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# Blue Ain't Your Color: Kentucky's Bar to Entry for Lawyers with Mental Health Diagnoses and Disabilities

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Blue Ain't Your Color: Kentucky's Bar to Entry for Lawyers with Mental Health Diagnoses and Disabilities

**By: Hayden T. Crosby, Staff Editor, Vol. 112**

The Kentucky Supreme Court Rules lay out the broad purpose of the fitness component of the Kentucky Bar application.<sup>[1]</sup> Fitness, in the language of the rule, speaks to the "competence of a prospective lawyer,"<sup>[2]</sup> and the function of the fitness section of the application is to "exclude from the practice of law any person having a mental or emotional illness or condition which would be likely to prevent the person from carrying out duties to clients, Courts or the profession."<sup>[3]</sup> Fitness is therefore about the desirability of prospective conduct. Bar examiners are not medical professionals rendering clinical judgments; their task is rather to enforce social preferences against the admission into legal practice of those who, because of some perceived and present defect, cannot carry out their professional responsibilities.

Against the backdrop of this broad purpose, I propose the removal of Question 31 from the Kentucky Bar application. Question 31 reads in full, "Do you currently have any condition or impairment which could materially affect your ability to practice law in a competent, ethical and professional manner, and which is not being treated or otherwise actively managed?"<sup>[4]</sup> The words "condition or impairment" include "any substance use disorder . . . and any mental health diagnosis or disorder."<sup>[5]</sup> Candidates who answer "yes" to Question 31 are asked to "provide a complete description of the condition or diagnosis affecting [their] abilities, including any prior diagnosis (es), treatment, therapy, medication, monitoring or participation in a support group which is not presently ongoing."<sup>[6]</sup> Considerations of its legality under the Americans with Disabilities Act aside,<sup>[7]</sup> Question 31 suffers from substantive defects that warrant its removal.

The most important consideration here is that Question 31 speaks to a candidate's status, not her conduct. Again, concerns over fitness are concerns over how a candidate will conduct herself in the future given some perceived and present defect, so a candidate's disability status is only relevant to the extent that it explains concerning conduct. In keeping with those concerns, the proper order of inquiry regarding mental disorders is (1) whether a candidate has exhibited conduct that would raise concerns about her capacity to practice law,<sup>[8]</sup> and, if so, (2) whether she has explained or excused her conduct on the basis of a mental disorder.<sup>[9]</sup> By inverting that order and placing a candidate's disability status at the forefront of the inquiry,<sup>[10]</sup> Question 31 begets an environment of compulsory disclosure of diagnoses and disabilities.

Such an environment has a well-established chilling effect on law students seeking professional medical intervention for their mental health struggles. According to a nationwide survey of 3,300 law students, "42% . . . indicated they felt they needed mental health intervention, but 45% would not seek help, believing it would threaten their ability to be admitted to the bar."<sup>[11]</sup> An even greater proportion of respondents drew an analogous conclusion regarding substance use treatment.<sup>[12]</sup> By incentivizing law students to forego treatment, the compulsory disclosure requirement perverts the purpose of the fitness

portion of the bar application. Whereas the function of the fitness evaluation is to filter out candidates whom bar examiners find unlikely to be able to carry out their professional duties, Question 31 incentivizes students with disorders and disabilities against taking the very steps—diagnosis, therapy, and medical treatment—that would improve their fitness for legal practice.

Question 31 is the only disability status-based question on the Kentucky Bar application.<sup>[13]</sup> No questions compel the disclosure of physical disabilities.<sup>[14]</sup> This distinction reflects a selective stigma regarding the effects of mental health diagnoses on legal practice.<sup>[15]</sup> But that stigma lacks a statistical basis—a comparison of rates of attorney misconduct across states shows no relationship between attorney discipline rates and status-based mental health questions on state bar applications.<sup>[16]</sup>

Recognizing these defects, many states have reformed or removed status-based mental health questions like Question 31. The Connecticut Bar Examining Committee removed all mental health questions from its bar application in 2018.<sup>[17]</sup> In the same year, the Florida Board of Bar Examiners reformed its approach to mental health questions in order to provide clarity and guidance for candidates.<sup>[18]</sup> In 2019, the Virginia bar stopped requiring candidates to disclose “mental health conditions and treatment,”<sup>[19]</sup> and the New York State Bar Association voted to remove a mental health question from its bar application after a report outlined the question’s effects on law students and questioned its legality under the Americans with Disabilities Act.<sup>[20]</sup>

Kentucky should follow suit. A diagnosis is not a crystal ball for future conduct. Given the inseparability of fitness and conduct, the chilling effect that status-based mental health questions have on law students seeking medical treatment, and the lack of evidence tying such questions to lower rates of attorney misconduct, neither candidates nor examiners should be asked to speculate about the effects of diagnoses and disorders on prospective legal practice. As such, Question 31 should be removed from the Kentucky Bar application.

[1] Ky. Sup. Ct. R. 2.011.

[2] *Id.*

[3] *Id.*

[4] Kentucky Office of Bar Admissions, Application, <https://synergy.kyoba.org/Login.aspx?ReturnUrl=%2fViews%2fauth%2fdefault.aspx> (click “Register Now” and create an account) (last visited Sept. 13, 2023).

[5] *Id.*

[6] *Id.*

[7] See, e.g., Dena DeFazio, Anne LaBarbera, Lauren Sharkey, Suzanne Hassani, Laura Jurewicz, Simeon Goldman, David Marshall, Marta Galan Ricardo, Thomas Schimmerling, & Eileen Travis, *The Impact, Legality, Use and Utility of Mental Disability Questions on the New York State Bar Application* (2019).

[8] Question 30 (“Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical and professional manner?”) already serves this role, so Question 31 could be removed without frustration to the overall function of the fitness portion of the application. See Kentucky Office of Bar Admissions, *supra* note 4.

[9] The preamble to Question 31 grants the propriety of this ordering when it says, “The mere fact of mental health treatment and/or substance use disorder treatment, monitoring or participation in a support group is not, in itself, a basis on which admission is denied.” *Id.*

[10] The legality under the Americans with Disabilities Act (“ADA”) of disability status-based screening questions for bar applications is, again, beyond the scope of this blog post, but consider that the ADA prohibits “eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.” 28 C.F.R. § 35.130(b)(8). It is difficult to imagine a situation wherein a candidate with a disability could answer “yes” to Question 31 without implicating this provision of the ADA.

[11] Am. Psych. Ass’n, *APA Resolution to Oppose Mental Health Screening Questions on Character and Fitness Examinations for Licensure to Practice Law 1* (2023).

[12] *Id.*

[13] Kentucky Office of Bar Admissions, *supra* note 4.

[14] *Id.*

[15] See also Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., U.S. Dep't of J. C.R. Div., to Bernette J. Johnson, Chief Just. of the La. Sup. Ct., Elizabeth S. Schell, Exec. Dir. of the La. Sup. Ct. Comm. on Bar Admissions, and Charles B. Plattsmier, Chief Disciplinary Couns. of the La. Attorney Disciplinary Bd. (Feb. 5, 2014), <https://www.ada.gov/louisiana-bar-lof.pdf> (finding that similar questions on the Louisiana Bar application "[tended] to screen out individuals with disabilities based on stereotypes and assumptions about their disabilities and [were] not necessary to assess the applicants' fitness to practice law.").

[16] Alyssa Dragnich, *Have You Ever...? How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 *Brook. L. Rev.* 677, 679 (2015).

[17] David Jaffe & Janet Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, 26 *The Prof'l Law.* 3, 11 (2019).

[18] *Id.* at 11-12.

[19] *Id.* at 12.

[20] *Id.*

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