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December 3, 1992

Jeter E. Rhodes, Jr., Chairman
South Carolina Supreme Court Committee
on Character and Fitness
Post Office Box 11330
Columbia, South Carolina 29211

Dear Jeter:

As you know, your letter to the Attorney General was referred to me for response. You requested an opinion concerning this question: "Does the 1990 Americans with Disabilities Act prohibit licensing agencies, and particularly the South Carolina Supreme Court Committee on Character and Fitness, from asking questions to applicants about mental health history?"

The Americans with Disabilities Act ["ADA"], 42 U.S.C. §§12101 -12213, which was signed into law on July 26, 1990, is, "[b]y all accounts, . . . the most sweeping antidiscrimination measure passed by the Congress and signed into law since the Civil Rights Act of 1964 [, 42 U.S.C. §§2000e et seq.]." Ogletree, Deakins, Nash, Smoak & Stewart, Americans with Disabilities Act: Employee Rights & Employer Obligations §1.01 (1992). With one purpose of the ADA being "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 1201(b)(1), the ADA is divided into five Titles: (1) Title I prohibits discrimination in employment, (2) Title II prohibits discrimination in public services, (3) Title III prohibits discrimination in public accommodations, (4) Title IV prohibits discrimination in telecommunications, and (5) Title V contains miscellaneous provisions.

Title I of the ADA defines "employee" to mean "an individual employed by an employer. . . " and "employer" to mean:

> a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar

> weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employee for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

42 U.S.C. §12111(4)&(5). Among the provisions contained in Title I of the ADA is a prohibition of covered employers from discriminating against a "qualified individual with a disability" as to job applications, hiring, advancement, discharge, compensation, training, or other terms, conditions, or privileges of employment. 42 U.S.C. §12112(a). Covered employers must make "reasonable accommodations" to the known physical or mental limitations of an otherwise qualified individual unless to do so would impose an "undue hardship." 42 U.S.C. §12112(b)(5)(A). This prohibition includes the use of qualification standards, employment tests, or other selection criteria that tend to screen out individuals with disabilities unless the standard, test, or other selection criteria is job-related. Also, the prohibition includes medical examinations and inquiries. Covered employers may only require a medical examination if it is job-related and consistent with business necessity and only after making an offer of employment to the applicant. The offer of employment may be conditioned on the results of the medical examination if all employees are subjected to medical examinations and the information obtained is kept confidential. Voluntary medical examinations are permitted. Employers may not inquire whether an applicant has a disability or the severity of the disability but may ask whether the applicant can perform job-related functions. 42 U.S.C. §12112(d). The United States Equal Employment Opportunity Commission has promulgated regulations concerning Title I of the ADA. 29 C.F.R. pt. 1690 (1991).

Title II of the ADA prohibits a public entity from discriminating against qualified individuals with disabilities from participation in its services, programs, or activities. The United States Department of Justice's regulations concerning Title II of the ADA provide:

> For purposes of this part, the requirements of Title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public

> entity is also subject to the jurisdiction of Title I.

29 C.F.R. §35.140(b)(1) (1992). Concerning licensing, the Department of Justice has interpreted Title II of the ADA as follows:

> A public entity may not discriminate on the basis of disability in its licensing, certification, and regulatory activities. A person is a "qualified individual with a disability" with respect to licensing or certification, if he or she can meet the essential eligibility requirements for receiving the license or certification.
>
> The phrase "essential eligibility requirements" is particularly important in the context of State licensing requirements. While many programs and activities of public entities do not have significant qualification requirements, licensing programs often do require applicants to demonstrate specific skills, knowledge, and abilities. Public entities may not discriminate against qualified individuals with disabilities who apply for licenses, but may consider factors related to the disability in determining whether the individual is "qualified."
>
> . . . .
>
> A public entity does not have to lower or eliminate licensing standards that are essential to the licensed activity to accommodate an individual with a disability. Whether a specific requirement is "essential" will depend on the facts of the particular case. . . .
>
> Although licensing standards are covered by Title II, the licensee's activities themselves are not covered. An activity does not become a "program or activity" of a public entity merely because it is licensed by the public entity.

Dep't of Justice Interpretation II-3.7200 (1992).

Simply because Department of Justice regulations provide that Title I of the ADA applies in certain respects to Title II of the

ADA would not appear to convert every licensee of a public entity into an employee of that public entity. Thus, the medical examinations and inquiries provisions of Title I with respect to employment would not appear to apply concerning licensing. Moreover, the mental health of applicants for licensing as attorneys by the South Carolina Supreme Court would probably constitute an "essential eligibility requirement" concerning the character and fitness of the applicant in determining whether the applicant is "qualified." Consequently, the ADA would probably not prohibit the South Carolina Supreme Court Committee on Character and Fitness from asking questions to applicants about their mental health history.

I hope this analysis will be of assistance to you.

Sincerely,

Samuel L. Wilkins

Samuel L. Wilkins
Assistant Attorney General

SLW/fg

REVIEWED AND APPROVED BY:

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