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Report of the
Board of Bar Examiners
Regarding Rule Petition
17-10

In December of 2017, Attorney Aaron Jeramie Loudenslager filed an administrative rule petition seeking to amend section BA 6.02, one of the provisions within the Board of Bar Examiner's Appendix to Chapter 40 of the Supreme Court Rules. Attorney Loudenslager sought the amendment to "bring Wisconsin's character and fitness investigations with regard to prospective lawyers' mental health into compliance with the Americans with Disabilities Act (ADA)." The Board of Bar Examiners (BBE) filed a response, asking that the Court dismiss the petition and refer the matter back to the BBE for further consideration. In January of 2018, the petition was dismissed and the matter was referred back to the BBE.

As the Court noted in its January 2018 Order, persons seeking admission to the Wisconsin bar must, among other requirements, file an application for a character and fitness certification with the BBE. 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. As part of that process, applicants must provide certain information to the BBE, including the completion and submission of 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 certifies that applicant to the Supreme Court for admission to the bar.

In August of 2014, the United States Department of Justice (DOJ), the agency charged with enforcing Title II of the Americans with Disabilities Act, announced that it had entered into a settlement agreement with the Louisiana Supreme Court resolving a DOJ investigation into their 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." Given that 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 “[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.”

Following the Court’s January 2018 Order, the BBE convened a subcommittee charged with reexamining its rules and procedures, including the questions on the Applicant Questionnaire and Affidavit, to ensure compliance with the Americans with Disabilities Act. As directed by the Court, the subcommittee met and conferred on two occasions with attorneys from the Wisconsin Department of Justice. The subcommittee also reviewed the most recently revised application used by the National Conference of Bar Examiners (NCBE), the NCBE policy statements explaining revisions that it had made to its application, and the various character and fitness requirements from several other states. While this area of the law remains unsettled, in part, because it is still being formed, the subcommittee nevertheless worked diligently to ensure that its recommendations complied with the law, that it made determinations that were fair to the applicants, and that the public would be adequately protected. At the July 2018 meeting of the BBE, Chair Steven M. Barkan reported on the work of the subcommittee and presented its recommendations.

The subcommittee made seven recommendations all of which the Board voted unanimously to adopt. They include the following:

(1) Sections BA 6.02 (i) and (j) are amended as follows (Please note that the prior version of BA 6.02 is attached as Appendix A):

(i) evidence of conduct due to mental or emotional impairments substantial enough to affect the applicant's ability to practice law

(j) evidence of conduct due to drug or alcohol abuse substantial enough to affect the applicant's ability to practice law

Comment: The phrase "conduct due to" was added to both BA 6.02 (i) and (j) to clarify that when a condition or impairment has been used as an explanation for questionable behavior, it is an appropriate area for a fitness inquiry.

(2) The Preamble to Questions 33-35 on the Applicant Questionnaire and Affidavit is modified as follows (Please note that the prior version of the Preamble is included in Appendix B):

Through this application, the Board of Bar Examiners makes inquiry about recent mental and physical health and chemical dependency matters. This information, along with all other information, is treated confidentially by the Board. The Board's purpose in making such inquiries is to determine the current fitness of an applicant to practice law. The mere fact of treatment for medical conditions or impairments or chemical dependencies is never, in itself, a basis on which an applicant is ordinarily denied admission, and the Board routinely certifies for admission individuals who have demonstrated personal responsibility and maturity in dealing with these issues. The Board supports and encourages applicants who may benefit from assistance to seek it. The Board has, on occasion, denied certification to applicants whose ability to function was impaired in a manner substantial enough to affect the applicant's ability to practice law at the time that the licensing decision was made.

The Board usually does not seek information about therapy that is fairly characterized as stress counseling, domestic counseling, grief counseling, or counseling for eating or sleeping disorders, as these are generally not viewed as germane to the issue of whether an applicant is qualified to practice law.

The Board seeks medical records sparingly and judiciously, and treats such information sensitively and confidentially.

Comment: The underscored language was added to the Preamble for Questions 33-35 to emphasize that minor or insignificant conduct that does not substantially affect an applicant's ability to practice law is not a basis for denying certification for admission.

(3) The following question from the NCBE general application will be added:

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?

Comment: The inclusion of this question is intended to ensure that conduct-based concerns are an appropriate area for a fitness inquiry.

(4) Question 33(d) on the Applicant Questionnaire and Affidavit is amended as follows (Please note that Questions 33 through 35 of the prior Applicant Questionnaire and Affidavit are included in Appendix B):

Within the past five years have you ever cited physical or mental illness, or an emotional, nervous or behavioral disorder as an explanation for your poor academic or professional performance? This does not include testing or classroom accommodations.

Comment: Applicants often ask whether testing or classroom accommodations are considered to be explanations for poor academic or professional performance. This statement was added to Question 33 (d) to clarify that testing or classroom accommodations are not part of this inquiry.

(5) Question 34 Applicant Questionnaire and Affidavit is amended as follows:

Within the past five years, have you been ~~diagnosed and or~~ treated for dependency upon any drug, including alcohol, or been compelled to submit to an assessment or screening for same?

Comment: The term “diagnosed” was deleted to ensure that the inquiry is based on the applicant’s conduct rather than the applicant’s status.

(6) Current Question 35(a) and (b) on the prior Applicant Questionnaire and Affidavit included below are deleted.

35(a) 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?

35(b) If your answer to Question 35 (a) is yes, are the limitations caused by your condition or impairment or substance abuse problem ameliorated because you are receiving ongoing treatment (with or without medication) or because you participate in a monitoring program?

Comment: Questions 35(a) and (b) were eliminated to ensure compliance with the Americans with Disabilities Act. Mental health status should not be a basis for the denial of a credential.

(7) Where necessary, the BBE will pay for independent medical evaluations to assist the Board in determining an applicant's fitness for practice.

Comment: On occasion and where necessary, the Board has directed applicants to undergo an independent medical evaluation so that it may use those findings to assist members in determining an applicant's fitness to practice law. The cost of those evaluations is often considerable and the Board will continue its policy of paying for them.

The BBE believes that these measures ensure compliance with the Americans with Disabilities Act while also serving as a means to protect the public from those who do not demonstrate the requisite character and fitness for the practice of law in Wisconsin.



Appendix A

BA 6.02

Relevant Conduct or Condition. 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
- (l) disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction



Appendix B

Inquiries Concerning Medical or Substance Abuse Condition or Impairment

Through this application, the Board of Bar Examiners makes inquiry about recent mental and physical health and chemical dependency matters. This information, along with all other information, is treated confidentially by the Board. The Board's purpose in making such inquiries is to determine the current fitness of an applicant to practice law. The mere fact of treatment for medical conditions or impairments or chemical dependencies is never, in itself, a basis on which an applicant is ordinarily denied admission, and the Board routinely certifies for admission individuals who have demonstrated personal responsibility and maturity in dealing with these issues. The Board supports and encourages applicants who may benefit from assistance to seek it. The Board has, on occasion, denied certification to applicants whose ability to function was impaired in a manner relevant to the practice of law at the time that the licensing decision was made.

The Board usually does not seek information about therapy that is fairly characterized as stress counseling, domestic counseling, grief counseling, or counseling for eating or sleeping disorders, as these are generally not viewed as germane to the issue of whether an applicant is qualified to practice law.

THE BOARD SEEKS MEDICAL RECORDS SPARINGLY AND JUDICIOUSLY, AND TREATS SUCH INFORMATION SENSITIVELY AND CONFIDENTIALLY.

If you answer 'yes' to any part of question #33, please provide an explanation on page 12.

33. Yes No (a) Within the past five years have you ever cited consumption of drugs or alcohol in the course of any inquiry or investigation, administrative or judicial proceeding, or proposed termination or other disciplinary action as an explanation for your failure to meet a deadline or as a defense, mitigation or explanation of those matters?
- Yes No (b) Within the past five years have you ever cited physical or mental illness, or an emotional, nervous or behavioral disorder in the course of any inquiry or investigation, administrative or judicial proceeding, or proposed termination or other disciplinary action as an explanation for your failure to meet a deadline or as a defense, mitigation or explanation of those matters?
- Yes No (c) Within the past five years have you ever cited consumption of drugs or alcohol as an explanation for your poor academic or professional performance?
- Yes No (d) Within the past five years have you ever cited physical or mental illness, or an emotional, nervous or behavioral disorder as an explanation for your poor academic or professional performance?

If you answer 'yes' to any part of question #34 or #35, please complete a Medical Information Form (BE-004) for each instance.

34. Yes No Within the past five years, have you been diagnosed and or treated for dependency upon any drug, including alcohol, or been compelled to submit to an assessment or screening for same?
35. Yes No (a) 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?
- Yes No (b) If your answer to Question 35 (a) is yes, are the limitations caused by your condition or impairment or substance abuse problem ameliorated because you are receiving ongoing treatment (with or without medication) or because you participate in a monitoring program?

GIVE FULL DETAILS for affirmative responses to QUESTIONS 17 - 33 in the space provided below. If your answer to questions #34 or #35 is affirmative, complete a Medical Information Form (BE-004).

If you provided a narrative on form BE-007 or BE-008, it is not necessary to duplicate that narrative below.

State the complete facts pertinent to the question to the best of your ability. Include names of people involved, addresses, dates, location, a narrative in your own words detailing the nature of the issue, reasons, disposition, references to court records, etc. Incomplete or vague responses will delay the processing of your application. Untruthful responses and/or omissions may provide a basis on which your admission will be denied.

Check here if additional information is listed on an attached sheet.

N/A

