



RIDLC

Rhode Island Disability Law Center

Your Protection and Advocacy System

Legal assistance for individuals with disabilities
and their families



September 15, 2015

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Civil Rights Division
Disability Rights – 1425 NYAV
Washington D.C. 20530

Re: Title II ADA Complaint against the Committee on Character and Fitness of the Supreme Court of Rhode Island and the Supreme Court of Rhode Island

Dear Sir/Madam:

Please consider this letter a complaint filed pursuant to Title II of the Americans with Disabilities Act (ADA) on behalf of A.S., a 2015 graduate from an ABA accredited law school, seeking admission to practice law in Rhode Island. As part of the admission process, the complainant completed the required Petition/Questionnaire for Admission to the Rhode Island Bar utilized by the Supreme Court of Rhode Island and the Court's Committee on Character and Fitness in 2015. The complainant is a person with a disability and seeks to eliminate discriminatory questions relating to disability and treatment from the Petition/Questionnaire that he was forced to answer, and which all other candidates must answer.

Parties

The complainant, A.S., may be contacted through the undersigned attorneys from the American Civil Liberties Union of Rhode Island (RIACLU) and the Rhode Island Disability Law Center, Inc. (RIDLC).

The government organization contacts are:

The Rhode Island Supreme Court
Committee on Character and Fitness
Licht Judicial Complex
250 Benefit Street
Providence, RI 02903
Phone: (401) 222-4233 (information line)

Gerald J. Coyne, Esq., Deputy Attorney General, whose address is the Rhode Island Department of the Attorney General, 150 South Main St., Providence RI 02903, phone (401) 274-4400, is the Chairperson of the Committee on Character and Fitness.

Debra A. Saunders, Esquire, who is Clerk of the Supreme Court of Rhode Island, (401) 222-3272, is the Vice Chair of the Committee on Character and Fitness.

Erika Kruse Weller, is the General Counsel for the Supreme Court of Rhode Island (401) 222-3266.

Julie Hamil, Esquire, is the Legal Counsel for the Committee on Character and Fitness, (401) 222-3266.

The Honorable Paul A. Suttell is Chief Justice of the Supreme Court of Rhode Island.

Ms. Saunders, Ms. Weller, Ms. Hamil and Chief Justice Suttell are all located at the Licht Judicial Complex, 250 Benefit Street, Providence, RI 02903.

Background

The Supreme Court of Rhode Island (Court) has a supervisory role over the practice of law in Rhode Island, which includes oversight of the process for admission to practice law. To that end, the Court has established a Committee on Character and Fitness (Committee) to review the moral character and fitness of all those who desire to be admitted to practice law.¹ Applicants for admission to practice law must complete the Court's Petition/Questionnaire for Admission to the Rhode Island Bar.

Since Title II of the Americans with Disabilities Act went into effect more than twenty-three years ago, questions on the Petition/Questionnaire pertaining to mental health and substance use have been rewritten at least three times, and have been the subject of two opinions by the Court. In re Petition and Questionnaire for Admission to the Rhode Island Bar, 683 A.2d 1333 (R.I. 1996); 658 A.2d 894 (R.I. 1995). In its last opinion, issued almost twenty years ago, the Court acknowledged that the Committee "must carry out its inquiry into an applicant's background within the constraints imposed by the ADA." In re Petition, 683 A.2d at 1337. The Court issued its opinions in response to a Petition for Instructions presented by the Committee on Character and Fitness. The Committee had proposed changes to the existing Petition/Questionnaire after receiving a request from the RIACLU to do so. The RIACLU asserted that both the then-existing and proposed questions violated the ADA as well as the privacy rights of applicants. The changes that were proposed by the Committee at that time are included in Attachment A.

Prior to issuing its second decision, the Court had appointed a Special Master (Patricia Ryan Recupero, J.D., M.D.) to receive public input and to submit model questions for the

¹ R.I Supreme Court Rules, Article II, Rule 3.

Court's review.² After receiving the Special Master's report and reviewing written public comment on the report,³ the Court instructed the Committee to adopt the following reformulations of Question 26 and Question 29 (a) and (b):

"Question 26: Are you currently using narcotics, drugs, or intoxicating liquors to such an extent that your ability to practice law would be impaired? Yes ____ No ____

" 'Currently' means recently enough so that the condition could reasonably be expected to have an impact on your ability to function as a lawyer.

" 'Ability to practice law' is to be construed to include the following:

(a) The cognitive capacity to undertake fundamental lawyering skills such as problem solving, legal analysis and reasoning, legal research, factual investigation, organization and management of legal work, making appropriate reasoned legal judgments, and recognizing and resolving ethical dilemmas, for example[:]

(b) The ability to communicate legal judgments and legal information to clients, other attorneys, judicial and regulatory authorities, with or without the use of aids or devices; and

(c) The capability to perform legal tasks in a timely manner."

"Question 29: Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law? Yes ____ No ____ " In re Petition, 683 A.2d at 1337.

These questions appear to have remained in use until a new Petition/Questionnaire for Admission to the Rhode Island Bar was approved by an April 18, 2007 Order of the Court.

² The Court welcomed public participation in the process, noting that "[g]iven the important public and private interests implicated in these questions, we deem it necessary to appoint a master to receive input from members of the community whose interests may be affected and whose participation may better inform us as to the value and propriety of the queries. This master is urged to ask all interested parties to submit any revisions and suggestions they may have ... This will assist in creating a meaningful dialogue." In re Petition, 658 A.2d at 896.

³ The Court expressed appreciation to those who provided public comment, including "the United States Department of Justice, Civil Rights Division; the Rhode Island Department of Mental Health, Retardation and Hospitals; the Rhode Island Mental Health Advocate; the Governor's Council on Mental Health; the Governor's Commission on the Handicapped; the Drug and Alcohol Treatment Association of Rhode Island; the Rhode Island Protection and Advocacy System, Inc.; the Alliance for the Mentally Ill of Rhode Island; the Manic Depressive and Depressive Association of Rhode Island; the National Association of Social Workers in Rhode Island; the Rhode Island Rape Crisis Center; the Rhode Island Psychiatric Society; the Rhode Island Council of Community Mental Health Centers, Inc.; the Newport County Community Mental Health Center, Inc.; The Northern Rhode Island Community Mental Health Center, Inc.; Howard Zonana, M.D., professor of psychiatry, Yale University; and several personal statements." 683 A.2d at 1335.

Under that Order, which to the complainant's knowledge did not receive the same level of public review as occurred in the Court's prior deliberations, the Court adopted the following Preamble and three questions pertaining to drug and alcohol use, mental health treatment and diagnosis, and certain other physical conditions:

Preamble to Questions 32-35

The Committee on Character and Fitness must assess effectively the health of each applicant. A lawyer's untreated or uncontrolled mental disorder or substance abuse may result in injury to the public. Additionally, physical conditions, under certain circumstances, may adversely affect one's ability to practice law. Questions 32-35 request information essential to the Committee's assessment. The Committee assures each applicant that the Supreme Court, upon the Committee's recommendations, has admitted applicants with a history of mental illness, substance abuse, and utilization of the services of mental health professionals.

The Committee considers unsatisfactory mental health to include (1) evidence of an untreated, uncontrolled mental illness or substance abuse that interferes with one's ability to practice law, or (2) evidence of the likelihood of a relapse of: (a) a prior mental illness, or (b) substance abuse that would interfere with one's ability to practice law. The Committee encourages applicants to seek assistance of mental health professionals, if needed. The Committee considers physical conditions that affect one's ability to practice law to include those mental conditions that are irreversible or, if untreated or uncontrolled, significantly interfere with one's cognitive capacity and legal judgment.

The Committee further assures each applicant that the information disclosed in the responses to these questions will be discussed, if at all, only at the initial interview with a single Committee member, unless the interviewer concludes that referral to the full Committee is warranted.

"Illegal use of drugs" means the use of controlled substances obtained illegally as well as the use of controlled substances which are not obtained pursuant to a valid prescription or taken in accordance with the directions of a licensed health care practitioner.

"Currently" does not mean on the day or even weeks or months preceding the completion of this application. Rather, it means recently enough so that the condition or impairment may have an ongoing impact. ...

32. During the past three years, have you been addicted to or treated for the use of any drug, including alcohol? Yes ____ No ____

If yes, please state the details, including dates and name(s) and address(es) of the individual(s) who provided treatment, if treatment was received. ...

In responding to Question 33, "ability to practice law" shall be construed to include the following:

- (a) the cognitive capacity to undertake fundamental lawyering skills such as problem solving, legal analysis and reasoning, legal research, factual investigation, organization and management of legal work, making appropriate reasoned legal judgments, and recognizing and solving ethical dilemmas, for example;*
- (b) the ability to communicate legal judgments and legal information to clients, other attorneys, judicial and regulatory authorities, with or without the use of aids or devices; and*
- (c) the capability to perform legal tasks in a timely manner.*

33. Within the past three (3) years have you suffered from any condition or impairment (including but not limited to substance abuse, alcohol abuse, physical condition, mental, emotional, or nervous disorder) that in any way impairs your judgment, or, if untreated, could affect your ability to practice law in a competent and professional manner? Yes _____ No _____

If yes, state the name and complete address of each hospital, institution, treatment facility or provider; the dates of treatment or evaluation; the name of each individual in charge of your treatment or evaluation; and describe what, if any, efforts have been made to remediate it ...

35. Within the past ten (10) years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional or behavioral disorder or condition as a defense, mitigation or explanation for your actions in the course of any administrative or judicial proceeding or investigation, or any proposed termination or suspension by an educational institution, employer, government agency, professional organization, or licensing authority? Yes _____ No _____

If yes, furnish a thorough explanation below, including the pertinent names, addresses, dates and references to records, as appropriate.

In May 2014, the Rhode Island Bar Association (RIBAR) wrote to the Chairperson of the Rhode Island Supreme Court Committee on Character and Fitness to express RIBAR's concern about the Petition/Questionnaire, and made note of the February 2014 U. S. Department of Justice Letter of Findings with respect to the Louisiana attorney licensure system.⁴ RIBAR expressed concern that by making inquiries into the mental health, and history of mental health, of applicants for licensure, Rhode Island's questionnaire appeared to violate the Americans with Disabilities Act. RIBAR also noted the questions relating to alcohol and other drug use were confusing and needlessly intrusive, as they did not take into account current concepts of "recovery" and addiction. Attachment B contains a copy of the RIBAR letter.

On January 22, 2015, the RIACLU and RIDLC wrote to the Committee on Character and Fitness to urge revisions to Questions 32, 33 and 35 of the Petition/Questionnaire as well as the Preamble to those questions. The RIACLU and RIDLC referenced the Court's prior extensive deliberations regarding inquiries into disability status, and the Court's prior finding that there was no empirical evidence associating a history of mental health treatment or treatment for addiction with a greater incidence of disciplinary action by attorney licensing entities or with an

⁴ See <http://www.ada.gov/louisiana-bar-lof.pdf> (last visited September 3, 2015)

inability to function in the workplace. *See* 683 A.2d at 1336. Attachment C contains a copy of the RIACLU and RIDLC letter.

To our knowledge, no substantive action has been taken to revise the Petition/Questionnaire in response to these inquiries.

Analysis

The current Questions 32, 33 and 35 and the Preamble to those questions allow the Committee to treat applicants with mental health, addiction and other disabilities differently from other applicants, in ways that violate the ADA. The questions:

- Presume a link between diagnosis and treatment and the ability to practice law. In examining the question of whether individuals with mental health or substance abuse histories actually pose a danger to the public, the Court previously found no evidence to support such a link.⁵ Reviews since that time have come to the same conclusion.⁶ These presumptions appear rooted in unfounded stereotypes about people with disabilities, which the ADA sought to eradicate.⁷ The questions and Preamble thus screen out otherwise qualified people with disabilities in violation of the ADA.⁸
- Subject people with disabilities to additional burdens, including disclosure of sensitive health care information, in violation of the ADA. Those who answer

⁵ “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.” *In re Petition*, 683 A.2d at 1336.

⁶ *See* Am. Bar Ass’n Committee on Mental and Physical Disability Law, *Recommendations to the House of Delegates*, 22 Mental and Physical Disability L. Rep. 266, 267 (Mar.-April 1998)(“Research in the health field and clinical experience demonstrate that neither diagnosis nor the fact of having undergone treatment support any inferences about a person’s ability to carry out professional responsibilities or to act with integrity, competence, or honor”); Jon Bauer, *The Character and 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”).

⁷ In enacting the ADA, Congress found that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations ... based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the ability of such individuals to participate in, and contribute to, society.” 42 U.S.C. 12101(a)(7)(1990). Congress further found “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity ... and economic self-sufficiency ... and the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those goals for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.” 42 U.S.C. 12101(a)(8) and (9).

⁸ *See* U.S. Department of Justice regulations implementing the ADA which prohibit a public entity from “impos[ing] or apply[ing] eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully or equally enjoying any service, program or activity, unless such criteria can be shown to be necessary ...” 28 C.F.R. §35.130(b)(8).

the questions in the affirmative are required to supply additional information, including the name of any treatment providers, dates of treatment, and course of treatment. The Preamble indicates that responses to the questions about treatment history may be shared with the full Committee. Further, the Court rule regarding the Committee process indicates that an applicant “waives all rights of privacy” with respect to the application and any supporting information (although this information is not made public, except by order of the Court).⁹

- Are unnecessary because they do not effectively identify unfit applicants. There are numerous other questions on the Petition/Questionnaire that serve as more effective, and non-discriminatory, screening questions, because they shed light on past behavior or conduct which may be relevant to the practice of law. Questions 17 through 31 contain an exhaustive and detailed list of inquiries into past educational, employment, military service, credit, business venture and litigation history that help the Court address its role in safeguarding the public interest.

The current Question 32 is very similar to the 1994 Committee’s proposed Question 26 (see Attachment A), which the Rhode Island Supreme Court found to be impermissible under the ADA in 1996. Although Question 32 narrows the scope of inquiry to the past three (3) years, instead of the five (5) years in the 1994 proposed question, it also broadens the scope of inquiry, by omitting the qualification that the substance use impacts the applicant’s ability to practice law. The question singles out applicants who are otherwise qualified to practice law, solely on the basis of their past treatment history. Applicants who are in recovery from addiction may feel compelled to answer Question 32 affirmatively, since many in the recovery community identify with being an addict even though they do not have an existing problem with alcohol or drug use. Applicants who have been treated for an adverse reaction to a prescribed drug may also feel compelled to answer the questions affirmatively. An affirmative answer also requires disclosure of sensitive and protected health information regarding treatment history.

Question 33 is very similar to the 1994 Committee’s proposed Question 29(b) (see Attachment A), which the Rhode Island Supreme Court also found impermissible in 1996 under the ADA. Question 33 narrows the scope of inquiry to the past three (3) years, instead of the five (5) years in the 1996 proposed question. However, Question 33 also broadens the scope of inquiry by adding a “physical condition” to the listed conditions for which treatment information is sought. Those individuals who answer “no” to Question 33 run the risk that if their disability is disclosed at some point in the future, their honesty in answering Question 33 will be questioned. An affirmative answer requires the disclosure of an extensive amount of sensitive and protected health information as well as provider and treatment history.

Question 35 is similar to the Louisiana Question No. 27, except that it broadens the scope of inquiry to ten (10) years, rather than the five (5) years used by Louisiana. Louisiana’s question was found by your agency to be unnecessary, both because of the lack of evidence supporting the

⁹ R.I Supreme Court Rules, Article II, Rule 3 (g) and (h).

link between diagnosis, treatment and ability to practice law, and because the Louisiana application asked numerous questions about prior proceedings, investigations, and terminations and suspensions from school or employment that gave bar examiners sufficient information to evaluate the circumstances surrounding these incidents and any defenses, explanations or mitigating arguments raised (including any disability-related reasons or mitigating arguments). In the Settlement Agreement with the DOJ, Louisiana agreed to eliminate any reference to disability, and focus instead on specific conduct that occurred within the past five (5) years.¹⁰ Like the Louisiana application, the Rhode Island Petition/Questionnaire asks extensive questions about past conduct, including educational, employment, military service, credit, business venture and litigation history that make Question 35, at a minimum, superfluous.

The Committee and the Court have a significant role in ensuring that attorneys in Rhode Island are competent to practice law and worthy of the trust placed in them by the public. It is consistent with this role to encourage attorneys and law students to take care of their health and disability-related needs, including mental health and substance use recovery needs. Asking Questions 32, 33, and 35 is counterproductive to this interest, as the Questions are more likely to deter applicants from seeking help with their mental health, substance use or other disability-related needs.¹¹

RIBAR and the Court have recognized the need to encourage attorneys to seek services for medical, behavioral and other conditions, and the need for attorneys to have confidential assistance in doing so. RIBAR's Lawyers Helping Lawyers Committee offers a free and confidential information, assessment and referral program (with assessment and counseling available from a non-affiliated Employee Assistance Program). RIBAR indicates that the privacy of lawyers is protected in this process and that the Court has taken steps to support the confidentiality of the process through amendments to the Rules of Professional Conduct.¹²

The American Bar Association (ABA), the largest and most influential national professional association of attorneys, recently adopted a policy acknowledging the harmful impact of state bar application questions about mental health history, diagnosis and treatment. At its 2015 Annual Meeting in July, the House of Delegates of the ABA approved a Resolution "urg[ing] state and territorial bar licensing entities to eliminate from applications required for admission to the bar any questions that ask about mental health history, diagnosis, or treatment and instead use questions that focus on conduct or behavior that impairs an applicant's ability to practice law in a competent, ethical, and professional manner."¹³ The report accompanying the resolution noted that "[q]uestions about mental health history, diagnoses, or treatment are not only unduly intrusive, but screen out or tend to screen out individuals with disabilities, are

¹⁰ See http://www.ada.gov/louisiana-supreme-court_sa.htm (last visited September 3, 2015).

¹¹ In 1994, the Special Committee on Problems of Substance Abuse in the Law Schools of the Association of American Law Schools (AALS) reported on survey results which indicated that concerns about the lack of confidentiality of treatment information would deter nearly half of all law students from seeking treatment or referring another for treatment for addiction. J. Legal Educ. 35, 54-55 (1994).

¹² See <https://www.ribar.com/For%20Attorneys/LawyersHelpingLawyers.aspx> (last visited September 3, 2015).

¹³ See http://www.americanbar.org/news/reporter_resources/annual-meeting-2015/house-of-delegates-resolutions/102.html (last visited September 3, 2015).

ineffective for the presumed purpose of identifying unfit applicants, and are likely to deter individuals from seeking mental health counseling and treatment.”

The complainant objects to having to answer questions on the Petition/Questionnaire that seek information regarding the nature and extent of his disability, and that potentially impose additional burdens on him that are not imposed on other applicants, including disclosure of sensitive health care information and provider and treatment history, and further examination by the Committee on Character and Fitness. The complainant also objects that the vagueness of the questions subjects him and other applicants to potential intrusive investigation in the future by the Committee.

In bringing this complaint, A.S. seeks the elimination of the current Questions 32, 33 and 35 from the Petition/Questionnaire, with the result that the Petition/Questionnaire does not include any question that asks about mental health history, diagnosis, or treatment.

On behalf of A.S.
By his attorneys,

 (A.S.)


Brian Adae, Anne Mulready
Rhode Island Disability Law Center, Inc.
275 Westminster St., Suite 401
Providence, RI 02903
Phone: (401) 831-3150
Fax: (401) 274-5568
Email: amulready@ridlc.org
badae@ridlc.org

 (A.S.)

Ellen Saideman, Cooperating Attorney
American Civil Liberties Union of
of Rhode Island
c/o 7 Henry Drive
Barrington, RI 02806
Phone: (401) 258-7276
Fax: (401) 709-0213
Email: esaideman@yahoo.com

Enclosures

cc: Gerald Coyne, Esq.
Julie Hamil, Esq.
Debra Saunders, Esq.
Erika Kruse Weller, Esq.
The Hon. Paul A. Suttell

ATTACHMENT A

The changes proposed by the Committee on Character and Fitness in 1994, and which, following public and Court review, were further revised in 1996, included the following revisions to Questions 26, 27 and 29:

The Committee on Character and Fitness must assess effectively the mental health of each applicant. A lawyer's untreated or uncontrolled mental disorder or pattern of substance abuse may result in injury to the public. Questions 26-29 request information essential to the Committee's assessment. The Committee assures each applicant that the Supreme Court, consequent upon the Committee's recommendation, regularly admits applicants with a history of mental ill-health, substance abuse, and utilization of the services of mental health professionals. The Committee considers satisfactory mental health to include (1) the current absence of an untreated, uncontrolled mental illness or pattern of substance abuse that interferes with law practice and (2) the unlikelihood of a relapse of a prior mental illness or pattern of substance abuse that would interfere with law practice. The Committee encourages applicants to seek the assistance of mental health professionals, if needed.

The Committee further assures each applicant that information disclosed in the responses to these questions will be discussed, if at all, only at the initial interview with a single Committee member, unless the interviewer finds evidence of unsatisfactory mental health that requires a referral of the applicant to the full Committee.

26. Are you or have you within the past five (5) years been addicted to or dependent upon the use of narcotics, drugs, or intoxicating liquors or been diagnosed as being addicted to or dependent upon said items to such an extent that your ability to practice law would be or would have been impaired? YES ---- NO ----.

If yes, please state details, including dates and name and address of the individual who made the diagnosis, if one was made.

"Ability to Practice Law" is to be construed to include the following:

- (a) The cognitive capacity to undertake fundamental lawyering skills such as problem solving, legal analysis and reasoning, legal research, factual investigation, organization and management of legal work, making appropriate reasoned legal judgments, and recognizing and resolving ethical dilemmas, for example.
- (b) The ability to communicate legal judgments and legal information to clients, other attorneys, judicial and regulatory authorities, with or without the use of aids or devices; and
- (c) The capability to perform legal tasks in a timely manner.

27. Are you currently engaged in the illegal use of drugs?

"Illegal Use of Drugs" means the use of controlled substances obtained illegally as well as the use of controlled substances which are not obtained pursuant to a valid prescription or taken in accordance with the directions of a licensed health care practitioner.

"Currently" does not mean on the day of, or even the weeks or months preceding the completion of this application. Rather, it means recently enough so that the condition or impairment may have an ongoing impact.

You have a right to elect not to answer those portions of the above questions that inquire as to the illegal use of controlled substances or activity if you have reasonable cause to believe that answering may expose you to the possibility of criminal prosecution. In that event, you may assert the Fifth Amendment privilege against self-incrimination. Any claim of Fifth Amendment privilege must be made in good faith. If you choose to assert the Fifth Amendment privilege, you must do so in writing. You must fully respond to all other questions on the application. Your application for licensure will be processed if you claim the Fifth Amendment privilege against self-incrimination.

29. (a) Have you ever been hospitalized, institutionalized or admitted to any medical or mental health facility (either voluntarily or involuntarily) for treatment or evaluation for any emotional disturbance, nervous or mental disorder? YES ---- NO ----. If yes, state the name and complete address of each hospital, institution or treatment facility; the dates of treatment or evaluation; and the name of each individual in charge of your treatment or evaluation.

(b) Are you now or have you within the past five (5) years been diagnosed as having or received treatment for an emotional disturbance, nervous or mental disorder, which condition would impair your ability to practice law? YES ---- NO ----. If yes, explain, stating the name and complete address of each psychologist, psychiatrist, counselor or other medical practitioner who made such diagnosis or from whom you received treatment, and the relevant dates.

See: In re Petition and Questionnaire for Admission to the Rhode Island Bar, 658 A.2d 894, 897-899 (R.I. 1995).

ATTACHMENT B



**RHODE
ISLAND
BAR
ASSOCIATION**

J. Robert Weisberger, Jr.
PRESIDENT

Bruce W. McIntyre
PRESIDENT-ELECT

Melissa E. Darigan
TREASURER

Armando E. Batastini
SECRETARY

Helen Desmond McDonald
EXECUTIVE DIRECTOR

May 28, 2014

Deputy Attorney General Gerald J. Coyne
Chairman, Supreme Court Committee on Character & Fitness
Rhode Island Department of Attorney General
150 South Main St.
Providence, RI 02903

Dear Jerry,

It was recently brought to the attention of the Bar Association by our Lawyers Helping Lawyers Committee that the current application for bar admission in Rhode Island includes queries regarding an applicant's mental health, history of mental health and history of addiction to alcohol and/or drugs.

We have also learned that the US Department of Justice, in February of this year, issued a formal "finding" that virtually identical queries on the Louisiana bar admission questionnaire violate the Americans With Disabilities Act. The Department of Justice also found that the Louisiana Supreme Court's processes for evaluating and granting conditional admission to certain persons with mental health disabilities violate the law.

The Rhode Island questionnaire, by making inquiries into the mental health and history of mental health of bar applicants, appears to violate the Americans With Disabilities Act for the reasons outlined in the Justice Department finding. (Copy attached)

More specifically, question 32 is confusing and needlessly intrusive. While opinions vary, there is a common understanding in the professional treatment community and among persons who have stopped using illegal drugs or abusing alcohol that they remain "addicted" for the remainder of their lives. Hence, if someone is a recovering alcoholic who has not had a drink in 30 years, they may nevertheless feel obliged to answer "yes" to the question. If they are being "treated" through participation in a "12 Step" program they may not respond to the second part of the question without violating the tenants of "12 Step" programs, which are founded on the principle of its members' anonymity. Moreover, many persons rely on daily medications to maintain their health, both physical and mental. In a sense, they may be considered addicted as well.

115 Cedar Street
Providence
Rhode Island 02903
telephone: (401) 421-5740
fax: (401) 421-2703
email: info@ribar.com
website: www.ribar.com

The Executive Committee voted at its meeting on May 27, 2014 to support the recommendation of our Lawyers Helping Lawyers Committee and to communicate to the Supreme Court Character & Fitness Committee our concern about this issue. We are also concerned about the stigma associated with mental health issues and that disclosure requirements may deter individuals from seeking treatment. The Department of Justice notes that a bar admissions committee can achieve its objective of identifying applicants who are not fit to practice law without utilizing questions that focus on an applicant's status as a person with a mental health disability.

If the Association can be of any assistance in your review of this request, please don't hesitate to contact me.

Very truly yours,

A handwritten signature in cursive script, reading "J. Robert Weisberger".

J. Robert Weisberger
President

Cc: Debra A. Saunders, Vice Chair
Nicholas Trott Long, Chairperson, RIBA Lawyers Helping Lawyers
Committee

ATTACHMENT C

January 22, 2015

Deputy Attorney General Gerald J. Coyne
Chairman, Supreme Court Committee on Character & Fitness
Rhode Island Department of Attorney General
150 South Main Street
Providence, RI 02903

**RE: Disability Discrimination in Questions 32, 33, 35 and the Preamble to Questions 32-35
of the Petition/Questionnaire for Admission to the Rhode Island Bar**

Dear Chairman Coyne,

We write the Committee because we understand that the Committee has received a request by the Rhode Island Bar Association to revise the Petition/Questionnaire for Admission to the Rhode Island Bar in order that improper queries into an applicant's mental health, history of mental health and history of addiction to alcohol and/or drugs are eliminated.

Because we believe that Questions 32, 33 and 35 are illegal inquiries and violate the Americans with Disabilities Act (ADA), we ask that they be eliminated. As the Preamble to Questions 32-35 of the Petition/Questionnaire outlines and references impermissible and discriminatory inquiries into an applicant's disability status, we urge revision to the Preamble to Questions 32-35. Further, as this also raises serious questions into the practice of admission and conditional admission to persons with disabilities that may violate the law, we suggest a review of the current rule and its application.

The current Questions 32, 33 and 35 solicit information about current and past disability (including a mental, emotional or behavioral disorder) and alcohol and/or drug use. The ADA prohibits licensing entities from using criteria that screen out applicants with disabilities, rather than criteria that relate to *conduct* that makes an applicant unfit. The Petition/Questionnaire has a very detailed and lengthy set of questions designed to elicit information about past conduct relevant to the practice of law. We are not aware of any studies that substantiate that the disability status of a lawyer correlates with a risk of injury to the public. As Justice Lederberg noted in the R.I. Supreme Court's review of a prior iteration of the Petition/Questionnaire, "[r]esearch has failed to establish that a history of previous psychiatric treatment can be correlated with an individual's capacity to function in the workplace." 683 A. 2d 1333, 1336 (R.I. 1996). In this same prior review, the report of the Court's Special Master noted "there is no empirical evidence demonstrating that lawyers who have had psychiatric treatment have a greater incidence of subsequent disciplinary action by the bar or by another regulatory body in comparison with those who have not had such treatment." *Id.*

In short, the Committee does not need to rely on assumptions and speculation about disability. If an applicant has passed the bar exam and past conduct provides no basis for concern, there is simply no legitimate reason to inquire or delve into the applicant's mental health condition and/or treatment.

Last year, the U.S. Department of Justice, Civil Rights Division (DOJ) completed its investigation of the Louisiana Supreme Court's attorney licensure system. The DOJ found that Louisiana violated Title II of the ADA when it used similar bar application questions that screened out or tended to screen out applicants with disabilities based on stereotypes and assumptions about their disabilities, and not on eligibility criteria essential to the practice of law. The DOJ found that other forms of discrimination flowed from the use of these discriminatory eligibility criteria in Louisiana, including (1) imposing additional burdens on applicants with disabilities in the form of expansive and intrusive requests for medical records, (2) making admissions recommendations that were based on the mere existence of a mental health disability rather than on conduct, (3) placing burdensome conditions on applicants' licenses because of mental health diagnoses or treatment, (4) imposing additional financial burdens on applicants and attorneys with disabilities, and (5) failing to protect the confidentiality of medical information of applicants with disabilities. The DOJ Settlement Agreement with the Louisiana Supreme Court called for elimination of inquiries into mental health diagnosis or treatment, including drug and alcohol use, (unless an applicant has put forth that information as an explanation for conduct that might otherwise warrant denial of admission), and also provided for compensatory damages.

Some states have bar applications that do not ask a single question regarding mental illness or seek any information regarding membership in any protected class and, in response to this DOJ action and other guidance, several states have since eliminated questions about the mental health diagnosis and treatment of individuals seeking to practice law. Instead, the interest of protecting the public against unfit practitioners and preserving the integrity of the profession is served by targeting questions to a person's conduct rather than protected status.

We look forward to the Committee's action in this matter.

Sincerely,



Brian Adae, Staff Attorney
RI Disability Law Center
275 Westminster St., Suite 401
Providence, RI 02903-3434
(401) 864-1705



Steven Brown, Executive Director
American Civil Liberties Union of Rhode Island
128 Dorrance Street, Suite 220
Providence, RI 02903
(401) 831-7171

cc: Debra A. Saunders, Vice Chair
Barbara Margolis, Legal Counsel