

IN THE SUPREME COURT OF FLORIDA

IN RE: PETITION TO AMEND RULE
REGULATING THE FLORIDA BAR 4-7.14

CASE NO. SC19-

**PETITION TO AMEND RULE REGULATING THE FLORIDA
BAR 1-3.2(b)**

Petitioners respectfully request that the Supreme Court of Florida adopt these amendments to the Rules Regulating The Florida Bar.

Jurisdictional Statement

Pursuant to Rule 1-12.1(f) of the Rules Regulating the Florida Bar:

1. Petitioners, who total more than 50 in number and whose names are set forth on Exhibit C attached to this Petition, are all members in good standing with The Florida Bar.
2. A copy of this Petition has been filed with The Florida Bar 90 days before the filing of this Petition with this Court.
3. A Notice of Intent to File this Petition has been published in The Florida Bar News at least 30 days before the filing of this Petition, and a copy of the notice is attached hereto as Exhibit C.

Explanation of the Proposed Changes

The Petitioners propose amendments to Rule 1-3.2(b) and transfer to a new rule, Rule 3-4.8, so as to eliminate the stigma of maintaining a second-class membership to lawyers who are under a consent agreement because of a disability. Furthermore, this new rule conforms The Florida Bar's rules with the practices of the Florida Board of Bar Examiners, which offers consent agreements to those applicants with current specified disabilities that impair the practice of law. Lastly, the new rule gives discretion to the Supreme Court to mandate payment of costs of a consent agreement. As a result, the proposed rule conforms to the requirements of the Americans with Disabilities Act, as well as current best practices from the American Bar Association, and this Court's ruling in *Fla. Bd. of Bar Exam'rs Re Amendment of Rules of Sup. Court Relating to Admissions to the Bar*, 645 So. 2d 972 (Fla. 1994) and *Fla. Bd. of Bar Exam'rs re Chavez*, 894 So. 2d 1 (Fla. 2004).

History of Rule 1-3.2(b)

Since 1986, The Florida Bar has allowed conditional admission under Rule 1-3.2(b) for applicants with "a prior history of drug, alcohol or psychological problems." In enacting the rule, the rationale was as follows:

RATIONALE: The Florida Board of Bar Examiners is seeing an increasing number of applicants with psychiatric, drug and alcohol-related problems. Based on expert testimony heard by the Board, it is clear that significant drug and alcohol-related problems are not isolated self-limiting episodes but rather a constant struggle throughout an individual's life to abstain from these substances. The fact that alcoholism is a progressive disease which if left unchecked will physically disable the patient at some point makes evaluation of the problems and follow-up extremely important...

In dealing with applicants who have experienced drug or alcohol-related problems or serious psychological disorders, the Board must be conscious of both the rights of the individual applicant and the protection of the public interest. Unrestricted admission of such an applicant can have catastrophic consequences. A client's legal affairs, funds and even personal liberty are all jeopardized by the actions of an

impaired attorney. However, the wholesale denial of applicants with these problems is not an acceptable solution....

The Consent Order will be used only after the Board has conducted its background investigation and has determined that the filing of Specifications is warranted based on adverse information arising from the applicant's psychological disorder or abuse of drugs or alcohol.

IN RE: Petition of Florida Board of Bar Examiners for Amendment of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar, Case No. SC60-68,307. At the time, The Florida Bar filed an objection to the proposed rule, and the Supreme Court ordered that The Florida Bar and FBBE meet to file a joint proposal. *In re Fla. Bd. of Bar Exam'rs etc.*, 498 So.2d 914, 914 (Fla.1986). In final rule, this Court amended several provisions of Rule 5-15 of the Rules Regulating the Admission of the Florida Bar, and Rule 1-3.2(b) of the Rules regulating the Florida Bar.

Currently, the Florida Board of Bar Examiners develops terms of a consent agreement pursuant to Rule 5-15 of the Rules Regulating the Admission of the Florida Bar, and if ordered by the Florida Supreme Court, the agreement is administered by The Florida Bar. Pursuant to Rule 1-3.2(b), costs of administration of the Agreement are shifted to the member who is subject to the consent agreement. The consent agreement is deemed to be confidential, and the lawyer is considered to be a member in good standing, notwithstanding their classification as a “conditionally admitted member.”

Evolution of Disability Rights and Stereotypes of Mental Illness and Substance Abuse

Since 1986, there has been significant development of Federal and Florida law to protect persons with disabilities from discrimination based upon stereotypes. Accordingly, to ensure that prior to denying or limiting a professional license, a governmental entity must make an individual assessment to ensure that any perceived risk due to a disability is substantial and related to the practice of that profession.

Primarily, in 1990, the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* 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.” 135 Cong.Rec.S4979-02, S4984 (daily ed. May 9, 1989) (Statement of Sen. Harkin). The purpose of the law is to eliminate all types of discrimination against persons with disabilities, “including outright intentional exclusion,... overprotective rules and policies,... exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.” 42 U.S.C. § 12101(5).

Under the ADA, adverse licensing decisions may not be made without a demonstration that a purported risk to the public is both substantial and likely, given objective and current medical information and testing, and is not speculative, invalid or unreliable over time, or remote. Speculative harms are not sufficient to create, deny or place eligibility bars for a program or service offered by a covered entity on the basis of disability. See *Bragdon v. Abbott*, 524 U.S.624 (1998); See *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275,1280(11th Cir.2001) (adopting a four factor test to determine if a risk was significant).

The U.S. District Court for the Northern District of Florida (Judge Robert L. Hinkle) issued an order on February 25, 2019, in *Hobbs v. Fla. Bd. of Bar Exam'rs*, No. 4:17cv422-RH-CAS, 2019 U.S. Dist. LEXIS 50732, at *4-5 (N.D. Fla. Feb. 25, 2019), in a case where Julius Hobbs sued The Florida Board of Bar Examiners regarding the scope of the investigation into an applicant’s substance abuse history and surcharges related to the investigative process. In *Hobbs*, the court found that while an investigation of an applicant’s background is relevant to determine if there is a substantial risk to the public, the investigation should be limited to the fitness to practice law, especially considering that such disclosures in the investigation is to a governmental entity.

In November 2018, The Florida Board of Bar Examiners changed questions 25 and 26, on the Bar Application, 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 (question 25) 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. See Letter to Justice Fred Lewis from the Florida Board of Bar Examiners, dated September 27, 2018. In the Summary Judgment hearing in *Hobbs*, Judge Hinkle found that such questions were not overbroad under the Americans with Disabilities Act.

Reduction of Stigma of Mental Illness and Substance Abuse

If the standard in existing Rule 1-3.2(b) of “a prior history of drug, alcohol or psychological problems” is used to categorize lawyers or applicants who should be subject to additional scrutiny, more than fifty percent of Florida Bar applicants and new Florida lawyers would qualify for this classification. According to the Young Lawyers Division Mental Health & Wellness in the Legal Profession survey¹ 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. (question 17)
- 36% of those who suffered from anxiety or depression or both self-medicated with alcohol. (question 20)
- 37% of respondents diagnosed with or professionally treated for depression, anxiety or another mental health concern. (question 19)
- 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,² 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.

¹ Found at <https://www-media.floridabar.org/uploads/2019/04/Young-Lawyers-Division-Mental-Health-Wellness-Survey-Report-Final.pdf> (last accessed on May 6, 2019)

² Jerome Organ, David Jaffe & Katherine Bender, Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns, 66 J.Legal Educ., Autumn 2016, at 128-134

- 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%)

As such, a standard that relies on prior or current history of drug, alcohol or psychological problems encompasses the majority of applicants to the Florida Bar. However, only a small fraction would actually disclose a “drug, alcohol or psychological problem”, and would be more likely to disclose if treatment for such problem had been received. As a result, applicants to the Florida Bar, including law students, were reluctant to disclose or obtain treatment for substance abuse or mental health for fear that it would be a hurdle to obtain admission or would require disclosure of sensitive personal information.

In response to this concern, the Florida Board of Bar Examiners limited the inquiry to schizophrenia or other psychotic disorder, bipolar disorder or major depression with suicidal ideations, or a recent history of substance or alcohol abuse. Ideally, the investigation will determine if a mental illness or substance abuse is untreated, and would pose a danger to the public if the person became a member of the Florida Bar. Furthermore, all rules should be narrowly tailored to encourage students and applicants to address wellness and receive treatment for substance abuse disorders or mental health issues as an element of professionalism of a practicing Florida lawyer.

Other jurisdictions have entirely moved away from disability-related inquiries to inquiries related to the underlying behavior. In 2015, the American Bar Association adopted a resolution (ABA Resolution 102, Aug.3-4 2015), to “eliminate questions that ask about mental health history, diagnoses, or treatment and instead use questions that focus on conduct or behavior that impairs an applicant’s ability to practice law in a competent, ethical, and professional manner.”

Segregating members into categories based on their disability and need for treatment is similarly stigmatizing and will further dissuade lawyers or applicants to the Florida Bar from receiving needed treatment or monitoring – and serves no purpose. A consent agreement is a contract and should be treated as any other contract. The importance of this change is to recognize that rules which are overbroad or stigmatize mental health issues or substance abuse serve to dissuade current and future members of the Florida Bar from seeking mental health or substance abuse assistance.

Change in the Rule to Reduce Stigma

The change in this rule will have no effect on the current operation of the practices of The Florida Bar. The only segment that will have any effect on The Florida Bar will be the change to make the imposition of administration costs to the member discretionary by the Supreme Court. The Florida Board of Bar Examiners will continue to recommend consent agreements that will be approved by the Supreme Court and administered and enforced by The Florida Bar.

The difference is changing 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, only 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 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. There is also a risk that impositions of a surcharge on a qualified person with a disability could be a violation of the Americans with Disabilities Act.

Where a consent agreement is a reasonable accommodation for a qualified person with a disability, who would otherwise meet the essential eligibility requirements under Rule 3-10.1 of the Rules Relating to the Admission to the Bar, additional surcharges to membership may be deemed to be an unlawful surcharge under 28 C.F.R. § 35.130(f). Because of the overall income of The Florida Bar, the costs of

such monitoring would not be considered an undue financial burden under 28 C.F.R. 35.164.

For example, there are circumstances where law students with treated bipolar conditions or treated schizophrenia, *without* a pattern or conduct of behavior that would adversely affect the practice of law, but will agree to a consent agreement to avoid the expense and the invasiveness an examination and disclosure of sensitive medical records. Other than the applicant's willingness to enter into a consent agreement, the limitations on the person's ability to practice may be a violation of the Americans with Disabilities Act. Also due to the limited costs involved in the administration of this agreement for a person who is treated by their own psychiatrist, the applicant should be able to request a waiver of such costs.

On the other hand, there are other applicants that would otherwise not meet the essential eligibility requirements under Rule 3-10.1 or the Rules Relating to the Admission to the Bar for membership in the Florida Bar due to conduct related to a disability. This would include a recent felony DUI. Without a consent agreement the applicant would not be a member of the Florida Bar. In this circumstance, as the applicant would not be a qualified person with a disability, the imposition of costs would not be in violation of the ADA, and imposition of costs would be equitable.

Organization of Amendments

The organization of these amendments appears as required by Part IV of this Court's administrative order number AOSC 06-14 of June 14, 2006 in *In Re: Guidelines for Rules Submissions*. The following information is provided: a jurisdictional statement, a discussion of each proposed change; and a discussion of any significant dissenting views.

Amendments

CHAPTER 4 GENERAL SUBCHAPTER 1-3. MEMBERSHIP

Rule 1-3.2 Membership Classifications

DELETED IN ITS ENTIRETY

Explanation: The change eliminates an entire subcategory of membership to the Florida Bar for persons with a “prior history of drug, alcohol, or psychological problems” who have conditions of probation imposed on their license. The rule to permit monitoring of consent agreements is transferred to Rule 3-4.8, Rules Regulating the Florida Bar.

CHAPTER 3. RULES OF DISCIPLINE

SUBCHAPTER 3-4. STANDARDS OF CONDUCT

Rule 3-4.8 Consent Agreement

Explanation: This new rule provides authority for The Florida Bar to monitor a consent agreement as ordered by the Supreme Court of Florida. It also provides discretion to the Supreme Court of Florida to assess costs of monitoring to the member subject to the consent agreement. The new rule does not contain the basis for conditional admission, a description of the conditions and period of probation as such terms are not determined by The Florida Bar, are included in Rule 5-15, Rules Regulating the Admissions to the Bar, as well as the regulations and policies of the Florida Board of Bar Examiners. Lastly, the specifics of the proceedings to determine compliance with the conditions of the consent agreement or other related disciplinary proceedings were removed as well, as the current rule refers to proceeding in the “same manner as matters of contempt provided elsewhere in the Rules Regulating the Florida Bar.” Accordingly, such additional explanation of the procedures is duplicative of Rule 3-7.2

Reasons: The Petitioners propose deletion of Rule 1-3.2(b), and new rule 3-4.8, to reduce stigma of disability in the profession as well as to be in conformance with the Americans with Disabilities Act, 42 U.S.C. § 12131.

Source: Petitioner Matthew Dietz, Disability Independence Group

Background Information:

- Letter to Justice Fred Lewis from the Florida Board of Bar Examiners, dated September 27, 2018.
- Hobbs v. Fla. Bd. of Bar Exam'rs, No. 4:17cv422-RH-CAS, 2019 U.S. Dist. LEXIS 50732 and transcript of the hearing

- ABA Resolution 102, Aug 3-4 2015, and commentary.

Board Action: Pending.

Official Notice of Amendments

Pursuant to R. Regulating Fla. Bar 1-12.1(g), formal notice of intent to file all the proposals in this petition was published in the June issue of the *Bar News*. A copy of that published notice from the Internet version of that *News* issue is included with this petition, in Appendix C. This notice can also be found at:

<https://www.floridabar.org/news/tfb-news/>

Contents of Appendices

The complete text of all proposals is included in Appendix A to this petition, in legislative format (i.e., deleted language struck through, shown first, followed by new language underlined).

A separate two-column presentation follows in Appendix B, which includes extracted text of affected rules with proposed amendments in legislative format and an abbreviated recitation of the reasons for the changes.

The notice of intent to file this petition is provided in Appendix C as well as a list of the petitioners, who total more than 50 and are all members in good standing with The Florida Bar

Appendix D contains background materials referred to in this petition, including: Letter to Justice Fred Lewis from the Florida Board of Bar Examiners, dated September 27, 2018; *Hobbs v. Fla. Bd. of Bar Exam'rs*, No. 4:17cv422-RH-CAS, 2019 U.S. Dist. LEXIS 50732 and transcript of the hearing and ABA Resolution 102, Aug 3-4 2015, and commentary

Comments in Response to Amendments

Pending

The comments or responses to the publication of this rule are found in Appendix D.

Oral Argument Not Requested

The Petitioners do not seek oral argument regarding these amendments, unless this Court orders oral argument or bar members file comments that require additional response or appearance by the Petitioners or the undersigned.

Effective Date Request

As to all amendments sought in this filing, the Petitioners request that any changes be made effective immediately from the date of this Court's order as the amendments conform to the rules and procedures of the Florida Board of Bar Examiners, and will have no substantive effect on new members or new applicants.

The Petitioners request that this Court enter an order amending the Rules Regulating the Florida Bar as requested in this petition.

Respectfully submitted,

By: /s/ Matthew W. Dietz
Matthew W. Dietz, Esq.
Florida Bar No.: 0084905
DISABILITY INDEPENDENCE
GROUP, INC.
2990 Southwest 35th Avenue
Miami, Florida 33133
T: (305) 669-2822 / F: (305) 442-
4181

mdietz@justdigit.org
aa@justdigit.org

CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this petition is typed in 14 point Times New Roman Regular type.

By: /s/ Matthew W. Dietz

Matthew W. Dietz, Esq.

Florida Bar No.: 0084905

DISABILITY INDEPENDENCE
GROUP, INC.

2990 Southwest 35th Avenue

Miami, Florida 33133

T: (305) 669-2822 / F: (305) 442-4181

mdietz@justdigit.org

aa@justdigit.org