelation or discovery of any of the following may be cause for further inquiry before the board recommends whether the applicant or registrant possesses the character and fitness to practice law:
>
> **…**
>
> **j.** evidence of ~~mental or emotional instability~~ <u>conduct indicating a mental disorder that may impair the ability to practice law</u>;

k. evidence of ~~drug or alcohol dependency~~ conduct indicating a current substance use disorder that may impair the ability to practice law;

Background of the Commenter's proposed Rule 3-11

In 1987, the National Board of Bar Examiners (NBBE) adopted the moral character and fitness standard of their model code. The Florida Supreme Court adopted these rules based on the fact that such standards were set forth in the NBBE Code and in response to criticism to the Board of Bar Examiners that insufficient guidance is given to applicants as to the standards of admission to the Florida Bar. *Florida Bd. of Bar Examiners Re: Amendment to Rules of Supreme Court Relating to Admissions to the Bar,* 578 So. 2d 704, 707 (Fla. 1991). Until the adoption of the NBBE provisions, the character and fitness requirements required production of satisfactory evidence to demonstrate "good moral character and an adequate knowledge of the standards and ideals of the profession." *Id*. Good moral character was not restricted to acts that reflect moral turpitude, but also included acts or conduct "which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and nation." F*lorida Bd. of Bar Examiners v. G. W. L*., 364 So. 2d 454, 458 (Fla. 1978). However, the NBBE provisions, as adopted, did not address acts or conduct that violate law or ethical standards, but was intentionally nebulous and stated - "evidence of mental or emotional instability" or "evidence of drug or alcohol dependency."

It has been noted that the "most nebulous basis for denying admission on moral character grounds is that the applicant's personality is unfit for the practice of law due to mental or emotional instability." Michael K. McChrystal, A STRUCTURAL ANALYSIS OF THE GOOD MORAL CHARACTER REQUIREMENT FOR BAR ADMISSION, 60 Notre Dame L. Rev. 67, 96 (1984). In the 19th Century, the lack of emotional stability was used as a basis to deny women the right to practice law:

> The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. ... The peculiar qualities of womanhood, its gentle graces, its quick

> sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battlefield. Womanhood is moulded [sic] for gentler and better things.

In re Goodell, 39 Wis. 232, 245, 20 A.R. 42, 46-47 (1875). Furthermore, in the not so distant past, it was questioned whether a man's sexual orientation had any relation to moral unfitness to be an attorney. *In re Florida Bd. of Bar Examiners (In re Eimers)*, 358 So. 2d 7 (Fla. 1978)("The present record contains no evidence scientific, medical, pathological or otherwise suggesting homosexual behavior among consenting adults is so indicative of character baseness as to warrant a condemnation per se of a participant's ability ever to live up to and perform other societal duties, including professional duties and responsibilities assigned to members of The Bar.").

However, the Florida Board of Bar Examiners have traditionally questioned and requested information relating to mental or emotional instability prior to and following the amendment to the rule. For example, in 1982, the application required the applicant to disclose, "Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder?", and if the answer was yes, the applicant was required to agree to disclose names and records of all such treating professionals. *Florida Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 71, 73 (Fla. 1983). At that time, the Court found that such an inquiry was appropriate as there was a "legitimate state interest since mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public. The pressures placed on an attorney are enormous and his mental and emotional stability should be at such a level that he is able to handle his responsibilities." *Id* at 75.

Effect of the Americans with Disabilities Act on the Scope of the Inquiry into Mental Disabilities or Substance Abuse

In 1990, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq*. was enacted to prohibit societal exclusion or discrimination against persons with disabilities "as a result of presumptions, generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies." 135 Cong.Rec.S4979-02, S4984 (daily ed. May 9, 1989) (Statement of Sen. Harkin).

Under the ADA, adverse licensing decisions may not be made without a demonstration that a purported risk to the public is both substantial and likely, given objective and current medical information and testing, and is not speculative, invalid or unreliable over time, or remote. Speculative harms are not sufficient to create, deny or place eligibility bars for a program or service offered by a covered entity on the basis of disability. See *Bragdon v. Abbott*, 524 U.S.624 (1998); See *Waddell v. Valley Forge Dental Associates, Inc*., 276 F.3d 1275,1280(11th Cir.2001) (adopting a four-factor test to determine if a risk was significant).

Accordingly, to ensure that prior to denying or limiting a professional license, a governmental entity must make an individual assessment to ensure that any perceived risk due to a disability is substantial and related to the practice of that profession. Accordingly, when these broad requests into a bar applicant's mental history were challenged, they were found to be subject to the requirements of the ADA. *Ellen S. v. Florida Bd. of Bar Examiners*, 859 F. Supp. 1489, 1493 (S.D. Fla. 1994).

In 2014, the Department of Justice entered into a consent agreement with the Supreme Court of Louisiana relating to their use of mental health status-based questions and their practice of requiring conditional admission for applicants with specific mental health or substance use diagnoses without any overt indication of troublesome conduct on the part of the applicants constituted a violation of the provisions of the Americans with Disabilities Act.[1] The settlement agreement with the Louisiana Supreme Court on August 15, 2014 mandated that the Court "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. Any such inquiry shall be narrowly, reasonably, and individually tailored."[2]

Since the Louisiana settlement, other jurisdictions have entirely moved away from disability-related inquiries to inquiries related to the underlying behavior. In 2015, the American Bar Association adopted a resolution (ABA Resolution 102, Aug. 3-4, 2015), to "eliminate questions that ask about mental health history,

[1] https://www.ada.gov/louisiana-bar-lof.pdf.
[2] https://www.ada.gov/louisiana-supreme-court_sa.htm

diagnoses, or treatment and instead use questions that focus on conduct or behavior that impairs an applicant's ability to practice law in a competent, ethical, and professional manner."

A survey of all fifty states demonstrate that twenty-five (25) have not updated the outdated language and either continue to apply the NCBE standard disqualification language or the NCBE conducts the character and fitness evaluation for such states of the applicants under the NCBE standard.[3] Seven

[3] States that either adopt the NCBE standards or NCBE conducts the character and fitness evaluation of the applicants under the NCBE standard: **Alabama** (Alabama, NCBE, https://www.ncbex.org/character-and-fitness/jurisdiction/al, last accessed Aug. 12, 2020), **Alaska** (AK R BAR Rule 2 (2014)), **Delaware** (Board of Bar Examiners of the Supreme Court of Delaware, Character and Fitness Guidelines, Delaware Courts, https://courts.delaware.gov/forms/download.aspx?id=119008), **Georgia** (Policy Statement of the Board to Determine Fitness of Bar Applicants Regarding Character and Fitness Reviews, Supreme Ct. of GA Office of Bar Admis., 4-5, May 2015, https://www.gabaradmissions.org/policy-statement), **Hawaii** (Hawaii, NCBE, https://www.ncbex.org/character-and-fitness/jurisdiction/hi, last accessed Aug. 12, 2020), **Indiana** (IN ST ADMIS AND DISC Rule 12 Sec. 2), **Louisiana** (LA ST S CT Rule 17 Sec. 5 (2020)), **Massachusetts** (MA R S CT R 3:01 BAR EX RULE V (2020)), **Mississippi** (MS R ADMIS Rule 8 § 6 (1991)), **Montana** (MT R CTTEE CHAR AND FIT § 4 (2016)), **Nebraska** (NE R CT § 3-116 (G) (2020)), **Nevada** (NV ST S CT Rule 51 (2016); Rules Regulating Admission to the Practice of Law, Supreme Ct of NV, 49-51, 2016, https://www.nvbar.org/wp-content/uploads/2016%20Supreme%20Court%20Rules%20Regulating%20Admission_2.pdf), **New Hampshire** (NH R S CT 42B (2016)), **North Carolina** (Character and Fitness Guidelines, Bd. of Law Exm'rs of the St. of NC, 1-2, https://www.ncble.org/character-and-fitness-guidelines), **North Dakota** (ND R ADMIS Rule 2 (B) (2016)), **Ohio** (OH ST GOVT BAR Rule 1 Sec. 13 (2020)), **Oklahoma** (Oklahoma, NCBE, https://www.ncbex.org/character-and-fitness/jurisdiction/ok, last accessed Aug. 12, 2020), **Pennsylvania** (What are examples of conduct that would be of concern to the board?, PA. Bd. of Law Exm'rs, https://www.pabarexam.org/c_and_f/cffaqs/20.htm, last accessed Aug. 12, 2020), **South Carolina** (SC R A CT PT 4 App. B Sec. 6 (2020)), **South Dakota** (SD ST § 16-16-2.3 (1990)), **Tennessee** (Tennessee, NCBE, https://www.ncbex.org/character-and-fitness/jurisdiction/tn, Last accessed Aug. 12, 2020), **Utah** (UT R SUP CT Rule 15-708 (2018)), **Vermont** (Vermont, NCBE,

states do not incorporate any standards that specify mental health and substance abuse.[4] Five states have hybrid rules.[5] However, when updating their requirements, thirteen states included a requirement for disqualifying conduct that would evidence a mental disorder or substance abuse disorder.[6]

---

https://www.ncbex.org/character-and-fitness/jurisdiction/vt, Last accessed Aug. 12, 2020), **Washington** (Washington, NCBE, https://www.ncbex.org/character-and-fitness/jurisdiction/wa, Last accessed Aug. 12, 2020), and **West Virginia** (West Virginia, NCBE, https://www.ncbex.org/character-and-fitness/jurisdiction/wv, Last accessed Aug. 12, 2020).

[4] **Iowa** (IA R 31.9 (2018)), **Maine** (ME R ADMIS Rule 9 (2012)), **Maryland** (MD R ATTORNEYS Rule 19-204 (2019)), **Missouri** (MO Bd. of Law Exm'rs Character and Fitness Info., MO Bd. of Law Exm'rs, 4, https://www.mble.org/getpdfform.action?id=2352), **New York** (NY R A CT § 520.12 (2020)), **Rhode Island** (RI R S CT ART II ADMIS Rule 4 (2018)), **Virginia** (Rules, VA Bd. of Bar Exm'rs, 2-3, April 2020, https://barexam.virginia.gov/pdf/VBBERules.pdf).

[5] **California** (Bus. & Prof. Code § 6060 (2020)), **Idaho** (ID R BAR COMM Rule 210 (2019)), **New Jersey** (Regulations Governing the Committee on Character, St. of NJ Comm. On Character, RG 302:1, https://www.njbarexams.org/getpdfform.action?id=203), **Oregon** (Supreme Ct. of the St. of OR., Rules for Admission of Attorneys, OR. St. Bd. of Bar Exm'rs, 1.30, Nov. 2019, https://www.osbar.org/_docs/rulesregs/admissions.pdf)(only mentions conduct and substance abuse, and not mental illness), and **Texas** (Board of Bar Examiners Guidelines for Determining Character and Fitness and Overseeing Probationary License Holders, Bd. of Law Exm'rs, 2, https://ble.texas.gov/guidelines-for-determining-c&f-and-overseeing-pls)

[6] **Arizona** (A.R.S. Sup.Ct.Rules, Rule 34 (b) (2020)), **Arkansas** (AR R ADMIS Reg. 8 (2020)), **Colorado** (CO ST RCP Rule 208.1 (2014)), **Connecticut** (Regulations of the Connecticut Bar Examining Committee Art. VI-4, 9, 11 (2020)), **Illinois** (IL R BAR ADMIS Rule 6.4 (2007)), **Kansas** (KS R ADMIS Rule 707 (2020)), **Kentucky** (KY ST S CT RULE 1.130 (2020)), **Michigan** (Rules, Statutes, and Policy Statements, MI Supreme Ct. Bd. of Bar Exm'rs, December 2019, 1-4, https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/BLERulesStatutesPolicyStatementsDecember2019.pdf), **Minnesota** (MN ST ADMIS

On July 30, 2019, California enacted a new law which prohibited the State Bar from reviewing or considering the person's medical records relating to mental health unless the applicant proactively uses the records to demonstrate good moral character, or as a mitigating factor to explain a specific act of misconduct. SB 544, Calif. Senate Bill (2019). The rationale and analysis for the statute focused on the deterrent effect that such inquiry has in the decision to obtain mental health services. In addition, as further support of the California bill, the analysis notes that Virginia, Washington and Louisiana have entirely ended the practice of inquiring about an applicant's mental health diagnosis and treatment, rather than conduct and performance. The importance of this change is to recognize that rules which are overbroad or stigmatize mental health issues or substance abuse serve to dissuade current and future members of the Florida Bar from seeking mental health or substance abuse assistance.

The Florida Board of Bar Examiners and Application to the Disqualification Standards

Primarily, there are **no** cases decided by the Florida Supreme Court that have denied admission to an applicant solely based upon "mental or emotional instability," or even imposed discipline, without other independently disqualifying conduct. See *Florida Bar v. Hartman*, 519 So. 2d 606 (Fla. 1988)(imposing discipline for misuse of client funds during short period of emotional instability); *Florida Bar v. Worthington*, 276 So. 2d 39, 39 (Fla. 1973)(determination of mental incompetency); *Florida Bar v. Horowitz*, 697 So. 2d 78 (Fla. 1997) (clinical depression did not sufficiently mitigate his pattern of neglecting clients); see also *Validity and application of regulation requiring suspension or disbarment of attorney because of mental or emotional illness*, 50 A.L.R.3d 1259. Similarly, with regards to "evidence of drug or alcohol dependency," there are no cases decided by the Florida Supreme Court that have denied admission to an applicant based solely on "evidence of drug or alcohol dependency," or even imposed discipline without otherwise disqualifying conduct, See *Florida Bar v. Price*, 632 So. 2d 69, 69–70 (Fla. 1994)(active drug or alcohol abuse leading to failing to act with reasonable diligence and promptness in representing a client and engaging in conduct intended to disrupt a tribunal); *Florida Bar ex rel. Hochman*, 944 So. 2d 198, 199 (Fla.

BAR Rule 5 (B) (3) (2016)), **New Mexico** (NM R ADMIS Rule 15-103 (2010)), **Wisconsin** (WI ST BAR EXAM BD BA 6.02 (2020)), and **Wyoming** (WY R ADMIS Rule 401 (2018)).

2006)(denying reinstatement after suspension due to misappropriating clients' funds during an episode of drug or alcohol abuse without evidence of rehabilitation); *Florida Bar v. Corbin*, 540 So. 2d 105, 106 (Fla. 1989)(alcohol dependency treatment required during rehabilitation after pleading nolo contendere to attempted sexual activity with a child); *Florida Bar v. Liroff*, 582 So. 2d 1178 (Fla. 1991)(issuing a private reprimand to a lawyer and licensed dentist, for engaging in conduct arising from his addiction to the synthetic opiate cough syrup). Most issues of drug and alcohol abuse arise in explanations for otherwise disqualifying conduct and attempts to rehabilitation by obtaining treatment to substance abuse issue.

While the Court has never rendered an opinion solely on the basis of a disability without otherwise disqualifying conduct,[7] the application of the disqualifying standard based on disability has been used by the Florida Board of Bar Examiners as a method to permit an invasive inquiry into the mental health history of applicants and as a cudgel to force applicants into treatment, which may or may not be necessary, and to withhold recommendation of admission until such preconditions are met.

In *Hobbs v. Fla. Bd. of Bar Exam'rs,* No. 4:17cv422-RH-CAS, 2019 U.S. Dist. LEXIS 50732, at *4-5 (N.D. Fla. Feb. 25, 2019), a veteran brought an action under the ADA related to the scope of the investigation into an applicant's substance abuse history and surcharges related to the investigative process. Mr. Hobbs sought mental health services when undergoing a traumatic life event, and the Florida Board of Bar Examiners used such help seeking behavior as a method to do a thorough dive into his alcohol use and psychiatric history. The District Court found that while an investigation of an applicant's background is relevant to determine if there is a substantial risk to the public, the investigation should be limited to the fitness to practice law, especially considering that such disclosures in the investigation is to a governmental entity. The Court recognized that "[p]lacing unnecessary hurdles in the path of a person with a disability is the paradigm of an ADA violation." *Hobbs v. Florida Bd. of Bar Examiners*, 4:17-CV-422-RH/CAS, 2018 WL 5905467, at *7 (N.D. Fla. June 16, 2018). In another matter, the District Court found that it is a violation of the ADA to require compliance with conditions for admission or reinstatement relating to a mental or emotional

[7] This analysis does not include situations in which the Court has upheld discipline or denial for failure to comply with a conditional admission agreement which was based solely on a disability.

condition when such conditions were **no longer necessary**. *Renner v. Supreme Court of Florida*, 4:17-CV-451-RH/CAS, 2019 WL 5684176, at *3 (N.D. Fla. Nov. 1, 2019). This includes treatment for a substance abuse disorder when such disorder does not exist.

In November 2018, The Florida Board of Bar Examiners changed questions 25 and 26, on the Bar Application, to address mental health and substance abuse issues within the past five years that have impaired or could impair the ability to practice law. The mental health question (question 25) was limited to conditions such as schizophrenia or other psychotic disorder, bipolar disorder, or major depression with suicidal ideations. The substance abuse inquiry was separated from mental health and placed in question 26 and contained the limitation to five years and the nexus to the ability to practice law. See Letter to Justice Fred Lewis from the Florida Board of Bar Examiners, dated September 27, 2018. Furthermore, the Florida Board of Bar Examiners advised applicants to seek mental health treatment and services.

However, the questions on the exam are very different from the investigative process that is undertaken by the Florida Board of Bar Examiners under their responsibility to determine the existence of disqualifying conduct in Rule 3-11, which are not limited by the questions or the broad nature of the terms of 3-11. Furthermore, all guidelines and standards applied by the Florida Board of Bar Examiners in evaluating applicants is deemed fully confidential by their own interpretation of their Rule 1-61, which makes "all information maintained by the board in the discharge of the responsibilities" confidential.

The actions of the Board of Bar Examiners along with the shield over their practices leads to trepidation with the process and reluctance to get needed assistance. However, for those who practice before the Board of Bar Examiners, it is known that the Florida Board of Bar Examiners' has recently entirely disregarded any nexus between mental illness or substance abuse and otherwise disqualifying conduct when evaluating the severity of a disability and its effect on the practice of law. The clearest example of this is the new guidance regarding the imposition of a conditional admission. The *prior* guidelines to conditional admission were as follows:

Last Alcohol-Related Incident	**Recommended Length of Probation**
If within the last 3 years	2 years
If more than 3, but less than 5 years prior to the application	1 year
If more than 5 years prior to the application	without conditions

In circumstances relating to the past guidance, "incident" was not limited to police contact, but includes any incident, such as a student conduct code violation, issues at work, not paying taxes, arguments with girlfriends, and any similar incident which was a result of the conduct.

However, in the meeting of the Florida Board of Bar Examiners from June 6 to 9, 2019, the Florida Board of Bar Examiners changed their guidelines as follows:

Revisions to Guidelines for Length of Conditional Admission

Subsequent to consideration of staff's recommendation, the board, on motion made, seconded, and carried, decided to adopt the following as the new guidelines for determining the length of conditional admission:

Length of Conditional Admission

When deciding on a recommended length for a conditional admission time period of up to five years, the board must consider the factors in Rule 3-12 and, to the extent applicable, the following:

- The applicant's record of receiving treatment for the substance-related or mental health condition;
- Corroborating evidence of the applicant's commitment to treatment;
- Any lapses in treatment or failures to comply with a treatment program;

- The applicant's insight into the substance-related or mental health condition;
- The opinion of the applicant's treating physician; and
- The opinion of the evaluator.

In fact, the formal investigatory hearing process is very similar to the process that was questioned in a report criticizing the use of mental health and substance abuse questions and investigations in New York State. See "The Impact, Legality, Use and Utility of Mental Disability Questions on the New York State Bar Application" (November 2, 2019), as well as the American Bar Association Resolution 102 with Report, August 2015, and the Conference of Chief Justices Resolution 5, In Regard to the Determination of Fitness to Practice Law, February 2019. See *Id*. at p. 43-56. This overreach into an applicant's psychological or medical history is an extreme violation of privacy, has little connection with the practice of law, and disrupts and second-guesses the treatment relationship between an applicant and its treating medical professionals. Lastly, it will serve to prevent any applicant from receiving needed mental health or substance abuse assistance and adds stigma to having a disability.

The Proposed Changes of the Terminology of Mental Disorders or Substance Abuse Must be Tailored to Disqualifying Conduct.

Seven years into the use of the DSM-5, the Florida Board of Bar Examiners requests to simply update outdated medical terminology while failing to focus on disqualifying conduct that is a result of a disability or history of a disability. The Board of Bar Examiners cannot continue to look for evidence of the existence of a "mental disorder" or "substance use disorder" in an applicant, as it has been able to simply look for evidence of the existence of "mental or emotional instability" or "drug or alcohol dependency" in an applicant.

While the board's proposed amendments for Rule 3-11(j) and (k) update the wording of the sections to current medical terminology, they reverts to broad definitions. Pursuant to these definitions, the Board of Bar Examiners will investigate what is included in the DSM-5 definition of a mental disorder:

> "a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning."[8]

Additionally, "[m]ental disorders are usually associated with significant distress or disability in social, occupational, or other important activities."[9] In fact, the entire DSM-5 is the "Diagnostic and Statistical Manual of *Mental Disorders*." (emphasis added) The disorders that are considered mental disorders in the DSM-5 range from language disorder, to major depressive disorder, to anorexia nervosa, and beyond; every mental disorder in the DSM-5 spans over 675 pages.[10] Using the DSM-5's terminology allows the Board of Bar Examiners to investigate any and every piece of evidence that may indicate that an applicant has or had any one of the over 300 mental disorders listed in the DSM-5.

Not only does the board's proposed amendment to Rule 3-11(j) give the board an overbroad purview over what they can investigate regarding an applicant's mental health and disability history, it also directly contravenes the 2018 efforts and actions taken by the Board of Bar Examiners by limiting the mental health question (question 25) to conditions such as schizophrenia or other psychotic disorder, bipolar disorder, or major depression with suicidal ideations. Currently, the Florida Board of Bar Examiners seeks to amend Rule 3-11(j) to include the ability to investigate every mental disorder in the DSM-5. In addition, at the same time the Board changed question 25 on the Bar Application, it also separated its substance abuse inquiry into its own question, question 26. Question 26 also contained the nexus to the ability to practice law, as well as a limitation to the previous five years. However, the board's proposed amendment to section (k) does not set a time limitation, nor does it define which substance use disorders may be investigated. Substance use disorders in the DSM-5 can occur with alcohol use, cannabis use, and tobacco use, among seven other additional substance classes.[11] Much like the issues with the board's investigative abilities regarding mental disorders under the proposed amendments, the board's investigative abilities regarding substance use disorders would be too broad using only the updated terminology of the DSM-5.

The extensive breadth of investigative abilities given to the board under its proposed amendments to sections (j) and (k) also lead back to one common

---

[8] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 20 (5th ed. 2013).
[9] *Id.*
[10] *Id.* at 31-708.
[11] *Id.* at 482.

problem: the lack of any wording that the board must look at an applicant's conduct rather than the existence of a mental disorder or substance use disorder. Under the board's proposed amendments, the board will still be allowed to investigate an applicant's mental health and disability history with almost no limitations as it always has been. Adding language to Rule 3-11(j) and (k) indicating that the board may only investigate an applicant for otherwise disqualifying conduct that is a result of a disability or history of a disability, and not simply the existence of "evidence of" a disability, is imperative to dismantling the structural barriers that are in the rules of the legal profession in Florida that prevent otherwise qualified persons from becoming lawyers simply because they have or had a disability.

Reduction of Stigma of Mental Illness and Substance Abuse

If the standards in the board's proposed amendments to Rule 3-11(j) and (k) of "evidence of a mental disorder that may impair the ability to practice law" and "evidence of a substance use disorder that may impair the ability to practice law" are used to categorize lawyers or applicants who should be subject to additional investigation, more than fifty percent of Florida Bar applicants and new Florida lawyers would qualify for this categorization. According to the Young Lawyers Division Mental Health & Wellness in the Legal Profession survey[12] results, published in 2019:

- 62% of respondents believe that they have suffered from anxiety or depression or both where it has lasted for more than four weeks or have substantially impacted their job. (question 17)

- 36% of those who suffered from anxiety or depression or both self-medicated with alcohol. (question 20)

- 37% of respondents diagnosed with or professionally treated for depression, anxiety or another mental health concern. (question 19)

- 27% of all respondents handle stress with alcohol. (question 23)

[12] Found at https://www-media.floridabar.org/uploads/2019/04/Young-Lawyers-Division-Mental-Health-Wellness-Survey-Report-Final.pdf (last accessed on May 6, 2019)

Furthermore, the American Bar Association Survey of Law Student Well-Being (SLSWB) implemented in spring 2014 at fifteen law schools around the country, demonstrated similar findings, and also included alcohol and drug use,[13] as follows:

- Twenty five percent of all respondents were at significant risk for alcohol use disorder. More than half of the respondents reported drinking enough to get drunk in the prior thirty days; 43% of the respondents had engaged in binge-drinking at least once in the prior two weeks, and 22% of law students binge-drank two or more times in the prior two weeks.
- Twenty five percent used marijuana within the past twelve months, and fourteen percent within the past 30 days; six percent used cocaine within the past twelve months, and two percent within the past 30 days.
- Prescription drugs within the past year: Sleeping medication 9%; Sedatives - 12%; Stimulants - 13%; Pain Medications – 15%; Anti-Depressants - 12%
- 14% of respondents reported having used prescription drugs without a prescription in the prior twelve months. Stimulants were the prescription drug most frequently used without a prescription (9%), followed by pain medication and sedatives/anxiety medication (4%)

As such, a standard that relies on prior or current history of substance use or mental health problems encompasses the majority of applicants to the Florida Bar. However, only a small fraction would actually disclose a substance use or mental health problem and would be more likely to disclose if treatment for such problem had been received. As a result, applicants to the Florida Bar, including law students, were reluctant to disclose or obtain treatment for substance abuse or mental health for fear that it would be a hurdle to obtain admission or would require disclosure of sensitive personal information. All rules should be narrowly tailored to encourage students and applicants to address wellness and receive treatment for substance abuse disorders or mental health issues as an element of professionalism of a practicing Florida lawyer.

Proposed Edits to Amendments

[13] Jerome Organ, David Jaffe & Katherine Bender, Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns, 66 J.Legal Educ., Autumn 2016, at 128-134

RULE 3 BACKGROUND INVESTIGATION

3-11 Disqualifying Conduct. A record manifesting a lack of honesty, trustworthiness, diligence, or reliability of an applicant or registrant may constitute a basis for denial of admission. The revelation or discovery of any of the following may be cause for further inquiry before the board recommends whether the applicant or registrant possesses the character and fitness to practice law:

a. unlawful conduct;

b. academic misconduct;

c. making or procuring any false or misleading statement or omission of relevant information, including any false or misleading statement or omission on the Bar Application, or any amendment, or in any testimony or sworn statement submitted to the board;

d. misconduct in employment;

e. acts involving dishonesty, fraud, deceit, or misrepresentation;

f. abuse of legal process;

g. financial irresponsibility;

h. neglect of professional obligations;

i. violation of an order of a court;

j. evidence of ~~mental or emotional instability~~ conduct indicating a mental disorder that may impair the ability to practice law;

k. evidence of ~~drug or alcohol dependency~~ conduct indicating a current substance use disorder that may impair the ability to practice law;

l. denial of admission to the bar in another jurisdiction on character and fitness grounds;

m. disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction; or

n. any other conduct that reflects adversely on the character or fitness of the applicant.

Explanation: The changes in the rules focus on otherwise disqualifying conduct that is a result of the disability or history of the disability and conforms to the

requirements of the Americans with Disabilities Act, as well as current best practices from the American Bar Association.

Oral Argument Not Requested

Commenters do not request oral argument regarding the proposed amendments.

The Commenters requests that this Court enter an order amending the Rules of the Supreme Court Relating to Admissions to the Bar as requested in these comments.

Respectfully submitted,

By: */s/ Matthew W. Dietz*
Matthew W. Dietz, Esq.
Florida Bar No.: 0084905

CERTIFICATE OF COMPLIANCE

I certify that this response has been prepared in MS Word using Times New Roman 14-point font, in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: */s/ Matthew W. Dietz*
Matthew W. Dietz, Esq.
Florida Bar No.: 0084905

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed using the E-Filing Portal, and served by e-mail to Joshua E. Doyle, Bar Executive Director, at The Florida Bar Headquarters 651 E Jefferson St, Tallahassee, FL 32399-6584 by e-mail jdoyle@floridabar.org, and J.T Almon, General Counsel and Michele A. Gavagni, Executive Director, Florida Board of Bar Examiners by email almonjt@flcourts.org on this 27th Day of August, 2020.

By: */s/ Matthew W. Dietz*

Matthew W. Dietz, Esq.
Florida Bar No.: 0084905
Disability Independence Group, Inc.
2990 Southwest 35th Avenue
Miami, Florida 33133
T: (305) 669-2822
mdietz@justdigit.org
aa@justdigit.org