

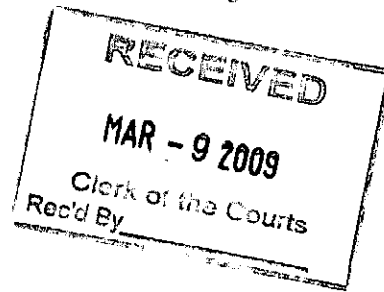


DISABILITY LAW & ADVOCACY CENTER
of Tennessee

VIA HAND DELIVERY

March 9, 2009

Michael W. Catalono, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407



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**Re: Comments on Proposed Amendment to Tennessee Supreme Court Rules
Rule 7, Section 10.05 Conditional Admission**

Mr. Catalono:

Please accept the following comments regarding the proposed amendment to
Tennessee Supreme Court Rule 7, Section 10.5.

Sincerely,

Martha M. Lafferty
Managing Attorney

Attachment: Comments on Proposed Amendment

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**Comments on Proposed Amendment to Tennessee Supreme Court Rules
Rule 7, Section 10.05 Conditional Admission**

Disability Law & Advocacy Center of Tennessee (DLAC) is a private nonprofit agency which has been designated as the protection and advocacy system for Tennessee. Our organization belongs to a national network of agencies mandated and funded by Congress to help enforce the human and civil rights of individuals with disabilities. DLAC joins with all of the undersigned to comment on the proposed amendment of Tennessee Supreme Court Rule 7 by adding a new provision governing “conditional admission” to the practice of law. *See*, Exhibit A, for additional information about DLAC and the other supporters of these comments.

The proposed conditional admission provision violates the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., as amended, by holding attorney licensure applicants with disabilities to a higher standard than licensure applicants without disabilities. The provision singles out lawyers with mental illness, chemical dependency/substance abuse disorders and other disabilities and permits the imposition of costly, invasive and cumbersome conditions on these individuals’ ability to practice. Lawyers without disabilities are not subjected to these conditions. This provision allows the Board of Law Examiners to impose conditions based on an individual’s past disability-related conduct, notwithstanding the fact that the individual currently satisfies all essential eligibility requirements for admission, including fitness requirements. The justification for the conditions is the possibility that “the conduct or behavior, *if it should recur*, would impair the applicant’s current ability to practice law or pose a threat to the public.”

The ADA does not permit the Board of Law Examiners to subject a person to differential treatment based on the mere possibility that disability-related conduct *might* recur. It requires an individualized assessment of whether the person is fit to practice based on present circumstances and current, objective medical or similar relevant evidence. Safety concerns posed by a person's disability may be disqualifying only where there is a significant risk of imminent harm. *See, e.g., Bragdon v. Abbott*, 524 U.S. 624, 648-50 (1998), *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287-88 (1987); 28 C.F.R. Pt. 35, App. A, § 35.104 (definition of "qualified individual with a disability").

Moreover, if adopted, the conditional admission provision would allow the Board of Law Examiners to impose conditional admission on some applicants solely because those applicants have a mental health diagnosis or substance abuse disorder even though they already meet all essential eligibility requirements. Although the proposed provision contains language suggesting that the conditional admission may be based upon "conduct" or "behavior" rather than disability status, the provision does not define these terms or provide any examples of the types of conduct or behavior at issue.

The absence of detailed information about the conduct or behavior that may trigger this rule leaves the Board of Law Examiners with discretion to impose conditions based simply on an individual's disability or need for treatment. For example, the kinds of conduct/behavior which trigger conditional admission could include simply obtaining treatment for a mental illness or substance abuse disorder. Similarly, the Board could impose conditions based on conduct occurring in the distant past.

The proposed provision also permits the Board of Law Examiners to impose conditional admission for an applicant based on conduct caused by a disability when the

same conduct would not be the basis for conditional admission if it does not arise due to a disability. In order to avoid unlawful discrimination, the same conduct and behaviors should be viewed as problematic regardless of whether an individual has a disability. Disability should only become an issue during a licensure inquiry in the event that an individual voluntarily discloses a disability and requests a reasonable accommodation related to that disability.

Our concerns about this proposed rule are heightened by the fact that the Tennessee Board of Law Examiners currently requires applicants to answer the mental health and substance abuse inquiries contained in questions 25-27 of the National Conference of Bar Examiners (NCBE) Character and Fitness Application.¹ Because those questions focus on diagnosis, not behavior or conduct, there is a risk that the Board of Law Examiners or its agents may use diagnosis as a proxy for conduct/behavior or as the threshold for taking a harder look at behavior or conduct that would not otherwise be at issue.²

¹ Many states which use the NCBE application have opted to no longer use these three questions. In addition, it is our position that questions about diagnosis violate the ADA's prohibition on unnecessary inquiries. That position is well supported by applicable case law. See, *Clark v. Virginia Board of Bar Examiners*, 880 F.Supp. 430 (E.D. Va. 1995); *In re Petition and Questionnaire for Admission to the Rhode Island Bar*, 683 A.2d 1333 (R.I. 1996); *In re Applications of Underwood*, 1993 WL 649283 (Me. Dec. 7, 1993); *Ellen S. v. Florida Board of Bar Examiners*, 859 F.Supp.1489 (S.D. Fl. 1994).

² While we contend the use of all three of these questions violates the ADA, the most troubling of these questions is Question 26 which reads as follows:

Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner? (emphasis added).

Obviously, any condition or impairment could potentially affect a person's ability to practice law if left untreated. Accordingly, any person with any kind of impairment must answer this question in the affirmative in order to provide a truthful answer. Therefore, NCBE Question 26 effectively forces applicants for attorney licensure who have a mental illness or substance abuse disorder but are currently fit to practice to choose between disclosing their disability and providing a false answer. Researchers have (Footnote Continued on Next Page)

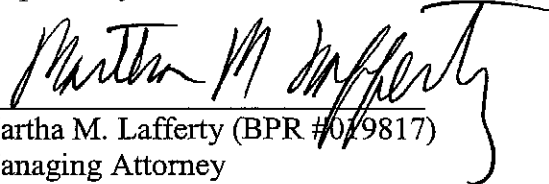
In addition, we are concerned that the Board of Law Examiners may attempt to impose conditional admission upon all applicants who answer any of NCBE questions 25-27 affirmatively. This concern is not only based upon the proposed rule's lack of criteria for imposition of conditional admission but also on reports DLAC has received from individuals who have given affirmative answers to these questions. It appears the Board of Law Examiners may already subject applicants with disabilities who honestly answer these questions to a much higher level of scrutiny than either applicants without disabilities or applicants who provide false answers to these questions.

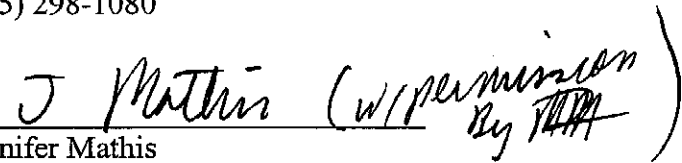
The proposed conditional admission provision is also likely to deter college and law students from seeking treatment for mental illnesses and substance abuse disorders. For example, in surveying 13,000 law students, the *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools* found that, when asked if they would seek assistance from a law school or university substance-abuse program, only 10 percent responded with an unqualified "yes," while 41 percent responded that they would seek such assistance only if they were assured that bar officials would not have access to the information. 44 J. Legal Educ. 35, 55 (1994). Indeed, the Bazelon Center for Mental Health Law has received a number of calls from students who have expressed reluctance to seek needed mental health treatment due to fears that receipt of treatment will hinder their admission to the bar.

found that approximately twenty percent of the population has some form of mental or emotional disorder. *Clark*, 880 F.Supp. at 437. Yet, as the court noted in *Clark*, between 1989 and 1994, only one percent of applicants responded affirmatively when asked whether they had been "treated or counseled for any mental, emotional or nervous disorders" within the past five years. *Id.* This discrepancy suggests that either people with mental disorders are not seeking help, or that individuals are answering the question inaccurately.

Due to the concerns discussed above, we recommend that the Tennessee Supreme Court decline to adopt this proposed conditional admission provision. If an applicant is currently engaging in conduct that would make him or her unfit to practice law, the applicant should not be admitted. If the applicant has a disability that caused him or her to engage in such conduct in the past, but there is no significant risk that the conduct will recur, that conduct should be irrelevant to the fitness inquiry. Conditional admission serves no productive purpose in assisting lawyers with disabilities, and serves as an unnecessary restriction rather than a benefit to these lawyers. If the Court remains concerned about how to address the issue of problematic conduct, we recommend that the Court table this issue for a period of time and create a committee to study this issue further by seeking input from attorneys, law students, disability rights organizations, medical professionals and interested others. At the Court's request, DLAC would be happy to provide further input on this issue.

Respectfully Submitted on March 9, 2009,


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Nancy Keeler

Chair

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EXHIBIT A
INFORMATION ABOUT SUPPORTERS
OF THESE COMMENTS IN OPPOSITION
TO CONDITIONAL ADMISSION

Disability Law & Advocacy Center of Tennessee (DLAC) is a private non-profit Protection & Advocacy organization which advocates for the rights of Tennesseans with disabilities to ensure they have an equal opportunity to be productive and respected members of our society. Our agency was established in 1978. DLAC provides legally based advocacy services for the rights of people with disabilities in many areas including education, abuse/neglect, accessibility/disability discrimination, access to services and supports/community integration, employment, juvenile justice and voting.

The Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, training and education, the Center promotes the rights of individuals with mental disabilities to participate equally in society. The Center has litigated on behalf of individuals challenging overly broad bar admission questions related to mental health and improper disability-based denials of admission to the bar. The Center has assisted many other individuals through advice and informal advocacy. It has also served as a resource for lawyers and advocates addressing these issues across the country.

The National Disability Rights Network (“NDRN”) is the membership association of protection and advocacy (“P&A”) agencies that are located in all 50 states, the District of Columbia, Native American community, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. The P&A system comprises the nation’s largest provider of legally based advocacy services for persons with disabilities.

Mental Health Association of Tennessee (MHA) is a 501(c)(3) founded and incorporated in 1999 to address advocacy and public policy initiatives and promote mental health education. MHA’s mission is to influence and drive public mental health policy for all Tennesseans.

NAMI Tennessee, the state chapter of the National Alliance on Mental Illness, is a grassroots, self-help organization dedicated to improving quality of life for individuals with mental illness, their families and communities. Our mission is accomplished through mutual support, education and advocacy.

American Civil Liberties Union of Tennessee (“ACLU-TN”), is a private nonprofit non-partisan organization dedicated to protecting and expanding the civil liberties of all Tennesseans. ACLU-TN’s mission is to promote and protect constitutional rights in Tennessee. ACLU-TN has a demonstrated interest in disability rights and ensuring that all people are treated equally under the law, rules and regulations affecting Tennesseans.

The PAIMI Advisory Council (PAIMI Council) advises the Board of Directors of Disability Law & Advocacy Center of Tennessee (DLAC) on policies and priorities to be carried out to protect and advocate for the rights of individuals with mental illness. The PAIMI Council includes representation from each of the following categories: attorneys, mental health professionals, individuals from the public who are knowledgeable about mental illness, providers of mental health services, individuals who have received or are receiving mental health services, and family members of such individuals.