Dear Ms. McLeod:

On behalf of the American Bar Association (ABA), I write to urge that the Office of Personnel Management (OPM) reject the proposed modifications to Question 9 of the OPM Optional Form (OF) 306, relating to an applicant’s participation in a pretrial intervention or diversionary program leading to the dismissal of a criminal charge. The inclusion of the question undermines strong public policy supporting the creation of diversion programs, and it will unnecessarily restrict the pool of qualified job candidates the federal government attracts. We appreciate the government’s position that OF 306 may be used for security clearance purposes, but we believe that this vitally important purpose can be fulfilled in a constructive way by saving questions such as the current question concerning prior criminal convictions and participation in diversion programs for when they become most relevant, i.e., upon a conditional offer of employment and active screening of a person for a security clearance.

The ABA is comprised of over 400,000 members representing all aspects of the legal system, including prosecutors, defense counsel, judges, academicians, correctional officials, and others. Among other relevant resources, we produce the ABA Standards for Criminal Justice on topics including Sentencing, Collateral Consequences and Discretionary Disqualifications of Convicted Persons, and our 16,000-member Criminal Justice Section has a new task force developing standards specific to diversion programs. It is from this experience and expertise that we ask you to consider the following arguments against the proposed Question 9 for the OF 306.

1. The proposed amendment directly contradicts the underlying objectives of current criminal justice reform initiatives.

The federal government, along with local and state jurisdictions, have in recent years enacted significant criminal justice reform measures designed to provide treatment services in lieu of traditional prosecution and custodial sentences to those who have been affected by substance and/or mental health disorders. Driven by such factors as escalating opioid and other drug overdose deaths, rising imprisonment and supervision costs, and a reexamination of public policy, proactive changes
have been made to statutory schemes as well as to discretionary programs fostered by the courts, probation and pretrial services, law enforcement and correction agencies, prosecutors, defense counsel and treatment providers alike. It is notable that while these diverse criminal justice stakeholders were able to coalesce into a common effort to bring about the recent passage of the First Step Act, the OPM’s current proposal runs counter to the Administration-supported national movement to embrace alternatives to incarceration that ease persons’ transitions to lives as productive, contributing members of their community following completion of their sentence.

Similar efforts, such as the “ban the box” initiatives, allow employers to consider a job candidate’s qualifications first -- without the stigma of a conviction or arrest record; they have been adopted by 34 states, the District of Columbia, and over 150 cities and counties across the country. Also, the Second Chance Act of 2007 has provided significant funding to government agencies and nonprofit organizations to provide employment assistance, substance abuse treatment, housing, family programming, mentoring, victim support and other services to individuals returning to the community from a period of incarceration. Considering the significant federal investment promoting persons’ success, we believe that the proposed Question 9, independent of any actual security clearance background check, would presents an unnecessary barrier to employment.

2. The proposed amendment will unnecessarily discriminate against those who have acted in good faith and who have made positive change in their lives.

Given that most diversion type dispositions involve a substance use and/or non-threatening mental health disorder, the proposed amendment unfairly seeks to identify those who may have such an issue or engaged in a related incident that led to law enforcement contact. Although some progress has been made, stigma still attaches to those who may suffer from these conditions, regardless of whether they have been arrested, prosecuted or convicted. The National Academies Press released a report entitled Ending Discrimination Against People with Mental Health and Substance Use Disorders: The Evidence for Social Change (2016), which states:

Although much of the research discussed above referred to people with mental illness, people with substance use disorders also experience structural discrimination in many forms. A national survey of people in recovery from alcohol and drug problems and their families (Hart Research Associates, 2001) documented barriers to treatment, such as lack of insurance and trouble obtaining insurance, the cost of treatment, and lack of access to treatment programs. They also reported fear of discrimination at work and previous experiences of being denied a job or promotion. Despite the hurdles people with substance use disorders face, the implementation of legislation such as the ADA and awarding of federal disability

---

2 Public Law 115-391.
benefits can be more restrictive for people with substance use disorders than for those with mental illness (Join Together, 2003).\(^5\)

Many of the participants who enroll in treatment are acutely aware of this stigma, including job discrimination, and thus are eager to accept the resources available through a diversionary or deferred adjudication programs that will not show up on their “rap-sheet.” It is also important to note that these problem-solving or collaborative court programs are often long-term (i.e., one year or more), highly structured, may require that a participant complete intense drug and/or mental health treatment, involve probation supervision and regular meetings with a judge and court team, and they demand a significant period of sobriety and pro-social conduct before graduation. In other words, many of these programs are not easy to complete, and require a significant commitment on behalf of those who are granted such an alternative resolution to their case. Thus, to then deny their hard-earned “anonymity” when applying for federal employment would undoubtedly diminish the numbers and incentive for program participation.

3. The proposed amendment will dismantle decades of positive contributions that collaborative courts have made to American jurisprudence and to society at large.

Organizations such as the ABA and the National Association of Drug Court Professionals (NADCP) have been national leaders in the development and proliferation of problem-solving courts since 1994. In establishing any such program, proponents must work closely with law enforcement as well as prosecutorial and corrections agencies to help their programs reduce recidivism rates for those who engage in a supervised criminal justice setting. The latest biannual publication of the National Drug Court Institute, entitled *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States* (2016)\(^6\), reports that:

> At least nine meta-analyses, systematic reviews, and multisite studies conducted by leading scientific organizations have concluded that adult drug courts significantly reduce criminal recidivism -- typically measured by rearrest rates over at least two years -- by an average of approximately 8% to 14%. The best adult drug courts were determined to reduce recidivism by 35% to 80%. Several studies included in the meta-analyses were randomized controlled experiments, which meet the highest standards of scientific rigor. [References omitted].

It is no wonder, then, that drug treatment and other collaborative courts have grown in number and stature when 20.2 million American adults (about 1 in 10, and about 65% of all U.S. inmates) have a substance use disorder, and 43.6 million (about 1 in 5) have a mental health problem. Nearly 8 million of these individuals suffer from co-occurring substance use and mental health disorders.\(^7\) Because more people are likely to be incarcerated than treated, a relatively small but growing percentage of persons are granted pretrial intervention or a diversion/deferred adjudication program.

---

\(^5\) Id., at page 38.
4. The proposed amendment conflicts with the rehabilitative mission of the criminal justice system.

Under American jurisprudence, the criminal justice system—in addition to punishment, incapacitation, specific and general deterrence, and restitution to victims—should seek to rehabilitate those within its custody. As noted in the Oxford Bibliographies on the subject of rehabilitation, Beth M. Huebner writes in the introduction\(^8\):

Rehabilitation is a central goal of the correctional system. This goal rests on the assumption that individuals can be treated and returned to a crime free lifestyle. Rehabilitation was a central feature of corrections in the first half of the twentieth century. The favorability of rehabilitation programming declined in the 1970s and 1980s but has gained favor in recent years. Rehabilitation includes a broad array of programs including mental health, substance abuse, and educational services.

During the 1990’s, however, law and policy-makers had adopted a more punitive approach, i.e., a “get tough on crime” campaign, that has failed to produce promised savings to taxpayers or increase public safety. Research indicates that current criminal justice system reform efforts aimed at treating the root causes of crime in lieu of traditional prosecution and incarceration are more effective in the long-term\(^9\).

By moving appropriate cases away from costly trials and incarceration, diversion programs help lower system costs to taxpayers and free up prosecutors and other criminal justice professionals to focus on higher priorities. These programs help keep justice-involved persons employed, housed, and together with their families while repaying their debt to society as determined by a court. We should support such programs and not impose unnecessary obstacles to them, which we believe the proposed addition to Question 9 on the OF 306 would do. We urge you not to ask about a candidate’s participation in diversion programs until the point at which they may be under active consideration of a security clearance.

Thank you for your consideration of the ABA’s comments. If you have any questions about this matter, please contact Kenneth Goldsmith in the ABA Governmental Affairs Office (202) 662-1789 or kenneth.goldsmith@americanbar.org.

Sincerely,

Robert M. Carlson
