

9-1-2003

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IMPROVING THE FITNESS INQUIRY OF THE NORTH CAROLINA BAR APPLICATION

ANN HUBBARD*

The North Carolina Bar has been in the forefront of nationwide efforts to reduce lawyer impairment by educating lawyers to recognize and respond to the symptoms of mental disorders and by providing confidential support and assistance for lawyers coping with those disorders. The Bar's approach rests on two sound principles. First, the proper concern is professional impairment, not diagnosis of or treatment for mental disorders. Second, the key to avoiding professional impairment is early treatment, and the key to encouraging early treatment is confidentiality. These widely accepted principles hold equally true for bar applicants as for bar members, but in North Carolina, they are not equally applied. To this day, an applicant to the North Carolina Bar must disclose intensely personal details about her lifetime history of counseling or other mental health treatment, including treatment or episodes that are long passed or that reflect only how she feels, not how she currently functions, much less how she would function as a lawyer.

This far-reaching mental health inquiry is counterproductive. It is also illegal. The Americans with Disabilities Act of 1990 prohibits professional licensing boards from asking about an applicant's mental health conditions or treatment unless the questions are necessary to determine the applicant's current professional impairment. Past diagnoses and treatment do not reflect current impairment, and even current diagnoses and treatment may reflect personal striving or distress, not professional impairment, or any impairment at all. Accordingly, federal courts uniformly have

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condemned bar application questions like North Carolina's, and many state bars and licensing boards have revised their bar applications to narrow or even eliminate mental health inquiries. This circumscribed approach has been advanced by the American Bar Association, the National Conference of Bar Examiners, the Association of American Law Schools and the American Psychiatric Association. A decade after the passage of the ADA, North Carolina is one of a dwindling number of states still clinging to the discredited far-reaching questions. As members of the North Carolina Bar, we should actively support revising the bar application to conform to the law and to reflect the Bar's commitment to reducing lawyer impairment by removing any stigma or penalty from an applicant's responsible decision to seek the help necessary to maintain sound mental health and competent professional functioning.

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INTRODUCTION

A lawyer in North Carolina who is struggling with substance abuse, depression, or the familiar stress of balancing personal needs and professional demands enjoys a guarantee of confidential support and counseling. The North Carolina Bar ("Bar"), through its Lawyer Assistance Program, promises peer support, counseling, and other services to help her maintain or regain her functioning without jeopardizing her clients or her practice.¹ Critical to this effort is the promise of confidentiality: nothing revealed to the Lawyer Assistance Program is disclosed to bar disciplinary officials.² A lawyer thus has every incentive—and no penalty—for seeking early treatment for actual or imminent impairment.

A law student in North Carolina who is struggling with substance abuse, depression, or the stress of balancing personal needs and academic demands is not so fortunate. The Bar, through the Board of Law Examiners of North Carolina ("Board"), will require that she disclose any counseling or other treatment in her application to the Bar. Indeed, the current bar application questions require the law student to give a full accounting of every time she has sought mental health treatment at any point in her life, whether for depression, stress, the trauma of sexual abuse, or the loss of a relationship.³ She thus faces a difficult choice. If she seeks treatment, she will have to make personal and often painful disclosures to bar authorities. If she forgoes treatment, she finds no relief from her current distress and her condition may worsen. Or she may pursue a risky third option: seek the treatment, but decline to disclose it, even though this lack of candor raises questions about whether she has the "good moral character" required for bar admission.⁴

1. North Carolina Lawyer Assistance Program, *What We Do*, at <http://www.nclap.org/whatwedo.asp> (last visited June 10, 2003) (on file with the North Carolina Law Review).

2. See N.C. ADMIN. CODE tit. 27, r. 1D.0613 (June 2002).

3. The questions ask, among other things: "Have you ever been impaired . . . or have you ever been told that you were impaired as a result of any medical, surgical, or psychiatric condition? . . . Have you ever been involuntarily committed to any . . . outpatient mental health . . . facility for treatment or evaluation? . . . Have you ever been admitted at the request of any person other than yourself, to any . . . outpatient mental health . . . facility for treatment or evaluation?" BD. OF LAW EXAM'RS OF THE STATE OF N.C., APPLICATION FOR ADMISSION TO THE NORTH CAROLINA BAR EXAMINATION 20-22 (April 2003) [hereinafter N.C. BAR APPLICATION] (General Application), <http://www.ncble.org> (last visited May 10, 2003) (on file with North Carolina Law Review).

4. See BD. OF LAW EXAM'RS OF THE STATE OF N.C., RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA., Rule

This double standard regarding mental health treatment for bar members and bar applicants is misguided and counterproductive.⁵ For bar members, the promise of confidentiality promotes mental health maintenance by encouraging early treatment, which reduces lawyer impairment and thereby protects the public.⁶ For bar applicants, the requirement of disclosure discourages the same treatment, thereby increasing their risk of immediate or even long-term impairment. Indeed, by equating mental health treatment with a lack of “character and fitness,” mental health questions only reinforce the biggest obstacle to obtaining needed treatment: the stigma.⁷

Invasive mental health questions also run afoul of the Americans with Disabilities Act of 1990⁸ (“ADA”), which prohibits professional licensing agencies from making unwarranted inquiries into actual or perceived disabilities.⁹ Under the ADA, a licensing board that wishes

.0501(1) [hereinafter N.C. RULES GOVERNING ADMISSION], <http://www.ncble.org/RULES.htm#REQUIREMENTS> (last visited July 13, 2003) (on file with the North Carolina Law Review); Stanley S. Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635, 658 (1997) (describing bar applicants’ “tormenting” choices: “divulge information that might be protected from disclosure under the ADA, unilaterally interpret ambiguous terms to shield themselves from disclosing disability conditions and treatment or give evasive, if not untruthful answers”).

5. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 583 (1985). Professor Rhode aptly denounces this double standard:

[Forcing individuals] to choose between developing adequate therapeutic relationships and minimizing certification difficulties is not readily justified given the limited value of the information likely to be provided. That licensed attorneys undergoing treatment are not forced to make comparable tradeoffs, despite the temporally more relevant nature of any disclosures, again underscores the perversity of current procedures.

Id.

6. See tit. 27, r. 1D.0601. The North Carolina Administrative Code states that: [t]he purpose of the lawyer assistance is to (1) protect the public by assisting lawyers and judges who are professionally impaired by reason of substance abuse, addiction, or debilitating mental condition; (2) assist impaired lawyers and judges in recovery; and (3) educate lawyers and judges concerning the causes of and remedies for such impairment.

Id.

7. See SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. AND NAT’L INST. OF HEALTH, U.S. DEP’T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 3, 8 (1999) [hereinafter SURGEON GENERAL’S REPORT] (declaring stigma to be the “most formidable obstacle” to progress on mental illness and one of the barriers to seeking treatment), <http://www.surgeongeneral.gov/library/mentalhealth/home.html> (last visited July 2, 2003) (on file with the North Carolina Law Review).

8. 42 U.S.C. § 12101 (2000).

9. See discussion *infra* Part I.D.

to ask questions related to mental disorders or psychological treatment must demonstrate that those questions are both effective at identifying unfit applicants and necessary to the board's objective of protecting the public from unfit practitioners.¹⁰ Significantly, the board must show that the questions are relevant to the applicant's *current* fitness to practice law.¹¹ Questions about illness or treatment remote in time or about recent conditions that might warrant treatment, but do not impair the applicant's ability to practice law, are not permissible.¹² The ADA has prompted many states to narrow, or even eliminate, mental health questions on their bar applications.¹³

The last decade has produced a growing legal and professional consensus supporting the elimination of far-reaching mental health inquiries on bar applications. Federal courts have uniformly condemned questions about a bar applicant's lifetime history of mental illness or treatment—the “have you ever” questions—as unnecessarily broad, ineffective at identifying problem attorneys, and not helpful, much less necessary, to protect the public or reduce lawyer impairment.¹⁴ They have also invalidated, on similar grounds, questions about recent or even current conditions or treatment that have no relevance to an applicant's present fitness to practice law.¹⁵ In 1994, the American Bar Association called on bar examiners to renounce broad questions about treatment in favor of narrowly tailored questions focusing on an applicant's behavior, conduct, or current impairment.¹⁶ The following year, the National Conference of

10. See *infra* notes 71–73 and accompanying text.

11. H. Rutherford Turnbull III et. al., *American Bar Association Bar Admissions Resolution: Narrow Limits for Questions Related to the Mental Health and Treatment of Bar Applicants*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 597, 597 (1994) [hereinafter *ABA Resolution*]; AM. PSYCHIATRIC ASS'N, RESOURCE DOCUMENT: GUIDELINES CONCERNING DISCLOSURE AND CONFIDENTIALITY 1 (1997) [hereinafter *APA GUIDELINES*], <http://www.psych.org/archives/970015.pdf> (last visited May 10, 2003) (on file with the North Carolina Law Review).

12. See *infra* notes 88–113 and accompanying text.

13. See *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 440 (E.D. Va. 1995) (observing that at least eight states had revised their mental health questions in the face of actual or potential litigation under the ADA); *id.* at 438 & n.15 (listing former mental health questions from five states that no longer asked such questions).

14. See discussion *infra* Part I.D.

15. See, e.g., *Doe v. Judicial Nominating Comm'n for the Fifteenth Judicial Circuit of Fla.*, 906 F. Supp. 1534, 1544–45 (S.D. Fla. 1995) (prohibiting the use of questions that could require the disclosure of family counseling or treatment in response to personal traumas such as sexual abuse or loss of a loved one).

16. *ABA Resolution*, *supra* note 11, at 598 (denouncing the use of questions that “yield information of questionable value at the expense of discouraging prospective applicants from seeking needed help”).

Bar Examiners ("NCBE") revised its own application form, which serves as a model for many state bars, by replacing "have you ever" questions with more narrowly tailored inquiries.¹⁷

Despite this consensus among the federal judiciary and national bar officials and bar examiners, the North Carolina bar application still asks mental health questions that are staggering in their scope. These include "have you ever" questions about outpatient treatment or evaluation, actual or alleged impairment, and psychiatric diagnoses.¹⁸ The applicant who answers "yes" to one of these triggering questions also must authorize the release of any and all records related to his evaluation, diagnoses, or treatment.¹⁹

This Article argues that the Board and the Bar should make it a priority to reexamine both the legality and the wisdom of asking intrusive mental health questions. The legal argument is straightforward: under the ADA, the Board may ask only those health- or disability-related questions that are demonstrably *necessary* to protect the public from applicants who are "unfit" to practice law. There is, however, no evidence that information about past mental health diagnoses or treatment is necessary *or even useful* to identify unfit applicants.²⁰

By far the best predictor of how an applicant will function as a lawyer is how she has functioned to date—that is, her *conduct*.²¹ Fittingly, the North Carolina bar application asks exhaustive questions about every facet of an applicant's conduct in school, at work, and in the community.²² Experience shows that some aspect of that conduct (arrests, unpaid debts, academic discipline and the like) will almost always alert bar examiners to any impairment that compromises an applicant's ability to practice law.²³ This casts serious doubt on the need to ask *status* questions, including status as a person with a diagnosed mental disorder and status as a past or present

17. See NAT'L CONFERENCE OF BAR EXAM'RS, REQUEST FOR PREPARATION OF A CHARACTER REPORT 12 (2002) [hereinafter NCBE CHARACTER REPORT], <http://www.ncbex.org/character/Standard01.htm> (last visited Aug. 31, 2003) (on file with the North Carolina Law Review).

18. See *supra* note 3 and accompanying text.

19. N.C. BAR APPLICATION, *supra* note 3, at 1 (Authorization and Release).

20. See APA GUIDELINES, *supra* note 11, at 1 ("Prior psychiatric treatment is, per se, not relevant to the question of current impairment.").

21. 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 Constitution*, 20 J. LEGIS. 147, 149, 152–55 (1994).

22. See N.C. BAR APPLICATION, *supra* note 3, at 7–19 (General Application).

23. Charles L. Reischel, *The Constitution, the Disability Act, and Questions About Alcoholism, Addiction, and Mental Health*, 61 B. EXAMINER 10, 20–21 (Aug. 1992).

consumer of mental health services. If such status questions provide only scant (if any) marginal benefit, they are neither effective nor necessary for identifying unfit practitioners and therefore violate the ADA.²⁴

The factors that make these questions illegal under the ADA also make them unwise and ineffective as a long-term strategy for reducing lawyer impairment. Requiring the disclosure of mental health treatment, which concerns private and often painful matters, penalizes and stigmatizes applicants with the wisdom and maturity to seek needed treatment. This penalty deters other prospective applicants from acknowledging and responding to signs of mental or emotional distress by seeking appropriate care. At worst, law students and other applicants who fail to seek treatment may suffer serious setbacks in their health, well-being, and personal and professional satisfaction. At best, they miss an important opportunity to obtain treatment and develop skills that will help them cope with the stresses and challenges of law practice. As a result, mental health status questions that discourage or stigmatize mental health treatment lead to greater lawyer impairment, not less. Moreover, the bar application process should reflect and reinforce some of the shared values and expectations of the profession, including respect for the law, the principle of nondiscrimination, and the importance of personal and professional responsibility to address impairments that could injure clients' interests.²⁵ Asking questions that clearly violate the ADA and stigmatize mental health treatment undermines the Bar's moral authority and fuels the very prejudices the ADA is intended to dispel.²⁶

This Article urges the prompt review and revision of the mental health questions on the North Carolina bar application and offers proposals for that reform. Part I provides the necessary background for assessing the validity of mental health inquiries under the ADA. After a brief overview of concerns about mental disorders in the legal profession and the role of character and fitness reviews, it presents the basic requirements of Title II of the ADA with respect to mental

24. See discussion *infra* Part II.A.

25. See Rhode, *supra* note 5, at 509.

26. See Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 96 (2001) ("If discriminatory attitudes infect the process established by bench and bar to determine who may serve as a lawyer, there is reason to doubt the legal system's fitness to carry out the ADA's mandate, and the character of its commitment to the nondiscrimination ideal.").

fitness inquiries by licensing boards. Part II then traces a decade of judicial and professional pronouncements on the legality and effectiveness of mental health inquiries on bar applications. This account reveals the emergence of a consensus on two points. First, far-reaching questions about an applicant's mental health or treatment history are prohibited by the ADA. Second, they are unsound as a means to reduce lawyer impairment and protect the public.

Part III sets forth options for reform in North Carolina, examining the process for reform, the overarching principles that should guide reform, and specific proposals that reformers might choose to consider. Section A, drawing from reform efforts in other states, calls for a reform process committed to open-minded collaboration to achieve consensus among members of the Board, the bar, and the bench. The proper aim of this cooperative effort should be to tailor a fitness screening process that best serves North Carolina's objective of reducing lawyer impairment, not merely to fashion a process that passes muster under the ADA.

Section B of Part III identifies three cardinal principles that should steer reform. First, reformers must never lose sight of the necessity requirement, which prohibits mental health status questions unless bar examiners can show that they are necessary to detect unfit applicants whom conduct-based questions fail to detect. Second, the fitness screening should be tailored to serve two complementary objectives: the immediate objective of ensuring that new members of the bar are mentally and emotionally fit to practice law and the long-term goal of developing a screening process that reflects the bar's commitment to reducing lawyer impairment by educating lawyers about impairment and recovery and encouraging them to seek early treatment for mental or emotional problems. Third, any fitness inquiry should be incremental and carefully structured to seek only that information that is needed, only from whom it is needed, and only when it is needed—that is, an incremental, focused, and sequenced inquiry.

Following this discussion of the process and general principles that should inform any effort to revise the fitness inquiry, Section C of Part III turns to specific proposals for revising or eliminating the Bar's current mental health questions. These range from the minimalist—tucking and trimming to conform to the ADA—to the ambitious—asking no mental health questions unless and until the applicant's conduct raises fitness concerns. The Article concludes that the most principled approach is also the most promising one: to

focus on the applicant's past conduct as the principal—if not sole—indicator of her future conduct as a lawyer.

I. BACKGROUND AND OVERVIEW

A. *Mental Disorders and the Practice of Law*

Mental disorders are prevalent in America and in the legal profession. Nearly half of all Americans will experience some diagnosable mental disorder at some point in their lives.²⁷ For one in five Americans, that disorder will be depression.²⁸ For lawyers, that number is considerably higher.²⁹ One study showed that lawyers were 3.6 times more likely than other full-time professionals to experience depression.³⁰ Because depression and other mental disorders may arise—or recur—at any point in a lawyer's career, even the most capable and experienced attorney may face impairment. Untreated or uncontrolled, mental disorders can wreak havoc on a lawyer's life and jeopardize his clients' interests.³¹

27. Ronald C. Kessler et al., *Lifetime and 12-Month Prevalence of DSM-III-R Psychiatric Disorders in the United States*, 51 ARCHIVES GEN. PSYCHIATRY 8, 11 (1994).

28. *Id.* at 10.

29. See G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 240–41 (1990) (finding that lawyers in the State of Washington experienced symptoms of depression or substance abuse at a rate double the national average for the general population).

30. William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1083 (1990).

31. A lawyer with untreated depression, for example, may become unable to concentrate, think clearly, make sound decisions, meet deadlines, or communicate with others, including clients, opposing counsel and court officials. See *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 436 (E.D. Va. 1995) (noting “cases of acute mental disability among lawyers [that] resulted in license suspensions” demonstrated that “untreated mental or emotional illness may result in injury to clients”); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 320–45 (4th ed. 1994) [hereinafter DSM-IV] (describing symptoms and forms of mood disorders such as depression). For rich, first-person accounts of how debilitating depression can be, see generally ANDREW SOLOMON, NOONDAY DEMON: AN ATLAS OF DEPRESSION (2001) (chronicling the author's recurrent depression); WILLIAM STYRON, DARKNESS VISIBLE: A MEMOIR OF MADNESS (1990) (describing author's debilitation and recovery from depression); UNHOLY GHOST: WRITERS ON DEPRESSION (Nell Casey ed., 2001) (collecting essays on depression). Moreover, depression may lead to or coincide with alcohol abuse. See SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T HEALTH & HUMAN SERVS., REPORT TO CONGRESS ON THE PREVENTION AND TREATMENT OF CO-OCCURRING SUBSTANCE ABUSE DISORDERS AND MENTAL DISORDERS, EXECUTIVE SUMMARY 1 (2002) (citing government statistics showing that seven to ten million Americans have co-occurring substance abuse and mental disorders and that roughly half of all persons with a lifetime history of a mental disorder also have a

Mental disorders, however, are more treatable than ever. Recent advances in psychiatry, neurology, and pharmacology have produced medications that relieve more of the symptoms of conditions like anxiety disorders, depression, and bipolar disorder, with fewer side effects, thereby allowing more people with these conditions to function well in their professional and personal lives.³² Knowledge about the etiology and prevalence of mental disorders has contributed to a growing recognition that mental illness is a public health problem,³³ not a personal failing or, worse, a character flaw.

Despite this increased knowledge, the stigma of mental disorders persists. In one study, respondents described a typical man with mental illness as “dangerous, dirty, unpredictable, and worthless.”³⁴ Stigma presents a “formidable obstacle” to progress in the treatment of mental illness.³⁵ Nearly two-thirds of all Americans with a diagnosable mental disorder do not seek treatment.³⁶ One challenge for state bars and their licensing organizations is to identify those few bar applicants whose mental disorders will impair their ability to function competently as lawyers, without stigmatizing the far greater number of applicants who have past or present mental disorders that do not impair their fitness to practice law.

B. Defining and Measuring Fitness to Practice Law

The North Carolina legislature created the Board “[f]or the purpose of examining applicants and providing rules and regulations for admission to the Bar”³⁷ The Board is authorized to conduct investigations as it deems necessary “to satisfy it that the applicants for admission to the Bar possess the qualifications of character and

lifetime history of a substance abuse disorder), <http://samhsa.gov/reports/congress/2002/execsummary.htm> (last visited May 13, 2003) (on file with the North Carolina Law Review); Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Programs and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1–3 (1995–96) (citing symptoms of distress that make a lawyer vulnerable to alcohol abuse).

32. SURGEON GENERAL’S REPORT, *supra* note 7, at 9, 13–14 (discussing advances in medical understanding of mental disorders and increased effectiveness in their treatment); *id.* at 64–65 (discussing “armamentarium of efficacious treatments” that are particularly effective in combination).

33. *See id.* at 1.

34. Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 AM. J. PUB. HEALTH 1328, 1328 (1999) (observing that “[r]ather than waning . . . stereotypes of dangerousness are actually on the increase” and that “the stigma of mental illness remains a powerfully detrimental feature of the lives of people with such conditions” (citations omitted)).

35. SURGEON GENERAL’S REPORT, *supra* note 7, at 3.

36. *Id.* at 8.

37. N.C. GEN. STAT. § 84-24 (2001).

general fitness requisite for an attorney and counselor at law”³⁸ Pursuant to this authority, the Board requires that an applicant “possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law and be of good moral character and entitled to the high regard and confidence of the public”³⁹ Thus, the Board conducts character and fitness reviews to protect the public from unscrupulous, unprofessional, or unfit lawyers.

Each state bar defines for itself the knowledge, skills, character traits, and personal qualities that make a competent lawyer. “Good moral character” and “fitness” are common requisites.⁴⁰ “Good moral character” encompasses personal qualities such as honesty, reliability, fairness, and respect for the rights of others.⁴¹ “Fitness,” properly understood, refers to the absence of any physical or mental condition, disease, or disorder that impairs a lawyer’s ability to practice law competently and to protect her clients’ interests.⁴²

Unfortunately, bar examiners often fail to appreciate the fundamental differences between a person’s “character” (her moral or ethical fiber) and her “fitness” (the condition of her health) as they conduct investigations commonly known as “character and fitness” reviews.⁴³ The bar applications themselves often conflate the two criteria through the definitions or juxtapositions of character and

38. *Id.*

39. N.C. RULES GOVERNING ADMISSION, *supra* note 4, Rule .0501(1).

40. NAT’L CONFERENCE OF BAR EXAM’RS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2003, at 6 [hereinafter GUIDE TO BAR ADMISSION REQUIREMENTS] (charting state-by-state features of character and fitness determinations), <http://www.ncbex.org/pubs/pdf/2003CompGuide.pdf> (last visited Aug. 31, 2003) (on file with the North Carolina Law Review).

41. The Board of Law Examiners of the State of North Carolina’s “Character and Fitness Guidelines” provide a typical definition: “The term ‘good moral character’ includes but is not limited to the qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary and personal responsibility and of the laws of North Carolina and of the United States and a respect for the rights of other persons and things.” N.C. BAR APPLICATION, *supra* note 3, at 1 (Character and Fitness Guidelines); see *Tex. State Bd. of Law Exam’rs v. Malloy*, 793 S.W.2d 753, 756 (Tex. App. 1990) (noting that the good moral character requirement is intended to exclude applicants who exhibit dishonesty or lack of trustworthiness).

42. See Stephen K. Huber, *Admission to the Practice of Law in Texas: A Critique of Current Standards and Procedures*, 17 HOUS. L. REV. 687, 691–92 (1980) (distinguishing between “fitness,” which concerns “present mental and emotional health of an applicant as it affects competence to practice law,” and “good moral character,” which “involves an evaluation of the character traits of an applicant, particularly honesty and trustworthiness”).

43. GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 40, at vii–viii (articulating the purpose of “moral character and fitness” review and identifying conduct commonly deemed relevant to “character and fitness” determinations).

fitness, the choice and placement of questions, and the structure and headings of the application.⁴⁴ This equation of illness with personal fault only disserves analysis and further stigmatizes bar applicants diagnosed with depression or other disorders.⁴⁵ This Article addresses only fitness and specifically mental fitness. Additionally, while substance abuse disorders are related to and often accompany other mental disorders,⁴⁶ this discussion focuses on mood disorders, including depression and bipolar disorder.

C. *Defining and Measuring Fitness in North Carolina*

In North Carolina, “fitness” is contrasted with “impairment.” The bar application defines “impaired” as “[l]imited in your ability to carry on any life activities to an extent which would, if you had been an attorney with obligations to a client at the time, have adversely affected your ability to provide services to that client.”⁴⁷ The ability to provide services to the client, or “to practice law,” is defined to include: “An accurate perception of reality, the capability to comprehend facts and circumstances, the capability to reason logically, the capability to communicate, the capability to recognize and appropriately resolve ethical dilemmas, honesty, and the capability to perform legal tasks in a timely manner.”⁴⁸

44. See, e.g., SUP. CT. OF GA., SUPREME COURT RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW §§ 1, 5–6, <http://www2.state.ga.us/courts/bar/pdf/rules10.pdf> (last visited May 10, 2003) (on file with the North Carolina Law Review); SUP. CT. OF GA., POLICY STATEMENT OF THE BOARD TO DETERMINE FITNESS OF BAR APPLICANTS REGARDING CHARACTER AND FITNESS REVIEWS (treating fitness issues, including those involving mental illness and substance abuse, as character considerations), http://www2.state.ga.us/Courts/bar/pages/policy_statement.html (last visited May 10, 2003) (on file with the North Carolina Law Review).

45. In a 1996 survey, nearly four in ten persons viewed major depression as the result or manifestation of a character flaw. Link et al., *supra* note 34, at 1330 (reporting that 38.2 percent said a person’s “own bad character” was the likely cause of his symptoms of depression). Roughly two out of three persons thought that alcoholism likely resulted from the “way the person was raised,” and a similar number attributed cocaine addiction to the person’s “own bad character.” *Id.*

46. See *supra* note 31.

47. N.C. BAR APPLICATION, *supra* note 3, at 23 (citation omitted).

48. *Id.* For the most part, this list appropriately points to functions—cognition, reason, perception, concentration, communication, and the like—that may be impaired by psychiatric disorders. Honesty is another matter. While disordered thinking or distorted perceptions might, in fact, compromise a person’s ability to make “honest” and accurate judgments, it would be a mistake to equate such impaired functioning with knowing or intentional dishonesty, which reflects a person’s character, not her illness. A similar definition from the Rhode Island bar application avoids this mistake:

“Ability to practice law” is to be construed to include the following: (a) The cognitive capacity to undertake fundamental lawyering skills such as problem solving, legal analysis and reasoning, legal research, factual investigation,

The fitness inquiry in North Carolina begins with seven questions on the bar exam application—questions 26 through 32.⁴⁹ With one exception,⁵⁰ all are “have you ever” questions, asking for the applicant’s lifetime history of diagnosis, treatment, and impairment. For each question, the applicant who answers “yes” must provide “full details,” including the dates of any diagnoses, treatment, or impairment; the names and addresses of people who told the applicant he was impaired; and the names and addresses of any professional, institution, or program that provided treatment to the applicant or supported his recovery.⁵¹

organization and management of legal work, making appropriate reasoned legal judgments, and recognizing and resolving ethical dilemmas, for example; (b) The ability to communicate legal judgments and legal information to clients, other attorneys, judicial and regulatory authorities, with or without the use of aids or devices; and (c) The capability to perform legal tasks in a timely manner.

In re Petition for Admission to R. I. Bar, 683 A.2d 1333, 1337 (R.I. 1996).

49. See N.C. BAR APPLICATION, *supra* note 3, at 23–25. Those questions ask:

26. Have you within the last seven years been impaired as a result of your use of alcohol or drugs, or have you been told that you were, or are, impaired as a result of your use of alcohol or drugs?

27. Have you ever been impaired as a result of any other medical, surgical, or psychiatric condition, or have you ever been told that you were impaired as a result of any medical, surgical, or psychiatric condition?

28. Have you ever been diagnosed with or have you been treated for bipolar disorder, schizophrenia, or any other psychosis or psychotic disorder, or organic brain syndrome?

29. Have you ever suffered from blackout spell or periods of amnesia or memory loss?

30. Have you ever been involuntarily committed to any inpatient or outpatient medical, mental health, or substance abuse facility for treatment or evaluation?

31. Have you ever been admitted at the request of any person other than yourself, to any inpatient or outpatient mental health or substance abuse facility for treatment or evaluation?

32. Have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservator, or committee; or has any petition or other proceeding ever been brought requesting that you be declared legally incompetent, or requesting that your property be placed under any guardianship, conservator, or committee?

Id.

50. See *id.* at 23 (question 26).

51. See *id.* at 23–25. For example, question 27 states:

If your answer is YES, give full details below and on an attached sheet if necessary, including the names and mailing addresses of the person(s) who told you you were impaired, to whom the Board can address inquiries if necessary. If you have been treated by any professional or institution in connection with this impairment, or have been engaged in any program of recovery, provide the full

In addition to providing this information, the applicant must sign a broad “authorization and release” form. It “authorizes and requests” every identified health care provider to furnish the Board with all records relevant to the applicant’s “general fitness,” including “any and all medical reports . . . which may have been made or prepared pursuant to, or in connection with, any examination or examinations, consultation or consultations, test or tests, evaluation or evaluations.”⁵² The applicant also must waive the right to see, be informed about, or know the contents of any reports or other information provided in response to any inquiries from the Board.⁵³ When the Board wants further medical or health care information, it sends a copy of this release to the applicant’s health care provider or treatment professional, requesting a letter that provides “any pertinent information you may possess,” specifically including “your analysis of the applicant’s condition along with a description of the treatment afforded and your prognosis in this case.”⁵⁴

A recent study of the Board’s character and fitness inquiries explains the Board’s policies and procedures for reviewing applications.⁵⁵ If an applicant answers “yes” to any one of the seven fitness questions, her application automatically is “red-dotted,” or “flagged for additional scrutiny.”⁵⁶ The Board’s executive director reviews each red-dotted application, “deciding which should be held

name and mailing address of each such professional and institution and program, and direct each to furnish to the Board any information the Board may request with respect to any such impairment and treatment.

Id. at 23.

52. *Id.* (Authorization and Release).

53. *See id.*

54. Letter from the Bd. of Law Exam’rs of the State of N.C. to Health Care Provider (Jan. 21, 2003) [hereinafter Letter to Health Care Provider] (requesting information on a bar exam applicant) (on file with the North Carolina Law Review).

55. *See generally* E. D. Gaskins, Jr., A Study of the Character and Fitness Responsibilities of the North Carolina Board of Law Examiners (2002) (unpublished report) (on file with the North Carolina Law Review). The information in this report is drawn from the Board’s published rules, policies, and procedures; from the Board’s written responses to requests for information; from telephone conversations with Board staff; and from deposition testimony by Fred P. Parker III, Executive Director of the Board of Law Examiners. *Id.* The report, which was submitted to the North Carolina Bar Council on December 31, 2002, concludes with a series of recommendations intended to increase the consistency, predictability, openness, and fairness of the Board’s review process. *See id.* at 29–32.

56. *Id.* at 15. “A red dot on a file is simply a flag that the file has some problem[s] that require a closer look than one that is routine It does not ‘hurt’ an applicant to red dot his/her file and the rule of thumb should always be ‘when in doubt—red dot.’ ” *Id.* at 14 (citing Internal Memorandum of the Bd. of Law Exam’rs of the State of N.C. (on file with the North Carolina Law Review)).

for further investigation and which should be sent to a special committee of four Board members for review.”⁵⁷ This committee, called the Character and Fitness Committee, may either approve an application or refer it to a Board Panel for a de novo hearing.⁵⁸ The Board Panel, made up of two or three members, conducts a formal hearing.⁵⁹ Following this hearing, the Board Panel takes one of four actions: approving the application, denying the application, sending the application to the full Board for a second hearing, or holding it pending further information or inquiry.⁶⁰ An applicant dissatisfied with the Board Panel’s ruling may request a de novo hearing before the full Board.⁶¹ The applicant thereafter may appeal the full Board’s determination to the Wake County Superior Court and ultimately to the Supreme Court of North Carolina.⁶²

D. The ADA and Mental Health Inquiries by Licensing Boards

Title II of the ADA prohibits state and local public entities from discriminating against qualified individuals with a disability on the basis of their disability.⁶³ Threshold issues concerning the applicability of Title II to licensing boards have been thoughtfully addressed elsewhere and do not warrant extended discussion here.⁶⁴ Nonetheless, four basic propositions about ADA litigation warrant highlighting.

First, professional licensing organizations—including boards of

57. *Id.* at 14.

58. *Id.*; N.C. RULES GOVERNING ADMISSION, *supra* note 4, Rule .1203(2). Members of the Committee cast their votes independently, without conferring with one another. Gaskins, *supra* note 55, at 16. The Character and Fitness Committee should not be confused with the local Bar Candidate Committee before which each applicant must appear. See N.C. RULES GOVERNING ADMISSION, *supra* note 4, Rule .0604.

59. N.C. RULES GOVERNING ADMISSION, *supra* note 4, Rule .1203. The Panel may require an applicant to appear before it multiple times. N.C. RULES GOVERNING ADMISSION, *supra* note 4, Rule .1203. The Panel has the power to subpoena witnesses and compel the production of documents. N.C. RULES GOVERNING ADMISSION, *supra* note 4, Rule .1205.

60. Gaskins, *supra* note 55, at 16. If the Panel elects to hold the application for further review, it may allow the applicant to take the bar examination, but seal the results of the exam until the Panel or the full Board has made a final determination that the applicant possesses the requisite “good moral character” and “general fitness.” N.C. RULES GOVERNING ADMISSION, *supra* note 4, Rule .1203(4).

61. N.C. RULES GOVERNING ADMISSION, *supra* note 4, Rule .1203(2).

62. *Id.* Rules .1401–.1405.

63. Under Title II, “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.” 42 U.S.C. § 12132 (2000).

64. See, e.g., Bauer, *supra* note 26, at 125–35.

law examiners, character and fitness committees, and other organizations that screen and license lawyers—act as arms of the state judiciary and therefore are “public entities” subject to Title II.⁶⁵

Second, the ADA’s broad definition of “discrimination” encompasses more than outright exclusion. It extends to asking unnecessary and burdensome health- or disability-related questions and requiring additional related information, even if the answers do not result in the denial of a benefit or service.⁶⁶ In the context of

65. Title II, by its terms, applies to “any State or local government” and “any department, agency . . . or other instrumentality of a State . . . or local government . . .” § 12131. Regulations issued by the Department of Justice specify that Title II reaches the activities of state licensing programs and of the state judiciary. 28 C.F.R. § 35.130(b)(6) (2000) (prohibiting discrimination in the operation of “licensing or certification programs”); pt. 35, app. A, at 517 (“Title II coverage . . . includes activities of the . . . judicial branches of State and local governments.”). Bar examiners, who act as agents of the state courts in licensing lawyers, are therefore covered by Title II. *See, e.g.,* *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1270 (10th Cir. 2001); *Clark v. Va. Bd. of Bar Exam’rs*, 880 F. Supp. 430, 441 (E.D. Va. 1995); *Applicants v. Tex. State Bd. of Law Exam’rs*, No. A 93 CA 740 SS, 1994 WL 923404, at *5 (W.D. Tex. Oct. 11, 1994); *Ellen S. v. Fla. Bd. of Bar Exam’rs*, 859 F. Supp. 1489, 1495 (S.D. Fla. 1994); *In re* Petition for Admission to R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996); *Application of Underwood*, 1993 WL 649283, at *2 (Me. Dec. 7, 1993). *But cf. In re Frickey*, 515 N.W.2d 741, 741 (Minn. 1994) (expressing doubt about the application of Title II to bar exam questions, but using the court’s supervisory powers to modify the questions nonetheless).

66. Congress did not include a detailed definition of “discrimination” in Title II, choosing instead to rely on the definitions of discrimination included in Title I, which applies to employment, and Title III, which applies to public accommodations:

The Committee has chosen not to list all the types of actions that are included within the term “discrimination,” because this title essentially simply extends the anti-discrimination prohibition . . . to all actions of state and local governments. The Committee intends . . . that the forms of discrimination prohibited by [42 U.S.C. § 12132] be identical to those set out in the applicable provisions of titles I and III of this legislation. Thus, for example, the construction of “discrimination” set forth in [42 U.S.C. § 12112(b) and (d)] and [42 U.S.C.

§ 12182(b)] should be incorporated into the regulations implementing this title.

HOUSE COMM. ON EDUCATION AND LABOR, H.R. REP. NO. 101-485, pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367; *see also* REP. OF SENATE COMM. ON LABOR AND HUMAN RESOURCES, S. REP. NO. 101-116, at 44 (1989) (“The forms of discrimination prohibited by [42 U.S.C. § 12132] are comparable to those set out in the applicable provisions of titles I and III of this legislation.”).

Title I defines discrimination to include “utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability; or . . . using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities . . .” 42 U.S.C. § 12112(b)(3), (6). Title III similarly defines discrimination to include:

impos[ing] or apply[ing] . . . eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

professional licensing, discrimination includes administering a program “in a manner that subjects qualified individuals with disabilities to discrimination,”⁶⁷ including the use of “policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others.”⁶⁸ The additional demands placed on the bar applicant who answers “yes” to a triggering question—providing additional information, such as details about diagnoses and treatment history and the names and addresses of health care providers; authorizing the release of treatment records; possibly undergoing further investigations or examinations—are sufficiently burdensome to constitute discrimination, thus requiring bar examiners to demonstrate that the questions are necessary to

§ 12182(b)(2)(A)(i).

The United States Department of Justice (“DOJ”) looks to Title III to define “discrimination” in cases challenging bar application inquiries in Title II. See Memorandum of the United States as Amicus Curiae at 15, *Ellen S. v. Fla. Bd. of Bar Exam’rs*, 859 F. Supp. 1489 (S.D. Fla. 1994) (No. 94-0429-CIV-KING) (“Unnecessary inquiries are barred by 28 C.F.R. § 35.150(b)(8), which is identical in substance to a statutory provision in title III, 42 U.S.C. § 12182(b)(2)(A)(i), and [a] title III regulation, 28 C. F. R. § 36.301(a). The legislative history of the title III statutory provision makes clear that Congress intended to prohibit unnecessary inquiries into disability.” (emphasis added)), <http://www.usdoj.gov/crt/foia/fl1a.txt> (last visited on Aug. 31, 2003) (on file with the North Carolina Law Review).

67. 28 C.F.R. § 35.130(b)(6), (8) (2000) (prohibiting public entities from using “eligibility criteria that screen out or tend to screen out an individual with a disability . . . from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered”); *id.* § 35.130(b)(3)(i) (prohibiting public entities from “subjecting qualified individuals with disabilities to discrimination on the basis of disability”).

68. *Id.* app. A, at 488. The DOJ’s Technical Assistance Manual for Title II of the ADA includes this apt illustration of discrimination:

An essential eligibility requirement for obtaining a license to practice medicine is the ability to practice medicine safely and competently. State Agency X requires applicants for licenses to practice medicine to disclose whether they have ever had any physical and mental disabilities. A much more rigorous investigation is undertaken of applicants answering in the affirmative than of others. This process violates title II because of the additional burdens placed on individuals with disabilities, and because the disclosure requirement is not limited to conditions that currently impair one’s ability to practice medicine.

U.S. DEP’T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL II-3.5300 (1992), available at <http://www.usdoj.gov/crt/ada/taman2.html>.

Additional burdens imposed by mental health inquiries include: the obligation to provide additional information about diagnoses, treatment, and providers; privacy invasions resulting from required disclosure of personal information; the required waiver of confidentiality for records from treatment providers; the obligation to allow the bar examiners to seek additional information; possibly a mandatory appearance at a hearing; and deterrence from seeking treatment or being sufficiently candid with a treating professional, for fear of compelled disclosure of treatment records. Memorandum of the U.S. as Amicus Curiae at 25–30, *Ellen S.* (No. 94-0429-CIV-KING).

identify unfit applicants.⁶⁹ The stigma of being treated as potentially unfit to practice law only increases the burden.⁷⁰

Third, the test for justifying burdensome health inquiries is whether they are necessary to achieve the bar examiners' purpose of protecting the public from unfit practitioners. In ADA terms, the questions must be necessary to guard against a "direct threat" to others.⁷¹ A direct threat is "a significant risk to the health or safety of

69. See, e.g., *Applicants*, 1994 WL 923404, at *5 (indicating that although none of the plaintiffs had been denied a license, the requirement to disclose information that might subject them to further investigation could constitute discrimination); *Ellen S.*, 859 F. Supp. at 1494 n.7 (stating that the required consent forms and the examiners' letters of inquiry to treatment professionals, along with possible investigations and hearings, were discriminatory burdens on applicants who answered "yes" to a triggering question).

The only question is whether "merely" asking a status-based question, without requiring the applicant to give details, identify care providers, or release treatment records, is *in itself* discrimination. One court concluded that it was not the initial questions alone, but the demands for additional information or investigations that constituted discrimination. *Med. Soc'y of N.J. v. Jacobs*, No. 93-3670 (WGB), 1993 WL 413016, at *8 (D.N.J. Oct. 5, 1993). But as this court itself suggested, the distinction may be more theoretical than real. See *id.* (noting that the medical licensing board "theoretically" could "ask questions concerning the status of applicants" without investigating or acting upon the answers, but noting that this was not the case).

70. The DOJ has recognized that questions about a person's mental health history or status are burdensome because they are stigmatizing. Memorandum of the U.S. as Amicus Curiae at 29, *Ellen S.* (No. 94-0429-CIV-KING). The DOJ also has cited the individual's "substantial liberty interest . . . in avoiding the social stigma of being known to have been treated for a mental illness." *Id.* For judicial recognition of stigma as a form of discrimination under Title II, see *Olmstead v. L.C.*, 527 U.S. 581, 600-01 (1999) (finding unjustified institutional isolation of people with mental disorders discriminatory in part because it "perpetuates unwarranted assumptions" about people with disabilities and imposes a "stigmatizing injury"); *Doe v. Judicial Nominating Comm'n for the Fifteenth Judicial Circuit of Fla.*, 906 F. Supp. 1534, 1542 (S.D. Fla. 1995) (accepting the contention that requiring disclosure of mental health information in a public document would "subject plaintiff to additional impermissible burdens" in light of the "overarching purpose of the ADA: to eliminate the stigma and stereotypes associated with disability and to eradicate discrimination on the basis of such stereotypes" (quoting Carol J. Banta, Note, *The Impact of the Americans with Disabilities Act on State Bar Examiners' Inquiries into the Psychological History of Bar Applicants*, 94 MICH. L. REV. 167, 177 (1995))).

71. 42 U.S.C. § 12182(b)(3) (2000) ("Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a *direct threat to the health or safety of others.*" (emphasis added)). Courts analyzing ADA challenges to bar application inquiries routinely invoke this direct threat test, sometimes calling it the "necessity test" or "necessity exception." See, e.g., *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 446 (E.D. Va. 1995) (recognizing that "certain severe mental or emotional disorders may pose a direct threat to public safety," but concluding that the board had not demonstrated the necessity of the challenged mental health questions); *Doe*, 906 F. Supp. at 1540 (stating that under the necessity exception, public entities may use eligibility criteria that burden individuals with disabilities if the criteria are "necessary to insure the safe operation of the program or if the individual 'poses a direct threat to the health or safety of others'" (quoting 28 C.F.R. pt. 35, app. A, at 455 (1995))); *Applicants*,

others that cannot be eliminated” by reasonable modifications.⁷² Thus, a mental health inquiry must be limited to information relevant to whether an applicant presents a “significant risk” of harm to prospective clients, not merely a remote, theoretical, or potential risk.⁷³

The fourth proposition relates to the challenge of finding a bar applicant who is both willing to bear the risks and costs of suing the gatekeeper to his chosen profession and qualified to sue under the ADA. Most eligible bar applicants, having successfully completed law school, have considerable cognitive and communicative skills and can handle an intellectually, physically, and emotionally demanding workload. Under recent Supreme Court precedent, such applicants might have difficulty satisfying the ADA’s definition of disabled, even if they have a major mental disorder and even if that disorder causes them considerable distress or makes them struggle to meet the demands of law school or other aspects of their lives.⁷⁴ Thus many applicants who are burdened, stigmatized, or deterred from treatment by unnecessary mental health inquiries will not be able to seek redress under the ADA. There are, however, other prospective ADA plaintiffs.⁷⁵ Regardless, the final proposition is this: the fact

1994 WL 923404, at *6 (recognizing that “[w]hen, as in this case, questions of public safety are involved, the determination of whether an applicant meets ‘essential eligibility requirements’ involves consideration of whether the individual with a disability poses a direct threat to the health and safety of others.” (quoting 28 C.F.R. pt. 35, app. A, at 448 (1993))).

72. § 12182(b)(3).

73. See *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (“Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists, but whether it is significant.” (citing *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 & n. 16 (1987))). For a more complete discussion of the ADA’s direct threat defense, see generally Ann Hubbard, *Interpreting and Implementing the ADA’s Direct Threat Defense*, 95 NW. U. L. REV. 1279 (2001) (assessing the proper understanding and application of the direct threat defense).

74. The ADA defines “disability” as a physical or mental impairment that substantially limits one or more of an individual’s “major life activities.” § 12102(2)(A). A person with a serious or even life-threatening disease might manage through medical supports or personal strength to function reasonably well at work and in other aspects of his life. If so, he is not disabled as that term has been interpreted by the Supreme Court. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999) (holding that the existence of a disability, or a substantial limitation on a major life activity, must be based on an individual’s actual functioning, in light of mitigating measures such as medicine or assistive devices, and not on the severity of the underlying disease or condition).

75. In addition to protecting individuals who are actually disabled, the ADA protects persons who have a record or history of a disability or who are regarded as having a disability, whether or not they do. 42 U.S.C. § 12201(2). These definitions would encompass applicants who presently are high-functioning in all important respects, but who in the past were seriously debilitated by a mental disorder, as well as applicants who

that many applicants who are injured by an illegal practice cannot or will not sue is no justification for continuing that practice.

In sum, Title II does not prohibit a licensing agency like a board of law examiners from defining its own "essential eligibility criteria" for admission, including qualifications like "good moral character" and "general fitness" to practice law.⁷⁶ Indeed, courts show great respect for the bar examiners' obligation to try to identify applicants whose lack of fitness poses a threat to the public.⁷⁷ The bar examiners' authority is limited, however, by the prohibition on using disability-related criteria that exclude or discriminate against individuals with disabilities *unless* the examiners can demonstrate that those criteria are necessary. Therefore, the focus of the Title II analysis is which—if any—inquiries about mental health status are *necessary* to screen for unfit lawyers.

II. THE GROWING CONSENSUS FOR NARROWING THE QUESTIONS

A. *Post-ADA Litigation and Reform*

Over the last decade, the legal understanding of what constitutes necessity in this context has developed hand-in-hand with a growing professional recognition that broad diagnosis and treatment questions are ill-suited to assess an applicant's present capacity to function as a competent and reliable lawyer. Mental health inquiries are a

are perceived as having significant dysfunction in one or more life activities, whether or not they do. *See, e.g.,* *Bowen v. Income-Producing Mgmt.*, 202 F.3d 1282, 1287 (10th Cir. 2000) (applying this standard to the activities of working and learning).

76. *Hawkins v. Moss*, 503 F.2d 1171, 1175 (4th Cir. 1974) (acknowledging that the "power of the courts of each state to establish their own rules of qualification for the practice of law within their jurisdiction, subject only to the requirements of the due process or equal protection clauses of the Fourteenth Amendment, is beyond controversy").

77. *See* *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 41 n.4 (1961) (recognizing that most states require good moral character, with the applicant bearing the burden of demonstrating good character); *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 239 (1957) (recognizing the right of states to set high standards of qualification and, to this end, to investigate an applicant's character and fitness to practice law); *Applicants v. Tex. State Bd. of Law Exam'rs*, No. A 93 CA 740 SS, 1994 WL 923404, at *8 (W.D. Tex. Oct. 11, 1994) (noting the need for a "rigorous application procedure" to "ensure that Texas' lawyers are capable, morally and mentally, to provide . . . important services"); *In re Willis*, 288 N.C. 1, 14, 215 S.E.2d 771, 779 (1975) (recognizing the Board's right to "require high standards for admission to the bar, including good moral character and proficiency in its laws, so long as the qualifying standards have a rational connection with the applicant's fitness or capacity to practice law" (citing *Schware*, 353 U.S. at 239)); *see also* *Keenan v. Bd. of Law Exam'rs of State of N.C.*, 317 F. Supp. 1350, 1359 (E.D.N.C. 1970) ("In licensing attorneys there is but one constitutionally permissible state objective: the assurance that the applicant is capable and fit to practice law.").

relatively recent feature of the bar admissions process. In the mid-1970s, most states asked no questions directly addressing the applicant's mental health.⁷⁸ From the outset, skeptics have wondered whether mental health questions effectively identify applicants who pose a risk to the public or instead simply invade applicants' privacy, fuel prejudice about mental disorders, and deter prospective applicants from seeking needed treatment.⁷⁹ Skepticism turned to litigation following the passage of the ADA, which provided new legal norms to address these questions. Successful challenges in several states lead to two broad conclusions, one legal and one policy-related. First, to satisfy the ADA's necessity requirement, questions about mental health status must be narrowly tailored to address only current or recent impairment, diagnoses, and treatment that are relevant to the applicant's present fitness to practice law. Second, even mental health questions that are legal may nonetheless be unwise. Questions about an applicant's conduct more effectively identify serious impairment and dysfunction, without deterring law students and other applicants from seeking the counseling or other services that will help them learn to handle the stresses they will encounter in their legal careers.

Three early rulings, while not decisions on the merits, provided the foundation for subsequent Title II challenges to mental health questions in connection with professional licensing. In each, the court concluded that "have you ever" questions about mental disorders, which required additional information from applicants who answered "yes," violated Title II by imposing additional and unwarranted burdens on qualified individuals with disabilities. In *Medical Society of New Jersey v. Jacobs*,⁸⁰ the U.S. District Court for the District of New Jersey, ruling on a motion for a preliminary injunction, found that the plaintiff demonstrated a high probability of success on the merits in its challenges to the medical board's "have you ever" questions. The court found that questions about the existence of or treatment for alcohol or drug dependence or any mental or psychiatric condition over the course of the applicant's lifetime, combined with the further investigation triggered by a "yes" answer, discriminated against qualified applicants with disabilities by imposing additional and unnecessary burdens on them.⁸¹ The

78. Michael J. Place & Susan L. Bloom, *Mental Fitness Requirements for the Practice of Law*, 23 BUFF. L. REV. 579, 582 (1974); Rhode, *supra* note 5, at 595-96.

79. See, e.g., Place & Bloom, *supra* note 78, at 586; Rhode, *supra* note 5, at 581-83.

80. No. 93-3670 (WGB), 1993 WL 413016 (D.N.J. Oct 5, 1993).

81. *Id.* at *8.

Supreme Judicial Court of Maine employed similar reasoning in *In re Applications of Underwood & Plano*,⁸² a challenge to the bar examiners' refusal to admit two applicants who refused to respond to mental health inquiries.⁸³ The court concluded that asking applicants if they had ever been diagnosed with an "emotional, nervous or mental disorder" or if they had been treated for such a disorder in the preceding decade and requiring them to authorize the release of all medical records related to their diagnosis and treatment for those disorders violated the ADA.⁸⁴ Finally, in *Ellen S. v. Florida Board of Bar Examiners*,⁸⁵ the U.S. District Court for the Southern District of Florida ruled that the plaintiffs stated a claim that the Florida bar examiners' mental health inquiries violated Title II of the ADA by placing additional burdens on qualified applicants with disabilities.⁸⁶ The challenged inquiries included "have you ever" questions about diagnosis, treatment, or medication for a "nervous, mental, or emotional condition"; a consent form requiring applicants to authorize the release of any and all mental health records; a letter of inquiry sent to past treatment professionals; and the Board's follow-up investigations and hearings.⁸⁷

These "have you ever" questions were seen as "easy targets" for ADA challenges.⁸⁸ Courts also have invalidated more circumscribed questions limited to the applicant's mental health treatment during the five or ten years preceding the application. In *Clark v. Virginia Board of Bar Examiners*,⁸⁹ for example, the U.S. District Court for the Eastern District of Virginia struck a question about treatment or counseling for any "mental, emotional or nervous disorders" during

82. 1993 WL 649283 (Me. Dec. 7, 1993).

83. *Id.* at *1.

84. *Id.* at *2 n.1. The challenged question asked:

Within the ten (10) year period prior to the date of this application, have you ever received treatment of emotional, nervous or mental disorder? . . . If so, state the names and complete addresses of each psychologist, psychiatrist or other health care professional, including social worker, who treated you. (THIS QUESTION DOES NOT INTEND TO APPLY TO OCCASIONAL CONSULTATION FOR CONDITIONS OF EMOTIONAL STRESS OR DEPRESSION, AND SUCH CONSULTATION SHOULD NOT BE REPORTED.).

Id. at *2.

85. 859 F. Supp. 1489 (S.D. Fla. 1994).

86. *Id.* at 1493-94 ("[A]s the Title II regulations make clear, [the challenged question] and the subsequent inquiries discriminate against Plaintiffs by subjecting them to additional burdens based on their disability.").

87. *Id.* at 1491 n.1.

88. See Herr, *supra* note 4, at 647-49.

89. 880 F. Supp. 430 (E.D. Va. 1995).

the preceding five years.⁹⁰ The court recognized that the ADA permits a licensing agency to ask even burdensome questions if it can demonstrate that the questions are “necessary to the performance of its licensing function.”⁹¹ Because the function of the Virginia Board of Bar Examiners was to protect the public, it could justify the challenged question only by showing that the question was both effective and necessary to protect the public from a direct threat.⁹² This standard is sometimes referred to as the “necessity exception.”⁹³

The *Clark* court found, however, that asking about prior mental health counseling was not effective, much less necessary, given that the board could not “point to a single instance where an affirmative answer to [the counseling question] ha[d] prevented licensure.”⁹⁴ The court further observed that the counseling question risked being counterproductive because it deterred applicants from seeking or receiving treatment that would help control a potentially impairing condition.⁹⁵ Although the court refrained from deciding or suggesting

90. *Id.* at 431. The challenged question asked:

Have you within the past five (5) years, been treated or counseled for a mental, emotional or nervous disorders [sic]?” *Id.* at 433. If the applicant answered “yes,” she was instructed to provide: “(a) Dates of treatment or counseling; (b) Name, address and telephone number of attending physician or counselor or other health care provider; (c) Name, address and telephone number of hospital or institution; (d) Describe completely the diagnosis and treatment and the prognosis and provide any other relevant facts. You may attach letters from your treating health professionals if you believe this would be helpful.

Id.

91. *Id.* at 442–43.

92. *See id.* at 443–45; *accord* Applicants v. Tex. State Bd. of Law Exam’rs, No. A 93 CA 740 SS, 1994 WL 923404, at *6 (W.D. Tex. Oct. 11, 1994) (“[w]hen, as in this case, questions of public safety are involved, the determination of whether an applicant meets ‘essential eligibility requirements’ involves consideration of whether the individual with a disability poses a direct threat to the health and safety of others” (quoting 28 C.F.R. pt. 35, app. A, at 448 (1993))).

93. *See, e.g.,* Doe v. Judicial Nominating Comm’n for the Fifteenth Judicial Circuit of Fla., 906 F. Supp. 1534, 1540 (S.D. Fla. 1995) (stating that under the “necessity exception,” public entities may use eligibility criteria that burden individuals with disabilities if the criteria are “necessary to insure the safe operation of the program or if the individual ‘poses a direct threat to the health or safety of others’ ” (quoting 28 C.F.R. pt. 35, app. A, at 455 (1995))).

94. *Clark*, 880 F.Supp. at 437. The Board official who screened the applications testified that, in his twenty-three years of experience, he had “never brought to the attention of the Board an application disclosing the mere receipt of treatment or counseling for stress, depression, or marital or adjustment problems. Further, no applicant ha[d] been denied the right to sit for the bar examination based on their answer to [the counseling question].” *Id.* at 434.

95. *Id.* at 437–38. The court cited evidence, including testimony from several law school deans, that questions related to mental health counseling deterred students from seeking treatment. *Id.* Moreover, the court recognized the danger that such questions

which mental health inquiries (if any) would be permissible,⁹⁶ it did note that both parties' experts "testified that past behavior is the best predictor of present and future mental fitness."⁹⁷

The Supreme Court of Rhode Island had similar concerns about irrelevant or even counterproductive questions on its state's bar application. In *In re Petition & Questionnaire for Admission to the Rhode Island Bar*,⁹⁸ the court invalidated three questions. One asked about lifetime history of hospitalization for any emotional, nervous, or mental disorder.⁹⁹ The other two asked about chemical dependence or diagnosis or treatment of emotional, nervous, or mental disorders.¹⁰⁰ The latter questions had two limitations: first, the inquiries were limited to the preceding five years; and second, they addressed only conditions or disorders that, by the applicant's self-assessment, would impair her ability to practice law.¹⁰¹ The court found that even these inquiries into past treatment or diagnosis had little, if any, value in predicting an applicant's future functioning.¹⁰² At the same time, the court found that the prospect of having to disclose diagnosis and treatment information could deter applicants from seeking needed treatment.¹⁰³ The court held that questions about diagnosis or treatment history violate the ADA *unless* the bar examiners demonstrate a direct threat to public safety if persons with a mental or emotional disorder or history of substance-abuse treatment are admitted to the bar.¹⁰⁴

could inhibit effective treatment: "Faced with the knowledge that one's treating physician may be required to disclose diagnosis and treatment information, an applicant may be less than totally candid with their therapist." *Id.* at 438. "Thus," concluded the court, "it is possible that open-ended mental health inquiries may prevent the very treatment which, if given, would help control the applicant's condition and make the practice of law possible." *Id.*

96. *Id.* at 446; *see also id.* at 436 n.10 (finding it unnecessary to decide whether mental health questions should be eliminated entirely).

97. *Id.* at 446; *see also id.* at 435 (quoting expert testimony about the limited predictive value of past treatment evidence and identifying "past behavior" as "the best indicator of an applicant's present ability to function and work").

98. 683 A.2d 1333 (R.I. 1996).

99. *Id.* at 1334.

100. *Id.*

101. *Id.*

102. *Id.* at 1337.

103. *Id.* at 1336.

104. *Id.*; *accord Doe v. Judicial Nominating Comm'n for the Fifteenth Judicial Circuit of Fla.*, 906 F. Supp. 1534, 1540 (S.D. Fla. 1995) (holding that "public entities may utilize eligibility criteria that screen out, or tend to screen out, individuals with disabilities [only] if the criteria are necessary to insure the safe operation of the program or if the individual 'poses a direct threat to the health or safety of others'" (quoting 28 C.F.R. pt. 35, app. A, at 455 (1995))).

In *Doe v. Judicial Nominating Commission for the Fifteenth Judicial Circuit of Florida*,¹⁰⁵ a federal district court in Florida similarly held that, under the “necessity exception,” public entities may use eligibility criteria that burden individuals with disabilities only if the criteria are “necessary to insure the safe operation of the program or if the individual ‘poses a direct threat to the health or safety of others.’”¹⁰⁶ *Doe* makes clear that a question may be overinclusive—and therefore unduly burdensome—either because its time frame is too long, requiring the disclosure of remote conditions or treatment, or because its scope is too broad, requiring the disclosure of recent conditions or treatment that are not relevant to an applicant’s professional fitness.¹⁰⁷ The court enjoined the judicial nominating committee from asking whether an applicant has had “any form of emotional disorder or disturbance”¹⁰⁸ or been treated by “any mental health care professionals,”¹⁰⁹ even if the inquiry is limited to the preceding five years.¹¹⁰ This question is objectionable because it could “force the disclosure of intimate, personal matters that have nothing to do with job performance,”¹¹¹ including family counseling or “treatment resulting from personal traumas such as childhood sexual abuse or loss of a loved one.”¹¹² The court emphasized that “forced disclosure” and the resulting stigmatization are themselves burdens

The issue was before the Supreme Court of Rhode Island on petition from the state bar Committee on Character and Fitness, with a recommendation from a special master. *In re* Petition, 683 A.2d at 1333. The court, acting under its general supervisory powers, directed that the bar application include two questions, each restricted to current conditions that would, in the applicant’s view, impair her ability to practice law. *Id.* at 1337. For another example of a court’s use of its supervisory powers to modify bar application questions, see *In re* Frickey, 515 N.W.2d 741, 741 (Minn. 1994). The deans and various faculty members of three Minnesota law schools petitioned the Minnesota Supreme Court to eliminate questions about mental health treatment on the grounds that they violated state and federal law, including the ADA; deterred law students from seeking mental health counseling; invaded applicants’ privacy; and had a disparate impact on female applicants, who were more likely to have sought treatment. *Id.* The court ordered the bar examiners to remove the questions. *Id.*

105. 906 F. Supp. 1534 (S.D. Fla. 1995).

106. *Id.* at 1540 (quoting 28 C.F.R. pt. 35, app. A, at 455). The court also stated that “[t]he exception must be read narrowly to further the remedial purpose of the statute.” *Id.* at 1545.

107. *Id.* at 1542–45.

108. *Id.* at 1537.

109. *Id.*

110. *Id.* at 1545. The court enjoined the use of several other questions. These included “have you ever” questions about the existence of or treatment for any mental illness or chemical dependency, and questions about health status and the existence of any sensory impairments or “other debilitating handicap or disease.” *Id.* at 1537.

111. *Id.* at 1544.

112. *Id.* at 1545.

prohibited by the ADA unless the inquiry is justified or required by the necessity exception.¹¹³

Not every court has approached mental health inquiries with this degree of skepticism. The notable exception is *Applicants v. Texas State Board of Law Examiners* (“*Texas Applicants*”).¹¹⁴ In *Texas Applicants*, the court addressed a challenge to two questions about “serious mental illnesses,”¹¹⁵ namely, “bipolar disorder, schizophrenia, paranoia, and . . . other psychotic disorder[s].”¹¹⁶ The application asked whether would-be lawyers had been diagnosed with or treated for any of these disorders in the preceding ten years and whether they had been hospitalized for treatment of any of these disorders in the preceding ten years or since turning eighteen, whichever was shorter.¹¹⁷ An applicant who answered “yes” was required to provide details and to sign an authorization and release of medical records.¹¹⁸ The Texas court articulated the familiar “necessity” or “direct threat” test,¹¹⁹ stating that, because public safety was involved, the proper consideration was “whether the individual with a disability poses a direct threat to the health and safety of others.”¹²⁰

At the end of the day, however, the court required scant justification for these diagnosis and treatment questions. Evidence showed that in the preceding seven years the board’s character and fitness director had reviewed only about thirty files as a result of affirmative answers to these and even broader questions about mental health treatment.¹²¹ He had to reach back eight years to find a

113. *Id.* at 1544. The harm was particularly great in this case, as the requested information provided by judicial candidates would be available to the public. *Id.* The court’s reasoning, however, would disallow the forced disclosure of any disability-related information that is not related to job performance and required to protect the public. *Id.* at 1545.

114. No. A 93 CA 740 SS, 1994 WL 923404 (W.D. Tex. Oct. 11, 1994).

115. *Id.* at *3.

116. *Id.* at *1.

117. *Id.* at *2 n.5.

118. *Id.* The details included dates, diagnoses, a description of her present conditions, and the names and addresses of all treating professionals. The authorization was limited to the release of medical records related to the specified diagnoses. *Id.*

119. *Id.* at *7.

120. *Id.* at *6 (citing 28 C.F.R. pt. 35, app. A, at 448 (1993)).

121. *Id.* at *3 n.8. From 1986 until April 1992, applicants were required to report whether they had been either “examined *or* treated” for “any mental, emotional or nervous conditions,” not merely for the specified serious disorders. *Id.* at *2 n.3 (emphasis added). From April 1992 until July 1993, applicants were asked about “treat[ment] for any mental illness” in the preceding ten years. *Id.* at *2 n.4. The challenged version of the question had been in effect for about one year at the time of trial. Thus, even the modest

single applicant who was denied admission largely for mental health reasons and who would not have been identified by other questions.¹²² Nonetheless, the court rejected the plaintiffs' contention that the question served no useful purpose.¹²³ Entirely missing from the court's discussion was any consideration of whether the deterrent effect of asking the question would ultimately produce greater lawyer impairment by causing more law students, and ultimately perhaps more lawyers, to avoid treatment.

In a similar vein, a federal district court in Virginia suggested that it would uphold questions adopted by the Virginia Board of Bar Examiners in response to *Clark*. In *O'Brien v. Virginia Board of Bar Examiners*,¹²⁴ the plaintiff refused to answer the revised questions and sought a preliminary injunction requiring the board to allow him to take the bar exam.¹²⁵ The revised questions asked whether, within the preceding five years, the applicant had been diagnosed or treated for certain identified disorders or for "any other condition [that] significantly impaired [his] behavior, judgment, understanding, capacity to recognize reality, or ability to function in school, work or

response rate of nearly nine affirmative answers a year is higher than would be expected under the narrower question.

122. *Id.* at *4 n.10. Other applicants may have abandoned their hopes of becoming lawyers rather than submit to the investigations. *See id.* at *5 nn.11–12 (noting two files that were terminated for the applicants' failure to sign the release or undergo a board-required evaluation, and two cases in which hearings were set but never held). During the same period, the board denied admission to applicant Charles Malloy for lack of "good moral character" largely because he answered, but criticized, a question about mental health treatment. *Tex. State Bd. of Law Exam'rs v. Malloy*, 793 S.W.2d 753, 754 (Tex. App. 1990). The board relied on his answers to three questions. Two concerned conduct. First, he stated that he had never understood why he was fired from one job. *Id.* at 756. Second, he reported (although not required to) misdemeanor charges of disorderly conduct (of which he was found not guilty) and failure to identify (which was later dismissed). *Id.* at 758. But the bar examiners cited his answer to a mental health treatment question as "perhaps the best evidence that Malloy lacked the required character to practice law in Texas." *Id.* at 759. In response to the question whether he had been "examined or treated for mental, emotional, or nervous disorders" in the preceding ten years, he answered, "Yes, I saw a counselor as a youth (17–18 yrs. old). This stuff is really none of your business as it does not affect my ability to practice law in Texas." *Id.* at 757. Malloy's therapist informed the board that the counseling was to help Malloy cope with family problems following the death of Malloy's younger brother. *Id.* at 759. The board nonetheless concluded that this answer, along with the others, indicated a lack of good moral character, which was relevant to his current fitness or capacity to practice law. *Id.* at 755. Malloy appealed. *Id.* at 754. The district court reversed, finding that the board's decision was not based on substantial evidence, and the Texas Court of Appeals affirmed. *Id.* at 760.

123. *Applicants*, 1994 WL 923404, at *7.

124. No. 98-0009-A, 1998 WL 391019 (E.D. Va. Jan. 23, 1998).

125. *Id.* at *1.

other important life activities.”¹²⁶ The application made clear that the board did not seek, and the applicant need not provide, any information about “situational counseling such as stress counseling, domestic counseling, grief counseling, and counseling for eating or sleeping disorders.”¹²⁷ Judge Cacheris, who decided *Clark*, declined to grant the plaintiff’s motion for a preliminary injunction, concluding that he had not shown “a great likelihood of success on the merits.”¹²⁸

While *Texas Applicants* and *O’Brien* represent a more lenient view,¹²⁹ it is significant that both cases upheld inquiries that were limited in two distinct ways that earlier cases deemed important. First, they were limited in time, covering only the preceding five or ten years.¹³⁰ Second, they were limited in scope, asking only about more “serious” disorders, as identified either by diagnoses or by degree of impairment.¹³¹ The questionnaires disavowed any interest in the disclosure of “situational” counseling and excluded information about treatment for conditions (such as moderate or well-controlled depression) that do not produce significant impairment and information about most treatment sought before the age of eighteen.¹³² Thus, neither decision provides support for lifetime inquiries into even serious diagnoses or for any inquiries into mere counseling.

B. *The Professional Consensus*

The passage of the ADA prompted organizations of lawyers, law professors, and law examiners to revisit existing bar application questions to determine whether they imposed additional and unnecessary burdens on persons with disabilities. As a result of this

126. *Id.* at *3.

127. *Id.*

128. *Id.* In addition, the court found the revised authorization and release to be “carefully tailored to respect the [applicant’s] privacy rights” because it allowed the Board access “only to information relevant to the applicant’s fitness to practice law.” *Id.* at *4.

129. Professor Jon Bauer identifies two basic standards for analyzing the “necessity” of mental health questions on bar applications. Under the “strict scrutiny” standard articulated in *Jacobs*, virtually all disability-based questions on applications violate Title II. *Med. Soc’y of N.J. v. Jacobs*, No. 93-3670 (WGB), 1993 WL 413016, at *7 (D.N.J. Oct. 5, 1993); Bauer, *supra* note 26, at 139–43. Under the “relaxed scrutiny” standard of *Texas Applicants*, courts are more deferential to bar examiners’ fitness determinations. Bauer, *supra* note 26, at 143–48. The only criterion is that they be “narrowly framed.” Bauer, *supra* note 26, at 143.

130. *O’Brien*, 1998 WL 391019, at *3; *Applicants v. Tex. State Bd. of Law Exam’rs*, No. A 93 CA 740 SS, 1994 WL 923404, at *2 n.5 (W.D. Tex. Oct. 11, 1994).

131. *O’Brien*, 1998 WL 391019, at *3; *Applicants*, 1994 WL 923404, at *3.

132. *O’Brien*, 1998 WL 391019, at *4; *Applicants*, 1994 WL 923404, at *7 n.14.

reexamination, the American Bar Association ("ABA") adopted a resolution calling for narrower mental health questions on bar applications, and the NCBE narrowed the mental health questions on its standard application and character form.¹³³ These developments brought bar application questions closer in line with the American Psychiatric Association's ("APA") guidelines for mental health screening for medical professionals.¹³⁴

The ABA resolution resulted from the collaboration of four organizations: the ABA Commission on Mental and Physical Disability Law, the ABA Section on Legal Education and Admissions to the Bar, the NCBE, and the Association of American Law Schools ("AALS").¹³⁵ These organizations, whose members had differing and often conflicting perspectives on both the effectiveness and the propriety of mental fitness inquiries, came together to seek consensus on appropriate fitness inquiries.¹³⁶ These inquiries would need to provide the bar examiners the information necessary to assess an applicant's current fitness, respect the applicants' privacy interests, and further the shared interest in not unduly deterring law students and other applicants from seeking counseling and other helpful treatment. With these goals in mind, the four organizations produced a joint resolution calling for "narrow limits" on mental health inquiries to bar applicants.¹³⁷ The ABA House of Delegates adopted this resolution in 1994.¹³⁸

The ABA resolution recommends three principles to guide bar examiners in formulating character and fitness inquiries. First, bar examiners should "consider the privacy concerns of bar admission

133. *ABA Resolution*, *supra* note 11, at 598. See generally NCBE CHARACTER AND FITNESS REPORT, *supra* note 17 (reflecting narrower character and fitness questions).

134. See APA GUIDELINES, *supra* note 11, at 1.

135. *ABA Resolution*, *supra* note 11, at 598.

136. *Id.*

137. *Id.* The ABA Commission on Mental and Physical Disability Law and the Section on Legal Education and Admissions to the Bar released statements accompanying the resolution, emphasizing that it was a "compromise position." *Id.* at 597. Members of both organizations would have preferred to take the position that any inquiries into mental health diagnoses and treatment were inappropriate. *Id.* at 597-98; see Coleman & Shellow, *supra* note 21, at 162 n.90 (noting that the Commission proposed that inquiries be limited to "specific behaviors related to character and fitness, such as the individual's conduct, exercise of responsibility, trustworthiness, integrity and reliability" or the existence of a current "condition that significantly impairs that applicant's ability to exercise the responsibilities of an attorney such as handling funds, exercising independent judgment, meeting deadlines, or otherwise affecting the representation of clients" (quoting *ABA Resolution*, *supra* note 11, at 598)).

138. *ABA Resolution*, *supra* note 11, at 597.

applicants.”¹³⁹ Second, they should “tailor questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law.”¹⁴⁰ And finally, they should “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.”¹⁴¹ Reflecting these principles, the ABA further recommended “[t]hat 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.”¹⁴² The ABA thus encouraged bar examiners to shift their inquiries from treatment history or diagnoses to an applicant’s past conduct and current functioning.

At the time the NCBE endorsed this resolution, its own character questionnaire included far-reaching questions that were not in keeping with the call for narrowly tailored questions focusing on current functioning.¹⁴³ In response, the NCBE modified its form by narrowing its inquiries, though perhaps not as tightly as the ABA resolution would seem to require.¹⁴⁴ Because many states pattern

139. *Id.* at 598.

140. *Id.*

141. *Id.*

142. *Id.* (emphases added).

143. See Herr, *supra* note 4, at 644–45. The NCBE form then in use asked whether the applicant had “ever been treated or counseled for any mental, emotional, or nervous disorder or condition” or had “ever voluntarily entered or been involuntarily admitted to an institution for treatment of a mental, emotional, or nervous disorder or condition.” *Id.* (citing *Clark v. Va. Bd. of Bar Exam’rs*, 880 F. Supp. 430, 441 (E.D. Va. 1995)).

144. See NCBE CHARACTER REPORT, *supra* note 17, at 12. Question 25 asks: “Within the past five years have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?” *Id.* While this inquiry is time-limited and focused on more serious disorders, it asks about diagnosis and treatment history, not current functioning. Question 26 inquires: “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?” *Id.* This otherwise well-crafted question requires an applicant to disclose a controlled or treated condition that has no actual effect on current functioning.

Around this time, the federal government revised its own security clearance inquiries, tailoring questions about mental disorders to relate to the employee’s job performance and eliminating the requirement that the employee sign general releases to allow examination of all medical records. Herr, *supra* note 4, at 643. Professor Herr suggests that the reforms of the bar questionnaires and of the government security clearance questionnaires were “not unrelated.” *Id.* Both reflected a commitment to conform to the ADA, as well as a growing concern about the perils of professional penalties for seeking mental health treatment. Herr points to the suicide of White House aide Vincent Foster as a salient reminder of this risk. *Id.* at 644. It was later learned that Foster, despite his depression, had hesitated to see a psychiatrist for fear that it would cost him his White House security clearance. *Id.* (citing Lloyd Cutler, *Psychotherapy: No Sign*

their own fitness inquiries after the NCBE's form, or contract with the NCBE to administer their fitness reviews, these revisions were significant.

These steps toward narrowing or eliminating questions about mental health diagnoses and treatment bring the legal profession more in line with the medical profession. The APA's guidelines for licensing boards—principally medical or nursing boards—call for a focus on current functioning or impairment, not on diagnosis or treatment history.¹⁴⁵ When a licensing board assesses an applicant's fitness, “[t]he salient concern is always the individual's *current* capacity to function and/or current functional impairment.”¹⁴⁶ Thus, applications should inquire only about “disorders that *currently* impair the capacity to function” and that are “relevant to *present* practice.”¹⁴⁷ A sample question for assessing current functioning asks only about recent disorders that actually impair the individual's ability to practice.¹⁴⁸

Significantly, the APA asserts that “[p]rior psychiatric treatment is, per se, not relevant to the question of current impairment.”¹⁴⁹ Accordingly, it is “not appropriate or informative to ask about past psychiatric treatment except in the context of understanding current functioning.”¹⁵⁰ Where there is no evidence that current functioning is impaired, there is no reason to inquire about past mental health treatment. Indeed, the APA expresses concern about “policies that require inappropriate and indiscriminant disclosure of a history of psychiatric consultation and treatment . . . [that] stigmatize individuals who seek consultation and treatment” and “inhibit individuals who are in need of treatment from seeking help.”¹⁵¹

of a Security Risk, WASH. POST, July 12, 1994, at A17).

145. See APA GUIDELINES, *supra* note 11, at 1. The APA is “a national medical specialty society,” whose “physician members specialize in the diagnosis and treatment of mental and emotional illnesses and substance use disorders.” *Id.* While these guidelines are addressed to medical licensing boards and others who assess physician impairment, they are equally applicable to assessing attorney impairment.

146. *Id.* (emphasis added).

147. *Id.* (emphases added).

148. *Id.* (“In the last two years have you had any medical condition, mental disorder, or use of alcohol or drugs which has impaired your ability to practice medicine or to function as a student of medicine?”).

149. *Id.*

150. *Id.*

151. *Id.* By the mid-1990s, most, but not all, state medical licensing boards had adopted the APA's recommended approach, asking about impaired professional performance rather than diagnosis or treatment. Claudia Center, et al., *Confronting Depression and Suicide in Physicians: A Consensus Statement*, 289 J. AM. MED. ASS'N 3161, 3164 (June 18, 2003). In a recent statement, a respected team of medical, legal, and

The federal courts and medical and legal professional organizations thus concur that a licensing board's proper concern is the applicant's *current* fitness, not her history of impairment or treatment. There also is a legal and professional consensus that mental health questions must be narrowly tailored to seek only information relevant to an applicant's current professional fitness. Finally, there is widespread concern that questions about diagnosis and treatment will deter applicants from seeking needed care to maintain their mental and emotional fitness. These widely accepted principles provide one basis for evaluating the mental health questions on the North Carolina bar application.

III. REFORMING THE FITNESS INQUIRY IN NORTH CAROLINA

The preceding discussion helps identify two major flaws in North Carolina's bar exam application. First, the "have you ever" questions often require disclosure of information too remote in time to be relevant to an applicant's current fitness to practice law. An applicant's hospitalization at age fifteen for major depression has no bearing, a decade or more later, on her current fitness to practice law. Second, the questions require disclosure of diagnoses and treatment that have no relation to an applicant's fitness to practice law, regardless of their timing. A third-year law student's decision to seek counseling to help her through a painful divorce in no way suggests that she poses a threat to prospective clients. Because such information is neither relevant nor necessary to determining an applicant's fitness, the ADA prohibits seeking it. The issue for the Board and the Bar is not whether the current questions are valid, but how they should be revised.

Truth be told, even stubborn-spirited revisions to bring about mere grudging compliance with the ADA would constitute a step forward for North Carolina. But candid recognition that North Carolina's current bar application questions do not comply with the ADA presents an opportunity for something worthier—a voluntary, cooperative effort to realize truly progressive reform that will bear witness to the Bar's dedication to equal opportunity, fair treatment, and respect for all. As members of the North Carolina legal community, we should settle for nothing less than an open-minded,

professional licensing experts cited remaining diagnosis and treatment questions as "punitive barriers" to physicians' seeking mental health treatment. The team called on licensing boards to "require disclosure of misconduct, malpractice, or impaired professional abilities" rather than diagnosis or treatment and to limit the time frame of impairment questions. *Id.* at 3161, 3165.

inclusive, and ambitious pursuit to identify the fitness review that best serves the long-term interests of the public and the profession. The fitness review should reflect the Bar's high standards of conduct and professionalism; its continued commitment to confidential support, treatment, and intervention for impaired lawyers; and its respect for the letter and the spirit of the law.

To seize this opportunity and effect needed change, we should be mindful of three dimensions of a meaningful reform effort. First is the process of reform: who should initiate it, who should participate in the decision-making, and who should be invited to offer comments, expert opinions, or other guidance? I suggest that the Board and the Bar together undertake a proactive collaboration to formulate a new fitness inquiry with input from knowledgeable and interested parties without undue delay. Second are the principles of reform: what basic principles should guide and inform any discussion of mental health inquiries? I propose three: a focus on the necessity of the questions, an appreciation of the risks and costs of deterring applicants from seeking treatment, and a commitment to tailor the inquiries in order to seek and obtain only that information that is needed and only when it is needed. The third dimension of this undertaking involves specific proposals for reform: within the discretion allowed by the ADA, what inquiries and investigations would best protect the public from unfit lawyers while respecting applicants' privacy and encouraging sound mental health maintenance? I conclude that the approach that is most consistent with the letter and intent of the ADA and truest to our ideals and practices as lawyers is to ask only about conduct and behavior—the best predictors of an applicant's future behavior—unless and until there is convincing empirical evidence that status-based questions (e.g., the status of being a mental health consumer) are necessary to protect the public from unfit lawyers.

A. *The Process of Reform*

The Bar should be proactive, reviewing and revising the bar application as soon as possible rather than waiting to respond to an ADA lawsuit.¹⁵² The Board and the Bar together could initiate

152. At least one North Carolina bar applicant has considered a lawsuit. In 1995, an applicant retained counsel to challenge the then-current question (question 24(b)) about regular treatment—defined as more than four visits in a year—for “amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder.” Stuart C. Gauffreau, *The Propriety of Broadly Worded Mental Health Inquiries on Bar Application Forms*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 199, 199 (1996). The applicant's affirmative answer to this

reform, taking their lead from any number of existing sources, including case law; U.S. Department of Justice regulations, guidance and litigation positions; the consensus position of the AALS, the ABA, and the NCBE; the recent experiences of other states; and North Carolina's own experiences in identifying bar applicants who present a fitness risk.

Successful models of responsiveness exist, starting with the actions of bar admissions officials in the District of Columbia. Shortly before the ADA was to take effect, a mental health advocacy group wrote to the District of Columbia Committee on Admissions ("Committee") and to the chief judge of the District of Columbia Court of Appeals, asserting that the mental health questions on the bar application violated Title II of the ADA.¹⁵³ In short order, the court of appeals directed the Committee to eliminate a question about outpatient treatment or counseling and to limit the substance abuse and inpatient treatment questions to the preceding five years.¹⁵⁴ Writing about the Committee's readiness to change the questions,

question subjected him to a hearing. *Id.* In response to a request from his attorney, the DOJ stated in an opinion letter that this and other questions "'appear problematic because they fail to focus on *current* impairment.'" *Id.* at 217 n.119 (quoting Letter from Sheila M. Foran, DOJ, Re: Mental Health and Substance Abuse Inquiries on North Carolina Bar Exam Application Form, 1 (Sept. 29, 1995)). The applicant ultimately decided not to sue after the Board deemed him fit to practice law and revised its questionnaire to omit question 24(b). *Id.* at 199. The Board replaced question 24(b) with the current questions 27, 28, 30 and 31. *Id.* at 217 n.119.

While North Carolina's fitness inquiry has not yet been the subject of a lawsuit, it has been the subject of concern. In his thoughtful analysis of the legal and equitable issues surrounding mental health inquiries on bar applications, North Carolina lawyer Stuart Gauffreau recounts the work of University of North Carolina law professor Daniel H. Pollitt. *Id.* at 200-01. In 1992, Professor Pollitt sought to have the questions removed or revised, criticizing them as stigmatizing, overly intrusive under the ADA, inaccurate as a means to identify unfit applicants, disrespectful of applicants' privacy, and ineffective at ensuring lawyer fitness, in that they deterred law students from seeking treatment that would help them maintain their mental and emotional fitness. *Id.* at 200. To buttress his contentions, Professor Pollitt offered, among other things, an affidavit from psychiatrist Robert N. Golden of the University of North Carolina School of Medicine. Dr. Golden advised that requiring applicants to release treatment records would result in the disclosure of intensely private matters that have no bearing on an applicant's fitness to practice law. *Id.* at 201. He equated regular mental health care with regular physical health care and stated that the decision to seek counseling often reflects insight and maturity. *Id.* Flagging mental health treatment as a sign of possible lawyer unfitness reflected "the lingering fear, ignorance, and prejudice that still surrounds psychiatry and psychotherapy." *Id.*

153. Reischel, *supra* note 23, at 10 & 22 n.3. The application asked three "have you ever" questions taken from the NCBE standard application: one dealing with substance abuse disorders, one with inpatient treatment for mental disorders, and one with any treatment or counseling for any mental, emotional or nervous disorder. *Id.* at 10.

154. *Id.* at 10 & 22 n.3.

counsel to the Committee explained that the treatment question added little, if any, marginal benefit because applicants' significant mental health problems "[a]lmost always . . . ha[d] been signaled by responses to other questions (about arrests, crimes, debt, litigation, discipline, etc.)."¹⁵⁵

Other states have revised their questionnaires through cooperative efforts by members of the state bar, the board of law examiners, the state's law school faculties, civil rights organizations, and past and prospective applicants. In Maryland, for example, the board of law examiners narrowed its mental health inquiries at the request and recommendation of two organizations, the state bar's Section on Legal Education and the Clinical Law Office of the University of Maryland Law School. The clinic, representing an applicant whose admission had been delayed because of her history of mental health treatment, elected to pursue this non-adversarial approach partly in recognition of the common ground shared by bar applicants, bar members, and bar examiners.¹⁵⁶

Elsewhere, resolution and accord have not come easily. The Connecticut Bar Examining Committee ("CBEC") has defended against numerous ADA lawsuits during the past twelve years.¹⁵⁷ One lawsuit settled only after public hearings demonstrated widespread support for reform.¹⁵⁸ The CBEC scheduled the hearings at the urging of the federal judge handling an ADA lawsuit challenging that state's questions—the third such challenge filed in three years.¹⁵⁹ Two public hearings and many written submissions revealed nearly unanimous opposition to the challenged questions.¹⁶⁰ Opponents included psychiatrists, mental health organizations, state agencies, bar applicants, the U.S. Department of Justice, practicing attorneys, and

155. *Id.* at 20. Elsewhere, plaintiffs have demonstrated the efficacy of conduct-related questions. *See, e.g.,* *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 445 (E.D. Va. 1995) (citing the lack of evidence that the challenged mental health question revealed any mental illness that other questions could not as easily uncover).

156. Herr, *supra* note 4, at 655–65 (discussing the clinic's strategy of pursuing reform without litigation). The results were not all that the clinic had hoped to achieve, but its director nonetheless considered the process a "win-win" situation. *Id.* at 665.

157. *See* Bauer, *supra* note 26, at 106, 109 (discussing four lawsuits—filed by Doe, Roe, Anonymous, and Szarlan—initiated between 1992 and 1994); *id.* at 116–19 (discussing Rose Gower's 2000 lawsuit); *id.* at 119–25 (discussing Kathleen Flaherty's 2000 lawsuit).

158. *Id.* at 107–08. The lawsuit challenged a "have you ever" question about outpatient treatment for any "mental, emotional or nervous disorder." *Id.* at 109 n.51.

159. *See id.* at 108–09.

160. The lone statement supporting the questions came from the Florida Board of Law Examiners. *See id.* at 108 n.48. Florida subsequently lost two ADA challenges to its own questions. *Id.* at 126–27.

others.¹⁶¹ Following these hearings, the CBEC settled the lawsuit with a consent decree.¹⁶²

In Rhode Island, the Character and Fitness Committee reform was achieved by court order, this time in advance of an ADA lawsuit rather than in response to one. When the Rhode Island affiliate of the American Civil Liberties Union ("ACLU") asked the committee to revise the mental health questions to comply with the ADA, the committee sought direction from the Supreme Court of Rhode Island, which deferred the matter pending the committee's "fact-finding and revision process."¹⁶³ When the committee and the ACLU could not agree on new questions, the court appointed a special master, who had both legal and medical degrees, to receive public comments, analyze the permissibility of the challenged questions, and make recommendations about new inquiries.¹⁶⁴ A leading mental health

161. *Id.* at 108. Professor Jon Bauer, who represented the plaintiff, reported that the reform effort benefited greatly from the formal and informal involvement of many members of the legal community, including the chief justice of the state supreme court, a law school dean, the state bar association's Committee on Disability Law and Section on Human Rights and Responsibilities, and the Civil Rights and Disability Law Clinics of the University of Connecticut School of Law. *See id.* at 106 n.41, 107 n.45, 108 n.47.

162. *Id.* at 108–09. The settlement required the CBEC to eliminate a broad treatment-based question: "Have you ever been treated as an outpatient for any mental, emotional or nervous disorders?" *Id.* at 109 n.51 (citing *Szarlan v. Conn. Bar Exam. Comm.*, No. 3:94CV-160 (D. Conn. June 26, 1994) (stipulation and order of dismissal)). The CBEC replaced it with the following question: "Since you became a law student, have you ever had an emotional disturbance, mental illness or physical impairment which has impaired or would impair your ability to practice law or to function as a student of law?" *Id.* at 108, 109 n.51 (citing *Szarlan* (No. 3:94CV-160)).

Unfortunately for the reform advocates, while the consent decree prohibited the use of the old question, it did not direct the use of any specific new questions. Thus it did not bar the CBEC from revising its application two years later to require disclosure of certain diagnoses, even absent any current impairment. *Id.* at 109. The CBEC later added "clinical depression" to the list of diagnoses that had to be disclosed, prompting forceful objections from the president of the Connecticut Bar Association and the president pro tempore of the state senate, among others. *Id.* at 111. In the face of intense public criticism, the CBEC deleted the reference to depression the following year. *Id.* at 112.

The CBEC remains inexplicably committed to its status-based mental health questions. To this day, it asks applicants whether they have ever been hospitalized for mental illness, have ever been treated or counseled for substance abuse, or within the preceding five years have been diagnosed or treated for specified mental disorders. CONN. BAR EXAMINING COMM., APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY IN CONNECTICUT BY EXAMINATION, <http://www.jud.state.ct.us/CBEC/instadmisap.htm#Form> (last visited May 17, 2003) (on file with the North Carolina Law Review).

163. *See In re* Petition and Questionnaire for Admission to the R.I. Bar, 658 A.2d 894, 895 (R.I. 1995). The court also granted the ACLU amicus status. *Id.*

164. *Id.* (appointing a special master to "receive input from members of the community whose interests may be affected and whose participation may better inform us as to the value and propriety of the queries"). The special master received briefs and comments

advocate and legal scholar praised this process for shedding light on stereotypes and myths, offering “political ‘cover’ for the committee to make extensive changes in the questions . . . [and] reassuring the public that it could have ‘competent counsel while protecting the individual applicant from unnecessary intrusions into his or her zone of privacy.’”¹⁶⁵ The court endorsed the special master’s determination that the challenged questions violated the ADA and ordered the bar examiners to limit their inquiry to two questions related to any conditions that, in the applicant’s own assessment, would affect her ability to practice law.¹⁶⁶

North Carolina would be well advised to pursue the receptive, cooperative approach to reform modeled by the District of Columbia and Maryland licensing boards, which responded promptly and positively to requests to bring their bar application inquiries into compliance with the ADA.¹⁶⁷ It would be a mistake, however, to

from, among others, the United States Department of Justice, the Governor’s Commission on the Handicapped, the Rhode Island Association of Social Workers, the Rhode Island Psychiatric Society, and numerous mental health treatment and advocacy groups. *In re Petition and Questionnaire for Admission to the R.I. Bar*, 683 A.2d 1333, 1335 (R.I. 1996).

165. Herr, *supra* note 4, at 669–70 (quoting *In re Petition and Questionnaire for Admission to the R.I. Bar*, 658 A.2d at 896); *see id.* at 669 (praising this process for creating a “a model of organized fact finding and a climate for ‘meaningful dialogue’ among ‘all interested members of the community’”).

166. *In re Petition and Questionnaire for Admission to the R.I. Bar*, 683 A.2d at 1337. Other states have revised their questions through negotiations or settlement agreements with the U.S. Department of Justice. *See, e.g.*, Letter from Merrily A. Friedlander, Acting Chief, Coordination and Review Section, Civil Rights Division, United States Department of Justice, to Stephen C. Villarreal, Chairman, Committee on Character and Fitness, Arizona State Supreme Court (Nov. 7, 1994) (noting agreement to replace questions based on treatment history or on current conditions that “might” affect the applicant’s ability to “engage in the continuous practice of law” with questions based on conduct, rather than status), <http://www.usdoj.gov/crt/foia/lof038.txt> (last visited June, 30, 2003) (on file with the North Carolina Law Review).

In Minnesota, reform came about when law school deans and professors petitioned the Supreme Court of Minnesota to direct the board of law examiners to eliminate the bar application questions about mental health treatment. *In re Frickey*, 515 N.W.2d 741, 741 (Minn. 1994). The court so ordered, “finding that the prospect of having to answer the mental health questions . . . causes many law students not to seek necessary counseling . . . and believing that questions relating to conduct can, for the most part, elicit the information necessary . . . to protect the public from unfit practitioners.” *Id.* The court was exercising its discretion to grant the order based on policy concerns; it did not address the permissibility of the questions under the Minnesota Human Rights Act or the federal and state constitutions, and, indeed, it questioned whether the ADA applied. *Id.*

167. In the District of Columbia, mental health advocates wrote to the District of Columbia Court of Appeals and bar admissions committee in September 1991 and January 1992; the questions were revised by February 1992. Reischel, *supra* note 23, at 10 & 22 n.3. In Maryland, the law examiners took only a week to admit the applicant whose denial of admission prompted the request for reform; they revised their questions eight months later. Herr, *supra* note 4, at 660. Rhode Island’s reform took longer. The state

delay review and reform for protracted hearings. Rather, the Board or the Bar could set a reasonable time period to collect comments and suggestions from concerned and knowledgeable individuals and organizations¹⁶⁸ and then use those contributions to supplement the information and guidance produced by a full decade of judicial, medical, professional, and scholarly responses to concerns about sweeping mental health inquiries for bar applicants.

B. Principles for Reform

Eliminating the existing over-broad mental health questions is just the starting point. The more challenging task is shaping a new fitness review. Three principles should inform North Carolina's consideration of the precise content and structure of this review procedure. First and foremost, we must be confident that the mental health questions on the application are "necessary," that is, that they are relevant to an applicant's current fitness to practice law, and that they serve to detect unfitness that would not otherwise be revealed by conduct-related questions. Second, we should assess the questions' potential long-term effects on lawyer impairment, bearing in mind that the message a bar applicant receives about the profession's attitude toward mental disorders and mental health treatment may shape his future decisions about treatment. Third, whatever questions are included must be carefully worded, and any follow-up inquiries and investigations should proceed incrementally and judiciously in order to require the disclosure of only that information that is necessary to the Board's fitness determination.

1. Focus on "Necessity"

Because the touchstone of a question's validity is "necessity," a clear appreciation of this concept should precede discussion of any specific inquiries. A first step might be to ask "necessary for what purpose?" The Board's character and fitness review is limited to the applicant's *present* fitness, so questions must be necessary to

ACLU first asked the Rhode Island Character and Fitness Committee for revisions in February 1993, and the state supreme court did not issue its order revising the questionnaire until October 1996. *In re Petition and Questionnaire for Admission to the R.I. Bar*, 658 A.2d at 895.

168. These might include mental health professionals, law school deans, law school faculty and administrators who counsel students, past and present officials of the North Carolina Bar, the directors of the Lawyer Assistance Program, bar disciplinary officials, members of the bar, recent and prospective bar applicants, and interested sections of the North Carolina Bar Association, such as the Section on the Quality of Life and the BarCARES program.

determine *present* fitness to *practice law*.¹⁶⁹ The standard is not whether the bar examiners are confident (much less certain) that the applicant will maintain a high level of functioning over time.¹⁷⁰ No applicant presents such a guarantee. Illness, accident, or personal or family trauma could diminish any lawyer's functioning at any time.¹⁷¹

Moreover, the Board's sole concern is evidence of actual present impairment that bears on fitness *to practice law*. Thus, questions about current impairment must address professional functioning, not an applicant's personal dysfunction or distress. An applicant's personal struggles with marital discord, sexual dysfunction, or self-esteem are just that: personal.¹⁷² The same is true for conditions that may constrict a person's employment or other life options but do not render her unfit to practice law. Consider a law student or lawyer

169. See *Applicants v. Tex. State Bd. of Law Exam'rs*, No. A93 CA 740 SS, 1994 WL 923404, at *1 (W.D. Tex. Oct. 11, 1994) (noting that mental health inquiry is relevant only where board can "identify a clear and rational connection between the applicant's *present* mental or emotional condition and the likelihood that the applicant will not discharge properly the applicant's responsibilities to a client, a court, or the legal profession if the applicant is licensed to practice law." (emphasis added)); *ABA Resolution*, *supra* note 11, at 598 (questions must be germane to the applicant's "*current* qualifications to practice law" (emphasis added)); APA GUIDELINES, *supra* note 11. Fitness, recall, includes the abilities to reason, communicate, accurately perceive and understand facts and circumstances, and to perform legal tasks in a timely manner. See N.C. BAR APPLICATION, *supra* note 3, at 4 (Character and Fitness Guidelines).

170. See NAT'L CONFERENCE OF BAR EXAM'RS, THE BAR EXAMINERS' HANDBOOK 73:8302 (Stuart Duhl ed., 3d ed. 1991) (stating that examining boards should not consider themselves responsible for assuring the public that an applicant who, at the time of admission, "is doing what is necessary to maintain his recovery" will not relapse in the future because "[f]itness . . . relates to the applicant's integrity and character today"). Predictions about future conduct of any sort are dubious enterprises, even in the hands of mental health professionals. See Ann Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerous Mentally Ill,"* 34 U.C. DAVIS L. REV. 849, 885-92 (2001) (discussing the complexity and uncertainty of attempting to predict violent behavior by persons with diagnosed mental disorders).

171. Indeed, given that depression, substance abuse and other disorders occur frequently among lawyers and may appear after years of practice, perhaps the only certainty for bar examiners is that some significant number of applicants who are fit today will face impairment tomorrow. That impairment is properly addressed by lawyer assistance programs and bar disciplinary schemes, not by the bar application.

172. This was a central concern in *Doe v. Judicial Nominating Commission of the Fifteenth Judicial District of Florida*, 906 F. Supp. 1534 (S.D. Fla. 1995). The court concluded that "[t]he inquiry into 'any hospital confinement,' 'any form of mental illness,' [and] 'any form of emotional disorder or disturbance,' vividly demonstrate[d] the over-inclusiveness of the mental health questions," as it could require disclosure of family counseling or "hospitalization or treatment resulting from personal traumas such as childhood sexual abuse or loss of a loved one." *Id.* at 1544-45 (quoting application questions) (alteration in original). The court was perplexed by the point of such inquiries: "How such events and conditions could possibly be considered reasonably related to an individual's capacity to perform as a judge eludes this court." *Id.* at 1545.

with chronic depression or chronic fatigue syndrome that leaves her little energy or motivation for anything outside her work or that prompts her to choose part-time work. Her stamina is limited, but her thinking is clear, her communication effective, her judgment sound, and she undertakes obligations that are suited to her abilities and her needs. She is fit to practice law.

A second step to gauging the necessity of mental health questions is to determine whether the existing conduct-related questions suffice to alert the Board to applicants who need a harder look. If so, the mental health questions are unnecessary. The North Carolina bar application currently inquires exhaustively into many aspects of an applicant's conduct, including: past and present family relationships and responsibilities;¹⁷³ academic performance and educational record, including actions that reflect poorly on the applicant or led to discipline;¹⁷⁴ military record;¹⁷⁵ complete work history; employment problems;¹⁷⁶ proof of good character;¹⁷⁷ adverse judgments or claims or demands; financial or credit problems;¹⁷⁸ litigation history;¹⁷⁹ criminal and traffic records;¹⁸⁰ and, where applicable, record of practice in other jurisdictions.¹⁸¹ In addition, the applicant must obtain certificates of good moral character from four people and provide the names of eight others who will serve as character references.¹⁸² These questions can be expected to produce evidence of most—if not all—conduct that discloses poor judgment, impaired cognition, a lack of maturity or responsibility, a skewed perception of reality, unprofessional behavior, financial irregularities or irresponsibility, erratic academic or professional performance,

173. N.C. BAR APPLICATION, *supra* note 3, at 6 (General Application). Question 3 inquires about current and prior marriages, separation, divorce, alimony, or support payments and requests documentation related to terminated relationships or ongoing support obligations. *Id.*

174. *Id.* at 7 (asking, among other things, whether the applicant has ever been “dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled or requested to resign from any school”; been charged with an honor code violation; or failed to answer truthfully all questions on admissions applications).

175. *Id.* at 9 (asking about Selective Service registration, court-martials, and military discharge).

176. *Id.* at 10–11 (asking if the applicant has been discharged from employment or asked to resign from a job).

177. *Id.* at 11 (asking about license denials or suspensions for lack of good character).

178. *Id.* at 13–15 (inquiring into bankruptcy filings, delinquent taxes, student loan defaults, current indebtedness, and revoked or suspended credit cards).

179. *Id.* at 15–16.

180. N.C. BAR APPLICATION, *supra* note 3, at 15–17.

181. *Id.* at 30–32.

182. *Id.* at 27–28.

impulsiveness, a lack of regard for others, or other personal traits, tendencies, or behaviors that warrant further inquiry to determine the applicant's fitness to practice law. If the Board's experience were to prove these conduct-related questions inadequate to call attention to applicants who may pose a risk to the public, it should first attempt to revise these questions to make them more effective before it resorts to mental health status questions.

2. Weigh the Long-Term Costs of Deterrence Against Immediate Gains in Detection

While necessity is the threshold of permissibility, the second principle—careful consideration of the long-term effects on overall lawyer impairment—goes more to the wisdom and desirability of mental health questions. Instead of asking whether a mental health inquiry is merely acceptable, North Carolina should ask whether it is optimal for removing the stigma of mental health diagnoses and treatment and encouraging the responsible use of mental health services. This approach weighs the long-term costs of questions that discourage treatment against the benefits (if any) those questions provide for detecting unfit applicants. Doing so honors the Bar's laudable commitment to reducing lawyer impairment through education, confidential peer support, and early intervention.

The Lawyer Assistance Program ("LAP") embodies that commitment and reflects sensitivity to the principle proposed here. LAP and its component organizations, Positive Action for Lawyers ("PALS") and FRIENDS,¹⁸³ provide confidential support and assistance to lawyers confronting, living with, or in recovery from mental disorders or substance abuse.¹⁸⁴ LAP uses peer support, referrals, and intervention to help a lawyer maintain or regain her professional functioning, preferably before she disserves her clients, neglects her professional responsibilities, or damages her professional standing or personal life. All information received by LAP—from lawyers, concerned colleagues, friends, or family members—is kept confidential under the Revised Rules of Professional Conduct.¹⁸⁵ Nothing is disclosed to the Bar's disciplinary organization. This guarantee of confidentiality encourages lawyers to seek early treatment without risking damaged reputations or intrusive

183. For a description of PALS and FRIENDS, see N.C. State Bar, *LAP/PALS/FRIENDS*, at <http://www.ncbar.com/home/pal.asp> (last visited June 10, 2003) (on file with the North Carolina Law Review).

184. *Id.*

185. See N.C. ADMIN. CODE tit. 27, r. 1D.0613 (June 2002).

investigations into personal matters.

This approach weighs the long-term costs of mental health questions against their benefits (if any) in detecting unfit applicants. The principle can be simply stated: in reducing lawyer impairment, the long term matters, and in the long term, confidentiality encourages treatment while disclosure deters treatment. Deterring treatment results in more lawyers with untreated or uncontrolled mental disorders, which produces greater lawyer impairment, which in turn increases the risk of injured and disserved clients.¹⁸⁶

The Bar also encourages treatment through programs that educate lawyers about mental disorders and seek to remove the stigma and prejudice surrounding them. One significant step is the requirement, imposed in 2002, that lawyers take one hour of continuing legal education on substance abuse and debilitating mental conditions every three years.¹⁸⁷ This instruction can help lawyers recognize the symptoms of depression and other disorders in themselves, their colleagues, and their clients; overcome prejudices and stereotypes about mental disorders; learn about treatment and prevention programs; support the recovery efforts of their peers; and examine the effect of mental disorders on a lawyer's professional responsibilities.

The Bar, through its Quality of Life Task Force ("Task Force"), also has emphasized the importance of removing mental health stigma and encouraging mental health treatment. The Task Force's 1991 report and recommendations included the goal of "remov[ing] counseling stigma," and it challenged bar organizations, law firms, law schools, and individuals to do their part.¹⁸⁸ Notably, it called on bar

186. In a similar context, the Supreme Court has recognized that protecting an individual's privacy with respect to mental health treatment may also protect public interests. See *Jaffee v. Redmond*, 518 U.S. 1, 10–11 (1996) (recognizing that the fear of disclosure undermines effective mental health treatment, and that deterring public servants, such as police officers, from seeking or receiving effective treatment risks compromising the public safety).

187. tit. 27, r. 1D.1518. Other means of educating and enlightening lawyers include the features and columns about recovery that appear regularly in the Bar's quarterly magazine. See, e.g., Anonymous, *Before and After*, N.C. STATE BAR J., Spring 2003, at 33.

188. N. C. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE QUALITY OF LIFE TASK FORCE 1, 17 (1991). The Task Force encouraged law schools to "[m]ake counseling readily available, encourage its use and remove any stigma associated with it by making it a normal function in the educational process." *Id.* at 24. It called on law firms to "[p]romote an environment where lawyers seek professional counseling without stigma . . . through adoption of an EAP [employee assistance program], participation in Bar support programs or establishment of relationships with counselors." *Id.* at 21. It also urged individual members of the profession to "utilize appropriate counseling, therapy and peer support." *Id.* at 27.

organizations “[t]hrough proper means, [to] re-examine language of the North Carolina State Bar Application regarding the history of counseling question, or otherwise eliminate any inference of stigma arising from counseling.”¹⁸⁹

Concerns that stigma and fear of disclosure deter people from seeking mental health treatment are well-placed. The U.S. Surgeon General, in his groundbreaking 1999 report on mental health, reported that the majority of Americans who experience depression will not seek treatment, in large part due to the fear of being stigmatized.¹⁹⁰ Research indicates that people will be less likely to seek treatment, or less likely to reveal sensitive information in treatment, if they believe the information may be disclosed to others.¹⁹¹ An AALS survey of students at nineteen law schools confirms this pattern in law students.¹⁹² Students were four times more likely to seek help from a law school or university substance abuse program if given the assurance that they would not have to report the treatment and bar officials would not learn of it.¹⁹³ The guarantee of confidentiality more than doubled their willingness to refer a fellow law student for substance abuse treatment.¹⁹⁴

The personal and professional costs of deterring mental health treatment are amplified by the high incidence of depression, anxiety, and stress-related symptoms among law students. As many as one-third of first-year law students experience significantly elevated levels of depressive symptoms, and as many as two in five graduate from law school—and enter the profession—in the same condition.¹⁹⁵ Law students fare no better once they become lawyers.¹⁹⁶ Studies suggest that depression rates for lawyers are three times higher than for other professionals¹⁹⁷ and double that of the general population.¹⁹⁸

189. *Id.* at 17.

190. SURGEON GENERAL'S REPORT, *supra* note 7, at 22.

191. *Id.* at 6.

192. Ass'n of Am. Law Schools, *Report of the AALS Special Committee on Problems of Substance Abuse in Law Schools*, 44 J. LEGAL EDUC. 35, 36 (1994).

193. *Id.* at 55.

194. *Id.*

195. G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 246-47 (1986) (noting that twenty to forty percent of law students report an increase in depression, anxiety, and other stress-related symptoms once they begin law school).

196. Beck, *supra* note 31, at 2-3 (noting that, not surprisingly, “nearly 70% of lawyers are likely candidates for alcohol-related problems” during their careers).

197. See Bauer, *supra* note 26, at 161 n.220 (citing Eaton et al., *supra* note 30 at 1081, 1083).

198. Benjamin et al., *supra* note 29, at 240-41 (finding that lawyers in the State of Washington experienced symptoms of depression or substance abuse at a rate double the

Against well-founded concerns about stigma and deterrence and their detrimental effect on lawyer impairment, there is little or no evidence that status-based questions related to diagnosis or treatment disclose any impairment that is not already revealed or suggested by conduct-related questions. Time after time, a thoughtful review of the evidence—whether trial testimony or public submissions—has revealed that mental health status questions offer little appreciable benefit at considerable personal and professional cost.¹⁹⁹ There is no reason to believe the calculus is different in North Carolina. Statistics recently compiled by Fred P. Parker III, Executive Director of the Board, show that 3,976 applicants applied to the Bar in the three-year period of 2000 to 2002.²⁰⁰ Of those nearly four thousand applicants, only six were denied licenses on “character and fitness grounds.”²⁰¹ The report does not separate denials based on character from those based on fitness or on some combination of the two.²⁰² It may be that none of the six applicants even presented a mental health issue. Many or even all may have been denied on character grounds, based on evidence of unlawful conduct; academic misconduct; a lack of candor on a law school application or the bar application; any act involving dishonesty, fraud, or misrepresentation; or neglect of financial or professional responsibilities.²⁰³

Moreover, the relevant question is not whether any of the excluded applicants happened to have a diagnosis or history of a mental disorder, but rather whether any of them would have escaped detection but for an affirmative answer to one of the triggering mental health questions. In other words, did any of these applicants answer “yes” to one of questions 26 through 32, yet have *nothing* else in his or her file that would have alerted bar examiners to a potential lack of fitness? And even assuming (against all odds) that all of these applicants were detected *solely* because of their mental health

national average).

199. See, e.g., *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 445–46 (E.D. Va. 1995) (balancing the “stigmatizing and inhibiting effect” of a mental health treatment question against the “insignificant results it achieves”); Bauer, *supra* note 26, at 164 (“The costs of deterring treatment, both in terms of future lawyers’ health and the potential adverse effect on their performance as attorneys, easily wipe out the benefits of any small gains in screening efficacy that might be claimed for depression inquiries.”).

200. Letter from Fred P. Parker III, to E.D. Gaskins, Jr. (July 5, 2002) (discussing North Carolina Board of Law Examiners Character and Fitness Evaluations, 2000–02) (on file with the North Carolina Law Review).

201. *Id.*

202. *Id.*

203. See N.C. BAR APPLICATION, *supra* note 3, at 1 (Character and Fitness Guidelines).

records, we still must ask whether the identification of roughly two applicants a year makes the questions necessary or advisable, when weighed against the costs of deterring greater numbers of applicants from seeking treatment and of stigmatizing mental disorders and mental health treatment in the eyes of nearly four thousand applicants.

3. Carefully Tailor and Thoughtfully Structure Mental Health Inquiries

Whatever mental health information the Board decides to require, the mental health questions and any follow-up inquiries and investigations must be tailored to require disclosure of only that information that is needed, and only when it is needed. This requires careful attention to the wording of the inquiries (what is asked); which applicants, based on all available information, will be required to answer the inquiries (who is asked); and the point at which the information is deemed necessary (when it is asked). This care is necessary to protect applicants from compelled disclosure of information that the Board itself does not deem relevant or necessary.

Questions should be written with awareness that applicants mindful of the duty of candor may feel compelled to “over-disclose.”²⁰⁴ Ambiguities in the existing mental health questions on the North Carolina bar application invite such overdisclosure. Question 30, for example, asks if the applicant has ever been “voluntarily committed” to any “outpatient . . . facility” for “treatment or evaluation.”²⁰⁵ Applicants and mental health professionals both might wonder precisely what this means.²⁰⁶ Does it require disclosure of garden-variety counseling for stress or related concerns? Because the question addresses outpatient treatment and visits for simple evaluation, even absent any diagnosis or diagnosable

204. *Id.* (citing Character and Fitness director’s admission that the question “m[ight] be overbroad in that it elicits unnecessary and unintended mental health information”); *Tex. State Bd. of Law Exam’rs v. Malloy*, 793 S.W.2d 753, 760 (Tex. App. 1990) (noting that, “[f]ar from failing to disclose or cooperate,” the resistant applicant “over disclosed” concerning a private matter not related to any legitimate inquiry by the Board).

205. N.C. BAR APPLICATION, *supra* note 3, at 21 (General Application).

206. Similarly, question 31 asks if the applicant has ever been “admitted” to an “outpatient mental health facility or substance abuse facility” for “treatment or evaluation” at “the request of any person other than yourself.” *Id.* at 22. What scenario is envisioned with respect to “the request” of “any other person”? That the other person (a parent, perhaps) asked the facility to admit the applicant? Or simply that the other person encouraged the applicant to go for evaluation?

disorder, applicants who fail to report such counseling do so at their own peril. It is inconceivable, however, that the Board would assert that mere situational counseling in any way suggests an applicant's unfitness to practice law.²⁰⁷

Even if the initial application asks only about conduct, an applicant's responses to those questions—disclosing recent academic slumps, workplace difficulties, erratic or self-destructive behavior, convictions for drunk driving, complaints of assaultive or disruptive behavior—can raise concerns about his judgment, reliability, self-control, or mental or emotional stability. At this point, the Board may have the need—and indeed the duty—to inquire into the applicant's current functioning or impairment, including his mental health.²⁰⁸ Even then, the principle of necessity must constrain the scope and sequencing of those follow-up inquiries or investigations.

Assume, for example, that an applicant discloses her treatment for bipolar disorder, along with details of how she successfully manages her condition and assurances of her continued treatment compliance. What more, if anything, does the Board need to know? Who should make this determination? And under what standards? These questions point to another problematic aspect of fitness screening: the people making these complex predictions and determinations have no training in psychiatry, psychology, medicine, social work, substance abuse, or any related discipline. Professor (and later AALS President) Deborah Rhode leveled this criticism

207. A preamble to questions 26 through 32 takes pains to assure applicants that “the Board looks favorably on applicants’ self-recognition of their need for treatment and appropriate utilization of services.” *Id.* at 19. Moreover, the Board’s Executive Director, Fred P. Parker III, regularly visits the states’ law schools and makes a point of telling prospective bar applicants that the Board does not intend to seek disclosure of “short-term” or “situational” counseling for “family stress, exam stress, grief . . . or related matters.” E-mail from Fred P. Parker III, Executive Director, Bd. of Law Exam’rs of the State of N.C., to Ann Hubbard, Associate Professor of Law, U.N.C. School of Law (July 14, 2003, 08:45:05 EST) (on file with the North Carolina Law Review). This might be a welcome exception but for its uncertainty. What is “short term”? Six weeks, six months, a year? What if the counseling is “situational,” but the situation lasts several years? Regardless, with so much at stake, a prudent bar applicant might not risk under-disclosure or the serious charge of lack of candor by relying on an oral qualification to the written question.

208. Dr. Howard V. Zonana, Director of the Law and Psychiatric Division and Professor of Clinical Psychology at the Yale University School of Medicine, proposed this kind of sequencing for bar fitness reviews. In expert testimony in the *Clark* case, he testified that responses to behavioral, or “characterological,” questions are the best indicators of an applicant’s present ability to function and work, but that mental health inquiries may be required as a second stage of the application proceedings. See *Clark v. Va. Bd. of Bar Exam’rs*, 880 F. Supp. 430, 436 & n.9 (E.D. Va. 1995).

nearly two decades ago:

[W]hile mental stability is obviously relevant to practice, current certification standards license untrained examiners to draw inferences that the mental health community would itself find highly dubious. As noted earlier, even trained clinicians cannot accurately predict psychological incapacities based on past treatment in most individual cases.²⁰⁹

Lawyers are simply not equipped or qualified to make these determinations. Even the most “enlightened” lawyers lack the necessary training, and many may yet harbor misconceptions or biases about mental disorders or simply lack imagination about how certain conditions can be accommodated to—or even harnessed for—the effective practice of law.²¹⁰ Uninformed decisions about what is relevant to a fitness determination can put unwarranted burdens on applicants with mental disorders, up to and including the expense of hiring counsel or a delay in admission to the bar.

To avoid these forms of disability discrimination, the fitness screening process should rely on trained mental health professionals to evaluate an applicant’s current intellectual functioning, emotional stability, and where applicable, short-term prognosis.²¹¹ The ADA requires no less. The determination that a person with a disability poses a direct threat to others must rely on “an individualized inquiry and . . . appropriate findings of fact. . . ‘based on reasonable medical judgments given the state of medical knowledge . . .’ ”²¹²

Let us assume that a qualified professional determines that more information is needed about the applicant with bipolar disorder to assess the applicant’s control or management of her symptoms. To avoid requiring disclosure of detailed private information irrelevant to symptom management, the inquiry should proceed incrementally.

209. Rhode, *supra* note 5, at 581–82.

210. See, e.g., David L. Dunner & G. Andrew H. Benjamin, *Bipolar Affective Disorder (Manic Depressive Illness)*, 63 B. EXAMINER 25, 28 (Nov. 1994) (noting that trial lawyers with bipolar disorder use their hypomania to maintain their energy during demanding trials).

211. One model for accomplishing this, proposed by Professor Jon Bauer, would be to formulate a medical questionnaire separate from the regular bar application and to have applicants send this questionnaire directly to a medical office, not the bar examiners’ regular staff. Bauer, *supra* note 26, at 215–16. There are, of course, many ways to obtain guidance from trained health professionals.

212. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287–88 (1987) (quoting Brief Amicus Curiae of American Medical Association, at 19); see also Bradgon v. Abbott, 524 U.S. 624, 649 (1998) (confirming that direct threat assessment must be based on professionally accepted medical or other objective information (citing *Arline*, 480 U.S. at 288)).

As a first step, the Board (or its agent) might write a letter to the applicant's psychiatrist, asking the following question: "Is [the applicant] presently fit to practice law, as the Board has defined fitness in its character and fitness guidelines?" If the response is "yes," the inquiry should end there. If the response is "no" or equivocal, the Board might then ask for more detailed information about the applicant's functioning and prognosis. The current investigation procedures, by contrast, are devoid of any tailoring to minimize unnecessary disclosures. The Board issues an open-ended request for "any pertinent information" the psychiatrist possesses, including her analysis of the applicant's "condition, treatment and prognosis."²¹³ This request is likely to yield intensely personal information that has no bearing on the applicant's present fitness to practice law, including information that the Board itself would deem irrelevant.

The Board loses little by abandoning its scattershot approach in favor of a more tailored, incremental tack. The decision not to pose a mental health question to *all* applicants does not preclude asking those questions of *selected* applicants when the need arises.²¹⁴ Admittedly, such a progressive inquiry could affect the Board's ability to complete a thorough and timely review. But if the initial inquiries are properly narrowed, the Board will seek, collect, and review considerably less information at the preliminary stages, allowing it to redirect its resources to the more intensive follow-up required for a smaller number of files. If the sequencing of the inquiry simply cannot be reconciled with the present schedule, the Board could set an earlier application deadline or, better yet, adopt a pre-registration scheme that allows students to begin the bar application process at any time during law school.²¹⁵ Regardless, considerations of

213. Letter to Health Care Provider, *supra* note 54.

214. For example, a mental disorder may have been a factor in a reported event, such as academic probation, an arrest, or a firing. A proper understanding of the event and its relevance to the applicant's current fitness may turn on the influence of the disorder, whether it had been diagnosed at the time, whether the applicant responded by seeking treatment, and whether the condition or disorder, if still present, is effectively controlled. The mere disclosure of this disorder does not, however, open the door to any and all questions about diagnoses and treatment. If, for example, bar examiners learn that a responsible and upstanding applicant's uncharacteristic "youthful indiscretion" was fueled by the applicant's undiagnosed or poorly controlled bipolar disorder, this alone would not justify an inquiry into years of subsequent treatment. Rather, the scope of any further inquiry should reflect whether an isolated, rare or remote event has actual significance to the applicant's current fitness.

215. Sixteen states currently require or permit law students to register with their licensing agencies during law school and before applying to the bar. NAT'L CONF. OF BAR

administrative efficiency or convenience must yield to the ADA's command that mental health inquiries be narrowly tailored.²¹⁶

C. *Specific Proposals for Reform*

Sound processes and solid principles provide the basis for effective reform. The success of the reform effort then depends on the quality of the proposals that those processes and principles yield. A comprehensive reexamination of North Carolina's fitness screening process for bar applicants could spark proposals to revise many aspects and details of the application itself and the investigations that follow from it.²¹⁷ At this stage, it is worth sketching out and analyzing a spectrum of possibilities. At one end of that continuum lies minimalist reform: proposals to make only those changes necessary to bring North Carolina into grudging compliance with federal law. At the other end of the continuum lies ambitious reform: proposals calculated to honor the full breadth of the ADA's anti-discrimination norms and the Bar's commitment to eliminating the stigma of mental health diagnosis and treatment. Between these poles lie many combinations of possible proposals. What follows is an introductory exploration of that range of possible reforms, moving from the

EXAM'RS, LAW STUDENT REGISTRATION, at <http://www.ncbex.org/character/lawregister.htm> (last visited June 10, 2003) (on file with the North Carolina Law Review). Raleigh lawyer Ed Gaskins included this recommendation in the report he recently submitted to the Board. Gaskins, *supra* note 55, at 29–30. This pre-registration or pre-certification approach has obvious virtues. The Board would benefit from additional time to conduct a thorough investigation. The student would benefit from receiving either advance notice that she will not be admitted to the bar, or, alternatively, guidance about how she might conduct herself in law school so as to demonstrate to the Board that she has matured in her judgment, reformed her conduct, or otherwise rehabilitated herself. For an explanation of how a similar two-tiered approach works in Texas, see *Applicants v. Tex. State Bd. of Law Exam'rs*, No. A93 CA 740 SS, 1994 WL 923404, at *2 (W.D. Tex. Oct. 11 1994).

216. See *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 443 (E.D. Va. 1995) (rejecting the board's argument about limited resources as a basis for making a question "necessary" under Title II).

217. Revising the mental health questions that appear on the initial application is only the first step. In addition, the Board might revise, among other things, (1) the nature and details of the information an applicant must provide to accompany an affirmative answer to one of those questions; (2) the standards and procedures for determining which applicants warrant further fitness scrutiny; (3) the nature and wording of the request for information sent to an applicant's health care providers; (4) the breadth of the authorization and release the applicant is required to sign; (5) the content and wording of the conduct-related questions used to identify those applicants who may pose fitness risks; (6) the definitions of character, fitness and impairment; (7) the content, organization and wording of revised character and fitness guidelines that accentuate the distinction between good moral character and mental fitness; and (8) the identities of the people who may see and evaluate an applicant's private health or treatment information.

minimalist toward the ambitious.

1. Make Minimal ADA-Mandated Changes

Review of the ADA case law demonstrates that the mental health questions on the North Carolina bar application are impermissible on two measures: the breadth of the conditions and treatment included and the length of time covered. We can take *Texas Applicants* as a rough measure of the outer reaches of permissible questions. There, the state's counsel conceded, and the judge concurred, that an earlier question—"Have you, within the last ten years, been treated for any mental illness?"—violated the ADA because it "intruded into an applicant's mental health history without focusing on *only those mental illnesses* that pose a potential threat to the applicant's present fitness to practice law."²¹⁸ Thus, North Carolina's question 27, inquiring about impairment (or even alleged impairment) from "any" psychiatric condition, fails even under *Texas Applicants*.²¹⁹ So, too, does question 31, which asks about outpatient treatment, without regard to diagnosis and even in the absence of any diagnosable disorder.²²⁰

Texas Applicants also demonstrates that North Carolina's "have you ever" questions fail for want of reasonable time limits.²²¹ There the court permitted the ten-year (or since adulthood) scope of the question about so-called "serious mental illnesses" based on trial testimony that the chronic nature and frequent adolescent onset of these disorders made it necessary to reach back that far.²²² The court

218. *Applicants*, 1994 WL 923404, at *7 (emphasis added) (noting that the question was nearly identical to questions invalidated elsewhere).

219. N.C. BAR APPLICATION, *supra* note 3, at 23 (asking about any impairment). Question 27, which asks about impairment from "medical, surgical, or psychiatric conditions" does avoid the common problem of singling out mental impairment. *See id.*

220. *Id.* at 25.

221. *Applicants*, 1994 WL 923404, at *7 (concluding that questions regarding mental illness may inquire only ten years into the past).

222. *Id.* The defendant's expert testified that five years was minimal, ten years optimal. *Id.* Other states that ask a similar question, including Delaware, Kentucky, Missouri, and Nebraska, limit the query to the preceding five years. BD. OF BAR EXAM'RS OF THE SUP. CT. OF DEL., APPLICATION FOR ADMISSION 25 (2003), <http://courts.state.de.us/bbe> (last visited July 13, 2003) (on file with the North Carolina Law Review); KY. OFFICE OF BAR ADMISSIONS, APPLICATION FOR ADMISSION BY EXAMINATION SCR 2.022, at 26, <http://www.kyoba.org/forms/baronlineapp.pdf> (last visited July 13, 2003) (on file with the North Carolina Law Review); MO. BD. OF LAW EXAM'RS, APPLICATION FOR CHARACTER AND FITNESS REPORT 9 (2003), [http://www.osca.state.mo.us/SUP/index.nsf/48152408327899bc8625673500728856/74d4967a037ff17a8625696d006fb5a9/\\$FILE/_68cj4c821e1o6oqb3c5q6irre_.pdf](http://www.osca.state.mo.us/SUP/index.nsf/48152408327899bc8625673500728856/74d4967a037ff17a8625696d006fb5a9/$FILE/_68cj4c821e1o6oqb3c5q6irre_.pdf) (last visited July 13, 2003) (on file with the North Carolina Law Review); NEB. STATE BAR COMM'N, EXAM

emphasized that this limited time period “simply encompass[ed] an applicant’s adult years,”²²³ and indeed, the board recently revised the question to exclude information about inpatient treatment before the age of eighteen.²²⁴ The court’s careful justification of the ten-year time period, emphasizing adult disorders, and its insistence that the fitness inquiry be “narrowly focused” on diagnoses and treatment relevant to present fitness to practice law,²²⁵ puts it at odds with North Carolina’s use of lifetime history questions.

Thus, to comply with even the most permissive interpretation of the ADA, North Carolina would need at the very least to limit the mental health inquiries to specific diagnoses within a recent period of time. This incremental change, however, fails to address the danger of deterrence that inheres in treatment questions—a prospect the *Texas Applicants* court gave short shrift.²²⁶ Moreover, *Texas Applicants* rested on expert testimony that the ten-year history was necessary—a proposition that would need to be revisited in light of current medical knowledge and treatment practices.²²⁷

2. Ask Narrowly Tailored Questions About Diagnosis and Treatment

If the Board did nothing more than modify the current questions to bring them in line with *Texas Applicants*, the fitness inquiry might satisfy the ADA, but it would do little to meet the Bar’s goals of removing the stigma attached to mental disorders and encouraging early and effective treatment of these disorders, nor would it protect bar applicants from the forced disclosure of irrelevant information. The second and somewhat less intrusive option would be to retain diagnosis and treatment questions but to tailor them more narrowly by limiting them to shorter time periods, excluding outpatient

APPLICANT’S QUESTIONNAIRE, 10 (2003), <http://www.nebar.com/memberinfo/nsbc/Applications/NSBCApplicationExam05282002.pdf> (last visited July 13, 2003) (on file with the North Carolina Law Review).

223. *Applicants*, 1994 WL 923404, at *7 n.14; *id.* at *9 (finding that the board appropriately tailored the question by limiting it “to a specified time frame, primarily spanning late adolescence and adult life”).

224. *Id.* at *2 & n.4.

225. *See id.* at *1, *2, *4, *9 (advising that inquiries be narrowly focused on specific mental illnesses).

226. *See id.* at *8 (observing cursorily that some individuals may defer treatment in order to avoid answering these questions affirmatively).

227. Under the “direct threat” test, an applicant’s risk must be assessed according to the latest medical or other scientific information. *See Bragdon v. Abbott*, 524 U.S. 624, 649–50 (1998). The evidence presented in *Texas Applicants* is now nearly a decade old and may not necessarily reflect current medical understanding or treatment of the identified mental disorders.

treatment, requiring the disclosure of fewer or narrower specific diagnoses, or by using some other method. However the questions are tailored, it is important to remember that because the Board's sole fitness concern is *current professional impairment*, diagnoses and treatment histories are relevant, if at all, only to the extent that they provide information about the applicant's current level of functioning or impairment as it would affect her ability to practice law. Both diagnoses and treatment are poor indicators of current impairment.

Diagnoses are inadequate for several reasons. First, a diagnosis generally reflects a cluster of symptoms, often requiring the presence of several items from a larger menu of symptoms. Some symptoms reflect how a person feels, not how she performs, much less how she performs at work.²²⁸ Thus, a person may have a diagnosed mental disorder without having any of the associated symptoms that could impair her ability to function as a lawyer. Second, a diagnosis refers to the underlying condition without regard to the ameliorative effects of medication or other treatment. A person diagnosed with major depression may nonetheless control or eliminate the most debilitating symptoms with antidepressants. Third, a diagnosis fails to account for distinctions among individuals (each presenting a unique combination of intellect, talent, character, education, insight, values, social supports, coping mechanisms, and treatment compliance) and among their disorders (which, even within a diagnosis, produce a diversity of symptoms and functional impairments; different courses of illness, including severity, chronicity, and recurrence; and varied responses to treatment).

Consider bipolar disorder. Along with schizophrenia and "any other psychotic disorders," bipolar disorder appears on many bar examiners' lists of "serious mental illnesses."²²⁹ Untreated bipolar

228. The American Psychiatric Association's DSM-IV, defines a mental disorder as "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress . . . or disability . . . or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom." DSM-IV, *supra* note 31, at xxi. Thus, some diagnoses are based on behavioral or psychological distress, or pain, rather than on "disability," which DSM-IV defines as an "impairment in one or more important areas of functioning." *Id.*

229. This list appears in a question on the NCBE character and fitness questionnaire that serves as a model for many states. NCBE CHARACTER REPORT, *supra* note 17, at 12 (describing question 25, which inquires about "bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder"); *see also* N.C. BAR APPLICATION, *supra* note 3, at 24. The reference to "any *other* psychotic disorder" could suggest that bipolar disorder is a psychotic disorder. It is not. A psychotic disorder has psychosis as a defining feature. DSM-IV, *supra* note 31, at 273. Yet the majority of people with bipolar disorder never have a psychotic episode. One-third of people with bipolar disorder are diagnosed with

disorder is characterized by alternating periods of depression and either hypomania or mania.²³⁰ Mania warrants bar examiners' concern. It can result in distractibility, poor concentration, "severely compromised" judgment, and in severe episodes, hallucinations and grandiose or paranoid delusions.²³¹ Hypomania, by contrast, generates "productive energy and heightened creativity" rather than impaired judgment, and it never results in psychosis.²³² It is the mania—not the hypomania, nor the bipolar disorder itself—that poses a serious risk for clients. Yet many persons diagnosed with bipolar disorder never experience manic episodes,²³³ making bipolar disorder an overbroad and inappropriate proxy for mania. If the bar examiners' concern is about mania, the application should ask about mania.

Treatment is no better an indicator of functional impairment and may even be worse. First, asking about treatment fails to identify the applicants who pose the greatest fitness risk—those with "untreated or uncontrolled mental or emotional disorders."²³⁴ Indeed, an inquiry accurately targeted at the prospective lawyers most likely to endanger their clients would read: "Have you (within some time period) *failed* to seek treatment for any condition (mental or physical) that significantly impaired your functioning and, had you been practicing law, might have compromised your clients' interests? If your answer is 'yes,' explain fully." Second, questions about treatment most directly deter applicants from seeking treatment, resulting in more lawyers with untreated impairments. The effect is perverse.²³⁵

bipolar II disorder, which means they have never had a single episode of either mania or psychosis. *Id.* at 362; SURGEON GENERAL'S REPORT, *supra* note 7, at 249. Persons with a diagnosis of bipolar I disorder have had at least one manic episode but may never have exhibited any psychotic symptoms. DSM-IV, *supra* note 31, at 350–52 (noting that bipolar I disorder is characterized by one or more manic episodes and that distinctions among persons with bipolar I disorder include the presence or absence of psychotic symptoms).

230. See DSM-IV, *supra* note 31, at 328–38.

231. *Id.* at 328–30; SURGEON GENERAL'S REPORT, *supra* note 7, at 249.

232. SURGEON GENERAL'S REPORT, *supra* note 7, at 249. Two experts on bipolar disorder report that most lawyers with this hypomania "function quite well in their occupations." Dunner & Benjamin, *supra* note 210, at 30. Indeed, trial lawyers may effectively harness the "excess energy, decreased need for sleep, over talkativeness, and increase in ability to interact with others" to get them through demanding trials. *Id.* at 28.

233. See *supra* note 229 and accompanying text.

234. Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 433 (E.D. Va. 1995) (quoting VA. BD. OF BAR EXAM'RS, APPLICANT'S CHARACTER AND FITNESS QUESTIONNAIRE); see SURGEON GENERAL'S REPORT, *supra* note 7, at 18, 226–27.

235. See Memorandum of the United States as Amicus Curiae at 32, *Ellen S. v. Fl. Bd. of Bar Exam'rs*, 859 F. Supp. 1489 (S.D. Fla. 1994) (No. 94-0429-CIV-KING) ("[R]ather than improving the quality of attorneys in the State, the Board's inquiries may have the perverse effect of deterring those who could benefit from treatment from obtaining it,

Questions about diagnosis or treatment are also flawed in that they rely on an applicant's status as a person with a diagnosed mental disorder, a "former mental patient," a "mentally ill person," or a consumer of mental health services, rather than on the applicant's demonstrated abilities and actual conduct.²³⁶ Worse, these questions reflect and reinforce the broad, stigmatizing, and inaccurate assumptions that the ADA aims to eradicate. Such assumptions are especially unjustified where, as in the bar screening process, there is a wealth of available information about how the individual actually functions.

3. Ask About Current Impairment

Recognizing that treatment and diagnosis are flawed measures of impairment, some bar examiners follow the APA and ABA recommendations and limit mental health questions to current impairment.²³⁷ For example, Alaska, Iowa, Rhode Island, and South Carolina ask variations of the following question: "Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?"²³⁸

while penalizing those who enhance their ability to perform successfully as attorneys by seeking counseling."), <http://www.usdoj.gov/crt/foia/fl1a.txt> (last visited on Aug. 31, 2003) (on file with the North Carolina Law Review); Rhode, *supra* note 5, at 582 ("To the extent that bar oversight deters psychological or psychiatric treatment, the current approach is simply perverse. Penalizing those who recognize a need for assistance is unlikely to yield greater mental health among the practicing bar.").

236. See *Clark*, 880 F. Supp. at 444 n.25 (noting the United States' assertion in *Texas Applicants* that even "limited inquiry" into diagnosis violates Title II of ADA because the status of having a diagnosis was an unnecessary classification).

237. APA GUIDELINES, *supra* note 11, at 1; see also ABA Resolution, *supra* note 11, at 598 (advocating "specific, targeted questions about an applicant's behavior, conduct or any current impairment of the applicant's ability to practice law").

238. See ALASKA BAR ASS'N, APPLICATION FOR ADMISSION TO THE ALASKA BAR ASSOCIATION 15, <http://www.alaskabar.org/library/barexamapplication.pdf> (last visited May 14, 2003) (on file with the North Carolina Law Review); SUPREME COURT OF IOWA, APPLICATION FOR THE IOWA BAR EXAMINATION 8, <http://www.judicial.state.ia.us/regs/barinfo/barexam.asp> (last visited May 14, 2003) (on file with the North Carolina Law Review); THE R. I. JUDICIARY, PETITION/QUESTIONNAIRE FOR ADMISSION TO THE RHODE ISLAND BAR 21, <http://www.courts.state.ri.us/supreme/bar/baradmission.htm> (last visited May 14, 2003) (on file with the North Carolina Law Review); S. C. JUDICIAL DEPT., SOUTH CAROLINA BAR APPLICATION 8, <http://www.scd.uscourts.gov/DOCS/admprac.pdf> (last visited May 14, 2003) (on file with the North Carolina Law Review).

Some states combine questions about current impairment with time-limited questions about treatment for serious disorders. See, e.g., N. J. COMM. ON CHARACTER, CERTIFIED STATEMENT OF CANDIDATE 15 (inquiring into any twelve-month history of hospitalization for serious mental illnesses; current professional impairment from emotional, mental or nervous disorder), <http://www.njbarexams.org/app/app-On.htm> (last

Such “self-assessment” questions have been criticized for giving the applicant leeway to answer “no” by minimizing her degree of impairment.²³⁹ This may be true. The temptation not to disclose is present (and apparently strong) with all mental health questions. One close observer of mental health inquiries on bar applications has described “mass noncompliance, a form of ‘questionnaire nullification.’”²⁴⁰ But other applicants, mindful of their duty of

visited May 14, 2003) (on file with the North Carolina Law Review). Wisconsin asks only about actual impairment in recent years. *See generally* SUPREME COURT OF WIS. & BD. OF BAR EXAM’RS, APPLICANT QUESTIONNAIRE AND AFFIDAVIT (allowing five-year history of the applicant’s assertion of impairment as defense, explanation or mitigation in administrative, judicial or disciplinary proceedings or in academic or professional context; twelve-month history of professional impairment; and exclusion of “therapy that is fairly characterized as stress counseling, domestic counseling, grief counseling, or eating or sleeping disorder counseling, as these are generally not viewed as germane to the issue of whether and applicant is qualified to practice law”), <http://www.courts.state.wi.us/bbe/pdf/bbe106.pdf> (last visited Aug. 10, 2003) (on file with the North Carolina Law Review).

Maryland asks a question that initially appears to focus on current impairment. A closer reading reveals that it requires disclosure of diagnoses and treatment. This results from a hypothetical question about conditions that would produce impairment “if untreated or not otherwise actively managed.” MD. STATE BD. OF LAW EXAM’RS, APPLICATION FOR ADMISSION TO THE BAR OF MARYLAND., CHARACTER QUESTIONNAIRE 11, <http://www.courts.state.md.us/ble/download.html> (last visited May 14, 2003) (on file with the North Carolina Law Review). There is no apparent reason—and certainly no conceivable need—to ask applicants, “Would you be impaired if you didn’t take care of yourself?” In one sense, wouldn’t we all? The inquiry moves on to treatment by asking if the limitations imposed by the applicant’s condition are reduced or ameliorated by “ongoing therapy or treatment (with or without medication) or because you participate in a monitoring program or another support system (including A.A., N.A. etc.)?” *Id.* Moreover, this inquiry about support groups for recovering substance abusers could require affirmative answers from applicants who have been drug-free and sober for years or even decades.

239. *See, e.g.*, Applicants v. Tex. State Bd. of Law Exam’rs, No. A93 CA 740 SS, 1994 WL 923404, at *6 (W.D. Tex. Oct. 11, 1994) (asserting that those who answer untruthfully will not be identified, which makes the question ineffective).

240. Herr, *supra* note 4, at 658–59 (“In reality, candidates seem to be engaging in mass noncompliance, a form of ‘questionnaire nullification,’ as they resist undue governmental scrutiny into their private lives.”). Professor Herr goes on to lament:

While this Article does not condone dishonesty in completing bar applications, there is something dysfunctional with a system that throws its net so wide that only a handful of candidates answer ‘yes’ to questions that epidemiological studies suggest would require hundreds of candidates to affirm their past or present disability.

Id. at 658 n.102; *see* Clark v. Va. Bd. of Law Exam’rs, 880 F.Supp. 430, 437 (E.D. Va. 1998) (observing that expert testimony indicated that “approximately twenty percent of the population suffers from some form of mental or emotional disorder at any given time,” but fewer than one percent of bar applicants answered “yes” to mental health questions on application”); Bauer, *supra* note 26, at 105 (reporting that only two and one-half percent of Connecticut bar applicants disclosed mental health treatment, but general health statistics suggest the percentage “was undoubtedly much higher,” and concluding that “many bar applicants regarded the broad mental health inquiry as an illegitimate

candor, may overdisclose, reporting any condition that is arguably a limitation.²⁴¹ In any event, if the condition or disorder significantly impairs the applicant's functioning (judgment, motivation, impulse control, cognition, ability to meet deadlines, and the like), questions about conduct are likely to tip examiners off to any problems.

It is also true that self-assessment impairment questions do not detect applicants who are unaware of (or in denial about) the existence or significance of an untreated disorder. This, however, is equally true of questions about diagnoses or treatment. In the end, a question about impairment is preferable to questions about diagnoses or treatment for two reasons. First, it does not discourage evaluation or treatment; and second, it does not suffer the startling overbreadth of questions about diagnoses and treatment. An inquiry into current impairment focuses on the very thing the Board is charged with detecting: current unfitness.

4. Ask About Conduct, Not Status

This brings us to the final model: ask no questions about the past or present existence of, diagnoses of, or treatment for mental disorders. Instead, screen bar applicants for character and fitness solely through questions about their behavior and conduct. Several state bars have adopted this approach.²⁴² This approach, advised the late Professor Stanley Herr, is "[i]n many ways . . . the more

intrusion, and resisted it by just saying 'no' ").

241. See generally *Tex. State Bd. of Law Exam'rs v. Malloy*, 793 S.W.2d 753 (Tex. App. 1990) (acknowledging that plaintiff's answers to board questions overdisclosed personal information in response to application questions).

242. Massachusetts, Illinois, and Pennsylvania are among the states that have adopted this approach. See generally COMMONWEALTH OF MASS. BD. OF EXAM'RS, FIRST TIME APPLICATION FOR ADMISSION TO THE BAR (making no inquiries regarding mental illnesses), <http://www.state.ma.us/bbe/BBEDocs.htm> (last visited May 14, 2003) (on file with the North Carolina Law Review); ILL. BD. OF ADMISSIONS TO THE BAR, CHARACTER AND FITNESS REGISTRATION APPLICATION (asking no questions about diagnosis, treatment or impairment from mental disorders), http://www.ibaby.org/forms.html#exam_app (last visited May 14, 2003) (on file with the North Carolina Law Review); PA. BD. OF LAW EXAM'RS, APPLICATION FOR PERMISSION TO SIT FOR THE PENNSYLVANIA BAR EXAMINATION (having no questions regarding mental illnesses on the bar application form), http://www.pabarexam.org/Application_Information/Applications/Applications.htm (last visited May 14, 2003) (on file with the North Carolina Law Review). Illinois does include a catchall question asking for "any additional information with respect to possible misconduct or lack of moral qualifications or general fitness on your part which is not otherwise disclosed" by answers to other questions. ILL. BD. OF ADMISSIONS TO THE BAR, CHARACTER AND FITNESS REGISTRATION APPLICATION, http://www.ibaby.org/forms.html#exam_app (last visited July 10, 2003) (on file with the North Carolina Law Review).

principled and practical one.”²⁴³ The Board’s legitimate fitness concern is how a lawyer *behaves*, not how she *feels*. Psychiatric diagnoses, as discussed above, often reflect subjective distress or unhappiness, not objective functioning.²⁴⁴ The same is true for treatment, as in the case of the lawyer who asks her therapist, “I just negotiated the largest settlement in our firm’s history, so why am I not happy?” Matters like these are the province of therapists, not professional licensing boards. If a person has maintained and continues to maintain an adequate degree of functioning, that is all that matters for licensing: she is fit. It is of no consequence what health conditions she might be managing, what obstacles she has surmounted, or what positive supports help her sustain her functioning, be they strong family relations, antidepressants, prayer, twelve-step programs, yoga, psychological counseling, kickboxing, or some combination of these or other supports.

The proper focus of the fitness screening is circumscribed: Does this applicant’s current impairment compromise her ability to practice law competently? How the applicant has handled her own affairs—financial, professional, legal, personal, and public—is the best indication of how she will handle her clients’ matters. If her conduct reflects responsibility, strength, intellectual achievement, and respect for the law and the rights of others, the Board has no need (and consequently, no right) to pry into her private or inner life. If, on the other hand, her conduct, as reported on the bar exam application, reveals a recent trail of disarray, delinquency, and professional dysfunction, the Board has every reason to conclude that she poses a risk that warrants further inquiry. That risk exists, whether or not it is associated with a disorder.

Asking about conduct has other virtues. It emphasizes accountability and personal responsibility, which at times may require the responsible decision to seek mental health treatment. In so doing, it rewards, rather than penalizes, applicants who have the maturity and judgment to seek mental health services when they need them. We thus extend to aspiring lawyers the same respect and professional expectations that we confer upon admitted lawyers. Finally, focusing

243. Herr, *supra* note 4, at 672–73. Herr also promoted this approach as consistent with the ADA’s bar on pre-offer medical inquiries by private employers and with law schools’ abandonment of such inquiries in their applications. *Id.* He maintained that the questions should be discontinued at least until bar examiners meet their burden of proving, by scientifically convincing evidence, the effectiveness of and need for such questions. *Id.* at 673.

244. See *supra* note 228.

on conduct, not on treatment, has the virtue of consistency. The Bar has made the considered judgment that respecting the confidential nature of mental health treatment is the most effective way to encourage its members to seek early treatment and thus to avoid impairment or unfitness. All available evidence confirms that the same holds true for bar applicants.

CONCLUSION

The Board of Law Examiners, on behalf of the North Carolina Bar, performs a necessary and valuable service by assessing the character and fitness of each person who seeks to enter the profession. This character and fitness review can and should express the profession's high standards and the principles it embraces: respect for the law and for individuals, the repudiation of prejudices and discriminatory stereotypes, an ethic of personal and professional responsibility, and an unwavering commitment to fairness and decency.

The mental health inquiries on North Carolina's current bar application do not reflect those ideals or even satisfy the Bar's legal obligations. First, there is no evidence that they serve their fundamental purpose: identifying unfit applicants whose reported behavior and conduct do not otherwise reveal their dysfunction. Second, they inflict significant harm on the prospective lawyers who are required to disclose to strangers private and sometimes painful personal information not reasonably related to their present fitness to practice law. Third, to compound these problems, the questions themselves further stigmatize people with mental disorders. Finally, by probing into counseling and other mental health treatment, they deter law students and other applicants from seeking needed treatment.

We can do better. The North Carolina Bar has demonstrated its commitment to reducing lawyer impairment through education, outreach, confidential support, and timely intervention. The Bar now has the opportunity—and the obligation—to extend this model to our future colleagues about to enter the profession. Thoughtful revisions of the applicant screening process can create a situation in which everybody wins. Bar applicants, spared painful investigations into personal matters that are remote and irrelevant to their current fitness to practice law, would be freer to seek treatment they consider necessary or desirable. The Board and its staff would obtain, through detailed responses to conduct-related questions, ample information to assess an applicant's current fitness while being spared the task of

sorting through treatment histories of those applicants whose behavior presents no reason to question their fitness. The Bar would be able to convey to applicants its belief in the importance of treatment and intervention for mental disorders. Finally, to the extent that the revised process encourages more prospective lawyers to seek needed treatment, the public would be doubly rewarded. Their lawyers would be more aware of their own needs and limitations and better equipped to maintain their mental fitness throughout their careers. Those same lawyers would also be more likely to understand, and less likely to stigmatize, the mental conditions or impairments that touch the lives of their clients.

