

ASK ABOUT CONDUCT, NOT MENTAL ILLNESS: A PROPOSAL FOR BAR EXAMINERS AND MEDICAL BOARDS TO COMPLY WITH THE ADA AND CONSTITUTION

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I. INTRODUCTION

In deciding issues of character and fitness to practice, professional licensing boards, including state bar examiners, ask applicants about history of or treatment for mental illness and substance abuse. Rather than identifying applicants who might injure future clients or patients, however, these questions merely perpetuate prejudice against the mentally ill.

Courts acknowledge the questions implicate an applicant's right to privacy. Nevertheless, these same courts consistently rebuff constitutional challenges to the questions, citing the compelling state interest in protecting the public from incompetent practitioners. These judges are right—but they are also wrong. The underlying hypothesis of these questions is that absence of treatment for or history of mental illness or substance abuse somehow correlates with character and fitness to perform as a competent professional. New medical research suggests this hypothesis is an outdated myth.

Protecting the public is undoubtedly a compelling state interest. But recent scientific studies demonstrate inquiries about illness and addiction do not elicit meaningful knowledge regarding competence. Therefore, because these questions fail to achieve their ostensible goal of protecting the public, no state interest exists to justify invading the applicant's privacy.

New medical research reveals the startling information that almost half the people treated by a mental health professional for emotional problems do not have a diagnosable mental illness. When this new data is combined with the fact that many people who suffer from a recognized psychiatric condition never consult a mental health professional, the conclusion seems unavoidable. Even if there were some causal relation between mental illness and competence to practice—and the burden of proving this nexus rests on professional licensing boards—current questions target the wrong people for heightened scrutiny. Under the present system, the number of individuals, if any, who might be identified as likely to later pose problems for clients or patients is too small to justify the injury to all applicants.

Extent of injury does vary depending on the applicant's situation. But, because of the intrusive nature of the inquiries all applicants are damaged.¹ Applicants who must

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1. This position is consistent with the Americans with Disabilities Act of 1990. See *infra* notes

respond affirmatively face additional injury. Many applicants who disclose a history of illness or treatment are injured because their admission is delayed.² Further, even those applicants who are admitted timely are harmed in at least two ways: 1) being compelled to reveal private details of mental health or substance abuse and 2) facing the stigma associated with a mental disorder.

This article briefly discusses the role of boards and their virtually unlimited authority to determine and apply criteria for granting licenses. It reviews questions concerning mental health and substance abuse typically used as part of the evaluation process for state licensing of lawyers and physicians.³

This article describes new medical research which can be used to underscore problems with current questions. Representative cases challenging these inquiries as unconstitutional invasions of privacy are analyzed. Because courts generally use a balancing test—privacy rights of the applicant against the compelling need to protect potential clients and patients—to reject privacy arguments, this article suggests how new data about mental illness should prompt a reweighing of the interests. The new evidence tilts the balance in favor of an applicant's privacy rights and supports abolishing these intrusive questions. However, even if courts continue to reject privacy arguments, the questions must be eliminated for another reason—they violate the Americans with Disabilities Act of 1990 ("ADA").

This article explains relevant portions of the ADA and analyzes a few ADA cases and legislative history⁴ to illustrate how and why the Act prohibits these questions. Injury results under the Act from merely asking the questions thereby identifying persons suffering from a disability such as mental illness. Finally, this article proposes questions about specific behavior which will provide needed information without unnecessarily infringing upon an applicant's privacy rights or violating the ADA.

Presence of or treatment for mental illness or substance abuse are not directly related to character and fitness. Instead, the test is conduct: whether the applicant's

98-101 and accompanying text.

2. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985). In this comprehensive article, Professor Rhode suggests that the present system is "simply perverse" to the extent that these inquiries deter treatment. *Id.* at 581.

Professor Rhode highlights several flaws in the current approach. First, she points out the paradox inherent in the bar's position: punishing applicants who recognize a need for help and seek treatment "is unlikely to yield greater mental health among the practicing bar." *Id.* at 582. Second, even where problems are most likely to affect a person's practice, forecasts "rarely will be conclusive" in individual cases. *Id.* Because of difficulty in prediction, she argues that these questions are "equally open to dispute." *Id.* She finds "irony, if not hypocrisy," in denying an applicant a license based on "contentiousness" when the profession "generally rewards it." *Id.*

Finally, she says the bar's approach to confidentiality is "anomalous." When the issue is lawyer-client privilege, attorneys "have consistently maintained that compelled disclosures will chill the kind of candid interchange necessary for informed assistance. Yet the profession is entirely comfortable requiring applicants with histories of psychological treatment to waive the privilege for therapeutic communication . . . a policy . . . scarcely conducive to fostering the candor and trust on which effective therapeutic relationships depend." *Id.* (citations omitted).

3. Letters were sent requesting applications to boards of bar examiners and medical boards in every state. Applications were received from thirty-two boards of bar examiners and thirty-seven boards of medicine. *See infra* note 44 and accompanying text.

4. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1988).

Although appellate courts have not specifically held Rehabilitation Act cases are persuasive authority under the ADA, "that conclusion would appear both logical and reasonable." Andrew L. Symons, *A Three-Step Test for Determining When Compliance with the Americans With Disabilities Act is Required*, 28 GONZAGA L. REV. 235, 239 (1992/93).

behavior is likely to injure his patients or clients, the profession or the public. The most accurate way to predict whether a person's conduct is likely to cause injury is to determine if he has a history of harmful behavior.⁵ Consequently, professional licensing boards should inquire about conduct, not treatment for or history of mental illness or substance abuse.

Licensing Boards

More than a century ago, the Supreme Court made it clear that the obligation to protect the public welfare permits states to regulate professions by licensing those who may practice.⁶ Later, in *Schwartz v. Board of Bar Examiners*,⁷ the Court concluded that a state may "require high standards of qualification, such as good moral character or proficiency in its law."⁸ The state's authority is "not unfettered,"⁹ but great deference is given to the criteria licensing boards establish.¹⁰ "Most commentators agree that occupational licensing has been carried too far and that its adverse effects on individual liberty . . . outweigh its benefits."¹¹

Another problem for most professional licensing boards stems from potential conflict inherent in their composition. In fact, more than twenty years ago, Justice Black cautioned about this dilemma when he dissented in an attorney licensing case.¹² Justice Black acknowledged the importance of ensuring applicants and bar members be of good character.¹³ But, he also recognized the value to the applicant of his right to

5. See, e.g., *State of Wisconsin v. Daniel J. Sepulveda*, 350 N.W.2d 96, 103 (Wis. 1984). In this case, a psychiatrist testified that because "the best predictor of future behavior is past behavior, there is an increased chance that this individual's future behavior would be similar to his past behavior." *Id.* (quoting Dr. James Richard Thiel and Steven M. Garrett, Note, *Criminal Law: People v. Murtishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases*, 70 CAL. L. REV. 1069, 1083 (1982)).

6. See generally *Dent v. West Virginia*, 129 U.S. 114 (1889). The Court upheld a West Virginia statute establishing criteria for a license to practice medicine.

7. 353 U.S. 232 (1957).

8. *Id.* at 239.

The good moral character requirement was developed to safeguard the legal rights of clients. Michael Fritz, Comment, *Constitutional Law—Attorney & Client: Denial of Admission to the Bar Because of Past Conduct and Present Moral Character*, Layon v. North Dakota State Bar Board, 458 N.W.2d 502 (N.D. 1990), 68 NO. DAK. L. REV. 969 (1992). The bar's interest in preserving the profession and its good societal image is another, more subtle reason for the standard. According to bar spokespeople, this goal "can be achieved by 'eliminating the diseased dogs before they inflict the first bite.'" *Id.* at 970 (quoting Donald T. Weckstein, *Recent Developments in the Character and Fitness Qualifications for the Practice of Law: The Law School Role; The Political Dissident*, BAR EXAM., Aug. 1971, at 23).

9. Toni M. Massaro & Thomas L. O'Brien, *Constitutional Limitations on State-Imposed Continuing Competency Requirements for Licensed Professionals*, 25 WM. & MARY L. REV. 253, 266 (1983) [hereinafter *Licensed Professionals*].

10. Broad deference "is especially unreasonable in the occupational licensing area, where the selection measures that are protected from meaningful scrutiny are essential prerequisites to professional employment." *Id.* at 271-72.

11. J.R.R., II, Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1129 (1973). The student author argues that there needs to be effective review of this "virtually unchecked" power. *Id.* at 1097. Judicial review "is a necessary component of due process." *Id.* at 1128. But the need for judicial review of licensing board actions is particularly critical. "And because licensing boards are of necessity tinged with the appearance of bias, a willingness by courts to review board decisions can go a long way toward restoring both the image and the actuality of fairness." *Id.* at 1128-29. The time has come for courts to honestly confront the invasive, discriminatory nature of questions concerning mental health and substance abuse. See *infra* notes 46-52 and accompanying text.

12. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971).

13. *Id.* at 174 (Black, J., dissenting). Courts consistently ignore another important argument. Treat-

practice, "often more valuable to him than his home, however expensive that home may be."¹⁴ This means before a State may deny or revoke a license, it "must proceed according to the most exacting demands of due process of law."¹⁵ Justice Black expressed concern that this important right was "left to the mercies of his [the applicant's] prospective or present competitors." He argued that when the State deprives a person of the right to practice, the individual should enjoy the same protections as when he is deprived of any other property. "[A]lmost anyone would be stunned" if a person were deprived of his home because of his political beliefs or loyalty to the government, but states deny licenses to practice for exactly those reasons.¹⁶

A similar argument can be made if denial¹⁷ is based on an applicant's history of

ment of applicants is very different from those who are already licensed. Preferential treatment for the licensed professional creates serious inconsistencies. For example, the usual disciplinary action in the 1970s for failure to file a tax return was a public reprimand. However, at that very same time, an applicant was denied admission because he did not file a return with the Internal Revenue Service. R.J. Gerber, *Moral Character: Inquiries Without Character*, 57 B. EXAMINER 13, 19 (May 1988) (the author provides additional, equally troubling, illustrations).

But see *Frasher v. West Virginia Board of Bar Examiners*, 408 S.E.2d 675 (W.Va. 1991). Deciding that applicants are not similarly situated with attorneys who are already admitted, the Supreme Court of Appeals of West Virginia rejected an equal protection challenge based on disparate treatment. *Id.* at 679-80. Because of the differences between the groups, "a higher standard of good moral character may be applied so long as there is 'a rational connection with the applicant's fitness or capacity to practice law.'" *Id.* at 680 (quoting *Schwartz*, 353 U.S. at 239).

Some move toward periodic recertification of physicians has begun. Alfred Gellhorn, *Periodic Physician Recertification*, 265 JAMA 752 (1991). "Federal legislation has been introduced requiring physician recertification, 19 of 23 specialty boards are requiring periodic recertification, and it has been proposed that reimbursement for physician services be contingent on compliance with standards of medical care." *Id.*

Ironically, imposing a disclosure requirement on professionals might actually prompt elimination of the inquiries for everyone. However, because most practicing lawyers and physicians are not subject to periodic review regarding their mental health, asking applicants about their illnesses is even more offensive.

The Federation of State Medical Boards recognizes the need for review. In fact, as early as 1976, the Federation suggested licensed physicians be "systematically assessed at appropriate intervals to identify those whose qualifications and/or fitness for continued licensure are open to reasonable question." *Position statement of The Federation of State Medical Boards of the United States on the assessment of licensed physicians*, N.Y. STATE J. MED. 226 (Apr. 1989).

The Federation's proposed question regarding a licensee's illnesses is appropriate:

h. Whether the licensee has had any physical injury or disease or mental illness within the registration period which could reasonably be expected to affect his or her practice of medicine.

Id. at 226-27.

But, the proposed question about substance abuse is troubling, reflecting the Federations's apparent erroneous belief that history of or treatment for substance abuse necessarily impairs ability to practice forever:

g. Whether the licensee has ever been addicted to or treated for addiction to alcohol or any chemical substance.

Id. at 226.

14. 401 U.S. at 174 (Black, J., dissenting).

15. *Id.*

16. *Id.*

17. The fact that "few applicants, if any, have been denied admission on mental health grounds," Rosalind Resnick, *Groups Criticize Bar On Mental Histories*, NAT'L L.J., May 18, 1992, at 1, 3, is not sufficient to justify these questions for at least two reasons. First, if the information obtained from these intrusive inquiries does not exclude applicants, what purpose are the questions intended to serve? Second, the ADA and regulations go further than simply preventing denial of equal treatment to individuals with disabilities. The Act also prohibits policies which unnecessarily impose additional require-

or treatment for mental illness or substance abuse. "[A]lmost anyone would be stunned" if an individual were deprived of his home because of his illness. Decisions to deny are particularly troubling because applicants are at the "mercies" of prospective competitors.

Justice Frankfurter, concurring in *Schwartz*, highlighted the role of the profession in determining fitness.¹⁸ However, the majority focused on the requirements rather than who made the decision. The Court concluded that board-established criteria are valid so long as they have "a rational connection with the applicant's fitness or capacity to practice law."¹⁹ This standard of review is "easily satisfied,"²⁰ but limits exist. States "cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."²¹ Nevertheless, this rational connection standard dooms "nearly all" substantive due process challenges to failure.²² Equal protection challenges also lose, even when the "regulation has had a consistent and significant adverse impact on a suspect class."²³

Because lawyers and physicians enjoy a position of trust²⁴ vis-a-vis clients or patients and the public,²⁵ licensing boards may require applicants to establish their

ments on individuals with disabilities, and unneeded inquiries about disabilities. 28 C.F.R. § 35.130(b)(8) (1993) (interpretative guidance).

18. 353 U.S. at 248 (Frankfurter, J., concurring).

19. *Id.* at 239.

20. *Licensed Professionals*, *supra* note 9, at 269.

21. 353 U.S. at 239.

22. *Licensed Professionals*, *supra* note 9, at 269. In a footnote, the authors acknowledge the "few exceptions in which courts have held otherwise either involve the application of a legitimate requirement, such as good moral character, to discriminate against a specific group of individuals, or implicate other constitutional rights . . ." *Id.* at 269 n.34.

23. *Id.* Although these disparate impact cases involve race discrimination, they are relevant because the ADA treats disabled persons as a suspect class. *See infra* note 87 and accompanying text. Because of this precedent, the ADA is even more important. The Act and legislative history clearly establish intent to expand protection for persons with disabilities.

24. The state interest in regulating doctors is "especially great" because the physician is in a "position of public trust and responsibility." *Boedy v. Department of Professional Regulation*, 463 So. 2d 215, 217 (Fla. 1985). Although the qualified physician enjoys a "valuable property right which must be protected," that right is not absolute. Regulation is permitted under the police power. When the rights of the physician and the state conflict, the rights of the doctor "must yield to the power of the state to prescribe reasonable rules and regulations which will protect the people from incompetent and unfit practitioners." *Id.*

The Department of Professional Regulation (DPR) attempted to take disciplinary action against the physician asserting he "suffered from a mental or emotional illness." *Id.* at 215-16. The court affirmed an order for psychiatric examinations to obtain "reports and expert opinion and testimony concerning [petitioner's] ability to practice medicine with reasonable skill and safety," the standard established by statute. *Id.* at 216 (quoting from the DPR order). The doctor's claim that his fifth amendment privilege prohibited the board-ordered examinations was rejected because disciplinary proceedings are not penal in nature. *Id.* at 216-17.

25. "The necessity of good moral character originates in the peculiar fiduciary nature of the practice of law." *See R.J. Gerber, supra* note 13, at 15. In this thought-provoking article, Rudolph J. Gerber—Associate Presiding Judge of the Superior Court in Phoenix, Arizona—argued that entry restrictions "still remain largely ineffective in identifying those likely to engage in misconduct." *Id.* at 14-15. Conceding the underlying hypothesis that "to be a good lawyer one must be a morally good person," Judge Gerber exposed the obvious flaw in the argument: absence of any definition of "a morally good person." *Id.* In fact, courts recognize "no litmus test" to determine good moral character exists. *See, e.g., Application of Allan S.*, 387 A.2d 271, 275 (Md. 1978).

Some courts do attempt to define attributes of good moral character. *See, e.g., In re Manville*, 494 A.2d 1289 (D.C. 1985) ("respect for the rights of others and for the law, . . . fairness, . . . trustworthiness and reliability, . . . and a professional commitment to the judicial process and the administration of justice.") *Id.* at 1298.

good moral character²⁶ and fitness to practice.²⁷ The character and fitness requirements are appropriate. The problem is that using current questions to define these inquiries improperly confuses legitimate questions of character and fitness with illness. The mere presence of mental illness or substance abuse no more impacts on an individual's character than the existence of coronary artery disease or cancer.

Certainly, an applicant or professional may be denied a license or disciplined if his behavior is a product of mental illness.²⁸ Mental disorders or substance abuse are sometimes also raised in disciplinary actions to mitigate²⁹ sanctions for misconduct.³⁰

Mr. Manville engaged in a continuous pattern of criminal and antisocial conduct for a period of two years, culminating in a homicide while in the commission of a burglary. He pled guilty to voluntary manslaughter. After his parole ended, Mr. Manville attended law school. He graduated and passed the bar examination. He applied for admission to the District of Columbia Bar. But following a committee hearing, he was denied admission. Because of his record of past behavior, the court determined the usual ex parte procedure was insufficient. Instead, without denigrating testimony of his rehabilitation or credibility of his witnesses, the court decided an independent investigation of his moral character was necessary.

26. Using mental or emotional instability to determine fitness to practice is the "most nebulous basis" for deciding moral character. Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 96 (1984). Professor McChrystal explains that most reported cases actually concern persons who "exhibit abnormal behavior, whether or not victims of mental illness." *Id.* at 97. The issue is "a particularly sensitive one, especially since not all forms and degrees of emotional instability are rationally connected with fitness or capacity for law practice." *Id.* at 99. Professor McChrystal states the "imprecision" of standards for judging mental or emotional instability make these decisions even "more delicate." *Id.* at 100. Consequently, he concludes, bar authorities "may feel more comfortable . . . focusing on the symptoms of mental or emotional instability rather than on the degree of instability itself." *Id.* Presumably, the "symptoms of mental or emotional instability" to which he refers are the applicant's behavior.

27. 401 U.S. at 159.

28. *See, e.g.*, In the Matter of Hoover, 779 P.2d 1268, 1271 (Ariz. 1989). The attorney, who suffered from "bipolar manic depressive psychosis, . . . misappropriated substantial sums from his client and fraudulently billed for personal expenses." *Id.* at 1269-70. Psychiatrists agreed the attorney's conduct was a "product" of his psychosis. But clients were injured by the attorney's misconduct, not his illness. Thus, disciplinary action for that conduct was appropriate. Although the court did permit consideration of the M'Naghten test of insanity in mitigation, judges rejected the notion that mental illness is a per se bar to disciplinary action for ethical violations. *Id.* at 1270-72.

When necessary to protect the public, sanctions in addition to license suspension may be imposed. For example, a physician's bipolar mental disorder manifested in a psychotic episode and bizarre behavior which jeopardized his patients. As a result, the Iowa State Board of Medical Examiners suspended his license indefinitely. *State Takes [sic] Suspends Psychiatrist's License*, UPI, Aug. 7, 1990, available in LEXIS, News Library, UPI file. Subsequently, the U.S. Department of Health and Human Services excluded him from participation in Medicare and federally funded state health care programs. The decision was based on risk of recurrence of his illness and possible injury to his patients. Dr. Narinder Saini's request to apply the Rehabilitation Act of 1973 to modify his exclusion because of his disability was denied. *In re Application of Saini*, 588 N.Y.S.2d 563 (N.Y. App. Div. 1992).

In disciplinary actions, some courts do recognize an attorney's behavior is the issue. *See, e.g.*, Matter of Carmany, 466 N.E.2d 16 (Ind. 1984). The court referred to the attorney's diagnosed mental condition as: "manic depression in the manic stage, active psychosis, schizophrenia and possible paranoia." *Id.* at 23. The court acknowledged mental illness or alcoholism may be considered in mitigation. Nevertheless, the court's obligation is to "safeguard the public from unfit attorneys, whatever the cause of unfitness." *Id.* Consequently, the court balanced the attorney's "unfortunate circumstances" against its:

duty to maintain a competent Bar and protect the public from further unethical conduct. Respondent's specific acts of misconduct, taking his client's funds under the most bizarre circumstances, without any authority and in flagrant violation of the rules, and his engaging in deception and misrepresentation strike at the very core of the attorney's basic obligation to his client, trust.

Id.

29. Gregory G. Sarno, Annotation, *Mental or Emotional Disturbance as Defense to or Mitigation*

But, in all cases, the real issue is conduct, not illness.³¹

of Charges Against Attorney in Disciplinary Proceeding, 26 A.L.R.4th 995 (1983).

30. Even in cases where sanctions are reduced, however, the public is protected, contrary to arguments of people like Thomas A. Pobjecky, General Counsel to the Florida Board of Bar Examiners. Thomas A. Pobjecky, *Mental Health Inquiries: To Ask, or Not to Ask—That Is the Question*, 61 B. EXAMINER 31, 35 (Aug. 1992).

For example, as a result of his alcoholism, an attorney neglected clients, causing them injury. *The Florida Bar v. Larkin*, 420 So. 2d 1080 (Fla. 1982). Following the disciplinary proceeding, the referee recommended a three year suspension. The Supreme Court of Florida acknowledged “a practicing attorney who is an alcoholic can be a substantial danger to the public and the judicial system as a whole.” *Id.* at 1081. The justices also explained that the “responsibility to assure that the public is fully protected from attorney misconduct” rests with the court. *Id.* Nevertheless, the court recognized “[i]f alcoholism is dealt with properly, not only will an attorney’s clients and the public be protected, but the attorney may be able to be restored as a fully contributing member of the legal profession.” *Id.* The court held that it was proper to consider if the attorney was willing to seek rehabilitation when determining the appropriate discipline.

Based on this philosophy, the justices approved the referee’s recommendation that the attorney be found guilty of three counts of professional misconduct, but modified the sanction. The attorney was suspended for “ninety-one days and until such time as respondent establishes rehabilitation.” *Id.* This solution furthers the interest of all parties. Clients and the public are protected because until the attorney can prove he is rehabilitated, he cannot practice. The impaired attorney is punished for his misconduct, but the penalty may be reduced because the misconduct was a product of his disease. The possibility of a lesser sanction provides incentive to seek rehabilitation. *Id.*

Additionally, rather than mitigating the sanction if misconduct is caused by mental illness, it may actually increase the punishment. *In re Peek*, 565 A.2d 627 (D.C. 1989). The attorney violated several disciplinary rules by neglecting to pursue his client’s lawsuit and lying about the status of the case. In defense, the attorney claimed “‘extreme depression and a personal decline’ had ‘impaired his ability to conduct his law practice.’” *Id.* at 629 (quoting response to bar counsel). The court agreed that “absent consideration of respondent’s emotional condition,” a four month suspension would be appropriate. *Id.* at 632. The court imposed a four-month suspension—the final two months stayed—if the attorney satisfied conditions of a two year probation, including supervision and weekly counseling. *Id.* at 634.

The court conceded the validity of the concern “that a lengthy period of probation in addition to, or even in lieu of, a shorter period of suspension may amount to a greater, not a lesser, sanction.” *Id.* at 633. Nevertheless, “[a]bsent objection, we cannot conclude [an attorney] will be aggrieved by a long probationary term that affords an obvious advantage: the continuation or early resumption of a law practice that otherwise would be suspended.” *Id.* at 634.

Further, an attorney may not use alcoholism, drug use, or mental illness as a mitigating factor in a disciplinary proceeding unless he can demonstrate, by a preponderance of the evidence, that his condition “substantially affected” his misconduct. *In re Temple*, 596 A.2d 585, 590 (D.C. 1991). This means the lawyer “must show that the factor was sufficiently determinative of his conduct that its removal can be expected to end the misconduct.” *Id.*

Moreover, despite sympathy for attorneys whose misconduct is a product of mental disorders, courts refuse to mitigate where the misconduct involves serious moral turpitude. *See, e.g., In re Lamb*, 776 P.2d 765 (Cal. 1989). The attorney took the bar exam for her husband. She argued her “troubled background led her to value family life and marital harmony at all costs.” *Id.* at 766. After her husband failed bar exams in Texas and California, he “reacted with violent rage and depression.” *Id.* Further stress was placed on their marriage when her pregnancy and general health were threatened by “serious complications of her chronic diabetes.” *Id.*

After she pled nolo contendere to two felony counts of false personation, she divorced her husband and was evaluated and treated briefly by a psychiatrist. *Id.* Because of “the magnitude of petitioner’s misconduct, and its pertinence to her fitness as an attorney, proof of her complete and sustained recovery and rehabilitation must be exceptionally strong Though replete with testimonials to her talent and general character, . . . no ‘clear and convincing’ indication of petitioner’s sustained and complete rehabilitation from chronic personal problems which led to her catastrophic misjudgment” was proven. *Id.* at 768-69 (emphasis in original).

Finally, a lawyer’s mental condition may be considered in mitigation, and “to demonstrate his capacity for rehabilitation and fitness to practice law, but it may not be used as a complete barrier to a legal practitioner’s amenability to immediate sanctions for professional misconduct.” *Oklahoma Bar Association v. Colston*, 777 P.2d 920, 925-26 (Okla. 1989) (emphasis in original).

31. One particularly egregious case is illustrative. *Matter of Ronwin*, 667 P.2d 1281 (Ariz. 1983).

Illness does not effect a professional's fitness to practice unless his disease causes conduct harmful to clients or patients. Therefore, inquiries about illness are ineffective and inappropriate. Instead, questions about character should focus on behavior which demonstrates whether the applicant is honest³² and ethical.³³ Inquiries concerning fitness should probe whether the applicant can competently perform the tasks of his profession.³⁴

For example, the District of Columbia Court of Appeals concluded requirements for an attorney include honesty, plus "respect for the rights of others and for the law, trustworthiness, reliability, and commitment to judicial process and the administration of justice."³⁵ None of these are necessarily adversely affected by mental disease³⁶ or

Applicant was denied admission because he failed to establish his mental fitness to practice. Experts concluded his "compulsive personality disorder manifested itself in overzealousness in the pursuit of what Ronwin considered to be justice and was marked by paranoid attitudes, lack of flexibility, hypersensitivity, inability to compromise, perfectionism, obsessive preoccupation with details, suspiciousness and hostility." *Id.* at 1285.

The court correctly recognized:

The question is whether these behavioral traits and the emotional problems which cause them are sufficient in magnitude and duration that they may be expected to affect the applicant's conduct as a lawyer and, to a significant degree, cause it to fall below acceptable standards. The issue thus is not merely capacity and capability, but also behavior.

Id.

32. John Moore, Executive Director of the Florida Board of Bar Examiners, claims that these questions are necessary to identify people who lie on applications. John Murawski, *Fitness vs. Stereotype: Can Bar Examiners Seek Psychiatric Records*, LEGAL TIMES, Jan. 13, 1992, at 1. Lying is conduct which impairs a person's ability to function as a lawyer, but better ways exist to discover liars than these intrusive, personal questions which fail to specifically target integrity. People who are dishonest will probably lie about other facts.

A 1992 attorney-discipline case provides an example. *In re* Application of Sandler, 588 N.E.2d 779 (Ohio 1992). Stephen Sandler was admitted to practice law in early November 1989. Within a couple of weeks, Sandler disclosed to the Ohio Supreme Court a list of criminal offenses he had failed to disclose. Spurred by this indication of deceit, the board investigated further. Additional serious untrue statements were uncovered, including a false denial of treatment for mental illness.

Certainly, boards should not license dishonest professionals. But evidence of his false statement concerning treatment for mental illness was not even instrumental in alerting the board to this applicant's dishonesty. As occurred in the *Sandler* case, applicants who lie about some things will likely lie about other matters as well. Thus, deceptive answers concerning past treatment for illness were merely cumulative and unnecessary to establish lack of integrity.

Further, these questions may be traps for the misinformed. Some students simply do not understand the need to reveal any treatment for mental illness or substance abuse. Others fail to disclose because of bad advice. For example, in an article about counseling law students, the author—a clinical psychologist—says "[a] few students questioned the implications for their bar applications or for employment, but they were usually reassured when they learned that services were confidential and could not be reported to professional authorities." Faith Dickerson, *Psychological Counseling for Law Students: One Law School's Experience*, 37 J. LEGAL EDUC. 82, 89-90 (1987). The fact that such inaccurate, potentially damaging advice could be published in the *Journal of Legal Education* suggests that the reason some students fail to disclose this information is not to deceive; instead, they are following advice of a counselor or other person they trust.

33. "The relationship between a lawyer and a client calls for the exercise of the highest degree of integrity and fidelity." *State ex. rel. Oklahoma Bar Assoc. v. Colston*, 777 P.2d 920, 925 (Okla. 1989).

34. *But see* Stephen K. Huber, *Admission to the Practice of Law in Texas: A Critique of Current Standards and Procedures*, 17 HOUS. L. REV. 687 (1980). Professor Huber also argues fitness and character are separate standards, but he claims fitness includes "present mental and emotional health of an applicant as it affects competence to practice law, while good moral character involves an evaluation of the character traits of an applicant, particularly honesty and trustworthiness." *Id.* at 691-92.

35. *In re* Baker, 579 A.2d 676, 683 (D.C. 1990) (quoting *In re* Manville, 494 A.2d 1289, 1298 (D.C. 1985)).

36. In fact, it has been suggested that the presence of certain mental disorders could have a posi-

substance abuse, and certainly not by treatment for these disorders.

Recognizing general questions about treatment or counseling for mental illness have "rarely, if ever, brought to light a serious fitness question that was not highlighted by other information,"³⁷ the District of Columbia recently modified its bar application.³⁸ Questions about mental illness were eliminated, and inquiries regarding hospitalization and substance abuse were limited to the past five years.³⁹ Although this compromise moves the result in the right direction, it misses the real solution. Because the issue is behavior, information about character and fitness can better be gleaned from more focused, less intrusive questions about conduct.

II. QUESTIONS

Professional licensing boards ask questions about mental illness and substance abuse to determine which applicants are fit to practice.⁴⁰ However, these questions⁴¹

tive correlation with success in practice. For example, an applicant to the D.C. bar had been "an extremely successful, and apparently exceptionally able" litigator in another jurisdiction, despite a long history of treatment for "a condition which involved exaggerated feelings of grandiosity, among other things." Charles L. Reischel, *The Constitution, the Disability Act, and Questions About Alcoholism, Addiction, and Mental Health*, 61 B. EXAMINER 10, 24 n.26 (Aug. 1992). Mr. Reischel serves as a member and counsel to the District of Columbia Court of Appeals Committee on Admissions.

37. *Id.* at 11.

38. These changes were a response to action by the Mental Health Law Project. John Murawski, *Bar Applications to Drop Questions on Mental Health*, LEGAL TIMES, March 9, 1992, at 15. "It's an excellent first step, and it will protect the rights of the vast majority of bar applicants," according to Leonard Rubenstein, Executive Director of the project. *Id.*

39. See Charles Reischel, *supra* note 36, at 10. Unfortunately, not all jurisdictions are this enlightened. In Florida, for example, the general counsel to the Board of Bar Examiners, Thomas Pobjecky, rejects the applicability of the ADA. Thomas A. Pobjecky, *Mental Health Inquiries: To Ask, or Not to Ask—That Is the Question*, 61 B. EXAMINER 31 (Aug. 1992). Mr. Pobjecky apparently fails to understand the Act. He attacks the decision because D.C. eliminated questions about mental illness but retained limited inquiries about substance abuse. "If the ADA were to mandate the removal of mental health inquiries on a bar application, then questions regarding alcohol and drug treatment should also be barred." *Id.* at 34.

Mr. Pobjecky's conclusion is puzzling. The ADA explicitly denies protection to those who are currently using illegal drugs. 42 U.S.C. § 12114(a). Further, the ADA permits drug testing, even prior to employment, by specifically excluding these tests from other medical examinations. 42 U.S.C. § 12114(d)(1).

Mr. Pobjecky's lack of understanding is not limited to the ADA. He also confuses mental illness with "ability to practice law in an ethical and competent fashion." *Id.* at 35. Mental illness is not a character flaw—it is a disease.

40. Advocates claim present questions are "intentionally broad in scope to eliminate subjective decision making by bar applicants" about what they must disclose. Thomas Pobjecky, *supra* note 39, at 32. Proposed inquiries about behavior which request specific examples of impairment are more concrete, and thus diminish "subjective decision making."

Questions about mental illness and substance abuse are also raised in disciplinary actions. See, e.g., Danny R. Veilleux, Annotation, *Misconduct Involving Intoxication as Ground for Disciplinary Action Against Attorney*, 1 A.L.R.5th 874 (1992); Robert A. Brazener, Annotation, *Validity and Application of Regulation Requiring Suspension or Disbarment of Attorney Because of Mental or Emotional Illness*, 50 A.L.R.3d 1259 (1973).

41. One expert, who says his perspective is that of a philosopher concerned with ethics in the professions, denies the validity of these questions. Frederick A. Elliston, *Character and Fitness Tests: An Ethical Perspective*, 51 B. EXAMINER 8 (Aug. 1982). Mr. Elliston is a Senior Research Associate at the Center for the Study of Ethics in the Professions at the Illinois Institute of Technology and author of several publications on professional ethics. He argues that troubling moral issues underlying assessment of an applicant's mental health justify abandoning the inquiry.

Elliston suggests information concerning an applicant's emotional stability is only available from three sources: 1) a professional counselor; 2) the applicant; or 3) someone else who is aware of the applicant's situation. *Id.* at 12-13. When the "serious moral hurdles" to using any of these sources is

fail to elicit information about competence.⁴²

Thirty-seven medical boards responded to requests for application forms. The following table reviews the classes of questions on these medical board applications:

<i>General subjects of questions</i>	<i>Frequency</i>
Legal problems connected with substance abuse	24
Addicted to or used drugs or alcohol	27
Treated for substance abuse	20
Physical or emotional problem	22
Treatment for mental illness	20
Medication	2
Communicable disease	2

Thirty-two boards of bar examiners responded to requests for application forms. The following table reviews the classes of questions on these bar applications:

<i>General subjects of questions</i>	<i>Frequency</i>
Legal problems connected with substance abuse	6
Addicted to or used drugs or alcohol	23
Treated for substance abuse	24
Physical or emotional problem	5
Treatment for mental illness	26
Medication	1
Communicable disease	0

viewed in light of the absence of data, establishing "the mental health of prospective lawyers is a serious problem," Elliston says the questions should be eliminated. *Id.* at 14.

Elliston objects to asking professional counselors because compelling disclosure violates their ethical codes, making it "morally unjustifiable and wrong." *Id.* at 13. In fact, because the lawyers' own code of ethics requires confidentiality, attorneys cannot seek the information "without violating a basic moral principle of their own profession." *Id.* Elliston contends that "[i]t is wrong for lawyers to ask" mental health professionals to reveal confidences when they themselves are prohibited from doing so. *Id.* "Both the disclosure and the request for the disclosure are morally proscribed by a basic principle of professional ethics." *Id.*

An article in the *American Medical News* points to a similar paradox in medical licensing. Linda Oberman, *Do Licensing Boards Need Your Medical History?*, AM. MED. NEWS, May 3, 1993, at 3. "Although physicians are required to keep patients' records confidential, they generally must give state licensing boards a guided tour through their own medical histories." *Id.*

The second possible source for information about an applicant's mental health, according to Elliston, is the applicant himself, where "the relevant moral principle" is the right to privacy. The fifth amendment provides a corollary moral right to protect individuals from being compelled to reveal damaging information about themselves. "[R]equiring an applicant to furnish information about his past which may be used to deny him admission to the bar is very much like requiring a witness to testify against himself." Elliston, at 13.

Finally, the third source is others who know about the applicant's mental condition—support groups, counselors, or friends. Elliston rejects asking these people because they typically obtained the information when the applicant came to them for help with his problems. "The willingness to seek help is an important first step on the road to mental health. To disqualify the person who takes this step while admitting the person who does not is wrong-headed, and it would be a weak defense . . . simply to say that nothing can be done about those who do not seek help." *Id.*

42. In a case which advocates argue supports these questions, the Supreme Court held that bar committees could ask whether an applicant belonged to the Communist Party even if he could not be excluded for membership. *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961). The Court said the answer might lead to other information relevant to the applicant's fitness to practice. *Id.* at 45-47. The attorney for an applicant who refused to answer these questions objected. "The logic would be: We can search your house without a warrant to see if there's any reason that we should get a warrant." John Murawski, *Fitness vs. Stereotype: Can Bar Examiners Seek Psychiatric Records*, LEGAL TIMES, Jan. 13, 1992, at 1 (quoting Donald Dinan).

These data demonstrate that most state bar examiners and medical boards ask about applicants' substance abuse and mental illness. Similarly, most of these boards ask about applicants' treatment for mental illness and substance abuse.⁴³ Affirmative responses to these inquiries generally lead to further investigation, often demanding therapists to supply details about an applicant's illness and treatment.⁴⁴

The fact that few boards of either profession inquire about physical illness demonstrates prejudice against mental disorders and a basic misunderstanding of mental illness. By asking only about mental or emotional problems, rather than *any* illness, licensing boards invidiously discriminate against a particular group.⁴⁵ Because no clear distinction between mental and physical illness exists, this discrimination is simply indefensible.

Illnesses generally considered mental disorders have physiological causes.⁴⁶ Symptoms of physical problems often mimic symptoms generally associated with mental diseases. Indeed, the insurance industry has been compelled to recognize that an overlap exists. For example, an Arkansas court held that because the cause of bipolar affective disorder—formerly labeled manic-depression—was organic, an insurance

43. The only bar applications received which did not ask about treatment for mental illness were Illinois, Nebraska, New Hampshire, South Dakota, Utah and Vermont. Among the applications received for license to practice medicine, all but Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, New York, Pennsylvania, Rhode Island, Utah, West Virginia, and Wyoming asked about treatment for mental or emotional disorders.

44. The primary benefit of the current approach is that it eases the burden and the expense of investigating applicants. Stephen T. Maher & Dr. Lori Blum, *A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants*, 23 IND. L. REV. 821, 828-29 (1990). Boards seek information directly from the applicant's therapist. Assuming the applicant was honest during treatment, and the therapist cooperates, such an inquiry "may reveal the best information available concerning the applicant's mental and emotional health." *Id.* at 829. Nevertheless, this approach probably fails to detect those who are mentally unfit because applicants who are most in need of treatment may not have sought help. *Id.*

Further, any possible benefits are outweighed by the high costs. Time and resources of bar examiners are wasted in additional investigation of certain applicants. Applicants suffer economically and emotionally if admission is delayed and the issue of their mental health becomes public. A less obvious, but important, cost is lost opportunity "to prepare lawyers for the stress of practice through the use of mental health resources available before admission to the bar." *Id.* This is because, the authors argue, these inquiries discourage, or at least interfere with, treatment. As a result, students do not learn healthy ways to deal with stress. When, as attorneys, they find themselves in a competitive, stressful practice, they have not developed effective methods of coping. *Id.* at 829-46.

The authors suggest bar examiners "focus their initial inquiry on whether applicants have had serious life problems." *Id.* at 859. An affirmative response would "raise the question of fitness." *Id.* Applicants who have experienced "serious life problems" could be asked whether they sought treatment. If so, bar examiners could inquire about any treatment including counseling. However, "[t]he fact that an individual has sought and obtained counseling should not raise the question of fitness." *Id.*

The authors concede this narrower inquiry "is a compromise and, like all compromises, is both positive and negative. On the positive side, it will make counseling more available and protect the integrity of some treatment On the negative side, the modification recommended does not solve all the problems of the inquire and exclude approach." *Id.* at 860.

The authors suggest an important reason for the compromise is a "more realistic chance of adoption" than a more radical approach. *Id.* Unfortunately, however, the compromise fails to address the real problem with the current system. The issue is conduct, not mental illness—even if emotional problems are a result of "serious life problems." The presumption that such problems "raise the question of fitness" is simply unacceptable. Instead, only harmful behavior should "raise the question of fitness."

45. This is exactly the type of invidious discrimination the ADA was enacted to eliminate. See *infra* notes 86-99 and accompanying text.

46. *Equitable Life Ins. Soc. of U.S. v. Berry*, 260 Cal. Rptr. 819, 824 (Cal. Ct. App. 1989).

policy's mental illness limitation was not applicable.⁴⁷ All but one of the experts testified that the cause of the illness was *physical*, even though they agreed that the disorder was classified as a mental condition and its symptoms fell within a classification for mental disorder. The court cited persuasive authority to support its conclusion that the trend is toward classifying illness by cause rather than symptoms.⁴⁸

In a more recent case, the Ninth Circuit decided that autism is not a mental disorder.⁴⁹ Expert testimony defined mental illness as "refer[ring] to a behavioral disturbance with no demonstrable organic or physical basis."⁵⁰ This definition is difficult to defend because of the organic or physical origin of many mental disorders. This same basic misunderstanding leads professional boards to ask questions only about mental—not physical—illness. In fact, certain illnesses characterized as physical may cause behavior which could adversely impact on an individual's ability to practice competently.⁵¹ But the answer is not to ask about all illnesses. Instead, professional boards must ask about behavior—whatever its cause.

III. MENTAL ILLNESS

Before 1980, psychiatric diagnosis was based on the theory that most mental disorders were results of social, psychological, or developmental factors. In the 1980s, the Diagnostic and Statistical Manual of Mental Disorders, Third Edition, and its revision,⁵² established a system utilizing symptom complexes for classifying mental disorders. This new system resulted in greater reliability and reproducibility in diagnosis from examiner to examiner.

Based on this manual, the National Institute of Mental Health (NIMH) designed a Diagnostic Interview Schedule (DIS).⁵³ DIS was used to interview a randomized population to determine actual prevalence of mental illness in the United States. This Epidemiologic Catchment Area (ECA) study sampled and interviewed 18,571 households and 2,290 institutional residents aged eighteen years and over in five areas across the country.⁵⁴ For the first time, advances in psychiatric diagnosis, a standardized interviewing technique, and a large, random sampling provided information on the true incidence and prevalence of mental disorders. Prior to this study, estimates of the prevalence and significance of psychiatric diagnosis were mere speculation.

The ECA study determined twenty-two percent of the population suffer from mental illness. When substance abuse is added, the overall incidence rises to twenty-

47. *Arkansas Blue Cross and Blue Shield v. Doe*, 733 S.W.2d 429 (Ark. Ct. App. 1987).

48. *Id.* at 432. *But see* *Brewer v. Lincoln National Life Ins.*, 921 F.2d 150 (8th Cir. 1990). The *Brewer* court said that the insured son's illness manifested in "depression, mood swings and unusual behavior . . . commonly characterized as mental illnesses." *Id.* at 154. Lay persons focus on symptoms, rather than cause, and the insurance policies did not limit mental illness to only those without a physical origin. Consequently, the policies' mental illness limitation was applicable.

49. *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 538 (9th Cir. 1990).

50. *Id.* (quoting testimony of Drs. Ritvo and Freeman).

51. For example, a person suffering from diabetes may become confused, disoriented, and lose intellectual functions when either hypo- or hyperglycemic.

52. AMERICAN PSYCHIATRIC ASSOCIATION, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. rev. 1987).

53. See generally L.N. Robins et. al., *National Institute of Mental Health Diagnostic Interview Schedule: Its History, Characteristics, and Validity*, 38 ARCHIVES OF GEN. PSYCHIATRY 381 (1981).

54. See generally D.A. Regier et. al., *The NIMH Epidemiologic Catchment Area Program*, 41 ARCHIVES OF GEN. PSYCHIATRY 934 (1984).

eight percent.⁵⁵ Contrast this with earlier assessments, some estimating incidence of mental illness in the population as high as eighty-two percent.⁵⁶ Conclusions about mental disorders based on erroneous statistics generated before the ECA study must have colored decisions relying on them. Results and current implications of data developed using DSM-III-R, DIS, and ECA are important to demonstrate the need to discard invalid theories based on obsolete hypotheses.

Approximately one-third of the twenty-eight percent of Americans who suffer from a diagnosable mental illness experience some functional disability caused by their psychiatric condition.⁵⁷ One-third of those with a mental illness consult a mental health professional, not necessarily the same third who are disabled by their mental disorder. Of those who seek treatment, fifty-four per cent have a mental disorder which can be diagnosed.⁵⁸ While significant, this obviously means nearly half of those treated by a mental health professional have no mental disorder.

IV. CONSTITUTIONAL PRIVACY ISSUES

The right to privacy is not absolute.⁵⁹ When the issue is disclosure of personal matters,⁶⁰ such as mental illness or substance abuse, the Court applies a flexible balancing test.⁶¹ The standard of review ranges from intermediate to strict depending on the extent of the intrusion.⁶² "[A]s the sensitivity of the personal information disclosed, and hence the intrusion on the right to confidentiality, increases the burden on the state to justify a disclosure will increase under the balancing test."⁶³ To determine whether an invasion of privacy is justified, certain factors⁶⁴—including injury from disclosure, adequacy of safeguards to avoid inappropriate disclosure, and need for access—should be considered.

Courts have consistently rejected challenges based on an applicant's constitutional right to privacy in licensing cases. They hold the compelling interest in permit-

55. *Id.*

56. L. Srole et. al., *The Midtown Manhattan Study*, in 1 MENTAL HEALTH IN THE METROPOLIS (1962).

57. D.A. Regier et. al., *The de Facto US Mental and Affective Disorders Service System; Epidemiologic Catchment Area Prospective 1-Year Prevalence Rates of Disorders and Services*, 50 ARCHIVES OF GEN. PSYCHIATRY 85 (1993).

58. W.E. Narrow et. al., *Use of Services by Persons with Mental and Addictive Disorders; Finding from National Institute of Mental Health Catchment Program*, 50 ARCHIVES OF GEN. PSYCHIATRY 95 (1993).

59. See, e.g., *Cruzan v. Dir.*, Missouri Dept. of Health, 497 U.S. 261, 270 (1990); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986); *Roe v. Wade*, 410 U.S. 113, 153-55 (1973).

60. *Fraternal Order of Police, Lodge 5 v. Philadelphia*, 812 F.2d 105, 110 (3d Cir. 1987). The constitutional right to privacy actually encompasses two interests. One is the interest in avoiding disclosure of private matters. When this is the interest involved, courts use a balancing test. The second is an interest in freedom to make certain important decisions. Here, the court used strict scrutiny. *Id.* at 109.

61. *Nixon v. Administrator of General Services*, 433 U.S. 425, 458 (1977).

62. 812 F.2d at 110.

63. *Hawaii Psychiatric Society v. Ariyoshi*, 481 F. Supp. 1028 (D. Haw. 1979).

64. These factors are:

the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Id. at 110 (quoting *U.S. v. Westinghouse Electric Corp.*, 638 F.2d 570, 578 (3d Cir. 1980)).

ting only those who are fit to practice outweighs the individual's rights,⁶⁵ even in jurisdictions such as Florida where the state constitution explicitly provides a right of privacy.

The Florida Supreme Court conceded questions regarding mental illness and substance abuse implicate an applicant's right to privacy in *Florida Board of Bar Examiners Re: Applicant*.⁶⁶ Nevertheless, the court said, "pressures placed on an attorney are enormous and his mental and emotional stability should be at such a level that he is able to handle his responsibility."⁶⁷ The court is obviously correct. Professionals do face extraordinary stress and must be able to handle responsibility. Unfortunately, however, the court approved an invalid method for deciding whether the professional can handle responsibility. Rather than focusing on the applicant's past conduct under stress,⁶⁸ the court permitted inquiries about treatment for mental illness and substance abuse.

The court avoided deciding the appropriate standard of review by concluding that these questions survive even strict scrutiny. The justices were correct that a compelling state interest to protect the public exists.⁶⁹ But, they erred in finding that these questions are the least intrusive means to effectuate that interest.⁷⁰ Without any proof, merely by repeating the assertion, the justices concluded "[t]he means employed by the Board cannot be narrowed without impinging on the Board's effectiveness in carrying out its important responsibilities."⁷¹ The court makes this mistake because it failed to understand mental illness. It is not illness—and certainly not treatment for an illness—which causes injury to clients or patients. Instead, it is conduct. Therefore, the means that boards choose to protect the public from incompetent professionals—questions about mental illness and substance abuse—are not narrowly tailored to effectuate that interest. In fact, because these inquiries focus on the wrong issues, they fail to effectuate this important interest at all.

The Florida Supreme Court also rejected related confidentiality and privilege arguments. Disingenously, the majority claimed applicants do not enjoy these rights because, by applying to the bar, they place their "mental and emotional fitness" at issue.⁷² An analogous federal case exposes the flaw in this argument.

The Third Circuit recognized that it is "illusory" to treat police applicants for a special investigative unit as volunteers.⁷³ Additionally, the court rejected the notion that government can condition employment on a waiver of constitutional rights because

65. See, e.g., *Florida Board of Bar Examiners Re: Applicant*, 443 So. 2d 71 (Fla. 1983); *Arizona Appellate Decisions*, 19 ARIZ. L. REV. 672 (1977).

66. 443 So. 2d at 74.

67. *Id.* at 75.

68. In fact, the rules for admission in some states even recognize this as the appropriate focus for inquiry. For example, the Florida Supreme Court rules for admission to the bar provide "[a]n attorney should be one whose *conduct* justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them." RULES OF THE FLORIDA SUPREME COURT RELATING TO ADMISSION TO THE BAR III.B.2.b. (1992) (emphasis added).

69. 443 So. 2d at 75.

70. *Id.* at 74-76.

71. *Id.* at 76.

72. *Id.* at 76-77. The majority incorrectly supported this claim with statutory provisions denying confidentiality and privilege to a patient who "relies upon the condition as an element of a claim or defense." *Id.* at 77 (quoting FLA. STAT. § 90.503 (1981)).

73. *Fraternal Order of Police, Lodge 5*, 812 F.2d at 111.

"that would eviscerate the court's opinion establishing a balancing standard."⁷⁴ Thus, the court held that the "voluntary nature of the application" was not a "basis to pre-empt analysis of whether the condition of employment violates the applicants' privacy rights."⁷⁵

Applicants objected to questions which included inquiries regarding physical and mental conditions.⁷⁶ Because responses to these questions might "contain intimate facts about one's body and state of health,"⁷⁷ answers are within an individual's reasonable expectations of privacy and entitled to protection.⁷⁸ "The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny."⁷⁹ Medical information is considered confidential; information about history of or treatment for mental illness is particularly sensitive.⁸⁰ Nevertheless, the Third Circuit upheld the questions, arguing that the individual's interest was decreased because historically applicants faced similar inquiries. This means an individual's expectation of privacy would be reduced because other applicants had been questioned about their mental health. The obvious problem with this argument is that many applicants sought counseling years before they applied for this special unit, or for a license to practice medicine or law. In other words, at the time the applicant consulted a mental health professional he had no reason to expect restrictions on his privacy or limitations on confidentiality.⁸¹

Professional licensing boards compel applicants to respond to all questions. Courts concede that these questions implicate privacy rights.⁸² The invasion of privacy constitutes injury,⁸³ regardless of whether any further disclosure or investigation

74. *Id.* at 112.

75. *Id.*

76. *Id.* The challenged questions included:

18. List any physical defects or disability, also list any extended time spent in the hospital for any reason.

19. Are you presently using any prescription drugs? If yes, state the drug, the need for it and the dosage.

20. Are you now or have you ever been attended, treated or observed by any doctor or psychiatrist or at any Hospital or Mental Institution on an in-patient or out-patient basis for any mental or psychiatric condition? If yes, give the dates and the nature of the treatment.

Id. (emphasis in original).

77. *Id.*

78. One simple example illustrates judicial awareness of the sensitive nature of these inquiries. A federal district judge in Connecticut sealed portions of the record and permitted an applicant who challenged the questions to use a pseudonym "[b]ecause of potentially embarrassing and personal information." Thomas Scheffey, *Applicant Claims Bar Query Violates ADA*, CONN. L. TRIB., Aug. 10, 1992, at 1.

79. 812 F.2d at 112-13.

80. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins and his shame." Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 272 (1952)).

81. "Every patient, and particularly every patient undergoing psychoanalysis, has such a right to privacy. Under what circumstances can a person be expected to reveal sexual fantasies, infantile memories, passions of hate and love, one's most intimate relationship with one's spouse and others except upon the inferential agreement that such confessions will be forever entombed in the psychiatrist's memory, never to be revealed during the psychiatrist's lifetime or thereafter? The very needs of the profession itself require that confidentiality exist and be enforced." Doe v. Roe, 400 N.Y.S.2d 668, 676 (N.Y. Sup. Ct. 1977).

82. See *supra* notes 67-82 and accompanying text.

83. For example, the current practice of asking about treatment tends to make students reluctant to

occurs.⁸⁴

V. ADA

A. The Act

The Americans with Disabilities Act of 1990 ("ADA") was passed to protect 43 million disabled Americans⁸⁵ from discrimination.⁸⁶ As a step toward achieving this goal, the Act elevates persons with disabilities to suspect class status.⁸⁷ With this simple stroke of the pen, legislators maximized the probability of eliminating discrimination⁸⁸ by heightening the standard of review to strict scrutiny.⁸⁹

Questions about treatment for mental illness and substance abuse on licensing applications simply cannot withstand this scrutiny.⁹⁰ In fact, cases in several states

seek treatment. The Report of the American Association of Law Schools Special Committee on Problems of Substance Abuse recently recognized this problem. "Rightly or wrongly, students may calculate that if they do not tell anyone about the problem, do not have it diagnosed, and avoid treatment, there is no obligation to disclose anything to a bar admission authority." *Report of the American Association of Law Schools Special Committee on Problems of Substance Abuse*, 44 J. LEGAL EDUC. 35, 54-55 (March 1994).

Law students were surveyed to see whether they would seek treatment if they believed they had a substance abuse problem. Ten percent said "yes." However, another 41 percent said they would seek help if bar examiners could not get the information. Another question asked students if they would refer a troubled law school classmate to counseling. The numbers were equally disparate: 19 percent said "yes," another 47 percent said "yes" if bar examiners would not get the information.

"These answers, together with considerable anecdotal evidence, indicate that law students' concerns about confidentiality probably reduce significantly not only the number of students willing to self-refer but also the number who would report an impaired colleague." *Id.* at 55. Discouraging students from obtaining help is contrary to the interests of the individual and the public.

84. Unfortunately, not all courts agree. A New Jersey federal district court recently concluded, in dicta, that it is not the questions which discriminate. *The Medical Society of New Jersey v. Jacobs*, 1993 U.S. Dist. LEXIS 14294 (D.N.J. Oct. 5, 1993). "Theoretically," the court opined, the board could ask the questions but never act on the information received. Instead, "it is the extra investigation of qualified applicants who answer 'yes' to one of the challenged questions that constitutes invidious discrimination." *Id.* at 16.

The issue before the court was a petition for temporary injunction. Based on the court's decision that the injury is additional investigation, not the "mere asking of questions," and plaintiffs' failure to prove further investigations were imminent, the court denied the injunction.

85. 42 U.S.C. § 12101(a)(1).

86. 42 U.S.C. § 12101(b).

87. 42 U.S.C. § 12101(7). In the Act, Congress declares "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals . . ." *Id.*

These Congressional findings track Supreme Court case law establishing criteria for suspect class status. By its language, "Congress clearly intended to create a new protected class—the disabled." Amy Scott Lowndes, *The Americans with Disabilities Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons*, 44 U. FLA. L. REV. 417, 446 (1992). Ms. Lowndes argues that the findings provide the Court "data to accurately assess the equal protection claims of the disabled as a class." *Id.* at 448. Rather than the distinctions being "purely the product of physical or mental imperfection," these findings confirm "individuals with disabilities labor under the additional burden of society's ignorance, prejudice and stigmatization which inexorably widen the gulf between perception and reality." *Id.*

88. The ADA has even been dubbed the "'emancipation proclamation' for people with disabilities in America, and its date of enactment 'liberation day for the disabled.'" 20 THE AMERICANS WITH DISABILITIES ACT OF 1990: INTRODUCTION; WHO IS DISABLED (1992).

89. Where either a suspect class or fundamental right is involved, the Court examines legislation and regulations using a strict scrutiny test. This means that there must be a compelling state interest and legislation or regulations must be narrowly tailored to effectuate that state interest.

90. The American Bar Association has "consistently condemned" any discrimination. In line with

allege that the ADA prohibits questions about mental illness⁹¹ on licensing or relicensing applications. Analysis of statutory provisions and analogous cases decided either under the Act or earlier legislation⁹² portends success. Because these questions discriminate based on disability, they must be eliminated.⁹³

that policy, the Commission on Mental and Physical Disability Law recommended eliminating questions on state bar applications which discriminate by inquiring into an applicant's treatment for mental illness. *ABA Report on Resolution Concerning Inquiries Into Mental Health Treatment of Bar Applicants*.

The Commission acknowledged state bars have "a legitimate interest in assuring the character and fitness" of individuals they license. However, "[a]lthough presumably intended to protect the public and the profession from unfit lawyers, questions about a person's mental health history are ill-suited to do so." *Id.* at 3. Instead, the necessary information can be obtained through questions—to applicants and their references—about specific behavior that "comprise[s] good moral character or fitness to practice." *Id.*

In addition to failure to elicit answers which reflect on character and fitness, the Commission raises other important objections to current questions. "Such questions likely violate the Americans with Disabilities Act, irredeemably abridge applicants' privacy interests, and—to the extent they deter potential attorneys from seeking treatment—have deleterious effects on the mental health and emotional well-being of some members of the legal profession." *Id.*

The resolution has been revised and now provides:

BE IT RESOLVED, that the American Bar Association recommends to the extent that state bar examiners seek to obtain information regarding one's mental or emotional fitness, they should limit their inquiries to questions that seek to ascertain the following:

(1) whether the applicant has exhibited specific behaviors related to character and fitness, such as the individual's conduct, exercise of responsibility, trustworthiness, integrity and reliability; or

(2) whether an applicant has a 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.

Proposed resolution regarding disability-related questions asked by bar examiners.

The American Psychiatric Association ("APA") is also concerned about the discriminatory effect of these questions on state medical licensing applications. The APA acknowledges medical boards are charged with protecting the public from impaired physicians but objects to "inappropriate and indiscriminant disclosure of a history of psychiatric consultation and treatment Such disclosure stigmatizes individuals who seek consultation and treatment, equates help seeking behavior with the existence of problems sufficient to cause impairment, singles out psychiatric treatment for discriminatory attention, and exposes those who report treatment to breaches of confidentiality." *Work Group on Disclosure of APA, Recommended Guidelines Concerning Disclosure and Confidentiality* (Dec. 1992).

In addition to suggested guidelines, the Work Group proposed an appropriate question for a residency application:

Since you became a medical student, have you ever had an emotional disturbance, mental illness, physical illness or dependency on alcohol or drugs, which has impaired your ability to practice medicine or to function as a student of medicine?

Similar to the bar committee on disability, the APA work group question focused on the only important issues—impairment and ability to function.

91. See, e.g., *Ellen S. v. Florida Board of Bar Examiners*, 1994 U.S. Dist. LEXIS 10842 (S.D. Fla. 1994), *Richard Roe v. Connecticut Bar Examining Committee* (D.C. Conn. 1993) (cited in Thomas Scheffey, *Applicant Sues Bar Examiners over Mental Health Queries*, CONN. L. TRIB., May 31, 1993); *The Medical Society of New Jersey v. Jacobs*, 1993 U.S. Dist. LEXIS 14294 (D.N.J. Oct. 5, 1993); *John Doe v. Connecticut Bar Examining Committee and R. David Stamm* (D. Conn. 1992) (cited in *Bar Examiners Run Afoul of New Disabilities Law*, CONN. L. TRIB., Aug. 10, 1992, at 10).

92. Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. 1992).

93. A district court in New Jersey seemed to have little difficulty concluding that the ADA applied to these questions. 1993 U.S. Dist. LEXIS 14294. Unfortunately, the court's analysis and conclusion were dicta because the issue was whether to grant a temporary injunction against use of the questions. Nevertheless, the court recognized the board's "important, and sometimes very difficult, function" does not justify "carry[ing] out its duties in a fashion that discriminates against applicants with disabilities" based on their status. *Id.* at 22. Thus, the court concluded that applicants had a "high probability of success" on the merits. *Id.*

In an earlier case, the New Jersey Supreme Court avoided the issue of applicability of the Act because of delay in raising the claim until after the court granted plaintiffs' petition for certification.

The Act is divided into several parts. Preliminary provisions include discussion of pervasiveness of discrimination based on disability and a statement of purpose to establish a national commitment and standards to eliminate discrimination. Title I prohibits discrimination in employment. Title II extends protection to "benefits of the services, programs, or activities of a public entity." Title III focuses on public accommodations and services of private entities. Title IV mandates establishing telecommunication relay systems and requires federally funded public service announcements be close captioned. Finally, Title V contains miscellaneous sections, including a waiver of state immunity⁹⁴ and provision for attorneys' fees and litigation costs to the prevailing party at judicial or agency discretion.

B. Disability

The ADA defines disability to include not only "a physical or mental impairment that substantially limits one or more of the major life activities"⁹⁵ but also "a record of such impairment"⁹⁶ or "being regarded as having such an impairment."⁹⁷ This expanded protection was necessary because "society's accumulated myths and fears about disability are as handicapping as are physical limitations that flow from actual impairment."⁹⁸

Questions about mental illness and substance abuse demonstrate licensing boards have fallen victim to these "accumulated myths and fears about disability." The only reason to ask the questions is the mistaken notion that being "regarded as" disabled—based on affirmative responses to these inquiries—indicates an applicant is impaired.

Hirsch v. New Jersey State Board of Medical Examiners, 607 A.2d 986 (N.J. 1992). However, justices seemed to experience discomfort with the questions and suggested possible merit in the ADA argument.

Plaintiffs—Stuart Hirsh, M.D., the Medical Society of New Jersey, and the New Jersey Society of Osteopathic Physicians and Surgeons—challenged several questions on the biennial license renewal application, including inquiries about "past or present impairment based on drug or mental or emotional illness." Hirsch v. New Jersey State Board of Medical Examiners, 600 A.2d 493, 496 (N.J. Super. Ct. App. Div. 1991). Two questions are relevant:

"Have you suffered from or been treated for any mental illness or psychiatric problem at any time during the past 10 years?" Question 9(f).

"Have you ever been granted a leave of absence by a healthcare facility, HMO, or any employer for reasons that relate to any physical, mental, or emotional condition (other than parental leave) or any drug or alcohol problem at any time during the past 10 years?" Question 9(g).

Id. at 495-96.

The supreme court upheld these inquiries "[a]lthough some of the questions could benefit from reformulation to achieve a better-defined focus and to reflect a more sensitive appreciation of the privacy concerns of those who must answer." 607 A.2d at 987. The court deferred "a definitive ruling" on the ADA claim until a case where the issue had been fully developed. *Id.*

94. The Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. 1992), did not abrogate Eleventh Amendment immunity. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246 (1985). The specific waiver of immunity under the ADA indicates Congress' increased commitment to eliminating all discrimination.

95. 42 U.S.C. § 12102(2)(A) (Supp. IV 1992).

96. 42 U.S.C. § 12102(2)(B) (Supp. IV 1992).

97. 42 U.S.C. § 12102(2)(C) (Supp. IV 1992).

98. *Schoolboard of Nassau County v. Arline*, 480 U.S. 273, 284 (1987). Although the case was decided under the Rehabilitation Act of 1973, 29 U.S.C. § 794, the conclusion is relevant because the ADA uses the previous act as a guide. One of the purposes of the ADA is to expand protection granted by this earlier legislation to disabled individuals.

Licensing boards do need to know if an individual is impaired. The applicant or professional who is actually impaired might pose increased risk to his clients or patients. However, contrary to the presumption inherent in questions about mental illness and substance abuse, neither clients nor patients face additional risk of harm from the individual who is only "regarded as" having a disability. The truth is, despite pervasive but unfounded prejudice, an applicant who is "regarded as" having a disability 1) may never be impaired by his disorder or 2) may not actually have a mental illness at all.⁹⁹ The ADA included protection for people regarded as having a disability specifically to prevent the invidious discrimination of treating all disabled persons as impaired. Neither disability, nor being regarded as disabled, is synonymous with impairment. Only one-third of those suffering from mental disorder are functionally impaired,¹⁰⁰ and almost half the people who consult a mental health professional do not have a diagnosable mental illness.¹⁰¹ When these facts are understood, the conclusion is obvious: the individual who is regarded as having a disability generally presents no more or less danger to clients or patients than any other applicant.

C. Discrimination

Recognizing myths and stereotypes often incorrectly equate disability with impairment, the Act prohibits discriminating against qualified individuals because of their disability.¹⁰² Construction of "discrimination" under the ADA serves to invalidate questions about treatment for mental illness and substance abuse. Discrimination includes "limiting, segregating, or classifying" a disabled applicant so as to adversely affect his status or opportunity based on his disability.¹⁰³ Discrimination also includes "utilizing standards, criteria . . . that have the effect of discrimination."¹⁰⁴ Questions about treatment for mental illness or substance abuse inappropriately classify individuals and may adversely affect their status based on disability. Further, using these questions as standards or criteria for licensure "have the effect of discrimination."

The Act protects qualified individuals with disabilities from discrimination. Title I defines a "qualified individual with a disability" as a disabled individual "who, with or without reasonable accommodation can perform the essential functions of the employment position."¹⁰⁵ To decide if a disabled applicant is being discriminated against

99. An individual is "regarded as" having a disability if an employer or covered entity's decision was based on "myth, fear or stereotype." If the employer cannot show a non-discriminatory reason for his actions, "an inference that the employer is acting on the basis of 'myth, fear or stereotype' can be drawn." 28 C.F.R. § 1630.2(1) (1993) (interpretive guidance).

100. Used by the medical profession,

"impairment" means an alteration of an individual's health status that is *assessed by medical means*; "disability," which is *assessed by nonmedical means*, is an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements. Stated another way, "impairment" is what is wrong with a body part or organ system and its functioning; "disability" is the gap between what the individual *can* do and what the individual *needs* or *wants* to do.

An individual who is "impaired" is not necessarily "disabled." Impairment gives rise to disability only when the medical condition limits the individual's capacity to meet the demands of life's activities.

AMA *Guides to the Evaluation of Permanent Impairment* 1-2 (emphasis in original).

101. See *supra* notes 55-58 and accompanying text.

102. 42 U.S.C. § 12112(a) (Supp. IV 1992) (employment); 42 U.S.C. § 12132 (Supp. IV 1992) ("benefits of the services, programs, or activities of a public entity").

103. 42 U.S.C. § 12112(b)(1) (Supp. IV 1992).

104. 42 U.S.C. § 12112(b)(3)(A) (Supp. IV 1992).

105. 42 U.S.C. § 12111(8) (Supp. IV 1992). This definition is in Title I. Applying this Title I

because of his disability there must be a finding of whether he is otherwise qualified for the job. "Otherwise qualified"¹⁰⁶ requires two factual determinations: 1) whether the applicant can perform the "essential functions" of being a physician or lawyer, and 2) whether criteria in the application process actually measure those essential functions.¹⁰⁷

D. Essential Functions

Defining essential functions is not easy. The decision turns on whether the functions are "necessary and legitimate" requirements of the job.¹⁰⁸ The employer bears the burden of proving the function is essential.¹⁰⁹ Deference is given to the employer's judgment of essential functions,¹¹⁰ but his job description must be based on objective criteria or historical allocation of tasks performed by others in the position.¹¹¹

Just as the employer defines "essential job functions," licensing boards must establish essential professional functions. But, rather than using objective criteria or historical allocation of tasks, licensing boards hide behind a general requirement of character and fitness. This is wrong. Instead, boards may only ask questions which, according to objective criteria, deal with tasks that are essential parts of the professional's job. Boards bear the burden of showing inquiries about mental illness and substance abuse are "job-related . . . and . . . consistent with business necessity."¹¹² Title I does permit employers to defend against a charge of discrimination by

employment definition is appropriate because even though applicants are not seeking to be board employees, the licensing evaluation process is similar to a hiring decision. In addition, neither law school nor medical school graduates can practice in their chosen professions without a license.

Title II contains a slightly different, but substantively similar, definition of "qualified individual with a disability." See *infra* notes 107-08 and accompanying text.

106. This is language from the Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1988 & Supp. IV 1992). Presumably, a similar standard would be applied to determine a qualified individual under the ADA. See Symons, *supra* note 4, at 239.

Other commentators agree. See, e.g., Matthew B. Schiff & David L. Miller, *Reasonable Accommodations Under the Americans with Disabilities Act*, 28 GONZAGA L. REV. 219 (1992-93). "The EEOC suggests a two-step determination of whether a disabled individual is qualified. First, the individual must satisfy the prerequisites for a position, such as possessing the appropriate educational background, employment experience, skills, or licenses. Second, the individual must be able to perform the essential functions of the position, with or without reasonable accommodation." *Id.* at 222.

107. See *Pandazides v. Virginia Board of Education*, 946 F.2d 345 (4th Cir. 1991). Because of her learning disabilities, Sofia Pandazides was unable to pass the examination required of prospective teachers in Virginia. Although Ms. Pandazides had successfully taught in the school district for two years under temporary one year contracts—receiving the higher of two possible ratings in the second year—because she was unable to pass the communications skills portion of the test, the board found her "ineligible to teach." *Id.* at 347.

According to testimony, her learning disability prevented Ms. Pandazides from passing this portion of the test. She did pass the other required portions of the exam, including the general knowledge and professional knowledge sections. *Id.* at 347 n.1. The expert stated, her handicaps limited her abilities in some areas, but "they have no significant impact on her ability to teach." *Id.* at 347.

The court concluded that employers cannot simply invoke any set of requirements to declare a disabled applicant not otherwise qualified. Courts "must look behind the qualifications. To do otherwise reduces the term 'otherwise qualified' and any arbitrary set of requirements to a tautology." *Id.* at 349.

108. *Carter v. Casa Central*, 849 F.2d 1048, 1056 (7th Cir. 1988).

109. 42 U.S.C. § 12111(8) (Supp. IV 1992).

110. *Id.* This is true especially for written job descriptions prepared prior to advertising or interviewing. *Id.*

111. *Davis v. Frank*, 711 F. Supp. 447, 453 (N.D. Ill. 1989).

112. 42 U.S.C. § 12112(b)(6) (Supp. IV 1992). Discrimination includes using "selection criteria that

proving that such "selection criteria that screen out or tend to screen out or otherwise deny a job or benefit" are "job-related and consistent with business necessity."¹¹³ In the absence of such proof, the ADA prohibits these questions.

*Southeastern Community College v. Davis*¹¹⁴ provides an example of an applicant whose disability prevented her from performing essential functions of the nursing program.¹¹⁵ Although she met all admission requirements, the hearing impaired applicant was rejected because of her disability. The Court agreed that "legitimate physical qualifications may be essential to participation in particular programs."¹¹⁶ Where the physical qualifications were necessary to perform as a student or professional, the school was not required to lower its standards to accommodate the applicant's disability.¹¹⁷ The ADA augmented "the 'essential functions' analysis in *Davis*, . . . plac[ing] the burden on the employer to show the critical nature of the function."¹¹⁸

Cases such as *Delgado v. McTighe*¹¹⁹ suggest the need for a definitive description of essential functions of an attorney. Expert testimony raised several objections to both parts of the Pennsylvania bar exam.¹²⁰ The multiple choice section failed to simulate practice because, in solving clients' problems, attorneys are not faced with four possible answers.¹²¹ The essay portion was also unreliable for two reasons: (1) potential for inconsistent grading and (2) failure to be a comprehensive test of legal knowledge.¹²²

This analysis is equally applicable to questions about mental illness and substance abuse. They do not simulate skills necessary to practice because many professionals who suffer from a mental disorder or seek treatment for emotional problems or substance abuse enjoy successful careers. Further, analogous to objections raised against essay questions, inquiries limited to mental illness are not a comprehensive test of an applicant's health, nor, more importantly, possible impairment. To be comprehensive, boards must inquire into physical illness which might also lead to impairment.¹²³ Nevertheless, professional licensing boards seldom inquire about physical illness.¹²⁴

screen out or tend to screen out an individual with a disability or a class of individuals with disabilities." *Id.*

113. 42 U.S.C. § 12113(a) (Supp. IV 1992). This language is important as it supports the argument that Title I provisions are applicable beyond employment, to benefits provided by public entities under Title II. See *supra* notes 94-95 and accompanying text.

114. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

115. See also *Treasury Employees v. Von Raab*, 489 U.S. 656, 677 (1989).

116. 442 U.S. at 407.

117. The Court agreed with the school that hearing was essential to many job functions of a nurse. *Id.* at 408-09.

118. John J. Sarno, *The Americans With Disabilities Act: Federal Mandate to Create an Integrated Society*, 17 SETON HALL LEGIS. J. 401, 413 (1993). The ADA seems to embrace the *Davis* principle that a qualified person must be able to perform "the essential functions of the employment position," with or without a reasonable accommodation." *Id.* at 413 (citing 42 U.S.C. § 12111(8) (Supp. IV 1992)). Further, the Act places the burden on the employer to establish that the function is critical. *Id.*

119. 522 F. Supp. 886 (E.D. Pa. 1981).

120. See generally W. Sherman Rogers, *The ADA, Title VII, and the Bar Examination: The Nature and Extent of the ADA's Coverage of Bar Examinations and an Analysis of the Applicability of Title VII to Such Tests*, 36 HOW. L.J. 1 (1993) (discussion of the ADA and bar examinations).

121. 522 F. Supp. at 897. There was also concern that many answers were not clearly right or wrong. *Id.*

122. *Id.* at 896.

123. See *supra* notes 32-35 and accompanying text.

124. See *supra* note 44 and accompanying text.

But, the primary objection to the Pennsylvania test was that a bar exam cannot “measure minimal competence to practice law unless some determination was made as to what constitutes incompetent performance by an attorney.”¹²⁵ To be valid, a test must be an evaluative tool which actually measures ability to perform functions of an attorney or physician. “Absent identification of these aspects and proof that the examination measures them, a state may be applying a permissible standard of qualification—proficiency in the state’s law—with no basis for finding that unsuccessful applicants fail to meet that standard.”¹²⁶

The same is true for inquiries into an applicant’s treatment for mental illness or substance abuse. Boards ask these questions under the rubric of determining fitness to practice. Establishing fitness as a “permissible standard of qualification” is not sufficient. Boards must also prove what functions might be affected and whether answers to the questions actually help assess an applicant’s fitness.¹²⁷ However, absent a clear definition of minimal competence, boards cannot determine in what ways, if at all, mental illness affects competence.

Because licensing boards have defined neither essential functions nor connection to inquiries about treatment for mental illness or substance abuse, the questions must be eliminated. They should be replaced by inquiries designed to elicit meaningful information concerning an applicant’s ability to perform competently.¹²⁸

Suppose, for example, a board establishes—as it seems likely it could—that one essential function of an attorney is to deal honestly with clients and other lawyers.¹²⁹ Questions concerning an applicant’s integrity in other professional, educational and even personal, relationships would then be appropriate. Similar analysis is possible for the physician. Presumably a medical board would have little difficulty establishing that an important function of being a doctor is ability to analyze and integrate a vast body of information. Questions concerning an applicant’s analytical and integrative skills in other professional, educational and even personal, situations would then be appropriate. By contrast, questions about treatment for or history of mental illness or substance abuse are improper because responses fail to provide information about the applicant’s ability to be a competent lawyer or doctor.

Boards have not established a nexus between history of or treatment for mental illness or substance abuse and inability to practice competently. Instead, behavior—which may or may not be associated with mental disorders—impacts upon ability to perform essential functions of an attorney or physician. The best predictor of behavior is past conduct. Therefore, to determine if an applicant—with or without a history of mental illness—is qualified, boards should ask about patterns of past conduct which, if they recur, might impair the applicant’s ability to practice with skill and safety.

125. *Id.*

126. *Licensed Professionals*, *supra* note 9, at 280.

127. “[C]ompetent professionals are necessary to protect public health and safety,” but where “evaluation tools do not measure job-related skills, then the primary effect of the measures, and perhaps their true purpose, is to control entry into the profession.” *Id.* at 283. This is especially problematic because the vast majority of—and sometimes all—board members are professionals who will be in competition with the applicant if he is licensed. See *supra* note 11 and accompanying text.

128. See *infra* note 130 and accompanying text.

129. See, e.g., *People v. Heibrunn*, 814 P.2d 819, 820-21 (Colo. 1991) (where the court agreed that at least 17 instances of an attorney’s “neglect, deception, and ultimate abandonment of his clients” were grounds for discipline).

Some courts do recognize that the important question is behavior, not treatment for or history of mental illness or substance abuse. For example, one court recognized an employer could discharge a paranoid schizophrenic who demonstrated antisocial behavior.¹³⁰ Plaintiff failed to take medication which controlled her condition and was fired because of several "threatening and belligerent" incidents and at least three violent episodes.¹³¹ The record established that plaintiff was "suffering from a severe mental illness."¹³² Discharging her was not discrimination, however, because she was not otherwise qualified for the position. Plaintiff's condition was controllable with medication she chose not to take. Even if her behavior was a direct result of her illness, she is "clearly not 'otherwise qualified,' but simply an individual unwilling to perform the function of her job."¹³³ Because plaintiff was discharged for her behavior, rather than her mental illness, she is "not a victim of discrimination."¹³⁴

The Act permits an employer to reject an applicant who poses a "direct threat" to the health or safety of others in the workplace.¹³⁵ Similarly, bar examiners and medical boards may exclude applicants who pose a "direct threat" in their workplace—clients or patients. However, ADA regulations require that this assessment be "based on a reasonable medical judgment that relies on the most current medical knowledge . . ."¹³⁶ Indeed, "[f]or individuals with mental and emotional disabilities, the employer must identify the *specific behavior* on the part of the employee that would pose the direct threat."¹³⁷

130. *Franklin v. U.S. Postal Service*, 687 F. Supp. 1214, 1219 (S.D. Ohio 1988).

131. *Id.* at 1216.

132. *Id.* at 1218.

133. *Id.* at 1219.

134. *Id.* In another case, a student filed an action for readmission to medical school. *Doe v. New York University*, 666 F.2d 761 (2d Cir. 1981). The trial judge did not focus on treatment for plaintiff's "serious psychiatric problem." *Id.* at 767. Doctors diagnosed her as a borderline personality. *Id.* at 768. Instead, the judge correctly relied on her "actual behavior and condition over the past five years." *Id.* at 772.

135. 42 U.S.C. § 12113(b) (Supp. IV 1992) ("The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.").

The EEOC regulation goes beyond the language of the Act. The regulations define direct threat to include "a significant risk, of substantial harm" to the individual himself or others. 28 C.F.R. § 1630.2(r) (1993).

One author suggests that this is a "major gaffe" by the EEOC. Charles D. Goldman, *Commentary, Americans with Disabilities Act: Dispelling the Myths. A Practical Guide to EEOC's Voodoo Civil Rights and Wrongs*, 27 U. RICH. L. REV. 73, 85 (1992). Resolution of this conflict is unnecessary for purposes of this article. Boards ask the questions to protect clients or patients, not the applicant himself.

A direct threat requires a "high probability, of substantial harm; a speculative or remote risk is insufficient." 28 C.F.R. § 1630.2(r) (1993) (interpretive guidance). The determination of whether an applicant is a direct threat "must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes or stereotypes—about the nature or effect of a particular disability, or of disability generally." *Id.*

An employer cannot simply assume a person suffering from or treated for a mental illness poses a direct threat. Such an assumption would be based on fear and stereotype. The "direct threat" standard was created to prevent treating disabled individuals differently from others unless the need for disparate treatment was based on objective evidence. 136 CONG. REC. H2599 (1990).

136. 28 C.F.R. § 1630.2(r) (1993) (interpretive guidance).

137. *Id.* (emphasis added). This argument is buttressed by the different focus for physical disabilities. Rather than target behavior—as the regulation does for mental disorders—where the issue is physical disability "the employer must identify the aspect of the *disability* that would pose the direct threat." *Id.* (emphasis added).

This means that the behavior of a person with a disability may render him "not otherwise qualified," thus denying him the protection of the ADA. *Adams v. Alderson*¹³⁸ is illustrative. A former federal employee brought an action under the Rehabilitation Act of 1973. The court concluded that, even assuming the employee suffered from an adjustment disorder,¹³⁹ his violence toward his superior meant he was "simply not otherwise qualified for employment."¹⁴⁰ An employer is "not obliged to indulge a propensity for violence—even if engendered by a 'handicapping' mental illness."¹⁴¹ Otherwise qualified means the ability to perform essential job functions. Violent behavior towards fellow employees—regardless of cause—interferes with an individual's ability to perform job functions. Therefore, an employer may reject an applicant whose violent behavior poses a direct threat. Inquiries must focus on past violence rather than what might have "engendered" the behavior, even if the probable cause is mental illness or substance abuse.

E. Reasonable Accommodations

If an individual's behavior is not a direct threat, but he suffers from a disability which might affect ability to perform as an attorney or physician, boards must show they have made a reasonable accommodation.¹⁴² Factors generally used to excuse the obligation when compelling an accommodation that would "impose an undue hardship"¹⁴³ are not applicable to professional boards.

Unfortunately, no bright line exists to distinguish a legitimate refusal to make accommodations from illegal discrimination against a qualified individual.¹⁴⁴ "Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment,"¹⁴⁵ further blurring the current ambiguous distinction. Indeed, recent medical research about prevalence and effect of mental illness—analogueous to these predicted technological advances—should enhance the disabled individual's opportunity to be free of discrimination. The Supreme Court has conceded that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory."¹⁴⁶ Based on this new medical research,¹⁴⁷ failure to eliminate questions about mental illness and substance abuse on licensure applications falls into this category of "unreasonable and discriminatory."

Licensing boards do grant conditional admissions, imposing limitations on an applicant's license to practice. Restrictions such as practicing only under supervision, requiring monitoring by a physician, or entering a substance abuse program are typical.¹⁴⁸ Boards might argue these conditional admissions represent reasonable accom-

138. 723 F. Supp. 1531 (D.D.C. 1989).

139. Plaintiff was diagnosed as having "'adjustment disorder with mixed disturbance of emotion and conduct' and a 'compulsive personality disorder.'" *Id.*

140. *Id.* at 1532. The court also refused to find the employer failed to make a reasonable accommodation. *Id.* See *infra* notes 143-149 and accompanying text.

141. *Id.*

142. 42 U.S.C. § 12111(9) (1993).

143. 42 U.S.C. § 12111(10)(B) (1993). "[U]ndue hardship" requires "significant difficulty or expense." 42 U.S.C. § 12111(10)(A) (1993).

144. 442 U.S. at 412.

145. *Id.*

146. *Id.* at 412-13.

147. See *supra* notes 51-57 and accompanying text.

148. Grievance committees might also impose conditions for reinstatement. For example, the Colo-

modations. However, even assuming *arguendo* these conditions are “reasonable accommodations”—necessary to protect the public, profession, and potential clients or patients—the restrictions are inappropriate as applied because the means of identifying persons for conditional admission violates the ADA. The entire system crumbles when the foundation on which it is built—invalid questions about treatment for mental illness or substance abuse—is exposed.

F. Confidentiality of Medical Information

Title I prohibits asking about disability or requiring medical examinations prior to employment. But, under very specific, limited circumstances the Act does permit such inquiries and examinations.¹⁴⁹ Nevertheless, the requirement that all medical information must be “collected and maintained on separate forms and in separate medical files and . . . treated as a confidential medical record”¹⁵⁰ serves as an important restriction. Moreover, the Act permits medical examinations only after an offer has been made and if all employees are subjected to the same exam.¹⁵¹

Contrary to the Act’s express requirement, however, bar examiners and medical boards do not ask about history of or treatment for mental illness or substance abuse on separate forms nor maintain this confidential information in separate files. Instead, the questions are on the general form all applicants must file; consequently, responses are available to everyone with access to the applications. This is not to suggest that boards could comply with the Act simply by maintaining separate files for responses to questions about mental illness and substance abuse. Still, compliance would strengthen a board’s argument for the continued primacy of the need for this information when balanced against the applicant’s privacy rights. In fact, courts frequently explain that effective precautions against inappropriate disclosure weaken an individual’s privacy interest.¹⁵²

For example, in *Walls v. City of Petersburg*,¹⁵³ an employee was fired from the city police department because she refused to answer personal questions, including questions regarding her sexual history. She contended that these questions violated her constitutional right to privacy. The court disagreed.¹⁵⁴ One important factor in the

rado Supreme Court approved a committee order that an attorney—whose sanction for neglect and causing injury to clients was a year and a day suspension—undergo psychiatric evaluation before being permitted to resume his practice. *People v. Fagan*, 745 P.2d 249, 252-53 (Colo. 1987). The basis of the committee’s recommendation was the attorney’s “erratic behavior . . . manifested, in part, by his conduct of the cases leading to the disciplinary action and, in part, by his conduct during the disciplinary proceedings. The hearing board observed that, at times, Fagan performed normally and effectively but, at other times, he functioned without noticeable expression or affect and was rambling and disorganized. There also is evidence in the record that the respondent exhibited threatening conduct toward the deputy disciplinary prosecutor.” *Id.* at 253.

Admission standards require applicants to show “they are mentally stable and morally and ethically qualified.” *Id.* at 254 (quoting C.R.C.P. 201.6(1)). Further, to demonstrate whether they meet these qualifications, applicants may have to submit to “a current mental status examination.” *Id.* (quoting C.R.C.P. 201.6(2)). These rules, combined with the fact that an applicant bears the burden of establishing that he is qualified, “fully considering the previous disciplinary action,” were used to support the court’s conclusion that a psychiatric evaluation was an appropriate requirement for reinstatement. *Id.* at 253-54 (quoting C.R.C.P. 241.22(c)).

149. 42 U.S.C. § 12112 (1993).

150. 42 U.S.C. § 12112(3)(B) (1993).

151. 42 U.S.C. § 12112(3)(A) (1993).

152. See, e.g., Applicant, 443 So. 2d at 75.

153. 895 F.2d 188, 194 (1990).

154. *Id.* at 193. Her title VII claim, alleging the questions had a disparate impact, was also denied.

court's decision was the government's procedure for avoiding unauthorized disclosure. The confidential information was kept in a private filing cabinet which was locked at night. The plaintiff's privacy was further protected because only four people were authorized to access the information.¹⁵⁵ Professional licensing boards do not provide similar safeguards against disclosure.

G. Substance Abuse

One problem many applicants face is history of substance abuse.¹⁵⁶ The Act specifically excludes illegal drug users from protection because an "applicant who is currently engaging in the illegal use of drugs" is not a qualified individual with a disability.¹⁵⁷ But, those who no longer use drugs or are erroneously regarded as using drugs are protected.¹⁵⁸

The Act was intended to exclude illegal drug users—not alcoholics—from protection.¹⁵⁹ Legislative history supports this conclusion. Passage of the ADA coincided with President Bush's stepped up war on drugs. Legislators intended that the Act not undermine the government's commitment to stamping out drugs.¹⁶⁰

Id. at 190-91.

155. *Id.* at 194.

156. Despite absence of supporting data, "[e]xtreme statements regarding the prevalence of problems with alcohol and other drugs among physicians" persist. Joan M. Brewster, *Prevalence of Alcohol and Other Drug Problems Among Physicians*, 255 JAMA 1913 (Apr. 1986). In fact, Dr. Brewster concluded, "When alcohol and other drugs are considered together, physicians may not be unusually likely to have such problems." *Id.*

See also David Orentlicher, *Drug Testing of Physicians*, 264 JAMA 1039 (Aug. 1990). Dr. Orentlicher agrees recent, better data contradicts earlier assumptions that physicians are more likely to abuse drugs than other professionals. However, despite the absence of good data on the correlation between drug abuse and "substandard patient care, even a small risk cannot be tolerated." *Id.*

157. 42 U.S.C. § 12114 (1993). Employers may adopt procedures "designed to ensure" that an individual is no longer using illegal drugs. 42 U.S.C. § 12114(b) (1993).

158. *Id.*

The Act provides little guidance on how an employer can determine whether an individual uses illegal drugs. The ADA does distinguish drug testing from prohibited medical examinations. 42 U.S.C. § 12114(d)(1) (1993). But, the Act does not "encourage, prohibit, or authorize" drug testing. 42 U.S.C. § 12114(d)(2) (1993).

The apparent solution—just ask the applicant—is troubling for at least two reasons. First, because the drugs are illegal, the applicant would be required to lie—thus risking his career—or tell the truth—subjecting himself to criminal investigation. This raises obvious Fifth Amendment issues.

At least some boards recognize this problem. The state medical board in New Jersey requires applicants to respond to all questions. However, relicensing applications explicitly notify licensees of their right to assert, in writing, their Fifth Amendment privilege in refusing to answer questions about illegal use of drugs. *Jacobs*, 1993 U.S. Dist. LEXIS 14294, at *5.

The second problem is the Act itself. The ADA provides protection for those who are not currently using illegal drugs—whether they have been rehabilitated or were merely "regarded as engaging in such use." 42 U.S.C. § 12114(b) (1993). Thus, the Act creates a conundrum: how to identify current drug users without impermissibly infringing on the rights of protected individuals. The only situation where this might not be a problem, of course, is where the behavior of the drug user alerts the employer to the abuse.

Professional licensing boards face a similar difficulty in identifying current drug users. However, by focusing on the real issue—whether the applicant's behavior is likely to injure his clients or patients—the problem is resolved. Boards do not need to know whether an applicant uses illegal drugs. The only legitimate question is whether the applicant's conduct—whatever its cause—poses a risk to clients or patients.

159. According to the Act, "homosexuality and bisexuality are not impairments and as such are not disabilities." 42 U.S.C. § 12211(a) (1993). "Certain conditions" are also excluded. These include various "sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs." 42 U.S.C. § 12211(b) (1993).

160. Loretta K. Haggard, *Reasonable Accommodation of Individuals with Mental Disabilities and*

However, provisions of the ADA permit employers to treat alcoholics similarly to drug users,¹⁶¹ excluding them from protections afforded other individuals with disabilities. For example, the Act provides an employer may hold the employee who "engages in the illegal use of drugs or who is an alcoholic" to the same standards as other employees.¹⁶² Even though an alcoholic is not specifically excluded from protection, requiring alcoholics to meet the same standards as other employees appears "to immunize" employers from an obligation to make accommodations for the disability. This "acts to contradict" an EEOC mandate that alcoholics be treated like other disabled persons.¹⁶³

As with mental illness, when evaluating an applicant for a professional license, the important question is conduct, not substance abuse—whether illegal drugs or alcohol. For example, in a disciplinary action, when the board raised the issue of an attorney's alcohol abuse, the D.C. court remanded for further inquiry into capacity to practice.¹⁶⁴ After violating several disciplinary rules, the attorney was suspended indefinitely because he was "incapacitated from practicing law by reason of addiction to alcohol."¹⁶⁵ But, the court remanded because "[n]ot for a moment negat[ing] the importance of the concern . . . about respondent's relapses into active drinking and the effect on his capacity to practice," the record failed to establish the necessary "linkage of respondent's alcoholism to available specific manifestations of general incapacity to

Psychoactive Substance Use Disorders under Title I of the Americans with Disabilities Act, 43 J. URBAN AND CONTEMP. L. 343, 388 (1993).

161. For example, the Act permits a covered entity to ban both alcohol and illegal drugs from the workplace. 42 U.S.C. § 12114(c)(1) (1993). The Act also allows the covered entity to require employees not be under the influence of alcohol or illegal drugs at work. 42 U.S.C. § 12114(c)(2) (1993).

162. This is true "even if any unsatisfactory performance or behavior is related to the drug use or alcoholism." 42 U.S.C. § 12114(c)(4) (1993).

163. Haggard, *supra* note 160, at 388-89. This author identifies and discusses this conflict created by the Act. She speculates Congress might simply have intended to only excuse employers from making accommodations for substance abusers "under the influence at work." *Id.* at 388. Unfortunately, because of the "scanty legislative history" on the issue, courts will have difficulty deciding this issue. *Id.* at 388-89.

164. In the Matter of S., 579 A.2d 156 (D.C. 1990).

The same is true when the issue is admission to practice. In *re Haukebo*, 352 N.W.2d 752 (Minn. 1984) provides an example. Between 1979 and 1981, the applicant had pled guilty to three charges of driving under the influence of alcohol. In 1982, when he graduated from law school, Craig Haukebo applied to take the bar exam. Based on its determination that the applicant was dependent on alcohol—which he consistently denied—the board said he was not "a person of good moral character." *Id.* at 755. The Minnesota Supreme Court disagreed, deciding "[a] primary question, then, is whether chemical dependency on alcohol is rationally related to fitness for the practice of law such that it can form the basis for preventing an otherwise qualified applicant from gaining admission to the bar." *Id.* The court acknowledged alcoholism is a disease, "not a mere pattern of voluntary conduct; neither is it an offense which necessarily involves moral turpitude or reflects on the individual's honesty, fairness, or respect for the rights of others or for the law." *Id.* After conceding alcoholism is "frequently a contributing factor" in attorney misconduct, the court correctly recognized the test of an applicant's moral character is his "past and present pattern of conduct or behavior." *Id.* The court buttressed its argument with cases from other jurisdictions which "focus on a pattern of immoral conduct and . . . require that the applicant overcome the presumption that similar conduct will recur in the future." *Id.*

It is important to recognize, as the court pointed out, Haukebo's behavioral record raised questions about his moral character. Three convictions for driving while intoxicated reflect "an apparent disregard" for the law. The board should have "focused on this pattern of behavior as its reason for questioning Haukebo's moral character," because, the court held, "good moral character for the purposes of bar admission, shall be determined from the applicant's pattern of conduct or behavioral record." *Id.* at 756.

165. 579 A.2d at 159 (quoting Board of Professional Responsibility Report).

practice law."¹⁶⁶ In other words, where alcohol abuse is suspected, the "pivotal issue is how the condition affects the lawyer's ability to function in his or her professional role."¹⁶⁷ The "pivotal issue"—ability to function, not substance abuse—is the same whether raised in a disciplinary action or an application for a license to practice.

H. Using Title I in Title II

Title II specifically prevents public entities from discriminating against qualified individuals with disabilities when providing benefits. Public entities include "any . . . instrumentality of a state."¹⁶⁸ This means bar examiners and medical boards, as instrumentalities¹⁶⁹ of the State, are public entities prohibited from discriminating.¹⁷⁰

Under Title II, a "qualified individual with a disability" is one "who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for . . . participation in programs or activities provided by a public entity."¹⁷¹ The public entity is only permitted to ask questions about whether the applicant meets "essential eligibility requirements." Boards bear the burden of proving what are essential requirements and how specific inquiries measure these qualifications. There is no proof that treatment for mental illness or substance abuse would prevent an applicant from satisfying essential requirements to practice. Therefore, boards may not ask questions regarding such treatment.

Title II does not contain detailed protections. Nevertheless, according to ADA regulations and Interpretive Guidance, Title I provisions are applicable to Title II.¹⁷²

166. *Id.* at 162.

167. *Id.* at 160.

See also *In re Glenville*, 565 N.E.2d 623 (Ill. 1990). Michael Glenville was denied admission to the Illinois Bar based on several incidents of criminal or violent behavior. He claimed his misconduct only occurred when he was under the influence of alcohol. He testified he had become active in Alcoholics Anonymous and had not consumed liquor or mood altering drugs in more than six years, following a home invasion armed robbery. He claimed this occurred during a 14 to 16 hour blackout. *Id.* at 624-26. Experts testified that excessive alcohol consumption frequently causes blackouts. *Id.* at 626-27. A.A. members—who had become friends—and his sister predicted that he would never drink again. *Id.* at 626. However, in addition to his prior criminal activity, the court was troubled by inconsistencies in Glenville's story about the robbery and blackout, and lies on his law school application.

The court said applicant was to be "commended for his fortitude" in overcoming his alcoholism. Nevertheless, rehabilitation is "only one factor, albeit an important one . . . past misconduct cannot be lessened by his subsequent exemplary conduct." *Id.*

168. 42 U.S.C. § 12131(1)(b) (1993).

169. The U.S. Department of Justice, in its amicus brief in *Rosenthal v. New York State Board of Law Examiners*, asserts that "because the board is an 'instrumentality' of the State, it also falls under the purview of Title II of the act." *Rosenthal v. New York State Board of Law Examiners*, No. 92-Civ-1100-JSM (S.D.N.Y. 1992) (quoting DOJ brief).

170. To avoid any question, the Act specifically waives state immunity as might be claimed under the Eleventh Amendment. 42 U.S.C. § 12202 (1993).

171. 42 U.S.C. § 12131(2) (1993). This varies slightly from the definition in Title I. See *supra* note 105 and accompanying text. Presence of this different definition does not invalidate the argument that legislators intended some protections from Title I be incorporated into Title II. The minor modifications merely reflect differences between employment and public programs or activities. Substantively, the protection is the same. Neither the employer nor covered entity may discriminate against a disabled individual who meets essential qualifications, with or without accommodations or modifications.

172. The only limitation is that they be consistent with Section 504 Rehabilitation Act. 28 C.F.R. § 35.103(a). See *Judiciary Committee Report*, H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990).

The State Medical Board in New Jersey agrees that Title I should be incorporated into Title II. *Jacobs*, 1993 U.S. Dist. LEXIS 14294 (D.N.J. Oct. 5, 1993). The Board uses this conclusion to support questions regarding mental illness and substance abuse on its relicensure application. Conceding

Some commentators suggest that Title I provisions only apply to Title II when the State is an employer.¹⁷³ They are wrong—at least to the extent this theory denies Title I protections to applicants for professional licenses.

First, neither the Act nor regulations contain this restriction. Second, the purpose of the Act is to prevent discrimination against disabled individuals. Discrimination in employment may seem particularly harmful, but legislative history and testimony before Congressional committees establish the pervasiveness and virulence of discrimination against persons with disabilities. The ADA was enacted to combat this discrimination, whatever its source. Thus, legislators must have intended that the specific protections provided in Title I apply to the less detailed provisions of Title II to satisfy the broad purpose of the Act to prevent discrimination against disabled individuals.

Indeed, a third reason to apply Title I provisions to Title II is provided by an explicit statement in Title II regulations evidencing intent to extend broad protection to disabled persons.¹⁷⁴ Finally, even if legislators did not intend to extend provisions of Title I to all services and benefits under Title II—because they are not appropriate or necessary—the protections should be applied to professional licensing. A board's li-

the Act specifically prohibits pre-employment questions about disabilities, the Board argues its relicensing procedure complies with the Act.

Medical questions and examinations about disability—prohibited pre-employment—are permissible after a conditional offer. The offer may be withdrawn based on the information obtained from these medical examinations only if the reason is job related and consistent with business necessity. Because the Board grants renewal licenses to all licensees who complete the application—whatever their answers to these questions—the Board claims its relicensure procedure is analogous to post-employment inquiries. The Board argues that because the Act permits an employer to withdraw an offer based on medical information, it also allows Boards to use responses to trigger further investigation into an applicant's fitness to practice medicine.

This argument rests on the notion that obtaining a professional license is comparable to being hired for a job. Medical inquiries and examinations after the applicant is granted a license are analogous to post-employment inquiries—approved by the ADA under limited circumstances. On a motion for preliminary injunction, the court rejected this argument. Ironically, however, the theory—if accepted—would invalidate the same questions on initial applications. If the initial license is similar to employment—and the Board concedes questions about mental illness and substance abuse cannot be asked until after employment—the Board must agree that these inquiries are improper on initial applications.

173. See, e.g., Charles Reischel, *supra* note 36, at 18-19. Reischel concedes that legislative history suggests "'forms' of discrimination prohibited by, *inter alia*, Title I should also be prohibited by Title II." *Id.* at 19. But, he claims, "such intended incorporation seems to be limited to government activities which . . . fit into the employment . . . context . . ." *Id.* (quoting H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 84 (1990) (Committee on Education and Labor)).

Reischel concludes that "[b]ar admission certification does not 'fit into . . . the employment . . . context.'" *Id.* Based on a "continuing relationship," the employer will have a greater means and incentive to test applicants and will "derive benefits or suffer detriments" due to the worker's performance. Reischel contrasts this with the licensing board which "deals with many applicants, always on a strictly limited basis, . . . not directly affected, if at all, by their post-license performance." *Id.* He reaches his erroneous conclusion because he perceives these differences but ignores fundamental similarities.

Superficially correct, his argument misses the true nature of the licensing process. Professional licensing boards take their ongoing responsibilities to the public seriously. Although the initial licensing decision is "limited," once admitted, the applicant has a continuing relationship with other professionals and his post-license performance affects them, at least indirectly. Furthermore, in some jurisdictions, boards have continuing responsibility for recertification.

Most importantly, however, Reischel ignores the underlying basic similarity with the employment situation—the applicant who is not granted a license cannot work in his chosen profession. See *infra* notes 176-80 and accompanying text.

174. "This part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, . . . that provide greater or equal protection for the rights of individuals with disabilities . . ." 28 C.F.R. § 35.103(b) (1993).

censing function bears greater similarities to an employer-employee situation than to other services and benefits covered under Title II.¹⁷⁵ Unless admitted to the bar, a law school graduate cannot work as an attorney. Unless granted a license, a medical school graduate cannot practice as a physician. Licensing is merely one step removed from employment and is an essential condition to practice.

A 1992 ADA case provides further support for the conclusion that Title I protections apply to licensing even though it is not an employment situation.¹⁷⁶ The plaintiff claimed he was denied vocational rehabilitation because of his refusal to submit to a psychological examination.¹⁷⁷ He argued that requiring an examination violated the Title I prohibition on medical examinations. "[I]t is arguable that what is considered discrimination in employment practices (Subchapter I) may well be considered discrimination by entities providing services (Subchapter II)."¹⁷⁸ The court rejected the notion that the claim was frivolous simply because plaintiff "was seeking vocational rehabilitation rather than actually applying for a job."¹⁷⁹ In the same way, courts should reject a claim that the ADA does not apply merely because the applicant is seeking a license "rather than actually applying for a job."

VI. SUMMARY

In an effort to protect clients, patients, and the public, professional licensing boards inquire into character and fitness to practice. Boards ask applicants questions about history of or treatment for mental illness and substance abuse in their effort to determine fitness. Nonetheless, these questions are inappropriate, and their very asking constitutes injury to all applicants.

Recent scientific data concerning mental illness and substance abuse cast doubt on the utility of these inquiries as part of the fitness evaluation. Relying on conclusions supported by outdated research, courts have upheld the use of these questions. Nevertheless, new data supports a reweighing in the balancing test between an applicant's privacy rights and protection of the public. Even if courts continue to reject constitutional challenges, however, these questions must be eliminated from professional licensing applications because they violate the ADA.

The Act protects people who are or have been disabled and those who are "regarded as having a disability." By asking the questions, boards imply they regard applicants with history of or treatment for mental illness and substance abuse as "having a disability." As a result of this implication, these applicants are entitled to protection of the ADA, and any inquiries must comply with the Act's requirement that questions be connected with "essential business functions" of a physician or attorney. No proof ties information derived from questions about mental illness and substance abuse to

175. Many of the specific provisions under Title I are not necessary for certain services and benefits provided under Title II. Chai Feldblum, *Medical Examinations and Inquiries Under The Americans With Disabilities Act: A View From The Inside*, 64 TEMP. L.Q. 521 (1991). For example, many Title I protections are simply not relevant to disabled persons using parks and public buildings. Disabled individuals do need these protections when applying for licensing because this "benefit" is more closely analogous to an employer-employee situation than a picnic in the park.

176. *Kent v. Director, Missouri Dept. of Elementary and Secondary Education and Div. of Vocational Rehabilitation*, 792 F. Supp. 59 (E.D. Mo. 1992).

177. *Id.* at 60. He refused because he claimed that psychological examinations violate his religious beliefs. *Id.*

178. *Id.* at 61.

179. *Id.*

professional functions performed by doctors or lawyers. Thus, these questions must be eliminated from applications. Because present inquiries violate the ADA, information obtained cannot be used.

The best means to predict an applicant's behavior and fitness to practice is past conduct. If boards are truly interested in fitness to practice medicine or law, new questions should inquire into past behavior.

VII. SUGGESTED QUESTIONS

1. Have you ever been expelled, suspended from, or had disciplinary action taken against you by any educational institution? If so, explain the circumstances.
2. Has your grade point average ever varied by half a letter grade or more between two terms? If so, explain the circumstances.
3. Have you ever been absent from school or a job for more than 30 consecutive days? If so, explain the circumstances.
4. Have you ever been fired from, asked to leave, or had disciplinary action taken against you in any job? If so, explain the circumstances.
5. Have you ever been evicted or asked to vacate a place in which you lived? If so, explain the circumstances.
6. Have you ever been arrested for D.U.I.? If so, explain the circumstances, including the outcome of the incident.¹⁸⁰
7. Have you had any blackouts or periods of intoxication associated with alcohol or any other drug within the past six months? If so, explain the circumstances.

180. Although apparently contradictory to the American legal system, asking about arrests and outcome in addition to convictions is important to decide whether an individual is impaired. For example, regardless of whether he was convicted, the Board would have reason for concern if an applicant had been arrested several times for driving under the influence and each time he had been above the legal limit for intoxication.

