Yale University

School of Medicine
Department of Psychiatry

Connecticut Mental Health Center
Law and Psychiatry Division
34 Park Street
New Haven, Connecticut 06519-1187

Howard Zonana, M.D., Director

Telephone: 203 789-7421
Fax: 203 789-7349

November 20, 1995

Patricia Ryan Recupero
Special Master, Rhode Island Supreme Court
c/o Brennen & Recupero
50 Holden St.
Suite 150
Providence, Rhode Island 02908

RE: In re Petition and Questionnaire for Admission to the Rhode Island Bar, No. 93-246-M.P.

Dear Dr. Recupero:

I am writing to support the proposals of the Rhode Island Affiliate of the ACLU regarding the proposed questions regarding mental illness used for screening applicants to the Rhode Island Bar.

I hold the position of Professor of Psychiatry at Yale University School of Medicine. Since 1986, I have served as the Director of the Law & Psychiatry Division of the Connecticut Mental Health Center. In addition to teaching and supervising medical students and psychiatric residents, I have co-taught numerous courses on psychiatric and legal issues at the Yale Law School and have an appointment as Clinical Lecturer in Law. During the past twenty years I have written extensively and spoken frequently on the interrelationship between the legal system and psychiatric diagnostic and treatment issues. In addition to these academic responsibilities, I am consulted regularly in criminal and civil cases raising psychiatric questions. My curriculum vitae is attached.

During the past five years I have been involved as a member of the American Bar Association's Commission on Mental and Physical Disability Law's efforts to draft a proposed resolution urging the removal of all questions regarding a bar applicant's diagnosis, and prior treatment as a screening

device to assess character and fitness. Our proposal was modified and passed after two years. The proposal suggested a narrow tailoring of such questions.

In our report, we concluded that inquiries about mental health history shed little or no light on applicants' fitness to practice law, intrude on their privacy interests and likely violate the Americans with Disabilities Act. In addition, such questions discourage prospective attorneys from seeking treatment for fear that the fact of their treatment will be a barrier to their admission to the bar.

In my view, questions about mental health history in the bar admission process do not have legitimate use. As we observed in our report, a few mental disorders, per se, are accompanied by behavior likely to render an individual unfit to practice law. Phobias, such as fear or heights and sleep walking, rarely impair one's occupational function yet are classified as mental disorders in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). We further emphasize that "research in the field, clinical experience and common sense all demonstrate that neither diagnosis nor the fact of having undergone treatment supports any inference about a person's ability to carry out professional responsibilities or to act with integrity, competence or other."

As my co-authors and I note, "while the fact of diagnosis or treatment has no predictive value of past behavior, it is the most predictive of future behavior. That past behavior is, of course, a legitimate subject of inquiry to bar examiners, and they can ask about it." Mental health history, however, is not an appropriate proxy for past behavior.

"Examiners may not ask questions about a person's mental health history as though they are asking about behavior. This use of mental health history is a surrogate for behaviors as a product of the very stereotyping and prejudice the ABA was designed to eliminate."

The Rhode Island Bar Committee on Character and Fitness notably already makes comprehensive inquiries about applicants' past behaviors. In their admissions process, the Committee conducts extensive review of applicants' biographical, educational and employment backgrounds to determine their morals and fitness. For instance, each applicant is asked to provide references for each residence in which he or she has lived more than 30 days

since his/her 18th birthday. In addition, applicants are asked to provide detailed information regarding their higher education including whether or not they have been expelled or otherwise subject to any academic discipline. Applicants also are required to identify each of their employers with addresses since they were 18 years old and to indicate the reason for leaving the employment. Questions further inquire into divorce, alimony, bankruptcy, criminal or juvenile offenses as well as military service. These types of inquires are tailored to elicit useful information about past behaviors that, unlike questions about mental health history, are likely to shed light on an applicant's fitness to practice law.

I also wanted to share some of my experiences in four cases regarding these kinds of questions in different states. I have been an expert witness in cases in Florida, Texas, Virginia and Connecticut.

1. Most states only conduct inquiries about applicants at the time of the initial application to the Bar. Unlike physicians who are generally questioned yearly when they reapply for their licenses, attorneys are rarely, if ever, asked about current problems. Yet, most attorney disciplinary and grievance problems arise after an attorney has been in practice for a number of years, and the vast majority of complaints have to do with alcoholism, addiction and gambling which are late onset conditions. In my view, an unfair and impossible burden is placed on bar examining committees to somehow screen and insure to the public that they are looking after the public's interests and safety in the selection of attorneys.

2. While all states attempt to do these evaluations in a confidential manner, this is generally not possible even with the best intentions. At the least, bar examining committees are made up of prominent attorneys in practice. They become privy to a large amount of confidential information since most questions ask an applicant to explain all of the details concerning their past treatment without limit. In addition, in Connecticut, for example, in spite of their efforts to maintain confidentiality in their screening procedures, all applicants with questions about their character and fitness were invited on one day. An attorney who was representing an applicant noticed someone sitting in the hallway whom his firm had interviewed the week before. It is very difficult, if not impossible, to maintain adequate confidentiality in these proceedings.

3. In addition, in Florida, treatment centers near law schools became so concerned about the use of this information that they began routinely giving warnings to law students applying for treatment saying they needed to be aware that if they came for treatment, they would have to report this on the bar examiners application. Florida, before they recently changed their questions, would ask individuals at times to enter the hospital for further testing at their own expense. This is hardly a good beginning for treatment.

4. There is no data from any state I have been involved with as well as reviewing the literature which shows that these questions have been productive in screening out unfit applicants. All the cases I have reviewed, where further inquiry was appropriate, would have been picked up by behavioral questions as well as questions about mental illness.

5. Most bar examining committees do screening in a arbitrary fashion in that the initial screenings are done by lay individuals with no mental health experience or training, usually the executive director. They review the applications and if it looks to them as though there may be a problem, they select those which are sent to the psychiatric consultant or in which applicants are asked to provide greater information.

Some states have responded to the ADA by dropping these questions altogether as they have reviewed their past experience with them. Other states have narrowed the question to certain severe psychiatric disorders. Even these, however, serve only to stigmatize mental disorders as generally comparable questions and not ask about physical disorders. Even the diagnosis of a severe mental disorder such as schizophrenia or bipolar disorder is not dispositive of the issue. First of all, especially with schizophrenia, it is usually debilitating so that successful completion of law school is not possible. In a few cases where that is not the issue, the individual is able to practice and function adequately as a recent article in the New York Times illustrated (enclosed). Even Bipolar disorder is generally a very treatable condition and most afflicted individuals comply with treatment and lead very successful professional lives. In contrast untreated psychiatric and other conditions, if severe, are likely to be reflected in functional problems. Questions relating to employment, education, and other history are best suited to ferret out such problems. A focus on psychotic disorders contributes to the stigmatization of mental illness and is not sufficiently related to the purpose of determining current fitness to practice.

The American Psychiatric Association (APA) has long been concerned about the possible adverse effects of policies which require inappropriate and indiscriminate disclosure of the history of psychiatric consultation and treatment. Before the ADA was written, the APA had several policies condemning such inquiries, and the work group on disclosure suggested guidelines which were approved by the Board of Trustees in 1992. One of the guidelines for licensing boards stated the following principle:

"Prior psychiatric treatment is, per se, not relevant to the question of current impairment It is not appropriate or informative to ask about past psychiatric treatment except in the context of understanding current function. A past history of work impairment, but not simply past treatment, or leaves of absence may be gathered."

Their model question was, "Since you became a medical student, have you ever had an emotional disturbance, mental illness, physical illness, or dependency on alcohol and drugs which has impaired your ability to practice medicine or to function as a student in medicine?" This question is better than ones which do not tie the inquiry to behavior but probably violates the ADA in going further than questioning about current conditions. There should be some finite time limit for the inquiry. The APA also had a more general policy which is currently being updated to include the principles outlined under the ADA.

This is not meant to suggest that inquiries cannot be made if, in the explanation of a problematic behavior, an explanation is given by the applicant which invokes a mental illness that played some role. This is very different than direct inquiries about treatment per se. In my view the best approach is to combine a general inquiry focusing on current functional impairment with broad and specific conduct based inquiries of the type already used by the Committee. While some bar examiners claim that a question focusing on specific psychotic disorders is more useful (because it gets more truthful answers and deters applicants with more disabling mental disorders from applying), there is no data to support this position. In particular, no one has reported that a general inquiry about functional impairment has resulted in subsequent performance problems traceable to nonresponsive answers. So long as the penalty for a false answer is clear, I believe that such a question will yield as truthful answers as a question

focusing on psychotic disorders. Time lapses in work or education are good indicators of possible impairment. There is some additional literature that may be of interest and I have summarized the portions that are pertinent for your consideration.

1) Halleck, S. et al. The Use of Psychiatric Diagnoses in the Legal Process The American Psychiatric Association, Task Force Report:, pp. 11-13. (1992)

In this section, the report discusses the misuse of psychiatric diagnosis as a proxy for capacity to function. As the report emphasizes, "There may be considerable variation in impairments, abilities, and disabilities within a diagnostic category. While a diagnosis is instrumental in gaining access to clinical and research data defining the range of impairments associated with its symptoms, it does not inform the legal decision maker about the actual impairment of a particular patient. The range of possible functioning (whether it involves mental capacities or behavioral performance) within a diagnosis is broad." (p. 12) The report then points out the fallacy of assuming that because certain diagnoses are commonly associated with certain functional problems, those diagnoses are predictive of functional problems: [W]hile certain diagnoses commonly may be found among those who are characterized as 'incompetent' or disabled for legal purposes the prevalence of legally relevant disability among all those suffering from a disorder may be quite low." (Id.) Although the report's focus is on the misuse of diagnoses in legal settings, its findings and reasoning apply with equal force to the use of particular diagnoses, such as of a psychotic disorder, to predict functioning as an attorney.

2) P. Coleman and R. Shellow, Fitness to Practice Law: A Question of Conduct, Not Mental Illness The Florida Bar Journal May 1994 pp. 71-74

This article summarizes the arguments against broad mental health inquiries in the bar admissions process, with which I assume the Committee is already familiar. I am enclosing it because it contains on p. 74 a list of suggested questions that may be useful to the Committee. They are obviously very similar to the questions already asked by the Committee in the bar application. The suggested questions do not include a general question about medical conditions related to functional impairment. I have reviewed the questions approved by the Department of Justice for New Mexico -- which I understand the Committee has obtained -- and believe that such questions are appropriate so long as limited to current impairments.

3) C. Baer and P. Corneille, Character and Fitness Inquiry: From Bar Admission to Professional Discipline, 61 The Bar Examiner 5 (1992)

This is the only study of which I am aware that attempts to trace attorney discipline problems to character and fitness issues arising in the bar application process. The sample of disciplined attorney files was small (52). It is nevertheless suggestive that only two applications out of the 52 (3.8%) disclosed histories of mental health treatment.

While the study did not report what percentage of all applicants had disclosed mental health treatment, it was probably at least 4%. Thus, it would appear that those with pre-admission mental health histories were no more likely than other applicants to later engage in misconduct as attorneys. In contrast, the applications disclosed a much higher rate of pre-admission conduct-related problems (e.g. arrests (27%) and involuntary terminations (17%)). This differential suggests that conduct-based inquiries are likely to be more probative of future disciplinary problems. I should note, in addition, that drawing an inference that mental health inquiries are valuable from even the two applications that revealed histories of mental health treatment is highly problematic because the study does not indicate whether those two applications also contained histories of problems in conduct. If these applications also revealed conduct-related issues, mental health history would clearly be irrelevant.

4) S. Maher and L. Blum, A Strategy for Increasing the Mental Health Health and Emotional Fitness of Bar Applicants 23 Ind. L. Rev. 821 (1990)

This article contains a useful discussion of the problems with broad mental inquiries in the admissions process. As the authors point out, any inquiry that focuses on diagnosis and treatment will overlook applicants with mental health problems who have never sought treatment and who may deserve the most attention. (p. 829) In addition, such inquiries deter applicants from seeking treatment and interferes with treatment (pp. 834-46).

If you think it useful, I would be more than happy to consult or provide other information regarding the development of appropriate questions in Rhode Island.

Sincerely yours,

Howard Zonana, MD
Professor of Psychiatry