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 New medical research suggests this hypothesis is an outdated myth.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
respond affirmatively face additional injury. Many applicants who disclose a history of illness or treatment are injured because their admission is delayed. 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.

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 evidence 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 history 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

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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.


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).
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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. 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. Later, in *Schware v. Board of Bar Examiners,* the Court concluded that a state may “require high standards of qualification, such as good moral character or proficiency in its law.” The state’s authority is “not unfettered,” but great deference is given to the criteria licensing boards establish. “Most commentators agree that occupational licensing has been carried too far and that its adverse effects on individual liberty . . . outweigh its benefits.”

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. Justice Black acknowledged the importance of ensuring applicants and bar members be of good character. But, he also recognized the value to the applicant of his right to...

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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.


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).


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.


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.” 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.” 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.

A similar argument can be made if denial is based on an applicant’s history of...
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 *Schware*, highlighted the role of the profession in determining fitness. 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." This standard of review is "easily satisfied," 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." Nevertheless, this rational connection standard dooms "nearly all" substantive due process challenges to failure. Equal protection challenges also lose, even when the "regulation has had a consistent and significant adverse impact on a suspect class."

Because lawyers and physicians enjoy a position of trust vis-a-vis clients or patients, 
and the public, licensing boards may require applicants to establish their...
good moral character\textsuperscript{26} and fitness to practice.\textsuperscript{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.\textsuperscript{28} Mental disorders or substance abuse are sometimes also raised in disciplinary actions to mitigate\textsuperscript{29} sanctions for misconduct.\textsuperscript{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.

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

30. Id.

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 protected” 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 no contest 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).

Illness does not affect 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 honest and ethical. Inquiries concerning fitness should probe whether the applicant can competently perform the tasks of his profession. 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." None of these are necessarily adversely affected by mental disease or dishonesty 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.


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.

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

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
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:

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<th>General subjects of questions</th>
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<td>Legal problems connected with substance abuse</td>
<td>24</td>
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<tr>
<td>Addicted to or used drugs or alcohol</td>
<td>27</td>
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<tr>
<td>Treated for substance abuse</td>
<td>20</td>
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<tr>
<td>Physical or emotional problem</td>
<td>22</td>
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<tr>
<td>Treatment for mental illness</td>
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<td>Medication</td>
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Thirty-two boards of bar examiners responded to requests for application forms. The
following table reviews the classes of questions on these bar applications:

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<th>General subjects of questions</th>
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<td>Addicted to or used drugs or alcohol</td>
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<td>Treated for substance abuse</td>
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<td>Physical or emotional problem</td>
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<td>Communicable disease</td>
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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]quiring 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. Affirmative responses to these inquiries generally lead to further investigation, often demanding therapists to supply details about an applicant's illness and treatment.

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. Because no clear distinction between mental and physical illness exists, this discrimination is simply indefensible.

Illnesses generally considered mental disorders have physiological causes. 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.

policy's mental illness limitation was not applicable. 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.

In a more recent case, the Ninth Circuit decided that autism is not a mental disorder. Expert testimony defined mental illness as "refer[ring] to a behavioral disturbance with no demonstrable organic or physical basis." 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. 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, 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). 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. 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-four percent. The headnotes and footnotes are as follows:

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.
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.
Conduct, Not Mental Illness

eight percent. Contrast this with earlier assessments, some estimating incidence of mental illness in the population as high as eighty-two percent. 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. 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. 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. When the issue is disclosure of personal matters, such as mental illness or substance abuse, the Court applies a flexible balancing test. The standard of review ranges from intermediate to strict depending on the extent of the intrusion. "[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." To determine whether an invasion of privacy is justified, certain factors—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).
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.
62. 812 F.2d at 110.
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, 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. 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.” 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, 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. But, they erred in finding that these questions are the least intrusive means to effectuate that interest. 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.” 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. An analogous federal case exposes the flaw in this argument.

The Third Circuit recognized that it is “illusory” to treat police applicants as volunteers. 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.” Thus, the court held that the “voluntary nature of the application” was not a “basis to pretermit analysis of whether the condition of employment violates the applicants’ privacy rights.”

Applicants objected to questions which included inquiries regarding physical and mental conditions. Because responses to these questions might “contain intimate facts about one’s body and state of health,” answers are within an individual’s reasonable expectations of privacy and entitled to protection. “The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.”

Medical information is considered confidential; information about history of or treatment for mental illness is particularly sensitive. 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.

Professional licensing boards compel applicants to respond to all questions. Courts concede that these questions implicate privacy rights. The invasion of privacy constitutes injury, 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
V. ADA

A. The Act

The Americans with Disabilities Act of 1990 ("ADA") was passed to protect 43 million disabled Americans\(^5\) from discrimination.\(^6\) As a step toward achieving this goal, the Act elevates persons with disabilities to suspect class status.\(^7\) With this simple stroke of the pen, legislators maximized the probability of eliminating discrimination\(^8\) by heightening the standard of review to strict scrutiny.\(^9\)

Questions about treatment for mental illness and substance abuse on licensing applications simply cannot withstand this scrutiny.\(^10\) 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." \(\text{Id. at 55.}\) 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." \(\text{Id. at 16.}\)

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 . . . ." \(\text{Id.}\)

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." \(\text{Id. at 448.}\) 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." \(\text{Id.}\)

\(^{88}\) 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 illness\(^{91}\) on licensing or relicensing applications. Analysis of statutory provisions and analogous cases decided either under the Act or earlier legislation\(^{92}\) 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. \textit{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." \textit{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." \textit{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." \textit{Id.}

The resolution has been revised and now provides:

\begin{itemize}
  \item 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:
  \begin{enumerate}
    \item 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
    \item 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.
  \end{enumerate}
\end{itemize}

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 indiscriminate 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." \textit{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.


\textit{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 "carrying] out its duties in a fashion that discriminates against applicants with disabilities" based on their status. \textit{Id.} at 22. Thus, the court concluded that applicants had a "high probability of success" on the merits. \textit{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 immunity 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" but also "a record of such impairment" or "being regarded as having such an impairment." 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."

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).

The supreme court upheld these inquiries "although 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.


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."

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.


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" 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.

D. Essential Functions

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

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." Title I does permit employers to defend against a charge of discrimination by
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.\(^{124}\)

\(^{113}\) 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.


\(^{115}\) 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.


\(^{121}\) 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. 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. The record established that plaintiff was “suffering from a severe mental illness.” 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.” Because plaintiff was discharged for her behavior, rather than her mental illness, she is “not a victim of discrimination.”

The Act permits an employer to reject an applicant who poses a “direct threat” to the health or safety of others in the workplace. 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 . . . .” 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.”

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.”

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).

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\textsuperscript{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,\textsuperscript{139} his violence toward his superior meant he was "simply not otherwise qualified for employment."\textsuperscript{140} An employer is "not obliged to indulge a propensity for violence—even if engendered by a 'handicapping' mental illness."\textsuperscript{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.\textsuperscript{142} Factors generally used to excuse the obligation when compelling an accommodation that would "impose an undue hardship"\textsuperscript{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.\textsuperscript{144} "Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment,"\textsuperscript{145} further blurring the current ambiguous distinction. Indeed, recent medical research about prevalence and effect of mental illness—analogous 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."\textsuperscript{146} Based on this new medical research,\textsuperscript{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.\textsuperscript{148} Boards might argue these conditional admissions represent reasonable accom-
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. 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" 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.

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.

For example, in Walls v. City of Petersburg, 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. 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)).

152. See, e.g., Applicant, 443 So. 2d at 75.
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. Professional licensing boards do not provide similar safeguards against disclosure.

G. Substance Abuse

One problem many applicants face is history of substance abuse. 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. But, those who no longer use drugs or are erroneously regarded as using drugs are protected.

The Act was intended to exclude illegal drug users—not alcoholics—from protection. 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.

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.


158. Id.


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.

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, 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. 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.

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. After violating several disciplinary rules, the attorney was suspended indefinitely because he was “incapacitated from practicing law by reason of addiction to alcohol.” 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

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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 pleaded 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." 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." 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." This means bar examiners and medical boards, as instrumentalities of the State, are public entities prohibited from discriminating.

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." 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.

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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. 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.

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.


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. 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.

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-
licensing function bears greater similarities to an employer-employee situation than to other services and benefits covered under Title II. 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. The plaintiff claimed he was denied vocational rehabilitation because of his refusal to submit to a psychological examination. He argued that requiring an examination violated the Title I prohibition on medical examinations. "It is arguable that what is considered discrimination in employment practices (Subchapter I) may well be considered discrimination by entities providing services (Subchapter II)." The court rejected the notion that the claim was frivolous simply because plaintiff "was seeking vocational rehabilitation rather than actually applying for a job." 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.


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.

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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.