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RAISING THE BAR: WHY NEW JERSEY SHOULD RECONSIDER ITS MENTAL HEALTH INQUIRIES ON THE BAR EXAM

Summer Cordasco[1]

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I. INTRODUCTION

The combination of long hours, conflict-driven work projects, and demanding work environments has helped to establish the high-stress reputation of the legal profession. In 2016, a study of almost 13,000 attorneys funded by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs found that 20.6% of the attorney participants screened at a level consistent with problem drinking, 28% were experiencing signs of depression, 19% were experiencing signs of anxiety, and 23% were experiencing signs of stress.[2] For many attorneys, stress is not something new. While in law school, prospective attorneys are faced with the pressures to meet strict deadlines, keep up with large amounts of reading, and land the best internships, all while competing with their classmates for the best grades on the grading curve.

A study completed by Yale Law School shows that 70% of the 296 student participants reported experiencing mental health challenges during law school.[3] Additionally, a 2014 study indicates that law students from fifteen different law schools around the United States feel discouraged from seeking help regarding substance abuse or mental health for a multitude of reasons including the potential threat to Bar admission, social stigma, and concerns about privacy.[4] The study found that "with respect to mental health, the percentage of third-year respondents concerned that seeking help would be a potential threat to a job or academic status or a threat to Bar admissions was higher than the percentage of first-year respondents for whom these factors were of

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[2] *See generally* Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016) (While the study had a total of 12,825 participants, only 11,278 fully participated in the alcohol portion and only 11,516 fully participated in the mental health screening. Therefore, these statistics are only taking into account those that fully participated in those portions of the screenings.).

[3] Jesse Agatstein et al., YALE L. SCH. MENTAL HEALTH ALL., FALLING THROUGH THE CRACKS: A REPORT ON MENTAL HEALTH AT YALE LAW SCHOOL 14 (Dec. 2014), https://law.yale.edu/sites/default/files/area/department/studentaffairs/document/falling_through_the_cracks.pdf. Out of the 296 students in the sample, 70% agreed with the statement, "[w]hile at Yale Law, I believe I have experienced mental health challenges." *Id.*

[4] Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 141 (2016).

concern."[5] The percentage of third-year students with concerns relating to the potential threat to Bar admission with respect to alcohol and drug use was also higher than the percentage of first-year students.[6] The data shows that 63% of respondents were discouraged from seeking help regarding substance abuse and 45% of respondents were discouraged from seeking help regarding mental health due to the potential threat to Bar admissions.[7]

These statistics illustrate that there is a problem; law students are not seeking the mental health and substance abuse treatments that they need. Since the first day of law school, law students are taught the importance of professional integrity and disclosure. Yet, when it comes to being asked about their mental health or history with substance abuse, many law students worry that being honest may cost them their career. For many of these students, the fear of being rejected from the Bar may be enough to keep them from seeking necessary treatment.[8]

Typically, to practice law in any state, one must first pass the state Bar Exam.[9] Along with being tested on substantive legal knowledge, prospective lawyers fill out a separate character and fitness evaluation.[10] The purpose of the character and fitness evaluation is "to identify issues that could affect the responsible and competent practice of law."[11] It is not surprising that with the "heightened rate of attorneys

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *See generally id.* The survey results indicate that almost half of the student respondents were discouraged from seeking treatment because of the potential threat to bar admissions.
[9] *Bar Admissions Basic Overview*, ABA (June 26, 2018), https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/?q=&fq=(id%3A%5C%2Fcontent%2Faba-cms-dotorg%2Fen%2Fgroups%2Flegal_education%2F*)&wt=json&start=0 (This overview provides information regarding how a prospective attorney may go about obtaining a license to practice law. The overview also mentions that testing bar applicants is a common way of determining whether an applicant meets the competence requirements to practice in that state.).
[10] *Id.*
[11] David Jaffe & Janet Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, 26 ABA: THE PRO. LAW. (2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/26/2/conduct-yourselves-accordingly-amending-bar-character-and-fitness-questions-promote-lawyer-wellbeing/.

who experience depression and the often high-stress nature of both law school and the practice of law," a majority of states inquire into the Bar applicant's mental history.[12] However, while these questions may claim to be linked to an applicant's ability to practice law, they can be problematic because they are putting too much emphasis on an applicant's past mental health and substance abuse rather than focusing on an applicant's present conduct and behavior. In an opinion from August 2020, a judge from the United States District Court for the Western District of Kentucky made the following statement:

> Law school is hard. The stress, rigor, and competition can lead to depression, anxiety, and substance abuse. Many students who start school healthy are far from it by the time they graduate. Some kill themselves.
>
> Aspiring lawyers should seek the health care they need. But if Kentucky continues to punish people who get help, many won't. And one day, a law student will die after choosing self-help over medical care because he worried a Character and Fitness Committee would use that medical treatment against him — as Kentucky's did against Jane Doe.
>
> It is not a matter of if, but when.[13]

These words illustrate that there is a problem in the way that Bar admissions handle mental health inquiries and the impact that these inquiries have on the legal profession.

New Jersey is among the 39 states that currently "ask about the existence of a mental health condition or impairment."[14] Not only does

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[12] Bailey L. Box, *It Isn't Crazy: Why Indiana Should Re-Evaluate its Mental Health Related Bar Exam Application Questions*, 13 IND. HEALTH L. REV. 472, 475 (2016).

[13] Doe v. Sup. Ct. of Ky., No. 3:19-CV-236-JRW, 2020 U.S. Dist. LEXIS 157049 at *21 (W.D. Ky. Aug. 28, 2020).

[14] Marilyn Cavicchia, *A new look at character and fitness: Bar leaders, lawyers, others urge elimination of mental health questions*, 44 ABA: BAR LEADER (2020), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2019_20/january-february/a-new-look-at-character-and-fitness-bar-leaders-lawyers-others-urge-elimination-of-mental-health-questions/.

New Jersey ask about the existence of a condition or impairment, but if an applicant answers "yes" to the existence of one, the questionnaire also requires that the applicant describe treatments that are being used to reduce the condition or impairment.[15] The required disclosure of this personal information could be found as a violation of an applicant's privacy. This privacy may be awarded to Bar applicants through the Americans with Disabilities Act (ADA), which "prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public."[16]

Although the board of Bar Examiners has broad authority to set licensing qualifications, that authority is subject to the requirements of the ADA. Specifically, Title II of the ADA applies to State and Local Governments and its substantive provision includes that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[17] Under this statute, a "public entity" is defined as "any State or local government [and] any department, agency . . . or other instrumentality of a State . . . or local government."[18] The attorney general's issuance of the implementation of regulations indicates "that coverage extends to activities of the state

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[15] NJ BD. OF BAR EXAM'RS, *Character & Fitness Questionnaire*, https://www.njbarexams.org/browseprintform.action?formId=2 (last visited Feb. 20, 2021). On its Character and Fitness Questionnaire, New Jersey's Question 12(B) under "Other Disorders" asks, "Do you CURRENTLY have any condition or impairment (including but not limited to substance abuse, alcohol abuse, or a mental, emotional or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical and professional manner and in compliance with the Rules of Professional Conduct, the Rules of Court, and applicable case law?"

[16] *What is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, https://adata.org/learn-about-ada#:~:text=Title%20II%20(State%20and%20Local%20Government)&text=Title%20II%20of%20the%20ADA,and%20services%20of%20public%20entities.&text=Department%20of%20Justice.-,More%20information%20and%20events%20related%20to%20ADA,(State%20and%20Local%20Government) (last visited Feb. 20, 2021).

[17] 42 U.S.C. § 12132.

[18] 42 U.S.C. § 12131(1).

judicial branch and to state licensing programs."[19] Moreover, "[c]ourts have uniformly held that Bar Examiners, who act as arms of the state judiciary in licensing attorneys, are covered by Title II."[20] Therefore, there may be a legality issue regarding the New Jersey Bar inquiring into an applicant's mental health status under the ADA.

The current system may have a perverse effect on law students applying for the New Jersey state Bar because it discourages students from seeking mental health and substance abuse treatment. By inquiring into an applicant's mental health and substance abuse treatment, Bar Examiners are deterring applicants from seeking critical treatment for these concerns.[21] By keeping the current system as is, the character and fitness inquiry is not serving its purpose of identifying whether an applicant is fit to practice law. It is likely that Bar applicants are being admitted without receiving necessary treatment because of the deterrent effect of mental health inquiries on the Bar Exam.[22] This achieves the opposite of what the character and fitness questionnaire is supposed to accomplish because there are prospective attorneys being admitted that should be receiving mental health treatment, but have not because of the fear of rejection from the Bar.

These mental health inquiries are not only acting as a deterrent for law students to seek help, but they may also compel students who have sought help to disclose their conditions or impairments, even if they do not believe that these conditions will affect their practice. This also does not help achieve the character and fitness questionnaire's goal of public safety because it is not successfully identifying unfit applicants.[23] Instead, these questions are placing additional stress on applicants that have exercised good judgment by seeking treatment, and

[19] Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 128 (2001).

[20] *Id.*

[21] *See* Organ et al., *supra* note 4, at 141. The results from this study have indicated that law students feel discouraged from seeking mental health treatment because of the fear of bar rejection. *Id.*

[22] *Id.*

[23] Mary Dunnewold, *The Other Bar Hurdle: the Character and Fitness Requirement*, A.B.A. FOR L. STUDENTS: STUDENT L. BLOG (Dec. 1, 2013), https://abaforlawstudents.com/2013/12/01/bar-hurdle-character-fitness-requirement/. "In theory, the character and fitness requirement protects the public from individuals whose past conduct shows they will not be scrupulous lawyers." *Id.*

as a result may have been diagnosed with a condition or impairment.[24] Inquiring into an applicant's mental health status only encourages unhelpful speculation, which further encourages the negative stereotypes surrounding those that seek treatment for mental health problems.[25] Therefore, rather than being part of a system that deters treatment and encourages the stigmatization of mental health, New Jersey Bar Examiners should be part of the movement to encourage students to pursue the treatment they need.

This article is not disputing that a Bar applicant's untreated mental illness or substance abuse may result in future injury to potential clients and the public, but it is rather considering the legality under the ADA of the specific questions being asked and the opportunity for modification of these questions.

First, this article will examine the questions that appear on New Jersey's character and fitness examination and how these questions may further discourage law students from seeking the treatment that they need. Second, it will discuss a brief history of the ADA and the relevant case law regarding its problematic relationship with the character and fitness examination. Third, it will discuss how other states have eliminated or modified these questions and why New Jersey should follow suit. Finally, this article will discuss how to modify these questions to improve the handling and treatment of mental health and substance abuse issues within the legal profession and law school community.

II. BACKGROUND

A. The Character and Fitness Evaluation

When law students are applying to state Bars, they are also required to submit a character and fitness questionnaire.[26] This questionnaire is used to evaluate whether the applicant is fit to perform the duties of a lawyer.[27] It is expected that an applicant will disclose any misconduct or information asked of them on the character and fitness questionnaire.[28] Full disclosure is vital to being admitted to the

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[24] *See* Organ et al., *supra* note 4 at 141.

[25] N.J. L. J., *Bar Application Shouldn't Inquire into Mental Health*, (Mar. 15, 2020, 10:00 AM), https://www.law.com/njlawjournal/2020/03/15/bar-application-shouldnt-inquire-into-mental-health/.

[26] ABA, *supra* note 9.

[27] *See generally id.*

[28] *See* NJ BD. OF BAR EXAM'RS, *supra* note 15. New Jersey's Character and Fitness Questionnaire asks about an applicant's misconduct and requires an

state Bar, because if it is found that an applicant did not fully disclose prior misconduct, she may face the consequence of not being admitted to practice.[29] On the questionnaire, "[b]ar applicants must show by clear and convincing evidence that they possess the requisite degree of good character to sit for the exam and be admitted."[30] This requires revealing not only "a dizzying array of personal information from their past," but also disclosure of "any arrests, academic misconduct charges, job losses, traffic tickets, bankruptcies and in some cases mental health histories."[31]

In the late 19th and early 20th century, the purpose of the screening "was to red-flag anyone who didn't fit the image of mainstream, majoritarian preferences."[32] In that time, "applicants were denied because of race, class or even where their parents were born."[33] It was during this time "that character and fitness qualifications began to become more formalized in ways that a member of the modern legal profession would recognize."[34] By 1927, almost two-thirds of all states took efforts to strengthen their character and fitness requirements through the use of interviews, questionnaires, and other methods.[35]

In 1930, the National Conference of Bar Examiners (NCBE) was established which was "specifically founded 'to work with other institutions to develop, maintain, and apply reasonable and uniform standards of education and character for eligibility for admission to the practice of law.'"[36] The problem with the early character and fitness tests were that they were less about protecting the public from unfit

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applicant to certify the provided information. The certification states that, "[c]andor and truthfulness are significant elements of fitness." *Id.*

[29] David L. Hudson, *Honesty is the best policy for character-and-fitness screenings*, ABA J. (June 1, 2016, 2:20 AM), https://www.abajournal.com/magazine/article/honesty_is_the_best_policy_for_character_and_fitness_screenings. In this article, a University of Connecticut law professor, Leslie Levin, is quoted saying that, "[l]ack of candor is frequently a factor that significantly contributes to a character-and-fitness committee's refusal to admit an applicant." *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Derek Davis, *A Higher Bar: Revisiting character and fitness in the profession*, 4 HARV. L. SCH.: THE PRACTICE 1 (Mar./Apr., 2018), https://thepractice.law.harvard.edu/article/a-higher-bar/.

[35] *Id.*

[36] *Id.*

attorneys and more about excluding certain people.[37] While now the character and fitness inquiry is focused primarily on determining the fitness of Bar applicants, there are still issues regarding its line of mental health questioning. Many states have continued to include mental health inquiries on their character and fitness questionnaires as part of their assessment of a law student's ability to practice law proficiently.[38]

On these questionnaires, many jurisdictions ask about an applicant's mental health or substance abuse.[39] The questions pertaining to mental health typically fall into four different categories:

> (1) diagnosis or existence of a mental health condition that could affect an applicant's ability to practice law; (2) treatment, in-patient or out-patient, of the aforementioned condition; (3) role or use of the condition or impairment as an explanation or defense in legal or administrative proceedings; and (4) whether the applicant has ever been party to conservatorship or court-appointed guardianship proceedings.[40]

While there are states that have either modified or eliminated mental health inquiries from their character and fitness questionnaires, many states still include one or more questions that reference the mental health status of an applicant.[41] Thirteen states and Washington D.C. have adopted the questions drafted by the NCBE.[42] Under the "Condition or Impairment" section of the NCBE, question 30 asks, "Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous

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[37] *Id.*
[38] *Bar Admissions Questions Pertaining to Mental Health, School/Criminal History, and Financial Issues*, BAZELON CTR., http://www.bazelon.org/wp-content/uploads/2019/05/Bar-Application-Character-and-Fitness-Questions.pdf (last updated Feb. 2019).
[39] *Id.*
[40] ABA COMM'N DISABILITY RTS., *Mental Health Provisions in State Bar Exams* (n.d.), https://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/mh-provisions-state-bar-exams.pdf. While this note will discuss New Jersey's questions in relation to these categories, the topic of conservatorship is beyond the scope of this note.
[41] *Id.*
[42] BAZELON CTR., *supra* note 38.

disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?"[43] Following the question, there is a note that defines "currently" in the context of the question as meaning "recently enough that the condition or impairment could reasonably affect your ability to function as a lawyer."[44]

While questions focusing on a current condition may appear permissible, they still could be violating the ADA.[45] This line of questioning does not focus on the applicant's behavior or conduct based on these conditions, but only on the existence of an impairment. Furthermore, there are also policy implications to making these inquiries because they have a deterrent effect on law students seeking treatment for their mental health concerns. Law students that seek treatment for mental health should not be placed under the additional stress of worrying if seeking treatment will adversely affect their chances of being admitted to the Bar. Therefore, making such an inquiry is not only a violation to the ADA,[46] but it also further encourages the stigmatization of those who seek treatment for their mental health concerns.

B. New Jersey's Character and Fitness Questionnaire

To practice law in New Jersey, Bar applicants are required "to demonstrate their fitness by showing the requisite traits of honesty, integrity, fiscal responsibility, trustworthiness, and a professional commitment to the judicial process and the administration of justice."[47] Rule 1:25 allows the Committee on Character to review "the personal record and reputation of each candidate for admission to the Bar of the State of New Jersey to determine fitness to practice law."[48] Following the review of an applicant's character and fitness questionnaire, "the Committee either certifies a candidate or recommends the withholding

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[43] *NCBE Character and Fitness Sample Application*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/dmsdocument/134 (last visited Feb. 20, 2021).

[44] *Id.*

[45] 42 U.S.C. § 12132.

[46] *Id.*

[47] *Information for Admission by Motion Applicants*, N.J. BD. BAR EXAM'RS, https://www.njbarexams.org/appinfo.action?id=12#:~:text=The%20Board%20of%20Bar%20Examiners%20is%20authorized%20through%20the%20Supreme,the%20New%20Jersey%20State%20Police (last visited Feb. 20, 2021).

[48] *Id.*

of certification pursuant to the Regulations Governing the Committee on Character."[49] The purpose of the Committee on Character is "to determine the fitness to practice law of each candidate for admission to the Bar of the State of New Jersey and thereby to promote the public interest and to protect the integrity of the legal profession."[50]

On its Character and Fitness Questionnaire, the New Jersey Bar makes inquiries into both a prospective attorney's mental health and substance abuse history.[51] These questions appear under Section 12 of the Questionnaire, which addresses an applicant's "recent mental health, chemical, alcohol, and/or psychological dependency matters."[52] While the questionnaire's preamble of Section 12 indicates that the mere fact of treatment for these conditions is not a basis for the denial of Bar admissions, it does include that there is a possibility for denial if a candidate is found to be unfit when the licensing decision is made.[53] Consequently, Bar applicants may perceive such mental health and substance abuse inquiries as a make-or-break factor in deciding whether they will be denied or delayed admission to the Bar. The relevant question under Section 12 is as follows:

> 12(B) Other Disorders
> Do you CURRENTLY have any condition or impairment (including but not limited to substance abuse, alcohol abuse, or a mental, emotional or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical and professional manner and in compliance with the Rules of Professional Conduct, the Rules of Court, and applicable case law?
>
> If yes, please describe any ongoing treatment programs you receive to reduce or ameliorate the condition or impairment.[54]

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[49] *Id.*
[50] *Regulations Governing the Committee on Character*, N.J. BD. BAR EXAM'RS, https://www.njbarexams.org/committee-on-character-regulations (last visited Feb. 21, 2021).
[51] NJ BD. OF BAR EXAM'RS, *supra* note 15.
[52] *Id.*
[53] *Id.*
[54] *Id.*

In terms of the different types of questions that are typically found on character and fitness questionnaires, this question falls within the category of "diagnosis or existence of a mental health condition that could affect an applicant's ability to practice law."[55] This question also leaves it solely up to the applicant to decide whether her condition will affect her ability to practice.

While New Jersey does not utilize the NCBE's questionnaire, Question 12(B) uses almost the exact same language.[56] This type of questioning is overbroad and unnecessary. There is also the element that if an applicant responds affirmatively to the first part of the question, she then is asked to provide more information. This puts applicants with a mental health condition or impairment at a disadvantage because it then burdens them with having to describe their treatment history.

Rather than asking a candidate about her conditions or impairments, the Bar should be asking conduct-based questions to determine whether the applicant is fit to practice law. Additionally, because they fear the consequences of failing to disclose information, applicants may feel compelled to disclose their mental health conditions even if they do not believe that their condition will affect their legal practice. As a result, this type of inquiry not only enhances the stigmatization of mental health disabilities in the legal field, but it also violates applicants with disabilities' rights under the ADA.

C. The Americans with Disabilities Act (ADA)

1. History of the ADA

While the ADA was not signed into law until 1990, it owes its creation to the disability rights movement.[57] The disability rights movement worked for decades to reverse the historically accepted notion of "'out of sight, out of mind' that the segregation of disabled people served to promote."[58] Many of the strategies that the disability rights movement adopted were inspired by those of the civil rights movement.[59]

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[55] ABA COMM'N DISABILITY RTS., *supra* note 40.
[56] NJ BD. OF BAR EXAM'RS, *supra* note 15.
[57] Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), https://dredf.org/about-us/publications/the-history-of-the-ada/.
[58] *Id.*
[59] *Id.*

Prior to the passage of the ADA, "a profound and historic shift in disability public policy occurred" when Section 504 of the Rehabilitation Act was passed in 1973.[60] Under Section 504, no qualified individual with a disability could because of her disability, "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."[61] The enactment of Section 504 demonstrated that Congress acknowledged "that the inferior social and economic status of people with disabilities was not a consequence of the disability itself, but instead was a result of societal barriers and prejudices."[62] Moreover, Section 504 was the first time that "people with disabilities were viewed as a class – a minority group."[63]

The ADA was signed into law in 1990 and prohibited discrimination against people with physical and mental disabilities.[64] To be eligible for the protections under the ADA, a person must have a disability which is defined under the Act "as a physical or mental impairment that substantially limits one or more major life activities."[65] The ADA also provides protections for "a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment."[66]

2. Background on the ADA

The ADA is designed to make sure "that people with disabilities have the same rights and opportunities as everyone else."[67] It is "a civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public."[68] To gain protection under the ADA, one must meet the definition of having a disability. A disability is defined as "a

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[60] *Id.*
[61] 29 U.S.C. § 794(a).
[62] Mayerson, *supra* note 57.
[63] *Id.*
[64] 42 U.S.C. § 12101; *Introduction to the ADA*, U.S. DEP'T OF JUST. CIV. RTS. DIV., https://www.ada.gov/ada_intro.htm (last visited Feb. 21, 2021).
[65] *Id.*
[66] *Id.*
[67] ADA NAT'L NETWORK, *supra* note 16.
[68] *Id.*

physical or mental impairment that substantially limits one of major life activities of such an individual . . . a record of such an impairment; or . . . being regarded as having such an impairment."[69]

The ADA is divided into five titles that each relate to a different area of public life.[70] Title I is the Employment section of the ADA which is "designed to help people with disabilities access the same employment opportunities and benefits available to people without disabilities."[71] This article is primarily focused on Title II which is the State and Local Government section. Title III is the public accommodations section which "prohibits private places of public accommodation from discriminating against individuals with disabilities."[72] Title IV is the Telecommunications section which "requires telephone and Internet companies to provide a nationwide system of interstate and intrastate telecommunications relay services that allows individuals with hearing and speech disabilities to communicate over the telephone."[73] Finally, Title V is the Miscellaneous Provisions which "contains a variety of provisions relating to the ADA as a whole, including its relationship to other laws, state immunity, its impact on insurance providers and benefits, prohibition against retaliation and coercion, illegal use of drugs, and attorney's fees."[74] While the ADA is divided into five titles, this article will only be considering Title II.[75]

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[69] 42 U.S.C. § 12102(1)(A)–(C).
[70] ADA NAT'L NETWORK, *supra* note 16.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] Title III also applies to bar examinations under 42 U.S.C. § 12189. This provision covers examinations and courses related to licensing. *Id.* Not only are test centers that hold examinations regulated by Title III, but so are the organizations that develop and administer these tests. *Id.* Therefore, it would apply to bar examiners as the bar examination administrators. However, since this provision applies mostly to the physical administration of the test, it is beyond the scope of this article.

3. Title II of the ADA

Title II is the State and Local Governments section of the ADA.[76] Under this title, qualified individuals with disabilities are protected "from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities."[77] In the past decades since the ADA went into effect, there have been numerous decisions in federal district and state courts that have addressed whether Bar Examiners are prohibited from making mental health inquiries.[78] Most of these cases have concluded that Title II of the ADA directly applies to state Bar Examiners, but not without its challenges.[79]

To determine whether Bar Examiners are considered a "public entity" under Title II, courts have had to consider the statutory meaning of Title II and its provisions.[80] Under Title II, a public entity is defined as "any State or local government…or other instrumentality of a State or States or local government."[81] As an arm of the state under the Supreme Court, Bar Examiners are given the authority to determine who is fit to practice law.[82] Therefore, as instrumentalities of the State, Bar Examiners are deemed public entities under Title II of the ADA.

Moreover, as a public entity, Bar Examiners are subject to the provisions under Title II to prevent the discrimination of applicants with disabilities.[83] The central provision of Title II states that:

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[76] *State and Local Gov'ts (Title II),* U.S. DEP'T OF JUST. CIV. RTS. DIV., https://www.ada.gov/ada_title_II.htm (last visited Feb. 21, 2021).
[77] *Id.*
[78] *See* Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430 (E.D. Va. 1995); Brewer v. Wis. Bd. of Bar Exam'rs, No. 04-C-0694, 2006 WL 3469598, at *10 (E.D. Wis. Nov. 28, 2006); In re Petition & Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996).
[79] *See* Ellen S. v. Fla. Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1493 (S.D. Fla. 1994) (holding that Title II of the ADA directly applied to Bar Examiners).
[80] *Id.*
[81] 42 U.S.C. §§ 12131 (1)(A)–(B).
[82] NJ BD. OF BAR EXAM'RS, *Information for Bar Exam Applicants*, https://www.njbarexams.org/appinfo.action?id=1 (last visited Nov. 13, 2021). "The Supreme Court has exclusive authority to determine who is qualified to practice law in New Jersey and what admission procedure will be used. Only a member of the New Jersey Bar may practice law in this State." *Id.*
[83] 42 U.S.C. § 12132.

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[84]

In *Ellen S. v. Florida Board of Bar Examiners*, the Board of Bar Examiners argued that the general language of Title II did not extend to the Board's regulation and licensing of attorneys.[85] The Board's argument was based on "Title I of the ADA specifically prohibits employers from conducting pre-employment inquiries regarding disability while Title II only generally prohibits discrimination by public entities, Title II does not proscribe the challenged inquiry at issue."[86] But, the Court rejected this argument of statutory construction because in terms of the ADA's legislative history, it is revealed that "Congress deliberately chose 'not to list all the types of actions that are included within the term 'discrimination', as was done in [T]itles I and III.'"[87]

Even though the general language of Title II does not directly govern the licensing and regulation of attorneys, the Court in *Ellen S.* points out that the Board's argument would still fail.[88] When "the broad anti-discriminatory language of Title II is read in conjunction with the regulations promulgated by the Department of Justice pursuant to § 12134 of the ADA[,]" the regulations apply Title II to the licensing and regulation of attorneys.[89] The regulation, 28 CFR § 35.130(b)(6) applies directly to the licensing of attorneys and reads:

> A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with

[84] *Id.*
[85] *Ellen S.*, 859 F. Supp. at 1493.
[86] *Id.*
[87] *Id.* (quoting H.R. Rep. No. 485(II), pt. 2, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367).
[88] *Ellen S.*, 859 F. Supp. at 1493.
[89] *Id.*

> disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.[90]

Thus, as public entities under Title II of the ADA, Bar Examiners must adhere to the law under this provision.[91] Therefore, Bar Examiners cannot use character and fitness questionnaires to discriminate against qualified disabled persons.

By making mental health inquiries on state Bar Examinations, Bar Examiners are discriminating against applicants with disabilities. These types of questions pose both a disparate treatment and a disparate impact on people with mental health disabilities. Not only are these questions intrusive, but it is unclear whether these types of mental health inquiries are even necessary for the purpose of determining which applicants are fit to practice law. Even though the purpose of the character and fitness examination is to determine whether an applicant is fit to perform the duties of a lawyer,[92] that does not suggest that Bar Examiners are able to disregard the protections granted to individuals with disabilities under the ADA in order to make these determinations.

a. Disparate Treatment

Disparate treatment is treating a member of a protected class differently than others who do not share the same protected characteristic.[93] In other words, a disparate treatment claim asks if the outcome would be different but-for the individual's disability.[94] A disparate treatment claim is not limited to disability law but applies to

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[90] 28 C.F.R. § 35.130 (2021).

[91] 42 U.S.C.S. § 12131 (2021).

[92] N.J. BD. OF BAR EXAM'RS, *supra* note 15. In the preamble to Section 12 of its questionnaire, the New Jersey Board of Bar Examiners includes, "[t]he Committee on Character ("Committee") asks these questions because of its responsibility to protect the public by determining the current fitness of an applicant to practice law, and the purpose of these questions is to determine the current fitness of an applicant to practice law." *Id.*

[93] U.S. EQUAL EMP. OPPORTUNITY COMM'N, CM-604, THEORIES OF DISCRIMINATION (1988), https://www.eeoc.gov/laws/guidance/cm-604-theories-discrimination.

[94] *See generally id.*

all discrimination law.[95] Disparate treatment claims also arise when someone is treated differently based on their sex, race, religion, or other protected class status.[96] An example of disparate treatment is if women were required to submit additional documents to be accepted to the Bar, while men did not have to complete these additional requirements. Many people would see this to be an issue because women were being treated differently based on their sex. Here, Bar Examiners are engaging in disparate treatment by subjecting Bar applicants with mental health disabilities to further inquiries than those without these disabilities.

The mental health inquiries on the Bar Examination pose a disparate treatment on applicants with mental health disabilities for multiple reasons. To make a disparate treatment claim, it must be determined whether an individual was treated differently on the basis of her disability.[97] While these questions pertaining to an applicant's mental health are required to be answered by every Bar applicant, they pose an additional burden on individuals with disabilities. If an applicant answers affirmatively to a question pertaining to having or being treated for a mental illness, it is common for Bar Examiners to require additional information from the applicant.[98] This information could include treatment history, doctor information, and even notes from the applicant's counseling sessions.[99] Having to provide this confidential information imposes an unnecessary burden on applicants with mental health disabilities that applicants without these disabilities do not have to worry about. Therefore, imposing these inquiries on applicants with mental health disabilities generates a disparate treatment by treating these applicants with disabilities differently than applicants without these disabilities.

Moreover, the Department of Justice (DOJ) has found this type of disparate treatment in Bar licensing to be in violation of the ADA.[100]

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[95] *Id.* Disparate treatment claims are also commonly brought in employment discrimination cases under Title VII of the Civil Rights Act of 1964.
[96] *Id.*
[97] *Id.* "To prove disparate treatment, the charging party must establish that respondent's actions were based on a discriminatory motive." *Id.*
[98] *See* Doe v. Sup. Ct. of Ky., No. 3:19-CV-236-JRW, 2020 U.S. Dist. LEXIS 157049 at *8 (W.D. Ky. Aug. 28, 2020).
[99] *See id.* (the plaintiff was forced to turn over her therapist's notes from her counseling sessions).
[100] Letter from Jocelyn Samuels, Acting Asst. Att'y Gen., U.S. Dep't of Just. Civ. Rts. Div., to the Hon. C.J. Bernette J. Johnson, La. Sup. Ct., Elizabeth S. Schell, Exec. Dir., La. Sup. Ct. Comm. on Bar Admissions & Charles B.

In 2014, the DOJ investigated and made recommendations for Louisiana's Bar application based on the following questions:

> 25. Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?
> 26A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?
> 26B. If your answer to Question 26(A) is yes, are the limitations caused by your mental health condition . . . reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?
> 27. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority?[101]

If an applicant answered affirmatively to Question 25 or Question 26, she had to then "complete a form authorizing each of their treatment providers 'to provide information, without limitation, relating to mental illness . . . , including copies of records, concerning advice, care, or treatment provided. . . .'"[102] Applicants were also required to "complete a form describing their condition and treatment or monitoring program."[103]

Plattsmier, Chief Disciplinary Couns., La. Att'y Disciplinary Bd. 2 (Feb. 5, 2014), http://www.bazelon.org/wp-content/uploads/2017/03/2.5.14-DOJ-Letter-on-Bar-Admissions.pdf.

[101] *Id.* at 5.

[102] *Id.* at 6.

[103] *Id.*

Additionally, "[a]pplicants who responded affirmatively to Question 27 are asked to 'furnish a thorough explanation,' but are not required to provide forms authorizing their treatment professionals to provide information regarding their mental health disability, nor are they required to complete a form describing their condition and treatment or monitoring program."[104] In its evaluation of these questions and the additional requirements, the DOJ stated that these documents requested "can contain information of an extremely personal nature which is irrelevant to the applicant's ability to practice law."[105]

Following this investigation, the DOJ concluded that the "processes for evaluating applicants to the Louisiana Bar, and its practice of admitting certain persons with mental health disabilities under a conditional licensing system, discriminate against individuals on the basis of disability, in violation of the ADA."[106] The DOJ further identified six reasons as to why these mental health inquiries discriminated against Bar applicants with disabilities:

> (1) making discriminatory inquiries regarding bar applicants' mental health diagnoses and treatment; (2) subjecting bar applicants to burdensome supplemental investigations triggered by their mental health status or treatment as revealed during the character and fitness screening process; (3) making discriminatory admissions recommendations based on stereotypes of persons with disabilities; (4) imposing additional financial burdens on people with disabilities; (5) failing to provide adequate confidentiality protections during the admissions process; and (6) implementing burdensome, intrusive, and unnecessary conditions on admission that are improperly based on individuals' mental health diagnoses or treatment.[107]

These six reasons indicate that the DOJ found Louisiana's mental health inquiries demonstrated a disparate treatment of applicants with mental health disabilities. In certain instances, applicants were not only required to release their medical records, but to also receive independent

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[104] *Id.*
[105] *Id.* at 8.
[106] Samuels, *supra* note 100, at 2.
[107] *Id.*

medical examinations (IME).[108] Applicants were also required to pay the costs of these IMEs, which financially placed an additional burden on applicants with mental health disabilities that other applicants were not subjected to.[109] For all the above reasons, the DOJ found that the mental health questions on Louisiana's Bar Exam were unnecessary because they did not help to identify unfit candidates.[110]

Courts have also concluded that mental health inquiries on licensing examinations subject applicants with disabilities to additional burdens.[111] In *Medical Society v. Jacobs*, the New Jersey District Court found that the Board was violating the ADA by imposing "extra burdens on qualified individuals with disabilities when those burdens are unnecessary."[112] When applicants answered the mental health questions affirmatively, they were subject to further investigation.[113] In *Clark v. Virginia Board of Bar Examiners*, the Virginia Eastern District Court considered whether one of the Virginia Bar Exam questions violated the ADA.[114] Question 20(b) asked: "Have you within the past five (5) years been treated or counselled for any mental, emotional or nervous disorders?"[115] The Court held that the question was "framed too broadly and violates the Plaintiff's rights under the Americans with Disabilities Act."[116] If an applicant responded affirmatively, she was then asked to disclose dates of treatment or counseling, the contact information of her physician or counselor, the contact information of the hospital or institution, and to describe her diagnosis and treatment.[117]

While state Bar Examiners are able to conduct investigations into all Bar applicants, "they may not use an applicant's disclosure of mental health disability as a screening device to determine which

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[108] *Id.* at 8.
[109] *Id.*
[110] *Id.* at 22.
[111] Med. Soc'y v. Jacobs, No. 93-3670, 1993 U.S. Dist. LEXIS 14294, at *18 (D.N.J. October 5, 1993).
[112] *Id.* While this case is not about bar licensing, it is an important case regarding licensing boards violating the ADA by imposing extra burdens on applicants with disabilities. *Id.* It is cited in many of the other cases that are mentioned in this article and it is also a New Jersey case which makes it further relevant to the issues being discussed in this article.
[113] *Id.*
[114] *Clark*, 880 F. Supp. 430.
[115] *Id.* at 431.
[116] *Id.*
[117] *Id.* at 433.

applicants warrant further investigation and which do not."[118] This behavior of targeting individuals with mental health disabilities "for further intrusive investigation, interfering with the confidentiality of their medical records, or imposing additional financial costs on applicants due to mental health diagnoses or treatment also violate[s] the ADA by imposing unnecessary burdens on applicants with disabilities that are not imposed on others."[119] In *Brewer v. Wisconsin Bd. of Bar Examiners*, the Court found that the Bar Examiners could not require additional investigations based on an applicant's disability.[120] The Bar Examiners were requiring the applicant to undergo a psychological evaluation at her own expense, which was not a burden that most other applicants faced.[121]

By requiring additional investigations and placing extra burdens on applicants with mental health disabilities, Bar Examiners are violating the regulations set forth for licensing under the ADA. Under 28 C.F.R. § 35.130(b)(6):

> A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.[122]

This regulation sets the standard for which Bar Examiners must follow in accordance with the ADA. Here, the issue is that mental health inquiries on the character and fitness evaluation tend to apply additional burdens on individuals with disabilities by requiring them to be subjected to extra investigations that other Bar applicants are not typically burdened with.[123]

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[118] Samuels, *supra* note 100, at 8.
[119] *Id.*
[120] *Brewer*, No. 04-C-0694, 2006 WL 3469598, at *10.
[121] *Id.*
[122] 28 C.F.R. § 35.130(b)(6) (2021).
[123] Medical Soc'y v. Jacobs, No. 93-3670, 1993 U.S. Dist. LEXIS 14294, at *21 (D.N.J. October 5, 1993) (stressing "that it is not actually the questions

Moreover, while Bar Examiners may argue that there is no discrimination if applicants are not denied Bar admission, this is not the case. It does not matter whether an applicant is granted a license to practice, there can still be discrimination against applicants with disabilities if there are additional burdens placed on them.[124] This was the case in *Ellen S.*, where the Court stated that, "[t]he Board can discriminate against qualified disabled applicants by placing additional burdens on them and this discrimination can occur even if these applicants are subsequently granted licenses to practice law."[125] This is considering that even if an applicant with a disability is granted a license to practice, the applicant has still faced disparate treatment by being required to meet additional burdens that other applicants were not subjected to.

Although Bar Examiners are prohibited from discriminating against applicants with disabilities under the ADA, Bar Examiners can prevent a person from obtaining licensure if that person is found to be a "direct threat."[126] This allows for Bar Examiners to bring a "direct threat" defense against an applicant.[127] If an applicant is found to be a "direct threat to the health or safety of others" a public entity, such as the Bar Examiners, is not required "to permit an individual to participate in or benefit from the services, programs, or activities of that public entity."[128] An individual determined to be a "direct threat" is no longer "qualified" within the meaning of the ADA.[129]

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themselves that are discriminatory under the Title II regulations. Theoretically, the Board could ask questions concerning the status of applicants, yet neither have the time nor the manpower to act upon the answers. Rather, it is the extra investigations of qualified applicants who answer 'yes' to one of the challenged questions that constitutes invidious discrimination under the Title II regulations.").

[124] Ellen S. v. Fla. Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994).

[125] *Id.*

[126] 28 C.F.R. § 35.139(a) (2021).

[127] *Clark*, 880 F. Supp. at 442. "Absent a showing that Ms. Clark would pose a direct threat to the health or safety of others, the Court finds that Ms. Clark meets all of the 'essential eligibility requirements' for admission to the bar of the Commonwealth of Virginia." *Id.* This indicates that if the Bar Examiners were able to prove that the applicant was a "direct threat" to the safety of others, the applicant would not be admitted to practice. *Id.*

[128] 28 C.F.R. § 35.139(a) (2021).

[129] *Id.*

To determine "whether an individual poses a direct threat to the health of safety of others, a public entity must make an individualized assessment."[130] This individualized assessment must be:

> based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.[131]

Furthermore, "[t]he determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability."[132] Under these standards, after an individualized assessment of an applicant, Bar Examiners are able to refuse to license the applicant if her disability poses a "direct threat" to the health and safety of others.

The "direct threat" concern is that an applicant with a mental health disability may put the wellbeing of her client at risk in her practice.[133] The reasoning for this is that "an attorney in the throes of a debilitating bout of mental illness could wreak havoc on his clients' lives."[134] Therefore, it is the right of the Bar Examiners "to make certain inquiries into bar applicants' character and fitness," but the "questions must stay within the confines of the ADA."[135] This means Bar Examiners must show that these mental health inquiries "are

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[130] 28 C.F.R. § 35.139(b).
[131] *Id.*
[132] 28 C.F.R. pt. 35, app. B.
[133] *Id.* "A 'direct threat' is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." *Id.* In the case of Bar applicants, the concern is that an attorney with mental health issues could pose a "direct threat" to her clients and the public through her legal practice.
[134] ACLU v. Individual Members of the Ind. State Bd. of L. Exam'rs, No. 1:09-cv-842-TWP-MJD, 2011 U.S. Dist. LEXIS 106337, at *20-21 (S.D. Ind. Sept. 20, 2011).
[135] *Id.* at *21.

'*necessary'* to determine whether the bar applicant poses a '*direct threat.*'"[136]

The Court in *In re Petition & Questionnaire for Admission to the R.I. Bar* was "persuaded that the procedures required for admittance to the bar are the functional equivalent of a hiring process and that the committee operates as the equivalent of an employer when it screens applicants."[137] In the opinion, the Court discussed that while during the hiring process, public entities "may ask about an applicant's ability to perform job-related functions," they "may not ask whether an applicant is disabled or inquire into the nature or severity of an applicant's disability."[138] The Court appointed a "special master" to gather information and address concerns about the questions that were being asked on the Rhode Island character and fitness questionnaire.[139]

In her report, the "special master" found that "these questions may be deemed to violate the ADA, absent a showing of a "direct threat" to public safety if persons with a mental or an emotional disability or history of substance-abuse treatment are admitted to the Bar."[140] Furthermore, it was found that "even mental-health practitioners would experience difficulty in predicting with accuracy the future threat posed during a lifetime of practicing law, and she reported that almost half of all Americans who seek mental-health treatment do not have a diagnosable mental health problem."[141] Thus, these questions were not indicative of applicants that posed a "direct threat" to public safety.[142]

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[136] *Id.*

[137] In re Petition & Questionnaire for Admission to the R.I. Bar, 683 A.2d at 1336.

[138] *Id.* at 1335.

[139] *Id.* at 1333.

[140] *Id.* at 1336.

[141] *Id.*

[142] *See id.* at 1336-37. In her report, the "special master" proposed new questions for the Bar Examiners to ask applicants which were supposed to be more conduct based than the previous ones. *Id.* While the Court found the proposed questions to preserve an applicant's rights under the ADA they were still too broad and did not focus enough on an applicant's behavior and conduct to be acceptable. One of these proposed questions was Question 29 which now asked, "Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?" This question is still framed too broadly and still only focuses on an applicant's diagnosis, rather than her conduct. Therefore, while the "special master" found that the original questions were not

Moreover, mental health inquiries are not an effective way to determine whether an applicant is a "direct threat." While it is important to protect potential clients from an unfit attorney, there is no clear evidence that shows that requiring applicants to respond to mental health questions is indicative of determining whether an applicant is a "direct threat" to public safety. In *Clark*, the Court did not find obtaining evidence of mental health counseling or treatment to be effective in guarding against a "direct threat" to public safety.[143] Furthermore, there was "no evidence of correlation between obtaining mental counseling and employment dysfunction."[144] Merely asking whether an applicant has sought treatment or counseling for a mental, emotional, or nervous disorder does not indicate that an applicant is a "direct threat." To better serve this purpose, Bar Examiners should be asking applicants about specific behaviors and conduct which would provide a better basis for predicting an applicant's future conduct in practice.[145]

b. Disparate Impact

Requiring applicants with disabilities to answer mental health inquiries also has a disparate impact on these applicants.[146] A disparate impact claim asks whether a facially neutral policy or practice has a greater adverse impact on a protected group.[147] Typically, when there is a disparate impact, it is the public entity's burden to justify the practice, despite its impact.[148] This type of claim is intended only to

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permissible under the ADA, the proposed questions were still not effective in determining an applicant's fitness to practice.

[143] Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 446 (E.D. Va. 1995).

[144] *Id.*

[145] Samuels, *supra* note 100, at 5 ("Conduct-based questions are appropriate and most effective in assessing whether applicants are fit to practice law.").

[146] *See generally* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 93 (While this source refers to a disparate impact claim as an adverse impact claim, both terms are used interchangeably in this context.).

[147] *See id.* ("The charging party does not have to prove that respondent's actions were based on a discriminatory motive. (S)he need only establish that an employment practice, even though applied equally to all applicants or employees, has the effect of excluding or otherwise adversely affecting women and/or minority groups in significant numbers." In terms of disability law, this means that an applicant has to show that the neutral policy has a greater disparate impact on applicants with mental health disabilities.).

[148] *Id.*

prohibit unjustified qualifications or policies with a disparate impact.[149] In a scenario outside of disability law, this could mean requiring applicants for a police department to pass a fitness test which disproportionately screens out female candidates for the job.[150] Therefore, the fitness test has a disparate impact on female job candidates.[151] Here, the issue is that mental health inquiries cause a greater adverse impact on applicants with mental health disabilities than other applicants.

In fact, the impact is so great that it may even tend to screen out individuals with a disability.[152] This practice of screening out individuals with a disability is illegal under the ADA:

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.[153]

This provision makes it discriminatory to impose eligibility criteria that excludes individuals with disabilities from having the opportunity to participate in a service, program, or activity. But this provision does not prohibit Bar Examiners from screening out applicants based on their behavior and capabilities.[154] Bar Examiners would not be prohibited

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[149] *See generally id.*

[150] *See generally id.* This example does not come from directly from the cited source but is meant to help illustrate another type of disparate impact claim that could be made outside of the disability law context.

[151] *See generally id.* This example illustrates how this fitness test would have a disparate impact on female job candidates because they are being disproportionately screened out in the process. If female job candidates were to bring a disparate impact claim, the police department would need to justify the fitness test or show that it meets the business necessity requirement.

[152] *See* Samuels, *supra* note 100, at 18. The DOJ's finding was that Louisiana's mental health inquiries violated the ADA because they were "eligibility criteria that screen out or tend to screen out individuals with disabilities based on stereotypes and assumptions about their disabilities and are not necessary to assess the applicants' fitness to practice law." *Id.*

[153] 28 C.F.R. § 35.130(b)(8).

[154] Med. Soc'y v. Jacobs, No. 93-3670, 1993 U.S. Dist. LEXIS 14294, at *19 (D.N.J. Oct. 5, 1993).

"by Title II from screening out applicants based on their employment histories; based on whether applicants can perform certain tasks or deal with certain emotionally or physically demanding situations; or based on whether applicants have been unreliable, neglected work, or failed to live up to responsibilities."[155]

If it is found that a public entity's policy has a disparate impact on individuals with disabilities, the public entity then has an opportunity to show why the policy or practice is important and justified, despite its impact.[156] In an employment context, to justify a disparate impact, employers argue that the policy is job related and consistent with business necessity.[157] In terms of mental health inquiries, many Bar Examiners have tried to argue that these inquiries are necessary for public safety.[158] The issue with that is that many of these mental health inquiries do not indicate whether an applicant that answers the questions affirmatively is a threat to public safety.

In *Clark*, the Court found that by having to answer these mental health inquiries, "[u]nlike other applicants, those with mental disabilities are required to subject themselves to further inquiry and scrutiny."[159] Furthermore, the Court found "that this additional burden discriminates against those with mental disabilities" and that "to avoid violating the ADA, the Board must show that Question 20(b) is necessary to the performance of its licensing function."[160] The Virginia Board of Bar Examiners claimed that the Question 20(b) was "necessary because it enables the Board to identify potentially unfit applicants with the limited resources and time available to it."[161] Even though the Court

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[155] *Id.*

[156] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 93. "If respondent does not eliminate the adverse impact in the total selection process for a job, it must justify the use of the selection procedure causing the adverse impact by showing that it is valid or is otherwise justified by business necessity." *Id.*

[157] *Id.* ("Justifying an employment policy or practice by business necessity involves a showing that the policy or practice is related to performance on the job").

[158] Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 431 (E.D. Va. 1995) (The Board of Bar Examiners in this case claimed that the mental health inquiry was "necessary to identify applicants with mental disabilities that would seriously impair their ability to practice law and protect their clients' interests.").

[159] *Id.* at 442.

[160] *Id.* at 442-43.

[161] *Id.* at 443.

recognized that the Board only had limited resources, it did not find that these limitations made imposing Question 20(b) "necessary' under the ADA."[162] The Court rejected the argument that the question was "necessary" because it found that Question 20(b) "has been unsuccessful in identifying applicants with mental disabilities," thus is was not "necessary" under the ADA.[163]

While "[a] public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities," it must "ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities."[164] The Courts and the DOJ have found that these mental health inquiries, that both cause additional burdens and tend-to-screen out applicants, are not necessary to promoting public safety.[165] Asking an applicant if they have a mental health disability is not a good indicator of whether that candidate is fit to practice law.[166] The DOJ has stated in response to specific mental health questions, one being verbatim to the New Jersey question, that the "questions are not necessary because . . . they do not effectively identify unfit attorney applicants; and they have a deterrent effect that is counterproductive to the states' objective of ensuring that licensed attorneys are fit to practice."[167]

III. EVALUATION

A. Other States: Eliminate or Modify?

Over the past few years, many states have made efforts to eliminate or modify their Character and Fitness questions regarding mental health.[168] This effort has been partially the result of recent

[162] *Id.*
[163] *Id.* at 445.
[164] 28 C.F.R. § 35.130(h) (2021).
[165] *See* Samuels, *supra* note 100, at 4; Clark, 880 F. Supp. at 446.
[166] *See* Samuels, *supra* note 100, at 4 ("Inquiring about bar applicants' mental health conditions inappropriately supplements legitimate questions about applicants' conduct relevant to their fitness to practice law with inappropriate questions about an applicant's status as a person with a disability.").
[167] *Id.* at 4-5.
[168] Margaret Hannon & Scott Hiers, *Law Students, Law Schools Lead Efforts to Remove Mental Health Questions from Character & Fitness Equation*, A.B.A. FOR L. STUDENTS: STUDENT L. BLOG (Oct. 9, 2019), https://abaforlawstudents.com/2019/10/09/law-students-law-schools-mental-health-character-and-fitness/.

resolutions made by two national organizations.[169] The ABA House of Delegates adopted Resolution 102 in August 2015, "which urged licensing entities to remove questions about mental health history, diagnoses, and treatment, and to focus instead on conduct and behavior."[170] Similarly, in February 2019, the Conference of Chief Justices approved a set of recommendations as Resolution 5.[171] Under Resolution 5, the Conference of Chief Justices recommends "that reasonable inquiries concerning an applicant's mental health history are only appropriate if the applicant has engaged in conduct or behavior and a mental health condition has been offered or shown to be an explanation for such conduct or behavior."[172] The common consensus among these two national organizations is that states should modify their questionnaires to focus on conduct rather than treatment history.[173] The National Conference of Bar Examiners has also noted that the mere fact that a Bar candidate has sought treatment is not a basis for denying Bar admissions.[174]

In February 2020, New York became the eleventh state to remove questions about mental health from the Bar application.[175] This change occurred after the New York Bar Association created a task force in June 2019 to revise the state's Bar application to make sure that mental health treatment was not negatively affecting Bar admissions.[176] Prior to its elimination, the question the task force reviewed asked an applicant if she has "any condition or impairment including, but not limited to a mental, emotional, psychiatric, nervous or behavioral disorder or condition, or an alcohol, drug or other substance abuse condition or impairment or gambling addiction, which in any way

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[169] Cavicchia, *supra* note 14.
[170] *Id.*
[171] *Id.*
[172] Conf. C.J.s, *Resolution 5: In Regard to the Determination of Fitness to Practice Law* (Feb. 13, 2019), https://www.ncsc.org/__data/assets/pdf_file /0021/23484/02132019-determination-of-fitness-to-practice-law.pdf.
[173] Cavicchia, *supra* note 14.
[174] *Id.*
[175] Debra Cassens Weiss, *New York Removes Mental Health Question from State Bar Application*, ABA J. (Feb. 28, 2020, 1:07 PM), https://www.abajournal.com/ news/article/new-york-removes-mental-health-questions-from-state-bar-application.
[176] Keshia Clukey, *N.Y. Bar Association to Study Mental Health Application Question,* BLOOMBERG L. (June 10, 2019, 4:54 PM), https://news.bloomberglaw.com/legal-ethics/n-y-bar-association-to-study-mental-health-application-question.

impairs or limits your ability to practice law?"[177] If a student answered this question affirmatively, she was then required to provide additional information.[178] After the review of this question, New York Chief Judge Janet DiFiore announced that "'the question has been found to have an adverse impact on law students in need of mental health services'" and that "'[s]tudents have avoided treatment for fear of the negative effect it may have on their bar admission.'"[179] The New York Bar Association has replaced this question with one that reads:

> Within the past seven years, have you asserted any condition or impairment as a defense, in mitigation or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority; or in connection with an employment disciplinary or termination procedure?[180]

This question now focuses solely on an applicant's behavior and conduct rather than only asking about the existence of a condition or impairment.

New York is just one of the many states that have made an effort to eliminate or modify mental health inquiries on the Bar Exam.[181] For many of these states' initiatives, law students and law schools are leading the effort to advocate for the removal of mental health questions from the Bar Exam.[182] The 2014 Survey of Law Student Well-Being revealed the effects that these questions have on law students by showing that nearly half were dissuaded from seeking treatment because of the fear of negative outcomes for Bar admissions.[183] This study helped to initiate a coalition of judges, lawyers, law students, and other advocates to work toward the removal and modification of these questions.[184] In Virginia, "students at law schools across the state coordinated their efforts in a letter-writing campaign to the state Bar

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[177] *Id.*
[178] Weiss, *supra* note 175.
[179] *Id.*
[180] *Id.*
[181] Hannon & Hiers, *supra* note 168.
[182] *Id.*
[183] *Id.*
[184] *See generally id.*

association, the local legal community, and the news media," which led to the elimination of "the requirement that applicants disclose prior mental health treatment."[185] In addition, there are several states that have eliminated mental health questions prior to 2019, such as Arizona, Illinois, Massachusetts, Mississippi, and Washington.[186]

In July 2019, the Governor of California, Gavin Newcome, signed a bill that removed the requirement for prospective lawyers to not only indicate their mental health, but also to sign over medical records.[187] Senator Tom Umberg, of California, announced that "[t]he purpose of the bill is to reduce the stigma of mental health issues, and to help mitigate any chilling effect that prevent[s] law students from getting treatment for mental health issues, including sexual assault and PTSD."[188] Under this new law, the California Bar and the examining committee cannot consider an applicant's medical records regarding her mental health to decide if an applicant is "of good moral character."[189]

Connecticut has also changed its character and fitness questioning to align with federal disability law.[190] The Connecticut State Bar Examiners decided in June 2019 to eliminate all questions about mental health in favor of asking behavior-based questions.[191] Now, rather than these questions targeting a diagnosis, "an immutable but often irrelevant characteristic," the Bar Examiners can instead focus on a candidate's known behaviors that could affect her ability to practice law.[192] In June 2020, New Hampshire became the most recent state to join in removing questions about mental health history, diagnosis, and treatment from its Bar application.[193] New Hampshire officials have

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[185] *Id.*
[186] *Id.*
[187] Joyce E. Cutler, *California Bans Inquiries on Would-be Lawyers' Mental Health*, BLOOMBERG L. (July 30, 2019, 6:41 PM), https://news.bloomberglaw.com/legal-ethics/california-bar-bans-inquiries-on-would-be-lawyers-mental-health.
[188] *Id.*
[189] *Id.*
[190] Conn. L. Trib. Ed. Bd., *Bar Admissions Process Bends Toward Justice—With a Little Help*, *Conn. L. Trib.*: LAW (June 12, 2019, 10:24 AM), https://www.law.com/ ctlawtribune/2019/06/14/bar-admissions-process-bends-toward-justice-with-a-little-help/.
[191] *Id.*
[192] *Id.*
[193] Kyla Rivas, *New Hampshire Removes Mental Health Questions from Bar Application*, N.Y. POST (June 23, 2020, 5:17 PM),

stated their belief that removing these questions will help to encourage students and attorneys to seek needed treatment.[194]

For many of these states, the change that has taken place has not been to completely remove mental health inquiries, but rather to modify the existing questions.[195] While the call for full removal of these types of inquiries may be most beneficial for applicants with mental health disabilities, the modifications that states have made are in line with the ADA standards because of the emphasis on an applicant's conduct and behavior, rather than the applicant's disability status.[196] These new approaches to questions pertaining to mental health also accomplish the character and fitness questionnaire's true goal, which is to determine an applicant's fitness to practice.[197] Only asking about an applicant's condition or impairment does not accomplish this purpose because it does not indicate how the existence of the condition or impairment alone will affect an applicant's ability to practice.[198]

B. The Model Question

Based on the examples set forth by states that have already made changes to their Bar admission questionnaires, it seems that there are two appropriate options.[199] The first option is for the removal of all mental health inquiries from the New Jersey State Bar Exam.[200] While it is likely that this option would help to mitigate law student anxiety regarding such mental health inquiries, it may be too great of a step for Bar Examiners to take. Therefore, the second option of modifying mental health inquiries to be conduct or behavior based may be the most realistic route for the New Jersey character and fitness questionnaire.[201]

In fact, the DOJ has stated that a board of Bar Examiners "can achieve its objective of identifying applicants who are not fit to practice

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https://nypost.com/2020/06/23/new-hampshire-removes-mental-health-questions-from-bar-application/.

[194] *Id.*

[195] Hannon & Hiers, *supra* note 168.

[196] *Id.*

[197] N.J. BD. OF BAR EXAM'RS, *supra* note 15 ("the purpose of these questions is to determine the current fitness of an applicant to practice law").

[198] *See Samuels*, *supra* note 100, at 4.

[199] *See generally* Hannon & Hiers, *supra* note 168 (Other states have sought to either modify their questions to be based on an applicant's conduct or have eliminated mental health inquiries altogether.).

[200] *See generally id.*

[201] *See generally id.*

law without utilizing questions that focus on an applicant's status as a person with a mental health disability."[202] To accomplish this, the DOJ has stated that "[c]onduct-based questions are most effective in assessing whether applicants are fit to practice law."[203] This is consistent with the DOJ's response to mental health inquiries over the past few years. The DOJ has also stated that "[a]ttorney licensing entities can achieve their objective of identifying applicants who are not fit to practice law without utilizing questions that focus on an applicant's status as a person with a mental health disability."[204] The DOJ added:

> Questions designed to disclose the Bar applicant's prior misconduct, including the applicant's academic, employment, and criminal history, which are part of the Request for Preparation of a Character Report, would serve the legitimate purposes of identifying those who are unfit to practice law, and would do so in a non-discriminatory manner.[205]

This reasoning illustrates that asking questions about an applicant's mental health status, rather than an applicant's conduct and behavior is not an effective means of determining whether the applicant is fit to practice.[206]

Applying modifications that ask about an applicant's conduct and behavior, rather than the existence of a mental health disability and treatment history, is a more effective way of determining an applicant's fitness to practice.[207] It should not matter whether an applicant has a mental health disability, so long as that disability does not impact her

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[202] Samuels, *supra* note 100, at 20.
[203] *Id.* at 22.
[204] Samuels, *supra* note 100, at 5.
[205] *Id.*
[206] *Id.* at 1 (In this letter, the DOJ also stated that "In contrast, questions and inquiries based on an applicant's status as a person with a mental health diagnosis do not serve the worthy goal of identifying unfit applicants, are in fact counterproductive to ensuring that attorneys are fit to practice, and violate the standards of applicable civil rights laws." This illustrates the need to remove questions that only ask about the status of a person with a mental health disability because it does violate the standards of civil rights law. There is no evidence showing that these questions identify whether an applicant is unfit to practice.)
[207] *See generally id.*

legal practice.[208] Therefore, inquiries into an applicant's specific conduct and behaviors that may interfere with the applicant's practice are more appropriate in determining an applicant's fitness to practice and thus, better fulfill the purpose of the character and fitness questionnaire.[209]

Based on New Jersey's current mental health inquiry, the perception may be that an applicant who discloses that she has a condition and has sought treatment may be delayed or denied of admission to the Bar.[210] The ABA has stated that, "[p]rovided that Bar applicants can perform the essential elements and duties of a lawyer with competence and diligence, overbroad or outdated character and fitness questions should not stand in the way of their admission."[211] But, the New Jersey Character and Fitness questionnaire is not currently asking about whether an applicant can accomplish these duties, rather instead focusing solely on the existence of a condition or impairment.[212]

Thus, since the "[t]he character and fitness process is intended to identify issues that could affect the responsible and competent practice of law," focusing on the existence of a mental health condition is not achieving this goal.[213] New Jersey should follow the lead of other states that have already made modifications of their mental health inquiries. This means removing the broad language asking applicants if their current condition or impairment could affect their "ability to practice law in a competent, ethical and professional manner."[214] Instead, New Jersey needs to form a question that focuses on how the applicant's conduct and behavior may affect their legal practice.

To achieve the model question, New Jersey must look to the guidance set forth by the courts, national organizations, and states that

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[208] *Id.* at 1-2 ("questions based on an applicant's status as a person with a mental health diagnosis do not serve the Court's worthy goal of identifying unfit applicants, are in fact counterproductive to ensuring that attorneys are fit to practice, and violate the standards of applicable civil rights laws").

[209] *Id.*

[210] N.J. BD. OF BAR EXAM'RS, *supra* note 15 (New Jersey's current line of questioning only asks whether an applicant currently has a condition or impairment. Asking such a broad question may indicate to an applicant that because of her current condition or impairment, she may be denied bar admissions.)

[211] Jaffe & Stearns, *supra* note 11.

[212] NJ BD. OF BAR EXAM'RS, *supra* note 15.

[213] Jaffe & Stearns, *supra* note 11.

[214] NJ BD. OF BAR EXAM'RS, *supra* note 15.

have already made progress in using less discriminatory questions. One example that New Jersey can follow is the standard set forth by the Connecticut Bar Examiners.[215] This means removing New Jersey's current inquiry and asking a question that focuses solely on the applicant's conduct.[216] For example, Question 34 on Connecticut's character and fitness questionnaire asks an applicant: "Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?"[217] Connecticut also asks a more specific conduct-based question which asks whether within the past five years, a candidate has been arrested, fired, breached a fiduciary obligation, etc.[218] Both of these questions are permissible under the ADA because they do not ask applicants about their mental health diagnosis, but instead focus solely on the applicant's behavior and conduct within the last five years.[219]

Alternatively, New Jersey could choose to eliminate its mental health inquiries in favor of a question similar to New York's new inquiry. Prior to its removal, New York asked a question almost

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[215] *See* CONN. BAR EXAM. COMM., *Form 1E*, STATE OF CONN. JUD. BRANCH, at 9, https://www.jud.ct.gov/cbec/Feb21/Form1E.pdf (last visited Oct. 24, 2021).
[216] *Id.*
[217] *Id.*
[218] *Id.* at 9 (Question 33 on Connecticut's character and fitness form is: "Within the past five years, have you engaged in any conduct that: (1) resulted in an arrest, discipline, sanction or warning; (2) resulted in termination or suspension from school or employment; (3) resulted in loss or suspension of any license; (4) resulted in any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority, or in connection with an employment disciplinary or termination procedure; (5) endangered the safety of others, breached fiduciary obligations, violated the confidentiality of information, or constituted a violation of workplace or academic conduct rules; or (6) resulted in your being asked or encouraged to resign or withdraw by an employer, supervisor, teacher or other educator based on your truthfulness or your excessive absences? If so, explain on Form 2 and include any asserted defense or claim in mitigation or as an explanation of your conduct.").
[219] *See* 28 C.F.R. § 35.130 (2021).

verbatim to that of New Jersey's question 12(B).[220] Now, New York's inquiry reads:

> "Within the past seven years, have you asserted any condition or impairment as a defense, in mitigation or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority; or in connection with an employment disciplinary or termination procedure?"[221]

This question does not focus on whether an applicant has been diagnosed or sought treatment for a mental health condition, but instead takes a conduct-based approach. This question is a better indicator of how an applicant's behaviors may affect her ability to practice, whereas New Jersey's current line of questioning is only determining that an applicant has a condition or impairment and not inquiring into how the applicant's conduct would impact her practice.[222]

With so many other states making these modifications to eliminate mental health inquiries, New Jersey should follow suit. The New Jersey Bar Examiners should consider adopting a question which focuses on an applicant's behavior and eliminate its over-broad, outdated, and unnecessary current mental health inquiry.[223] By eliminating its current question and adopting a more mental health-friendly inquiry, New Jersey would be joining the other states that have

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[220] Weiss, *supra* note 175 (The eliminated question read: "Do you currently have any condition or impairment including but not limited to a mental, emotional, psychiatric, nervous or behavioral disorder or condition, or an alcohol, drug or other substance abuse condition or impairment or gambling addiction, which in any way impairs or limits your ability to practice law?")

[221] *Id.*

[222] *Id.*; NJ BD. OF BAR EXAM'RS, *supra* note 15 (While New York's new line of questioning asks about an applicant's behaviors, New Jersey's questioning asks whether an applicant has a condition or impairment that would affect her law practice.)

[223] *See* Hannon & Hiers, *supra* note 168. New Jersey should follow the lead of other states that have made an effort to eliminate or modify their mental health inquiries. For example, the Connecticut Bar Examining Committee voted to eliminate questions about an applicant's mental health diagnoses in favor of questions related to an applicant's specific conduct.

removed and modified their mental health inquiries.[224] This change will help mitigate the fears of law students that have avoided treatment because of the chance it would have an adverse effect on their Bar admissions.[225] Studies show that the potential threat to Bar admissions has been a major reason as to why law students do not seek help or treatment.[226] This in itself should indicate the need for New Jersey to alleviate these fears by modifying its mental health inquiries. However, if that is not enough to advocate for a change, the fact that the current inquiry violates the ADA should be persuasive for the need to make these modifications.

IV. CONCLUSION

By state Bar Examiners inquiring into an applicant's mental health and substance abuse treatment, they are further adding to the stigma that already exists around these issues. While law students may be encouraged by law school faculty to seek treatment for these issues, there is still the fear that doing so may cost them their right to practice. The legal profession's high rates of mental health and substance abuse problems should illustrate the need for change.[227] If state Bar Examiners can modify or eliminate mental health inquiries so as to alleviate the anxiety that law students face when answering these

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[224] *See* Conn. L. Trib. Ed. Bd., *supra* note 190 (Connecticut modified its questions to eliminate questions about mental health and to switch to behavior-based questions.); Cutler, *supra* note 187 (California passed a bill that removed the requirement for Bar applicants to indicate their mental health and sign over medical records); Hannon & Hiers, *supra* note 168 (Many other states have eliminated mental health inquiries, such as Arizona, Illinois, Massachusetts, Mississippi, and Washington).

[225] *See generally* Organ et al., *supra* note 4 (the results of the Survey of Law Student Well-Being show that law students fear disclosing their mental health treatment because of the impact disclosure may have on Bar admissions); Hannon & Hiers, *supra* note 168 (The Hannon article discusses how different states have begun removing or modifying their mental health inquiries because of the effect that this line of questioning has on Bar applicants.)

[226] *See generally* Organ et al., *supra* note 4.

[227] Krill et al., *supra* note 2. (The Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs' study of almost 13,000 attorneys found that 20.6% of the attorney participants screened at a level consistent with problem drinking, 28% were experiencing signs of depression, 19% were experiencing signs of anxiety, and 23% were experiencing signs of stress.)

questions, then it may have a positive effect in that these students will feel more inclined to seek necessary mental health treatment.

While it is the Bar Examiners' duty to determine whether applicants are fit to practice law, these intrusive mental health inquiries are not necessary to accomplish this goal. Moreover, inquiries such as those made on New Jersey's Character and Fitness Questionnaire are not in compliance with Title II of the ADA. While Question 12(B) asks about an applicant's current condition or impairment, it does not ask about specific behavior or conduct that could impact an applicant's ability to practice law.[228] Any law student who has sought treatment for mental health issues and has been diagnosed with a "condition or impairment"[229] should not be put under further stress by having to consider whether seeking treatment will adversely affect her Bar admittance.

An article written for the *New Jersey Law Journal* has called for New Jersey to follow New York's lead in modifying its mental health inquiries to be focused "on the conduct that may have resulted from any such condition" because, it "is more than sufficient to allow the appropriate character committees to assess whether the applicant will be a fit and competent lawyer."[230] Furthermore, continuing to require applicants to provide information on their "general mental health status simply invites unhelpful speculation, and encourages the propagation of stereotypes about those who seek mental health treatment."[231] New Jersey should heed this advice and modify its questionnaire to help eliminate the stigmatization of seeking treatment for mental health problems.

New Jersey's current line of questioning puts law students in a position to decide whether their mental health condition will affect their ability to practice.[232] This not only adds additional fears of rejection, but also leaves the applicant in a difficult position of making a judgment that she is not equipped to make. In an *Above the Law* article, former lawyer and recovering alcoholic and drug addict, Brian Cuban writes:

> The most stressful question during law school that a student in addiction recovery or who has sought treatment for other mental health issues may not be about

[228]N.J. BD. OF BAR EXAM'RS , *supra* note 15.
[229] *Id.*
[230] Law J. Ed. Bd., *supra* note 18.
[231] *Id.*
[232] N.J. BD. OF BAR EXAM'RS, *supra* note 15.

> the rule against perpetuities on that property exam. It may be the addiction/mental health question on the application that must be filled out to sit for the bar exam.[233]

This quote illustrates the feelings that applicants with mental health and substance abuse problems have when filling out the character and fitness questionnaire. By focusing on a particular mental health diagnosis or condition, the character and fitness questionnaire is not serving its purpose.[234] Mental health inquiries are not helping to protect the public because they are instead deterring prospective attorneys from seeking treatment. This puts the public at an even greater risk because Bar applicants are not seeking the help they need and are then going into practice without receiving necessary treatment for mental health issues.

Through its current system, the New Jersey Bar Exam is contributing to the stigma surrounding mental health treatment. Therefore, to help lessen the stigma and the pressures put on students with these conditions, New Jersey should follow the lead of other states and the guidance set forth by the ABA, the Conference of Chief Justices, and the DOJ by modifying its mental health questions to exclude inquiries into treatment and mental health diagnoses.

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[233] Brian Cuban, *When Bar Examiners Become Mental Health Experts*, ABOVE THE L. (Jan. 10, 2018, 10:03 AM), https://abovethelaw.com/2018/01/when-bar-examiners-become-mental-health-experts/ (Brian Cuban is the author of the Amazon best-selling book, *The Addicted Lawyer: Tales of the Bar, Booze, Blow & Redemption.* In this article, Cuban also includes an example of a licensed attorney who was "required to jump through mental health hoops to prove they are worthy of sitting for the exam or getting their license to practice if they have already passed." This attorney was interviewed by a Bar Examiner, who recommended that this attorney meet with the "Character and Fitness psychiatrist for a mental evaluation to see if he was 'prepared to practice.'" It was also mandated that he to meet with a private therapist weekly for six months and he had to pay for this himself. It took him a year and a half after passing the bar to be recommended to be admitted, and two years to be licensed. This story shows the implications of answering affirmatively to mental health inquiries in that it puts these additional burdens on individuals with disabilities, and it could cause delays in being admitted to practice.)

[234] Jaffe & Stearns, *supra* note 11.