

Litigation Update – *Hobbs v. Florida Board of Bar Examiners* –

Decorated Army Vet Seeks Admission to the Florida Bar, but treatment for psychological scars lead to additional character and fitness barriers

On June 16, 2018, U.S. District Judge Robert Hinkle upheld Captain Julius Hobbs cause of action against the Florida Court's licensing board, the Florida Board of Bar Examiners, for establishing discriminatory barriers based on his adjustment disorder as a result of his ten year service in the U.S. Army. Cpt. Hobbs case is a clarion call for immediate changes to remove barriers to the legal profession for persons who seek mental health assistance.

Captain Hobbs:

Captain Hobbs is currently a second year law student at Western Michigan University, Cooley School of Law in Tampa, Florida, and would like to be a lawyer, licensed to practice in the state of Florida. Prior to going to law school, Hobbs was a captain in the U.S. Army, and served for ten years, including three tours of duty in Iraq and Afghanistan. He had an exemplary record in the U.S. Army, and was a company commander, where he was responsible for 175 soldiers, and he worked in the Counter Improvised Explosive Device (IED) cell, where he studied, assessed and mitigated IEDs in Iraq. In order to hold his position in an IED cell, Hobbs held national security clearances at the secret level.



How does the Military handle mental health issues?

Since 2008, the United States Department of Defense has recognized the critical importance of mental health and supported proactive management of mental health conditions, wellness and recovery, because left untreated, mental health conditions may affect an individual's judgment, reliability, and trustworthiness. As a result of his military service, Captain Hobbs lives with Adjustment disorders with mixed anxiety and depressed mood, and alcohol use disorder. An Adjustment Disorder is a stress-related condition caused by years of battlefield stress that results in chronic depression. However, as an officer, Cpt. Hobbs was well aware of the US DOD's policies on encouraging mental help, discussed mental health resources with his troops, and the notices for resources and help lines were ubiquitous at Ft. Benning, Ft. Stewart, as well as in combat operations. In fact, the U.S. DOD views help-seeking behaviors for wellness and recovery as favorably impacting eligibility for sensitive national security positions. Failure to seek care when needed actually increases the likelihood that psychological distress may escalate

to a more serious mental condition, which in turn, could cause behaviors that would be of security concern.

As such, when Cpt. Hobbs was involved in a misdemeanor DUI in 2012, Cpt. Hobbs superior recommended that he see a mental health counselor and he did so. Later, in 2015, as a result of acclimating to civilian life, the stress that was a result of his custody lawsuit and a recent romantic relationship that had unexpectedly terminated, Cpt. Hobbs adjustment disorder developed into a severe depressive episode where he used alcohol. Cpt. Hobbs remembered his training and reached out to the Veterans Administration for help, and he received five months of psychotherapy sessions to cope with the issues that he had at the time.

In 2016, Cpt. Hobbs applied to law school at Cooley School of Law in March 2016, and matriculated in the fall of 2016. The Florida Board of Bar Examiners (FBBE) encourages law students to apply in the First year of law school. If a law student applies for admission in their first year, there is a significant savings in the cost of the application. Further, if a law student applies early, then the student can take advantage of becoming a certified legal intern and be able to practice before a court and work on cases for a variety of other facilities. As such, Cpt. Hobbs was eager to begin the application process.

How does the Florida Board of Bar Examiners handle mental health issues?

However, the Florida Board of Bar Examiners considers a past history of mental illness or alcohol dependency to be potentially disqualifying as indicative of conduct that demonstrates the lack of adequate character or fitness to become a member of the Florida Bar. To accomplish their mandate to ensure that Florida lawyers have a good character, the FBBE attempts to assess the mental health of each applicant to the Florida Bar.

The FBBE considers satisfactory mental health to include: (1) the current absence of an untreated, uncontrolled mental illness that impairs or limits an applicant's ability to practice law in a competent and professional manner; and (2) the unlikelihood of a relapse of such a prior mental illness. To begin this assessment process, the FBBE uses the following two questions:

25. Within the past five years have you ever been diagnosed with, suffered from, or been treated for a mental illness involving a severe thought disorder (including, but not limited to, schizophrenia), a severe mood disorder (including, but not limited to major depressive disorder or bipolar disorder) or substance use disorder (including, but not limited to, abuse of or addiction to/dependence on alcohol, marijuana, cocaine, or prescription medications)? If yes, identify which of the listed conditions you were diagnosed with, suffered from or were treated for, state the beginning and ending dates of each consultation or treatment period, and state the name and address of the treating doctor(s) or professional(s) who treated you or who made such diagnosis. Also state the name(s) of any medication prescribed for you during treatment. Please direct each such professional

and any hospital and/or other facility in which you were treated to furnish to the Board any information or records the Board may request with respect to any hospitalization, consultation, treatment or diagnosis relating to any such listed condition. "Professional" includes a physician, psychiatrist, psychologist, psychotherapist or mental health counselor.

26. Do you currently (as hereinafter defined) have a mental health condition (not reported above) which in any way impairs or limits, or if untreated could impair or limit, your ability to practice law in a competent and professional manner? If yes, are the limitations or impairments caused by your mental health condition reduced or ameliorated because you receive ongoing treatment (with or without medications) or participate in a monitoring or counseling program? If yes, describe such condition and any treatment or program of monitoring or counseling. "Currently" does not mean on the day of, or even in the weeks or months preceding the completion of this application; rather, it means recently enough so that the condition may have an ongoing impact on your functioning as a licensed attorney.

As a follow up to a yes response to either question 25 or 26, the FBBE requires a detailed explanation of the applicant's history of mental illness, and collects medical and psychiatric records for the applicant. If an applicant claims that he or she has received treatment for mental illness or substance abuse in the past, the FBBE requires the applicant to produce "clear and convincing evidence of rehabilitation," as well as exemplary conduct following prior "transgressions." (Rule 3-13). To develop "clear and convincing evidence of rehabilitation, the FBBE can obtain the following materials:

- Obtain all records from all treating physician, psychiatrist, psychologist, psychotherapist or mental health counselors and any hospitals that treated the applicant.
- Take testimony from all treating mental health professionals.
- Seek production of any additional documents requested by FBBE.
- Undergo evaluation through a mental health professional chosen by the FBBE, and at the expense of the applicant
- Compel by subpoena the attendance of witnesses and the production of documents.
- Request the applicant to appear before the FBBE in an investigative hearing, and pay \$250.00 for such hearing, and pay for any transcripts of such hearing. "Investigative hearings will be informal but thorough, with the object of ascertaining the truth," where the rules of evidence are not observed. (Rule 3-22)

As a matter of practice, policy, and procedure, the FBBE will not accept an evaluation or report from the applicant's own treating physician, psychologist, or therapist in lieu of the FBBE requested evaluation. Further, based on the FBBE's investigation and an evaluation by the FBBE's selected expert mental health practitioner, the FBBE may permit an applicant with mental illness or a history of mental illness to be licensed conditioned

on entering into a 'Consent Agreement', for a period of one year to an indefinite period, which requires some or all of the following conditions (all at the expense of the applicant):

- The applicant must be engaged in the practice of law in Florida, must live in Florida and must be monitored in Florida during the period of conditional admission.
- prohibiting use of alcohol and controlled substances;
- requiring participation in Florida Lawyers Assistance, Inc. (FLA); and,
- random screenings for alcohol and controlled substances.
- Consult with a licensed mental health provider at least quarterly, or more frequently as such mental health provider deems necessary,
- Have the mental health provider submit quarterly reports to the Florida Bar during the entire probationary period;
- Have the mental health provider immediately notify the Florida Bar if the applicant misses a scheduled appointment without prior rescheduling; and
- Have the mental health provider submit quarterly sworn statement to The Florida Bar during the entire probationary period attesting to the applicant's compliance with the conditions.

What is the current state of affairs for other state Bars?

Since 2014, it has been generally known that requiring applicants to be subject to additional barriers based on a history of mental illness or substance abuse, or current treated mental illness, without disqualifying conduct, is discriminatory and unlawful. The Department of Justice had issued findings against several states finding similar behavior discriminatory, and settled a similar complaint in 2014 against the State of Louisiana. Further, in 2015, the American Bar Association enacted a resolution condemning such policies, and encouraging bar associations to focus on behavior rather than disability status. There is no empirical evidence or studies demonstrating a correlation between mental illness for applicants to the Bar and unethical or unlawful practices of lawyers.

What effect do these policies have on lawyers and prospective lawyers?

All of the empirical evidence demonstrates that the additional scrutiny only prevents law students from obtaining needed help, and then the reluctance to obtain mental health care extends to the lawyer's entire career. Pursuant to a 2016 survey of law student wellbeing, forty two percent of law students needed help for poor mental health but only half sought it out. For law students, seventeen percent experienced some level of depression, fourteen percent experienced severe anxiety, twenty-three percent had mild or moderate anxiety, and six percent reported serious suicidal thoughts in the past year. As to alcohol use, 43 percent of law students reported binge drinking at least once in the prior two weeks and nearly one quarter (22 percent) reported binge-drinking two or more times during that period. One quarter fell into the category of being at risk of alcoholism for which further screening was recommended. Further, out of this quarter at risk, only four percent said they had ever received counselling for alcohol or drug issues.

The top factors why only four percent sought counseling included the fact that it would threaten their bar admission or have other job or social stigma. This leads to a mental health epidemic in our profession, with 21 and 36 percent of practicing lawyers are problem drinkers, and 26 percent, 19 percent, and 23 percent are struggling with some level of depression, anxiety, and stress respectively.

So – What’s Wrong with Captain Hobb’s Character and Fitness?

When Cpt. Hobbs submitted an application to the Florida Bar he provided truthful answers to Question 25 and 26. He consulted his treating physician and reported a history of “drug or alcohol” abuse between March 2015 and April 2016 in response to Question 25. In response to Question 26, Plaintiff truthfully and accurately reported “No.” Along with his application, Cpt. Hobbs enclosed a letter from his treating Veterans Administration physician, which detailed the reason and duration Cpt. Hobbs treatment-specifically, that it was a 4-5-month period of voluntary and active engagement in nine therapy sessions for “Adjustment disorder with mixed anxiety and depressed mood and Alcohol Use Disorder, mild” caused by a situational event.”

The VA doctor continued that Cpt. Hobbs “learned and successfully used coping skills to address mood and alcohol use” and that he “demonstrated significant progress . . . in terms of his employment, social interactions, appl[ication] for school, and appropriate reduction in alcohol use,” and concluded that Dr. Stewart “[did] not foresee any deleterious effects on [Mr. Hobbs] participation in the legal profession.” The doctor attested to Cpt. Hobbs progress, participation in treatment, absence of any current problem, as well as an unlikelihood of a relapse. The document submitted further attested the current absence of an untreated, uncontrolled mental disorder that impairs or limits an applicant’s ability to practice law in a competent and professional manner.

Notwithstanding Cpt. Hobbs proffer, the FBBE conducted a further investigation, including further intrusive questioning about his past history of alcohol abuse and current support system, as well as requesting *all* records from his physical and the Veterans Administration Hospital. Cpt. Hobbs complied with the FBBE’s requests, and Dr. Stewart provided additional documentation relating to and attesting to Cpt. Hobbs mental health, and included additional information regarding Cpt. Hobbs’s health and treatment.

Notwithstanding the intrusive questioning and invasive records production, and attestations by Cpt. Hobbs’s Veterans Administration doctor, the FBBE persisted in further scrutiny, as its own paid consultant, who had never met Cpt Hobbs found that his past DUI misdemeanors,, along with his psychological diagnosis places his character and fitness into question. As to alcohol use, Cpt. Hobbs is not even within the 43 percent of law students who reported binge drinking at least once in the prior two weeks or the 22 percent who reported binge-drinking two or more times during that period. Mr. Hobbs received months of counselling for one incident in 2015. As such, pursuant to a national study, 43 percent of law students drank more, and more regularly, than Cpt. Hobbs. However, Cpt. Hobbs was singled out because the FBBE deemed him a potential alcoholic who obtained help for an acute mental health crisis.

As such, the FBBE asked HOBBS to “agree to undergo an evaluation at the applicant’s expense by a board-selected evaluator” or undergo an investigative hearing before the FBBE. If Cpt. Hobbs were to agree to see the FBBE’s practitioner, he would need to pay between \$ 750 and \$ 2,750 to see a doctor in Florida, and the examination would consist of the following:

- Biological drug screens for drugs and alcohol. One such screen is to be completed on the first day of the evaluation with at least one follow-up screen administered on a random basis.
- A complete medical history and physical examination.
- Psychiatric evaluation with psychological testing if not in detox or intoxicated or if diagnosis is not established and psychosocial testing.
- A substance use disorder evaluation.
- A family support assessment (optional).
- Potential for an inpatient observation.

Cpt. Hobbs asked the FBBE to reconsider its request for a psychiatric and substance abuse evaluation. His request was ignored. If he refused undergo a complete physical and psychiatric examination, Cpt. Hobbs would be required to appear before the FBBE for an investigative hearing. The investigative hearing has a cost of \$250.00. Further, Cpt. Hobbs was advised that it would be possible that he would need to enter into a conditional admission (as detailed above) if he were to practice in Florida.

Cpt. Hobbs decided to withdraw his application. While he continues to wish to be a member of the Florida Bar when he completes law school and passes the Florida Bar exam, but does not wish to be subject to increased scrutiny solely on account of his disability or be required to pay additional sums or subject to additional conditions solely on account of his disability.

If he wanted to become a lawyer, and not be forced to disclose his psychiatric history and undergo an examination, he would need to forego any mental health maintenance or treatment so he can truthfully respond to the Defendant’s questions. This is in line with the ABA 2016 Survey of Law Student Well-Being, which demonstrated that forty two percent of law students needed help for poor mental health but only half sought it out. For law students, seventeen percent experienced some level of depression, fourteen percent experienced severe anxiety, twenty-three percent had mild or moderate anxiety, and six percent reported serious suicidal thoughts in the past year.

Judge Hinkle’s Order

After finding his claims were ripe, and Cpt. Hobbs had standing to assert his claims, Judge Hinkle continued to confirm the rights persons with disabilities maintain in our society.

If, as he alleges, the Board required him to submit to invasive procedures and to expend funds not because the requirements serve a purpose in

determining his fitness to practice law but only because he has a disability, the Board violated the ADA. Placing unnecessary hurdles in the path of a person with a disability is the paradigm of an ADA violation. Indeed, the very first provision of the ADA is this congressional finding

[P]hysical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination.
42 U.S.C. § 12101(a)(1).

The Court found that the FBBE has every right to inquire into past occurrences about driving under the circumstances, but may have gone too far in disregarding Cpt Hobbs treating doctor, and the evaluation that the board demanded was not reasonably related to Cpt. Hobbs fitness to practice law.

Mr. Hobbs had been treated by Dr. Stewart, an apparently well-qualified clinical psychologist at a Veterans Administration facility. The Board refused to rely on Dr. Stewart's evaluation—formed after multiple therapy sessions—and instead insisted that Mr. Hobbs undergo an extremely broad evaluation by one of eleven doctors chosen by the Board. The complaint does not allege—and indeed the record gives no reason to believe—that any of the eleven could match Dr. Stewart's expertise in dealing with conditions secondary to participation in war.

Next Steps:

One of the essential elements in making a determination of whether a person with a disability needs an accommodation (such as a testing accommodation) or can be fit to practice law is the need for an individualized assessment to determine whether the person with a disability could do a particularized profession with or without a reasonable accommodation to do so. Correctly, Judge Hinkle focused on the knowledge and scope of the individual who made the assessment, and the apparent qualifications of that person that would not subject his opinion to question.

In most circumstances, a treating doctor or mental health practitioner does a detailed evaluation which is done for the sole purpose of assisting a person with his or her condition, and not for alternative purposes, such as being deemed to be fit to be a lawyer. Especially in a mental health context, it is more likely that a person with mental illness does not obtain assistance, and in such cases, the help-seeking behavior and the subsequent treatment should be viewed as a mitigating factor for fitness to practice, and not subject the applicant to stigmatizing evaluations and conditional admissions.

How to fix the stigma as a profession

It should be basic that an applicant to the Bar should have the same standards to be able to practice as a current member of the bar, as such, Questions 25 and 26 to the Bar Application need to be amended in accord with the ABA's Resolution #102 (August 2015), and the DOJ settlement with the Louisiana Supreme Court, to only inquire into mental health history if the applicant has engaged in *conduct or behavior* that may otherwise warrant a denial of admission, a mental health condition either has been raised by the applicant as, or is shown by other information to be, an explanation for such conduct or behavior.

Furthermore, there needs to be a working committee that includes all branches of the court that discusses other ways to remove barriers in the legal profession for access for persons with a history of mental illness and to encourage help seeking behaviors, including, but not limited to:

- a. Deriving standards of when to question a treating doctor's credibility that attests to a patient's fitness to practice because of a mental illness.
- b. Publishing guidance to Florida law schools and law students encouraging mental health and treatment, and what to expect during the bar application process
- c. Determining best practices for reasonable accommodations for lawyers coping with mental illness to remain in practice
- d. Determining whether the duty to make reasonable accommodations for disabilities should be included as part of an attorney's ethical duties.
- e. Amending standards to ensure when conditional admissions are required and do not create unnecessary barriers for persons with disabilities.

Only until active measures are taken to change the rules of branches of the Florida Court System to remove stigma and allow accommodation for persons with mental disabilities, will we be able to ensure adequate responsiveness to our colleagues with disabilities.