In response to the January 23, 2019 Michigan Supreme Court ("Court") special administrative inquiry, the University of Michigan Law School submits this comment on the issue of whether questions regarding mental health should be included on the personal affidavit that is part of the application for the Michigan Bar Examination, and if so, what form those questions should take.

BACKGROUND

The Michigan Board of Law Examiners ("BLE") establishes bar admission policies and procedures. "A person is qualified for admission to the bar of this state who proves to the satisfaction of the board of law examiners that he or she is a person of good moral character . . . [and] has the required . . . fitness and ability to enable him or her to practice law in the courts of record of this state."[1] The Character and Fitness investigation process governs whether an applicant is recommended for admission to the bar on the basis of their personal background, and a successful applicant must meet educational, moral character, and fitness qualifications.

To do so, a bar applicant must submit an affidavit that provides information about the applicant's life prior to taking the bar examination, including information about the applicant's mental health and treatment history. Specifically, questions 54a and 54b ask:

> *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*

[1] MICH. COMP. LAWS § 600.934 (1961).

ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?

As noted in the Court's special order, the BLE recently added clarifying language in a preamble to these questions. This language further contextualizes the scope and purpose of the questions, and emphasizes the value of "effective treatment by a licensed professional."

The National Conference of Bar Examiners ("NCBE") has revised its own form questions to focus on applicant *conduct*, as opposed to diagnosis and treatment. Ten states have outright eliminated mental health questions, in some cases replacing them with broadly worded questions. Together, these states and the states using the NCBE's form account for the majority of U.S. jurisdictions.

The Court is now considering whether Michigan's questions should continue to be included on the affidavit, and if so, whether they should be revised.

COMMENT

The University of Michigan Law School ("Law School") respectfully asks that the Court eliminate questions related to mental health diagnosis, treatment, and history from the Michigan bar application affidavit. While bar admission authorities exercise a weighty responsibility in ensuring that the public is served by competent and ethical attorneys, the current questions on the affidavit are overbroad and unnecessary, and may serve to deter law students from seeking salutary professional help. Moreover, absent a relevant record of conduct, any future questions that continue to solicit disclosure of mental health diagnosis or treatment history will present similar concerns. Instead, the Law School recommends that in cases where a relevant impairment of functioning has been acknowledged by the applicant or documented by other sources or application

questions, inquiries about mental health treatment may be appropriate for the sole purpose of understanding *current functioning and future performance*.

Questions about mental health history, diagnosis, or treatment inappropriately focus on the status of an individual and fail to gauge relevant conduct or fitness to practice.[2] A history of a mental health disorder has little predictive value when determining present impairment of functioning or fitness.[3] Furthermore, it is not a useful predictor of future attorney misconduct or malpractice.[4] If unaccompanied by separate disclosure of past work impairment or other salient conduct, an affirmative answer to a question related to history, diagnosis, or treatment sheds little light on the person's current fitness to practice law. Additionally, including questions about mental health conditions—even if the same questions are attached to conduct inquiries—suggests that mere disclosures made in response to these questions will trigger further investigation or follow-up. This built-in step in the character and fitness review would necessarily rely on stereotypes and generalizations about individuals with mental health conditions–i.e., speculation on what it means to live with a mental health condition–speculation that does not befall applicants without a disability status.[5]

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[2] American Psychiatric Association, *Position Statement on Inquiries about Diagnosis and Treatment of Mental Disorders in Connection with Professional Credentialing and Licensing* (2018).

[3] Liselotte N. Dyrbye et al., *Medical Licensure Questions and Physician Reluctance to Seek Care for Mental Health Conditions*, 92 MAYO CLINIC PROCEEDINGS, 1486, 1492 (2017).

[4] *See, e.g.*, Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 141 (2001) ("there is simply no empirical evidence that applicants' mental health histories are significantly predictive of future misconduct or malpractice as an attorney"); *In re Petition & Questionnaire for Admission to R.I. Bar*, 683 A.2d 1333, 1336 (R.I. 1996) ("Research has failed to establish that a history of previous psychiatric treatment can be correlated with an individual's capacity to function effectively in the workplace."); *Application of Underwood*, 1993 WL 649283, at *2 (Me. Dec. 7, 1993) ("Although it is certainly permissible for the Board of Bar Examiners to fashion other questions more directly related to *behavior* that can affect the practice of law without violating the ADA, the questions and medical authorization objected to here are contrary to the ADA.") (emphasis in original).

[5] 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.*

The Law School believes that the myriad existing questions connected to the Michigan Bar character and fitness process are sufficient to gather information relevant to determining current and future capacity to practice law. In general, bar examiners appropriately ask a wide range of questions that focus on conduct relevant to applicants' fitness. Such conduct-based questions are the most effective means for evaluating fitness.[6] On the Michigan Bar character and fitness application, individuals already must provide details related to academic, disciplinary, residential, legal, financial, employment, and criminal history. Applicants are also required to provide contact information for five personal references. Hence, there are adequate processes in place to ensure that if an individual with a mental health condition has been unable to meet relevant obligations or has displayed functional impairment, this record will come to light even in the absence of treatment or diagnosis questions. Of course, an applicant is always free to disclose mental health history or treatment in an effort to contextualize prior behavior or to buttress a claim of current capability.

Most compellingly, questions regarding mental health on bar applications often deter law students from seeking professional help.[7] The perceived potential risk to bar admission is one of the most significant factors discouraging law students from seeing a health professional for

204-32M-60-32-88,204-32-89 (Feb. 5, 2014) [Findings Letter], *available at* http://www.ada.gov/louisiana-bar-lof.pdf.

[6] Allison Wielobob, *Bar Application Mental Health Inquiries: Unwise and Unlawful*, 24:1 HUMAN RIGHTS 12, 14 (Winter 1997) ("But questions about behavior, not mental health treatment, would more accurately discover potentially problematic practitioners."); Carol J. Banta, Note, *The Impact of the Americans with Disabilities Act on State Bar Examiners' Inquiries into the Psychological History of Bar Applicants*, 94 MICH. L. REV. 167, at 186-87 (1995) ("Permissible inquiries into conduct and behavior to determine fitness are sufficient to serve bar examiners' purpose of protecting the public."); Phyllis Coleman & Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution*, 20 J. LEGIS. 147, 149 (1994) ("Consequently, professional licensing boards should inquire about conduct, not treatment for or history of mental illness or substance abuse.").

[7] *Clark v. Virginia Bd. of Bar Examiners*, 880 F. Supp. 430, at 437 (E.D. Va. 1995).

substance use issues or for mental health concerns.[8] (A similar pattern is observed among physicians, a cohort that is certainly aware of the balance between protecting the public via licensure and appropriate fitness inquiries; nearly 40% of physicians have reported a reluctance to seek treatment for a mental health condition because of concerns about repercussions to their medical license.[9]) It is the case at law schools across the country, and is certainly true at the University of Michigan, that students openly express reluctance to seek counseling for, or even discuss their mental health for fear of reporting it to bar authorities. This is true regardless of the severity of the condition or stressor: Students experiencing emotional distress over the death of a loved one have shared the same hesitation as students living with chronic anxiety or those recovering from severe clinical episodes. In addition, bar admission questions may prevent applicants who seek treatment from being fully candid about their conditions, thereby limiting a health care provider's ability to accurately diagnose and treat them. [10]

This aversion to address mental health and to seek treatment is particularly concerning when working with students who have been historically underrepresented in the legal profession. First-generation and low-income students, for example, are less likely to have prior access to counseling services or high-cost professional evaluations. Students of color may arrive from communities that stigmatized conversations around mental health, may have faced systemic hurdles to medical care, or may experience unique stressors connected to their racial identities.[11]

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[8] Jerome M. Organ, David B. Jaffe & Katherine M. 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. 116, 141 (2016).

[9] Dyrbye, *supra* note 3, at 1490.

[10] Findings Letter, *supra* note 5, at 24 ("evidence also indicates that people may become less willing to make disclosures during treatment if they know that information will be disseminated beyond the treatment relationship") (citing U.S. Dep't of Health & Human Services, *Mental Health: A Report of the Surgeon General* 441 (1999)).

[11] Or as Outlaws, a student organization at the Law School that serves LGBTQ law students, noted in a letter to the Law School's Office of Student Life: According to the National Alliance on Mental Illness, LGB individuals are almost three times more likely to experience a mental health condition such as major depression or generalized

In short, questions concerning mental health diagnoses and treatment are counterproductive if the goal is ensuring the fitness of licensed attorneys, as they further stigmatize the topic of mental health and disincentivize help-seeking measures.[12]

anxiety disorder. Hence, the deterrent effect of mental health questions is disproportionately harmful among those populations the legal profession is attempting to better support and include.

[12] Findings Letter, *supra* note 5, at 23-24 (citing American Psychiatric Ass'n, *Recommended Guidelines Concerning Disclosure and Confidentiality* (1999) (disclosure policies "inhibit individuals who are in need of treatment from seeking help"); *Clark*, 880 F. Supp. at 445-46 (bar examiners' mental health question "deters the counseling and treatment from which [persons with disabilities] could benefit" and "has strong negative stigmatic and deterrent effects upon applicants"); *In re Petition of Frickey*, 515 N.W.2d 741 (Minn. 1994) ("the prospect of having to answer the mental health questions in order to obtain a license to practice causes many law students not to seek necessary counseling").

CONCLUSION

The Law School is grateful for the opportunity to weigh in on the matter of whether and how mental health questions should be included in the Michigan Bar application process. We understand the delicate countervailing factors, and we appreciate that the Court invites comment on this important topic. Undoubtedly, the BLE cannot abrogate its duties to the public or the profession–the character and fitness process must always anticipate high thresholds for admission.

We also, however, strongly believe that eliminating mental health questions preserves the BLE's ability to identify relevant conduct, highlight problematic histories of functioning, and assess current and future impairment. In removing these questions, the Court would send a powerful message to law students and attorneys: There is no shame in experiencing psychological distress, and a clear sign of fitness to practice law is the self-awareness evinced by asking for help.

Thus, we join the Conference of Chief Justices and the American Bar Association House of Delegates in saying that reasonable inquiries concerning an applicant's mental health history are only appropriate if the applicant has engaged in conduct or behavior and a mental health condition has been offered or shown to be an explanation for such conduct or behavior.