

SUPREME COURT OF WISCONSIN

No. 17-10

**In the matter of the petition to amend
Board of Bar Examiners Rule 6.02 (BA 6.02)**

FILED

MAR 8, 2018

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

On December 7, 2017, Attorney Aaron Jeramie Loudenslager filed an administrative rule petition asking this court to amend Board of Bar Examiners (BBE) Rule 6.02 (BA 6.02) to "bring Wisconsin's character and fitness investigations with regard to prospective lawyers' mental health into compliance with the Americans with Disabilities Act (ADA)." On December 21, 2017, BBE Director Jacquelynn Rothstein filed a response to the petition, asking the court to dismiss the rule petition and refer the matter to the BBE for further consideration.

The court discussed this petition at closed administrative conference on January 18, 2018. The court voted to dismiss the rule petition and to refer the matter to the BBE as set forth herein.

The ultimate responsibility for regulating admission to the practice of law in Wisconsin rests with this court. The Supreme Court Rules (SCR) governing admission to the bar are found in SCR Ch. 40 and are administered by the BBE. Persons seeking admission to the Wisconsin bar must, among other requirements, file an application for a character and fitness certification with the BBE.

SCR 40.06(3m). The purpose of the character and fitness requirement is to limit admission to those applicants found to have the qualities of character and fitness needed to assure to a reasonable degree of certainty the integrity and the competence of services performed for clients and the maintenance of high standards in the administration of justice. SCR 40.06(1).

As part of this process, the applicant must provide certain information to the BBE and complete and submit to the BBE a lengthy "Applicant Questionnaire and Affidavit". The BBE conducts an investigation and, if it concludes the applicant has met his or her burden of establishing the requisite qualities of character and fitness (as well as the other requirements for bar admission), the Board will certify a qualifying applicant to the supreme court for admission to the bar.

Pursuant to SCR 40.11, the court has delegated to the BBE the authority to promulgate its own rules necessary to carry out the intent and purpose of SCR Ch. 40. The BBE has thus implemented a number of rules that inform applicants of various aspects and requirements of the bar admission process, such as how long an incomplete bar application will be maintained (BAs 4.03, 5.01, 6.06), and certain application deadlines (BA 14.04). Several of these rules, including BA 6.02, pertain to the character and fitness requirement (BAs 6.01-6.06).

As such, BA 6.02 is the BBE's rule; it is not a rule this court would typically amend pursuant to a rule petition. Moreover, it is not clear that the proposed amendment to BA 6.02 would effectively accomplish the petitioner's objective. Bar Admission Rule 6.02

consists of a list of 12 items that the BBE "should" treat "as cause for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law." These are wide ranging and include matters such as evidence that the applicant has engaged in academic misconduct, neglect of financial responsibilities, or been the subject of prior professional discipline.¹ The petition proposes amending item (i) as follows:

¹ BA 6.02 provides that the revelation or discovery of any of the following should be treated as cause for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law:

- (a) unlawful conduct
- (b) academic misconduct
- (c) false statements by the applicant, including concealment or nondisclosure
- (d) acts involving dishonesty or misrepresentation
- (e) abuse of legal process
- (f) neglect of financial responsibilities
- (g) neglect of professional obligations
- (h) violation of an order of a court
- (i) evidence of mental or emotional impairments substantial enough to affect the applicant's ability to practice law
- (j) evidence of drug or alcohol dependency
- (k) denial of admission to the bar in another jurisdiction on character and fitness grounds (cont.)
- (l) disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction

"(i) evidence of mental or emotional impairments ~~substantial enough to~~ that currently affect the applicant's ability to practice law in a competent and professional manner."

The memorandum filed in support of the petition explains that the petitioner believes that one question on the BBE's Applicant Questionnaire and Affidavit contravenes the ADA.² Question 35(a) states:

Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse or a mental, emotional or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?

The petitioner asserts that an applicant's affirmative response to this question triggers more scrutiny than other applicants as they are required to describe the mental disorder and how it has been treated. See BBE's Applicant Questionnaire and Affidavit, Question 35(b). To the extent the petitioner seeks clarification or revision of Question 35(a), it is not clear the proposed amendment to BA 6.02(i) would accomplish the desired result.

That said, Attorney Loudenslager's petition does present an important question. In August 2014, the United States Department of Justice (DOJ), the agency charged with enforcing Title II of the ADA, announced that it had entered into a settlement agreement with the

² As relevant here, Title II of the ADA 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 the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1990).

Louisiana Supreme Court resolving a DOJ investigation into Louisiana court's policies, practices, and procedures for evaluating bar applicants with mental health disabilities. The DOJ noted that it had also "raised issues about unnecessary bar application questions related to mental health disabilities with the states of Vermont and Connecticut and with the National Council of Bar Examiners (NCBE) [and the] NCBE revised two of its questions about mental health on February 24, 2014." Press Release 14-860, Department of Justice Reaches Agreement with the Louisiana Supreme Court to Protect Bar Candidates with Disabilities, U.S. Dep't of Justice (Aug. 15, 2014).³

In the wake of this announcement, a number of states reviewed the manner in which they inquire about and consider mental health information in their screening process for bar applicants. In 2015, the American Bar Association (ABA) adopted a resolution urging state and territorial bar licensing entities to:

[E]liminate from applications required for admission to the bar any questions that ask about mental health history, 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.

Notably, the ABA further resolved that:

³ See also Letter from Jocelyn Samuels, Acting Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to the Honorable Bernette J. Johnson, Chief Justice, Louisiana Supreme Court; Elizabeth S. Schell, Executive Director, Louisiana Supreme Court Committee on Bar Admissions; and Charles B. Plattsmier, Chief Disciplinary Counsel, Louisiana Attorney Disciplinary Board Office of Disciplinary Counsel, The United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act, DJ No. 204-32M-60, 204-32-88, 204-32-89 (Feb. 5, 2014).

[S]tate and territorial bar licensing entities are not precluded from making reasonable and narrowly-tailored follow-up inquiries concerning an applicant's mental health history if the applicant has engaged in conduct or behavior that may otherwise warrant a denial of admission and a mental health condition either has been raised by the applicant as, or is shown by other information to be, an explanation for such conduct or behavior.

ABA Resolution No. 102, Aug. 2015. In recounting this information, we make no legal determination here as to either BA 6.02 or Question 35(a).

However, Attorney Loudenslager's question warrants consideration and we thus accept the BBE's offer to revisit its rules and procedures, including the questions on the Applicant Questionnaire and Affidavit, to ensure compliance with the ADA. Therefore,

IT IS ORDERED that rule petition 17-10 is dismissed.

IT IS FURTHER ORDERED that the issues presented in this petition are referred to the Board of Bar Examiners for its review and consideration. The Board of Bar Examiners is directed to confer with the Wisconsin Department of Justice and with any other entity it deems appropriate, and to submit a written report advising this court whether Board of Bar Examiners rules or procedures, including questions on the Board of Bar Examiners' Applicant Questionnaire and Affidavit, should be revised to ensure compliance with the Americans with Disabilities Act.

IT IS FURTHER ORDERED that the Board of Bar Examiners shall file its written report on or before July 1, 2018, advising the court of the result of its review, or providing a status report with an anticipated completion date for the report. The Board of Bar Examiners' report, together with any interim status reports, will be

made available to the public on the court's website at <https://www.wicourts.gov/scrules/supreme.htm>.

Dated at Madison, Wisconsin, this 8th day of March, 2018.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

