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Rape Questions Could Be Next Focus Of Bar App Reforms

By **Cara Bayles**

Law360 (February 5, 2024, 4:24 PM EST) -- When Eileen filled out New Jersey's character and fitness questionnaire several years ago, she was not surprised to learn she'd have to explain her arrest at a protest in San Francisco. She did not expect she'd have to disclose her rape.

But New Jersey's questionnaire asked would-be lawyers if they'd ever been a named party in any civil proceeding, adding they had to disclose "petitions for protection from abuse, restraining orders and/or peace orders" and "Title IX proceedings." Applicants who answered "yes" were required to "provide full details" and documentation.

And so Eileen, who spoke to Law360 on the condition of anonymity, reported she'd been sexually assaulted when she was a college freshman.

She'd spent her undergraduate career trying to avoid her rapist, but during her senior year, he was dating someone who lived in Eileen's small dorm. He was always there. She could hear him laughing in the dining area and she feared she'd run into him on the stairs. This took a toll. She couldn't sleep. She had panic attacks. She would randomly burst into tears. She was afraid to leave her room. She consulted her resident adviser, who, as a mandated reporter, told the school's Title IX office. The matter was resolved a few months later, with the other student agreeing to stay away from Eileen.

Years later, she disclosed the Title IX proceeding in her bar application, and attached a resolution letter describing the case and its outcome. Most of her cohort was already barred when, six months later, she received a letter from a member of the committee on character, asking for, among other things, the Title IX complaint. The hold-up meant she didn't have benefits and couldn't take time off from her new job, because she couldn't be considered a full-time salaried employee until she was admitted.

"I just thought it was really outrageous," Eileen told Law360. "It has no bearing on my fitness to be an attorney. It has no bearing on my character. It's a thing that somebody else did."

Law360 contacted the New Jersey Administrative Office of the Courts last week for comment on the intent of the question. In response to that inquiry, the state's Supreme Court released a notice saying that candidates who disclose they've filed petitions for protection from abuse, restraining orders or Title IX actions don't have to provide a description or documentation — only the case caption and the outcome.

The question's mention of petitions from abuse, restraining orders and Title IX proceedings were "designed to ascertain whether a candidate has been accused of serious conduct" and identify vexatious litigants, not to "probe into the sensitive details of proceedings that involve victims of abuse or assault."

The change puts New Jersey, which until recently had asked one of the most detailed questions about such proceedings, ahead of most other jurisdictions in protecting survivors' privacy.

But having to disclose sexual assault in bar applications is still a nationwide phenomenon.

States require that applicants say whether they've been a party to a civil proceeding, which would require divulging restraining orders and orders of protection as well as the reasons for seeking them. And some states also inquire about "administrative proceedings," a question that would likely require candidates to disclose Title IX proceedings.

Those sorts of questions can dredge up old traumas for people who have experienced sexual assault, and their subtext suggests that being assaulted somehow calls an applicant's character and fitness into question.

"This was a failure of empathy on the part of the bar examiners and also, frankly, a failure of critical thinking," Eileen said. "The powerlessness of waiting to be admitted can kind of mirror the powerlessness of the aftermath of being sexually assaulted and then navigating these unfamiliar and stressful bureaucratic structures when you report an assault."

The process is "deeply problematic and invasive," said Hilary Gerzhoy, vice chair of HWG LLP's legal ethics and malpractice group. She often counsels bar applicants on character and fitness matters, and recently advised applicants seeking admission to the D.C. and New York bars about proceedings related to sexual assault that might come up in the character and fitness process.

"The character and fitness process is designed to understand whether or not someone is fit to be a lawyer," she said. "Whether or not you have survived sexual assault and were then brave enough to report it does not answer that question."

A few states inquire about sexual assault-related proceedings by name — Michigan and Connecticut ask about protection orders or restraining orders, and Minnesota and Missouri ask about domestic abuse proceedings. Representatives for those states did not respond to Law360's queries about how being a plaintiff in such proceedings affects an applicant's character and fitness.

Many other states, including Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Maryland, Minnesota, Mississippi, Missouri, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania and Virginia ask about involvement in "administrative" or "special" proceedings that could invoke Title IX.

California also asks about administrative proceedings, but in 2020, the bar updated its frequently asked questions to indicate "an applicant who reported an incident of sexual assault or sexual harassment to an educational institution is not required to disclose the incident on the moral character application," adding that people accused of sexual assault still needed to disclose such proceedings.

The change came about after Equal Rights Advocates, a nonprofit legal organization that advocates for women's rights, wrote to the state bar to report they'd heard from individuals whose applications suffered "undue delay" that forced them "to disclose their sexual assaults to the bar, their employers, their schools, and perhaps others."

One of those applicants had initiated Title IX proceedings as an undergraduate, and the respondent had been found responsible, according to Kel O'Hara, an ERA staff attorney. The applicant's disclosure held up her bar application and when the ERA wrote to the bar, the applicant was facing an interview about the experience.

"It forces her to discuss and disclose this very personal, traumatic experience in this professional setting," O'Hara said. "In some ways, it turns her into a suspect, and she's a survivor."

The applicant also worried about professional repercussions, according to O'Hara. She had been offered employment at a BigLaw firm. She was working there as an intern, awaiting a significant pay bump when she officially became an attorney. If her application was delayed past when bar exam results came out, she would not only take a pay hit, but she would have had to tell her employer why her license was still pending, O'Hara said. She worried about the possible intangible penalties of such a disclosure — the prejudices she might face if she were outed as a survivor.

"She was really worried about what that would mean for her as a young female associate," O'Hara said. "She was worried that people who are above her would see her as damaged or fragile in some way if they found out that she was a survivor, or alternatively, that she'd be seen as sort of a complainer or someone who couldn't handle pressure, who wasn't trustworthy, and would report everything."

California changed its Title IX policy but still requires that applicants disclose any restraining order proceedings, according to Rick Coca, a spokesperson for the state bar, who added that "the extent to which the applicant is required to disclose information underlying the proceedings may vary, depending on the facts of the specific case."

The question about being party to litigation is meant to suss out misuse of the legal system. Examiners are looking for examples of frivolous litigation, misconduct resulting in sanctions, or perjury. **Abusing the legal system** to harass defendants could be particularly relevant to sexual assault proceedings, Coca said.

"There are cases in which the perpetrators of domestic violence use litigation, including requests for restraining orders, to harass and further abuse their victims," Coca said.

Officials in other states echoed those concerns.

Daniel Blinka, a law professor at Marquette University and chair of Wisconsin's Board of Bar Examiners, said the civil action question is designed to provide "a fuller picture of this individual and any litigation history they may have." He said disclosures remain confidential, unless there are serious allegations, like perjury.

"We're only going to care if there's something that surfaces that raises legit questions about their integrity and their 'good moral character,'" he said.

Wisconsin does not do in-person character and fitness interviews, Blinka said. An investigator might seek more information, and if a candidate's written response assuages any concerns, the application would move forward, he said. If there were lingering questions, an applicant might have to go before the board of bar examiners. But in his nine years on the board, Blinka said, he's never seen a hearing in which the board questioned someone about being sexually assaulted.

Still, the fear of such interviews can be a serious obstacle to the profession, especially for those who were recently assaulted, according to Gerzhoy.

She said it would be one thing if she could guarantee to her clients that they would just have to check a box saying they'd filed a restraining order, and that they wouldn't get any follow-up questions.

"But that's, for a lot of people, not where it necessarily ends. There are follow-up questions or there's, at the very least, a legitimate fear that there could be follow-up questions," she said. "It's somebody that you don't know asking you live and in-person a host of questions that cause you to relive your trauma. And for a lot of people that's just not worth it, or it's sufficiently terrifying to contemplate that they just don't even want to go down that path."

She recently advised a woman who had gone to an Ivy League undergraduate program and was considering applying to law school, but wanted to know if a restraining order she'd filed would come up during the character and fitness process. Gerzhoy told her it was possible. She decided not to pursue a career in law.

"I'm sure she'd make a phenomenal lawyer. But she just can't do it," she said. "It just happened to her pretty recently. She's still dealing with it now."

Questions about proceedings under Title IX flout the whole point of that law, which was created to ensure gender equity in education, O'Hara said. In the character and fitness process, personal and often gendered experiences suddenly become professional stumbling blocks.

"Students who experienced some sort of gender discrimination or violence, including sexual violence, who sought support from their schools to be able to continue to access their education safely and fully, are now having that catch up to them," O'Hara said. "That positions them behind their peers in a way that is both rooted in and contributing to gender inequity. It's more often women, nonbinary people, [and] queer people who are being positioned behind other people in their graduating classes."

Like nearly every profession, the legal community was affected by the explosion in 2017 of the #MeToo movement, a public dialogue about sexual assault and harassment that revealed how pervasive the problem is. Former clerks came forward with allegations against **federal judges**, students have detailed harassment by their **professors**, and attorneys have sued **BigLaw firms**.

Gerzhoy believes the character and fitness process is now due for a reckoning, too.

"I think this is absolutely something that will change over time as people are increasingly educated about what sexual assault does to a person," she said. "I think as we all become much more savvy about that, we'll stop asking a lot of the questions that we currently ask."

In recent years, bar examiners have reconsidered other longstanding questions that now seem insensitive.

It was standard to inquire about a candidate's mental health, including past diagnoses, treatment for those conditions and whether the applicant has ever used their condition as a defense in criminal or disciplinary proceedings. But in recent years, **more than a dozen states** have opted to either do away with such questions or focus on a candidate's behavior rather than diagnosis.

One of those states is Indiana, which in 2020 changed the language of its questions to only inquire about mental health if a candidate has invoked it as a defense for misconduct. The change was "a real step forward," said Bradley Skolnik, executive director of Indiana's Office of Admissions and Continuing Education and a former chair of the national Council of Bar Admission Administrators.

He added that the next wave of reform could focus on questions that force applicants to detail sexual trauma, calling it "an area that I think is ripe for further exploration."

"Admission administrators have come a long way over the past decade in reducing the intrusive nature of our exam applications," he told Law360. "Administrators around the country as well as those of us here in Indiana are always evaluating our applications to make sure that they do not seek information that is unnecessary. I think you touched upon a matter here that is probably worthy of further consideration."

--Editing by Haylee Pearl.

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