The Stigma of Second Class Membership in The Florida Bar

Since 1986, the Florida Bar rules maintained two classes of membership for practicing attorneys, the first is a membership in good standing, and the other is a conditional membership for attorneys with a "prior history of drug, alcohol, or psychological problems" who are subject to "conditions of probation." The identities of those who are subject to this second class membership, and the contents of their conditions of probation are confidential, and not subject to disclosure to employers or the public; nonetheless, the fact that these lawyers have a past (or current) disability categorized as a quasi-criminal condition that subjects them to a probationary status is demeaning and entirely unnecessary. Second class membership unequivocally connotes inferiority and probation also carries of stigma of punishment for bad acts.

In August, Disability Independence Group and a group of over 50 petitioners will submit a petition to the Supreme Court of Florida to abolish this rule, and create a separate rule that allows the Supreme Court to regulate the admission of lawyers who have a current substance abuse disorder or mental illness that may put the public at risk.

When the Florida Bar and the Florida Board of Bar Examiners first established conditional admission in 1986, the purpose underlying the rule was good intentioned. The purpose was to allow applicants to become members of the Florida Bar when they may otherwise have disqualifying conduct of "mental or emotional instability." So, if there was any evidence of such instability, such as a prior history of drug, alcohol, or psychological problems, the Board of Bar Examiners would recommend, and the Supreme Court would approve a consent agreement for a conditional admission, which would require the applicant to abide by certain monitoring or treatment requirements.

In the 33 years since the rule was passed, the law on and the view of mental illness and substance abuse has evolved. Primarily, in 1990, the Americans with Disabilities Act was enacted to prohibit societal exclusion or discrimination against persons with disabilities "as a result of presumptions, generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies." (Statement of Sen. Harkin). Substance abuse and mental illness were recognized as disabilities, and accordingly, licensing decisions based on any disability must be made only when the risk to the public is both substantial and likely, based on objective and current medical information, and is not speculative, invalid or unreliable over time, or remote. As such, the risks involved with a past history of a disability or treated mental illness, would be, by definition, speculative.

More importantly, the standard of scrutinizing the existing Rule 1-3.2(b) standard of "a prior history of drug, alcohol or psychological problems," more than fifty percent of Florida Bar applicants and new Florida lawyers would qualify for this classification. According to the Florida Bar's Young Lawyers Division Mental Health & Wellness in the Legal Profession survey results, published in 2019:

- 62% of respondents believe that they have suffered from anxiety or depression or both where it has lasted for more than four weeks or have substantially impacted their job.
- 36% of those who suffered from anxiety or depression or both self-medicated with alcohol.

- 37% of respondents diagnosed with or professionally treated for depression, anxiety or another mental health concern.
- 27% of all respondents handle stress with alcohol (question 23)

Furthermore, the American Bar Association Survey of Law Student Well-Being (SLSWB) implemented in spring 2014 at fifteen law schools around the country, demonstrated similar findings, and also included alcohol and drug use, as follows:

- Twenty five percent of all respondents were at significant risk for alcohol use disorder. More than half of the respondents reported drinking enough to get drunk in the prior thirty days; 43% of the respondents had engaged in binge-drinking at least once in the prior two weeks, and 22% of law students binge-drank two or more times in the prior two weeks.
- Twenty five percent used marijuana within the past twelve months, and fourteen percent within the past 30 days; six percent used cocaine within the past twelve months, and two percent within the past 30 days.
- Prescription drugs within the past year: Sleeping medication 9%; Sedatives - 12%; Stimulants - 13%; Pain Medications – 15%; Anti-Depressants - 12%
- 14% of respondents reported having used prescription drugs without a prescription in the prior twelve months. Stimulants were the prescription drug most frequently used without a prescription (9%), followed by pain medication and sedatives/anxiety medication (4%)

Lastly, these statistics do not include the great lawyers that we have lost to suicide or overdose over the past few years.

As such, the Florida Bar, and the Young Lawyer's Division of the Florida Bar has engaged in a mental health and wellness campaign to educate the membership as well as prospective members about the benefits of treatment and continuing mental wellness. However, the basis to any change should be a review and examination of the structural causes of stigma which prevent treatment, such as the fear that if treatment is sought, then if an applicant is admitted at all, he or she will be relegated to a second class membership for those with "drug, alcohol, or psychological problems."

In November 2018, the Florida Board of Bar Examiners changed the questions in the Bar Application and the investigation procedures to address mental health and substance abuse issues within the past five years that have impaired or could impair the ability to practice law. The mental health question was limited to conditions such as schizophrenia or other psychotic disorder, bipolar disorder or major depression with suicidal ideations. The substance abuse inquiry was separated from mental health and placed in question 26, and contained the limitation to five years and the nexus to the ability to practice law. The statement with the change to the questions encouraged applicants to seek mental health or addiction treatment and urged that such treatment would be a positive factor in an applicant's application.

A consent agreement is voluntary, and an applicant can always challenge the Florida Board of Bar Examiner's determination of the character and fitness of an applicant. However, once an agreement is entered into, the member admitted under the terms of a consent agreement will be deemed to be a member in good standing.

The main difference in this rule change is amending the nomenclature from punishing disability-related conditions to treating a consent agreement similarly to any other accommodation for a disability-related need. As such, a person who is subject to a consent agreement would not be a separate class of members who is on probation, instead, he or she will be a member in good standing that is subject to a consent agreement. A breach of such agreement is subject to the jurisdiction of the Supreme Court, pursuant to the terms of the agreement. If such breach is accompanied by another violation of the Rules of Professional Conduct, then additional sanction may be warranted.

The only segment that will have any effect on The Florida Bar will be the change to make the imposition of administration costs of the consent agreement to the member discretionary by the Supreme Court. The change in shifting the costs of administration of the Consent Agreement to the discretion of the Supreme Court is to avoid penalizing applicants solely because of that person's disability or where the imposition of such costs would be inequitable or otherwise in violation of the Americans with Disabilities Act.

For more information, please feel free to contact me at mdietz@justdigit.org

For copies of the relevant documents, see the Rule Change tab on www.Justdigit.org