

Consideration of Eliminating Eligibility Question on Applications and Petitions Relating to Mental Health

Summary of Request: Consider the replacement of mental health question on applications and renewals for all licensees.

Background:

The Texas Nurses Association requested that the Board consider revision of its licensure forms (including application, renewal, endorsement, and any other related forms) by deleting the question regarding mental health conditions. The request is attached as "Attachment A." Given the current national trend of eliminating questions about specific mental health diagnoses and the legal developments that call into question whether the current question may be discriminatory, Staff agrees that it is an appropriate time for the Board to reconsider the mental health question.

The current mental health question reads as follows: "In the last 5 years, have you been diagnosed with or treated or hospitalized for schizophrenia or other psychotic disorder, bipolar disorder, paranoid personality disorder, antisocial personality disorder, or borderline personality disorder which impaired or does impair your behavior, judgment, or ability to function in school or work? (You may answer "No" if you have completed and/or are in compliance with TPAPN for mental illness OR you've previously disclosed to the Texas Board of Nursing and have remained compliant with your treatment regime and have had no further hospitalization since disclosure.)"

Broadly, the Americans with Disabilities Act (ADA) prohibits discrimination against individuals with disabilities by public entities.¹ As such, a public entity may not utilize criteria that tend to screen out an individual 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.² The United States Department of Justice has interpreted these provisions to prohibit inquiring into specific mental health diagnoses. Please see "Attachment B" (Department of Justice Letter complaining to Louisiana Supreme Court about eligibility questions that mention specific mental health diagnoses).

The potential legal issues with the current question identified by Staff are that the current question: (1) does not focus exclusively on current fitness to practice; (2) singles out mental health diagnoses; and (3) may deter nurses from seeking appropriate treatment for mental health issues. Staff has developed language which focuses on

¹ 42 U.S.C. Sec. 12132.

² 28 C.F.R. Sec. 35.130(b)(8).

current fitness to practice and does not discriminate against those with appropriately treated mental health diagnoses while still appropriately inquiring into the applicant's fitness. Staff's recommends replacing the current question with the following question: "Are you currently suffering from any condition for which you are not being appropriately treated that impairs your judgment or that would otherwise adversely affect your ability to practice nursing in a competent, ethical and professional manner?"

Staff Recommendation: Move to authorize Staff to replace the current mental health question on all licensure forms with the following language: "Are you currently suffering from any condition for which you are not being appropriately treated that impairs your judgment or that would otherwise adversely affect your ability to practice nursing in a competent, ethical and professional manner?"



February 28, 2020

Katherine Thomas, MN, RN, FAAN
Executive Director
Texas Board of Nursing
333 Guadalupe, Suite 3-460
Austin, TX 78701-3944

Dear Ms. Thomas:

As we have previously discussed, the Texas Nurses Association (TNA) requests the Board of Nursing revise its licensure forms (application, renewal, endorsement and any other related forms) by deleting the question regarding mental health conditions; specifically:

In the past 5 years, have you been diagnosed with or treated or hospitalized for schizophrenia or other psychotic disorder, bipolar disorder, paranoid personality disorder, antisocial personality disorder, or borderline personality disorder which impaired or does impair your behavior, judgment, or ability to function in school or work?

If a question regarding fitness for duty is deemed necessary, we believe a question regarding any medical condition, rather than singling out mental health conditions, would be less stigmatizing and discriminatory. For example: Do you currently have a medical condition that impairs your ability to practice safely?

We respectfully request consideration of this change to licensure forms at your April Board meeting. I am happy to respond to any questions. Thank you.

Sincerely,

A handwritten signature in black ink that reads "Cindy Zolnierek". The signature is written in a cursive, flowing style.

Cindy Zolnierek, PhD, RN, CAE
Chief Executive Officer



U.S. Department of Justice

Civil Rights Division

ATTACHMENT "B"

Assistant Attorney General
950 Pennsylvania Ave, NW - RFK
Washington, DC 20530

FEB 05 2014

The Honorable Bernette J. Johnson
Chief Justice
Louisiana Supreme Court
400 Royal Street, Suite 4200
New Orleans, LA 70130-8102

Elizabeth S. Schell
Executive Director
Louisiana Supreme Court Committee on Bar Admissions
2800 Veterans Memorial Blvd., Suite 310
Metairie, LA 70002

Charles B. Plattsmier
Chief Disciplinary Counsel
Louisiana Attorney Disciplinary Board
Office of Disciplinary Counsel
4000 S. Sherwood Forest Blvd., Suite 607
Baton Rouge, LA 70816

Re: The United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act (DJ No. 204-32M-60, 204-32-88, 204-32-89)

The Honorable Chief Justice Johnson, Ms. Schell, and Mr. Plattsmier:

We write concerning the Civil Rights Division's investigation of Louisiana's attorney licensure system pursuant to Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 *et seq.*

The United States recognizes and respects the great responsibility placed on the Louisiana Supreme Court to safeguard the administration of justice by ensuring that all attorneys licensed in the State of Louisiana are competent to practice law and worthy of the trust and confidence clients place in their attorneys. The Court can, should, and does fulfill this important responsibility by asking questions related to the conduct of applicants. These questions enable the Court and the Admissions Committee to assess effectively and fully the applicant's fitness to practice law, and the Court can appropriately take responses to them into account in its licensing decisions. In contrast, however, 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.

We set forth below the Department's findings with respect to Louisiana's attorney licensure system, as well as the minimum steps the Court needs to take to meet its legal obligations and remedy the violations the Department has identified.

I. SUMMARY OF FINDINGS

We conclude that the Court's 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. In particular, we find that Louisiana's attorney licensure system discriminates against bar applicants with disabilities by: (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;¹ and (6) implementing burdensome, intrusive, and unnecessary conditions on admission that are improperly based on individuals' mental health diagnoses or treatment.²

II. INVESTIGATION

In March 2011, we notified the Louisiana Supreme Court ("Supreme Court"), the Louisiana Supreme Court Committee on Bar Admissions ("Admissions Committee"), and the Louisiana Attorney Disciplinary Board Office of Disciplinary Counsel ("Disciplinary Board") of our investigation of Louisiana's attorney licensure system.³ The investigation was initiated pursuant to Title II of the ADA in response to a complaint filed by the Bazelon Center for Mental

¹ As we will discuss below, the Court has made some revisions to its procedures that provide enhanced confidentiality protections and modify some elements of the monitoring process. However, these procedures are insufficient to come into compliance with the ADA, and fail to compensate applicants with mental health disabilities who were conditionally admitted based on a mental health diagnosis prior to these changes.

² This letter discusses discriminatory policies and practices identified during this investigation, which was narrowly focused on character and fitness screening of individuals with mental health disabilities, in particular, with respect to the Admissions Committee's use of the National Conference of Bar Examiners ("NCBE") Questions 25-27. The Department takes no position on whether policies and practices outside the scope of this investigation comply with the ADA.

³ The Admissions Committee and Disciplinary Board were established by the Supreme Court, operate in accordance with rules promulgated by the Supreme Court, and consist of members appointed by the Supreme Court. La. Sup. Ct. R., Part B, Rule XVII § 1; Rule XIX § 2.

Health Law on behalf of an individual, TQ.⁴ The Bazelon Center later filed a complaint on behalf of another individual, JA.

As part of our investigation, we have identified other applicants with mental health diagnoses who have experience with the State's bar admissions process, including LD, LH, TB, JH, ME, and others. We also sought and obtained documents that TQ, JA, LD, LH, TB, JH, and ME had in their possession related to their admissions process, including their requests for preparation of character reports, correspondence with the Admissions Committee, medical records provided to the Admissions Committee, petitions for conditional admission, and monitoring agreements. We interviewed TQ, JA, LD, LH, TB, JH, ME, and other individuals affected by the Court's policies, and reviewed the documents these individuals provided. We also reviewed the documents and information provided by the Admissions Committee, which consisted of the files of TQ and JA, two spreadsheets that listed individuals who were conditionally admitted and summarized actions taken in response to affirmative responses to Question 25, and responses to seven of the Department's written inquiries regarding admissions and monitoring.

During our investigation, we have spoken with Chief Justice Johnson, Ms. Schell, Mr. Plattsmier, members of the Admissions Committee staff, and counsel for the Louisiana Supreme Court on several occasions to discuss the complaints that prompted the Division's investigation, the scope and status of that investigation, and to obtain more information regarding character and fitness inquiries and recommendations, the conditional admissions process, and the monitoring of conditionally admitted attorneys. We have previously informed you of our findings and the minimum steps necessary to bring Louisiana's attorney licensure system into compliance with the ADA with respect to its treatment of bar applicants with mental health diagnoses and to remedy ADA violations. Though we sincerely appreciate the Court's expressed willingness to work with the Department, and acknowledge the steps the Court has taken thus far to attempt to address some of our findings, we respectfully disagree that these measures resolve the violations of the ADA we have identified.

III. FACTUAL BACKGROUND

A. Court Rules Governing Bar Admissions

The Supreme Court has delegated its constitutional authority to regulate the admission of qualified bar applicants to the Admissions Committee.⁵ Applicants are required to "have demonstrated sound mind, good moral character and fitness to practice law."⁶ "Fitness to

⁴ To protect their confidentiality, the initials we use to refer to some of the individuals identified in this letter do not refer to their first and last names.

⁵ La. Sup. Ct. R., Part B, Rule XVII § 1.

⁶ *Id.* § 3C.

practice law” includes “the mental or emotional suitability of the applicant to practice law in this state.”⁷ In evaluating whether an applicant is fit to practice law, bases for investigation and inquiry include “evidence of mental or emotional instability.”⁸ Factors which *may not* be considered in evaluating an applicant’s fitness to practice law include “a physical disability of the applicant that does not prevent the applicant from performing the essential functions of an attorney,” but no similar exclusion is made for an applicant who has a disability affecting *mental* health that does not prevent the applicant from performing the essential functions of an attorney.⁹

The Admissions Committee may recommend that an applicant be admitted to the bar on a conditional basis:¹⁰

An applicant whose record shows *conduct* that may otherwise warrant denial due to present or past substance misuse, abuse or dependency, physical, mental or emotional disability or instability, or neglect of financial responsibilities, may consent to be admitted subject to certain terms and conditions set forth in a conditional admission consent agreement.¹¹

The Rule expressly limits conditional admission to circumstances in which *conduct* warrants denial of admission. As discussed below, however, the Admissions Committee recommends conditional admission for applicants with mental health diagnoses who have not engaged in any conduct indicating that they are unfit to practice law.

B. Character Report Required by Admissions Committee

The Admissions Committee requires each applicant – including all prospective applicants enrolled in law schools in Louisiana¹² – to request that the National Conference of Bar

⁷ *Id.* § 5B.

⁸ *Id.* § 5E(15).

⁹ *Id.* § 5H. Even though physical disabilities are specifically excluded from the list of factors considered relevant to determine an applicant’s fitness for bar admission, we note that unanticipated absences from practice or inattention caused by prolonged physical illness have been recognized by the Supreme Court and the Office of Disciplinary Counsel as mitigating factors in disciplinary proceedings. *See, e.g., In re Barstow*, 817 So.2d 1123 (La. 5/14/02) (chronic bronchitis); *In re Bennett*, 32 So.3d 793 (La. 4/9/10) (hospitalization for stomach ulcers). Appropriately, the physical disability or illness is treated as generally irrelevant to evaluating an applicant’s eligibility for bar admission, but is considered when raised as a mitigating factor to explain misconduct. Mental health disabilities should be treated similarly.

¹⁰ *Id.* §§ 5C, 5M.

¹¹ *Id.* § 5M(1) (emphasis added).

¹² *Id.* § 4A.

Examiners (“NCBE”) prepare a character report.¹³ Louisiana law students must submit their request for preparation of a character report before October of their second year of law school, even if they do not ultimately choose to take the Louisiana bar examination or practice in Louisiana.¹⁴ To request an NCBE character report, the applicant must establish a character and fitness electronic account with NCBE and answer 28 questions, including questions about previous disbarment or disciplinary measures; revocation of other professional licenses; accusations of fraud, forgery, or malpractice; arrests and convictions; bankruptcy; and loan defaults. The applicant is required to sign releases allowing third parties to disclose information to NCBE for the purposes of its investigation.¹⁵ NCBE reviews the applicant’s responses, conducts an investigation, and submits a report of findings to the Admissions Committee.¹⁶

The Request for Preparation of a Character Report that the Admissions Committee requires each applicant to complete includes 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?

¹³ *Id.* § 4.

¹⁴ *Id.* § 4A.

¹⁵ Standard NCBE Character and Fitness Application, available at http://www.ncbex.org/assets/media_files/CandF/StandardNCBE.pdf at 17-19 (last visited January 26, 2014).

¹⁶ La. Sup. Ct. R., Part B, Rule XVII § 4A.

Sample NCBE Request for Preparation of a Character Report, available at http://www.ncbex.org/assets/media_files/CandF/StandardNCBE.pdf (last visited June 10, 2013).¹⁷

Applicants who respond affirmatively to Questions 25 or Question 26 must 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. . . .” They also must complete a form describing their condition and treatment or monitoring program. This form requires individuals to “Answer every question; do not leave anything blank. Incomplete applications will not be accepted. . . . Complete all forms required; you must provide all the requested information.”

Applicants who respond 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.

All applicants must certify and affirm in front of a notary that they have answered all questions fully and frankly, provided complete answers, and have not modified the questions.

Using a private third party, such as NCBE, to gather application information does not insulate the Louisiana Supreme Court from complying with the requirements of the ADA. Indeed, many states, including Massachusetts, Pennsylvania, and Illinois, do not use Questions 25, 26 and 27 of the NCBE Request for Preparation of a Character Report as a tool for conducting character and fitness screenings. We recently advised the Vermont Human Rights Commission that using these particular NCBE questions as part of character and fitness evaluations is unnecessary and not in compliance with the ADA. *See* Letter from Jocelyn Samuels, Acting Assistant Attorney General, U.S. Dep’t of Justice, to Karen L. Richards, Executive Dir., Vt. Human Rights Comm’n (Jan. 21, 2014) (attached). Furthermore, although NCBE has drafted these questions, it is the state Court that determines how to interpret the NCBE report, what action to take based on the report, and how the information presented in the report applies to the applicant’s fitness to practice law. The Court, therefore, is responsible for ensuring that its process for licensing attorneys, including its use of the NCBE questions in its screening process, does not violate the ADA.

¹⁷ As of January 2014, 25 states use one or more of Questions 25-27 of the NCBE Request for Preparation of a Character Report. Some states do not ask any mental health questions at all, relying solely on conduct-based questions to determine fitness to practice law.

C. Supplemental Character and Fitness Investigations by the Admissions Committee

The NCBE's character reports are submitted to the Admissions Committee, which utilizes them to make character and fitness recommendations to the Supreme Court.¹⁸ The Admissions Committee also has the authority to conduct further investigations before making its recommendation:

[The Admissions Committee may] take all steps necessary to investigate any relevant information pertaining to an applicant's character and fitness to practice law including, but not limited to, issuing investigatory subpoenas, obtaining pertinent documentary evidence, directing that an applicant submit to an independent medical, psychiatric or psychological examination and conducting interviews and obtaining sworn statements.¹⁹

An applicant who fails to cooperate with an Admissions Committee investigation may be denied admission.²⁰

The Admissions Committee frequently conducts further investigations when the NCBE has reported that an applicant has disclosed a mental health diagnosis or treatment in response to Question 25. According to spreadsheet data provided to us by the Admissions Committee ("Admissions Committee Q25 Spreadsheet"), 53 of 68 applicants who responded affirmatively to Question 25 between August 1, 2008 and December 11, 2012 whose character and fitness investigations were completed,²¹ were required to provide detailed medical information related to their condition, to submit to an Independent Medical Examination ("IME"), or to do both. Of these, at least 46 were required to provide medical records related to treatment for their diagnosis for the past five years and any hospitalization records from the past ten years. In several instances, the only justification given by the Admissions Committee to the applicant for its decision to conduct further investigation was the applicant's diagnosis, rather than any problematic conduct by the applicant. The Department has obtained five letters from applicants in which the Admissions Committee stated that further inquiry is necessary "given the nature of [the applicant's] diagnosis." For example, the Admissions Committee notified one applicant, referred to herein as TQ, that:

¹⁸ La. Sup. Ct. R. Part B, Rule XVII § 5C.

¹⁹ La. Sup. Ct. R. Part B, Rule XVII § 5G.

²⁰ *Id.* § 5I.

²¹ Of the 107 applicants who responded affirmatively to Question 25, 39 individuals' applications are pending, withdrawn, or incomplete because they were law student registrants who did not submit an application to take the bar examination. Admissions Committee Q25 Spreadsheet.

Review of your NCBE Character and Fitness Report and/or other information obtained by the Committee²² reveals your diagnosis of Bi-Polar Disorder. Given the nature of the diagnosis, the Committee has determined that further inquiry will be necessary in order to make an appropriate assessment regarding your fitness to practice.²³

The documentation requested by the Admissions Committee can contain information of an extremely personal nature which is irrelevant to the applicant's ability to practice law. For example, the Admissions Committee reviewed TQ's psychiatrist's treatment notes, which describe each therapy session since she began treatment. These notes include details of intimate information discussed in therapy, such as her upbringing, relationships with members of her family, sexual history, body image, and romantic relationships. Applicants are reminded that failure to comply with the request for information and medical documentation will be considered a lack of cooperation that could prevent the applicant from being certified for admission (*i.e.*, that the Admissions Committee could recommend that the Supreme Court deny the application for admission to the bar).

In numerous cases, the Admissions Committee forwards the applicant's medical records to its consulting psychiatrist, who reviews them to determine if more information is necessary. At least 29 applicants who have completed character and fitness reviews since 2008 and responded affirmatively to Question 25 had their medical records forwarded to the consulting psychiatrist. Admissions Committee Q25 Spreadsheet. In many instances, the Admissions Committee has subsequently recommended evaluations by independent psychiatrists or psychologists, and in some cases has recommended that an individual be examined by several different professionals.²⁴ Applicants have been required to pay the costs of these IMEs. For example, applicant JA was charged \$562.50 for such an evaluation and applicant ME was charged approximately \$800.²⁵

²² The only information contained in the Admissions Committee file for TQ as of the date of this letter was the NCBE Report, which included the complainant's diagnosis and medications, and indicated that she sees a therapist.

²³ Letter of February 9, 2009, to TQ from the Character and Fitness Attorney for the Admissions Committee.

²⁴ The Admissions Committee recommended that seventeen (17) applicants who had completed character and fitness reviews since 2008, and who responded affirmatively to Question 25, submit to an IME. *Id.* An IME is known to have been completed in 16 of these 17 instances. *Id.* Though the Admissions Committee characterizes IMEs as a suggestion of the Lawyer's Assistance Program ("LAP"), which coordinates many of the evaluations, the Executive Director of LAP describes it as one of the "requirements of the LSBA Committee on Bar Admissions." Letter from William R. Leary to ME, dated June 30, 2010.

²⁵ Under its revised procedures, depending on the content of the additional information the Admissions Committee receives from applicants who respond affirmatively to Question 25, the Admissions Committee intends to continue to refer them to LAP for further evaluation. The Admissions Committee will consult with LAP when considering imposing conditions on admission.

D. Conditional Admission Recommendations by the Admissions Committee

According to the Louisiana Supreme Court Rules, conditional admission is warranted only when an applicant's record shows *conduct* that may otherwise warrant denial.²⁶ For non-disabled individuals, conditional admission is often imposed upon those who have engaged in conduct such as defaulting on financial obligations,²⁷ engaging in criminal activity,²⁸ displaying a lack of candor (often on a law school or bar application),²⁹ or having disciplinary complaints as a licensed attorney in another jurisdiction.³⁰

The Admissions Committee has recommended conditional admission where there is no evidence of conduct that may otherwise warrant denial. For instance, an Admissions Committee attorney proposed to members reviewing TQ's application that she be recommended for "conditional admission with standard 5 yr consent agreement." The only "factors [sic] for consideration" listed to support this recommendation was that TQ had been "diagnosed with bipolar disorder." The Admissions Committee made this recommendation even though TQ's treating psychiatrist told the Admissions Committee that TQ has "adhered to the prescribed treatment regimen and kept careful track of her mood" and "has at no time since I have known her been a danger to herself or others." Significantly, the Admissions Committee's own consulting psychiatrist stated that "all psychiatric problems appear to be well-managed and stable at this time." Similarly, the Admissions Committee recommended conditional admission for JA even though the psychiatrist to whom the Admissions Committee had referred JA for further evaluation reported back to the Admissions Committee, "there is no clinical evidence [JA's]

²⁶ La. Sup. Ct. R. Part B, Rule XVII § 5M(1) (emphasis added).

²⁷ See, e.g., *In re Rocha*, 98 So.3d 265 (La. 2012) (financial concerns and honor board proceedings in law school; imposed 2 years of conditional admission); *In re Gray*, 76 So.3d 417 (La. 2011) (imposed 2 years of conditional admission); *In re Suriel*, 55 So.3d 757 (La. 2010) (imposed 2 years of conditional admission); *In re Pollock*, 22 So.3d 866 (La. 2009) (financial concerns and unauthorized practice of law; imposed 2 years of conditional admission); *In re Kennedy*, 8 So.3d 547 (La. 2009) (imposed 3 years of conditional admission); *In re Ramsay*, 998 So.2d 691 (La. 2009) (imposed 2 years of conditional admission).

²⁸ See, e.g., *In re Pedersen*, 9 So.3d 128 (La. 2009) (alcohol-related crimes; imposed 5 years of conditional admission, including reporting to Lawyers' Assistance Program); *In re Wright*, 969 So.2d 1250 (La. 2007) (domestic violence; conditional admission originally imposed for 2 years, extended for another two years; attorney was disbarred in 2012 after physical altercation with client).

²⁹ See, e.g., *In re Young*, 101 So.3d 438 (La. 2012) (failure to disclose alcohol-related crimes and DWIs; imposed 5 years of conditional admission with referral to LAP); *In re Allen*, 100 So.3d 300 (La. 2012) (failed to disclose criminal history on law school and bar applications; imposed 2 years of conditional admission); *In re Graham*, 100 So.3d 299 (La. 2012) (failed to disclose criminal history on law school application; imposed 2 years of conditional admission); *In re Bradley*, 50 So.3d 114 (La. 2010) (failure to disclose relevant information on his law school application; imposed 2 years of conditional admission).

³⁰ *In re Doskey*, 953 So.2d 812 (La. 2007) (imposed 1 year of conditional admission).

mental status, her diagnosis or diagnoses will interfere with her ability to practice law. Therefore, there is no mental health contraindication to her admission to the Louisiana Bar. . . .”

Even when applicants have demonstrated their ability to practice law successfully in other jurisdictions without oversight, the Admissions Committee has recommended that they be conditionally admitted based on their mental health diagnoses. For example, JH, who has a diagnosis of bipolar disorder, had been unconditionally licensed and practicing in another jurisdiction for six years when she applied to the Louisiana bar, without any disciplinary or ethical concerns whatsoever. JH’s treating professionals reported to the Admissions Committee that JH was compliant with treatment, stable, asymptomatic, highly capable, responsible, had not exhibited any evidence of disturbed mood, and would be an effective practitioner. The Admissions Committee’s consulting psychiatrist opined that JH was compliant with treatment, her symptoms were well-controlled, and there was no evidence of suicidal or violent actions. Nevertheless, the Admissions Committee recommended conditional admission for JH. Similarly, LH was already unconditionally licensed in two jurisdictions when she applied for admission in Louisiana. At the time LH was conditionally admitted, she had been practicing in these jurisdictions without any disciplinary or ethical incident for three years. Although the Admissions Committee’s consulting psychiatrist reported that LH’s mental health conditions were well-controlled and should remain so, the Admissions Committee recommended conditional admission for LH.

By contrast, others who have engaged in substantial misconduct relevant to their practice of law – and some who have even committed felonies – have been admitted to the Louisiana bar without *any* condition or oversight whatsoever. *See, e.g., In re Mark E. Carter*, 11 So.3d 1089 (La. 2009) (unconditional admission despite prior abuse of legal process and lack of candor); *In re Eric W. Claville*, 997 So.2d 527 (La. 2008) (unconditional admission despite prior arrest for attempted second degree murder in a road rage incident involving a shooting; pled guilty to aggravated assault); *In re Marcus Anthony Bryant*, 922 So.2d 471 (La. 2006) (unconditional admission despite felony conviction for possession and intent to distribute cocaine, plus indebtedness).

Though the Rules reflect that conditional admission is recommended with the voluntary consent of the applicant, applicants are informed that if they do not consent to conditional admission, the Admissions Committee may refuse to certify them for admission. *See, e.g.,* Letter to ME from the Director, dated June 20, 2011; Letter to JA from the Director, dated Nov. 24, 2009. According to the Admissions Committee’s Executive Director, an individual who disagrees with the Admissions Committee’s recommendation must appeal to the Supreme Court.

E. Petitions for Conditional Admission Proposed by the Admissions Committee

When the Admissions Committee recommends to the Supreme Court that an applicant be conditionally admitted, the applicant and the Director of Character and Fitness must enter into a

consent agreement that sets forth the terms and conditions of admission.³¹ Again, though the applicant must consent to the conditions of admission, applicants are not permitted to alter the terms proposed by the Admissions Committee. As the Admissions Committee told applicant ME:

The consent agreement shall set forth the terms and conditions for admission approved by the Director of Character and Fitness. Upon receipt of this correspondence please notify the Committee in writing whether you accept or decline the proposed recommendation. You may contact . . . [the] Attorney for Character and Fitness . . . regarding the specific terms and conditions of your conditional admission, if you so desire. Be advised that if you decline the proposed recommendation, the Committee may refuse to certify you for admission.

Letter to ME from the Director, dated June 20, 2011. Notwithstanding the Admissions Committee's statement that the applicant may contact the Attorney for Character and Fitness regarding the terms of conditional admission, it appears that the Admissions Committee does not, in fact, allow that opportunity in all cases. For example, JA asked to modify certain terms of her purported consent agreement and was told that they were non-negotiable. Email to JA from the Attorney for Character and Fitness, dated Dec. 8, 2009 ("You cannot make any modifications to the Consent agreement.") Applicants are thus faced with a choice between accepting the Admissions Committee's non-negotiable terms or risking being denied admission altogether.

Individuals who have been conditionally admitted based on mental health diagnoses typically have consent agreements lasting for five years, with a possibility for extension. An Admissions Committee staff attorney described the recommendation for a five-year term as the "standard 5 yr consent agreement." (Supporting documentation is on file with the Department). Indeed, the Admissions Committee recommended five-year terms of conditional admission for JA, LD, JH, LH, TB, TQ, and ME, all of whom were identified by the Admissions Committee as receiving conditional admission based on mental health status. *See* Admissions Committee Conditional Admission Spreadsheet ("Conditional Admission Spreadsheet"). Individuals who have engaged in serious financial, criminal, or other misconduct often have shorter terms of conditional admission.³²

³¹ La. Sup. Ct. R. Part B, Rule XVII § 5M(2).

³² *See, e.g., In re Rocha* (financial concerns and honor board proceedings in law school; 2 years); *In re Gray* (financial; 2 years); *In re Suriel* (financial; 2 years); *In re Pollock* (financial concerns and unauthorized practice of law; 2 years); *In re Ramsay* (financial; 2 years); *In re Wright* (domestic violence; 2 years); *In re Allen* (lack of candor; 2 years); *In re Graham*, (criminal history and lack of candor; 2 years); *In re Bradley* (lack of candor; 2 years).

The consent agreements entered into by JA, LD, JH, LH, TB, TQ, and ME contain virtually identical conditions. Typically, applicants with mental health diagnoses who are conditionally admitted must:

- Enter into, and comply with, probation agreements with the Office of Disciplinary Counsel (“ODC”) who will assign them to practice monitors or probation monitors.³³
- Consult with their treating health care providers not less than every three months;
- Authorize their treating health care providers to submit substantive reports to the ODC every three months;
- Have their treating health care providers inform ODC of prescribed medications and notify ODC of any changes in medication;
- Inform ODC of changes in doctors and therapists;
- Agree to personally appear at their own expense before psychiatrists or health care professionals designated by ODC for an assessment of their recovery and medical status; and
- Grant ODC “full and unfettered access to any and all information contained in files kept by any health care professional regarding [their] diagnosis, treatment, and recovery” and execute medical authorizations required to facilitate full disclosure.³⁴

If applicants fail to comply with any condition of the agreement, their licenses may be revoked.

³³ Although LH’s Mississippi employer must send semi-annual letters to ODC, she was not assigned a Louisiana practice monitor. She did, however, have to enter into a formal agreement with ODC that was approved by the Supreme Court as part of the conditional admission process. LD, who lives outside of Louisiana, was assigned the Deputy Disciplinary Counsel of ODC as her probation monitor.

³⁴ The Court recently modified some of its procedures for monitoring conditionally admitted attorneys. An attorney who is conditionally admitted due to “mental or emotional disability or instability” on or after February 1, 2014 will have her compliance with the terms of admission monitored by a probation monitor assigned by LAP, not ODC. La. Sup. Ct. R. Part B, Rule XVII § 5M(6). Though the affiliation of the probation monitor to whom the applicant must report has changed, the reporting requirements may remain the same, depending on what conditions LAP recommends.

F. Petitions for Conditional Admission Reviewed and Orders Issued by the Louisiana Supreme Court

Conditional admission must be approved by the Louisiana Supreme Court.³⁵ Thus, a petition for conditional admission is jointly submitted to the Supreme Court by the Admissions Committee and the applicant for admission, along with a copy of the signed and notarized consent agreement.³⁶ According to the Supreme Court Rules in effect until February 1, 2014, “By consenting to conditional admission, the applicant waives any confidentiality pertaining to the matters which are the subject of the consent agreement unless the applicant seeks and is granted a protective order by the [Supreme] Court.”³⁷ However, as of February 1, 2014, “The Joint Petition shall be confidential as to the applicant’s identity. . . . Any medical or other sensitive information shall be filed under seal.”

Many petitions for conditional admission to the Supreme Court filed to date exposed the applicants’ personal and mental health history to public scrutiny. Petitions for conditional admission and accompanying exhibits became part of the court record and, thus, were available to the public, except in the relatively rare instance that a protective order was granted.³⁸ The petitions contain information about the applicants’ diagnosis and treatment. For example, the petitions for conditional admission for JA, LD, JH, LH, TB, TQ, and ME all stated the applicants’ diagnoses and described the conditions of admission for each applicant, making clear that they are required to see mental health professionals. Each petition also discussed psychiatrists’ opinions and/or observations regarding the applicants. In numerous cases, medical records that were submitted to the Admissions Committee were attached to these petitions as exhibits, and, therefore, also became public. For instance, records submitted by JH, LH, TB, ME and TQ’s treating professionals were attached to their petitions to the Supreme Court as exhibits. These records contained personal information disclosed during the course of treatment and/or details of their medication regimens.

The Supreme Court must enter an order ruling on the petition for conditional admission. Until recently, these orders contained the applicant’s full name and the fact that he or she has

³⁵ La. Sup. Ct. R. Part B, Rule XVII § 5M(5).

³⁶ *Id.* § 5M(4).

³⁷ La. Sup. Ct. R. Part B, Rule XVII § 5M(3) (repealed by amendment effective Feb. 1, 2014).

³⁸ Although applicants had the right to seek a protective order to have their petitions and medical records sealed, motions for protective orders were granted infrequently to applicants who were conditionally admitted due to mental health diagnoses. According to records provided by the Admissions Committee, only one applicant’s motion for a protective order was granted in full. LH’s motion to seal her petition for admission and accompanying medical records was denied in full. TB and ME’s motions were granted only in part, such that references to their medical records, information about their diagnosis, and professionals’ observations contained in the joint petition were matters of public record.

been conditionally admitted.³⁹ The Court's orders are available on the Supreme Court's web site and RSS (rich site summary) feed, and are thus indexed by internet search engines. A prospective employer, prospective client, opposing counsel, or any other individual who is searching for information about an attorney on the internet is thus informed about the fact of his or her conditional admission. JA reported that she has experienced difficulty obtaining employment because information about her conditional admission is readily available to prospective employers. TQ also feels that employers are less likely to hire her because she is conditionally admitted.

G. Implementation and Monitoring of Conditional Admission

After the Supreme Court enters an order granting conditional admission, the ODC has been responsible for monitoring the conditionally admitted attorney's compliance with the conditions of admission.⁴⁰ ODC does not have any psychologists or psychiatrists on staff. ODC typically required attorneys who are conditionally admitted due to mental health diagnoses to sign a probation agreement. In addition to incorporating the reporting requirements embodied in the Admissions Committee agreement, three of the probation agreements we reviewed had identical terms and required attorneys who are conditionally admitted due to mental health diagnoses, among other things, to:

- Promptly notify ODC if they establish a solo practice or otherwise engage in the private practice of law;
- Acknowledge that it may be necessary and appropriate to assign a practice monitor to oversee the attorney's professional activities;
- Submit reports of professional activities to ODC twice yearly;
- Timely provide waivers of confidentiality to ODC to enable ODC to monitor compliance with the agreement;
- Promptly respond to all requests of ODC;
- Acknowledge that any violation of the agreement could result in revocation of the conditional right to practice law; and

³⁹ Effective February 1, 2014, "The fact that an individual is conditionally admitted and the terms of the consent agreement shall be confidential and shall not be disclosed, except to the Office of Disciplinary Counsel, the Lawyer's Assistance Program, or in [certain] circumstances." La. Sup. Ct. R. Part B, Rule XVII § 5M(8). Applicants' names will not be removed from conditional admissions orders entered before February 1, 2014, so prior applicants' conditional admission status will remain public.

⁴⁰ *Id.* § 5M(6). *See supra* note 35. Though the Court intends to move the monitoring of attorneys who were conditionally admitted based on mental health diagnosis to LAP, their files had not been transferred as of January 27, 2014, and these attorneys were not aware of any change in monitoring procedures.

- Submit an affidavit demonstrating compliance with the terms of the agreement and payment of all costs of “these proceedings” within ten days of expiration of the agreement.⁴¹

Other ODC monitoring agreements also require the attorneys to agree that ODC will contact their employers or supervising attorneys to discuss the conditionally admitted attorneys’ professional activities and performance.⁴² While some agreements entered into by attorneys with mental health diagnoses permit reporting directly to ODC, other agreements require reporting by a probation monitor appointed by ODC.⁴³ The probation monitor submits quarterly reports to ODC regarding the attorney’s compliance with the agreement. When a probation monitor is appointed, the attorney must also agree to:

- Allow the probation monitor to contact her employer to discuss her performance;
- Maintain an effective calendaring system and create a proper law office management program if she engages in private law practice;
- Agree to allow her probation monitor to review her files and accounts if she engages in private law practice;
- Provide the probation monitor with a list of prospective continuing legal education classes each year; and
- Meet in person with her probation monitor every three months.⁴⁴

The monitoring of these attorneys by the ODC, the title of the “probation agreement” that they are required to enter into, and the “probation monitor” that they are assigned treats attorneys who are conditionally admitted due to mental health diagnoses as though they have committed misconduct. The ODC maintains a file for each conditionally admitted attorney that lists

⁴¹ See Monitoring Agreements of LD, TB, and ME. The revised Supreme Court Rules codify a conditionally admitted attorney’s responsibility for expenses associated with the conditions of her admission. La. Sup. Ct. R. Part B, Rule XVII § 5M(3).

⁴² Probation Agreement of JA.

⁴³ The revised Supreme Court rules require assignment of a probation monitor “in all cases.” La. Sup. Ct. R. Part B, Rule XVII § 5M(3). This revision appears to make compliance with the conditions of admission even more onerous by precluding the possibility of self-reporting.

⁴⁴ Probation Agreement of TQ.

conditional admission as a type of “misconduct alleged,” along with violations of the attorney disciplinary code like criminal conduct and client neglect.⁴⁵

Attorneys whose conditional admission is predicated on mental health diagnoses have experienced professional difficulties. LH informed us that her former employer held the reporting over her head as leverage towards the end of her employment. TQ disclosed her disability to her employer sooner, and in a different manner, than she had planned because she needed to prepare for the fact that her probation monitor would contact her employer. TQ’s employer was uncomfortable with inquiries by her probation monitor and asked the monitor to respect TQ’s right to privacy. TQ’s probation monitor sought to review all of her firm’s files for matters on which TQ had worked. The monitor’s inflexibility regarding scheduling interfered with TQ’s work. Additionally, previous employers treated TQ differently or discounted her opinions because they knew the basis for her conditional admission.

Attorneys whose conditional admission is predicated on mental health diagnoses also have incurred additional expenses and received less effective medical care as a result of their efforts to comply with the terms of their probation agreements. For example, JA reported she must pay to see her psychiatrist every three months even though, in his professional opinion, she does not need to be seen that frequently. She also incurs additional expenses to have her psychiatrist prepare quarterly reports for ODC. ME similarly stated that her doctors do not believe that quarterly medical appointments are necessary for the successful treatment of her condition, and she incurs additional expenses associated with the ODC-mandated appointments. LD reports that she was guarded in her therapy sessions because she did not know what her psychiatrist would report to ODC and who would have access to that information. Though she has considered additional treatment, she refrained from pursuing it for fear that it would negatively impact her admission status.⁴⁶

IV. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the ADA in 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1).⁴⁷ The forms of discrimination encountered by individuals with disabilities

⁴⁵ As discussed *supra* note 35, moving forward, attorneys who are conditionally admitted due to mental health conditions will no longer need to report to ODC and have their mental health treated as a disciplinary issue. However, as of January 27, 2014, attorneys who had already been conditionally admitted due to mental health diagnosis were still required to report to ODC.

⁴⁶ LAP may continue to recommend and monitor compliance with the same reporting requirements, such that the burdens associated with conditional admission will not be lessened. Further, the Admissions Committee intends to require attorneys who had been conditionally admitted due to mental health diagnosis before the recent policy changes to be re-evaluated by LAP before the conditions of their admission will be revised or terminated.

⁴⁷ Someone who “has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities,” “has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation,” or “has

include “overprotective rules and policies,” “exclusionary qualification standards and criteria,” and “relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.” *Id.* § 12101(a)(5). Congress found that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity . . . and economic self-sufficiency for such individuals,” *id.* § 12101(a)(7), while noting that:

the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Id. § 12101(a)(8). For these and other reasons, Congress enacted Title II of the ADA, which prohibits discrimination against individuals with disabilities by public entities:

[N]o 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.

Id. § 12132.

Pursuant to a Congressional directive, 42 U.S.C. § 12134(a), the Department has issued several regulatory provisions that govern the Court’s policies and practices for attorney licensure. A public entity may not “directly or through contractual or other arrangements, utilize criteria or methods of administration [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(3)(i). Specifically, 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 a disability.” *Id.* § 35.130(b)(6). Further, a public entity may 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. *Id.* § 35.130(b)(8). Policies that “unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others” are also prohibited. 28 C.F.R. pt. 35, app. B at 673. Legitimate safety requirements necessary for the safe operation of an entity’s programs, services, and activities must be “based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.” 28 C.F.R. § 35.130(h).

a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment” is considered an individual with a disability entitled to protection under the ADA. 42 U.S.C. § 12102; 28 C.F.R. § 35.104 (definition of disability at (3), (4)(i), and (4)(ii)).

V. FINDINGS

We conclude that the Court's process for evaluating applicants to the Louisiana bar who have mental health diagnoses discriminates against qualified individuals with disabilities in violation of the ADA. 42 U.S.C. § 12132. The Admissions Committee's requirement that applicants for admission to the Louisiana bar (including prospective applicants enrolled in Louisiana law schools) answer Questions 25-27⁴⁸ of the NCBE Request for Preparation of a Character Report (hereinafter "the Questions") violates the ADA because these questions are 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. Other forms of discrimination flow from the Admissions Committee's use of these discriminatory eligibility criteria, including 1) imposing additional burdens on applicants with disabilities in the form of expansive and intrusive requests for medical records; 2) making admissions recommendations that are based on the mere existence of a mental health disability rather than on conduct; 3) placing burdensome conditions upon applicants' legal licenses because of mental health diagnosis or treatment; 4) imposing additional financial burdens on applicants and attorneys with disabilities; and 5) failing to protect the confidentiality of the medical information of applicants with disabilities.⁴⁹

A. The Questions Violate Title II of the ADA

The ADA prohibits public entities, including state licensing entities, from imposing or applying "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." 28 C.F.R. § 35.130(b)(8). It also prohibits "policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others." 28 C.F.R. pt. 35, app. B at 673. By requiring all applicants for admission to the Louisiana bar to complete the Questions,⁵⁰ the Court violates the ADA. The Department has spoken with the NCBE, and is prepared to work with the NCBE to improve the Questions. However, the Court remains responsible for its ADA violations.

⁴⁸ As explained more fully below, Question 26A as currently written is discriminatory because inquiring about the effect of an applicant's health condition when it is untreated seeks information about an applicant's diagnosis, not its actual effect on his or her current fitness to practice law.

⁴⁹ Though the Court has made some revisions to its procedures that provide enhanced confidentiality protections, these procedures are insufficient to come into compliance with the ADA, and fail to compensate applicants with mental health disabilities who were conditionally admitted based on a mental health diagnosis prior to these changes.

⁵⁰ La. Sup. Ct. R. Part B, R. XVII § 4.

1. The Questions Are Eligibility Criteria that Tend to Screen Out Persons with Disabilities and Subject Them to Additional Burdens

Requiring applicants for admission to the Louisiana bar to state whether they have been diagnosed with or treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder (Question 25), and to provide additional information if they have, utilizes an eligibility criterion that tends to screen out individuals with disabilities and subjects them to additional burdens. *See, e.g., Clark v. Virginia Bd. of Bar Examiners*, 880 F. Supp. 430, 442-43 (E.D. Va. 1995) (finding that questions requiring individuals with mental disabilities to subject themselves to further inquiry and scrutiny discriminate against those with mental disabilities); *Medical Society of New Jersey v. Jacobs*, 1993 WL 413016 at *7 (D. N.J. 1993) (refusing to allow questions that substitute an inquiry into the status of disabled applicants for an inquiry into the applicants' behavior and place a burden of additional investigations on applicants who answer in the affirmative).

Inquiring about applicants' medical conditions substitutes inappropriate questions about an applicant's status as a person with a disability for legitimate questions about an applicant's conduct. The applicant's diagnosis and treatment history, by virtue of their mere existence, are presumed by these questions to be appropriate bases for further investigation. The Admissions Committee's inquiry, and the actions that flow from inappropriate disability status-based inquiries, are therefore based on "mere speculation, stereotypes, or generalizations about individuals with disabilities." *See* 28 C.F.R. § 35.130(h); 42 U.S.C. § 12101(a)(7) (criticizing unequal treatment "resulting from stereotypic assumptions not truly indicative of the individual ability [of people with disabilities] to participate in, and contribute to, society").⁵¹

2. The Questions Are Not Necessary to Determine Whether Applicants Are Fit to Practice Law.

Title II prohibits eligibility criteria that screen out or tend to screen out people with disabilities "unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(8). The Admissions Committee's use of the Questions is not necessary to achieve its objective of determining whether individuals who apply for admission to the Louisiana bar are fit to practice law. These questions are not necessary because they are not the only method for identifying unfit applicants, they do not effectively identify unfit applicants, and they have a deterrent effect that is counterproductive to the Court's objective of ensuring that licensed attorneys are fit to practice.

⁵¹ *See also* S. Rep. No. 116, 101st Cong., 1st Sess., at 7 (1989) (discussing the "false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies" surrounding disability; H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. III, at 25 (1990) (noting that "many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices towards people with disabilities."))

a. The Questions Are Unnecessary Because Questions Related to Applicants' Conduct Are Sufficient, and Most Effective, to Evaluate Fitness.

The Admissions Committee can achieve its 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. Questions designed to disclose the applicant's prior misconduct would serve the legitimate purposes of identifying those who are unfit to practice law or are unworthy of public trust, and would do so in a non-discriminatory manner. *See New Jersey*, 1993 WL 413016, at *7 (finding that inquiry into applicants' behavior is the proper and necessary inquiry); Am. Bar Ass'n Bar Admissions Resolution, 18 MENTAL & PHYSICAL DISABILITY L. REP. 597, 598 (June 1994) (stating that specific, targeted questions may be asked about an applicant's behavior or conduct, or a current impairment of the applicant's ability to practice law). The Court's own rules for bar admissions appropriately state that applicants who satisfy requirements for good moral character and fitness are those "whose *record of conduct* justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them."⁵²

The Request for Preparation of a Character Report that the Admissions Committee currently uses already asks a multitude of questions that will allow the Admissions Committee to evaluate applicants' record of conduct, including:

Q5: Have you ever been dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled, requested to resign, or allowed to resign in lieu of discipline from any college or university (including law school), or otherwise subjected to discipline by any such institution or requested or advised by any such institution to discontinue your studies there?

Q8: Have you ever been terminated, suspended, disciplined, laid-off, or permitted to resign in lieu of termination from any job?

Q10A: Have you ever been disbarred, suspended, censured, or otherwise reprimanded or disqualified as an attorney?

Q10B: Have you ever been the subject of any charges, complaints, or grievances (formal or informal) concerning your conduct as an attorney, including any now pending?

Q11: Have you ever been the subject of any charges, complaints, or grievances (formal or informal) alleging that you engaged in the unauthorized practice of law, including any now pending?

⁵² La. Sup. Ct. R. Part B, Rule XVII § 5B (emphasis added).

Q12: Have sanctions ever been entered against you, or have you ever been disqualified from participating in any case?

Q16: Have you ever been denied a license or had a license revoked for business, trade, or profession (e.g., CPA, real estate broker, physician, patent practitioner)?

Q17A: Have you ever been suspended, censured, or otherwise reprimanded or disqualified as a member of another profession, or as a holder of public office?

Q17B: Have you ever been the subject of any charges, complaints, or grievances (formal or informal) concerning your conduct as a member of any other profession, or as a holder of public office, including any now pending?

Q18: Has any surety on any bond on which you were the principal been required to pay any money on your behalf?

Q19: Have you ever been a named party to any civil action?

Q20: Have you ever had a complaint or action (including, but not limited to, allegations of fraud, deceit, misrepresentation, forgery, or malpractice) initiated against you in any administrative forum?

Q21A: Have you ever been cited for, arrested for, charged with, or convicted of any alcohol- or drug-related traffic violation other than a violation that was resolved in juvenile court?

Q21B: Have you been cited for, arrested for, charged with, or convicted of any moving traffic violation during the past ten years? (Omit parking violations.)

Q22: Have you ever been cited for, arrested for, charged with, or convicted of any violation of any law other than a case that was resolved in juvenile court? (Report traffic violations at Questions 21.)

Q23: Have you ever filed a petition for bankruptcy?

Q24A: Have you ever had a credit card or charge account revoked?

Q24B: Have you ever defaulted on any student loans?

Q24C: Have you ever defaulted on any other debt?

Q24D: Have you had any debts of \$500 or more (including credit cards, charge accounts, and student loans) that have been more than 90 days past due within the past three years?

Q24E: If your answer to Question 23 is yes, are there any additional debts not reported in Questions 24(A-D) that were not discharged in bankruptcy?

Applicants are also required to provide at least six personal references as well as contact information for every employer for the past ten years. These inquiries provide a comprehensive basis for drawing inferences about an individual's fitness for the practice of law without resorting to discriminatory inquiries regarding the applicant's mental health history.⁵³

Conduct-based questions are most effective in assessing whether applicants are fit to practice law. Based on testimony from experts for both the applicants and the licensing entity that "past behavior is the best predictor of present and future mental fitness," a federal court in Virginia found that the mental health inquiry at issue was not necessary. *Clark v. Virginia Bd. of Bar Examiners*, 880 F. Supp. 430, 446 (E.D. Va. 1995). Similarly, the Questions are not necessary to the Court's program of attorney licensure.

b. The Questions Are Unnecessary Because They Do Not Effectively Identify Unfit Applicants.

The Questions are not necessary because they do not serve the Court's goal of identifying applicants who are unfit to practice law. Question 26A's inquiry into whether a condition or impairment "if untreated could affect" an applicant's ability to practice law is particularly unnecessary and improper. Inquiring about the effect of an applicant's disability when it is untreated reduces the question to one about an applicant's diagnosis, not the effect of that diagnosis on his or her fitness to practice law. This question considers an applicant's disability in a hypothetical future untreated form, which does not inform an assessment of how the disability affects an applicant's current fitness to practice law. It seeks information about the diagnosis alone, assuming a worst case scenario that may never come to pass. It is akin to asking whether an applicant has financial obligations that could result in default or bankruptcy if he or she lost all income and savings. Further, Question 26B makes clear that Question 26A is intended to single out individuals with a "mental health condition or substance abuse problem," in that it assumes an affirmative answer to Question 26A is related to these conditions. Thus, Question 26, as currently written, appears rooted in unfounded stereotypes about individuals with these diagnoses, and is not appropriately tailored to assess the applicant's current fitness to practice law. If the "if untreated could affect" clause of Question 26A were removed, this question would be permissible, because the question would be based on the applicant's current fitness to practice law, not on future, hypothetical scenarios.

⁵³ The Admissions Committee may also ask all applicants additional questions that focus on the conduct and behavior that it is concerned about, if it determines that the applicant's responses to the NCBE questions do not provide enough information for the Admissions Committee to determine if an applicant possesses the character and fitness to practice law.

Similarly, because Question 25 has no connection to conduct or current fitness of the applicant, it is also problematic. Question 27 similarly singles out mental health diagnosis in seeking information concerning whether an applicant has raised a mental health condition as a defense in any proceeding, investigation, inquiry, or proposed termination of employment or educational institution. Numerous other NCBE questions seek information concerning whether the applicant has been the subject of charges, complaints, or grievances; reprimanded, suspended, warned, dropped, expelled, or disciplined by a college or university; or terminated, laid-off, permitted to resign or disciplined by an employer. These questions appropriately allow attorney licensing entities to evaluate the circumstances surrounding the proceedings and any defenses raised. Accordingly, Question 27 is unnecessary.

The Questions also are not necessary to determine whether applicants will be able to fulfill their professional responsibilities as attorneys because a history of mental health diagnosis or treatment does not provide an accurate basis for predicting future misconduct. *See* Am. Bar Ass'n Comm'n on Mental and Physical Disability Law, *Recommendation to the House of Delegates*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 266, 267 (Feb. 1998) (“Research in the health field and clinical experience demonstrate that neither diagnosis nor the fact of having undergone treatment support any inferences about a person’s ability to carry out professional responsibilities or to act with integrity, competence, or honor.”); 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, 141 (2001) (“there is simply no empirical evidence that applicants’ mental health histories are significantly predictive of future misconduct or malpractice as an attorney”); *id.* at 141-42 n. 153 (observing that the only small retrospective study of attorneys “provides no support at all for the notion that individuals with mental health treatment histories are more likely than others to engage in misconduct as attorneys”).

Courts in Rhode Island and Virginia have agreed that licensing questions related to mental health status or treatment are not necessary because they have little or no predictive value. *Clark*, 880 F. Supp. at 446 (finding that questions were unnecessary where “the Board presented no evidence of correlation between obtaining mental counseling and employment dysfunction.”); *In re: Petition & Questionnaire for Admission to Rhode Island Bar*, 683 A.2d 1333, 1336 (R.I. 1996) (noting that “[r]esearch has failed to establish that a history of previous psychiatric treatment can be correlated with an individual’s capacity to function effectively in the workplace”). Because the Questions cannot accurately predict which applicants are unfit to practice law, it is not necessary for the Admissions Committee to use them in order to identify unfit applicants.

c. The Questions Are Unnecessary Because They Are Counterproductive to the Court’s Interests.

The Questions are likely to deter applicants from seeking counseling and treatment for mental health concerns, which fails to serve the Court’s interest in ensuring the fitness of licensed attorneys. *See Jaffee v. Redmond*, 518 U.S. 1, 10-11 & n.10 (1996) (recognizing a psychotherapy privilege under Federal law, based on Supreme Court’s view that confidentiality

of psychotherapy sessions is crucial to their success and serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem); U.S. Dep't of Health & Human Servs., *Mental Health: A Report of the Surgeon General* 408, 441 (1999) (observing that "evidence also indicates that people may become less willing to make disclosures during treatment if they know that information will be disseminated beyond the treatment relationship"); Am. Psychiatric Ass'n, "Recommended Guidelines Concerning Disclosure and Confidentiality" (1999) (finding that disclosure policies "inhibit individuals who are in need of treatment from seeking help"); Ass'n of Am. Law Schools, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35, 54-55 (1994) (finding that a much higher percentage of law students would seek treatment for substance abuse problems or refer others to treatment if they were assured that bar officials would not have access to that information); Bauer, *supra*, at 150 (describing how disability-related questions can discourage applicants from obtaining treatment and undermine its effectiveness).

In *Clark v. Virginia Board of Bar Examiners*, a law school dean and a law school professor both testified that, in their experience, mental health questions deter law students from seeking treatment. 880 F. Supp. at 437. The *Clark* court relied on its finding that the licensing question "deters the counseling and treatment from which [persons with disabilities] could benefit" and "has strong negative stigmatic and deterrent effects upon applicants" in finding that the question was unnecessary. *Clark*, 880 F. Supp. at 445-46; *see also Rhode Island*, 683 A.2d at 1336 (finding that the inclusion of questions regarding mental health may prevent a person in need of treatment from seeking assistance); *In re Petition of Frickey*, 515 N.W.2d 741, 741 (Minn. 1994) (finding that "the prospect of having to answer the mental health questions in order to obtain a license to practice causes many law students not to seek necessary counseling"). As the *Clark* court observed:

[B]road mental health questions may inhibit the treatment of applicants who do seek counseling. Faced with the knowledge that one's treating physician may be required to disclose diagnosis and treatment information, an applicant may be less than totally candid with their therapist. Without full disclosure of a patient's condition, physicians are restricted in their ability to accurately diagnose and treat the patient. Thus, it is possible that open-ended mental health inquiries may prevent the very treatment which, if given, would help control the applicant's condition and make the practice of law possible.

880 F. Supp. at 438. Questions that dissuade applicants from seeking needed mental health treatment fail to serve the Court's interest in ensuring that licensed attorneys are fit to practice. Rather than improving the quality, dependability, and trustworthiness of attorneys, the Admissions Committee's inquiries may have the perverse effect of deterring those who could benefit from treatment from obtaining it⁵⁴ while penalizing those who will be better able to

⁵⁴ Students at Louisiana law schools who intend to practice in Louisiana are particularly likely to be deterred by these inquiries. They are required to submit a request for preparation of a character report, including Questions 25-

successfully practice law and pose less of a risk to clients because they have acted responsibly and taken steps to manage their condition.

Because these questions tend to screen out people with disabilities and are unnecessary, the Supreme Court's use of the questions violates the ADA.

B. Other Processes Flowing from the Admissions Committee's Use of the Questions Also Discriminate on the Basis of Disability.

Many of the actions that the Admissions Committee and ODC take as a result of an applicant's affirmative response to the Questions are also discriminatory. Specifically, we find that the Admissions Committee and ODC violate the ADA when they subject individuals who disclose certain disabilities in response to the Questions to additional burdens in the form of 1) supplemental investigations and requests for medical records based on the applicant's diagnosis; 2) conditional admissions decisions that are improperly rooted in mental health diagnosis or treatment; 3) onerous conditions of admission; 4) additional costs as part of the application process and for monitoring; and 5) exposure of personal medical information to public scrutiny.

1. The Admissions Committee's Supplemental Investigations Impose Burdens on Persons with Disabilities Based on Stereotypes.

When an applicant answers the Questions affirmatively, the Admissions Committee typically investigates further. *See supra* at 6-8. As part of the investigation triggered by their mental health diagnoses, applicants are usually required to submit extensive medical records, including all medical records related to a mental health diagnosis from all treating physicians from the past five years, and any hospitalization records from the past ten years. TQ, JH, and LH received letters from the Admissions Committee stating that they should submit information concerning the diagnosis, notes related to the condition, treatment history, summaries of evaluations, prescribed medication, and prognosis. The applicants were reminded that if they failed to comply with this request for information, they could be denied admission.

The decision to request medical records appears to be based purely on diagnosis, which is revealed by applicants' responses to the Questions. As the Admissions Committee told TQ, "*Given the nature of the diagnosis*, the Committee has determined that further inquiry will be

27, before October of their second year of law school. La. Sup. Ct. R. Part B, Rule XVII § 4B. Students who may have sought mental health treatment to cope with this extremely stressful period in their lives may be deterred from doing so when faced with the prospect of needing to disclose information about that treatment to the entity that controls their ability to pursue a career as an attorney. Some of the individuals who may be deterred from seeking treatment because they are required to respond to these inquiries by virtue of attending law school in Louisiana may not ultimately choose to take the Louisiana bar examination or practice in Louisiana.

necessary in order to make an appropriate assessment regarding your fitness to practice.⁵⁵ By unnecessarily targeting individuals for further investigation on the basis of certain diagnoses or treatment, the Admissions Committee is not only ignoring its own statutory mandate, which requires it to evaluate an applicant's conduct,⁵⁶ it is also engaging in impermissible stereotyping proscribed by the ADA. *See* 42 U.S.C. § 12101(a)(7); 28 C.F.R. § 35.130(h). When requirements are based on speculation, stereotypes, or generalizations about people with disabilities, rather than actual risks, they are prohibited by Title II.

These investigations also violate the ADA because they impose an unnecessary burden on applicants with disabilities that is not imposed on others. Mental health treatment often involves discussion of intensely personal issues that are not related to the practice of law, as is evident from the extremely detailed records that TQ was required to disclose to the Admissions Committee, which described conversations that TQ had with her psychiatrist about a wide range of issues. Louisiana applicants with disabilities who affirmatively answer the Questions are required to disclose information of a highly personal and potentially embarrassing nature merely because they revealed that they were individuals with disabilities.

Courts have made clear that placing unnecessary additional burdens on applicants with disabilities, as the Admissions Committee's diagnosis-based or treatment-based requests for medical records do, violates the ADA. *See, e.g., Clark*, 880 F. Supp. at 442-43 (finding that applicants with disabilities cannot be required to subject themselves to additional unnecessary scrutiny); *Ellen S. v. Florida Bd. of Bar Examiners*, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994) (a licensing entity discriminates against qualified disabled applicants by placing additional unnecessary burdens on them and this discrimination can occur even if these applicants are subsequently granted licenses); *New Jersey*, 1993 WL 413016, at *8 (holding that a licensing board may not place the burden of additional investigations on an applicant who answers questions about their disability status affirmatively). The Court may not require additional investigation solely because of an applicant's disability. *See Brewer v. Wisconsin Bd. of Bar Examiners*, 04-C-0694, 2006 WL 3469598, at *10 (E.D. Wis. Nov. 28, 2006).

⁵⁵ Letter of February 9, 2009, to TQ from the Character and Fitness Attorney for the Admission Committee (emphasis added).

⁵⁶ La. Sup. Ct. R. Part B, Rule XVII § 5B.

2. The Admissions Committee Discriminates Against Applicants with Disabilities by Making Conditional Admissions Recommendations Based on Diagnosis Rather Than Conduct.

The Admissions Committee has recommended conditional admission for applicants whose NCBE Request for Preparation of a Character Report shows no evidence of conduct that would otherwise warrant denial. It has denied individuals with mental health diagnoses access to an unconditional law license simply because of their diagnosis, which discriminates against applicants on the basis of disability in violation of the ADA. For example, other than disclosure of her bipolar disorder, the only negative responses on JH's report related to a traffic ticket for going 13 miles over the speed limit and falling behind on credit card payments. She had been practicing law without incident in another jurisdiction for six years. Regardless, JH, like other applicants with a mental health diagnosis, was asked to submit all medical records related to her diagnosis for the past five years. After reviewing these records, the Admissions Committee recommended that JH be conditionally admitted for five years. Such admissions decisions are rooted in stereotypes about individuals with mental health diagnoses and violate the ADA. The Court must base its admissions decisions on an applicant's record of conduct, not the applicant's mental health history.⁵⁷

3. The Admissions Committee and the Office of Disciplinary Counsel Discriminate Against Attorneys with Disabilities By Imposing Conditions of Admission That Are Not Individually Tailored to Actual Risks.

The Admissions Committee and the ODC impose intrusive and onerous conditions of admission upon applicants with disabilities. These conditions inappropriately burden applicants with disabilities, limiting their employment opportunities and interfering with their relationships with employers, clients, and psychiatrists. Attorneys whose conditional admission is improperly predicated on mental health diagnoses have found it more difficult to obtain employment, have had to share information about their mental health diagnoses with employers, have been treated differently because their employers and colleagues were aware of their mental health status, have been asked to disclose clients' files, and have been distracted from their work by inflexible monitoring requests. These attorneys have made decisions about their treatment based on the Admissions Committee's requirements instead of their health, have been less able to share information freely with their psychiatrists, and have refrained from considering a full range of treatment options. They have made career decisions that are based on their conditional admission status and monitoring requirements rather than their talents and interests. The Court's

⁵⁷ Moreover, if the Admissions Committee intends to recommend denial or restriction of admission because of an applicant's conduct, the applicant must be provided with an opportunity to present disability-related information that may explain conduct that would otherwise warrant denial or restriction of admission. If the applicant offers convincing evidence that sufficiently mitigates any concerns related to prior misconduct, and the applicant is otherwise qualified for admission, the Admissions Committee should recommend admission and the Court should admit the applicant. During this process, just as disability-related information is typically considered as a mitigating factor in Louisiana bar disciplinary proceedings, *see supra*, note 9, it should similarly be considered as a mitigating factor during the Louisiana bar admissions process.

discriminatory imposition of conditional admission upon applicants with mental health diagnoses on the basis of their diagnoses has substantial detrimental effects.

The Admissions Committee and the ODC generally impose uniform conditions on attorneys who are conditionally admitted due to their mental health diagnosis. *See supra* at 11-12. The length of term of the conditional admission is the same, as are the majority of the conditions. All seven of the monitoring/probation agreements that the Department reviewed required attorneys who were conditionally admitted due to mental health disability to see their treating health care professional every three months and have their treating health care professional submit reports to ODC every three months. The same terms and conditions of admission were imposed, without regard to distinctions between these applicants such as their successful record of law practice or recommendations from their psychiatrists regarding their stability and the appropriate level of monitoring. Indeed, an Admissions Committee attorney recommended what she described as the “standard 5 yr consent agreement.”

When the Admissions Committee determines, based on an appropriate and non-discriminatory review process, that conditional admission is warranted for an attorney with a mental health disability, it must conduct an individualized analysis of each applicant’s record to determine how long the term of conditional admission should be and what conditions are necessary. The conditions should be limited to those that are necessary to mitigate the risk posed by the applicant’s prior conduct. Conditions must be justified by objective evidence of the applicant’s conduct, and not based on generalization or stereotype of the individual’s mental health diagnosis. The Admissions Committee and ODC should carefully tailor the conditions of each agreement to address the problematic conduct that was the basis for the conditional admission recommendation, imposing only those conditions that are necessary — and only for the amount of time necessary — to ensure the same or similar misconduct concerns do not arise after admission.⁵⁸

4. The Admissions Committee’s Investigations and the Office of Disciplinary Counsel’s Monitoring Impose Improper Financial Burdens on Applicants with Disabilities.

Title II generally prohibits imposing additional burdens on persons with disabilities that are not imposed on others. *See* 28 C.F.R. pt. 35, app. B at 673.

If the Admissions Committee determines that it needs additional information to determine whether an applicant with a mental health diagnosis should be admitted, it currently reserves the right to refer applicants for an IME. The applicant is informed that he or she will be required to pay the costs of any IME that the Committee requires. The Admissions Committee will refer the applicant’s case to the Lawyers’ Assistance Program, who then selects a medical professional to conduct the evaluation; applicants do not have input into which professionals will

⁵⁸ When LAP recommends conditional admission pursuant to the revised admissions procedures that take effect on February 1, the same guidelines should apply to LAP. *See* La. Sup. Ct. R. Part B, Rule XVII § 5M(2).

conduct their evaluations. As previously noted, ME, for example, was required to pay \$800 for an independent psychiatric evaluation requested by the Admissions Committee. To the extent that applicants with mental health diagnoses are required to undergo these examinations in a way that violates Title II, this cost constitutes an inappropriate financial burden imposed on applicants with disabilities.⁵⁹

Further, individuals with mental health diagnoses who are conditionally admitted are required to enter into a probation agreement with the ODC.⁶⁰ All of the agreements that the Department reviewed stated that the individual will provide proof of “payment of all costs of these proceedings at the conclusion of the probation period.” Though it is unclear what proceedings are being referred to or what costs would be incurred, any additional cost incurred as a result of the conditional admission process constitutes a discriminatory burden, where applicants are being conditionally admitted in response to a discriminatory inquiry about their mental health diagnosis and treatment. Additionally, the Admissions Committee, ODC, and LAP cannot pass the costs of any reasonable modification along to an applicant or attorney. *See* 28 C.F.R. § 35.130(f) (prohibiting the imposition of surcharges to cover the costs of measures required to provide an individual with nondiscriminatory treatment).

Finally, as noted above, ODC’s probation agreements typically require attorneys who are conditionally licensed on the basis of mental health to agree to personally appear at their own expense before psychiatrists or health care professionals designated by ODC for an assessment of their recovery and medical status. This is also an impermissible financial burden that is not imposed upon nondisabled attorneys.

5. The Court’s Failure to Provide Adequate Confidentiality Protections during the Formal Conditional Admissions Process Imposes Burdens on Applicants with Disabilities.

The Court’s practices also place unnecessary burdens on individuals with disabilities by failing to respect their confidentiality. *See supra* at 11-12. When the Admissions Committee recommends that an individual be conditionally admitted, it files a petition for conditional admission with the Supreme Court.⁶¹ All of the petitions that the Department has reviewed

⁵⁹ *Cf.* Equal Opportunity Emp. Comm’n, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (an employer may, in certain circumstances, require the employee to be examined by an appropriate health care professional of the employer’s choice, but “an employer also must pay all costs associated with the employee’s visit(s) to its health care professional.”)

⁶⁰ *See supra* note 35 for a discussion of recent modifications to this process.

⁶¹ We note, too, that the Committee members, who are all attorneys, are prospective employers and peers of the applicants. The fact that applicants must unnecessarily disclose their mental health diagnoses during the admissions process renders them more vulnerable to employment discrimination, stigma, and the potential for inappropriate disability-based animus by opposing counsel in the future.

clearly indicate the reason for the individual's conditional admission, including his or her diagnosis and other information related to the individual's medical condition. Several petitions also include the applicant's medical records as unredacted exhibits. Though petitions for conditional admission have been sealed, orders to date granting conditional admission, including the attorney's name, remain publicly available on the internet.⁶² The public nature of these orders forces conditionally admitted attorneys to disclose their disability to employers and colleagues in order to avoid a presumption that they were conditionally admitted due to a criminal history, financial delinquency, or other misconduct.

According to the Supreme Court Rule in effect until February 1, 2014, “[a]n attorney who is conditionally admitted “waives any confidentiality pertaining to the matters which are the subject of the consent agreement [regarding the conditions of admission] unless the applicant seeks and is granted a protective order by the Court.”⁶³ According to the American Bar Association, “the fact that an individual is conditionally admitted and the terms of the Conditional Admission Order shall be confidential”⁶⁴ The Louisiana Supreme Court's approach placed an unreasonable burden on applicants who needed to seek protective orders to ensure that their disability-related information remained confidential. The burdensome nature of this process is demonstrated by the fact that several applicants' motions for protective orders were only granted in part, while others were unable to file motions or had their motions denied. By requiring an applicant who was conditionally admitted due to his or her disability to seek a protective order, the Court subjected applicants with mental health diagnoses to another burden before they were able to achieve the same status and privacy afforded to other applicants who do not have disabilities.

Given the liberty interest that the United States Supreme Court and many other courts have recognized in the privacy of highly personal medical information, the presumption should be to protect confidentiality.⁶⁵ This right to privacy yields only to proof of a strong public

⁶² As noted *supra* p. 12 and note 40, as of February 1, 2014, the fact of conditional admission will be confidential, joint petitions will not include the applicant's name, and medical information will be filed under seal.

⁶³ La. Sup. Ct. R. Part B, Rule XVII § 5M(3) (repealed by amendment effective Feb. 1, 2014).

⁶⁴ Am. Bar Ass'n, *Model Rule on Conditional Admission to Practice Law* (August 2009), available at https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/model_rule_on_conditional_admission_aug2009.pdf.

⁶⁵ See *Whalen v. Roe*, 429 U.S. 589, 600 (1977) (recognizing constitutionally protected zone of privacy including an interest in nondisclosure of private medical information); see also *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) (“One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up.”); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995) (constitutional right to privacy in psychiatric records); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (individuals with HIV clearly possess a constitutional right to privacy regarding their condition and “there are few matters that are quite so personal as the status of one's health”); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (finding that “medical records and information stand on a different plane than other relevant material” and acknowledging that information disclosed during consultations with physicians may be particularly sensitive). Other courts that have considered the confidentiality of licensing information have

interest in access to or dissemination of the information.⁶⁶ The public interest in preventing discrimination against individuals with disabilities weighs strongly against publicizing their medical information. Exposing this information to the public merely enables prospective employers, clients, or opposing counsel to act on their preconceived notions about individuals with mental health diagnoses. It also creates a chilling effect that could deter individuals with disabilities from pursuing the legal profession or seeking treatment, and reduces employment opportunities available to lawyers with disabilities by allowing their prospective employers to access information about their disability to which employers would not otherwise be entitled. Though the Court has now sealed applicants' medical records and disability-related information, this does not undo the harm that has been done to the individuals whose sensitive information was exposed to the public for years.

VI. RECOMMENDED REMEDIAL MEASURES

To remedy the deficiencies discussed above and protect the civil rights of individuals with mental health diagnoses or treatment who seek to practice law in the State of Louisiana, the Court should promptly implement the minimum remedial measures set forth below.

- a) Refrain from utilizing Questions 25-27 of the NCBE Request for Preparation of a Character Report as currently written, or using any other question that requires applicants to disclose diagnosis of, or treatment for, a disability when that information is not being disclosed to explain the applicant's conduct.
- b) Modify the Louisiana Supreme Court Rules and the questions utilized to conduct character and fitness screening of applicants for admission to the Louisiana bar to ensure that only an applicant's conduct, not his or her mental health diagnoses or treatment for such diagnoses, is considered in evaluating fitness to practice law.
- c) Modify the Louisiana Supreme Court's policies and practices for making admissions recommendations to conform to the principles described herein, including, but not limited to:

assumed that licensing boards do not publish their reasons for admissions decisions or distribute information obtained during the admissions process. *See Brewer*, 2007 WL 527484 (assuming that the board does not publish its reasons for denying an application); *Doe* (refusing to release information to the public even for judicial nominees); *Clark*, 880 F. Supp. 438 n.13 (recognizing that the applicant's questionnaire is not available to the public); *New Jersey*, 1993 WL 413016, at *11 (affirming that information that is part of applications has been kept secret).

⁶⁶ *Wolfe v. Schaefer*, 619 F.3d 782, 785 (7th Cir. 2010); *see also F.E.R.*, 58 F.3d at 1535 (even when interest in preventing dissemination of psychiatric records yields to compelling governmental interest of preventing Medicaid fraud, objectives must be achieved in least intrusive manner); ABA Recommendation at 269 (stating that the government's interest in obtaining or disseminating the information must be balanced against the individual's interest in its nondisclosure).

- (i) Refrain from using mental health disability as a basis for determining which applicants warrant further investigation;
 - (ii) Refrain from recommending conditional admission, or conditionally admitting applicants, except when an applicant's responses to conduct-related questions indicate that the applicant has a history of conduct that would otherwise warrant denial of admission, and when any conduct concerns are not mitigated by the applicant's voluntary disclosure of relevant information, including relevant information concerning mental health diagnosis and treatment;
 - (iii) Ensure that any conditions of admission are individually tailored to address the concerns regarding the applicant's conduct that justified the recommendation;
 - (iv) Refrain from imposing additional burdens on applicants with mental health disabilities, including impermissible costs.
- d) Publicize modifications to the Supreme Court's rules, policies, and practices related to character and fitness screening, conditional admission, and confidentiality to prospective applicants (e.g., at Louisiana law schools and in preparatory courses for the Louisiana bar examination).
- e) Evaluate pending applications without consideration of an applicant's affirmative response to Questions 25-27 or information requested based on that response.
- f) Identify all individuals who remain conditionally admitted following an affirmative response to Questions 25-27 and:
- (i) Take immediate steps to terminate the conditions of admission, unless the applicant's responses to conduct-related questions would otherwise warrant denial of admission, and conduct concerns are not mitigated by the applicant's voluntary disclosure of information related to mental health diagnosis and treatment;
 - (ii) For individuals whose conditional admissions are terminated, expunge all documents and records related to the conditional admission, and ensure that any references to the conditional admission are not publicly available; and
 - (iii) For any individuals who remain conditionally admitted for non-discriminatory reasons, re-evaluate the conditions of admission to ensure they are narrowly tailored to address only the conduct warranting conditional admission, and ensure that any and all medical or health-related information is kept strictly confidential.

- g) Identify applicants who were denied admission following an affirmative response to Questions 25-27:
 - (i) Re-evaluate their original applications on a priority basis, without consideration of an applicant's affirmative response to Questions 25-27 or information requested based on that response;
 - (ii) Inform any qualified individuals of revisions to the Court's processes for conducting character and fitness inquiries and the Admissions Committee's preliminary determination that they are qualified for unconditional or conditional admission under these revised processes;
 - (iii) Invite qualified individuals to update their application for admission to the Louisiana bar without additional expense;
 - (iv) Re-evaluate and process the updated applications on a priority basis, without considering mental health diagnoses or treatment for such diagnoses.
- h) Identify applicants who withdrew from the admissions process following an affirmative response to Questions 25-27 and:
 - (i) Inform these individuals of revisions to the Court's processes for conducting character and fitness inquiries;
 - (ii) Invite these individuals to re-apply for admission to the Louisiana bar without additional expense; and
 - (iii) Re-evaluate and process their applications on a priority basis, without considering mental health diagnoses or treatment for such diagnoses.
- i) Pay compensatory damages to individuals with mental health disabilities who were subjected to discrimination during the bar admissions process.
- j) Provide information to the United States following each set of admissions ceremonies for the next five years regarding the Court's ongoing efforts to comply with Title II in a manner consistent with this Letter of Findings, including providing modifications to bar admissions policies or practices and summaries of application outcomes and the reasons for those outcomes (*i.e.*, the total number of individuals conditionally admitted or denied admission, including the number of individuals conditionally admitted or denied for any given reason).

VII. CONCLUSION

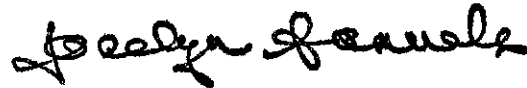
Please note that this Letter of Findings is a public document and will be posted on the Civil Rights Division's website. We will provide a copy of this letter to any individual or entity upon request, and will share it with the complainants and other affected individuals who participated in our investigation.

We hope to be able to work with you and other officials in an amicable and cooperative fashion to resolve our outstanding concerns with respect to the State's attorney licensure system. Please contact Anne Raish, Deputy Chief of the Disability Rights Section, at 202-307-0663 by February 18, 2014 if you are willing to resolve this matter voluntarily in a manner that will bring the Court into full compliance with Title II.

We are obligated to advise you that, in the event that we are unable to reach a resolution regarding our concerns, the Attorney General may initiate a lawsuit pursuant to the ADA once we have determined that we cannot secure compliance voluntarily to correct the deficiencies identified in this letter. *See* 42 U.S.C. § 12133-34; 42 U.S.C. § 2000d-1. We would prefer, however, to resolve this matter by working cooperatively with you.

If you have any questions regarding this letter, you may call Rebecca B. Bond, Chief of the Civil Rights Division's Disability Rights Section, or Anne Raish at (202) 307-0663.

Sincerely,

A handwritten signature in black ink, appearing to read "Jocelyn Samuels". The signature is written in a cursive, flowing style.

Jocelyn Samuels
Acting Assistant Attorney General

Attachment



U.S. Department of Justice

Civil Rights Division

*Assistant Attorney General
950 Pennsylvania Ave, NW - RFK
Washington, DC 20530*

January 21, 2014

Ms. Karen L. Richards
Executive Director
Vermont Human Rights Commission
14-16 Baldwin Street
Montpelier, VT 05633-6301

Dear Ms. Richards:

We write in response to your letter dated November 7, 2013, inquiring about the use of mental health questions in state bar application processes and requesting the Department of Justice's position regarding the extent to which states may consider mental health in their screening process for bar applicants.

The Department of Justice ("Department") recognizes and respects the great responsibility placed on state attorney licensing entities to safeguard the administration of justice by ensuring that all licensed attorneys are competent to practice law and worthy of the trust and confidence clients place in their attorneys. States can, should, and do fulfill this important responsibility by asking questions related to the conduct of applicants. Conduct-related questions enable states to assess effectively and fully applicants' fitness to practice law, and states can appropriately take responses to these questions into account in their attorney licensing decisions. Numerous questions in the National Conference of Bar Examiners' ("NCBE") Request for Preparation of a Character Report appropriately seek information concerning an applicant's conduct, including whether an applicant has been the subject of charges, complaints, grievances, or other discipline related to professional conduct; has been the subject of other complaints in an administrative forum; has been cited for, arrested for, charged with, or convicted of any violations of law; has been reprimanded, suspended, warned, dropped, expelled, or disciplined by a college or university; has been terminated, laid-off, permitted to resign, or disciplined by an employer; and has managed debt and credit responsibly. These existing questions allow attorney licensing entities to evaluate – in a non-discriminatory manner – whether an applicant is currently fit to practice law.

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.

I. Background

The Disability Rights Section of the Civil Rights Division of the Department enforces Title II of the Americans with Disabilities Act (“ADA”), which bars public entities from discriminating against individuals with disabilities:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Pursuant to a Congressional directive, 42 U.S.C. § 12134(a), the Department has issued several regulatory provisions that govern states’ policies and practices for attorney licensure and are relevant to your inquiry. As an initial matter, a public entity may not “directly or through contractual or other arrangements, utilize criteria or methods of administration [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(3)(i); *see also* § 35.130(b)(1) (prohibiting states from engaging in discriminatory conduct through their “contractual, licensing, or other arrangements.”). Further, 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 a disability.” *Id.* § 35.130(b)(6). A public entity is also prohibited from imposing or applying “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. *Id.* § 35.130(b)(8). Policies that “unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others” are also prohibited. 28 C.F.R. pt. 35, app. B at 673. Legitimate safety requirements necessary for the safe operation of an entity’s programs, services, and activities must be “based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.” 28 C.F.R. § 35.130(h).

As your letter notes, many states use the character report services of the NCBE to process applications for admission to the bar. However, using a third party to gather application information does not insulate a public entity from complying with the requirements of the ADA. States make the decision to use the NCBE Character and Fitness Application as a tool for conducting character and fitness screenings. *See* National Conference of Bar Examiners, Character & Fitness Services, <http://www.ncbex.org/character-and-fitness/>. Further, state offices determine how to interpret the NCBE report, what action to take based on the report, and how the information presented in the report applies to the applicant’s fitness to practice law. States, therefore, are responsible for ensuring that their processes for licensing attorneys, including their use of the NCBE questions in their screening processes, do not violate the ADA.

Many states require applicants to complete the NCBE’s standard Request for Preparation of a Character Report, which appropriately asks twenty-one questions about an applicant’s

academic, professional, judicial, and financial history. The Request for Preparation of a Character report also includes three inquiries related to mental health:

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 or substance abuse problem 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?

Applicants who respond affirmatively to Questions 25 or Question 26 must 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. . . .” They also must complete a form describing their condition and treatment or monitoring program. Applicants who respond affirmatively to Question 27 are required to “furnish a thorough explanation.”

We believe these questions are unnecessary, overbroad, and burdensome for applicants.¹

¹ As discussed below, bar licensing entities may request mental disability information only as to its *current* effect on an applicant’s fitness to practice law or as a *voluntary* disclosure to explain conduct that would otherwise require denial of admission.

II. Analysis

A. Questions 25-27 Are Eligibility Criteria that Tend to Screen Out Persons with Disabilities and Subject Them to Additional Burdens.

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. The applicant's diagnosis and treatment history, by virtue of their mere existence, are presumed by these questions to be appropriate bases for further investigation. The inquiries are therefore based on "mere speculation, stereotypes, or generalizations about individuals with disabilities," and are prohibited by the ADA. *See* 28 C.F.R. § 35.130(h); 42 U.S.C. § 12101(a)(7) (criticizing unequal treatment "resulting from stereotypic assumptions not truly indicative of the individual ability [of people with disabilities] to participate in, and contribute to, society").

For example, requiring applicants for admission to the bar to state whether they have been diagnosed with or treated for bipolar disorder, schizophrenia, paranoia, any other psychotic disorder, a mental health condition, or any other condition or impairment, as Question 25 does with no connection to current fitness to practice, and to provide additional information if they have, unnecessarily utilizes an eligibility criterion that tends to screen out individuals with disabilities and subjects them to additional burdens in violation of the ADA. 28 C.F.R. § 35.130(b)(3)(1) (prohibiting states from utilizing criteria that subject qualified individuals with disabilities to discrimination through contractual or other arrangements); *see also Clark v. Virginia Bd. of Bar Examiners*, 880 F. Supp. 430, 442-43 (E.D. Va. 1995) (finding that questions requiring individuals with mental disabilities to subject themselves to further inquiry and scrutiny discriminate against those with mental disabilities); *Medical Society of New Jersey v. Jacobs*, 1993 WL 413016, at *7 (D. N.J. 1993) (refusing to allow questions that substitute an inquiry into the status of disabled applicants for an inquiry into the applicants' behavior and place a burden of additional investigations on applicants who answer in the affirmative).²

Title II prohibits eligibility criteria that screen out or tend to screen out people with disabilities "unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(8). States' use of Questions 25-27 in attorney licensing is not necessary to achieve their important and legitimate objective of determining whether individuals who apply for admission to the bar are fit to practice law. These questions are not necessary because there are effective, non-discriminatory methods for identifying unfit attorney applicants which are already included in the Request for Preparation of

² Though other courts have permitted inquiries into applicants' mental health diagnoses, it is the Department's position that these decisions are wrongly decided and inconsistent with the ADA. *See ACLU of Indiana v. Individual Members of the Indiana State Bd. of Law Examiners*, 1:09-CV-842-TWP-MJD, 2011 WL 4387470, at *2 (S.D. Ind. Sept. 20, 2011) (allowing inquiry into diagnosis or treatment for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder with no temporal limitation); *O'Brien v. Virginia Bd. of Bar Examiners*, 98-0009-A, 1998 WL 391019 (E.D. Va. Jan. 23, 1998) (permitting inquiry into whether applicants had been diagnosed with or treated for certain mental illnesses within the past five years); *Applicants v. Texas State Bd. of Law Examiners*, A 93 CA 740 SS, 1994 WL 923404, at *3 (W.D. Tex. Oct. 11, 1994) (allowing inquiry into diagnosis or treatment for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder within the last ten years).

a Character Report; 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.

B. Questions 25-27 Are Unnecessary Because Questions Related to Applicants' Conduct Are Sufficient, and Most Effective, to Evaluate Fitness.

Attorney 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. 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. *See New Jersey*, 1993 WL 413016, at *7 (finding that inquiry into applicants' behavior is the proper and necessary inquiry); Am. Bar Ass'n Bar Admissions Resolution, 18 MENTAL & PHYSICAL DISABILITY L. REP. 597, 598 (June 1994) (stating that specific, targeted questions may be asked about an applicant's behavior or conduct, or a current impairment of the applicant's ability to practice law).

The Request for Preparation of a Character Report already asks a multitude of appropriate questions that allow attorney licensing entities to evaluate applicants' record of conduct. Applicants are also required to provide at least six personal references as well as contact information for every employer and residence for the past ten years. These permissible inquiries provide a comprehensive basis for drawing inferences about an individual's fitness to practice law without resorting to discriminatory inquiries regarding the applicant's mental health history. Furthermore, attorney licensing entities may also ask all applicants additional questions that focus on the conduct and behavior they are concerned about, if they determine that the applicant's responses to the existing non-discriminatory NCBE questions do not provide enough information for the entities to determine if the applicant possesses the character and fitness to practice law.

Conduct-based questions are appropriate and most effective in assessing whether applicants are fit to practice law. Based on testimony from experts for both the applicants and the licensing entity that "past behavior is the best predictor of present and future mental fitness," a federal court in Virginia found that the mental health inquiry at issue was not necessary. *Clark*, 880 F. Supp. at 446. Similarly, Questions 25-27 are not necessary to the state programs of attorney licensure.

C. Questions 25-27 Are Unnecessary Because They Do Not Effectively Identify Unfit Applicants.

Questions 25-27 also are not necessary to determine whether applicants will be able to fulfill their professional responsibilities as attorneys because a history of mental health diagnosis or treatment does not provide an accurate basis for predicting future misconduct. *See Am. Bar Ass'n Comm'n on Mental and Physical Disability Law, Recommendation to the House of Delegates*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 266, 267 (Feb. 1998) ("Research in the health field and clinical experience demonstrate that neither diagnosis nor the fact of having

undergone treatment support any inferences about a person’s ability to carry out professional responsibilities or to act with integrity, competence, or honor.”); 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, 141 (2001) (“there is simply no empirical evidence that applicants’ mental health histories are significantly predictive of future misconduct or malpractice as an attorney”); *id.* at 141-42 n.153 (observing that the only small retrospective study of attorneys “provides no support at all for the notion that individuals with mental health treatment histories are more likely than others to engage in misconduct as attorneys”).

Courts in Rhode Island and Virginia have agreed that attorney licensing questions related to mental health status or treatment are not necessary because they have little or no predictive value. *Clark*, 880 F. Supp. at 446 (finding that questions were unnecessary where “the Board presented no evidence of correlation between obtaining mental counseling and employment dysfunction.”); *In re Petition & Questionnaire for Admission to Rhode Island Bar*, 683 A.2d 1333, 1336 (R.I. 1996) (noting that “[r]esearch has failed to establish that a history of previous psychiatric treatment can be correlated with an individual’s capacity to function effectively in the workplace”). Because Questions 25-27 cannot accurately predict which applicants are unfit to practice law, it is not necessary for states to use them in order to identify unfit applicants.

Question 26A’s inquiry into whether a condition or impairment “if untreated could affect” an applicant’s ability to practice law is particularly unnecessary and improper.³ Inquiring about the possible effect of an applicant’s disability if it were untreated reduces the question to one about an applicant’s diagnosis, not the real effect of that diagnosis on his or her fitness to practice law. This question considers an applicant’s disability in a hypothetical future untreated form, which does not inform an assessment of how the disability affects an applicant’s current fitness to practice law. It seeks information about the diagnosis alone, assuming a speculative worst case scenario the likelihood of which no one can predict, which may never come to pass, and which the applicant may never have experienced. It is akin to asking whether an applicant has financial obligations that could result in default or bankruptcy if he or she lost all income and savings. Further, Question 26B makes clear that Question 26A is intended to single out individuals with a “mental health condition or substance abuse problem,” in that it assumes that an affirmative answer to Question 26A is related to these conditions. Thus, Question 26, as currently written, appears rooted in unfounded stereotypes about individuals with these diagnoses, and is not appropriately tailored to assess the applicant’s current fitness to practice law. If the “if untreated could affect” clause of Question 26A were removed, this question would be permissible, because the question would be based on the applicant’s current fitness to practice law, not on future, hypothetical scenarios.

Similarly, because Question 25 has no connection to conduct or current fitness of the applicant, it is also problematic. Question 27 similarly singles out mental health diagnosis in seeking information concerning whether an applicant has raised a mental health condition as a

³ Questions 26 and 27 also inquire about an applicant’s substance abuse. Though a detailed discussion of discrimination against individuals with a history of substance abuse is beyond the scope of this letter, we note that public entities may not discriminate against an individual who is not engaging in current illegal use of drugs and who has successfully completed a drug rehabilitation program, is participating in a rehabilitation program, or who has otherwise been rehabilitated successfully. The ADA, however, generally does not prohibit discrimination based on a person’s current illegal use of drugs.

defense in any proceeding, investigation, inquiry, or proposed termination of employment or educational institution. Numerous other NCBE questions seek information concerning whether the applicant has been the subject of charges, complaints, or grievances; reprimanded, suspended, warned, dropped, expelled, or disciplined by a college or university; or terminated, laid-off, permitted to resign or disciplined by an employer. These questions appropriately allow attorney licensing entities to evaluate the circumstances surrounding the proceedings and any defenses raised. Accordingly, Question 27 is unnecessary.

D. Questions 25-27 Are Unnecessary Because They Are Counterproductive to State Interests.

Questions 25-27 are likely to deter applicants from seeking diagnosis, counseling and/or treatment for mental health concerns, which fails to serve states' interest in ensuring the fitness of licensed attorneys. *See Jaffee v. Redmond*, 518 U.S. 1, 10-11 & n.10 (1996) (recognizing a psychotherapy privilege under Federal law, based on Supreme Court's view that confidentiality of psychotherapy sessions is crucial to their success and "serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem."); U.S. Dep't of Health & Human Servs., *Mental Health: A Report of the Surgeon General* 408, 441 (1999) (observing that "evidence also indicates that people may become less willing to make disclosures during treatment if they know that information will be disseminated beyond the treatment relationship"); Am. Psychiatric Ass'n, "Recommended Guidelines Concerning Disclosure and Confidentiality" (1999) (finding that disclosure policies "inhibit individuals who are in need of treatment from seeking help"); Ass'n of Am. Law Schools, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35, 54-55 (1994) (finding that a much higher percentage of law students would seek treatment for substance abuse or refer others to treatment if they were assured that bar officials would not have access to that information); Bauer, *supra*, at 150 (describing how disability-related questions can discourage applicants from obtaining treatment and undermine its effectiveness).

In *Clark v. Virginia Board of Bar Examiners*, a law school dean and a law school professor both testified that, in their experience, mental health questions deter law students from seeking treatment. 880 F. Supp. at 437; *see also ACLU of Indiana v. Individual Members of the Indiana State Bd. of Law Examiners*, 2011 WL 4387470 (S.D. Ind.), at *3 (noting testimony from a law school counselor that "many students worry about having to report counseling on their bar applications, to the point where the mental health-related questions deter students from seeking treatment"). The *Clark* court relied on its finding that the licensing question "deters the counseling and treatment from which [persons with disabilities] could benefit" and "has strong negative stigmatic and deterrent effects upon applicants" in finding that the question was unnecessary. *Clark*, 880 F. Supp. at 445-46; *see also Rhode Island*, 683 A.2d at 1336 (finding that the inclusion of questions regarding mental health may prevent a person in need of treatment from seeking assistance); *In re Petition of Frickey*, 515 N.W.2d 741, 741 (Minn. 1994) (finding that "the prospect of having to answer the mental health questions in order to obtain a license to practice causes many law students not to seek necessary counseling"). As the *Clark* court observed:

[B]road mental health questions may inhibit the treatment of applicants who do seek counseling. Faced with the knowledge that one's treating physician may be required to disclose diagnosis and treatment information, an applicant may be less than totally candid with their therapist. Without full disclosure of a patient's condition, physicians are restricted in their ability to accurately diagnose and treat the patient. Thus, it is possible that open-ended mental health inquiries may prevent the very treatment which, if given, would help control the applicant's condition and make the practice of law possible.

880 F. Supp. at 438. Questions that dissuade applicants from seeking needed mental health treatment fail to serve the states' interest in ensuring that licensed attorneys are fit to practice. Rather than improving the quality, dependability, and trustworthiness of attorneys, inquiries regarding mental health may have the perverse effect of deterring those who could benefit from treatment from obtaining it while penalizing those who will be better able to successfully practice law and pose less of a risk to clients because they have acted responsibly and taken steps to manage their condition.

Because Questions 25-27 tend to screen out people with disabilities and are unnecessary, the use of these questions in bar applicant screening processes violates the ADA. The Department is prepared to work with the NCBE, as well as state bar licensing committees, to improve these questions.

III. The ADA Similarly Prohibits Other Discriminatory Inquiries, Investigations and Additional Burdens Imposed on Applicants with Mental Health Disabilities

As discussed above, attorney licensing entities must base their admissions decisions on an applicant's record of conduct, not the applicant's mental health history. Accordingly, while states may conduct investigations of all applicants to the bar, they may not use an applicant's disclosure of mental health disability as a screening device to determine which applicants warrant further investigation and which do not. Courts have made clear that placing unnecessary additional burdens on applicants with disabilities violates the ADA. *See, e.g., Clark*, 880 F. Supp. at 442-43 (finding that applicants with disabilities cannot be required to subject themselves to additional unnecessary scrutiny); *Ellen S. v. Florida Bd. of Bar Examiners*, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994) (a licensing entity discriminates against qualified disabled applicants by placing unnecessary additional burdens on them and this discrimination can occur even if these applicants are subsequently granted licenses); *New Jersey*, 1993 WL 413016, at *8 (holding that a licensing board may not place the burden of additional investigations on an applicant who answers questions about their disability status affirmatively); *Brewer v. Wisconsin Bd. of Bar Examiners*, 04-C-0694, 2006 WL 3469598, at *10 (E.D. Wis. Nov. 28, 2006) (finding that licensing entities may not require additional investigation solely because of an applicant's disability). Targeting individuals 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 the ADA by imposing unnecessary burdens on applicants with disabilities that are not imposed on others.

Similarly, states may not impose restrictions or conditions on an applicant's license because of his or her mental health diagnosis. It has been reported that as of 2009, twenty-one states had conditional admission programs. Stephanie Denzel, *Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories*, 43 CONN. L. REV. 889, 912-14 (2011). Such programs allow state bars to attach conditions, such as supervision, reporting requirements, disclosure of medical records, or mandated psychiatric treatment to an applicant's law license. Conditionally admitting an applicant because of his or her mental health diagnosis violates the ADA. See 28 C.F.R. § 35.130(b)(1)(ii) (prohibiting public entities from affording qualified individuals with disabilities unequal opportunities to participate in or benefit from benefits or services); *id.* at § 35.130(b)(1)(iv) (prohibiting public entities from providing different or separate benefits or services to individuals with disabilities). Individuals who are otherwise qualified for admission may not be relegated to a separate admissions status solely on the basis of their mental health diagnosis. If an applicant's conduct indicates that he or she is not currently qualified to practice law, conditional admission may be permissible, if conditions are based on an individualized assessment, limited to those that are necessary to mitigate the risk posed by the applicant's prior conduct, and justified by objective evidence of the applicant's conduct, not based on generalization or stereotype of the applicant's mental health diagnosis.

Mental-health related information can only be requested and considered in very limited circumstances where an applicant's mental health condition *currently affects* his or her fitness to practice law. Additionally, a bar licensing entity may request voluntary disclosure of disability-related information as a mitigating factor in the bar admissions process if an attorney licensing entity intends to recommend denial or restriction of admission because of an applicant's conduct. In such a case, the applicant should be provided with a voluntary opportunity to present disability-related information that may explain conduct that would otherwise warrant denial or restriction of admission.⁴

Any requests for mental health-related records or information in these limited circumstances must be narrowly tailored to assess the impact of the condition that was voluntarily disclosed on the applicant's current fitness to practice law. Applicants with disabilities may not be required to disclose information of a highly personal nature merely because they revealed that they were individuals with disabilities. Moreover, any health-related information or records must be kept strictly confidential. When a state attorney licensing entity fails to respect the confidentiality of applicants with disabilities, it places additional burdens on those applicants in violation of the ADA. Additionally, given the liberty interest that courts have recognized in the privacy of highly personal medical information, *see, e.g., Whalen v. Roe*, 429 U.S. 589, 600 (1977), an applicant's medical records, or information about her diagnosis, treatment history, or prognosis, should not be disclosed or otherwise become part of the public record. Among other harms, exposing this information to the public creates a chilling effect that could deter individuals with disabilities from pursuing the legal profession or seeking treatment, and reduces employment opportunities available to lawyers with disabilities by allowing their prospective employers to access information about their disability to which employers would not otherwise be entitled.

⁴ If the applicant offers convincing evidence that sufficiently mitigates any concerns related to prior misconduct, and the applicant is otherwise qualified for admission, the state should admit the applicant.

We hope this information is helpful. Please do not hesitate to contact the Department if we may be of assistance with this, or any other matter.

Sincerely,

A handwritten signature in blue ink that reads "Jocelyn Samuels". The signature is written in a cursive style with a large initial "J".

Jocelyn Samuels
Acting Assistant Attorney General