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## **Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicant with Mental Health and Substance Abuse Histories**

Stephanie Denzel

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## Article

### Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories

STEPHANIE DENZEL

*The permissibility of inquiries about mental health and substance abuse treatment histories on bar applications was actively debated in the years after the passage of the Americans with Disabilities Act (“ADA”). Two decades after those debates began, the law remains unclear and the question is, for the most part, no longer discussed. However, the increasing use of conditional admission for applicants with treatment histories requires a renewed scrutiny of whether state bars should be allowed to use or request this information. Conditional admission programs, which allow applicants to be admitted to the bar subject to monitoring or supervision conditions, have been promoted as a way to admit disabled applicants who would previously have been denied while protecting the public from potentially impaired attorneys. However, conditional admission is often used for applicants with mental health or substance abuse histories who are not impaired and who would have previously been fully licensed. As currently operated, these programs divert qualified applicants with disabilities into an unequal licensure program. This second-class licensure of applicants who are fit to practice law on the basis of their disability clearly violates the ADA and further deters law students from seeking treatment. Both the ADA and these policy concerns require that the use of these programs be reevaluated.*

## ARTICLE CONTENTS

I. INTRODUCTION .....	891
II. CHARACTER AND FITNESS EVALUATIONS.....	894
A. MENTAL HEALTH AND SUBSTANCE ABUSE QUESTIONS .....	896
III. APPLICABILITY OF THE ADA AND LEGAL CHALLENGES.....	900
A. LEGAL CHALLENGES UNDER THE ADA.....	902
IV. THE CURRENT USE OF MENTAL HEALTH AND SUBSTANCE ABUSE INQUIRIES .....	907
V. CONDITIONAL ADMISSION PROGRAMS.....	912
A. CONDUCT- OR STATUS-BASED?.....	914
B. INDICATIONS THAT PROGRAMS ARE STATUS-BASED.....	915
C. THE BURDEN OF CONDITIONAL ADMISSION.....	917
D. EXAMPLES FROM PRACTICE.....	917
VI. CONDITIONAL ADMISSION PROGRAMS UNDER THE ADA AND CONTINUING ISSUES.....	922
A. CONDITIONAL ADMISSION PROGRAMS VIOLATE THE ADA.....	923
B. CONDITIONAL ADMISSION PROGRAMS WILL DETER LAW STUDENTS FROM SEEKING TREATMENT .....	925
VII. CONCLUSION.....	927



# Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories

STEPHANIE DENZEL\*

## I. INTRODUCTION

Every applicant to the bar faces a character and fitness evaluation, an investigation which may delve into normally private areas such as finances, divorces, citations, and frequently, mental health or substance abuse treatment histories. The inclusion of mental health and substance abuse inquiries on bar applications has been a matter of great debate. Courts, commentators, and state bars have all disagreed about the extent to which bars can, or should, inquire into the mental health and substance abuse background of applicants. It is clear that attorneys whose ability to practice law is impaired by a mental illness or substance abuse can present a risk to clients and that the bar has a duty to prevent attorneys who will harm clients from practicing law. There is, however, considerable disagreement over whether these inquiries are an appropriate or effective method for accomplishing this goal. Many argue that the broad inquiries discriminate against applicants with disabilities, and are thus barred by the Americans with Disabilities Act (“ADA”).<sup>1</sup> In the two decades since the passage of the ADA, questions on bar applications have undergone numerous transformations. While some states have narrowed the scope of their questions, others have broadened them, and a few states even initially narrowed or eliminated questions only to reintroduce them or broaden them later.<sup>2</sup>

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\* J.D., December 2010, University of Michigan Law School; M.Ed., 2007, George Mason University; B.A., 2003, Simon’s Rock College of Bard. I would like to thank Professor Carl Schneider, Professor Mark Cody, and Anastasia Niedrich for their helpful comments and encouragement. I would also like to thank Jon Bauer for providing helpful comments and information about the efforts and changes in Connecticut’s regulations and application. Lastly, I would like to thank the editors and staff of the *Connecticut Law Review* for their hard work.

<sup>1</sup> See, e.g., 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, 99 (2001) (stating that there is discriminatory treatment against applicants with disabilities); Kelly R. Becton, Comment, *Attorneys: The Americans with Disabilities Act Should Not Impair the Regulation of the Legal Profession Where Mental Health Is an Issue*, 49 OKLA. L. REV. 353, 353–54 (1996) (“[C]ritics of mental health questions argue that the questions unduly invade applicants’ privacy and deter mental health treatment.”).

<sup>2</sup> Minnesota at one time eliminated all inquiries. *In re* Petition of Frickey, 515 N.W.2d 741, 741 (Minn. 1994); see also MINN. STATE BD. OF BAR EXAMINERS, APPLICATION, available at

Critics of the inquiries claim that they burden applicants with disabilities by subjecting them to additional scrutiny, and impermissibly discriminate on the basis of disability.<sup>3</sup> The critics point to the lack of research supporting the predictive value of such questions and the association between prior treatment for mental health and substance abuse disorders and later misconduct.<sup>4</sup> What research does suggest is that the presence of the inquiries deters law students from seeking treatment for mental health and substance abuse problems, potentially increasing the number of new lawyers with untreated conditions.<sup>5</sup> These critics argue that bars should rely on behavioral or conduct-based questions, rather than status based questions, to identify unfit applicants.<sup>6</sup>

Proponents of the inquiries note that the bar has a duty to the public to ensure that applicants who are admitted to the bar are mentally and emotionally capable of practicing law.<sup>7</sup> Inquiries about mental health or substance abuse problems are necessary for the bar to fulfill that duty.<sup>8</sup> The reoccurring nature of such disorders makes an inquiry into history illuminating and this information allows the bar to determine the applicant's degree of insight into his or her illness.<sup>9</sup> These proponents also argue that behavior- or conduct-based questions will not catch all of the applicants who may be unfit to practice because of such disorders.<sup>10</sup>

The questions about whether mental health and substance abuse

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<http://www.ble.state.mn.us/application.html> [hereinafter MINN., APPLICATION] (showing that there are no questions on the bar application which would implicate the ADA). Connecticut removed major depressive disorder depression from the list of diagnoses about which the application inquires in 2000, only to add it back in 2006. Douglas Malan, "Honest Abe" Wouldn't Make the Grade: *Mental Health Questions on Bar Application "Way Out of the Mainstream,"* CONN. L. TRIB., Apr. 24, 2006, at 1. There are signs that Connecticut may yet again change its application inquiries, this time to narrow them. See Thomas B. Scheffey, *Too Revealing?: Bar Examiners To Ask Fewer Questions About Prospective Lawyer's Mental Illness,* CONN. L. TRIB., Aug. 16, 2010, at 1, 12 [hereinafter Scheffey, *Too Revealing?*] ("The revisions to Practice Book Rules 2-5 through 2-9 will likely lead to the elimination of some current questions and the creation of new ones—though no final decisions have been made. However, the bottom line is that inquiries about mental health will be narrower, and will focus on specific conduct—not just a diagnosis or history of treatment.").

<sup>3</sup> See, e.g., Bauer, *supra* note 1, at 138 ("[I]f behavioral, self-assessment, and second-level question can identify the problem cases, disability-based questions are superfluous . . . . The application of this test raises both empirical and normative problems."); Becton, *supra* note 1, at 353–54 ("[A] flood of law review articles has been published arguing that mental health questions should be eliminated from all state bar applications.").

<sup>4</sup> See, e.g., Bauer, *supra* note 1, at 155 (stating that "[a] current or recent diagnosis with a serious mental disorder cannot support a prediction about the applicant's future behavior").

<sup>5</sup> *Id.* at 150–51.

<sup>6</sup> 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, 177 (1994); Becton, *supra* note 1, at 363–66.

<sup>7</sup> Becton, *supra* note 1, at 353–54.

<sup>8</sup> Bauer, *supra* note 1, at 144–45; Becton, *supra* note 1, at 374, 376–77.

<sup>9</sup> Bauer, *supra* note 1, at 144–45; Becton, *supra* note 1, at 365.

<sup>10</sup> See, e.g., Becton, *supra* note 1, at 368 ("Behavioral questions may be helpful, but the true gravity of an applicant's fitness, or lack thereof, may not be revealed if important mental health information is unobtainable by boards of bar examiners.").

inquiries violate the ADA and what bars can do to address concerns about applicants with such histories still exist. In recent years, states have started to use conditional admission programs as a further method to protect the public from lawyers with mental health or substance abuse histories or disorders.<sup>11</sup> These programs allow state bars to admit an applicant conditioned on participation in ongoing monitoring. The justification for such programs is that this allows admission for some applicants who would otherwise be denied and protects the public from attorneys with mental health and substance abuse disorders who require ongoing treatment or support.<sup>12</sup>

Conditional admission programs have been introduced as a way for state bars to comply with the ADA while still addressing their concerns about applicants with mental health and substance abuse histories.<sup>13</sup> It has additionally been suggested that the presence of conditional admission programs might mitigate the effects of the inquiries by making law students more willing to seek treatment.<sup>14</sup> The legality of these programs under the ADA, however, has yet to be examined either by commentators or through a legal challenge. This Article reviews the conditional admission programs currently in operation and the character and fitness evaluation process that gives rise to them. Through an examination of the rules of these programs and examples of how they operate, this Article discusses why such programs likely violate the ADA and why they fail to address the concerns raised by mental health and substance abuse inquiries. Instead of addressing the ADA concerns surrounding mental health and substance abuse inquiries, conditional admission programs take the bar's discrimination a step further and threaten to force applicants with disabilities into a second-class licensure.

Part II of this Article provides an overview of the history and use of character and fitness reviews, as well as the introduction of mental health and substance abuse questions. Part III reviews the applicability of the ADA to attorney licensing and the legal challenges to mental health and substance abuse inquiries under the ADA. Because an understanding of

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<sup>11</sup> Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 554–55 (2008); see also Stephanie Lyerly, Note, *Conditional Admission: A Step in the Right Direction*, 22 GEO. J. LEGAL ETHICS 299, 306 (2009) (“To address the problems raised by applicants with previous substance abuse and mental health issues, many states have instituted conditional admission programs that allow these applicants to be admitted to the bar with the requirement that certain conditions be met over a set period.”).

<sup>12</sup> See Coleman & Shellow, *supra* note 6, at 170–71 (“Boards might argue these conditional admissions represent reasonable accommodations.”); Lyerly, *supra* note 11, at 315–16 (“The most obvious benefit of conditional admission programs is giving applicants the chance for admission. The distrust that state bars have expressed towards applicants with histories of addiction and mental health has resulted in straight out denials of admissions.”).

<sup>13</sup> Coleman & Shellow, *supra* note 6, at 170–71; Lyerly, *supra* note 11, at 299–300, 306–07.

<sup>14</sup> Lyerly, *supra* note 11, at 315–16.

the inquiries that control which applicants the bar will examine for possible conditional admission is necessary to evaluate the programs, and because a review of the mental health and substance abuse inquiries has not been published in recent years, Part IV provides an overview of the mental health and substance abuse inquiries on the applications for all fifty states and the District of Columbia. Part V discusses the growth of conditional admission programs and the lesser status of a conditional license and provides examples of how these programs operate. Finally, Part VI discusses why many such programs are impermissible under the ADA and how they perpetuate the problems created by the application questions themselves.

## II. CHARACTER AND FITNESS EVALUATIONS

Every state bar in the United States requires applicants to prove good moral character and fitness to practice law in order to gain admission to the bar.<sup>15</sup> Character and fitness requirements have existed since at least the eighteenth century.<sup>16</sup> In the early days, character and fitness requirements may have been satisfied by personal references.<sup>17</sup> Over the late nineteenth and early twentieth centuries, these admissions standards became more formalized and more stringent.<sup>18</sup> The purpose of such requirements is ostensibly to protect the public from potential abuse at the hands of morally unfit lawyers.<sup>19</sup>

Character and fitness requirements have historically served purposes well beyond ensuring that admitted applicants will act ethically.<sup>20</sup> Evidence suggests that while character and fitness requirements changed as social mores changed, a tightening of such requirements was sometimes prompted by concerns about potential competition created by new lawyers.<sup>21</sup> Requirements were also often formalized and strengthened in response to concerns about the public perception of attorneys, as the general public dislike of lawyers has long troubled the profession.<sup>22</sup>

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<sup>15</sup> Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493 (1985). "Good moral character" is defined differently in each jurisdiction, but the definition from California is typical. The California rules for bar admission state: "The term 'good moral character' includes qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation and respect for the rights of others and for the judicial process." RULES REGULATING ADMISSION TO PRACTICE LAW IN CAL. R. X (2004).

<sup>16</sup> Rhode, *supra* note 15, at 494.

<sup>17</sup> See Aaron M. Clemens, *Facing the Klieg Lights: Understanding the "Good Moral Character" Examination for Bar Applicants*, 40 AKRON L. REV. 255, 260 (2007) ("History is silent about the implementation of the character requirement until the last century, perhaps due to the previous informality of early mechanisms to ensure good moral character.").

<sup>18</sup> Rhode, *supra* note 15, at 498–99.

<sup>19</sup> *Id.* at 507–08.

<sup>20</sup> *Id.* at 501–02.

<sup>21</sup> *Id.* at 502.

<sup>22</sup> *Id.* at 510–11.

Additionally, as more formal reviews developed, character and fitness standards increasingly became a way to exclude certain classes of applicants from the bar.<sup>23</sup> Early requirements served to prevent women, who were not believed to have the constitution necessary to practice law, from being admitted.<sup>24</sup> The increased specificity and intensity of evaluations in the early twentieth century coincided with the increase in the number of immigrants in the country, whom bars openly sought to discourage from seeking admission.<sup>25</sup> While the number of applicants denied admission on character and fitness grounds remained low, the requirements may have deterred a significant number of applicants from ever pursuing admission or a legal education.<sup>26</sup>

Through the middle of the twentieth century, bar applications frequently sought information about an applicant's immigration status, religion, and political affiliations.<sup>27</sup> This and other information was used to discriminate against applicants on the basis of their race or ethnicity, religious preferences, or political views.<sup>28</sup> Character and fitness questions were openly acknowledged as ways to keep "undesirables" out of the legal profession, and research suggests that admission decisions were often made on the basis of stereotypes and biases.<sup>29</sup>

Over time, questions about discrimination and open discrimination on the basis of religion, ethnicity, and politics have fallen away.<sup>30</sup> In 1957, the Supreme Court ruled that while a state bar can require applicants to have a mastery of the law or good moral character, any qualification must "have a rational connection with the applicant's fitness or capacity to practice law."<sup>31</sup> Thus, membership in a political party or a particular class was not, in itself, enough to exclude an applicant. Character and fitness inquiries remain broad enough, however, that the potential remains for discrimination against applicants on grounds unrelated to fitness for practice.

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<sup>23</sup> *Id.* at 499–500.

<sup>24</sup> Clemens, *supra* note 17, at 260–61; Rhode, *supra* note 15, at 497.

<sup>25</sup> Rhode, *supra* note 15, at 499–500.

<sup>26</sup> *See id.* at 502 ("In most states, review became increasingly systematic, and definitions of virtue shifted with the national mood, but the number of individuals formally denied admission remained minimal.")

<sup>27</sup> *See id.* at 500–02 (describing discrimination in admission to bars due to immigration status, religion, or political affiliation).

<sup>28</sup> *Id.* at 501.

<sup>29</sup> *Id.*

<sup>30</sup> *See* Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 239 (1957) ("Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.")

<sup>31</sup> *Id.*

### A. *Mental Health and Substance Abuse Questions*

Over the past several decades, state bars have continued to expand their inquiry into an applicant's background under the guise of character and fitness screening. One of the more controversial expansions has been the addition of questions seeking information about an applicant's mental health or substance abuse history.<sup>32</sup> These questions, like those about religion, politics, or immigration, serve to both deter and screen out people who the bar feels are undesirable.<sup>33</sup> The questions are reportedly based on a concern that applicants with histories of mental illness or substance abuse present a danger to the public.<sup>34</sup> Since the introduction of these inquiries, both courts and commentators have disagreed as to whether such questions or concerns are valid.<sup>35</sup>

It is widely acknowledged that, along with factors such as a criminal history or lack of academic integrity, a history of treatment for mental health problems or substance abuse will "raise red flags" on most bar applications.<sup>36</sup> A 1983 survey of the bar administrators in all fifty states revealed that seventy-two percent of the forty-seven bar examiners responding indicated that acknowledging a history of psychiatric treatment during the application process would likely trigger further investigation, while a further twenty-six percent said that such a history might trigger additional inquiry.<sup>37</sup> The treatment of applicants with such histories, however, varied from state to state. At the time of the survey, a bar examiner in Michigan admitted that applicants with mental health histories were likely to be denied admission, whereas an examiner in Idaho stated that only a "homicidal maniac or a schizo who loses touch for a week at a time" would be denied.<sup>38</sup>

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<sup>32</sup> See Rhode, *supra* note 15, at 526, 540 (discussing the controversy between varying institutions and administrators regarding mental health issues).

<sup>33</sup> See *id.* at 532 (explaining what the courts and bar committees feel constitute undesirable traits in bar candidates).

<sup>34</sup> See *id.* at 537-40 (discussing bar committees' concerns over applicants' drug and alcohol offenses and psychological instability).

<sup>35</sup> See *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 431 (E.D. Va. 1995) ("[T]he Court finds that Question 20(b) [concerning the mental health of an applicant] is framed too broadly and violates the Plaintiff's rights under the Americans with Disabilities Act."); *Applicants v. Tex. State Bd. of Law Exam'rs (Texas Applicants)*, No. A 93 CA 740 SS, 1994 WL 923404, at \*1 (W.D. Tex. 1994) ("[T]he Court finds the Board's narrowly focused inquiries and investigation into the mental fitness of applicants to the Texas Bar who have been diagnosed or treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder do not violate the ADA."); *In re Schaengold*, 422 P.2d 686, 688 (Nev. 1967) ("One need not show the absence of recorded emotional disturbance, or mental illness, before being eligible to write the bar examination . . . . A mental or emotional disturbance requiring treatment is not an uncommon experience for many successful business and professional people. We fear that a grave injustice may result if we were to approve the Board's recommendation."); Rhode, *supra* note 15, at 540 (discussing different jurisdictions' treatment of grounds for denial of admission to the state bar).

<sup>36</sup> Clemens, *supra* note 17, at 257; Rhode, *supra* note 15, at 533.

<sup>37</sup> Rhode, *supra* note 15, at 534.

<sup>38</sup> *Id.* at 540 (quoting Interview, President-Elect, Idaho Bd. of Comm'rs (July 17, 1983)).

Courts have also treated applicants with mental health and substance abuse histories differently. In 1967, the Nevada Supreme Court in *In re Schaengold* ruled that a mental illness, in and of itself, did not make an applicant unfit.<sup>39</sup> The applicant, with a long history of mental illness, was diagnosed by a psychiatrist as suffering from a form of psychosis that caused “a loosening of the thinking processes under pressure . . . .”<sup>40</sup> However, because the psychiatrist was not willing to comment on the applicant’s fitness to practice law, the court ruled that the bar did not have enough evidence to reject the applicant on the basis of his mental illness.<sup>41</sup> The Minnesota Supreme Court similarly ruled in 1984 that a history of chemical dependency was not sufficient, in the absence of conduct indicating unfitness, to deny an applicant admission to the bar.<sup>42</sup> The court held that a history of chemical dependency alone was not rationally related to fitness to practice law and that applicants should be judged only on the basis of conduct.<sup>43</sup> The Western District of New York also found that an applicant could not be denied admission to the bar solely on the basis of his mental illness, holding that any denial must be based on conduct.<sup>44</sup>

Other courts have routinely upheld mental health and substance abuse based denials and the bars in those states continue to deny applicants on the basis of a history of mental illness or substance abuse.<sup>45</sup> In 1993, the Connecticut bar denied an applicant who had been a member of the New York bar for twenty years on the basis of his mental health history.<sup>46</sup> The applicant had been diagnosed with bipolar disorder and had presented letters from two psychiatrists noting that his disorder involved only hypomania, rather than mania, and thus did not present a risk of psychosis.<sup>47</sup> The psychiatrists also stated that he was fit to practice law.<sup>48</sup> Despite the evidence that his mental illness did not impair his ability to practice law and the absence of a history of any troubling conduct, the bar nonetheless denied his application for admission.<sup>49</sup>

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<sup>39</sup> *Schaengold*, 422 P.2d at 688.

<sup>40</sup> *Id.* at 687.

<sup>41</sup> *See id.* (“We think it noteworthy, however, that the doctor was unwilling to pass judgment upon Schaengold’s ability to function as a lawyer.”).

<sup>42</sup> *In re Haukebo*, 352 N.W.2d 752, 755 (Minn. 1984).

<sup>43</sup> *Id.* at 756.

<sup>44</sup> *Campbell v. Greisberger*, 865 F. Supp. 115, 121 (W.D.N.Y. 1994).

<sup>45</sup> *See Bauer*, *supra* note 1, at 97–98 (discussing the reluctance of bar examiners to abandon mental health inquiries entirely and the role of the courts in bar examiners’ continued screening of applicants on the basis of disability).

<sup>46</sup> *Id.* at 109; Thomas Scheffey, *Applicant Charges Bar with Discrimination*, CONN. L. TRIB., Aug. 14, 2000, at 8 [hereinafter Scheffey, *Applicant Charges Bar*].

<sup>47</sup> John D. McKenna, Note, *Is the Mental Health History of an Applicant a Legitimate Concern of State Professional Licensing Boards? The Americans with Disabilities Act vs. State Professional Licensing Boards*, 12 HOFSTRA L.J. 335, 345 (1995).

<sup>48</sup> *Bauer*, *supra* note 1, at 109; McKenna, *supra* note 47, at 345; Scheffey, *Applicant Charges Bar*, *supra* note 46, at 8.

<sup>49</sup> McKenna, *supra* note 47, at 345–46.

Several cases in Wisconsin demonstrate that the bar there continues to deny admission to applicants with histories of substance abuse or mental health issues whose recent conduct does not support a finding of unfitness, despite endorsements of the applicants' fitness by treating professionals.<sup>50</sup> Heather Rippl, an academically and professionally successful law graduate, was denied admission to the Wisconsin bar in 1999.<sup>51</sup> The board based its denial on findings that she had a misdemeanor conviction for the theft of a seven-dollar bracelet during her freshman year in college, had a history of excessive drinking which she refused to discuss, and had sought and received treatment for depression during law school.<sup>52</sup> In so finding, the board discounted the professional opinions of both Ms. Rippl's treating psychiatrist and an independent psychiatrist that Ms. Rippl did not have a drinking problem, was free of symptoms of depression, and was not currently impaired in her ability to practice law.<sup>53</sup>

The Wisconsin bar similarly denied admission in 2001 to an applicant who was already successfully admitted to the Minnesota bar. The denial was based on the applicant's history of alcohol abuse and several citations indisputably related to that use, the last of which occurred seven years prior.<sup>54</sup> The applicant was denied admission despite her presentation of several evaluations, one of which concluded that there were insufficient signs of a chemical dependency and the other of which concluded that her alcohol abuse was in full remission.<sup>55</sup> A psychological report similarly concluded that there was no evidence to suggest that she would present a harm to her clients and concluded that her practice of law could be unsupervised.<sup>56</sup>

While the court reversed the denials in the two Wisconsin cases, and the outcome of the appeal of the denial in Connecticut is uncertain,<sup>57</sup> it is likely that many more applicants are similarly denied but do not challenge those denials, or withdraw their applications once they are subject to additional scrutiny.<sup>58</sup> This evidence supports the conclusion that bars use

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<sup>50</sup> *E.g.*, *In re Vanderperren*, 661 N.W.2d 27, 32–33 (Wis. 2003); *In re Rippl*, 639 N.W.2d 553, 556 (Wis. 2002).

<sup>51</sup> *Rippl*, 639 N.W.2d at 556.

<sup>52</sup> *Id.* at 555–56, 560.

<sup>53</sup> *Id.* at 560.

<sup>54</sup> *Vanderperren*, 661 N.W.2d at 36.

<sup>55</sup> *Id.* at 39–40.

<sup>56</sup> *Id.* at 32.

<sup>57</sup> As of 2000, the applicant in the Connecticut case still had not been admitted to the bar and had filed a second lawsuit alleging discrimination under the ADA. Scheffey, *Applicant Charges Bar*, *supra* note 46, at 8. A December 2009 search of the Connecticut Bar Association's membership did not reveal a member with the last name of the applicant as reported in the article.

<sup>58</sup> *See id.* ("Professor Bauer, who has been counseling students for 22 years at the University of Connecticut School of Law, said that he's seen 'dozens of students and recent graduates who have experienced intense distress and humiliation at having to disclose mental health treatment as a condition of their admission.'").

mental health and substance abuse information to deny applicants who would otherwise be fit and qualified for the practice of law.<sup>59</sup> The history of character and fitness reviews demonstrates that state bars have generally viewed mental health and chemical dependency *status*, rather than conduct, as suspicious.<sup>60</sup>

Some of the reasons given for asking such questions, including that depression, bipolar disorder, substance abuse, or other impairments may cause an attorney to neglect clients or miss deadlines, do nothing to refute a conclusion that such inquiries are based, in part, in prejudice.<sup>61</sup> These justifications also support inquiring about chronic or potentially recurring physical conditions such as chronic fatigue syndrome, multiple sclerosis, heart conditions, or various types of cancer that might similarly impair an attorney's ability to complete work or meet deadlines.<sup>62</sup> If bar examiners are justified in asking about mental health and substance abuse histories because these conditions might impair an attorney, they would also be justified in asking about a litany of physical conditions or diagnoses. Yet bar applications almost never inquire about applicants' past or present physical conditions.<sup>63</sup> State bars do not ask about physical conditions because they assume that applicants with those conditions will act ethically and responsibly in managing their condition and take steps to protect clients if their condition should begin to impair their performance.<sup>64</sup> The presumption in the case of an applicant with a mental health or substance abuse history, on the other hand, is that he or she cannot be trusted to appropriately manage the condition or act in a professionally responsible manner.<sup>65</sup>

Cases in which state bars refused to admit an applicant because of a history of mental health treatment—despite the fact that the applicant had

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<sup>59</sup> See *id.* (“[Michael Bowler, the Connecticut statewide bar counsel] said as a general rule, lawyers on conditional admission have behaved in an exemplary fashion, and those who have been diagnosed with anxiety, depression or bipolar disorder have almost invariably been able to obtain successful treatment.”).

<sup>60</sup> See Bauer, *supra* note 1, at 96–98 (discussing bar examiners' reluctance in most states to abandon questions regarding an applicant's mental health or substance abuse treatment even after successful litigation against these types of questions was brought under the ADA).

<sup>61</sup> See *id.* at 162–63 (pointing out that any debilitating condition poses a risk that an attorney might miss deadlines, neglect client matters, or fail to adequately inform his or her clients).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See *id.* at 154 (“In the case of physical disabilities, examiners presume that applicants will live up to their ethical obligations. They do not use the existence of a physical disability as a trigger for probing whether the applicant has behaved responsibly in managing the condition, and can be trusted to take appropriate steps to protect clients if it interferes with performance in the future.”).

<sup>65</sup> See *id.* at 100–01 (“Deep-seated societal prejudices about mental illness and substance abuse inevitably intrude into a process in which bar examiners are charged with making a highly subjective and value-laden determination. The narrowing of mental health inquiries to single out serious mental illnesses and substance abuse—conditions particularly subject to fears, misconceptions, and moral disapprobation—has intensified the stigma felt by applicants.”).

been a successful member of the bar in another state—undermine these justifications further.<sup>66</sup> These applicants have already shown that they can successfully practice law and, thus, the state bar has no reason to doubt their ability.<sup>67</sup> The Supreme Court has noted that the ambiguous nature of character and fitness determinations is a scenario ripe for prejudice,<sup>68</sup> and just as prejudice and bias have historically influenced such determinations, prejudice and bias may be leading to discrimination on the basis of mental health and substance abuse histories.<sup>69</sup>

Given the long-standing concerns and disagreement over the use of mental health and substance abuse inquiries, it is unsurprising that such questions have faced repeated legal challenges. Early challenges, based on constitutional rights to privacy, almost universally failed.<sup>70</sup> The passage of the ADA, however, gave challengers new support for their contention that state bars cannot inquire about and discriminate against those with mental health histories. A number of cases in the years after the passage of the ADA challenged the inclusion of mental health and substance abuse inquiries on bar applications. Some cases succeeded in eliminating or narrowing inquiries, while others met with resistance.

### III. APPLICABILITY OF THE ADA AND LEGAL CHALLENGES

The ADA seeks to eliminate discrimination against individuals with disabilities in employment, public services, and public accommodations.<sup>71</sup> Title II of the ADA applies to public entities and prohibits them from discriminating against qualified individuals with disabilities in providing benefits of services, programs, or activities.<sup>72</sup> The Department of Justice has published regulations implementing the provisions of Title II.<sup>73</sup> The

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<sup>66</sup> See Scheffey, *Too Revealing?*, *supra* note 2, at 1 (describing the case of an applicant who had a torturous time gaining admission to the Connecticut bar due to her bipolar disorder despite having been successfully admitted to the Massachusetts and New York bars).

<sup>67</sup> See, e.g., Bauer, *supra* note 1, at 118 (“During [the time when her admission to the Connecticut bar was delayed for more than a year], Ms. Gower had been promoted to a supervisory position in the legal research office for Connecticut judges, as a result of her excellent performance as a law clerk. She had been offered, and would soon begin, a clerkship with a justice of the Maine Supreme Court.”).

<sup>68</sup> See *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 262–63 (1957) (“The term ‘good moral character’ . . . can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.”).

<sup>69</sup> See Rhode, *supra* note 15, at 561 (“Applicants’ law schools, law firm affiliations, and domestic living arrangements frequently have affected character predictions, and examiners’ own prejudices about drugs, alcohol, sex, psychiatry, and redemption inevitably will bias their perceptions.”).

<sup>70</sup> *Coleman & Shellow*, *supra* note 6, at 159–160; see, e.g., Fla. Bd. of Bar Exam’rs re: Applicant, 443 So. 2d 71, 75 (Fla. 1983) (“Necessarily, the Board must ask questions in this screening process which are of a personal nature and which would not be asked of persons not applying for a position of public trust and responsibility.”).

<sup>71</sup> 42 U.S.C. § 12,101 (2006).

<sup>72</sup> *Id.* § 12,132.

<sup>73</sup> 28 C.F.R. § 35.101–.190 (2010).

Supreme Court has held that these regulations, which are expressly authorized by Congress, may be looked to for guidance in interpreting the ADA.<sup>74</sup> These regulations state, in relevant part:

(b)(3)(i) A public entity may not . . . utilize criteria or methods of administration . . . that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability . . . .

(b)(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability . . . .

(b)(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully or 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.<sup>75</sup>

The ADA defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment.”<sup>76</sup> A physical or mental impairment includes “[a]ny mental or psychological disorder . . . emotional or mental illness” and “drug addiction and alcoholism.”<sup>77</sup> Thus, many applicants with mental illnesses or substance abuse problems are protected under the ADA.<sup>78</sup> Most courts and commentators who have considered the application of the ADA to state boards for professional licensing have concluded that such licensing programs are subject to Title II.<sup>79</sup> State bars have been found to

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<sup>74</sup> See 42 U.S.C. § 12,134(a) (directing the Attorney General to promulgate regulations to implement the statute); *Olmstead v. L.C.*, 527 U.S. 581, 597–98 (1999) (“Because the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II . . . its views warrant respect.” (internal citations omitted)).

<sup>75</sup> 28 C.F.R. § 35.130(b).

<sup>76</sup> *Id.* § 35.104.

<sup>77</sup> *Id.*

<sup>78</sup> The 2008 amendments to the ADA provided that both “disability” and “substantially limits” should be construed more broadly than previously required by the courts. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (2008). Additionally, if bar examiners are subjecting applicants with treatment histories to additional scrutiny because such applicants are assumed to have a physical or mental impairment, the applicants would be covered under the ADA as individuals “regarded as” having a disability. *Id.* § 4, 122 Stat. at 3555–56.

<sup>79</sup> *E.g.*, *Clark v. Va. Bd. of Bar Exam’rs*, 880 F. Supp. 430, 441 (E.D. Va. 1995); *Ellen S. v. Fla. Bd. of Bar Exam’rs*, 859 F. Supp. 1489, 1493 (S.D. Fla. 1994); *Applicants v. Tex. State Bd. of Law Exam’rs (Texas Applicants)*, No. A 93 CA 740 SS, 1994 WL 923404, at \*5 (W.D. Tex. Oct. 11, 1994); *Bauer, supra* note 1, at 99; Carol J. Banta, Note, *The Impact of the Americans with Disabilities Act on*

be public entities for the purposes of the ADA and therefore the licensing process, including the application for licensure, may not violate the ADA.<sup>80</sup> Thus, any inquiry into the mental health or substance abuse history of applicants must not discriminate against applicants with disabilities.

Despite a number of challenges to these inquiries shortly after the passage of the ADA, and sporadic cases since that time, the issue of whether such inquiries are permissible under the ADA remains unsettled. Some courts have determined that inquiries into the mental health or substance abuse history of applicants violate the ADA unless the bar provides evidence that applicants with treatment histories or diagnoses actually pose an increased risk to the public and the questions are necessary to and effective in identifying these applicants.<sup>81</sup> Other courts have allowed what they view as narrower questions, focusing on a specific time period and a set of diagnoses the bar believes to be most relevant, even in the absence of evidence that targeted applicants pose an increased risk and such inquiries are effective or necessary.<sup>82</sup>

#### A. Legal Challenges Under the ADA

The majority of mental health and substance abuse inquiries that courts have invalidated under the ADA have been broad ones.<sup>83</sup> Such questions have asked whether applicants have received treatment for mental or emotional disorders without limiting the inquiry to a recent time frame or a particular type of treatment or disorder.<sup>84</sup> Courts that have found that these questions violate the ADA focused on the additional burdens that such questions impose on disabled applicants.<sup>85</sup>

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*State Bar Examiners' Inquiries into the Psychological History of Bar Applicants*, 94 MICH. L. REV. 167, 171–72 (1995). *But see In re* Petition of Frickey, 515 N.W.2d 741, 741 (Minn. 1994) (noting that the application of the ADA to applications for admission to the bar is doubtful).

<sup>80</sup> *E.g.*, *Clark*, 880 F. Supp. at 441; *Ellen S.*, 859 F. Supp. at 1493; *Texas Applicants*, 1994 WL 923404, at \*5; *Bauer*, *supra* note 1, at 99; *Banta*, *supra* note 79, at 171.

<sup>81</sup> *See Clark*, 880 F. Supp. at 442 (noting that the Board of Bar Examiners presented no evidence of a threat to the health or safety of the public, and that absent such a showing, Ms. Clark met all requirements for bar admission); *Ellen S.*, 859 F. Supp. at 1493 (stating that public entities cannot impose discriminatory criteria “unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered” (internal quotation marks omitted)); *In re* Petition and Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996) (requiring a showing that “(1) applicants with mental-health-and substance-abuse-treatment histories *actually* pose an increased risk to the public, [and] (2) . . . [the questions] identify those persons with mental-health-or substance-abuse-treatment histories who are a danger to the public . . .”).

<sup>82</sup> *Bauer*, *supra* note 1, at 97–98.

<sup>83</sup> *See, e.g.*, *Clark*, 880 F. Supp. at 433; *Ellen S.*, 859 F. Supp. at 1491 n.1; *R.I. Bar*, 683 A.2d at 1334.

<sup>84</sup> *E.g.*, *Ellen S.*, 859 F. Supp. at 1491 n.1 (“Have you ever consulted a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental, nervous or emotional condition, drug or alcohol use?”); *In re* Underwood, No. BAR-93-21, 1993 WL 649283, at \*1 n.1 (Me. Dec. 7, 1993) (“29. Have you ever received diagnosis of an emotional, nervous or mental disorder?”).

<sup>85</sup> *See, e.g.*, *Clark*, 880 F. Supp. at 446 (“Question 20(b)’s broadly worded mental health question discriminates against disabled applicants by imposing additional eligibility criteria.”); *Ellen S.*, 859 F.

A 1995 case challenged the Virginia bar application which asked, “Have you within the past five (5) years, been treated or counselled [sic] for a mental, emotional or nervous disorder[ ]?”<sup>86</sup> The court found that this question subjected applicants with psychological disabilities, who would be required to answer the question in the affirmative, to additional inquiry and scrutiny on the basis of their disability beyond that to which non-disabled applicants were subject.<sup>87</sup> The court held that the bar did not show that such a broad question was necessary to screen for fitness to practice law.<sup>88</sup> The court focused on the relatively few affirmative responses to the question since its inclusion on the application and the fact that no applicant had ever been denied on those grounds.<sup>89</sup> Additionally, the court noted that the board was able to present no evidence that the existence of mental health disorders was related to subsequent unfitness to practice law.<sup>90</sup>

A district court in Florida found in 1994 that the bar discriminated against applicants with disabilities by placing the burden of an additional inquiry on applicants who affirmatively answered similarly broad questions.<sup>91</sup> The court held that the board’s inquiry constituted discrimination even if such applicants were eventually admitted.<sup>92</sup> The Supreme Judicial Court of Maine also held that mental health inquiries and the accompanying requirement that applicants sign broad releases for medical records violated the ADA due to the screening effect of the questions and the additional burden placed on applicants with disabilities.<sup>93</sup>

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Supp. at 1493–94 (“[Q]uestion 29 and the subsequent inquiries discriminate against Plaintiffs by subjecting them to [additional burdens based on their disability.]”).

<sup>86</sup> *Clark*, 880 F. Supp. at 433.

<sup>87</sup> *Id.* at 446.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 437 & n.12 (noting that in the five years that the question had appeared on the application, only forty-seven applicants had answered “yes” and no applicants were denied admission on the basis of their answer to this question).

<sup>90</sup> *Id.* at 446.

<sup>91</sup> *Ellen S.*, 859 F. Supp. at 1493–94. The challenged question broadly inquired as to treatment sought for any emotional or substance abuse disorder. It read:

29. Consultation with Psychiatrist, Psychologist, Mental Health Counsellor [sic] or Medical Practitioner: [a.] Have you ever consulted a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental, nervous or emotional condition, drug or alcohol use? . . . [b.] Have you ever been diagnosed as having a nervous, mental or emotional condition, drug or alcohol problem? . . . [c.] Have you ever been prescribed psychotropic medication?

*Id.* at 1491 n.1.

<sup>92</sup> *Id.* at 1493–94.

<sup>93</sup> *In re Underwood*, No. BAR-93-21, 1993 WL 649283, at \*2 (Me. Dec. 7, 1993). The *Underwood* decision is perhaps most notable because the questions and release that were found to be invalid are similar to questions and releases in use today. The questions at issue in the case asked broadly if the applicant had ever received a diagnosis of a mental disorder or treatment for one in the last ten years; however, they specifically excluded “occasional consultation for conditions of emotional stress or depression.” *Id.* at \*1 n.1. Such exclusions are often included in the preambles to the mental health questions used on bar applications today. Additionally, the release that was found to be invalid

The Rhode Island Supreme Court found in 1996, after investigation by a special master, that mental health and substance abuse questions on the state's bar application, which were narrower than the inquiries struck down in other states, were discriminatory because they acted to screen out applicants with disabilities.<sup>94</sup> Unlike the questions in Virginia and Florida, the Rhode Island bar application restricted its inquiry to disorders in the past five years that would impair the applicant's ability to practice law.<sup>95</sup> The court ordered that the questions be removed from the application and replaced with questions asking only about current substance abuse or other disorders that would adversely impact the applicant's ability to practice.<sup>96</sup> More recently, the District Court for the Eastern District of Wisconsin held in 2006 that the bar's requirement following an affirmative answer to mental health history questions, such as requiring an applicant to pay for and undergo a psychological evaluation, was discriminatory and may have violated the ADA to the extent that they were based on the applicant's disability.<sup>97</sup>

Not all courts have struck down such questions, however.<sup>98</sup> At the same time that some state courts invalidated mental health and substance

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was the standard authorization and release, which every applicant was required to sign. *Id.* at \*1. At the time, that release included access to "any and all medical records." *Id.* at \*1 n.2. Some states continue to use standard releases that include such access to medical records, while many others specifically require applicants answering mental health and substance abuse inquiries in the affirmative to sign an additional release for their medical records. *See, e.g.*, DEL. BD. OF BAR EXAM'RS, APPLICATION FOR ADMISSION FORM 25A AUTHORIZATION TO RELEASE MEDICAL RECORDS (required only of applicants answering the mental health and substance abuse inquiries in the affirmative); IND. STATE BD. OF LAW EXAM'RS, APPLICATION 10, available at <http://www.in.gov/judiciary/ble/exam/first-time.html> (follow "Bar Examination Application" hyperlink) (standard release).

<sup>94</sup> *In re* Petition and Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996).

<sup>95</sup> *Id.* at 1334. The challenged questions asked:

26. Are you or have you within the past five (5) years been addicted to or dependent upon the use of narcotics, drugs, or intoxicating liquors or been diagnosed as being addicted to or dependent upon said items to such an extent that your ability to practice law would be or would have been impaired?

.....  
29(a) Have you ever been hospitalized, institutionalized or admitted to any medical or mental health facility (either voluntarily or involuntarily) for treatment or evaluation for any emotional disturbance, nervous or mental disorder? . . . (b) Are you now or have you within the past five (5) years been diagnosed as having or received treatment for an emotional disturbance, nervous or mental disorder, which condition would impair your ability to practice law?

*Id.*

<sup>96</sup> *Id.* at 1337.

<sup>97</sup> *Brewer v. Wis. Bd. of Bar Exam'rs*, No. 04-C-0694, 2006 WL 3469598, at \*10 (E.D. Wis. Nov. 28, 2006). The court noted that there may be a necessity exception under Title II of the ADA, and that if there were, and the bar examiners could show that their requirement was necessary in order for the bar to perform its licensing function, such a requirement would not violate the ADA. *Id.* at \*11-12. As the bar examiners had not sought summary judgment on necessity grounds, however, the court did not ultimately rule on the issue. *Id.*

<sup>98</sup> *Applicants v. Tex. State Bd. of Law Exam'rs (Texas Applicants)*, No. A 93 CA 740 SS, 1994 WL 923404, at \*9 (W.D. Tex. Oct. 11, 1994).

abuse inquiries, a Texas court held that the Texas bar application's narrower question, focusing only on the most "severe" disorders, was narrow enough to comply with the ADA because inquiry into the mental health of applicants was necessary in order for the bar to protect the public.<sup>99</sup> The Texas question at issue read, "Within the last ten years, have you been diagnosed with or have you been treated [for] bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?"<sup>100</sup>

Unlike the courts in Florida, Rhode Island, and Virginia, the court in Texas simply accepted the bar's assertion that the more "serious" mental illnesses were consistently connected to an applicant's unfitness to practice law.<sup>101</sup> The court referred to no research or evidence in its opinion, and did not indicate that the bar had presented any.<sup>102</sup> Rather, the court appears to have relied on "common sense" based on the biases and stereotypes that the ADA seeks to combat.<sup>103</sup> Indeed, research has consistently failed to support the validity of asking about mental health status in order to predict fitness.<sup>104</sup> Rather, only conduct or past behavior is related to unfitness.<sup>105</sup> While somewhat more evidence exists to support a relationship between substance abuse and attorney misconduct, there is little to suggest that those attorneys who seek treatment prior to applying for admission to the bar are the same attorneys who later violate the rules of conduct.<sup>106</sup> In fact, informal tracking by the Michigan bar has demonstrated no relationship between "problem" character and fitness reviews and later misconduct.<sup>107</sup>

The only study that purports to find a connection between character and fitness application problems and later misconduct is a retrospective study of fifty-two attorneys disciplined for misconduct in Minnesota.<sup>108</sup>

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<sup>99</sup> *Id.* at \*3.

<sup>100</sup> *Id.* at \*2 n.5.

<sup>101</sup> *See id.* at \*8 ("The rigorous application procedure, including investigating whether an applicant has been diagnosed or treated for certain serious mental illnesses, is indeed necessary to ensure that Texas' lawyers are capable, morally and mentally, to provide these important services.")

<sup>102</sup> *See id.* at \*3 (noting "[b]ipolar disorder, schizophrenia, paranoia, and psychotic disorders are serious mental illnesses that may affect a person's ability to practice law," but offering no evidence in support of this assertion).

<sup>103</sup> *See id.* at \*8 (listing some of the important responsibilities of attorneys and stating, "[i]n each of these proceedings, the lawyer must be prepared to offer competent legal advice and representation despite the stress of understanding the responsibility the lawyer has assumed while balancing other clients' interests and time demands," but providing no evidence that an attorney who previously suffered from a mental health condition is in any way incapable of meeting these demands).

<sup>104</sup> *In re* Petition and Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996); Banta, *supra* note 79, at 182–83.

<sup>105</sup> Banta, *supra* note 79, at 185–86.

<sup>106</sup> Bauer, *supra* note 1, at 176. Estimates indicate that twenty-seven to seventy-five percent of attorney disciplinary complaints involve misconduct that is related to substance abuse. *Id.* at 176–77. These estimates, however, do not reveal whether these substance abuse problems had been identified or treated before these attorneys were admitted to the bar, or even after admission but before the commission of the misconduct. *Id.*

<sup>107</sup> D. Larkin Chenault, Director's Dialogue, *It Begins with Character* . . . , 77 MICH. B.J. 138, 139 (1998).

<sup>108</sup> Bauer, *supra* note 1, at 141–42 n.153.

Half of those disciplined attorneys—compared to twenty percent of all bar applicants—revealed problems on their character and fitness applications.<sup>109</sup> This result includes all types of character and fitness problems, such as employment termination, arrests, academic probation, financial problems, substance abuse, and mental health treatment.<sup>110</sup> When looking at reports of mental health treatment alone, the study found that only four percent, or two out of fifty-two attorneys, of the disciplined attorneys had reported mental health treatment on the application, compared to the estimated fifteen to twenty-six percent of bar applicants who seek treatment prior to admission.<sup>111</sup> While the sample size is too small to draw a statistically significant conclusion about the connection between character and fitness problems and later discipline, the numbers fail to support the contention that prior mental health treatment is related to later misconduct.<sup>112</sup> If anything, the numbers support the opposite conclusion, that applicants who report mental health treatment on their bar application are less likely to be disciplined.

All courts that have examined relevant research and evidence have concluded that the state bars have not demonstrated the necessity of asking about mental health and substance abuse histories, rather than asking applicants to disclose only those conditions that currently impair their ability to practice or relying solely on conduct or behavioral questions.<sup>113</sup> In fact, the U.S. Attorney General, in its Amicus Brief in *Clark v. Virginia Board of Bar Examiners*, stated that asking about disability status by inquiring about mental health treatment or a disorder violates the ADA and is not necessary.<sup>114</sup> Additionally, the American Psychiatric Association (“APA”) guidelines state that:

Prior psychiatric treatment is, per se, not relevant to the question of current impairment. It is not appropriate or informative to ask about past psychiatric treatment except in the context of understanding current functioning. A past history of work impairment, but not simply of past treatment or leaves of absence may be gathered.<sup>115</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 105 n.37, 141–42 n.153.

<sup>112</sup> *Id.*

<sup>113</sup> See, e.g., *In re* Petition and Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1336–37 (R.I. 1996) (noting the lack of evidence linking prior mental health treatment to an inability to practice law, and allowing for questions regarding current illegal drug use on the bar application); Banta, *supra* note 79, at 182–83, 185–86 (noting that prior psychological records are not an effective predictor of future behavior, and that previous conduct may be).

<sup>114</sup> *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 444 n.25 (E.D. Va. 1995).

<sup>115</sup> AM. PSYCHIATRIC ASS'N, RECOMMENDED GUIDELINES CONCERNING DISCLOSURE AND CONFIDENTIALITY (1999), available at [http://archive.psych.org/edu/other\\_res/lib\\_archives/archives/199912.pdf](http://archive.psych.org/edu/other_res/lib_archives/archives/199912.pdf).

While these guidelines were created for medical licensing boards, the principles are the same when applied to attorney licensing boards and the APA's statement that only information "about disorders that currently impair the capacity to function" as a lawyer are relevant is applicable.<sup>116</sup>

#### IV. THE CURRENT USE OF MENTAL HEALTH AND SUBSTANCE ABUSE INQUIRIES

Despite the evidence that status-based mental health inquiries are discriminatory and unnecessary, and therefore violate the ADA, the issue remains unsettled because courts in different states have arrived at different conclusions. Many states have changed their inquiries to mirror the questions upheld in *Texas Applicants* and this may mean that fewer applicants are affected and that those who are may believe their chances of successfully challenging such questions are lower.<sup>117</sup> States continue to inquire about applicants' past mental health and substance abuse histories and continue to investigate those who answer such questions in the affirmative. Even when states do not inquire about such histories, or ask only narrow questions, they commonly require that applicants attach any bar applications that have been submitted to other states and thus the applicant may nonetheless be forced to disclose such histories.<sup>118</sup>

At least two states, Oregon and Indiana, continue to ask applicants about mental health history with no timeframe. Oregon's questionnaire asks, "Have you ever been treated for any mental or emotional condition which, if active or untreated, could affect your ability to practice law in a competent and professional manner?"<sup>119</sup> The inclusion of "if active," as well as the presence of an additional question asking about conditions that currently impair or, if untreated could impair, the applicant, indicates that applicants with a treatment for any mental illness at any point in the past must answer in the affirmative, regardless of how long they have been free from symptoms.<sup>120</sup> Indiana's question is restricted to certain conditions, asking, "Have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?"<sup>121</sup> Indiana additionally asks whether an applicant has been diagnosed with or treated for *any* mental, emotional, or nervous disorder

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<sup>116</sup> *Id.*

<sup>117</sup> Bauer, *supra* note 1, at 143–48.

<sup>118</sup> *Id.* at 209.

<sup>119</sup> OR. STATE BD. OF BAR EXAM'RS, APPLICATION.

<sup>120</sup> *Id.*

<sup>121</sup> IND. STATE BD. OF LAW EXAM'RS, APPLICATION 6 no. 22, available at <http://www.in.gov/judiciary/ble/exam/first-time.html> (follow "Bar Examination Application" hyperlink).

since the age of sixteen.<sup>122</sup>

The most common questions ask about diagnosis and treatment for bipolar disorder, schizophrenia, paranoia, or other psychotic disorders in the past five years, similar to the question upheld in *Texas Applicants*, with many states also including major depressive disorder and other psychological disorders.<sup>123</sup> A few states limit their questions to diagnoses or treatment within the past two to three years, with at least one state restricting its inquiry to the past twelve months.<sup>124</sup> Two states ask only about current mental health conditions.<sup>125</sup> While many states ask about any current condition that might impair an applicant's ability to practice law, most states phrase the question so that applicants with mental health or substance abuse disorders that are currently controlled by treatment, and thus pose no risk, will still need to provide an affirmative answer.<sup>126</sup> Interestingly, while the majority of states also ask about substance abuse histories, and more of these ask about longer or unlimited periods of time than for mental health questions, more states also limit their substance abuse questions to current impairments.<sup>127</sup> Only three states—Illinois, Massachusetts, and Pennsylvania—do not ask questions that would require

<sup>122</sup> *Id.* This question is currently the subject of a legal challenge under the ADA. *Doe v. Members of the Ind. State Bd. of Law Exam'rs*, No. 1:09-cv-842-WTL-JMS, slip op. at 3–4 (S.D. Ind. Dec. 8, 2009).

<sup>123</sup> A listing of the questions included on bar applications as of 2009 for the fifty states and the District of Columbia can be found in Appendix I at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1566572](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566572). Most states ask more than one question or type of question. Twenty-two applications ask questions substantially similar to the question upheld in *Applicants v. Tex. State Bd. of Law Exam'rs* (*Texas Applicants*), 1994 WL 923404, at \*2 (W.D. Tex. Oct. 11, 1994); eight applications included diagnoses of major depression and other psychological disorders.

<sup>124</sup> Rhode Island asks about diagnoses and treatment within the last three years. R.I. SUP. CT., BAR EXAM APPLICATION 18 no. 33 [hereinafter R.I., APPLICATION], available at [http://www.courts.ri.gov/supreme/bar/July\\_2009\\_Bar\\_Exam\\_Application.pdf](http://www.courts.ri.gov/supreme/bar/July_2009_Bar_Exam_Application.pdf). Minnesota asks about the last two years. MINN., APPLICATION, *supra* note 2, at 8–9, no. 4.34–.35. New Jersey restricts its question to the last twelve months. STATE OF N.J. BD. OF BAR EXAM'RS, APPLICATION 13 no. XII.B, available at <http://www.njbarexams.org/app/application.pdf>.

<sup>125</sup> California and New York ask about a condition that currently impairs the applicant. STATE BAR OF CAL., APPLICATION, available at [http://www.calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10115&id=1006](http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10115&id=1006); STATE BAR OF N.Y., APPLICATION, available at <http://www.nycourts.gov/courts/ad2/pdf/AdmissionsPackage-Noletter.pdf>.

<sup>126</sup> Thirty-seven states ask about any current condition that might impair an applicant's ability to practice law while an additional six states ask about the existence in the past two to ten years of any condition which might impair an applicant. Twenty-eight of the thirty-seven states phrase their questions to include conditions currently under control. Such questions are most often phrased, "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?" (emphasis added). See, e.g., SUP. CT. OF GA. OFFICE OF BAR ADMISSIONS, APPLICATION 6 no. 25 [hereinafter GA., APPLICATION], available at <http://www.gabaradmissions.org>.

<sup>127</sup> Thirty-nine states ask specifically about a diagnosis of or treatment for substance abuse. Eight of these states have no time limit on their question, while three states ask about the last ten years and two states ask about the last five years. While only thirteen states have no mental health questions or restrict questions only to current disorders, twenty-six states ask no questions about substance abuse or only ask about current disorders.

an applicant to reveal treatment for or diagnosis of a current or past mental illness.<sup>128</sup>

Applicants who answer such inquiries in the affirmative are routinely asked to sign a release providing access to the applicant's medical records, a release a non-disabled applicant without a mental health or substance abuse history does not need to sign.<sup>129</sup> While some states note that they rarely request these records, others indicate that they routinely obtain the medical records of applicants who answer such inquiries affirmatively.<sup>130</sup> Some of the releases are restricted to information about the diagnosis and treatment for the conditions about which the application inquires.<sup>131</sup> The

<sup>128</sup> ILL. BD. OF ADMISSIONS TO THE BAR, CHARACTER AND FITNESS QUESTIONNAIRE, *available at* <https://www.ibaby.org/applications.action> (follow "Character and Fitness Questionnaire" hyperlink); MASS. BD. OF BAR EXAM'RS, APPLICATION, *available at* <http://www.sjccountyclerk.com/pdf/FEBRUARY%202010%20FIRST%20TIME%20APPLICATION.pdf>; PENN. BD. OF LAW EXAM'RS, APPLICATION 8 [hereinafter PENN., APPLICATION], *available at* [http://www.pabarexam.org/bar\\_exam\\_information/203\\_205\\_app.htm](http://www.pabarexam.org/bar_exam_information/203_205_app.htm). Pennsylvania asks only about current substance addictions. *Id.* Illinois asks if applicants have ever been declared incompetent, which may occur when an individual is involuntarily admitted to a hospital for psychiatric treatment. ILL. BD. OF ADMISSIONS TO THE BAR, *supra*, at 11 no. 52. Iowa, New Mexico, and Wisconsin also only ask about current conditions that impair an applicant, but the accompanying definitions and explanations make it clear that the board is inquiring about any mental health disorder. IOWA OFFICE OF PROF'L REGULATION, APPLICATION FOR THE IOWA BAR EXAMINATION 20 no. 43, *available at* [http://www.iowacourts.gov/wfdata/frame9274-1600/Bar\\_Application.pdf](http://www.iowacourts.gov/wfdata/frame9274-1600/Bar_Application.pdf); STATE OF N.M. BD. OF BAR EXAM'RS, N.M. BAR LICENSURE APPLICATION 7 no. 18, *available at* <http://www.nmexam.org/law-fm.htm>. Wisconsin also asks whether the applicant has raised the issue of a mental health condition as an explanation or defense for poor academic performance, a judicial proceeding, and in other situations. WIS. BD. OF BAR EXAM'RS, APPLICANT QUESTIONNAIRE AND AFFIDAVIT 11 no. 35, *available at* <http://www.wicourts.gov/services/attorney/barexam.htm>. An additional six states—Alaska, Arizona, California, Hawaii, New York, and South Carolina—only ask applicants about disorders that currently impair their ability to practice law. ALASKA BAR ASSOCIATION, APPLICATION FOR ADMISSION; SUP. CT. OF ARIZ., CHARACTER REPORT; STATE BAR OF CAL., APPLICATION, *available at* [http://www.calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10115&id=1006](http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10115&id=1006); HAW. BD. OF BAR EXAM'RS, BAR APPLICATION; STATE BAR OF N.Y., APPLICATION, *available at* <http://www.nycourts.gov/courts/ad2/pdf/AdmissionsPackage-Noletter.pdf>; SUP. CT. OF S.C., APPLICATION.

<sup>129</sup> See ME. BD. OF BAR EXAM'RS, APPLICATION TO TAKE BAR EXAMINATION 20 nos. 26.A., 27.A. [hereinafter ME., APPLICATION], *available at* <http://www.mainebarexaminers.org/AppFrmInstr.html> (follow "Application To Take Bar Examination" hyperlink) (instructing applicants to fill out authorizations for release of medical records and to provide a description of mental health or substance abuse conditions); NAT'L CONFERENCE OF BAR EXAMINERS, CHARACTER AND FITNESS QUESTIONNAIRE 13 no. 25–26 [hereinafter NCBE, CHARACTER AND FITNESS], *available at* <http://www.ncbex.org/character-and-fitness/services1/blank-forms>.

<sup>130</sup> The bar application for Maine notes, "The Maine Board of Bar Examiners does not ordinarily seek medical records, although it may do so." ME., APPLICATION, *supra* note 129, at 19. The New Hampshire application, however, states, "You should direct each of the foregoing doctors or health care professionals to furnish directly to the Court any information requested by the Court in respect to such treatment. You should understand that the Committee on Character and Fitness will be requesting reports from all treating doctors or other health care professionals concerning such treatment." N.H. SUP. CT., PETITION AND QUESTIONNAIRE FOR ADMISSION TO THE BAR OF N.H., at no. 13, *available at* <http://www.courts.state.nh.us/nhbar/index.htm> (follow "Petition and Questionnaire for Admission" hyperlink).

<sup>131</sup> *E.g.*, CONN. BAR EXAMINING COMM., AUTHORIZATION TO RELEASE MEDICAL RECORDS, FORM 7, *available at* [http://www.jud.ct.gov/cbec/instadmisap.htm#February\\_2010](http://www.jud.ct.gov/cbec/instadmisap.htm#February_2010); TEX. BD. OF LAW EXAM'RS, GENERAL APPLICATION TO THE TEX. BAR EXAMINATION 22 [hereinafter TEX.,

releases in other states, however, are quite broad and provide access to medical records beyond those pertaining to the condition the applicant was forced to reveal.<sup>132</sup> In Missouri, until recently, the medical records release form that applicants were forced to sign when they revealed a mental health or substance abuse condition provided the bar with access not only to records related to those conditions, but also to records relating to *any* psychiatric or substance use treatment and the applicant's HIV/AIDS status.<sup>133</sup> The general release and authorization forms that some states require all applicants to sign also include broad access to medical records.<sup>134</sup>

The applications for a number of states that ask mental health and substance abuse history questions include a preamble or note preceding such questions that often states that the bar is not seeking information about situational counseling.<sup>135</sup> These preambles also state that the questions should not discourage students from seeking treatment. Most often, the applications include a statement such as the one from Colorado, which states, “[t]he mere fact of treatment for mental health problems or chemical or psychological dependency is not, in itself, a basis on which an

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APPLICATION], available at [http://www.ble.state.tx.us/applications/GenApp/genapp\\_main.htm](http://www.ble.state.tx.us/applications/GenApp/genapp_main.htm). The release for Texas is part of the general release that all applicants must sign; however, it is limited to the medical records concerning the diagnoses and timeframe that the application asks about. TEX., APPLICATION, *supra*, at 23.

<sup>132</sup> The Ohio release gives the bar access to all “information, including copies of records, concerning advice, care or treatment given . . . regarding my mental health” even though the application inquires only about psychotic disorders. SUP. CT. OF OHIO, AUTHORIZATION TO RELEASE RECORDS (MENTAL HEALTH RECORDS), available at <https://secure.ncbex2.org/php/ea/view.php>. The NCBE medical records release, which many states copy, covers “information, without limitation, relating to mental illness or the use of drugs and alcohol, including copies of records, concerning advice, care, or treatment provided to” the applicant. NCBE, AUTHORIZATION TO RELEASE MEDICAL RECORDS 32, available at <http://www.ncbex.org/character-and-fitness/services1/blank-forms>. If an applicant must answer one of the questions in the affirmative, for example if they have received a diagnosis of bipolar disorder within the past five years, the bar will also gain access to records about a substance abuse problem the applicant had over ten years ago, even though the applicant was not required to reveal the condition on the application. *Id.*

<sup>133</sup> MO. BD. OF LAW EXAM'RS, HIPAA PRIVACY AUTHORIZATION FORM, available at <http://www.ncbex.org/ea>.

<sup>134</sup> *E.g.*, ALA. STATE BAR, AUTHORIZATION AND RELEASE [hereinafter ALA., AUTHORIZATION], available at <http://www.alabar.org/public/admissions.cfm> (follow “Authorization and Release Form” hyperlink); N.C. BD. OF LAW EXAM'RS, AUTHORIZATION AND RELEASE [hereinafter N.C., AUTHORIZATION], available at <https://secure.ncbex2.org/php/ea/view.php> (follow hyperlink “Application Questionnaire” hyperlink). The North Carolina release authorizes the board to access to records and information “including but not limited to any and all medical reports, laboratory reports, X-rays, or clinical abstracts which may have been made or prepared pursuant to, or in connection with, any examination or examinations, consultation or consultations, test or tests, evaluation or evaluations, of the undersigned.” *Id.* The Alabama authorization uses identical wording. ALA., AUTHORIZATION, *supra*.

<sup>135</sup> *E.g.*, STATE OF COLO. SUP. CT. BD. OF LAW EXAM'RS, APPLICATION FOR ADMISSION TO THE STATE BAR OF COLO., at no. 36 [hereinafter COLO., APPLICATION], available at <http://www.coloradosupremecourt.com/BLE/Application/OnlineApp/OnlineAppHome.asp>; GA., APPLICATION, *supra* note 126, at 27; NCBE, CHARACTER AND FITNESS, *supra* note 129, at 13.

applicant is ordinarily denied admission to the Colorado bar.”<sup>136</sup> This statement, while meant to be reassuring, leaves open the possibility that the “mere fact of treatment” might be sufficient to deny applicants admission in some states.

At least one state, Georgia, includes a more definitive statement that treatment alone will not serve as a basis for denial: “The mere fact of treatment for mental health problems or addictions is not in itself a basis on which an applicant will be denied admission. To date, the Board to Determine Fitness of Bar Applicants has never denied an applicant based solely on this information.”<sup>137</sup> Several states do not include any statement of the likelihood that affirmative answers to such questions will be used as the basis for a denial.<sup>138</sup>

Despite, or perhaps because of, the outcome of the legal challenges to the ADA, the inquiries vary widely from state to state. It is clear, however, that bar applications will continue to include these questions. Even states that once eliminated or severely restricted such questions now make mental health and substance abuse inquiries.<sup>139</sup> In recent years, the answers to

<sup>136</sup> COLO., APPLICATION, *supra* note 135, at no. 36.

<sup>137</sup> GA., APPLICATION, *supra* note 126, at 27.

<sup>138</sup> *E.g.*, ALA. STATE BAR, APPLICATION FOR ADMISSION, at no. 43 [hereinafter ALA., APPLICATION], available at <http://www.alabar.org/public/admissions.cfm>; IDAHO STATE BAR, APPLICATION FOR EXAMINATION AND ADMISSION TO THE IDAHO STATE BAR, at no. 31–32, available at [http://isb.idaho.gov/admissions/bar\\_exam/application.html](http://isb.idaho.gov/admissions/bar_exam/application.html).

<sup>139</sup> Rhode Island, whose questions were revised by the state Supreme Court in 1996 to ask only about conditions causing current impairment, now includes the following questions:

32. During the past three years, have you been addicted to or treated for the use of any drug, including alcohol? . . .

33. Within the past three (3) years have you suffered from any condition or impairment (including but not limited to substance abuse, alcohol abuse, physical condition, mental, emotional or nervous disorder) that in any way impairs your judgment or, if untreated, could affect your ability to practice law in a competent and professional manner?

R.I., APPLICATION, *supra* note 124; *In re* Petition and Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1334, 1337 (R.I. 1996). Minnesota’s application, stricken of all mental health and substance abuse inquiries in 1994 due to a concern that such questions deterred students from seeking treatment, now asks:

4.34. Do you have, or have you had, any condition including, but not limited to the following: a) alcohol, drug or chemical abuse or dependency condition; b) mental, emotional, or behavioral illness or condition; c) compulsive gambling condition; that impairs or, within the last two years, has impaired your ability to meet the Essential Eligibility Requirements for the practice of law listed in Rule 5A of the Rules for Admission to the Bar?

MINN., APPLICATION, *supra* note 2; *In re* Petition of Frickey, 515 N.W.2d 741, 741 (Minn. 1994). The Maine Supreme Court in *Underwood* invalidated questions regarding mental health conditions and the requirement that applicants sign a medical release as violating the ADA, and noted that the bar could use questions “more directly related to *behavior* . . .” *In re* Underwood, No. BAR-93-21, 1993 WL 649283, at \*2 (Me. Dec. 7, 1993). The current bar application in Maine asks, among other questions, “Within the last three (3) years have you had 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?” ME., APPLICATION, *supra* note 129, no. 26A. Applicants who answer

these questions have increased in importance as some states developed conditional admission programs for applicants with mental health or substance abuse histories, threatening to divert applicants who would previously have been admitted unconditionally into a separate licensure program.<sup>140</sup> The legality of these programs under the ADA has not yet been challenged, but there is reason to think that such programs are no less problematic under the ADA than the inquiries on which they are based.

## V. CONDITIONAL ADMISSION PROGRAMS

In recent years, a number of states have introduced conditional admission programs as one way to address concerns that mental health inquiries, and any resulting denials of admission to the bar, may violate the ADA.<sup>141</sup> In 2009, twenty-one states had conditional admission programs.<sup>142</sup> Four of these programs have been introduced in the past two years.<sup>143</sup> Other states are considering adding such programs. Wisconsin is currently awaiting a court ruling on a petition for such a program<sup>144</sup> and Michigan has considered such a program in recent years, but the bar has twice rejected the idea.<sup>145</sup>

Conditional admission programs allow the state bar to attach conditions to the admission of certain candidates, a type of probationary admission.<sup>146</sup> The programs are used most frequently for applicants with substance abuse or mental health histories, but may also be employed for those with histories of financial difficulties or, in some states, in any situation that the board feels a period of monitoring would be appropriate.<sup>147</sup> Conditions attached to admission may include close

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affirmatively are required to sign a medical release providing access to any records concerning mental illness or drug and alcohol use. *Id.* at Form 7, 8.

<sup>140</sup> Lyerly, *supra* note 11, at 306.

<sup>141</sup> Bauer, *supra* note 1, at 109–10; Lyerly, *supra* note 11, at 306.

<sup>142</sup> TENN. SUP. CT. RULES, § 10.05 (2009), available at [http://www.tsc.state.tn.us/opinions/tsc/rules/tnrulesofcourt/06supct1\\_9.htm#6](http://www.tsc.state.tn.us/opinions/tsc/rules/tnrulesofcourt/06supct1_9.htm#6); ADMISSION TO THE R. I. BAR, art. 2, R-3 (2007), available at <http://www.courts.ri.gov/supreme/bar/baradmission.htm> (follow “bar application” hyperlink); NCBE & ABA SECTION OF LEGAL EDUCATION ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (2009), available at <http://www.ncbex.org/comprehensive-guide-to-bar-admissions>.

<sup>143</sup> LA. ADMISSIONS RULES, R-XVII § 5(M) (2008), available at [http://www.lascba.org/admission\\_rules.asp](http://www.lascba.org/admission_rules.asp); TENN. SUP. CT. RULES, § 10.05; RULES GOVERNING THE LEGAL PROFESSION AND JUDICIARY IN ILL., R-701 (2007), available at <http://www.iardc.org/rulesSCT.html>; ADMISSION TO THE R.I. BAR, art. 2, R-3 (2007), available at <http://www.courts.ri.gov/supreme/bar/baradmission.htm> (follow “Order—In re Amendments” hyperlink).

<sup>144</sup> See *High Court Supports Conditional Bar Admission*, WIS. L.J. (Mar. 16, 2009), <http://wislawjournal.com/blog/2009/03/16/high-court-supports-conditional-bar-admission/> (discussing the Wisconsin Supreme Court’s unanimous endorsement of conditional admission).

<sup>145</sup> See STATE BAR OF MICH., 2008–2009 ANNUAL REPORT STANDING COMM., available at [http://www.michbar.org/generalinfo/committee\\_pdfs/arCandF2009.pdf](http://www.michbar.org/generalinfo/committee_pdfs/arCandF2009.pdf) (discussing proposals from subcommittees regarding conditional licensure).

<sup>146</sup> Bauer, *supra* note 1, at 156; Lyerly, *supra* note 11, at 306.

<sup>147</sup> Lyerly, *supra* note 11, at 309.

supervision by an admitted attorney; continued sobriety; drug tests; substance abuse, psychiatric, or psychological treatment; or other forms of monitoring.<sup>148</sup>

Because these programs theoretically allow for the admission of applicants who would otherwise be rejected, they have been welcomed by some as a step in the right direction towards compliance with the ADA and the integration of people with disabilities into the law community.<sup>149</sup> The operation of conditional admission programs, however, may run afoul of the same issues that status-based mental health questions encounter. A conditional license is inherently unequal to a full license to practice law. Where a fully licensed attorney may only have her license revoked if she violates the rules of professional conduct, conditional licenses may be revoked for a failure to adhere to conditions that are not directly related to the attorney's ability to practice law.<sup>150</sup> Additionally, conditionally admitted attorneys may be repeatedly required to turn over medical records to the bar, reveal their or their sponsor's participation in otherwise "anonymous" support programs, expend thousands of dollars to enroll in monitoring programs or to obtain professional evaluations, or be continually supervised by another attorney in order to maintain their license.<sup>151</sup> A conditional license is an official statement that an attorney is less capable, and therefore less trustworthy, reliable, or simply "less than" a fully licensed attorney.<sup>152</sup> Conditional status is stigmatizing and, if known, may damage an attorney's reputation and ability to build a practice.<sup>153</sup>

Thus conditional admission programs may operate to create a second-

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<sup>148</sup> Coleman & Shellow, *supra* note 6, at 170–71.

<sup>149</sup> Lyerly, *supra* note 11, at 315–16.

<sup>150</sup> See Bauer, *supra* note 1, at 124 ("A month after the hearing, the panel issued findings of fact with a recommendation of conditional admission. As conditions, Ms. Flaherty would be required to continue with her current therapies or any successor regime recommended by her treating psychiatrist, and to twice a year submit to the statewide grievance committee, which monitors conditional admissions in Connecticut, an affidavit from herself and her treating psychiatrist confirming that she is in compliance.").

<sup>151</sup> Coleman & Shellow, *supra* note 6, at 170–71.

<sup>152</sup> See *In re* Petition to Create Supreme Court Rule SCR 40.075 Relating to Conditional Admission to the Bar, May 1, 2008 ("A conditional admission rule would protect the public and allow conditionally admitted attorneys the opportunity to demonstrate that they deserve *full* admission to the bar.") (emphasis added).

<sup>153</sup> *Confidentiality Issues Arise in Petition for Conditional Bar Access*, WIS. L.J. (July 7, 2008), <http://wislawjournal.com/blog/2008/07/07/confidentiality-issue-arises-in-petition-for-conditional-bar-access/>; Michael J. Oths, *Conditional Admission in Idaho*, BAR EXAMINER, Feb. 2002, at 10. The ABA Model Rule on Conditional Admission originally included a statement that confidentiality was key to a conditional admission program because of the stigma that conditionally admitted attorneys are likely to face. Edward A. Adams, *ABA OKs Conditional Admission to Bar for Would-be Lawyers with Addiction, Mental Problems*, A.B.A. J., Feb. 11, 2008, [http://www.abajournal.com/news/article/aba\\_oks\\_conditional\\_admission\\_to\\_bar](http://www.abajournal.com/news/article/aba_oks_conditional_admission_to_bar). This statement was heavily debated and ultimately removed in order for the model rule to gain approval. See *id.* ("The revised commentary leaves to state bar admission authorities to determine whether the public would be made aware of the conditional nature of the admission.").

class licensure for applicants with disabilities,<sup>154</sup> who are no less fit or qualified than non-disabled applicants, formalizing the discrimination that can occur during the bar admission process. Given the low rates of denial of admission on character and fitness grounds,<sup>155</sup> it is likely that some programs will shift disabled applicants, who would have previously been admitted unconditionally, to the conditional admission track rather than increasing the pool of applicants who are admitted. In fact, both the ABA Model Rule on Conditional Admission to Practice Law and the information about programs in some states have explicitly recognized that many applicants who qualify for conditional admission would have been admitted unconditionally in the absence of these programs.<sup>156</sup> In addition, as entry to these programs is often based on the answers to the arguably objectionable mental health and substance abuse questions on bar applications, such programs may only increase the additional burden disabled applicants face.<sup>157</sup>

#### A. *Conduct- or Status-Based?*

The Committee on Lawyers Assistance Programs first proposed a Model Rule on Conditional Admission to Practice Law to the American Bar Association (“ABA”) in 2006.<sup>158</sup> The Model Rule was premised on the idea that conditional admission programs would target those applicants whose mental illness or substance abuse had caused conduct or behavior that would otherwise render the applicant unfit to practice law.<sup>159</sup> The preamble to the Model Rule states in part:

[W]hile a bar applicant who is chemically dependent or has suffered from mental or other illness does not, solely for that reason, lack the character or fitness necessary for admission to practice law, such dependency or illness may result in conduct or behavior that may render the applicant unfit for

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<sup>154</sup> See Oths, *supra* note 153, at 10 (discussing how conditional licenses “creat[e] some kind of second-class licensure”).

<sup>155</sup> See Rhode, *supra* note 15, at 516 (discussing the historically low rate of admission denials based on character grounds).

<sup>156</sup> ABA HOUSE OF DELEGATES, MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW (2009), available at [http://www.abanet.org/legalservices/colap/downloads/model\\_rule\\_on\\_conditional\\_admission\\_aug2009.pdf](http://www.abanet.org/legalservices/colap/downloads/model_rule_on_conditional_admission_aug2009.pdf) [hereinafter MODEL RULE 2009]; Oths, *supra* note 153, at 12. Oths, in describing the impact of the Idaho conditional admission program, notes that “it is certain that a greater number who would have been admitted” prior to the implementation of the program have had conditions attached to their licenses. *Id.*

<sup>157</sup> See Coleman & Shellow, *supra* note 6, at 171 (noting that the requirements mandating collection of medical records “serves as an important restriction”).

<sup>158</sup> Robert L. Childers, *CoLAP Law School Assistance Committee to Submit Proposed Model Rule to ABA House of Delegates*, HIGHLIGHTS OF THE ABA COMM’N ON LAWYER ASSISTANCE PROGRAMS I (Fall 2006/Winter 2007), available at <http://www.abanet.org/legalservices/colap/highlights/highlightsfall06winter07.pdf>.

<sup>159</sup> *Id.*

admission in the absence of evidence of rehabilitation or successful treatment.<sup>160</sup>

The committee was clear that the rule was not to target applicants on the basis that they had received treatment, only on the basis of a history of problematic conduct or behavior.<sup>161</sup> The commentary to the ABA 2008 and 2009 Model Rules indicates that the ABA intended the rule to operate as the committee suggested.<sup>162</sup>

A conduct-based conditional admission program, as envisioned by the committee, might be in line with the requirements of the ADA. Only those applicants whose behavior, rather than status, had demonstrated a threat to the safety of the public in the absence of monitoring or conditions would be subject to such programs.<sup>163</sup> While the purpose of conditional admission programs would not be to admit applicants whose conduct demonstrated current unfitness, it would be used for applicants who had recently undertaken a course of rehabilitation or treatment to address the mental illness or substance abuse that caused the past problematic conduct.<sup>164</sup> It has been suggested that such programs might be viewed as an accommodation for people who, due to conduct caused by a disability, might be denied admission if judged on the same basis as all other applicants, without regard for their recent rehabilitation.<sup>165</sup>

#### B. *Indications that Programs Are Status-Based*

There are several reasons to be concerned that the current conditional admission programs in operation are status-focused, rather than conduct-focused. First, when bars define “conduct” for the purposes of character and fitness evaluations, mental or emotional instability—often defined as the existence of a mental illness—and a history of substance abuse are often included.<sup>166</sup> This definition of conduct includes these disability-

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 2.

<sup>162</sup> MODEL RULE 2009, *supra* note 156; ABA, MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW 3–4, 10 (2008), available at [http://www.abanet.org/media/youraba/200804/ABAModelRule\\_ConditionalAdmission\\_Feb2008.pdf](http://www.abanet.org/media/youraba/200804/ABAModelRule_ConditionalAdmission_Feb2008.pdf).

<sup>163</sup> See Childers, *supra* note 158, at 2 (noting that the proposed Model Rule for Conditional Admission to Practice Law focuses on applicants whose conduct or behavior may pose a threat to the public, not those who solely have been shown to have a condition of chemical dependency or mental or other illness).

<sup>164</sup> *Id.* at 1–2.

<sup>165</sup> See Coleman & Shellow, *supra* note 6, at 170–71 (describing the view of some licensing boards that conditional admissions represent reasonable accommodations).

<sup>166</sup> See, e.g., SUP. CT. OF GA. OFFICE OF BAR ADMISSIONS, POLICY STATEMENT OF THE BOARD TO DETERMINE FITNESS OF BAR APPLICANTS REGARDING CHARACTER AND FITNESS REVIEWS 1, (2010), available at <http://www.gabaradmissions.org/pdf/policystatement.pdf> (describing conduct as including evidence of mental or emotional instability and evidence of drug or alcohol dependency); MINN. STATE BD. OF LAW EXAM’RS, CHARACTER AND FITNESS FOR ADMISSION TO THE BAR: A GUIDE TO THE CHARACTER AND FITNESS STANDARDS AND INVESTIGATION OF APPLICANTS TO THE BAR IN

based statuses, rather than just behavior. With such a definition, even states purporting to operate conditional admission programs based on conduct may instead be basing them on status.<sup>167</sup>

Second, the Frequently Asked Questions that the ABA published when it adopted the Model Rule on Conditional Admission to Practice Law in 2008 indicate that such programs may be mainly status-based.<sup>168</sup> The answer to one question about the purpose of the rule states that “[p]reviously, the fact that a law student had admitted having a dependency or receiving mental health counseling could be enough to disqualify him or her from ever being admitted to the bar.”<sup>169</sup> This implies that conditional admissions programs are meant to apply to these applicants, previously excluded solely because of their disability.

Scholars have additionally interpreted conditional admission programs to allow the state to force applicants who are currently fit, but have a history of substance abuse or mental illness, to prove themselves to the bar before being unconditionally admitted.<sup>170</sup> One commentator noted that while previously the bar would be in the difficult position of considering denying such an applicant based on the “mere apprehension” that the applicant might be unfit in the future, conditional admission programs allow bars to admit these applicants with monitoring.<sup>171</sup> Thus, the decision to place an applicant in a conditional admission program, rather than admitting him unconditionally, may be based on a “mere apprehension” that the applicant might be unfit in the future.<sup>172</sup> This “mere apprehension,” based on the disability of the applicant, rather than any concrete, objective evidence that the applicant poses a current threat to the public, would not be enough under the ADA to justify denying admission.<sup>173</sup> Similarly, it is not enough to justify subjecting disabled applicants to the additional burden of proving themselves far beyond what is required of non-disabled applicants.

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MINN. (2007), [http://www.ble.state.mn.us/character\\_and\\_fitness.html](http://www.ble.state.mn.us/character_and_fitness.html) [hereinafter MINN., GUIDE] (listing conduct evidencing mental or emotional instability or drug or alcohol abuse as grounds for further inquiry into character and fitness and a possible basis for denying admission to the bar).

<sup>167</sup> See, e.g., MINN., GUIDE, *supra* note 166 (describing Minnesota’s conditional admission program as being based on an applicant’s record of conduct).

<sup>168</sup> ABA, MODEL RULE FOR CONDITIONAL ADMISSION TO THE BAR: FREQUENTLY ASKED QUESTIONS (2008), available at <http://www.abanet.org/media/youraba/200804/CondAdm.pdf>.

<sup>169</sup> *Id.*

<sup>170</sup> See Lyerly, *supra* note 11, at 316 (“With conditional admission, at least these applicants will be granted the chance to prove themselves under the supervision of the bar without being deprived of the living they have worked so hard to achieve.”).

<sup>171</sup> *Id.*

<sup>172</sup> See *id.* at 316 (referring to conditional admission as an alternative to denial of admission in response to the state’s apprehension about an applicant’s potential to cause harm to the public).

<sup>173</sup> See Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35,694, 35,705 (July 26, 1991) (noting that safety-based screening criteria for individuals with disabilities must be based on actual risks and not on speculation).

### C. *The Burden of Conditional Admission*

The burden that accompanies conditional admission programs can be significant.<sup>174</sup> Applicants must bear all of the costs of monitoring, including ongoing treatment and evaluations, which can be substantial.<sup>175</sup> Additionally, applicants who are conditionally admitted often go through the extended investigation into their medical history that results from affirmative answers to mental health and substance abuse inquiries on bar applications, and continue to have their admission, conditional or not, delayed.<sup>176</sup> Furthermore, the conditions, in and of themselves, increase the burden on applicants—close supervision or quarterly reports from supervisors or treatment providers are burdens such applicants may face solely because of their disability.<sup>177</sup>

Just like questions that impose a greater burden on disabled applicants may violate the ADA, conditional admission programs that are based solely on disability violate the ADA.<sup>178</sup> The ADA seeks to end discrimination on the basis of disability in licensing programs<sup>179</sup>—the establishment of a second-class licensure track not only does not end discrimination, it formalizes and sanctions this discrimination.<sup>180</sup> The existence of a second-class licensure, into which applicants are placed solely because of their disability status, increases stigma and stereotypes and moves further away from the integration that the ADA was trying to achieve.

### D. *Examples from Practice*

Part of the difficulty with evaluating these programs is that, as with bar admissions decisions, it is difficult to determine how decisions are made. Most conditional admission decisions are confidential.<sup>181</sup> Many states, though they have conditional admission programs, provide little information about those programs.<sup>182</sup> Of the twenty-one states with conditional admission programs, thirteen provide no information about

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<sup>174</sup> Bauer, *supra* note 1, at 156.

<sup>175</sup> Lyerly, *supra* note 11, at 309–11.

<sup>176</sup> Bauer, *supra* note 1, at 209–10.

<sup>177</sup> See Lyerly, *supra* note 11, at 309 (listing supervision by an admitted attorney and professional auditing or reporting requirements as possible conditions that may be imposed on applicants).

<sup>178</sup> See Bauer, *supra* note 1, at 156–57 (noting that the ADA requires an assessment of the current fitness of an applicant, rather than speculation about possible future changes in the applicant's behavior).

<sup>179</sup> See *id.* at 96, 99 (stating that the ADA was enacted to eliminate discrimination against individuals with disabilities and that courts have unanimously applied the ADA to issues that arise when disabled individuals are assessed by licensing boards).

<sup>180</sup> See Coleman & Shellow, *supra* note 6, at 165 (noting that using questions regarding mental illness or substance abuse as standards or criteria for licensure “have the effect of discrimination”).

<sup>181</sup> Bauer, *supra* note 1, at 156; Lyerly, *supra* note 11, at 306.

<sup>182</sup> Lyerly, *supra* note 11, at 309.

when such programs are used in their rules regarding admission.<sup>183</sup> Twenty of these states, however, indicated to the NCBE that such programs are used for applicants with substance abuse histories and mental disabilities.<sup>184</sup> Several states provide examples of conditions that may be applied and these examples support the conclusion that conditional admission programs are used for applicants with histories of substance abuse and mental health problems.<sup>185</sup> Applicants with physical disabilities are included in the rules of four states.<sup>186</sup> South Dakota provided no information to the NCBE about when its program is used, and no details appear in its rules.<sup>187</sup>

Bar publications and the few court cases resulting in published decisions provide some insight into how these programs are implemented and demonstrate the problems the programs can create or perpetuate. The conditional admission program in Idaho, though available for a number of reasons, is most often used to admit applicants with substance abuse histories.<sup>188</sup> The Bar Commission for the Idaho State Bar described its purpose by using an example of a potential applicant who might have presented a dilemma to bar examiners prior to the introduction of the program.<sup>189</sup> This imaginary applicant is a former alcoholic who has been sober for three years and has no evidence of current unfitness.<sup>190</sup> Everyone agrees that if he is sober, he is a fit attorney; if he starts drinking again, he should not practice.<sup>191</sup> With the conditional admission program, the bar may admit this attorney with the condition that he remains sober.<sup>192</sup> His

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<sup>183</sup> NCBE & ABA SECTION OF LEGAL EDUC. ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS (2010) [hereinafter NCBE & ABA, COMPREHENSIVE GUIDE], available at <http://www.ncbex.org/comprehensive-guide-to-bar-admissions>. The twenty-one states providing for admission with conditions are Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Texas, and West Virginia. *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See, e.g., R.I. SUP. CT. R. 3, available at [http://www.courts.ri.gov/supreme/bar/Bar-07order\\_amendment\\_Article\\_II\\_Rule\\_3.pdf](http://www.courts.ri.gov/supreme/bar/Bar-07order_amendment_Article_II_Rule_3.pdf) (listing examples of license conditions that may be applied). While Rhode Island's rules do not state when conditional admission is appropriate, the rules provide that the bar may impose conditions such as "requiring assessment and/or treatment for alcohol, drugs or other chemical dependency . . . requiring medical, psychological or psychiatric care . . . [or] requiring submission to periodic, random drug testing to be administered by a professional approved by the Committee . . ." *Id.*

<sup>186</sup> CONN. PRACTICE BOOK REVISIONS § 2-9(b) (July 13, 2010), available at <http://www.jud.ct.gov/pb.htm>; BD. OF ADMISSIONS TO THE BAR & THE COMM. ON CHARACTER AND FITNESS FOR THE STATE OF ILL. RULES & REGULATIONS R. 7.3 (2010) [hereinafter ILL. RULES & REGULATIONS]; LA. SUP. CT. R. XVII § 5(H) (2010); N.D. ADMISSION TO PRACTICE RULES R. 9(A) (2008).

<sup>187</sup> RULES FOR ADMISSION TO PRACTICE LAW IN SOUTH DAKOTA, R-16-16-17.1 (2010), available at [http://www.sdjudicial.com/uploads/bar\\_exam/RReg.pdf](http://www.sdjudicial.com/uploads/bar_exam/RReg.pdf); NCBE & ABA, COMPREHENSIVE GUIDE, *supra* note 183.

<sup>188</sup> Oths, *supra* note 153, at 9.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

selection for the program is based solely on his history as an alcoholic—he is currently fit to practice law and, but for his history, he would have been admitted unconditionally.

This example clearly illustrates that the Idaho program operates to exclude people from unconditional admission solely on the basis of their disability. Two applicants, one a former alcoholic and one not, both of whom are currently fit to practice, will be treated differently and will have access to a different type of admission program solely because one of them has a history of a disability. This second-class licensure on the basis of disability blatantly violates the ADA.<sup>193</sup> Yet, not only does the Idaho bar regard this discrimination as a success, they would like to extend it. There have been recent calls in Idaho for extending the two-year conditional period indefinitely because the bar would like to supervise former alcoholics for a much longer period.<sup>194</sup> This means that an applicant with a history of substance abuse, who is fit upon application to the bar, may be permanently subject to the additional burden of conditional admission, and permanently denied access to full admission to the bar, solely on the basis of his disability.

Florida has had a conditional admission program since 1986, which has also been mostly used to admit applicants with substance abuse histories.<sup>195</sup> Two cases demonstrate how the Florida program operates. In *J.A.S.*, an applicant with a history of substance abuse applied to the bar.<sup>196</sup> The applicant had been receiving treatment for over three years and his fitness to practice was endorsed by several witnesses and his therapist.<sup>197</sup> It was undisputed that he had not had any arrests since before he became sober, his last noted arrest being over ten years prior, and had not had any other concerning incidents of conduct.<sup>198</sup> Despite the lack of recent conduct that might support a determination that the applicant was unfit, the bar determined that he was to be conditionally admitted subject to monitoring for substance abuse.<sup>199</sup>

In a second case, a lawyer reapplied to the bar after having resigned following disciplinary action a decade earlier.<sup>200</sup> It was undisputed that he had been sober for nine years, and that there had been no conduct indicating unfitness during that time.<sup>201</sup> He was also recommended for

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<sup>193</sup> 28 C.F.R. § 35.131 (2010) (noting that the ADA recognizes addiction as a disability and protects individuals who have successfully rehabilitated themselves and are not engaged in current illegal use of drugs).

<sup>194</sup> Oths, *supra* note 153, at 11–12.

<sup>195</sup> Lyerly, *supra* note 11, at 307.

<sup>196</sup> Fla. Bd. of Bar Exam'rs *re J.A.S.*, 658 So. 2d 515, 515–16 (Fla. 1995).

<sup>197</sup> *Id.* at 516.

<sup>198</sup> *Id.* at 515–16.

<sup>199</sup> *Id.* at 516.

<sup>200</sup> Fla. Bd. of Bar Exam'rs *re Barnett*, 959 So. 2d 234, 235 (Fla. 2007) (per curiam).

<sup>201</sup> *Id.* at 237.

admission by his current employer.<sup>202</sup> Despite almost a decade of sobriety, the bar required that his admission be conditional because of the likely stress he would face when he resumed the practice of law and the possibility that he would resume drinking.<sup>203</sup>

In both Florida cases, evidence indicated that the applicants were currently fit. Evidence also indicated that past conduct was due to substance abuse, a disability, which had since been successfully rehabilitated. Despite the evidence, neither applicant was admitted unconditionally. If a decade of sobriety, free from concerning conduct, is not sufficient for unconditional admission, it is difficult to argue that the Florida program is conduct-based, rather than status-based. At some point, the required length of sobriety, freedom from symptoms of mental illness, or time since treatment, becomes so long that an applicant's status as a person with a mental health or substance abuse history is truly the determining factor, rather than the applicant's conduct.

While it is possible that the two Florida cases are not representative of the way the program operates, or that the commentary on the Idaho program may not reflect its true operation, these examples indicate that, at least in some cases, the programs operate in a way that discriminates against applicants solely on the basis of their disability. Based on the commentary that accompanies the ABA's Model Rule, it seems likely that the conditional admission programs in other states operate similarly.<sup>204</sup> In fact, a look at the rules of several states reveals that some may explicitly intend conditional admission programs to apply to applicants based solely on their status as a person with a disability.

The Louisiana rules on admission to the bar state:

In determining an applicant's character and fitness to practice law in this state, the Panel shall not consider factors which do not directly bear a reasonable relationship to the practice of law, including, but not limited to, the following impermissible factors:

- (1) The age, sex, race, color, national origin, religion, or sexual orientation of the applicant; or
- (2) A physical disability of the applicant that does not prevent the applicant from performing the essential functions of an attorney.<sup>205</sup>

Louisiana's conditional admission program is specifically for applicants with physical, mental, or emotional disabilities, among other

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 237–39.

<sup>204</sup> MODEL RULE 2009, *supra* note 156, § 1 cmt.

<sup>205</sup> LA. SUP. CT. R. XVII § 5(H) (2010).

conditions.<sup>206</sup> Though Louisiana specifically states that a physical disability may not be relevant to a lawyer's fitness, the failure to similarly note that a mental or emotional disability is not always relevant implies that Louisiana may view the mere existence of such a disability as sufficient to call into question an applicant's fitness. Such an assumption would violate the ADA by permitting direct discrimination on the basis of psychological disabilities or discrimination on the basis of stereotypes related to those disabilities.

The conditional admission rules in other states also appear to allow those states to conditionally admit applicants solely on the basis that they have a mental or physical disability.<sup>207</sup> In North Dakota, the relevant rule states, "[T]he Board may, in light of an applicant's physical or mental disability, present or past use or abuse of drugs or alcohol . . . recommend admission or licensure to the bar conditional upon the applicant's compliance with relevant conditions prescribed by the Board."<sup>208</sup> This seems to be a clear statement that a fit applicant with a disability may be only conditionally admitted solely on the basis of that disability. New Jersey's conditional admission program appears to apply to all applicants who seek treatment for specified disorders within the year preceding their application.<sup>209</sup>

The Texas rule states, "The Board shall not have the authority to refuse to recommend the granting of a Probationary License to an Applicant who has passed the applicable bar examination solely because the Applicant suffers from chemical dependency . . ." <sup>210</sup> While this appears to prohibit the board from denying a license of some kind to applicants solely because of a substance abuse disorder, it does appear to allow for the granting of conditional licenses solely on that status basis, regardless of whether such a dependency impacts their ability to function as a lawyer. A later section of the rule limiting the timeframe for conditional licenses appears to confirm this interpretation: "A Probationary License issued solely because of the Board's determination that the individual suffers from chemical dependency shall expire on the second anniversary of the date on which it

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<sup>206</sup> *Id.* § 5(H), (M)(1).

<sup>207</sup> *See, e.g.*, N.D. ADMISSION TO PRACTICE RULES R. 9(A) (2008) (providing for conditional admission or licensure due to an applicant's physical or mental disability); RULES GOVERNING ADMISSION TO THE BAR OF TEX. R. XVI (2006), *available at* [http://www.ble.state.tx.us/Rules/rulebook\\_0807.pdf](http://www.ble.state.tx.us/Rules/rulebook_0807.pdf) (providing probationary licensure for, among other things, applicants who suffer from chemical dependency).

<sup>208</sup> N.D. ADMISSION TO PRACTICE RULES R. 9(A).

<sup>209</sup> N.J. REGULATIONS GOVERNING THE COMM. ON CHARACTER § 303:8 (2002), *available at* <http://www.njbarexams.org/commchar/char.pdf>. The New Jersey regulations provide for admission with conditions if "the candidate has been treated for substance abuse or bipolar disorder, schizophrenia, paranoia, or other psychotic disease within the twelve months preceding" their application. *Id.*

<sup>210</sup> RULES GOVERNING ADMISSION TO THE BAR OF TEX. R. XVI(b).

is issued, unless temporarily extended hereunder.”<sup>211</sup>

Of the twenty-one states that have a conditional admission program, only two include a definition that is conduct, rather than status, based.<sup>212</sup> In Tennessee, “[a]n applicant whose previous conduct or behavior would or might result in a denial of admission may be conditionally admitted to the practice of law upon a showing of sufficient rehabilitation and/or mitigating circumstances.”<sup>213</sup> Connecticut’s new rules, effective January 1, 2011, now explicitly state that conditional admission may only be applied “in light of the physical or mental disability of a candidate that has caused conduct or behavior that would otherwise have rendered the candidate currently unfit to practice law . . . .”<sup>214</sup> The commentary to the Connecticut rule makes clear that the mere existence of a disability will not justify the imposition of conditions or the denial of admission.<sup>215</sup>

The language of the Illinois rule also indicates that it may be intended as a conduct-based rule: “[C]onditional admission may be employed to permit an applicant who currently satisfies character and fitness requirements to practice law while his or her continued participation in an ongoing course of treatment or remediation for previous misconduct or unfitness is monitored to protect the public.”<sup>216</sup> Given the inclusion of mental health and substance abuse disorders in the definition of “conduct” in other sections of the admission rules, these rules may also be employed to make status-based decisions.

## VI. CONDITIONAL ADMISSION PROGRAMS UNDER THE ADA AND CONTINUING ISSUES

Conditional admission programs have many of the same problems as questions about mental health and substance abuse histories. To the extent that they are applied on the basis of status, they violate the ADA. Even when they are not status-based, decisions may be impermissibly based on speculation or the terms of the program may be impermissible.<sup>217</sup> Additionally, the programs do not address the issue of deterrence. Law students may still be deterred from seeking treatment for mental health problems, even if they know a conditional admission program is available.

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<sup>211</sup> *Id.* R. XVI(d)(1).

<sup>212</sup> CONN. PRACTICE BOOK REVISIONS § 2-9(b) (July 13, 2010), available at <http://www.jud.ct.gov/pb.htm>; TENN. SUP. CT. R. 7 § 10.05.

<sup>213</sup> TENN. SUP. CT. R. 7 § 10.05.

<sup>214</sup> CONN. PRACTICE BOOK REVISIONS § 2-9(b).

<sup>215</sup> *Id.*

<sup>216</sup> ILL. RULES & REGULATIONS R. 7.2 (2010).

<sup>217</sup> 28 C.F.R. § 35.131 (2010)

A. *Conditional Admission Programs Violate the ADA*

The Regulations for Title II of the ADA provide that:

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others . . . .<sup>218</sup>

Thus, licensing boards, as public entities, may not mandate that qualified individuals with disabilities use a separate licensing program. Conditional admission programs are indisputably different from unconditional admission to the bar. Admission under a conditional admission program is not equal to unconditional admission, thus requiring qualified applicants with disabilities to utilize a conditional admission program is a direct violation of the ADA.<sup>219</sup> A “[q]ualified individual” is one “who . . . meets the essential eligibility requirements” of the program.<sup>220</sup> Those programs that allow the bar to conditionally admit applicants who are currently fit for the practice of law on the basis of a current or past disability are engaging in the denial of access to full and equal participation for qualified individuals that the ADA seeks to prohibit.<sup>221</sup>

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<sup>218</sup> *Id.* § 35.130(b)(1)(i)–(iv).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* § 35.104.

<sup>221</sup> *See id.* § 35.130(b)(1)(i)–(iv) (providing that a public entity may not directly or through licensing deny qualified individuals with a disability participation or benefits and may not provide qualified individuals with a disability unequal participation, benefits, or opportunities).

Even those programs that are conduct-based may violate the ADA in their implementation. Under such programs, applicants with disabilities may be denied unconditional admission on the basis of conduct that, had it not been associated with a disability, would not have barred full admission. When conduct is used as evidence of a disability, and the decision to conditionally admit an applicant is based on the existence of the disability, these programs effectively act like status-based conditional admission programs.<sup>222</sup>

The Section-by-Section Analysis published by the U.S. Department of Justice as a preamble to the regulations for Title II of the ADA highlights additional reasons why both status- and conduct-based conditional admissions programs violate the ADA.<sup>223</sup> According to the preamble, Section 35.130(b)(8) of the regulations “prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others.”<sup>224</sup> While a public entity may “impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question,” these safety requirements “must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.”<sup>225</sup>

Thus, conditional admission programs cannot be defended on the grounds that they are necessary for the safe operation of attorney licensing to the extent that they are based on speculation of the future risk a disability might pose. State bars make it clear that conditional admission programs are only to be used for applicants currently fit to practice law.<sup>226</sup> Any decision to conditionally admit an applicant will be necessarily based on speculation about the future risk such an applicant might pose. The mere fact that an applicant’s disability *might* pose a risk in the future or *might* render the applicant unfit at some future time is not sufficient to deny a disabled applicant full and equal licensure. Any applicant *might* be

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<sup>222</sup> See ILL. RULES & REGULATIONS R. 7.1–3 (noting that while Illinois’s conditional admission program is conduct-based, its inclusion of mental health and substance abuse in its definition of conduct may create, in effect, a status-based rule).

<sup>223</sup> See Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35,694, 35,706 (July 26, 1991) (recognizing that the status of being addicted is protected as are individuals who have successfully rehabilitated or are in the process of completing a supervised rehabilitation program and who are not currently using drugs).

<sup>224</sup> *Id.* at 35,705.

<sup>225</sup> *Id.*

<sup>226</sup> See, e.g., ILL. RULES & REGULATIONS R. 7.3 (stating that the Committee may recommend an applicant for conditional admission only if the he or she “currently satisfies all requirements for admission”); LA. SUP. CT. R. 17 § 5(M) (stating that conditional admission is available to an applicant “whose record of conduct evidences . . . an ability to meet the essential eligibility requirements of the practice of law”); MINN. RULES FOR ADMISSION TO THE BAR R. 16(B) (Supp. 2009) (“Only an applicant whose record of conduct evidences a commitment to rehabilitation and an ability to meet the essential eligibility requirements of the practice of law . . . may be considered for conditional admission.”).

unfit in the future. Only disabled applicants, however, are forced into conditional admission programs because of that possibility. Such segregation into an unequal licensure program relegates disabled applicants to a second-class status and violates the ADA.

Likewise, the claim that conditional admission programs serve as reasonable accommodations for disabled applicants does not render them permissible under the ADA. The regulations of Title II clearly prohibit a public entity from requiring a person with a disability to accept an accommodation.<sup>227</sup> “[N]othing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability,” and “nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them.”<sup>228</sup>

Therefore, licensing boards may choose to provide conditional admission programs as reasonable accommodations for disabled applicants, but they may not require otherwise qualified applicants to enter them in lieu of full licensure. A licensing board may only subject a disabled applicant to conditional admission rather than unconditional admission if conditions are necessary for safety reasons.<sup>229</sup> The board would need to have evidence that the applicant would be unable to safely practice law without such conditions in order to impose them.<sup>230</sup> Mere speculation that a disability may reoccur, or that an applicant might stop treatment, is not sufficient under the ADA to deny an applicant a full license.

#### B. *Conditional Admission Programs Will Deter Law Students from Seeking Treatment*

Conditional admission programs also fail to alleviate the concerns that accompany mental health and substance abuse inquiries regarding potential deterrence to seeking treatment or uncertainty about how bars treat such information. It will continue to be humiliating for applicants to go through the investigation process, discuss their personal issues, and provide unfettered access to their records, regardless of the outcome of the

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<sup>227</sup> See 28 C.F.R. § 35.130(e)(1) (“Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept.”).

<sup>228</sup> Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35,684, 35,705 (July 26, 1991) (to be codified at 28 C.F.R. § 35).

<sup>229</sup> See *id.* (stating that a public entity may impose neutral rules or criteria necessary for the safe operation of the program).

<sup>230</sup> See *id.* (stating that “[s]afety requirements must be based on actual risk”).

admissions decision.<sup>231</sup> Just as lawyers without medical training determine which applicants to deny on the basis of a mental health history, the same untrained lawyers will determine which applicants will be subject to conditions.<sup>232</sup> Even worse, a number of states allow the bar to determine what the conditions are without first consulting an appropriately trained professional.<sup>233</sup> As a result, applicants are faced with the prospect of untrained attorneys prescribing mental health or substance abuse treatment. The conditions imposed may not be appropriate for an individual and may not be necessary.

Additionally, given the little concrete information provided by states about their conditional admission programs, there will be continued uncertainty for applicants about the outcome of admissions decisions.<sup>234</sup> It remains unclear what sort of history will result in an unconditional admission, a conditional admission, or an outright denial. When applicants are conditionally admitted, the length of the conditional period may be uncertain. While some states have a timeline that ranges from two to five years, several have no time limit at all, and others have the discretion to extend this time period as the bar deems appropriate.<sup>235</sup> In theory, this may leave conditionally admitted attorneys in the limbo of conditional admission forever.

Furthermore, some states have instituted additional requirements for conditional admission, such as a recent Florida requirement that conditionally admitted applicants intend to reside in the state.<sup>236</sup> These requirements may mean that while a nondisabled lawyer living out of state may be admitted to the bar in Florida, a disabled lawyer living out of state, who is subject to the conditional admission requirements, may not be.<sup>237</sup> Conditionally admitted lawyers will not have the same freedom to move or practice where they wish that unconditionally admitted lawyers enjoy. Additionally, while conditional admission is confidential in many states, the fact that a lawyer is conditionally admitted is public information in at

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<sup>231</sup> See Bauer, *supra* note 1, at 156 (warning that conditional admission is degrading and discriminatory if imposed without sufficient basis).

<sup>232</sup> See *id.* at 212 (stating that mental health professionals fear that untrained examiners are likely to “misunderstand or take out of context” applicants’ mental health records).

<sup>233</sup> See, e.g., CONN. RULES CT. § 2-9 (2010) (describing the conditions the committee may set); FLA. RULES REGULATING THE FLA. BAR R. 1-3.2 (2008) (“The Supreme Court of Florida may admit a person with a prior history of drug, alcohol, or psychological problems to membership in the Florida Bar and impose conditions of probation as the court deems appropriate upon that member.”).

<sup>234</sup> See Lyerly, *supra* note 11, at 309 (“The states apply many different conditions in their conditional admission programs.”).

<sup>235</sup> *Id.* at 310.

<sup>236</sup> See FLA. RULES OF THE SUP. CT. RELATING TO ADMISSIONS TO THE BAR R. 5-15 (2010), available at <http://www.floridabarexam.org/public/main.nsf/rules.html?OpenPage#Rule5> (“Conditional admission is limited to persons who will live in Florida, who will be engaged in the practice of law primarily in Florida, and who will be monitored in Florida during the entire period of conditional admission.”).

<sup>237</sup> *Id.*

least two states.<sup>238</sup> Lastly, given the investigation applicants may be subject to prior to conditional admission, it is likely that their admission will be delayed, a fact that may be evident to their employer. All of these factors may be sufficient to continue to deter applicants from seeking mental health or substance abuse treatment.

## VII. CONCLUSION

Lawyers who are impaired do present a real risk to clients. The outcome of a legal action or the consequence of a lawyer's decision can have serious financial or personal consequences and clients may not be in a position to protect themselves from attorneys who act unethically. An attorney who fails to communicate with a client, misses deadlines, misappropriates funds, or commits other misconduct may cause lasting and serious harm to a client. While some of this harm is not measurable, the monetary harm suffered by clients as a result of unearned fees or misappropriated funds is significant. In 2007, client protection funds in each state, which serve to reimburse clients for lost money or property when the attorney responsible is unable to provide full restitution, approved a total of 2,247 claims.<sup>239</sup> In total, the funds awarded clients wronged at the hands of their attorney came to over twenty-nine million dollars.<sup>240</sup> These numbers do not capture all of the financial harm or any of the emotional or other harm that clients experience at the hands of impaired or unethical attorneys.

Many lawyers who commit misconduct and harm clients are not impaired, but there is no doubt that sometimes mental illness or substance abuse problems play a role. While all states have a system for disciplining attorneys for misconduct, this system is often considered inadequate.<sup>241</sup> By the time some attorneys are reported for misconduct, they have already caused their clients grave harm.<sup>242</sup> Additionally, sanctions, which range from private admonitions to suspension and disbarment, are often thought

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<sup>238</sup> Oregon and North Dakota's rules explicitly state that an attorney's conditional admission status is a matter of public record. The rules of several states do not specify when the conditional admission is confidential. N.D. ADMISSION TO PRACTICE RULES R. 9(F) (2004), available at <http://www.court.state.nd.us/rules/Admission/frameset.htm>; OR. STATE BAR, MEETING OF THE BOARD OF GOVERNORS OPEN SESSION MINUTES 6 (Feb. 22–23, 2008), available at [http://www.osbar.org/\\_docs/leadership/bog/minutes/bm080223.pdf](http://www.osbar.org/_docs/leadership/bog/minutes/bm080223.pdf).

<sup>239</sup> ABA CTR. FOR PROF'L RESPONSIBILITY STANDING COMM. ON CLIENT PROT., SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2005–2007, at 31 (2008), available at <http://www.abanet.org/cpr/clientpro/2007-survey.pdf>.

<sup>240</sup> *Id.* at 17.

<sup>241</sup> See Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 5–6 (1998) (“Indeed, relatively little attention has been given in recent years to the manner in which state lawyer discipline sanctions are determined or to the consistency or efficacy of the sanctions imposed.”).

<sup>242</sup> See, e.g., *id.* at 12 (discussing the sanctions imposed on two attorneys after they plead guilty to felonies).

to be too lenient, and recidivism among attorneys given lesser sanctions may be high.<sup>243</sup>

Given the difficulties with controlling and disciplining attorneys once they are admitted to the bar, it is not surprising that the focus has turned to trying to prevent the admission of these attorneys in the first place. The state bars' attempts to prevent attorneys who will harm clients from becoming licensed is not only understandable, but possibly demanded by the responsibility that these bars have accepted in their choice to regulate the profession. Bars, however, are subject to the same laws as other public entities in their efforts to achieve this goal. The means currently used in the licensing process in the name of protecting clients are not permissible under current law and may increase, rather than decrease, the risks to clients.

The newest developments in the bars' efforts—conditional admissions programs—are neither the ADA compliant solution nor the panacea for law student concerns that some have made them out to be. As currently operated, these programs frequently violate the ADA. Conditional admission programs increase the burden that disabled applicants face and create a second-class licensure for individuals with disabilities. Admission to these programs, like the inquiries on which they are based, are not grounded in research or specific evidence that an individual applicant poses a direct threat to the public. Rather, they are based on stereotypes about mental illness and substance abuse and on the biases of those who make the admission decisions.

Additionally, conditional admission programs create some of the same concerns that questions on bar applications and possible denial of admission currently do, and create new concerns for those who end up conditionally admitted. Law students will still face the prospect of releasing confidential mental health records to bar committees, and will now be faced with the possibility of being subjected to conditions that may include further release of treatment records for an extended period of time. The prospect of conditional admission, especially given the fact that in the past few applicants were denied outright, is unlikely to encourage law students to seek treatment. Rather than a solution to the problem of discrimination in bar admission, conditional admission programs are an unnecessary continuation and institutionalization of this discrimination, and are impermissible under the ADA. The programs are additionally unwise if the legal community wishes to encourage students to seek treatment when they are struggling. Any method that deters law students from receiving needed treatment can only increase the risk to these students' future clients.

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<sup>243</sup> *Id.* at 6.

This is not to say that admission with conditions would never be appropriate. Just as an in depth investigation into an applicant's mental health or substance abuse background may be necessary when there is specific evidence of concerning conduct or behavior due to that background, some conduct or behavior may warrant continued supervision after licensure. Some applicants may need monitoring in order to ensure that they do not harm clients. The determination of who requires monitoring, however, must be made on the basis of the applicant's conduct or behavior, not on the existence or history of substance abuse or mental health treatment or diagnoses.<sup>244</sup> Conditions may only be imposed on those applicants who would otherwise be denied admission based on their conduct or behavior. If that conduct or behavior is caused by a disability, the conditions imposed must be necessary to protect the public. If a conditional admission program functioned in this way, it would be permissible under the ADA.

The recent changes to Connecticut's conditional admission rules demonstrate that states can formulate ADA compliant programs. As of January 1, 2011, Connecticut may only impose conditions on those applicants whose behavior would have otherwise rendered them unfit to practice and the commentary to the changes makes it clear that the existence of a disability in the absence of concerning conduct cannot justify a denial of, or conditional, admission.<sup>245</sup> Furthermore, the rules require that any inquiries or procedures used by the bar examining committee relating to a mental or physical disability "must be narrowly tailored and necessary to a determination of the applicant's current fitness to practice law" in order to comply with the ADA.<sup>246</sup> A clear definition of "fitness" has also been added.<sup>247</sup> Unfortunately, though the mental health inquiries on the bar application have been changed, the questions continue to target only those who have received treatment for the condition and do not restrict their application to conduct or behavior material to the applicant's fitness to practice law and thus both the application and the conditional admission program may continue to violate the ADA.<sup>248</sup>

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<sup>244</sup> See Coleman & Shellow, *supra* note 6, at 168 ("Boards have not established a nexus between history of or treatment for mental illness or substance abuse and inability to practice competently. Instead, behavior—which may or may not be associated with mental disorders—impacts upon ability to perform essential functions of an attorney or physician. The best predictor of behavior is past conduct.").

<sup>245</sup> CONN. PRACTICE BOOK REVISIONS § 2-9(b), available at [http://www.jud.ct.gov/Publications/PracticeBook/pblj\\_071310.pdf](http://www.jud.ct.gov/Publications/PracticeBook/pblj_071310.pdf) (approved on July 13, 2010 for publication in 2011 OFFICIAL CONN. PRACTICE BOOK).

<sup>246</sup> *Id.* § 2-8(3).

<sup>247</sup> See *id.* § 2-5A(1)–(3) ("Fitness to practice law shall be construed to include . . . [t]he cognitive capacity to undertake fundamental lawyering skills . . . [t]he ability to communicate legal judgments and legal information to clients, other attorneys, judicial and regulatory authorities, with or without the use of aids or devices; and [t]he capability to perform legal tasks in a timely manner.").

<sup>248</sup> The application now asks whether the applicant "has engaged in any conduct or behavior

The current formulations of most conditional admission programs, however, prevent such programs from operating in the manner described above. Current decisions about who should be considered for conditional admission programs are based in part on the answers to inquiries about an applicant's mental health and substance abuse history. The ADA compliant solution is to eliminate these inquiries and instead rely on questions about applicants' conduct and behavior. This solution, however, seems to have been discounted on the basis of little evidence by some commentators and courts. The discussion about the permissibility of current inquiries and the viability of relying on conduct and behavior based questions has all but stopped. Courts and commentators appear to have separated themselves into two opposing camps early on, and the lack of continued consideration of the issue in the absence of a true resolution has allowed state bars to continue using these inquiries.

Even if we ignore the issue of whether the inquiries on which consideration for conditional admission is based are permissible, most programs themselves are still in violation of the ADA. A prerequisite to admission with conditions in most states is the present fitness of the applicant to practice law. This requirement alone renders the programs impermissible. Any applicant who is currently fit to practice is entitled to the same full licensure offered to other qualified applicants. If a state wishes to impose conditions on some applicants, they may only impose conditions on applicants who would otherwise be currently unfit to practice law. Until states are willing to use conditional admission programs only for such applicants, these programs will be clear violations of the ADA.

State bars can and should continue to wrestle with the issue of how to best protect clients from attorney misconduct. Continued reexamination of the discipline system is warranted, but based on the failure of past attempts to reform or improve the system, it is likely that the bars will also need to continue to seek other ways to address the issue. While doing so, however, the ADA—and wise policy—requires that the bars refrain from using methods such as status-based inquiries and conditional admission programs that discriminate against those with mental health and substance abuse histories and disabilities.

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which caused [the applicant] to be voluntarily or involuntarily" hospitalized or treated for a select list of conditions. CONN. BAR EXAMINING COMM., APPLICATION FOR ADMISSION TO PRACTICE 10, available at <http://www.jud.ct.gov/CBEC/July11/Form1E.pdf>. Though the words "conduct or behavior" have been added, the question still acts to identify applicants on the basis of treatment, and thus status, rather than conduct germane to the practice of law.