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Learning and Mental Disability Protection under the Americans with Disabilities Act in the Quest for Certification for the Practice of Law

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LEARNING AND MENTAL DISABILITY PROTECTION UNDER THE AMERICANS WITH DISABILITIES ACT IN THE QUEST FOR CERTIFICATION FOR THE PRACTICE OF LAW

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I. INTRODUCTION

The Americans with Disabilities Act was enacted in 1990 as a comprehensive scheme in which previously discriminated against classes would be guaranteed fair treatment in employment as well as other settings. The Act protects those with both physical and mental disabilities. With respect to certification for the practice of law, the Act has almost unique significance as the accommodations the Act calls for arguably clash with state bar standards of competence both in legal education and mental fitness for certification. These clashes tend to stem from two major situations - accommodation of the learning disabled student who may not be able to complete course work or examinations in the same time as others do and reluctance of prospective attorneys to answer questions regarding past mental health treatment on bar examination applications. This note will give an overview of current litigation regarding these issues and summarize what uniform decisions have been made with respect to these situations.

II. AN OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

The purpose of enacting the Americans with Disabilities Act was to provide a clear and comprehensive national mandate for the elimination of discrimi-

ation against individuals with disabilities.¹ Congress found that individuals being discriminated against on the basis of a disability usually had no form of legal recourse, thus propounded to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. Congress invoked its authority under the Fourteenth Amendment and its power to regulate Commerce to address the major areas of discrimination faced day-to-day by people with disabilities.² The Americans with Disabilities Act (hereinafter "ADA") contains five separate Titles addressing the needs of individuals with disabilities, the first three will be analyzed in relation to this issue of certification for the practice of law.

The ADA begins with definitions that apply to the Act as a whole. This includes a definition of disability. With respect to an individual, the term "disability" means one of three things. First, an individual has a disability if a physical or mental impairment³ substantially limits one or more of the major life activities of such individual. An individual must prove that he or she has a physical or mental impairment, that substantially limits performance of a major life activity, such as walking, seeing, hearing, breathing, speaking, performing manual tasks, caring for self, learning, or working.⁴ The term "impairment" may include physiological disorders, or any mental or psychological disorder.⁵ Second, an individual is regarded as being disabled if he or she has a record of such an impairment.⁶ Having a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.⁷ Third, an individual is disabled under the statute if he or she is

¹42 U.S.C. § 12101(b) (1994).

²*Id.*

³42 U.S.C. § 12102(2) (1994). A physical or mental impairment means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. 28 C.F.R. § 35.104 (1994). An impairment also includes contagious and noncontagious diseases and conditions, but does not include homosexuality or bisexuality. *Id.*

⁴28 C.F.R. § 35.104 (1994). For the purposes of this note, being denied an opportunity to be certified or compete in a law school program would substantially limit the major life function of both learning and working.

⁵W. Sherman Rogers, *The ADA, Title VII, and the Bar Examination: The Nature and Extent of the ADA's Coverage of Bar Examinations and an Analysis of the Applicability of Title VII to Such Test*, 36 HOW. L.J. 1 (1993). Other disabilities covered under the ADA are AIDS, cosmetic disfigurement, dyslexia, and other learning disabilities. Stress may also be covered by the ADA if the condition is so severe as to be considered disabling by a psychiatrist.

⁶42 U.S.C. § 12102(2) (1994).

⁷28 C.F.R. § 35.104 (1994).

regarded as having such an impairment.⁸ The phrase "regarded as having an impairment" can mean three different things—that an individual has an impairment that does not limit a major life activity but that is treated as constituting such a limitation, that an impairment substantially limits a major life activity only as a result of the attitudes of others towards the impairment, or an individual may not have an impairment as defined under the statute, yet is treated as having such an impairment.⁹

A. Title I

Title I of the ADA applies to "covered entities." Under the statutory definition, covered entities include an employer, employment agency, labor organization, or joint labor-management committee.¹⁰ The general rule states that no "covered entity" shall discriminate against a "qualified individual with a disability" because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.¹¹ A "qualified individual with a disability" is defined under Title I as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such an individual holds or desires. This definition gives the employer deference as to what is to be considered essential. However, included as a means of discrimination is an employer's failure to provide a reasonable accommodation necessary to allow an individual with a disability the ability to perform the functions of the job.¹²

Title I specifically prohibits medical examinations and inquiries, stating that a "covered entity" shall not conduct a medical exam or make inquiries of a job

⁸42 U.S.C. § 12102(2) (1994). The third meaning of disability under the statute - regarded as having an impairment - is perhaps the most troublesome definition for challenges to bar application questions. By answering in the affirmative to a specific inquiry into mental health treatment or mental health history, the applicant may be unfairly regarded as having an impairment and their application may be treated differently than those who answered in the negative. This differential treatment may be viewed as a clear violation of the ADA.

⁹28 C.F.R. § 35.104 (1994).

¹⁰42 U.S.C. § 12111(2) (1994).

¹¹42 U.S.C. § 12112(a) (1994).

¹²42 U.S.C. § 12112(b)(5)(a) (1994). As defined under the ADA, 42 U.S.C. § 12111(9), reasonable accommodation may include:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.¹³ However, a "covered entity" may condition employment by requiring a medical exam after an offer of employment has been made to the applicant and prior to the commencement of employment duties, if all employees are subject to the same process and the results are kept confidential in accordance with Title I.¹⁴ Furthermore, examinations and inquiries must be job related and consistent with business necessity.¹⁵

B. Title II

Title II applies to "public entities." This means any State or local government, any department, agency, special purpose district, or other instrumentality of a State or local government.¹⁶ Title II states in pertinent part that no qualified individual with a disability may be subject to discrimination by a public entity, be excluded from participation in, or be denied the benefits of, the services, programs or activities of any department, agency, or other instrumentality of a state.¹⁷

Using similar language as Title I, Title II applies to "qualified individuals with a disability." An individual is "qualified" if he or she can meet the "essential requirements" of the testing or licensing entity "with or without reasonable modifications to rules, policies or practices, or the provision of auxiliary aids and services."¹⁸ In construing this statutory language, the Department of Justice has issued regulations that indicate that Title II is applicable to professional certification and licensing programs. It states in pertinent part:

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees

¹³42 U.S.C. § 12112(d)(2)(A) (1994).

¹⁴42 U.S.C. § 12112(d)(3) (1994).

¹⁵42 U.S.C. § 12112(d)(4)(A) (1994). Also, a covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. 42 U.S.C. § 12112(d)(4)(B) (1994). The information obtained in medical inquiries or examinations, regarding the medical condition or history of any employee are subject to strict confidentiality requirement. 42 U.S.C. § 12112(d)(4)(C) (1994).

¹⁶42 U.S.C. § 12131(1) (1994).

¹⁷42 U.S.C. § 12132 (1994).

¹⁸42 U.S.C. § 12131(2) (1994). It is important to note that the term "qualified individual with a disability" means an individual with a disability who meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. *Id.*

or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability.¹⁹

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.²⁰

While many individuals can meet the educational requirements and qualifications for certification, difficulties arise in professional testing procedures and circumstances that provide a specific challenge to an individual's disability. The testing agency is obligated by law to provide that individual with a modification that will allow the individual to complete the examination.²¹

As in Title I, failing to provide a qualified individual with a disability a reasonable accommodation in rules, practices, or procedures administrated by the state is included in the definition of "discrimination" in Title II.²² Therefore, if the individual is "qualified with a disability" and there exists a "reasonable accommodation" that will modify the rules, policies or procedures of the examination, the state agency must comply. A failure to comply would be a violation of the ADA.

C. Title III

Title III applies to places of public accommodation and any private entity that owns or operates that place of public accommodation. For the purposes of Title III, some private entities are considered places of public accommodation. Included in the definition of private entities which are considered places of public accommodation are undergraduate, postgraduate private school, or other places of education.²³ The general rule of Title III is that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the privileges, advantages, or accommodations of any place of public accommodation by anyone who operates a place of public accommodation.²⁴

Title III specifically prohibits the imposition of eligibility criteria that screen out or tend to screen out an individual with a disability from enjoying the

¹⁹28 C.F.R. § 35.130(b)(6) (1994).

²⁰28 C.F.R. § 35.130(b)(8) (1994).

²¹28 C.F.R. § 36.309 (1994). Specific requirements pertaining to the administration of a test are contained in the regulations in Title III of the ADA.

²²42 U.S.C. § 12132 (1994).

²³42 U.S.C. § 12181(7)(J) (1994).

²⁴42 U.S.C. § 12182(a) (1994).

accommodations being offered.²⁵ Furthermore, a failure to make reasonable modifications in policies, practice, or procedures, when such modifications are necessary constitutes discrimination.²⁶

The Department of Justice prescribed regulations that attempt to implement Title III. Section 36.309 of these regulations specifically addresses the place and manner or alternative accessible arrangement that must be afforded individuals with disabilities.²⁷ These criteria are applicable to administering examinations and courses related to applications, licensing, and certification of professionals. The United States Justice Department's position is that Title III covers bar examinations.²⁸ Private and public entities have a requirement to provide individualized modifications in order that a student or bar applicant can achieve a fair result with regard to that individual's disability.

Title III of the ADA specifically requires private entities to provide reasonable accommodations tailored to the examinee's individual needs when offering examinations or courses.²⁹ Furthermore, a private entity offering the examination must assure it is selected and administered so as to best ensure that "the examination results accurately reflect the individual's aptitude or achievement level or whatever other factors the examination purports to measure."³⁰

²⁵42 U.S.C. § 12182(b)(2)(A)(i) (1994).

²⁶42 U.S.C. § 12182(b)(2)(A)(ii) (1994). Other specific types of discrimination that are expressly prohibited by Title III state in pertinent part:

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied service, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, . . . , where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

⁴² U.S.C. § 12182(b)(2)(A)(iii)-(v) (1994).

²⁷28 C.F.R. § 36.309 (1994).

²⁸Rogers, *supra* note 5, at 8.

²⁹Deborah Piltch, et al., *The Americans With Disabilities Act And Professional Licensing*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 556 (1993).

³⁰*Id.* at 557.

D. Applicability

The ADA does not explicitly address possible violations with respect to every aspect of the certification for the practices of law. Title II broadly prohibits discrimination by disallowing state certification programs from denying the benefits of those programs or activities of a public entity, i.e. a State bar examining committee. This would directly apply to the character and fitness portion of the certification process.³¹ Title III's application provides more insight into specific accommodations that should be made in selection and the administration of testing followed by law schools and the bar examination process. While Title I does not directly include law schools and public agencies, its similar purpose and language in the employment context allows an analogous application to this issue and provides pertinent insight into reasonable accommodations and the way problems and issues should be addressed. Together, all three Titles provide the necessary groundwork to challenge the appropriateness of making accommodations in professional school settings and the current conflicts between subjective competence standards and the relationship to the fitness of practicing law.

III. LEARNING DISABILITIES

A. Application of the ADA

In 1967, the National Advisory Committee promulgated the following definition of "specific learning disability":

[A] disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, spell or do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps or mental retardation or emotional disturbance or of environmental, cultural, or economic disadvantage.³²

A learning disability effects an individual's ability to comprehend and analyze information as routinely as the normal student. Learning disabilities

³¹Rogers, *supra* note 5, at 7. The author of this article, W. Sherman Roger, suggests that Title II, due to its overly broad language and lack of specific prohibitions, only applies to the character and fitness portion of the bar certification procedures. Moreover, Rogers purports that Title III is limited to the selection and administration of licensing and professional tests. He reaches the conclusion since the Department of Justice provides specific regulations as to accommodation that should be afforded to individuals with disabilities while taking examinations.

³²M. Kay Runyan & Joseph F. Smith, Jr., *Identifying and Accommodating Learning Disabled Law School Students*, 41 J. LEGAL EDUC. 317, 318 (1991).

range from dyslexia to visual impairments and hearing problems. One effect that a learning disability may have on a student is that the individual may need additional time to complete examinations or timed events due to the inability to reasonably comprehend questions and relay correct answers in a short amount of time. In order not to discriminate against these individuals under the ADA, a public or private entity administering an examination must provide these individuals with an accommodation that would allow such individual a fair chance to succeed on the examination.

Title III mandates that reasonable accommodations be made for test takers. To that effect, Title III outlines reasonable accommodations that may be given by examiners administering examinations. The first suggestion is that the required modification to the examination may include changes in the length of time permitted for the completion of the examination and adaptation of the manner in which the examination is given.³³ Second, providing auxiliary aids and services, including taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impediments, Braille or large print examinations and answer sheets or qualified readers for individuals with visual impairments or learning disabilities.³⁴

Title III also outlines reasonable modifications that are necessary to ensure that the place and manner in which a course is given are accessible to individuals with disabilities. Similar to examinations, required modifications may include changes in length of time permitted for the completion of a course, substitution of specific requirements, or adaptation of the manner in which the course is conducted.³⁵ Also, auxiliary aids and services required are the same that are required for the adaptation of an exam.³⁶

When making a determination as to what sort of accommodation should be made, the focus should be on the individual. Title III makes it very clear that in determining what accommodation should be made, the public entity should first consult with the individual requesting the accommodation.³⁷ The difficulty with this provision is determining what accommodation should be made and for whom. Title III makes suggestions for "traditional" types of disabilities, i.e. making doors wide enough for wheelchair accessibility; however, it would be overly burdensome to expect that every disability be assigned a boilerplate accommodation. The need to personalize accommodations has exam givers walking on eggshells. What is enough extra time for an individual with dyslexia? If the exam giver creates a standard time

³³28 C.F.R. § 36.309(b)(2) (1994).

³⁴28 C.F.R. § 36.309(b)(3) (1994).

³⁵28 C.F.R. § 36.309(c)(2) (1994).

³⁶28 C.F.R. § 36.309(c)(3) (1994).

³⁷Piltch, *supra* note 24, at 558.

extension for all disabilities, the failure to accommodate a particular individual with a disability would be discriminatory.

All of these concerns spill over into the law school setting. Law school examinations call for an immediate application of a wealth of information, all in a short period of time. The examinations are centered on one's ability to read, analyze and comprehend the issues of a certain subject or area of law. The ability to succeed and perform well is grounded in the ability to discover the most issues and rapidly apply those issue to the law. Due to the difficulty of grading, time becomes an important factor that weeds out the successful from the not so successful. Should the time factor be extended for qualified individuals with disabilities so that the playing field is leveled? Or does the time limitation successfully accomplish its goal in preparing future students for success in the legal field regardless of the presence of a disability?

B. Recent and Current Litigation

The requirement to accommodate is the law, but how far can this extend without destroying the foundations of the academic setting? This issue was addressed in the case of *Wynne v. Tufts University School of Medicine*.³⁸ In *Wynne*, a medical student who failed out of medical school later claimed that he failed due to a learning disability.³⁹ The student challenged that the school discriminated against him by requiring him to take multiple choice examinations.⁴⁰

After the district court initially granted summary judgment in favor of Tufts, the First Circuit Court of Appeals reversed and remanded the case for further factual submissions.⁴¹ The court stated that in order for the university to overcome the discrimination challenge, it had to submit to the court evidence that it consciously carried out its obligation to seek a suitable means of reasonably accommodating a person with a disability. This included submitting a factual record that the university officials considered alternative means, their feasibility, cost, and effect on the academic program, and came to a rationally justified conclusion that alternatives were not appropriate because they would lower academic standards or fundamentally alter the nature of the program.⁴²

³⁸932 F.2d 19 (1st Cir. 1991). The procedural history in the *Wynne* case is somewhat complicated. In the initial district court case, Tufts filed a motion for summary judgment, which the court denied. Tufts appealed the decision. The First Circuit Court of Appeals states the standard of proof that Tufts needed to meet in order that summary judgment be granted and remanded the case. Producing the required information, Tufts renewed its motion for summary judgment. The motion was granted and the plaintiff appealed. The First Circuit Court of Appeals affirmed the district courts decision.

³⁹*Id.* at 20.

⁴⁰*Id.* at 22.

⁴¹*Id.* at 28.

⁴²*Wynne*, 932 F.2d at 28.

On remand the District Court of Massachusetts granted Tufts renewed motion for summary judgment. The court held that the use of multiple choice examinations did not illegally discriminate against the student. The court stated that the school met their burden of showing that alternative means were considered and correctly concluded they were not practicable.⁴³ The medical school considered alternative means, but reasonably concluded that the available alternatives would result in either a lowering of academic standards or would require substantial program alterations.⁴⁴ The university advocated that the multiple choice format was important because the format required students to quickly read and analyze information. Furthermore, modern diagnostic and treatment procedures require physicians to be able to read and assimilate complex data and immediately render important decisions in stressful situations. In the judgment of the school, multiple choice examinations best met those demands of the profession.⁴⁵ The district court also pointed to the fact that Tufts reasonably accommodated the student by allowing him to retake the first year curriculum, by funding notetakers and tutors for him, and by taping the plaintiff's lectures. Tufts also permitted the plaintiff to retake exams in an untimed setting.⁴⁶ The First Circuit Court of Appeals affirmed the district court's decision.⁴⁷

In a more recent case, *D'Amico v. New York State Bd. of L. Examiners*,⁴⁸ the United States District Court for the Western District of New York granted a preliminary injunction which compelled the Board to provide the plaintiff bar applicant with certain requested accommodations when she was to sit for the New York State Bar Exam. The plaintiff, D'Amico, suffered from a severe visual disability. She had marked myopia and partial amblyopia.⁴⁹ As a result, the plaintiff had an extremely difficult time reading, finding it near impossible to read normal-sized print. Reading for extended periods of time caused blurring, tearing, and a burning sensation, and she had to take frequent breaks to rest her eyes.⁵⁰ After graduating from law school in 1992, she registered to take the July bar exam. In anticipation of her need for an accommodation to take the

⁴³ *Wynne v. Tufts Univ. Sch. of Medicine*, No. 88-1105-Z, 1992 U.S. Dist. LEXIS 2629 *2 (D. Mass. 1992).

⁴⁴ *Id.* at *1.

⁴⁵ Runyan, *supra* note 32, at 326.

⁴⁶ *Wynne*, No. 88-1105-Z, 1992 U.S. Dist. LEXIS 2629 at *3.

⁴⁷ *Wynne v. Tufts Univ. Sch. of Medicine*, 976 F.2d 791, 792 (1st Cir. 1992).

⁴⁸ 813 F. Supp. 217 (W.D.N.Y. 1993).

⁴⁹ *Id.* at 218. The plaintiff's vision was so severely damaged, that although she wore glasses, her medical condition could not be corrected to achieve 20/20 vision. With visual aids, her vision was 20/50 in the right eye and 20/70 in the left eye. This caused the plaintiff to suffer from ocular fatigue and a "lazy eye" condition, which was marked by dimness of her vision. *Id.*

⁵⁰ *Id.*

exam, she requested that she be permitted various accommodations. The Board agreed and she was provided with a large print exam. Additionally, she was permitted to bring her own lamp and a straight edge that would enable her to focus on specific lines of text. Lastly, she took the exam in a separate location (with one other student) in the presence of a proctor.⁵¹ After she failed the first examination, she made similar requests for accommodation for the second exam, and included a request to stretch the bar examination time from two days to four days long. The Board denied this request although it granted the requests that she made earlier. The Plaintiff challenged the Board's denial of allowing her the "reasonable accommodation" of four days to take the examination.⁵²

The dispute in *D'Amico* related solely to the extent to which reasonable accommodations should be given. In analyzing the plaintiff's situation the court first looked to whether or not the plaintiff would suffer irreparable harm by not having an extension of time.⁵³ The court found this to be the case as it employed a "but for" analysis. The court stated that "but for plaintiff's disability and the Board's reluctance to allow her to take the exam over a four day period, she would have an equal opportunity to be admitted to the practice of law."⁵⁴

The court then determined that in accordance with the purpose and language of the Act, the plaintiff must show that (1) she was disabled, (2) that her requests for accommodations were reasonable, and (3) that those requests were denied.⁵⁵ The focal element was reasonable accommodation. The court stated that there was a delicate balance that must be made in determining whether requested accommodations were reasonable, in order to provide the disabled individual on equal footing and not give them an unfair advantage. The court relied extensively on the opinion of the plaintiff's medical doctor who specifically opined that the four day accommodation was critical to the plaintiff's ability to compete equally with others taking the examination and held that all of the plaintiff's requests for accommodation were reasonable.⁵⁶

⁵¹*D'Amico*, 813 F. Supp. at 218.

⁵²*Id.* at 219.

⁵³*Id.* at 220. The plaintiff claimed that she would suffer irreparable harm because it would be extremely difficult for her to take and pass the bar without the accommodation. She maintained that she would lose extensive time she invested in preparation, would suffer serious setback in her efforts to chose a profession, would face the prospect of taking another bar exam, and will suffer the professional stigma of failure because of her medical disability. *Id.*

⁵⁴*D'Amico*, 813 F. Supp. at 220.

⁵⁵*Id.* at 221.

⁵⁶*Id.* at 222. The plaintiff's doctor found that the daily time schedule of the bar examination exacerbated her visual impairment and that extensions of time on exam days did not effectively give the plaintiff an equal opportunity to compete. Rather, the plaintiff needed shorter time periods spread out over more days. *Id.*

The decision of the court requiring that the plaintiff be accommodated with a four day examination period established the willingness of courts to protect individuals with disabilities by providing them with sufficient leeway to compete on the bar examination. This protection was afforded on the recommendations of the plaintiff's physician and his opinion as to what accommodations must be made. While the court stated that the physician did not have the final word on determining what was reasonable, the court gave great weight to the physician's opinions as to the nature of the accommodations required for his patient.

The Delaware Supreme Court reached a similar result in *In re Petition of Kara B. Rubenstein*.⁵⁷ The plaintiff in *Rubenstein* was in a unique situation in that she continued after three unexplained failed attempts at the bar exam, to work as a clerk in the Superior Court and later obtained a position as Assistant Deputy Attorney General. These employers attested to the fact that she was more than competent and able to practice law, and that they found her failure to pass the bar exam inexplicable.⁵⁸ After the three failures, Rubenstein sought an expert's explanation for her inability to pass the exam. The analysis resulted in the diagnosis of a learning disability, which was attributable to her linguistic, sequential processing learning style. This learning disability greatly affected her ability to process information presented all at once compared to her ability to develop a problem sequentially, which explained her success in practicing law.⁵⁹

Rubenstein applied for permission to take the bar examination a fourth time. She also requested that a reasonable accommodation of unlimited time be given to her. This request for additional time was granted for the essay portion, but was rejected for the Multistate section.⁶⁰ Rubenstein failed the Multistate section. Rubenstein brought an action to ask the court to compel the state of Delaware to certify her as able to practice law regardless of her fourth failed bar examination.⁶¹

The court held that plaintiff's request for unlimited time was a reasonable accommodation that the Board should have granted. The court stated that the Board, which was an instrumentality of the court, constituted a public entity within the meaning of Title II.⁶² Consequently, as a public entity, the Board was required to make reasonable accommodations to prevent the de facto exclusion which may occur when disabled but otherwise qualified individuals were

⁵⁷637 A.2d 1131 (Del. 1994).

⁵⁸*Id.* at 1133.

⁵⁹*Id.*

⁶⁰*Id.* at 1134.

⁶¹*Rubenstein*, 637 A.2d at 1134.

⁶²*Id.* at 1136. The court found that Title II had no specific standards for the administration of bar examinations or other professional licensing test and then looked to the specific regulations enunciated in Title III for guidance.

limited from fully participating in the examination process due to standard administrative procedures.⁶³ The court then looked to Title III for specific guidance regarding the administration of examinations.

In accordance with the purpose of the ADA—to place those with a disability on equal footing and not to give them an unfair advantage—the court felt consistent with Rubenstein's disability needs, that unlimited time should have been granted to her.⁶⁴ The court again relied on the opinion of the expert that examined Rubenstein and discovered that she had a learning disability, determining that the failure to give her this additional time was manifestly unfair.⁶⁵ The court, in assessing an appropriate and equitable remedy, waived the requirements that Rubenstein pass both sections of the bar examination. It ruled that her ability to pass one section and her competence to practice law, attested to by her legal employers, was enough to waive the formal requirements.⁶⁶

Both the *D'Amico* case and the *Rubenstein* case display a leniency that the court is willing to apply to cases where a reasonably requested accommodation has been made and rejected by the test administering body. The emphasis was placed on a case by case analysis of the individual's specific needs to be accommodated. The uniformity of these decisions sends a message to testing entities that they must take the time and make a specific tailoring of their testing procedures to not only account to disabled individuals as a whole, but for the specialized needs of those with particular disabilities.

The current problems in this area center on the conflict with the goals of state bar certification procedures enacted to ensure that applicants who are later certified are competent to practice law. The practice of law is a high-stressed, high-pressure professional field and the ability to act under these conditions is vital to the ability to fairly represent another party with some degree of competence. A state has an interest in assuring that those practicing law within its boundaries are competent. With this in mind, an analysis of individuals and their disabilities, particularly within the practice of law, should not result in favoring disabled individuals over others. Rather, strict rules regarding modifications should be adhered to in order to protect a state's interest in competence. Deference to doctors' decisions of what is reasonable regarding a specific learning disability should be strictly scrutinized and challenged in order to ensure that a high standard of competence and fitness to practice law is upheld. This is necessary in order to establish an adequate balance between accommodations that are legitimately necessary under the ADA, and the competency and fitness requirements called for by the legal profession.

⁶³*Id.*

⁶⁴*Id.* at 1138.

⁶⁵*Rubenstein*, 637 A.2d at 1139.

⁶⁶*Id.* at 1140.

IV. MENTAL DISABILITIES

A. Application of the ADA

Like learning disabilities, mental disabilities also receive varying degrees of protection under the ADA. One aspect of this protection is that employers may not discriminate against employees on the basis of mental disabilities. Evidence of this is the strict rules regarding pre-employment inquiries or medical examinations. Employers are prohibited from asking about mental disabilities on employment applications, inquiring about mental disabilities in an interview setting, and subjecting an applicant to medical examinations before hiring.⁶⁷ Nevertheless, after an offer of employment has been made, an employer may condition the employment on passing a medical examination.⁶⁸ While these protections are very clear in Title I of the ADA, it is in dispute as to whether such protection extends to applications for professional certification.

In order to be certified by a state to practice law, an individual must complete a bar application and must pass the bar examination. Included on most bar applications is a general question concerning whether or not the applicant has been treated for or has sought treatment for any mental health problems. While the purpose of the application is to assess an individual's health and fitness to practice law, the inquiry can be interpreted as intruding on one's privacy and creating a discriminatory tool on which certification decisions may be based. This type of questioning may elicit a truthful answer of the type of treatment one has received or it may work to prevent a prospective certification candidate from seeking necessary treatment for common anxieties or mental disturbances brought about due to the high intensity that law school and the legal profession create. These inquiries have been challenged under the ADA in recent litigation in a number of states.

B. Recent and Current Litigation

In *Ellen S. v. Florida Board of Bar Examiners*,⁶⁹ plaintiffs were seeking admittance to the Florida Bar and claimed that certain inquiries of the Florida Bar Examiners violated the American with Disabilities Act. Question 29 on the Florida Bar application asked whether the applicant had ever sought treatment for a nervous, mental, or emotional condition, has ever been diagnosed as having such a condition, or has ever taken psychotropic drugs of any kind.⁷⁰

⁶⁷ See 42 U.S.C. § 12112(d)(2)(A) (1994).

⁶⁸ See 42 U.S.C. § 12112(d) (1994).

⁶⁹ 859 F. Supp. 1489 (S.D. Fla. 1994).

⁷⁰ *Id.* at 1491. Question 29 of the application to the Florida Bar reads as follows:

29. Consultation with Psychiatrist, Psychologist, Mental Health Counselor or Medical Practitioner

a. Yes No Have you ever consulted a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental,

An affirmative answer to any of the above mentioned questions required the subsequent disclosure by the applicant of the names and addresses of each consulting physician as well as the beginning and ending dates for the consultations.⁷¹ Furthermore, each applicant was required to execute "Authorization and Release" forms, to release all records and rights of confidentiality. The plaintiff claimed that the Florida Bar would not certify an individual to practice law in Florida if in the past such individual had consulted a mental health professional unless he or she agreed to reveal to the Board the facts and circumstances of the consultation.⁷²

In denying the defendant's motion to dismiss, the court in *Ellen S.* centered on the extra investigations that an affirmative answer to question 29 provoked, rather than the inquiry itself. The court disagreed with the Board's argument that no discrimination had occurred because the plaintiff has not been denied a license to practice, and stated that the subsequent inquiries discriminate against individuals with disabilities by subjecting them to additional burdens based on their disabilities.⁷³

Another state to address this issue is Minnesota. The Dean and Faculty members of the University of Minnesota Law School, the William Mitchell College of Law and the Hamline University Law School petitioned for an order of the court directing the State Board of Law Examiners to delete questions from the Application for Admission to the Bar of Minnesota which required information about mental health treatment.⁷⁴ The petitioners argued that the questions should be removed as a matter of public policy, since they deter law students from seeking mental health counseling and unduly invade privacy.⁷⁵

Even though the court was unsure of the ADA's application to the questions at issue, the court issued an order, as a matter of public policy, to remove the questions from the application. The court stated that the prospect of having to

nervous or emotional condition, drug or alcohol use? If yes, state the name and complete address of each individual you consulted and the beginning and ending dates of each consultation.

b. Yes No Have you ever been diagnosed as having a nervous, mental or emotional condition, drug or alcohol problem? If yes, state the name and complete address of each individual who made each diagnosis.

c. Yes No Have you ever been prescribed psychotropic medication? If yes, state the name of each medication and the name and complete address of each prescribing physician. Psychotropic medication shall mean any prescription drug or compound effecting the mind, behavior, intellectual functions, perceptions, moods, or emotions, and includes anti-psychotic, anti-depressant, anti-manic and anti-anxiety medications. *Id.*

⁷¹*Id.*

⁷²*Ellen S.*, 859 F. Supp. at 1491.

⁷³*Id.* at 1494.

⁷⁴*In re Petition of Frickey*, 515 N.W.2d 741, 741 (Minn. 1994).

⁷⁵*Id.*

answer the mental health question may cause many law students to forego much needed counseling, and for the most part, the questions relating to conduct could elicit the information necessary to enable the court to protect the public from unfit practitioners.⁷⁶

Broad mental health questions were also addressed in *In re Underwood*.⁷⁷ In *Underwood*, the Maine Supreme Court ruled that broad questions about mental health on state bar applications violate the ADA.⁷⁸ The court reasoned that "the requirement to answer the questions discriminates on the basis of disability and imposes eligibility criteria that unnecessarily screen out individuals with disabilities." The judge did not rule out inquiries altogether, by stating that it was permissible for the board of bar examiners to fashion other questions more directly related to behavior that could affect the practicing of law without violating the ADA.⁷⁹ Again an emphasis was placed on the extra burdens that were placed on post affirmative answers to the questions, such as authorization for release of information.

Despite this trend, in October of 1994, the United States District Court for the Western District of Texas surprisingly ruled that bar examiners may ask questions about mental health history without linking their inquiries to an ability to perform the job. In *Applicants v. Texas Board of Law Examiners*,⁸⁰ Judge Sam Sparks held that it was "ludicrous to propose that protecting individuals with disabilities from discrimination can only be accomplished by prohibiting a state from directly investigating and assessing an applicant's emotional and mental fitness to practice law." The court stated that the Board has a duty to protect the public.⁸¹ While the court commented that broad based questions in

⁷⁶*Id.*

⁷⁷No. BAR-93-21, 1993 WL 649283 (Me., Dec. 7, 1993).

⁷⁸*Maine Judge is First to Ban Broad Mental Health Queries by Bar Examiners*, 4 DISABILITY COMPLIANCE BULL., Jan. 20, 1994, at 4.

⁷⁹*Id.*

⁸⁰No. A 93 CA 740 ss, slip op. (W.D. Tex. Oct. 10, 1994); *Mental Health Questions on Licensing Application Withstand ADA Challenge*, 5 DISABILITY COMPLIANCE BULL., Oct. 27, 1994, at 1 [hereinafter *Mental Health Questions*]. The question that withstood the ADA challenge in Texas are most likely to set the national boilerplate. The approved questions state in pertinent part:

Within the last ten years, have you been diagnosed with or have you been treated [for] bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

Have you, since the age of 18 or within the last 10 years, whichever period is shorter, been admitted to a hospital or any other facility for treatment of bipolar disorder, schizophrenia, paranoia or any other psychotic disorder?

Applicants who answer in the affirmative to the question must submit to the board details of the treatment and names of treating physician.

Id. at 10.

⁸¹*Mental Health Questions*, *supra* note 80, at 1.

other jurisdictions violated the ADA, Texas' questions complied with the law because they focused on only those mental illnesses that pose a potential threat to the applicant's present fitness to practice law. The court reasoned that inquiry into past diagnosis and treatment of the severe mental illnesses, such as bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder, was necessary to provide the Board with the best information possible to assess the functional capacity of the individual.⁸²

Another state that has addressed the possible discriminatory effects of bar application inquiries is the state of Virginia. In *Clark v. Virginia Board of Bar Examiners*,⁸³ the applicant refused to answer two questions inquiring about treatment and counseling for mental or nervous disorders. The Board advised Clark that a refusal to answer the questions made her Character and Fitness Questionnaire incomplete, which made her ineligible to sit for the bar exam.⁸⁴ The Board allowed Clark to sit for the bar, without prejudice to its position that she would have to answer the questions before being allowed to practice law in the state of Virginia. Clark successfully passed the bar examination, but her refusal to answer the two questions stopped her from being licensed.⁸⁵

In *Clark*, the court initially ruled that it failed to have jurisdiction to interfere in the Board's proceedings to determine Clark's fitness to practice law.⁸⁶ Furthermore, the court stated that the plaintiff did not have a disability as defined under the ADA.⁸⁷ However, in a Motion to Reconsider, the court retracted its position on both of these issues and the case is currently pending.⁸⁸

⁸²*Id.* at 10.

⁸³861 F. Supp. 512 (E.D. Va. 1994).

⁸⁴*Id.* at 514.

⁸⁵*Id.*

⁸⁶*Id.* at 516. In reaching its decision that it lacked jurisdiction, the District court reasoned that the licensing board was simply requesting that the Plaintiff finish her application by answering the two questions. Since the board had not made any decision about the Plaintiff's fitness to practice law, the court determined that it did not have jurisdiction to interfere in the state board's administrative proceedings. Accordingly, the court noted that she could bring her ADA claim in the context of state admission proceedings by petitioning the Supreme Court of Virginia.

⁸⁷*Clark*, 861 F. Supp. at 517. The disability that the Plaintiff claimed she had was "major depression recurrent." The plaintiff claimed that it substantially limited one or more of her major life activities, specifically that it affected her ability to concentrate, act decisively, sleep properly, orient herself, and maintain social relationships. The court found that the ADA did not cover such common difficulties and that the Fourth Circuit has expressly rejected attempts to define disabilities so broadly. The court referred to the plaintiff's expert deposition testimony that stated by the third year of law school, forty percent of law students reported significantly elevated depression levels. The court concluded that protecting this "disability" under the ADA would debase the high purpose of the statutory protections available to those truly handicapped. *Id.*

⁸⁸*Clark v. Virginia Bd. of Bar Examiners*, No. 94-211-A, 1994 U.S. Dist. LEXIS 12256 (E.D. Va. Aug. 31, 1994).

Other litigation concerning the discriminatory effects of bar application questions concerning mental treatment or history is pending in several other states. For instance, a suit was recently filed in the state of Connecticut. *Richard Roe v. Connecticut Bar Examining Committee* has been filed in the United States District Court for the District of Connecticut and contends that the plaintiff's history of mental disability is completely irrelevant to the practice of law.⁸⁹ The plaintiff was unwilling to answer questions about past mental illness. He claimed that the questions unnecessarily intruded on his privacy and were in violation of the ADA. The plaintiff advocated that the very fact that those types of questions were being asked, suggests that the examining committee has the stereotypical assumption that being treated for mental or emotional illness, affects one's ability to function as an attorney.⁹⁰ The examining committee believed that its questions were legally proper and relevant to a determination of fitness of bar applicants.⁹¹

A few commentators have addressed the need for uniformity concerning mental health inquiries that can be made to assess the health and fitness of a bar applicant. However, an agreement on whether it is permissible under the ADA to ask these types of questions does not seem close at hand. In a recent article, *Mental Health Inquiries: To Ask, or Not to Ask - That is the Question*,⁹² Thomas A. Pobjecky stated that such inquiries were needed to determine a qualified applicant, as "it is necessary for the protection of the public to screen out would-be lawyers who are not emotionally stable to fulfill the duties and responsibilities of a member of the legal profession."⁹³ He commented that the best source of accurate, detailed information concerning an individual's mental fitness was from the applicant, as a balanced and thorough identification of information was best achieved by a combination of self-reporting and third party contacts.⁹⁴ Pobjecky contended that the information gathered was only used to gain insight into an applicant's fitness to practice law and was not used to discriminate against those applicants with a disability.⁹⁵

While Pobjecky's reasoning seems logical, it appears to be inconsistent with the thrust of the ADA - to avoid burdening those with histories of disabilities. In *The Constitution, the Disability Act, and Questions About Alcoholism, Addiction, and Mental Health*, Charles L. Reischel asserted that no basis appears for a rigid "no inquiry" rule, however, where there is insufficient justification a general

⁸⁹*Bar Exams, Medical Boards are Putting ADA to the Test*, 4 DISABILITY COMPLIANCE BULL., July 7, 1993, 1. (This case has not yet been decided.)

⁹⁰*Id.* at 6.

⁹¹*Id.*

⁹²Thomas A. Pobjecky, *Mental Health Inquiries: To Ask, or Not to Ask - That Is the Question*, B. EXAMINER, Aug. 1992, 31.

⁹³*Id.* at 33.

⁹⁴*Id.* at 36.

⁹⁵*Id.*

prohibition against mental health inquiries may be found.⁹⁶ Reischel commented that because the information gathered was used to focus further investigations, individuals with disabilities were more closely scrutinized.⁹⁷ Reischel advocated that the questions should be removed from bar applications because serious mental health problems have almost always surfaced in response to other questions (about debt, crimes, arrests, litigation, discipline, etc.). Since the purpose behind the fitness inquiry is to uncover any risks as to competent job performance, the inquiry should be limited to evidence of a mental condition's interference with relevant activities. This type of information is almost always apparent through other information sought by the committee.⁹⁸ Therefore, inquiries as to mental health counseling are irrelevant in determining an individual's health and fitness to practice law.⁹⁹

Agreeing that mental health inquiries violate the ADA, Phyllis Coleman and Ronald A. Shellow in their article *Ask About Conduct, Not Mental Illness*, recently challenged bar examiners and medical boards to comply with the ADA.¹⁰⁰ They contended that by asking these questions, boards were implying that applicants with a history of treatment for mental illness were regarded as "having a disability."¹⁰¹ Therefore, any inquiries must comply with the ADA's requirements that questions be linked to the essential functions of the profession. Since no proof tied the information gathered to the essential functions of the profession, Coleman and Shellow asserted that the questions should altogether be eliminated for bar applications.¹⁰²

With the number of suits challenging bar examination questions under the ADA progressively increasing, a need for a uniform decision is imperative. The only case that has provided any guidance concerning this issue is the aforementioned Texas case *Applicants v. Texas Board of Law Examiners*.¹⁰³ In reaching its decision on the merits, the court came to the conclusion that states may ask questions about mental health history without linking those questions to the ability to practice the law. However, the court did concur that broad-

⁹⁶Charles L. Reischel, *The Constitution, the Disability Act, and Questions About Alcoholism, Addiction, and Mental Health*, B. EXAMINER, Aug. 1992, 10, at 19.

⁹⁷*Id.* at 20.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰Phyllis Coleman and Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution*, 20 J. LEGIS. 147 (1994).

¹⁰¹*Id.* at 165.

¹⁰²*Id.* at 166.

¹⁰³*Mental Health Questions*, *supra* note 80, at 10.

based mental health inquiries were violative of the ADA and only permitted inquiries that were tailored to discover major illnesses.¹⁰⁴

The *Texas Board* decision may provide other states with boilerplate language for general questions that do not violate that court's interpretation of the ADA, however, whether the decision adequately answered the issue remains to be seen. The court's reliance on a state's interest to protect the public seems paradoxical. Even general inquiries may violate public policy, as they may deter law students from seeking needed mental health counseling or any counseling for fear of not being certified to practice law. An applicant's failure to get treatment or reporting that treatment was received ironically defeats the states policy of protecting the public, as states may be certifying individuals who intentionally denied treatment and whose condition has subsequently worsened. This may create a legitimate question of competency.

V. CONCLUSION

The quest for the certification for the practice of law creates numerous problems regarding compliance with the Americans With Disabilities Act. While students with learning disabilities have a right to reasonable accommodations that level the competitive playing field, drawing the line on what is reasonable is often too difficult. Courts have given great deference to doctors' opinions of what is reasonable regarding a specific learning disability. However, with this deference, the focus of ensuring that a high standard of competence and fitness to practice law is upheld is blurring. A closer union between accommodations that are legitimately necessary under the ADA, and the competency and fitness requirements called for by the legal profession is needed.

Mental health inquiries during the bar application process also create potential compliance problems with the ADA. The cases and commentators assessing whether a bar application process may inquire into an applicant's mental health, demonstrate that courts are not as willing to go as far for protecting those with alleged mental disabilities from discrimination, as they are for protecting those with alleged learning disabilities from discrimination. This is an odd contradiction. If courts are under the impression that they are protecting the integrity of the profession by allowing questions about mental health on bar applications, it would seem logical to assume they would find extensions of time to take bar exams impermissible as that, too, would tend to compromise the integrity of the profession. This, however, is not the case.

While the difference between the protection of learning disabilities and the protection of mental health disabilities on bar applications appears to center around the making of accommodations, the inconsistency in logic detracts from the vital function of the certification process—to screen applicants for competency and fitness to practice law. Rather, challenges of certification procedures under the ADA have shifted the focus to fear of litigation. As Judge

¹⁰⁴*Id.*

Sparks stated, prohibiting the state from directly investigating and assessing an applicant's emotional and mental fitness to practice law would be ludicrous.

Both not being able to directly investigate mental fitness and providing highly deferential accommodations have a potentially disastrous effect in the legal community, as avenues for assessing competency are continually being narrowed. Learning and mental disability protection under the ADA in the quest for the certification of law must be refocused in favor of competency.

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