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Carol J. Banta
University of Michigan Law School

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NOTES

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Carol J. Banta

INTRODUCTION

Bar examiners, as the designated gatekeepers of the legal profession, are responsible for protecting the public from unfit attorneys. Because attorneys interact with and serve the public in a profession that requires responsibility and trustworthiness, bar applicants are subject to especially rigorous screening. In determining the fitness of candidates for the practice of law, state boards of bar examiners follow a two-pronged approach, consisting of a written examination to test legal knowledge and a character and fitness assessment. Bar examiners investigate applicants thoroughly, inquiring as to personal traits and background information that would not be as relevant for other positions. As part of the fitness assessment, inquiries into the applicants' mental health histories are common. Bar examining boards in forty-three states and the District of Columbia use some form of psychological history inquiry.

Mental health questions take several possible forms, varying both in subject matter and in the scope of the time period about which they inquire. In terms of subject matter, the broadest type of question asks whether the applicant has received treatment or counseling from a medical professional for any psychological condition or substance abuse. Some questions ask only whether the applicant has ever been dependent on drugs or alcohol, as

1. Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71, 75 (Fla. 1983); see also Thomas A. Pobjecky, Everything You Wanted to Know About Bar Admissions and Psychiatric Problems But Were Too Paranoid to Ask, B. EXAMINER, Feb. 1989, at 14, 21 (arguing that by approving an individual, bar examiners represent to the public that the person is fit and competent to practice).
3. Florida Bd., 443 So. 2d at 75.
6. See, e.g., Clark, 880 F. Supp. at 440 n.19 (quoting such questions from a variety of states).
distinguished from questions about treatment or diagnosis. Other questions focus more narrowly on actual diagnosis of a psychological problem or on specified psychological problems, or on both. With respect to the relevant time periods, state bars often place no time limit on the questions, asking whether applicants have "ever" received treatment, been institutionalized, and so on. Some boards of bar examiners limit the time period subject to inquiry to a specific number of years.

Since the enactment of the Americans with Disabilities Act of 1990 (ADA), bar examiners across the nation have debated the Act's impact on the use of mental health inquiries in bar applications. In some cases they have amended their questions to address concerns that such inquiries may violate the ADA. For example, the District of Columbia Court of Appeals changed the D.C. bar application in February 1992, eliminating a question about past treatment for mental illness and putting a five-year limit on

7. See, e.g., Thomas A. Pobjecky, Mental Health Inquiries: To Ask, or Not to Ask — That Is the Question, B. EXAMINER, Aug. 1992, at 31, 31 (quoting question 26 of the Florida bar application, which asks: "Are you or have you ever been addicted to or dependent upon the use of narcotics, drugs, or intoxicating beverages?"); cf. Medical Socy. v. Jacobs, No. CIV.A.93-3670, 1993 WL 413016, at *1 (D.NJ. Oct. 5, 1993) (quoting question 7 of the initial application to the New Jersey State Board of Medical Examiners, which asked: "Have you ever been dependent on alcohol or Controlled Dangerous Substances?").


An even more specific type of question involves treatment for more serious psychological problems, such as voluntary or involuntary commitment to a mental hospital or institution, or judicial determination of incompetence. See, e.g., Clark, 880 F. Supp. 438-39 n.16 (quoting such questions from a variety of states).

9. See, e.g., Clark, 880 F. Supp. at 440 n.19 (listing states which ask such questions).

10. See, e.g., Clark, 880 F. Supp. 438-39 n.16 (referring to questions of this type); Texas State Bd., 1994 WL 776693 at *10 n.5 (quoting the Texas question).


12. See Don J. DeBenedictis, Bar Examiners Respond to the ADA, A.B.A. J., Nov. 1992, at 20, 20 ("The ADA is 'a hot topic among bar examiners' these days . . . ." (quoting Armando Menocal, past president of the National Conference of Bar Examiners)). Both the American Bar Association and the National Council of Bar Examiners have recently changed their policies to reflect ADA considerations. See Clark, 880 F. Supp. at 440 (noting the organizations' actions).


Erica Moeser, president of the National Conference of Bar Examiners, has argued that bar examiners are narrowing the scope of inquiry to "zero in on raging and risky, chronic and serious" psychological problems. Erica Moeser, Should Bar Applicants Be Asked About Treatment for Mental Health?, A.B.A. J., Oct. 1994, at 36, 36.
two questions about drug or alcohol treatment and about hospitalization for mental illness. The New York State Bar took a different approach in changing its questions, eliminating a question regarding past commitment, institutionalization, or incompetence and replacing it with two questions: one asking about any condition that could adversely affect capability to practice and one asking about current use of illegal drugs. An increasing number of lawsuits challenging the legality of psychological history inquiries are forcing bar examiners and courts to consider the impact of the ADA and alternatives to mental health questions.

Two federal district courts have recently ruled on challenges to revised questions. In Applicants v. Texas State Board of Law Examiners, the court rejected an ADA challenge to a question about diagnosis of or treatment for certain disorders within the previous ten years. The court held that the inquiry was “necessary” for the investigation of bar applicants’ fitness. A few months later, the

14. DeBenedictis, supra note 12, at 20; Charles L. Reischel, The Constitution, the Disability Act, and Questions About Alcoholism, Addiction, and Mental Health, B. EXAMINER, Aug. 1992, at 10, 10 & 22 n.3; Rosalind Resnick, Groups Criticize Bar on Mental Histories, NATH. L.J., May 18, 1992, at 3, 3; Thomas Scheffey, Applicant Claims Bar Query Violates ADA, CONN. L. TRIB., Aug. 10, 1992, at 1. But see Pobjecky, supra note 7, at 34 (arguing that the change was “not supported by any reasonable interpretation of the ADA” and should be viewed as a “policy decision”; the court’s decision “should not be viewed as a persuasive (let alone authoritative) interpretation of the ADA”).

The revised questions still rely on psychological status, a basis that this Note argues violates the ADA.

15. See Campbell v. Greisberger, 865 F. Supp. 115, 117 (W.D.N.Y. 1994) (noting the change). Because the ADA does not protect current use of illegal drugs, see infra note 37, and does permit questions about actual capability, see infra notes 105-07 and accompanying text, the revised questions do not violate the ADA.


See also Scheffey, supra note 14, at 11 (quoting Leonard S. Rubenstein, director of the Mental Health Law Project in Washington, D.C. as saying, “People are coming out of the woodwork. . . . I’m hearing from more and more bar applicants on this issue.”).

17. 1994 WL 776693.

18. “Within the last ten years, have you been diagnosed with or have you been treated [for] bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?” 1994 WL 776693, at *10 n.5.

19. “[T]he question and subsequent investigation are necessary to ensure the integrity of the Board’s licensing procedure, as well as to provide a practical means of striking an appropriate balance between important societal goals.” 1994 WL 776693, at *9. For a discussion of the necessity exception to the ADA and its applicability to bar examiners, see infra Part III.

The Texas court also held that the inquiry and investigation process actually furthers the goal of the ADA to integrate individuals with mental disabilities into society by allowing individualized, case-by-case evaluations of competence. 1994 WL 776693, at *9; see also McCready v. Illinois Bd. of Admissions to the Bar, No. 94-C-3582, 1995 WL 29609, at *7 (N.D. Ill. Jan. 24, 1995) (agreeing with the Texas court and rejecting an ADA challenge to mental health investigation in general).
court in Clark v. Virginia Board of Bar Examiners\textsuperscript{20} held that a question about treatment or counseling within the previous five years\textsuperscript{21} did violate the ADA. The Virginia court also considered whether the question was "necessary," but held that the question was too broad and that its negative effects outweighed its utility.\textsuperscript{22} Although it invalidated the Virginia Board's question, the court indicated that the ADA would permit some form of mental health inquiry.\textsuperscript{23}

This Note disagrees with both of these cases and with the apparent trend toward revising psychological history inquiries to make them seem narrower while continuing to base them on mental health status. This Note argues that the use of any questions based upon an applicant's psychological history in the state bar application process violates the Americans with Disabilities Act. Part I demonstrates that Title II of the ADA\textsuperscript{24} applies to state boards of bar examiners, and that the ADA definition of a person with a disability includes a person who has sought or received psychological counseling. Part II applies the ADA and accompanying regulations to the psychological history inquiries currently used by state bar examiners and argues that such inquiries violate the ADA because they inquire specifically about disabled status. Part III argues that although Department of Justice regulations allow for a narrow necessity exception to the ADA, bar examiners' use of psychological background inquiries are not "necessary" because they are ineffective in determining applicants' fitness to practice law. Part IV asserts that the ADA permits questions relating to conduct and behavior, rather than past or present psychological status, and that such questions would adequately serve the bar examiners' purpose.

\section*{I. Applicability of the ADA}

The Americans with Disabilities Act applies to state bar inquiries into applicants' psychological histories. Section I.A contends

\begin{footnotesize}
\footnote{This Note argues that, on the contrary, the inquiry itself constitutes impermissible discrimination based on disability status and rooted in stereotypes. The fact that each applicant who answers the question affirmatively is then evaluated individually does not erase the fact that the initial "cut" that triggers the investigation is based on one's history of disability. \textit{See generally infra} Part II.}
\footnote{20. 880 F. Supp. 430 (E.D. Va. 1995).}
\footnote{21. "Have you within the past five (5) years been treated or counselled for any mental, emotional or nervous disorders?" 880 F. Supp. at 431.}
\footnote{22. \textit{See} 880 F. Supp. at 431, 446.}
\footnote{23. \textit{See} 880 F. Supp. at 436. The court referred to the Texas decision, but distinguished it rather than disagreed with it. \textit{See} 880 F. Supp. at 444.}
\footnote{24. 42 U.S.C. §§ 12131-12134 (Supp. V 1993). This Note actually considers only Title II, Part A, which applies generally to public services. Part B, 42 U.S.C. §§ 12141-12165 (Supp. V 1993), applies specifically to public transportation provided by public entities and is irrelevant to this discussion of state bar examiners.}
\end{footnotesize}
that state boards of bar examiners are public entities subject to the ADA, and that Title II of the ADA applies to their procedures and criteria. Section I.B argues that the ADA protects individuals who have sought or received psychological treatment, or who have been misclassified as or are regarded as having psychological disorders.

A. Applicability to Bar Examiners’ Inquiries

State boards of bar examiners, as instrumentalities of state judicial branches, are public entities under the ADA and therefore subject to its provisions. Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” The definition of “public entity” includes “any . . . agency . . . or other instrumentality of a State or States or local government.” The Department of Justice stated in its regulations implementing Title II and stated that the regulations apply to all programs or activities provided by public entities. The DOJ explained that the scope of Title II coverage includes not only executive agencies, but also “activities of the legislative and judicial branches of State and local governments.”

Title II and the accompanying regulations explicitly apply to state licensing and certification bodies, and therefore to state boards of bar examiners. A DOJ regulation prohibits public entities under Title II from “administer[ing] a licensing or certification

25. See, e.g., Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 441 (E.D. Va. 1995) (“The Virginia Board of Bar Examiners concedes that it is a public agency within [the ADA] definition.”); Applicants v. Texas State Bd. of Law Examiners, No. A-93-CA-740-SS, 1994 WL 776693, at *5 (W.D. Tex. Oct. 10, 1993) (“The Board as the state governmental agency responsible for licensing attorneys in the State of Texas is a public entity within the ADA definition.”); In re Rubenstein, 637 A.2d 1131, 1136 (Del. 1994) (holding that the Delaware Board of Bar Examiners, “as an instrumentality of this Court,” was a public entity within the meaning of Title II); see also Phyllis Coleman & Ronald A. Shellow, Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution, 20 J. LEGIS. 147, 174 n.169 (1994) (noting that the U.S. Department of Justice asserted in an amicus brief in a New York case that a board of bar examiners is an “instrumentality” of the state and therefore subject to Title II).


program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability.”

Title II of the ADA applies to state bar examiners' application and investigation procedures and criteria. Regulations implementing Title II prohibit public entities from applying criteria that have the effect of differentiating people on the basis of disability unless such criteria are “necessary.” Questions about and investigations into character and fitness are methods of administration that single out certain individuals on the basis of specified criteria, and therefore Title II applies to them. As public entities engaged in professional licensing, therefore, state boards of bar examiners are necessarily subject to the provisions of Title II of the ADA.

B. Psychological Disorders

This section argues that the Americans with Disabilities Act prohibits discrimination on the basis of psychological disorders, even in cases where such disorders do not rise to the level of a disability as defined by the Act.

The ADA protection against discrimination extends to individuals with psychological disorders. The statute defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such an individual.” The Department of Justice further defined “mental impairment” to include any psychological disorder, or emotional or mental illness, and


32. See 28 C.F.R. § 35.130(b)(3) (1994) (stating that public entities are prohibited from "utiliz[ing] criteria or methods of administration . . . that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability"); 28 C.F.R. § 35.130(b)(8) (1994) (prohibiting public entities from "impos[ing] or apply[ing] eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary").

33. One commentator has argued that “Title II would certainly apply to the standards governing the portion of the bar examination process involving the investigation of an applicant's character and fitness.” W. Sherman Rogers, The ADA, Title VII, and the Bar Examination: The Nature and Extent of the ADA’s Coverage of Bar Examinations and an Analysis of the Applicability of Title VII to Such Tests, 36 How. L.J. 1, 7 (1993).

34. For the purposes of this Note, the term “psychological” will include “mental,” “nervous,” and “emotional.”


36. 28 C.F.R. § 35.104 (1994). The DOJ definition specifically excludes certain disorders: Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; [c]ompulsive gambling, kleptomania, or pyromania; or [p]sychoactive substance use disorders resulting from current illegal use of drugs. 28 C.F.R. § 35.104 (1994).
has interpreted the definition to include drug addiction and alcoholism.\textsuperscript{37}

The ADA also protects individuals who have had psychological disorders in the past. The statutory definition of the term "disability" includes "a record of" a substantially limiting physical or mental impairment.\textsuperscript{38} This definition applies both to people who have a history of an impairment and to those who have been misclassified as having an impairment.\textsuperscript{39} In the preamble to its interpretive regulation, the DOJ explained that the definition seeks to protect people who have recovered from their previous impairments by prohibiting discrimination on the basis of those past impairments.\textsuperscript{40} As common examples of individuals that the statute protects, the DOJ referred to people who have recovered from mental or emotional illness and people who have been misclassified as mentally ill.\textsuperscript{41}

Finally, the ADA protects even those with psychological disorders that would not qualify as disabilities. The statute defines "disability" to include "being regarded as having" a substantially limiting physical or mental impairment.\textsuperscript{42} The DOJ regulation construes this language to apply to individuals who have an impairment that is not substantially limiting "but that is treated by a public entity as constituting such a limitation,"\textsuperscript{43} and to individuals who have an impairment that is substantially limiting "only as a result of the attitudes of others."\textsuperscript{44} The preamble to the regulation emphasizes the importance of "perception" to this prong of the definition;\textsuperscript{45} persons who are subjected to discrimination by a public entity because of "myths, fears, and stereotypes" are covered by the ADA regardless of whether their conditions would qualify as disabilities.

\textsuperscript{37} 28 C.F.R. § 35.104 (1994). The ADA explicitly excludes from protection individuals who are "currently engaging in the illegal use of drugs." 42 U.S.C. § 12114(a) (Supp. V 1993); see also 28 C.F.R. § 35.131(a)(1) (1994). The statute does, however, protect individuals who are no longer engaging in illegal use or who are erroneously regarded as engaging in such use. See 42 U.S.C. § 12114(b) (Supp. V 1993); 28 C.F.R. § 35.131(a)(2) (1994).


\textsuperscript{39} 28 C.F.R. § 35.104 (1994).

\textsuperscript{40} 28 C.F.R. pt. 35, app. A at 444 (1994) ("This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited.").


\textsuperscript{43} 28 C.F.R. § 35.104 (1994).

\textsuperscript{44} 28 C.F.R. § 35.104 (1994).

under either of the first two prongs of the definition. Mental illness, regardless of whether it rises to the level of a disability, is frequently stigmatized by such stereotypes, and is therefore protected under the ADA.

II. BAR EXAMINERS' USE OF PSYCHOLOGICAL HISTORY INQUIRIES

This Part argues that bar examiners' use of inquiries into applicants' psychological histories constitutes discrimination under the ADA. Section II.A demonstrates that Department of Justice regulations promulgated under Title II of the ADA prohibit bar examiners' use of psychological history inquiries. Section II.B contends that certain provisions in the ADA demonstrate Congress's intent to eliminate such inquiries. Section II.C argues that inquiries into psychological history violate the overarching purpose of the ADA to eliminate discrimination based on stigmas and stereotypes about mental illness.

A. DOJ Regulations

The DOJ regulations promulgated under Title II forbid the use of inquiries into bar applicants' psychological backgrounds. In general, public entities cannot use criteria that discriminate on the basis of disability. More specifically, they also cannot administer licensing or certification programs in a manner that discriminates on the basis of disability. Title II also prohibits the imposition of any eligibility criteria that "screen out or tend to screen out" individuals with disabilities, unless the criteria are necessary.

Psychological history inquiries subject individuals with disabilities to discrimination both by selecting out individuals who have or have previously had psychological disorders and by imposing additional burdens on them. The questions single out for special scrutiny many qualified individuals with disabilities or histories of

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46. 28 C.F.R. pt. 35, app. A at 445 (1994). This category is particularly important to the ADA analysis of psychological history inquiries because such inquiries single out individuals whose problems may never have risen to the level of a "disability." See infra section III.B.1. In addition, the inquiries are based on stereotypes about the competence of individuals with psychological problems. See generally infra section II.C.

47. See infra notes 71-74 and accompanying text.


49. 28 C.F.R. § 35.130(b)(6) (1994).

50. 28 C.F.R. § 35.130(b)(8) (1994); cf. 42 U.S.C. § 12112(b)(6) (Supp. V 1993) (using very similar language in Title I to define one kind of discriminatory practice in the employment context). For a discussion of necessary as it applies to Title II, see infra section III.A.
disabilities, and as such act as a “screening device.”\textsuperscript{51} This screening triggers further investigation,\textsuperscript{52} which imposes additional burdens only on people with disabilities, on the basis of their disabled status.\textsuperscript{53}

**B. Congressional Intent**

Provisions in Title I\textsuperscript{54} of the ADA demonstrate Congress’s intent to prohibit inquiries about current or past disabilities. Title I provisions limiting medical inquiries to questions about ability and prohibiting questions about the existence, nature, or severity of disabilities are significant to the interpretation of the entire Act.\textsuperscript{55}

\textsuperscript{51} See, for example, Medical Socy. v. Jacobs, No. CIV.A.93-3670, 1993 WL 413016 (D.N.J. Oct. 5, 1993), in which a federal district court discussed the impact of the DOJ regulations on such inquiries. The court stated that many qualified individuals with disabilities or histories of disabilities would be “singled out” by the questions, which were a “‘screening’ device.” 1993 WL 413016, at *7.

\textsuperscript{52} Affirmative answers to psychological history questions on bar examinations trigger further investigation. For instance, in the inquiry addressed in Jacobs, if an applicant answered that he or she had been dependent on drugs or alcohol, had been treated for drug or alcohol abuse, or had suffered or been treated for any psychiatric problems, the applicant was required to have any treating physicians submit summaries of diagnosis, treatment, and prognosis to the Board of Medical Examiners. 1993 WL 413016, at *1.

\textsuperscript{53} The Jacobs court emphasized that the additional burden of extra investigations (see below), rather than the psychological history questions themselves, constituted invidious discrimination under the ADA. 1993 WL 413016, at *8. The board could ask such questions, but could not use them to trigger further inquiries, which would burden individuals on the basis of disability.

In Ellen S. v. Florida Bd. of Bar Examiners, 859 F. Supp. 1489 (S.D. Fla. 1994), another district court criticized the Jacobs court’s limitation, calling it “questionable” and a “flawed conclusion.” 859 F. Supp. at 1494 n.7. The Ellen S. court held that the DOJ regulations made clear that both the questions themselves and the subsequent inquiry discriminated by imposing additional burdens based on disability. 859 F. Supp. at 1493-94. Similarly, the Maine Supreme Court held in In re Underwood, 1993 WL 649283, at *2 (Me. Dec. 7, 1993), that both the questions and the additional investigation violated the ADA and the accompanying regulations.

Although the burden of answering additional questions, including some which may be quite intrusive, is in itself an additional burden, psychological history inquiries also impose other burdens on individuals who answer them affirmatively. See, e.g., Resnick, supra note 14, at 34 (stating that, according to Nina E. Vinik, staff counsel for the ACLU of Florida, the additional investigations can delay applications for over a year, causing stress and added costs); Stephen T. Maher & Lori Blum, A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants, 23 IND. L. REV. 821, 829 (1990) (stating that, in addition to the anxiety caused by investigations, applicants suffer economically from the delay and from participation in formal or informal proceedings, and suffer personally if character questions delay admission and become public).

\textsuperscript{54} 42 U.S.C. §§ 12111-12117 (Supp. V 1993). This Note points to Title I only to demonstrate Congress’s understanding that medical inquiries are discriminatory. The extent to which Congress intended to incorporate Title I provisions into Title II, if at all, is not settled. See infra note 57.

\textsuperscript{55} One commentator has stated that “[a]rguably, the Title I prohibition against preemployment inquiries concerning disability constitutes a public policy statement applicable throughout the ADA.” Rogers, supra note 33, at 7. In fact, Title I does not impose such a prohibition only on preemployment inquiries; inquiries to employees are also limited to ability to perform. See infra notes 58, 59 and accompanying text. The implication of a public
Although Title II of the ADA does not provide a specific definition of "discrimination," Title I, which applies to private employers, specifies practices that constitute discrimination in the employment context,\(^{56}\) including medical inquiries.\(^{57}\) Title I limits employers' preemployment inquiries to questions about applicants' \textit{ability} to perform job-related functions.\(^{58}\) Similarly, employers' inquiries to employees are also limited to ability to perform job-related functions.\(^{59}\) After an employer has made a conditional offer of employment, the employer may require a medical examination only if all entering employees are subjected to the examination\(^{60}\) and if the

\(\text{\textit{policy against such inquiries, therefore, is even stronger than Professor Rogers's statement suggests.}}\)

\(^{56}\) 42 U.S.C. § 12112(b), (d) (Supp. V 1993). Significantly, the DOJ regulations implementing Title II borrowed language directly from the Title I definition of discrimination. \textit{See supra} notes 48, 50 and accompanying text.


A Senate committee used different language, stating: "The forms of discrimination prohibited by [Title II, Part A] are \textit{comparable} to those set out in the applicable provisions of titles I and III of this legislation." \textit{Senate Comm. on Labor & Human Resources, Report on the Americans with Disabilities Act of 1989, S. Rep. No. 116, 101st Cong., 1st Sess. 44 (1989).} The apparently conflicting reports have left the exact relation between Titles I and II in doubt, particularly with regard to medical and psychological inquiries. The difference between "identical" and "comparable" may determine the extent to which opponents of bar examiners' inquiries can draw an analogy to preemployment inquiries. The \textit{Jacobs} court stated that the committee reports "produce[d] an ambiguous picture." 1993 WL 413016, at *10. Another federal district court agreed that the extent to which Title II incorporates Title I is unclear, but held that the differences between Title II and Titles I and III, in light of the House Report, did not indicate, as the bar examiners had argued, that the inquiries prohibited under Title I must be permissible under Title II. Ellen S. v. Florida Bd. of Bar Examiners, 859 F. Supp. 1489, 1493 (S.D. Fla. 1994) (denying defendant bar examiners' motion to dismiss an ADA challenge).

For a discussion of the incorporation issue with regard to medical inquiries, see Coleman & Shellow, \textit{supra} note 25, at 174-76 & n.172.

\(^{58}\) 42 U.S.C. § 12112(d)(2)(B) (Supp. V 1993) (stating that a private employer "may make preemployment inquiries into the ability of an applicant to perform job-related functions"). Because questions about ability to perform certain functions inquire about actual current capability, not disabled status, they do not violate the ADA. \textit{See infra} note 98.

\(^{59}\) 42 U.S.C. § 12112(d)(4)(B) (Supp. V 1993) (stating that a private employer "may make inquiries into the ability of an employee to perform job-related functions").

\(^{60}\) 42 U.S.C. § 12112(d)(3)(A) (Supp. V 1993). A private employer can use results of medical examinations only if the examination is both job-related and necessary. \textit{See 42 U.S.C. § 12112(d)(4)(A) (Supp. V 1993).} Even if bar examiners could argue that their inquiries are analogous to medical examinations, they would have to show the inquiries to be job-related and necessary. \textit{See infra} Part III.
results are not used to discriminate against those with disabilities.61 Aside from the narrow medical exam exception, employers cannot make any inquiries of job applicants or employees as to whether the applicants or employees have any disabilities or as to the nature or severity of such disabilities.62

C. Elimination of Stereotypes

This section argues that questions about psychological history violate the overarching purpose of the ADA: to eliminate the stigma and stereotypes associated with disability and to eradicate discrimination on the basis of such stereotypes. Because mental and psychological disorders are subjected to particularly severe stigma and negative stereotypes, this overarching purpose takes on added importance when these disabilities are implicated.

The ADA itself contains explicit language that clearly expresses a policy of eliminating the stigma of disability. In its findings and purposes, Congress stated:

[1] Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . .63

Congress also noted that people with disabilities continually experience discrimination in a number of forms, including exclusionary criteria,64 and that discrimination and prejudice continue to deny individuals with disabilities the opportunity to compete fairly and equally.65 Congress then stated that the purpose of the Act was to establish a clear national mandate for eliminating discrimination on the basis of disability.66

In the preamble to its regulations promulgated under Title II of the ADA, the Department of Justice echoed the statute's purpose. The preamble describes the law's "goal of protecting disabled indi-

65. See 42 U.S.C. § 12101(a)(9) (Supp. V 1993). One Note stated that the congressional findings "proclaim that individuals with disabilities labor under the additional burden of society's ignorance, prejudice and stigmatization which inexorably widen the gulf between perception and reality." Lowndes, supra note 63, at 448.
individuals from discrimination based on prejudice, stereotypes, or unfounded fear."67

The legislative history of the ADA also demonstrates Congress's purpose to eliminate discrimination based on stereotypes. In their reports recommending passage of the ADA, committees in both the House and the Senate quoted the Supreme Court in School Board of Nassau County v. Arline,68 stating that by including those "regarded as" impaired, Congress recognized that society's "myths and fears" about disabilities constrain people with disabilities as much as the limitations resulting from actual impairment.69 In the Senate debate on the bill, its sponsor, Senator Tom Harkin, argued:

There is a wellspring of fears and unfounded prejudices about people with disabilities, unfounded fears, whether people have mental disorders, whether they are manic depressive[,] or schizophrenic[,] or unfounded fears and prejudices based upon physical disabilities. The point of the bill is to start breaking down those barriers of fear and prejudice and unfounded fears, to get past that point so that people begin to look at people based on their abilities, not first looking at their disability.

That is really what the point of this legislation is . . . to get past that initial barrier.70

These statements make clear that Congress intended to eradicate judgments of ability based on myths about disabilities.

Bar examiners' use of psychological history inquiries constitutes such a myth-based assessment. By requiring applicants to divulge information about their status with regard to certain disabilities, bar examiners begin with the presumption that any psychological disa-


70. 135 Cong. Rec. 19,866 (1989) (statement of Sen. Harkin). Significantly, Senator Harkin made this statement in the context of a discussion of employers' inquiries into job applicants' psychological histories. Shortly before, Senator Jesse Helms had asked Senator Harkin whether potential employers could "ask regarding a history of psychosis, neurosis, or other mental, psychological disease or disorder." Id.; cf. supra section II.B.
bility may be a sign of unfitness to practice. Even if nearly every affected applicant is approved following an investigation, the initial categorization is based on stereotypes about mental and psychological disorders. This kind of stereotype-based inquiry is discriminatory on the basis of disabled status, in direct contradiction of the congressional intent behind the ADA.

Furthermore, mental and psychological disabilities are especially stigmatized in comparison with other disabilities. Individuals with psychological disorders or histories of such conditions face unique stigmas based on stereotypes about psychological problems. In fact, disclosure of treatment may itself be an “issue,” giving rise to a myth-based assumption of deficiency.

The legislative history of the ADA recognized the special stereotypes and prejudices attached to mental illness. In the debate on the Senate floor, Senator Pete Domenici discussed the stigma attached to psychological conditions. He described the common association of the term “mental illness” with what he termed a few of “the most serious mental illnesses,” schizophrenia and manic-depression. He later said that people with mental illnesses deserve to be evaluated based on their actual capability rather than on some assumed disability that others just associate with the name of a particular condition.

III. The Necessity Exception to the ADA

Having shown in Part II that the use of psychological history questions constitutes impermissible discrimination under the ADA, this Note now analyzes whether such inquiries fall under the necessity exception to the ADA prohibition of discrimination. Although

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71. One commentator has suggested that “in the world of disabilities, mental impairments have greater stigmas associated with them than do other disabilities.” John W. Parry, Mental Disabilities Under the ADA: A Difficult Path to Follow, 17 Mental & Physical Disability L. Rep. 100, 110 (1993). He found evidence of those greater stigmas in the ADA itself, noting that some of the excluded conditions, such as compulsions and sexual disorders, are those with the greatest stigmas, id. at 100, and that most of the excluded conditions are psychological, id. at 110. For a complete list of the excluded conditions, see supra notes 36-37.

72. Rubenstein, supra note 67, at 214. Rubenstein attributed this assumption to “social prejudices against and myths and stereotypes about people with mental disorders.” Id. at 218.

73. 135 Cong. Rec. 19,878 (1989) (statement of Sen. Domenici). Senator Domenici went on to state: [T]here are hundreds of thousands of Americans today who have been diagnosed or are being treated for manic-depression, bipolar [a]ffective disease or schizophrenia, and I do believe we have to make a serious effort to eliminate the automatic stigma attached to those ailments. . . . We all perceive some idea in our minds about people who have those kinds of ailments. It turns out that more times than not, we are wrong in our perceptions of their abilities. We certainly overstate their disabilities.

Id.

74. See id.
the ADA and the DOJ regulations do permit discrimination under certain excepted circumstances, this Part argues that state boards of bar examiners cannot justify their inquiries into applicants' psychological histories under the exception. Section III.A describes the necessity exception to the ADA allowed by the Department of Justice regulations. Section III.B argues that even if unfit attorneys' threat to the public is sufficient to trigger the exception, inquiries into psychological history do not serve their intended purpose and therefore cannot meet the narrow exception.

A. The Meaning of "Necessity"

The DOJ regulations promulgated under Title II of the ADA allow a necessity exception. A public entity cannot impose eligibility criteria that tend to screen out individuals with disabilities "unless such criteria can be shown to be necessary for the provision of the service, program, or activity." 75 Similarly, in the preamble to the regulations, the DOJ explained that neutral criteria that tend to screen out individuals with disabilities are permissible "if the criteria are necessary for the safe operation of the program in question." 76 The preamble states the exception in even narrower terms, allowing public entities to discriminate against an individual only if that individual "poses a direct threat to the health or safety of others." 77 The preamble also gives examples of justifiable safety qualifications, such as eligibility requirements for drivers' licenses or a swimming proficiency prerequisite for a rafting trip. 78 Any safety requirements that a public entity imposes must be based on actual risks, rather than on speculation or stereotypes about individuals with disabilities. 79 Given the narrow language in both the regulation and the preamble, and the directness and tangibility of the threat in each of the examples in the preamble, the exception must be read narrowly. 80

75. 28 C.F.R. § 35.130(b)(8) (1994) (emphases added).
78. 28 C.F.R. pt. 35, app. A at 452 (1994). Significantly, these examples suggest that the DOJ related the safety exception to immediate, tangible dangers, such as the physical threat that a driver or rafter unable to meet the physical demands the task would pose, as opposed to the kind of threat that an unstable attorney might pose to his or her clients' interests or to the integrity of the profession. This might suggest that bar examiners could never use the exception. This Note will assume for the sake of argument that the exception could apply if the questions were narrow enough.
79. 28 C.F.R. pt. 35, app. A at 452 (1994). The preamble also expresses the ADA's goal of protecting the disabled from discrimination based on unfounded stereotypes "while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks." 28 C.F.R. pt. 35, app. A at 446 (1994) (emphasis added).
80. Two recent federal district court cases applied the necessity exception to bar examiners' use of psychological history inquiries, with differing degrees of narrowness and with differing results. Compare Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 441-42,
B. Psychological History Inquiries and the Necessity Test

This section argues that bar examiners’ inquiries into applicants’ psychological backgrounds are not within the permitted exception because they are not necessary; they do not serve their intended purpose and instead are based on stereotypes and misconceptions. Section III.B.1 argues that the questions are overinclusive, singling out many individuals who are mentally and emotionally fit and capable for the practice of law. Section III.B.2 asserts that questions about past psychological status are unreliable for evaluation of present and future fitness to practice law because past mental illness is a poor predictor of present and future fitness. Finally, section III.B.3 demonstrates that the use of these questions is actually counterproductive to the goal of protecting the public, in that it deters law students from seeking psychological treatment or assistance.

1. Overinclusiveness

Inquiries into psychological history are overbroad and ineffective because they single out many individuals who are not unfit. Although bar examiners argue that such inquiries assist them in screening applicants for fitness to practice law by identifying people with a proven potential for psychological instability, the questions also identify people who are mentally and emotionally healthy and stable and who are not likely to prove unfit. Questions regarding psychological background ignore both the varying degrees of severity of condition and the possibility of recovery, and impose additional and intrusive burdens upon individuals without regard to the severity of their previous conditions or to the extent of their recovery. As a result, these inquiries not only identify applicants who may at one time have been unfit to practice law but who have recovered completely, but also single out applicants who were never unfit. Those individuals may have suffered from only minor psy-
chological problems, or may have been misdiagnosed or misclassified as ill but actually were never afflicted at all. In addition, the questions regarding treatment single out individuals who sought treatment but who were never mentally ill. Inquiries into psychological history screen out for further investigation applicants who are not and perhaps never were mentally or emotionally unfit to practice law. Such inquiries are therefore too broad and inclusive to identify individuals who may pose a threat to the public.

2. Unreliability

Psychological history inquiries are also unreliable for evaluation of applicants' fitness to practice law. First, the records of mental health professionals who treated an applicant in the past are irrelevant to that applicant's current or future condition and ability to practice. Psychological records are not a reliable predictor of be-

A recent study found that only one-third of the 28 percent of Americans suffering from diagnosable mental illnesses are disabled by their conditions. Phyllis Coleman & Ronald A. Shellow, Fitness to Practice Law: A Question of Conduct, Not Mental Illness, 68 FLA. B.J. 71, 72, 74 n.9 (May 1994) (citing Darrell A. Regier et al., The de Facto US Mental and Affective Disorders Service System: Epidemiologic Catchment Area Prospective 1-Year Prevalence Rates of Disorders and Services, 50 ARCHIVES GEN. PSYCHOL. 85 (1993)).

See supra notes 6, 8 and accompanying text (citing questions about treatment and about diagnosis); supra notes 39-41 and accompanying text (discussing ADA protection of individuals misclassified as or regarded as having or having had a disability).

See supra note 6.

A recent study by the National Institute of Mental Health (NIMH) found that 46 percent of those treated by mental health professionals have no diagnosable mental illness. See Coleman & Shellow, supra note 82, at 72, 74 n.10 (citing William E. Narrow et al., Use of Services by Persons with Mental and Addictive Disorders; Findings from National Institute of Mental Health, Epidemiologic Catchment Program, 50 ARCHIVES GEN. PSYCHOL. 95 (1993)).

It is worth noting that psychological background questions also miss some of their intended targets completely, failing to single out individuals who may be unfit. Although the purpose of the questions is to identify applicants who may pose a threat to the public, the inquiries overlook applicants who may in fact pose a significant risk but who have never sought treatment for their conditions or been diagnosed as mentally ill. See supra notes 6, 8 and accompanying text (citing questions about treatment and/or diagnosis). Those applicants may well be more dangerous than those whom the inquiries do single out; they may have serious psychological impairments that remain untreated. See Maher & Blum, supra note 53, at 829 ("The fact that applicants have not sought treatment is not proof that treatment is not needed. Indeed, the group needing the most attention may be those who have difficulties, but have not sought treatment."). Researchers have found that only one-third of Americans with diagnosable mental illnesses consult mental health professionals. Coleman & Shellow, supra note 82, at 72. Those individuals would answer bar examiners' psychological background questions in the negative, and therefore would not trigger further investigation.

"There's no basis for concluding that someone who has undergone psychiatric treatment, that they're unfit to practice... You simply can't draw any conclusion from it." John Murawski, Can Bar Examiners Seek Psychiatric Records?, LEGAL TIMES, Jan. 13, 1992, at 1, 13 (quoting Leonard Rubenstein, Executive Director of the Mental Health Law Project).

"Prior psychiatric treatment is, per se, not relevant to the question of current impairment." Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 435 (E.D. Va. 1995) (quoting the American Psychiatric Association guidelines for mental health inquiries by licensing boards). See also Mary Elizabeth Cisneros, A Proposal to Eliminate Broad Mental Health Inquiries on Bar Examination Applications: Assessing an Applicant's Fitness to Practice Law
behavior, since the range and severity of individuals’ problems vary.\textsuperscript{88} Even trained mental health professionals usually cannot accurately predict an individual’s psychological incapacities based on his or her past treatment.\textsuperscript{89} In addition, the presumption, upon which bar examiners base their use of psychological inquiries, that psychological problems are connected to ability to handle stress may be wrong.\textsuperscript{90} Because previous mental and emotional problems are unreliable for determining an applicant’s present and future fitness and capacity, psychological background questions fail to aid bar examiners in evaluating applicants’ ability to practice.

3. Deterrence

Finally, bar examiners’ inquiries into applicants’ psychological histories are actually counterproductive to the goal of protecting the public from unfit lawyers, in that they deter law students from seeking psychological treatment or counseling.\textsuperscript{91} Knowing that they will have to disclose any sessions with mental health profes-


\textsuperscript{88} Even with information about a current psychological problem, [bar examiners] cannot, by virtue of that fact alone, make any reliable predictions about the attorney’s fitness to practice law. The range and severity of psychological problems is so great that no reviewers, no matter how expert, could make reliable judgments about fitness except in the most egregious cases.\textsuperscript{89}


\textsuperscript{90} See Rhode, supra note 4, at 582 (arguing that “even trained clinicians cannot accurately predict psychological incapacities based on past treatment in most individual cases”) (citation omitted); id. at 559-60. Rhode also maintained that current standards of certification permit untrained bar examiners “to draw inferences that the mental health community would itself find highly dubious.” Id. at 582. Similarly, Stephen Maher and Dr. Lori Blum suggested that bar examiners, “at some point in the process, act as amateur psychiatrists.” Maher \& Blum, supra note 53, at 838 (citation omitted).

\textsuperscript{91} See Rubenstein, supra note 67, at 214. Similarly, Deborah Rhode referred to mental stability as “dubiously relevant to practice.” Rhode, \textit{supra} note 4, at 581-82.

\textsuperscript{92} See Maher \& Blum, supra note 53, at 830-33 (arguing the likelihood of deterrence in more detail); see also Laura F. Rothstein, \textit{Bar Admissions and the Americans with Disabilities Act}, Hous. LAW., Sept./Oct. 1994, at 34, 39 (“The danger of asking [mental health] questions is that individuals who may know that they will have to answer them may avoid seeking counseling for depression and other conditions because of concerns that bar authorities might view such treatment negatively.”).

At least two courts have recognized this potentially strong deterrent effect. The Minnesota Supreme Court based its decision striking several psychological background questions from the state bar application in part upon the chilling effect such questions had on law students. \textit{In re Frickey}, 515 N.W.2d 741, 741 (Minn. 1994) (“[F]inding 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 weighs against asking the questions . . . .”).

A federal district court also considered the possibility of deterrence. Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 445-46 (E.D. Va. 1995) (“[T]here is ample support, from the testimony of [several expert witnesses] for the conclusion that [the mental health inquiry] deters applicants from seeking mental health counseling from which they might otherwise benefit.”).
sionals, many law students choose to postpone counseling for stress, marital difficulties, and even drug and alcohol problems.\textsuperscript{92} The inquiries discourage law students from developing their mental and emotional fitness and strategies for coping with stress before entering the profession; without adequate preparation for the stress of legal practice, they may turn to "unhealthy coping strategies, such as drug or alcohol abuse."\textsuperscript{93}

The bar examiners' additional investigations, involving required disclosure of patient records, also have a chilling effect on law students' treatment when they do seek it; if the therapist and the patient know that their interaction will be disclosed to the bar, the dynamic may change.\textsuperscript{94} The patient may not be as candid as she would otherwise be, and the therapist may alter the treatment.\textsuperscript{95} The deterrent effect of bar examiners' psychological background inquiries discourages law students from seeking effective psychiatric treatment.\textsuperscript{96}

\section*{IV. The Alternative: Behavior-Conduct Questions}

Bar examiners' psychological history inquiries rely on stereotypes as a substitute for evaluations of ability and on status as a substitute for behavior. Bar examiners are not trained psycholo-

Ironically, law students may be especially in need of psychological treatment. An expert witness, Dr. Howard V. Zonana, in one ADA case testified that "between twenty and forty percent of all law students have 'significant depression symptoms.'" Clark v. Virginia Bd. of Bar Examiners, 861 F. Supp. 512, 517 (E.D. Va. 1994) \textit{vacated}, 880 F. Supp. 430 (E.D. Va. 1995).

This has also been noted by other commentators:

Law school is not only stressful, it may actually promote unfitness. Empirical studies have shown that when compared to medical and other graduate students, law students experience greater stress. Symptoms of that stress include increased depression, anger, hostility, anxiety, social alienation, and obsessive-compulsive behavior. Such symptoms increase during law school so that third-year students and graduates tend to be more symptomatic than first-year students.

Maher & Blum, supra note 53, at 843 (citations omitted). \textit{See id.} at 843 nn.73, 74 (citing studies that found that law students had higher stress levels and more depression, anger, and hostility than medical and/or other graduate students). The authors also argued that "[l]aw students do not know how to handle the stress of law school effectively." \textit{Id.} at 843. Additionally, they cited one study that found that 43 percent of law students reported excessive drinking. \textit{Id.} at 844 n.77 (citing Marilyn Heins et al., \textit{Law Students and Medical Students: A Comparison of Perceived Stress}, 33 J. LEGAL EDUC. 511, 522 (1983)).

92. Resnick, \textit{supra} note 14, at 34.
94. \textit{See id.} at 834.
95. \textit{See id.}
96. As one commentator has noted: "To the extent that bar oversight deters psychological or psychiatric treatment, the current approach is simply perverse. Penalizing those who recognize a need for assistance is unlikely to yield greater mental health among the practicing bar." Rhode, \textit{supra} note 4, at 582.
gists, and may tend to rely on stereotypes and status in their evaluations.  

This Part proposes that state boards of bar examiners abandon the use of inquiries into applicants' psychological histories and instead inquire as to past behavior and conduct that might indicate inadequacies of fitness and capacity. Section IV.A argues that questions based upon status are impermissible, and that questions based upon conduct are permissible. Section IV.B argues that behavior-based inquiries are sufficient for bar examiners' purpose of screening applicants who pose a potential threat to the public. Section IV.C then suggests questions that bar examiners should use instead of psychological history inquiries.

A. Permissibility

Psychological history questions and the further investigations that may ensue are based upon the status of having psychological problems, rather than upon applicants' past behavior or conduct. As an antidiscrimination statute, the ADA prohibits discrimination based on disabled status.98 Therefore, bar examiners must limit their inquiries to information about conduct.

In a case involving bar examiners' inquiries outside the ADA context, the New York Court of Appeals relied upon the status/conduct distinction to invalidate questions about bankruptcy status and to limit bar examiners to conduct-related questions.99 The In re Anonymous court stated that the Bankruptcy Act was intended to protect debtors from "discrimination . . . based upon the fact of bankruptcy,"100 so a determination of unfitness "must rest not on the fact of bankruptcy but on conduct reasonably viewed as compatible with a lawyer's duties and responsibilities as a member of the Bar."101 The court held that the statute did not shield debtors

97. One commentator has argued that psychological background questions are "more a product of stereotypes than [questions] about people's fitness." Leonard Rubenstein, executive director of the Mental Health Law Project, quoted in Murawski, supra note 87, at 1.

98. This Note uses the term "status" to mean the state of having a covered condition. Under the ADA, an individual who has, or has had, or has been regarded as having a mental or psychological impairment qualifies for ADA protection. See supra section I.B. He or she cannot be subjected to discrimination on the basis of the past or present disability — in other words, on the status of being disabled. "Conduct" and "behavior," on the other hand, merely refer to what an individual has or has not done, apart from considerations of his or her status.

A recent custody case relied upon the status/conduct distinction with regard to the ADA. The Connecticut Supreme Court rejected a motion to compel disclosure of a parent's mental health history, stating that "[c]ertainly, with the adoption of the Americans with Disabilities Act, the conduct of the parties rather than their mental status must be the focus of the court." Granbery v. Carleton, No. FA92-0038677, 1993 WL 547295, at *1 (Conn. Super. Ct. Dec. 27, 1993).


100. 549 N.E.2d at 473.

101. 549 N.E.2d at 473-74.
from reasonable questions about their ability to manage money when the ability to do so was related to fitness for a license.102

More recently, a federal district court held that although a committee of bar examiners could not reject an applicant on the basis of mental illness per se, it could inquire into conduct that could reasonably be viewed as incompatible with the practice of law and disapprove him because of that conduct, even if he claimed that the objectionable conduct was a result of his mental illness.103 Although the plaintiff claimed a violation of ADA Title II,104 the court did not mention the ADA in its analysis.

Other courts have applied similar analyses in cases that do rely upon the ADA. For example, the New Jersey Supreme Court has recognized the ADA's impact on status-based questions about psychological history. In Medical Society v. Jacobs,105 the court stated:

The essential problem with [psychological background] questions is that they substitute an impermissible inquiry into the status of disabled applicants for the proper, indeed necessary, inquiry into the applicants' behavior. In the context of other antidiscrimination statutes, it has been held to be fundamental that an individual's status cannot be used to make generalizations about that individual's behavior.106

The court then suggested that the Board of Medical Examiners could formulate effective questions that would be permissible, screening applicants "based only on their behavior and capabilities," including questions about employment history, ability to handle certain stressful situations, and fulfillment of responsibilities.107

B. Sufficiency

Permissible inquiries into conduct and behavior to determine fitness are sufficient to serve bar examiners' purpose of protecting the public. A member of the Committee on Admissions of the District of Columbia Court of Appeals has stated that, in the commit-

102. 549 N.E.2d at 473.
106. 1993 WL 413016, at *7 (emphasis added).
107. 1993 WL 413016, at *7 (emphasis added); see also In re Underwood, 1993 WL 649283, at *2 (Me. Dec. 7, 1993) (applying the Jacobs analysis to bar examiners' inquiries and invalidating status-based questions regarding mental illness, adding that "it is certainly permissible for the Board of Bar Examiners to fashion other questions more directly related to behavior that can affect the practice of law without violating the ADA") (emphasis added). The Jacobs court noted that under the ADA examiners may discriminate based on current illegal use of drugs. 1993 WL 413016, at *7; see supra notes 36-37.

Questions about current ability to perform certain functions do not implicate the ADA because they do not rely on status with regard to disability. Cf: supra notes 58-59 and accompanying text. Inquiries limited to capability therefore do not violate the ADA.
tee's experience, the question as to treatment or counseling for drug or alcohol use

has rarely, if ever, brought to light a serious fitness question that was not highlighted by other information (concerning litigation, employment, encounters with legal authorities, academic or bar discipline, etc.). In contrast, the committee's experience has been that alcohol and substance abuse problems are not infrequently associated with conduct raising very serious fitness problems.108

This argument also applies to psychological problems not related to substance use; if an applicant is unfit to practice law because of mental or emotional instability, some aspect of his or her conduct or behavior will probably reveal the problem.109 Given the severe flaws in the current, invalid, status-based approach,110 a more focused, conduct-based approach would be at least as effective as the prohibited inquiries.111

At least two courts have decided that a narrower, conduct-based inquiry would be sufficiently effective for bar examiners' purposes. The court in *Jacobs* stated that psychological history inquiries were unnecessary and that it was confident that the board of medical examiners could formulate "a set of effective questions" based only on conduct and capability.112 Similarly, the court in *In re Frickey*113 rested its ruling invalidating bar examiners' psychological history questions in part on the court's belief that questions relating to conduct are equally effective in protecting the public from unfit practitioners.114

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109. Psychological fitness problems that are serious enough to interfere with competent legal practice probably will manifest themselves in other areas of life involving responsibility, integrity, and stress management; a psychological incapacity that would render an individual unfit to practice law seems intuitively unlikely to be isolated to one specific area of that individual's life.

For example, claiming that medical health professionals cannot conclusively predict future difficulties "in any but the clearest cases of incapacity," Deborah Rhode suggested that "[i]t is doubtful that many individuals fitting that diagnosis are capable of successfully completing law school, passing a bar exam, and establishing a practice in which unsuspecting clients or colleagues will be at risk." Rhode, *supra* note 4, at 560.

110. See *supra* section III.B.

111. In fact, evidence of past behavior may be the best indicator of an applicant's present ability and fitness to practice. See Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 435-36 (E.D. Va. 1995) (citing the opinion of Dr. Howard V. Zonana, an expert witness for the plaintiff).


113. 515 N.W.2d 741 (Me. 1994).

114. 515 N.W.2d at 741.
C. Proposals for a Conduct-Based Inquiry

In formulating conduct-based inquiries to detect unfitness to practice law, bar examiners should focus on certain aspects of applicants' lives and backgrounds, such as employment, disciplinary action (particularly within employment or academic institutions), and encounters with legal authorities. The Jacobs court has adopted this type of approach, suggesting that bar examiners screen based on employment history and whether applicants "have been unreliable, neglected work, or failed to live up to responsibilities."115 The court also suggested that bar examiners ask applicants about their ability to "perform certain tasks or deal with certain emotionally or physically demanding situations";116 though not specifically conduct-based, such an inquiry would screen applicants on their actual ability rather than on status or stereotypes, and therefore would be permissible under the ADA.

Some boards of bar examiners already use conduct- and behavior-based questions to elicit information about applicants' fitness for legal practice.117 Commentators have made some useful suggestions for bar examiners who want to ask conduct-based questions. For example, Phyllis Coleman and Ronald A. Shellow suggest that bar examiners ask the following questions:

Have you ever been expelled, suspended from, or had disciplinary action taken against you by any educational institution? . . .

Has your grade point average ever varied by half a letter grade or more between two terms? . . .

Have you ever been absent from school or a job for more than 30 consecutive days? . . .

Have you ever been fired from, or asked to leave, or had disciplinary action taken against you in any job? . . .

Have you ever been evicted or asked to vacate a place in which you lived? . . .

Have you ever been arrested for D.U.I.? . . .

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117. See, e.g., Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 432 n.3 (E.D. Va. 1995) (including in a footnote the board's list of factors that could trigger further inquiry). Besides mental health problems, the factors enumerated in Clark include: commission or conviction of a crime; academic misconduct; making false statements or omissions on the application; misconduct in employment; other than honorable discharge from a branch of the armed service; acts involving dishonesty, fraud, deceit or misrepresentation; abuse of legal process; failure to meet financial responsibilities; neglect of professional obligations; violation of a court order; denial of admission to another bar on character and fitness grounds; disciplinary action, whether resolved or pending, by any professional disciplinary agency; unauthorized practice of law, or unresolved complaints thereof; and any other conduct that raises doubts as to character or fitness. 880 F. Supp. at 432 n.3.
Have you had any blackouts or periods of intoxication associated with alcohol or any other drug within the past six months?118

According to Coleman and Shellow, these questions focus narrowly on past conduct and behavior that would signal an individual’s unfitness to practice law.119

Bar examiners should use inquiries that examine applicants’ behavior and conduct in academic and employment settings, and in fulfillment of other responsibilities, to single out for further investigation applicants who may be unfit to handle legal practice.

CONCLUSION

Most state bar applications currently include questions about applicants’ past psychological conditions or treatment. Although the need to screen for fitness may be legitimate, boards of bar examiners that use psychological history questions violate both the language and the purpose of the Americans with Disabilities Act. Such inquiries treat status with regard to past or present disabilities as a proxy for ability, which is precisely the kind of assumption that Congress sought to eliminate.

The apparent trend among both bar examiners and courts to consider narrower psychological history inquiries permissible under the ADA fails to recognize the inherent invalidity of such inquiries. Questions about an individual’s past or present psychological condition or treatment are questions about his or her protected status. Whether bar examiners limit their inquiries to the last five or ten years or to specific psychological disorders is irrelevant — they still ask about a status that is protected by law. Merely narrowing the scope of status-based questions does not cure their illegality.

To comply with the Americans with Disabilities Act, bar examiners must discontinue the use of psychological history questions and rely instead on questions about applicants’ past conduct and behavior, and about their current capability. Discontinuing the use of psychological history questions will help achieve an essential goal of

118. Coleman & Shellow, supra note 82, at 73-74. The authors also proposed these questions in Coleman & Shellow, supra note 25, at 177.

119. Coleman & Shellow, supra note 82, at 73-74.

Other suggestions for bar examiners interested in asking conduct-based questions can be found in the work of Stephen Maher and Dr. Lori Blum, who suggest that bar examiners focus the initial inquiry on “whether applicants have had serious life problems,” rather than on whether they have sought or received treatment or counseling. Maher & Blum, supra note 53, at 859. An indication that an applicant has experienced serious life problems should raise the question of fitness and trigger further inquiry. Id. “Serious life problems” include some of the examples cited by Charles Reischel: employment difficulties, encounters with legal authorities, and academic discipline. See Reischel, supra note 14, at 11; supra note 108 and accompanying text. It is worth noting however, that Maher & Blum published just before the passage of the ADA in 1990: hence their suggestions were not specifically intended to ensure compliance with the ADA.
the ADA: eliminating the stigma associated with disabilities, mental or otherwise. To allow bar examiners to inquire about the past mental health status of applicants perpetuates this stigma.