

The Propriety of Broadly Worded Mental Health Inquiries on Bar Application Forms

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Many of our states continue to make broadly worded inquiries on bar application forms as to the mental health of the applicants. Constitutional attacks on the propriety of such inquiries have been unsuccessful. Since the passage of the Americans with Disabilities Act of 1990, however, the courts have ruled against the legality of nonspecific inquiries into issues that are not relevant to the applicant's competence to practice law. The current status of litigation in this area is discussed and recommendations are made for dealing with this issue.

Prior to August of 1995, Question 24(b) of the North Carolina Board of Law Examiners' "Applicant's Questionnaire and Affidavit" asked the following of each applicant: "Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder?"¹ A recent applicant's "yes" answer to this question triggered a series of events that represents much of the controversy surrounding the propriety of such a question on bar application forms.

The applicant filled out the questionnaire as directed by the Board and answered question 24(b) in the affirmative.² As a result, the Board withheld the applicant's bar examination results and im-

posed the following additional requirements upon him before it would consider his admission to the North Carolina Bar: the applicant would have to (1) undergo a comprehensive psychiatric evaluation, and (2) appear before a panel of the Board of Law Examiners to determine his mental and emotional fitness to practice law.

The applicant received and paid for a psychiatric evaluation in which his mental health practitioner stated that he was fit for the practice of law. Even so, the Board forced the applicant to appear at a hearing. At the hearing, the Board also found that the applicant was fit for the practice of law.³ Pending the outcome of the Board's summer of 1995 review of the suitability of the mental health inquiry, the applicant was considering suing the Board for discriminating against him on the basis of his status as a prior recipient of mental health treatment.⁴

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The series of events affecting this one applicant demonstrates the range of difficulties that bar applicants around the country are having with similar mental health inquiries. The proposed litigation in North Carolina reflects a growing resentment toward the perceived intrusiveness of such far-reaching questions, a resentment that has resulted in several challenges of these inquiries in other jurisdictions, particularly after Congress passed the Americans with Disabilities Act of 1990 (the Act or ADA).⁵

In this article the author examines the equitable arguments on both sides of the issue to demonstrate the nature of the controversy and provide a framework for the review and analysis of the law, which follows; discusses constitutional challenges of the mental health inquiries that predated the ADA and proved largely unsuccessful; introduces the Act, regulations pursuant to the Act, and the Act's relevance to mental health inquiries; and reviews and analyzes post-ADA challenges of broad-based mental health questions and the legal effect of the subsequent tailoring of such questions in some jurisdictions. Finally, the author summarizes the current state of the law and status of the issue and also proposes alternative solutions to the problem.

Equitable Arguments on Both Sides of the Issue

Criticisms of the Mental Health Inquiries The most fundamental objection to broad mental health inquiries is that such questions invade the applicants' right to privacy and discriminate against them on the basis of their status as past

recipients of mental health counseling without adequately meeting the goal of the questions, which is to protect the public and safeguard the system of justice through a character and fitness review of each applicant. The problem, critics contend, is that no evidence exists to prove "that fitness to practice is directly related to absence of . . . mental illness"⁶ and that "even trained clinicians cannot accurately predict psychological incapacities based on past treatment in most individual cases,"⁷ much less untrained members of law examiner boards. Rather, "[b]ecause the most accurate predictor of conduct is past behavior, the board should ask an applicant about history of impairment—whatever the cause—portending inability to perform competently as a lawyer."⁸

Professor Daniel H. Pollitt of the University of North Carolina School of Law (Chapel Hill, NC) previously attempted to have the broad mental health inquiry on the old North Carolina Bar Application removed or altered not only because the question was "not properly tailored to serve the purposes the Board intends . . . , [but also because it] result[ed] in an unnecessary invasion of Bar applicant's privacy."⁹ Professor Pollitt objected to the overreaching nature of the question which, in addition to being an inaccurate indicator of an "unfit" applicant, served to "deny the individual the security of patient/doctor confidentiality,"¹⁰ deterring law students from seeking counseling for fear of disclosure and stigmatization. While answers to mental health inquiries and any subsequent investigations remain confidential within a bar examining board, most such boards are

Mental Health Inquiries on Bar Applications

made up of practicing attorneys with whom an applicant knows it is likely that he or she will have some professional interaction in the future, thereby increasing the deterrent effect of the question.

To assist him in his endeavor, Professor Pollitt enlisted Drs. Myron B. Liptzin and Robert N. Golden, psychiatrists at the University of North Carolina School of Medicine, to provide affidavits in support of his position. Dr. Liptzin acknowledged the lack of documentation that "psychiatric treatment is predictive of subsequent problems in the practice of law"¹¹ and recognized that a broad mental health inquiry is an invasion of privacy that prevents students from seeking help and stigmatizes those who do.¹² Furthermore, Dr. Liptzin stated that "seriously troubled students who eschew psychiatric care to avoid imagined disqualification may be more at risk, perhaps potentially more damaging or unethical in their practice of law, than if they had sought help as students."¹³ Such a conclusion casts further doubt on the inquiry's capacity to meet its stated purpose of protecting the public.

Dr. Golden stated that requiring an applicant to release treatment records "could result in the disclosure of personal information, such as sexual dysfunction or an isolated incident of emotional distress, which have no bearing on an applicant's ability to carry out the responsibilities of an attorney."¹⁴ Dr. Golden equated seeking regular treatment for personal growth and mental health with seeking regular physical examinations for one's physical health and stated that decisions to seek counseling are often associated with insight, maturity, and

strength.¹⁵ Instead of recognizing this, "the [then] current Bar application represents the lingering fear, ignorance, and prejudice that still surrounds psychiatry and psychotherapy."¹⁶ Finally, Dr. Golden recognized that mental conditions do exist that could impair an applicant's ability to practice law but that a broad inquiry is an ineffective method of identifying individuals with such conditions.¹⁷

Arguments in Favor of Broad Mental Health Inquiries Proponents of broad mental health inquiries counter that "bar examiners must safeguard the public from unfit bar applicants, whatever the cause of unfitness may be"¹⁸ and that "the bar application 'is the most effective investigative tool available to examiners [for] discovering preliminary information about an individual's past which may reflect adversely upon the applicant's character and fitness to practice law.'"¹⁹ Therefore, "[b]ecause mental illness in a practicing attorney can lead to extremely adverse consequences for the unsuspecting public, many bar examining authorities have routinely screened applicants for such problem [sic],"²⁰ and proponents contend that bar examiners should have wide discretion in how they inquire into the mental and emotional stability of bar applicants.

Furthermore, proponents of the inquiries argue that there is no practical alternative to asking broad questions that might elicit some responses that are not relevant to a determination of fitness.²¹ Rephrasing the questions to "requir[e] responses only with respect to 'serious' disabilities or 'conditions which you believe

may affect your ability to discharge your duties to your clients and the court,' would effectively permit the applicant to determine his or her own fitness,"²² a relinquishment of responsibility, these critics argue, that states should be unwilling to make. Thus, those in favor of broad mental health questions believe that the harm of any intrusion into an individual's right to privacy caused by the inquiry is outweighed by the state's interests in protecting the public and in ensuring that only those applicants fit for the practice of law are admitted to the bar.

It is clear that advocates on both sides of the mental health inquiry issue have compelling arguments in their favor. What remains to be seen is what the law and the courts have to say about the issue. As will become evident from the following review, the Americans with Disabilities Act of 1990, and not the federal or state constitutions, has provided applicants with a statutory basis for successfully challenging broadly worded inquiries about past mental health treatment and should provide the impetus for nationwide tailoring of such inquiries to focus only on specific behavior and specific, serious disorders.

Pre-ADA Constitutional Challenges of Broad Mental Health Inquiries

Applicants that have attempted to challenge the constitutionality of inquiries into past mental health treatment have generally relied on the constitutional right of privacy from government intrusion. Applicants have argued that the questions were overbroad and "that much of the

information they would require to be disclosed was unlikely to be material to present fitness to practice law."²³ However, most courts considering such constitutional challenges have permitted the inquiries, even if some of the information which is required to be disclosed may not be material to the purpose of the inquiry. The courts merely require that the inquiries *may* lead to relevant information and that the safeguards against disclosure are adequate.²⁴

In *Florida Board of Bar Examiners Re: Applicant*²⁵ ("Florida Board"), plaintiff applicant challenged the constitutionality of the Board of Bar Examiners' refusal to process his application for admission to the Florida Bar until he answered a broadly worded mental health question and executed an authorization and release form regarding the records and substance of his mental health treatment.²⁶ Plaintiff claimed that the Board's action violated both his state and federal constitutional right to privacy. The Florida Supreme Court instead found no merit to plaintiff's contentions and approved the decision of the Board "requiring applicant to complete all portions of the questionnaire . . . and to execute an unaltered authorization and release form before the Board will process his application for admission to the Florida Bar."²⁷

The Court determined that the Board's action met the highest standard of the compelling state interest test for determining the constitutionality of state government action, which required the "state to show an important societal need and the use of the least intrusive means to achieve that goal."²⁸ The Court recog-

Mental Health Inquiries on Bar Applications

nized that the state has a compelling interest in regulating the legal profession²⁹ and held that "the inquiry into an applicant's past history of regular treatment for emotional disturbance or nervous or mental disorder . . . furthers the legitimate state interest since mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public."³⁰ The Court also decided that the Board employed the least intrusive means to achieve its compelling state interest because the "means employed by the Board cannot be narrowed without impinging on the Board's effectiveness in carrying out its important responsibilities."³¹

The Court also determined that the Board's action did not violate plaintiff's *federal* constitutional right of privacy, not by applying the appropriate standard of review of a balancing test comparing the individual's interest with the government's interest, but rather because the Board had already met the more stringent compelling interest standard of review.³² Finally, the Court rejected plaintiff's reliance on the psychotherapist-patient privilege because plaintiff had placed his emotional and mental fitness at issue when he applied to the Bar and because there is no privilege when plaintiff's emotional or mental condition is an element of his claim.³³

Similarly, the District of Columbia Court of Appeals, in *In re Mulroy*,³⁴ rejected an American Civil Liberties Union-assisted constitutional challenge of general inquiries into a bar applicant's past substance abuse and/or mental health treatment, as well as a question about

institutional admission for mental health treatment.³⁵ The Court rejected the challenge on substantially the same basis as the *Florida Board* court.³⁶

These two cases are representative of the judicial response to constitutional challenges of broad mental health inquiries on bar application forms. The *Florida Board* case has been extensively cited as justification for permitting investigations into mental fitness as necessary for the protection of a compelling state interest.³⁷ There is little judicial support for finding that such questions violate one's constitutional right to privacy.³⁸

Thus, challenges of mental health inquiries based on a constitutional right of privacy have generally been rejected as insufficient to overcome the compelling government interest in protecting the public. It was not until the passage and implementation of the Americans with Disabilities Act that courts began to recognize that bar applicants had a viable basis for challenging the legality of such inquiries.

Americans with Disabilities Act of 1990

The Americans with Disabilities Act was enacted on July 26, 1990 to provide "comprehensive civil rights protections to covered individuals in the areas of employment, state and local government services, public accommodations and telecommunications."³⁹ Title II of the Act prohibits discrimination against disabled persons by public entities, which include state and local governments, such as state bar licensing boards.⁴⁰ Title II provides that "no qualified individual with a dis-

ability 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 such entity."⁴¹ The Act defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."⁴² The courts have routinely held that applicants to professional licensing boards who have a history of mental health treatment are persons with disabilities under the Act who meet the "essential eligibility requirements" of practicing the profession.⁴³

In the ADA, Congress explicitly authorized the Attorney General to promulgate regulations implementing Title II.⁴⁴ The regulations help to define what is considered "discrimination" against "qualified individuals with disabilities":

A public entity may not . . . utilize criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability . . .⁴⁵

A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability . . .⁴⁶

A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability . . . from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program or activity being offered.⁴⁷

When read together, "these regulations prohibit the imposition of extra burdens

on qualified individuals with disabilities when those burdens are unnecessary."⁴⁸

The litigation resulting from ADA-based challenges of broadly worded mental health inquiries has focused on whether the inquiries and subsequent investigations place additional burdens only upon the disabled and whether such burdens are necessary to protect the public from potentially unfit attorneys. As the following review of cases will show, it is not that the bar licensing boards are inquiring into an applicant's mental health that is troubling to the courts; rather, it is that the inquiries are not sufficiently related to behavior that can affect the practice of law that the courts find as violative of the ADA.

Post-ADA Litigation and Modification Regarding Broad Mental Health Inquiries

Judicial Recognition of Broad Mental Health Inquiries as Violative of the ADA

In the fall of 1991, soon after the implementation of the ADA, the Mental Health Law Project, a Washington, DC-based public interest group challenged the District of Columbia bar application's broad mental health and substance abuse questions as violating the new Act.⁴⁹ In February 1992, the District of Columbia Court of Appeals responded to the challenge with an internal directive to the Committee on Admissions to discontinue the question regarding treatment for a mental condition and limiting the substance abuse and institutional admission questions to five-year period prior to the date of the answers.⁵⁰ In reviewing this decision, one commentator stated that the

Mental Health Inquiries on Bar Applications

"court's modification of the mental fitness and substance abuse inquiries is consistent with the thrust of the ADA to avoid burdening those with histories of disabilities except to the extent that experience has shown necessary to avoid serious fitness risks."⁵¹

One of the first and most often cited cases regarding mental health inquiries and the Americans with Disabilities Act did not involve bar licensing boards at all. In *Medical Society of New Jersey v. Jacobs*,⁵² the plaintiff association, representing over 9,000 practicing physicians in New Jersey, sought to enjoin the defendant Board of Medical Examiners from compelling licensees and applicants to answer certain questions or from denying an initial or renewal application based on answers to the challenged questions.⁵³ Although the district court denied the plaintiff's request for a preliminary injunction because the plaintiff did not carry its burden of showing immediate and irreparable harm,⁵⁴ the court did conclude that the challenged questions and subsequent investigations were likely to be a violation of the ADA.⁵⁵

The court stated that "the essential problem with the present questions is that they substitute an impermissible inquiry into the status of disabled applicants for the proper, indeed necessary, inquiry into the applicants' behavior."⁵⁶ The court was careful to point out that "it is not actually the questions themselves that are discriminatory . . . [but] [r]ather, it is the extra investigations of qualified applicants who answer 'yes' to one of the challenged questions that constitutes invidious discrimination under the Title II

regulations."⁵⁷ Finally, the court recognized the important function of the Board in protecting the public, but concluded that the Board may not carry out its duties by subjecting only those applicants with disabilities to further scrutiny based only on the status of the applicants.⁵⁸ The court recommended instead that the Board "formulate a set of effective questions that screen out applicants based only on their behavior and capabilities."⁵⁹

In *In re Applications of Underwood and Plano*,⁶⁰ the issue of the legality under the Act of broad mental health inquiries was litigated in the context of a bar examination application. Plaintiffs Underwood and Plano refused to answer two such questions on the Maine application, and also refused to sign a standard authorization and release of their medical records, and sued the Board of Bar Examiners, which had declined to admit either applicant to the bar, for violating the ADA.⁶¹

The Supreme Judicial Court of Maine determined that the Board's requirement that applicants answer the question and sign the medical authorization "violates the ADA because it discriminates on the basis of disability and imposes eligibility criteria that unnecessarily screen out individuals with disabilities."⁶² The court went on to state that, "although it is certainly permissible for the Board of Bar Examiners to fashion other questions more directly related to behavior that can affect the practice of law without violating the ADA, the questions and medical authorization objected to here are contrary to the ADA."⁶³

In *Ellen S. v. The Florida Board of Bar*

Examiners,⁶⁴ the District Court for the Southern District of Florida considered a bar applicant's ADA-based challenge of the Board's mental health inquiries as well as the Board's subsequent motions to dismiss or for summary judgment. The plaintiff challenged the propriety of a question which asked "whether an applicant has ever sought treatment for a nervous, mental, or emotional condition, has ever been diagnosed as having such a condition, or has ever taken any psychotropic drugs"⁶⁵ and which required a release and investigation of the applicant's mental health records. In denying defendant's motions, the court held that, "as the Title II regulations make clear, [the challenged] question . . . and the subsequent inquiries discriminate against Plaintiffs by subjecting them to additional burdens based on their disability."⁶⁶

Although the district court cited *Medical Society of New Jersey v. Jacobs* for the proposition that "'the extra investigation of qualified applicants' constituted 'invidious discrimination under the Title II regulations,'"⁶⁷ the court here found fault with the *Jacobs* court's conclusion that the questions themselves did not violate the ADA.⁶⁸ The *Ellen S.* court determined that the challenged question in the instant case was itself a violation of the Act "because an affirmative response . . . automatically triggers subsequent questions and possible subsequent investigation."⁶⁹ Finally, the court concluded that discrimination against disabled applicants as a result of additional burdens "can occur even if these applicants are subsequently granted licenses to practice law."⁷⁰

The most recent and highly publicized case in this line of decisions is that of *Clark v. Virginia Board of Bar Examiners*.⁷¹ On February 23, 1995, the District Court for the Eastern District of Virginia held that a mental health inquiry on the Virginia Board's "Character and Fitness Questionnaire" was framed too broadly and violated the plaintiff applicant's rights under the ADA.⁷² The court therefore enjoined the Board from requiring that future applicants answer the question.

Plaintiff Julie Ann Clark, who suffered from depression at a time in her life prior to her application for the bar, declined to answer the mental health inquiries on the questionnaire on the grounds that they violated Title II of the ADA. At first the Board would not let Clark take the bar examination because she refused to answer the questions, but relented when Clark retained counsel and threatened the Board with an injunction.⁷³ Clark took and passed the bar exam, but the Board would not grant her a license to practice law because she had not provided the requested information.⁷⁴ Clark sued and the district court determined that the imposition of the mental health inquiry violated the ADA. The court recognized that "the licensure of attorneys implicates issues of public safety, [but that] the Board has failed to show that [the] [q]uestion, as posed, is necessary to the Board's performance of its licensing function"⁷⁵ as is required by the regulations.⁷⁶

In reaching this conclusion, the *Clark* court considered a variety of factors. First, the court noted that an applicant may not meet the essential eligibility re-

Mental Health Inquiries on Bar Applications

quirements for the receipt of a public entity's services if he or she poses "a direct threat to the health or safety of others"⁷⁷ but that the Board "presented no evidence to suggest that all or most of the applicants answering [the] [q]uestion affirmatively threaten the health or safety of the public."⁷⁸

Second, applying the test for a violation of the ADA as set forth in the regulations, the court determined that the mental health inquiry subjected qualified individuals to discrimination on the basis of their disability and that the inquiry was not necessary to the Board's licensing function. Citing *Ellen S., Jacobs, and Underwood* as guidance, the court found that the additional burden of further inquiry and scrutiny beyond that required of other applicants discriminates against those with mental health disabilities.⁷⁹

With respect to the necessity of the inquiry, the *Clark* court recognized that the Board has both a statutory and common law basis for setting licensing qualifications but that such authority is subject to the requirements of the ADA.⁸⁰ Again citing *Ellen S., Jacobs, and Underwood*, the court declared that "the ADA restricts licensing boards' freedom to inquire into mental health background"⁸¹ and that the Board's need to determine an applicant's fitness is not sufficient to justify the discriminatory inquiry as "necessary."

Finally, the court concluded that the costs of administering the question, including the deterrent and stigmatic effect of the question on potential applicants, are not justified by the insignificant results the question achieves.⁸² The court

recognized that the imposition of the inquiry "both amplifies the stigmatization of disabled persons and, at the same time, deters the counseling and treatment from which such persons could benefit."⁸³

Regarding the practical ineffectiveness of the inquiry, the court stated that neither the Board nor its expert presented any evidence of a correlation between past mental health counseling and fitness to practice law.⁸⁴ The court also noted that "the extremely small number of applicants answering [the mental health] [q]uestion . . . affirmatively, compared with the comparatively large percentage of the population suffering from mental illnesses at any given time attests to the practical ineffectiveness [of the] [q]uestion."⁸⁵

Thus, this line of cases demonstrates the trend toward judicial recognition that broadly worded inquiries into an applicant's prior mental health treatment are discriminatory and unnecessary under the ADA. However, there are occasions when courts have determined that narrower mental health inquiries or inquiries conducted in a different manner may be permissible under the Act.

Permissible Mental Health Inquiries
In *Applicants v. Texas State Board of Law Examiners*,⁸⁶ three law students who wished to be admitted to the Texas Bar challenged the Board's mental health inquiries as violative of the ADA. The District Court for the Western District of Texas decided on October 10, 1994 that "the Board's narrowly focused inquiries and investigation into the mental fitness of applicants to the Texas Bar who have been diagnosed or treated for bipolar dis-

order, schizophrenia, paranoia, or any other psychotic disorder do not violate the ADA.”⁸⁷

The court stated that these enumerated disorders are serious mental illnesses that may affect an applicant’s fitness to practice law and “inquiry into past diagnosis and treatment of [such] illnesses is necessary to provide the Board with the best information available with which to assess the functional capacity of the individual.”⁸⁸ The court acknowledged the “awesome responsibility with which the Board is charged”⁸⁹ in protecting the public and the integrity of the bar and concluded that the Board’s narrow questions and individualized, case-by-case investigations “are necessary to ensure the integrity of the Board’s licensing procedure, as well as to provide a practical means of striking an appropriate balance between important societal goals.”⁹⁰ Because the questions address only those “serious mental illnesses that experts have indicated are likely to affect present fitness to practice law”⁹¹ and because the investigation does not result in an immediate denial of a license to practice law, the court decided that this mental health inquiry does not violate the ADA.⁹²

In *McCready v. Illinois Board of Admissions to the Bar*,⁹³ an applicant to the bar of the State of Illinois alleged that the Board violated the ADA in asking disability-related questions in connection with his application. Here, the applicant was denied admission to the bar after he interviewed with a special panel of the Board and went through a voluntary psychiatric evaluation and a formal hearing to determine his fitness.⁹⁴ The District

Court for the Northern District of Illinois dismissed the applicant’s federal claims, holding that “there is no basis for setting aside the decision of the Committee on Character and Fitness . . . [because] [t]he ADA does not prohibit reasonable inquiry concerning the mental disabilities or addictions of applicants for admission to the bar.”⁹⁵

The court distinguished the decisions in *Ellen S.*, *Jacobs*, and *Underwood* in that the mental health inquiries in the instant case were asked of the applicant’s references and not on the bar application itself.⁹⁶ A mental health question asked of an applicant’s references is not violative of the ADA because “it is noncoercive and imposes no additional burden on the applicant [, and because it] necessarily focuses on his behavior, not his status.”⁹⁷ The court decided that such questions were not designed to form a diagnosis but rather “to develop a comprehensive picture of each individual, to compile a record of significant life events upon which informed judgments as to character and fitness can be based.”⁹⁸ The court concluded that Title II of the ADA places none of these sorts of facts off limits and that a licensing board would be derelict in its duty if it did not conduct this kind of an investigation.⁹⁹

Therefore, while it is clear that the ADA provides a basis for challenging and limiting broad-based mental health inquiries, the Act does not proscribe such inquiries entirely, so long as they are sufficiently related to behavior affecting an applicant’s fitness for the practice of law or they impose no additional burdens on the applicant on the basis of his or her

disability. The purpose of the following section of this article is to identify the current state of the law in the wake of the preceding cases and to propose alternative solutions to the issue.

The Current and Future State of the Law Regarding Mental Health Inquiries

Current State of the Law All 50 states and the District of Columbia have character and fitness qualifications that applicants to the bar are required to demonstrate as a condition of admission. The jurisdictions differ greatly in how they approach the issue of mental health. In addition to the situation in Virginia in which a district court enjoined the Board of Law Examiners from requiring future applicants to answer a broadly worded mental health inquiry,¹⁰⁰ the various approaches of the bar examiners in other jurisdictions can be categorized as follows:

- Two (2) states, Arizona and Massachusetts ask no mental health questions[.]
- Five (5) states have recently stricken their mental health questions. These include: Hawaii, Illinois, New Mexico, Pennsylvania and Utah.
- Ten (10) states and the District of Columbia ask only about hospitalization or institutionalization for mental impairment or illness. The states include: California, Georgia, Iowa, Kansas, Louisiana, Montana, New Hampshire, New Jersey, South Dakota, and Vermont.
- Thirty-two (32) states ask broad questions concerning treatment or counseling for mental and emotional disorder or illness. These thirty-two states are further divided into [three] groups: one (1) state, Arkansas limits inquiry to continuous treatment for mental or emotional disorder; thirteen (13) states limit their question to specific diagnoses or ask

applicants if they have any mental disorder which they believe will affect their ability to practice law. This group includes: Alabama, Alaska, Connecticut, Delaware, Florida, Idaho, Maine, Maryland, Minnesota, New York, Rhode Island, Texas, and Washington; and eighteen (18) states . . . ask broad mental health questions like [the question challenged in Virginia in *Clark v. Virginia Board of Bar Examiners supra*]. These include: Colorado, Indiana, Kentucky, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, West Virginia, Wisconsin and Wyoming.¹⁰¹

In the wake of the passage and implementation of the ADA, several states and the District of Columbia have altered their mental health questions due to actual or potential litigation under the Act.¹⁰² In addition, several leading national legal and medical organizations have come out in favor of limiting mental health questions to more narrow inquiries that focus only on behavior and chronic mental conditions which affect the ability to practice law.

The House of Delegates of the American Bar Association adopted a recommendation in August of 1994 that recognized the responsibility of bar examiners to:

admit only qualified applicants worthy of the public trust [, but, in doing so, should] . . . tailor questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law, and take steps to ensure that their processes do not discourage those who would benefit from seeking professional assistance with personal problems and issues of mental health from doing so.¹⁰³

Similarly, the National Conference of Bar Examiners took steps in February 1995 to alter its standard mental health questions so as to limit their scope and

more narrowly focus on behavior that may affect fitness to practice law.¹⁰⁴ The new questions are not yet available, but the standard questions they will replace provided the basis for the broadly worded mental health questions used (and now successfully challenged) in many states.¹⁰⁵

The American Psychiatric Association approved guidelines on disclosure and confidentiality in December 1992, which refer to medical residents but are equally applicable to other professions. The guidelines provide: "Prior psychiatric treatment is, per se, not relevant to the question of current impairment Only information about current impairing disorder affecting the capacity to function as a physician, and which is relevant to present practice, should be disclosed on application forms."¹⁰⁶

Finally, the Justice Department submitted *amicus curiae* briefs in support of the applicants' positions in *Jacobs*, *Ellen S.*, and *Clark* and continues to "vigorously pursu[e] changes in state licensing applications, arguing the mental health questions are discriminatory."¹⁰⁷ While none of the actions of these organizations are binding on the states, they represent the great impact that the ADA is having on the status of broad mental health inquiries.

Future State of the Law It is clear that bar examiners who continue to require broad inquiries on bar applications into an applicant's past mental health treatment and counseling will have a difficult time withstanding an ADA-based challenge of the questions. The obvious trend in the law and within organizations

that influence the law is that such inquiries discriminate against the disabled and are not necessary to meet bar examiners' need to protect the public from unfit attorneys. The states that still ask broad mental health questions would do well to modify their inquiries to conform with the ADA now and save the costs of litigation later. What remains unclear, however, is to what extent mental health inquiries must be narrowed in order to comply with the Act.

The District of Columbia and the State of Texas represent two different attempts at answering this question. The District of Columbia eliminated a broad question about past treatment and tailored its remaining question as follows: "During the past five years have you voluntarily entered or been involuntarily admitted to an institution for treatment of a mental, emotional, or nervous disorder or condition?"¹⁰⁸ This question focuses on an applicant's recent institutionalization for impairments and, because of the significance of the level of impairment necessitating such institutionalization, may meet a high enough threshold of an applicant's potential unfitness to practice law to avoid a claim of discrimination.

The District Court for the Western District of Texas is skeptical of behavior-based approaches¹⁰⁹ and has instead upheld the revised Texas mental health inquiry not only as permissible under the ADA but also as "necessary to ensure that Texas' lawyers are capable, morally and mentally, to provide these important services."¹¹⁰ The Texas question asks: "Within the last ten (10) years, have you been diagnosed with or have you been

Mental Health Inquiries on Bar Applications

treated for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?"¹¹¹ The court concluded that this question did not violate the ADA because it narrowly addressed only those disorders relevant to the practice of law.¹¹²

However, the Texas approach is not without its critics. The United States, appearing before the *Clark* court as *amicus curiae*, argued that the *Texas State Board* decision was wrong "to the extent that it allowed even limited inquiry into 'severe' mental disabilities."¹¹³ The United States argued "that the diagnoses listed are unnecessary classifications that violate title II of the ADA."¹¹⁴ Since there has been no judicial resolution of this challenge of the Texas decision, the issue remains subject to debate.

Proposed Solution Perhaps a better approach than either of these alternatives is to follow and expand upon the lead of those state bar examining boards that only ask of their applicants whether they have any recent or current mental disorder which they believe will affect their ability to practice law. For example, the Connecticut board asks: "Since you became a law student, have you ever had an emotional disturbance, mental illness or physical illness which has impaired your ability to practice law or to function as a student of law?"¹¹⁵

If an applicant answers such a question affirmatively, then and only then should a bar licensing board conduct a further investigation. The board should assess all sources providing information about an applicant's conduct and, in consultation with an objective mental health professional,¹¹⁶ determine whether such con-

duct suggests a mental disorder sufficiently relevant to the applicant's fitness to practice law to warrant further inquiry.

If the board so determines, an applicant may then be compelled to undergo a mental health examination to assist the board in its important function of ultimately deciding whether to permit the applicant to practice law. Throughout this process, the applicant should have equal access to all records and reports and should be able to present any information on his or her own behalf.

Such a process focuses only on recent and current behavior and is certain not to discriminate against an applicant on the basis of his or her status as mentally disabled or as a previous recipient of mental health treatment in that a further investigation is not triggered unless the applicant's conduct indicates an inability to practice law. Furthermore, this recommended process conforms with a wide variety of expert proposals¹¹⁷ and seems most likely to both accommodate the requirements of the ADA and still provide bar examiners with a workable method for carrying out their duty to protect the public.

In sum, it would appear that the disgruntled North Carolina Applicant discussed earlier¹¹⁸ would have had a ground swell of judicial support if he had decided to pursue an ADA-based challenge of the state's former broadly worded mental health inquiry.¹¹⁹ States retaining broad mental health inquiries would be wise to amend the inquiries before the states have to face such litigation. In light of the foregoing analysis, the interests of the state bars and of all future

bar applicants would seem to be best served if each state were to adopt a question focusing only on recent or current behavior relevant to one's fitness to practice law and permit further investigation only if a disinterested mental health professional determines that the applicant's behavior indicates a potential lack of such fitness.

Annotated Bibliography

¹Applicant's Questionnaire and Affidavit. Board of Law Examiners of the State of North Carolina, Rev. Oct. 1992. A "yes" answer to this question required the applicant to state the names and complete mailing addresses of each mental health practitioner who treated the applicant and to agree to direct each listed doctor and hospital to "furnish to the Board any information the Board may request with respect to any such treatment." *Id.* The Board defined "regular" treatment as consultation with any mental health practitioner more than four times within any 12-month period. *Id.*

²All of the facts regarding this applicant's situation are true, but the various parties involved will remain anonymous to protect their privacy.

³After the Board made this determination, the Board unsealed the applicant's bar examination results and revealed that he had failed the exam.

⁴The Board of Law Examiners of the State of North Carolina formed a committee to review the application questions regarding past mental health treatment and substance abuse and to make appropriate recommendations. In August 1995, the Board revised the bar application form, eliminating Question 24 and requiring instead that applicants respond to more narrow questions. See *infra* note 119 and accompanying text. Because the applicant's main motivation in pursuing litigation against the Board was to get rid of the broadly worded mental health inquiry, the applicant, in light of the changes to the application, has decided not to sue the Board.

⁵42 USC secs. 12101-12213 (1990). See *infra* Parts IV and V.

⁶Coleman P, Shellow RA: Fitness to Practice Law: A Question of Conduct, Not Mental Illness. 68 Fla BJ 71, 71 (1994)

⁷Rhode DL: Moral Character as a Professional Credential. 94 Yale LJ 491, 581 (1985). Rhode stated: "Yet while mental stability is obviously relevant to practice, current certification standards

license untrained examiners to draw inferences that the mental health community would itself find highly dubious." *Id.* at 581-2

⁸Coleman and Shellow, *supra* note 6, at 71

⁹Pollitt DH: Memorandum to Dean Judith Wegner, Re: Bar inquiry into applicant's mental health fitness (April 20, 1992), at 1

¹⁰*Id.* at 3

¹¹Liptzin MB: Affidavit Re: The Efficacy of North Carolina Bar Application's Requiring Information About a Bar Applicant's Treatment for Amnesia, Insanity, and Mental or Emotional Disorders (April 16, 1992), at 2

¹²*Id.*

¹³*Id.* at 5-6

¹⁴Golden RN: Affidavit Re: The efficacy of North Carolina Bar application questions requesting information about a Bar applicant's treatment for amnesia, insanity and mental or emotional disorders (April 16, 1992), at 2

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.* at 3

¹⁸Pobjecky TA: Mental Health Inquiries: To Ask, or Not to Ask—That is the Question. 61 Bar Examiner 31, 36 (1992)

¹⁹*Id.* at 32 (quoting TA Pobjecky, Everything You Wanted to Know About Bar Admissions and Psychiatric Problems But Were Too Paranoid to Ask. 58 Bar Examiner 14, 16 (1989)). Pobjecky cites several cases of licensed attorneys whose mental and emotional problems were harmful to their clients as examples of what the mental health inquiries are designed to prevent. See *In re Peek*, 565 A.2d 627 (DC App 1989) (the court determined that an attorney's professional neglect and misrepresentation were substantially affected by his mental problems); *In re Larsen*, 589 A.2d 400 (DC App 1991) (the court found that an attorney's misappropriation of client funds resulted from his mental illness)

²⁰*Id.* at 31

²¹Fedo S, Brown KH: Character and Fitness Review: Is it Legal to Ask About Addiction and Mental Disabilities? 61 Bar Examiner 40, 41 (1992)

²²*Id.* at 41-2

²³Reischel CL: The Constitution, the Disability Act, and Questions About Alcoholism, Addiction, and Mental Health. 61 Bar Examiner 10, 10 (1992)

²⁴*Id.* at 11-15 (citing Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 US 154, 165-66 (1971); *Konigsberg v. State Bar of California*, 366 US 36, 46-7 (1961)). In conducting investigations regarding an applicant's character and fitness, "the admitting authorities may constitutionally inquire into matters that themselves may

Mental Health Inquiries on Bar Applications

not be used to disqualify an applicant, provided that such inquiries may lead to information directly relevant to admission." Reischel, *supra* note 23, at 12

²⁵443 So.2d 71 (Fla 1984)

²⁶*Id.* at 72. The question at issue was identical to Question 24(b) on the old North Carolina Application. *Id.* at 73. See *supra* note 1 and accompanying text.

²⁷Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71, 72 (Fla 1984)

²⁸*Id.* at 74 (citing *Carey v. Population Services International*, 431 U.S. 678 (1971); *Roe v. Wade*, 410 US 113 (1973))

²⁹*Id.* at 75 (citing *Goldfarb v. Virginia State Bar*, 421 US 773 (1975))

³⁰*Id.*

³¹*Id.* at 75-6. The Court stated that the confidentiality of the inquiry and limitation on information released from treatment records to that which is relevant to the inquiry minimized the intrusion on an applicant's privacy. In his dissent, Justice Adkins disagreed with this argument, contending instead that a time frame must be incorporated into the mental health inquiry, that the question could be phrased in terms more relevant to fitness to practice law, and that the interests served did not outweigh the privacy interests of the individual hindered. *Id.* at 77 (Adkins J, dissenting)

³²*Id.* at 76

³³*Id.*

³⁴No. 91-965 (DC App Nov 21, 1991). This case was described in detail in Reischel's article; see Reischel, *supra* note 23.

³⁵Reischel, *supra* note 22, at 10. The questions at issue were: "Question 27: Have you ever been addicted to or treated for, or counseled concerning the use of any drug, including alcohol?; Question 28: Have you ever been treated or counseled for any mental, emotional or nervous disorder or condition?; Question 29: Have you ever voluntarily entered or been involuntarily admitted to an institution for treatment of a mental, emotional or nervous disorder or condition?" *Id.*

³⁶*Id.* at 12-16. Reischel, in commenting on the *Mulroy* decision, noted that: "Even trenchant critics of the bar examination process have been reluctant to rest too heavily on a constitutional right of privacy[, and] . . . there has been a definite trend to find that very substantial governmental intrusions into private matters are justified by an important purpose, even where privacy rights resting on explicit constitutional language are at issue." *Id.* at 16. After the passage of the ADA, the DC Court of Appeals on its own volition eliminated Question 28 and limited Questions 27 and 29 to occurrences within the five years previous to the

date of application. See *infra* notes 49-51 and accompanying text.

³⁷See, e.g., *Boedy v. Department of Professional Regulation*, 463 So.2d 215, 218 (Fla 1985) (the Supreme Court of Florida cited *Florida Board* in holding that "it is constitutionally permissible to deny authority to practice medicine to a physician who asserts the privilege against self-incrimination if his claim has prevented full assessment of his fitness and competency to practice").

³⁸Those who maintain that broad mental health inquiries are an unconstitutional invasion of privacy briefly had some judicial support in 1992 when the District Court for the District of Columbia decided the case of *National Federation of Federal Employees v. Greenberg*, 789 F Supp 430 (DDC 1992). In *Greenberg*, the court decided to strike down mental health inquiries on a questionnaire used by the Department of Defense in granting and reviewing security clearances as violative of the constitutional right of privacy. This support was short-lived, however, as the Court of Appeals in 1993 vacated and remanded the district court's decision, holding that the plaintiffs were unlikely to succeed in the claim that the questions violated an individual's constitutional right to privacy. *National Federation of Federal Employees v. Greenberg*, 983 F.2d 286 (1993)

³⁹Pobjecky, *supra* note 18, at 32

⁴⁰42 USC sec 12131(1)(B) (1990). See, e.g., *Clark v. Virginia Board of Bar Examiners*, 880 F.Supp. 430, 441 (ED Va 1995) ("The Virginia Board of Bar Examiners concedes that it is a public agency within [the Act]."); *Ellen S. v. Florida Board of Bar Examiners*, 859 F Supp 1489, 1493 (SD Fla 1994) ("The regulations [promulgated pursuant to the ADA] directly apply Title II to the licensing and regulation of attorneys."); In *Re Application of Underwood and Plano*, 1993 WL 649283 at *1 (Me. Dec. 7, 1993) ("The Board of Bar Examiners is a public entity within the meaning of the Act.")¹

⁴¹42 USC sec 12132 (1990). The ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 USC sec 12131(2)

⁴²42 USC sec 12102(2). A "mental impairment" includes "[a]ny mental or psychological disorder such as . . . emotional or mental illness . . ." 28 CFR sec 35.104 (1993). See *Applicants v. The*

*Indicates West Law screen page number follows (citation to on-line source).

Texas State Board of Law Examiners, No. A 93 CA 740 SS, slip op. at 15 (WD Tex Oct. 10, 1994) ("individuals not currently impaired but who have a history of mental illness or emotional disorder may fit within the second and third elements of the statutory definition"); *Medical Society of New Jersey v. Jacobs*, No. 93-3670, 1993 WL 413016 at *5 (D.N.J. Oct. 5, 1993) ("The ADA thus protects those individuals who have recovered from a disability, those who have been misdiagnosed as having a disability, as well as those who are merely perceived as having a disability.")

⁴³*Clark*, 880 F Supp at 441 ("Ms. Clark is a person with a disability or alternatively, a person with a past record of impairment within the meaning of the ADA . . . [and] she can meet the essential eligibility requirements of practicing law."); *Underwood*, 1993 WL 649283 at *1 ("Applicants are individuals with disabilities within the meaning of the ADA, and thus they have standing to invoke the Act."); *Jacobs*, No. 93-3670, 1993 WL 413016 at *6 ("Under even the most minimal scrutiny, it is obvious to this Court that many, if not the vast majority, of the applicants who answer 'yes' to one of the challenged questions are nevertheless qualified to hold a medical license by reason of the applicant's character, training, and experience.")

⁴⁴42 USC sec 12134. Such regulations have controlling weight "unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton*, 467 US 822, 834 (1984)

⁴⁵28 CFR sec 35.130(b)(3)(i)

⁴⁶28 CFR sec 35.130(b)(6)

⁴⁷28 CFR sec 35.130(b)(8)

⁴⁸*Medical Society of New Jersey v. Jacobs*, No. 93-3670, 1993 WL 413016 at *7 (DNJ Oct 5, 1993)

⁴⁹*Reischel*, *supra* note 23, at 10. The challenged questions were: "Question 27: Have you ever been addicted to or treated for, or counseled concerning the use of any drug, including alcohol?; Question 28: Have you ever been treated or counseled for any mental, emotional or nervous disorder or condition?; Question 29: Have you ever voluntarily entered or been involuntarily admitted to an institution for treatment of a mental, emotional or nervous disorder or condition?" *Id.* See *supra* notes 34-36 and accompanying text.

⁵⁰*Reischel*, *supra* note 23, at 10

⁵¹*Id.* at 11. Reishel noted that the DC Committee's experience with the counseling and treatment questions rarely brought to light a serious fitness question that was not made known through behavioral information such as employment or academic history. *Id.*

⁵²No. 93-3670, 1993 WL 413016 (D NJ Oct 5, 1993)

⁵³*Id.* at *1. Among the challenged questions were the following: "Have you ever suffered or been treated for any mental illness or psychiatric problems?" *Id.* "Are you presently or have you previously suffered from or been in treatment for any psychiatric illness?" *Id.* If an applicant or licensee answered "yes" to any of these questions, he or she was required to have any "TREATING PHYSICIANS . . . SUBMIT DIRECTLY TO THE BOARD OFFICE, A SUMMARY OF THE DIAGNOSIS, TREATMENT, AND PROGNOSIS RELATING TO ANY OF THE ABOVE." *Id.*

⁵⁴*Id.* at 11. The court pointed out that to issue an injunction "it must be satisfied (1) that the moving party is likely to succeed on the merits; and (2) that the moving party will suffer immediate and irreparable harm without injunctive relief." *Id.* at *4

⁵⁵*Id.* at *11

⁵⁶*Id.* at *7

⁵⁷*Id.* at *8. Most courts conclude that the questions themselves are also discriminatory under the Act. See *infra* notes 63, 66-70, 72, and accompanying text.

⁵⁸*Id.* at *10

⁵⁹*Id.* at *7

⁶⁰1993 WL 649283 (Me. Dec 7, 1993)

⁶¹*Id.* at *1. The questions read: "[Question] 29. Have you ever received diagnosis of an emotional, nervous or mental disorder? Yes No; If so, state the names and addresses of the psychologists, psychiatrists or other medical practitioners who made such diagnosis; [Question] 30. Within the ten (10) year period prior to the date of this application, have you ever received treatment of emotional, nervous or mental disorder? Yes No; If so, state the names and complete addresses of each psychologist, psychiatrist or other health care professional, including social worker, who treated you. (THIS QUESTION DOES NOT INTEND TO APPLY TO OCCASIONAL CONSULTATION FOR CONDITIONS OF EMOTIONAL STRESS OR DEPRESSION, AND SUCH CONSULTATION SHOULD NOT BE REPORTED)." *Id.* at *2. The authorization and release required the applicant to authorize disclosure of medical records and reports and consent to an investigation of such records. *Id.*

⁶²*Id.* at *2 (citing *Medical Society of New Jersey v. Jacobs*, No. 93-3670, 1993 WL 413016 (D NJ Oct 5, 1993))

⁶³*Id.*

⁶⁴859 F Supp 1489 (SD Fla 1994)

⁶⁵*Id.* at 1491

⁶⁶*Id.* at 1493-4. The court distinguished Florida

Mental Health Inquiries on Bar Applications

Board of Bar Examiners Re: Applicant in which the Florida Supreme Court upheld a precursor to the challenged question, on the basis that *Florida Board* predated the ADA and that the Florida Supreme Court only considered constitutional challenges of the question in that case. See *supra* notes 25–33 and accompanying text.

⁶⁷*Id.* at 1494. See *supra* notes 55–58 and accompanying text.

⁶⁸*Ellen S.*, 859 F Supp at 1494

⁶⁹*Id.* at 1494, n. 7

⁷⁰*Id.*

⁷¹880 F Supp 430 (ED Va 1995). For recent commentary on the *Clark* case and the ADA, see Hagenbaugh B: Saying No to Mental Health Inquiries. 22 Sum Hum Rts 14 (Summer 1995); and Edson G: Mental Health Status Inquiries on Bar Applications: Overbroad and Intrusive. 43 U Kan L Rev 869 (July 1995)

⁷²*Id.* at 431. The challenged question contained a preamble explaining that the Board was only interested in “severe forms of mental or emotional problems” and then asked: “Have you within the past five (5) years been treated or counselled for any mental, emotional or nervous disorders?” *Id.* If an applicant answered “yes” to this question, the applicant was required to divulge specific treatment information, including a complete description of the “diagnosis and treatment and the prognosis.” *Id.* at 433

⁷³*Id.* at 433. See Karel R: Victory in Virginia ADA Case Strikes Against Discrimination. 30 Psychiatric News 5 (March 3, 1995) for a good summary of the case.

⁷⁴*Clark*, 880 F Supp at 433

⁷⁵*Id.* at 446. In April 1995, the Virginia Board appealed the district court’s decision to the Court of Appeals for the Fourth Circuit, but the Court of Appeals granted Ms. Clark’s motion to dismiss the appeal. No. 95-1782 (4th Cir June 6, 1995)

⁷⁶28 CFR sec 35.130(b)(8) forbids a public entity from imposing eligibility criteria that screen out any individual with a disability unless such criteria can be shown to be necessary. See *supra* notes 45–48 and accompanying text.

⁷⁷*Clark*, 880 F Supp at 841 (quoting 28 CFR part 35, app A at 446). The court suggested that the burden of proving a “direct threat” is a difficult one, requiring an individualized assessment of the risk, “the probability that potential injury will actually occur[,] and whether reasonable modification of policies, practices and procedures will mitigate the risk.” *Clark*, 880 F Supp at 842 (quoting 28 CFR part 35, app A at 446)

⁷⁸*Clark*, 880 F Supp at 442

⁷⁹*Id.*

⁸⁰*Id.* at 443

⁸¹*Id.* at 444

⁸²*Id.* at 444–6

⁸³*Id.* at 445. The court cited two law professors, Paul M. Marcus and Philip P. Frickey, as well as the plaintiff’s expert, Dr. Howard V. Zonana, and the defendant’s expert, Dr. Charles B. Mutter, as substantiating the deterrent effect of the question. *Id.* at 445–446. The experts contend that, for fear of disclosure of diagnosis and treatment information, an applicant may avoid treatment altogether or inhibit treatment by withholding information from his or her therapist. *Id.* at 437–438. Also, because the Board is made up of practicing attorneys, these experts argue that “applicants may be reluctant to disclose mental or emotional problems to a group who, at some level, comprise the applicants’ peers and colleagues.” *Id.* at 438, n. 13. Finally, they contend that the placement of the question between others regarding drug or alcohol addiction and hospitalization for mental illness, may stigmatize the applicant by suggesting “that those answering affirmatively are somehow deficient or inferior applicants.” *Id.* at 445

⁸⁴*Id.* at 445. The court cited plaintiff’s expert, Dr. Howard V. Zonana, a psychiatrist at the Yale University School of Medicine, whose testimony indicated that evidence of past treatment, unlike evidence of past behavior, is “unrelated to applicants’ present ability to practice law and has little or no predictive value.” *Id.* at 435. Dr. Zonana also testified to the effect that: “[T]here is little evidence to support the ability of bar examiners, or even mental health professionals, to predict inappropriate or irresponsible behavior based on a person’s history of mental health treatment [Instead,] evidence of past behavior, as elicited by the Board’s other ‘characterological’ questions, provides the best indicator of an applicant’s present ability to function and work.” *Id.*

⁸⁵*Id.* at 445. The court noted that about 20 percent of the population suffers from some form of mental or emotional disorder at any given time but that the Board, despite reviewing over 2,000 applications per year, received only 47 “yes” answers to its mental health questions in the five years preceding the litigation. *Id.* at 437. The court concluded that “the great discrepancy between the Board’s hit rate and the reported percentage of persons suffering from mental impairment indicates that [the] [q]uestion is ineffective in identifying applicants suffering from mental illness.” *Id.* at 437. Furthermore, despite receiving 47 affirmative answers, the Board has never denied a license on the basis of prior mental health counseling, further proving that the inquiry “has failed to serve its purpose of preventing the licensure of appli-

cants lacking the fitness to practice law." *Id.* at 437, n. 12

⁸⁶No. A 93 CA 740 SS, slip op. (WD Tex Oct 10, 1994)

⁸⁷*Id.* at 1–2. The questions at issue, which the Board substantially revised since 1992 in attempting to comply with the ADA, asked: "11. a) Within the last ten 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 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?" *Id.* at 5–6, n. 5. A "yes" answer to either question required the applicant to describe the course of treatment, describe his or her present condition, and authorize a release of relevant mental health records. *Id.*

⁸⁸*Id.* at 8

⁸⁹*Id.* at 21

⁹⁰*Id.* at 24. The court identified the important societal goals as "integrat[ing] those defined as mentally disabled into society while ensuring that individuals licensed to practice law in Texas are capable of practicing law in a competent and ethical manner." *Id.*

⁹¹*Id.*

⁹²*Id.* The court did point out however that broad-based inquiries such as those held prohibited by the ADA by courts in other jurisdictions (and such as the question used in Texas before implementation of the Act) are in fact violative of the ADA because they "intrude[] into an applicant's mental health history without focusing on only those mental illnesses that pose a potential threat to the applicant's present fitness to practice law." *Id.* at 20

⁹³No. 94 C 3582, 1995 WL 29609 (ND Ill. Jan. 24, 1995)

⁹⁴*Id.* at *1

⁹⁵*Id.* at *7

⁹⁶*Id.* at *5–6

⁹⁷*Id.* at *6. The Board only required the applicant to undergo a panel interview, psychiatric evaluation, and formal hearing after the applicant's references disclosed behavior of the applicant sufficiently questionable to trigger such further investigation. A similar process would ensue if an applicant's references disclosed information about an applicant's credit history, criminal background, etc., regardless of disability.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰See *supra* notes 71–85 and accompanying text.

¹⁰¹Clark v. Virginia Board of Bar Examiners, 880

F Supp 430, 438–440 (ED Va 1995) (citations omitted). Footnotes 15 through 19 of the Clark opinion provide the verbatim wording of the relevant mental health inquiry for each jurisdiction. *Id.* Note that since the time of the Clark decision, when this data was compiled, the North Carolina Board of Bar Examiners changed its questions. See *infra* note 119 and accompanying text.

¹⁰²*Id.* at 441. The states include: Connecticut, Florida, Maine, Minnesota, New York, North Carolina, Pennsylvania, Rhode Island and Texas. See *supra* notes 49–51 and accompanying text with respect to the District of Columbia's modification of the inquiry; *infra* note 119 and accompanying text for North Carolina's changes.

¹⁰³Proposal 110, American Bar Association House of Delegates (August 9, 1994)

¹⁰⁴Clark, 880 F Supp at 441

¹⁰⁵*Id.* The questions eliminated by the NCBE asked: "Have you ever been treated or counseled for any mental, emotional or nervous disorder or condition?" *Id.* "Have you ever voluntarily entered or been involuntarily admitted to an institution for treatment of a mental, emotional or nervous disorder or condition?" *Id.*

¹⁰⁶Karel, *supra* note 73, at 17. The American Medical Association has similarly urged that "questions about mental health be narrowly focused to cover only existing conditions." Miller B: Va. Woman Sues to Bar Mental Health Inquiry. Washington Post. January 15, 1995, at A10

¹⁰⁷Miller, *supra* note 106, at A10

¹⁰⁸Clark, 880 F Supp at 438, n. 16. See *supra* notes 49–51 and accompanying text.

¹⁰⁹Applicants v. The Texas State Board of Law Examiners, No. A 93 CA 740 SS, slip op. at 21, n. 15 (W.D.Tex. Oct 10, 1994) ("the Court has concerns about the practical application of a 'behavior' based method of ascertaining mental fitness and what difficulties the Board would encounter under the ADA in defining 'behavior' sufficient to trigger a mental fitness investigation").

¹¹⁰*Id.* at 22

¹¹¹See *supra* note 87 and accompanying text.

¹¹²*Id.*

¹¹³Clark v. Virginia Board of Bar Examiners, 880 F Supp 430, 444, n. 25 (ED Va 1995)

¹¹⁴*Id.*

¹¹⁵*Id.* at 439, n. 18

¹¹⁶Johnson MT: Treatment Histories Covered by ADA? 26 APA Monitor 1 (1994), at 13. Molly Treadway Johnson of the Federal Judicial Center, writing in the "Judicial Notebook" section of the APA Monitor, recommended that psychologists "advise state boards on how to identify applicants whose psychological impairments are likely to adversely affect their fitness to practice law,

Mental Health Inquiries on Bar Applications

without burdening those whose mental health history or current status is irrelevant to their ability to practice.”

¹¹⁷Dr. Zonana stated that “evidence of past behavior, as elicited by the Board’s [non-mental health-related] ‘characterological’ questions, provides the best indicator of an applicant’s present ability to function and work” and only after such an investigation suggests some mental disorder should a board initiate a second stage of mental health inquiries. *Clark*, 880 F Supp at 435.

The American Psychiatric Association (APA) deems an appropriate question to be: “Since you became a medical student, have you ever had an emotional disturbance, mental illness, or dependency on alcohol or drugs, which has impaired your ability to practice medicine or to function as a student of medicine?” Karel, *supra* note 73, at 17. The APA recommends that only a “yes” answer to this question should trigger further inquiry and that such inquiry should “be conducted as an assessment by a psychiatrist who has no treatment relationship with the individual when the issue concerns emotional or mental suitability or reliability.” *Id.* Finally, the APA states that a “licensing board cannot require the treating psychiatrist to give information.” *Id.*

Furthermore, public interest lawyer Phyllis Coleman and her co-author, psychiatrist Ronald A. Shellow, as well as professor of psychiatry Dr. Robert Golden, propose questions that bar examiners should ask in lieu of broad-based mental health treatment questions that discriminate based on disability, questions that instead focus on specific behavior indicating a potential lack of fitness to practice law. Golden, *supra* note 14, at 4; Coleman and Shellow, *supra* note 6, at 5. For example, Coleman and Shellow suggest asking the following: “1) Have you ever been expelled, suspended from, or had disciplinary action taken against you by any educational institution? If so, explain[;] 2) Has your grade point average ever varied by half a letter grade or more between two terms? If so, explain[;] 3) Have you ever been absent from school or a job for more than 30 consecutive days? If so, explain[;] 4) Have you ever been fired from, asked to leave, or had disciplinary action taken against you in any job? If so, explain[;] 5) Have you ever been evicted or asked to vacate a place in which you lived? If so, ex-

plain[;] 6) Have you ever been arrested for DUI? If so, explain the circumstances, including the outcome[;] 7) Have you ever had any blackouts or periods of intoxication associated with alcohol or any other drug within the past six months? If so, explain.” Coleman and Shellow, *supra* note 6, at 5. These suggested questions, as well as others focusing more directly on mental health and institutional commitment, are representative of those proposed by experts in many fields.

¹¹⁸See *supra* notes 1–5 and accompanying text.

¹¹⁹North Carolina eliminated the broadly worded Question 24(b) and replaced that inquiry with the following questions: “27. Have you ever been impaired as a result of any . . . psychiatric condition, or have you ever been told that you were impaired as a result of any . . . psychiatric condition?[,] 28. Have you ever been diagnosed with or have you ever been treated for bipolar disorder, schizophrenia, or any other psychosis or psychotic disorder, or organic brain syndrome?[,] 30. Have you ever been involuntarily committed to any inpatient or outpatient . . . mental health . . . facility for treatment or evaluation?[,] 31. Have you ever been admitted at the request of any person other than yourself to any inpatient or outpatient mental health . . . facility for treatment or evaluation?”

Applicant’s Questionnaire and Affidavit, Board of Law Examiners of the State of North Carolina, Rev. August 1995. “Yes” answers to any of these questions require the applicants to provide names of persons to whom the Board can address inquiries and to agree to direct relevant facilities to furnish requested information to the Board. *Id.*

While these questions may have eliminated unnecessary inquiry into past treatment unrelated to an applicant’s fitness to practice law, the questions do not go far enough. The US Department of Justice, authorized by the ADA to provide technical assistance to aid with ADA compliance, stated, in response to a request from the disgruntled applicant’s attorney, that these revised questions on the North Carolina application “appear problematic because they fail to focus on *current* impairment of ability to practice law.” Letter from Sheila M. Foran, Disability Rights Section Attorney, Re: Mental Health and Substance Abuse Inquiries on North Carolina Bar Application Form (September 29, 1995), at 1 (emphasis in original).