To: Michigan Supreme Court

From: Timothy A. Dinan (P49499)

In Re: Questions regarding Mental Health on the Affidavit of Personal History

At the outset, Questions 54a and 54b make a proper inquiry regarding the current state of the applicant's ability to practice. The limitations of these questions deal with self-reporting a condition if there is no indication from the public record that a problem exists. Unlike a criminal offense or an employment record, medical issues and records are only available if an applicant identifies them.

The second part of this discussion focuses on providing conditional admission with supervision for a period of time assuming the applicant meets the other requirements of the profession. This concept is used in a number of jurisdictions where applicants enter into monitoring contracts to ensure they are able to perform as lawyers without endangering the consuming public.

The NCBE questions make similar inquiry as questions 54a and 54b but are worded more directly. The following terms and phrases would need to be clarified:

Question 25

a. "Any Conduct or Behavior"

b. "Could call into question"

c. "Your ability to practice law in a competent, ethical, and professional manner?"

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a. This question puts the burden on the applicant to "self-diagnose" whether they have conduct them themselves in a manner or behaved in a manner which would suggest they suffer from a mental disability. It is not limited to professional conduct.

There is potential to compartmentalize conduct on the part of the applicant as a justification to not discuss the issue at all. The applicants I have interviewed and represented in the past are reluctant to discuss their psychological history and any treatment they have or do receive. The concern is that if they admit to a problem that is largely 'personal', they endanger their chance to be licensed. With all of the time and money invested into a law degree and the licensing process, it is human nature to want to protect that investment.

For instance, an applicant may have a troubled personal life at home with a spouse or children but that conduct does not manifest itself at the time of the application in the work environment or otherwise in the public record. Does that conduct fall under the broad term "any conduct or behavior" for which the applicant ought to make a disclosure? There are many professionals whose conduct and behavior does not affect their work but could call into account their ability to practice law if the problem became larger. The classic example is an alcohol

abuser with a professional license who compartmentalizes the drinking as one part of the day and the work is another. Eventually, this person could have something happen to them that would affect their clients directly or indirectly because of an arrest or loss of capacity due to a diagnosable mental/medical issue. Does that person a have a mental problem? A medical problem? To what degree does this person's problem potentially affect the professional in the future? How can we be sure?

b. The phrase "could call into question" is another judgment call for the applicant. I think this question needs to delve further into the decision-making process of the applicant rather than simply leaving it to the applicant to determine whether there is a question or not about their conduct and its reflection on the applicant's ability to practice law. For instance, addictive behavior does not fall under "logical thinking" because it is a physical disease that manifests itself in conduct believed by some to be solely mental and/or morally controlled. What's the difference between somebody that had one operating while impaired conviction who otherwise is able to mask his conduct versus the person who is diagnosed with an alcohol abuse/dependence disease who has an extensive public record?

c. The ability to practice law in a competent, ethical, and professional manner is a valid inquiry. Once again, the problem will always surround the applicant's ability to understand whether he/she has a problem. In a society where people are encouraged to put their best face forward and to mask their imperfections and shortcomings, this inquiry leaves it to the discretion of the applicant to determine whether their work would meet this standard.

Applicants generally understand that their work as a licensed attorney needs to meet a standard of professional competence. What that standard is, they do not specifically know especially as applicants (and presumptively less experienced adults). Even though professional responsibility is taught in law schools, is a question on the MI essay exam, and is tested on the MPRE, an applicant may be hard-pressed to state in a close call situation that they lack the ability/character/fitness to work as a professional. From an ego standpoint, anybody who has spent three or four years in law school and hundreds of thousands of dollars on their education would be hard-pressed to admit that they could not practice in this manner.

Question 26 (A): this inquiry is more direct. It asks the applicant the question which is usually determined by third party. It might be helpful to add language that states whether the applicant has a diagnosis from a professional and/or you believe you may have such a condition.

Question 26 (B): this inquiry is helpful because it encourages applicants to share their experience with counseling and provides the Board of Law Examiners assurances that the problems being addressed. Coupling a positive response to this inquiry by offering supervision or oversight of some sort could send the message that you do not need to be perfect to practice law, but you must be responsible to make sure you're able to do your work in a competent manner. In other words, your problems do not become the problems of your clients.

I believe it is a good practice to making query into an applicant's mental health well before the bar examination and most likely before matriculating to a law school. Specific wording invites more specific answers. The example cited from California and Arizona could be

included as a "catchall" question. An applicant may identify other issues which do not go to good character but rather go towards practical concerns of practicing law. By identifying those problems upfront, the State Bar of Michigan can aid in the more practical problems which new lawyers face. Think of lawyers with ADA restrictions that may need help getting a job or starting a practice. There are lawyers with cognitive disabilities such as dyslexia who, with the right therapy, are able to function well.

Justice Bernstein's questions create a good rubric for considering these important issues.

1. "Good moral character" as defined by MCL 600.934 (1) addresses the manner in which professionals do their job. It not only goes to competency, but also goes to the heart of professionalism, being able to practice their profession in an open honest and forthright manner. Mental health can affect the ability to practice in an open honest and forthright manner. Any sort of addiction issue can be the root of criminal behaviors such as theft and other dishonest acts. Persons under the strain of pressure misrepresent themselves all of the time. When the addictive behaviors affect the ability of the professional to work, it necessarily interferes with the ability of the professional to act in an open honest and forthright manner. My experience with applicants and disciplined attorneys shows a pattern of conduct that would be contrary to the statutory goals of good moral character.

Other mental conditions can also crossover into the goal that the state has in licensing attorneys who will meet the standards of MCL 600.934 (1). Persons who are licensed and then go through some sort of trauma or fundamental life change could see their ability to practice in an open honest and forthright manner compromised because of external stresses and changes.

Having said that, it's important to recognize that these individuals who suffer or go on to suffer mental disease must be assessed in a light of trying to assist the licensee while protecting the public. This is a difficult balance at times.

2. The fitness and ability to practice speaks to the fitness and ability to perceive the clients' problems, discuss possible solutions, communicate those solutions to the client, maintain objectivity in listening to and analyzing the clients' needs, and ultimately serve the clients' best interests and desires. This is not an easy task and requires focus and attention on the client. This also assumes that the lawyer to be would perform ethically.

If an individual is burdened with their own problems, they may not be able to compartmentalize their problems and focus only on the client problems. In a number of past scenarios, the lawyer who is consumed with personal problems may use IOLTA money to solve short term issues.

If the mental issues are not a present hazard to the public and/or are a past issue with evidence of treatment and counseling, then such a diagnosis should not be a bar on admission.

3.Guidelines for evaluation of applicant's answers, regulating subsequent investigation and determining whether such history should act as a bar on licensure.

(a) Evaluation questions: These questions should be designed to gauge 1) whether there is a present condition, 2) the severity of that condition, 3) what, if any, treatment is in place, 4) how the treatment aids in the applicant's professional functionality, 5) Is current treatment used 'as needed' or chronically, 6) did this condition exist before, during or after matriculation to law school. In short, the questions and answers should provide a triage to determine if further investigation or evaluation is warranted. If the individual sought treatment or receives treatment, that ought to be deemed a positive scoring attribute unless such treatment is on an acute basis.

(b) Regulating subsequent investigation into the condition: Assuming the problem was initially deemed by the Board of Law Examiners as warranting further inquiry, the Applicant should have the ability to present findings that demonstrates current C & F and how that current fitness was achieved. Possibly, the burden should shift to the government to show how the Applicant's mental condition proves to not meet the appropriate C & F assuming the Applicant brought in the appropriate records and proofs of addressing the problem. Right now, SBM uses independent evaluators for certain applicants at the applicant's expense.

It would also be helpful for mental health treaters to have a rubric or standard describing the qualities and aspects of personality constitutes good moral character and fitness. It should give such practitioners an ability to compare behaviors and expectations with what they observe in their rendering of care.

(c) Preclusion of licensure: any standard like this should be understood in light of protecting the public and protecting the integrity of the justice system. If a person under pressure misrepresents him or herself, is that their nature or a temporary condition brought on by a mental condition? Is it avoidance or an inability to convey bad news?

Any condition that prevents the lawyer from independently performing their job is necessarily raises a condition for barring licensure. As one's conditions are more complex (e.g. able to work well when compliant with medication), can that person be conditionally licensed? Can a law license give on probationary terms be revoked for lack of compliance?

This is a slippery slope. There needs to be a bright line standard ought to be: Can the applicant serve the public as a lawyer without the lawyer's problems becoming the client's problems. If that standard can be met, then the balance of the inquiry should focus on improving and preparing that applicant to engage in practice.

4. In short, yes. No one likes to believe they have a problem that sets them apart from the crowd or potentially puts them into a situation where they have to disclose life events that have scarred them or caused some short-term problems from which they later recovered. Anecdotally, it seems that clients are reluctant to seek help, but once they do, they tend to embrace it.

5. A separate question is necessary because the applicant's mental health condition not disclosed on other parts of the affidavit of personal history could affect his/her ability to function as lawyer. This would not necessarily be flushed out by the other questions. To leave this area of inquiry blank is akin to ignoring a small problem that manifests itself later on into something much worse. Anything discovered through this question does not mean that the applicant cannot

practice law. Rather, it gives the State Bar and the applicant the ability to assess the problem/condition, make sure the applicant understands the condition, and with that knowledge enter practice.

6. Only time will tell if that choice is wise.

7. Any applicant who has a criminal history, adverse employment history, problems in school, drug and alcohol problems, etc. is necessarily delayed due to the structure of the current investigative system and the time it takes to identify the problem(s), vet those files, and determine who ought to be put through the District Committee process and Standing Committee hearings. Any applicant who is in this process is generally guaranteed 12-18 month delay.

Recommendations

The underlying question to ask: is using a written application enough? No. All applicants ought to have their affidavits of personal history reviewed by members of the bar or by investigators in a face to face interview like is done in Illinois. It would give greater dimension to the APH and possibly help identify applicants with psychological histories who do need help or do not need assistance in entering practice.

Secondly, the C and F process ought to start well before the Bar Exam and graduation. Applicants ought to have the option to begin it immediately upon starting law school so they do not reach the end of their schooling with $200K in debt and doubtful prospects of being licensed timely.

Third, extensive disclosures about licensure including the presence of mental issues should be made by all law schools to the prospective students. I am aware this is done now but it ought to be strengthened and reinforced.