IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE PETITION OF		
	)	
	)	
IAN BRUCE JOHNSON	)	Docket No. 12,320
	)	
FOR ADMISSION TO THE BAR OF THE STATE OF KANSAS	)	
BY WRITTEN EXAMINATION PURSUANT TO RULE 704	)	

MINORITY DISSENTING REPORT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The undersigned, one of the members of the Kansas Board of Law Examiners, writes and reports separately to express disagreement with and dissent from the Recommendation to this Court by a majority of the Kansas Board of Law Examiners. This report is not meant to disparage the Majority Report agreed to by Examiners for whom I have profound respect.

I dissent because I believe that the applicant has satisfied the requisites of showing by clear and convincing evidence that he possesses good moral character and is mentally and emotionally fit to engage in the active and continuous practice of law as required by Supreme Court Rule 702.

Because I have no disagreement with the first five paragraphs of the Majority Report, I will have no comment thereon except to note that the focus on "current fitness to practice law" is by implication an acknowledgment that there was no dispute that the applicant's evidence established his good moral character.

My primary area of disagreement is with paragraphs 6 through 10 of the "Findings" and with the conclusion based on those findings.

I further point out that the majority has created a standard which many successful applicants to take the Kansas bar would fail – *i.e.*, a prediction that stress would at some point disable an applicant from the "active and continuous practice of law." The majority has ignored the counsel of the "expert witnesses" and engaged in pure speculation as to the effect the stress of the "active and continuous practice of

law" would have on this applicant. I will attempt to demonstrate my conclusion through a recitation of the evidence before the Board and now this Court.

In paragraph 6, the majority finds: ". . . the risk of applicant's re-offending is not as high as it was twenty years ago." This finding, while technically correct, greatly constricts the true meaning of the testimony offered and heard in the following particulars.

First, as to rehabilitation from the condition which caused the former offenses, the Board heard testimony from Dr. Leonel Urdaneta, MD, who has been the applicant's psychiatrist for 17 years. Dr. Urdaneta explained that presently, he only sees the applicant three to four times a year, which is quite a change from their earlier relationship which was sometimes more often than twice a month, depending on the periods of adjustment to stressors. ***(Transcript of hearing, p. 93)***. Dr. Urdaneta explained that he was "pretty much convinced that in terms of inappropriate behavior with clients and so on the risks are very, very low and not higher than what you will find in a general population." ***(Transcript of hearing, p. 96).***

In paragraph 7, the Majority Report points out that there was conflicting testimony as to whether the applicant suffers from a bi-polar disorder. That statement however, fails to take into consideration the following facts. The applicant's own physician, Dr. Urdaneta, explained that he began to question his own diagnosis of a bi-polar condition when the course of the applicant's continued treatment did not show the natural development of someone suffering from bi-polar disorder, having neither manic, hypo manic or depressive episodes. He, therefore, began to wean the applicant off the drug lithium, which he had prescribed for treatment of the bi-polar condition. Dr. Urdaneta explained that the applicant's life continued uninterrupted without this drug. Dr. Urdaneta said studies show that if a person has a bi-polar disorder, there is a 50% chance of recurrence within six months after discontinuance of lithium and a 99% chance of recurrence within two years. When the applicant had no such recurrences, Dr. Urdenta concluded that the applicant was not suffering from a bi-polar disorder but rather from Asperger's disorder.

Dr. George Hough, PhD is a clinical psychologist who was retained by the office of the Disciplinary Administrator to conduct an Independent Medical Evaluation. Dr. Hough reviewed records and administered a battery of psychological tests to the applicant. While he testified that he believed the applicant had suffered from a bi-polar condition, the most important part of his testimony was in his written report when he wrote:

> The bipolar condition can safely be assumed by this point to be in full and stable remission. ***(Exhibit 17, Psychological Evaluation by Dr. Hough p. 29)***

In response to an inquiry from the applicant, Dr. Hough explained what those terms meant as follows:

> Generally speaking, in psychiatry there is little discussion of the concept of 'cure'. One hears the term in medical research circles, such as when referring to a 'cure' for cancer. Psychiatry addresses 'management' of illness, without the implication that the illness has necessarily been 'cured'. There are plenty of examples, of course, of people who had only a single bout of an illness, such as with a depression. They may never have it again. In those cases we can speak of 'long-term, sustained remission', or of 'no longer being in clinical evidence,' or even of no longer carrying the diagnosis. ***(Letter from Dr. Hough, Exhibit 35)***

The two "experts" agreed upon this analysis. Dr. Urdaneta testified as follows when questioned by the applicant:

Q. (By Mr. Johnson) And Doctor Hough's report says even that my bipolar, if it's there, is in full remission?

A. Correct.

Q. And you agree with that?

A. Yes.

Q. Yes. Which is as far as you can really go. Kind of a hypothetical here. Consider a hypothetical adult male brought to you for examination, could you testify that any hypothetical adult male with reasonable medical certainty will never in the future commit any sex offenses?

A. No, we can never say never. We can only make a clinical judgment and offer, you know, an educated opinion of that, but we can never say never.

Q. Certainty is a problem?

A. Yes.

Q. You said that earlier that my risk of reoffending is low?

A. Correct.

Q. Can you say that with reasonable medical probability?

A. Correct, I can say that with reasonable medical probability.

Q. Do I presently require any further psychiatric treatment in order to function safely?

A. No, you do not.

Q. Would it be beneficial?

A. It would be beneficial.

Q. But not necessary?

A. But not necessary, correct.

Q. Let's see, you've known me professionally as a patient since 1989, right?

A. Correct.

Q. Do you consider me to be a person of good moral character?

A. Yeah, I do.

Q. Do you consider me to be mentally fit to engage in the continuous full-time practice of law?

A. Yes, I do.

Q. Do you consider me to be emotionally fit to engage in the continuous full-time practice of law?

A. Yes, I do.

Q. Thank you. That's all I have.
(Transcript of hearing, pp. 59-60)

This writer has searched the record to see if any witness testified that applicant is not emotionally fit to engage in the continuous full-time practice of law and can find none. The Majority Report seeks to make much of Dr. Hough's recommendation that the applicant continue therapy – apparently not realizing that he was only seeing Dr. Urdaneta three to four times a year. However, the Majority Report ignores that portion of the offering of Dr. Hough set out below:

Q. (By Judge Hill) I put it to the doctor this morning, I'll put it to you. Is this man rehabilitated?

A. I think he is rehabilitated to the best that can be expected at this point. But I think it would be a mistake to assume that therefore he's free to walk out the door without ongoing monitoring and treatment

Q. Okay.

A. Even in the addictions even when people have been abstinent for years and may be able to talk in terms of rehabilitation or sobriety and so on, no one talks about giving up their ongoing maintenance plan.
(Transcript of hearing, p. 264)

This testimony, when seen in its complete light, indicates not a reflection solely on the applicant, but on any applicant who has a history of substance abuse, drug problems, or mental illness in general and has achieved management of that disability. Dr. Hough was speaking of continuing management of what has become a successful maintenance plan. No other applicant is subject to denial of the opportunity to take a bar examination who has achieved the level of maintenance of this applicant.

Our own attorney's brief on the application of the Americans With Disabilities Act (ADA) to applicants who take bar examinations may be summarized to say that the ADA prohibits a public entity (Board of Law Examiners) from discriminating against a qualified individual with a disability. A qualified person is a person who "with or without reasonable modification to rules, policies or practices" can meet essential eligibility requirements. ***(Admissions Attorney's Brief, pp. 23-24)***

It appears clear that all the evidence before the Board and indeed, the implication from the wording of paragraph 10 of the Board Recommendations, is that

this applicant has put in place accommodations such as to meet the essential eligibility requirements to allow him to engage in the continuous practice of law.

In paragraphs 8 and 9, the Majority Report highly summarizes the work experience of the applicant at the law firm of Weathers, Riley & Sheppeard, where the applicant has been performing exceeding well as a paralegal for 15 years. Summarizing the testimony by both exhibits and live testimony, the Board was informed that the applicant is highly intelligent, and was described by Wesley Weathers as the peer of some of the best expert witnesses in the country in the area of toxic tort defense, which is the primary scope of Mr. Weathers' practice.

The applicant takes statements from clients and witnesses, meets and interacts with representatives of chemical companies, does research, drafts briefs, reviews documents, prepares case chronologies, and drafts discovery among other things. His work product is described as good. ***Exhibit 19, letter from Ms. Riley; Transcript of hearing, pp. 127-155)***

Mr. Weathers explained that he learned of the applicant's prior criminal difficulty prior to hiring him. The applicant was hired on a part-time probationary status and steps were taken to ensure there was no risk to female employees. Over the years, Mr. Weathers and his wife, Ms. Riley, became completely comfortable with the applicant to the point that Mr. Weathers felt comfortable with his own daughter and two of her best friends working with the applicant. ***(Transcript of hearing pp. 136-139;150-151)***

Mr. Weathers will offer a job to applicant if he is admitted to the bar, but the details are yet to be worked out. ***(Transcript of hearing, pp. 149-150)***

The Majority Report concludes that testimony ". . . acknowledged the supportive and protected environment in which Mr. Johnson has worked as a paralegal. That environment does not parallel the stress placed on a practicing attorney." ***(Majority Report, Paragraph 8)*** Mr. Weathers described stress level in his office as very high at times. His testimony on this issue was, in part:

Q. (By Ms. Larkin) How would you describe the stress level of Mr. Johnson's current position?

A. I think at times it can be intense. Ours is a pretty low key office, but you know, like any other law office that does especially litigation and

deadline related business, you know, there comes times when there's a lot of stress.

Q. Is the petitioner's amount of stress different than what you would experience as a lawyer?

A. Yes.

Q. How is that?

A. I would think his stress level – I would think the stressors on him – stress level maybe implies how he perceives it. But the stressors on him would be less than the stressors on me or Patty or Cindy who have the ultimate responsibility for some project.

Mr. Weathers said no beginning lawyer at his firm would be allowed to function independently at first. The applicant would be in the same position, and while he would not send applicant into a highly contested deposition, neither would he any beginning lawyer.

It must be recognized that the applicant represented himself throughout this proceeding and while he was not a "Super Lawyer" in terms of his trial skills, it was observed that he handled the matter adequately in what had to be an extremely stressful situation. Indeed, Dr. Hough testified that the applicant's preparations for this proceeding were a significant stressor and that he, Dr. Hough, saw no indication that the stressor had caused a relapse. ***(Transcript of hearing, p. 200)***

Perhaps the conclusion about the stress on a practicing lawyer alluded to in the Majority Report, comes about as a result of describing a worst case scenario.[1] That, of course, does not apply to all lawyers and is not a standard by which we determine eligibility to take a bar examination. The conclusion seems to fly in the face of the testimony given by Dr. Urdeneta as follows:

---

[1] Consider and compare the wording of the question of Dr. Hough by one Examiner who said: ". . . I think we have to assume that a practitioner, as opposed to a paralegal, is going to be facing a number of those interactions with the public, periods of high stress, sometimes, prolonged high stress, periods of sleep deprivation, sometimes prolonged deprivation. And would those circumstances or changes in circumstances potentially affect your assessment of a low threat of reoffense?" ***(Transcript of hearing, p 249)*** and "And you recognize that not all lawyers to the same thing. We're not all litigators. We're – some of us are maybe CPAs or somebody in the office. We have some people in our office that I would call nerds that we never let out, but they're great in the books and arguing things. You recognize that . . . . And he would fit within some of those abilities wouldn't he?" ***(Transcript of hearing p. 261)***

Q. (By Mr. Murray) All right. I want you to assume with me hypothetically that Mr. Johnson has just obtained a medical degree. All right. In your opinion do you believe that Mr. Johnson would have the mental fitness and emotional fitness to be able to undergo a physician's internship and residency and thereafter become a practicing physician?

A. The two – the rigors of the two professions are a little bit different. But, yes, I think he would – he would qualify to go through an internship, which is the roughest time probably.

Q. And in your opinion he would have the requisite mental and emotional fitness to be a practicing physician?

A. I think so.

Q. Are you thinking so or do you know so?

A. Well, I know for –

MR. FOCHT: I want to object to your question.

Q. (BY CHAIR MURRAY) I'm just asking.

A. I know as far as I could know, you know, with a degree of – of variability that we have. But medically – with medical certainty, yes, I know so. ***(Transcript of hearing, pp. 119-120)***

While it is acknowledged that the practice of medicine and the practice of law are quite different, it is general knowledge that the intern/residency time of a physician's life is one of great stress. Of equal importance to this case, is the lack of evidence of what is required in the way of stress as an eligibility requirement for taking the bar. It is certainly unfair to utilize a worst case scenario to make that determination. It is an open invitation to further litigation – an invitation I urge the Court to decline.

The elephant in the bedroom in this case is the question of rehabilitation. The flavor of the Majority Report indicates a clear concern about future misconduct, the same or similar to the sexual misbehavior last engaged in by the applicant 21 years ago. This causes the Board to engage in speculation about the future. It is important

to look at the testimony on this subject. Dr. Urdaneta was asked his opinion as to future risk as follows:

Q. (By Mr. Arthur) Doctor, on Exhibit No. F, the next to the last paragraph I'd just like to read your first sentence, "We believe at this point Mr. Johnson has reached the ability that he poses no threat in any way or risk in any way to himself or anyone." Poses no threat or is a risk. I'm wondering in terms of practicing law do we need to go beyond that, what is his diagnosis and in what you've observed how does that affect his ability on a positive basis to practice law, to interrelate with clients, to deal with female clients. Other than a risk or a threat it seems to me that as a professional there's a greater standard there.

A. Yeah, you know, that's a little bit difficult to judge. I think I am pretty much convinced that in terms of inappropriate behavior with clients and so on the risks are very, very low and not higher than what you find in a general population.

I have had thoughts about and questions about the ability to serve a client's welfare, the client's case because of the – for instance, the presentation in court and the difficulty perhaps in coming across with the proper affective emotional tone that – present one that could not be misconstrued. So those have been my questions on – in terms of that. But then I have looked at the other side too knowing that, well, there is a great variability of personality styles and so on in the general legal population and the system seems to work.

So he has been in his work now doing some work, a great deal of it research and so on, but I think that also gives him an extra step towards even being able to deal with those matters.

(Transcript of hearing, P. 95-97)

Q. (By Mr. Focht) Okay. One of the significant things to me always when I'm trying to judge conduct in the future is one I recognize we're guessing, aren't we, speculating?

A. Correct.

Q. But you do it on all the facts that you have available. One of the facts we have available here is that there has been no criminal conduct and there is

a stipulation that the admission attorney doesn't have any evidence of petitioner committing any criminal offenses since the ones in our booklet which is 1985?

A. Correct.

Q. And that's how long, 21 years, isn't it?

A. Twenty-one years, yeah.

Q. Is that significant then in trying to predict future behavior?

A. It certainly is, yes.

Q. And is there anything that you can utilize other than that and what you have given us in terms of your clinical judgment?

A. I think I would go to doctor, psychologist, predictive – or protective values and add that to the mix.

Q. Thank you. And that's where I would have gone also.

A. Yeah.

Q. Which was to guard against that acting out again one can put up some structures or devices or I think they're called in here – in the report of Mr. – protective factors which can help you keep from acting out?

A. Correct.

Q. And do you agree he has in place – he, the petitioner, has in place correct protective factors?

A. Yes, he does.

Q. And it seemed that Hough would have told us that the current protective factors currently outweigh the risk factors?

A. I believe so too.
(Transcript of hearing, pp- 105-106

Dr. Hough's "Independent Medical Evaluation," commissioned by the Board through the Disciplinary Administrator, concluded as to this applicant:

> 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." ***(Exhibit 17, Psychological Evaluation by Dr. Hough, p. 31)***

Dr. Hough was asked to chime in on the speculation and the following questions and answers resulted:

Q. (By Mr. Focht) I want to see if I understand some things you're saying. One, I think you told us there is no way that we can predict the conduct of this gentleman in the future or anyone else. Is that right?

A. That's correct.

Q. And so that if we sent you 250 applicants for the bar, you couldn't tell us which ones of those would be likely to steal from their clients or to develop alcoholism or anything else?

A. No. What I could tell you is who, based on the history, is perhaps more likely. I can't say that any of them actually will, but there are some people who are more likely to do it than others. If they've had a past history of that. If there's a dishonest streak with them, there's – there's just more likelihood that they would than somebody who has never done that.

Q. But what we're interested in is here today as he sits here his present character and fitness to practice law. We can't predict whether or not in the future he will have done something wrong and we know that he has done things wrong in the past. We have to give some credit, don't we, for 21 years of nonoffensive, noncriminal behavior?

A. Yes, you do. And I think 21 years is substantial.

Q. And that indicates that something has been going on in his life to allow him to handle this fantasy that you talk about?

A. That's correct. ***(Transcript of hearing, pp. 254-255)***

.....

Q. All right. And that's what we're talking about in terms of trying to predict the future, we're trying to speculate. Isn't that right?

A. Well, speculate is one word. I'm talking about trying to weigh factors that go into risk and protection. But if speculation is a word you want to use –

Q. And I will use the word you used was that he is – on that scale of high risk, medium risk, and low risk – a low risk?

A. I put him at low risk right now, yes.

Q. All right.

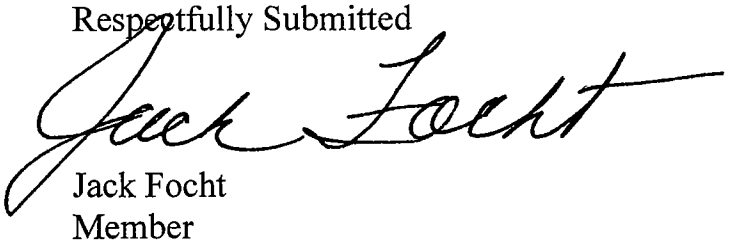
A. But may I offer a caveat to that. Low risk as the current life circumstances are organized at the moment.

Q. That's today, presently today when we're judging him today?

A. Right, correct. ***(Transcript of hearing, pp. 256-258)***

This writer believes that the applicant has carried his burden of demonstrating that for 21 years, he has been actively engaged in managing whatever mental disorders may have caused his behavior in the past. If we start down the slippery slope of trying to predict the stress level of an applicant after licensing and what the effect of that stress will be, it is doubtful that we will have many successful applicants for future bar examinations. It seems to me that the Majority would like to obtain certainty of future conduct at the expense of denial of an opportunity earned. I cannot join in that recommendation. Certainty is elusive in this context, but 21 years and the factors in place are enough for me to recommend that the Majority Recommendations be denied and that the applicant be allowed to stand for the bar examination.

Respectfully Submitted



January 16, 2007

Jack Focht
Member
KANSAS BOARD OF LAW EXAMINERS