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Have You Ever . . . ?

HOW STATE BAR ASSOCIATION INQUIRIES INTO MENTAL HEALTH VIOLATE THE AMERICANS WITH DISABILITIES ACT

Alyssa Dragnich[†]

“In the 1950’s and early 1960’s bar examiners looked for communists and fornicators. In the late 1960’s and early 1970’s they looked for hippies and pot smokers. Then came the era of cocaine, homosexuals, bankrupts and unpaid student loans.”¹

INTRODUCTION

Today, bar examiners are singling out bar applicants with any history of mental health treatment. In 2014, 26 states required any person applying for a license to practice law to answer questions about her² past mental health diagnoses and treatment as part of the “character and fitness” investigation all bar applicants undergo. Some of those amended their applications following a Department of Justice settlement with the Louisiana Supreme Court in August 2014,³ but 14 states⁴ continue to ask impermissible questions about an applicant’s mental health.

The specific questions vary in scope and intrusiveness, depending on the state in which the applicant is applying. If an applicant refuses to answer the questions, she will not be admitted to the bar. If she answers any question affirmatively, she is then subjected to a host of additional requirements, which can include production of all past medical records from

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¹ Richard C. McFarlain, *Character & Fitness Process Before the Florida Board of Bar Examiners*, FLA. B.J., Jan. 1989, at 29, 34.

² For the sake of consistency, this Article uses the feminine pronoun throughout.

³ See *infra* Part II.B.

⁴ The survey information taken from state bar applications is current as of April 2015.

doctors, hospitals, and therapists; an appearance before a hearing of bar examiners; and consent to additional psychological examinations. Even after all of that, she may be only “conditionally” admitted, allowing the board of bar examiners indefinite jurisdiction over her right to practice.⁵

Despite the passage of the Americans with Disabilities Act (ADA) in 1990 and the firm position of the Department of Justice (DOJ) that these bar application questions violate the ADA, states persist in making these inquiries. Under the ADA, mental health inquiries are suspect because they screen out applicants with disabilities. The Code of Federal Regulations requires that any such screening be “necessary” to achieve its stated purpose.⁶ Here, bar examiners’ stated purpose is to protect the public from “unfit” attorneys.

This Article argues that bar examiners fail to prove the screening is necessary because they cannot show that the screening is effective at reducing the rate of unfit attorneys, as measured by the per capita rates of attorney discipline in each state. The data shows that there is no connection between asking about mental health on a bar application and future rates of attorney misconduct. These results mirror what psychologists and psychiatrists have said for years: that there is no connection between a diagnosis of mental illness and future misconduct as an attorney. Thus, because bar examiners cannot show that their questions about mental health are necessary to protect the public, these questions violate the ADA.

Part I of the Article outlines the statutory framework of the ADA and its implementing regulations. It discusses the arguments proffered by bar examiners in support of mental health inquiries and then the responses made by disability rights advocates as to why those arguments are unpersuasive.

Part II reviews the case law on this issue to date, as well as the landmark settlement reached between the DOJ and the Louisiana Supreme Court in August 2014. In this settlement, Louisiana agreed to eliminate mental health questions from its bar application, radically change its system of conditional licensing for attorneys with mental health issues, and pay \$200,000 to compensate past victims of its discrimination.⁷ Almost immediately, the National Conference of Bar Examiners (NCBE) moved to revise its standard character and fitness questions to eliminate queries about mental health.

⁵ See *infra* Part IV.A.3.

⁶ 28 C.F.R. § 35.130(b)(8) (2014).

⁷ See *infra* Part II.B.

Part III reviews specific questions used by various states across the country, analyzing which comply with the ADA and which do not.

Part IV delves into the “necessary” query. It argues that bar examiners are not capable of making accurate predictions of future fitness based on an applicant’s mental health history. It then compares the rates of attorney discipline from states that do not ask about mental health as part of the character and fitness investigation with states that do ask, showing that there is no connection between asking about mental health on a bar application and future rates of attorney discipline in that state. Part IV then reveals that very few applicants are actually denied admission on mental health grounds and argues that these inquiries persist only because of fear and stereotypes surrounding mental illness.

The article concludes with recommendations for state bar associations and law schools.

I. BACKGROUND

In 1996, one author called the question of bar association inquiries into mental health “one of the most disputed issues to face boards of bar examiners in recent years.”⁸ Almost 20 years later, the issue has not become any less contentious.

A. *Statutory Framework*

Before the passage of the ADA, several bar applicants challenged bar association questions about an applicant’s mental health on the grounds that these questions violated their right to privacy, but courts rejected these arguments, holding that the states’ need to protect the public and the profession outweighed the applicants’ privacy interests.⁹ In 1990, Congress enacted the ADA, a broad civil rights act that prohibits discrimination against people with physical and mental disabilities. Under the ADA, a person is considered disabled if she (a) has “a physical or mental impairment that substantially limits one or more major life activities,” (b) has “a

⁸ Kelly R. Becton, Comment, *Attorneys: The Americans with Disabilities Act Should Not Impair the Regulation of the Legal Profession Where Mental Health is an Issue*, 49 OKLA. L. REV. 353, 353 (1996).

⁹ See, e.g., Fla. Bd. of Bar Exam’rs Re: Applicant, 443 So. 2d 71 (Fla. 1983) (upholding Board of Examiners’ refusal to process application on basis of applicants’ refusal to answer question inquiring about mental health treatment).

record of such an impairment,” or (c) is “regarded as having such an impairment.”¹⁰

Title II¹¹ of the ADA, which applies to state and local government agencies, states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any entity.”¹² Federal courts have consistently held that 1) Title II applies to state bar associations; and 2) bar applicants with a history of mental health diagnosis or treatment are “qualified individuals with a disability.”¹³

Congress required the DOJ to write the implementing regulations for the ADA.¹⁴ Under those regulations, a public entity is prohibited from administering “a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability.”¹⁵ Furthermore, “[a] public entity shall not impose or apply any eligibility criteria that screen out or tend to screen out an individual with a disability . . . unless such criteria can be shown to be *necessary* for the provision of the service, program, or activity being offered.”¹⁶

Courts have already determined that bar application questions about mental health “screen out or tend to screen out” applicants with mental disabilities.¹⁷ The definition of “disability” includes a history of alcohol or drug addiction, but not current drug use.¹⁸ Although many commentators discuss the questions surrounding mental health and addiction together, this Article addresses only mental health questions.

There is a public safety exception to Title II. The law “does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a

¹⁰ 42 U.S.C. § 12102(1) (2012).

¹¹ *Id.* § 12131(1)(B).

¹² *Id.* § 12132.

¹³ *See, e.g.*, *ACLU of Ind. v. Ind. State Bd. of Law Exam'rs*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *5-6 (S.D. Ind. Sept. 20, 2011); *Ellen S. v. Fla. Bd. of Bar Exam'rs*, 859 F. Supp. 1489, 1492-93 (S.D. Fla. 1994); *see also* Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans With Disabilities Act*, 49 U.C.L.A. L. REV. 93, 128 (2001).

¹⁴ 42 U.S.C. § 12134(a).

¹⁵ 28 C.F.R. § 35.130(b)(6) (2014).

¹⁶ *Id.* § 35.130(b)(8) (emphasis added).

¹⁷ *See, e.g.*, *Med. Soc'y of N.J. v. Jacobs*, No. 93-3670 (WGB), 1993 WL 413016, at *7 (D.N.J. Oct. 5, 1993); *In re Application of Underwood*, 1993 WL 649283, at *2 (Me. Dec. 7, 1993).

¹⁸ 42 U.S.C. § 12114(a). The ADA does apply to a person who is participating in a drug rehabilitation program and not currently using illegal drugs. *Id.* § 12114(b)(2).

direct threat to the health or safety of others,”¹⁹ unless the threat can be eliminated by reasonable accommodation.²⁰ Bar examiners have used this “direct threat” language to justify the necessity of their inquiries into applicants’ mental health.²¹

Bar examiners, not applicants, bear the burden of showing that these questions are indeed necessary.²² Several federal courts have held that “[e]ligibility criteria that ‘screen out’ or ‘tend to screen out’ disabled individuals violate the ADA unless the proponent of the eligibility criteria can show that the eligibility requirements are necessary.”²³ Furthermore, a court is not permitted to merely accept the bar examiners’ statement that the screening questions are necessary but “must make an independent inquiry into the soundness of [the] policy.”²⁴

An affirmative answer to any of the mental health questions triggers an onslaught of additional inquiries and disclosures.²⁵ Applicants are required to execute medical record release forms and produce records, treating notes, prescription history, and more from all previous psychologists, psychiatrists, and therapists.²⁶ In some states, these forms require the production of treatment history and notes from all mental health providers the applicant has ever seen.²⁷ In some cases, a committee of the board of bar examiners will review the records and process the application. In other cases, the applicant may be required to attend a hearing before the bar examiners. These requests pose an additional burden not borne by non-disabled applicants.²⁸

¹⁹ 28 C.F.R. § 35.139(a).

²⁰ 42 U.S.C. § 12111(3).

²¹ See, e.g., *ACLU of Ind. v. Ind. State Bd. of Law Exam’rs*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *1 (S.D. Ind. Sept. 20, 2011).

²² *Colo. Cross Disability Coal. v. Hermanson Family Ltd.*, 264 F.3d 999, 1003 (10th Cir. 2001) (“Several district courts have placed the burden of showing that the eligibility criteria are necessary on the proponent of such criteria.” (citations omitted)); *In re Petition & Questionnaire for Admission to the R.I. Bar (Rhode Island)*, 683 A.2d 1333, 1336 (R.I. 1996) (“[T]he burden is on those who propose to ask the questions to show an actual relationship . . .”).

²³ *Hahn v. Linn Cnty.*, 130 F. Supp. 2d 1036, 1055 (N.D. Iowa 2001); see also *Bowers v. NCAA*, 118 F. Supp. 2d 494, 518 (D.N.J. 2000).

²⁴ *Stillwell v. Kan. City Bd. of Police Comm’rs*, 872 F. Supp. 682, 687 (W.D. Mo. 1995).

²⁵ See, e.g., *FLA. BD. OF BAR EXAM’RS, ONLINE BAR APPLICATION* (on file with author) (“Please direct each such professional and hospital and/or other facility to furnish to the Board any information the Board may request with respect to any such hospitalization, consultation, treatment or diagnosis.”).

²⁶ *Id.*

²⁷ See, e.g., *id.*

²⁸ *Med. Soc’y of N.J. v. Jacobs*, No. 93-3670 (WGB), 1993 WL 413016, at *7 (D.N.J. Oct. 5, 1993).

B. *Bar Examiner Arguments*

Each state sets its own criteria for licensing attorneys, and states have broad latitude in administering this process.²⁹ All states typically require applicants to pass a written exam on substantive law, as well as undergo what is effectively a background investigation, known as the “character and fitness” process.³⁰ During this investigation, bar examiners probe into all aspects of an applicant’s life, including her academic record, former residences, marital status, employment record, credit and financial history, military service, criminal acts, legal proceedings, and more.³¹

The stated purpose of the character and fitness investigation is to protect the public from unfit or unscrupulous attorneys and safeguard the system of justice, which some commentators interpret as protecting the image of the profession.³² The United States Supreme Court has held that “any qualification [required by bar examiners] must have a rational connection with the applicant’s fitness or capacity to practice law.”³³ However, many scholars have criticized the tenuous connection between a character and fitness investigation and a person’s future conduct as an attorney.³⁴

As part of the character and fitness inquiry, bar examiners historically have insisted on investigating the mental health of bar applicants.³⁵ Examiners argue that this investigation is needed because “mental illness in a practicing attorney can lead to extremely adverse consequences for the unsuspecting public.”³⁶ A prior General Counsel to the Florida Board of Bar Examiners has argued that “it is *necessary* for the protection of the public to

²⁹ *Schware v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 239 (1957); *Clark v. Va. Bd. of Bar Exam’rs*, 880 F. Supp. 430, 443 (E.D. Va. 1995).

³⁰ *Bar Admissions Basic Overview*, AM. B. ASS’N, http://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html (last visited Apr. 20, 2015).

³¹ Donald H. Stone, *The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study*, 15 N. ILL. U. L. REV. 331, 353 (1995).

³² John D. McKenna, Note, *Is the Mental Health History of an Applicant a Legitimate Concern of State Professional Licensing Boards? The Americans with Disabilities Act vs. State Professional Licensing Boards*, 12 HOFSTRA LAB. L.J. 335, 344 (1995) (“[B]ar associations[,] . . . like other [professional] associations, are interested in protecting their image and economic well being.”).

³³ *Schware*, 353 U.S. at 239.

³⁴ See *infra* note 349.

³⁵ Thomas A. Pobjecky, *Everything You Wanted to Know About Bar Admissions and Psychiatric Problems But Were Too Paranoid to Ask*, B. EXAM’R, Feb. 1989, at 14, 21 (“To fulfill their obligation to the public, bar examiners must be equipped to identify bar applicants with serious mental problems.”).

³⁶ Thomas A. Pobjecky, *Mental Health Inquiries: To Ask, or Not to Ask—That Is the Question*, B. EXAM’R, Aug. 1992, at 31, 31.

screen out would-be lawyers who are not mentally fit or emotionally stable”³⁷ He further stated that “a mentally unfit bar applicant will go on to become a mentally unfit attorney unless prevented by the bar admitting authority.”³⁸

Erica Moeser, the current president of the NCBE,³⁹ has stated, “If the scenario were shifted from the licensing of lawyers to some other line of work, such as first-grade teachers, it is difficult to imagine that anyone seriously would argue that the current mental health of applicants should be placed out of bounds.”⁴⁰ Moeser made this statement when she was the chairperson-elect of the American Bar Association Section of Legal Education and Admissions to the Bar in 1994—four years after the ADA passed.⁴¹ She went on to write that “the insistence by some that the Americans with Disabilities Act bars any inquiry at all into an applicant’s mental health . . . is a misuse of a watershed of civil rights legislation.”⁴²

C. *Responses from Disability Rights Advocates*

Disability rights advocates argue that inquiry into mental health on a bar application is ill-advised for a number of reasons. The inquiry could deter law students from seeking beneficial counseling, embarrass applicants and delay approval of their applications, provide an incentive for applicants to lie on their applications, force mental health professionals to violate their own ethical codes by breaching confidentiality, and discriminate against mental disabilities but not physical disabilities.

1. Deterrent Effect

Perhaps the biggest risk of requiring applicants to disclose their past mental health treatment is that it deters some people who would benefit from treatment from seeking

³⁷ *Id.* at 33.

³⁸ Pobjecky, *supra* note 35, at 16. There are two problems with this statement. The first is the implicit assumption that an applicant diagnosed with a mental illness is unfit. The second is the belief that an applicant who is unfit at one time will be unfit in the future. Mental illnesses tend to wax and wane throughout a person’s lifetime. If an applicant is truly mentally unfit at the time of application, then her application should be denied. But a determination of fitness rests on the applicant’s actual capabilities at the time of application, not the mere existence of a diagnosis.

³⁹ See discussion of the NCBE actions on this issue, *infra* Part II.C.

⁴⁰ Erica Moeser, *Yes: The Public Has a Right to Know About Instability*, A.B.A. J., Oct. 1994, at 36, 36.

⁴¹ *Id.*

⁴² *Id.*

it.⁴³ It is impossible to measure precisely how many students forego treatment in fear of the bar application, but no one doubts that the effect is real.⁴⁴

Many states now include a disclaimer on their applications, urging applicants not to avoid seeking treatment if they need it. But the efficacy of these disclaimers is questionable because many applicants may not believe them and will continue to avoid treatment.⁴⁵

2. Embarrassment, Invasion of Privacy, and Processing Delays

Many applicants are ashamed and humiliated by being forced to provide details of their very difficult and personal circumstances to strangers.⁴⁶ Applicants must execute broad medical record release forms, and they often must attend a hearing before a committee of bar examiners, where they are required to answer additional questions about their treatment history.

These additional investigations can substantially delay the processing of the application,⁴⁷ further embarrassing the applicant and in many cases, affecting her employment prospects. The delay in processing these applications is a “great source of inconvenience, distress, economic loss and even physical harm.”⁴⁸ There is also some risk that bar examiners will, perhaps unconsciously, make harsher judgments about other aspects of an applicant’s file—such as credit issues—once the examiners have knowledge of the applicant’s mental disability.⁴⁹

Some commentators believe that the lengthy and intrusive process may be a deliberate action by bar examiners to discourage applicants with disabilities from even applying for bar admission.⁵⁰ Other bar examiners may view the delays

⁴³ Stephen T. Maher & Lori Blum, *A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants*, 23 IND. L. REV. 821, 830-33 (1990); see also Clark v. Va. Bd. of Bar Exam’rs, 880 F. Supp. 430, 445 (E.D. Va. 1995) (detailing bar applicant’s argument that a question asking about mental health “ha[d] the adverse effect of deterring mental health treatment and stigmatizing those who do seek treatment”).

⁴⁴ Bauer, *supra* note 13, at 150. Some authors argue that the applicants that the bar examiners should be most worried about are those applicants who are in need of treatment but have not sought it. See, e.g., Maher & Blum, *supra* note 43, at 829. The reasoning is that applicants who are currently in treatment are likely to be more stable.

⁴⁵ Becton, *supra* note 8, at 370; Maher & Blum, *supra* note 43, at 833.

⁴⁶ See, e.g., Bauer, *supra* note 13, at 113-25.

⁴⁷ *Id.* at 95-96; Phyllis Coleman & Ronald A. Shellow, *Fitness to Practice Law: A Question of Conduct, Not Mental Illness*, FLA. B.J., May 1994, at 71, 72.

⁴⁸ Stanley S. Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635, 678 (1997).

⁴⁹ Bauer, *supra* note 13, at 207.

⁵⁰ Herr, *supra* note 48, at 678.

as beneficial because they keep the candidate's file pending for a longer period of time, in essence serving as an illegal form of probation while providing more time for the board to monitor the applicant.⁵¹ The NCBE Bar Examiners' Handbook notes that it is "easier to refuse admittance to an immoral applicant than it is to disbar him after he is admitted."⁵²

3. Incentive for Applicants to Lie

The current system provides a perverse incentive for applicants to lie on their applications.⁵³ If an applicant answers "no" to all of the mental health questions, the inquiry ends there, assuming nothing else in the applicant's file is problematic. However, if the same applicant honestly answers "yes" on her application, she is subjected to a barrage of additional scrutiny. She must produce her medical records, might be required to attend a hearing where she will be asked deeply personal questions, and will experience a delay in processing her application. "It is an irony of the current system that the most candid and cooperative applicant often faces the longest ordeal, while other applicants with similar backgrounds who tick the box 'no' sail into the bar with no ripple of attention."⁵⁴ Surely honesty is a more important characteristic for an attorney than the presence or absence of a particular mental health diagnosis.

Several commentators have questioned the low rate of affirmative answers to bar application mental health questions, wondering if applicants are in fact omitting information. The *Clark* decision⁵⁵ noted that although evidence suggested that approximately 20% of the United States population suffers from some form of mental illness at any given time, the rate of affirmative answers regarding mental health on the Virginia bar application was less than 1%.⁵⁶ The court stated that this discrepancy "indicates that [the question] is ineffective in identifying applicants suffering from mental illness."⁵⁷ Law students likely experience mental illness at a lower rate than the general population, but such a wide variance is highly questionable.

⁵¹ *Id.*

⁵² NAT'L CONF. OF BAR EXAM'RS, BAR EXAM'RS' HANDBOOK, 73:4 (3d ed. 1991).

⁵³ Herr, *supra* note 48, at 658.

⁵⁴ *Id.*

⁵⁵ See *infra* Part II.A.5.

⁵⁶ *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 437 (E.D. Va. 1995).

⁵⁷ *Id.*

Similarly, during a five-year span, only 2.5% of applicants to the Connecticut bar disclosed mental health treatment on their applications.⁵⁸ In *Texas Applicants*,⁵⁹ the court found that from August 1987 until the decision in 1994, only 30 applications raised mental health issues.⁶⁰ One bar examiner interprets these results to mean that “[if] a bar examining authority is not seeing any applicants with these problems, then it is suggested that such authority is not looking very hard.”⁶¹

Another author believes the lower than expected rate of affirmative answers may be because applicants view the questions as an illegitimate intrusion and are simply refusing to answer the questions truthfully.⁶² Regardless of the cause, the low number of affirmative answers “calls the utility—and fairness—of the whole enterprise into question.”⁶³

4. Mental Health Providers’ Duty of Confidentiality

Psychologists, psychiatrists, and other mental health providers are bound by professional ethical rules that require doctor-patient confidentiality.⁶⁴ Asking a psychologist to disclose privileged provider-patient information is asking her to violate her own ethical code.⁶⁵ For bar examiners to make this request is particularly hypocritical, given that lawyers are bound by their own confidentiality rules.⁶⁶

Mandatory disclosures about mental health on bar applications may make the course of treatment less effective. Knowing that they will have to disclose their treatment, applicants may be less forthcoming with their therapists and doctors.⁶⁷ Successful psychotherapy generally requires openness and truthfulness from the patient,⁶⁸ and if the patient is worried about what her therapist could reveal to others, it may cause the patient to withhold information, hindering her

⁵⁸ Bauer, *supra* note 13, at 105.

⁵⁹ See *infra* Part II.A.4.

⁶⁰ *Applicants v. Tex. State Bd. of Law Exam’rs*, No. A 93 CA 740 SS, 1994 WL 923404, at *4 (W.D. Tex. Oct. 11, 1994). The opinion did not state the number of total applications received.

⁶¹ Pobjecky, *supra* note 35, at 16.

⁶² Bauer, *supra* note 13, at 105.

⁶³ Herr, *supra* note 48, at 674.

⁶⁴ Maher & Blum, *supra* note 43, at 834.

⁶⁵ Frederick A. Elliston, *Character and Fitness Tests: An Ethical Perspective*, B. EXAM’R, Aug. 1982, at 8, 13.

⁶⁶ *Id.* (“It is wrong for lawyers to ask other professionals to disclose information when they are forbidden to do so themselves.”).

⁶⁷ Maher & Blum, *supra* note 43, at 829-30.

⁶⁸ *Id.* at 834.

treatment and prognosis.⁶⁹ In addition, the therapist herself may alter the treatment plan based on the knowledge that she must disclose that treatment, rather than choosing the best therapeutic option for the patient.⁷⁰

5. No Equivalent Inquiry into Physical Disabilities

The vast majority of bar applications do not ask applicants about any physical disabilities that may impair their ability to practice law. The Code of Recommended Standards for Bar Examiners, adopted in 1987—thus predating the ADA—expressly provides that “the physical disability of the applicant is not relevant to character and fitness for law practice and should not be considered.”⁷¹ But many physical disabilities run the risk of being even more incapacitating than mental disabilities. For example, a diabetic⁷² who is having difficulty controlling her blood sugar or who takes an incorrect dose of insulin may experience erratic and extreme behavior even worse than that commonly seen in some psychotic patients.⁷³ Hypothyroidism, a fairly common physical disorder and one that is generally regarded as mild, can cause hallucinations and psychosis in some cases.⁷⁴ Yet, no bar examiner inquires into the thyroid status of bar applicants. Many other physical conditions could render an attorney unfit to practice.⁷⁵ But states do not ask about physical disabilities in the same way that they pry into mental disabilities.

II. LEGAL PROCEEDINGS TO DATE

A. *Court Decisions*

The first courts to confront the issue of mental health questions on licensing applications held that asking “have you

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Bauer, *supra* note 13, at 153.

⁷² Diabetes is a physical disability under the ADA. *Questions & Answers about Diabetes in the Workplace and the Americans with Disabilities Act (ADA)*, U.S. EQUAL OPP. EMP. COMM’N, available at <http://www.eeoc.gov/laws/types/diabetes.cfm#fn9> (last visited Apr. 20, 2015).

⁷³ Ira Burnim, Legal Dir. of the Bazelon Ctr. for Mental Health Law, Remarks at *Suffering in Silence: The Tension Between Self-Disclosure And a Law School’s Obligation to Report Conference Panel* (2009), in 18 AM. U. J. GENDER SOC. POL’Y & L. 121, 122 [hereinafter *Suffering in Silence*].

⁷⁴ Thomas W. Heinrich & Garth Graham, *Hypothyroidism Presenting as Psychosis: Myxedema Madness Revisited*, 5 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 260, 260 (2003).

⁷⁵ Herr, *supra* note 48, at 642.

ever had any mental health treatment” or “any mental disorder” were overbroad and violated the ADA. As the questions became narrower over time, the courts’ holdings did too. This section describes the progression of cases over time, from 1993 until the present.

1. *Medical Society of New Jersey v. Jacobs*

The first case to confront the issue of mandatory inquiries into mental health involved physicians, not attorneys. In 1993, an association representing physicians in New Jersey sought a preliminary injunction against the New Jersey Board of Medical Examiners, the state agency that licensed physicians.⁷⁶ The physicians protested questions that appeared on forms required of those seeking an initial medical license or renewal of an existing license. The questions were “Have you ever suffered or been treated for any mental illness or psychiatric problems?” and “Are you presently or have you previously suffered from or been in treatment for any psychiatric illness?”⁷⁷

The District Court of New Jersey held that these questions clearly singled out qualified individuals with disabilities.⁷⁸ If an applicant answered affirmatively, she was subjected to further investigation, and the questions were therefore an impermissible screening device under the ADA because they imposed additional burdens on qualified individuals with disabilities.⁷⁹ The court further held that “these additional burdens are unnecessary” and that “[t]he Court is confident that the Board can formulate a set of effective questions that screen out applicants based only on their behavior and capabilities.”⁸⁰ The court was clear that the mental health questions “substitute[d] an impermissible inquiry into the status of disabled applicants for the proper, indeed necessary, inquiry into the applicants’ behavior.”⁸¹

⁷⁶ *Med. Soc’y of N.J. v. Jacobs*, No. 93-3670 (WGB), 1993 WL 413016, at *1 (D.N.J. Oct. 5, 1993).

⁷⁷ *Id.* at *1.

⁷⁸ *Id.* at *5.

⁷⁹ *Id.* at *7.

⁸⁰ *Id.* The court suggested that appropriate inquiries could be “based on [applicants’] employment histories; based on whether applicants can perform certain tasks or deal with certain emotionally or physically demanding situations; or based on whether applicants have been unreliable, neglected work, or failed to live up responsibilities.” *Id.*

⁸¹ *Id.* The court then concluded that although the plaintiff physicians had a high probability of succeeding on the merits, they had not shown immediate irreparable injury because they had not provided any evidence that the Board actually subjected

Interestingly, the court was careful to state that it was not the questions themselves that were discriminatory, but rather the extra investigation that an affirmative answer to the questions triggered.⁸² In other words, if the Board asked the questions but then did not act upon the answers, the questions themselves would be permissible.⁸³

2. *In re Underwood*

Only a few months later, the Supreme Court of Maine ruled on the same question, this time in the context of attorney licensing.⁸⁴ In *Underwood*, two bar applicants refused to answer the following questions on the Maine state bar application: “Have you ever received diagnosis of an emotional, nervous or mental disorder?” and “Within the ten (10) year period prior to the date of this application, have you ever received treatment of emotional, nervous or mental disorder?”⁸⁵

In a short opinion, the court held that both asking the questions and requiring applicants to sign broad medical record authorizations violated the ADA because it discriminated on the basis of disability and imposed eligibility criteria that screened out individuals with disabilities.⁸⁶ The court noted that “it is certainly permissible for the Board . . . to fashion other questions more directly related to *behavior* that can affect the practice of law without violating the ADA.”⁸⁷

3. *Ellen S. v. Florida Board of Bar Examiners*

In 1994, a bar applicant and several law students sued the Florida Board of Bar Examiners, alleging that four aspects of the Board’s bar application violated the ADA: 1) broad questions about mental health treatment and diagnosis, 2) broad medical records release authorizations, 3) a letter of inquiry sent from the Board to all treating professionals, and 4) follow-up investigations and hearings conducted by the Board.⁸⁸ The application asked the following questions:

applicants who answered affirmatively to additional investigations. *Id.* at *11. Therefore, the court denied the application for a preliminary injunction, even though the opinion was quite clear that the Board’s scheme violated Title II of the ADA. *Id.*

⁸² *Id.* at *8.

⁸³ *Id.*

⁸⁴ *In re Application of Underwood*, 1993 WL 649283 (Me. Dec. 7, 1993).

⁸⁵ *Id.* at *1 n.1.

⁸⁶ *Id.* at *2.

⁸⁷ *Id.*

⁸⁸ *Ellen S. v. Fla. Bd. of Bar Exam’rs*, 859 F. Supp. 1489, 1490-91 (S.D. Fla. 1994).

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

_____ Yes _____ No Have you ever consulted a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental, nervous or emotional condition, drug or alcohol use? If yes, state the name and complete address of each individual you consulted and the beginning and ending dates of each consultation.

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

b. _____ Yes _____ No Have you ever been prescribed psychotropic medication? If yes, state the name and complete address of each prescribing physician. Psychotropic medication shall mean any prescription drug or compound effecting the mind, behavior, intellectual functions, perceptions, moods, or emotions, and includes anti-psychotic, anti-depressant, anti-manic and anti-anxiety medications.⁸⁹

The Southern District of Florida held that Title II of the ADA applied to the licensing of attorneys,⁹⁰ and that the Board's actions of placing additional burdens on qualified applicants with disabilities discriminated against those applicants.⁹¹ Technically, the *Ellen S.* decision ruled only on the Board's Motion to Dismiss and held that the court had jurisdiction to hear the case.⁹² After this decision, the plaintiffs and the Board entered a consent decree where the Board voluntarily changed the disputed questions.⁹³

4. *Applicants v. Texas State Board of Law Examiners*

Only two months later, a district court in Texas reached the opposite conclusion of the *Ellen S.* court and upheld several mental health questions on the Texas bar application.⁹⁴ Surprisingly, the Texas decision did not even mention *Ellen S.* The Texas application asked the following questions:

a. Within the last ten years, have you been diagnosed with or have you been treated by [sic] bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?

⁸⁹ *Id.* at 1491 n.1.

⁹⁰ *Id.* at 1493.

⁹¹ *Id.* at 1494.

⁹² *Id.* at 1495-96.

⁹³ See *Doe v. Jud. Nominating Comm'n*, 906 F. Supp. 1534, 1543 (S.D. Fla. 1995).

⁹⁴ *Applicants v. Tex. State Bd. of Law Exam'rs*, No. A 93 CA 740 SS, 1994 WL 923404, at *1 (W.D. Tex. Oct. 11, 1994).

- b. Have you, since the age of attaining eighteen or within the last ten years, whichever period is shorter, been admitted to a hospital or other facility for the treatment of bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?⁹⁵

Answering affirmatively required the applicant to provide additional information, authorize the release of medical records, and subject herself to an additional investigation by the Board.⁹⁶ The Texas questions were limited in temporal scope, while the challenged questions in *Medical Society of New Jersey* and *Ellen S.* were open-ended, “have you ever” been treated questions. Because of this temporal limitation, the court held that the Texas questions were more narrowly tailored.⁹⁷

However, the *Texas Applicants* questions included a list of specific diagnoses that appeared to frighten the court, which wrote “[b]ipolar disorder, schizophrenia, paranoia, and psychotic disorders are serious mental illnesses that may affect a person’s ability to practice law.”⁹⁸ The court reasoned that even though a person may go for long periods of time without a problem, the risk of any future “episode” was sufficient to trigger a further investigation by the Board.⁹⁹

The court stated that the Board’s “individualized, case-by-case investigation”—which plaintiffs characterized as “screening out” and “additional burdens”—was actually “efforts to avoid improper generalization or stereotyping of mentally disabled individuals.”¹⁰⁰ The court went on to commend the Board, saying “the Board discharges its duty in a responsible

⁹⁵ *Id.* at *2 n.5.

⁹⁶ *Id.* at *2.

⁹⁷ *Id.* at *9.

⁹⁸ *Id.* at *3.

⁹⁹ The opinion read as follows:

Bipolar disorder, schizophrenia, paranoia, and psychotic disorders are serious mental illnesses that may affect a person’s ability to practice law. People suffering from these illnesses may suffer debilitating symptoms that inhibit their ability to function normally. The fact that a person may have experienced an episode of one of these mental illnesses in the past but is not currently experiencing symptoms does not mean that the person will not experience another episode in the future or that the person is currently fit to practice law. Indeed, a person suffering from one of these illnesses may have extended periods between episodes, possibly as much as ten years for bipolar disorder or schizophrenia. Although a past diagnosis of the mental illness will not necessarily predict the applicant’s future behavior, the mental health history is important to provide the Board with information regarding the applicant’s insight into his or her illness and degree of cooperation in controlling it through counseling and medication. In summary, inquiry into past diagnosis and treatment of the severe mental illnesses is necessary to provide the Board with the best information available with which to assess the functional capacity of the individual.

Id.

¹⁰⁰ *Id.* at *7.

manner while making every effort not to discriminate against those who have suffered a mental illness but have the present fitness to practice law.”¹⁰¹

The opinion further stated that the Board was charged with an “awesome responsibility”:¹⁰²

The Board has a duty not to just the applicants, but also to the Bar and the citizens of Texas to make every effort to ensure that those individuals licensed to practice in Texas have the good moral character and present fitness to practice law and will not present a potential danger to the individuals they will represent. The Board has a limited opportunity to accomplish this task—the time of the filing of the declaration and application. The Board, therefore, must make every effort to investigate each applicant as thoroughly as possible and as efficiently as possible during this limited time.¹⁰³

The reference to a “limited” time period for investigation is somewhat misleading, given that these applicants filed as first-year law students, more than two years before they were scheduled to sit for the bar examination. But the court concluded that the Board’s “rigorous application procedure, including investigating whether an applicant has been diagnosed or treated for certain serious mental illnesses, is indeed necessary to ensure that Texas’ lawyers are capable, morally and mentally, to provide these important services.”¹⁰⁴ The court went so far as to say that the Board “would be derelict in its duty if it did not investigate the mental health of prospective lawyers.”¹⁰⁵

The Texas suit was perhaps complicated by the fact that the Texas Board of Law Examiners had revised its mental health questions several times in recent years: it used one question prior to April 1992, another from April 1992 to July 1993, and then a third after July 1993.¹⁰⁶ The plaintiffs did not file their complaint until October 22, 1993.

Other courts and commentators have criticized the *Texas Applicants* decision.¹⁰⁷ This includes the DOJ, which has long maintained that the questions upheld in this

¹⁰¹ *Id.*

¹⁰² *Id.* at *8.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *9.

¹⁰⁶ *Id.* at *2 & nn.3-5.

¹⁰⁷ *See, e.g.,* Herr, *supra* note 48, at 667.

decision are impermissible because of their focus on status rather than behavior.¹⁰⁸

5. *McCready v. Illinois Board of Admissions to the Bar*

In *McCready*, the applicant challenged questions on a bar application form to be completed by a person serving as a reference for the applicant.¹⁰⁹ The Illinois bar application did not ask about mental health, but the third-party reference forms required by the bar asked if the reference knew of any “drug or alcohol dependency or abuse,” as well as “any emotional, mental, behavioral or nervous affliction” on the part of the applicant.¹¹⁰

The Northern District of Illinois found that the questions struck down in *Ellen S.* were broader than the questions at issue and followed the lead of *Texas Applicants* in finding that Illinois’s inquiry was narrowly tailored.¹¹¹ The court held that it was “ludicrous . . . to propose that [the purpose of the ADA] can only be accomplished by prohibiting a state from directly investigating and assessing an applicant’s emotional and mental fitness”¹¹² It went on to replicate the language of *Texas Applicants* and say that the Board “would be derelict in its duty if it did not investigate the mental health of prospective lawyers to the extent allowed by law[,]” and concluded that the ADA “does not prohibit reasonable inquiry concerning the mental disabilities or addictions of applicants for admission to the bar.”¹¹³ The court held that because the application did not ask *the applicant*, only her references, and imposed no additional burden on the applicant, the inquiry did not violate the ADA.¹¹⁴

6. *Clark v. Virginia Board of Bar Examiners*

One month after *McCready*, the Eastern District of Virginia struck down a mental health question on the Virginia

¹⁰⁸ Letter from Jocelyn Samuels to C.J. Bernette J. Johnson et al. 2 (Feb. 5, 2014) [hereinafter DOJ Letter], available at <http://www.ada.gov/louisiana-bar-lof.pdf>; Herr, *supra* note 48, at 667.

¹⁰⁹ *McCready v. Ill. Bd. of Admissions to the Bar*, No. 94 C 3582, 1995 WL 29609, at *6 (N.D. Ill. Jan. 24, 1995).

¹¹⁰ *Id.* at *6. The plaintiff’s issues appeared to be related to drug and alcohol dependency, not mental health.

¹¹¹ *Id.*

¹¹² *Id.* at *7.

¹¹³ *Id.*

¹¹⁴ *Id.* at *6.

bar application.¹¹⁵ At the time of the suit, Virginia's application asked "Have you within the past five (5) years, been treated or counselled for a mental, emotional, or nervous disorder?"¹¹⁶ An affirmative answer required the applicant to furnish details about her diagnosis, treatment, and prognosis.¹¹⁷

The opinion carefully evaluated testimony from two competing expert witnesses, both psychiatrists. The plaintiff's expert, Dr. Howard V. Zonana, testified that the question asked for information that "is unrelated to applicants' present ability to practice law and has little or no predictive value."¹¹⁸ Dr. Zonana first stated that "there is little evidence to support the ability of bar examiners, or even mental health professionals, to predict inappropriate or irresponsible future behavior based on a person's history of mental health treatment."¹¹⁹ The court noted that the American Psychiatric Association supported the position that "psychiatric history should not be the subject of applicant inquiry because it is not an accurate predictor of fitness."¹²⁰

The defendant's expert was Dr. Charles B. Mutter, a psychiatrist and former member of the Florida Board of Bar Examiners.¹²¹ Dr. Mutter testified that broad mental health questions were "essential" and narrower questions were "inadequate because they allow[ed] applicants to filter their responses and provide self-promoting answers."¹²² The court rejected Dr. Mutter's position as "immoderate" and "somewhat extreme," finding that it was "unsupported by objective evidence and discordant with a contemporary understanding of mental health questions under the ADA."¹²³ The court noted that Dr. Mutter "was unable [to] point to any evidence proving a correlation between mental health questions and an inability to practice law."¹²⁴ The court was also concerned that the inquiry would deter

¹¹⁵ *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 431 (E.D. Va. 1995). When the complaint was first filed, the court concluded that it did not have jurisdiction over the matter, although it oddly then proceeded to discuss the ADA instead of stopping at the jurisdictional question. *Clark v. Va. Bd. of Bar Exam'rs*, 861 F. Supp. 512, 516 (E.D. Va. 1994). The court then determined that the plaintiff Clark was not disabled and granted summary judgment in favor of the board of bar examiners. *Id.* at 517. However, after Clark filed a motion to alter judgment, the court determined that the previous decision was in error and that 1) the court did have jurisdiction and 2) the court's determination that Clark was not disabled was "premature." *Id.* at 517-19. The court reversed the grant of summary judgment. *Id.*

¹¹⁶ *Clark*, 880 F. Supp. at 433.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 435.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 436.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

law students from seeking counseling¹²⁵ and could negatively affect the treatment of those who did seek counseling.¹²⁶

The court stated it was “not clear” that the disputed question screened out potential applicants, but that the question clearly did “impose[] an additional burden on applicants with disabilities”¹²⁷ Because this additional burden existed, the Board had to show that the question was “necessary” to the licensing function.¹²⁸ The court found that “the Board presented no evidence of correlation between obtaining mental counseling and employment dysfunction,”¹²⁹ and, therefore, the question was not “necessary” under the ADA.¹³⁰ In addition, the court found that Virginia’s question was broader than those asked in *Texas Applicants*, which were “addressed only to specific behavioral disorders relevant to the practice of law.”¹³¹

The court emphasized the narrow scope of its ruling by stating that “some form of mental health inquiry is appropriate,”¹³² and declined to rule on whether all mental health questions should be eliminated from bar applications.¹³³ The court also specifically declined to craft a question that would comply with the ADA: “As the Court’s job in this case is to decide whether [Question] 20(b) complies with the ADA, not to draft a question that would comply with the ADA, the Court will refrain from offering any *dictum* guidance.”¹³⁴

7. *Doe v. Judicial Nominating Commission*

In *Doe*, the Southern District of Florida applied the same analytical framework to a judicial nomination application.¹³⁵ In Florida, when a state judicial vacancy occurs between elections, a judicial nominating commission (JNC) solicits and reviews applications before submitting nominees to the governor.¹³⁶ An attorney who sought a judicial nomination filed suit on the grounds that the questions in the application violated the ADA. The questions asked for general information about the applicant’s physical health and asked if applicants

¹²⁵ *Id.* at 437-38.

¹²⁶ *Id.* at 438.

¹²⁷ *Id.* at 442.

¹²⁸ *Id.* at 442-43.

¹²⁹ *Id.* at 446.

¹³⁰ *Id.*

¹³¹ *Id.* at 444.

¹³² *Id.* at 436.

¹³³ *Id.* n.10.

¹³⁴ *Id.* at 446.

¹³⁵ *Doe v. Jud. Nominating Comm’n*, 906 F. Supp. 1534 (S.D. Fla. 1995).

¹³⁶ *Id.* at 1536.

have ever been treated for “any form of mental illness” or “any form of emotional disorder or disturbance or otherwise [had] been treated by psychologists, psychiatrists, or other mental health care professionals in the last five years.”¹³⁷

The court focused its inquiry on the “necessary” exception, finding that the “forced disclosure of information relating to disabilities without a necessary basis for the information is a form of discrimination because it screens out, or tends to screen out, the disabled by imposing disproportionate burdens on them.”¹³⁸ The court concluded that the JNC’s questions were overbroad because they inquired about “any form of mental illness” and “any hospital confinement.”¹³⁹ The court found that such inquiries were over-inclusive because they would “force the disclosure of intimate, personal matters that have nothing to do with job performance.”¹⁴⁰ The court also noted that “at minimum, the inquiry must be subject to reasonable time limitations”¹⁴¹

The court enjoined the JNC from asking the disputed questions and requiring medical records releases.¹⁴² However, the court explicitly rejected the plaintiff’s argument that the ADA prohibited the asking of *any* questions about mental and physical fitness and held that “the ADA does not prevent inquiry into an applicant’s status, i.e., diagnosis or treatment for severe mental illness.”¹⁴³

8. *In re Petition and Questionnaire for Admission to the Rhode Island Bar (Rhode Island)*

In 1996, the Supreme Court of Rhode Island issued perhaps the most thoroughly researched opinion on this issue.¹⁴⁴ The case began when the ACLU of Rhode Island challenged four questions on the Rhode Island bar application on the grounds that they violated the ADA.¹⁴⁵ The board of bar examiners then revised two of the questions, and its Committee on Character and Fitness then petitioned the Supreme Court of

¹³⁷ *Id.* at 1537.

¹³⁸ *Id.* at 1544.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1545.

¹⁴² *Id.*

¹⁴³ *Id.* at 1541-42.

¹⁴⁴ *In re Petition & Questionnaire for Admission to the R.I. Bar (Rhode Island)*, 683 A.2d 1333 (R.I. 1996).

¹⁴⁵ *Id.* at 1333.

Rhode Island for instructions on how to proceed with the remaining two questions.¹⁴⁶

The challenged questions asked “Have you ever been hospitalized, institutionalized or admitted to any medical or mental health facility (either voluntarily or involuntarily) for treatment or evaluation for any emotional disturbance, nervous or mental disorder?” and “Are you now or have you within the last five (5) years been diagnosed as having or received treatment for an emotional disturbance, nervous or mental disorder, which condition would impair your ability to practice law?”¹⁴⁷ An affirmative answer to either question triggered the need to produce medical records and a further investigation.

As part of the case, the court invited written comments from the public and held a public hearing.¹⁴⁸ It also appointed a special master, who was both a lawyer and a medical doctor, to investigate the matter.¹⁴⁹ The court placed great weight on the report of the special master, which concluded that there was no link between previous psychiatric treatment and a person’s ability to function effectively in the workplace.¹⁵⁰ The special master also found that there was no empirical evidence showing that lawyers with a history of psychiatric treatment had a higher incidence of disciplinary actions later.¹⁵¹ The special master’s conclusions essentially mirrored those of the plaintiff’s expert, Dr. Zonana, in *Clark*.¹⁵²

Ultimately, the court adopted the question recommended by the special master: “Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?”¹⁵³ The other questions were removed from the application.¹⁵⁴

9. *O’Brien v. Virginia Board of Bar Examiners*

In 1998, Virginia’s bar application question was challenged once again.¹⁵⁵ After *Clark*, the Virginia Board of Bar Examiners had revised the question to read as follows:

¹⁴⁶ *Id.* & n.1.

¹⁴⁷ *Id.* at 1334.

¹⁴⁸ *Id.* at 1333-34.

¹⁴⁹ *Id.* at 1333.

¹⁵⁰ *Id.* at 1336; see also discussion *infra* Part IV.A.1.

¹⁵¹ *Rhode Island*, 683 A.2d at 1336.

¹⁵² See *supra* Part II.A.6.

¹⁵³ *Rhode Island*, 683 A.2d at 1337. There was also a second question about the current use of drugs and alcohol.

¹⁵⁴ See *id.* at 1333 n.1.

¹⁵⁵ *O’Brien v. Va. Bd. of Bar Exam’rs*, No. 98-0009-A, 1998 WL 391019 (E.D. Va. Jan. 23, 1998).

Within the past five years, have you been diagnosed with or have you been treated for any of the following: schizophrenia or any other psychotic disorder, delusional disorder, bipolar or manic depressive mood disorder, major depression, antisocial personality disorder, or any other condition which significantly impaired your behavior, judgment, understanding, capacity to recognize reality, or ability to function in school, work or other important life activities?¹⁵⁶

The new question also included a preamble stating that the Board did not seek information related to situational counseling.¹⁵⁷ The *O'Brien* opinion held that the revised question addressed “many” of the concerns raised in *Clark* and that the question was “carefully tailored to respect the privacy rights of the individual applicant.”¹⁵⁸ The court therefore denied the plaintiff’s motion for a preliminary injunction and upheld the question under the ADA.

10. *Brewer v. Wisconsin Board of Bar Examiners*

In *Brewer*, the applicant did not challenge the questions on the bar application but rather the Wisconsin Board of Bar Examiners’ requirement that she undergo a psychological examination at her own expense.¹⁵⁹ The cost of this evaluation was estimated between \$1500 and \$2000.¹⁶⁰

The Eastern District of Wisconsin held that even if the Board ultimately licensed the plaintiff, “requiring [her to] undergo [the examination] at her own expense and submit the results to the Board amount[ed] to a burden to which the vast majority of her classmates and other applicants were not subjected.”¹⁶¹ The court reasoned that even without a current psychological evaluation, the Board would be able to look at the plaintiff’s past conduct and behavior to evaluate her fitness to practice law, just as it did for applicants without disabilities.¹⁶²

¹⁵⁶ *Id.* at *3.

¹⁵⁷ *Id.* “Situational counseling” is generally regarded as counseling to help a person handle a particular situation. Common examples include the death of a loved one, relationship difficulties, or exam stress.

¹⁵⁸ *Id.* at *3-4.

¹⁵⁹ *Brewer v. Wis. Bd. of Bar Exam’rs*, No. 04-C-0694, 2006 WL 3469598, at *1 (E.D. Wis. Nov. 28, 2006).

¹⁶⁰ *Id.* at *2.

¹⁶¹ *Id.* at *10.

¹⁶² *Id.* at *12.

11. *ACLU of Indiana v. Indiana State Board of Law Examiners*

In *ACLU of Indiana v. Indiana State Board of Law Examiners*, the Southern District of Indiana struck down one question on the Indiana bar application but upheld three others.¹⁶³ The court held that questions asking about “any mental, emotional or nervous disorders,” beginning from the age of 16, were overly broad.¹⁶⁴ However, the court upheld a question asking about specific diagnoses, noting its similarity to questions upheld by *Texas Applicants* and *O’Brien*.¹⁶⁵ Even though the Indiana question was unlimited in temporal scope, while the *Texas Applicants* and *O’Brien* questions were not, the court held that “the Board had a sound basis” for the unlimited time period “given the undisputed evidence that mental illnesses tend to recur throughout a person’s lifetime.”¹⁶⁶

The court also upheld a question asking “Do you have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?”¹⁶⁷ In upholding this question, the court stated, “[u]ndoubtedly, these related questions are narrowly focused on the *current* time period.”¹⁶⁸ The court held specifically that these questions were “permissible under the ADA . . . because [they] appropriately bear on the applicant’s *current* ability to practice law.”¹⁶⁹

B. *Department of Justice Actions in 2014*

The DOJ Civil Rights Division has long been involved in this issue, including filing amicus briefs in many of the cases discussed above. In early 2014, the DOJ took its strongest action to date to bring state bar associations into compliance. First, it responded to a request from the Vermont Human Rights Commission asking whether Vermont’s bar application questions violated the ADA. On January 21, 2014, the DOJ

¹⁶³ *ACLU of Ind. v. Ind. State Bd. of Law Exam’rs*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *1 (S.D. Ind. Sept. 20, 2011).

¹⁶⁴ *Id.* at *9.

¹⁶⁵ *Id.* at *8.

¹⁶⁶ *Id.* at *9.

¹⁶⁷ *Id.* at *10.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

sent a written response concluding that Vermont's questions did violate the ADA.¹⁷⁰

The following month, the DOJ sent a more stern letter, using similar language and reasoning, to the Louisiana Supreme Court.¹⁷¹ The Louisiana case began when the Bazelon Center for Mental Health Law filed an administrative complaint with the DOJ on behalf of an applicant who was granted conditional admission to the Louisiana bar because of her mental health diagnosis.¹⁷² This led to the DOJ's investigation of Louisiana's bar admission procedures, including its application questions as well as its conditional admission program. The DOJ's letter to Louisiana explained that Louisiana's system of evaluating applicants for the Louisiana bar, as well as its conditional admission program, violated the ADA.¹⁷³ The DOJ letter set forth a number of remedial measures for the Louisiana Supreme Court to implement and warned that the Attorney General might initiate a lawsuit if Louisiana did not comply.¹⁷⁴

Although Louisiana disputed that its policies violated the ADA,¹⁷⁵ it ultimately agreed to a settlement with the DOJ on August 14, 2014.¹⁷⁶ Before this settlement, Louisiana used old NCBE Questions 25, 26, and 27¹⁷⁷ to solicit information about

¹⁷⁰ See DOJ Letter, *supra* note 108, Attachment 1.

¹⁷¹ *Id.*

¹⁷² See *Louisiana Bar Conditional Admissions*, BAZELON CENTER FOR MENTAL HEALTH L., <http://www.bazelon.org/In-Court/Current-Litigation/Louisiana-Bar-Conditional-Admissions.aspx> (last visited Mar. 14, 2015).

¹⁷³ DOJ Letter, *supra* note 108.

¹⁷⁴ *Id.* at 31-34.

¹⁷⁵ SETTLEMENT AGREEMENT BETWEEN U.S. AND LA. SUP. CT. UNDER THE AMERICANS WITH DISABILITIES ACT ¶¶ 7, 10 (Aug. 14, 2014) [hereinafter LA. SETTLEMENT AGREEMENT], available at http://www.ada.gov/louisiana-supreme-court_sa.htm.

¹⁷⁶ *Id.* at ¶¶ 1-3.

¹⁷⁷ The previous versions of the NCBE questions were as follows:

25. Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

26A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?

26B. If your answer to Question 26(A) is yes, are the limitations caused by your mental health condition . . . reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?

27. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation;

applicants' mental health. Under the settlement agreement, Louisiana deleted those questions and now uses the new NCBE Questions 25 and 26, as well as a third question of its own.¹⁷⁸

The new NCBE questions are as follows:

25. 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?

26. A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?

B. If your answer to Question 26(A) is yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?

Additionally, Louisiana agreed to refrain from inquiring about an applicant's mental health diagnosis or treatment at all, unless the applicant raised mental health as a defense to explain conduct or behavior that might otherwise warrant a denial of admission or the bar examiners learned that such a mental health defense had been raised elsewhere.¹⁷⁹ If such a defense is raised, the bar examiners will first request statements from the applicant and possibly from the applicant's treating professional, whose statement "shall be accorded considerable weight."¹⁸⁰

any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority?

See DOJ Letter, *supra* note 108, at 5.

¹⁷⁸ LA. SETTLEMENT AGREEMENT, *supra* note 175, ¶ 14. Louisiana also added a new Question 28, which reads:

Within the past five years, have you engaged in any conduct that:

- (1) resulted in an arrest, discipline, sanction or warning;
- (2) resulted in termination or suspension from school of employment;
- (3) resulted in loss or suspension of any license;
- (4) resulted in any inquiry, any investigation, or any administrative or judicial proceeding by an employer, educational institution, government agency, professional organization, or licensing authority, or in connection with an employment disciplinary or termination procedure; or
- (5) endangered the safety of others, breached fiduciary obligations, or constituted a violation of workplace or academic conduct rules?

Id.

¹⁷⁹ *Id.* ¶ 13(c).

¹⁸⁰ *Id.*

The settlement provides that Louisiana bar examiners will no longer request medical records as a matter of course but instead only when their reasonable concerns cannot be resolved by further dialogue with the treating professional.¹⁸¹ Louisiana also agreed not to use conditional admission solely on the basis of mental health.¹⁸² All applicants who are currently admitted on a conditional basis will be granted full admission, unless the applicant has engaged in concerning conduct or her condition currently impairs her ability to practice law.¹⁸³

This settlement applies to all pending applications and to any applicants who previously answered the mental health questions affirmatively and were denied admission.¹⁸⁴ Those files must be reevaluated under the new standards. In addition, Louisiana agreed to pay \$200,000 to compensate seven applicants identified by the DOJ as having been harmed by the past discrimination.¹⁸⁵

This settlement is a watershed moment. It represents a clear statement that the DOJ will insist on scrupulous adherence to the letter and spirit of the ADA. States whose current applications do not conform with the ADA¹⁸⁶ should take immediate action to bring their application processes into compliance.

C. *Response of the National Conference of Bar Examiners*

The NCBE, the organization that administers many bar exams, including the Multistate Bar Examination (MBE), Multistate Professional Responsibility Examination (MPRE), and Multistate Performance Test (MPT), also offers character and fitness processing services for states.¹⁸⁷ The NCBE offers a standard application form, which states may adopt in full or in part, or states may hire the NCBE to process their applicants' files using an application form written by the state.¹⁸⁸ Other states do not use the NCBE forms but use the language of the NCBE questions on their own applications.¹⁸⁹ In the past,

¹⁸¹ *Id.*

¹⁸² *Id.* ¶ 13(d).

¹⁸³ *Id.* ¶ 21(b)(i).

¹⁸⁴ *Id.* ¶ 21.

¹⁸⁵ *Id.* ¶ 22.

¹⁸⁶ *See infra* Part III.A.

¹⁸⁷ *See Character and Fitness*, NAT'L CONF. OF B. EXAMINERS, <http://www.ncbex.org/character-and-fitness/> (last visited Apr. 20, 2015).

¹⁸⁸ *Id.*

¹⁸⁹ Herr, *supra* note 48, at 644.

revision of the NCBE questions has been an “indicator of future trends in state bar applications.”¹⁹⁰

While the DOJ and Louisiana were negotiating the settlement, the DOJ was also in negotiations with the NCBE. On February 24, 2014, the NCBE notified state bar associations that it had revised the mental health questions on its standard application form—Questions 25, 26, and 27, as well as the preamble to those questions.¹⁹¹

In its letter, the NCBE was careful not to concede that the DOJ’s interpretation about the illegality of these questions was correct. The NCBE insisted that it was not a covered entity under Title II of the ADA, but that it was “mindful of the pressure that the DOJ has brought to bear upon jurisdictions that use [its] questions.”¹⁹² The NCBE stated that “it would be incorrect to conclude that we agree with [the DOJ’s] positions” and that new Question 25 “should not be read to signify the NCBE’s agreement with the DOJ’s position.”¹⁹³ But actions speak louder than words, and the new questions represent a major departure from the previous questions.

The new NCBE questions are as follows:

25. 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?

26. A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?

B. If your answer to Question 26(A) is yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?

27. Within the past five years, have you asserted any condition or impairment as a defense, in mitigation, or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution,

¹⁹⁰ *Id.* at 644-45; *Clark v. Va. Bd. of Bar Exam’rs*, 880 F. Supp. 430, 441 (E.D. Va. 1995) (“[The NCBE] questions formed the basis for many states’ mental health questions, including Virginia While the actions of the NCBE and ABA are not binding on the states, they signify the substantial impact the ADA is having on the formulation of mental health inquiries.”).

¹⁹¹ Memorandum from Erica Moeser, President, Nat’l Conf. of Bar Exam’rs to Bar Admission Adm’rs (Feb. 24, 2014) (on file with author).

¹⁹² *Id.* at 1.

¹⁹³ *Id.* at 1-2.

government agency, professional organization, or licensing authority; or in connection with an employment disciplinary or termination procedure?¹⁹⁴

The question about specific mental health diagnoses is completely gone. The new Question 26 is very similar to the question upheld in *ACLU of Indiana*, with the crucial deletion of the “if untreated” language.¹⁹⁵ The inquiry is properly limited to current impairment and the focus is on ability, not diagnosis. Therefore, these questions do not screen out or tend to screen out applicants with disabilities and thus comply with the ADA.

The Louisiana settlement and the NCBE revisions should send a very clear message to states. The DOJ has proven its willingness to take action and strike a hard line with bar associations to bring them into compliance. But as of this writing, 14 states continue to ask questions on their bar applications that violate the ADA, and only one year ago, that number was 26.

III. WHAT IS PERMITTED UNDER THE ADA?

The nature and breadth of questions asked varies dramatically from state to state. Nine states ask no questions about mental health at all.¹⁹⁶

A. *States That Ask About Mental Health*

As of April 2015, 24 states were using the revised NCBE questions.¹⁹⁷ Seven states ask their own questions about mental health, and three of those violate the ADA.¹⁹⁸ Seven states continue to ask questions about specific mental health diagnoses,¹⁹⁹ down from 18 states in 2014.²⁰⁰ Ten states²⁰¹

¹⁹⁴ See *id.* at 5.

¹⁹⁵ See discussion *infra* Part III.A.2.

¹⁹⁶ Alaska, Arizona, California, Illinois, Maine, Massachusetts, New Mexico, Pennsylvania, and Tennessee. See Alyssa Dragnich, Bar Admission Survey (2015) [hereinafter Bar Survey] (unpublished survey) (on file with author). This survey reviewed the character and fitness questions on the bar applications of all 50 states and the District of Columbia as of April 2015.

¹⁹⁷ Alabama, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Oklahoma, South Dakota, Vermont, Washington, and Wyoming. *Id.* Georgia also asks additional questions of its own.

¹⁹⁸ Arkansas, Georgia, Hawaii, Iowa, Michigan, Minnesota, and South Carolina. *Id.*

¹⁹⁹ Florida, Kentucky, Nevada, Ohio, Texas, Utah, and Virginia. *Id.*

²⁰⁰ Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Kentucky, Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Texas, Utah, and Virginia. *Id.*

²⁰¹ Arkansas, Florida, Kentucky, New Hampshire, Ohio, Oregon, Rhode Island, Virginia, West Virginia, and Wisconsin. *Id.*

continue to ask the “if untreated” question, also down from 18 in the previous year. In total, 14 states still ask application questions that violate the ADA.²⁰²

1. Questions about Specific Diagnoses

Seven²⁰³ state applications currently ask about specific mental health diagnoses, which is the question upheld in *Texas Applicants*,²⁰⁴ but deleted from the new NCBE questions.²⁰⁵ The applicable time period for this inquiry varies, with most states inquiring about the previous five or 10 years. The most common form of the specific diagnosis question asks: “In the past [5 or 10] years, have you been diagnosed with, been treated or sought counseling for bi-polar disorder, schizophrenia, paranoia, or any other psychiatric disorder, or have you ever been committed to any institution for the treatment of any such condition?”²⁰⁶

In *Rhode Island*, the special master specifically considered and rejected a question about specific diagnoses, such as bipolar disorder and schizophrenia, on the grounds that it likely violated the ADA by inquiring into diagnosis and status rather than behavior and function.²⁰⁷ Some commentators who object to questions about mental health generally would still permit inquiry into specific diagnoses such as bipolar disorder or schizophrenia.²⁰⁸ But this approach continues to reflect a biased vision of mental illness because it effectively concludes certain types of mental illness are permissible, but other types are not.

This is the wrong lens through which to view the issue. Twenty years ago, some bar examiners insisted they needed to know details of an applicant’s counseling sessions for temporary stresses, such as exam anxiety or bereavement.²⁰⁹ Today, the opposite is true: most state applications specifically state that this type of situational counseling does not need to

²⁰² Arkansas, Florida, Georgia, Kentucky, Minnesota, Nevada, New Hampshire, Ohio, Oregon, Texas, Utah, Virginia, West Virginia, and Wisconsin. *Id.*

²⁰³ Florida, Kentucky, Nevada, Ohio, Texas, Utah, and Virginia. *Id.*

²⁰⁴ See *Applicants v. Tex. State Bd. of Law Exam’rs*, No. A 93 CA 740 SS, 1994 WL 923404, at *2 (W.D. Tex. Oct. 11, 1994).

²⁰⁵ See discussion *supra* Part II.C.

²⁰⁶ See, e.g., KY. OFFICE OF BAR ADMISSIONS, *Admission by Examination SCR 2.022 Attorney Applicants Summer 2015* (on file with author).

²⁰⁷ Bauer, *supra* note 13, at 139 n.144.

²⁰⁸ See, e.g., *id.* at 213 (suggesting that bipolar disorder and schizophrenia may be appropriate subjects of inquiry under the ADA); see also Becton, *supra* note 8, at 383-84.

²⁰⁹ See *infra* Part IV.B.2.

be disclosed.²¹⁰ Just as the states slowly recognized that there was no need for information on situational counseling, so too should they recognize that there is no need for information on specific diagnoses, absent any conduct irregularities.

Any inquiry into physical disabilities that asked about only “serious” disabilities would be immediately recognized as a violation of the ADA. What would qualify as “serious?” Blindness? A missing limb? Those certainly sound “serious” but in no way preclude a person from being an outstanding attorney. Drawing a parallel to physical disabilities (and bearing in mind that the inquiry for physical and mental disabilities is the same under the ADA) shows the futility of attempting to separate out “serious” mental illness from other types.

General classifications by diagnosis are wholly ineffective at predicting if someone might be an unfit attorney in the future.²¹¹ The “mere presence of a medical condition is not an accurate predictor of fitness,” and people diagnosed with the same condition can react very differently and have very different levels of functionality.²¹²

For example, many people diagnosed with the “serious” conditions of bipolar disorder or schizophrenia are capable of succeeding in high-level and stressful jobs.²¹³ Some people diagnosed with bipolar disorder manage their condition extremely well, and their coworkers and clients would never know about their diagnosis.²¹⁴ The same is true for many people diagnosed with schizophrenia.²¹⁵

Applicants with bipolar disorder probably comprise a majority of the hearings, conditional admissions, and denials that result from mental health disclosures.²¹⁶ This is perhaps the disorder that laypeople most frequently misunderstand and fear.

²¹⁰ See, e.g., MINN. BD. OF BAR EXAM'RS, *Application for Admission*, available at [http://www.ble.state.mn.us/file/Bar%20Application%202014%20-%20fill%20in\(6\).pdf](http://www.ble.state.mn.us/file/Bar%20Application%202014%20-%20fill%20in(6).pdf).

²¹¹ Allison Wielobob, *Bar Application Mental Health Inquiries: Unwise and Unlawful*, 24 HUM. RTS. 12, 14 (1997).

²¹² Coleman & Shellow, *supra* note 47, at 72.

²¹³ James T.R. Jones, *Walking the Tightrope of Bipolar Disorder: The Secret Life of a Law Professor*, 57 J. LEGAL EDUC. 349, 351 (2007) (citing Marsha Langer Ellison & Zlatka Russinova, *A National Survey of Professionals and Managers with Psychiatric Conditions: A Portrait of Achievement and Challenges*, BOSTON U. CTR. FOR PSYCHIATRIC REHABILITATION (1999), available at <http://cpr.bu.edu/wp-content/uploads/2013/05/National-Survey-of-Professionals-and-Managers-with-Psychiatric-Conditions.pdf>).

²¹⁴ See Herr, *supra* note 48, at 674 n.175.

²¹⁵ Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students With Mental Illnesses and Disabilities Out of the Stigma Straightjacket*, 79 U.M.K.C. L. REV. 123, 137 (2010) (citing Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1370 (2008)).

²¹⁶ Bauer, *supra* note 13, at 165.

In fact, “bipolar” has even become a pejorative term,²¹⁷ much as “gay” has been used not to refer to sexual orientation but as a slur.

But most people diagnosed with bipolar disorder, even those with severe forms, can stabilize their mood swings and related symptoms with proper treatment. People diagnosed with bipolar disorder can be—and are—successful lawyers and judges.²¹⁸ Two medical researchers who have treated many lawyers with bipolar disorder write that “most individuals with this condition function quite well in their occupation.”²¹⁹

No state application differentiates between Bipolar I and Bipolar II disorders. A medical doctor who served on the Georgia Board to Determine Fitness of Bar Applicants has noted that many people—one can assume this includes bar examiners—“do not understand the difference between Bipolar I and Bipolar II disorders.”²²⁰ A diagnosis of Bipolar II is generally appropriate when the person has not experienced a full-blown manic episode.²²¹ There has been a significant increase in the number of adolescents diagnosed with Bipolar II in the last decade,²²² a large number of whom have never had a manic episode and have never been hospitalized.²²³ Bar examiners appear to be most concerned with manic episodes²²⁴ (rightly or wrongly), so failing to differentiate between Bipolar I and II is not logical and suggests that bar examiners do not understand the difference.

As one successful law professor who suffers from bipolar disorder has stated: “I want to demonstrate that those with mental illness can have full and satisfying professional and personal lives, and they need not and should not endure stigma or doubt as to their ability to perform their personal or employment duties.”²²⁵ This same professor—who graduated Order of the Coif from Duke University School of Law, worked at Davis Polk & Wardwell in New York City, clerked for a

²¹⁷ Jon Kelly & Denise Winterman, *OCD, Bipolar, Schizophrenic and the Misuse of Mental Health Terms*, BBC NEWS MAG. ONLINE, (Oct. 10, 2011), <http://www.bbc.com/news/magazine-15213824>.

²¹⁸ Jolly-Ryan, *supra* note 215, at 136; Jones, *supra* note 213, at 354 n.27; Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1371 (2008).

²¹⁹ Bauer, *supra* note 13, at 167-68 (quoting David L. Dunner & G. Andrew H. Benjamin, *Bipolar Affective Disorder (Manic Depressive Illness)*, B. EXAM’R, Nov. 1994, at 25, 28).

²²⁰ Peter Ash, *Predicting the Future Behavior of Bar Applicants*, B. EXAM’R, Dec. 2013, at 6, 12.

²²¹ *Id.* at 13.

²²² *Id.* at 12.

²²³ *Id.* at 13.

²²⁴ See, e.g., Pobjecky, *supra* note 35, at 20.

²²⁵ Jones, *supra* note 213, at 357 n.36, 373.

judge on the Fifth Circuit Court of Appeals, taught at the University of Chicago Law School, and earned tenure at the Louis D. Brandeis School of Law at the University of Louisville—never applied for bar admission in Kentucky in part because that would have required him to disclose his bipolar diagnosis.²²⁶

Several highly successful law professors have been open about their struggles with mental illness. Perhaps the best known is Elyn Saks, the Orrin B. Evans Professor of Law, Psychology, and Psychiatry and the Behavioral Sciences at the University of Southern California Gould School of Law.²²⁷ Others include Marjorie Silver of Touro Law School;²²⁸ Sol Watchler, a former judge on the New York Court of Appeals and adjunct professor at Touro;²²⁹ James T.R. Jones at the Louis D. Brandeis School of Law at the University of Louisville;²³⁰ and Lisa T. McElroy at Drexel University School of Law.²³¹

Critics would say that these professors are outliers and that just because a few attorneys diagnosed with mental illnesses have been successful does not mean that all such attorneys will be. But attorneys with mental illnesses who commit egregious misconduct are also outliers and not representative of the general attorney population. The thesis of this Article is that the presence or absence of a mental health diagnosis cannot predict a person's future fitness as an attorney.

Furthermore, the disorders that bar examiners choose to single out in their applications reveal the examiners' limited knowledge of mental health and mental illness. As recently as 2014, some states' lists of diagnoses appeared oddly under-inclusive. For example, most of the applications did not ask about obsessive compulsive disorder or post-traumatic stress disorder. Severe cases of either could render a person incapable of practicing law. An attorney with narcissistic personality disorder or borderline personality disorder is arguably at a higher risk of committing misconduct. But only four states asked about personality disorders in their lists of diagnoses.

²²⁶ *Id.* at 357 & 357 n.36.

²²⁷ See ELYN R. SAKS, *THE CENTER CANNOT HOLD: MY JOURNEY INTO MADNESS* (2007).

²²⁸ Anita Bernstein, *Lawyers with Disabilities: L'Handicapé C'est Nous*, 69 U. PITT. L. REV. 389, 403 (2008) (citing Michael L. Perlin, "You Have Discussed Lepers and Crooks": *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 715 n.182 (2003)).

²²⁹ *Id.* (citing SOL WATCHLER, *AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR* (1997)).

²³⁰ Jones, *supra* note 213, at, 349-50.

²³¹ Lisa T. McElroy, *Worrying Enormously about Small Things*, SLATE (July 18, 2013 8:16 AM), http://www.slate.com/articles/health_and_science/medical_examiner/2013/07/living_with_anxiety_and_panic_attacks_academia_needs_to_accommodate_mental.html.

This is not to suggest, of course, that these disorders should be added to the list of named diagnoses on application questions. If a person suffering from any of these disorders seeks admission to the bar, the inquiry ought to be the same as for all other applicants: the focus should be the record of conduct, not the diagnosis. If a person has successfully completed three years of law school, a time of great stress,²³² and successfully passed the written bar examination, then there is every reason to believe that she will go on to be a fit and capable attorney. If the person had conduct problems during law school—for example, she was found to have fabricated parts of a resume, or she verbally assaulted a classmate—those incidents would be revealed through the other parts of the character and fitness investigation. Asking about specific diagnoses only screens out applicants with certain disabilities and does not yield more accurate predictions of future fitness.

2. The “If Untreated” Question

Ten states ask if applicants have “any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or *if untreated could affect*, your ability to practice law in a competent and professional manner?”²³³ This question was specifically upheld in *ACLU of Indiana*.²³⁴

But as worded, the question is senseless. If the candidate *is* treating her condition and experiencing no impairment, a hypothetical inquiry about what might happen if she discontinued treatment is pointless. It is rather like asking “If

²³² An estimated 44% of law students meet the criteria for clinically significant levels of psychological distress. Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL’Y L. & ETHICS 357, 359 (2009). Students begin law school with normal levels of stress, but their stress continues to increase throughout their three years in school (not decreasing after the first year). *Id.* Their levels of depression and anxiety remain significantly elevated even two years after graduation. *Id.* This stress is not unique to American law students but is seen in law schools around the world. See, e.g., Wendy Larcombe et al., *Does an Improved Experience of Law School Protect Students against Depression, Anxiety and Stress? An Empirical Study of Wellbeing and the Law School Experience of LLB and JD Students*, 35 SYDNEY L. REV. 407 (2013) (discussing stress among Australian law students).

²³³ IND. SUP. CT. BD. OF LAW EXAM’RS, *Character & Fitness Questionnaire*, available at <https://myble.courts.in.gov/browseform.action?sid=46405001&ssid=46705001&applicationId=9> (emphasis added).

²³⁴ *ACLU of Ind. v. Ind. State Bd. of Law Exam’rs*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *10 (S.D. Ind. Sept. 20, 2011).

you stop studying, are you at risk of failing any of your classes?” The answer would depend on a myriad of factors, including the point in the semester one stops studying, the course one is taking, one’s innate intelligence, one’s previous knowledge of the subject area, and more. It is both impossible to accurately predict and pointless to speculate—because the candidate has no intention of ceasing to study, there is no reason to ask the hypothetical. The same comparison could also be drawn to a physical disability, such as diabetes. If an applicant with diabetes controls her condition with diet and medication, would the bar examiners ask her whether she could be impaired should she stop her treatment? The answer is surely no.

The “if untreated” question requires only a modest amendment to bring it into compliance with the ADA, and in fact, this is essentially one of the revised NCBE questions.²³⁵ If the “if untreated could affect” language were deleted, the question would read “Do you have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects your ability to practice law in a competent and professional manner?” With this amendment, the question is limited to “currently affects” and thus the question is permissible.

The *ACLU of Indiana* court upheld this question by stating that it was “narrowly focused on the *current* time period.”²³⁶ The court held specifically that these questions were “permissible under the ADA” “because [they] appropriately bear on the applicant’s *current* ability to practice law.”²³⁷

But the court critically misread the question. The clause “if untreated could affect” relates to the *future*, not the present. If this clause were omitted, the court’s interpretation of the question as focusing only on current fitness would be correct, and the question would be permissible. Questions about current fitness are appropriate and permitted. However, the “if untreated” clause necessarily requires applicants and bar examiners to speculate about an event that may never occur. Therefore, this clause must be deleted.

²³⁵ New NCBE Question 26(a) asks “Do you currently have any condition or impairment (including, but not limited to, substance abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?” See *supra* Part II.C.

²³⁶ *ACLU of Ind.*, 2011 WL 4387470, at *10.

²³⁷ *Id.*

3. Preambles

Over time, many states have added a preamble to their mental health questions. Some current preambles urge applicants who need mental health treatment to obtain it and not be deterred by the application questions.²³⁸ Some preambles define terms such as “ability to practice law” and “currently” (in the context of “any condition that *currently* impairs . . .”).²³⁹ Most disclaimers state that mental health treatment will not necessarily result in the denial of bar admission. The efficacy of these disclaimers is questionable.²⁴⁰ Many bar applicants may not believe the disclaimers and fear that disclosure of treatment will result in delays or denials of their applications. Whether bar examiners truly abide by these sentiments is also questionable.

The Texas application’s preamble is perhaps more threatening than comforting:

If you have received mental health counseling or have been hospitalized for mental health reasons and do not know the diagnosis which was made, you should contact the health care provider responsible for your care and inquire as to whether you were diagnosed with bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder. In answering the following questions, you are entitled to rely on the diagnosis of your treating health care provider. You do not need to report any counseling, treatment, or hospitalization, which was for a diagnosis other than those included in the following questions.

²³⁸ See, e.g., Preamble of Arkansas discussed *infra* Part III.A.3.

²³⁹ Emphasis added. For example, California’s preamble includes the following definitions:

“Ability to practice law” includes performing services in a court of justice, in any manner, throughout its various stages and in conformity with adopted rules of procedure. In a larger sense it includes providing legal advice and counsel and preparation of legal instruments and contracts by which legal rights are protected. Law practice may also include the resolution of legal questions for consumers by advice and action if difficult or doubtful legal questions are involved, which, to safeguard the public, reasonably demand the application of a trained legal mind.

“Good moral character” includes qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws to the state and the nation, and respect for the rights of others and for the judicial process.

“Currently” does not mean on the day of, or even in the weeks or months preceding the completion of the application. Rather, it means recently enough so that you believe that there is something that may have an ongoing impact on your ability to be an attorney.

COMM. OF BAR EXAM’RS, STATE BAR OF CAL., APPLICATION FOR EXTENSION OF DETERMINATION OF MORAL CHARACTER 12, *available at* <http://www.calbar.ca.gov/Portals/0/documents/exmcwebform.pdf> (last visited Mar. 15, 2015).

²⁴⁰ Maher & Blum, *supra* note 43, at 833.

A “yes” response to either of the following questions does not mean necessarily that you will be found to lack the fitness required for admission to the Bar. The Board is sensitive to confidentiality concerns. Please refer to Rule I(d) of the Rules Governing Admission to the Bar of Texas concerning confidentiality.²⁴¹

Saying that a “yes response . . . does not necessarily mean you will be found to lack the fitness required for admission to the Bar” could be interpreted as saying an affirmative answer creates a rebuttable presumption of unfitness.

Arkansas’s application has the following preamble and questions:

According to Rule XIII of the Rules Governing Admission to the Bar of Arkansas—“every applicant for admission to practice by examination and every applicant for reinstatement of license to practice must be of good moral character and mentally and emotionally stable. The determination of the eligibility of every such applicant shall be made by the Board and the burden of establishing eligibility shall be on the applicant.”

The following questions 10(e) through 10(g) are designed to elicit information in light of the standards set forth above. Your responses to the following questions are treated in absolute confidence by the Arkansas State Board of Law Examiners. However, in the event your responses to the inquiries below establish serious concerns about your current ability to represent the citizens of Arkansas as a licensed lawyer, further inquiry may result. Such additional inquiries will be as limited in scope as possible, and will likewise remain confidential to the extent possible.

Applicants with a history of mental or emotional infirmity or history of substance or alcohol abuse have been admitted to the Bar of Arkansas in the past. The mere revelation of treatment for mental or emotional infirmities, or substance or alcohol abuse, is not, in itself, a basis upon which an applicant is ordinarily denied admission. The questions below have been narrowly drawn to acquire information on the most serious instances of mental or emotional infirmity, or substance or alcohol abuse. The Arkansas State Board of Law Examiners does not seek information that is fairly characterized as “situational counseling.” Examples of such counseling include stress counseling, domestic counseling, grief counseling, and counseling for eating or sleeping disorders.

(e) Have you ever been declared, or are you presently, a ward of any court of competent jurisdiction; or have you ever been adjudicated, or are you presently, an incompetent or insane person as determined by any court of competent jurisdiction?

²⁴¹ TEX. BD. OF LAW EXAM’RS, GEN. APPLICATION FOR ADMISSION TO THE BAR OF TEX. 9 [hereinafter *TEX. APP.*], available at http://www.ble.state.tx.us/pdfs/Applications/Gen_App.pdf (last visited Mar. 16, 2015).

(f) Do you currently have any condition or impairment including, but not limited to, mental or emotional infirmity, alcoholism, substance abuse, or nervous disorder or condition which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner in this jurisdiction?

If yes, briefly describe the condition or impairment.

(g) Are you currently utilizing or being treated with prescription drugs or other substances in order to manage a mental or emotional infirmity, alcoholism, substance abuse, or nervous disorder or condition?

If yes, briefly describe the prescription drugs or other substances, and the purpose for which prescribed.²⁴²

The Arkansas Preamble is somewhat amusing because it describes the questions as “narrowly drawn,” yet the question about “prescription drugs or other substances” is perhaps the broadest in the country. One can imagine a laundry list of prescription or holistic medications a law student may be taking for “mental or emotional infirmity,” none of which has any bearing on her ability to practice law. For example, insomnia can be described as a mental or emotional condition and is one that commonly afflicts law students. An applicant taking prescription Ambien or over-the-counter melatonin would technically need to list it here. An applicant who is nervous about traveling on an airplane would need to disclose her use of Xanax for a flight. Any applicants taking anti-depressants would need to disclose that here. And in each of these examples, bar examiners would have no qualms admitting a candidate using such substances, so the question is absurdly broad.

Nevada’s preamble still seems to require disclosure of situational counseling:

Questions regarding professional counseling, treatment, and medication are not intended to unnecessarily invade the applicant’s privacy or to discourage applicants from seeking professional assistance. The Board of Bar Examiners and the Character and Fitness Committee seek this information pursuant to their character and fitness guidelines. Applicants must disclose this information. Occasional short-term counseling for relationship problems or situational stress, standing alone, are not reasons for further inquiry.²⁴³

Nevada’s application does state that situational counseling alone is not a reason for “further inquiry,” but given

²⁴² SUP. CT. OF ARK. OFF. OF PROF’L PROGRAMS, APPLICATION FOR ADMISSION ON MOTION 6-7, *available at* <https://courts.arkansas.gov/sites/default/files/tree/AOM%20ap%202013%20in%20PDF.pdf> (last visited Mar. 16, 2015).

²⁴³ STATE BAR OF NEV., APPLICATION FOR ADMISSION (on file with author).

that this is true, applicants should not need to disclose such counseling at all.

Iowa's disclaimer language, on the other hand, is particularly good. It reads as follows:

The Board understands that mental health counseling or treatment is a normal part of many persons' lives and such counseling or treatment does not of itself disqualify an applicant from the practice of law. Furthermore, the Board does not wish to pry into the private affairs of applicants. However, the Board is obligated by the Supreme Court of Iowa's rules governing admission to the Bar to determine whether an applicant is physically and mentally fit to practice law, and therefore, must inquire into such matters to the extent necessary to make such determination. The Board is not seeking disclosure of counseling or treatment for a traumatic or upsetting event such as death, break-up of a relationship, or a personal assault, even if such event does affect the applicant's ability to practice law for a limited time.²⁴⁴

While many states include similar disclaimers, Iowa's disclaimer is well-crafted because it recognizes that mental health counseling is "a normal part of many persons' lives" and expresses the Board's distaste for prying into a candidate's private life. The specific exclusion of situational counseling is good, although given the stress of law school²⁴⁵ and the high number of law students who could benefit from counseling to better manage this stress, Iowa ought to add "stress of law school" to its list.²⁴⁶

4. Other Types of Questions

Georgia uses two of the NCBE questions and also asks, "Has your functioning at school or at work ever been sufficiently impaired (as the result of substance abuse, alcohol abuse, or a mental, emotional, or nervous or behavior disorder or condition) as to require inpatient or outpatient

²⁴⁴ IOWA JUDICIAL BRANCH, BAR EXAM APPLICATION FORM 21 [hereinafter IOWA APP. FORM], available at http://www.iowacourts.gov/wfdata/files/ProfessionalRegulation/BarExam/Bar_Application.pdf (last visited Apr. 20, 2015).

²⁴⁵ See *supra* note 232.

²⁴⁶ Further to Iowa's credit, it asks applicants only "Do you have any condition or impairment that currently impairs your ability to practice law?" IOWA APP. FORM, *supra* note 244, at 22. It then defines "condition or impairment" as "any physiological, mental or psychological condition, impairment or disorder, including drug addiction and alcoholism," and defines "ability to practice law." *Id.* at 20-21. This question is permissible under the ADA because it allows a candidate whose mental illness is well controlled to answer in the negative and does not screen out applicants with disabilities.

treatment?”²⁴⁷ Georgia does include a preamble that states it does not seek information about situational counseling. This question could be viewed as appropriately focused on conduct, or it could be seen as overbroad, particularly because “outpatient” treatment could mean a weekly session with a therapist. If an applicant seeks treatment before she becomes impaired, does she answer this question with a yes or a no? The question seems to be asking about only conditions that impair functioning, but it is not clear.

Ohio revised its questionnaire in March 2014, at the same time the NCBE was revising its questions, but Ohio opted to continue using questions that violate the ADA. Its application asks if applicants have “suffered from, been diagnosed with, or been treated for bipolar disorder, schizophrenia, delusional disorder (paranoia), or any other psychotic disorder” within the last 10 years.²⁴⁸ It then asks about any “physical condition (e.g., stroke, head injury, dementia, brain tumor, heart disease) that has resulted in significant memory loss, significant loss of consciousness, or significant confusion” within the last 10 years.²⁴⁹ This question is quite broad. It seems that even a candidate who suffered a concussion from sports or a car accident would need to answer affirmatively.

Minnesota asks an odd question: “Within the past two years, have you discontinued treatment or medication for a condition that at any time impaired your ability to meet the Essential Eligibility Requirements for the practice of law set forth in Rule 5A?”²⁵⁰ This question is overbroad because it would require an applicant who has been functional for two years to disclose past treatment if her condition has improved to the point that her treatment plan has been reduced. In effect, the application punishes an applicant for “improving” enough to no longer need medication.

Virginia asks the specific diagnosis discussed in Part III.A.1, but Virginia’s list includes major depression.²⁵¹

²⁴⁷ SUP. CT. OF GA. OFFICE OF BAR ADMISSIONS, APP. OF FITNESS TO PRACTICE LAW IN GA., available at <https://www.gabaradmissions.org/browseprintform.action?formId=1> (last visited Mar. 14, 2015).

²⁴⁸ SUP. CT. OF OHIO, OFFICE OF BAR ADMISSIONS, NAT’L CONF. OF BAR EXAM’RS (NCBE), APP. TO THE BAR OF OHIO 15 (on file with author).

²⁴⁹ *Id.*

²⁵⁰ MINN. BD. OF LAW EXAM’RS, *App. for Adm.*, available at [http://www.ble.state.mn.us/file/Bar%20Application%202014%20-%20fill%20in\(6\).pdf](http://www.ble.state.mn.us/file/Bar%20Application%202014%20-%20fill%20in(6).pdf) (last visited Apr. 5, 2015).

²⁵¹ VA. BD. OF BAR EXAM’RS, *Character and Fitness Questionnaire*, available at <http://barexam.virginia.gov/pdf/SampleCFQ.pdf> (last visited Apr. 5, 2015).

Texas largely retains the questions upheld in *Texas Applicants*:

(a) Within the last ten (10) years, have you been diagnosed with, or have you been treated for, bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?

(b) Have you, since attaining the age of eighteen or within the last ten (10) years, whichever period is shorter, been admitted to a hospital or other facility for the treatment of bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?

If you answered “YES” to any part of Question 11, provide details on a *Continuation Form*. Include date(s) of diagnosis and treatment, a description of your course of treatment and a description of your present condition. Include the name, current mailing address, and telephone number of each person who treated you, as well as each facility where you received treatment, and the reason for each treatment. You may also include information as to why, in your opinion or that of your health care provider, your illness or disorder will not affect your ability to practice law in a competent and professional manner.²⁵²

The last sentence is particularly ridiculous. A candidate *may* include a statement from her doctor explaining that her condition will not affect her ability to practice law? If bar examiners do ask about mental illness, the inquiry should focus on one’s ability to practice law, and the treating provider is the best source of such an evaluation.

B. States That Do Not Ask about Mental Health

Nine states do not ask about mental health history on their bar applications. Alaska first defines “ability to practice law,” then asks only one question: “Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law? If yes, please explain.”²⁵³ This question is well-formulated because it focuses on present abilities, not on history or on certain suspect diagnoses.

Arizona asks even less: “Is there any other information, incident(s), or occurrence(s) which is not otherwise referred to in your response to this application which, in your opinion, may have a bearing, either directly or indirectly, positively or negatively,

²⁵² TEX. APP., *supra* note 241.

²⁵³ ALASKA BAR ASS’N, APPLICATION FOR ADMISSION TO THE ALASKA BAR ASS’N, *available at* <https://www.alaskabar.org/servlet/download?id=1486> (last visited Mar. 14, 2015).

upon your ability to practice law actively and continuously? If yes, please explain fully in the comment box below.”²⁵⁴

IV. IS THE INQUIRY “NECESSARY?”

As explained in Part I, Title II of the ADA prohibits state bar associations from applying any eligibility criteria that screen out a disabled individual unless that screening criteria “can be shown to be necessary for the provision of the service, program, or activity being offered.”²⁵⁵ The burden of proving that these inquiries are necessary falls on the bar examiners.²⁵⁶ This Article argues that if bar examiners cannot show that their inquiries are *effective* at achieving the stated goal of reducing the number of unfit lawyers, then the inquiry cannot be *necessary*. This section shows that bar examiners’ questions about mental health are not effective in reducing the number of unfit attorneys and therefore the questions are impermissible under the ADA.

A. *There is No Adequate Justification for the Inquiry*

1. Bar Examiners are Not Mental Health Experts

Bar examiners have, in many ways, an impossible task. Predicting which applicants are likely to commit misconduct in the future is extraordinarily difficult, perhaps near impossible.²⁵⁷ This is in part because the rate of misconduct among the total number of attorneys is so very small—fractions of 1%.²⁵⁸ Many authors have questioned the notion that bar examiners are capable of making accurate predictions about future fitness at all, not just on mental health grounds.²⁵⁹

²⁵⁴ ARIZ. SUP. CT. CERT. AND LIC. DIV., CHARACTER AND FITNESS APP. FOR EXAM APPLICANTS 11, available at <https://elicense02.az.gov/app/azsc/> (last visited Mar. 14, 2015).

²⁵⁵ 28 C.F.R. § 35.130(b)(8) (2014).

²⁵⁶ See *supra* notes 22-23 and accompanying text.

²⁵⁷ See, e.g., Stone, *supra* note 31, at 352-53.

²⁵⁸ See AM. BAR ASS’N, SURVEY ON LAWYER DISCIPLINE SYSTEMS 2012-2013, available at http://www.americanbar.org/groups/professional_responsibility/resources/surveyonlawyerdisciplinesystems20122013.html (last visited May 11, 2015).

²⁵⁹ In the 1970s, an ABA committee wanted to see if a character test could be developed to screen students for unfitness before those students began law school. See Alan M. Dershowitz, *Preventive Disbarment: The Numbers Are Against It*, 58 ABA J. 815, 815 (Aug. 1972). At that time, Alan Dershowitz warned that “[i]t would be unrealistic in the extreme . . . to attempt to predict all violations of ethical norms.” *Id.* at 817. He explained that it is impossible to reduce the number of false positives (students wrongly predicted to be ethical violators in the future) due to the very low number of ethical violators in total. *Id.* He also attacked the efficacy of incorporating a “human element—the interviewer or investigator—” by explaining that science does not support the notion that individual experts would be more accurate at these

Bar examiners argue that applicants must disclose their mental health history “to enable bar examiners to evaluate sufficiency of [applicants] treatment and to determine their current fitness.”²⁶⁰ But this argument is contingent on the assumption that bar examiners are capable of evaluating an applicant’s treatment and current fitness. The evidence shows that they are not.

Mental health professionals have long recognized that predicting the future behavior of patients is extremely difficult. For example, a meta-analysis of the literature in 2010 concluded that various tools used to predict which mentally ill patients would become violent had only “moderate predictive” value.²⁶¹ As a result of this low level of accuracy, the authors of that study concluded that such predictions should not be used for “decision making that is contingent on a very high level of predictive accuracy.”²⁶² Another study found that future incidences of violence were accurately predicted in 71.4% cases of schizophrenic patients and a lack of future violence was accurately predicted in 87.5% of cases.²⁶³ Other studies about patients with a variety of diagnoses found that psychiatrists accurately predicted nonviolence in 88% of cases and accurately predicted violence in only 37%.²⁶⁴

No bar examiner should be comfortable denying a law license to an applicant given this level of inaccuracy. And these numbers are attempting to predict future incidences of *violent* behavior—something that has been studied for decades. In contrast, there are virtually no studies evaluating the connection between past mental health diagnosis or treatment and future misconduct of a much less serious nature, such as the mishandling of client funds or failure to communicate with a client.²⁶⁵

Mental health professionals agree that past diagnosis or treatment of mental illness has no predictive value on an applicant’s ability to practice law in the future.

predictions than purely statistical evaluations. *Id.* at 818-19. Dershowitz was quite pessimistic about such a proposal, saying that “any attempt to predict attorney misconduct, whether among first-year law students or law school applicants, is necessarily doomed to failure.” *Id.* at 819.

²⁶⁰ Pobjecky, *supra* note 36, at 35.

²⁶¹ Min Yang et al., *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, 136 *PSYCHOL. BULL.* 740, 761 (2010).

²⁶² *Id.*

²⁶³ Shing-Chia Chen et al., *Clinical Prediction of Violence Among Inpatients with Schizophrenia Using the Chinese Modified Version of Violence Scale: A Prospective Cohort Study*, 51 *INT’L J. OF NURSING STUD.* 198, 201 (2014).

²⁶⁴ Rachel Haim et al., *Predictions Made by Psychiatrists and Psychiatric Nurses of Violence by Patients*, 53 *PSYCHIATRIC SERVS.* 622, 623 (2002).

²⁶⁵ See discussion of Leslie C. Levin’s study *infra* Part IV.A.2.

Treatment for mental disorder provides no basis for assuming that an applicant's ability to practice law in a competent and ethical manner is impaired . . . Research and clinical experience demonstrate that the receipt of mental health treatment is not predictive of a person's ability to carry out responsibilities with competence and integrity. Nor does the evidence in the field indicate that bar examiners or mental health professionals can predict inappropriate or irresponsible behavior on the basis of a person's mental status.²⁶⁶

Bar examiners are usually lawyers with no training in psychology or psychiatry. Mental health professionals acknowledge that *they* cannot accurately predict who will be unfit to practice law in the future and who will not.²⁶⁷ Yet bar examiners, who have no expertise in mental health, believe that they can—and indeed, must—make these determinations. In a statement that can only be viewed with comic disbelief, one Florida bar examiner has defended bar examiners' ability to make these judgments. He explains that, armed only with the DSM-III,²⁶⁸ “one need not have a background in psychology” to evaluate the mental health of bar applicants.²⁶⁹ Ironically, at the time he made this statement, the DSM-III was two years out of date, having been replaced with the DSM-III-R in 1987.²⁷⁰ One commentator has replied that “advocating the use of [the DSM] by nonexperts to make a finding of fact is irresponsible and unrealistic. It is analogous to giving a psychiatrist a criminal law hornbook and expecting him or her to successfully defend a client in a murder trial.”²⁷¹

The report of the special master (who had both a J.D. and an M.D.) in the *Rhode Island* case concluded that “[r]esearch has failed to establish that a history of previous psychiatric treatment can be correlated with an individual's capacity to function effectively in the workplace[,]” and that “there is no empirical evidence demonstrating that lawyers who have had psychiatric treatment have a greater incidence of subsequent disciplinary action by the bar or any other

²⁶⁶ Herr, *supra* note 48, at 641 n.30, (quoting COMM'N ON DISABILITY LAW ON PROPOSED CONN. BAR ASS'N APPLICATION, REPORT OF THE SECTION ON HUMAN RIGHTS AND RESPONSIBILITIES AND THE RESOLUTION CONCERNING INQUIRIES INTO MENTAL HEALTH TREATMENT OF BAR APPLICANTS 5 (Feb. 1994)).

²⁶⁷ Herr, *supra* note 48, at 642.

²⁶⁸ The *Diagnostic and Statistical Manual of Mental Disorders* (DSM) is published by the American Psychiatric Association. It offers a common language and standard criteria for the classification of mental disorders and is widely relied upon by mental health professionals.

²⁶⁹ Pobjecky, *supra* note 35, at 19.

²⁷⁰ Maher & Blum, *supra* note 43, at 838 n.55.

²⁷¹ Gail Edson, Comment, *Mental Health Status Inquiries on Bar Applications: Overbroad and Intrusive*, 43 U. KAN. L. REV. 869, 896 (1995).

regulatory body in comparison with those who have not had such treatment.”²⁷² Furthermore, “most disciplinary problems and grievance issues arise after an attorney has been in practice for a number of years, and in nearly all such cases no indicators of future difficulty manifested themselves at the time of original licensure.”²⁷³

In *Clark*, the court placed great weight on the testimony of Dr. Howard Zonana, a medical doctor and professor at Yale University’s medical and law schools.²⁷⁴ Dr. Zonana testified that these questions are a very inefficient method of attempting to predict which applicants will be unfit lawyers.²⁷⁵ The court noted that the bar committee performing the screening was composed of “lay individuals with no mental-health training” and “even mental-health practitioners would experience difficulty in predicting with accuracy the future threat posed during a lifetime of practicing law.”²⁷⁶

The *ACLU of Indiana* plaintiffs argued that applicants who were currently in treatment for a mental disorder and functioning well did not pose a direct threat to public safety and thus should not have to answer questions about their mental health.²⁷⁷ The court disagreed with this position on the grounds that few mental disorders can be cured²⁷⁸ and stated that if it adopted this argument, bar examiners would not be permitted to ask applicants about their treatment, which was an important part of the analysis.²⁷⁹ The court completely avoided any discussion of bar examiners’ competence to evaluate an applicant’s treatment history and to determine her current or future fitness.

The belief of some bar examiners that they are capable of assessing future mental stability is highly troubling. Some bar examiners seem to be aware of this disconnect. In 1994, the Utah State Bar Association conducted an informal study of 33 states. This study found that while most states asked about

²⁷² *In re* Petition & Questionnaire for Admission to the R.I. Bar (*Rhode Island*), 683 A.2d 1333, 1336 (R.I. 1996).

²⁷³ *Id.*

²⁷⁴ Herr, *supra* note 48, at 674 (citing Trial Transcript at 46, *Clark v. Va. Bd. of Bar Exam’rs*, 880 F. Supp. 430 (E.D. Va. 1995)).

²⁷⁵ *Id.*

²⁷⁶ *Rhode Island*, 683 A.2d at 1336.

²⁷⁷ *ACLU of Ind. v. Ind. State Bd. of Law Exam’rs*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *10 (S.D. Ind. Sept. 20, 2011).

²⁷⁸ *Id.* (“[T]he Board’s evidence shows that even if the applicant is seeking treatment, all available treatments have their limitations and there are few [mental] disorders where it is possible to be cured.” (second alteration in original) (internal quotation marks omitted)).

²⁷⁹ *Id.*

mental health on their applications, “only fifteen percent of examiners stated that they could support their use of mental health inquiries with statistical or anecdotal data.”²⁸⁰ It is hard to say which is worse: bar examiners who incorrectly believe they are capable of predicting future fitness, or bar examiners who realize that their inquiries are likely fruitless but continue to make them. The acknowledged use of “anecdotal data” is particularly worrisome.

A medical doctor who serves on the Georgia Board to Determine Fitness of Bar Applicants has stated that decisionmakers need to be aware of cognitive biases that can affect their judgments.²⁸¹ He explains that people who do not have wide experience with a particular situation tend to generalize all cases based on their knowledge of the situation of a friend, family member, or their own personal experience.²⁸² In this way, “[t]heir own experience tends to anchor their own understanding. They tend not to recognize that their own experience with an issue is not necessarily typical and so undervalue the often most important distinctions between their experience and the present case.”²⁸³ One can also imagine that bar examiners, after reviewing several files of applicants with a particular diagnosis, for example, begin to feel overly confident in their knowledge of that disorder.

2. Predicting Misconduct on Any Grounds Is Difficult

Only two studies have evaluated the accuracy of predicting future attorney misconduct based on bar applications. One was a very small Minnesota study involving 52 disciplined attorneys.²⁸⁴ The author of that study later noted that it “was not conducted scientifically and involved a very small sample[.]”²⁸⁵ The other was funded by the Law School Admissions Council (LSAC) and published in 2013 by Leslie C. Levin.²⁸⁶ Levin’s study confirmed what other authors have long argued: because the overall risk of an attorney being

²⁸⁰ Edson, *supra* note 271, at 870.

²⁸¹ Ash, *supra* note 220, at 14-15.

²⁸² *Id.* at 14.

²⁸³ *Id.*

²⁸⁴ Carl Baer & Peg Coneille, *Character and Fitness Inquiry: from Bar Admission to Professional Discipline*, B. EXAM’R, Nov. 1992, at 5, 6-7.

²⁸⁵ Margaret Fuller Corneille, *Bar Admissions: New Opportunities to Enhance Professionalism*, 52 S.C. L. REV. 609, 619 (2001).

²⁸⁶ LESLIE C. LEVIN ET AL., LAW SCHOOL ADMISSIONS COUNCIL GRANTS REPORT SERIES, A STUDY OF THE RELATIONSHIP BETWEEN BAR ADMISSIONS DATA AND SUBSEQUENT LAWYER DISCIPLINE (2013), available at [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/gr-13-01.pdf](http://www.lsac.org/docs/default-source/research-(lsac-resources)/gr-13-01.pdf).

disciplined is so low, the data furnished by the bar application questions is “not helpful for predicting” which attorneys will be disciplined in the future.²⁸⁷

Levin’s study looked at 1,343 lawyers admitted to the Connecticut bar from 1989 to 1992 and their subsequent discipline history, if any.²⁸⁸ Her report was careful to acknowledge the limitations of her study, including that “discipline is an imperfect proxy for the presence of problematic conduct for a variety of reasons, as much lawyer misconduct is never detected, reported, or sanctioned through formal channels.”²⁸⁹ However, “bar discipline identifies much of the more serious misconduct”²⁹⁰ and is the best measure available.

Levin’s study revealed that most instances of attorney misconduct occur at least 10 years after the attorney’s initial licensing.²⁹¹ A lawyer’s career may span 30 years or more. This means that bar examiners must make a prediction about that applicant’s likely mental state 30 years into the future,²⁹² knowing that many mental illnesses wax and wane throughout a person’s lifetime.

Levin’s study found that 23.68% of the disciplined lawyers may have had psychological issues which contributed directly or indirectly to the misconduct.²⁹³ This is a significant percentage, certainly. However, it is not known if those lawyers had the psychological issues before their admission or whether their conditions developed later in life.

Levin further divides “discipline” into “severely disciplined” for the worst misconduct and “less severely disciplined” for more minor misconduct.²⁹⁴ Levin found that there were *no* cases where an applicant who reported a mental health issue on her bar application was later severely disciplined.²⁹⁵ However, there was an increased rate of less severe discipline among lawyers whose applications included a mental health issue.²⁹⁶ The study found that the baseline probability of an applicant with no reported mental health problems to be disciplined was 2.5%, and the probability of an applicant with a

²⁸⁷ *Id.* at 2.

²⁸⁸ *Id.* at 5.

²⁸⁹ *Id.* at 6.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 16.

²⁹² Maher & Blum, *supra* note 43, at 827 (“Even if there were some way to determine the mental and emotional fitness of applicants at the time of application, there is no guaranty that applicants’ fitness will remain constant.”).

²⁹³ Levin, *supra* note 286, at 16.

²⁹⁴ *Id.* at 19.

²⁹⁵ *Id.* at 24.

²⁹⁶ *Id.*

prior diagnosis or treatment for a mental health issue was 6%.²⁹⁷ In short, past diagnosis or treatment for mental health significantly raised the probability that a lawyer will be disciplined “less severely” but significantly lowered the probability that a lawyer will be disciplined “severely.”²⁹⁸ Levin cautions that these results “must be interpreted with caution” because the applications likely underreported their mental health diagnoses and treatment.²⁹⁹

Interestingly, of the 29 disciplined lawyers who reported a mental health diagnosis or treatment on their application, none reported a serious mental health issue and none had been hospitalized.³⁰⁰ Though the conclusions were drawn from a small sample, this data suggests that the belief that the “most serious” mental illnesses warrant the closest scrutiny may be incorrect.

Levin’s overall conclusion was that “[t]he information collected during the character and fitness inquiry does not appear to be very useful in predicting subsequent lawyer misconduct.”³⁰¹ Even the strongest factor—gender—which doubled the likelihood of being disciplined, only raised the probability from 2.5% to 5%.³⁰² No one is suggesting that men should be subjected to greater scrutiny than women purely on the basis of their sex, even though male attorneys are disciplined at twice the rate of female attorneys. The decision to deny bar admission to any applicant on the grounds that her chances of being disciplined in the future are 5%—especially where “discipline” might mean a single reprimand—is unsupportable.³⁰³

In addition to the difficulty of predicting a person’s mental stability over the course of 30 or more years, there is the reality that “practicing law” is not a singular task.³⁰⁴ In contemporary legal practice, there is no single vision of a lawyer’s “work.” Some attorneys are constantly facing tight deadlines in fast-paced, high-pressure environments. Others work in much steadier, lower stress offices. Some attorneys are frequently appearing in court; others work at their desks all day and may not interact with clients or other attorneys frequently. Any given attorney may flourish in one job but flounder in another. Therefore, it is impossible to predict

²⁹⁷ *Id.* at 29.

²⁹⁸ *Id.* at 37.

²⁹⁹ *Id.* at 40.

³⁰⁰ *Id.* at 41.

³⁰¹ *Id.* at 42.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Stone, *supra* note 31, at 352 (“The broad spectrum of a lawyer’s duties makes predicting future behavior an extremely burdensome responsibility.”).

whether a given mental illness will render a person unfit to practice law. The same individual might be fit for one type of position and unfit for another, but both jobs fall within the umbrella of “practicing law.”

There are no additional inquiries into an attorney’s fitness once she is admitted to the bar, except under conditional admission programs. If it is essential for bar examiners to deny admission to attorneys with mental illnesses, why is there no continuing inquiry into mental health post-admission?³⁰⁵

3. Actual Attorney Misconduct Rates Do Not Reflect Pre-Admission Screening

Bar examiners argue that an inquiry into applicants’ mental health history is necessary to prevent unfit attorneys from harming the public.³⁰⁶ This argument is not supported by data. Because each state bar association writes its own application questions, the various states effectively serve as an experiment with different inputs. If these questions were successful in reducing the number of unfit attorneys, we would expect to see lower rates of attorney discipline in the states that ask about mental health on their bar applications, as compared to the states that do not ask about mental health. But this is not the case.

As a proxy for “unfit lawyers,” this Article compares the rates of attorney discipline from three states that ask detailed mental health questions on their bar applications with three states³⁰⁷ that have not asked any questions about mental health for years. This is, of course, an imperfect statistical analysis. Some attorneys who commit malpractice or other ethical violations will not be disciplined by their bar associations for various reasons—the attorney was not caught, the client did not pursue the issue, or other possibilities. Many factors other than the pre-admission mental health screening affect the rate of attorney discipline. The type of attorney discipline and level of enforcement vary in consistency from state to state.³⁰⁸ Furthermore, the overall numbers of

³⁰⁵ Herr, *supra* note 48, at 642.

³⁰⁶ See *supra* Part I.B.

³⁰⁷ The comparison states are three states that have not asked about mental health history for a number of years (Arizona, Pennsylvania, and Massachusetts) and three states that continue to ask some of the most intrusive and specific mental health questions (North Carolina, Florida, and Texas). North Carolina amended its application in early 2015.

³⁰⁸ Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 678 n.3 (2003). Each state sets its own disciplinary procedures and penalties.

disciplined attorneys are so tiny—fractions of one percent—that meaningful comparisons are difficult. However, the data is sufficient to show that bar examiners cannot meet their burden of showing the necessity of these questions.

This data was compiled from the ABA Survey on Lawyer Discipline Systems (SOLD) for 2009 through 2013.³⁰⁹ The Misconduct Rate in Table 1 was calculated as the number of attorneys sanctioned, both privately and publicly, as reported in the SOLD, divided by the number of attorneys with active licenses, as reported by the same survey.

TABLE 1

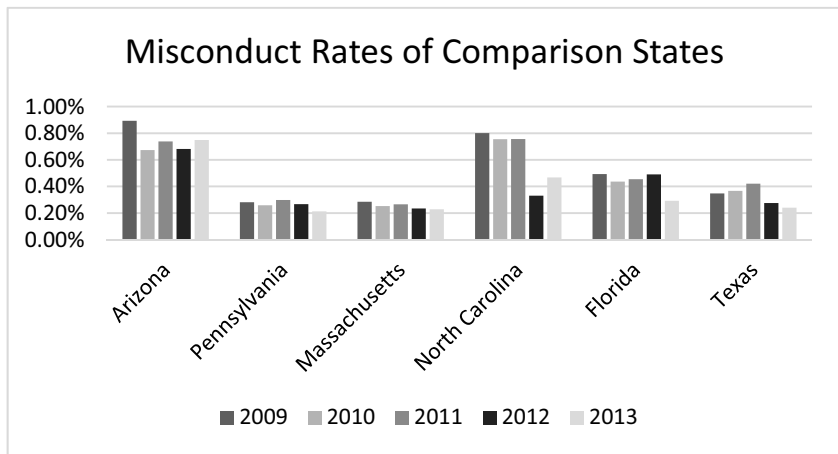


Table 1 demonstrates that asking about mental health as part of the character and fitness process does not produce lower rates of lawyer discipline. Pennsylvania and Massachusetts, which do not ask questions about mental health, have the lowest rates of misconduct over these five years. Arizona, which does not ask, and North Carolina, which does, have roughly similar rates.

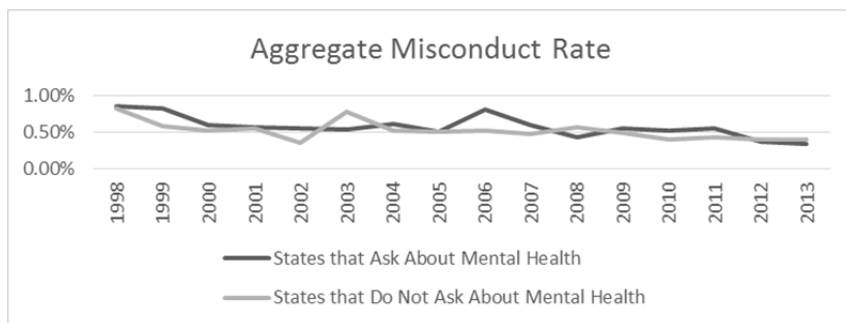
Table 2 uses the same data but aggregates the comparison states that ask about mental health and the comparison states that do not ask. Here too, there appears to

“Discipline” includes both formal proceedings to address more severe misconduct—with more severe sanctions—and more informal, confidential proceedings to address less serious violations. *Id.* at 677-82.

³⁰⁹ *Historical A.B.A. S.O.L.D. Studies*, AM. BAR ASS’N, available at http://www.americanbar.org/groups/professional_responsibility/resources/historicalabas_oldsurveys.html (last visited May 19, 2015); SURVEY ON LAWYER DISCIPLINE SYSTEMS 2012-2013, *supra* note 258.

be no correlation between states that question applicants about their mental health and states that do not.

TABLE 2



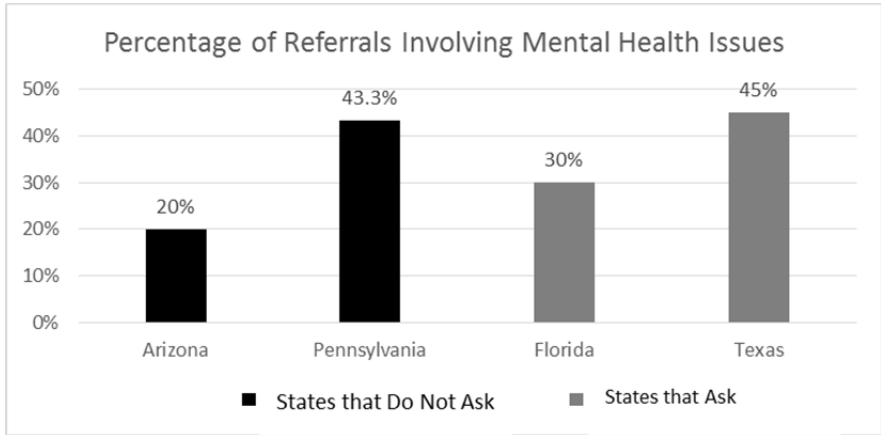
Given the number of other variables present, this comparison should not be taken as a serious statistical endeavor. But it does show that bar examiners cannot meet their burden of proving that asking mental health questions on bar applications reduces the rate of attorney discipline in their state. These statistics are also supported by the opinions of experts and some courts: “there is simply no empirical evidence that applicants’ mental health histories are significantly predictive of future misconduct or malpractice as an attorney.”³¹⁰

Proponents of these questions may argue that attorneys who commit ethical violations and have mental health problems are not disciplined in the ordinary channels but instead may be referred to confidential lawyer assistance programs.³¹¹ This argument is also not borne out by the data. In viewing the total cases that lawyer assistance programs handle, the number involving mental health issues is not related to whether the bar application asked about mental health.³¹²

³¹⁰ Bauer, *supra* note 13, at 141; *see also* discussion *supra* Parts IV.A.1-2.

³¹¹ *See, e.g.*, STATE BAR OF CAL., LAWYER ASSISTANCE PROGRAM, *available at* <http://www.calbar.ca.gov/Attorneys/MemberServices/LawyerAssistanceProgram.aspx> (last visited Mar. 14, 2015).

³¹² *See* AM. BAR ASS’N COMM’N ON LAWYER ASSISTANCE PROGRAMS, 2012 COMPREHENSIVE SURVEY, OF LAWYER ASSISTANCE PROGRAMS A-18-19 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_2012_lap_comprehensivesurvey.authcheckdam.pdf. Data for Massachusetts was not included in this survey.

TABLE 3³¹³

If the states that ask about mental health on their bar applications were “weeding out” attorneys who are likely to be unfit due to mental illness, there should be lower rates of referrals to the confidential assistance program on mental health grounds. Instead, Table 3 shows no clear correlation at all. Arizona, which asks no questions about mental health, has the lowest rate of attorneys referred on mental health grounds. Pennsylvania, which does not ask, and Texas, which does ask, have almost equal referral rates.

Another variable that must be considered is conditional admittance programs, now offered by a number of states. These are essentially probationary programs for applicants about whom the bar examiners have doubts, usually because of mental health or substance abuse issues.³¹⁴ Under these programs, the applicant is licensed as long as she complies with a set of requirements set by the bar examiners. The requirements typically include regular meetings with a mental health provider, reports submitted by the mental health provider, random drug testing, or other types of monitoring. The length of time an applicant remains conditionally admitted varies and can last indefinitely in some states, such as Florida.³¹⁵

The number of applicants admitted under conditional admission programs is very low. For example, the number of

³¹³ North Carolina and Massachusetts are omitted from Table 3 because they did not submit data to the survey.

³¹⁴ FLA. BD. OF BAR EXAM’RS, FREQUENTLY ASKED QUESTIONS, available at <https://www.floridabarexam.org/web/website.nsf/faq.xsp#201A> (last visited Mar. 14, 2015)

³¹⁵ *Id.* Conditional admission programs are suspect under the ADA as well, but they are not the primary subject of this Article. See DOJ Letter, *supra* note 108; LA. SETTLEMENT AGREEMENT, *supra* note 175.

applicants admitted on a conditional basis in Florida from 2005-2008 has ranged from 19 to 39 per year.³¹⁶ This small number does not explain the lack of a correlation between bar application mental health questions and attorney misconduct.

4. Few Applicants are Actually Denied on Mental Health Grounds

What is perhaps most puzzling about this issue is that, despite bar examiners' insistence that the mental health inquiry is essential to their mission, very few applicants are actually denied admission on these grounds. It is difficult to obtain information on the number of applicants denied bar admission for any character and fitness reason,³¹⁷ let alone precise data on the number denied specifically on mental health grounds. The data that is available suggests that very few applicants are denied bar admission on mental health grounds, although this is partly because some are diverted into conditional admission programs. Or it may be that applicants with a history of mental health treatment may choose not to apply for bar admission in certain states based on that state's application questions.

The number of applicants denied on *any* character and fitness grounds, not just mental health, is very low.³¹⁸ In the 1980s, Deborah Rhode found that only 0.2% of applicants were denied for character and fitness reasons.³¹⁹ In recent years, the national rate appears to range from 0.15% to 0.48%, and this includes those denied for current and ongoing substance abuse, criminal matters, academic integrity issues, and so on.³²⁰

According to *Texas Applicants*, the Texas Board of Bar Examiners received only 30 applications that raised mental health issues between August 1987 and the October 1994

³¹⁶ FLA. BD. OF BAR EXAM'RS CHARACTER & FITNESS COMM'N, FINAL REPORT TO THE SUPREME COURT OF FLORIDA 30 (2009) available at http://www.floridasupremecourt.org/pub_info/documents/2009_FBBE_Character_Fitness_Report_Short_Version.pdf. In Florida, conditional admittances have been as follows:

2005	22
2006	39
2007	26
2008	19

Id. The reason for the conditional admission (substance abuse, etc.) is not provided.

³¹⁷ LEVIN ET AL., *supra* note 286, at 4 n.20.

³¹⁸ *Id.* at 4.

³¹⁹ *Id.*

³²⁰ *Id.*

opinion.³²¹ Of those cases, 19 raised “serious”³²² mental health concerns.³²³ Twenty-one of the 30 cases were set for hearing.³²⁴

Of the 19 “serious” cases, the outcomes were as follows: two were cleared by Board staff members; seven were approved by the Board (presumably following a hearing); one was denied admission on mental health grounds; one was denied for reasons other than mental health; one remained under investigation at the time of the decision for unstated reasons; one applicant’s file was terminated when the applicant did not complete the medical records release form; one applicant’s file was terminated when the applicant did not complete a Board-required examination; one was approved but the Board said it might require a mental health update later; one was approved for a temporary license subject to mental health counseling; one had been required to complete a post-hearing psychological evaluation, the results of which were pending at the time of the evaluation; and two had hearings set but not held, and the applicants had taken no further action.³²⁵

In total, of the 19 cases, nine applications were approved.³²⁶ Only one was a clear denial on mental health grounds.³²⁷ The others were either conditional approvals, still pending, or “effective” denials where the applicant declined to continue jumping through the Board’s hoops.³²⁸ The court further noted that only one person has been denied admission to the Texas bar on mental health grounds since 1986.³²⁹

In the 1995 *Clark* decision, the court learned that the Virginia Board of Bar Examiners had never denied an applicant on the basis of mental health treatment.³³⁰ The evidence showed that over a five-year period, 47 out of roughly

³²¹ *Applicants v. Tex. State Bd. of Law Exam’rs*, No. A 93 CA 740 SS, 1994 WL 923404, at *4 (W.D. Tex. Oct. 11, 1994). The opinion does not state how many total applications were submitted.

³²² The court did not define “serious.” *Id.*

³²³ *Id.*

³²⁴ *Id.* This raises the question of why at least two “non-serious” cases were set for hearing.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ One wonders what became of those ten students. Did they drop out of law school? Did they complete law school and apply for bar admission in another state? Look for a job that did not require bar admission? Even though the formal number of applicants denied admission on mental health grounds is so low, the effective number of denials may be much greater when considering the students who never apply for bar admission because of their fears about disclosing their mental health history.

³²⁹ *Tex. Applicants*, 1994 WL 923404, at *7.

³³⁰ *Clark v. Va. Bd. of Bar Exam’rs*, 880 F. Supp. 430, 437 n.12 (E.D. Va. 1995).

10,000 applications³³¹ had answered the mental health question affirmatively, and only two of those cases were investigated further by the Board.³³² One of these two applicants was licensed when her health care provider wrote a letter stating the applicant was fit to practice law; the other applicant failed the written component of the bar exam.³³³

In the 2011 *ACLU of Indiana* case, the court found that 113 of 649 applicants answered one of the mental health questions affirmatively during 2009.³³⁴ Seventeen of those were referred to Indiana's lawyer assistance program, which conducted further assessment and reported back to the Board.³³⁵ Four applicants withdrew from the process, and no applicants were denied admission to the bar.³³⁶ Even though the court called one of Indiana's questions "quite possibly the most expansive bar application question in the country,"³³⁷ it appears that Indiana's bar examiners actually deny few or no applicants on mental health grounds.

The Assistant Dean and Senior Manager of Student Affairs at the University of Michigan Law School stated that in his decade of experience, he was unaware of any applicant who has been denied bar admission for mental health reasons.³³⁸ Similarly, the Assistant Dean for Professional Development at the University of Miami School of Law stated that in his 27 years of experience, he was unaware of any Florida applicant's denial of bar admission on mental health grounds.³³⁹

B. *The Only Rational Justification Violates the ADA*

1. Stigma Explains This Discrepancy

If so few applicants are denied bar admission on mental health grounds and the effectiveness of the inquiry is questionable, why do some states persist in asking the

³³¹ *Id.* at 434. "The Board review[ed] approximately 2000 applications per year[]" during this time period. *Id.*

³³² *Id.*

³³³ *Id.* n.6.

³³⁴ *ACLU of Ind. v. Ind. State Bd. of Law Exam'rs*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *3 (S.D. Ind. Sept. 20, 2011).

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.* at *9.

³³⁸ David Baum, Assistant Dean & Senior Manager of Student Affairs at the Univ. of Mich. Law Sch., Remarks at *Suffering in Silence*, *supra* note 73, at 122.

³³⁹ Interview with William P. VanderWyden III, Assistant Dean for Professional Development, University of Miami School of Law (July 24, 2014) (notes on file with author).

questions? The answer seems to be rooted in fear and stereotypes based on a limited understanding of mental illness.³⁴⁰ Some authors have argued that these questions have “an insincere purpose” because they are not actually screening prospective attorneys in a meaningful way, but rather “reflect biases against mental health care and allegiance to those biases.”³⁴¹ Other commentators give bar examiners the benefit of the doubt, saying that they probably “genuinely believe this is an important enterprise,” but even so their beliefs are based on stereotypes about people with mental illness.³⁴²

Bias against people with mental illness remains widespread in American culture. When surveyed, 68% of Americans said they would not want a person with a mental illness to marry into their family, and 58% would not want a person with a mental illness in their workplace.³⁴³ Many people wrongly believe that individuals with a mental illness tend to be violent.³⁴⁴ In one study, although the participants agreed that there was a biochemical reason that caused depression, 45% of participants “believed depressed people are unpredictable, and [20%] said that depressed people tend to be dangerous.”³⁴⁵

Even among educated lawyers and law professors, mental illness still carries a profound stigma.³⁴⁶ Courts have acknowledged that many people seek mental health counseling for “acceptable” reasons such as the death of a loved one or the stress of law school, and many bar associations now exclude such situational counseling from their application questions.³⁴⁷ But the same fears and prejudices that motivated bar associations to ask about situational counseling 20 years ago are prompting bar associations to continue to ask about specific diagnoses today. Bar examiners previously considered any person who had visited a counselor as suspect. Today, only people with certain diagnoses

³⁴⁰ Burnim, *supra* note 73, at 130 (“[T]he entire system of inquiry by the bar . . . is essentially an expression of prejudice and stereotypes . . .”); Bauer, *supra* note 13, at 100; Coleman & Shellow, *supra* note 47, at 71.

³⁴¹ Wielobob, *supra* note 211, at 14.

³⁴² Burnim, *supra* note 73, at 135.

³⁴³ Sadie F. Dingfelder, *Stigma: Alive and Well*, MONITOR ON PSYCHOL., June 2009, at 56, 57.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 59.

³⁴⁶ Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1, 30 (1999).

³⁴⁷ See, e.g., Doe v. Jud. Nominating Comm’n, 906 F. Supp. 1534, 1544-45 (S.D. Fla. 1995); Discussion of Preamble to New York Bar Application *supra* Part III.A.3; but see STATE BAR OF NEV., *supra* note 243 (suggesting that although “[o]ccasional short-term counseling for relationship problems or situational stress, standing alone, are not reasons for further inquiry[,]” such situational counseling must still be disclosed on the application).

are viewed with suspicion. But this approach is just as illogical and just as impermissible under the ADA. Limiting discrimination to a smaller pool of people does not make that discrimination any more legal or any more ethical.

Part III of this Article explained that people diagnosed with conditions such as bipolar disorder and schizophrenia can be highly functional and succeed in high-stress jobs.³⁴⁸ Grouping together all people with a particular diagnosis, such as all bar applicants with a diagnosis of bipolar disorder or schizophrenia, is precisely the type of stereotypical inquiry that the ADA was enacted to prohibit. The same concerns that spurred the passage of the ADA—stigma and a misplaced fear of people with mental illness—are the same reasons courts have wrongly continued to permit these questions on bar applications.

Many authors have criticized the character and fitness inquiry generally.³⁴⁹ Some authors argue that character and fitness inquiries—on all topics, not just mental health—are overly intrusive and ineffective.³⁵⁰ Even the United States Supreme Court has described the character requirements as “unusually ambiguous” and with “shadowy rather than precise bounds.”³⁵¹

In the past, bar associations have used the character and fitness process as a way to keep “undesirables” out of their ranks. Exactly whom was viewed as undesirable has changed over time. In the nineteenth century, character and fitness standards were used to exclude women from the bar.³⁵² In the early twentieth century, character and fitness standards were used to exclude immigrants, particularly Jewish applicants.³⁵³ In the later twentieth century, the standards worked against suspected communists.³⁵⁴ In the 1970s and 1980s, bar examiners inquired into applicants’ sexual orientation.³⁵⁵ Bar

³⁴⁸ See *supra* Part III.A.1.

³⁴⁹ As one author notes, “[t]here is no shortage of critiques of the character and fitness requirement.” LEVIN ET AL., *supra* note 286, at 4; see also Aaron M. Clemens, *Facing the Klieg Lights: Understanding the “Good Moral Character” Examination for Bar Applicants*, 40 AKRON L. REV. 255, 257 (2007); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L. J. 491, 493-94 (1984-85).

³⁵⁰ See, e.g., Patrick L. Baude, *An Essay on the Regulation of the Legal Profession and the Future of Lawyers’ Characters*, 68 IND. L.J. 647, 648 (1993); Stone, *supra* note 31, at 353.

³⁵¹ Clemens, *supra* note 349, at 257 (quoting *Konigsburg v. State Bar of Cal.*, 353 U.S. 252, 263 (1957); see *Schwartz v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 249 (1957).

³⁵² Bauer, *supra* note 13, at 206.

³⁵³ *Id.*; see also Baude, *supra* note 350, at 649 (At one point, the goal was to “keep[] the American bar as Anglo-Saxon as possible.”); Clemens, *supra* note 349, at 260.

³⁵⁴ Bauer, *supra* note 13, at 206-07.

³⁵⁵ See, e.g., Barbara Blackford, Comment, *Good Moral Character and Homosexuality*, 5 J. LEGAL PROF. 139 (1980); Mark A. Williams, Comment, *Homosexuality and the Good Moral Character Requirement*, 56 U. DET. J. URB. L. 123 (1978-79).

examiners insisted they “ha[d] an interest in preventing [the bar’s] reputation from being tarnished by public disaffection with the sexual practices of a given attorney.”³⁵⁶

In the Bar Examiners Handbook, published in 1991, bar examiners had to be told “not [to] ask judgmental, life-style questions about an applicant’s living arrangements, social activities, or sexual activities or preferences” or not to “judgmentally question or comment upon an applicant’s ethnic background or country of origin” and even “not ask a female applicant about her failure to change her surname after marriage.”³⁵⁷ Perhaps in another twenty years, we will look back on mental health questions as equally McCarthy-esque.

2. Florida as a Case Study

The state of Florida serves as an interesting case study. Florida has long been regarded as one of the states with the most intrusive mental health questions,³⁵⁸ and two of the most important lawsuits on this question, *Ellen S.*³⁵⁹ and *Doe*,³⁶⁰ were litigated in Florida. Florida appears to have been the first state to ask about outpatient mental health treatment on its bar application.³⁶¹

Florida’s bar examiners also chime in when the issue is litigated in other states. During the *Clark* litigation in Virginia, a former member of the Florida Board of Bar Examiners testified as an expert witness for the Virginia Board of Bar Examiners.³⁶² Of the many commentators, which included psychiatrists, mental health organizations, state agencies, bar applicants, admitted attorneys, a law school dean, and the DOJ, only the Florida Board recommended retaining the questions.³⁶³

Over the years, the Florida Board has stubbornly resisted any efforts to limit or reduce the scope of the mental health questions asked on its bar application. As far back as 1987 (predating the ADA), the Ethics Committee of the American Psychological Association held that “the Florida Board of Bar Examiners’ method of requesting the specifics of

³⁵⁶ Williams, *supra* note 355, at 128.

³⁵⁷ NAT’L CONF. OF BAR EXAM’RS, *supra* note 52, at 73:6015.

³⁵⁸ Maher & Blum, *supra* note 43, at 824 (“In Florida, the examiners make particularly intrusive inquiries about all forms of psychiatric treatment, from counseling to hospitalization.”).

³⁵⁹ *Ellen S. v. Fla. Bd. of Bar Exam’rs*, 859 F. Supp. 1489, 1491 (S.D. Fla. 1994).

³⁶⁰ *Doe v. Jud. Nominating Comm’n*, 906 F. Supp. 1534, 1536 (S.D. Fla. 1995).

³⁶¹ Bauer, *supra* note 13, at 103 n.29.

³⁶² *Clark v. Va. Bd. of Bar Exam’rs*, 880 F. Supp. 430, 436 (E.D. Va. 1995). The *Clark* court was not persuaded by Dr. Mutter’s arguments. *Id.*

³⁶³ Bauer, *supra* note 13, at 107-08 & n.48.

treatment of law student clients is asking the psychologist to violate the Ethical Principles of Psychologists.”³⁶⁴

In 1989, Florida’s application asked the following questions:

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

_____ Yes _____ No Have you ever consulted a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental, nervous or emotional condition, drug or alcohol use? If yes, state the name and complete address of each individual you consulted and the beginning and ending dates of each consultation.

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

b. _____ Yes _____ No Have you ever been prescribed psychotropic medication? If yes, state the name and complete address of each prescribing physician. Psychotropic medication shall mean any prescription drug or compound effecting the mind, behavior, intellectual functions, perceptions, moods, or emotions, and includes anti-psychotic, anti-depressant, anti-manic and anti-anxiety medications.³⁶⁵

28. _____ Yes _____ No Have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservator, or committee? If yes, please give full details as to court, date and circumstances.

29. a. _____ Yes _____ No Have you ever received diagnosis of amnesia, emotional disturbance or nervous or mental disorder, whether temporary or otherwise? If yes, state the name, street number or PO box, city, state and zip of each psychologist, psychiatrist, or other medical practitioner who made such diagnosis.

b. _____ Yes _____ No Have you ever received REGULAR treatment for any such amnesia, emotional disturbance, nervous or mental disorder? If yes, state the name, street number or PO box, city, state and zip of each psychologist, psychiatrist, or other medical practitioner who treated you and the date you began treatment. (Regular treatment shall mean consultation with any such person more than four times within any 12-month period.)

You must enclose copies of letters which direct each such practitioner and hospital and other facility to furnish to the Board any information the Board may request with respect to any such diagnosis or treatment.

c. _____ Yes _____ No Have you ever been hospitalized or institutionalized or entered any other treatment facility for treatment of any condition or disorder listed in Items 29(a) and (b),

³⁶⁴ Maher & Blum, *supra* note 43, at 836.

³⁶⁵ *Ellen S. v. Fla. Bd. of Bar Exam’rs*, 859 F. Supp. 1489, 1491 n.1 (S.D. Fla. 1994).

above? If yes, state the name, street number or PO box, city, state and zip of each hospital or other treatment facility, the dates of treatment, and the name of each of the attending practitioners.³⁶⁶

The questions included the following preamble:

Questions regarding psychiatric treatment are not intended to invade unnecessarily the privacy of an applicant or to probe into desirable treatment or counseling for most nervous or depression related disorders. Rather, the Board is concerned with forms of serious mental disorder which may impact adversely on an applicant's fitness to practice law. *However, only through full disclosure of all known treatment can a fair and adequate evaluation be made.* Your confidential cooperation in this sensitive area is appreciated.³⁶⁷

Thus, Florida insisted that all counseling, including situational counseling, must be disclosed so that the bar examiners could make an adequate determination of a candidate's fitness.³⁶⁸ One Florida bar examiner explained that Florida's "mental health inquiries [were] intentionally broad in scope to eliminate subjective decision making by bar applicants as to what must be disclosed."³⁶⁹ Today, most states' applications direct that situational counseling need not be disclosed, although Florida's application does not specify either way.

In 1987, several Florida law schools approached the Board and proposed an alternative question: "Have you ever had a substantial mental disorder that significantly impaired your judgment, behavior or your ability to cope with ordinary demands of life?"³⁷⁰ The proposal seemed to backfire. The Board rejected the proposed question on the grounds that the "modifiers 'substantial' and 'significantly' would provide bar applicants with the basis to conceal even the most serious mental problems."³⁷¹ After this meeting, the Board decided to expand its application to require applicants to disclose even a single counseling visit (instead of the previous limitation of four or more sessions within 12 months).³⁷²

Today, Florida's questions are less far-reaching than previous versions but still among the most intrusive in the

³⁶⁶ Pobjecky, *supra* note 35, at 16-17.

³⁶⁷ *Id.* at 17.

³⁶⁸ Interestingly, even at the time, the preamble was criticized as being "inconsistent with the examiners' actual practice[.]" Maher & Blum, *supra* note 43, at 833 n.36, and the Board would routinely recommend applicants for admission who reported the use of situational counseling. Pobjecky, *supra* note 35, at 18.

³⁶⁹ Pobjecky, *supra* note 36, at 32.

³⁷⁰ *Id.* at 37.

³⁷¹ *Id.*

³⁷² Maher & Blum, *supra* note 43, at 847.

nation.³⁷³ The Florida Board of Bar Examiners website currently states:

The Florida Board of Bar Examiners must assess effectively the mental health of each applicant. A lawyer's untreated or uncontrolled mental disorder, if severe, could result in injury to the public. The board assures each applicant that the Supreme Court, on the board's recommendation, regularly admits applicants with a history of both mental ill-health and treatment by mental health professionals. The board considers satisfactory mental health to include: (1) the current absence of an untreated, uncontrolled mental illness that impairs or limits an applicant's ability to practice law in a competent and professional manner; and (2) the unlikelihood of a relapse of such a prior mental illness. With respect to either, evidence of treatment by a mental health professional is useful. The board encourages applicants to seek the assistance of mental health professionals, if needed.³⁷⁴

Even after the DOJ settlement with Louisiana, the Florida Board of Bar Examiners has refused to amend its questions. As of December 2014, the DOJ was investigating Florida's bar admission procedures, but Florida continued to ask questions about mental health in violation of the ADA.³⁷⁵

The Florida example shows that some bar examiners will fight efforts to limit or eliminate these questions to the

373

26.a. During the last 10 years, have you been hospitalized for treatment of any of the following: schizophrenia or other psychotic disorder, bipolar or major depressive mood disorder; drug or alcohol abuse; impulse control disorder, including kleptomania, pyromania, explosive disorder, pathological or compulsive gambling; or paraphilia such as pedophilia, exhibitionism, or voyeurism? . . .

26.b. During the last 5 years, have you received treatment for (whether or not you were hospitalized) or have you received a diagnosis of any of the following: schizophrenia or other psychotic disorder, bipolar or major depressive mood disorder; drug or alcohol abuse; impulse control disorder, including kleptomania, pyromania, explosive disorder, pathological or compulsive gambling; or paraphilia such as pedophilia, exhibitionism, or voyeurism? . . .

26.c. During the past twelve months have you been hospitalized for treatment of any mental, emotional, or psychiatric illness, whether or not the diagnosis was one listed in Item 26.a.? . . .

26.d. Do you currently (as hereinafter defined) have a mental health condition (not reported above) which in any way impairs or limits, or if untreated could impair or limit, your ability to practice law in a competent and professional manner? If yes, are the limitations or impairments caused by your mental health condition reduced or ameliorated because you receive ongoing treatment (with or without medications) or participate in a monitoring or counseling program? . . ."

Online Bar Application, FLA. BOARD OF B. EXAMINERS (on file with author).

³⁷⁴ FLA. BD. OF BAR EXAM'RS, *supra* note 314.

³⁷⁵ Julie Kay, *Florida Bar Investigated Over Mental Health Questioning*, DAILY BUS. REV., Mar. 27, 2015, at A1, A1-A2.

bitter end. But with each incremental change to the questions, the sky has not fallen. Based on the experience of other states,³⁷⁶ there is no reason to believe that the fitness of Florida attorneys will change if these questions are eliminated from the application.

C. *The Appropriate Inquiry Is Conduct, Not Status*

The ADA clearly prohibits discrimination based on an applicant's status as a person with a disability. Given that bar examiners have a duty to ensure applicants are fit to practice law,³⁷⁷ what should the examiners consider if they do not ask about mental health history?

The appropriate inquiry should be the applicant's history of behavior. This is legal under the ADA and has the considerable benefit of being a more accurate predictor of future fitness.³⁷⁸ Applicants who are emotionally unstable or whose actions are morally questionable should be evaluated on the basis of those actions. The mere existence of a particular mental health diagnosis has no probative value.

An inquiry into behavior, rather than diagnosis, will likely yield more accurate results. Some authors have found that "in the few cases where mental illness might have played a role in the applicant's rejection, questions and answers about mental illnesses actually seemed to be superfluous. The applicant's previously bizarre behavior—whether a manifestation of disability or something else—should have been sufficient to alert bar examiners to potential problems."³⁷⁹

As far back as 1982, commentators have reasoned that "the law school program is sufficiently demanding that those who are mentally unfit are unlikely to complete it."³⁸⁰ Successfully completing law school and passing the written bar exam ought to establish a rebuttable presumption of fitness. Many mental illnesses are exacerbated by stress,³⁸¹ and many students who coped well with their disorders during undergraduate studies have difficulties when they enroll in law

³⁷⁶ See *supra* Part IV.A.3.

³⁷⁷ And assuming that such a task is even possible. See *supra* note 349 and accompanying text (discussing general critiques of character and fitness inquiry).

³⁷⁸ Wielobob, *supra* note 211, at 14.

³⁷⁹ Phyllis G. Coleman & Ronald A. Shellow, *Comply With the Americans With Disabilities Act: Judicial Nominating Commission Must Ask About Conduct, Not Disability*, FLA. B.J., July/Aug. 1996, at 56, 58.

³⁸⁰ Elliston, *supra* note 65, at 14.

³⁸¹ Smith, *supra* note 346, at 28.

school, a time of great stress.³⁸² Law school and studying for the written bar examination is arguably more stressful than law practice for many attorneys. Therefore, if a candidate successfully completes three years of law school, that candidate is also likely to successfully navigate a legal career.

Some bar examiners have argued that asking about prior conduct instead of treatment will not work because it could call for “bar examiners to perform as unlicensed mental health professionals[.]”³⁸³ But this is precisely what bar examiners *are* doing under the present system.³⁸⁴

A Florida bar examiner, Thomas Pobjecky, attempts to rebut the argument that bar examiners can learn of an applicant’s unfitness through “other aspects of the character and fitness background investigation.”³⁸⁵ But his replies only explain why the third party reference forms, rather than the application package as a whole, may not be sufficient. He states that a reference “may be unaware of an applicant’s mental problems.”³⁸⁶ If this is so, then it is evidence that the applicant may not have a “mental problem.” If the applicant has functioned well in his place of employment or school, that is more useful information than whether the applicant has a particular mental health diagnosis. Second, Pobjecky states that “a lay person may not perceive anything unusual or bizarre in the applicant’s conduct which would justify notification to bar examiners of a possible mental problem.”³⁸⁷ Again, this yields a conclusion opposite of what Pobjecky seeks. If the applicant does nothing “unusual or bizarre,” there is nothing to investigate.

Furthermore, Pobjecky’s argument rests only on the third party reference form. An applicant with serious fitness concerns will reveal those concerns through other information gathered by the application, such as a leave of absence from school or work, credit problems due to a failure to pay bills, an employment history revealing multiple terminations, or other signs of instability.

Some courts have also suggested that conduct is the more appropriate inquiry. The court in *Brewer v. Wisconsin Board of Bar Examiners* reasoned that without a current psychological evaluation, the Board was able to look at the

³⁸² *Id.*; see also discussion of stress caused by law school, *supra* note 232.

³⁸³ Moeser, *supra* note 40, at 36.

³⁸⁴ See *supra* Part IV.A.1.

³⁸⁵ Pobjecky, *supra* note 36, at 36.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

plaintiff's past conduct and behavior to evaluate her fitness to practice law, just as it did for applicants without disabilities.³⁸⁸ And in *Clark*, the court took note of testimony from the plaintiff's expert witness, who stated that an applicant's past behavior "provides the best indicator of an applicant's present ability to function and work."³⁸⁹ The expert further stated that the behavioral or "characterological" questions on a bar application would elicit the appropriate information.³⁹⁰

There is certainly a possibility that some students will ably complete law school and become licensed attorneys, only to experience a debilitating episode of mental illness later in life. The problem is that there is no way of identifying which students will and which students will not. Their psychologists cannot make such a prediction, and lay people with no mental health training—such as bar examiners—absolutely cannot make such a prediction. Therefore, the inquiry is not likely to produce an accurate prediction of future fitness, and it fails to be "necessary" under the ADA.

CONCLUSION

Seventeen years ago, Stanley S. Herr wrote that "[t]he visibility of bar admission activities, the legal training of aggrieved applicants and the interest of the [DOJ] in this subject all point to the potential for further litigation. Bar officials, however, can and should take preventive action by revamping questionnaires now."³⁹¹ No doubt he expected much greater progress than has actually been achieved.

Most law students are not in a position—or necessarily even interested—to bring a lawsuit against the bar association. Most of them simply want to obtain their law licenses and begin their careers, not spend several years battling with the bar.³⁹² And of course, lawsuits are expensive. Particularly in today's market, where most law students are graduating with a heavy student debt load, students do not have excess funds available for a lawsuit, and they are generally not in a position to forego a steady paycheck while their law license remains pending. Many law firms will be reluctant to hire a recent

³⁸⁸ *Brewer v. Wis. Bd. of Bar Exam'rs*, No. 04-C-0694, 2006 WL 3469598, at *12 (E.D. Wis. Nov. 28, 2006).

³⁸⁹ *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 435 (E.D. Va. 1995).

³⁹⁰ *Id.*

³⁹¹ Herr, *supra* note 48, at 671.

³⁹² Ira Burnim, Legal Dir. of the Bazelon Ctr. for Mental Health Law, Remarks at *Suffering in Silence*, *supra* note 73, at 133.

graduate who not only is not admitted to the bar but is “the one suing the bar because he’s mentally ill and didn’t want to disclose it on his application.” The bar application process has been described as one in which the bar examiners have all the power and applicants are mere “supplicants.”³⁹³ The majority of students will jump through whatever hoops they must in order to not waste their three years—and thousands of dollars—of legal education.

The DOJ-Louisiana settlement was a landmark moment and led to 14 states promptly amending their applications to comply with the ADA. But some states remain reluctant, even openly defiant. Arkansas amended its application but continues to ask questions that violate the ADA, including the broadest question in the country about the use of prescription or over-the-counter drugs for any mental condition. Ohio too revised its questions in 2014 but did so in a way that still violates the ADA.³⁹⁴ The DOJ is now investigating Florida because Florida has not amended its application questions.³⁹⁵

Even the DOJ cannot necessarily compel states to comply. Louisiana reached a settlement, but a particularly recalcitrant state might require the DOJ to litigate the matter, rather than settle. On the one hand, this might be beneficial because it would force a court decision. But again, lawsuits are costly and slow. The DOJ also has competing priorities and limited resources. And there is no guarantee that the DOJ would succeed. As this Article explains, the inquiries are impermissible under the ADA, but some courts have nevertheless reached the wrong conclusion (*Texas Applicants*³⁹⁶ and *ACLU of Indiana*³⁹⁷). The risk exists that a future court will simply follow the prior decisions and uphold the questions, and then all parties must wait for an appellate court to hear the case.

There is a role for law schools to play in this process. Bar associations require schools to certify their applicants for admission, and those certification forms often include questions about the applicants’ mental health. If the law schools in a particular state decided collectively to 1) stop answering those questions on the certification forms, and 2) direct their

³⁹³ McFarlain, *supra* note 1, at 30. One attorney who has represented numerous applicants before the Florida Board of Bar Examiners states “the applicant . . . must defend his past in a procedure in which he has no leverage.” *Id.* at 29.

³⁹⁴ See discussion *supra* Part III.A.4.

³⁹⁵ Kay, *supra* note 375, at A1.

³⁹⁶ *Applicants v. Tex. State Bd. of Law Exam’rs*, No. A 93 CA 740 SS, 1994 WL 923404 (W.D. Tex. Oct. 11, 1994).

³⁹⁷ *ACLU of Ind. v. Ind. State Bd. of Law Exam’rs*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470 (S.D. Ind. Sept. 20, 2011).

students to stop answering those questions on their individual applications, the bar associations might take notice.³⁹⁸

Precedent exists for this type of collective action. In 1994, the deans of the three Minnesota law schools wrote a petition that convinced the Minnesota Supreme Court to revise its bar application.³⁹⁹ Although the court stated that it was “in doubt” as to whether the ADA applied to the disputed questions, it held that the questions should be removed from the application because they deterred students from seeking necessary counseling and that questions related only to conduct could elicit the necessary information “for the most part.”⁴⁰⁰ However, it appears that something went awry in the intervening years, because the Minnesota bar application now asks several odd questions about mental health.⁴⁰¹

In Maryland in 1996, an Associate Dean of the University of Maryland School of Law and the school’s Clinical Law Office successfully worked with the state bar admission to amend the questionnaire.⁴⁰² But Maryland retained mental health questions on its application until 2014. And in Florida, bar examiners rejected a similar request in 1990 and even broadened their application questions, rather than limiting the question, as the Florida schools suggested.⁴⁰³

Some commentators have pointed out the irony of lawyers committing discrimination in their own licensing process. “Lawyers have worked hard to impose antidiscrimination rules on schools, employers, housing providers, federal contract officers, and keepers of building and other spaces open to the public. But on themselves? Not so much.”⁴⁰⁴

Now is the time for lawyers and law schools to eliminate discrimination in the very process that licenses attorneys. The bar should respect not only the letter but also the *spirit* of the

³⁹⁸ One commentator has suggested that if law schools agreed amongst each other to simply stop reporting this information, that would end the whole inquiry. Laura Rothstein, Professor of Law & Distinguished Univ. Scholar at the Louis D. Brandeis Sch. of Law at the Univ. of Louisville, Remarks at *Suffering in Silence*, *supra* note 73, at 135.

³⁹⁹ Herr, *supra* note 48, at 685.

⁴⁰⁰ *In re Frickey*, 515 N.W.2d 741, 741 (Minn. 1994).

⁴⁰¹ MINN. BD. OF LAW EXAM’RS, APPLICATION FOR ADMISSION 9-10 (Mar. 2014), available at [http://www.ble.state.mn.us/file/Bar%20Application%202014%20-%20fill%20in\(1\).pdf](http://www.ble.state.mn.us/file/Bar%20Application%202014%20-%20fill%20in(1).pdf).

⁴⁰² Herr, *supra* note 48, at 685-86.

⁴⁰³ See *supra* Part IV.B.2; Maher & Blum, *supra* note 43, at 847.

⁴⁰⁴ Bernstein, *supra* note 228, at 391; see also Jolly-Ryan, *supra* note 215, at 130 (“Although lawyers work hard to assure that the antidiscrimination laws are fairly applied to most other people’s employment, education, and housing situations, they often fail to apply antidiscrimination laws to their own profession.”).

ADA.⁴⁰⁵ Rather than continuing to quibble over which questions comply with the ADA, bar examiners should eliminate these questions entirely to comply with the spirit of the ADA. It would be to the shame of this profession if the remaining 14 states wait for the DOJ to force them to amend their applications, rather than taking action now to bring their processes into compliance with the ADA.

The very first court to consider this question decided it correctly. In *Medical Society of New Jersey*, the court held that the appropriate questions asked about behavior and capability.⁴⁰⁶ More than two decades later, we are still waiting for some states to comply with the law.

⁴⁰⁵ Smith, *supra* note 346, at 80.

⁴⁰⁶ *Med. Soc'y of N.J. v. Jacobs*, No. 93-3670 (WGB), 1993 WL 413016, at *1 (D.N.J. Oct. 5, 1993).