BEFORE THE KANSAS BOARD OF LAW EXAMINERS

In the Matter of the Application of
Ian Bruce Johnson
For Admission to the Kansas Bar

Application No. 12320

FILED
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CAROL G. GREEN
CLERK OF APPELLATE COURTS

PETITIONER'S REPLY BRIEF

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[At p. 1:]

Initially, Petitioner notes that, in her Hearing Brief, the Admissions Attorney has commented upon a document—Dr. Hough's report—which was not in existence at the time Petitioner filed his principal Hearing Brief. Therefore, Petitioner will also comment upon Dr. Hough's report and several other documents that have come into existence since that time.

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[At p. 4:]

Moreover, while Dr. Hough's current independent psychological evaluation report indicates that Petitioner continues to have some unusual sexual fantasies (a matter that will be discussed further below), nothing in that report supports the conclusion that Petitioner continues to have "urges" toward illegal behavior. A "fantasy" that remains a fantasy, and an "urge" that attempts to motivate action, are two different things. Petitioner has suffered no impulsive "urges" to touch strangers in many years, and the 1983 affidavit cited by the Admissions Attorney does not tend to show the contrary.

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[At p. 4:]

The Admissions Attorney's summary of Dr. Hough's conclusions is accurate as far as it goes, but omits the last paragraph of Dr. Hough's report, which is significant because it states his conclusion that the protective factors in Petitioner's case outweigh the risk factors:

> The crux of the dilemma seems to be that while the engrained fantasy life that has fueled and given rise to the background of sexual acting out (both the known and unknown episodes); Mr. Johnson reports that it has now been

> twenty-one years since the last such episode. I am not aware of any data … that would contradict this assertion. Whether he has re-offended and we simply do not know about it is at the moment *relegated to the realm of speculation*. In general, the literature on re-offending is confused, often contradictory, and typically based on large groups (large-in studies) that overlook the idiographic and particular features of the individual. *The current protective factors currently outweigh the risk factors for re-offense* however, this analysis is based upon a clinical, qualitative analysis, not a quantitative one.

(Hough Report, p. 31, emphasis added).

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[At p. 6:]

There is no Kansas Bar admissions case law. Therefore, it cannot be said that the Kansas Supreme Court has ever explicitly approved of the use of case law from other jurisdictions to fill in the gaps in its rules for admission to the Bar. Other states have different rules than Kansas and are free to apply different standards. For this reason, in preparing his principal Hearing Brief, Petitioner drew his arguments regarding Kansas Bar admissions rules and standards entirely from Kansas sources: namely, the text of Supreme Court Rules 219, 702 and 704, the Kansas disciplinary case law, and Kansas cases defining the "clear and convincing" evidentiary standard.

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[At p. 7:]

In most jurisdictions that have published opinions setting forth the order of proof, the burden is initially placed upon the applicant to make a *prima facie* showing of his or her good moral character and fitness. This showing is generally made by presenting letters or affidavits of recommendation, in at least the number prescribed by the licensing court's rules, attesting to the applicant's present good moral character and fitness[4]. See, e.g., *State ex rel. Board of Bar Examiners v. Poyntz*, 152 Or. 592, 593, 595, 52 P.2d 1141, 1142-43 (1935); *Application of Warren*, 149 Conn. 266, 268, 274, 178 A.2d 528, 530, 533 (1962); *Matter of Rogers*, 297 N.C. 48, 49, 54, 253 S.E.2d 912, 913, 916 (1979). Once this *prima facie* showing is made, the burden shifts to the Bar to come forward with evidence sufficient to rebut it. *Konigsberg*, 366 U.S. at 41; *Rogers*, 297 N.C. at 57; *Warren*, 149 Conn. at 274. The applicant's *prima facie* case must be rebutted with competent evidence. *Application of Burke*, 87 Ariz. 336, 339, 351 P.2d 169, 171 (1960); *Lubetzky*, 34 Cal.3d at 308-09; *Warren*, 149 Conn. At 274-75. The denial of an application may not be based upon suspicion or accusation. *Rogers*, 297 N.C. at 58; *Coleman v. Watts*, 81 So.2d 650, 655 (Fla. 1955). Moreover, generally the evidence against an applicant must generally 1) "be supplied or confirmed by the applicant himself," 2) be "of an *undisputed* documentary character disclosed to the applicant," or 3) be presented through the testimony of a witness to the fact in question who is made available for cross-examination. *Mattox v. Diciplinary Panel of the U.S. District Court for the District of Colorado*, 758 F.2d 1362, 1366 (10th Cir. 1985) *quoting Konigsberg*,

353 U.S. at 273 (Goldberg, J., concurring); *Willner v Committee on Character and Fitness*, 373 U.S. 96, 103-104 (1963); *Application of Kellar*, 81 Nev. 240, 244-45, 401 P.2d 616, 618 (1965). Proof of matters denied by the applicant should be made by the greater weight of the evidence. *Rogers*, 297 N.C. at 59.

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[At p. 9:]

"Good moral character" cannot mean less for an attorney than its does for a non-attorney applicant. (Indeed, it should mean more for an attorney). Similarly, the term "mentally and emotionally fit" cannot mean less once one has the license than it meant before he or she received it. The Admissions Attorney appears to be arguing on pages 7 and 8 of her brief that, because courts in three other jurisdictions have held that they are free to apply *lower* standards of good moral character and mental and emotional fitness to admitted attorneys than they apply to applicants for admission, Kansas also ought to recognize that the standards for admitted attorneys are more lenient, and apply to Petitioner a higher and more stringent standard than is applied to attorneys in the Kansas disciplinary case law. However, there can be no reason that does not offend both the Equal Protection clause and sound public policy for setting a *lower* standard of moral character and mental and emotional fitness for attorneys than is set for applicants. This is the point made in *Miller v. Carter*, 547 F.2d 1314, 1316 (7th Cir. 1977) *aff'd per curiam sub nom. Carter v. Miller*, 434 U.S. 356 (1978), as argued in Petitioner's Hearing Brief[5].

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[At p. 14:]

The Admissions Attorney appears to concede for the purpose of her brief that ADA applies to bar admissions decisions, that exclusion from the practice of law limits a major life activity, and that Petitioner's condition likely fits within one of the prongs of the definition of a disability. (Admissions Attorney's Hearing Brief, pp. 22-23). She instead focuses her ADA argument on the issue of whether Petitioner is "qualified." She concludes that the tests to be employed under ADA to determine whether Petitioner is a "qualified individual with a disability" are 1) whether Petitioner's condition permits him to perform the "essential functions" of a lawyer, with or without accommodation, and 2) whether, as an attorney, he would pose a "direct threat" to the health and safety of others. She also states that these tests must be applied "based on an individualized assessment of his capabilities" that "relies upon current medical evidence or the best available objective evidence" rather than generalizations or stereotypes. (Admissions Attorney's Hearing Brief, pp. 24-25). Petitioner agrees that these are the correct tests, but insists that, fairly applied, they support his admission. The *current* medical evidence shows that, though Drs. Urdaneta and Hough disagree somewhat about Petitioner's diagnosis, they agree that he presently presents little risk of committing another sexual offense. Thus, he would not pose a "direct threat" to potential clients and others if admitted. The Admissions Attorney does not argue that any other aspect of Petitioner's condition would prevent him from performing the "essential functions" of a lawyer.

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[At p. 15:]

Two of the "risk factors" listed by Dr. Hough in his report are Petitioner's "core sexual fantasy system" and his "continued interest in adult pornography." Petitioner here notes that both of these factors are subject to constitutional rights of privacy.

First, the evidence presented at the hearing in this matter will show that the "month long relapse" of pornography use to which Dr. Hough refers occurred at the beginning of 2006 and involved the use of only lawful, adult pornography. Moreover, the relapse occurred more than eight months ago, and pornography is no longer a part of Petitioner's life. However, even if Petitioner were still viewing pornography (which he is not), the United States Supreme Court has long recognized a First Amendment privacy right to possess and use such material in private. *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969) (a case cited in Petitioner's Hearing Brief). One cannot be penalized for the private use of lawful pornography.

However, *Stanley* also recognized a privacy right that applies to Petitioner's "core sexual fantasy system:" the right to freedom of thought. As long as fantasies remain fantasies, they occur entirely in the mind. *Stanley* recognized that "the assertion that the State has the right to control the moral content of a person's thoughts… is wholly inconsistent with the philosophy of the First Amendment." *Stanley*, 394 U.S. at 565-66. Indeed, "our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565. This right to freedom of thought applies to protect, not only obscene thoughts, but also unpopular religious and political thoughts. *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34, 641-42 (1943) (religious thoughts); *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 178-79 (1971) (political thoughts). More to the point, the right to freedom of thought has been held to protect an applicant for admission to the Bar from denial of her application because of her disapproved beliefs. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971). According to the Supreme Court in its opinion regarding the bar applicant, "the First Amendment gives freedom of mind the same security as freedom of conscience." *Baird*, 401 U.S. at 6.

Thus, in determining my application, the Board must consider only Petitioner's conduct—which has been good for the last 21 years. It may not attempt to penalize his thought life.