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I. Introduction

In the pre-Americans with Disabilities Act (ADA)1 case of In re Hoover,2 an attorney who suffered from manic depressive psychosis admitted that while under pressure and working on a large real estate transaction, he misappropriated substantial funds from his client and fraudulently billed for personal expenses. Psychiatrists agreed that the attorney's misconduct was a product of his mental illness.

The Hoover court found that, "mental disease or not," the attorney committed serious misconduct and that disciplinary sanctions were appropriate.3 The attorney was given six months suspension and two years probation in which the bar was to monitor his mental health.4

Obviously, "[t]he pressures placed on an attorney are enormous and his mental and emotional stability should be at such a level that he is able to handle his responsibilities."5 Since the enactment of the ADA, however, the legal profession's methods of regulating attorney fitness where mental health is an issue have been attacked on grounds that such methods violate the ADA. Attacks have been directed primarily at bar application questions concerning mental health6 and, to a lesser extent, at attorney discipline. Unfortunately, disputes concerning mental health are complicated by opposing opinions laced with strong feelings and emotions.

Whether a bar applicant should be required to answer questions concerning his or her mental health has been one of the most disputed issues to face boards of bar examiners in recent years.7 Supporters of bar application mental health questions maintain that such questions are reasonable and necessary to obtain information

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3. Id. at 1274.
4. The court emphasized that in determining the attorney's sanctions, it considered the mitigating effect of the mental illness that contributed to his misconduct. Id. "If not for the record establishing the diagnosis of bipolar manic depressive psychosis, the appropriate sanction for misappropriation of clients' funds normally is disbarment." Id.
5. Florida Bd. of Bar Exam's Re: Applicant, 443 So. 2d 71, 75 (Fla. 1984).
6. For an overview of the various mental health questions used by different jurisdictions, see infra notes 160-66 and accompanying text.
needed to protect the public from incapable attorneys. Conversely, critics of mental health questions argue that the questions unduly invade applicants' privacy and deter mental health treatment. Further, critics argue that the questions are ineffective and rooted in stereotype.

The ADA, which prohibits discrimination against individuals with disabilities, has proven to be an effective tool for those opposing mental health questions. In litigation concerning how the ADA affects bar application mental health questions, the challenged questions have generally been found overly broad and in violation of the ADA.

Responding to the mental health question debate, the American Bar Association, in its August 1994 meeting, approved a resolution limiting the types of questions bar examiners may ask concerning mental health. Accordingly, many states and the National Conference of Bar Examiners revised the mental health questions on their applications and character reports. Some states have gone as far as completely eliminating mental health questions from their bar applications.

On the sideline, a flood of law review articles has been published arguing that mental health questions should be eliminated from all state bar applications. This comment disagrees with that view and argues that the ADA should not prevent narrowly tailored bar application questions concerning mental health, such as those currently employed by the National Conference of Bar Examiners. Such questions are appropriate and necessary to achieve a thorough investigation of applicant fitness.

In contrast to the bar application mental health question debate, attacks in the area of attorney discipline have had little effect on traditional practice. Prior to the enactment of the ADA, courts held that mental illness did not prevent attorney discipline. Because of the importance of maintaining the integrity of the bar, courts held that discipline was necessary regardless of the reason for unfitness. Since the enactment of the ADA, some attorneys with disabilities have argued that

8. In re Frickey, 515 N.W.2d 741 (Minn. 1994).
9. Id.
15. Clark, 880 F. Supp. at 438 (noting that Arizona and Massachusetts ask no mental health questions).
17. Id. at 1274. However, mental or emotional disabilities are often a basis for mitigation. Id.
the ADA precludes discipline of disabled attorneys.\textsuperscript{18} However, courts have consistently held that the ADA does not prevent courts from taking disciplinary action against attorneys with disabilities.\textsuperscript{19}

"[L]awyers serve the important role in our society of assisting people in the management of the most important of their affairs."\textsuperscript{20} The legal profession should be regulated in light of the important responsibilities that lawyers assume. The purpose of this comment is to argue that the ADA should not prevent necessary regulation of the legal profession where mental health is an issue. The threat of attorney misconduct caused by mental illness is real. Bar examiners and courts must have the capacity to protect the public from such harm.

Part II discusses bar application questions concerning mental health. This comment urges that narrowly tailored mental health questions, such as those currently employed by Oklahoma, are necessary for the determination of an applicant's ability to practice law. Because these questions are necessary, they are, therefore, permissible under the ADA. Part III examines attorney discipline rules and procedures and why they stand strong against ADA challenges.

II. Mental Health Inquiries in the Bar Application Process

A. Bar Examiners Have a Duty to Protect the Public From Unfit Attorneys

As early as 1889, the United States Supreme Court recognized that a state's obligation to provide for the general welfare of the public allows it to regulate certain professions to guard against the consequences of incapacity in those professions.\textsuperscript{21} In the legal profession, states have commissioned state bar examiners to restrict the profession to qualified individuals. In this gatekeeping capacity, bar examiners may require high standards of qualification, such as good moral character and proficiency in the law, before it admits an applicant to the bar, so long as the qualifications have a rational connection with the applicant's fitness or capacity to practice the law.\textsuperscript{22} Because the demands placed on attorneys are enormous, mental fitness and emotional stability have been recognized as essential to the ability to practice law in a manner not injurious to the public.\textsuperscript{23} Does it not follow then that bar examiners should inquire into the mental stability of those individuals aspiring to enter into the profession?

Until recently, it was widely accepted practice for bar examiners to ask bar applicants questions concerning their mental health. By screening for problems, bar


\textsuperscript{19} \textit{Busch}, 919 P.2d at 1119-20; \textit{Clement}, 662 So. 2d at 700; \textit{Wolfgram}, 1995 WL 506002, at *7.


\textsuperscript{21} See generally Dent v. West Virginia, 129 U.S. 114 (1889) (upholding West Virginia statute establishing requirements to practice Medicare).

\textsuperscript{22} Schware v. Board of Bar Exam'rs, 353 U.S. 232, 239 (1957).

\textsuperscript{23} Florida Bd. of Bar Exam'rs Re: Applicant, 443 So. 2d 71, 74 (Fla. 1984).
examining, seek to prevent the extreme harm that may result from some mental health problems. Traditional mental health questions can be categorized into four groups:
(a) Questions concerning hospitalization or institutionalization for mental impairment;
(b) Questions concerning continuous treatment for mental or emotional disorders;
(c) Questions limited to specific diagnoses or asking whether the applicant has any mental disorder that he or she believes will affect his or her ability to practice law; and
(d) Questions asking whether the applicant has ever been diagnosed or treated for any mental or emotional disorder.24

Even prior to the passage of the ADA, such questions were challenged. These attacks were primarily grounded on state and federal constitutional rights of privacy.25 It was argued that certain mental health questions interfered too greatly with a bar applicant's capacity to keep certain aspects of his or her personal life to himself or herself. One such case was Florida Board of Bar Examiners Re: Applicant.26

In Applicant, a bar applicant challenged the Board's refusal to process his bar application until he answered an application question concerning mental health and submitted an authorization and release form. The applicant maintained that the question and release form at issue invaded his right to privacy. The question asked:

Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder?

If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)27

The Supreme Court of Florida recognized that the applicant did have a right to privacy.28 However, the court noted that the extent of his privacy right was "limited by the circumstances in which he asserts that right."29 Because the practice of law is a privilege, the applicant assumed the burden of demonstrating his fitness for admission to the bar. The court found that this fitness "encompasses mental and

25. Mental health bar application questions have also been challenged on due process and equal protection grounds. See Florida Bd. of Bar Exam'rs Re: Applicant, 443 So. 2d 71 (Fla. 1984) (holding that mental health question did not violate applicant's due process rights); Mary Elizabeth Cisneros, A Proposal to Eliminate Broad Mental Health Inquiries on Bar Examination Applications: Assessing an Applicant's Fitness to Practice Law by Alternative Means, 8 GEO. J. LEGAL ETHICS 401, 402 (1995) (noting various constitutional grounds upon which challenges to mental health questions have been made).
26. 443 So. 2d 71 (Fla. 1984).
27. Id. at 73 (emphasis added).
28. Id. at 74.
29. Id.
emotional fitness as well as character and educational fitness." The applicant conceded that the state had a compelling interest in ensuring that only those fit to practice law be admitted to the bar. His concern was with the means the Board employed to fulfill its duties. He argued that the question and release form were "unnecessarily overbroad."

However, the court reasoned that "[t]he means employed by the Board cannot be narrowed without impinging on the Board's effectiveness in carrying out its important responsibilities." Further, "the Board rather than the applicant must be the judge of what part of the applicant's past history is relevant." The court noted that because the information was held in confidence, intrusion on the applicant's privacy was minimized. Therefore, the court found that it was necessary that the Board ask questions which were personal and would not otherwise be asked of persons not applying for a position of public trust and responsibility. The court held that the Board's action of requiring the applicant to answer an application question concerning mental health and submit an authorization and release form was "vitaly relevant" to the determination of an applicant's fitness to practice law and did not violate state or federal privacy rights.

Although the public policy of having a trusted, sound bar has outweighed applicants' privacy rights, dissatisfied bar applicants received an alternative cause of action with the enactment of the ADA.

B. The Americans with Disabilities Act

The ADA provides a "national mandate for the elimination of discrimination against individuals with disabilities" based on the Congressional finding that individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic as-

30. Id.
31. Id. at 75.
32. Id. at 76.
33. Id. at 75-76.
34. Id. at 76.
35. Id.
36. Id.
37. However, long before the enactment of the ADA, the Supreme Court of Nevada held that an applicant could not be denied bar admission solely because of a history of mental illness. In re Schaengold, 422 P.2d 686 (Nev. 1967). It is also notable that in the post-ADA case of In re Frickey, 515 N.W.2d 741 (Minn. 1994), the Minnesota State Board of Law Examiners was ordered to remove certain questions which required information about mental health treatment from its bar application. However, the court, in doubt as to whether the ADA applied, ordered the removal the questions simply because (1) they might deter students from seeking needed counseling and (2) alternative behavioral questions could be substituted to elicit the information necessary for the Board to protect the public from unfit practitioners, "for the most part." Id. at 741.
sumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . .

"The point of the bill is to start breaking down those barriers of fear and prejudice . . . so that people begin to look at people based on their abilities, not first looking at their disability." 40

Title II of the ADA provides 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 such entity." 41 The definition of "public entity" includes state governments and instrumentalities thereof. 42 Licensing agencies, such as state bar examiners, are not expressly included in the definition. However, Department of Justice (DOJ) regulations, authorized by the ADA, include licensing agencies within the scope of the ADA. 43 Therefore, state boards of bar examiners must comply with the ADA.

The ADA 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 an impairment; or (C) being regarded as having such an impairment." 44 The last prong of the definition was drawn from the Rehabilitation Act of 1972, 45 which Congress amended to provide protection to individuals who are simply "regarded as having" a physical or mental disability. 46 With this amendment, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." 47

Because most diagnoses of mental illness do not necessarily cause "major life activity limitations," the first prong of the disability definition provides limited protection for a bar applicant with a mental illness. 48 However, the latter two prongs are significant to "qualified" individuals who have recovered from previous impairments or have been misclassified or perceived as having an impairment. Overall, the definition seeks to protect all individuals who might suffer the effects of misconceptions, fears, and stereotypes often associated with mental illness.

39. Id. § 12101(a)(7).
42. Id. § 12131(1)(A)(2).
48. Major life impairments include substantial limitations to one's ability to care for one's self, learn, work, go to school, see, hear, or walk. See Clark v. Virginia Bd. of Bar Exam'trs, 880 F. Supp 430, 441 (E.D. Va. 1995).
A qualified individual with a disability is defined 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 participation in programs or activities provided by the public entity." Discrimination, under Title II regulations of the ADA, includes administering a licensing program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability. "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 . . . ." Further, qualification standards that screen out or tend to screen out individuals with disabilities are prohibited unless such criteria "can be shown to be necessary for the provision of the service, program, or activity being offered."

Specific examples of discriminatory conduct are not offered in Title II as they are in Title I which covers employment. However, legislative history reveals that Congress deliberately chose not to list the types of actions that would be considered discriminatory. Instead, Congress directed the DOJ to promulgate regulations to implement Title II. The DOJ regulations subject licensing boards to provisions of Title II. Moreover, the regulations have been found to stand for the principle that the imposition of extra burdens on qualified individuals with disabilities is prohibited unless those burdens are necessary.

When questions of public safety are involved, the determination of whether an applicant meets the "essential eligibility requirements," and is therefore protected under Title II of the ADA as a "qualified individual with a disability," involves the consideration of whether the individual with a disability poses a direct threat to the safety of others. However, this determination may not be based on generalizations or stereotypes about the effects of a particular disability. Instead, the decision "must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk."

51. Id. § 35.130(b)(3)(i).
52. Id. § 35.130(b)(8).
53. For example, Title I of the ADA specifically prohibits employers from making inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability. See 42 U.S.C. § 12112(d)(2)(A) (1994).
56. Id. at *7; see 28 C.F.R. § 35.130(b)(3)(i), (6), (8).
58. Id.
C. Bar Applicants in the Court Room

The first case to discuss the relationship between state licensing procedures and the ADA, *Medical Society v. Jacobs*, 60 was decided on October 5, 1993. The plaintiff, an unincorporated association representing practicing New Jersey physicians, applied for a preliminary injunction 61 seeking to enjoin the Board from compelling applicants to answer certain questions on grounds that such questions violated the ADA. One of the challenged questions asked, "Have you ever suffered or been treated for any mental illness or psychiatric problems?" 62 If an applicant answered in the affirmative, he or she was required to have any treating physicians submit a summary of the diagnosis, treatment, and prognosis to the Board.

In determining the probability of success on the merits, the court first recognized that the questions were overinclusive because "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." 63 Under the ADA, the Board was prohibited from discriminating against those "qualified" applicants with disabilities. 64 The central issue was essentially whether the Board's use of the challenged questions was discrimination against those "qualified individuals with disabilities" who answered in the affirmative. 65

Under the ADA, the Board was prohibited from utilizing requirements that had the effect of discrimination or that screened out individuals with disabilities unless the criteria could be shown to be necessary. 66 From this, the court reasoned that the Board could not impose extra burdens on qualified applicants with disabilities when those burdens are unnecessary. 67 Therefore, the court focused not on the challenged questions themselves but on the additional burdens required of qualified applicants who answered in the affirmative. 68 The court did find that "[the questions] were used ... as a 'screening' device to decide on whom the Board will place additional burdens." 69 However, it was the extra investigations required of qualified applicants who answered in the affirmative that the court held to constitute discrimination under the ADA. 70

61. A preliminary injunction should only be granted upon a clear showing by the party seeking the injunction of (1) probable success upon a trial on the merits and (2) likely irreplaceable injury to him unless the injunction is granted. Cohen v. Price Comm'n, 337 F. Supp. 1236, 1239 (S.D.N.Y. 1972); see also FED. R. CIV. P. 65 (requiring likely irreparable injury for an injunction to be granted).
63. Id. at *6.
64. Id. The Board was prohibited from discriminating against qualified individuals under Title II of the ADA. See 42 U.S.C. §§ 12132, 12131(2) (1994); 28 C.F.R. § 35.130(b)(6) (1995).
66. Id. at *6; see 23 C.F.R. § 35.130(b)(6).
68. Id. at *8.
69. Id. at *7.
70. Id. at *8.
The court reasoned that the Board could formulate a set of effective questions that screen out applicants simply based on their behavior and capabilities. Therefore, the court found that the Board's broad questions would probably be found unnecessary and impermissible under the ADA. Although the court concluded that the plaintiff had a high probability of succeeding on the merits, because the plaintiff had not shown immediate irreparable injury, the court denied the requested preliminary injunction.

Two months later, the Supreme Judicial Court of Maine followed the reasoning of Jacobs in the case of In re Underwood. Two bar applicants had refused to answer application questions concerning mental health. The questions asked: (1) whether the applicant had ever received diagnosis of an emotional, nervous, or mental disorder and (2) whether, within the ten-year period prior to the date of the application, the applicant had received treatment for an emotional, nervous, or mental disorder. However, the application stated, concerning the latter question, that "this question does not intend to apply to occasional consolation for conditions of emotional stress or depression . . . ." If an applicant answered "yes" to either of the questions, he or she was required to state the names and addresses of relevant health care professionals including social workers and submit an authorization and release form.

The court held that the Board's requirements violated the ADA because they discriminated on the basis of disability and imposed eligibility criteria that unnecessarily screened out qualified applicants with disabilities. Like the Jacobs court, the Underwood court suggested "questions more directly related to behavior" as an alternative. Thereafter, the applicants were granted admission to the Bar.

In Ellen S. v. Florida, the plaintiffs sought a preliminary injunction to enjoin the Board from requiring applicants to answer Florida's mental health application question and from being subjected to additional inquiries associated with an affirmative answer to the question. The question at issue asked whether the applicant had ever sought consultation for or been diagnosed as having a nervous, mental, or emotional condition. An affirmative answer triggered the additional requirements that the applicant provide information concerning any treatment, an authorization for the release of medical records, and a waiver of confidentiality. Additionally, the Board maintained the practice of sending an applicant's health professionals a letter.
containing questions about the applicant's treatment history. Finally, the Board was also authorized to hold a hearing for an applicant to respond to further questions concerning his or her mental health history.

The Board filed a motion to dismiss based on several arguments. First, the Board asserted that Florida law required the Board to investigate each applicant's ability to practice law and that the information sought by the challenged question was relevant to the Board's determination of an applicant's fitness to practice law. The court rejected this argument simply stating that although the Board was authorized to investigate an applicant's fitness, it was "not permitted to conduct such investigation in violation of federal law." 80

The Board's second argument was that Title II of the ADA did not prohibit the challenged question. The Board asserted that because Title I of the ADA specifically prohibits employers from conducting preemployment inquiries regarding disability, while Title II only generally prohibits discrimination by public entities, Title II does not prohibit the use of such inquiries. The court held that this statutory argument failed because "legislative history reveals that Congress deliberately chose not to list all the types of action that are included within the term "discrimination," as was done in Titles I and III." 81 Subsequently, the court found that Title II regulations made clear that the challenged requirements discriminated by subjecting qualified applicants with disabilities to additional burdens. 82

The Board also asserted that qualified applicants with disabilities are not discriminated against if they are not denied admission to the bar. 83 However, the court held that "[t]he Board can discriminate against qualified disabled applicants by placing additional burdens on them and this discrimination can occur even if these applicants are subsequently granted licenses to practice law." 84

Finally, the Board argued that applying Title II of the ADA to the Board violates the Tenth Amendment of the United States Constitution 85 because "Congress allegedly did not express its intent to preempt state governance over the licensing of attorneys." 86 However, the court held that the language of the ADA did in fact demonstrate Congress' intent to regulate the Board's licensing of bar applicants. 87 Therefore, the court held that the Tenth Amendment did not restrict the application of Title II of the ADA to the Board. 88 The court denied the Board's motion to dismiss. 89 Thereafter, the Board entered into a consent decree and voluntarily changed the disputed questions. 90

80. Id. at 1492.
81. Id. at 1493.
82. Id. at 1493-94; see 28 C.F.R. § 35.130(b)(6), (8) (1995).
84. Id. at 1494.
85. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.
86. Ellen S., 859 F Supp. at 1494.
87. Id.
88. Id.
89. Id. at 1496.
The most recent decision to find that a Board's mental health question violated the ADA is Clark v. Virginia Board of Bar Examiners. Following a preamble which explained that the Board was only concerned with "severe forms of mental or emotional problems," the Virginia bar application question asked, "Have you within the past five (5) years been treated or counseled for any mental, emotional or nervous disorders?" If an applicant answered affirmatively, he or she was required to give specific treatment information.

The plaintiff bar applicant refused to answer the question on grounds that it violated the ADA because it was overbroad in that it burdened mentally disabled applicants without effectively identifying those applicants who were unfit to practice law. Further, the applicant alleged that the question had the adverse effect of deterring mental health treatment and stigmatizing those who do seek treatment. Conversely, the Board argued that the question was necessary to allow the Board to fulfill its duty of assessing applicants' fitness to practice law; the question enabled the Board to identify potentially unfit applicants with the limited resources and time available to it.

The court accepted the proposition that "an uncontrolled and untreated mental or emotional illness may result in injury to clients and the public." Further, the court agreed that "at some stage in the application proceeding, some form of mental health inquiry is appropriate." However, the court found that the challenged question was unacceptable because it was framed too broadly:

[The] broadly worded mental health question discriminates against disabled applicants by imposing additional eligibility criteria. While certain severe mental or emotional disorders may pose a direct threat to public safety, the Board has made no individualized finding that obtaining evidence of mental health counseling or treatment is effective in guarding against this threat.

In reaching its conclusion, the court noted the American Psychiatric Association's (APA) guidelines for mental inquiry by licensing boards. The APA suggested that prior psychiatric treatment is, per se, not relevant to the question of current impairment. It is not appropriate or informative to ask about past psychiatric treatment except in the context of understanding current

Florida Bar modified its bar application questions after the Ellen S. decision).

92. Id. at 431 (emphasis added).
93. Id. at 436.
94. Id. The court noted the plaintiff's expert witness' opinion that "mental health inquiry may be appropriate as a second stage of the application proceedings." Id. at 436 n.9. The expert testified that "an applicant's fitness to practice law should be assessed from other characterological inquiries first and, where the results suggest some mental disorder, should be followed up with a second stage of mental health inquiries." Id.
95. Id. at 446.
96. Id. at 435.
functioning. . . . The salient concern is always the individual's current capacity to function and/or current impairment.\textsuperscript{97}

These guidelines echoed the plaintiff's expert witness' testimony that the Board's concern should be focused on an applicant's present ability to practice law. The court agreed and expressed its preference for questions more directly related to behavior.\textsuperscript{98}

\textit{Applicants v. Texas State Board of Bar Examiners}\textsuperscript{99} is the one decision in which a court held that the question at issue did not violate the ADA.\textsuperscript{100} The application asked: (1) "Within the last ten years, have you been diagnosed with or have you been treated by [sic] bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?" and (2) "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 bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?"\textsuperscript{101} An affirmative answer triggers the requirement that the applicant provide a description of the diagnosis and/or treatment and the names and addresses of health care professionals relevant to the affirmative answer.

The question had recently been revised "in efforts to comply with the ADA."\textsuperscript{102} The court noted that the current question "narrows the inquiry to the diagnosis of certain specified mental illnesses that may bear on an applicant's present fitness to practice law."\textsuperscript{103} The court pointed out that bipolar disease, schizophrenia, paranoia, or psychotic disorders are serious mental illnesses that may affect an individual's ability to practice law, people suffering from these illnesses may suffer debilitating symptoms that inhibit their ability to function normally.\textsuperscript{104} Further, because an individual may have experienced an episode of one of these illnesses in the past, but currently is not experiencing symptoms, does not mean that individual will not experience another episode in the future. Nor does it mean that the individual is presently fit to practice law.\textsuperscript{105}

The court recognized that an individual suffering from one of the specified illnesses may have extended periods between episodes, as long as ten years for some illnesses.\textsuperscript{106} The court found that an applicant's treatment records could furnish important information on "the applicant's insight into his or her illness and degree of cooperation in controlling it."\textsuperscript{107} The court held that the question at issue

\textsuperscript{97} Id.
\textsuperscript{98} Id. at 446.
\textsuperscript{100} Id. at *1.
\textsuperscript{101} Id. at *2 n.5.
\textsuperscript{102} Id. at *2. Previous mental health questions asked by the Board concerned \textit{any} mental illness.
\textsuperscript{103} Id. at *2 n.3, 4.
\textsuperscript{104} Id. at *2.
\textsuperscript{105} Id. at *3.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
was "necessary to provide the Board with the best information available with which to assess the functional capacity of the individual."

In reaching its conclusion, the court balanced the goals of the ADA with the countervailing goal of ensuring that individuals licensed to practice law are capable of practicing law in a competent manner. The purpose of the ADA is to prevent discrimination against disabled individuals and to promote their integration into the mainstream of society. However, the court stated:

It is ludicrous . . . to propose that this purpose can only be accomplished by prohibiting a state from directly investigating and assessing an applicant's emotional and mental fitness to determine if the applicant has sufficient competence to discharge the responsibilities of a lawyer before the state warrants by licensing to the citizens that the individual has the mental and emotional fitness to fulfill a lawyer's legal, ethical, and moral responsibilities.

The court pointed out that the ADA does not preclude bar examiners from any inquiry and investigation related to mental illness but instead allows for such inquiry and investigation when necessary. The court reasoned that reliance on "behaviors" occurring in other facets of an individual's life as a trigger to indicate mental illness affecting present fitness was a much more inexact and potentially unreliable method of ascertaining mental fitness than the challenged question. Therefore, the challenged question was in fact necessary to the Board's procedures. The court concluded by stating "[t]he Board would be derelict in its duty if it did not investigate the mental health of prospective lawyers." Further, the court stated that the Board had made every effort to investigate "in the least intrusive, least discriminatory manner possible, focusing only on those serious mental illnesses that experts have indicated are likely to affect present fitness to practice law." Although affirmative answers trigger investigation that applicants answering negatively do not have to undergo, the court held that this practice is 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."

Each of the aforementioned cases indicate that, under the ADA, inquiries cannot be made concerning an applicant's mental health unless such inquiry is necessary. Such inquiries must be necessary because mental health questions do, in fact,
"screen out, or tend to screen out," individuals with a mental disability, with a history of mental disability, or perceived disability, by imposing additional burdens on them. Criteria that have such an effect are precluded unless it is necessary.

In all of the cases except Texas Applicants, the challenged questions were overinclusive. Generally, the questions asked whether the applicant had ever been diagnosed or treated for a mental or emotional illness, or whether within a specified time the applicant had been diagnosed or treated for any emotional or mental illness. Because of such overly broad language, the additional burdens commonly triggered by an affirmative answer largely fell on "qualified" applicants with disabilities. Such applicants were individuals who met the essential eligibility requirements, including mental and emotional stability, but who qualified under the ADA as having a disability because they had either: (1) a mental disability which did not affect their ability to practice law, (2) a record of a disability, or (3) were perceived as having a disability.118 Obviously, such a broad investigation is unnecessary.

The difference between overbroad questions, like in Underwood, and the narrowly tailored question in Texas Applicants is clear. Narrowly tailored questions affect only those applicants with conditions that experts have indicated are likely to pose a direct threat to clients, the courts, and/or the profession. Whether an applicant poses such a threat speaks directly to whether that applicant meets the "essential eligibility requirements" for the practice of law.

Some proponents for the disabled seem to hold the extreme view that any and all bar application questions concerning mental health are unnecessary and that such questions should be replaced by purely "behavioral" questions.119 The following section will examine some of these advocates' arguments. However, it will become apparent that these arguments are persuasive only against outdated "overly broad" mental health questions.

D. Arguments Against Mental Health Inquiries

1. Efficiency of Mental Health Questions

Disability advocates often complain that mental health questions are inefficient at protecting the public from incapable attorneys. In fact, medical research reveals that broad questions concerning past mental or emotional illness diagnosis and/or treatment fail to be an effective means to that end.120 Data from a mental illness study shows that 22% of the population suffer from mental illness.121 This number

119. See Applicants v. Texas State Bd. of Law Exam'rs, No. A 93 CA 740 SS, 1994 WL 776993, at *8 (commenting unfavorably on the plaintiff's argument that behavioral questions are sufficient for detecting an impairment in an applicant's ability to practice the law); Phyllis Coleman & Ronald A. Shellow, Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and the Constitution, 20 J. LEGIS. 147, 148-49 (1994) (suggesting that behavioral questions should replace mental health questions).
120. Coleman & Shellow, supra note 119, at 158-59.
121. Id. Based on the Diagnostic and Statistical Manual of Mental Disorders, the National Institute of Mental Health designed a Diagnostic Interview Schedule which was used to interview a randomized population to determine actual prevalence of mental illness in the United States. The study interviewed
rises to 28% when substance abuse is included.122 About one-third of this number experience some functional disability caused by their condition.123 The study also reveals that one-third of those with a mental illness consult a mental health professional.124 However, this one-third is not necessarily the same one-third who are functionally impaired by their illness.125

Further, the study shows that of the number of individuals who seek mental health treatment, only 54% have a diagnosable mental illness.126 Thus, nearly half of those treated by a mental illness professional have no mental health disorder. Yet these individuals would have to answer affirmatively to a broad application question concerning past mental health treatment and/or counseling. Obviously, such questions are ineffective in spotting individuals who would pose a direct threat to clients, the courts, or the profession. Actually, those individuals with mental illnesses who do not seek treatment are likely to be a greater threat to the public than those who do because they have made no effort to control their illness through treatment. However, these individuals are passed over by treatment questions.

Statistics in Virginia have been cited to reflect the ineffectiveness of such treatment questions.127 Out of approximately 2000 bar applications per year, the Virginia Board of Bar Examiners received only forty-seven affirmative answers in five years.128 This number turns out to be less than 1%, a number far below the expected rate of about 20% affirmative responses. In Clark, the court found that the discrepancy between the Board's hit rate and the reported percentage of individuals suffering from mental illnesses indicated that the Board's treatment question was ineffective in identifying applicants suffering from mental illness.129 Additionally, the court noted that an affirmative answer to the question had never prevented licensure.130 Therefore, the court reasoned that the question had failed its purpose of protecting the public from applicants not fit to practice law.131

However, the Clark court's reasoning concerning the difference between the Board's hit rate and the reported percentage of individuals suffering from mental illnesses may be faulty. No finding was presented that the percentage of individuals with mental illnesses who apply to the bar is representative of the 22-28% of the general public. Therefore, it may simply be that a less than representative percentage of individuals with mental illnesses attempt to enter the legal profession. This conclusion would not be difficult to accept realizing the tremendous pressures placed on those who enter the profession.

18,571 households and 2090 institutional residents. Id. at 158.
122. Id. at 158, 159.
123. Id. at 159.
124. Id.
125. Id.
126. Id.
128. Id.
129. Id.
130. Id.
131. Id.
The Texas Applicants court was not so critical of Texas' licensing procedures. There, thirty applicants' files raised mental health concerns in a period of about seven years. Of that number, nineteen raised "serious mental health concerns." At the time of the Texas Applicants litigation, one of those cases remained under investigation, and two were cleared by a staff review of recent psychological evaluations. The other sixteen had been set for hearing. Of those, one was denied admission on mental health grounds; one was denied on other grounds; two had hearings set but not held; one applicant's file was terminated for failure to execute an authorization and release form; one was approved; one did not complete a bar examination; one was approved for a temporary license on the condition that the applicant maintain mental health counseling; and one was required to submit a posthearing psychological evaluation, the results of which were still pending at the time of Texas Applicants. The other eight cases resulted in either denial or inconclusive results. According to the Texas Board's Director of Fitness and Character, "[i]n five of the eight cases, the Board would have been unaware of mental health concerns absent the applicant's disclosure." In the end, only two applicants out of the thirty appear to have been actually denied for mental health reasons which the Board would not have been aware of if the applicant had not been required to reveal them. However, it is noteworthy that several temporary/conditional licenses were granted to applicants with mental health concerns.

The Texas investigation covered years in which the Board employed broad questions as well as subsequent years in which the Board had revised questions to comply with the ADA. Clearly, now that the Board employs a narrowly tailored question concerning only serious mental illnesses, considerably fewer applicants will be singled out in the application stage. However, the new question should still expose those applicants who may pose a direct threat to the public because it focuses on those illnesses which experts have found especially likely to impair one's ability to practice law.

Questions concerning serious mental illnesses are necessary given the likelihood that such impairment may cause harm to the public. The same argument holds true for questions concerning whether there is any current impairment to an applicant's ability to practice law. These questions should not be disregarded in favor of purely behavioral questions. Behavioral questions may be helpful, but the true gravity of an applicant's fitness, or lack thereof, may not be revealed if important mental health information is unobtainable by boards of bar examiners.

Disabilities advocates have also asserted that the practice of using past diagnosis and treatment questions is ineffective because it substitutes bar examiners for trained

133. Id.
134. Id. at *5.
135. Id.
136. Id. at *5 nn. 11, 12.
137. Id. at *4, 5.
mental health professionals. It is true that the nature of mental illnesses makes determination of mental fitness difficult even for experts. However, boards of bar examiners should not be prevented from fulfilling their duty because it is difficult.

Further, boards which employ narrowly focused mental health questions should not be criticized for evaluating mental fitness because they are not trained in the area. Narrowly tailored questions only address current impairments and/or serious mental illnesses which experts have found likely to impair one’s ability to practice law. One does not have to be a mental health expert to recognize the potential danger that may be connected to an affirmative answer to such a question. As the Texas Applicants court pointed out:

The Board has a duty not just to the applicants, but also to the Bar and to the citizens . . . to make every effort to ensure that those individuals licensed to practice . . . 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 Board, therefore, must make every effort to investigate each applicant as thoroughly as possible. . . .

[L]awyers serve the important role in our society of assisting people in the management of the most important of their affairs. Therefore, . . . the Board must evaluate each applicant’s ability in light of the important responsibilities lawyers assume.

2. Deterrent Effects of Mental Health Questions

Critics of mental health inquiries argue that the mental health questions have a deterrent effect. Mental health questions may have such an effect because some applicants may be inhibited from seeking necessary and desirable treatment for fear of damaging their record. However, many bar applications, including the National Conference of Bar Examiners’ application, as used in Oklahoma, include a preamble which encourages applicants who may benefit from treatment to seek it. However, it is questioned whether applicants who may be intimidated by the application process will take this advice.

It is also argued that mental health questions that trigger the release of medical records and a waiver of confidentiality may inhibit the treatment of those who do seek it. Knowing that one’s physician may be required to disclose diagnosis and treatment information, an applicant may be less candid with the physician. Arguably, physicians may also be affected by the knowledge that they may later be

140. E.g., Clark, 880 F. Supp. at 437, 438.
141. E.g., REQUEST FOR CHARACTER REPORT, supra note 14, at 10.
143. Id.
144. Id.
required to divulge treatment information. Physicians may, therefore, defer or eliminate controversial subjects.\textsuperscript{145} For these reasons, it has been suggested that the elimination of the questions would result in a healthier bar.\textsuperscript{146}

Once again, this argument speaks more against broad mental health questions than those which are narrowly tailored. As noted, many bar applications, including the National Conference of Bar Examiners' application, employ a mental health question preamble to minimize any deterrent effects.\textsuperscript{147} The National Conference of Bar Examiners' application preamble encourages applicants who may benefit from treatment to seek it. Further, it clarifies the scope and purpose of the questions employed. The use of this kind of preamble reflects the policy adopted in the American Bar Association's (ABA) resolution concerning mental health inquiries on bar applications.

\textbf{E. The ABA Resolution}

At the ABA's February 1994 meeting, the ABA Commission on Mental and Physical Disability Law (Commission) recommended that when making character and fitness determinations for the purpose of bar admission, bar examiners, consistent with the ADA, should remove application questions concerning an applicant's disability.\textsuperscript{148} The Commission also suggested specific targeted questions concerning an applicant's behavior, conduct, or current impairment of an ability to practice law.\textsuperscript{149}

The recommendation was tabled until the August annual meeting. Negotiations in the interim resulted in a compromise resolution which makes no reference to the ADA.\textsuperscript{150} At its August meeting, the ABA adopted the following resolution, Proposal 110:

\begin{quote}
BE IT RESOLVED, That the American Bar Association recommends that when making character and fitness determinations for the purpose of bar admission, state and territorial bar examiners, in carrying out their responsibilities to the public to admit only qualified applicants worthy of public trust, should consider the privacy concerns of bar
\end{quote}

\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} REQUEST FOR CHARACTER REPORT, supra note 14, at 10.
\textsuperscript{148} Cisneros, supra note 25, at 408 n.34. The February recommendation read as follows:

\begin{quote}
BE IT RESOLVED, That the American Bar Association recommends that when making character and fitness determinations for the purpose of bar admission, state bar examiners, consistent with the Americans with Disabilities Act, should refrain from inquiring whether a person has a mental disability.

BE IT FURTHER RESOLVED, That fitness determinations may include specific, targeted questions about an applicant's behavior, conduct or any current impairment of the applicant's ability to practice law; inquiries could include such matters as the handling of funds, history of trustworthiness, integrity, record of compliance with deadlines, and other aspects of the individual's background affecting the representation of clients.
\end{quote}

\textit{Id.}
\textsuperscript{149} Id. at 408-09 n.35.
\textsuperscript{150} Id. at 409.
admission applicants, 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.

BE IT FURTHER RESOLVED, That fitness determinations may include specific, targeted questions about an applicant's behavior, conduct or any current impairment of the applicant's ability to practice law.\textsuperscript{151}

Although the resolution was a compromise, the Commission endorsed it because the Commission saw the resolution as a step forward in the process of reforming mental health questions on bar applications. According to the Commission, the resolution accomplishes four main objectives. First, the resolution recognizes that traditional broad mental health and treatment questions are inappropriate and must be changed.\textsuperscript{152} Second, the resolution protects privacy interests by requiring that mental health questions: (a) be narrowly tailored, (b) inquire into current fitness rather than past fitness, and (c) concern an applicant's behavior, conduct, or a current impairment affecting the applicant's ability to practice law.\textsuperscript{153} Third, the resolution indicates that broad mental health and treatment questions are inappropriate on privacy grounds, regardless of the ADA.\textsuperscript{154} Finally, the resolution encourages the ABA to work with bar examiners to revise mental health questions.\textsuperscript{155}

As can be expected, the final resolution is criticized by disability advocates because it does not expressly mention the ADA.\textsuperscript{156} These advocates further complain that the resolution gives no guidance as to the language "narrowly tailored." Nor does the resolution include examples of appropriate questions, as did the initial recommendation.\textsuperscript{157}

Perhaps the ultimate resolution is not perfect. However, it is superior to the February 1994 resolution, which is overly restrictive. The February resolution recommended that all mental health questions be removed.\textsuperscript{158} However, under the ADA, only unnecessary mental health questions and burdens are prohibited.\textsuperscript{159} Questions concerning serious and chronic mental illnesses should be considered necessary for the determination of whether an applicant possesses the mental and emotional stability essential to the practice of law. However, under the February resolution, such questions would not be acceptable.

\textsuperscript{151} Turnbull et al., supra note 13, at 598.
\textsuperscript{152} Id. at 597.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Cisneros, supra note 25, at 409.
\textsuperscript{157} Id.
\textsuperscript{158} See supra note 148.
\textsuperscript{159} See 28 C.F.R. § 35.130(b) (1995).
F. Data from Different Jurisdictions

Every state bar currently requires certification of an applicant's moral character as a prerequisite to bar admission.\(^{160}\) The general purpose of the character requirement is to protect the public from unscrupulous or unethical practices.\(^{161}\) The majority of states include questions concerning an applicant's mental health and/or mental health treatment as a part of the determination of character fitness.\(^{162}\) As of February 1995, Arizona and Massachusetts asked no mental health questions.\(^{163}\) California, Georgia, Iowa, Kansas, Louisiana, Montana, New Hampshire, New York, Ohio, Oklahoma, South Dakota, Vermont, and the District of Columbia asked only about hospitalization or institutionalization for mental impairment or illness.\(^{164}\) Arkansas asked whether an applicant had ever suffered from a mental illness which resulted in hospitalization, institutionalization, or continuous treatment.\(^{165}\) Alabama, Alaska, Connecticut, Delaware, Florida, Idaho, Maryland, Minnesota, New York, Rhode Island, Texas, and Washington limited their inquiries to questions concerning specific diagnoses or asked if applicants had any mental disorder that they believe will affect their ability to practice law.\(^{166}\) Finally, Colorado, Indiana, Kentucky, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma,\(^{167}\) Oregon, South Carolina, Tennessee, West Virginia, Wisconsin, and Wyoming asked broad questions as in \textit{Clark}.\(^{168}\)

\hspace{1in}G. Oklahoma's Current Mental Health Questions

The National Conference of Bar Examiners (NCBE) administers an "Applicant's Request for Character Report."\(^{169}\) This service is available to states for use in their bar applications. States encourage registration with their respective bars during the first year of law school.\(^{170}\) This supposedly benefits the applicant "because a negative report tells the applicant, before investing three years in law school, 'to concentrate his or her efforts elsewhere' or 'proceed at his or her own peril.' Further, it takes pressure off the committee, which can make this decision for a first year student without the guilt of erasing three years of economic and emotional investment in law school."\(^{171}\) The NCBE service, like traditional state bar applica-

\footnotesize
161. \textit{id.}
164. \textit{id.}
165. \textit{id.}
166. \textit{id.} at 439.
167. Oklahoma has since revised its mental health questions. \textit{See infra} notes 172-73 and accompanying text.
170. This encouragement for early registration is evident through the National Conference's fee schedule which requires a higher fee for applicants who are past their first fifteen months of law school. \textit{See Request for Character Report, supra} note 14, at i.
tions, is designed to determine an applicant's character fitness. Not surprisingly, the NCBE, like most states, includes questions concerning mental health in its report. However, each jurisdiction using the service may decide whether or not to use the suggested questions. Also, states may modify the report questions to adjust to their particular needs and desires.

The Oklahoma Board of Bar Examiners (Board) uses the NCBE Character Report service. The most recent mental health question revision took place in June 1995. On the report form, the mental health questions are preceded by a preamble. The preamble assures the applicant that the information acquired by the questions will be treated confidentially by the NCBE. It then states its purpose of determining the applicant's current fitness to practice law. The preamble explains that the mere fact of mental health treatment is not, in itself, a basis on which an applicant is ordinarily denied admission in most jurisdictions, and that "boards of bar examiners routinely certify for admission individuals who have demonstrated personal responsibility and maturity in dealing with mental health . . . issues." Further, "(t)he National Conference encourages applicants who may benefit from

172. REQUEST FOR CHARACTER REPORT, supra note 14, at 10.
174. The preamble reads as follows:
Through this application, the National Conference of Bar Examiners makes inquiry about recent mental health and addiction matters. This information, along with all other information, is treated confidentially by the National Conference and will be disclosed only to the jurisdiction(s) to which a report is submitted. The purpose of such inquiries is to determine the current fitness of an applicant to practice law. The mere fact of treatment for mental health problems or addictions is not, in itself, a basis on which an applicant is ordinarily denied admission in most jurisdictions, and boards of bar examiners routinely certify for admission individuals who have demonstrated responsibility and maturity in dealing with mental health addiction issues. The National Conference encourages applicants who may benefit from treatment to seek it.

Boards do, on occasion, deny certification to applicants whose ability to function is impaired in a manner relevant to the practice of law at the time that the licensing decision is made, or to applicants who demonstrate a lack of candor by their responses. This is consistent with the public purpose that underlies the licensing responsibilities assigned to bar admission agencies; further, the responsibility for demonstrating qualification to practice law is ordinarily assigned to the applicant in most jurisdictions.

The National Conference does not ordinarily seek medical records, although the jurisdiction in which the applicant is seeking admission may do so.

The National Conference does not, by its questions, seek information that is fairly characterized as situational counseling. Examples of situational counseling include stress counseling, domestic counseling, grief counseling, and counseling for eating or sleeping disorders. Generally, the National Conference and the various boards of bar examiners do not view these types of counseling as germane to the issue of whether an applicant is qualified to practice law.

175. Id.
176. Id.
177. Id.
treatment to seek it."\textsuperscript{178} The preamble then warns that "[b]oards do, on occasion, deny certification to applicants whose ability to function is impaired in a manner relevant to the practice of law at the time that the licensing decision is made, or to applicants who demonstrate a lack of candor by their responses."\textsuperscript{179}

The mental health questions read as follows:

21. Within the past five years, have you been diagnosed with or have you been treated for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?

22. A. 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?

B. If your answer to Question 22(A) is affirmative, are the limitations or impairments caused by your mental health condition or substance abuse problem reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?

If your answer to Question 22(A or B) is affirmative, complete FORMS 16 and 17.\ldots As used in Question 22, 'currently' means recently enough so that the condition could reasonably have an impact on your ability to function as a lawyer.

\ldots

23. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or 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; any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority?

If you answered yes, furnish a thorough explanation below. Include pertinent names, addresses, dates, and references to records, as appropriate.\textsuperscript{180}

Form 16 in the Character Report is a medical records release form. Form 17 requires a description of the mental health condition or impairment including names and addresses of any relevant physicians, hospitals, and institutions.

An examination of these new questions will show that they should prove to be effective in screening out applicants who are unfit to practice law. Moreover, if challenged, the questions should be found permissible under ADA regulations because they are necessary to protect the public from the harm. First, question 21

\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 10, 11.
is similar to the question\textsuperscript{181} upheld by the court in Applicants \textit{v. Texas Board of Bar Examiners}.\textsuperscript{182} However, the NCBE question is even more narrowly tailored than the Texas question because it limits the inquiry to whether the applicant has been diagnosed or treated for one of the targeted illnesses to the last five years rather than ten years as in the Texas question.

An examination of one of the targeted illnesses, bipolar disorder (manic depressive illness), proves useful in concluding that boards are necessarily concerned when an applicant has been diagnosed or treated for an illness of this nature within the last five years. Bipolar disorder is "characterized by periods of severe depression and mania [elation/euphoria]."\textsuperscript{183} There are two major subtypes of bipolar illness: bipolar I and bipolar II. Bipolar I is characterized by severe manic episodes.\textsuperscript{184} An attorney in an acute manic episode may experience an inflated self-esteem, possibly creating feelings that he or she can win an impossible case or accomplish things he or she is not generally able to do.\textsuperscript{185} Mania often creates impulsive behavior resulting in excessive involvement in activities that may cause painful consequences for the attorney and his or her clients, such as buying sprees, sexual indiscretions, or foolish business investments. Other symptoms associated with mania include a decreased need for sleep, excessive talking or pressure to keep talking, flight of ideas\textsuperscript{186} or racing thoughts, distractibility, and psychomotor agitation.\textsuperscript{187} Additionally, one suffering from manic psychosis may experience hallucinations or delusions. Persons suffering from acute manic psychotic episodes should be hospitalized to protect both themselves and others. This may be difficult, however, because many who suffer from acute mania deny that they are sick.\textsuperscript{188}

Most who suffer from bipolar I also have depressive episodes.\textsuperscript{189} Some symptoms of the depressive phase include depressed mood, weight gain or loss, insomnia or oversleeping, fatigue, feelings of worthlessness or guilt, and suicidal thoughts.\textsuperscript{190} Individuals suffering from bipolar II experience severe depression and are highly suicidal. Just before or after a depressive episode, those suffering from bipolar II usually have mild periods of mania called "hypomania."\textsuperscript{191}

\begin{footnotes}
\item[181] See supra text accompanying note 101.
\item[183] David L. Dunner \& Andrew H. Benjamin, \textit{Bipolar Mental Disorder (Manic Depressive Illness)}, B. EXAMINER, Nov. 1994, at 25.
\item[184] Id. Generally, mania is characterized by sudden mood changes — from depression to irritability to elation to normal mood — and requires hospitalization. An onset of mania typically begins slowly and progresses during a few weeks into a "more frenzied state." However, mania can sometimes come on suddenly over a few hours or days. \textit{Id.} at 26.
\item[185] \textit{Id.} at 26.
\item[186] "Flight of ideas" refers to a form of speech disorder where the patient jumps rapidly from topic to topic. \textit{Id.} at 26-27.
\item[187] \textit{Id.} at 26. "Psychomotor agitation" is an increase in motor activity. \textit{Id.}
\item[188] \textit{Id.} at 27.
\item[189] \textit{Id.}
\item[190] \textit{Id.}
\item[191] \textit{Id.} at 25. Periods of hypomania rarely require treatment. \textit{Id.}
\end{footnotes}
is similar to mania in terms of symptoms. However, hypomanic episodes are associated with creativity and productivity and can be particularly useful to an attorney suffering from the disorder.\textsuperscript{192} An attorney with bipolar II is likely to experience hypomanic episodes before and during trials. However, they are also likely to experience the extreme depression associated with bipolar II disorder following the trial, as well as after complicated negotiations or concerted periods of tedious work.\textsuperscript{193}

Bipolar disorder often begins at an early age, in the mid-twenties.\textsuperscript{194} Therefore, if one entering the legal profession is going to suffer from the disorder, it is likely that the individual will experience his or her first episode of depression, hypomania, or mania while in college or law school. For the most part, periods of being well last longer than periods of being ill.\textsuperscript{195} Most patients cycle through depression-mania-depression, mania-depression, or depression-mania followed by a normal period that can last from several weeks to several years. The average cycle frequency is four episodes over a ten-year period.\textsuperscript{196}

The reoccurring nature of bipolar disorder, as well as the other illnesses targeted by question 21, was a concern of the Texas Applicants court.\textsuperscript{197} It is well established that mental fitness and emotional stability are essential to the practice of law.\textsuperscript{198} The determination of whether an applicant meets this "essential eligibility requirement" involves the consideration of whether the individual poses a direct threat to others.\textsuperscript{199} Clearly, an attorney with one of the targeted illnesses may be affected by his or her disability in a way which interferes with his or her mental and emotional stability and poses a threat to the public. The fact that a bar applicant who has experienced an episode of a targeted illness in the past, but is currently not experiencing symptoms, obviously does not mean that the applicant will not experience additional episodes in the future. Therefore, because of the chronic nature of the targeted illnesses, a direct connection exists between any treatment for such illnesses, in the past five years, and an applicant's current capacity to practice law. For this reason, questions like Oklahoma's Question 22 are vital to guarding against the consequences of incapacity.

Question 22.A is expressly permitted by the ABA Resolution: "[F]itness determinations may include . . . questions about an applicant's . . . current impairment of the applicant's ability to practice law."\textsuperscript{200} Question 22.A also meshes nicely with the American Psychiatric Association's position recognized in Clark that Boards' concerns should be with applicants' current capacity to function

\textsuperscript{192} Id. at 27.
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 26.
\textsuperscript{195} Id. at 30.
\textsuperscript{196} Id. at 27.
\textsuperscript{198} Florida Bd. of Bar Exam'ts Re: Applicant, 443 So. 2d 71, 75 (Fla. 1984).
\textsuperscript{200} Turnbull et al., supra note 13, at 598.
and/or current impairment. Additionally, the Department of Justice, in its amicus brief in Jacobs, stated that "the board is free, consistent with the ADA, to ask specific, targeted questions designed to determine ... a current impairment ... of ability to practice." This is clearly the goal of question 22.A. Question 22.A is commendable because it is limited to the present time. Further, it does not broadly ask whether any condition exists. Instead, the question is concerned only with whether an applicant's ability to practice law is affected by such a condition.

However, Question 22.A has its faults. Self-disclosure-type questions suffer because some applicants may not recognize or understand the nature and extent of their illnesses nor the need to reveal them. Others may fail to disclose relevant information, not with the intent to deceive, but because of the bad advice of a counselor or other person they trust. Also, there will be those who are simply untruthful in answering the question.

Further, Question 22.A has the potential of creating a chilling effect similar to that allegedly caused by traditional broad questions such as: Have you ever been diagnosed or treated for any mental illness or psychiatric problems? An applicant may believe that if he or she seeks needed treatment or counseling, the applicant will be regarded as having a condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in some way could currently affect, or if untreated could affect in the future, his or her ability to practice law. For fear of being categorized in this manner, an applicant may defer treatment.

Question 22.B, however, may reduce the fear of treatment because it recognizes an applicant's initiative to take control of an impairment or condition that could otherwise affect competency. If an applicant interprets the question this way, it may in fact encourage treatment, which would create a more desirable result. Healthier bar applicants will lead to a healthier bar.

Interestingly, Question 23 is reflective of typical disciplinary rules which provide for the suspension of an attorney for personal incapacity to practice law. For example, Rule 10 of Oklahoma's Rules Governing Disciplinary Procedures, "Suspension for Personal Incapacity to Practice Law," provides for license suspension whenever it has been determined that a lawyer is "personally incapable of practicing law." Under Rule 10, "personally incapable of practicing law" includes "[s]uffering from mental ... illness of such character as to render the person afflicted incapable of managing himself, his affairs or the affairs of others with the integrity and competence requisite for the proper practice of law." Reason to believe that a lawyer may be personally incapable of practicing law,

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205. Id. Rule 10.1(a).
under Rule 10, exists whenever information is received that such lawyer has
interposed successfully a defense of mental incompetence to secure abatement of or
to defeat an adverse determination in a disciplinary proceeding or suit in any
court.206

Question 23 is not discriminatory. Not unlike the treatment of lawyers under Rule
10, to be affected by Question 23, an applicant must have raised the issue of his
substance abuse or mental, emotional, nervous, or behavioral disorder as a defense,
mitigation, or explanation for behavior which resulted in a proceeding, investigation,
or proposed termination in the past five years. Question 23 does not discriminate
against an applicant because of disability status. Instead, the question focuses on the
applicant's behavior. Experts claim that past behavior, as opposed to past mental
health treatment, is the best predictor of future behavior.207 Therefore, it is
reasonable to scrutinize applicants who have already had behavioral problems,
whatever the cause. An applicant puts his fitness in question by using his condition
as an excuse for previous unsatisfactory behavior.

Further, the testimony of the plaintiff's expert witness in Clark suggests that she
would even find Question 23 is justified. According to the expert, mental health
inquiries may be appropriate in a second phase of application proceedings when the
results of behavioral inquiries suggest some mental disorder.208 Although Question
23 addresses mental health in the initial application phase, the effect is similar to
the expert's approved procedure because of the question's behavioral focus.

As mentioned previously, some mental health question opponents argue that
behavioral questions should completely replace mental health questions.209 They
suggest that if a disability is of the nature that would hinder an applicant's ability
to practice law, it would also reveal itself in the applicant's behavior.210 By
focusing questions on specific behaviors that could affect an applicant's capacity to
practice law, supposedly emphasis is placed on one's ability to practice law, not on
his disability status nor on any history or treatment of a disability. Some suggested
behavior questions include:

1. Have you ever been expelled, suspended from, or had disciplinary
action taken against you by any educational institution? If so, explain
the circumstances.
2. Has your grade point average ever varied by half a letter grade or
more between two terms? If so, explain the circumstances.
3. Have you ever been absent from school or a job for more than 30
consecutive days? If so, explain the circumstances.

206. Id. Rule 10.3(b).
208. Id. at 436.
209. See Applicants v. Texas State Bd. of Law Exam'rs, No. A 93 CA 740 SS, 1994 WL 776693,
at *8 (W.D. Tex. Oct. 11, 1994) (commenting unfavorably on the plaintiff's argument that behavioral
questions are sufficient for detecting an impairment in an applicant's ability to practice the law); Coleman
& Shellow, supra note 119, at 148-49.
4. Have you ever been fired from, asked to leave, or had disciplinary action taken against you in any job? If so, explain the circumstances.
5. Have you ever been evicted or asked to vacate a place in which you lived? If so, explain the circumstances.211

It is clear that answers to these questions may serve as a trigger to indicate a mental illness which could affect an applicant's ability to practice law. However, limiting the scope of questions to behavior occurring in other facets of an applicant's life may result in an inexact and unreliable evaluation of fitness.212 Further, these questions may also be considered overbroad and intrusive. Affirmative answers to these questions may be personal and have nothing to do with any mental illness or an applicant's ability to practice law. Simple direct questions concerning severe mental illnesses, as well as questions regarding any current impairment to an applicant's ability to practice law, are a better solution.

Disability advocates also suggest that character references, recommendation letters, and performance records from law schools and/or previous employment may serve to reveal behavior that would indicate a mental or emotional condition that could impair an applicant's ability to practice law.213 If negative comments were returned in areas concerning an applicant's diligence, responsibility, or honesty, it may be an indication that the applicant lacks the character necessary to be a lawyer. However, these sources of information alone would be inadequate for purposes of determining mental and emotional stability. This is because a recommender almost certainly could not be aware of all aspects of an applicant's life. Also, those giving character references might be wary of liability. Therefore, private or controversial information might not be exposed.

In the end, it becomes clear that there are probably no perfect mental health questions. However, a perfect system would not exist without them. Narrowly tailored questions concerning an applicant's current capacity to practice law are the best means of protecting the public from incapacity, without subjecting qualified individuals with disabilities to discrimination. Hopefully, their use will maintain a healthy bar with as few disciplinary proceedings related to mental or emotional instability as possible.

III. Attorney Discipline Where Mental Health Is a Issue

To protect the public, states "have broad power to establish standards for licensing practitioners and regulating the practice of professions."214 One means of regulating the legal profession is through disciplinary proceedings, special proceedings which

211. Id. at 177.
213. Cisneros, supra note 25, at 431, 432.
inquire into the fitness, in light of conduct or condition, of members of the bar. Such a proceeding is neither civil nor criminal.

Membership to the bar is a privilege that can be revoked by suspension or disbarment when a member exhibits conduct rendering him or her unfit to practice or exercise the duties and responsibilities of an attorney. The purpose of a disciplinary proceeding is not to punish an attorney. Instead, similar to the purpose of bar application inquiries, disciplinary proceedings are conducted to inquire into an attorney's fitness to practice law. The objective is to protect the public, the courts, and the legal profession. To warrant discipline, it is not required that an attorney's misconduct renders him or her criminally or civilly liable. It is only necessary that the misconduct shows that the attorney is unfit to carry out his or her duties, or is unworthy of confidence. This holds true, even when the misconduct may be outside the attorney's professional dealings. The nature of an attorney's misconduct, in addition to any personal incapacity that may have affected the attorney's fitness to practice law, is important to the determination of a solution that works toward the purpose of protecting the public from unfit lawyers.

Prior to the enactment of the ADA, courts traditionally held that mental illness did not prevent attorney discipline. Because of the importance of maintaining the integrity of the bar, courts held that discipline was necessary regardless of the attorney's reason for unfitness. Since the enactment of the ADA, some attorneys with disabilities have argued that the ADA precludes the discipline of disabled attorneys.

The first attorney discipline case to discuss the applicability of the ADA was In re Wolfgram. In that case, an attorney who suffered from severe depression had been forced into inactive enrollment because he was unable to practice law without substantial threat of harm to his clients. The attorney argued to the California Bar Court that the ADA prohibited such disciplinary action.

215. Robert A. Brazener, Annotation, Validity and Application of Regulation Requiring Suspension or Disbarment of Attorney Because of Mental or Emotional Illness. 50 A.L.R.3d 1259, 1261 (1972).
216. Id. at 1260.
218. Brazener, supra note 215, at 1261.
220. Colston, 777 P.2d at 925.
221. Brazener, supra note 215, at 1261.
222. Id.
223. Donnelly, 848 P.2d at 546.
225. Id. at 1274. However, mental or emotional disabilities are often a basis for mitigation. Id.
228. Id. at *5.
Recognizing that the ADA does apply to the bar, the court noted that under the ADA, "no qualified individual with a disability shall by reason of such disability, be excluded from participation . . . or be subject to discrimination." Further, a "qualified individual" is one who, "with or without reasonable modifications . . . meets the essential eligibility requirements . . . ." The court then relied on the reasoning of several federal employment discharge cases. These cases held that individuals with "disabilities which prevented an otherwise qualified employee from meeting the essential requirements of the job were not entitled protection under the ADA.

The Wolfgram court reasoned that the attorney had not been disciplined because he had a mental illness. Rather, the discipline decision was based on the fact that the attorney was unable to practice law without substantial threat of harm to his clients or the public. Therefore, because the attorney did not meet the essential requirements of the practice of law, the court held that the ADA did not prohibit the attorney's involuntary inactive enrollment.

Similarly, in Florida v. Clement, the Florida Supreme Court held that ADA did not prevent it from disbarring a disabled attorney. The attorney who suffered from bipolar disorder had been accused of misuse and misappropriation of client funds. The court held that the attorney's disbarment was not precluded by the ADA because (1) his conduct was not causally related to his disability and (2) even if it were, the attorney would not be protected by the ADA because he was not a "qualified" individual with a disability, as required for protection under Title II of the ADA. The attorney was not "qualified" to practice law because he committed serious misconduct.

The most recent case on point was decided by the Supreme Court of Oklahoma. In State ex rel. Oklahoma Bar Ass'n v. Busch, an attorney suffering from attention deficit disorder argued that the imposition of discipline upon him ignored the mandates of the ADA. The attorney asserted "that as an individual with a disability recognized under the ADA, he is entitled to a 'reasonable accommodation' for

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229. Id. at *6; see 42 U.S.C. § 12132 (1994).
234. Id.
235. Id.
236. 662 So. 2d 690 (Fla. 1995).
237. Id. at 700.
239. 919 P.2d 1114 (Okla. 1996).
240. Id. at 1115.
his disability, and that the trial panel's imposition of punishment is not a 'reasonable accommodation.'

The court recognized that under Title II of the ADA, the protected class is limited to "qualified" individuals with disabilities, not all individuals with disabilities. Therefore, the court reasoned, "the ADA expressly recognizes that, in some cases, an individual may be disqualified by reason of his disability." The court pointed out that the correct inquiry was whether an individual satisfies the essential requirements of the practice of law "despite his or her disability."

The attorney in Busch did not meet the essential requirements because he committed serious misconduct (neglect of client matters and intentional misrepresentation as to the status of his client's case). He failed to maintain the integrity necessary to practice law. Whether his misconduct was a product of his disability or not was irrelevant to the question of his fitness. When an attorney's mental illness causes misconduct, that illness is an impairment to the individual's present ability to perform the essential functions of an attorney. Such an attorney, therefore, is not protected under the ADA because he or she is not a "qualified individual."

In concluding that discipline was appropriate, the Busch court stated: "We would be shirking our duty as the guardians of the state's bar were we to permit [the attorney] to avoid discipline. Such would surely erode public confidence in the bar."

In each of these attorney discipline cases, it is clear that there was no discrimination. Each attorney was disciplined because of his misconduct and/or his threat to his clients or the public. The misconduct, whatever the cause, prevented each of the attorneys from meeting the essential requirements to practice law. This in turn prevented them from being qualified individuals. Only qualified individuals are protected under the ADA. Therefore, it is unlikely that there will be many further ADA challenges to the imposition of attorney discipline.

It is notable that there have been no ADA challenges to the disciplinary rules themselves. A quick examination of rules concerning an attorney's mental health

241. Id. at 1117.
242. Id. at 1119.
243. Id.
244. Id.
245. The court did, however, consider the attorney's disability and the fact that he was then being treated as mitigating factors. Id. at 1120.
246. Id.
247. However, prior to the enactment of the ADA, the validity of rules requiring the suspension or disbarment of an attorney because of mental or emotional illness has been challenged on other grounds. For example in the case of In re Chipley, 176 S.E.2d 412 (S.C. 1970), cert. denied, 91 S. Ct. 146 (1970), reh'g denied, 91 S. Ct. 454 (1971), cert. denied, 91 S. Ct. 1261 (1971), reh'g denied, 91 S. Ct. 2178 (1971), the constitutionality of a disciplinary rule was challenged on the grounds that it was so vague and uncertain as to amount to an infringement upon due process. Under the challenged rule, an attorney could be suspended because of "emotional or mental stability so uncertain as, in the judgment of ordinary men, would render a person incapable of exercising judgment and discretion as necessary for the protection of the rights of others . . . ." Id. at 412. The court held that use of the language "in the judgment of ordinary men" as a criterion for determining mental competency to practice law sufficiently
explains why. Rule 10 of Oklahoma's Rules Governing Disciplinary Procedures, "Suspension for Personal Incapacity to Practice Law," is typical of such rules.\textsuperscript{248} Rule 10 provides for the suspension of an attorney "[w]henever it has been determined that a lawyer is personally incapable of practicing law."\textsuperscript{249} According to the rule, "personally incapable of practicing law" includes "[s]uffering from mental ... illness of such a character as to render the person afflicted incapable of managing himself, his affairs or the affairs of others with the integrity and competence requisite for the proper practice of law."\textsuperscript{250} In addition to other circumstances, reason to believe that an attorney may be personally incapable of practicing law exists whenever information is received that such attorney has successfully interposed a defense of mental incompetence to secure abatement of, or to defeat an adverse determination in, a disciplinary proceeding or suit in any court in any jurisdiction.\textsuperscript{251}

If such a rule was ever challenged on grounds that it violates the ADA, it would surely be upheld. A rule is not discriminatory just because it recognizes that mental illness may cause incapacity. Further, mental illness is only an issue when it has caused the attorney to be incapable of practicing law. Under Rule 10, an attorney can not be suspended just because he or she has a mental disability. Suspension is only appropriate when an attorney fails to be capable of practicing law, whether or not his or her incapacity is a product of mental illness. If an attorney's mental illness has caused a lack of capacity, such illness prevents the attorney from being a "qualified individual" as required for protection under the ADA.\textsuperscript{252} For this reason, rules similar to Oklahoma's Rule 10 are likely to continue to go unchallenged.

\textit{IV. Conclusion}

Because mental and emotional stability are essential to the practice of law, states' concerns regarding mental health are justified. However, since the passage of the ADA, methods of regulating the legal profession, where mental health is an issue, have been questioned. The ADA has not caused problems in the area of attorney discipline. Courts have consistently held that the imposition of discipline on attorneys with mental illnesses does not violate the ADA. Attorneys are disciplined because of misconduct and/or incapacity to practice law, not because of mental health status. The disciplinary rules concerning mental health have, themselves, gone unchallenged. However, traditional means of bar admissions have not fared so well.

Traditional broad mental health questions have typically asked whether an applicant has ever been diagnosed or treated for any mental illness. Because experts have confirmed that past treatment is not an indicator of future behavior, broad mental health treatment questions are unnecessary. However, the ADA should not

\begin{footnotesize}


\textsuperscript{249} Id. Rule 10.2.

\textsuperscript{250} Id. Rule 10.1(a).

\textsuperscript{251} Id. Rule 10.3(b).


\end{footnotesize}
prevent narrowly tailored questions concerning an applicant's current ability to practice law.

Such questions are necessary to protect potential clients from incapable attorneys. Medical data provides that certain serious mental illnesses can reoccur over periods extending up to ten years. This information shows that treatment information concerning these chronic illnesses may very well serve to alert bar examiners of current and potential incapacity. Moreover, questions concerning any current impairment which may affect an applicant's ability to practice law are appropriate under the ADA. The ADA protects "qualified individuals" with disabilities, requiring that bar applicants meet the essential requirements of the practice of law despite any disability. If an applicant has a current impairment which may affect his or her ability to practice law, he or she does not meet these essential requirements. Such an applicant is not included in the class protected by the ADA.

Questions which deal with current impairments, such as those employed by the Oklahoma Board of Bar Examiners, do not violate the ADA. These questions do not single out applicants based on stereotype but rather based on an applicant's genuine risk to the public. Clients have no way of knowing whether their attorneys are incapable until the damage is done. The public depends on bar examiners for their protection. Does the public not have a right to be protected when the cost is merely a few narrowly tailored relevant questions on a bar application?

The alternative behavioral questions often suggested actually seem even more intrusive than the suggested mental health questions. The behavioral questions are likely to pry into a greater number of applicants' private lives than questions directly addressing current impairments. It is also notable that concerns regarding possible deterrent effects of mental health questions have been acknowledged by the ABA resolution, which charges bar examiners to take steps not to discourage those who would benefit from seeking treatment from doing so.

Bar examiners should continue to include mental health questions in their bar applications, however, only to the extent that the questions are necessary. The best means of protecting the public from potential harm related to mental illness is to inquire about serious and chronic mental illnesses, as well as current impairments which could affect an applicant's ability to practice law. Hopefully, this practice will alert bar examiners of current and potential incapacity before unsuspecting clients are represented by unqualified attorneys.

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