

Spring 1997

1996 Survey of Rhode Island Law: Cases: Attorney-Client

Tracy Kelly Doorley

Roger Williams University School of Law

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation

Doorley, Tracy Kelly (1997) "1996 Survey of Rhode Island Law: Cases: Attorney-Client," *Roger Williams University Law Review*: Vol. 2: Iss. 2, Article 7.

Available at: http://docs.rwu.edu/rwu_LR/vol2/iss2/7

This Survey of Rhode Island Law is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

Attorney-Client. *In re Petition and Questionnaire for Admission to the Rhode Island Bar*, 683 A.2d 1333 (R.I. 1996). Questions regarding an applicant's substance abuse and mental health history violate the Americans with Disabilities Act (ADA).

In *In re Petition and Questionnaire for Admission to the Rhode Island Bar*,¹ the Rhode Island Supreme Court held that two questions on the Rhode Island bar application, which inquired about the applicant's substance abuse and mental health history, violated the ADA.² According to the court, the questions must be modified to ask only whether the applicant is currently suffering from a mental disorder or currently using illegal drugs.³

FACTS AND TRAVEL

In 1993, the American Civil Liberties Union (ACLU), on behalf of an unnamed applicant, challenged the validity of four questions on the application for admission to the Rhode Island bar, contending that the inquiries violated both the ADA and an applicant's privacy rights.⁴ The Committee on Character and Fitness of the Board of Bar Examiners (Committee) petitioned the Rhode Island Supreme Court⁵ concerning what action it should take regarding the challenged questions.⁶ The court deferred the matter pending a "fact-finding and revision process" by the Committee.⁷ After the revision process and a face to face meeting between the ACLU and the Committee, two of the revised questions remained unacceptable to the ACLU.⁸ In 1995, the supreme court appointed a special

1. 683 A.2d 1333 (R.I. 1996).

2. *Id.*

3. *Id.* at 1337.

4. *Id.* at 1333.

5. The Rhode Island Supreme Court oversees the process of admission to the state bar. R.I. Sup. Ct. R. Art. II.

6. *In re Petition for Admission to the Rhode Island Bar*, 658 A.2d 894, 895 (R.I. 1995). The ACLU challenged questions 26-29. *See infra* note 8.

7. *Id.* To make its revisions, the Committee sought the assistance of a psychiatrist with extensive experience in the treatment of substance abuse and mental illness, the United States Department of Justice, and opinions from other jurisdictions. *Id.*

8. *Id.* The ACLU withdrew its challenge to two questions after the Committee modified the questions. *In re Admission*, 683 A.2d at 1333 n.1. The remaining contested questions, 26, 29(a) and 29(b), read:

master to conduct inquiries into the propriety of the two challenged questions, elicit responses from community members, and submit findings, along with newly proposed questions, to the court.⁹ Following the submission of the master's report, the supreme court sought and received numerous written comments on the report, and assigned the matter for a public hearing.¹⁰

BACKGROUND

The ADA was enacted to protect the rights of disabled Americans.¹¹ Its employment protections extend to "qualified"¹² individuals, who do not pose a "direct threat" to the health or the safety of

26. Are you or have you within the past five (5) years been addicted to or dependent upon the use of narcotics, drugs, or intoxicating liquors or been diagnosed as being addicted to or dependent upon said items to such an extent that your ability to practice law would be or would have been impaired? YES__ NO__. If yes, please state the details, including dates and name and address of the individual who made the diagnosis if one was made.

....
 29(a). Have you ever been hospitalized, institutionalized or admitted to any medical or mental health facility (either voluntarily or involuntarily) for treatment or evaluation for any emotional disturbance, nervous or mental disorder? YES__ NO__. If yes, state the name and complete address of each hospital, institution or treatment facility; the dates of treatment or evaluation; and the name of each individual in charge of your treatment or evaluation.

....
 29(b). Are you now or have you within the past five (5) years been diagnosed as having or received treatment for an emotional disturbance, nervous or mental disorder, which condition would impair your ability to practice law? YES__ NO__. If yes, explain, stating the name and complete address of each psychologist, psychiatrist, counselor or other medical practitioner who made such diagnosis or from whom you received treatment, and the relevant dates.

Id. at 1334.

9. *Id.* at 1333-34.

10. *Id.* at 1334. The court received more than 18 briefs and comments on this issue. *Id.* at 1335. However, the court noted that the Rhode Island Bar Association took no stand on the challenged questions. *Id.* at 1335 n.2.

11. *See id.* at 1335; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

12. The ADA protects "qualified individuals who either have a physical or a mental impairment that substantially limits a major life activity or have a record of such an impairment. To qualify for such protection, an individual must meet the essential eligibility requirements for receipt of services or for participation in a public entity's program activities, or services." *In re Admission*, 683 A.2d at 1335.

others.¹³ Under the ADA, both private employers¹⁴ and public entities¹⁵ are prohibited from conducting discriminatory employment practices.¹⁶ In order to prevent discrimination in the hiring process, the ADA limits an employer's inquiry to areas relevant to the "applicant's ability to perform job related activities."¹⁷ An employer may not make "unnecessary inquires into the existence [or severity] of a disability, nor may [a public entity] discriminate in its licensing, certification and regulatory activities."¹⁸

Other states¹⁹ have applied the ADA to their bar applications with differing results. Virginia²⁰ and Florida²¹ courts have found that application questions similar to Rhode Island's question 29(b) violate the ADA. A Texas court, however, upheld a bar question that asked whether the applicant has been diagnosed with or treated for "bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder."²² In light of the ADA, the American Bar Association (ABA) has recommended that states "tailor questions concerning mental health and treatment narrowly" so as not to discourage applicants from seeking mental health services.²³

13. The court defines a direct threat as "a significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the modification of the public entity's policies, practices, or procedures or by the provision of auxiliary aids or services." *Id.*; see 42 U.S.C. §§ 12111, 12131.

14. 42 U.S.C. §§ 12111-12117.

15. *Id.* §§ 12131-12134. "Public entity" is defined as "any department, agency, special purpose district, or other instrumentality of a State, or States, or local government." *Id.* § 12131(1)(B) (emphasis added).

16. It appears that the court included the commission in the latter category based on its frequent use of the term "public entity." See *Clark v. Virginia Bd. of Bar Exam'rs*, 880 F. Supp. 430, 441 (E.D. Va. 1995) (The Board conceded its public entity status under the ADA.).

17. 42 U.S.C. § 12112(d)(4).

18. *In re Admission to the Rhode Island Bar*, 683 A.2d 1333, 1335 (R.I. 1996).

19. Although all 50 states and the District of Columbia have questions concerning an applicant's character on their bar applications, no unanimity exists as to mental health questions. Arizona and Massachusetts do not ask such questions. Five other states have removed mental health questions from their applications. Ten states ask "about hospitalization or institutionalization for mental impairment or illness." Broad mental health questions are asked by 32 states. *Clark*, 880 F. Supp. at 438-40.

20. *Id.*

21. *Ellen S. v. Florida Bd. of Bar Exam'rs*, 859 F. Supp. 1489 (S.D. Fla. 1994).

22. *Applicants v. Texas State Bd. of Law Exam'rs*, No. A 93 CA 740 SS, 1994 WL 776693, at *3 (W.D. Tex. Oct. 11, 1994).

23. *In re Admission*, 683 A.2d at 1335 (quoting Proposal 110, A.B.A. House of Delegates (August 9, 1994)); *Clark*, 880 F. Supp. at 440-41.

ANALYSIS AND HOLDING

First, the Rhode Island Supreme Court stated that the ADA was applicable in this case, since the Committee acts as an employer in screening applicants, and the procedures for admission to the bar are the "functional equivalent of a hiring process."²⁴ As a result, questions 26, 29(a) and 29(b) would violate the ADA unless the Committee could prove they were linked to a direct threat to public safety.²⁵ The court stated that in order to demonstrate this threat, the Committee must show:

(1) applicants with mental-health and substance-abuse-treatment histories actually pose an increased risk to the public, (2) the admission process has effectively protected the public by using questions Nos. 26, 29(a), and 29(b) to identify those persons with mental-health or substance-abuse-treatment histories who are a danger to the public, or (3) attorneys who have become a danger to the public in their practice of law, when retrospectively reviewed, could have been identified with any degree of reliability by such questions.²⁶

This burden, the court held, was not satisfied since research has failed to establish a link between "previous psychiatric treatment . . . [and] an individual's capacity to function in the workplace."²⁷ The court also added that the record was barren of any evidence supporting the proposition that a history of psychiatric treatment leads to a higher rate of disciplinary action.²⁸ Furthermore, in "nearly all" recorded cases of attorneys with disciplinary problems, there were "no indicators of future difficulty" exhibited at the time of the licensure.²⁹ Finally, the court took issue with the fact that the initial screening process is not conducted by individuals with mental health training.³⁰

The court also placed emphasis on studies showing that many law students would only seek psychological or substance abuse

24. *In re Admission*, 683 A.2d at 1336.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* The court noted that even mental health professionals would "experience difficulty in predicting with accuracy the future threat posed during a lifetime of practicing law." *Id.* (citing W.E.B. Narrow et al., *Use of Services by Persons with Mental and Addictive Disorders*, 50 Archives of Gen. Psychiatry 95 (1993)).

counseling if they were assured the information would not be available to bar officials.³¹ The inclusion of questions such as numbers 26 and 29 on the bar application "may discourage future bar applicants from taking advantage of [counseling] opportunities."³²

The court concluded by recommending the adoption of the master's proposed questions.³³ The court said questioning applicants about current psychological and substance abuse problems is permissible under the ADA, and fulfills the competing goals of "protect[ing] the public from incompetent counsel," and protecting the privacy rights of the applicants.³⁴

CONCLUSION

The Rhode Island Supreme Court followed the recommendations of the ABA, and the trend seen in many other jurisdictions, by limiting the scope of mental health and substance abuse questions on the bar application. As a result of this case, an applicant for the Rhode Island bar may not be asked questions concerning past mental or substance abuse treatments. This case shows the breadth of the ADA's influence over any process deemed a "hiring process," as well as the continued importance placed on privacy rights and the protection of the "handicapped" from discrimination.

Tracy Kelly Doorley

31. *Id.*; see Report of the AALS Special Committee on Problems of Substance Abuse in the Law School, 44 J. Legal Ed. 35, 55 (1994); Dickerson, *Psychological Counseling for Law School Students, One Law School's Experience*, 37 J. Legal Ed. 82, 89-90 (1987).

32. *In re Admission*, 683 A.2d at 1336.

33. The questions will now read:

Question 26: Are you currently using narcotics, drugs, or intoxicating liquors to such an extent that your ability to practice law would be impaired? Yes__ No__ 'Currently' means recently enough so that the condition could reasonably be expected to have an impact on your ability to function as a lawyer

Question 29: Are you currently suffering from any disorder that impairs your judgement or that would otherwise adversely affect your ability to practice law? Yes__ No__

Id. at 1337.

34. *Id.*