**MEMORANDUM**

**Oregon State Board of Bar Examiners**

**To:** Dr. Mark Baskerville; Elizabeth Davis; David Elkanich; Bob Joondeph; Justice Rives Kistler; Richard Kolbell, Ph. D.; Cassandra McLeod-Skinner; Patricia Nation; Vanessa Nordyke; Joanna Perini-Abbott; Jonathan Puente; Doug Querin; Hon. Kelly Skye; Michael Slauson; and Eleanor Wallace.

**From:** Caroline Wong

**Date:** December 11, 2018

**Re:** Fitness Review Task Force

Thank you for agreeing to serve on the Oregon State Board of Bar Examiners (BBX) Fitness Review Task Force (Task Force). Justice Rives Kistler has agreed to chair the Task Force. Troy Wood is the OSB’s liaison to the Task Force. The following is intended to give context to the creation of the Task Force, stress the importance of your work and provide guidance to your efforts.

The BBX’s primary purpose is to safeguard the public by ensuring that bar applicants admitted to practice law in Oregon possess the requisite learning and ability, and character and fitness to practice law. Pursuant to Oregon Revised Statute (ORS) 9.210, the Oregon Supreme Court appoints members to the BBX to carry out the admissions functions of the Oregon State Bar (OSB), and authorizes the BBX to conduct bar examinations and to investigate the character and fitness of bar applicants. ORS 9.220(2) requires an applicant to demonstrate being of good moral character and fit to practice law.

The Oregon Supreme Court’s Rules for Admission of Attorneys (RFA) 1.05(4) defines "Fit to practice law" or "fitness" as an applicant demonstrating a level of conduct, mental health, judgment, and diligence that will result in adequate representation of the best interests of clients, including participation in the legal process according to the Oregon Rules of Professional Conduct.

Given the importance of mental health to fitness, the BBX recognizes that the constantly evolving scientific understanding of the brain and its processes has resulted in increasingly effective methodologies and treatments for conditions that otherwise might impact fitness. When applied, they allow impacted persons to fulfill their potential. The challenge is in seeking and receiving appropriate care.

In the spring of 2014, the Dave Nee Foundation funded a multi-school study of law student alcohol and substance use, as well as mental health concerns and help-seeking attitudes among law students (the Nee Study). The results of the Nee Study were published in the Autumn 2016 publication of the Journal of Legal Education. The Nee Study found that up to one-third of respondents reported frequent binge drinking, misuse of drugs or mental health challenges. The study also suggested that a significant majority of those law students most in need of help were reluctant to seek it.

In 2016, the American Bar Association (ABA) and Hazelden Betty Ford Foundation published a study of nearly 13,000 currently practicing lawyers nationwide (the Hazelden Study). The Hazelden Study found that between 21 and 36 percent of participants qualified as problem drinkers and up to 28 percent had some level of depression, anxiety or other issue related to stress. The Hazelden Study found that younger lawyers experience the highest rates of problem drinking and depression. Up to 25% of young lawyers were categorized as being at risk for alcoholism. The percentage of lawyers affected by the conditions considered by the Hazelden Study are at least three times higher than the general American population.

Several recent studies have shown a reticence on the part of bar applicants to seeking treatment for mental health issues out of a concern that doing so will result in a denial of admission due to their condition. In reality, the number of applicants that are ultimately denied admission for any reason is a very small number. Of those who receive closer scrutiny, it is most typically triggered by the person’s criminal, employment, or financial issues. And, with the option of conditional admission, those few with recent concerning behaviors who are already on a trajectory of recovery and treatment have a pathway to licensure. These studies illustrate a need for education about the realities of the admissions process. One means of combatting misperceptions about a negative connection between receiving treatment and achieving admission is by publishing each year the reasons for denials and quantifying how few applicants are actually denied admission relative to the total number of applicants. Of equal relevance, the admissions process should emphasize the importance of seeking treatment as early as possible, whether it relates to mental health or substance use issues, in order to minimize the impact any untreated condition might have on the future ability to practice of law. A third consideration is examining the manner in which any inquiry into mental health or substance use issues during the application process is framed.

In August 2017, the ABA published the report of the National Task Force on Lawyer Well-Being (the ABA Report). The ABA Report identified the necessity for the legal profession to take action on law student and lawyer well-being and made specific recommendations to certain stakeholders and gatekeepers. The following recommendations aimed at admissions departments were intended to promote law student well-being:

1. Re-Evaluate Bar Application Inquiries about Mental Health History;
2. Adopt Essential Eligibility Admission Requirements;
3. Adopt a Rule for Conditional Admission to Practice Law with Specific Requirements and Conditions; and
4. Publish Data Reflecting Low Rate of Denied Admissions Due to Mental Health Disorders and Substance Use.

In October 2017, the Oregon Council on Legal Education and Admissions to the Bar (OCLEAB) reviewed and discussed the Nee Study, the Hazelden Study and the ABA Report. The participants in OCLEAB also reviewed and discussed the success of the BBX’s conditional admission program. Following the 2017 OCLEAB, The BBX determined that no changes were required to its conditional admission program and made minor changes to bar application questions about mental health history.

Later in 2018, the BBX determined that an independent body should re-evaluate the bar application inquiries about mental health and substance use and the screening of these fitness issues. It was also contemplated that the development of essential eligibility admission requirements might help shape these inquiries or, at least, help future applicants understand the abilities needed to become a licensed lawyer in the State of Oregon. In September 2018, after discussing the scope of a task force’s charge, the BBX voted to create a task force, and empowered the BBX Chair to appoint its members and formulate the charges for the task force to consider, based upon that discussion.

The Task Force is appointed to examine the following two topics by reviewing other jurisdictions’ treatment of them, identifying and developing a compilation of best practices based upon that review, and making recommendations to the BBX:

1. Essential Eligibility Requirements. The ABA Report recommends the adoption of essential eligibility requirements.  Approximately 14 jurisdictions have such provisions in place. The ABA Report recommends requirements that affirmatively state the abilities needed to become a licensed lawyer. Their purpose is to provide the framework for determining whether an individual has the required abilities, with or without reasonable accommodations. The report opines that these requirements will help the applicant, the admissions authority, and the medical expert understand what is needed to demonstrate fitness to practice law.
2. Bar Application Fitness Inquiries. Oregon, consistent with a majority of states, utilizes the NCBE’s model application questions that screen for fitness issues on its application.  A few have moved away from asking any questions related to mental health or behavioral conditions. These jurisdictions have adopted a more resource intensive approach to investigate and screen the backgrounds of each bar applicant.

Ideally, the BBX would like to receive a written report and recommendations from the Task Force in time for the BBX’s September 2019 Board Meeting. This will provide sufficient time for the BBX to present the Task Force’s recommendations to the OCLEAB in October 2019.

If you have any questions, please contact Troy Wood at [twood@osbar.org](mailto:twood@osbar.org) or 503-431-6310.