IN THE SUPREME COURT OF THE STATE OF KANSAS

In the Matter of the Application of

Ian Bruce Johnson Docket No. 12320

For Admission to the Bar of the State of Kansas

MOTION FOR WAIVER OF SUPREME COURT RULES 704(k) AND 707(a)(6) OR FOR RECONSIDERATION

Ian Bruce Johnson, Petitioner in the above-captioned closed proceeding seeking admission to the Bar of the State of Kansas, hereby moves the Court enter an order waiving the requirements of Supreme Court Rules 704(k) and 707(a)(6) with regard to the next application filed by Petitioner after January 1, 2009, or, in the alternative, enter and order reopening its judgment entered September 5, 2007 in the above-captioned case and remanding the case to the Board of Law Examiners for redetermination in light of the ADA Amendments Act of 2008, Public Law 110-325, 122 Stat. 3553 (September 25, 2008). Petitioner makes this request on the following grounds:

1. Petitioner has had applications for admission to the Kansas Bar denied for failure to prove good moral character and/or mental and emotional fitness on February 10, 1993 and September 5, 2007, based on the findings of fact discussed in paragraphs 24 through 42, below.

2. Petitioner wishes to file a new application for admission to the Kansas Bar after the ADA Amendments Act of 2008, Public Law 110-325, 122 Stat. 3553 (September 25, 2008) ("ADAAA") becomes effective on January 1, 2009.
3. Most applicants for admission to the Kansas Bar are required only to prove, by clear and convincing evidence, that they have the requisite educational qualifications, are of good moral character and are presently mentally and emotionally fit to practice law. Kan. Sup. Ct. Rules 702(a) and 704(c).
4. However, Supreme Court Rule 704(k) imposes upon any applicant who has been previously denied admission due to failure to prove either good moral character or mental or emotional fitness the additional burden of proving, by clear and convincing evidence, that he or she "has been rehabilitated" since the time of the previous denial. That is, apparently, under Rule 704(k), an applicant who was previously denied admission on the grounds that he or she failed to prove mental and emotional fitness to practice due to the effects of a medical or psychological condition must prove *not only* that he or she is *presently* mentally and emotionally fit *but also* that significant rehabilitative *change* has occurred in that condition since the date of the previous denial.
5. An applicant's *failure to prove* his or her mental and emotional fitness on any given date by clear and convincing evidence, is *not* the same thing as a *proof* that the applicant was mentally and emotionally *unfit* on that date. It is simply a failure of proof, not a proof of the converse. Thus, in the absence of Supreme Court Rule 704(k), no proof of *change* in condition since a previous denial would logically be required on a subsequent application. In the absence of Rule 704(k), the burden of

proof on a new application might be satisfied by presenting a better or more complete proof of present condition than was presented on a previous application, by showing an additional period of time during which the condition remained under medical control, or by showing that a subsequent change has occurred in the legal standard by which the same evidence as was presented on a previous application is to be judged.

6. Therefore, in this motion, Petitioner seeks a waiver of Supreme Court Rule 704(k)'s additional requirement that, on any future application, he must prove that he "has been rehabilitated" since the denial of his last previous application in September 2007, for the reasons more fully explained below.
7. Rule 704(k) also requires rejected applicants to wait three years before applying again. This will prohibit Petitioner from applying again until September 5, 2010.
8. However, as explained more fully below, the legal standard governing the effect of the Court's findings when it denied Petitioner's 1992 and 2006 applications and under which Petitioner's future applications must be judged, will change dramatically on the January 1, 2009, effective date of the ADAAA. September 5, 2010, is more than 20 months after the effective date of the ADAAA.
9. Therefore, in this motion, Petitioner also requests a waiver of the requirement of Supreme Court Rule 704(k) that he must wait until September 5, 2010 to file another application.
10. Most applicants for admission to the Kansas bar upon written examination pay an application fee of $400 under Supreme Court Rule 707(a)(3). However, previously rejected applicants must bear the burden of paying a higher application fee, $750, under Supreme Court Rule 707(a)(6). In this motion, Petitioner also seeks a waiver

of this increased application fee on the next application filed by him after January 1, 2009.

11. Title II of the ADA, as originally enacted in 1990, regulates the programs and activities of departments and agencies of state governments. 42 U.S.C. § 12131(1). Title II of the ADA expressly provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

12. The ADA, as originally enacted in 1990, conferred upon the Attorney General the power to promulgate regulations implementing Title II. 42 U.S.C. § 12134. This regulatory authority was reaffirmed and reinforced by the ADAAA. ADAAA, § 6(a)(2), *to be codified as* 42 U.S.C. § 12205(a).

13. Pursuant to regulations promulgated by the Attorney General, the "programs" and "activities" of state government entities regulated by Title II of the ADA include all programs and activities related to professional or occupational licensure. 28 C.F.R. § 35.130(b)(6).

14. Various courts have held Title II of the ADA to apply to attorney licensure programs and activities of state courts. *See, e.g.*, *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69, 78 (2nd Cir. 2000); *In re Petition and Questionnaire for Admission to the Rhode Island Bar*, 683 A.2d 1333 (RI 1996); *Petition of Rubenstein*, 637 A.2d 1131 (Del Supr. 1994); and *State ex rel. Oklahoma Bar Association v. Busch*, 1996 OK 38, 919 P.2d 1114. No court appears to have held to the contrary.

15. With regard to licensure programs and activities, the regulations implementing Title II of the ADA, as it is presently in force, prohibit the administration of a licensure program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of a disability. 28 C.F.R. § 35.130(b)(6).

16. The regulations implementing Title II also require "reasonable modifications in policies, practices or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of" the program. 28 C.F.R. § 35.130(b)(7).

17. The regulations implementing Title II further prohibit the use of "eligibility criteria that screen out or tend to screen out an individual with a disability *or* any class of individuals with disabilities" unless the criteria "can be shown to be necessary" to the program in question. 28 C.F.R. §§ 35.130(b)(8). According to the interpretative commentary supplied by the Attorney General in the Appendix to 28 C.F.R. pt. 35, this provision was intended *both* to prohibit "overt denials of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation" and to prohibit "policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others." 28 C.F.R. pt. 35, Appendix A, commenting on 28 C.F.R. § 35.130(b)(8).

18. It has been held that, under Title II of the ADA, as implemented by 28 C.F.R. § 35.130(b)(8), in determining whether an individual is "qualified" to participate in a program of a state entity, a court may "not rest on the state's characterization" of the

program, "nor on the qualifications or eligibility criteria the state asserts as necessary, but instead must make an independent inquiry into the 'essential nature' or the program." *Guckenberger v. Boston University*, 974 F.Supp. 106, 133-135 (D. Mass. 1997); *citing and quoting Easley by Easley v. Snider*, 841 F.Supp. 668, 673 (E.D. Pa. 1993), *rev'd on other grounds*, 36 F.3d 297 (3rd Cir. 1994); *citing Pandazides v. Virginia Board of Education*, 946 F.2d 345, 348-350 (4th Cir. 1992) (reaching the same conclusion in a teacher licensing case under the Rehabilitation Act).

19. The Attorney General's Appendix to 28 C.F.R. pt. 35, clarifies that the determination whether "neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities" are, in fact, "necessary" must be determined based upon whether the "criteria are necessary for the safe operation of the program in question." The regulatory appendix further clarifies that "safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities." 28 C.F.R. pt. 35, Appendix A, commenting on 28 C.F.R. § 35.130(b)(8).

20. Courts considering ADA challenges to questions on application forms for admission to the Bar have held that application questions which place additional burdens on applicants with certain disabilities that are not placed on other applicants thereby "screen out" or "tend to screen out" applicants with those disabilities and are therefore prohibited by 42 U.S.C. § 12132 and 28 C.F.R § 28.130(b)(6) and (b)(8). *Ellen S. v. Florida Board of Bar Examiners*, 859 F.Supp. 1489, 1494 (S.D. Fla. 1994); *Clark v. Virginia Board of Bar Examiners*, 880 F.Supp. 430, 442 (E.D. Va.

21. Reasoning similar to that found in *Ellen S* and *Clark* should apply to Supreme Court Rule 704(k) to the extent that it imposes upon applicants who have previously been denied admission on grounds that included a disability the additional burden of proving that they have been "rehabilitated" from that disability since the time their previous application was denied and to rules imposing greater application fees in such cases.

22. The Attorney General's Appendix to 28 C.F.R. pt. 35 also clarifies that the determination whether an individual poses a sufficient threat to be excluded from a program of a public entity "may not be based on generalizations or stereotypes about the effects of a particular disability," but instead must be "based on an individualized assessment, based on reasonable judgment that *relies* on *current medical evidence* or the *best available* objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures will mitigate the risk." 28 C.F.R. pt. 35, Appendix A, commenting on 28 C.F.R. § 35.104 ("qualified individual with a disability") (emphasis added), *citing School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

23. For the reasons set forth below, Petitioner submits that, i) in determining his applications in 1992 and 2006, the Court failed to apply the ADA standards explained above based on a finding that Petitioner's medical or psychological condition did not meet the definition of a "disability" under the "demanding standard" then in use, ii)

that the ADAAA has legislatively superseded that "demanding standard," and iii) that the application of the appropriate standards under Title II of the ADA and 28 C.F.R. §§ 35.130(b)(6), (7) and (8), as set forth above, to the facts of Petitioner's 1992 and 2006 applications for admission to the Bar would likely have resulted in a different outcome, rendering inequitable any prospective effect on Petitioner's future applications for admission to the Bar of the Court's September 5, 2007, finding that Petitioner had failed to show his mental and emotional fitness to practice law.

24. Petitioner applied for admission to the Kansas Bar in 1992. After a hearing, the Board of Law Examiners recommended denial of his application based on grounds that included the following factual findings: " 3) Applicant is presently under treatment of Dr. Urdaneta. He needs continued treatment for a period of two years and requires therapy for a longer period. 4) Applicant is diagnosed as chronic bi-polar with his hypersexuality a symptom of his diagnosis… 6) The summary of the evidence which is made a part of the minutes of the Board is attached hereto and made a part of the findings of the Board." (December 17, 1992, Report of the Board of Law Examiners, Exhibit "A" hereto).

25. Bipolar disorder is an "impairment" for purposes of the ADA. See 28 C.F.R. § 35.104, defining "impairment" to include any "emotional or mental illness."

26. In the Minutes of the Board's 1992 hearing, which were incorporated into its report by reference, the Board notes that Dr. Leonel Urdaneta, the only expert who testified, stated that he considered Petitioner to be "stable and reliable" and his bipolar condition to be "*in remission*." (Minutes of hearing before the Board of Law

Examiners, November 9, 1992, Exhibit "B" hereto, p. 3, third and fourth unnumbered paragraphs).

27. In the Minutes of the Board's 1992 hearing, the Board also noted Dr. Urdaneta's testimony that "a patient [like Petitioner] responds to verbal and medicinal intervention; it has been shown that total breakdown is not probable with treatment; the chance of someone's using poor judgment is low if appropriate treatment is followed and maintained." (Exhibit B, p. 3, fifth unnumbered paragraph). Dr. Urdaneta's prediction that the probability of recurrence was low if appropriate treatment was continued has been proved true by the events of the subsequent sixteen years.

28. The Supreme Court "noted" the Board of Law Examiners' 1992 report and adopted its recommendation without comment. (Order, February 10, 1993, Exhibit "C" hereto).

29. Petitioner sought United States Supreme Court Review of the denial of his 1992 application, based on the ADA and other grounds. In its Brief in Opposition to Petitioner's Petition for a Writ of *Certiorari*, counsel for the Kansas Supreme Court explained that it had not favorably considered Petitioner's ADA arguments in determining his application for admission to the Bar i) because he had not raised the ADA issue until his Amended Exceptions to the Board of Law Examiners' report, which was considered an untimely attempt to raise the issue, and ii) because "he has offered no evidence to establish that he suffers from a physical or mental impairment that substantially limits one or more of the major life activities." (Respondent's Brief in Opposition, *Ian Bruce Johnson v. State Bar of Kansas*, United States Supreme

Court, Case No. 93-5408, pp. 19-22, relevant excerpt attached as Exhibit "D"). The Petition for a Writ of *Certiorari* was denied.

30. Thus, Petitioner's 1992 application for admission to the Kansas Bar was denied based, in part, on an explicit finding that he suffered from bipolar disorder, which is now and was then an "impairment" for purposes of the ADA, and on an implicit finding that Petitioner's impairment was not "substantially limiting" such as to invoke the protections of the ADA.

31. Petitioner's most recent Petition for Admission to the Bar of the State of Kansas, filed March 15, 2006, raised the issue whether Petitioner was a "qualified individual with a disability" protected by the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"), on its face. (See, Petitioner's March 15, 2006, Petition for Admission, pp. 10-11, answers to questions number 32-34 and 37, and his attachment to answers to questions 32-34 and 37, in the Court's files of Petitioner's 2006 application).

32. The questions of the applicability of the ADA to attorney licensure and the application of the ADA to Petitioner's case were extensively briefed during the 2006 proceedings, both before the Board of Law Examiners and before this Court.

33. The Board of Law Examiners held a hearing regarding Petitioner's 2006 application on December 11, 2006. At that hearing, two experts testified: 1) Dr. Urdaneta, who remained, as in 1992, Petitioner's treating psychiatrist, and 2) Dr. George Hough, an independent expert psychologist commissioned by the Board to examine Petitioner and render an opinion. (Board of Law Examiners' Report, January 19, 2007, attached hereto as Exhibit E, p. 1).

34. As a result of the hearing on December 11, 2006, the majority of the Board of Law Examiners recommended denial of Petitioner's application, on grounds which included the denial of his application in 1993, and his resulting enhanced burden of proof "pursuant to Supreme Court Rule 704(c) and (k)." (Exhibit E, p. 1, findings, ¶¶ 2-4).

35. In its 2006 Report, the Board of Law Examiners once again explicitly relied upon Petitioner's psychiatric condition as a grounds for recommending denial of his application: "Conflicting testimony was presented as to whether the applicant suffers from bipolar disorder, but Dr. Urdaneta and Dr. Hough agreed that he suffers from Asperger's Syndrome. At the present time, applicant's condition is stable." (Exhibit E, p. 2, findings, ¶ 7).

36. The Board of Law Examiners' grounds for recommending denial of Petitioner's 2006 application also explicitly included a finding regarding lack of adequate rehabilitative *change* in Petitioner's condition since 1993, to wit: "Because the March 16, 2006 petition was filed after a previous denial, the Board considered the applicant's progression over a number of years. The Board focused equally on the applicant's current fitness to practice law." (Exhibit E, p. 2, findings, ¶ 5).

37. In its 2006 Report, the Board of Law Examiners noted that there had been no recurrences since before the Board's hearing in 1992 (at which time the Board itself had noted that Petitioner's condition was "in remission"), and that the "risk" presented by Petitioner's condition was "not as high as it was" previously, although the Board avoided using the term "remission" in its 2006 Report. (Compare, Exhibit E, p. 2, findings, ¶¶ 6-7, with Exhibit B, p. 3, fourth unnumbered paragraph).

38. The Board of Law Examiners' grounds for recommending denial of Petitioner's 2006 application included a finding that further psychiatric treatment was recommended and that the Board disagreed with the relative infrequency of the maintenance treatment provided by Dr. Urdaneta: "Dr. Hough recommended that the applicant continue individual maintenance therapy with Dr. Urdaneta *and* seek group therapy concluding 'I think he [Mr. Johnson] 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.'" (Exhibit E, p. 2, findings, ¶ 10).

39. The recommendation of the Board of Law Examiners that Petitioner's application be denied (Exhibit E) did not respond to Petitioner's ADA arguments or even mention the ADA, and the Court adopted the Board's report without comment in its order of September 5, 2007 (Exhibit "F," attached).

40. However, the Minority Dissenting Report of the Board of Law Examiners expressed the opinions, *inter alia*, i) that even the Admissions Attorney had admitted that the ADA applies to attorney licensure decisions, ii) that Petitioner was a "qualified individual with a disability" for purposes of the ADA even as that statute read in 2007, iii) that both psychological experts had agreed that Petitioner's condition "was in full and stable remission," iv) 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" and iv) 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." (Minority Dissenting Report, Exhibit G, pp. 2, 5-6, 12). The minority Board member carefully cited, quoted, and discussed at some length the evidence in the record that supported his opinions.

41. The failure of both the Board and the Court to mention the ADA in the 2006 proceeding, after it was timely raised and thoroughly briefed, represents at least an implicit finding that the ADA, as it read in 2007, did not apply to Petitioner's case. Since the Board formally found evidence of a condition that qualified as an "impairment"— bipolar disorder, Asperger's Syndrome, or both (see 28 C.F.R. § 35.104)—the grounds for that implicit finding appear to be as they were in 1993, namely, that the impairment found was not "substantially limiting" so as to invoke ADA protection.

42. As reflected in the Boards' Report and Minutes in 1992, and in the Board's Report and Minority Dissenting Report in 2007, in both years all of the expert medical testimony was that Petitioner's condition was "stable," "in remission" and presented only a "low risk" of recurrence if proper treatment was maintained. (Exhibits A, B, E and G). Thus, if the 28 C.F.R. §§ 35.130(b)(6) through (b)(8) and the standards explained in the Appendix to 28 C.F.R. pt. 35, as set forth above, had been applied to Petitioner's 1992 and 2006 applications, the result likely may have been different.

43. Subsequent to the Court's entry of its September 5, 2007, order denying Petitioner's most recent application for admission to the Bar, on September 25, 2008, Congress enacted the ADAAA, to become effective January 1, 2009. The ADAAA made major revisions to the definition of a "disability" contained in the original ADA, as

interpreted by the courts, and also legislatively superseded judicial precedents regarding the definition of "substantial impairment" and the effect of mitigating measures on the determination whether a person has a "disability," as further explained below.

44. A provision of the ADA as originally enacted in 1990 provided that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under the Rehabilitation Act of 1973(29 US.C. 790 et seq.) or the regulations issued by federal agencies pursuant to such title." 42 U.S.C. § 12201(a).

45. In its uncodified findings incorporated into the ADAAA, Congress found that "while *Congress expected* that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, *that expectation has not been fulfilled."* ADAAA, § 2(a)(3) (emphasis added).

46. Case law under the Rehabilitation Act prior to the original enactment of the ADA in 1990 tended to treat bipolar disorder as *prima facie* a "handicap" for purposes of the Rehabilitation Act. *See, Carty v. Carlin*, 623 F.Supp. 1181 (D. Md. 1985); *Matzo v. Postmaster General*, 685 F.Supp. 260, 262-263 (D.D.C. 1987).

47. In its uncodified statutory findings incorporated into the ADAAA, Congress further found that "*Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases"—i.e., *Murphy v. United Parcel Service*, 527 U.S. 471 (1999); and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)—had "narrowed the *broad scope of protection* intended to be afforded by the ADA, thus eliminating protection for *many* individuals whom Congress intended to protect," and that *Toyota Motor*

Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) had "interpreted the term 'substantially limits' to require a *greater degree of limitation* than was intended by Congress," with the net effect that "lower courts have *incorrectly* found in individual cases that people with a range of substantially limiting impairments are not people with disabilities." ADAAA, § 2(a)(4)-(7) (emphasis added).

48. Among the purposes stated by Congress for the enactment of the ADAAA is the purpose to "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by *reinstating* a broad scope of protection to be available under the ADA." ADAAA, §2(b)(1).

49. Congress implemented this broad purpose in part by adding to ADA a statutory "rule of construction" that instructs courts to construe the entire ADA "in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." ADAAA, § 4(a)(4)(A), *to be codified as* 42 U.S.C. § 12102(4)(A).

50. With regard to the first prong of the definition of a "disability" under the ADA, the "actual disability" prong, the uncodified statutory purposes of the ADAAA also include a purpose "to *reject* the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual

from doing activities that are of central importance to most people's daily lives.'" ADAAA § 2(b)(4).

51. The uncodified statutory purposes of the ADAAA also include a purpose "to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), for 'substantially limits,' and applied by lower courts in numerous decisions, has created an *inappropriately* high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that *the primary object of attention* in cases brought under the ADA *should be whether entities covered under the ADA have complied* with their obligations, and *to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis*." ADAAA, § 2(b)(5) (emphasis supplied).

52. Congress implemented these purposes with regard to the first prong of the definition of a disability in part by adding a statutory "rule of construction" that "[t]he term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008." ADAAA, § 4(a)(4)(B), *to be codified as* 42 U.S.C. § 12102(4)(B). According to repeated statements in the legislative history of the statute, this "rule of construction" was added to ensure that the courts would not simply ignore Congress' instructions to abandon the analysis used in *Sutton* and its "companion cases" and in *Toyota Motor Manufacturing* and to adopt in its place a rule of broad coverage . See, *e.g.*, 154 CONG. REC. S8841-8842 (Sep. 16, 2008) (Report of Managers of S. 3406); 154 CONG. REC. S8349-8350 (Sep. 11, 2008)

(Remarks of Sen. Harkin); 154 CONG. REC. H6068-6069 (June 25, 2008) (Remarks of Rep. Conyers); 154 CONG. REC. H8290 (Sep. 17, 2008) (Remarks of Rep. Nadler).

53. Congress also implemented its purpose to broaden the first prong of the definition of a disability in part by incorporating into the ADA a broad statutory definition of "major life activities" and by incorporating into this definition a separate paragraph including a list of "major bodily functions." ADAAA, § 4(a)(2), *to be codified as* 42 U.S.C. § 12102(2). "Learning," "thinking," "communicating" and "working" are included in the new list of "major life activities." ADAAA, § 4(a)(2)(A), *to be codified as* 42 U.S.C. § 12102(2)(A). "Neurological" and "brain" functions are included in the new list of "major bodily functions." ADAAA, § 4(a)(2)(B), *to be codified as* 42 U.S.C. § 12102(2)(B). The evidence presented at the Board of Law Examiners' hearings in both 1992 and 2006 amply demonstrates that Petitioner's condition, whether diagnosed as bipolar disorder, or Asperger's Disorder, or both, affects neurological and brain functions and interferes with learning of social skills, thinking, communicating and working, and at one time substantially interfered with these major life functions, although the effects of these conditions have been mitigated by years of psychiatric treatment and personal learned adaptations.

54. With regard to the effect of mitigating measures on the determination of a "disability," in the ADAAA Congress declared its purpose "to *reject* the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures." ADAAA, § 2(b)(3).

55. Congress implemented its purpose to reject the holdings of the *Sutton* line of cases regarding mitigating measures by adding a statutory "rule of construction" that "the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." ADAAA, § 4(a)(4)(E)(i), *to be codified as* 42 U.S.C. § 12102(4)(E)(i).

56. Paragraph 4(a)(4)(E) of the ADAAA also includes an "illustrative but non-comprehensive list of the types of mitigating measures that are not to be considered." 154 CONG. REC. S8842 (Sep. 16, 2008) (Report of Managers of S. 3406). That illustrative list includes both "medication" and "learned behavioral or adaptive neurological modifications." ADAAA, § 4(a)(4)(E)(i)(I) and (IV), *to be codified as* 42 U.S.C. § 12102(4)(E)(i)(I) and (IV).

57. Psychiatric medication is, obviously, "medication," and the choice to continue receiving treatment from a psychiatrist on a regular basis, as directed, can properly be characterized as a "learned behavioral modification." Thus, whether Petitioner's condition constitutes a "disability" for purposes of the ADA, after January 1, 2009, should be judged based on what his condition would likely be if he had never sought treatment.

58. With regard to the first prong of the definition of a "disability," in the ADAAA, Congress also added to the ADA a statutory "rule of construction" that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." ADAAA, § 4(a)(4)(D), *to be codified at* 42 U.S.C. § 12102(4)(D). Thus, in determining whether Petitioner has a "disability" for purposes of the ADA, the Court should consider that his condition was substantially

limiting, under the new and broadened definition, when it was active—it led to a four month psychiatric hospitalization in 1985. (See, Exhibit A, findings, ¶1). The fact that Petitioner's condition has been in remission since sometime before 1992 will, under the ADAAA, no longer be relevant to the issue whether that condition brings him within the protection of the ADA.

59. Even before the ADAAA was enacted, at least one Federal appellate court had held that disqualification from the practice of law, an entire licensed profession, because of an impairment constituted disqualification from a "class of jobs" under the regulatory definition of the major life activity of "working." *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69, 83-84 (2nd Cir. 2000). This reasoning in *Bartlett* is specifically approved in the legislative history of the ADAAA. 154 CONG. REC. H8290-8291 (Sep. 17, 2008) (Colloquy between Rep. Stark and Rep. Miller).

60. Furthermore, the ADAAA added to the ADA a statutory rule of construction that "[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability." ADAAA, § 4(a)(4)(C), *codified at* 42 U.S.C. § 12102(4)(C). Thus, after January 1, 2009, an impairment that limits the major life activity of "working," due to the denial of a license to practice a profession as a result of the impairment, need not limit any other major life activity in order to constitute a protected "disability."

61. With regard to the third prong of the definition of a "disability," the "regarded as disabled" prong, in the ADAAA Congress stated the purpose "to *reject* the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of a disability and to *reinstate* the

reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of a handicap under the Rehabilitation Act of 1973." ADAAA, § 2(b)(3) (emphasis added).

62. To implement this purpose, Congress amended the definition of the third prong of the definition of a "disability" to clarify that, in order to show discrimination under the third prong, an individual must show only that a regulated entity took action against him or her because of a perceived physical or mental impairment, and need not show that the perceived impairment would qualify as a disability under the first prong of the definition. ADAAA, §§ 4(a)(1)(C) and 4(a)(3), *to be codified as* 42 U.S.C. §§ 12102(1)(C) and 12102(3).

63. In Petitioner's case, both the 1992 and the 2007 Reports of the Board of Law Examiners show that his applications were denied in large part on the grounds that he had a psychiatric condition that, at a minimum, constitutes an "impairment," and that the Board was dissatisfied with the evidence regarding the treatment and prognosis of that impairment. (See, Exhibits A, E and G). After January 1, 2009, this reliance on a perceived mental impairment in making an adverse licensing decision will be in itself sufficient to bring Petitioner within the protection of the ADA.

64. Complete freedom from mental or developmental disorders such as are shown by the Board of Law Examiners' 1992 and 2007 findings in Petitioner's case is not a "necessary" eligibility criterion to practice law for purposes of 28 C.F.R. § 35.130(b)(8), neither would modification of the Court's policies to permit the admission of applicants with a long history of successful treatment and control of

such conditions and upon proof of only a low risk of recurrence (rather than "no risk") "fundamentally alter" the nature of attorney licensure for purposes of 28 C.F.R. §§ 35.130(b)(7). The non-essential status of these selection criteria is demonstrated by the fact that attorneys who develop similar conditions to Petitioner's *after* licensure are sometimes permitted to retain their licenses upon a showing of successful treatment, even though they are still under treatment and are unable to show there is "no" risk. *See, e.g.*, *In re Ketter*, 268 Kan. 146, 992 P.2d 205 (1999) *discharged from probation* 276 Kan. 2 (2003); *In re Herman*, 254 Kan. 908, 869 P.2d 721 (1994), *discharged from probation*, 246 Kan. 497 (1999). Thus, these selection criteria, which appear to have been applied in Petitioner's case, will clearly be subject to regulation under the ADA after January 1, 2009.

65. Nevertheless, these non-essential selection criteria will be effectively grandfathered into any application filed by Plaintiff in the future, and the consideration of the ADA will be excluded by them, if the requirement of Supreme Court Rule 704(k) that Petitioner show that he "has been rehabilitated" since the denial of his last application in September 2007 remains in effect for all future applications for admission.

66. The Court has inherent power to waive its rules in order to avoid conflict with a new Federal statute such as the ADAAA.

67. In the alternative, the Court is authorized by K.S.A. 60-260(b)(5) to grant relief from a judgment whenever "it is no longer equitable that the judgment should have prospective application." Federal courts interpreting identical language in Fed. R. Civ. P. 60(b)(5) have recognized that it may become inequitable for a judgment to have continuing prospective effect when the law upon which the judgment was based

changes significantly, and that in applying Rule 60(b)(5) "a court may recognize subsequent changes in either statutory or decisional law." *Agostini v. Felton*, 521 U.S. 203, 215 (1977); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 121-122 (4th Cir. 2000).

For the above reasons, Petitioner asks the Court to waive the requirements of Supreme Court Rules 704(k) and 707(a)(6) with regard to the next application filed by Petitioner after January 1, 2009.

Respectfully submitted,

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