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January 10, 2018

VIA EMAIL

Glenn A. Grant, J.A.D.
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Re: Comments Regarding Report of Supreme Court Ad Hoc Committee on the Character Review Process

Dear Judge Grant:

On behalf of the American Civil Liberties Union of New Jersey (ACLU-NJ), I submit the following comments regarding the Report and Recommendations (hereafter, "Report") of the Supreme Court Ad Hoc Committee on the Character Review Process (hereafter, "Ad Hoc Committee").

As an organization, the ACLU-NJ is committed to the advancement of civil rights and civil liberties for all people. This encompasses, of course, a strong belief in government transparency and a commitment to protect and advance the civil rights of people of color, people with disabilities, and people with experience in the criminal justice system. As part of effectuating this commitment, we advocate to eliminate unnecessary barriers to those trying to enter the legal profession.

We previously submitted comments on the proposed regulations for the Committee on Character (hereafter, "Committee"), urging the Committee to narrow the inquiries into an applicant's criminal and mental health histories. In those comments we also outlined the need for greater transparency by the Committee, as well as suggested that the Committee provide advisory opinions to prospective applicants with complicated histories.

I. THE COMMITTEE ON CHARACTER SHOULD DIRECT THE AD HOC COMMITTEE TO CONSIDER BROADER POLICY RECOMMENDATIONS BEFORE TAKING ANY ACTION.

The Ad Hoc Committee was charged with making recommendations to speed up the character and fitness process "...without undermining the Court's ability to ensure that only candidates with the

requisite good character and fitness are admitted to the practice of law."[1] The Ad Hoc Committee interpreted this charge as limited in scope and, thus, the Report does not address some of the public comments presumed to raise "broader policy issues"[2] concerning the character and fitness process. Included in the category of broader policy issues not considered are those things related to

> "...the substance and scope of information that the Committee ... considers..., and/or the standard that it applies in determining whether a candidate has demonstrated fitness to practice law and good character."[3]

The "broader policy issues" not considered thus seems to include the lack of standards and guidance by which the Committee inquires into applicants' criminal, mental health, and financial histories. However, only by considering these broader issues will the Ad Hoc Committee and the Court as a whole ensure that the character and fitness process is equitable and not unnecessarily intrusive or burdensome for applicants. As noted, the ACLU-NJ submitted extensive comments on this issue to the Committee on Character on May 12, 2017; for the Court's convenience, we attach those comments hereto.

In addition to being a necessary area of review in its own right, the scope of information requested by the Committee and the standards by which applicants are evaluated can directly influence the length of the process, especially for applicants with more complicated histories. It is difficult, if not impossible, for the Ad Hoc Committee to make adequate recommendations to streamline the process without considering the breadth of the underlying content elicited and the standards for considering and reviewing applications. It is not only possible, but likely, that clear guidelines for reviewers to only request information that directly pertains to an applicant's ability to practice would streamline the process and cut down on the amount of time needed to process applications. Indeed, consideration of the time it takes to process applications cannot be considered in a vacuum and directly relates to the volume and scope of information being considered.

We therefore urge consideration these "policy issues" in its own right and in the context of recommendations to streamline the character review process.

II. RECOMMENDATIONS REGARDING STREAMLINING MENTAL HEALTH PROCESSES

Recommendation 5 of the Report specifically pertains to the ways to streamline the process for applicants referred for substance abuse/mental health evaluations. This recommendation includes placing a deadline for candidates to schedule their evaluation[4] while acknowledging the extended amount of time usually required for evaluators' reports and the tension between the mission of the

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[1] Supreme Court Ad Hoc Committee, "Report of the Ad Hoc Committee on the Character Review Process" 2 (Oct. 27, 2017), http://www.njcourts.gov/courts/assets/supreme/reports/2017/characterreviewprocess.pdf.

[2] Id. at 3.

[3] Id.

[4] Id. at 20.

New Jersey Lawyer's Assistance Program – which completes many of the evaluations – and the use of the evaluations to determine fitness to practice by the Committee.[5]

We praise the Committee's efforts to more efficiently process applications. However, the ACLU-NJ remains unconvinced that any inquiries into particular diagnoses or treatments appropriately assess an applicant's ability to practice law. And the recommendation does not address the underlying issue of the need for guidelines for reviewers to follow when making referrals of applicants for evaluation in the first instance.

To be sure, one way to streamline the character review process for those applicants with mental health histories is to narrow the scope of the inquiry to only those conduct-related issues that directly pertain to an applicant's ability to practice. There is no clarity regarding which candidates are referred for an evaluation, or at least the Committee has not publicly stated as much. There should instead be criteria that provide insight to reviewers as to how to discern which applicants require an evaluation and which applicants can be admitted without it.

We urge the Court to direct the Ad Hoc Committee to holistically evaluate the character review process for applicants with mental health histories. We hope that the Committee will train those conducting inquiries into an applicant's confidential medical conditions to limit the risk of an undue invasion of privacy into the personal lives of applicants. Finally, for necessary inquiries, we urge that the Ad Hoc Committee ensures this occurs with the appropriate sensitivity and respect, and therefore provide guidelines to conduct such inquiries.

III. CONCLUSION

We applaud the Committee's efforts to improve the character review process so that it is more effective. A first step is to completely evaluate and consider the 'broader policy issues' of the process, with an eye towards making it more fair and just. We welcome the opportunity to work with the Committee to move the bar in this direction and look forward to seeing the Committee take those steps.

Respectfully,

Portia Allen-Kyle
Staff Attorney

Enclosures: Comments to the Committee on Character (May 12, 2017)

[5] Id. at 21.

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May 12, 2017

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Re: Comments Regarding Proposed Regulations on Committee on Character

Dear Judge Grant:

On behalf of the American Civil Liberties Union of New Jersey (ACLU-NJ), I submit the following comments regarding the proposed updates to the Regulations Governing the Committee on Character (hereafter, "Regulations").

As an organization, the ACLU-NJ is committed to the advocacy of civil rights and civil liberties for all people. This includes, of course, a strong belief in government transparency and a commitment to protect and advance the civil rights of people of color, people with disabilities, and people with experience in the criminal justice system.

The ACLU-NJ recognizes that the proliferation of over policing and mass incarceration has had a devastating effect on communities throughout New Jersey, particularly communities of color and other marginalized communities. As a result, we believe the Judiciary must be conscious to ensure that its policies do not unnecessarily deny opportunities for people with criminal histories in ways that exacerbate these well documented problems. We have advocated for "reentry" initiatives such as the Opportunity to Compete Act (a.k.a. "Ban the Box"), which limited the ability of employers to inquire about criminal convictions prior to a conditional offer of employment.[1] We have also taken public positions in support of the ability of people with criminal convictions to serve on school boards[2] and cautioning against the expansion of criminal background checks into the regulation of the ride-sharing industry.[3] Occasionally our advocacy

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[1] Opportunity to Compete Act ("Ban the Box"), P.L. 2014, c. 32.

[2] *See* Spencer Kent, *N.J. says felon running for school board can't serve*, NJ.com (Sep. 9, 2016), *available at* http://www.nj.com/middlesex/index.ssf/2016/09/nj_says_felon_running_for_edison_school_board_cant.html.

[3] Portia Allen-Kyle and Rebecca Livengood, *ACLU to Christie: Where are people with criminal records supposed to work?*, NJ.com (May 10, 2017), *available at*

leads us to reflect upon our positions towards the fate of people with criminal histories – and other stigmatized past experiences – who attempt to enter our own profession.

It has long been the practice of the Committee on Character (hereafter, "Committee") to conduct a blanket inquiry into the criminal backgrounds, mental health histories, and the financial obligations of applicants to the State Bar. These inquiries are overly broad, often leading applicants to divulge deeply personal information that has no bearing on their fitness to practice law. Such overly broad inquiries can also function to disproportionately exclude people with more complex histories from entering the profession, both directly by withholding certification and indirectly through a chilling effect. The creation of these obstacles hampers critical efforts to ensure that the diversity of our profession reflects the diversity of the communities we represent.[4]

Of separate concern is the exclusionary function of the Committee in denying admission to candidates based on perceived moral character and fitness to practice. We are wary of setting a threshold for admission to the Bar that is much higher than the standards to which we hold our peers with regard to maintaining their license to practice. It is commonly perceived by members of the profession that conduct which can preclude one's entry into the profession is not as harshly treated when committed by current members of the profession. We are of the position that it should not be harder to disbar attorneys, who have taken the Oath to uphold the law, than it is to admit applicants who may have complicated histories and made youthful mistakes absent any Oath or professional ethical obligation.

Further, we are not currently able to assess the extent of the barriers to entry in the legal profession as a result of the Committee's concerns about an applicant's fitness due to their criminal history or mental health, because there is little to no transparency regarding the actual impact of the Committee's practices, regulations, and decisions. Through the following comments and recommendations, we aim to: (1) highlight the need for transparency in both the reporting on Committee outcomes and standards the Committee uses; (2) explain our concerns with regard to the current and proposed regulations relevant to the criminal and mental health histories of applicants; and (3) propose the development of regulations that will guide the Committee on how to use and evaluate sensitive information about applicants, namely, information disclosed about criminal and mental health histories.

I. THE COURT SHOULD IMPLEMENT TRANSPARENT GUIDELINES AND REPORTING REQUIREMENTS

The Committee does not currently publicly publish guidelines as to how the Committee will use and evaluate an applicant's sensitive personal information. It is also unclear as to whether these guidelines exist internally to guide a reviewer through how to assess this information when it is received from an applicant. Transparency by government is important because it provides applicants with better knowledge of how the process works, thereby building trust in the

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http://www.nj.com/opinion/index.ssf/2017/05/christie_has_to_help_people_rebuild_lives_after_ja.html#incart_river_index.

[4] Michael McKhrystal, *Legitimizing realities: State-based bar admission, national standards, and multistate practice*, 3 GEO. J. LEGAL ETHICS 533, 541 (1990) ("In order that segments of society are not unfairly excluded from access to and participation in government, the legal profession must be highly diverse.")

functioning of the system. As such, we recommend that the Court should establish and publish such guidelines for Committee members on its website.

The Committee is also not currently required to make public any information about the character and fitness outcomes of applicants to the State Bar. To improve the transparency of the Committee's decision making, the Court should require bi-annual reporting of the Committee in January and June (representing the month prior to the administration of the Bar exams). This reporting should include, but not be limited to the following:

- The total number of applicants to the Bar, disaggregated by race and gender.
- The total number of applicants who required additional review, disaggregated by race, gender, and the underlying reason for additional review.
- The total number of applicants who are conditionally admitted to the Bar, disaggregated by race, gender, age, required conditions, and time until full admission.
- The total number of applicants who are not certified by the Committee, disaggregated by race, gender, age, and the underlying reason for denial.

The Supreme Court of Ohio currently makes limited statistics publicly available on its website.[5] We urge the Court to become a leader in transparency for outcomes of applicants who seek admission to the Bar by publicly reporting the above metrics.

In New Jersey, there has not been an appeal from the Committee's decision to withhold certification to the Supreme Court in over a decade. While this may mean that the Committee has not withheld certification from applicants, anecdotally we know that this is not the case. This knowledge is cause to consider whether the Board of Law Examiners' current Committee process, combined with the stigma of criminal and/or mental health histories, has had a significant chilling effect on potential applicants into the profession. These transparency-reporting requirements should help to shine light on the Committee's process and decisions, helping to maintain the integrity of the profession. However, these reporting requirements are but one step towards a more just character and fitness process for applicants to the State Bar.

II. INQUIRIES INTO CRIMINAL HISTORY

People who have completed their obligations due to convictions have repaid their debt to society.[6] However, we know that a criminal conviction often carries a lifetime of stigma and

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[5] *See* http://www.supremecourt.ohio.gov/AttySvcs/admissions/cfstats/default.asp (providing an overview of Bar admissions outcomes from 1993 through 2003). The Supreme Court of Ohio also makes decisions of the court regarding Character and Fitness determinations available on its website. *See* http://www.supremecourt.ohio.gov/AttySvcs/admissions/application/04cf/default.asp.

[6] *But see*, Adam Chandler, *Paying (and paying and paying) a debt to society*, THE ATLANTIC (May 31, 2016), *available at* https://www.theatlantic.com/business/archive/2016/05/ban-the-box-incarcerated/484919/; *see also*, Grainne Dunne, *Banning "the Box" will benefit both the justice system and the economy*, Brennan Center for Justice (Nov. 12, 2015), *available at* https://www.brennancenter.org/blog/banning-box-will-benefit-both-justice-system-and-economy ("Having served their prescribed sentences, former prisoners have repaid their debt to society.

collateral consequences that stunt a person's financial earning capacity and facilitate a long, slow "civic death."[7] As evidenced by a *Syllabus* article linked to on the website of the NJ Board of Law Examiners,[8] the profession operates under a presumption of unfitness of people with criminal histories,[9] and the attendant need to *overcome* that obstacle and prove their worth.[10]

The presumption of unfitness based on an applicant's criminal history too broadly includes offenses that have no bearing on the ability to practice. This presumption can not only chill applicants' attempting to seek admission to the Bar, but also deter law school attendance at the outset. Especially given the potential for racially and economically disparate impact,[11] the Committee should reevaluate the question on criminal histories, narrowing the scope of the inquiry to conduct that might realistically bear on an applicant's fitness to practice.

The application to sit for the Bar exam currently asks:

> Have you ever been cited for, charged with, taken into custody for, arrested for, indicted, tried for, pled guilty to, or convicted of, the violation of any law (other than a minor traffic violation) or been the subject of a juvenile delinquent or youthful offender proceeding or received a conditional discharge, adjournment in contemplation of dismissal, or pretrial diversionary program? (NOTE: driving while intoxicated or impaired, driving without insurance, reckless driving, leaving the scene of an

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Yet the stigma of their criminal conviction continues to punish them and, in many ways, permanently relegate them to a second-class status.")

[7] *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (Univ. of Chicago Press, 2007); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW, 142 (2010) ("Myriad laws, rules, and regulations operate to discriminate against ex-offenders and effectively prevent their reintegration into the mainstream society and economy. These restrictions amount to a form of 'civic death' and send the unequivocal message that 'they' are no longer part of 'us.'").

[8] *See* https://www.njbarexams.org/other-links (link to American Bar Association - Article on professionalism and Character and Fitness Requirements).

[9] Lori Shaw, *What Does it Take to Satisfy Character and Fitness Requirements?*, 44 Syllabus, no.2, 2012, *available at* http://www.americanbar.org/publications/syllabus_home/volume_44_2012-2013/winter_2012-2013/professionalism_whatdoesittaketosatisfychracterandfitnessrequire.html (expressing surprise at applicants with criminal records who have "failed to be proactive about rebuilding their reputations."). *See also*, *Application of Matthews*, 94 *N.J.* 59, 83 (1983).

[10] *Id.* ("If you've had a brush with the law, it's important that you do more than simply stick to the straight and narrow. You need to actively seek to make a difference in the world.")

[11] *See e.g.,* AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE, (2013), *available at* https://www.aclu.org/report/report-war-marijuana-black-and-white (noting that marijuana usage rates by race are similar, but arrests for marijuana possession arrests of people of color are disparately arrested more than are whites).

> accident, and driving while suspended are not considered minor traffic offenses for the purposes of this section).[12]

We concede that there are crimes that directly relate to one's moral character and, thus, their ability to practice. However, not all crimes satisfy the nexus between the conviction and the expectation of attorney integrity. Crimes not satisfying this nexus should neither require disclosure nor should the Committee be able to consider them in the evaluation of one's "fitness." The current question, allowed under Regulation 302:1(c), constitutes a blanket inquiry into an applicant's past that is highly prejudicial towards applicants with even minor criminal histories, creating a "...strong presumption of continuing unfitness to practice law."[13] Moreover, there is no clear indication that doing so actually maintains the integrity of the profession.

We acknowledge that the present system requires an "inquiry" and is not an absolute bar. Indeed, the Court set out the limitations on the inquiry by acknowledging that, "[t]he fitness requirement exacted of all lawyers should be formulated in terms of the qualities of character that attorneys must possess in order to fulfill their obligations to individual clients and to the judicial system."[14] But the value of this limitation is undermined because of the presumption of unfitness, combined with the chilling effect on people who have been arrested for minor offenses that might never attend law school – especially given the cost – for fear that their work and investment might be stymied because of their history.[15] We are wary of a system that creates many obstacles that can function to exclude people from entering the profession through a presumption of unfitness. This is especially troubling when there exist no clear regulations that guide the Committee's evaluation of these topics.

We recommend that the Court limit the Committee's inquiry in applicants' criminal histories by focusing questions on conduct, not status.[16] The Committee could achieve its goals of evaluating an applicant's fitness by requiring applicants to divulge their criminal histories only the if the circumstances relate to certain behaviors or fact patterns that clearly put the applicant's fitness to practice law into question. If the Committee must inquire into an applicant's criminal background, the inquiry should be limited to offenses with direct implications on the ability to practice (*e.g.*, forgery, fraud, identity theft, murder). For example, applicants' criminal histories that involve simple drug possession and disorderly persons offenses should not require disclosure unless the facts surrounding that history involve dishonesty, fraud, or forgery.

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[12] *See* https://www.njbarexams.org/browseform.action?sid=67104001&ssid=74704001&applicationId=1.

[13] *Application of Matthews*, 94 *N.J.* at 83.

[14] Id. at 77.

[15] The Court has also stated in unequivocal terms that, "in the case of extremely damning past misconduct, a showing of rehabilitation may be virtually impossible to make." *Application of Matthews*, at 81-82.

[16] In an evaluation of the fitness of an applicant who participated in a Ponzi scheme, the Court has intimated that one can come to a conclusion of unfitness based on actual knowledge of fraudulent criminal behavior. *Application of Matthews*, at 78.

III. INQUIRIES INTO MENTAL HEALTH HISTORY

The ACLU-NJ is also concerned with the Committee's current *and* proposed process regarding inquiries into the mental health history of Bar applicants. It has long been a concern that inquiries into mental health history of Bar applicants may run afoul of the Americans with Disabilities Act (ADA).[17] Indeed, the U.S. Department of Justice has taken a firm position opposing these types of inquiries.[18]

As a preliminary matter, we remain unconvinced that any inquiries into particular diagnoses or treatments appropriately assess an applicant's ability to practice law. Instead, we propose limiting inquiries to specific conduct that demonstrates a significant impairment of one's fitness to practice law. Inquiries into mental health status exacerbate stigma, disincentivize treatment and fail to measure the relevant abilities of potential lawyers. However, we recognize that the American Bar Association (ABA) has taken a contrary position,[19] and we believe that there are ways to improve the regulations, even within the parameters set forth by the ABA.

Mental health history – like all medical history – is afforded some of the most stringent privacy protections under the law.[20] Moreover, due to the undeniable social stigma that attaches to most mental health diagnoses, an applicant's mental health history is particularly sensitive.[21] Currently Reg. 302:1(o) provides that an applicant's candidacy may be subject to heightened review when their application includes, "Evidence of current psychiatric disorders including paranoia, bi-polar disorder, or schizophrenia...."[22] We acknowledge the previous inclusion of these specific mental health diagnoses was likely influenced by the resolution of the American Bar Association addressing mental health inquiries.[23] While the current regulation unduly stigmatizes the conditions of schizophrenia and bi-polar disorder, at least the current phrasing appropriately narrows the inquiry into mental health history to diagnoses that are: 1) current, and 2) specific.

We believe that both requisite factors should be an explicit part of any inquiry into an applicant's mental health history, as opposed to focusing on diagnoses that may change over one's lifetime. However, we also believe that this inquiry should be further narrowed to focus on specific *conduct* stemming from a mental health diagnoses that may affect an applicant's ability to

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[17] *See* Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans With Disabilities Act*, 49 UCLA L. REV. 93 (2001); Alyssa Dragnich, *Have You Ever...?*, 80 BROOK. L. REV. 677 (2015).

[18] Letter from Merrily A. Friedlander, Acting Chief, U.S. Department of Justice, Coordination and Review Section, to Stephen C. Villarreal, Chairman, Supreme Court of Arizona, Committee on Character and Fitness (Nov. 7, 1994) (on file with author).

[19] *See* American Bar Association, *Bar Admissions Resolution: Narrow Limits Recommended for Questions Related to the Mental Health and Treatment of Bar Applicants*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 597 (1994) (reprinting the ABA resolution and report).

[20] *See e.g.*, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (1996); and the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C.S. §1232g.

[21] *See* Patrick W. Corrigan, Amy C. Watson, and Leah Barr, *The Self-Stigma of Mental Illness: Implications for Self-Esteem and Self-Efficacy*, 25 J. OF SOC. & CLINICAL PSYCHOL. 875 (2006).

[22] Regulation 302:1(o).

[23] American Bar Association, *supra*, note 17.

practice law. This way, the Committee can detail specific actions by applicants which, if present, have implications on an applicant's fitness.

The proposed regulations raise additional concerns. While we acknowledge that the new language includes a helpful qualification on disclosure by conditioning the requirement to disclose psychiatric disorders on whether these disorders, "...may affect the candidate's ability to practice law in a competent, ethical, or professional manner,"[24] it is unclear that such qualification sufficiently narrows the scope of the inquiry. To wit, we are aware that applicants are repeatedly advised by their law schools and other members of the Bar to disclose everything remotely relevant when responding to such official inquiries and should err on the side of over-disclosure.[25]

Thus, we recommend rephrasing the regulation to limit the inquiry into conduct stemming from "current medical conditions" and including a "note" to applicants providing that the inquiry is intentionally narrow in scope.[26] As with criminal histories, the Court should limit the Committee's inquiry to questions of conduct and ability, rather than status. An inquiry limited to incidents that reflect an inability to competently and ethically practice law would better capture applicants suffering from sufficiently serious mental health issues, or other relevant conditions, whether diagnosed or not. We further urge the Committee to train those conducting inquiries into an applicant's protected medical conditions to limit the risk of an undue invasion of privacy into the personal lives of applicants and approach any necessary inquiries with the appropriate sensitivity and respect.

IV. THE COMMITTEE ON CHARACTER SHOULD OFFER ADVISORY OPINIONS FOR ENTERING LAW STUDENTS

Law school is a significant investment in one's future in terms of time, money, energy, and sacrifice. For example, on average Rutgers Law School graduates can expect to shoulder a $56,173 burden of student loan debt;[27] a graduate who was a full-time student at Seton Hall Law School can expect to owe $125,300.[28] Under the current Regulations, applicants do not go through an inquiry by the Committee until they apply to sit for the Bar exam. People with prior criminal justice involvement could complete college, in which they likely had to overcome

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[24] Proposed Regulation 302:1(o).

[25] *See* G.G. Filisko, *Ready, Set, Go! It's Never Too Early to Start Preparing Your Character and Fitness Application*, ABA.com (Dec. 14, 2014), *available at* http://abaforlawstudents.com/2014/12/14/ready-set-go-never-early-start-preparing-character-fitness-application/.

[26] *See e.g.,* Regulation 302:1(c)'s parenthetical note within the text of the inquiry, explicitly indicating what is not required of a responsive disclosure.

[27] U.S. News & World Report, *available at* https://www.usnews.com/best-graduate-schools/top-law-schools/grad-debt-rankings/page+8 (accessed Apr. 14, 2017).

[28] Id., *available at* https://www.usnews.com/best-graduate-schools/top-law-schools/grad-debt-rankings/page+3 (accessed Apr. 14, 2017).

significant funding obstacles,[29] complete law school, and pass the Bar exam, yet face a risk of not being certified by the Committee to practice law.

While certitude about the process cannot be obtained, to decrease the risk of completing law school and still not being certified by the Committee, and lower the anxiety of people also studying for what may be the most important exam of their lives, we recommend that the Committee expands the process to provide advisory opinions for entering law students. Currently the states of California,[30] Ohio,[31] Missouri,[32] and Texas[33] allow students to go through the character and fitness process prior to their final year of law school. For efficiency purposes, the application for early review should not be mandatory, but instead available for applicants with concerns about their backgrounds. The opinion offered by the Committee will be advisory only, and would not bind the Committee to later certify any earlier applicant. After the Committee's review of these early applicants it could inform the applicant in writing as to whether, if the application were submitted as-is upon graduation, they are potentially 'fit' to be certified, have little chance of being certified by the Committee, or have a chance but could improve them by demonstrating certain evidence of rehabilitation.

V. CONCLUSION

The proposed regulations have provided an opportunity for the profession to reflect upon the goals of the character and fitness inquiry. As Justice Black noted over a half-century ago:

> The term "good moral character" has long been used as a qualification for membership in the Bar, and has served a useful purpose in this respect. However, the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways, for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.[34]

In an era of mass incarceration and profound collateral consequences of incarceration, it is important to reflect upon its impact on our profession. The American Bar Association has listed

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[29] *See* https://studentaid.ed.gov/sa/eligibility/criminal-convictions (describing the eligibility of people with criminal conviction for financial aid and the conditions upon which it can be obtained, if at all).

[30] *See* https://www.calbarxap.com/applications/calbar/California_Bar_Moral_Character/ (allowing students to register at any time prior to January of their third year of law school).

[31] *See* http://www.supremecourt.ohio.gov/AttySvcs/admissions/application/ (providing for timely registration of law students as candidates for admission to the bar by November of their second year of law school).

[32] *See* https://www.mble.org/rules (allowing students seeking an early determination on character and fitness to apply during their first or second year of law school).

[33] *See* https://ble.texas.gov/rule10 (providing for the character and fitness review of first-year law students upon required registration in the state in anticipation of applying to the State Bar).

[34] *Konigsberg v. St. Bar of Cal.*, 353 *U.S.* 252, 262-63 (1957).

as one of its goals to "eliminate bias and enhance diversity" through the, "promo[tion] of full and equal participation in … our profession…by all persons."[35] A first step for New Jersey is to reevaluate the point in the process where bias is most likely to enter and possibly exclude potentially valuable members of the profession: the character and fitness review.

Respectfully,

Portia Allen-Kyle
Staff Attorney

[35] ABA Mission and Goals, ABA.com, *available at* https://www.americanbar.org/about_the_aba/aba-mission-goals.html (accessed April 15, 2017).