

ELDER LAW & DISABILITY RIGHTS SECTION

May 31, 2019



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Chalgian & Tripp Law Offices
PLLC
26211 Central Park Blvd Ste 200
Southfield, MI 48076-4157

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Re: ADM File No. 2016-46: Elder Law and Disability Rights Section of the State Bar of Michigan Response to Special Administrative Inquiry Regarding Questions Relating to Mental Health on the Michigan Bar Examination Application from the Michigan Supreme Court

The State Bar of Michigan invited the Elder Law & Disability Rights Section (ELDRS) to respond regarding ADM File No. 2016-46 Special Administrative Inquiry Regarding Questions Relating to Mental Health on the Michigan Bar Examination Application from the Michigan Supreme Court. The ELDRS Council agreed that the Section should state an opinion on this.

ELDRS finds that questions specifically questioning a Bar applicant's mental health should be struck from the application because:

1. By asking applicants if they suffer from a "mental, emotional, or nervous condition" and not asking applicants questions regarding their physical health, mental health is being treated differently than physical health. ELDRS strongly advocates for mental health parity and Bar Exam Questions about mental health (but not physical health) perpetuates obsolete conceptions that mental health is separate from physical health, despite much evidence that mental health issues are physical in nature. ELDRS is committed to tearing down these misconceptions and believes the Bar should similarly reflect these values.
2. What is the definition of a "mental, emotional, or nervous condition" for this purpose? Mental health issues can range from sociopathy to attention deficit disorder, which would affect one's ability to practice law in different ways. Thus, the request for mental health backgrounds is overly broad.
3. The definition of a "mental, emotional, or nervous condition" is also ever evolving. As one Section member stated, homosexuality was in the DSM until 1973. By making judgments based on someone having a mental health condition, the Bar is opening itself up to legitimate accusations of discrimination.

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4. As a Bar, we are also frankly strengthened by having members with mental health issues. Their perspectives and experiences ensure that all citizens of Michigan are represented.
5. The question is also prejudicial to candidates diagnosed with mental health issues compared to those with undocumented mental health issues. Those who may have the same or even worse conditions, but who have never been diagnosed, would be able to honestly answer “no” to the questions with no further screening. While those who answer “yes” and presumably actually sought treatment will become the subject of greater scrutiny.
6. Simply knowing they may have to one day answer these questions if they ever want to practice law could be a deterrent to seeking needed treatment. Although unintended, this perverse outcome has likely already happened on numerous occasions.
7. The Bar is not qualified to diagnose mental health issues. If a candidate answers affirmatively, is the Bar able to effectively determine if the applicant is or is not qualified to practice law?
8. The question also skirts around the purpose of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA protected the privacy of an individual’s health care records. The Bar, in the application, asks the applicant to waive this Congressionally provided right for its own purposes and that practice should be questioned.
9. Most mental health issues are protected under the Americans with Disabilities Act of 1990 (ADA) as amended, preventing discrimination against those with mental conditions such as bipolar disorder and schizophrenia and requiring employers to suitably accommodate these employees. By asking this question (and as supported by examples that Justice Bernstein gives in his concurrence), the Bar is arguably violating the ADA.

For these reasons, the Elder Law and Disability Rights Section of the State Bar of Michigan urges the Supreme Court to revise the application consistent with the State Bar of Michigan’s position delivered to you by letter dated April 30, 2019. That is, replace Questions 54a and 54b on the current Affidavit of Personal History with the National Conference of Bar Examiner’s Questions 29 and 31 (except expanding the time frame in Question 31 from 5 years to 10 years).

We appreciate the opportunity to comment. If you have additional questions, please contact us.

Very Truly Yours,



Christopher W. Smith

Chair, Elder Law Section & Disability Rights Section, State Bar of Michigan

Chalgian & Tripp Law Offices, PLLC
26211 Central Park Blvd., Suite 200
Southfield, MI 48076
(248) 799-2711
smith@mielderlaw.com