JENNIFER SHAW
DEPUTY DIRECTOR

July 15, 2014

VIA ELECTRONIC MAIL

Ms. Paula Littlewood
Executive Director
And Members of the Board of Governors
Washington State Bar Association
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JEAN ROBINSON
BOARD PRESIDENT

KATHLEEN TAYLOR
EXECUTIVE DIRECTOR

Re: Mental health disability discrimination in questions 24 and 25 of the Washington state bar exam

Dear Ms. Littlewood,

The American Civil Liberties Union of Washington (ACLU-WA) appreciates the opportunity to comment on the Washington State Bar Association's (WSBA) bar exam application. The ACLU-WA is a statewide, non-partisan, non-profit, organization with over 20,000 members, dedicated to the preservation and defense of civil liberties.

The WSBA has an important role in protecting the public and our system of justice by determining whether applicants to the Washington state bar are fit to practice law. However, questions 24 and 25 of the "character and fitness" section of the Washington State Bar exam application do not further this goal. An applicant's response to these questions may subject that applicant to unnecessary intrusions based on his or her status as an individual with a mental health disability. As a result, these questions violate the Americans with Disabilities Act (ADA) and the Washington Law Against Discrimination (WLAD). We strongly urge the WSBA to remove questions 24 and 25 from the bar exam application.

Questions 24 and 25 are directed toward applicants who currently have or previously had mental health disabilities. In answering the questions, an applicant is required to state whether in the past two years they have experienced, been diagnosed with or undergone treatment for a mental health condition or impairment, which "substantially impairs your ability to practice law in a competent and professional manner." *See* Question 24(A); *accord* Question 25 (defining fitness to practice law as the absence of "any current mental impairment … which, if extant, would

substantially impair the ability of the applicant, bar association member, or petitioner to practice law"). Qualified applicants with psychiatric disabilities are put in a no-win situation. An applicant may answer, "No," reasoning that the condition is controlled and does not substantially impair his or her ability to practice law. But that answer may subject the applicant to an allegation of lack of condor, particularly given the content of question 24(B), which asks about ameliorating treatments. An applicant that answers, "Yes," is subject to a WSBA investigation into the details of the applicant's disability. These targeted applicants are then required to provide private information about past conduct, medical records and detailed information about their diagnosis, treatment and prognosis in order to gain admission to the bar.

Both state and federal law prohibit the use of criteria that screen out or tend to screen out applicants based on their status as an individual with a disability. The United States Department of Justice (DOJ) recently issued two opinion letters regarding the use of similar applicant screening questions by the bar associations in Louisiana and Vermont. In those letters, the DOJ concluded that "Title II [of the ADA] prohibits eligibility criteria that screen out or tend to screen out people with disabilities 'unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.'" 28 C.F.R. § 35.130(b)(8).[1] Similar to question 24 on the Washington state bar exam application, the National Conference of Bar Examiners (NCBE) report, required for bar applicants in both Louisiana and Vermont, screens out applicants on the basis of an applicant's "condition or impairment" that could affect his or her "ability to practice law in a competent and professional manner."[2] The DOJ determined that these inquiries were not necessary to making the determination of whether an applicant was fit to practice law because they do not effectively identify unfit attorney applicants. The DOJ also determined that alternative, non-discriminatory methods for effectively identifying unfit attorney applicants exist, such as utilizing conduct based inquiries.[3]

Subjecting applicants to further investigation based on their status as individuals with a mental health disability also violates the WLAD. RCW 49.60.010 declares that the purpose of the WLAD is to prohibit practices of discrimination against any of its inhabitants based upon "any sensory, mental, or physical disability" because such discrimination "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free and democratic state." Furthermore, RCW 49.60.030 declares the civil right to "the full enjoyment of any accommodation, advantages, facilities, or privileges of any place of public resort,

[1] Letter from Jocelyn Samuels, Assistant Attorney General, U.S. Dep't of Justice, to The Honorable Bernette J. Johnson, Chief Justice, La. Sup. Ct. at 18 (Feb. 5, 2014).
[2] *Id*. at 5.
[3] *Id.* at 19.

accommodation, assemblage, or amusement" free from discrimination based upon "any sensory, mental, or physical disability."

Broad inquiries into mental health disabilities and treatment are also inappropriate on privacy grounds. The vague and potentially confusing wording of questions 24 and 25 may result in applicants divulging to the WSBA excessive amounts of sensitive, personal information about his or her mental health history and treatment. Since the preamble to questions 24 and 25 admonishes applicants that they may be denied licensure for "lack of candor" in their responses,[4] applicants may feel compelled to provide information that is well beyond what is necessary for the WSBA to make its fitness determination. Furthermore, without clear guidance on what might "substantially impair" an applicant's ability to practice law, bar applicants cannot be certain as to what information the WSBA is seeking.[5] Therefore, applicants may provide information well beyond what is needed for WSBA to make a reasonable determination of an applicant's fitness to practice law under the belief that a violation of their privacy interests is less burdensome than the prospect of being denied admission into the bar for "lack of candor."

The WSBA has an interest in protecting the public by only admitting applicants who are fit to practice law. However, the WSBA must comply with both state and federal laws and avoid discriminatory practice while working to achieve this goal. The ADA and WLAD require the WSBA to refrain from using methods such as status-based inquiries that discriminate against those with mental health disabilities. Because questions 24 and 25 subject applicants to additional burdens based on their status as an individual with a mental health disability, we urge the WSBA to remove questions 24 and 25 from the bar exam application.

We look forward to your swift action on this important matter.

Sincerely,

Jennifer Shaw
Deputy Director

Cc: Board of Governors

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[4] *Application For the Washington State Bar Examination*, Washington State Bar Association, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Admissions/Application-and-Exam-Information (last visited July 10, 2014).
[5] *Id.*