UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Angelo Binno,

Plaintiff,

v

The American Bar Association,

Defendant.

No. 2:11-cv-12247

HON. DENISE PAGE HOOD

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EXHIBIT 1

PROPOSED BRIEF OF *AMICUS CURIAE*
MICHIGAN ATTORNEY GENERAL BILL SCHUETTE

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PROPOSED BRIEF OF *AMICUS CURIAE*
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INTEREST OF *AMICUS CURIAE*

Plaintiff Angelo Binno alleges that every law school in Michigan is basing admission in part on the results of a discriminatory examination in violation of the Americans with Disabilities Act (ADA). 42 U.S.C. § 12111 *et seq*. Specifically, he alleges that the Law School Admissions Test (LSAT) discriminates against blind and visually-impaired students by needlessly requiring diagramming to assist with answering questions. Further, Mr. Binno alleges that the accreditation standards of the American Bar Association (ABA) effectively *compel* law schools to consider the LSAT for admission.

If proven, these allegations would establish a violation of both the ADA and Michigan Persons with Disabilities Civil Rights Act (MDCRA). Mich. Comp. Laws § 37.1401 et seq. Like the ADA, the MDCRA prohibits schools from limiting a prospective student's admission based on a disability that is unrelated to his or her ability to utilize and benefit from that institution:

> An educational facility shall not … [e]xclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, and privileges of the institution, because of a disability that is unrelated to the individual's ability to utilize and benefit from the institution, or because of the use by an individual of adaptive devices or aids.

Mich. Comp. Laws § 37.1402(b).

The ABA's accreditation standards, Mr. Binno alleges, compel Michigan law schools to consider a discriminatory entrance examination because schools cannot

waive the requirement of an entrance examination and have no real alternative to the LSAT.

As Attorney General for the State of Michigan, Bill Schuette is authorized to intervene and appear on behalf of the people of Michigan in any cause or matter in which the people may have an interest. Mich. Comp. Laws § 14.28. *See also Associated Builders & Contractors v. Perry,* 115 F.3d 386, 390-92 (6th Cir. 1997). The State of Michigan has a history of and interest in improving access to education and employment for individuals with disabilities.[1] In fact, the very issue raised in Mr. Binno's amended complaint was recognized by the Disabilities Committee of the Michigan State Bar Open Justice Commission in 2002.[2]

Whether the LSAT is in fact discriminatory, and whether law schools in Michigan are effectively required to consider a discriminatory examination, are issues of substantial consequence to the people, universities, and government agencies of Michigan. It could mean that Michigan's blind and visually-impaired residents are inhibited from obtaining a legal education and future employment as

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[1] *See* MICHIGAN DEPARTMENT OF CIVIL RIGHTS, DIVISION ON DEAF AND HARD OF HEARING HISTORY (2011), http://www.michigan.gov/mdcr/0,4613,7-138-58275_28545_28560-53360--,00.html; MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, BRAILLE AND TALKING BOOK LIBRARY HISTORY (2011), http://www.michigan.gov/lara/0,4601,7-154-28077_54234_54256---,00.html; MICHIGAN DEPARTMENT OF CIVIL RIGHTS, MICHIGAN MILESTONES (2011), http://www.michigan.gov/mdcr/0,4613,7-13858275_28545_28560-14956--,00.html.

[2] STATE BAR OF MICHIGAN, OPEN JUSTICE COMMISSION, DISABILITIES COMMITTEE, LAW SCHOOL FORUM: SUMMARY OF GROUP DISCUSSION (Oct. 17, 2002) *available at* http://www.michbar.org/programs/ATJ/pdfs/law_school.pdf.

attorneys. Discovery will assist in assessing the factual support for Mr. Binno's allegations and whether intervention by the Attorney General is necessary.

Accordingly, Attorney General Bill Schuette respectfully requests that this Court deny summary dismissal and allow discovery.

ARGUMENT

I. Mr. Binno's amended complaint raises issues of significant consequence and there is a reasonable likelihood that discovery will uncover facts that could support his claims.

"Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives." *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003). As the training ground for our national leadership, law school schools must be inclusive of all talented and qualified individuals. *Id.* Indeed, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

Yet individuals with disabilities are disproportionately absent from the legal profession. The ABA's 2009 annual census of membership reflects that only 6.76% of respondents reported having a disability, "[a] percentage far lower than one would expect given the national statistics on the percentage of Americans with disabilities." ABA Commission on Mental and Physical Disability Law, *2010 Goal III Report*, at 6-7. A likely cause for this disparity, the ABA observed, is that "relatively few college students with disabilities attend law school due to factors ranging from lack of funds to problems with attaining accommodations for the Law

School Admissions Test." *Id.* at 7. In fact, lack of funding is connected to the LSAT since a high LSAT score often leads to scholarship opportunities.[3]

Access to education is a fundamental purpose of the ADA. Based on census data, polling, and surveys, Congress found that individuals with disabilities are "severely disadvantaged" in terms of educational opportunities. 42 U.S.C. § 12101(a)(6). This severe disadvantage, Congress concluded, is due in part to the failure to modify existing practices and exclusionary qualification standards. 42 U.S.C. § 12101(a)(5). And that is the very heart of Mr. Binno's amended complaint: refusal to modify an existing qualification standard he alleges to be exclusionary.

The LSAT is a gatekeeper. It is recognized as the standard admissions test for virtually every ABA accredited law school in the country. All five of Michigan's law schools are ABA accredited and specifically ask students to submit their LSAT scores for admission.[4] Statistical data on the LSAT scores of incoming students for

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[3] For example, the Thomas M. Cooley Law School website indicates that incoming students with an LSAT score of 163 or higher qualify for an Honor's Scholarship covering 100% of tuition, http://www.cooley.edu/prospective/scholarships.html.

[4] *See* THOMAS M. COOLEY LAW SCHOOL, FREQUENTLY ASKED QUESTIONS (2011), http://www.cooley.edu/prospective/questions.html#takeLSAT; WAYNE STATE UNIVERSITY LAW SCHOOL, LSAT/LSDAS REGISTRATION (2011), http://law.wayne.edu/jd/apply/lsat-lsdas-registration.php; MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, APPLICATION TIMEFRAME AND REQUIREMENTS (2011), http://www.law.msu.edu/admissions/timeframe-reqs.html; UNIVERSITY OF DETROIT MERCY SCHOOL OF LAW, J.D. ADMISSION REQUIREMENTS (2011), http://www.law.udmercy.edu/prospective/admission/index.php; UNIVERSITY OF MICHIGAN LAW SCHOOL, FREQUENTLY ASKED QUESTIONS (2011), http://www.law.umich.edu/prospectivestudents/admissions/Pages/faq.aspx.

each accredited school is gathered and reported.[5] In addition to providing a baseline for admission and scholarships, the LSAT is often used as a standardized means to compare schools.

This uniform reliance on the LSAT derives from the ABA's accreditation standards. In considering prospective students, ABA Standard 503 provides that law schools must require applicants to take a "valid and reliable admissions test" to assist in assessing the applicant's capability of completing the school's educational program. (R 17-2, p 14). Interpretation 503-1 of Standard 503 presumes the LSAT meets this requirement, stating that a law school that uses a test other than the LSAT must establish that the alternative test is valid and reliable. (R 17-2, p 14).

Instead of assisting law schools in selecting qualified candidates, however, Mr. Binno alleges that the LSAT winnows out qualified blind and visually-impaired students by needlessly asking questions that reflect their disabilities rather than aptitude. (R 15, pp 2-6). Further, he alleges that the ABA's accreditation standards effectively require law schools to consider the LSAT because there is no way to waive the entrance-exam requirement or consider an alternative to the LSAT on a student-by-student basis. And failure to comply with ABA standards, he alleges, can result in sanctions by the ABA, including loss of accreditation. (R 15, pp 2, 5).

Loss of accreditation would be a significant sanction indeed, impacting more than a school's reputation. A person may not even take the Bar Examination in

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[5] Official Guide to ABA-Approved Law Schools, *available at* http://www.lsac.org/LSACResources/Publications/official-guide-archives.asp.

Michigan unless he or she possesses a law degree from a "reputable and qualified" school, which ABA accredited schools are presumed to be.[6] In other words, much like ABA Standard 503 presumes the LSAT is valid and reliable, the State Bare presumes that an ABA accredited school is reputable and qualified. Doubt over the ability to sit the bar exam would certainly impact any student's interest in attending a specific school.

If proven, Mr. Binno's allegations could establish a violation of both the ADA and the MDCRA. Without discovery, however, it is difficult to assess Mr. Binno's allegations. Discovery is necessary to develop a full and complete record. For this reason, the *amicus curiae* urge this Court to deny summary judgment and allow the parties to proceed with discovery.

A. Discovery could uncover facts related to whether the LSAT has a discriminatory effect.

A school must not use an admission examination that needlessly reflects an applicant's disabilities. That basic principal is stated in 28 C.F.R. 36.309(b)(1)(i):

> (1) Any private entity offering an examination covered by this section must assure that--
>
> (i) The examination is selected . . . to best ensure that, when the examination is administered to an individual with a disability that impairs sensory . . . skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the

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[6] STATE OF MICHIGAN, BOARD OF LAW EXAMINERS, *Rules, Statutes, and Policy Statements*, Rule 2 (2011). *Available at* http://courts.michigan.gov/supremecourt/BdofLawExaminers/BLERules.pdf.

> individual's impaired sensory . . . skills (except where those skills are the factors that the examination purports to measure)."

The LSAT is a standardized test consisting of three types of multiple choice questions: reading comprehension, analytical reasoning, and logical reasoning.[7] Additionally, there is an un-scored "variable" multiple choice section, as well as an essay. *Id.* Mr. Binno alleges that the analytical reasoning section violates 28 C.F.R. 36.309(b) because it requires spatial reasoning and diagraming to assist in reaching the correct answers. (R 15, p 11). There seems to be little if any dispute that spatial reasoning and diagraming would at least assist students in answering these questions. Indeed, the suggested approach to answering analytical-reasoning questions on the LSAT set forth by the Law School Admission Council in "10 Actual Official LSAT Prep Tests" is to practice diagramming:

> In addition, it may prove very helpful to draw a diagram to assist you in finding the solution to the problem.
>
> In preparing for the test, you may wish to experiment with different types of diagrams. For a scheduling problem, a calendar-like diagram may be helpful. For a spatial relationship problem, a simple map can be a useful device.
>
> Even though some people find diagrams to be very helpful, other people seldom use them. And among those who do regularly use diagrams in solving these problems, there is by no means universal agreement on which kind of diagram is best for which problem or in which cases a diagram is most useful. Do not be concerned if a particular problem in the test seems to be best approached without the use of a diagram.

(10 Actual Official LSAT Prep Tests, © 2007 by Law Sch. Admissions Council, p. 3.)

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[7] LAW SCHOOL ADMISSION COUNCIL, ABOUT THE LSAT. http://www.lsac.org/JD/LSAT/about-the-LSAT.asp.

Comprehending spatial relationships and drawing diagrams, Mr. Binno asserts, reflect a blind or visually-impaired student's disability rather than his or her ability to succeed in law school. (R 15, p 13).

But without discovery, the average number of questions that require spatial reasoning or diagraming, and the average impact of those questions on a student's score are unknown.[8] Also, even if a blind or visually-impaired student scores well, it is unknown whether the allegedly discriminatory questions prevented that student from scoring better and, therefore, qualifying for admission into more schools or more scholarships. Such factual information would be developed through the discovery process.

B. Discovery could uncover facts related to whether law schools are effectively compelled to consider the LSAT.

Even assuming the analytical-reasoning section of the LSAT discriminates against blind and visually-impaired students, the ABA asserts that Standard 503 does not require the LSAT, but simply a test that is "valid and reliable." (R 17, p 8). Using and considering the LSAT, the ABA contends, is an independent decision made by the schools with no causal link to Standard 503. (R 17, p 8).

While the ability to ignore the ABA Standards is a factor to consider, it does not conclusively establish the lack of any causal connection. Such a connection can

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[8] This is not to suggest that a small number of discriminatory questions would be permissible, but rather, to determine whether actually discriminatory questions are a persistent problem or isolated incident.

exist, for example, where there is no real alternative. In *Communities for Equity v. Michigan High School Athletics Association, et al*, 80 F. Supp. 2d 729 (W.D. Mich. 2000), it was contended that the MHSAA did not have controlling authority over interscholastic athletic programs at local schools because the school districts could choose not to adopt MHSAA rules. The District Court concluded that a genuine issue of material fact existed as to the degree of control MHSAA exerted through the ability to impose sanctions and the lack of alternatives:

> There is only one interscholastic athletic association in the state of Michigan and that is the MHSAA. In a very real sense, the MHSAA has a de facto monopoly over interscholastic sports. This is evidenced by the fact that there is not a single high school in the state of Michigan, that is eligible for MHSAA membership, that is not a member. While local school districts may have the power to disregard MHSAA rules or policies, and the legal authority to leave the Association altogether, these are not realistic options given the nature of interscholastic sports in Michigan. If a local school district were to disregard MHSAA rules, or leave the MHSAA, it would subject itself to MHSAA imposed sanctions (including possible expulsion), jeopardize its ability to compete in statewide tournaments, find it difficult to schedule opponents, and in general have problems providing interscholastic athletic programs to its students.

Communities for Equity, 80 F. Supp. 2d at 738.

Like the MHSAA, the ABA has exclusive accrediting authority. (R 15, pp 4-5). Mr. Binno alleges that law schools are effectively compelled to consider the LSAT by operation of the ABA's accreditation standards. Specifically, he alleges that Interpretation 503-1 presumes that the LSAT is a "valid and reliable" test in amended compliance with Standard 503. (R 15, p 2; R 17-2, p 14). Since no other test enjoys this same presumption of compliance, a law school seeking to base admission on a different examination would bear the burden of establishing that

the alternate test is valid and reliable. (R 15, pp 13-17). Interpretation 503-1 provides that a law school using a test other than the LSAT must establish that test is valid and reliable. According to the ABA Consultant's Memorandum attached to Mr. Binno's complaint, "Interpretation 503-1 makes it clear that the burden is on the law school to demonstrate the validity and reliability of any test or assessment methodology, other than the LSAT, that is used for law school admission purposes." (R 15, Ex D).

Further, Mr. Binno alleges that failure to comply with Standard 503 could affect a school's ranking or lead to sanctions under ABA Rule 13, including the loss of accreditation. (R 15, p 12). Thus, since schools cannot waive the requirement of an entrance examination, a school considering admission of a single blind student can either attempt to prove to the ABA that an alternate examination complies with Standard 503, do so within an admissions cycle, and face sanctions if the student was admitted in violation of Standard 503—or simply require that all students take the LSAT.

If these allegations are true, there would certainly be a strong incentive—perhaps an outright compulsion—for schools to require the LSAT. And given that statistical data on the LSAT scores of incoming students is reported and used to rank schools, the connection between the LSAT and admission is more than purely speculative.[9] But at the pleadings stage, there is insufficient information to draw

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[9] While it may be true that the ABA does not require a school to place any specific weight on an applicant's LSAT score, that score will affect data on the LSAT scores

conclusions. The extent of the burden placed on schools to establish an alternative to the LSAT is unknown. The record is undeveloped as to whether any school has tried to use an alternative test for a single applicant, whether the ABA has ever approved such test, or whether the process could be completed within an admission cycle. Nor is there any information as to whether any school has in fact ever been sanctioned under Rule 13 for waiving the LSAT or basing admission on an alternate test without ABA approval. According to the affidavit attached to the amended complaint, at least one law school in Michigan considered waiving the LSAT for blind and visually-impaired applicants but determined that Rule 503 prevented them from doing so. (R 21, Ex A). Additional facts would be developed though discovery.

C. Discovery could uncover facts related to whether ABA Standards allow schools to waive the LSAT on a student-by-student basis.

Under ABA Standard 802, a school may request a variance from any other ABA Standard, including Standard 503. Therefore, the ABA asserts, law schools have the ability to offer a different test. (R 17, p 5). In fact, the ABA asserts, as many as eight law schools are receiving a variance from the LSAT. (R 13, p 6).

Mr. Binno calls that assertion into question, suggesting that Standard 802 may not give schools the ability to provide an alternate test on a student-by-student

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of incoming students for the school. Admitting too many students with low scores would lower the average for incoming students, affecting the public perception and reputation of the school.

basis, but rather, that Standard 802 applies only to admission programs. (R 15, p 11). In support, he points to an ABA Consultant's Memo that appears to expressly state that Standard 802 is limited to admission programs. (R 15, p 11; Ex D).

One example of a program-wide exception to the LSAT is the University of Michigan Law School's Wolverine program, under which a small number of University of Michigan alumni may be admitted to the law school based on undergraduate GPA.[10] These sort of programs do not appear to give schools the ability to waive the LSAT or provide an alternative for an individual student. The University of Michigan Law School's website still states that "[it] can't review your application without an LSAT score."[11]

Here again, there is a lack of information that should be developed through the discovery process. For example, whether Standard 802 has ever been used for an individual student, or, as Mr. Binno asserts, is limited to admission programs; how burdensome, if at all, the Standard 802 variance process is; and whether a variance could be obtained within an admission cycle

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[10] *See, e.g.* U.S. News Staff, *Michigan Law School Slightly Reconsiders LSAT*, U.S. NEWS AND WORLD REPORT (Sept. 30, 2008). http://www.usnews.com/education/blogs/paper-trail/2008/09/30/michigan-law-school-slightly-reconsiders-lsat.

[11] UNIVERSITY OF MICHIGAN LAW SCHOOL, FREQUENTLY ASKED QUESTIONS (2011). http://www.law.umich.edu/prospectivestudents/admissions/Pages/faq.aspx.

D. Discovery could lead to facts related to whether the ABA "offers" the LSAT within the meaning of the ADA.

Finally, the ABA asserts that Mr. Binno has sued the wrong party because it does not "offer" the LSAT within the meaning of the ADA. (R 17, p 13). Offering, the ABA asserts, refers to physical administration, such as choosing the place and manner in which the test is administered. It is not clear, however, that the ADA is so restrictive. As noted above, 28 C.F.R. 36.309(b) requires a private entity[12] that is "offering" an examination to ensure that the examination is "selected" in a way that reflects a person's aptitude rather than needlessly reflecting his or her disability. Mr. Binno's amended complaint raises the issue of whether the ABA has selected the LSAT by presuming that it is valid and reliable in compliance with Standard 503. As discussed above, discovery would develop the record as to whether schools have an independent choice or are effectively compelled to require the LSAT.

Other courts have identified the issue of what constitutes "offering" under the ADA as one appropriate for further development through discovery. For example, when a plaintiff alleged that the National Conference of Bar Examiners (NCBE) offers the Multistate Bar Exam, the United States District Court for the Northern District of California initially denied NCBE's motion to dismiss or motion for summary judgment, stating that "plaintiff should be allowed to take discovery and develop a full factual record on the issue whether NCBE 'offers' the MBE within the

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[12] While Mr. Binno alleges that the ABA is a private entity for purposes of Title III (R 15, p 10), he also raises a claim under Title V which is not limited to a private entity. *See* 42 U.S.C. § 12181(6); § 12131(1); § 12203.

meaning of the ADA." *Elder v. Nat'l Conference of Bar Examiners*, 2011 U.S. Dist. LEXIS 15787 at *12 (N.D. Cal. 2011) (motion later granted on other grounds). Similarly, the United States District Court for the District of Columbia addressed the same issue, and it stated that "the question whether NCBE 'offers' the MBE is a factual one not appropriate for resolution through Rule 12(b)(6)." *Bonnette v. D.C. Court of Appeals*, 2011 U.S. Dist. LEXIS 75076 at *39 (D. of D.C. 2011).

Whether presuming the LSAT is valid and reliable amounts to selecting, and therefore offering, for purposes of the ADA is an undeveloped legal issue that will depend on facts uncovered during discovery. Further factual development on the extent to which law schools are required to give the LSAT, how difficult it would be to obtain a variance, and whether a variance is even available on a student-by-student basis is necessary. It is also unknown whether the ABA has ever taken any disciplinary action against schools that have waived the LSAT or relied on a different admission examination.

CONCLUSION AND RELIEF REQUESTED

Whether Michigan law schools are effectively required to base admission in part on the result of an examination, the LSAT, that discriminates against blind and visually-impaired persons is a significant issue to the people, universities, and government agencies of Michigan. The allegations merit further inquiry.

Accordingly, *amicus curiae* Michigan Attorney General Bill Schuette respectfully urges this Court to deny summary judgment and allow discovery.

Respectfully submitted,

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