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VIA EMAIL

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The Michigan Supreme Court
Office of the Administrative Counsel
ADMcomment@courts.mi.gov

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

To the Michigan Supreme Court:

I am writing in response to the Court's January 23, 2019 Order with the designation ADM File No. 2016-46 (the "Order"). The Court has invited public comments on the inclusion and/or form of mental health questions on the application for admission to the State Bar of Michigan (the "Bar"). I am a member of the Bar and provide these comments in my personal capacity.

Questions about mental health should be excluded from the Bar application. Mental health diagnoses and treatment are irrelevant to evaluation of an applicant. The questions perpetuate stigma associated with mental health, are not authorized by statute, and are discriminatory in violation of federal law. Other issues directly implicating misconduct deserve more attention.

Background

The Bar application requires an extensive cataloguing of applicants' experiences with mental health diagnoses and treatment. Specifically, applicants must disclose, to the state board of law examiners (the "Board"), responses to the following questions:

> Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life? If yes, provide the names and addresses of all involved agencies, institutions, physicians or psychologists or other health care providers and describe the underlying circumstances or the diagnosis, treatment or hospitalization.
> ...
> Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?

Questions 54a and 54b of the Bar application (the "Mental Health Inquiry"). However, these disclosures bring no practical or legal return.

Mental Health Diagnoses and Treatment are Not Relevant to a Bar Candidacy

Mental health issues are health issues, not professional disqualifications. The Mental Health Inquiry presumes the negative, juxtaposing failings against "mental health" as a substitute for any actual causal relationship between the required disclosures and the ability to practice law. The questions are also generalized over the entire field of mental health, leaving it to applicants to define and explain the "issues." As a result, the Mental Health Inquiry leads to no meaningful information yet discourages applicants from getting treatment.

"Mental Health" is Not a Proxy for Capacity

Mental health issues are a part of life. Nearly 20% of Americans experience mental illness each year, but "(t)he vast majority of individuals with mental illness continue to function in their daily lives."[1] Lawyers experience these issues at similar rates.[2] Yet the Mental Health Inquiry does not recognize this reality. One permutation of the compounded request covers treatment which may "impair" an applicant's "ability to cope with ordinary demands of life." But maintenance of health and wellness (e.g., treatment) is an ordinary part of *everyone's* life — not an impairment.

What does not bar lawyers from practice, on one hand, should not, on the other, bar applicants from entering practice. Outside of the application, the Bar appropriately treats mental health issues as health issues. The Michigan Rules of Professional Conduct apply universally; all lawyers must prepare for death or disability and must withdraw, if necessary, due to a physical or mental condition.[3] Mental health issues are not grounds for discipline - conduct is.[4] Additionally, the Bar supports its members through its Lawyers and Judges Assistance Program.

Stigma Masquerades as Justification for the Mental Health Inquiry

The Mental Health Inquiry is premised on stigma. It positions failings and misconduct as "effects" and mental health diagnoses and treatment as "causes." Indeed, the Mental Health

[1] See American Psychiatric Association's *What is Mental Illness?* webpage, accessible at https://www.psychiatry.org/patients-families/what-is-mental-illness.
[2] See page 7 of *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, the National Task Force on Lawyer Well-Being (Aug. 2017), accessible at http://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf.
[3] See *SUDDEN DEATH OR DISABILITY: IS YOUR PRACTICE – AND YOUR FAMILY – READY FOR THE WORST*, Catherine M. O'Connell at https://www.michbar.org/file/opinions/ethics/articles/death-disability.pdf.
[4] This is reflected in reporting from the Attorney Discipline Board and Attorney Grievance Commission. See, e.g., *2017 AGC & ADB Joint Annual Report* at http://www.adbmich.org/download/2017_JOINT_ANNUAL_RPT_color.pdf.

Inquiry is said to stem from a "responsibility to **protect** the public."[5] This is harmful stigma: automatic association of mental health diagnoses and treatment with incapacity and threat.

The Mental Health Inquiry blurs its faulty premise through generalization. It requires disclosures for broadly stated "mental, emotional, or nervous condition(s)" with some relationship to the catalogued "bad" conduct. But it does not vary with the type, timing, and/or breadth of health issues and treatments -- despite the fact that it covers an entire field of health.[6]

Generalization is harmful stigma: inhibiting understanding with implicit dismissal of distinctions. To illustrate, assessing a sprained ankle may involve understanding physical activity, footwear, and terrain. But a doctor would not rely on a patient alone to choose and provide information about such an injury — *even with a sprained ankle, that has distinct, generally understood characteristics, causes, and effects*. In contrast, the Mental Health Inquiry relies solely on applicants to determine the scope of disclosures, across an entire field of health, for untrained Bar examiners. Such a perspective is inappropriate for considering distinct matters across any broad field, from mental health issues to working in the legal profession.[7]

The Mental Health Inquiry's selection of negative "effects" is dramatic and callous. It "limits" disclosures to those involving impaired "judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life," and impaired "ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others." This implies that "mental, emotional, or nervous condition(s)" could reasonably bear on these issues at all and that the Mental Health Inquiry is a sufficient way to address such dire matters. These implications are wrong.

The Questions are Not Meaningfully Focused

The Mental Health Inquiry itself is nearly incomprehensible. It is a series of compound phrases which each, in turn, multiply the permutations of disclosures. In an attempted offset, disclosure of "situational counseling" is now excused. But this just punts another variable to applicants.

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[5] Preamble to the Mental Health Inquiry, emphasis added.

[6] There is a wide variety of recognized mental health issues. See the Table of Contents for the *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* (DSM-V), at https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Contents.pdf.

[7] There are many variations of legal professionals. Criminal prosecutors, public defenders, commercial litigators, judges, law professors, mediators, in-house counsel, legal service providers, mediators, and attorneys in the fields of patent, trademark, copyright, data privacy, product liability, construction, tax, corporate, bankruptcy, real estate, trusts and estates, personal injury, or insurance defense law (by way of non-limiting example) each have different tasks, interactions, practice settings, resources, subject matters, time pressures, etc. Given these variations, it would not be helpful to evaluate these paths by requesting, of every type of legal professional: a listing of cases tried, clients accepted, clients refused, mediations conducted, classes taught, and deals closed, past or present, that have a substantive or procedural impact on the ability to practice law, including the accounting of time, and the maintenance of confidentiality, and all attorneys, courts, judges, and clients related thereto.

The approach is backwards — ensnaring everything, and leaving it to applicants to back out information, despite their candor being a principle measure of their qualifications.[8]

As set out in the recent findings of an ABA-led task force on lawyer wellness, any exclusive focus on mental health diagnoses and treatment on the Bar application — even if clear, objective, tailored for specific issues, and evaluated by professionals — would be misplaced. Rather, the findings recommend that the health of lawyers be analyzed as "lawyer well-being." This is no mere checkbox in an application. In the related report,[9] "lawyer well-being" is defined as:

> … [A] continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others. Lawyer well-being is part of a lawyer's ethical duty of competence. It includes lawyers' ability to make healthy, positive work/life choices to assure not only a quality of life within their families and communities, but also to help them make responsible decisions for their clients. It includes maintaining their own long term well-being. This definition highlights that complete health is not defined solely by the absence of illness; it includes a positive state of wellness.

This topic is far greater in scope than any reasonable evaluation of a Bar applicant. The Mental Health Inquiry seeks no more than to identify a presence (or, by implication, absence) of mental illness. It is no more significant to "well-being" than a simple listing of friends or hobbies.

The Mental Health Inquiry is Not Harmless

The Mental Health Inquiry is not merely an inconvenience. As noted above, it perpetuates stigma and, thereby, inhibits awareness and acceptance of these issues. Merely by its presence, it discourages candidates from pursuing membership to the Bar and from obtaining needed health care.[10] The Bar itself is better for every qualified member it is fortunate to welcome.

The Mental Health Inquiry Has No Statutory Basis

The Mental Health Inquiry conflicts with the underlying statutes. It is vague and circularly rationalized. Moreover, the burden on the issue of "character and fitness" is improperly imposed only on the applicant, and the required health disclosures are far outside the scope of what can be credibly reviewed by untrained Bar examiners.

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[8] See page 2 of *UNRAVELING THE MYSTERY OF THE CHARACTER AND FITNESS PROCESS*, Diane Van Aken, accessible at https://www.michbar.org/file/professional/pdfs/unraveling.pdf.

[9] See pages 9-10 of *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, the National Task Force on Lawyer Well-Being (Aug. 2017), accessible at http://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf.

[10] See DOJ Feb. 4 2015 Letter RE: Investigation of Louisiana Attorney Licensure System pursuant to the ADA, accessible at https://www.ada.gov/louisiana-bar-lof.pdf.

There is No Mandate or Permission to Assess Mental Health of Bar Applicants

By statute, evaluation of applicants is to cover "good moral character" and "the acquired general education, learning in the law, and fitness and ability ***to enable him or her to practice law in the courts of record of this state***."[11] Both of these provisions relate to professional standards of *conduct*. Neither encompasses assessment of mental health.

"Good moral character" is defined as a propensity for fair, honest, and open conduct. Evaluation thereof may include, e.g., review of an individual's criminal history, civil judgments, and other public records.[12] No investigation of any mental health issues is suggested. Indeed, there is no such thing as a "fairness disorder," an "honesty disorder," or an "openness disorder."[13] Health diagnoses and treatment are simply not indicative of character — they are indicative of health. Mental health diagnoses and treatment are also not a proxy for the ability to practice law, and active attorneys have no disclosure requirements parallel to the Mental Health Inquiry.

The enumerated standards for evaluation are circular. No statutory provision tasks anyone with assessing whether an applicant is "manifesting" any "mental, emotional, or nervous condition." But the comment to the Mental Health Inquiry in the Bar application states:

> [The Board], as part of its responsibility to protect the public, must assess whether an applicant manifests any mental health or substance abuse issue which impairs or could impair an applicant's ability to meet the essential eligibility requirements to practice law.

The citation to an applicant's "essential eligibility requirements to practice law" just refers to the Board of Law Examiners Policy Statements 1(B)-1 to 1(B)-3. Those statements are simply interpretations of MCL 600.934 -- and are expressly disclaimed as unsanctioned by the Court.

This loop results in the improper importation of "mental health" into Bar qualifications and the miscasting of an assessment of what any applicant may be "manifesting" as an affirmative duty. Like a question on cross, inquiry into the health of a Bar applicant should have a threshold level of factual and legal foundation. The Mental Health Inquiry has neither.

Responses are Subject to an Unfair Process

The Board imposes the burden of proof relative to issues raised by the Mental Health Inquiry entirely on the respondents.[14] However, MCL 338.45 states:

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[11] MCL 600.934 (emphasis added).
[12] MCL 600.934; MCL 338.41 to 338.47.
[13] See the Table of Contents for the *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* (DSM-V), at https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Contents.pdf.
[14] RCSBM, Rule 15, Sec. 1 (15).

> When a person is found to be unqualified for a license because of a lack of good moral character, or similar criteria, the person shall be furnished by the board or agency with a statement to this effect. The statement shall contain a complete record of the evidence upon which the determination was based. The person shall be entitled, as of right, to a rehearing on the issue before the board if he or she has relevant evidence not previously considered, regarding his or her qualifications.

The Board bears the burden to determine "a lack of good moral character, or similar criteria" and support it with evidence. While the first sentence of MCL 600.934(1) provides that"the applicant must prove to the satisfaction of [the Board]" the requisite "character and fitness," ignoring MCL 338.45 to impose the burden solely on applicants is improper.

Imposing the burden solely on applicants also ignores their qualification to apply for admission to the Bar. Applicants should be entitled to a presumption of "character and fitness" based on their completion of universally rigorous law school curricula and the other underlying requirements (even if that presumption would be rebuttable).

Additionally, disclosures under the Mental Health Inquiry are not necessarily reviewed by any medical professional. It is unclear how medical records and information on diagnoses and treatment could be appropriately used, only by lawyers, to "assess" what type of "mental, emotional, or nervous condition(s)" an applicant may be "manifesting." The Bar application should not require disclosures that untrained Bar examiners are not competent to use.

The Mental Health Inquiry Violates Federal Law

For at least the reasons set forth by the Department of Justice with respect to the Louisiana Bar application, the Mental Health Inquiry is discriminatory in violation of the Americans with Disabilities Act.[15] An application for admission to the bar may not (i) screen out any individual, or (ii) impose unnecessary burdens.[16] The Mental Health Inquiry does both. It improperly focuses on mental health diagnoses and treatment, effectively screening out individuals that may have to respond to it, and/or discouraging prospective applicants from treatment. Also, the Mental Health Inquiry significantly burdens only a subset of applicants by requiring disclosure of personal information, in a stressful process, with only a possibility of minor non-cumulative value.

Other Issues Merit Attention

The Mental Health Inquiry stands in the place of honest investigation of, e.g., impaired judgment, behavior, capacity to recognize reality, and ability to represent the interest of others.

[15] DOJ Feb. 4 2015 Letter RE: Investigation of Louisiana Attorney Licensure System pursuant to the ADA, accessible at https://www.ada.gov/louisiana-bar-lof.pdf.
[16] Id. at 108.

There is no question on the Bar application about harassment or abuse of status, position, or authority. There is no check on the acceptance and recognition of reality. There is also no review of public hostility toward any group based on, e.g., race, ethnicity, or gender identification. Yet, unfortunately, prominent news stories abound of lawyers' harassment of subordinates or adverse parties, specious filings and arguments, and public bigotry. Superficially raising topics such as behavior and judgement in the Mental Health Inquiry is not only misplaced, but an implicit valuation that a history of mental health diagnoses and treatment is a more meaningful way to address related misconduct than taking it on directly.

Conclusion

The Mental Health Inquiry is not relevant to a Bar candidacy and not authorized by statute. No tweaking of it can fix these flaws. The Court should exclude the Mental Health Inquiry and any other questions on mental health diagnoses and treatment from the Bar application.

Respectfully submitted,

David W. Hannon