

Duquesne Law Review

Volume 49
Number 3 *The Centennial Issue Celebrating 100
Years of Duquesne University School of Law:
Past, Present, and Future*

Article 5

2011

Completing the Puzzle: Lawyer Assistance and Conditional Admission

Janice M. Holder

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Janice M. Holder, *Completing the Puzzle: Lawyer Assistance and Conditional Admission*, 49 Duq. L. Rev. 439 (2011).

Available at: <https://dsc.duq.edu/dlr/vol49/iss3/5>

This Article is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Completing the Puzzle: Lawyer Assistance and Conditional Admission

*Janice M. Holder**

I. EVOLUTION OF LAWYER ASSISTANCE IN TENNESSEE	439
II. MAGNITUDE OF THE PROBLEM	442
III. THE AMERICANS WITH DISABILITIES ACT AND DENIAL OF BAR ADMISSION ON THE BASIS OF MENTAL IMPAIRMENT OR SUBSTANCE ABUSE	444
IV. ADMISSION TO THE PRACTICE OF LAW: THE ROLE OF CONDITIONAL ADMISSION	445
V. THE ABA MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW	446
VI. CONDITIONAL ADMISSION IN OTHER STATES	448
VII. THE ADOPTION OF CONDITIONAL ADMISSION IN TENNESSEE.....	456
VIII. CONCLUSION	457

I. EVOLUTION OF LAWYER ASSISTANCE IN TENNESSEE

When I graduated from Duquesne Law School in 1975, I had no knowledge of Lawyer Assistance Programs, or LAPs. My experience in law school was like that of many other students, using weekend parties to assist in decreasing the pressures of the law school experience. Not only was drinking acceptable, it was part of the lore of the profession. When I moved to Memphis in 1979, I found that these stories became the stuff of legends. We young lawyers often heard about one lawyer who retired to his hunting retreat to drink and prepare for trial, emerging to vanquish his foe.

* Janice M. Holder, Justice, Supreme Court of Tennessee; B.S. *summa cum laude*, 1971 from the University of Pittsburgh; J.D., 1975, from Duquesne University School of Law. Justice Holder was the organizational force behind the Court's adoption of Tennessee Supreme Court Rule 33, creating the Tennessee Lawyers Assistance Program. She is also currently the Court's liaison to the Commission that administers the Tennessee Lawyers Assistance Program. I would like to thank my law clerks, Adam J. Eckstein and Bryan C. Hathorn, for research assistance for this article.

Drinking to excess, of course, is not normally a matter that is the subject of discipline unless an ethical violation occurs as a result of the lawyer's impaired state. A recent article by a professor at the University of Tennessee describes how appearing intoxicated in court may have been acceptable two centuries ago, but now such behavior would be subject to criminal contempt.¹ In the legends we young lawyers heard, however, drinking enhanced the lawyers' abilities, and no ethical violations ever occurred.²

Mental health issues were largely ignored. We all knew those lawyers who appeared before the courts of our judicial district with what appeared to be mental health issues. None of us had the first inkling of what to do when the lawyer failed to represent his client in a professionally competent manner because of a mental health issue.

My interest in lawyer impairment became more personal in 1986. In that year, my law partner committed suicide.³ In the wake of that tragedy, his friends realized that we all knew something was amiss, but that we did not communicate with each other for various reasons. We all had pieces of the puzzle, but the puzzle remained incomplete. In the wake of that loss, some of us began to explore the role of lawyer assistance programs and the status of those programs in the United States.

What we found was that few such programs existed.⁴ Those that were in place were modeled after the approach of Alcoholics Anonymous and addressed lawyers with drinking and drug abuse problems.⁵ Few of the programs considered mental health issues

1. Donald F. Paine, *Paine on Procedure: Luther Martin: Founder, Lawyer, Drinker*, 47 TENN. BAR J. 21, 21 (2011).

2. *Id.* Professor Paine describes Luther Martin, a delegate to the 1787 Constitutional Convention in Philadelphia, as "a lawyer who excelled when fueled by alcohol." *Id.*

3. John C. Dice, a well-respected Memphis attorney, committed suicide in 1986. In his honor, the Memphis Bar Association now holds an annual seminar.

4. In 1980, the American Bar Association surveyed bar associations and found that forty-six percent of the state bar associations and twenty-one percent of the local bar associations had alcohol abuse programs. Bd. of Prof'l Responsibility of Sup. Ct. Tenn., Formal Ethics Op. 83-F-48 (1983).

5. For example, The Nashville Bar Association formed the Nashville Lawyers Concerned for Lawyers program in 1982 to help Nashville lawyers with alcohol and drug abuse problems. Early on it was recognized that "[o]ne of the most important elements of a successful . . . program is confidentiality," but that the rules of ethics required lawyers to report ethical violations committed by other lawyers. *Id.* This concern was partially alleviated in 1983 by a formal ethics opinion that relieved elected members of the Lawyers Concerned for Lawyers committee from the obligation to report their colleagues. *Id.* Based on the success of the program, in 1987 the Board of Professional Responsibility issued a formal ethics opinion relieving all participants in programs sponsored by the Tennessee Bar Association, Memphis & Shelby County Bar Association, Nashville Bar Association, and Knox-

or addressed such issues as senility or other medical problems that could lead to impairment.

Our group decided to form an assistance program that addressed all issues of impairment. From the humble beginnings of the organization that followed, known as the Memphis Bar Association's Lawyers Helping Lawyers Committee, we started on a path that would culminate in the creation of a state-wide Tennessee Lawyers Assistance Program ("TLAP") in Tennessee in 1999.⁶ My involvement started as a response to a tragedy in my adopted hometown. With my appointment and election to the Supreme Court of Tennessee, my role changed to that of a policy maker, advocating for a state-wide program.

When the Supreme Court of Tennessee adopted TLAP, it joined our Board of Professional Responsibility,⁷ the Supreme Court's disciplinary body, and the Tennessee Lawyers' Fund for Client Protection,⁸ a fund created by the Supreme Court of Tennessee to compensate clients who have incurred financial harm as a result of their lawyers' unprofessional conduct, to add lawyer assistance to the options available to address lawyer conduct. Our state has been fortunate to have the support of our Chief Disciplinary Counsel of the Board of Professional Responsibility, then and now, who has worked closely with TLAP.⁹ As a result, we have a system of discipline that recognizes the role of impairment in lawyers who violate ethical standards.

Currently, every state has established a lawyer assistance program or committee.¹⁰ In 1988, the American Bar Association

ville Bar Association from their obligation to report ethical violations while engaged in the programs. Bd. of Prof'l Responsibility of Sup. Ct. Tenn., Formal Ethics Op. 87-F-48(a) (1987). Confidentiality of the programs was assured when the legislature passed a law providing immunity for persons involved in the programs and making records of the programs not subject to the Tennessee Public Records Act. See TENN. CODE ANN. §§ 23-4-101 to 105 (West 2010) (originally enacted as 1993 Tenn. Pub. Acts ch. 359, § 1).

6. TENN. SUP. CT. R. 33. The original Tennessee Lawyers Assistance Program was scheduled to terminate on December 31, 2006, TENN. SUP. CT. R. 33.13, but the success of the program inspired the Supreme Court of Tennessee to amend the rule to make the program permanent. *Id.*

7. See TENN. SUP. CT. R. 9 § 1.

8. See TENN. SUP. CT. R. 25 § 1.

9. Lance B. Bracy was Chief Disciplinary Counsel at the time of the formation of the program. In 2004, he was replaced by Nancy S. Jones.

10. See Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 554 (2008); see also DIRECTORY OF STATE LAP'S, AM. BAR ASS'N, <http://apps.americanbar.org/legalservices/colap/lapdirectory.html> (last visited Mar. 25, 2011).

("ABA") created the Commission on Impaired Attorneys,¹¹ exploring the issues of lawyer impairment and providing a clearinghouse for lawyer assistance programs across the country. In 1996, the commission was renamed the Commission on Lawyer Assistance Programs ("CoLAP"), to better define the role of the Commission.¹² In 2002, CoLAP established a Law School Outreach Committee.¹³ CoLAP has been at the forefront of the evolution of lawyer assistance programs in the United States.¹⁴ In 2004, the ABA House of Delegates adopted a model rule for lawyer assistance programs.¹⁵

II. MAGNITUDE OF THE PROBLEM

Although precise data has always been difficult to obtain, lawyers appear to have a higher incidence of substance abuse and mental health issues than others in the general population.¹⁶ A Washington study concluded that eighteen percent of all lawyers developed a drinking problem.¹⁷ Of those lawyers who practiced law for over twenty years, the number increased to twenty-five percent.¹⁸ A Wisconsin study found that seventy-nine percent of lawyers in that state admitted to using alcohol "regularly" or to reduce stress.¹⁹

The relationship between lawyer discipline and chemical dependency or mental health problems is unclear because many jurisdictions, including Tennessee, do not keep such statistics and may be unaware of these issues when lawyer discipline is initiated.

11. Rothstein, *supra* note 10, at 554.

12. Rothstein, *supra* note 10, at 554.

13. Rothstein, *supra* note 10, at 554.

14. Rothstein, *supra* note 10, at 554.

15. Rothstein, *supra* note 10, at 559.

16. The rate of alcohol abuse among lawyers has been estimated at between fifteen and eighteen percent, nearly twice the eight to ten percent rate in the general population. Eric Drogin, *Alcoholism in the Legal Profession: Psychological and Legal Perspectives and Interventions*, 15 *LAW & PSYCHOL. REV.* 117, 127 (1991). See also AALS Committee Report, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 *J. LEGAL EDUC.* 35, 36 (1994); Rothstein, *supra* note 10, at 532.

17. James C. Gallagher, *Drugs, Alcohol, Mental Health, and the Vermont Lawyer*, VT. BAR J., Spring 2006, at 5 (citing G. Andrew H. Benjamin, Elaine J. Darling & Bruce Sales, *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 *INT'L J.L. & PSYCHIATRY* 233, 241 (1990)). The same study also showed that nineteen percent of lawyers suffered from depression. Gallagher, *supra*, at 241 (citing Benjamin, *supra*, at 240).

18. Benjamin, *supra* note 17, at 241.

19. Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 *CREIGHTON L. REV.* 265, 266 (1997) (citing G. Andrew H. Benjamin, Elaine J. Darling & Bruce Sales, *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 *LAW & PSYCHOL. REV.* 113, 115 (1992)).

ed. An Oregon study, however, found that of one hundred lawyers who entered the Oregon Bar lawyer assistance program, sixty-one had disciplinary complaints and sixty had malpractice suits filed against them.²⁰ The Report of the Association of American Law Schools Committee on Problems of Substance Abuse in Law Schools (“AALS Report”) estimates that fifty to seventy-five percent of attorney disciplinary actions result from substance abuse alone.²¹ CoLAP has similarly estimated that between forty and seventy-five percent of disciplinary complaints have their origins in substance abuse issues.²²

The purpose of lawyer discipline is to protect clients and the public and to enhance the reputation of the legal profession. When a state’s disciplinary body suspects that a lawyer against whom a complaint has been received has substance abuse or mental health issues, the disciplinary body should refer the lawyer to the lawyer assistance program for an evaluation.²³ If appropriate, the lawyer also should be encouraged to enter into a written contract with the lawyer assistance program to assist the lawyer with rehabilitation.²⁴ Services provided can include peer support, such as Lawyer In Recovery (LIR) groups, and can provide documented evidence of lawyer compliance with the written contract.²⁵

The AALS report indicates that almost one-third of the students surveyed admitted that they had abused alcohol and 11.7 percent reported abusing alcohol after admission to law school.²⁶ The Report of the AALS Committee on Problems of Substance Abuse in Law Schools found that law students are especially at risk for substance abuse.²⁷ Students are likely to suffer from depression and anxiety due to the stress of law school.²⁸ The AALS study also determined that students used certain substances in increasing quantities as they progressed through law school and that the in-

20. Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 178 n.293 (2001) (citing Benjamin, *supra* note 19, at 118).

21. AALS Committee Report, *supra* note 16, at 26.

22. Rothstein, *supra* note 10, at 533 n.6.

23. See, e.g., TENN. SUP. CT. R. 9 § 28.1(a) (providing a mechanism for the Tennessee Board of Professional Responsibility to refer attorneys to the Tennessee Lawyer Assistance Program); see also TENN. SUP. CT. R. 33.07(A).

24. See, e.g., TENN. SUP. CT. R. 9 § 28.1(b).

25. See, e.g., TENN. SUP. CT. R. 9 § 28.1(b); TENN. SUP. CT. R. 33.05(E).

26. AALS Committee Report, *supra* note 16, at 43.

27. See AALS Committee Report, *supra* note 16, at 45, 73.

28. See Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities out of the Stigma Straightjacket*, 79 UMKC L. REV. 123, 125-26 (2010).

crease in usage was most dramatic with alcohol.²⁹ The study found that this pattern of behavior in law students was predictive of addiction problems in practicing attorneys.³⁰

III. THE AMERICANS WITH DISABILITIES ACT AND DENIAL OF BAR ADMISSION ON THE BASIS OF MENTAL IMPAIRMENT OR SUBSTANCE ABUSE

The Americans with Disabilities Act (“ADA”) seeks to prevent discrimination against individuals in employment and public services.³¹ The ADA prohibits entities from discriminating against or “screening out” otherwise qualified individuals on the basis of a disability.³² The regulations applying the provisions of the ADA are broad and apply to such public services as licensing and certification.³³

The definition of “disability” provided by the ADA includes “a physical or mental impairment that substantially limits one or more of the major life activities” of a person, “a record of such an impairment,” or “being regarded as having such an impairment.”³⁴ Such an impairment can include “[a]ny mental or psychological disorder” and includes “drug addiction and alcoholism.”³⁵ Because

29. AALS Committee Report, *supra* note 16, at 42.

30. AALS Committee Report, *supra* note 16, at 45.

31. See The Americans with Disabilities Act, 42 U.S.C. §§ 12101, 12112, 12132 (2006).

32. 42 U.S.C. §§ 12101-12300 (2006).

33. The regulations provide that:

(b)(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

(b)(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 . . . 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.

28 C.F.R. § 35.130(b) (2010).

The United States Supreme Court interpreted disability narrowly, “to create a demanding standard for qualifying as disabled.” *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002), *overturned due to legislative action*, Pub. L. No. 110-325, 122 Stat. 3553 (2009). The United States Supreme Court interpreted “substantial limitation” to exclude conditions that can be corrected or mitigated. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 481-82 (1999), *overturned due to legislative action*, Pub. L. No. 110-325, 122 Stat. 3553 (2009).

Congress responded to the Court’s narrowing of the interpretation of disability with the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (“ADAAA”). The ADAAA was captioned “[a]n Act to restore the intent and protections of the Americans with Disabilities Act of 1990.” *Id.* The ADAAA left the definition of disability the same, but in its “purposes,” explicitly rejected both *Williams* and *Sutton* and clarified that the term “disability” should be interpreted broadly. See Pub. L. No. 110-325, 122 Stat. 3553 § 2(b).

34. 28 C.F.R. § 35.104 (2010).

35. *Id.*

boards of law examiners are public entities, denial of admission to the bar on the basis of a status of mental impairment, drug addiction, or alcoholism is prohibited by the ADA.³⁶

Although the ADA prohibits discrimination based on an individual's status of being impaired by mental disease or substance abuse, denial of admission based on prior conduct is permitted, if that prior conduct would render the individual unfit.³⁷ Such a determination is difficult because prior conduct that disqualifies an individual from bar membership may be attributable to underlying mental health or substance abuse issues.

IV. ADMISSION TO THE PRACTICE OF LAW: THE ROLE OF CONDITIONAL ADMISSION

Admission to the practice of law is not limited to new graduates of law school, but law students should be part of the mission of any LAP effort.³⁸ Detection of problems early and when students are in still law school is the best means of reducing problems when those students become lawyers. Reaching these students while they are in law school, however, is often difficult.

There is much at stake for law students who hope to be admitted to the practice of law. The consequences of disclosure of treatment is a significant factor in the failure to seek assistance.³⁹ In the AALS study, only ten percent of students surveyed indicated that they would seek treatment for a substance abuse problem.⁴⁰ Forty-one percent stated that they would seek treatment if they could be assured that the licensing authority would not discover the treatment.⁴¹

In addition to LAP outreach to law students, conditional admission may create a climate that will encourage law students to seek the help they need. A lawyer who is conditionally admitted to the bar agrees to post-admission monitoring for a period of time sub-

36. Title II of the Americans with Disabilities Act applies the act to public entities. 42 U.S.C. § 12132 (2006).

37. See Rothstein, *supra* note 10, at 538-39 (discussing the distinction between questions about prior conduct and diagnosis or status, and describing how licensing boards have changed their questions in response to adverse court decisions).

38. The inherent stress of law school can worsen underlying mental health issues. See generally Jolly-Ryan, *supra* note 28; Rothstein, *supra* note 10.

39. Rothstein, *supra* note 10, at 547-48 (noting concerns of students that seeking treatment for mental health or substance abuse issues will cause that information to be released to bar examiners). See also AALS Committee Report, *supra* note 16, at 54-55.

40. AALS Committee Report, *supra* note 16, at 55.

41. AALS Committee Report, *supra* note 16, at 55.

sequent to admission. If the applicant successfully completes the period of monitoring, the applicant is fully admitted to the bar. The first conditional admission rule was adopted in Florida in 1996.⁴² Twenty-one states currently offer conditional admission to the bar.⁴³ Prior to the adoption of a conditional admission rule in Tennessee in 2010,⁴⁴ the Tennessee Board of Law Examiners and TLAP had a de facto rule in which the Board of Law Examiners infrequently granted admission to an applicant who had entered into a contract with TLAP to monitor the applicant. Although the contract was voluntary and no report was provided to the Tennessee Board of Professional Responsibility or the Tennessee Board of Law Examiners, this informal mechanism indicated the need for a conditional admission rule.

V. THE ABA MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW

The ABA adopted the Model Rule on Conditional Admission to Practice Law (the "Model Rule") in February 2008.⁴⁵ The Model Rule urges "all states to implement conditional admission rules that do not discriminate against an eligible candidate for the bar because of the candidate's past treatment for addiction or mental health."⁴⁶ The Model Rule also states that it is designed for those individuals who are otherwise fit to practice law, but who have had recent rehabilitation or treatment for dependency or mental illness.⁴⁷

The commentary to the Model Rule focuses on rehabilitation,⁴⁸ and indicates that the Model Rule is intended to act as a safety

42. See Fla. Bd. of Law Exam'rs, re Amendment of Rules of the Sup. Ct. Relating to Admissions to the Bar, 658 So.2d 70, 71, 73-74 (Fla. 1995).

43. A survey of state bar admission rules found that Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Texas, and West Virginia each permit some type of conditional admission.

44. TENN. SUP. CT. R. 7 § 10.05.

45. MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW (2008) http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/colap/ABA_ModelRule_ConditionalAdmission_Feb2008.authcheckdam.pdf.

46. Stephanie Lyerly, *Conditional Admission: A Step in the Right Direction*, 22 GEO. J. LEGAL ETHICS 299, 312 (2009).

47. See MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW, *supra* note 45, at § 1.

48. To illustrate the commentary of the Model Rule, "[t]he Rule focuses on rehabilitation from conduct or behavior or effective treatment of a condition which was associated with a previous lack of fitness." MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW, *supra* note 45, at § 1 cmt.

net, not a means to achieve fitness.⁴⁹ The commentary also suggests that the Model Rule is useful when dealing with recent recovery or treatment for mental illness or substance abuse.⁵⁰

The Model Rule has a laudable policy: to allow admission, conditionally, of applicants who otherwise would be denied admission to the practice of law. Nonetheless, the Model Rule contains a potential problem that should be recognized before adoption of the Rule by individual states. The Model Rule can be read to permit the licensing authority to deny admission to an applicant who is otherwise fit, thereby separating a group of applicants based on recent rehabilitation from chemical dependency or successful treatment for a mental illness. The first paragraph of the Model Rule, Section 1, illustrates this point:

1. Conditional Admission. An applicant who *currently satisfies all essential eligibility requirements for admission to practice law, including fitness requirements, and who possesses the requisite good moral character required for admission*, may be conditionally admitted to the practice of law if the applicant demonstrates recent rehabilitation from chemical dependency or successful treatment for mental or other illness, or from any other condition this Court deems appropriate, that has resulted in conduct or behavior that would otherwise have rendered the applicant currently unfit to practice law, and the conduct or behavior, if it should recur, would impair the applicant's current ability to practice law or pose a threat to the public. The [Admissions Authority] shall recommend relevant conditions that the applicant to the bar must comply with during the period of conditional admission.⁵¹

If an applicant currently meets all requirements for admission, including fitness requirements, one might ask the reason for sepa-

49. "Conditional Admission is intended to act as a 'safety net' to increase the likelihood of the conditional lawyer's continuing fitness—not as a method of achieving fitness." MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW, *supra* note 45, at § 1 cmt.

50. The Model Rule states that:

The conditional admissions process is particularly useful when dealing with recent recovery from or treatment for chemical abuse, dependency, or mental illness since it recognizes the importance of behavior that, if unaddressed, would have rendered an applicant unfit, avoids denial of admission because rehabilitation or treatment is recent, encourages applicants not to delay getting help they need, and provides continuing assurances of fitness.

MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW, *supra* note 45, at § 1 cmt.

51. MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW, *supra* note 45, at § 1 cmt. (emphasis added) (underline in original, italics added) (addition in original).

rating that applicant from any other applicant meeting those requirements. The rule states that conditional admission is available if the applicant demonstrates “recent rehabilitation from chemical dependency or successful treatment for mental or other illness.” Therefore, the stated reason for separation of the applicant is the successful completion of treatment for substance abuse or mental health issues. The status of having received treatment or having been diagnosed with a mental health issue, rather than the conduct of the applicant, is the factor that determines whether the applicant is conditionally admitted. The classification of an applicant based on a status of past impairment or treatment appears to conflict with the ADA.⁵²

The Model Rule also has been criticized for imposing higher standards on bar applicants with mental disabilities and illnesses because the Model Rule requires “successful” treatment of a mental illness.⁵³ This requirement ignores the reality that some mental illnesses are chronic and may not be cured.⁵⁴

VI. CONDITIONAL ADMISSION IN OTHER STATES

Idaho’s Rule on Conditional Admission mirrors the Model Rule and suffers from the same infirmity.⁵⁵ Additionally, Wisconsin is presently considering an amendment to its conditional admission rule.⁵⁶ The Supreme Court of Wisconsin voted on March 9, 2009, to use the Model Rule as amended by the use of the phrase “demonstrates a record of rehabilitation.”⁵⁷ The proposed amendment provides:

52. See Rothstein, *supra* note 10, at 538-39.

53. Jolly-Ryan, *supra* note 28, at 159.

54. Jolly-Ryan, *supra* note 28, at 159.

55. Idaho Bar Commission Rules Governing Admission to Practice and Membership in the Idaho State Bar, § II, R. 212(a), “Conditional Admission” (amended Aug. 1, 2010), available at <http://isb.idaho.gov/pdf/rules/ibcr.pdf>.

56. See Proposed WIS. SUP. CT. R. 40.075, available at <http://www.wicourts.gov/supreme/docs/0813%20petition2.pdf>; see also Letter from Wis. Bd. of Law Examiners to C.J. Shirley Abrahamson, Wis. Sup. Ct. (Aug. 5, 2010) available at <http://www.wicourts.gov/supreme/docs/0813petitionsup.pdf>. After the submission of this article, the Supreme Court of Wisconsin adopted a conditional admission rule that differs from the proposed rule. *In re creation of Supreme Court Rule 40.075 relating to conditional admission to the bar*, 2011 WI 40 (filed June 8, 2011). The adopted rule focuses on conduct and appears to comport to the requirements of the ADA. WIS. SUP. CT. R. 40.075.

57. *High Court Supports Conditional Bar Admission*, WISC. L. J. BLOG (Mar. 16, 2009, 1:00 AM), <http://wislawjournal.com/blog/2009/03/16/high-court-supports-conditional-bar-admission/>.

An applicant who currently satisfies all essential eligibility requirements for admission to practice law, including fitness requirements, and who possesses the requisite good moral character required for admission, may be conditionally admitted to the practice of law if the applicant demonstrates *a record of rehabilitation* from chemical dependency or successful treatment for mental or other illness, or from any other reason the board deems appropriate, that has resulted in conduct or behavior that would otherwise have rendered the applicant currently unfit to practice law, and the conduct or behavior, if it should recur, would impair the applicant's current ability to practice law or pose a threat to the public.⁵⁸

This language, although differing slightly from the Model Rule,⁵⁹ exacerbates the problem noted with the Model Rule: the language focuses on rehabilitation. In Wisconsin's proposed rule, the applicant, who otherwise meets fitness requirements and possesses the requisite moral character, may be considered for conditional admission because of a "record of rehabilitation."⁶⁰ Arguably, this language can be interpreted to mean that an applicant who successfully completed a treatment program ten years prior to his or her application may be considered for conditional admission.

Conditional admission rules in other states can be grouped into various categories. For example, Arizona,⁶¹ Kentucky,⁶² Montana,⁶³ Nebraska,⁶⁴ New Mexico,⁶⁵ Oregon,⁶⁶ and West Virginia⁶⁷ provide no standards under which applicants are granted conditional admission.

Rules governing admission in Arizona require bar counsel to "monitor and supervise attorneys who have been admitted with conditions,"⁶⁸ although the recommendation for admission is "con-

58. Proposed WIS. SUP. CT. R. 40.075(1).

59. See MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW, *supra* note 45.

60. Proposed WIS. SUP. CT. R. 40.075(1).

61. ARIZ. SUP. CT. R 36(a)(2)(C)(ii); ARIZ. R. SUP. CT. R 36(a)(4).

62. KY. SUP. CT. R. 2.042.

63. MT. CT. R. § 5(d).

64. NEB. CT. R. 3-105(E).

65. N.M. CT. R. 15-302.

66. ORE. ATTORNEY ADMISSION RULES R. 6.15(2)(b); ORE. ATTORNEY ADMISSION RULES R. 6.15(3).

67. W. VA. CT. R. 7.0(c).

68. ARIZ. SUP. CT. R. 36(a)(2)(C)(ii). The specific behavior is not otherwise described. Arizona Supreme Court Rule 36(e) and (f) provide for procedures imposing conditions for admission and for the violation of a condition. ARIZ. SUP. CT. R. 36(e)-(f).

ditioned on compliance by the applicant with specified behavior for a specified period.”⁶⁹ Kentucky does not provide examples of the conditions that may be imposed.⁷⁰ Kentucky simply permits its character and fitness committee to require the applicant to enter into an agreement as a condition of his or her admission to the Bar.⁷¹ Nebraska⁷² and New Mexico⁷³ both provide for conditional admission with conditions set by the supreme court. Admission in Montana⁷⁴ and Oregon⁷⁵ follow a similar course, permitting admission subject to specific probationary terms. Unlike Kentucky, however, Montana and Oregon detail the types of probationary terms for admission that may be included: alcohol or drug treatment, medical care, psychological or psychiatric care, professional office practice or management counseling, practice supervision, and professional audits or reports.⁷⁶ The conditions listed by West Virginia are similar to those of Montana and Oregon.⁷⁷ These suggested conditions imply that issues of character and fitness exist at the time of application that might otherwise prevent the admission of the applicant. The probationary terms therefore are narrowly tailored to permit the admission to the practice of law of applicants whose admission could otherwise be denied and to comport with the requirements of the ADA.

Other states provide a standard to be applied for the conditional admission of an applicant, although some of the standards are broad. Such standards comply with the requirements of the ADA if they focus on the current fitness to practice law. South Dakota, for example, permits conditional admission when its admitting authority determines that “there are unresolved issues of good moral character, fitness, or general qualifications of the appli-

69. ARIZ. SUP. CT. R. 36(a)(4)(D).

70. KY. SUP. CT. R. 2.042(1). The terms and conditions are monitored by the character and fitness committee; additional provisions detail the procedure on failure to comply with the conditions imposed. KY. SUP. CT. R. 2.042(2)-(5).

71. KY. SUP. CT. R. 2.042(1).

72. NEB. CT. R. § 3-105(E). The relevant portion of this rule states that “[a]dmission of all applicants, including applicants who are being admitted with conditions set by the Supreme Court, will be by order of the Court, and certificates of admission issued to applicants will be signed by a Judge of the Court.” *Id.*

73. N.M. CT. R. 15-302(A). The relevant portion of this rule states that, “[a]pplicants who have qualified for admission and applicants who are being admitted with conditions set by the Supreme Court shall be granted a license to practice law in all the courts of this state.” *Id.*

74. MT. R. COMMITTEE ON CHARACTER AND FITNESS § 5 (d).

75. ORE. ATTORNEY ADMISSION RULES R. 6.15(2)-(3).

76. MT. CT. R. § 5(d); ORE. ATTORNEY ADMISSION RULES R. 6.15(2), (3).

77. W. VA. CT. R. 7.0(c).

cant.”⁷⁸ The recommendation may provide terms and conditions for conditional admission, which the state supreme court may accept or reject.⁷⁹ As an additional example, Nevada permits conditional admission of applicants “with character and fitness problems, which although serious, do not warrant denial of admission with or without prejudice.”⁸⁰ The terms and conditions are those that are recommended by the admitting authority, and the applicant must consent in writing to the conditions of admission.⁸¹

A few states combine a broad standard with specific suggestions for conditions to be imposed. Rhode Island, for instance, permits a recommendation of the conditional admission of an applicant when “it is determined that the protection of the public may require the temporary monitoring of the applicant.”⁸² The admitting authority is required to recommend specific conditions, which are listed in the rule.⁸³ These conditions are similar to those listed above, but specifically include providing business or personal financial records, taking action to cure or end any deficiencies in the applicant’s moral character and fitness, and random drug testing.⁸⁴

Minnesota permits conditional admission of “an applicant whose record shows conduct that may otherwise warrant denial.”⁸⁵ Louisiana permits admission of an applicant whose record “shows conduct that may otherwise warrant denial due to present or past substance misuse, abuse or dependency, physical, mental or emotional disability or instability, or neglect of financial responsibilities.”⁸⁶ Both Minnesota⁸⁷ and Louisiana⁸⁸ further require an applicant to evidence a commitment to rehabilitation and an ability to meet the essential eligibility requirements of the practice of law. Minnesota does not set forth examples of terms and conditions that may be required;⁸⁹ while Louisiana specifies the types of conditions that may be imposed.⁹⁰

78. S.D. CODIFIED LAWS § 16-16-17.1 (1996).

79. *Id.*

80. NEV. SUP. CT. R. 50.5.1.

81. *Id.*

82. R.I. SUP. CT. R. 3(k)-(o).

83. R.I. SUP. CT. R. 3(l).

84. R.I. SUP. CT. R. 3(l)(1), (7)-(8).

85. 54 MINN. STAT., Admission to the Bar Rule 16(B).

86. LA. SUP. CT. R. 17 § 5(M)(1).

87. 54 MINN. STAT., Admission to the Bar Rule 16(B).

88. LA. SUP. CT. R. 17 § 5(M)(1).

89. 54 MINN. STAT., Admission to the Bar Rule 16(B).

90. LA. SUP. CT. R. 17 § 5(M)(3).

Several states use more specific standards. Connecticut, for example, provides that its admitting authority, "in light of the physical or mental disability of a candidate that has caused conduct or behavior that would otherwise have rendered the candidate currently unfit to practice law," may determine that "it will only recommend an applicant for admission to the bar conditional upon the applicant's compliance with conditions prescribed" by the admitting authority "relevant to the disability and the fitness of the applicant."⁹¹ Connecticut explicitly requires that the conditions imposed be "tailored to detect recurrence of the conduct or behavior which could render an applicant unfit to practice law or pose a risk to clients or the public and to encourage continued treatment, abstinence, or other support."⁹² Furthermore, Connecticut is alone in including a provision in its rules that explicitly reference the ADA. The Connecticut rules provide, "[a]ny inquiries or procedures used by the bar examining committee that relate to physical or mental disability must be narrowly tailored and necessary to a determination of the applicant's current fitness to practice law, in accordance with the Americans with Disabilities Act."⁹³

Indiana permits conditional admission when its admitting authority "has special concerns about the proof of an applicant's moral character and fitness based upon the evidence of drug, alcohol, psychological or behavioral problems."⁹⁴ In lieu of denying admission, an attorney may be conditionally admitted if the admitting authority finds that the applicant "has satisfied [the authority] as to his or her character and fitness . . . sufficiently to be eligible for conditional admission upon such terms and conditions as specified by [the authority]."⁹⁵ Indiana also provides that conditional admission will be governed by internal rules and policies adopted by its admitting authority, and does not otherwise specify or suggest conditions for admission.⁹⁶

North Dakota also specifically states that conditional admission can be recommended based on "an applicant's physical or mental disability, present or past use or abuse of drugs or alcohol, neglect of financial responsibilities. . . ."⁹⁷ Although the language "present

91. CONN. SUPER. CT. R. § 2-9(b).

92. *Id.* See also CONN. SUPER CT. R. § 2-11 (describing monitoring the application for compliance with conditions).

93. CONN. SUPER. CT. R. § 2-8(3).

94. IN. ADMISS & DISC. R. 12. § 6(c).

95. *Id.*

96. *Id.*

97. N.D. CT. R. 9(A).

or past use or abuse” could be construed to allow conditional admission based on behavior long past, the rule continues by stating “or other circumstances in which the Board determines the protection of the public requires it.”⁹⁸ The addition of this language suggests that the Board must show that the applicant has a present lack of fitness.

Florida takes a slightly different approach. Its admitting authority may offer a consent agreement to an applicant “in lieu of filing specifications”⁹⁹ pertaining to drug, alcohol, or psychological problems that would otherwise preclude a ruling in favor of the admission of an applicant to the bar. The types of specified terms and conditions are not listed in the rule.¹⁰⁰

New Jersey offers yet another twist to conditional admission of attorneys. New Jersey permits conditional admission referenced on the treatment of an attorney for substance abuse or for specific health issues.¹⁰¹ If the admitting authority determines that inappropriate conduct has resulted from such issues as substance abuse, mental illness, or psychological disorder, the authority may recommend conditional admission.¹⁰² In addition, the authority may recommend conditional admission “when the candidate has been treated for substance abuse or bipolar disorder, schizophrenia, paranoia, or other psychotic disease within twelve months preceding the application for admission.”¹⁰³

New Jersey’s conditional admission rule has ADA implications. Conditional admission may be required if “the candidate has been treated” for chemical dependency or for specific mental health issues.¹⁰⁴ Because mental health issues may require long-term treatment over the course of an applicant’s lifetime and the applicant may be presently fit to join the bar absent the status of prior treatment for a disability, this provision arguably is not narrowly

98. *Id.*

99. FLA. ADMISS. TO BAR R. 3-22.5. Florida State Bar Admission Rule 3-23 provides that “[s]pecifications are formal charges filed in those cases where the board has cause to believe that the applicant . . . is not qualified for admission to The Florida Bar.” FLA. ADMISS. TO BAR R. 3-23.5.

100. FLA. ADMISS. TO BAR R. 3-23.5. The Florida rules, however, require the conditionally admitted applicant to live and work in the state of Florida. In re Amendments to Rules of the Sup. Ct. Pertaining to Admission to the Bar, 23 So.3d 1179 (Fla. 2009).

101. N.J. Regulations Governing the Committee on Character, 303:8(c) (adopted pursuant to N.J. CT. R. 1:25).

102. *Id.*

103. *Id.*

104. *Id.*

tailored to meet the ADA.¹⁰⁵ Similarly, it is unclear what constitutes "treatment" for a recovering addict or alcoholic.

Illinois's rule also references treatment, but characterizes the treatment as "a sustained and effective course of treatment or remediation for a period of time sufficient to demonstrate his or her commitment and progress but not yet sufficient to render unlikely a recurrence of the misconduct or unfitness."¹⁰⁶ The applicant must "currently satisf[y] character and fitness requirements to practice law while his or her continued participation in an ongoing course of treatment . . . is monitored to protect the public."¹⁰⁷ Conditional admission in Illinois is not to be used as a "method to achieve fitness nor as a method of monitoring the behavior of all applicants who have rehabilitated themselves from misconduct or unfitness."¹⁰⁸

The Illinois rule for conditional admission provides for "limited circumstances" under which conditional admission may be considered.¹⁰⁹ The applicant must satisfy all requirements for admission:

. . . *except that* he or she is engaged in a sustained and effective course of treatment for or remediation of . . . substance abuse or dependence; . . . a diagnosed mental or physical impairment that, should it recur, would likely impair the applicant's ability to practice law or pose a threat to the public; or . . . neglect of financial affairs, that previously rendered him or her unfit for admission to the bar *and* the applicant has been engaged in such course of treatment or remediation for no fewer than 6 continuous months, if the subject of treatment is substance abuse or dependence or mental or physical impairment, and no fewer than 3 continuous months if the subject of remediation is neglect of financial affairs. Absent recent lapses, recent failures, or evidence that a lapse or failure is presently likely to occur, an applicant who has engaged in such sustained and effective course of treatment or remediation for at least 24 continuous months may not be conditionally admitted.¹¹⁰

105. Jolly-Ryan, *supra* note 28, at 159.

106. ILL. COMP. STAT. BAR ADMISSION R. 7.2.

107. *Id.*

108. *Id.*

109. ILL. COMP. STAT. BAR ADMISSION R. 7.3.

110. *Id.* (emphasis in original).

As stated, this conditional admission rule appears to apply to applicants who are fit, but who, for six to twenty-three continuous months, have been undergoing treatment or remediation for previous conduct or unfitness. The previous misconduct or unfitness is not described as conduct that would otherwise have rendered the applicant to be unfit, unless the above language concerning the impairment (“should it recur, would likely impair the applicant’s ability to practice law”) be read to supply this element.¹¹¹ The Illinois rule, therefore, qualifies a candidate for conditional admission based on the status of previous treatment, in violation of the principles of the ADA.¹¹²

Texas’s conditional admission rule is even more unclear.¹¹³ Texas permits a probationary license when the applicant has “present good moral character and fitness” but the applicant “suffers from chemical dependency or has been convicted of, or is on probation for, a first offense of driving while intoxicated.”¹¹⁴ A separate subsection permits a probationary license “in other circumstances in which, on the record before it, the Board determines that the protection of the public requires the temporary monitoring of the [a]pplicant.”¹¹⁵ Since chemical dependency is never “cured,”¹¹⁶ conditional admission arguably can be required for every presently fit applicant who has been treated for chemical dependency. It may be possible to read this provision as requiring that the admitting authority find that the applicant would be a danger to the public if the applicant were admitted unconditionally. If the rule is not read to require such a finding of a danger to the public, this rule arguably is not narrowly tailored to meet the requirements of the ADA. To add to the confusion, another section of the Texas rule provides that the admitting authority cannot “refuse to recommend the granting of a Probationary License to an Applicant who has passed the applicable bar examination solely because the Applicant suffers from chemical dependency or has been convicted for a first offense for driving while intoxicated.”¹¹⁷

111. ILL. COMP. STAT. BAR ADMISS. R. 7.3(b).

112. *Id.* The rule could be cured, however, by determining that a person who has had a substance abuse problem within the prior twenty-four months is unfit to join the Bar. The rule, however, states that conditional admission applies to candidates who are fit except for the prior treatment. *Id.*

113. TX. R. ADMISS. XVI.

114. TX. R. ADMISS. XVI(a)(1).

115. TX. R. ADMISS. XVI(a)(2).

116. See National Institute on Alcohol Abuse and Alcoholism, *FAQs for the General Public*, <http://www.niaaa.nih.gov/FAQs/General-English/Pages/default.aspx>

117. TX. R. ADMISS. XVI(b).

VII. THE ADOPTION OF CONDITIONAL ADMISSION IN TENNESSEE

Recently, the Tennessee Board of Law Examiners, Tennessee Board of Professional Responsibility, and TLAP filed a petition with the Supreme Court of Tennessee requesting adoption of the Model Rule. After publication for public comment,¹¹⁸ the Supreme Court of Tennessee declined to adopt the Model Rule as drafted and modified the Model Rule as follows:

An applicant whose previous conduct or behavior would or might result in a denial of admission may be conditionally admitted to the practice of law upon a showing of sufficient rehabilitation and for mitigating circumstances. The Board of Law Examiners shall recommend relevant conditions relative to the conduct or the cause of such conduct with which the applicant must comply during the period of conditional admission.¹¹⁹

Tennessee Supreme Court Rule 7, Section 10.05 properly focuses on conduct that would indicate the applicant's lack of fitness, not on the rehabilitation that may have occurred as a result of that conduct. By focusing on the applicant's prior conduct, the Board of Law Examiners can assess the severity of the problem and predict the likelihood of its recurrence. Only then can the Board of Law Examiners determine whether conditional admission should be granted and, if so, the conditions that should be imposed and the length of time the applicant should be conditionally admitted. The revised version of the Model Rule promulgated in Tennessee both satisfies the requirement of the ADA that conditional admission be based on conduct and sufficiently protects the public.

118. See *In re Amendment to Rule 7, Section 10.05, Rules of Tennessee Supreme Court* (order filed Dec. 10, 2008), available at <http://www.tncourts.gov/OPINIONS/TSC/RULES/proposals/2009/Order%20Proposed-%20Rule%207%20Sec%2010-05.pdf>.

The Disability Law and Advocacy Center commented that the proposed rule violated the ADA. See *Letter from the Disability Law and Advocacy Center to Michael Catalano, Clerk of the Tennessee Supreme Court, Comments on Proposed Amendment to Supreme Court Rule 7, section 10.05, Conditional Admission* (Mar. 9, 2009), available at <http://www.tncourts.gov/OPINIONS/TSC/RULES/proposals/2009/Comments-Rule7-10-05.pdf>.

119. TENN. SUP. CT. R. 7 § 10.05, *amended by In re Amendment to Rule 7, Section 10.05, Rules of Tennessee Supreme Court*, (order filed Sep. 3, 2009), available at <http://www.tncourts.gov/OPINIONS/TSC/RULES/proposals/2009/Order%20Proposed%20Rule%207%20Sec%2010-05.pdf>.

VIII. CONCLUSION

The policy of the Model Rule is laudable, but Section 1 should be modified to achieve compliance with the ADA. States considering the adoption of a conditional admission rule should not model those rules on the Model Rule as currently drafted. Most states that developed conditional admission rules have avoided ADA non-compliance by focusing their rules on the applicant's conduct, rather than status. The purpose of all of the rules, flawed or not, is commendable and recognizes that prior treatment for substance abuse and mental health issues does not render an applicant unfit to practice law and that each applicant should be viewed on an individual basis. ADA compliant rules encourage law students to seek help at the earliest possible time and to be candid on bar applications. By obtaining assistance early in the applicant's law school career, the applicant has a documented time of fitness on which the admitting authority can base its decision for admission.

