From: John M. Lichtenberg
To: ADMcomment
Subject: Mental Health Questions on State Bar Application
Date: Thursday, April 11, 2019 10:07:13 AM
Attachments: imagef096df.PNG
imagefd85d6.PNG
image10c957.PNG

I have just concluded a federal district court case (*Peer v. West Shore Medical Center*, WD Mich. Case No. 1:17-cv-072) in which the legality of a question regarding health status on a medical privileging application at a county-owned hospital was challenged under Title II of the ADA – the same provision as will govern the proposed question on the bar application. At the District Court level, the hospital prevailed on summary judgment. However, at least two comments are in order.

First, the question we were defending, in my judgment, was much narrower than what is proposed. It asked, "Are you presently under the care of a physician?" The form then asked a follow-up question requesting disclosure of the condition and information regarding it, and directed the applicant to be prepared to discuss his/her condition and treatment at their interview (all applicants are interviewed)." The plaintiff in our case claimed to have been diagnosed with bipolar disorder 30 years before and to have been treating for it ever since through prescription medication, but did not disclose this on the application, resulting in a reduction in privileges when he belatedly disclosed the condition. He challenged the disciplinary action (which was based solely upon his failure to disclose as required by the form), alleging the question was unlawful and burdened persons with disabilities. Judge Maloney held otherwise. Our argument in support of the question was: (1) it asked only about current conditions for which the person is currently treating and limited those to conditions sufficiently serious to warrant treatment by a physician (as opposed to, say, a chiropractor or dentist); and (2) the question was not limited to mental health issues but included physical health conditions that could create risk to patients in a hospital setting if appropriate precautions were not in place to avoid such exposure or risk. Additionally, we noted that an offer to contract with the hospital (the physician was not an employed physician but his company was engaged to provide part-time services) was outstanding before he was asked the question – making the case analogous to a post-offer medical exam under Title I of the ADA, which permits more intrusive inquiries at that point than in a pre-offer setting.

Second, there is a paucity of case law on this subject. Our case was, we believe, the first in our district; and there was no circuit authority (in the 6th or any other Circuit) on the issue. The pertinent case law located by the parties and court included: *Medical Society of New Jersey v. Jacobs,* 1993 WL 413016 (D. N.J. 1993); *ACLU of Indiana v. Indiana State Bd. of Law Examiners,* 2011 WL 4387470 (S.D. Ind. 2011); *Clark v. Virginia Board of bar Examiners,* 880 F. Supp. 430 (1995); and *Ellen v. Florida Bd. of Bar Examiners,* 859 F.Supp. 1489 (S.D. Fla. 1994). The New Jersey and Virginia cases are the most critical of these sorts of questions and highlight the concerns raised by Justice Bernstein (deterrence, burden). I think one can synthesize these opinions and find a safe harbor of sorts by limiting the questions to current conditions that are material to protecting the public (which necessarily will require appropriate evaluation of the significance, if any, of the disclosed condition) and by avoiding undue burden upon applicants who must respond "yes". A case can be made that the proposed questions do that, but a contrary case is easily asserted.

The questions ask about past mental health diagnoses and treatment, not current ones. That is a problem in my view. One the other hand, it asks only about conditions "which permanently, presently or chronically" impact the person's capacity to discharge the duties of an attorney. That appears to require a *present* disability, though one evaluated for purposes of the required response without regard to the efficacy of any treatment. On the other hand, that qualification arguably defers to the judgment of the applicant about whether and how to respond. In the *Peer* case, Dr. Peer exercised his own judgment to conclude that his bipolar disorder was under control and – though he was treating for it – need not be disclosed. That was not a judgment the question permitted him to exercise which is why he was later disciplined for failing to disclose the condition. The proposed question, however, invites the exercise of such judgment by the applicant. Additionally, the risks presented by even a treated medical condition (e.g., HIV, hepatitis, epilepsy, etc.) could present a risk to patients if not known to and controlled for by the hospital, a presently controlled mental health condition does not present such risks to clients. It is the uncontrolled behavioral health conditions that are apt to present risks. This then raises this question in my mind: What is the bar going to do with this information? And is the bar going to monitor the mental health status of all lawyers on an on-going basis? Are applicants who disclose the existence of, say, a diagnosis of bipolar disorder or depression that is being treated and is under control going to be required to periodically update medical information to confirm that they are continuing to appropriately treat the disorder? If so, are lawyers not diagnosed at the time of application – or who do not regard an earlier diagnosis (say, depression in college) as a "permanent or chronic" condition but who thereafter experience a significant relapse – required to update their information? If not, have we really done much to protect the public that is not already addressed through less intrusive means by asking for this information?

The cited cases contain expert testimony on whether past behavioral health issues are a predictor of future bad behavior. Does the bar have information suggesting that they are? If not, then the most these questions will do is screen out temporarily (since if the applicant subsequently controls an uncontrolled disorder through treatment, s/he is presumably then qualified for admission) those applicants who at the time of application (a) have a presently uncontrolled mental disorder that (b) does not interfere with their ability to be truthful on the application. I suspect the number of such applicants is extremely small and – to Justice Bernstein's point – most if not all of those will be identified as problematic through other aspects of the character and fitness review process. While I am personally very comfortable with the question posed in the context of the case I defended, I am not with the proposed questions here.

Thanks you.

John Lichtenberg

Tel: 616.233.5163
Fax: 616.233.5269
Email:jmlichtenberg@rhoadesmckee.com

55 Campau Avenue NW, Suite 300
Grand Rapids, Michigan 49503
rhoadesmckee.com