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NOTES

Attorneys: The Hypocrisy of the Anointed — The Refusal of the Oklahoma Supreme Court to Extend Antidiscrimination Laws to Attorneys in Bar Disciplinary Hearings

Prologue — A Hypothetical

Suppose you are an experienced practicing attorney. You are in the middle of a particularly heated courtroom exchange. Tempers are mounting, and the tension is high. You feel a little weak, but dismiss it as the normal "butterflies" you sometimes get in trial.

The opposing counsel makes a statement you find highly inflammatory. You object, but are overruled. Rage fills your mind. You shout your objection again, and again are overruled. Slightly dizzy, confused, you begin to scream incoherently. The judge finds you in contempt and fines you. Feeling nauseous, a cold sweat covering your body, you sit down. The hearing is soon over, and you stagger out of the courtroom, wondering what just happened.

A few days later, you collapse and are taken to the emergency room. Subsequent tests reveal that you have developed diabetes mellitus. The episode you had in the courtroom was most likely an attack of hypoglycemia related to the diabetic condition. The stress of the hearing intensified the symptoms.

Several months later, you have largely adjusted to the reality of taking daily insulin injections to compensate your condition. In fact, you feel better physically and more alert mentally than you have in a long time. To your surprise, you receive a summons from the State Bar Association's Disciplinary Board. The judge you screamed at has recommended you for discipline. Realizing that your conduct was caused largely by the diabetes, you are confident that the Disciplinary Board will dismiss the charges when they realize the circumstances. "After all," you think, "my doctor told me that I probably acted that way because of my diabetes. Now that I am on insulin injections, there really is little chance that this will happen again. Surely the Bar won't punish me for something that was beyond my control and unlikely to happen again?"

Or will it?¹

1. See *Hoffman v. New York State Bar Ass'n*, 343 N.Y.S.2d 994, 996 (App. Div. 1973) (deciding that attorney's diabetic condition that caused mental lapses during which misconduct occurred was no defense to disciplinary action).

Symptoms describing onset-diabetes mellitus and accompanying hypoglycemia were drawn from DAVID E. LARSON, M.D., *MAYO CLINIC FAMILY HEALTH BOOK* 707-16 (1990). Any medical error in

In 1993, a psychiatrist diagnosed Michael Busch as having Adult Attention Deficit Disorder (ADD).² Busch began a program of behavioral and drug therapy. After diagnoses, Busch continued to struggle with some of the professional responsibilities associated with the practice of law.³ In 1996, he faced disciplinary proceedings for misconduct which had been committed in 1991 — two years prior to the diagnoses of his condition.⁴ Both the State Bar Association and the Oklahoma Supreme Court largely ignored Busch's argument that his conduct had been caused by his disability.⁵ Apparently, both the Oklahoma Bar Association and the Oklahoma Supreme Court believe that the "old ways" are the "good ways" — just shove people with disabilities off to the side whenever they become inconvenient or embarrassing rather than deal with the reality of attorneys with disabilities.⁶

Introduction

More than forty-three million Americans suffer from some form of mental or physical disability.⁷ On July 26, 1990, President George Bush signed the Americans with Disabilities Act⁸ into law, extending federal civil rights protection to those Americans.⁹ For many disabled Americans, this law provided opportunities for access to restaurants,¹⁰ shopping centers,¹¹ libraries,¹² and post offices.¹³

Discrimination still creates problems for many disabled Americans, however. While some disabled Americans have found new job opportunities¹⁴ and some employers have been forced to end discriminatory business practices,¹⁵ change has

this hypothetical, however, is entirely mine.

2. See *State ex rel. Oklahoma Bar Ass'n v. Busch*, 919 P.2d 1114, 1115 (Okla. 1996). For a description of Attention Deficit Disorder, see *infra* note 64.

3. In 1993 and 1995, Busch was suspended for failure to pay professional dues. In 1994, his dues were late. In 1995, he was suspended for failure to comply with CLE requirements. See Complainant's Reply Brief at 7-8, *Busch*, OBAD No. 1187, SCBD No. 4068 (Dec. 4, 1995).

4. See *Busch*, 919 P.2d at 1115.

5. See *id.*, 919 P.2d at 1120.

6. This note does not purport to excuse or justify Busch's misconduct. Instead, this note asserts that the best way to protect the public interest and see that justice is served is to comply with the mandates of the federal antidiscrimination statutes rather than to ignore them. This note advances the proposition that both the public interest and the rights of attorneys with disabilities can be enhanced by changing Oklahoma's policy towards attorneys with disabilities.

7. See 42 U.S.C. § 12101(1)(a) (1994).

8. Americans with Disabilities Act of 1990, Pub. L. No. 106-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)).

9. See 42 U.S.C. § 12101 (1994).

10. See *Boston Eatery to Accommodate Disabled*, UPI, June 8, 1994, available in LEXIS, News Library, Arcnws File.

11. See *Bush Signs Law on Disabled; Measure Bans Discrimination Against AIDS Patients, Others*, ST. LOUIS POST-DISPATCH, July 27, 1990, at 23A.

12. See *id.*

13. See *Barriers Fall Today for the Disabled*, THE RECORD (Newark, N.J.), Jan. 26, 1992, at A03.

14. See *Connie Farrow, Disabled No Longer Out of Modeling Picture; U.S. Legislation Wakes Firms Up to Huge Market*, CH. TRIB., May 22, 1994, at 13.

15. See *Strip Club's Shower Doesn't Wash with Law*, LAS VEGAS REVIEW-JOURNAL, Apr. 22, 1994,

been slow for them in the workplace. Recent surveys have shown that although nearly four-fifths of all disabled Americans would like to work, only one-third have found jobs.¹⁶ Overall, there is a high level of dissatisfaction with the effectiveness of the Americans with Disabilities Act in opening job opportunities among individuals with disabilities.¹⁷

The legal profession has been equally slow in adapting to attorneys with disabilities. While the federal courts have required bar examiners¹⁸ and bar application committees¹⁹ to accommodate mentally disabled applicants in testing procedures and bar application questions, courts have loathed extending those same protections to practicing attorneys.²⁰ *State ex rel. Oklahoma Bar Ass'n v. Busch*²¹ is another example of the courts refusing to extend attorneys with disabilities the same protections guaranteed to other Americans.

This note will discuss the applicability of the Americans with Disabilities Act to the bar disciplinary process. Part I will examine the historical treatment of mental illness as a defense to attorney disciplinary hearings and the two major laws providing protection from discrimination to individuals with disabilities. Part II will recount the facts and holdings of *Busch* and study the Oklahoma Supreme Court's decision in light of precedent. Part III proposes a plan for extending the Americans with Disabilities Act protections to attorneys in bar disciplinary hearings while citing potential benefits and shortcomings. Finally, this note urges the Oklahoma Supreme Court and the Oklahoma Bar Association to adopt policies providing protection to attorneys with mental disabilities.

at 17A.

16. See *Survey: Many Disabled Jobless*, AP, May 27, 1994, available in LEXIS, Nexis Library, ARCNWS File.

17. See, e.g., *Transit Service for Disabled Is Not Fulfilling Its Obligations*, FORT LAUDERDALE SUN-SENTINEL, June 22, 1996, Editorial Section, at 1A; Tim Bryant, *Law-Aiding Disabled Under Fire; Some Fear Congress Will Water Down ADA*, ST. LOUIS POST-DISPATCH, Dec. 24, 1995, at 1A; Kim Norris, *Rights Law Falls Short of Target, Critics Say*, ST. PETERSBURG TIMES, June 19, 1995, Business Section, at 10; Mary Kane, *Disabilities Act Stirs Paranoia in Workplace; Handling Mental Troubles Vexes Bosses and Employees*, May 29, 1995, ROCKY MOUNTAIN NEWS (Denver), at 37A; Jay Mathews, *Disabilities Act Failing to Achieve Workplace Goals; Landmark Law Rarely Helps Disabled People Seeking Jobs*, WASH. POST, Apr. 16, 1995, § A; see also Ron A. Vassel, Note, *The Americans With Disabilities Act: The Cost, Uncertainty and Inefficiency*, 13 J.L. & COM. 397, 410 (1994) (arguing that ADA is burdensome and ineffective).

18. See, e.g., *D'Amico v. New York State Bd. of Law Exam'rs*, 813 F. Supp. 217, 223 (W.D.N.Y. 1993) (requiring New York Board of Law Examiners to make reasonable accommodations for disabled plaintiff during bar examination).

19. See, e.g., *Clark v. Virginia Bd. of Bar Exam'rs*, 880 F. Supp. 430, 431 (E.D. Va. 1995) (ruling certain questions about mental health on bar application too broad). See generally Phyllis Coleman & Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and the Constitution*, 20 J. LEGIS. 147 (1994).

20. See, e.g., *Doe v. Attorney Discipline Bd.*, No. 95-1259, 1996 U.S. App. LEXIS 5727, at *8 (6th Cir. Feb. 22, 1996) (per curiam).

21. 919 P.2d 1114 (Okla. 1996).

I. Background Information

A. Historical Treatment of Mental Illness as a Defense in Attorney Discipline Hearings

The impact of mental illness as a factor in disciplinary proceedings has been wildly unpredictable.²² In some cases, courts essentially ignore mental illness as a factor in attorney disciplinary proceedings,²³ while in others it serves to exonerate an attorney's misconduct.²⁴

Historically, mental illness has not provided a viable defense in attorney disciplinary hearings.²⁵ This is true even in cases where the misconduct was the product of a mental illness.²⁶ Courts find this policy appropriate because the primary goal of disciplinary cases is to protect the public.²⁷

Mental illness can serve to mitigate the severity of bar discipline.²⁸ Mitigating circumstances can reduce a penalty of disbarment to suspension²⁹ or reduce the duration of a suspension.³⁰ However, few states will consider mitigating circumstances where an attorney has misappropriated client funds.³¹

B. Federal Disability Antidiscrimination Laws: The Rehabilitation Act of 1973 and the Americans with Disabilities Act

The first comprehensive statute designed to protect the civil rights of the disabled

22. For a broad discussion about the use of mental illness as a defense in attorney discipline hearings, see generally Gregory G. Sarno, Annotation, *Mental or Emotional Disturbance as a Defense to or Mitigation of Charges Against Attorney in Disciplinary Proceeding*, 26 A.L.R.4TH 995 (1983).

23. "The insanity of a respondent does not foreclose bar discipline. . . ." *In re Hoover*, 745 P.2d 939, 946 (Ariz. 1987) (attorney with bipolar disorder cannot avoid discipline because disorder made him incapable of comprehending the nature of his acts).

24. See *In re McLondon*, 845 P.2d 1006, 1012-13 (Wash. 1993) (holding that attorney's bipolar disorder, following treatment, was a mitigating factor reducing disbarment sanction to a two year suspension, with credit granted for time license was inactive).

25. See *Hoffman v. New York State Bar Ass'n*, 343 N.Y.S.2d 994, 996 (App. Div. 1973) (deciding that attorney's physical illness that caused mental lapses during which misconduct occurred was no defense to disciplinary action).

26. See *Hoover*, 745 P.2d at 946.

27. See *Carter v. Gonella*, 526 A.2d 1279, 1280 (R.I. 1987) ("[T]he primary goal in disciplinary proceedings is to protect the public.") (quoting Committee of Prof. Ethics & Conduct of the Bar Ass'n v. Silver, 395 N.W.2d 877, 879 (Iowa 1986)); see also *In re Rivikind*, 791 P.2d 1037, 1042 (Ariz. 1990) (defining goal of disciplinary proceedings as to protect public and deter similar conduct from other attorneys, not to punish individual attorneys).

28. See *Hoover*, 745 P.2d at 945-46.

29. See *Rose v. State Bar*, 779 P.2d 761, 773-74 (Cal. 1989) (holding that attorney's mental disorder was mitigating factor which reduced trial panel's recommendation of disbarment to suspension).

30. See *In re Peek*, 565 A.2d 627, 631 (D.C. 1989) (suspending attorney whose misconduct was caused by mental illness for two months rather than four months).

31. See *In re Wilsor*, 409 A.2d 1153, 1154 (N.J. 1979) (stating generally that in all cases where an attorney knowingly misappropriates client funds, the attorney should be disbarred). *But see In re Couser*, 596 P.2d 26, 28 (Ariz. 1979) (pointing out that misappropriation of client funds generally warrants disbarment absent extenuating circumstances).

was the Rehabilitation Act of 1973.³² Congress intended the Act to develop and implement programs providing vocational training and to otherwise promote the independent living of disabled individuals.³³ Section 504³⁴ of the Rehabilitation Act contained the most sweeping civil rights provisions of the Act, prohibiting any program or activity receiving federal financial assistance from discriminating against a person based upon that person's disability.³⁵

The Act did not intend to insulate disabled employees from disciplinary actions that would be brought against any nondisabled employee.³⁶ In fact, an employee whose disability prevents him from being "otherwise qualified"³⁷ may not be able to take advantage of the Act's protection.³⁸ Courts have interpreted this to mean that an alcoholic whose misconduct is a result of his current alcohol usage³⁹ or a doctor suffering from bipolar disorder yet refusing to admit that he ever had any mental problems⁴⁰ could not seek protection under the Act because they were not otherwise qualified.

Congress designed the Americans with Disabilities Act of 1990⁴¹ (ADA) to provide strong antidiscrimination protection for persons with disabilities.⁴² The ADA sets forth antidiscrimination laws for employment,⁴³ for access to public

32. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-797b (1994)).

33. See 29 U.S.C. § 701 (1994).

34. 29 U.S.C. § 794 (1994).

35. The section reads in pertinent part:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id. For a further discussion of the effects of the Rehabilitation Act of 1973, see generally U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 47-56 (1983) (discussing ramifications of Rehabilitation Act of 1973 and other related disabilities legislation).

36. See *Wilber v. Brady*, 780 F. Supp. 837, 840 (D.D.C. 1992) (finding that alcoholic who killed person while driving under the influence of alcohol was fired for conduct, not disability, and is therefore not entitled to protection of Rehabilitation Act of 1973).

37. For a full discussion of who is a "qualified" individual with a handicap under the Rehabilitation Act of 1973, see generally Colleen R. Courtade, Annotation, *Who Is 'Qualified' Handicapped Person Protected from Employment Discrimination Under Rehabilitation Act of 1973 (29 USCS §§ 701 et. seq.) and Regulations Promulgated Thereunder*, 80 A.L.R. FED. 380 (1986).

38. See *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979) (holding that Act "requires only that an 'otherwise qualified handicapped individual' not be excluded from participating in a federally funded program 'solely by reason of his handicap'").

39. See *Gonzalez v. California State Personnel Bd.*, 39 Cal. Rptr. 2d 282, 286 (Ct. App. 1995) (holding that employee's discharge was related to current use of alcohol, not his general alcoholism, and therefore not protected by Rehabilitation Act of 1973).

40. See *Ramachandar v. Sobol*, 838 F. Supp. 100, 109 (S.D.N.Y. 1993) (holding that reasonable accommodations for medical professionals did not require professional licensing authorities to gamble with the public health).

41. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)).

42. See 42 U.S.C. § 12101(b)(2) (1994).

43. See *id.* §§ 12111-12117.

services,⁴⁴ and for public accommodations and services operated by private entities.⁴⁵ The rights guaranteed by existing federal statutes, including the Rehabilitation Act, and existing case law on these issues are still effective; the ADA simply broadens the scope of the protection offered under these laws and occasionally expands their power.⁴⁶

The employment and government programs portions of the ADA protects individuals with disabilities who, with or without reasonable accommodations, are "otherwise qualified" to perform the job or participate in or receive the benefits of a government program or service.⁴⁷ The law also excludes certain "disabilities" from coverage.⁴⁸ Finally, the ADA does not extend protection to individuals who are not "otherwise qualified."⁴⁹

II. *State ex rel. Oklahoma Bar Ass'n v. Busch*

A. *Facts*

Connie Bateman retained J. Michael Busch for representation in a medical malpractice suit.⁵⁰ The suit alleged that the doctor who delivered Bateman's adult daughter had been negligent in the delivery and that this negligence caused the daughter to suffer various physical and mental disabilities.⁵¹ In November 1989, the court granted Bateman a default judgment for ten million dollars.⁵²

Busch conducted a brief investigation to determine the doctor's assets, then sent the doctor a letter stating that he would not seek to execute on any of the doctor's personal assets, but would simply collect from any insurance proceeds available.⁵³ Bateman did not consent to this arrangement or to the letter being sent.⁵⁴ Subsequently, Busch discovered that the doctor's insurance policy was not in force at the time the negligent acts occurred.⁵⁵ The trial court held the letter to be a valid

44. *See id.* §§ 12131-12165.

45. *See id.* §§ 12181-12189.

46. *See* AMERICAN BAR ASS'N, THE AMERICANS WITH DISABILITIES ACT MANUAL: STATE AND LOCAL GOVERNMENT SERVICES, EMPLOYMENT, AND PUBLIC ACCOMMODATIONS 4 (John Parry, ed., 1992).

47. *See* 42 U.S.C. §§ 12111, 12132 (1994).

48. Excluded "disabilities" include: sexually deviant behavior (homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders); compulsive behavior (gambling, kleptomania, or pyromania); and psychoactive substance use disorders which are the product of current illegal drug usage. *See id.* § 12211(b).

49. *See supra* notes 38-40.

50. *See State ex rel. Oklahoma Bar Ass'n v. Busch*, 919 P.2d 1114, 1115 (Okla. 1996).

51. *See id.*

52. *See id.*

53. *See id.* Busch believed the doctor had few personal assets and was covered by malpractice insurance.

54. *See id.*

55. *See id.* Upon subsequent investigation, Busch discovered that the doctor had substantial personal assets including a ranch, multiple bank accounts, and an antique car collection.

covenant not to execute and barred recovery on the doctor's personal assets.⁵⁶ Bateman told Busch to file an appeal of the ruling, but Busch never did so.⁵⁷

Busch then sued the hospital that had employed the doctor. The trial court granted summary judgment to the hospital. Busch filed an appeal of the summary judgment one day too late; the Oklahoma Supreme Court dismissed the appeal as out of time.⁵⁸

In February 1993, Busch appeared before a district judge for a hearing on the enforceability of the covenant not to execute.⁵⁹ The judge specifically asked about the status of the suit against the hospital. Although the Oklahoma Supreme Court had dismissed the appeal as out of time, Busch told the judge that the appeal was pending and should be resolved shortly.⁶⁰

The Oklahoma Bar Association received a complaint against Busch for his handling of the Bateman cases.⁶¹ A trial panel of the Oklahoma Bar Association convened to hear the case and make recommendations to the Oklahoma Supreme Court.⁶² The Complaint lodged with the trial panel alleged Busch committed six counts of misconduct.⁶³ Busch testified that a psychiatrist had diagnosed him with ADD⁶⁴ in June and July 1993.⁶⁵ The psychiatrist presented expert testimony

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.* Busch also misled his client concerning the status of her appeal.

61. *See id.* This was not the first time a grievance had been filed against Busch for his handling of a case. In 1992, Busch was publicly reprimanded for failure to communicate with his clients in at least two cases. The Oklahoma Bar Association also reprimanded Busch for violating the mandatory response provisions of the Oklahoma Rules Governing Disciplinary Proceedings. *See State ex rel. Oklahoma Bar Ass'n v. Busch*, 832 P.2d 845, 846-47 (Okla. 1992). In 1993, Busch misled a client and unreasonably delayed paying a consulting physician in a related case. *See State ex rel. Oklahoma Bar Ass'n v. Busch*, 853 P.2d 194 (Okla. 1993). Busch was suspended for ninety days and placed on one year's probation with the stipulation that during the probation he would have to work with Lawyers Helping Lawyers throughout his probation. *See id.* at 197. Presumably, Bateman filed the complaint at bar; however, the record is unclear on that point.

62. Pursuant to Rule 6 of the Rules Governing Disciplinary Proceedings. *See* 5 OKLA. STAT. ch. 1, app. 1-A (Supp. 1996).

63. *See Busch*, 919 P.2d at 1115 n.1. The charges were as follows: Count I alleged misconduct by sending the letter agreeing not to pursue the doctor's personal assets; Count II alleged misconduct by failing to appeal the district court's ruling concerning the letter; Count III alleged misconduct for failing to keep Bateman informed as to the status of her case; Count IV alleged misconduct for failing to appeal the summary judgment in favor of the hospital on a timely basis; Count V alleged misconduct for failing to inform Bateman that the hospital case had been dismissed; Count VI alleged misconduct for making an intentional misrepresentation to the court. *See id.*

64. Attention Deficit Disorder (ADD) is essentially "a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent and severe than is typically observed in individuals at a comparable level of development." AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 78 (4th ed. 1994) [hereinafter DSM-IV]. The disorder is not new — psychiatrists first recognized it nearly a hundred years ago. Originally, ADD was diagnosed as a childhood disorder occurring in 3% to 5% of the population. *See* Edward M. Hallowell, M.D. & John J. Ratey, M.D., DRIVEN TO DISTRACTION: RECOGNIZING AND COPING WITH ATTENTION DEFICIT DISORDER FROM CHILDHOOD THROUGH ADULTHOOD 12 (1994). Experts now believe as many as 50%

regarding Busch's condition to the trial panel.⁶⁶ The trial panel concluded that Busch had committed professional misconduct on all six counts of the Complaint, but that two of the counts were related to Busch's ADD.⁶⁷ The trial panel recommended that the Oklahoma Supreme Court suspend Busch for two years, then readmit him subject to the conditions proposed by the expert psychiatrist's letter of August 1, 1995.⁶⁸

The Supreme Court of Oklahoma reviewed the trial panel's findings *de novo*.⁶⁹ The respondent, Michael Busch, argued that the trial panel erred because it refused to make a reasonable accommodation for his disability as mandated by the Americans with Disabilities Act.⁷⁰ The court considered two issues on review: (1) whether the ADA applies to the Bar Association in general and to attorney disciplinary proceedings in particular⁷¹ and (2) whether the provisions of the ADA prohibit sanctioning an attorney whose misconduct arises from his disability.⁷² The court held that while the ADA does apply to the Bar Association and related disciplinary proceedings,⁷³ it does not necessarily prohibit sanctioning an attorney's misconduct, even if the misconduct arises from the attorney's mental illness.⁷⁴

B. Analysis of the Court's Reasoning

Busch contended that the disciplinary panel should have followed the laws and regulations set forth by the ADA. The respondent presented two arguments in support of his position. First, the respondent claimed that the ADA applied to bar disciplinary hearings.⁷⁵ Second, the respondent asserted that, as an individual with

of children who are diagnosed with the disorder will continue to have symptoms in adolescence and adulthood. See H. Russell Searight et al., *Attention-Deficit/Hyperactivity Disorder: Assessment, Diagnosis and Management*, 40 J. FAM. PRAC. 270 (1995), available in LEXIS, News Library (discussing the revised criteria for diagnosis presented in DSM-IV, *supra*).

In adults, symptoms of hyperactivity often manifest as restlessness and difficulty in pursuing sedentary activities. Impulsivity may occur in the form of inappropriate social activities (talking out of turn, failing to listen to directions, or initiating conversations at inappropriate times) and may lead to the pursuit of potentially dangerous activities without regard to the consequences. See DSM-IV, *supra*, at 79.

65. See *Busch*, 919 P.2d at 1115. Note that Dr. Dodson diagnosed Busch during the 1993 disciplinary suspension. See *infra* note 66.

66. See *Busch*, 919 P.2d at 1116. Busch's expert, Dr. William W. Dodson, M.D., submitted a complete report as to Busch's condition in August 1995. Supplement to the Record at 4-6, *Busch* (OBAD No. 1187; SCBD No. 4)68). Additionally, at the request of the trial panel, Dr. Dodson submitted a written proposal of a program designed to help attorneys with problems similar to Busch's. See *Busch*, 919 P.2d at 1116.

67. See *Busch*, 919 P.2d at 1116. The trial panel found that counts two and four, see *supra* note 63, were related to Busch's ADD. See *Busch*, 919 P.2d at 1116.

68. See *supra* note 66.

69. In Oklahoma, the supreme court reviews all attorney disciplinary hearings *de novo*. See *State ex rel. Oklahoma Bar Ass'n v. Kessler*, 818 P.2d 463, 466 (Okla. 1991).

70. See *Busch*, 919 P.2d at 1116-17.

71. See *id.* at 1117.

72. See *id.*

73. See *id.* at 1119.

74. See *id.* at 1119-20.

75. See *id.* at 1116-17.

a disability recognized by the ADA, he was entitled to a "reasonable accommodation" for his disability and that the suspension of his license was not a "reasonable accommodation."⁷⁶ Judge Summers, writing for the court, sustained the respondent's first contention but rejected the second.

1. Authority of the Court to Regulate the Legal Profession

The Oklahoma Supreme Court noted its broad authority to regulate the legal profession, referring to *Schware v. Board of Bar Examiners*.⁷⁷ In *Schware*, the New Mexico State Bar Association denied an applicant to the New Mexico State Bar permission to take the bar examination because he lacked "moral character."⁷⁸ The United States Supreme Court held that, while a state can set high standards for bar applicants, those standards must bear a rational connection to the applicant's ability to practice law.⁷⁹ In a concurring opinion, Justice Frankfurter noted that "[r]efusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause."⁸⁰

The *Schware* decision, while largely supportive of the power of state courts to regulate the legal profession, set forth an important rule limiting that power: the "rational connection test."⁸¹ In other words, to deny a person the opportunity to enter the legal profession, the state must show some "rational connection" between the reason that a person is denied the opportunity to practice and that person's fitness or capacity to practice law.⁸² Applying this standard to the *Busch* case, the court must show some rational connection between Busch's mental disability and his inability to practice law.

Other restrictions have been placed on the states' ability to regulate the legal profession. For example, in *Goldfarb v. Virginia State Bar*,⁸³ a husband and wife sued the Virginia State Bar alleging violations of the Sherman Antitrust Act,⁸⁴ stemming from the State Bar setting minimum fees for legal services.⁸⁵ The State Bar also issued ethical opinions indicating that failure to follow the fee schedule

76. *See id.* at 1117.

77. 353 U.S. 232 (1957).

78. *See id.* at 234-35. The Board of Bar Examiners determined *Schware* lacked moral character because he had once belonged to the Communist Party, had been arrested (but never convicted of any crime), and had used aliases. These charges centered on admissions *Schware* made on his application as well as on confidential information forwarded to the Bar Examiners. The events in question occurred at least fifteen years prior to *Schware's* application to the Bar. *See id.* at 234.

79. *See id.* at 239.

80. *Id.* at 249 (Frankfurter, J., concurring).

81. *Id.* at 239. The court noted that, for example, a person could not be denied the opportunity to take the bar examination because he was black or belonged to a certain mainstream political party. *See id.*

82. *See id.*

83. 421 U.S. 773 (1975).

84. 15 U.S.C. §§ 1-36 (1994).

85. *See Goldfarb*, 421 U.S. at 776.

could result in disciplinary action.⁸⁶ Petitioners, who sought legal services to close a real estate transaction, argued this practice amounted to price fixing and was therefore illegal under the Sherman Act.⁸⁷

Respondent, the Virginia State Bar, defended its right to regulate prices in the legal profession by claiming, in part, that Congress did not intend for the Sherman Act to apply to the legal profession.⁸⁸ However, the respondents were unable to provide any specific legislative history or statutory authority supporting this contention.⁸⁹ The Court, while noting the traditional power of states to regulate the legal profession, rejected this argument, pointing out "Congress intended to strike as broadly as it could in [section 1] of the Sherman Act and to read into it so wide an exemption as that urged [by respondent] . . . would be at odds with that purpose."⁹⁰ The Court mentioned, in dicta, that it "did not intend [any] diminution of the authority of the State to regulate its professions."⁹¹

Thus, as noted above, while a state supreme court has broad powers to regulate the legal profession, it may not set standards that have no relation to the candidate's ability or capacity to practice law, and may not ignore relevant federal laws and regulations. The standards should be designed to protect the public and the integrity of the bar, but must be within certain limitations.

2. *Applicability of the ADA to Bar Association Proceedings*

Courts first addressed the applicability of the ADA to state bar associations in cases involving either application for admission to the bar⁹² or accommodations for taking the bar examination.⁹³ In both instances, courts forced bar examiners and bar application committees to adopt policies consistent with the mandates of the ADA.

The ADA prohibits discrimination by reasons of disability against any disabled person who is "otherwise qualified" to participate in or receive the benefits of a government program or service.⁹⁴ The regulations governing the ADA prohibit a public entity⁹⁵ from directly or indirectly using any standard that would "have the effect of subjecting qualified individuals with disabilities to discrimination on the

86. *See id.* at 777.

87. *See id.* at 778.

88. *See id.* at 786.

89. *See id.*

90. *Id.* at 787.

91. *Id.* at 793.

92. *See generally* John D. McKenna, Note, *Is the Mental Health of Bar Applicants a Legitimate Concern of State Professional Licensing Boards? The Americans With Disabilities Act vs. State Professional Licensing Boards*, 12 HOFSTRA LAB. L.J. 335 (1995).

93. *See generally* Francis P. Morrissey, *The Americans with Disabilities Act: The Disabling of the Bar Examination Process?*, THE BAR EXAMINER, May 1993, at 9.

94. *See* 42 U.S.C. § 12132 (1994).

95. *See* 28 C.F.R. § 35.104 (1995). "Public entity means (1) any State or local government; (2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(b) of the Rail Passenger Service Act)." *Id.*

basis of disability.⁹⁶ Furthermore, a public entity may not administer or maintain a licensing or certification program that discriminates against or excludes a person because of a disability.⁹⁷ The ADA also requires that a public entity make reasonable modifications to its practices or policies to accommodate persons with disabilities.⁹⁸ Exceptions to this requirement exist in cases where no reasonable accommodation can be made or when the accommodation or modification would fundamentally alter the nature of the program.⁹⁹

A Delaware case, *In re Rubenstein*,¹⁰⁰ held that the ADA applied to bar examiners. In *Rubenstein*, the petitioner, who had a learning disability, requested additional time to take the bar examination. The Board of Bar Examiners granted her additional time on only part of the test. Subsequently, the petitioner passed the portion with which additional time was granted but failed the remainder of the examination.¹⁰¹

The court applied the regulations accompanying the ADA and determined that the bar examiners, while correct in granting additional time for one portion of the bar examination, had unreasonably denied petitioner time for the remainder of the examination.¹⁰² The court held that "the board's decision to deny [petitioner] additional time . . . is inconsistent with . . . the ADA regulations . . ."¹⁰³

A similar result occurs when bar applications ask applicants broad questions concerning an applicant's history of mental or emotional disorders.¹⁰⁴ Bar application questions concerning an applicant's mental health must have some connection to the ability to practice law; otherwise, the question violates the ADA. Similarly, bar members who apply for a judicial position may not be required to divulge mental health information that bears no connection to the ability to perform the duties of a judge.¹⁰⁵

Here, the Oklahoma Supreme Court did not directly address a key issue. The court stated that the ADA clearly applied to the Oklahoma Bar Association as an arm of the Oklahoma Supreme Court, but then held that the ADA "does not prevent this Court from sanctioning [an attorney]."¹⁰⁶ Citing extensively to *Florida Bar v. Clement*,¹⁰⁷ the *Busch* court inferred that an attorney who committed serious misconduct was "not otherwise qualified" under the ADA.¹⁰⁸ Furthermore, the

96. 28 C.F.R. § 35.130(b)(3)(I) (1995).

97. See 28 C.F.R. § 35.130(b)(6) (1995).

98. See 28 C.F.R. § 35.130(b)(7) (1995).

99. See *id.*

100. 637 A.2d 1131 (Del. 1994).

101. See *id.* at 1133-34.

102. See *id.* at 1139. The court approved, for example, the bar association requirement that Rubenstein present evidence that she had a disability requiring accommodations.

103. See *id.*

104. See *Morrissey*, *supra* note 93.

105. See *Doe v. Judicial Nominating Comm'n*, 906 F. Supp. 1534, 1536-37 (S.D. Fla. 1995) (holding that questions asked of candidates for judicial position were overly broad and in violation of ADA).

106. *Busch*, 919 P.2d at 1118 (quoting *Florida Bar v. Clement*, 662 So. 2d 690, 700 (Fla. 1995)).

107. 662 So. 2d 690 (Fla. 1995).

108. See *Busch*, 919 P.2d at 1118.

court determined that where an attorney commits serious misconduct, no reasonable accommodations are possible.¹⁰⁹

This analysis flies in the face of the mandates of the ADA.¹¹⁰ The ADA prohibits a governmental entity from denying an individual with a disability the right to participate in or gain benefits from a government program if he is otherwise qualified with or without reasonable accommodations for his disability.¹¹¹ The Oklahoma Supreme Court should have taken note as to whether Busch had continued to commit acts of misconduct after being diagnosed, and whether he was capable, with or without a reasonable accommodation, of continuing to practice law.

3. Impact of the ADA to the Imposition of Discipline

Finally, the court considered whether the ADA prohibits the imposition of bar discipline. The court relied heavily on the decision in *Florida Bar v. Clement*¹¹² to decide how courts should evaluate ADA claims in bar disciplinary hearings.¹¹³

In *Clement*, the Florida Bar Association recommended the Florida Supreme Court impose sanctions on an attorney who misappropriated funds from two clients.¹¹⁴ The attorney claimed that his actions were the result of his mental disorder and that the recommended discipline violated the ADA.¹¹⁵ The Florida Supreme Court rejected the attorney's ADA claims and ordered his disbarment.¹¹⁶

The court based its decision on two factors. First, the court pointed out that at least some of Clement's conduct was not the result of his mental disorder.¹¹⁷ The court held that a causal connection between the attorney's mental illness and the alleged misconduct must exist for an attorney to invoke a claim under the ADA.¹¹⁸

Second, the Florida Supreme Court indicated that the ADA might not bar discipline even if the misconduct did result from an attorney's mental illness.¹¹⁹ The court based its reasoning on its interpretation of the rules regulating the ADA.¹²⁰ The court interpreted the regulation to mean that if no reasonable

109. *See id.* at 1119.

110. *See supra* notes 42-49.

111. *See supra* note 37. Obviously, given Busch's history, the court would likely have reached the same conclusion. However, that is not and will not necessarily be true in every case.

112. 662 So. 2d 690 (Fla. 1995).

113. *See Busch*, 919 P.2d at 1118.

114. *See Clement*, 662 So. 2d at 692.

115. *See id.* at 699.

116. *See id.* at 700.

117. *See id.* The court noted that Clement's psychiatrist claimed the attorney was incapable of distinguishing right from wrong, but that his contention was rejected by the disciplinary referee. The court also noted that on at least one occasion, the attorney was not emotionally impaired when he misused client funds. *See id.* at 699-700.

118. *See id.* at 700 (citing *People v. Goldstein*, 887 P.2d 634, 638 n.2 (Colo. 1994) (attorney's mental illness was not a direct cause of misconduct; therefore disciplinary measures would not violate the ADA)).

119. *See Clement*, 662 So. 2d at 700.

120. *See* 28 C.F.R. § 35.104 (1996). A person is a qualified individual with a disability with respect to licensing if he or she, with or without reasonable modifications, "meets the essential requirements" for receiving a license. *See id.*

modification of the rules regulating the legal profession is possible, the ADA does not prevent exclusion from a government program or activity.¹²¹ This decision parallels similar disciplinary decisions governed by the ADA and the Rehabilitation Act of 1973.¹²²

The Oklahoma Supreme Court referred to *In re Wolfgram*¹²³ to determine whether the ADA covers an individual with a disability. The *Wolfgram* case involved an attorney being forced into "involuntary inactive" status because of his mental illness.¹²⁴ The attorney claimed that placing him on involuntary inactive status violated the ADA.¹²⁵

The *Wolfgram* court concluded that an attorney who was not otherwise qualified could not invoke the protection of the ADA in a bar disciplinary hearing.¹²⁶ The justices held that, since the evidence presented showed that the attorney was not capable of consistently and effectively practicing law without the threat of harm to his clients or the public, he was not otherwise qualified to practice law.¹²⁷ The ADA does not require a court to allow an attorney to practice law when doing so poses a substantial risk to clients and the public at large.¹²⁸

The Oklahoma Supreme Court's analysis of these cases led it to conclude that the ADA did not prohibit disciplining an attorney with a disability.¹²⁹ While this is true to a certain extent, the prior cases suggest that some reasoning and analysis of the threat the attorney poses to the general public is necessary, particularly in cases where most or all of the attorney's misconduct arose from a mental disability.¹³⁰ Rather than objectively applying the conclusions of law from similar cases, however, the Oklahoma Supreme Court reverted to its traditional practice of considering mental illness only as a mitigating factor in attorney discipline cases.¹³¹ The court determined that its duty to protect the integrity of the bar and public confidence in practicing attorneys superseded any duties set forth by the ADA.¹³² In fear of "shirking its duty as the guardians of the state's bar,"¹³³ the Oklahoma Supreme Court presented a policy blatantly discriminatory to individuals with disabilities.

121. See *Clement*, 662 So. 2d at 700.

122. See *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979); see also *Stillwell v. Kansas City, Mo. Bd. of Police Comm'rs*, 872 F. Supp. 682, 685 (W.D. Mo. 1995) (holding automatic decision to deny private security guard license to one-handed man, without showing that he is not "otherwise qualified" to perform necessary job duties, violated the ADA).

123. *In re Wolfgram*, No. 90-TT-16955, 1995 WL 506002 (Cal. Bar Ct. 1995).

124. See *Wolfgram*, 1995 WL 506002, at *1.

125. See *id.*

126. See *id.* at *7.

127. See *id.*

128. See *id.*

129. See *State ex rel. Oklahoma Bar Ass'n v. Busch*, 919 P.2d 1114, 1119-20 (Okla. 1996).

130. See *supra* notes 112-28 and accompanying text.

131. See *Busch*, 919 P.2d at 1120.

132. See *id.*

133. *Id.*

III. A Plan for Incorporating the ADA in Bar Discipline Actions

A. Policy Analysis of Status Quo

Most state courts are in fact reluctant to afford any legitimacy to mental defenses of bar discipline actions.¹³⁴ This practice continues because of the court's desire to protect the integrity of the bar and members of the public from attorneys deemed unfit to practice law.¹³⁵ Until recently, these concerns allowed state bar associations to ask broad and irrelevant questions about the mental health backgrounds of bar applicants.¹³⁶ It would be illogical to suggest that the ADA may serve to protect these individuals and yet cannot provide protection to attorneys whose mental illness has caused them to commit acts of misconduct.

The decision in *Clement* suggests a three part test to determine the applicability of the ADA to professional disciplinary actions. First, does the professional suffer from a disability covered under the ADA?¹³⁷ Second, does the alleged misconduct arise from the covered disability?¹³⁸ Finally, can any reasonable modifications be made to the licensing that would allow the professional to meet the essential requirements for receiving or maintaining the license.¹³⁹

To comply fully with the ADA, a court reviewing a professional disciplinary hearing should make its determinations based on the first two portions of this test. If some or all of the misconduct is the result of mental illness, the court should modify its normal disciplinary rules to safeguard the civil rights of disabled attorneys as well as the interests of the bar and of the public. The third prong of the test should be analyzed with the requirements of the ADA in mind.

Some courts have argued that they already account for the disciplined attorney's disability because the disability may mitigate any disciplinary action.¹⁴⁰ However, in the overwhelming majority of these instances, the attorney still faces punishment for misconduct he may have had no control over.¹⁴¹ The current approach has other problems as well. It leads to inconsistent rulings¹⁴² and unnecessarily drives individuals who may overcome their disability and be productive attorneys out of the profession.¹⁴³

134. See *supra* notes 22-28 and accompanying text.

135. See *In re Wolfgram*, No. 90-TT-16955, 1995 WL 506002, at *7 (Cal. Bar Ct. 1995).

136. See *supra* notes 92-93 and accompanying text.

137. See 42 U.S.C. § 12102(2) (1994). "The term 'disability' means, with respect to an individual — (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.*

138. See, e.g., *supra* notes 36-40 and accompanying text.

139. See 28 C.F.R. § 35.130(b)(7) (1996).

140. See *supra* notes 29-30 and accompanying text.

141. See *In re Hoover*, 745 P.2d 939, 946 (Ariz. 1987).

142. See *supra* note 31 and accompanying text.

143. See, e.g., *In re McLendon*, 845 P.2d 1006, 1012-13 (Wash. 1993).

B. Proposed ADA Plan

Any new plan for addressing mental illness in attorney discipline proceedings should be modeled as much as possible on existing rules and procedures. This will not only make creation of the ADA plan easier but will also provide an existing framework of court decisions and interpretations. The modifications must also serve to protect the public interests and preserve the integrity of the bar.¹⁴⁴

One possible method of accomplishing these goals while preserving the rights of disabled attorneys is suggested by rules adopted in nineteen states. These address treatment of mentally incapacitated attorneys.¹⁴⁵ The rules call for mentally disabled or incompetent attorneys to be placed on "disability inactive" status. Courts and bar associations may easily modify these rules to conform to ADA guidelines.

An examination of the Colorado Court Rules¹⁴⁶ is useful for understanding this system. In Colorado, an attorney who is unable to perform his professional responsibilities is placed on disability inactive status.¹⁴⁷ The court may transfer an attorney to disability inactive status if a court has declared the attorney incompetent, if the attorney is involuntarily committed to a mental hospital, if the attorney has voluntarily petitioned for a guardian, or if the attorney has been declared not guilty by reason of insanity in a criminal action.¹⁴⁸ Furthermore, an interested party may petition the Colorado Supreme Court to investigate whether an attorney is incapable of continuing to practice law due to mental or emotional disability or addiction to drugs or alcohol.¹⁴⁹ The court may require the attorney to undergo physical or mental evaluations and must grant the attorney the opportunity to show why such examinations are unnecessary as well as the opportunity to defend against the charges.¹⁵⁰ Finally, if an attorney seeks to defend a professional misconduct case on the grounds of disability or addiction, the misconduct hearing is immediately suspended, and the attorney is ordered to undergo a medical examination.¹⁵¹ In all these hearings, the burden of proof is placed upon the party seeking to transfer the

144. See *State ex rel. Oklahoma Bar Ass'n v. Busch*, 919 P.2d 1114, 1119 (Okla. 1996).

145. Nineteen states have adopted some form of "disability inactive" rules. See ALA. R. DISC. P. 27; ALASKA R. BAR 30; ARIZ. REV. STAT. ANN. SUP. CT. R. 59 (1988 & Supp. 1996); ARK. PROF. CONDUCT PROC. § 7; CAL. BUS. & PROF. CODE § 6007(a); COLO. R. CIV. P. 241.19; HAW. R. SUP. CT. 2.19; ILL. SUP. CT. R. 758; 1995 KAN. CT. R. ANNOT. 220; MINN. R. PROF. RESP. 28; NEV. SUP. CT. R. 117; N.J. R. GEN. APP. 1:20-12(a); PA. R. DISC. ENF. 301; R.I. SUP. CT. R. art. III, Rule 17; S.C. R. APP. CT. 413, ¶ 19; S.D. CODIFIED LAWS § 16-19-48 (1995); TENN. R. SUP. CT. 9, § 21.1; WASH. R.L.D. 10.2; WYO. R. DISC. CODE XVII. All of these state rules are available in LEXIS, States Library, Allcde File.

146. COLO. R. CIV. P. 241.19 (1995). Although no two states' Rules for Professional Conduct are identical, the Colorado rule is typical of states employing a "disability inactive" system.

147. See COLO. R. CIV. P. 241.19(a) (1995).

148. See *id.* Rule 241.19(b).

149. See *id.* Rule 241.19(c).

150. See *id.*

151. See *id.* Rule 241.19(d).

attorney to disability inactive status. Clear and convincing evidence is required to transfer the attorney to disability inactive status.¹⁵²

Disability hearings are not considered disciplinary hearings,¹⁵³ and, by their very nature, abide by the mandates of the ADA.¹⁵⁴ An attorney who is placed on the disability inactive status has been ruled "not otherwise qualified" by the court and therefore not protected by the ADA. The *Wolfgram* case involves the application of the ADA to just such a plan.¹⁵⁵ In *Wolfgram*, the State Bar Court of California ruled that an attorney who is placed on disability inactive status may not use the protections afforded by the ADA because he was not an "otherwise qualified" individual and therefore was not within the class protected by the Act.¹⁵⁶ The court noted, however, that "if at any time respondent can show that there is no longer a basis for this inactive enrollment, he may file an application . . . for transfer to active status."¹⁵⁷

Many states currently use programs such as Lawyers Helping Lawyers¹⁵⁸ or require periodic contact with the state bar by the attorney or his physician or psychiatrist during periods of probation.¹⁵⁹ These practices should continue as they provide an additional safeguard for the general public. Additionally, many states' rules of conduct require a judge or attorney to report professional misconduct, including cases where an attorney may be unfit to practice law.¹⁶⁰ If attorneys will

152. *See id.* Rule 241.19(e).

153. *See id.* Rule 241.19(a).

154. *See* 28 C.F.R. § 35.130(b)(7)-(b)(8) (1996) (allowing public entities to refrain from making program modifications or to set eligibility criteria that screen out a disabled individual if imposing the modification would "fundamentally alter the nature of the service, program, or activity" or if the eligibility criteria are "necessary for the provision of the service, program, or activity being offered").

While arbitrarily suspending an attorney's license for some misconduct arising from placing an attorney on disability inactive status until the illness no longer affects the attorney's ability to practice law would be exactly the "modification" or "eligibility criteria" the regulations require.

155. *See* discussion of *Wolfgram* *supra* notes 123-28 and accompanying text.

156. *See Wolfgram*, 1995 WL 506002, at *6. The court examined several employment discharge cases to reach its conclusion, including, *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 214 (4th Cir. 1994) (employee's disability prevented her from meeting essential job requirements despite accommodations); *Reigel v. Kaiser Foundation Health Plan*, 859 F. Supp. 963 (E.D.N.C. 1994) (shoulder injury and mental fitness made doctor unable to perform essential job functions); and *Larkins v. CIBA Vision Corp.*, 858 F. Supp. 1572 (N.D. Ga. 1994) (customer service representative who had frequent panic attacks was unable to complete essential job functions despite accommodations). Note that these cases involved suits brought against employers under Title I of the ADA. *See supra* note 37.

157. *Wolfgram*, 1995 WL 506002, at *7.

158. Lawyers Helping Lawyers is a confidential program provided by the Oklahoma Bar Association. The program is designed to help members who are having personal troubles that adversely affect their practice. OKLAHOMA BAR ASSOCIATION, LAWYERS HELPING LAWYERS: AN OKLAHOMA BAR ASSOCIATION PROJECT FOR REFERRAL OF ATTORNEYS IN NEED OF ASSISTANCE 2, available from Oklahoma Bar Association. The rule governing the "Lawyers Helping Lawyers" program is codified at 5 OKLA. STAT. ch. 1, app. 1-A, Rule 5.3(f) (Supp. 1996).

159. *See, e.g., State ex rel. Oklahoma Bar Ass'n v. Busch*, 919 P.2d 1114, 1120 (Okla. 1996).

160. *See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT* Rule 8.3(a) (1996) (reading, in part: "A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a

police the profession, and if failure to do so could be a violation of ethical rules of conduct, then the public and the bar will be protected by early detection and treatment of attorneys with mental or other disabilities.

Disability hearings, therefore, seek to remove attorneys with disabilities, mental or otherwise, thereby preventing them from being able to competently practice law, from active status until the disability no longer interferes with the attorney's ability to practice law. In an effort to prevent abuse, however, most states place restrictions or qualifications on disability inactive status that may violate the mandates of the ADA by unreasonably limiting an attorney's opportunity to seek reinstatement¹⁶¹ or by allowing misconduct hearings suspended during the disability period to be pursued when the attorney seeks reinstatement.¹⁶² As long as these provisions are in place, the potential of penalizing or unfairly treating an individual with a disability exists. These concerns may be addressed as follows.

First, a better solution to the reinstatement dilemma is to place reasonable restrictions on the number of times per year an attorney may seek reinstatement. This would allow attorneys such as Busch, who discover they have a mental disability and promptly seek help for the disability, to reenter the profession in an expeditious manner. A good benchmark might be to allow an attorney to file for reinstatement as often as the state offers the bar examination.¹⁶³ This would allow an attorney on the disability inactive rolls a reasonable number of opportunities per year to seek reinstatement, but would sufficiently regulate the system so as to prevent potential abuse. This would allow an attorney who is on the disability inactive status to undergo up to six months of treatment and therapy. The result might be a more stable attorney who is better prepared to cope with his disability in the profession.

Second, courts should not punish persons whose conduct is caused by their disability in disciplinary proceedings for that conduct. Discipline is designed to protect "the integrity of the bar and [to promote] the public's confidence in the state's many attorneys."¹⁶⁴ A policy that punishes attorneys for misconduct that arose from a disability now under control, cured, or in remission does not serve either interest. If the attorney has sought proper treatment and been ruled competent to practice law, then the attorney does not threaten the integrity of the bar. Supporting programs that seek to help members with mental disabilities get the treatment they need can only strengthen the bar. Courts threaten the integrity of the bar, however, when their rulings tacitly support blatantly discriminatory practices including punishing individuals for no other purpose than the "dignity" of the bar.¹⁶⁵

lawyer in other respects, shall inform the appropriate professional authority.").

161. *See, e.g.*, HAW. R. SUP. CT. 2.19(f) (Hawaiian disability inactive rule allowing one petition for reactivation per year).

162. *See, e.g.*, 5 OKLA. STAT. ch. 1, app. 1-A, Rule 10.4 (Supp. 1996).

163. Generally twice per year. *See, e.g.*, 5 OKLA. STAT. § 16 (1991).

164. *State ex rel. Oklahoma Bar Ass'n v. Busch*, 919 P.2d 1114, 1120 (Okla. 1996).

165. *See generally* Mary Elizabeth Cisneros, Note, *A Proposal to Eliminate Broad Mental Health Inquiries on Bar Examination Applications: Assessing an Applicant's Fitness to Practice Law by*

A disability inactive system also protects the public confidence in the bar because it monitors attorney conduct. Attorneys suffer a much higher rate of mental illness than the general population.¹⁶⁶ The alcoholism and drug abuse rates for professionals including attorneys are as much as three times higher than that of the general population.¹⁶⁷ A system that seeks to intervene and get treatment for attorneys suffering from these problems while insulating them from disciplinary action resulting from their problems is more likely to succeed in promoting quality legal assistance to the public than one that encourages attorneys to hide their problems and avoid treatment.

Additionally, the public is already protected from attorneys who misappropriate funds or whose actions cause their clients financial damage. An attorney who steals or otherwise misappropriates his client's funds may be criminally prosecuted. A successful prosecution will serve to protect the public by incarcerating the attorney and will act as a deterrent to other attorneys who may consider such actions. Additionally, a client may sue the attorney in malpractice for his damages. Collection may be difficult; however, the client may be able to recover more if courts have allowed the mentally disabled attorney to get help for his condition and resume practice because the attorney's income level is likely to be higher as a lawyer than in other professions. In any event, the client is no worse off under a disability inactive system than under any of the current systems.

Finally, a disability inactive system protects the public. This system forces attorneys with mental disabilities, who face disciplinary action, to get treatment before resuming the practice of law. The current system may suspend an attorney for a period of time, but the attorney may resume practice regardless of the attorney's long-term mental health needs. The current system has no long-term program to monitor and help attorneys with their problems; it merely waits until the problems have escalated to the point of malpractice and then punishes an attorney who, had help been available previously, may have avoided committing malpractice.

IV. Conclusion

Mental illness and attorney discipline actions are an uncomfortable reality in the legal profession. Until recently, the profession has preferred to ignore the possibility of rehabilitation for mentally ill attorneys. Instead, courts have drummed them out of the profession. This does not act to help the client, the lawyer, or the legal profession as a whole. Instead, it perpetuates the problem.

This type of discrimination is exactly the type addressed by the Americans with Disabilities Act. A system that incorporates attorney monitoring and disability

Alternative Means, 8 GEO. J. LEGAL ETHICS 401, 412-15 (1995) (pointing out tendency of bar associations to discriminate against socially powerless groups, such as women and minorities, in the past).

166. See generally G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233 (1990).

167. See Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1413 (1988).

inactive status will address these issues in a healthy and positive manner. A system incorporating these policies will also fall within the guidelines established by the ADA.

On April 8, 1996, attorneys for Michael Busch filed a Motion for Rehearing with the Oklahoma Supreme Court.¹⁶⁸ The brief pointed out the problems that exist in reconciling the mandates of the ADA with the court's decision of March 12, 1996. The court refused to reconsider its decision and denied the motion on May 7, 1996.¹⁶⁹

On July 16, 1996, the Oklahoma Supreme Court affirmed its decision in the *Busch* case. In *State ex rel. Oklahoma Bar Ass'n v. Prather*,¹⁷⁰ the court again refused to consider an attorney's disability as anything more than a "mitigating factor" in determining disciplinary measures.¹⁷¹ The trial panel of the Oklahoma Bar Association¹⁷² found that Prather had committed misconduct by neglecting one of his clients.¹⁷³ The majority of the misconduct occurred in 1992 and 1993.¹⁷⁴ In March 1995, Prather was diagnosed with ADD; since May 1995, Prather has successfully treated his disability with medication.¹⁷⁵ The court publicly censured Prather and required him to submit himself to supervision in his law practice.¹⁷⁶ Although the discipline is much lighter than that imposed on Busch, the Oklahoma Supreme Court continues to err by refusing to adopt a program to accommodate the interests of all parties in a fair and nondiscriminatory manner.

Stephen M. Hines

168. See Brief in Support of Respondent's Application for Rehearing and Oral Argument, Oklahoma Bar Ass'n v. Busch, 919 P.2d 1114, 1120 (Okla. 1996), OBAD No. 1187, SCBD No. 4068 (Apr. 8, 1996).

169. *Busch*, 919 P.2d at 1114.

170. 925 P.2d 28 (Okla. 1996).

171. See *id.* at 30.

172. See *supra* note 62.

173. See *Prather*, 925 P.2d at 28-29.

174. See *id.* at 29. Prather's client suffered a substantial amount of property damage in an apartment fire. Prather filed suit twice; on both occasions, the court dismissed the suit because the defendants were never properly served. Prather did not inform his client that the suit was dismissed. He also neglected to return the client's phone calls. The client eventually obtained other counsel, but was unable to pursue her claim due to the statute of limitations. See *id.*

Prather admitted violating various Oklahoma Rules of Professional Conduct by failing to notify the Oklahoma Bar Association and his client of his new address. Prather's office address changed four times between January 1994 and January 1996. See *id.* at 30.

Prather had been reprimanded on several previous occasions for professional misconduct which included client neglect. See *id.*

175. See *id.*

176. See *id.* at 30-31. The supervision included a quarterly meeting with an attorney of the OBA General Counsel's choice "to discuss [Prather's] case management and docketing systems." *Id.* at 31.

